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LAND SETTLEMENT AND COOPERATIVES

réforme agraire

COLONISATION ET COOPÉRATIVES AGRICOLES

reforma agraria

COLONIZACIÓN Y COOPERATIVAS

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This bulletin is issued by FAO as a medium for the dissemination of information and views on land reform and related subjects to the United Nations, FAO Member Governments and national and international experts and institutions. Articles are published in the original language (English, French or Spanish).

Readers requiring more detailed information concerning this bulletin or articles therein should write to the Editor, *Land Reform, Land Settlement and Cooperatives,* Land and Water Division, FAO, Viale delle Terme di Caracalla, 00153 Rome, Italy.

The opinions expressed in this document are the personal views of the individual authors and do not necessarily reflect those of FAO.

Le présent bulletin a pour but de fournir des renseignements et de faire connaître des opinions sur la réforme agraire et les questions connexes à l'Organisation des Nations Unies, aux États Membres de la FAO, ainsi qu'aux experts et institutions nationaux et internationaux. Les articles paraissent dans la langue originale (en français, anglais ou espagnol).

Les lecteurs désireux d'obtenir des renseignements complémentaires sur ce bulletin sont priés de s'adresser au rédacteur, *Réforme agraire, colonisation et coopératives agricoles,* Division des terres et des eaux, FAO, Viale delle Terme di Caracalla, 00153 Rome, Italie.

Les opinions exprimées dans le présent bulletin n'engagent que leurs auteurs et ne sont pas nécessairement celles de la FAO.

La presente publicación es editada por la FAO como medio difusor de información y opiniones sobre la reforma agraria y temas conexos entre las Naciones Unidas, los Estados Miembros y expertos e instituciones nacionales e internacionales. Se publican artículos originales en español, francés e inglés.

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reforma agraria
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Preface

Compulsory acquisition (or "expropriation") is when a government uses its power to acquire private rights in land without the owner's or occupant's willing consent. The process is intended to benefit society and is frequently used to enhance social and economic development and to protect the natural environment. The appropriate use of compulsory acquisition necessitates ensuring a balance between the public need for land on the one hand and the provision of land tenure security and the protection of private property rights on the other. It is an inherently disruptive process. Even with generous compensation and fair and efficient procedures, the displacement of people from established homes, businesses and communities entails significant human costs. Where the compulsory acquisition process is badly designed or poorly implemented, the economic, social and political costs can be enormous. Attention to its procedures is critical if a government's exercise of compulsory acquisition is to be efficient, fair and legitimate.

Since 2004, FAO has been working on raising awareness of the importance of compulsory acquisition. This themed edition of *Land Reform, Land Settlement and Cooperatives* is a part of the ongoing partnership between FAO, the World Bank, UN-Habitat and the International Federation of Surveyors (FIG) in this area. The articles in this volume are based on selected presentations made at the FAO-supported FIG seminar on "Compulsory purchase and compensation in land acquisition and takings" held in September 2007 in Helsinki, Finland.

The articles in this volume supplement FAO Land Tenure Studies 10, *Compulsory acquisition of land and compensation*. The latter publication explains what compulsory acquisition and compensation are and what constitutes good practice in this area. This current volume's introductory article provides an overview of these issues. The issue of compulsory acquisition from a human rights perspective is also addressed here as are the concepts of "market value", "compensation value" and "just terms compensation". Articles that examine national experiences in Argentina, Australia, Belarus, Nigeria, Sweden and Turkey underline the global diversity of compulsory acquisition and compensation issues.

Paul Munro-Faure
Chief, Land Tenure and Management Unit
FAO Land and Water Division

Préface

Il y a «expropriation» (ou acquisition forcée) lorsque l'État use de ses pouvoirs pour acquérir des droits fonciers privés sans le consentement ni l'agrément du propriétaire ou de l'exploitant. Cette procédure vise à servir l'intérêt public et on y a souvent recours pour renforcer le développement social et économique et préserver l'environnement. L'usage judicieux de l'expropriation suppose que l'on trouve un équilibre entre, d'une part, le besoin de terres des collectivités et, d'autre part, la sécurité de jouissance et la protection des droits de propriété privée. Ce n'est pas une procédure anodine: en effet, même en présence d'une indemnisation généreuse et de procédures équitables et efficaces, le déplacement de personnes de leur lieu d'habitation, de leurs activités et de leurs communautés a un coût humain non négligeable. Lorsque la procédure d'acquisition forcée est mal conçue ou médiocrement appliquée, les coûts économiques, sociaux et politiques peuvent être énormes. Tout gouvernement se doit d'être particulièrement attentif à ces procédures pour que les expropriations soient à la fois efficaces, équitables et légitimes.

Depuis 2004, la FAO s'attache à sensibiliser à l'importance de l'acquisition forcée. L'édition de *Réforme agraire, colonisation et coopératives agricoles* consacrée à ce thème s'insère dans le cadre du partenariat qui existe entre la FAO, la Banque mondiale, le Programme des Nations Unies pour les établissements humains et la Fédération internationale des géomètres dans ce domaine. Les articles de ce volume sont fondés sur certains exposés faits lors d'un séminaire de la Fédération internationale des géomètres sur «l'achat forcé et le dédommagement dans les acquisitions et prises de possession», qui a bénéficié de l'appui de la FAO et qui s'est tenu en septembre 2007 à Helsinki (Finlande).

Les articles du présent volume complètent Land Tenure Studies 10 de la FAO, *Compulsory acquisition of land and compensation*. Cette dernière publication explique ce que sont l'acquisition forcée et l'indemnisation et décrit les bonnes pratiques dans ce domaine. L'article d'introduction au présent volume donne un aperçu de ces éléments. La question de l'acquisition forcée dans la perspective des droits de l'homme est également traitée ici, de même que les concepts de «valeur vénale», «valeur d'indemnisation» et «justes conditions d'indemnisation». Enfin, les articles consacrés aux expériences nationales acquises en Argentine, en Australie, au Bélarus, au Nigéria, en Suède et en Turquie soulignent la diversité mondiale des questions d'acquisition et de dédommagement.

Paul Munro-Faure
Directeur de l'Unité de la gestion des terres et des régimes fonciers
Division des terres et des eaux de la FAO

Prefacio

Se habla de adquisición por expropiación (o forzada) cuando un gobierno usa su poder para adquirir derechos privados sobre tierras sin el consentimiento voluntario del propietario u ocupante. El proceso tiene la finalidad de beneficiar a la sociedad y se utiliza con frecuencia para impulsar el desarrollo económico y social y proteger el entorno natural. El uso apropiado de la adquisición por expropiación supone la consecución de un equilibrio entre la necesidad pública de tierras, por una parte, y la seguridad de la tenencia de la tierra y la protección de los derechos de propiedad privada, por otra. Se trata de un proceso por su misma naturaleza perturbador: incluso si se conceden indemnizaciones generosas y se aplican procedimientos justos y eficaces, el desplazamiento de personas de sus hogares, sus actividades y sus comunidades entraña costos humanos significativos. Cuando el procedimiento de adquisición por expropiación no está bien proyectado o no se lleva a cabo adecuadamente, los costos económicos, sociales y políticos pueden resultar enormes. Para que la adquisición por expropiación sea eficaz, justa y legítima, es esencial que el gobierno preste atención a esos procedimientos.

Desde 2004, la FAO viene procurando aumentar la concienciación sobre la importancia de la adquisición por expropiación. Este número monográfico de *Reforma agraria, colonización y cooperativas* es un resultado de la colaboración continua en esta esfera entre la FAO, el Banco Mundial, Naciones Unidas-Hábitat y la Federación Internacional de Agrimensores. Los artículos contenidos en este volumen se basan en algunas de las exposiciones hechas en el seminario sobre "Compra forzada y compensación en relación con la adquisición y apropiación de tierras", organizado por la Federación Internacional de Agrimensores con el apoyo de la FAO, que se celebró en septiembre de 2007 en Helsinki (Finlandia).

Los artículos publicados en el presente volumen complementan el número 10 de la serie *Estudios de la FAO sobre tenencia de la tierra*, titulado "Compulsory acquisition of land and compensation" ("Adquisición de tierras por expropiación y compensación"). En dicha publicación se explica qué son la adquisición por expropiación y la compensación, y cuáles son las buenas prácticas en esta esfera; en el artículo introductorio del presente volumen se ofrece un panorama de estas cuestiones. En el presente volumen se trata asimismo el tema de la adquisición por expropiación desde la perspectiva de los derechos humanos, al igual que los conceptos de "valor de mercado", "valor de compensación" y "compensación con condiciones justas". Por último, los artículos en los que se examinan las experiencias nacionales en la Argentina, Australia, Belarús, Nigeria, Suecia y Turquía ponen de manifiesto la diversidad mundial de las cuestiones relacionadas con la adquisición y la compensación.

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Acquisition forcée de terres et indemnisation

Il y a «expropriation» (ou acquisition forcée) lorsque l'État use de ses pouvoirs pour acquérir des droits fonciers privés sans le consentement ni l'agrément du propriétaire ou de l'occupant. Cette procédure vise à servir l'intérêt public et on y a souvent recours pour renforcer le développement économique et social et préserver l'environnement. Néanmoins, il faut trouver un équilibre entre, d'une part, le besoin de terres des collectivités et, d'autre part, la sécurité de jouissance et la protection des droits de propriété privée. Cela, parce que l'acquisition forcée n'est pas anodine – même en présence d'une indemnisation généreuse et de procédures équitables et efficaces, le déplacement de personnes de leur lieu d'habitation, de leurs activités et de leurs communautés a toujours un coût humain considérable. D'ailleurs, lorsque la procédure est mal conçue ou médiocrement mise en œuvre, les coûts économiques, sociaux et politiques peuvent être énormes. Tout gouvernement se doit d'être particulièrement attentif aux procédures d'acquisition forcée pour que les expropriations soient à la fois efficaces, équitables et légitimes.

Adquisición de tierras por expropiación y compensación

Se habla de adquisición por expropiación (o forzada) cuando un gobierno usa su poder para adquirir derechos privados sobre tierras sin el consentimiento del propietario u ocupante. El proceso tiene la finalidad de beneficiar a la sociedad, y se utiliza con frecuencia para impulsar el desarrollo económico y social y proteger el entorno natural. No obstante, es preciso velar por el equilibrio entre la necesidad pública de tierras, por una parte, y la seguridad de la tenencia de la tierra y la protección de los derechos de propiedad privada, por otra. Ello se debe a que la adquisición por expropiación es un proceso por su misma naturaleza perturbador: incluso si la indemnización es generosa y los procedimientos justos y eficaces, desplazar a las personas de sus hogares, sus actividades y sus comunidades entraña siempre costos humanos significativos. En efecto, cuando el procedimiento no está bien proyectado o no se lleva a cabo adecuadamente, los costos económicos, sociales y políticos pueden resultar enormes. Para que la implementación del proceso por un gobierno sea eficaz, justa y legítima, es de vital importancia prestar atención a los procedimientos de adquisición por expropiación.

Compulsory acquisition of land and compensation

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Compulsory acquisition (or "expropriation") is when a government uses its power to acquire private rights in land without the owner's or occupant's consent. The process is intended to benefit society and is frequently used to enhance social and economic development and to protect the natural environment. Nonetheless, a balance must be found between the public need for land on the one hand and the provision of land tenure security and the protection of private property rights on the other. This is because compulsory acquisition is inherently disruptive – whether compensation is generous or whether the procedures are fair and efficient, displacing people from their homes, businesses and communities always entails considerable human costs. Indeed, where the process is designed or implemented poorly, the economic, social and political costs can be enormous. A focus on the procedures of compulsory acquisition is vital if a government's exercise of the process is to be efficient, fair and legitimate.

INTRODUCTION

Compulsory acquisition is the power of government to acquire private rights in land without the willing consent of its owner or occupant in order to benefit society. It is a power possessed in one form or another by governments of all modern countries. This power is often necessary for social and economic development and the protection of the natural environment. Land must be provided for investments such as roads, hospitals, schools, electricity and water facilities. A government cannot rely on land markets alone to ensure that land is acquired when and where it is needed.

Compulsory acquisition requires finding the balance between the public need for land on the one hand and the provision of land tenure security and the protection of private property rights on the other. In seeking this balance, countries should apply principles that ensure that the use of this power is limited – that is, that it is used for the benefit of society for public use, public purpose or in the public interest. Legislation should define the basis of compensation for the land and guarantee the procedural rights of people who are affected, including the right of notice, the right to be heard and the right to appeal. It should provide for fair and transparent procedures and equivalent compensation.

Compulsory acquisition is inherently disruptive. Even where compensation is generous and procedures are generally fair and efficient, the displacement of people from established homes, businesses and communities entails significant human costs. Where the process is designed or implemented poorly, the economic, social and political costs may be enormous. Problems, such as reduced tenure security, reduced investments in the economy, weakened land markets, opportunities

created for corruption and the abuse of power, delayed projects, and inadequate compensation paid to owners and occupants, may arise where compulsory acquisition is not done well.

SOURCES AND LIMITS OF THE POWER, PURCHASE, RIGHTS AND PROCESS

The constitutions of many countries provide for both the protection of private property rights and the power of the government to acquire land without the willing consent of the owner. However, there is great variation. Some countries have broadly defined provisions for compulsory acquisition, while those of other countries are more specific. Most countries supplement the constitutional basis for compulsory acquisition with extensive laws and regulations. National or subnational laws usually describe in detail the purposes for which compulsory acquisition can be used, the agencies and officials with the power to acquire land compulsorily, the procedures to be followed, the methods for determining compensation, the rights of affected owners or occupants and how grievances are to be addressed. The laws governing compulsory acquisition are part property law and part administrative law (which dictates governance procedures). Principles of administrative justice and good governance often require that such powers be bound by legal rules that allow for hearings and appeals, and be subject to judicial review.

A balanced approach to compulsory acquisition requires a respect for the human rights of the owners and occupants of the land to be acquired. Various international laws reflect the concern for the protection of land rights and the payment of compensation when people are displaced. The acquisition of the land of indigenous communities is particularly sensitive. Protection of indigenous peoples' rights in relation to land is specifically expressed within a human rights framework.

Many constitutions and laws refer to compulsory acquisition being used for public purposes, for public uses and/or in the public interest. In practice, these terms are often not clearly distinguished and they tend to be used interchangeably. A broad survey of both developed and developing countries reveals the following among the commonly accepted purposes for compulsory acquisition:

- 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.

An exercise in compulsory acquisition is more likely to be regarded as legitimate if land is taken for a purpose clearly identified in legislation. An exclusive list of purposes reduces ambiguity by providing a comprehensive, non-negotiable inventory beyond which the government may not compulsorily acquire land. However, exclusive lists may be too inflexible to provide for the full range of public needs – the government may one day need to acquire land for a public purpose that was not considered when the law was written. The rationale for compulsory acquisition may be straightforward where land is acquired by the government for use by a public entity – for example, for a public school, hospital, road or airport. More controversial are cases where private land is acquired by government and then transferred to private developers and large businesses on the justification that the change in ownership and use will benefit the public. In countries where policies of redistributive land reform have been adopted, these are usually considered as being in the public interest even where the reform transfers land from one private owner to another. Such land reforms are often part of government programmes to address social injustices and to promote agricultural and rural development. Each country has its own set

of agencies, ministries and officials that have the power to acquire land compulsorily. The national level of government is usually granted authority for compulsory acquisition by the constitution, and relevant laws often designate the head of government or a specific minister as the person empowered to authorize the functions associated with compulsory acquisition. Relevant laws and regulations should clearly identify the authorized government bodies in order to reduce opportunities for abuse of power.

The extent of loss of land rights by owners and occupants may vary considerably both in terms of the amount of land involved and the types of rights that are affected. This also has implications regarding the rights and remedies of people affected by that action. Compulsory acquisition is commonly associated with the transfer of ownership of a land parcel in its entirety. This may occur in large-scale projects (e.g. construction of dams or airports) and also in smaller projects (e.g. construction of hospitals or schools). However, compulsory acquisition may also be used to acquire part of a parcel – for example, for the construction of a road. The use of specific portions of a land parcel may also be acquired for easements or servitudes to provide for the passage of pipelines and cables. Rights acquired usually include the right to enter the parcel to make repairs; they may be granted temporarily or permanently, and they may be transferable to others.

People may be deprived of some enjoyment of their land even if it is not acquired. For example, the construction of a highway may cause the value of neighbouring parcels to decrease because of the increased noise, but a project may also increase the values of neighbouring parcels. Some equivalence may be provided through changed tax burdens – people whose land has declined in value may pay less property taxation while others may find their tax bill has increased to reflect the higher land values.

Compulsory acquisition is not limited to contexts in which the state seeks to acquire land that is privately owned. Full private ownership of land does not exist in some countries, and the state can be the owner of all land. In other countries, the state retains ownership of substantial areas of land. A range of private occupancy, lease or use rights may be permitted over such state-owned land.

Compulsory acquisition is a power of government, but it is also the process by which that power is exercised. Attention to the procedures of compulsory acquisition is critical if a government's exercise of this power is to be efficient, fair and legitimate. Processes for the compulsory acquisition of land for project-based, planned development are usually different from processes for acquiring land during emergencies or for land reforms. In general, a well-designed compulsory acquisition process for a development project should include the following steps:

1. Planning: It is necessary to determine the different land options available for meeting the public need in a participatory fashion. The exact location and size of the land to be acquired is identified. Relevant data are collected. The impact of the project is assessed with the participation of the people affected.
2. Publicity: The notice describes the purpose and process, including important deadlines and the procedural rights of people, and is published to inform owners and occupants in the designated area that the government intends to acquire their land. People are requested to submit claims for compensation. Public meetings provide people with an opportunity to learn more about the project and to express their opinions.
3. Valuation and submission of claims: Equivalent compensation for the land to be acquired is determined at the stated date of valuation. Owners and occupants submit their claims. The land is valued by the acquiring agency or another government body. The acquiring agency considers the submitted claim and offers what it believes to be appropriate compensation. Negotiations may follow.

4. Payment of compensation: The government pays people for their land or resettles them on alternate land.
5. Possession: The government takes ownership and physical possession of the land for the intended purpose.
6. Appeals: Owners and occupants are given the chance to contest the compulsory acquisition, including the decision to acquire the land, the process by which the land was acquired, and the amount of compensation offered.
7. Restitution: Opportunity for restitution of land if the purpose for which the land was used is no longer relevant.

There is a danger that acquisition processes can last for many years, creating long-term insecurity and uncertainty for owners and occupants. Legislation should provide that the acquisition will be regarded as abandoned if the process is not completed within a specified period as a result of delays by the acquiring agency.

PLANNING AND PUBLICITY

The planning phase of a major public investment project should include the identification of any lands to be acquired for the project. Options should be analysed and presented to the public for their understanding and consultation in order to choose the site that presents the fewest obstacles and the best outcomes, having regard to all impacts, including those on any owners and occupants. An impact assessment is a common requirement of the planning phase. Such assessments should ensure that the acquiring agency considers the social, economic and environmental impacts before deciding whether and how to proceed with the project, and should determine ways to minimize any negative aspects. A variety of stakeholders should be involved in research and discussion about the project. The communities affected should be included in the planning process and provided with the support needed to enable them to participate effectively. Decisions, assessment of options and appeals processes should be based on the collection and analysis of data. Comprehensive mapping of the project area should document land-use and cropping patterns, and the location of protected sites (including cemeteries and sacred areas). The communities should contribute to the mapping. The acquiring agency should establish a clear definition of which owners and occupants will be entitled to compensation in the context of the relevant legislation. An inventory of affected owners and occupants should be prepared. The total compensation costs should be estimated and the necessary budget secured by the acquiring agency.

The provision of notice of the intention to acquire land compulsorily protects the rights of the people affected. Notice should be given as early as possible to allow people to object to the acquisition of their land, to submit compensation claims or to appeal against the incorrect implementation of procedures. To ensure that all affected people are aware of the project, notice should be publicized as widely as possible. Printed information should be sent to affected households and displayed in public areas and prominently on the land to be acquired. The information should be comprehensible and information should be presented in local languages. Oral communication is important in areas with high rates of illiteracy. The information should explain the purpose of the acquisition, identify the land to be acquired and provide a clear description of the procedures. It should describe the rights of owners and occupants, including the rights of appeal, and should reassure people of their rights, including in respect of compensation. The information should include the various time limits.

Public meetings will provide an opportunity for people to learn more about the project, to receive answers to their questions about the process and its procedures and to voice their concerns. The meetings illustrate accountability and transparency when the government

has to justify its proposal to acquire land compulsorily. Open discussion at public meetings should help the government to improve its understanding of the needs and concerns of affected communities and to prepare responses that reduce the number of challenges to the compulsory acquisition. Once notice has been given and the public review process has been concluded, people should submit claims for compensation of losses resulting from the compulsory acquisition of their land.

VALUATION, COMPENSATION AND TAKING POSSESSION

Compensation (whether in financial form or as replacement land or structures) is at the heart of compulsory acquisition. As a direct result of government action, people lose their homes, their land and at times their means of livelihood. Compensation is to repay them for these losses, and it should be based on principles of equity and equivalence. Affected owners and occupants should be neither enriched nor impoverished as a result of the compulsory acquisition. However, financial compensation on the basis of equivalence of only the loss of land rarely achieves the aim of putting those affected in the same position as they were before the acquisition. In some countries, there is legal provision recognizing this in the form of additional compensation to reflect the compulsory nature of the acquisition. In practice, given that the aim of the acquisition is to support development, there are strong arguments for compensation to improve the position of those affected wherever possible. The calculation of compensation is based on the value of the land rights and improvements to the land, and on any related costs. The determination of equivalent compensation can be difficult, particularly where land markets are weak or do not exist, where land is held communally, or where people have only rights to use the land. Many factors can lead to inadequate compensation. Legislation should ensure fair processes for determining valuation and compensation.

During the valuation phase, the acquiring agency and the affected landowners gather information and evidence to support their arguments for the compensation values they believe to be equitable. Responsibility for the valuation of land varies. In some countries, the work is carried out by or for the acquiring agency; in others, the valuations are the responsibility of independent commissions. In some countries, the acquiring agency makes an offer; if this offer is not accepted by the owner or occupant, the acquiring agency makes an official determination of compensation that can be appealed only in court or to a quasi-judicial body such as a tribunal. In other countries, the acquiring agency is required to negotiate in good faith first. These negotiations can save time and money when they produce solutions that leave the owners and occupants satisfied enough with the outcome and thus unlikely to prolong the process by submitting appeals. A drawback of negotiation is that there can be an imbalance in negotiating power. The government should ensure that owners and occupants know about the negotiation procedures and what their rights are. It should cover the reasonable costs of specialists such as valuers and lawyers as a part of the compensation claim. Special assistance will be needed for most claimants, particularly for indigenous communities and other vulnerable groups.

It will be necessary to build the capacity for valuation in government and the private sector if existing valuers are unable to carry out the work demanded by the project within a reasonable time. Legislation should enable the clear definition of the date at which the land should be valued – as values can change rapidly as a result of awareness of the project. The most equitable approach is to have a valuation date that sets the value of the land as if the proposed project did not exist. Many constitutions state that compensation should be paid promptly. However, the period in which payment is to be made is often left undefined in relevant legislation. Legislation should require that possession take place only after a

substantial percentage of the compensation offer has been paid.

Most laws on compulsory acquisition broadly define equivalent compensation with reference to market value or "just compensation". In general, compensation should be for: the loss of any land acquired; buildings and other improvements to the land acquired; the reduction in the value of any land retained as a result of the acquisition; and any disturbances or other losses to the livelihoods of the owners or occupants caused by the acquisition and dispossession. If market value is the basis of compensation, legislation should state clearly what is understood by market value. A common approach is to define market value by the amount that a willing buyer would pay a willing seller on the open market where some choice exists. The legislation should ensure that such an assessment does not include changes in the value of the property arising from the process of compulsory acquisition. Assessing the market value of a land parcel is not always simple, particularly where land markets are weak. Frequently, a variety of complex factors must be considered. The value of land is usually affected by regulations that classify land according to permissible uses, such as residential, agricultural, commercial or industrial. Many compensation laws allow for compensation on the basis of the most valuable use – as the person could have used the land in such a manner if compulsory acquisition had not occurred. It may not always be possible to determine compensation based on market value. Alternative approaches vary depending on the political economy of a country, the qualities of the land acquired and the nature of the land rights.

Agricultural land is valued in specific ways in some countries. Improvements to the land can be valued in various ways according to their nature. Houses and other buildings may be valued by applying market values or by their replacement costs. Trees and perennial crops may be valued by calculating the annual produce value for one season and then providing the owner with a multiple of that annual value.

The value for compensation should include more than the value of the land and improvements. The disturbance accompanying compulsory acquisition often means that people lose access to the sources of their livelihoods (a farmer losing agricultural fields, a business owner losing a shop, or a community losing its traditional lands). Compensation may be awarded for the disturbance or disruption to a person's life under certain conditions. A pragmatic way of determining when compensation is equivalent and appropriate is to consider all the general categories of expenses caused by the compulsory acquisition and to legislate that payments should cover those categories of expenses. Legislation should allow for flexibility in covering unforeseen expenses in situations where denying compensation would create injustices.

Valuation and compensation for the partial acquisition of land should follow the principles used where an entire parcel of land is acquired. However, additional factors may arise. For example, if a new road cuts a remote portion of agricultural land from the majority of the farm, the isolated portion may have little value to the owner, yet its market value may increase if it becomes more accessible to someone on the opposite side of the road. Alternatively, the value of the remaining land might increase as a result of the project. Equivalence could then be accomplished by balancing the compensation of the land acquired with the projected increase in value to the remaining land. The use of land for easements or servitudes is also subject to compensation in most countries where providers of public services have to place electric power transmission lines and pipelines on private land. In such instances, compensation is usually paid annually and is based on the market value of the area of land used. People whose land is partially acquired usually do not have to relocate, but they may experience problems when the project is implemented. Legislation should ensure that the acquiring agency

is responsible for compensating affected owners and occupants for damages caused during construction regardless of whether or not their land was acquired.

Whether or not land is leased from the state or from private owners, lessees should be entitled to compensation for the loss of their land rights on the basis of the principle of equivalence. The terms and conditions of the leases may identify the basis for compensation in the event of the termination of the lease prior to its expiry. The compensation entitlement should put the claimants in the same position as they were prior to the acquisition. One approach is to base compensation on the replacement cost of finding equivalent land to lease. Alternatively, the compensation can be based on the value of the lease rights. Legislation may also need to provide for the basis on which compensation is allocated between a landowner and a lessee or sharecropper.

Valuation and compensation of sacred areas and religious sites are difficult. In the case of a temple, church, mosque or other building that houses the meetings of a religious group, it may be possible for the acquiring agency either to provide the group with an equivalent building on another site or to pay compensation that covers the cost of constructing an equivalent place of worship at a new site, the cost of the new site, and costs associated with any disturbance. Financial compensation is often inappropriate where the religious site is a burial ground or sacred forest – some sacred areas simply cannot be replaced.

Where a number of members of a family, including women and children, own land jointly, it may be unclear who should receive compensation. Some family members may live together on the land and jointly cultivate it while other co-owners may have migrated elsewhere to seek work. Conflicts may arise when the land is compulsorily acquired – siblings may contest inheritance claims, or there may be intergenerational disputes. Women and children may have a significant stake in the family home or agricultural land but hold few rights to control what happens to it. Local laws, or cultural or religious rules, may prevent women and other vulnerable groups from having a legal claim to the land on which they live and work. The male head of the family may be automatically considered the landowner and receive the compensation. This decision may lead to injustice and the eventual impoverishment of the entire family if the funds are mismanaged. To remedy these situations, legislation should require the acquiring agency to investigate which family members hold de facto interests in the land and will suffer personal losses from its compulsory acquisition. The legislation could create mechanisms though which compensation is paid to members of an affected family in a manner that ensures joint decision-making about the use of such funds.

In many countries, land is held under customary tenure, with traditional leaders being responsible for the administration of land according to customary practices. Typically, some lands are assigned for the exclusive use of individuals or families (e.g. for residences) while the use of others (e.g. pastures) may be shared by all members of the community. Distinctions have often been made between “customary” and “statutory” tenure (i.e. defined in written laws). However, there is now increasing recognition of customary rights within formal law – this is leading to a blurring of the distinction between customary and statutory tenure. Customary land used by people considered to be indigenous may have special protections. The land may be regarded to be inalienable except under specific circumstances. The use of leases rather than outright sales may be a more appropriate solution for such lands. Decisions regarding the valuation of customary land may be based on a combination of statutory and customary law. Customary laws may dictate different methods of valuation according to local custom. In such instances, there may be a need for the clarification of tenure prior to determining the compensation claim.

The payment of financial compensation may present challenges. The compensation

for the loss of shared resources may be complicated by arguments as to who is eligible to share in the award. Leaders may divide the compensation according to customs that discriminate against women and other vulnerable groups. There may be occasions when financial compensation is inadequate. In cases where a community is to be displaced, the allocation of land for resettlement or leasing arrangements may remove the problems associated with financial compensation. However, the provision of alternative land as compensation can bring its own problems. In cases where only a portion of a community's land is to be acquired, negotiations may reveal that compensation could also take the form of the provision of facilities such as schools, clinics, public toilets, wells, markets or storage areas. Legislation should anticipate such instances for the valuation and compensation of customary land by including mechanisms that resolve them fairly and effectively.

The payment of compensation for rights that are not legally recognized may be a difficult policy question given the variety of cases that exist. In many such cases, people may be regarded as deserving compensation and an alternative place to settle if the land they occupy is to be used for a public investment project. For example, residents of an informal settlement who have only informal rights to their land and homes may be considered to be entitled to assistance, particularly if they are poor and have no alternative possibility for accommodation. It may be difficult to distinguish between cases to determine whether or not a particular illegal or informal occupant is deserving of compensation, but clear guidelines should be developed.

The construction of homes and other structures in informal settlements is usually illegal. However, such illegality alone should not prevent the payment of compensation for the value of buildings.

The decision as to whether compensation should be through resettlement or money may be difficult and complex. Care must be taken to ensure that a proposed solution is not an attempt to avoid paying equivalent compensation. Providing suitable alternative land may be difficult in the light of current population pressures on the land. However, many owners and occupants may prefer to receive land as compensation rather than money. Providing suitable land can help to reduce objections to the process and reduce the overall costs of compensation. Resettlement of vulnerable people on alternative land is required where the loss of their land means a loss of their livelihoods, and they are unable to use financial compensation to purchase similar land elsewhere or to find new ways to earn a living. Resettlement may be the only way for them to maintain their livelihoods. Where resettlement involves an entire community, social cohesion and networks can be maintained. Resettlement may also be required for people in informal settlements and others who have weak or absent legal rights to land that is compulsorily acquired. Financial compensation may be insufficient to enable them to purchase alternative land through the market. Resettlement may also be appropriate where the land to be acquired is used for a non-commercial use, such as a religious institution. Those who are to be displaced may be more interested in being able to continue their work with minimum interruption than in money. Moreover, the offer of alternative land as compensation may prevent problems that can arise when financial compensation is paid to people who are unused to handling large amounts of money. Without adequate training on how to manage a large lump-sum payment, people may spend the money quickly and unwisely. The end result may be people with no land to farm, no income stream to support themselves and no job skills with which to compete in a non-agricultural economy.

A project can face serious financial consequences if the acquiring agency cannot take possession of the land at the necessary time. As a result, it is common for legislation to contain provisions to allow for the possession of the land even without the cooperation of affected owners and

occupants. The acquiring agency should be able to enter the land on a specific date, as required by the project's schedule. However, people may face hardship and loss if they are not given enough time to vacate the land peacefully and carefully. Legislation should allow owners and occupants a reasonable time to vacate their land.

APPEALS

Legislation should provide opportunities for owners and occupants to appeal against the compulsory acquisition of their land. Procedures to appeal protect the rights of affected people. At the same time, governments have an interest in providing effective procedures – a belief that the appeals process is legitimate will encourage people not to resort to other forms of protest that could lead to violence and even loss of life. Unless care is taken, many obstacles can prevent people from appealing against the actions of government. The appeals process may be expensive, time-consuming, in a language that claimants cannot speak or technically inaccessible and overwhelming. A high level of technical expertise may be needed to counter the claims of the acquiring agency, and people may not have the technical knowledge to argue their cases effectively. Good practice is for an appeal to be allowed only where an agreement cannot be reached in any other manner, for example, only once negotiations have failed. Because the government has much greater access to resources and information, it typically has the burden of proof during an appeal, and it pays the associated costs. This is particularly important where there is an appeal against the purpose of the acquisition, abuses of power, or procedural injustice. If reasonable costs are not covered by the government, fear of having to pay all costs associated with an appeal may deter people from asserting their rights of appeal.

There are generally three types of appeals: (i) against the purpose of the project and the designation of land to be taken; (ii) against the procedures used to implement compulsory acquisition; and (iii) against the compensation value. Owners and occupants should have the right to appeal to a body that is independent of the acquiring agency. The review of appeals should be fair, inexpensive, easily accessible and prompt. The two main types of review procedures are juridical and administrative procedures, and many countries have a combination of both. In some countries, appeals against the compensation offered are reviewed by a court that deals with civil matters. In others, a specialized commission reviews appeals. Regardless of the approach followed, the body of casework built up over time provides a valuable resource to facilitate future negotiations and to guide decisions in subsequent appeals.

ADVOCACY AND ASSISTANCE

All affected owners and occupants may be at a disadvantage when their land is being acquired compulsorily, but the burden is particularly hard on the poor. They may not know their rights or how to safeguard them during negotiations with experienced officials who are supported by all the powers and resources of government. Moreover, it is often the land of the poorest and most vulnerable that is compulsorily acquired for projects. The value of their land is usually low compared with land owned by others, making it less costly to acquire and thereby reducing the total costs of the project. It is also easier to locate an unpopular public works project in a poor area because of residents' lack of political influence and other resources to block the choice of location successfully. Moreover, local governments may have an interest in redeveloping the poorest areas in order to increase the tax base. Such redevelopment usually requires the removal of residents.

Legislation can help to address the imbalance of power by providing for mechanisms to assist people to become better advocates for themselves. Laws could require that the acquiring agency provide affected people with access to lawyers, valuers and other relevant professionals to help them understand the process and prepare their responses. Alternatively,

people may be allowed to hire their own valuers and lawyers, with the cost of their fees being added to their overall compensation award. Non-governmental organizations can play an advocacy role throughout the process. They can educate people about their rights, advocate on their behalf and teach them negotiation skills to argue for equitable compensation.

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PAOM TÖRHÖNEN

La valeur du marché constitue-t-elle une mesure équitable et objective pour déterminer l'indemnisation versée dans le cadre d'une acquisition forcée de terre?

La valeur du marché revêt une importance primordiale en tant que base du calcul de l'indemnité versée aux propriétaires fonciers qui sont forcés de céder leurs terres en vue d'un usage public. Cela est particulièrement le cas en Suède où la valeur du marché est déterminée selon la loi relative à l'expropriation. C'est dans ce contexte que cet article examine les questions ci-après. Le propriétaire foncier moyen est-il satisfait de la valeur du marché en tant que base du calcul de l'indemnité? La valeur du marché est-elle équitable lorsqu'elle tient compte des possibilités qu'a le propriétaire foncier d'acquérir une propriété équivalente? La valeur du marché constitue-t-elle une mesure objective de calcul de l'indemnité? Comment les législateurs et les tribunaux devraient-ils prendre en compte l'incertitude de l'estimation?

¿Es el valor de mercado una medida justa y objetiva para determinar la indemnización por la adquisición de tierras por expropiación?

El valor de mercado tiene una importancia central como base para determinar la indemnización que se paga a los propietarios de tierras que son obligados a ceder tierra para uso público. Esto es particularmente cierto en el caso de Suecia, donde el valor de mercado se determina con arreglo a la Ley de Expropiación. Teniendo presente este contexto, en el artículo se examinan las cuestiones que se enumeran a continuación. ¿Para el propietario de tierras medio, es el valor de mercado satisfactorio como medida para determinar la indemnización? ¿Es justo el valor de mercado tomando en consideración las posibilidades del propietario de adquirir una propiedad equivalente? ¿Es el valor de mercado una medida objetiva para determinar la indemnización? ¿Cómo deberían los legisladores y los tribunales enfrentarse a la incerteza de la valoración?

Is the market value a fair and objective measure for determining compensation for compulsory acquisition of land?

L. Norell

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The market value is of central importance as the basis for determining the compensation paid to landowners who are forced to hand over land for public use. This is particularly the case in Sweden, where the market value is determined according to the Expropriation Act. It is against this background that this article discusses the following questions. Is the average type of property owner satisfied with the market value as the measure for determining compensation? Is the market value fair when taking into consideration the landowner's possibilities to acquire an equivalent property? Is the market value an objective measure for determining compensation? How should uncertainty of valuation be handled by legislators and the courts?

INTRODUCTION

The market value plays an important role in determining the compensation paid to landowners who are forced to vacate their properties as a result of expropriation or similar compulsory measures. This can be seen, among other things, from a number of judgments handed down by the European Court of Human Rights (Åhman, 2000; Allen, 2006). In the United States of America, the general standard is to accept a "fair market value" as the basis for determining just compensation (Miceli and Segerson, 2007).

In Swedish compensation legislation, the market value is clearly identified in the text of the Expropriation Act of 1972 (the Act), Chapter 4, Section 1 as the criterion for setting the level of compensation. According to the Act's main rule, the compensation paid for a whole property unit shall be equivalent to the property's market value. When part of a property unit is expropriated, or in the case of similar encroachment,[1] compensation shall reflect the decrease in the property's market value. In addition, the property owner shall be compensated for other economic damages, such as loss of income or increased costs that may affect activities carried out on the property as a result of the expropriation. In the other Nordic countries (Denmark, Finland, Iceland and Norway), the market value principles are not validated in the legislation as clearly as in Sweden. In these countries, compensation for property shall be equivalent to the highest market and yield value (Norell, 2001).[2] Nonetheless, here too the market value is the principle value and for properties that are not of a type that give yields (such as private houses), the market value is the only value on which compensation is based.

One of the basic reasons for adopting the market value as the main criterion for determining compensation is that the person to whom compensatory damages

[1] In Sweden, in addition to the Expropriation Act, there are a number of special laws that make it possible to acquire land compulsorily for public use, e.g. for building public roads, railways and utilities. In these laws, reference is made to the Expropriation Act concerning the rules to be followed for determining compensation (see Sjödin *et al.*, 2007.

[2] Prior to 1972, there were also similar rules in Sweden. In application of the Swedish Expropriation Act, the difference between the yield value and the market value should be considered to fall in the category "other damages" for which additional compensation is awarded over and above the property's market value or decrease in that value.

are paid shall be able to procure a new – in principle, exactly equivalent – property as that which has been expropriated. The intention is that the affected person's economic situation will be unchanged in comparison with the situation prior to the expropriation. In many countries, this is a constitutional principle. For example, in accordance with the Danish, Finnish and Norwegian constitutions, *full compensation* shall be paid from property that is lost as a result of expropriation and similar measures. However, in the Swedish constitution, it is stated that *compensation*, not full compensation, shall be paid for losses. Furthermore, it is stated that the compensation shall be determined in accordance with the criteria given in the law, i.e. primarily the Act. However, the market value principle is negated by a number of special provisions in the Act. Whether or not these provisions lead to the intentions of the constitution regarding compensations for losses not being complied with is a frequent subject of discussion in the literature (Bengtsson, 1996; Hager, 1998).

A further aspect of the market value is that it is considered an *objective* value that should be possible to determine more exactly than a yield value. This argument was given considerable weight when the pure market value principle was adopted in Swedish expropriation legislation in 1972. However, it should be pointed out that the market value is a *probable* price that can only be estimated and not exactly determined. A court of law must take this built-in uncertainty of the market value into account when determining compensation. This means, in effect, that the court must judge which of the parties is most affected by the uncertainty.

Against the background of the above, brief presentation of the problem, there is reason for a closer study of the market value concept and its function as a fair and just measure for determining compensation for expropriation of land. Such a study can, of course, be done from different angles but I have chosen to focus on the following four main issues that, although they are to a certain extent typical for Swedish circumstances, may also be of general interest:

1. Is the average property owner satisfied with the market value as the measure for determining compensation?
2. Is the market value fair when taking into consideration the landowner's possibilities to acquire an equivalent property?
3. Is the market value an objective measure for determining compensation?
4. How should uncertainty of valuation be handled by legislators and the courts?

QUESTION 1. IS THE AVERAGE PROPERTY OWNER SATISFIED WITH THE MARKET VALUE AS THE MEASURE FOR DETERMINING COMPENSATION?

The issue here is whether the average property owner is satisfied with payment of an amount equivalent to the market value as compensation for being forced to hand over his/her property. If not, which type of compensation can be considered to be fair from a property owner's perspective? A third question in this context is whether it would be possible to create another "reasonably objective" legal provision that satisfies property owners' demands irrespective.

We can begin a discussion of these issues with the following statement by the philosopher Nozick (1986, 89): "Full compensation is an amount that is adequate, although only just adequate, to make the concerned party say that he feels happy, not unhappy, about what happened."

To satisfy this compensation criterion, the property owner must feel slightly more satisfied after he/she has *voluntarily* sold the land to the person who plans to use it for, for example, building a motorway or other purpose. In other words, the landowner should feel that he/she has made a small profit. It is obvious, according to Nozick's criterion, that it need only be a matter of an individual and subjective amount.

The Swedish debate, initiated by Werin (1978) at the end of the 1970s, has focused

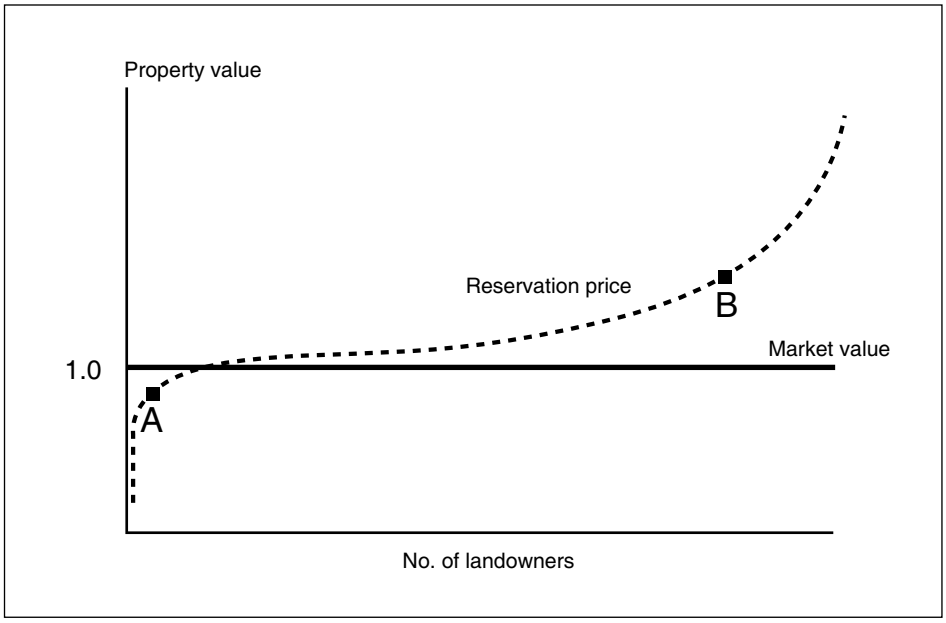

FIGURE 1
Relationship between reservation price and market value

on the reservation price. The reservation price has been discussed in other countries as well (see Munch, 1976; Fischel, 1995; Miceli and Segerson, 2007; Garrett and Rothstein. 2007). The reservation price is defined as the lowest price at which a property owner would agree to sell a property in connection with a voluntary sale, without the threat of expropriation. Werin (1978) mainly cites individualistic fairness aspects as grounds for basing compensation on the reservation price rather than on the market value. There does not appear to be any real difference between Nozick's and Werin's principles for full compensation as, finally, it is the property owner who decides when the compensation can be considered adequate.

Werin (1978) is, of course, aware of the major practical difficulties that could arise if the reservation price demanded by the owner were to be paid. As a conceivable solution to this problem, he proposes that compensation could be determined as the market value plus a percentage increase.[3] Other Swedish authors (e.g. Skogh, 1984; Kalbro, 1998 and 2004) have expressed similar ideas.

A general percentage increase of the market value would result in more landowners than previously being satisfied, but if the increase is not large enough, a number of dissatisfied landowners will remain. Figure 1 illustrates the general relationship between reservation price (dotted line) and market value (black line) (Kalbro, 2004). This shows that the reservation price is lower than the market value for some landowners (e.g. Owner A in Figure 1). This is, of course, a basic pre-condition for the creation of a supply side on the property market. However, for most landowners, the reservation price is higher than the market price. As an example, for Owner B in Figure 1, the reservation price is about 50 percent higher than the market value.

The reservation price is thus very much a subjective measure of value.[4] According to Lindeborg (1986), the reservation price varies between 1 and 22 times the market value (the average is 2.35 times the market value). In addition to it being a matter for different property owners, depending upon, among other things, the degree of sentimental attachment and similar personal values, there are several factors that indicate that the reservation price set by an owner will vary depending on the *reason* for the expropriation. Some property owners may accept a lower payment if the expropriation is being made to satisfy

[3] Werin makes no suggestions regarding the size of the increase, but the increase is intended to cover the average difference between reservation price and market value.

[4] The terms "subjective value" or "value to the owner" are sometimes used as synonyms for reservation price (Knetsch and Borcherling, 1979; Allen, 2006; Miceli and Segerson, 2007).

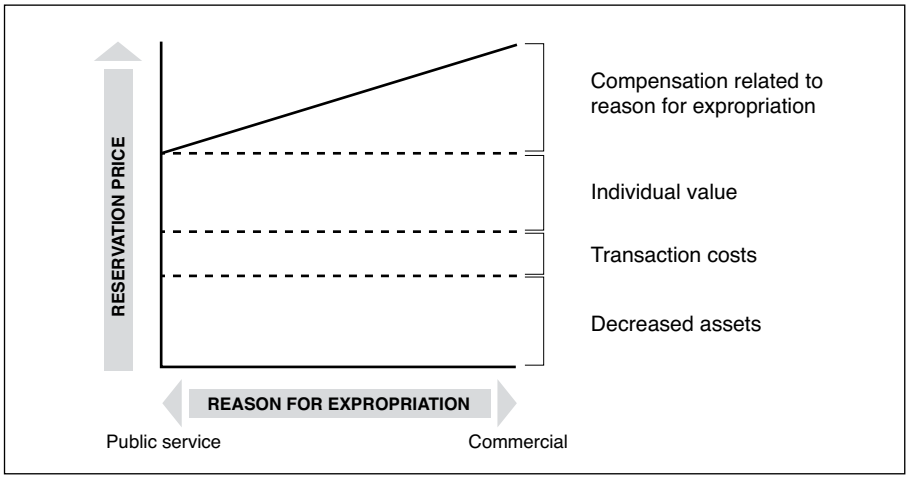

FIGURE 2
Components of reservation price

important public requirements (e.g. building a hospital) as opposed to an expropriation that has significant commercial elements (e.g. structures for mobile telephone networks). Based on an analysis carried out by Kalbro (1998) the reservation price can, in individual cases, be broken down into four components (Figure 2):

1. Decreased property value: In principle, this basic amount comprises compensation for damages for which compensation is paid according to Swedish legislation, e.g. market value and other monetary damages.
2. Transaction costs: The property owner may suffer damages for which no compensation is paid according to current Swedish legislation. Transaction costs can include costs and the time required for contacting the purchaser of the land or costs and loss of income in connection with appearance in courts and similar.[5]
3. Individual value: This item comprises the landowner's estimation of the size of the loss – in addition to those incurred under 1 and 2 above – independently of the reason for the expropriation and of who the purchaser is. This item includes sentimental value as well as other individual-related values such as compensation for violation of ownership rights, social value (Allen, 2006), mental suffering and so-called frustration damage (where the landowner cannot benefit from investments that he/she has made in the property [Radetzski, 2004]).
4. Compensation that is related to the reason for the expropriation of the land: This item comprises compensation over and above the property owner's estimate of the consequences of the actual loss of land. As stated above, the reason for the expropriation can be of significance for determining the size of the reservation price. There can be a difference between surrendering of land for building a hospital or a motorway – the landowner may consider that the general public will benefit more from a hospital than a motorway. As the reservation price is set by individual landowners based on their own criteria and on how much compensation they would be willing to accept for surrendering the land, it is naturally impossible for an uninitiated person to determine the size of the compensation. A landowner may give different weight to the public interest for utilizing the land, who the purchaser is, reactions expressed through the local media, etc. This attitude is perhaps understandable as property owners, or at least some of them, have a loyal attitude towards society and do not represent "Economic Man" (see Votinius, 2004). A share of the profits can also be included if it can be anticipated that

[5] Some transaction costs (e.g. moving to new accommodation) are normally covered by the compensation for expropriation. For simplicity, I have included only those transaction costs for which no compensation is received.

the property owner will request a share of the purchaser's profits.[6]

It may happen that the reservation price is very high, which can have unacceptable consequences if there are no rules that permit compulsory acquisition of land for important public purposes. A single property owner could prevent the construction of an important trunk road or housing development.

How then should a legal provision that takes into account the aspects discussed above be formulated? One solution could be to add *different general increases* to the market value, with the size of the increase varying depending on the purpose of the expropriation and where consideration is given to the commercial elements. Another solution could be to apply a *fairness rule*.[7] Application of this type of rule would make it possible to give consideration to both the "basic level" (the market value plus transaction costs in Figure 2) in addition to the purpose-related part of the reservation price.

In this paper, I will not discuss possible suitable solutions but will, instead – as an answer to the question in the heading to this section – state only that the average property owner has little reason to be satisfied with compensation based only on the market value, and to an even less extent (to again refer to Nozick) is it likely that the property owner would be more satisfied *after* than *before* the expropriation if compensation were equivalent to the market value.

[6] In Sweden, there seems to be a degree of consensus that landowners should share part of purchasers' profits (Bonde, 2003). Personally, I do not think that landowners normally think in these terms provided they have not been influenced by the discussions on the subject. On the other hand, they can feel wrongly done by because of expropriation, particularly if it is done to satisfy commercial interests, which is a situation that can justify a higher level of compensation.

[7] The so-called profit sharing rule in the Swedish Real Property Formation Act and the Joint Facilities Act are examples of a fairness rule in the compensation context. In accordance with these acts, *fair* consideration shall be given to the special value the land has for the new property. In cases where land cannot be taken over in accordance with other legislation, profit sharing should be applied so that it is possible to achieve the result that would have been achieved as the result of a normal, voluntary agreement. See also Kalbro and Sjödin (1993).

QUESTION 2. IS THE MARKET VALUE FAIR WHEN TAKING INTO CONSIDERATION THE LANDOWNER'S POSSIBILITY TO ACQUIRE AN EQUIVALENT PROPERTY?

The Swedish Expropriation Act, as well as legislation in the other Nordic countries, is based on the fundamental concept of unchanged assets – the level of compensation should guarantee that the property owner's total assets after an expropriation should be the same size as before the expropriation. Expressed in more pragmatic terms, this principle should imply that the property owner should be able to purchase a similar, equivalent property in the area with the compensation. How well does the market value satisfy this requirement?

Initially, this question can be discussed with reference to the normal distribution curve, which is generally used to illustrate the market value (Mallinson and French, 2000). Let us assume that we have normally distributed data for comparable purchases and that the compensation paid to the property owners, the market value (= the most probable price), is determined to be the amount that lies in the middle of the data (Figure 3). With this starting point it is easy to see that, theoretically, there is a 50-percent chance that the property owner will be able to purchase an *exactly* equivalent property for the price that lies under the compensation level (mean value). Similarly, there is a 50-percent chance or, rather, risk that the property owner will have to pay more than the amount received as compensation – the set market value – when purchasing a new, equivalent property. Thus, theoretically, it is equally probable that the property owner will make a "good" or a "bad" purchase.

Is it acceptable that there is a 50-percent risk that the property owner will suffer a loss when purchasing a replacement property? Does this represent a fair balance between private and public interests?[8] I will not attempt to define a fair "risk level", but

[8] Swedish compensation legislation is based on a balance between public and individual interests.

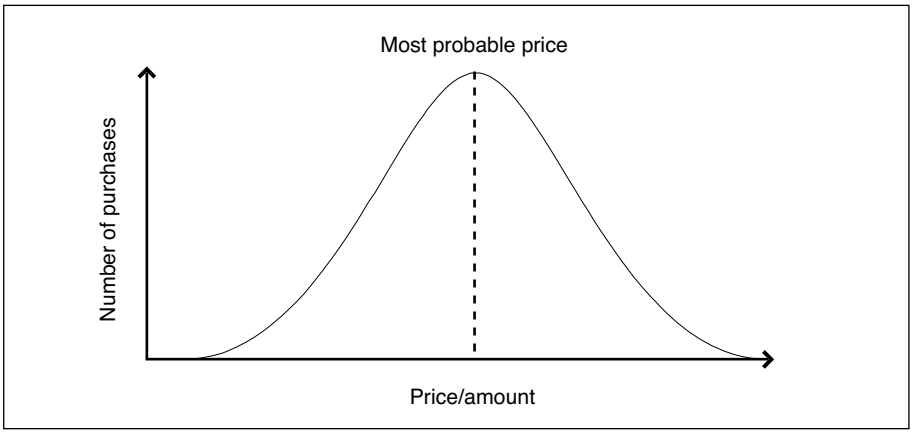

FIGURE 3
Market value set as mean of price data for a number of purchases of equivalent properties in same area

it can in principle be stated that, based on a normal distribution curve, it is possible to compute a percentage increase linked to a given risk level. If, as an example, we assume that the risk for a property owner should be 25 percent – in other words, that the chance that he/she will be able to buy an equivalent property for the compensation is 75 percent – this would perhaps be equivalent to an increase of 20 percent. The percentage increase relative to a given risk level will, naturally, depend on the shape of the curve ("flat" or "high"). In order for a property owner to be 100-percent certain of being able to purchase an equivalent property immediately, the amount of compensation must cover the whole price interval, provided that the price situation is the same at the time of procurement as at the time when the valuation on which the compensation was set.

To this theoretical and in many ways interesting way of looking at the problem can be added the observation that often it may be difficult, in reality, to acquire an *exactly equivalent* replacement property in the same location relative to place of work, day-care centre, etc. Therefore, the property owner may be faced with additional costs that, normally, are not covered by compensation according to current rules. For this reason, and also to cover costs for repairs, a certain increase in the market value may be motivated.[9]

[9] Such costs are included in the reservation price as are the property owners' estimates of the "risk level". The costs should normally be included under "transaction costs" where they have been defined as transaction costs (see Figure 2).

QUESTION 3. IS THE MARKET VALUE AN OBJECTIVE MEASURE FOR DETERMINING COMPENSATION?

This question is, perhaps, particularly interesting from a Swedish point of view. The main reason for including the market value principle in Swedish expropriation legislation in 1972 was because there was a need for an *objective*, unambiguous and simple measure for determining compensation for real property. It was considered that an objective determination of yield values was difficult.

Another basic principle in Swedish and Nordic expropriation legislation is that compensation is only paid in connection with "economic damage". The term economic damage in this context normally implies damage that can be estimated as a money value in an *objective way* by an independent body, such as a court (Hager, 1998; Radetzki, 2004). The object of this requirement is, clearly, to make the level of compensation predictable and – more simply – not to allow the property owner's subjective estimate of the damage to be the basis for the determination of compensation for expropriation. For this reason, no compensation is paid for losses such as those of sentimental value or for personal suffering in connection with expropriation.

Referring to the question of objectivity, the currently used *concept of market value* is not wholly unambiguous (Hager, 1998; Norell, 2005). The previously accepted definition in Sweden was "probable sale price on the open market". Since the 1980s, the definition used has been "*most* probable sale price on the open market".

Internationally (this has naturally also influenced valuation in Sweden during the last few years), the definition adopted by, among others, the International Valuation Standards Committee is: "Market value is the estimated amount for which a property should exchange on the date of valuation between a willing buyer and a willing seller in an arm's-length transaction after proper marketing wherein the parties had each acted knowledgeably, prudently and without compulsion." Another more detailed definition is the following variant adopted in the United States of America by the Federal National Mortgage Association: "The most probable price which a property should bring in a competitive and open market under all conditions requisite to a fair sale, the buyer and seller, each acting prudently, knowledgeably and assuming the price is not affected by undue stimulus. Implicit in this definition is the consummation of a sale as of a specified date and the passing of title from seller to buyer under conditions whereby: (1) buyer and seller are typically motivated; (2) both parties are well informed or well advised, and each acting in what he or she considers his or her own best interest; (3) a reasonable time is allowed for exposure in the open market; (4) payment is made in terms of cash in US dollars or in terms of financial arrangements comparable thereto; and (5) the price represents the normal consideration for the property sold unaffected by special or creative financing or sales concessions granted by anyone associated with the sale."

These international definitions include a requirement for "willing[ness]", "knowledge[ably]", "prudence", "without compulsion" and more. In an interesting analysis of the market value concept, Lind (1998) states that it is not necessary to place demands for willingness, knowledge and prudence on the purchaser and seller. According to Lind – and here I agree – such requirements do not make the definition more explicit than "the most probable price" as it is difficult to ascertain whether the requirements are satisfied, as a result of which their relevance can be questioned.

When discussing whether or not market value is an objective measure, it is important to emphasize that the market value for a given property can only be *assessed* or estimated and not calculated (Lundström, 1991). This can be seen clearly from the first international definition ("estimated amount"). The market value is thus a *fictitious value*, an abstraction, that is linked to a hypothetical sale of a property at a given point in time. The value is not based on facts – for example, a real sale of the property – but, instead, on an *interpretation* made by a valuer or court of what might happen *if* the property were to be sold at a given point in time.[10]

As indicated above, the market value concept is often explained using a normal distribution curve (Figure 3). The curve illustrates the *assumed* distribution of prices should the *actual property*, purely theoretically, be sold on the open market an infinite number of times at one and the same point in time.[11] From this hypothetical curve, it is easy to understand that the price for a *real* sale of the property, at approximately the same time as the valuation, does not in any way need to agree with the *assessed* most probable price. As the market value is an abstraction and, in the expropriation context, the result of a court's judgment, it is consequently not possible to verify whether or not it is correct. Therefore, one can question whether it is relevant to speak of

[10] With an incisive wording, a yield value can be said to be a more objective measure of the value of a property as such a value is normally *calculated* using a mathematical formula. However, yield valuation entails several assumptions of a more or less subjective type such as selection of interest rate and period for the calculation. The aim of this article is not to decide which value is "best" or "most objective" but rather to emphasize and give recognition to the basic role of interpretation in connection with property valuation (and the law).

[11] The curve can also describe the compilation of the prices that have been paid for equivalent properties in the area. However, in reality, it is very seldom possible to construct such an ideal curve based on prices for equivalent properties.

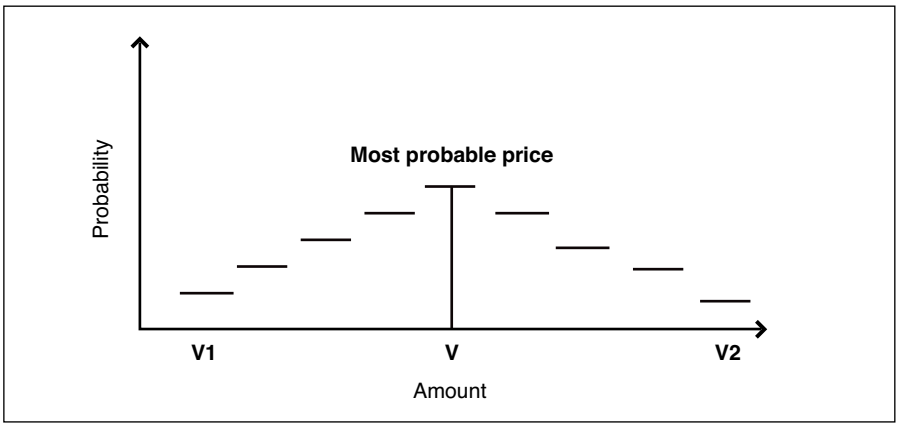

FIGURE 4
Market value (V) estimated using data from valuation made by a number of experts (V1–V2)

objectivity – although the legal process itself is, naturally, both objective and unbiased.

Because the market value is only an estimate and not a direct measurement, a radical definition could be: the *result* of estimates made by a number of experts. Mallinson and French (2000) have illustrated the concept of market value using the results of a number of unbiased valuations made by valuation experts as reference data. As all of the valuations have a degree of uncertainty, the individual valuations are shown as an interval (a line in Figure 4). In Figure 4, the market value (V), the most probable price, lies in the centre of the interval (V1–V2). Therefore, the individual valuations have been given a higher level of probability the closer they are to the midpoint (V). In Figure 4, it is assumed that the market value V has been estimated based on data from nine separate valuations in the interval V1–V2.

To sum up, it is possible, with a theoretical and philosophical approach, to advance arguments supporting the statement that the market value is not – and cannot be – an objective measure for determining compensation. In the first place, we have seen that the definition is not wholly unambiguous and lacks clarity. Second, the market value can only be estimated as it is an abstract value and one where personal judgements and not paragraphs in an act or a valuation handbook form the basis for the valuation.

Nonetheless, the practical consequences of these conclusions should not be exaggerated. The market value is, perhaps, after all, the least subjective measure of a property's value. However, in the compensation context, if the focus, as in Sweden, is only on compensation for economic damage (where the definition of such damage is damage that should be possible to be determined with an objective measure), possibilities could be found for a further application of the concept of financial damage (Hager, 1998). This is because, in my opinion, the demand for objectivity is not unambiguous.

QUESTION 4. HOW SHOULD UNCERTAINTY OF VALUATION BE HANDLED BY LEGISLATORS AND THE COURTS?

As stated above, all property valuation, by definition, suffers from varying degrees of *uncertainty* (Mallinson and French, 2000; Crosby, 2000; Crosby, Lavers and Murdoch; 1998, 2002; French and Gabrielle, 2004; Mallinson, 1994). We have seen that it is not possible to verify the correctness of the market value as it is a fictitious value that can only be estimated. In the case of valuation in connection with expropriation, it is the responsibility of the court to determine an *exact* figure for the market value unlike, for example, a sales situation where the value can be given as an interval (Hager, 1998). An interesting question is, therefore, how the uncertainty in a valuation should be handled by legislators and the courts.

We can begin by looking at the way the *courts* handle uncertainty in valuations. The Swedish Expropriation Act is based on the principle that a person who suffers damage must be able to prove and provide evidence of the extent of the damage. The burden

of proof is shared by the parties. In other words, the uncertainty of the valuation is also equally shared by the parties.

Prior to the 1972 Expropriation Act, the principle that applied was that, if the amounts were equally probable, the court should reject the higher amount. Considering the general uncertainty in property valuation, this principle would seem to be fairer than today's sharing of the burden of proof. Thus, there is a need for clarification by making changes in the *procedural* rules. However, in practice, it is not unlikely that, even today, the courts in a number of cases do take decisions in favour of the property owner if two amounts are equally probable, i.e. the expropriator largely has to bear the consequences of the uncertainty of the valuation.

As far as the formulation of the *legislation* regarding *material* rules is concerned, that is, the aim of the valuation, uncertainty in valuation should be a reason for including a higher level of compensation in the law. This would be an additional reason for determining the level of compensation as the market value plus a percentage *increase*. Another solution would be to include a rule on *fair payment* in the legislation. This would give the courts greater freedom to determine compensation with the aim of preventing the property owner from unnecessarily being, or facing the risk of being, unfavourably affected by uncertainty in the valuation.

However, it is worth pointing out that a possible additional paragraph in the law concerning a percentage increase of the market value will not lead to a more reliable determination of the market value. On the other hand, a possible result could be that the courts would not consider that they needed to be so precise in their estimation of values, i.e. that the "margin" that such an increase represents would permit a somewhat freer estimate of compensation than is possible at present.

To sum up, the viability of the Swedish model, with its strong links to market value and a shared burden of proof, can be questioned also regarding the general uncertainty of property valuation. If the courts do not make a relatively generous application of the current law, there may be a need for changes to it.

When *part of a property* is expropriated, or in cases of similar acquisition, it is even more obvious that the market value is an uncertain measure; it is not unlikely that it will lead to application problems. Compensation for expropriation should, theoretically, be determined as the difference between *two* fictitious values, the property's market value before expropriation and the value after expropriation. In many expropriation situations, such as the construction of roads and power transmission lines, the compensation is, in practice, often determined based on yield calculations adapted to the market value. Estimating the impact of a calculated decrease in the yield value on the market value is associated with a high level of uncertainty (Norell, 2001; Lantmäteriverket, 1999).

SOME CONCLUDING THOUGHTS

The aim of this article has been to make a critical analysis of the concept of market value, or, more precisely, to study whether this value can be considered to be a fair and objective measure for determining the level of compensation for expropriation of land. The answers to the four questions posed above can be summarized thus:

1. The market value is normally too low for a property owner to feel fully compensated when his/her property is expropriated. The property owner's reservation price, which can vary from person to person and from one situation to another, will, in most cases, probably be higher than the market value.
2. The market value cannot be seen as a guarantee that it will be possible to purchase an equivalent property as replacement for an expropriated unit. Theoretically, there is only a 50-percent probability that compensation based on the market value will be adequate for purchasing a new property if the

value is based on the statistical mean of prices for identical properties.

3. The market value concept is not unambiguous. There are several definitions. The market value can be estimated only and not calculated, which means that it cannot be considered to be more objective than any other value such as, for example, the yield value.
4. Uncertainty in a valuation can warrant determination of the compensation with a "safety" margin. This can be done, for example, by an increase of the market value that is regulated through the relevant legislation. An alternative could be that the courts do not demand the same level of proof as for normal damages.

Together, the four answers indicate that the market value, in almost all cases and seen from the property owner's point of view, does *not* represent adequate and fair compensation for land that is compulsorily taken over.

Particularly from a Swedish perspective, where the market value has a central function in expropriation legislation, there may be reasons to reduce the strong linkage to the market value either through changes to the legislation or a more generous application of current laws. A change in the legislation could, for example, be made by including a paragraph stating that compensation shall be equivalent to the market value plus an additional amount, which can either be precisely defined or based on fairness. The addition could also be linked to the reason for the expropriation, such that a higher level of compensation should be paid in cases where the expropriation is for purposes with commercial components.

These critical objections to the market value as a benchmark are biased in the sense that they represent the property owner's perspective. On the other hand, it must be remembered that the purpose of the rules that regulate the level of compensation is that their application should result in a fair balance between public and private interests. In Sweden, for example, before the construction of the national railway network began in earnest in the mid-1800s, the addition, according to the expropriation law then in force, was 50 percent of the value of the property. In 1866, the compensation rules were changed and payment of this addition was stopped as it was deemed that the cost to the state of expropriating land was too high.

In this article, I have not attempted to discuss what could currently be considered a fair balance between private and public interests. This is basically a political issue. Nonetheless, in Sweden, it can be stated that the possibility to acquire land compulsorily for different purposes has, over the years, successively increased, as there is special legislation that makes it possible to expropriate land for, for example, public roads, railways and power transmission lines. Furthermore, the element of commercial interest has increased in recent years as a consequence of privatization of activities that were formerly the state's responsibility. This could be taken as an argument for introducing a different compensation system (Bonde, 2003; Epstein, 1985).

Finally, it is important to emphasize that, in Sweden, in most cases, it is possible to resolve compensation issues on a voluntary basis through *agreements*. With regard to acquisition of land based on implementation of current legislation – for public roads, railways and power transmission lines – agreement is reached in about 95 percent of all cases. For the remaining 5 percent, the level of compensation is determined in court or by another government authority. The level of compensation as a result of voluntary agreements is generally somewhat higher than the level indicated in the legislation, i.e. the market value. In a few cases, the compensation is probably significantly higher than the market value in order to avoid legal proceedings that would be expensive and, above all, time-consuming and lead to delays in the process of acquisition of the land. Time is money even in this context.

Against the background of the situation as it is today, the problems that I have discussed here should not be overstated. When voluntary agreements are reached, the full reservation price is, perhaps, not paid as the valuation methods that are used are often based on the rules in the Expropriation Act. However, on the whole, it can be stated that the voluntarily agreed level of compensation in Sweden lies above that required by legislation.

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FAO/M. TÖRHÖNEN

La loi du plus fort: l'expropriation dans la perspective des droits de l'homme

Cet article expose quelques éléments clés d'une approche de l'acquisition forcée de terres fondée sur les droits de l'homme. Il montre que l'acquisition forcée de terres est souvent rapide lorsque les personnes directement concernées ont le pouvoir politique, économique et juridique le plus faible. L'expropriation devrait être un outil puissant et bénéfique pour les personnes défavorisées, mais elles en sont fréquemment les victimes. Les évictions forcées par expropriation continuent à se multiplier – des millions de personnes sont dépossédées chaque année, ce qui est à l'origine de conséquences graves et traumatiques pour les familles et les communautés, pour les femmes et les pauvres. S'il est vrai que le droit international en matière de droits de l'homme et de nombreuses constitutions interdisent les évictions forcées, les dispositifs d'application favorisent généralement ceux qui ont des droits de propriété forts, en particulier les investisseurs étrangers. De nombreux cas mettent aussi en évidence la nature de plus en plus «privée» des acquisitions publiques et la façon dont la législation en matière d'acquisition forcée tend à faire l'objet d'abus concrets, notamment dans les domaines de la justification, de la participation et du dédommagement.

Vía de la mínima resistencia: la expropiación desde la perspectiva de los derechos humanos

En este artículo se esbozan algunos elementos clave de un enfoque de la adquisición de tierras por expropiación basado en los derechos humanos. Se muestra que la adquisición de tierras por expropiación procede a menudo con rapidez allí donde el poder político, económico y jurídico de quienes resultan directamente afectados es más débil. Si bien la expropiación debería ser un poderoso y beneficioso instrumento para las personas desfavorecidas, con frecuencia éstas son en realidad víctimas de ella. Los desahucios forzosos mediante la expropiación continúan aumentando; millones de personas son desahuciadas cada año, con graves, traumáticas consecuencias en las familias y las comunidades, las mujeres y los pobres. Aunque el derecho internacional relativo a los derechos humanos y muchas constituciones prohíben los desahucios forzosos, los regímenes de puesta en aplicación tienden a favorecer a quienes gozan de derechos de propiedad más sólidos, en particular los inversores extranjeros. Muchos casos demuestran también la naturaleza crecientemente "privada" de la adquisición pública, y ponen de relieve que en la práctica tiende a abusarse de la legislación sobre adquisición por expropiación, especialmente en lo relativo a la justificación, la participación y la compensación.

Path of least resistance: a human rights perspective on expropriation

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This article outlines some key elements of a human-rights-based approach to the compulsory acquisition of land. It shows that the compulsory acquisition of land often proceeds rapidly where the political, economic and legal power of those affected directly is weakest. While expropriation should be a powerful and beneficial tool for disadvantaged people, they are in fact often its victims. Forced evictions through expropriation continue to grow – millions of people are evicted each year, bringing severe and traumatic consequences for families and communities, for women and for the poor. While international human rights law and many constitutions prohibit forced evictions, enforcement regimes tend to favour those with stronger property rights, in particular foreign investors. Many cases also demonstrate the increasingly "private" nature of public acquisition and underline how compulsory acquisition legislation tends to be abused in practice – particularly in the areas of justification, participation and compensation.

EXPROPRIATION FOR WHOM?

Expropriation[1] of land usually follows the path of least resistance. It proceeds rapidly and more harshly where the political, economic and legal power of those directly affected is weakest. Where the affected landowners or occupants are socially marginalized, they are more likely to be underrepresented in relevant decision-making processes, lose land to questionable uses and receive lower compensation. This is true for any attempt to reallocate land and resources. One study (Cities Alliance, 2003) concluded that the likelihood and degree of land division/sharing between private landowners and informal settlers in urban Thailand was directly proportional to organizing power and political connections.

In theory, state power to expropriate land for public purposes should be a powerful and beneficial tool for the rural and urban poor, for women, and for indigenous peoples. The realization of economic and social rights through the establishment of public utilities, schools, hospitals and particularly transport infrastructure is often not possible without the purchase of private land, which sometimes must be executed against the will of the owner. Expropriation powers are also essential for wider land redistribution. The 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR) explicitly acknowledges the importance of agrarian reform for realizing the right to food (see Article 11). Recent democratic changes in Latin America and South Africa have been partly driven by the injustice of heavily skewed land distributions that created large numbers of landless labourers and feudal-like tenant farmers.

However, land reform programmes have met fierce resistance from landowners, even where land is not developed, spawning growing self-help movements such as Movimento dos Trabalhadores Rurais Sem Terra (MST) in Brazil. In Asia, decades-long

[1] In this article, expropriation is used to designate a situation where a state forcibly acquires property from a private individual or entity. It is synonymous with terms such as compulsory purchase, compulsory acquistion and eminent domain.

agrarian reform programmes and legislation in many countries remain part-implemented (Borras, 2006). The same is true in urban areas. In Nairobi, Kenya, at least 60 percent of the population live in informal settlements that cover only 5 percent of the city's land (the same percentage devoted to golf courses). Despite the existence of undeveloped land in Nairobi, few efforts have been made to acquire it for the poor while many resettlement proposals involve locations far from the city centre and places of work.

Instead of being the direct or indirect beneficiaries, the marginalized can often be the victims of expropriation. Large-scale public infrastructure projects such as dams, roads, electrical networks and the holding of major events such as the Olympics, have resulted in tens of millions of people being forcibly evicted[2] without adequate remedies over the last decade alone (UN-Habitat, 2007; COHRE, 2006, 2007; du Plessis, 2005). The victims not only include small and poorer property owners but also informal occupiers. The latter remain largely invisible in expropriation laws, which tend be heavily property-rights-centric. This is despite the pervasiveness of informal land occupation in "the South" and among some low-income and minority communities in "the North". The asymmetry in treatment between different groups is perhaps well exemplified by the furore that greeted the *Kelo* v. *City of New London* 545 U.S. 469 (2005) decision by the Supreme Court of the United States of America. Courts in the United States of America had previously interpreted the public interest test for expropriation expansively to include for-profit projects such as shopping centres. However, the *Kelo* case was the first time such expropriation, or use of "eminent domain" as it is known in the United States of America, was fully targeted at a largely middle-class or "non-blighted" locality (Robbins and Svendsen, 2007). The wave of constitutional amendments and citizen mobilization across the United States of America to trim these powers only transpired when the middle class was affected directly.

The consequences of forced eviction for families and communities, particularly for the poor, are severe and traumatic (UNHCHR, 1996; du Plessis, 2005). Property is often damaged or destroyed; productive assets are lost or rendered useless; social networks are broken up; livelihood strategies are compromised; access to essential facilities and services is lost; and often violence, including rape, physical assault and murder, are used to force people to comply. In the case of children, Bartlett found: "The impacts of eviction for family stability and for children's emotional well-being can be devastating; the experience has been described as comparable to war for children in terms of the developmental consequences. Even when evictions are followed by immediate relocation, the effects on children can be destructive and unsettling." (Bartlett, 2002, 3). Non-owners and occupiers are also affected. In one expropriation process, not only was compensation for farmers one-sixth of market value but agricultural labourers and small support businesses received no support despite the collapse of livelihoods with the loss of the local agricultural economy (FIAN, 2008).

This article therefore sets out to examine expropriation briefly in the context of international human rights law and practice, with a particular focus on countries in the South. The first section argues that while international human rights law provides strong protections against unjust expropriations and positively encourages expropriation in the realization of certain human rights, enforcement mechanisms are heavily tilted towards the powerful. The subsequent section examines common problems in the South with a particular focus on outdated legal frameworks, the interpretation of public

[2] The UN Committee on Economic, Social And Cultural Rights (1997) defines "forced eviction" to mean an involuntary eviction without due process and remedies. See below in the section "Human rights".

interest, arbitrary expropriation processes and compensation all in the context of a modernist and "neoliberal" model for development. The article concludes with recommendations on incorporating a human rights approach into expropriation law and practice.

HUMAN RIGHTS

The former UN Commission on Human Rights, made up of states, called forced evictions a "gross violation of human rights", and international and regional human rights law is unequivocal on the obligation of states to protect individuals from forced eviction from their homes and, thus, from unjust expropriation (Langford and du Plessis, 2005). One can find it particularly in the right to housing, recognized in the ICESCR, and the right to respect for the home in the International Covenant on Civil and Political Rights (ICCPR).

In interpreting the former covenant, the UN Committee on Economic, Social and Cultural Rights (1991 and 1997) has stated that:

- Eviction should proceed only in "exceptional circumstances".
- Substantial justification must exist for any eviction.
- All feasible alternatives to eviction must be explored in consultation with the affected persons.
- There must be due process, including: (a) an opportunity for genuine consultation with those affected; (b) adequate and reasonable notice; (c) information on the proposed evictions and, where applicable, on the alternative purpose for which the land or housing is to be used; (d) government officials or their representatives to be present during an eviction especially where groups of people are involved; (e) all persons carrying out the eviction to be properly identified; (f) evictions not to take place in particularly bad weather or at night; (g) provision of legal remedies; and (h) provision, where possible, of legal aid to persons in order to seek redress from the courts as needed.
- All individuals concerned have a right to adequate compensation for any property, both personal and real, that is affected.
- Evictions should not result in individuals being rendered homeless or vulnerable to the violation of other human rights. Where those affected are unable to provide for themselves, the state party must take all appropriate measures, to the maximum of its available resources, to ensure that adequate alternative housing, resettlement or access to productive land, as the case may be, is available.
- Legislation must be enacted to ensure effective protection from forced eviction.

The UN Human Rights Committee (2005) enunciated similar principles when it reviewed evictions of residents in informal settlements in Kenya. The above comments have also been affirmed by the European Ministers at the Council of Europe and the African Commission on Human and Peoples' Rights (Langford and du Plessis, 2005). Guidelines on development-based displacement endorsed by the UN Secretary-General are also notable for their detailed prescriptions on adequate resettlement and compensation (UN Economic and Social Council, 1997).

The human right to food is enshrined in Article 11 of the ICESCR. In General Comment No. 12, the UN Committee on Economic, Social and Cultural Rights (UN Committee on Economic, Social and Cultural Rights, 1999) states that the right is realized when every man, woman and child, alone or in community with others, has *physical and economic access* at all times to adequate food or means for its procurement. This includes both the use of productive land or other natural resources to obtain food and income as well as functioning distribution, processing and market systems that can move food from the site of production to where it is demanded. Based on this interpretation, it is clear that the ability to cultivate land

individually or communally (on the basis of ownership or other form of tenure) is part of the basic content of the right to adequate food that must be respected, protected and fulfilled by states. The *Voluntary guidelines to support the progressive realization of the right to adequate food in the context of national food security*, drawn up and adopted by states at the 127th Session of the FAO Council in 2004 (FAO, 2005), explicitly provides: "8.10 States should take measures to promote and protect the security of land tenure, especially with respect to women, poor and disadvantaged segments of society, through legislation that protects the full and equal right to own land and other property, including the right to inherit. As appropriate, States should consider establishing legal and other policy mechanisms, consistent with their international human rights obligations and in accordance with the rule of law, that advance land reform to enhance access for the poor and women. Such mechanisms should also promote conservation and sustainable use of land. Special consideration should be given to the situation of indigenous communities."

The right to property has received comparatively less recognition in international law. Incorporated in the Universal Declaration of Human Rights, it was omitted in the ICESCR and ICCPR. Agreement could not be reached on the concept of property, the restrictions to which the right could be subjected and the principles by which compensation should be calculated (Jayawickrama, 2002). Nonetheless, some argue that the right to property now forms part of international customary law (American Law Institute, 2008). The right to property has been strongly recognized in the context of discrimination (included in treaties concerning racial discrimination and women's rights). In addition, International Labour Organization (ILO) Convention No. 169 recognizes indigenous property rights, such as the recognition of ownership, safeguarding of natural resources, protection from removal, and restitution and compensation. Relocation is forbidden except in exceptional circumstances and only where there is free and informed consent, although the latter protection is later watered down in the text. While ratifications of this convention are not numerous, similar provisions were included in the UN General Assembly's Declaration on the Rights of Indigenous Peoples in 2007.

Regional human rights treaties in Africa, Europe and the Americas and the Arab Charter on Human Rights do recognize the right to property. Unlike their international counterparts, the European Court of Human Rights (ECHR) and Inter-American Court of Human Rights can make enforceable orders when complaints are made concerning human rights violations. However, the ECHR cannot adjudicate on rights to housing and food *per se* while the Inter-American Court of Human Rights has infrequently addressed express socio-economic rights (Melish, 2008). This raises the possibility that regional systems favour property over socio-economic rights in expropriation-related cases. The possibility is only partly evident in practice. For example, the ECHR has recognized that forced evictions of tenants and informal occupiers can violate the civil right to protection of the home and family life[3] and that the right to property extends to compensation for the value of structures of slumdwellers.[4] The court also employs a wide margin of appreciation in the case of the right to property (Emberland, 2006) and has been somewhat cognizant of housing policy concerns in determining whether interferences with property rights are permissible (see Clements and Simmons, 2008). The Inter-American Court of Human Rights has extended the right to property to protect the ancestral lands of indigenous peoples and has used General Comment No. 4 (The Right to Adequate Housing) on

[3] See for example, *Connors* v. *United Kingdom* (ECHR, Application No. 66746/01, 27 May 2004) and *Khatun* v. *United Kingdom* (1998) 26 EHRR CD 212.

[4] *Öneryildiz* v. *Turkey* No. 48939/99), European Court of Human Rights, 18 June 2002.

the ICESCR in fashioning remedies.[5] Thus, there is evidence of some convergence between civil and political rights and socio-economic rights. However, property owners with formal and freehold title are likely to fare better than informal owners and the homeless.

More striking is the bipolarism in the international activities of the World Bank and the Organisation for Economic Co-operation and Development (OECD), which have supported strong property rights protections for multinationals through bilateral investment treaties (BITs). Such treaties have flourished, increasing from 385 to 1 857 between 1990 and 1999 (Peterson, 2006), with the total now well over 2 000. Companies can directly lodge complaints against host countries and the decisions are legally binding. The treaties provide for arbitration by the World Bank-hosted International Centre for Settlement of Investment Disputes (ICSID) or private arbitration. Cases are now regular. In 1995, a single case was lodged; in 2005, 42 were filed. In the area of expropriation, BITs provide strong protection to investors. The standard treaty provides for market value compensation for expropriation, which is drafted (and enforced) widely to cover all types of regulations that may affect the value of land or other type of property. Peterson (2006) notes that many of the treaties signed by South Africa provide greater property rights protection to foreign investors than locals.

However, the World Bank has made only timid steps to promote security of tenure for other groups. Its Operational Policy on Involuntary Resettlement (World Bank, 2007) states that "Involuntary resettlement should be avoided where feasible, or minimized, exploring all viable alternative project designs" (para. 2) and acknowledges that "resettlement of indigenous peoples with traditional land-based modes of production is particularly complex and may have significant adverse impacts on their identity and cultural survival" (para. 9). The guidelines are backed by the World Bank Inspection Panel, which can receive complaints from affected persons.

Nevertheless, the framework is barely consistent with a human rights approach. The guidelines essentially presume expropriation is necessary without any strong public interest test or process for consultation and negotiation. The focus is principally on compensation and relocation schemes. Only the World Bank's Indigenous Peoples Policy is more explicit, with a requirement for majority community support for resettlement. Revisions to the resettlement guidelines in 2001 also narrowed compensation to social and economic impacts, excluding psychological and cultural dimensions. In addition, the Inspection Panel has no explicit mandate to look at human rights standards and its findings are not enforceable on World Bank management. Studies have found that World Bank-sponsored resettlement programmes have rarely provided adequate compensation or livelihoods (Clark, 2002). The inability of the Inspection Panel to supervise its recommendations means it has little control over the remedying of violations. A former panel member, Scudder (2005) believes the guidelines are fundamentally the problem with their focus on restoration not improvement of livelihoods, as livelihoods post-eviction almost always decline.

Conflicts between investors' property rights and human rights have also manifested themselves in a similar way to the regional systems. In some cases, investors and marginalized groups contest the same piece of land. For example, the Government of Paraguay refused to expropriate lands of German owners that, according to the Paraguayan constitution, are suitable to be acquired for agrarian-reform purposes or for returning to indigenous peoples. The state cited the BIT between Paraguay and Germany in support of its stance even though it allowed for expropriations "in public interest". In

[5] Inter-American Court of Human Rights, *Case of the Mayagna (Sumo) Awas Tingni Community* v. *Nicaragua*, Judgment of 31 August 2001.

an interesting decision on one of these cases, in 2006, the Inter-American Court of Human Rights (*Sawhoyamaxa* v. *Paraguay*) held "that the application of bilateral commercial agreements do not provide a justification for the breach of states obligations emanating from the American Human Rights Convention; on the contrary, their application must always be compatible with the American Convention".[6] Civil-society groups also argued that Germany, as a state party to the ICESCR, was obliged under Article 2.1 to cooperate with other state parties, among them Paraguay, to realize the right to food of the landless peasants in Paraguay (see Brot für die Welt, FIAN and EED, 2006). However, international arbitration panels, which mostly adjudicate BIT-related disputes, are yet to incorporate clearly international human rights law in their interpretation of investment treaties.

Thus, the effective protection of the property and land rights for all seems not to be on the World Bank agenda. The World Bank has not moved to ensure that the decisions of the Inspection Panel are binding nor has it strongly encouraged states to develop broader protections from expropriation or forced eviction. Equally, the OECD's *Guidelines for multinational enterprises* (OECD, 2000), which would regulate foreign investor behaviour, are non-enforceable. The OECD appears content to promote a situation where multinational corporations have enforceable rights but only optional responsibilities. In the era of globalization, the effects of expropriation are tilted ever more downwards. A rule of thumb in international news coverage seems to be that the nationalization of one foreign company is equivalent to the eviction of 200 000 people.

The "other" development community has not fared much better. Of the much-trumpeted Millennium Development Goals (MDGs), the most relevant target (11) calls for the improvement of the lives of 100 million slumdwellers by 2020. Yet, there are almost 1 billion slumdwellers today with forecasts of 1.4 billion by 2020. The indicator for measuring this target is security of tenure but it may only cover the 100 million targeted. The vagueness of the target also allows some governments to cite policies, such as slum clearance, which on the face of them would violate human rights (see Government of Viet Nam, 2005). A much better target might have been basic security of tenure for all, which would have ensured protection from forced eviction, including unjust expropriation. The same concern can be extended to Target 2 on halving hunger by 2015. The qualified goal means one can potentially avoid focusing on the poorest farmers, possibly avoiding addressing forced evictions as well as accelerating agrarian land reform, although the United Nations Development Programme has called for agrarian reform as one of the strategies to reach MDG Target 2 (UNDP, 2003).

COMMON PROBLEMS WITH EXPROPRIATION IN THE SOUTH

The magnitude of the negative impact of unjust expropriations is often greatest in the South although one can find many alarming instances in the North (see COHRE, 2007). This is because of both the large number of people living in poverty and the current state of law, developmental ideology and governance. In some cases, it is also a question of resources – local municipalities may simply lack adequate funds to purchase land at market value for utilities and infrastructure development. More powerful economic actors, such as transnational corporations and foreign and domestic investors, are also exposed to the vagaries of expropriation in the South. However, it is arguable that the significant power of such actors minimizes the frequency and severity of expropriations. Indeed, even in the period between 1960 and 1976, when nationalization of foreign-owned firms was at its peak in the South,

[6] Corte Interamericana de Derechos Humanos *Caso comunidad indígena Sawhoyamaxa* v. *Paraguay*, Sentencia de 29 de Marzo de 2006.

less than 5 percent of such corporations were affected (Kobrin, 1984).

The first issue in some countries in the South is that expropriation legislation stems from colonial times and provides very limited legal protections in terms of defining public interest or with regard to providing due process and adequate compensation. In one state, expropriation legislation has not been amended since 1894 and the land records have not been updated since that time, while large-scale improvements to the land such as multicropping are not recognized in the payment of compensation.

Even contemporary Western-style legislation is not necessarily appropriate. It rests on the assumption that most land is registered formally. However, few developing countries have more than 30 percent of their land accounted for in land records. Land records are also often linked to the middle and commercial classes. This can exclude up to 85 percent of the population in some countries, the majority of whom are often people living under customary law systems or in informal settlements and often in poverty. It might be argued that these broader flaws in the distribution of land and housing rights should not be linked solely to expropriation legislation and that broader legal and policy developments are necessary instead. While this is true, expropriation legislation could be easily adjusted to include recognition of other property interests that are fundamental for human rights to housing, food and livelihoods.

A second important issue is that the interpretation of the public interest test, always controversial, can sometimes be more skewed. Leckie notes that: "[V]irtually no eviction is carried out without some form of public justification seeking to legitimize the action. Many of the rationale behind the eviction process are carefully designed to create sympathy for the evictor, while simultaneously aiming to portray the evicted as the deserved recipient of these policies – a process appropriately labelled 'bulldozer justice' by the retired Indian Supreme Court Justice Krishna Iyer." (Leckie, 1995, 17).

What is in the public interest is inherently subjective (Kalbro and Lind, 2007). Its definition is likely to be influenced by prevailing views of what constitutes "fairness" and the party with the greater bargaining power is most likely to influence its definition. The current vision of development in many countries in the South favours "big" over "small", even though institutions such as the World Bank have conceded that small-scale farmers are economically more efficient than large farmers (see van den Brink *et al.*, 2006). Alternative development paradigms that would allow people to define better their priorities and needs in pursuit of development still receive short shrift. In the era of globalization, the introduction of liberal economic policies, and many market-oriented "development" programmes also favour rapid public expropriations for large-scale private interest. In its new industrial policy, India has welcomed foreign technology and investments and taken the initiative to develop Special Economic Zones (SEZs) and Export Processing Zones (EPZs). Approximately 35 000 acres (about 14 000 ha) of agricultural land will be compulsorily acquired for this purpose in West Bengal alone.

The result of these ideologies and power imbalances is that the magnitude and pace of *pro-poor* expropriation is outstripped by *pro-big business* expropriation. For example, in India, a domestic and a foreign motor corporation were able to acquire private land from peasants by compulsory purchase in less than a year with government assistance. However, an evaluation of West Bengal's achievements in agrarian land reform since the early 1980s reveals that out of the 1 million acres (more than 400 000 ha) of land acquired for distribution only 250 000 acres (about 100 000 ha) were actually distributed (*Liberation*, 2002). The result is that 41 percent of households remain landless, while 13.23 percent of land-reform recipients have lost possession of lands and 14.37 percent of share croppers have been evicted (Government of West Bengal, 2004).

Moreover, what is pertinent about most official discourse concerning evictions is the virtually total absence of attempts by authorities to find creative alternatives in order to prevent evictions (du Plessis, 2005; Langford and du Plessis, 2005). Once an expropriation or other planned eviction project has been decided on, discussion usually turns to the more logistical issues of why, how and when. Consideration is seldom given to possibilities of averting evictions through community-based, locally appropriate alternatives. This unfortunate gap in thinking and practice relates to the fact that the input to be made by the affected groups is almost universally underrated and discounted against the technical expertise commissioned by the implementers of such eviction projects. In one case, the affected groups in partnership with experts developed detailed alternative plans that were arguably more affordable for the city and had far less impact on the environment (K. Fernandes, personal communication, 2007).

The third key problem is governance and particularly respect for other human rights in the process. Consultation with local actors on alternatives to eviction is often never carried out and expropriations can be marked by silence and secrecy. Rarely are impact assessments conducted to determine the nature and severity of economic, social and cultural losses together with a comprehensive and up-to-date list of affected persons. Such impact assessments are critical as they affect the entire discussion over whether an expropriation is in the public interest. They can also evaluate the wider impact. For example, compensation may be available to displaced owners of agricultural land but the expropriation can destroy the livelihoods of those engaged in the agricultural economy, such as unregistered sharecroppers, agricultural labourers and small entrepreneurs who depended on the agrarian economy (small shop owners, transport providers, and vendors). The physical acquisition of land can be violent and media representatives restricted from observing the process. Moreover, corruption can cloud the process. As land values increase during development, access to land by private interest or government officials is profitable and creates opportunities to circumvent fair processes (see *The Statesman*, 2007).

Last, women's land rights and the rights of marginalized groups are often less protected, and they may be excluded from both the process and design of any compensation payment. To take the case of women, legal frameworks may not take into account the particular rights and interests of women to ownership of the land, depriving them of a voice in the process and of compensation. Recent property law in China has been criticized for not only continuing to allow easy expropriation and the payment of inadequate compensation (which, remarkably, can include social security payments) but because it also fails to address women's rights to compensation – particularly for those women working in urban areas with property in rural areas (Tang, 2007). Women are also most likely to suffer the brunt of violence when evictions are carried out by force. Domestic violence also often increases before and after forced evictions because of a heightening of family tensions, and male family members often feel a loss of identity and control as economic providers for the family (COHRE, 2002). Where forced evictions lead to a long-term lack of economic and housing security, women are again placed at increased risk of violence and exploitation because of systems of gender-based discrimination.

TOWARDS A HUMAN RIGHTS APPROACH

While it is not possible within this article to outline a fully-fledged human-rights-based approach to expropriation and compensation, we do want to highlight some principles and approaches that are often lost in exercises to develop both laws, guidelines and processes. These principles also draw partly on work undertaken for the Global Land Tool Network in developing grassroots mechanisms for

land administration and management (see Langford and Goldie, 2007):

- Land equality: Macro analyses should be conducted to determine the extent to which expropriation is currently contributing to land *equality* or *inequality*. The UN Committee on Economic, Social and Cultural Rights (1999) has noted the importance of ensuring "full and equal access to economic resources, particularly for women ... including the right to inheritance and the ownership of land". If a particular expropriation will only exacerbate this trend, consideration should be given to whether it should be prioritized. Embodying such a principle in policy or law may spur greater attention to redistributive land reforms in contexts of high inequality of landownership.
- Protection from forced eviction: A baseline protection from forced evictions is needed in order to ensure that unjust expropriations are less likely to occur. Such protection could also be included in expropriation legislation. However, the protection needs to extend beyond law – an institutional culture that requires strong justification and due process for eviction needs to be encouraged. In addition, a full review of other laws that may permit forced eviction should be undertaken and appropriate action taken.
- Last resort: Displacement of people from their homes and basic livelihoods should be considered an action of last resort and evictions should only occur in exceptional circumstances. Public interest justifications for expropriation should be explicitly proved and verified according to clearly defined criteria including not violating human rights. Otherwise, the public interest should be disqualified as such. This should be enshrined as the key principle in any law or guideline.
- Consideration of alternatives: A full and transparent process should be adopted to determine whether there are alternatives to the planned expropriation and eviction. This should precede the decision and it should not be assumed that the standard consultation/objections processes in expropriation law are sufficient. Such a process should extend beyond the preparation of impact assessments and involve the active partnership of the state and the affected peoples in assessing various alternatives. If the state and the affected persons cannot agree, there should be an independent review of the decision.
- Effective participation: Most processes of participation in compulsory acquisition presume that affected individuals and groups can easily access information, organize collectively and make interventions effectively. While this is usually the case for a foreign investor, it is not always so for large urban settlements or disparate rural areas. An expropriation process should include: (i) a preliminary phase for independent assessment of the best means to engage with those affected; (ii) a determination of whether there are existing and adequate structures for participation in the group; (iii) a decision on whether separate channels of participation are needed in order to ensure the voices of marginalized groups can be heard; and (iv) a discussion on whether technical/non-governmental organization/legal support is needed at the preliminary stage of negotiations (see Langford and Goldie, 2007). All information concerning the expropriation should be made public. Consent for expropriation should be required, at least in cases involving indigenous peoples. Where compensation is ongoing (for example, recurring payments for expropriation of natural resources from indigenous lands), the participation mechanism should be reviewed constantly. Dorney (1990) suggests that if the Government of Papua New Guinea and the transnational mining company

concerned had paid attention to the changing and differing views on compensation and environmental issues within the Landowners Association (which represented villagers on Bougainville Island displaced by a large copper mine), the resulting conflict and ten-year civil war might have been averted.

- Customary and informal rights: These must be given sufficient attention. In many countries, customary rights stretch back centuries, while in urban informal settlements in all regions of the world, including Europe, one can find a fourth generation of families continuously occupying land plots. The UN Committee on Economic, Social and Cultural Rights has emphasized that all persons have the right to security of tenure of housing, for example, including those living in informal settlements. While a number of countries have adopted legislation recognizing customary law, this is not uniform. Most critically, for both customary and informal rights, up-to-date land records need to be developed before any expropriation process begins.
- Women's rights: Expropriation may affect women in different ways from men. In many cases, their joint rights to family property may not be recognized in either formal or customary law. They may also access land resources differently from men and their loss of livelihoods should be individually assessed. Compensation packages (including resettlement) should also take account of women's future livelihoods.
- Legal aid: In order for affected groups to participate effectively throughout the whole process, they should be given access to legal representation free of charge if they cannot afford a lawyer. For example, the South African Lands Claim Court has mandated this in cases of evictions: "Persons who have a right to security of tenure … and whose security of tenure is threatened or has been infringed, have a right to legal representation or legal aid at State expense if substantial injustice would otherwise result, and if they cannot reasonably afford the cost thereof from their own resources."[7]
- Compensation: While much has been written on the various ways of providing just or fair compensation, strong consideration should be given to making the objective the improvement of the situation of the affected people. This is for two reasons. First, if the overall aim of the project is development, then the affected group should be expected to improve its development along with others who may benefit from the project. Second, most evidence suggests that compensation packages, including resettlement schemes, have rarely prevented people from becoming worse off. Compensation should cover cultural and psychological losses and it is pertinent to note that the ECHR recently awarded EUR14 000 (about US$18 000) for the "emotional distress" caused by an eviction (*Connors* v. *United Kingdom* [see fn. 3]). If the expropriation will be for profit, a people-centred approach to development demands that they be included in the ongoing profits as far as possible. Kalbro and Lind (2007) also note that in experimental bargaining processes compensation tended to be higher when profits would be made from the new use of the property. In Papua New Guinea, legislation actually requires that landowners and provincial governments receive a certain share of ongoing profits from mining projects and that they must give their consent.
- Resettlement: The United Nations' human rights guidelines on development-based displacement provides detailed recommendations on

[7] *Nkuzi Development Association v. Government of the Republic of South Africa and The Legal Aid Board*, LCC 10/01, decided 6 July 2001 (see also (2002) 2 SA 733 (LCC)). See discussion in Budlender (2004).

resettlement plans (UN Economic and Social Council, 1997). If compensation partly takes the form of resettlement, then it must include the right to alternative land or housing that is safe, secure, accessible, affordable and habitable. No resettlement should take place until such a time that a full resettlement policy that is consistent with these guidelines and internationally recognized human rights is in place. If agricultural land is provided, there must be equivalent quality in terms of soil quality, access to water and agricultural support services and infrastructure. Attention should also be given to non-farm activities that support livelihoods or other economic, social and cultural rights. If land or space for housing is provided, then there should be strong consideration of access to livelihoods as well as basic services, education and health facilities. Most urban resettlement schemes fail because they are too far from the urban centre where people previously had their livelihood.

CONCLUSION

Ensuring that expropriation is for the common good and public interest is highly contingent on context. Strong large-scale development and market-based ideologies, unfair laws, poor governance and a lack of respect for human rights usually combine to ensure that the poor are victims not beneficiaries. Developing a human-rights-based approach to expropriation laws, guidelines and practices is essential but this also needs to be in a participatory fashion. The views of the disenfranchised, particularly those who have been affected by expropriation, should be directly heard and the discussion on guidelines, etc. should not be limited to technicians alone.

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L'épistémologie de la valeur dans l'estimation de l'indemnisation à des conditions équitables

L'acquisition forcée de terres en Australie est fondée sur les principes de l'indemnisation à des conditions équitables: sur la base de ces principes, le calcul de l'indemnité est assujetti à diverses lois et décisions de tribunaux. Cet article analyse ces principes et passe ensuite à l'examen des différences de parité d'indemnisation et sur la façon dont ces différences ont des incidences pour les parties à la procédure d'acquisition forcée. Il aborde également l'influence que le montant et les principes de l'indemnisation exercent sur la valeur des propriétés, en expliquant la façon dont la valeur est déterminée et dont ces méthodes d'estimation sont utilisées. Il examine les conclusions d'une enquête sur les propriétaires dépossédés en Nouvelle-Galles du Sud (Australie) qui a été menée pour évaluer la réussite de la législation et des procédures. Enfin, cet article se termine par une analyse des directives des tribunaux. Il pose la question de savoir si celles-ci contribuent à l'impasse concernant les points de vue contradictoires pour l'estimation de la valeur (et entravent les activités des tribunaux), alors qu'elles étaient initialement conçues pour aider les tribunaux australiens à traiter avec diligence les questions d'acquisition forcée.

Epistemología del valor en la evaluación de la compensación con condiciones justas

La adquisición de tierras por expropiación en Australia se funda en los principios de la compensación con condiciones justas: sobre la base de estos principios, la determinación de la indemnización está sujeta a diversos estatutos y fallos judiciales. En este artículo se examinan dichos principios y a continuación se debaten las diferencias en la paridad de la compensación y cómo afectan esas diferencias a las distintas partes en el proceso de adquisición por expropiación. En el artículo se considera también la influencia que el monto y los principios de la compensación tienen en el valor de la propiedad, estudiando la manera en que se determina el valor y cómo se utilizan estos principios de evaluación. Para ello se revisa un estudio sobre propietarios de tierras desposeídos en Nueva Gales del Sur (Australia) que se realizó a fin de medir el éxito de la legislación y los procesos. Por último, el artículo se concluye con un análisis de las directivas judiciales y se considera si éstas contribuyen a la invariabilidad de las características distintivas en la estimación del valor (y dificultan la labor de los tribunales), habida cuenta de que en realidad su objetivo era ayudar a los tribunales australianos a agilizar los procedimientos relativos a la adquisición por expropiación.

The epistemology of value in the assessment of just terms compensation

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Compulsory acquisition of land in Australia is predicated on the principles of just terms compensation. Based on these principles, the determination of compensation is subject to various statutes and court rulings. This article examines these principles and moves on to discuss the gaps in parity of compensation and how these gaps affect parties in the compulsory acquisition process. The article also looks at the influence compensation quantum and principles have over the value of properties, discussing how that value is determined and how valuation methods are used. It reviews a survey of dispossessed property owners in New South Wales, Australia, that was conducted to measure the success of the legislation and processes. Finally, the article concludes with an analysis of court directives; it asks whether these contribute to the impasse of points of difference in the assessment of value (and hinder the courts) when in fact they were designed to help Australian courts in expediting compulsory acquisition matters.

INTRODUCTION

As more than a century has passed since the case of *Spencer* v. *Commonwealth of Australia* (1907), it is perhaps appropriate to review the impact and contribution this judgment has had in the compulsory acquisition process and more importantly its impact in establishing the basis of market value. Referred to as the *Spencer* case, the simple but concise attributes of the judgment and definition of market value handed down have stood the test of time and have been adopted by legislators in various statutory definitions of value in the acquisition, rating and taxing legislation throughout Australia. The key components of the surmisal made by the judges in this case are: "… to suppose it sold then, not by means of a forced sale, but by voluntary bargaining between the plaintiff and a purchaser willing to trade, but neither of them so anxious to do so that he would overlook any ordinary business consideration. We must further suppose both to be perfectly acquainted with the land and cognisant of all circumstances which might affect its value, either advantageously or prejudicially …" (Rost and Collins, 1996).

This definition has been seen by many dispossessed parties as a legal construct for the acceptance of a process in which their decision to be a willing seller is not a consideration. It is this factor that has provided the greatest opposition to the compulsory taking of land.

Section 3(1)(b) of the Land Acquisition (Just Terms Compensation) Act 1991 (the Act) provides: "to ensure compensation on just terms for the owners of land that is acquired by an authority of the State when the land is not available for public sale". While dealing with the issue of the sufficiency of compensation, the justification for the compulsory acquisition of land is enshrined in the principle of the competing needs of the individual versus the needs of the community in which the purpose of the acquisition will serve.

WILLING OR NOT WILLING TO TRADE

Despite the fluency of the definition, which constitutes a hypothetical "willing buyer,

willing seller" scenario in which both parties are willing but not anxious to trade, this hypothesis has met much resistance from dispossessed parties not willing to sell for any price. It is in these cases that a hypothetical framework is adopted by the courts in the assessment of compensation on just terms. A further level of complexity is added to the acquisition process when distinguishing the difference between a genuine potential dispossessed party not wishing to trade at all and a potential dispossessed party seeking a ransom value (value in excess of market value) for a property.

Regardless of the circumstances of the affected party, state and Commonwealth of Australia legislation permits land to be compulsorily acquired for a public purpose. In exchange for an interest in property, Article 17 of the Universal Declaration of Human Rights states: "(1) Everyone has the right to own property alone as well as in association with others. (2) No one shall be arbitrarily deprived of his property" (United Nations, 1948). In New South Wales (NSW), Australia, the compulsory acquisition of land occurs once a notice to acquire is approved by the governor and advertised in the *Government Gazette*. Brown (2004) highlights that at this point all interests in the acquired land are vested in the Crown and the owner's interest is converted to a claim for compensation. This process is further defined by Jacobs (1998) who refers to Section 20 of the Land Acquisition (Just Terms Compensation) Act 1991 (NSW), which discharges all interests in the land, including dedications, reservations, easements, rights, charges, rates and contracts in, over or in connection with the land.

Prior to the compulsory acquisition process, all acquisition legislation in Australia provides for acquisition by agreement, in which the relevant government authority must attempt to acquire property by agreement. It is not until this process is exhausted that the compulsory process will commence. Despite the best efforts of an acquiring authority to negotiate the purchase of property, a small percentage of dispossessed owners choose not to negotiate or proceed through negotiation and the acquisition will proceed through the compulsory process. Whether the acquisition is achieved by negotiation or the compulsory process, valuers on each side are engaged to assess the value of the interest to be acquired. Their approach, method and supporting market evidence are important factors in determining whether the acquisition is achieved by negotiation or by compulsion.

In Australia, there is individual legislation for each state and the Commonwealth of Australia for the acquisition of property. In NSW, the Roads and Traffic Authority (RTA) is the largest acquirer of land in the state. While most land is acquired by negotiation, the RTA (2005) highlights that less than 10 percent of land acquired by the RTA is undertaken through the compulsory process, which in turn proceeds to court. In some cases, settlement is achieved during the mediation process and matters of differences are resolved to the mutual satisfaction of the parties. In many cases that do proceed to court, the most common issue of contestation concerns the quantum of compensation. In many cases, the issue of compensation goes beyond monetary amounts to include issues of the impact of the use of the acquired land in the case of partial takings and the ability to relocate in the case of marginal-value properties.

THE NATURE OF THE ACQUISITION AND THE ASSESSMENT OF VALUE

The basis of a claim for compensation will depend on the acquisition, the impact of the acquisition on the dispossessed party and – in the case of a partial acquisition – the impact that the taking of the land has on the land retained by the dispossessed. The nature of the claim will have an impact on the heads of compensation claimable and most importantly will drive the valuation methodology used in the assessment of compensation. Figure 1 distinguishes the differences in terms of heads of compensation and method of assessment

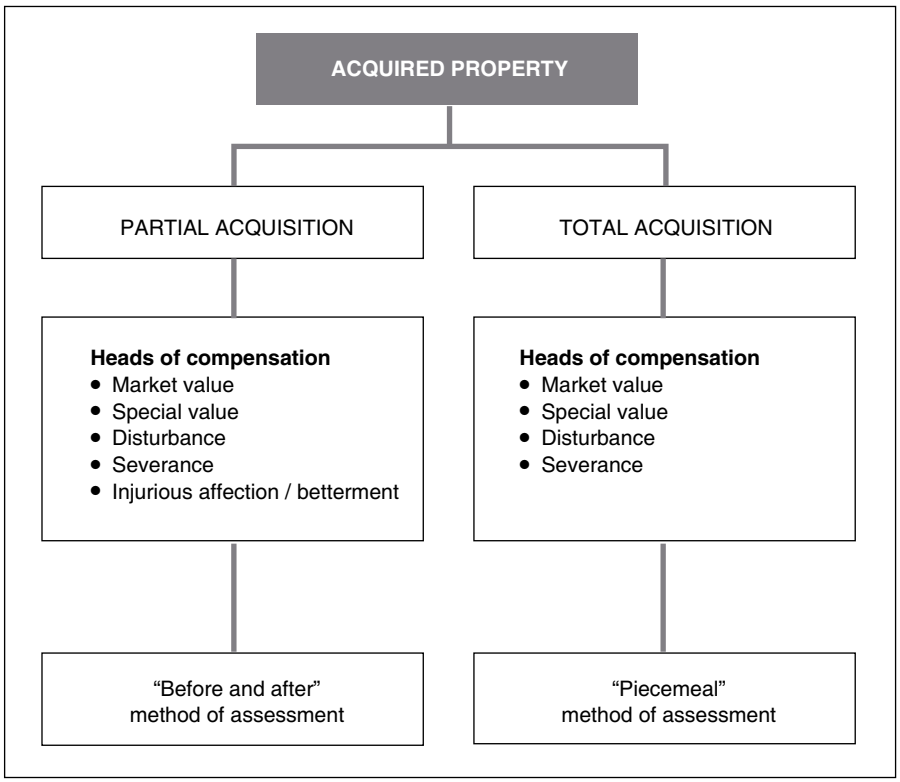

FIGURE 1
Total versus partial acquisition approach

between claims related to partial and total acquisition.

The acquisition of land and the extent of the acquisition are primarily determined by the requirements of an acquiring authority. An acquiring authority is not compelled to acquire any more land than is required for the public purpose. Case law prohibits the taking of any additional land than is required for the public purpose as defined in *Minister for Public Works (NSW)* v. *Duggan* (1951) 83 CLR 824 and *Thompson* v. *Randwick Corporation* (1950) 81 CLR 87. However, the State of Tasmania has the statutory power to enter into agreement under Section 10 of the Land Acquisition Act 1993 to acquire more land than is required by agreement. In NSW, it is not uncommon for an acquiring authority to negotiate the acquisition of the total property (particularly in the case of residential property) where a partial acquisition has been proposed and is not in the best interest of the dispossessed party. Figure 1 evidences that in partial acquisitions of land an additional head of compensation – injurious affection/ betterment – is to be considered and that the method of assessment differs from that for total acquisition. In the case of total acquisition, the "piecemeal" formula for this approach is: Market value + Special value + Disturbance + Severance = Sum of compensation.

This formula requires the addition of the sum of each element of compensation payable. This model assumes all of the heads of compensation are payable. However, this is to be determined on a case-by-case basis. In the case of the partial acquisition of land, injurious affection or betterment is also to be considered and assessed in the compensation. This method adds an additional layer of conceptual complexity in the assessment process and judgement of the valuer. In contrast to the "piecemeal" formula, Hornby (1996) highlights that the "before and after" method is not the sum of values but a judgement of the assessment of the property's value before acquisition and the value of the residual after acquisition, with the difference between the two values constituting the impact of the acquisition on the property retained. This method is not clearly understood by some valuers and property owners who have been dispossessed of part of their property.

The value of the land taken is not the subject of compensation – rather, it is the impact of the taking on the residual property that is the matter to be assessed in partial acquisitions.

ASSESSING VALUE AND THE IMPACT OF THE TAKING

The difficulty with the principle of establishing the market value of the property following a partial acquisition is the measurement of value of the residual land after the works have been carried out. The degree of difficulty in the judgement and assessment of the after value is dependent on the nature of the taking and most importantly the impact of the use to which the land taken is put. Figure 2 gives three examples to underline the different impacts on the same property of a partial acquisition of land

The parcel of land represented in Figure 2 is a 1-hectare block on the urban fringe of a city in NSW that is ripe for residential subdivision and will accommodate 16 separate 500-m^2 residential blocks of land. In each case, the impact of the acquisition and the use to which the acquired land is put will have a different impact on the retained land.

The subject property in Case 1 requires very little land for the supports of the overhead easement. The primary issue is the impact on the value of the subject land resulting from the visual and any other environmental consequences of the easement use. In Case 2, approximately 10 percent of the land is to be acquired from the front of the property for road-widening purposes, of which the anticipated increase in traffic flow fronting the property is about 5 percent. There will be no change to the permitted entry and exit from the property. In Case 3, the valuation approach is not applicable in NSW as no compensation is payable for land taken beneath the surface of land for an easement. Section 62 of the Land Acquisition (Just Terms Compensation) Act 1991 legislates that no compensation is payable to the party in the case of a substratum, beyond any damage caused to the surface of the property resulting from the works undertaken.

THE IMPRECISION OF VALUATION

As observed from the three cases above, each use has a different impact on the land retained by the affected party. The method of assessment of compensation in Cases 1 and 2 is the "before and after" method. This will necessitate evidence of transactions of similar property with and without the proposed works in order to assess a measure of difference on a "before and after" basis. Despite the simplicity of the descriptive approach in assessing the "before and after method, the non-heterogeneous attributes of property coupled with judgement for adjustments between sales and the subject property render the valuation approach subject

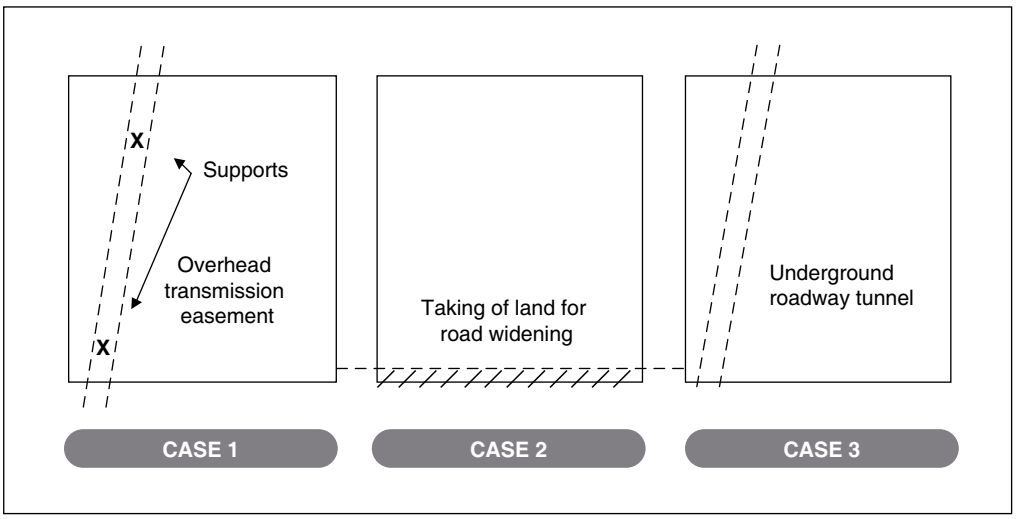

FIGURE 2
Alternate effects on the same property

to imprecision as defined in *Singer & Friedlander Ltd* v. *John D Wood & Co.* (1977) 2 EGLR 84, in which the court stated: "… two able and experienced men, each confronted with the same task, might come to different conclusions without anyone being justified in saying that either of them lacked competence and reasonable care, still less integrity, in doing his work …. Valuation is an art, not a science."

In contrast to the impact of injurious affection highlighted in Cases 1, 2 and 3, the reciprocal of this impact is betterment, which must also be considered in the partial taking of land. In the above three cases, betterment does not apply. However, a valuer assessing the impact of a partial taking must also weigh up the benefits of the use to which the land taken has on the value of the residual land retained. This was defined in *Brell anor* v. *Penrith City Council* (1965) 11 LGRA 156, in which a small portion of land at the rear of a shop was taken to form part of a car park, thus enhancing the value of the residue of the property. In this case, it was shown that the use of the acquired land increased the value of the residual land beyond its value prior to the acquisition and no compensation was determined for the value of the land taken.

There is no specific legislative provision that requires an acquiring authority to take more land than is required for the public works than is required. Despite the absence of such a provision, where the primary activity or use of the land can no longer continue or is affected by the use to which the acquired land is put, the impact of the acquired land may render the residual so heavily affected that the sum of compensation may be close to the value of the whole land. In addressing judgement of total versus partial acquisition, the courts will assess this by quantum where their discretion is limited.

EXTINGUISHMENT VERSUS PARITY OF COMPENSATION – WHAT IS VALUE AND WHEN SHOULD REINSTATEMENT APPLY?

In a number of circumstances, the taking of land through the compulsory acquisition process is inevitable. This is primarily because of the discrepancy in the meaning of value of a property to a dispossessed party and the definition of value as defined in the *Spencer* case highlighted above. For some home and business owners, the acquisition of their property means the extinguishment of their tenement in land, of which the assessment of market value under traditional terms by reference to similar property transaction is not parity of compensation. This is primarily because the amount of compensation offered is insufficient to re-establish the dispossessed parties' freehold tenement. From a residential perspective, it is the extinguishment of a home. In addressing this issue in residential tenancy decisions, the extinguishment of a residential tenancy amounts to more than a process, even when there is no financial interest in the property. The key issue for consideration is the impact of termination, which means having regard to the tenancy and the circumstances of the case. Mangioni (2006) cites the following case: "The Supreme Court of NSW held that a landlord did not have absolute right of possession upon serving a valid notice of termination on a tenant. This precedent was established in *Swain* v. *Residential Tenancy Tribunal* (unreported, Supreme Court, NSW, 22 March 1995, Rolfe J). The court held that s 64(2)(c) of the Residential Tenancies Act 1987 as amended requires the CTTT to consider the circumstances of the case and the tenancy. This decision was appealed to the NSW Court of Appeal, which upheld Rolfe J decision in the Supreme Court, primarily for the reasons stated by Rolfe J. *RTA* v. *Swain* (1997) 41 NSWLR, 452."

The Supreme Court of NSW has instructed the Consumer Trader and Tenancy Tribunal (CTTT) to investigate the reasons for the termination of the tenancy in the *Swain* case. In these cases, the lessee may hold a financial interest through a profit rent or a basic right to occupy land in exchange for rent. While a definitive rationale for the circumstances of the case and tenancy to be considered has

not been provided by the Supreme Court of NSW, it may be questioned as to whether the emergence of a possessory interest in property is recognized. The potential for the possession status of a property may be argued to be encompassed in its market value. However, its importance emerges as a principle for recognition when a party is not a willing seller, as the value of possession to them extends beyond its market value as defined under the *Spencer* test. The missing link in the assessment of just terms compensation is the element of value where a non-willing seller is assumed to be a willing seller in order for the construct of the traditional market value definition to be used to settle acquisition matters. What legislators, courts and acquiring authorities are attempting to do is to define and reduce all interests acquired in land into a financial datum for the settlement of non-commercial interests in land.

This is of greatest concern for those with marginal-value property or property at the lower end of the market in low socio-economic locations and who are not in a financial position to increase levels of debt to accommodate the purchase and finance of alternate higher-value premises. To these dispossessed parties, the value of their dispossession is the security of their environment in which they live and bears no relevance to the *Spencer* principle as the option of being a willing seller would not realistically become an option of choice. In these circumstances, it must be asked whether the objectives of just terms compensation have been applied. To this end, it is questioned as to whether the traditional definition of market value as defined in the *Spencer* case is the primary consideration for the assessment of just terms compensation.

To date, the courts have avoided this issue by reference to the absence of provisions for reinstatement in acquisition legislation. This issue is further defined by Brown (2004), who states: "Any question of compensation for resumed land being based on the cost of purchasing alternative, similar land must depend on the compensation provisions contained in the relevant resumption statutes". The provision for reinstatement is absent in the legislation of NSW.

It cannot be said that the epistemology of value has served those parties it is applied to in the assessment of just terms compensation when the assessment of value is channelled through a narrow conduit of interpretation by reference to transactions that bear little or no reference to the circumstances of the dispossessed. This issue has been raised by Hunt (1998), who, in contrast to the comparability of the property in the sale analysis process, looks at the comparability of the sale. This encompasses additional information, including: the special conditions of the sale; vendor/purchaser/agent motive; method of sale; marketing period; and the market dynamics under which the transaction occurred.

MEASURING THE SUCCESS OF COMPULSORY ACQUISITION IN NSW – A TEN-YEAR REVIEW

The Land Acquisition (Just Terms Compensation) Act 1991 replaced the rigid, inflexible and government-focused objectives of the Public Works Act 1912. Enacted in NSW to ensure expedient acquisition of land through agreement over compulsory taking, the objectives of the Act were reviewed in 2002 to accord with its ten-year anniversary. Prentice (2002) has measured the success of the Act in achieving its objectives. Twenty-three property owners who had their property compulsorily acquired – or who were nearing the completion of this process – were surveyed on a number of key issues.

The 23 property owners were randomly selected from a pool of dispossessed residential property owners. The sample of approximately 3 percent of dispossessed owners gives an indicative opinion only of the success of the legislation. Table 1 summarizes the key findings.

In the above survey, of the 23 parties dispossessed of their property, 19 parties (83 percent) negotiated a settlement with the RTA and 4 parties (17 percent) had their

TABLE 1
Dispossessed residential property owners – survey results

Question	Satisfied	Dissatisfied	Neutral
		(%)	
1. How satisfied were you with the amount of compensation paid?	74	22	4
2. Do you think the timeframe for the acquisition process was suitable?	83	17	0
	Yes	**No**	**Unsure**
		(%)	
3. If the underground of your land were acquired for a tunnel or easement, would you expect compensation?	100	0	0
4. Did you object to the amount of compensation that was initially offered by the acquiring authority?	61	39	n/a
5. Question to the 61 percent who objected to the amount initially offered: Did your compensation amount increase?	36	64	n/a
6. In your opinion, do you think that the Commonwealth or State Government should have the power to acquire land?	22	78	0

Source: Prentice, 2002.

property compulsorily acquired, of which 2 cases proceeded to court. In conclusion to this survey, participants were asked to give suggestions as to ways in which the acquisition process and compensation could be improved in the future. The key issues and feedback are:

- In the case of partial acquisition: A majority of the parties who objected to the amount of compensation initially offered were the subject of partial acquisitions and – excluding the amount of compensation – were most dissatisfied with noise and access to their property during the works being carried out and the time taken to carry out the works. The primary issue with partial acquisition was the non-claimable provision for the inconvenience factor experienced during the works.
- In the case of total acquisition: The key issue apart from the amount of compensation was the timeframe for completion of the process.

Of the 23 respondents to the survey, 40 percent did not have any complaints or suggestions for improving the process.

The compelling feedback and observations from this survey show that in general terms the Act was achieving its objectives in the acquisition of residential property. In the cases observed, the primary area of disputation occurred in cases of partial acquisition of land. A further interesting point was the acquiescence of property owners in not fighting the acquisition process once they were aware of the works to be carried out and the impact those works would have on their property.

VALUATION: POINTS OF DIFFERENCE AND EXPEDITING REVIEW

The expedition of resolution in the acquisition process is a primary objective of the Land Acquisition (Just Terms Compensation) Act 1991. In a further improvement over the cumbersome framework of the Public Works Act 1912, Section 3(1)(c) of the 1991 Act provides the following objective: "to establish new procedures for the compulsory acquisition of land by authorities of the State to simplify and expedite the acquisition process".

Timeframes have been provided in the Act to assist with this objective, which requires 90 days' notice to be given of a proposed acquisition and the acquisition must occur within 120 days. A further safeguard has been included in the Act, which allows an acquiring authority to make an advance payment to the dispossessed party after the acquisition has occurred, being the date of gazettal. A safeguard in the acceptance of such an offer is covered under Section 48 of the Act, which states that: "The acceptance by a person of an advance payment of compensation does not constitute an acceptance of any offer of compensation". This provision allows for the dispossessed party to be able to utilize

an advance payment for the purchase of alternate premises rather than being out of the market, particularly if the market is rising. While provision is made for statutory interest to accrue on the compensation amount between the date of gazettal and date of payment of the compensation, this may prove insufficient in a rising market, particularly where the resolution process is protracted and litigious.

In cases of larger landholdings and acquisitions that involve the extinguishment of a business, it is not uncommon for these matters to take up to three times longer than residential acquisitions (The Land and Environment Court of New South Wales, 2006a and b). The Land and Environment Court of New South Wales (the Court) has embarked on the expedition of matters that come before it, in which it refers to this as the process of "case management" in the achievement of this objective. In dealing with matters before it (including compulsory acquisition matters), it has stated: "The overriding purpose of the rules, in their application to civil proceedings, being to facilitate to the just, quick and cheap resolution of the real issues in such proceedings." (The Land and Environment Court of New South Wales, 2006b).

In adopting this approach, the Court has not gone without criticism from those who see it as a resolution mechanism in itself, whereas the Court has sought resolution or at least the establishment of common ground on as many points as possible in order that it might focus on the issues of differences between the parties. In its defence, the Court (The Land and Environment Court of New South Wales, 2006b) has justified its approach by defining its brand of what is "just" in the process: "some think that quick and cheap disposal, by definition, is not just, whereas we think that disposal which is not quick and cheap, by definition, is not just".

RESOLUTION METHODOLOGY

In compensation claims, the Court has sought to expedite the resolution and completion of these matters through its Practice Direction: Class 3 Compensation Claims (The Land and Environment Court of New South Wales, 2006c). In the valuation process, the direction requires expert valuers to confer and provide:

- method of valuation and check method where one has been used;
- full workings, documents relied upon and details of any personal communication relied upon;
- sales relied upon and all relevant information relating to those sales including price, date, area of land and improvements, rate per square metre analysis, zoning and planning controls and comparisons between the sales with percentage adjustments between the sales and the subject property.

Once the above information has been exchanged between valuers, they are to confirm matters they agree upon and identify matters they disagree on; these matters should include:

- highest and best use;
- list of comparable sales agreed upon;
- facts and assumptions upon which the respective valuations are based;
- comparable sales used by each valuer with their analysis;
- percentage adjustments between the sales and their application to the subject.

To ensure that the expert valuers engaged by their respective parties are fully acquainted with the expectations of the Court under the Practice Direction: Class 3 Compensation Claims, expert valuers are required to be served with this direction by their instructing party and sign that they have received it and understand its requirements. Its requirements prohibit the introduction of any evidence not provided in the expert's statement, report or affidavit. Joyce and Norris (1994) define this process as the "anti-ambush rule". In effect, the objective of the proceedings becomes the resolution of the matter, not a decisive win by one side or the other. Procedural fluency in the process through disclosure and articulation of reasoning of the valuation process and evidence used to underpin opinions of value are important. However,

as highlighted in *Singer & Friedlander Ltd* v. *John D Wood & Co* (1977), valuation is not an exact science but an imprecise art that goes beyond the articulation of process to cognitive judgement by the valuer.

CONCLUSIONS

The epistemology of value in the assessment of just term compensation provides a construct in which the commercial assessment of value can be defined in settling compensation matters. In the case of the proposed partial acquisition of land, it may be appropriate to assist the dispossessed party where required by offering a total acquisition of the property. In these circumstances, a true test of value may be achieved through transactions. The first transaction is the agreement to purchase the subject property at its market value unaffected by the acquisition and proposed works. The second transaction is the sale of the residual part of the acquired property after the public works have been completed. This would provide an option and encourage agreement by negotiation where some discretion and choice are given to the dispossessed party. As noted earlier, this may not be perceived as a feasible or affordable option by an acquiring authority.

The reinstatement option needs to be incorporated within state acquisition legislation. It is important that the dispossessed party be placed in the same position as before the commencement of the acquisition process. In achieving this objective, assessment on just terms cannot be made solely by reference to the monetary amount of the acquired home, but by parity of status. While it is important for a context to be drawn in which compensation matters may be defined, this context must not be driven by a process that seeks to dispense with these matters with expedition as its primary objective.

As compulsory acquisition matters come before the courts, the basis of argument supporting the compensation assessed is important. When assessing values, it is essential that valuers establish points of agreement and differences in expediting the resolution process. This can only be achieved when valuers assume the role of determining market value and other relevant heads of compensation from the beginning of their brief. This objective cannot be achieved when valuers act as advocates – regardless of whether they act for the acquiring authority or dispossessed party.

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L'estimation des indemnités dans le cadre de l'acquisition forcée de terres pétrolifères et gazifières du delta du Niger

L'extraction du pétrole et du gaz sollicite très fortement les ressources en terre, l'administration foncière et la gestion des terres dans différentes régions du monde. Au Nigéria, le transport du pétrole et du gaz et de leurs sous-produits et produits raffinés est assuré grâce à des réseaux complexes d'oléoducs et de gazoducs traversant des milliers de kilomètres et qui s'entrecroisent sur les terres de plusieurs communautés dans la région du delta du Niger. Les terres sont généralement acquises de façon forcée pour faciliter ce processus et l'estimation d'une indemnisation adéquate en faveur des communautés dépossédées et des divers propriétaires demeure la cause de contentieux et de conflits continus dans la région. Le sentiment général et l'expression d'insatisfaction quant au montant de l'indemnité versée pour les terres dans le cadre de l'exercice des pouvoirs d'acquisition forcée sont l'un des éléments qui alimentent l'actuelle crise du delta du Niger.

Cet article analyse la procédure d'estimation et d'établissement de la valeur. Ces conclusions révèlent que l'ambiguïté, le manque de clarté, l'incohérence du contenu et de l'interprétation des lois qui régissent cette question sont en partie responsables de l'insuffisance de l'indemnisation. Qui plus est, il montre que l'application d'une multiplicité de normes, procédures et méthodes d'estimation aboutit à des écarts d'une ampleur inquiétante des valeurs d'indemnisation pour un même intérêt relatif à des terres. L'article conclut que la procédure d'estimation peut être améliorée par l'adoption d'un code d'estimation pour les indemnisations au Nigéria. Il indique également qu'un tel code devrait être inspiré par les normes internationales en matière d'estimation pour le dédommagement.

La evaluación de la compensación en la adquisición por expropiación de tierras ricas en petróleo y gas en el delta del Níger

Los procesos de producción de petróleo y gas implican grandes demandas sobre los recursos, la administración y la ordenación de tierras en diferentes partes del mundo. En Nigeria, el transporte de petróleo y gas y de sus productos secundarios y refinados se realiza mediante una complicada red de oleoductos que recorren miles de kilómetros y atraviesan varias comunidades en la región del delta del Níger. La tierra se adquiere normalmente por expropiación para facilitar este proceso, y la evaluación de la compensación adecuada para las comunidades afectadas y los propietarios individuales constituye un motivo de discusión y conflicto continuos. El sentimiento y la expresión generales de insatisfacción con la compensación por la tierra en el ejercicio de los poderes de adquisición por expropiación es uno de los problemas que alimentan la actual crisis en el delta del Níger.

En este artículo se investiga el proceso de evaluación y determinación del valor. Sus conclusiones revelan que la ambigüedad, la falta de claridad y la incoherencia en el contenido y la interpretación de los estatutos que lo regulan son en parte responsables de la insuficiencia de la compensación. Además, se muestra que la aplicación de múltiples normas, procedimientos y métodos de valoración deriva en enormes discrepancias en los valores de compensación con respecto al mismo interés en la tierra. En el artículo se concluye que el proceso de evaluación podría mejorarse introduciendo en Nigeria un código de valoración de la compensación. Asimismo, se sugiere que tales códigos de prácticas deberían guiarse por normas internacionales de valoración de la compensación.

The assessment of compensation in compulsory acquisition of oil- and gas-bearing lands in the Niger Delta

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Oil and gas production processes place huge demands on land resources, land administration and land management in different parts of the world. In Nigeria, the transportation of oil and gas, their by-products and refined products is conducted through complicated pipeline networks traversing thousands of kilometres and criss-crossing several communities in the Niger Delta region. Land is usually acquired compulsorily to facilitate this process and the assessment of adequate compensation to deprived communities and individual landowners has remained an area of continuous contention and conflict within the region. The general feeling and expression of dissatisfaction with the quantum of compensation paid for land in the exercise of compulsory acquisition powers is one of the issues fuelling the current Niger Delta crisis.

This article investigates the process of assessment and value determination. Its findings reveal that ambiguity, lack of clarity, inconsistency in content and interpretation of enabling statutes are partly responsible for inadequate compensation. Moreover, it shows that the application of multiple standards, procedures and methods of valuation results in alarmingly wide discrepancies in compensation values over the same interest in land. The article concludes that the assessment process could be improved considerably by the introduction of a compensation valuation code in Nigeria. It also suggests that such a code should be guided by international standards of valuation for compensation.

INTRODUCTION

Nigeria has an estimated 159 trillion cubic feet (4.5 trillion m^3) of proven natural gas reserves, giving the country one of the top ten largest natural gas endowments in the world. Some of this gas exists in combination with oil and is unavoidably produced as a by-product of oil production. The process of exploration and production places huge demands on land resources and compulsory acquisition of land for this purpose occurs frequently within the Niger Delta region. In other parts of the world, when land is compulsorily acquired, the landowners or occupiers are usually entitled to compensation. Such claims may be assessed by valuers based on the statutory processes laid down by relevant legislation pertaining to the nature of the particular acquisition. However, one issue of growing concern in the Niger Delta region that needs urgent attention is the increased level of agitation and litigation associated with compensation for land acquisition. The communities concerned are usually not satisfied with the level of compensation payments made to them in cases of compulsory acquisition and this article identifies some of the reasons for this.

Because of the availability of crude oil in the region, oil exploration and consequential compensation are common phenomena in the Niger Delta. This is one cause of the series of crises that have engulfed the region in recent times, with community upheavals, protests from angry youths who claim neglect of their area by oil companies, and recent hostage-taking

incidents. In the wake of these crises in the region, the search for solutions should be holistic. A thorough examination of each aspect of the complicated situation in the Niger Delta should be undertaken and the findings should form the backbone of a sustainable structure for the future of the region. As valuation for compensation is regulated by statute, the current practice was reviewed alongside the relevant statute and other regulations in an exploratory and diagnostic manner during the research for this article.

COMPULSORY ACQUISITION AND COMPENSATION PRACTICE

The procedure for compulsory land acquisition and the assessment of compensation in Nigeria is contained in various enactments entrenched in the laws of the Federal Republic of Nigeria, but the principal law governing land tenure in Nigeria is the Land Use Act (LUA) Decree No. 6 of 1978 (currently Cap 202 of the Laws of the Federal Republic of Nigeria [LFN], 2004). A historical development of the assessment of compensation in Nigeria dates back to the Public Lands Acquisition Act of 1917 (Cap 167 of 1958 Laws of the Federation of Nigeria and Lagos [repealed]). Paragraph (b) of Section 15 of this act states: "The value of the land, estate, interest or profits shall, subject as hereinafter provided be taken to be the amount which such lands, estates, interest or profit if sold in the open market by a willing seller might be expected to realize." This act was followed by the Oil Pipelines Act of 1956 (amended in 1965 and currently Cap 07 LFN 2004), and the Public Acquisition (Miscellaneous Provisions) Act; Decree 33 of 1976 (repealed), and the Land Use Decree in 1978. The laws specifically addressing land acquisition and compensation in oil- and gas-related acquisitions are the LUA, the Oil Pipelines Act; the Nigerian National Petroleum Corporation (NNPC) Act (Cap 320 of LFN 1990); the Petroleum Act (Cap 350 LFN 1990 and currently Cap P10 LFN 2004) and the Mineral Resources Act (Cap 226 LFN 1990). Sections 28 and 29 of the LUA contain specific provisions relating to oil-production-related acquisitions.

The subject matter of compulsory purchase or acquisition (Stewart, 1962) depends largely upon the terms of the act, decree or other relevant statute under which the purchase or acquisition is made by the acquiring authority. In order to acquire, the authority must usually acquire all the proprietary interests in the land. Generally, legal presumptions in favour of compensation consider the principle of equivalence (Denyer-Green, 2005), where the expropriated owner is entitled to be compensated fairly and fully for his/her loss, and nothing more or less. In Nigeria, the process is fraught with a myriad of problems – particularly within the oil-producing communities of the Niger Delta region. Since the promulgation of the LUA in 1978, the structure of landownership in Nigeria has changed and changes have also been introduced into the process of assessment of compensation for compulsory acquisition. Acquiring agencies, landowners and valuers face the ongoing dilemma of finding a consistent interpretation and implementation of the LUA. For example, the drastic change from freehold ownership and absolute possession to a limited term of 99 years has received severe criticism (Uduehi, 1987; Umezuruike, 1989; Hemuka, 2000).

The laws of England and Wales and other Commonwealth jurisdictions (Nicholls, 1952) generally recognize the principle that persons whose rights to the use of property handed over for the use of the community are entitled to adequate compensation. However, such rights must be expressly or impliedly conferred by relevant statute. As far as compensation is concerned, it is generally expected that this must be the aim behind a claim. The assessment of compensation as a detailed process according to Davies (1994) is a matter for valuers and not for lawyers. In England, the guiding principles of assessment are contained in various statutes: Section 5 of the Land Compensation Act of 1961;

Sections 7 and 20 of the Compulsory Purchase Act of 1965; Sections 28–33, 39–43 and 45–46 of the Land Compensation Act of 1973; the Agriculture (Miscellaneous Provisions) Act of 1968; the Agricultural Holdings Act of 1986; and the Planning and Compulsory Purchase Act of 2004. The basis of valuation for land that is acquired compulsorily is the market value, which, as the term implies, covers the essential features of a purchase and sale between independent parties under normal market conditions. Prag (1998) suggests that land being taken for some statutory purpose under a compulsory purchase order should be valued as if it were being sold in an open market transaction. However, in practice, such cases will often be combined with wider negotiations that will need at least to have been noted by the valuer. Land Claims Court judgments also confirm that the preferred method for assessing the market value of land is the "comparable sales" method, that is, valuers must make their assessment of market value by looking at the prices paid for land in recent open-market transactions in the vicinity of the land being valued, disregarding transactions that are not sufficiently comparable and taking into account any adjustments that need to be made in order to render the figures obtained from the comparable transactions more meaningful. The rules of valuation as reflected in Section 15 of the Public Lands Acquisition Act (Cap 167 of the 1958 LFN) were basically the same as the six basic rules under the English act from which Nigeria's law of acquisition was derived.

ASSESSMENT OF COMPENSATION IN OIL AND GAS ACQUISITIONS

The special treatment of acquisitions for oil and gas purposes is provided for in Section 29(2) of the LUA, which requires all such assessments to be based on the provisions of the Petroleum Act. This is an unnecessary provision because from all indications the provisions of the LUA are the only statutory method for the assessment of compensation. Section 20(5) of the Oil Pipelines Act states that compensation should be determined in line with the provisions of the LUA with respect to public acquisitions. The relevant sections of the LUA are set out below.

The statutory provision for the assessment of compensation for public purposes in Section 29(1) of the LUA reads: "If a right of occupancy is revoked for the cause set out in paragraph (b) of subsection (3) of the same section the holder shall be entitled to compensation for the value of their un-exhausted improvements."

Section 29(3) of the LUA states: "If the holder or the occupier entitled to compensation under this section is a community the Governor may direct that any compensation payable to it shall be paid: (a) to the community; or (b) to the chief or leader of the community to be disposed of by him for the benefit of the community in accordance with the applicable customary law; or (c) into some fund specified by the Governor for the purpose of being utilised or applied for the benefit of the community."

Section 29(4) of the LUA provides for compensation with respect to land as follows: "for an amount equal to the rent, if any, paid by the occupier during the year in which the right of occupying was revoked".

Section 29(5) makes provision for payment where only part of the land is acquired.

In the case of buildings, installations and other improvements, Section 29(4) provides as follows: "(b) building, installation or improvements thereon, for the amount of the replacement cost of the building, installation or improvement, that is to say, such cost as may be assessed on the basis of the prescribed method of assessment as determined by the appropriate officer less any depreciation, together with interest at the bank rate for delayed payment of compensation and in respect of any improvement in the nature of reclamation works, being such cost thereof as may be substantiated by documentary evidence and proof to the satisfaction of the appropriate officer".

In the case of crops, Section 29(4) provides: "for an amount equal to the value prescribed and determined by the appropriate officer".

From the foregoing, there appears to be some confusion as to the correct approach to use when valuing land for oil and gas acquisitions in the Niger Delta.

METHODOLOGY

Research for this article was conducted from a philosophical orientation in phenomenology rather than a distinct social science theory framework. The phenomenological perspective is based on the premise that human experience makes sense to those who live in it prior to all interpretation and theorizing (Creswell, 2003). In this research, it determined what was studied and the study methods used. Purposive sampling was considered to be most appropriate for this study, and participant selection targeted people who had special knowledge and experience in the area and who were considered to be information-rich sources. Key actors in the process of land acquisition and valuation for compensation in Nigeria formed the population from which purposive samples were drawn – landowners; estate surveyors and valuers; land surveyors; lawyers; acquiring authorities (government); and oil and gas companies. These all have specific roles to play in the process and any phenomenon occurring within the process would logically be linked with the main facilitators of the process. Methods consistent with the philosophical, theoretical and methodological assumptions of the study were employed during the data collection stages of this work, and an analytical model was developed and used to analyse data. This was conducted using an amalgam of principles of computer-assisted qualitative data analysis software (CAQDAS); phenomenological analysis; qualitative data analysis; focus group analysis; and content analysis procedures. The model is described as a "bow-tie/ butterfly" model because of its graphical appearance.

FINDINGS

Ambiguity and lack of clarity of relevant statute

The LUA, which is the main statute governing land acquisition and compensation in Nigeria, is defective in a number of ways. It lacks clear definition and some of its content is hard to understand. This is partly responsible for the existence of multiple interpretations by key actors in the process. The lack of clarity is a hindrance to uniform and consistent interpretation and so operators tend to flout its provisions. There is conflict between the LUA and traditional landownership patterns; the laws dealing with land acquisition are not clear and there is ambiguity with regard to who is entitled to compensation. In addition, there are no clear guidelines or documented procedures regarding the process or the roles or responsibilities of different stakeholders. Neither is there any mention of the rights of the individual owner to compensation within the rural setting in Nigeria. The recent trend in which communities subdivide their land among family members (increasing instances of individual ownership) is not provided for in the law. A cross-section of all the acts shows that no mention is made for the value of land under any of the heads of claim (Table 1). This incompleteness filters down through the process of implementation.

Suitability of prescribed methods of assessment

The current statutory methods of valuation are unacceptable because they are grossly inadequate for achieving fair or adequate compensation. The heads of claim are not clearly defined and are incomplete, and the laws do not make provision for valuation on a market value basis. These issues are perceived to be unfair and unjust and partly responsible for some of the agitation in the Niger Delta. The law provides for compensation to be based on the value of economic crops and trees on the land at the time of acquisition, in the absence of which landowners receive nothing if they have made no other improvement on the land. This means that the existing use value is

not taken into account. The widely practised crop enumeration method is crude, the rates are usually too low (and in most cases outdated), and it does not ascribe value at all. It has been suggested that the market value of crops and economic trees could be determined by capitalizing on the annual yield instead of multiplying crops by pre-determined rates.

The LUA does not provide for the use of rates as is widely practised but allows the "appropriate officer" to define the rate to be used. This provision has been interpreted to mean a multiplier rate instead of an appropriate method. The appropriate officer is the Chief Lands Officer or Director of Lands in each state. This office is not restricted to the valuation profession – in some states this position is occupied by agriculturists or geographers. The fact that the appropriate officer has sole responsibility for recommending approved methods introduces subjectivity into, and removes equity from, the process.

Lack of standard practice procedures and guidelines

By using low multiplier rates (usually state or federal government rates), agents representing acquiring authorities arrive at compensation value figures that correspond with budgetary provisions for the particular acquisition. On the other hand, agents representing communities achieve a desired compensation figure by introducing names of non-existent claimants ("ghost names") and counting crops that do not exist, thus inflating the overall value. There is no other option available to them if they are to ensure adequate compensation.

The lack of a standard basis for and method of valuation for compensation in Nigeria and the use of non-professionals in ascertaining value is a central problem in the process of land acquisition and compensation assessment. There are also statutory conflicts and conflicts in government policy. Some of the provisions are subjective, allowing multiple interpretations.

It is widely recognized that standards are urgently required and that all stakeholders should share a collective responsibility in the standard-setting process.

An absence of guidelines also plays a role in the alarming discrepancies. The establishment of a code of practice would guide all parties involved and reduce the disparity in values. Local practices and methods are suited to their local reality even though they may not be suitable for the international community (as land policies differ). If the methods are standardized, surveyors' estimates will become closer and any differences will be insignificant.

Inadequacy of compensation payments and negotiation procedures

It is difficult to define what adequate compensation is as compensation is not just money. Because of its restrictions on the number of heads of claim as well as non-payment for undeveloped land, the provisions of Section 29 of the LUA are grossly inadequate for the purpose of achieving fair or adequate compensation.

Other issues of concern include delays in making payments. Sometimes, compensation is paid to the wrong people and there are instances where an oil well may be cited in one community and a neighbouring community comes forward for assessment and payment.

There is a general preference for negotiations to take place before the value of compensation is determined by the acquiring authority, and a common feeling that such negotiations should be between professionals representing all parties involved. Most communities feel that the negotiation procedure as currently practised is one-sided because the acquiring bodies dictate the values they are willing to offer and these values are considered to be unfair. Communities object to the use of predetermined rates. They also maintain that the oil companies should have no say in determining compensation rates and that the rates would be more acceptable if communities had an input in their determination. A lack of clearly defined boundaries between community

lands is also a major hindrance to the smooth running of the process. It is usually quite difficult to identify who the actual landowners are.

Inappropriate, greedy and corrupt practices

There is a widely held opinion that people employed in the acquisition process can use their positions as a tool for personal enrichment to the detriment of landowners. Sometimes, valuation for compensation is driven by greed and an eye on fees. The general view is that corruption permeates the process and leads to the manipulation of figures and distortion of values. Discrepancies also arise where landowners declare an increase in the number of crops on their land while making their claims and manipulate the grades of maturity and number of farms that they have. Officials and agents have been known to engage in corrupt practices such as adding "ghost names" to inflate compensation value and yet pay less to the claimants. This may suggest that they are not interested in the welfare of the people. The cash payment system feeds the "ghost name" syndrome because it encourages processes whereby agents can take a cut at the point of payment. Conflict is introduced into the process when someone without the requisite training in land management is employed to carry out the functions of valuers.

Community leaders may not declare openly the quantum of compensation paid to them by the companies and in so doing cheat the people they are supposed to represent.

In addition, some individuals also practise certain corrupt and unfair practices. For example, landowners sometimes collect compensation intended for their tenants (who are mostly female) and do not release it to them.

Acquisition authorities make compensation payments for surface rights that are not provided for in the LUA. In addition, it may be the case that some transnational companies are willing to pay higher fees for lower estimates of value, thereby putting pressure on valuers. The compensation rates issued by the Oil Producers Trade Section are used only as a guide and any improvement on the rates is at the discretion of the particular oil and gas company. They accept that compensation is inadequate and tend to upgrade their rates periodically. Sometimes, the oil sector payment is about 80 percent higher than the market value. In a sense, in making payments, oil companies may have relied on the defectiveness of the law.

Stakeholder attitudes

Expectations are important in determining stakeholder attitudes to compulsory acquisition and compensation. Landowners expect the acquired land to continue to appreciate in value. However, they are not entitled to any share in the dividends of the oil and gas companies. Communities' expectations in land acquisition include a desire to be part of the construction process either in the supply of labour or materials. Their expectations also include a wish to obtain gainful employment as a result of their deprivation. Culturally, chiefs and traditional rulers want to be treated better than their subordinates – this should be incorporated into the valuation figure in order for the process to run smoothly.

Government agencies and monitoring bodies might be viewed as part of the attitude problem because of a lack of visible effort to ensure that standards are developed and used.

Youth restiveness

Every issue in the Niger Delta is informed by the underlying poverty and lack of development. Many factors can spark youth restiveness, and compensation is a major issue. Compensation paid by the oil companies appears to be comparatively adequate because there are other benefits in addition to cash payments. Hostility resulting from the feeling of inadequate compensation stems from other factors and not compensation alone. Community youth want to earn as much as they can from land resources that are dwindling under the pressures of population

TABLE 1
Comparative analysis when land is taken

Description	England and Wales	Nigeria
General principle	The general principle is equivalence, which means that the owner should be no worse or better off in financial terms after the acquisition.	No principle of this nature is expressly stated anywhere in statute.
Basis of valuation	Land is valued on the basis of its open-market value; or the cost of equivalent reinstatement in extreme circumstances. The open-market value may also be based on the existing use of the property in the absence of a ready market.	No value whatsoever is ascribed to the land. The existing use value is not an option.
Disregard compulsion	Any increase or decrease in value attributable to the scheme of development that underlies the acquisition is ignored.	This is not specified in any statute of the enactments in Nigeria.
Valuation date	This is the date of assessment or the earliest of: the date the acquiring authority enters to take possession; the date title is vested in them; the date values are agreed; or the date of the Lands Tribunal's decision.	The date of assessment is not provided for in statute.
Heads of claim	The heads of claim are specified and include the value of the land taken; severance and injurious affection when only part of the land is taken; disturbance (paid to occupiers) only; and reasonable surveyor's fees incurred in preparing and negotiating a compensation settlement and solicitor's fees.	The only head of claim in the Land Use Act is the value of unexhausted improvements on the land. No provision is made for any other form of payment to the claimant in statute or any existing code. There is no payment for the value of the land. In oil mineral licences, provision is made for disturbance compensation.
Techniques of market value	The open-market value may be based on the development value, marriage value or ransom value provided that it can be demonstrated that these would have existed in the absence of the scheme warranting the acquisition.	No provision is made outside the replacement cost method for improvements upon the land.
Unlawful use	No regard is made to increases in value caused by unlawful use of the land.	No mention is made of this as there is no value for bare land.
Agricultural land	The future profitability of the farming business is included in the value of the land.	The only payment for agricultural land is one year's rental and the cost of economic crops on the land.
Loss payments	Provision is made for home loss payments in addition to value of property, basic loss for freehold or leasehold interests in farmland, occupier's loss payment.	No provision is made either by reference to statute or policy for loss payments.
Third-party liability	Contractors to the acquiring authority are responsible for the damage they cause.	This is provided for in the acquisition of oil mineral licences but not acquisitions.

growth, oil exploration and indiscriminate logging. Compulsory acquisition generates landownership disputes, which fuel youth restiveness.

COMPARATIVE ANALYSIS

The problems with the structure of the process of valuation for compensation in Nigeria are further highlighted by a comparative analysis of that in place in England and Wales. This is not to imply that the latter system is flawless but it is one that has developed over the years and could be used as a normative model for comparison. In the United Kingdom, the Department for Communities and Local Government (2004a–d) and the Office of the Deputy Prime Minister (2004) have produced a series of five booklets that explain, in simple terms, how the compulsory purchase system works. They provide information to those who think they may be affected by compulsory purchase and give guidance on procedural issues.

The outlines in these booklets are used in this comparative analysis for the validation of the findings. The issues considered in Table 1 apply to compensation where the whole parcel of land is acquired. However, in the Niger Delta region, while often misconstrued as an outright acquisition in real terms, the land acquired is usually the subject of a right-of-way acquisition. As such and according to separate statutory provisions, this means that 50 percent of it should be relinquished after 20 years and the rest over a balance of ten years. At the end of the first ten years, communities should be allowed to enter into fresh negotiations for another period of 20 years over 50 percent of the land that is to be relinquished by law. If this had been the actual practice all this while, it may have reduced suspicion on the part of landowners.

TABLE 2
Comparative review when no land is taken

Description	England and Wales	Nigeria
Compensation for reduction in value	Compensation is payable when loss occurs because some right in property is taken away or interfered with.	Same holds for Nigeria.
Basis of compensation	Based on the reduction in value of the land as a result of seven specific physical factors: noise; vibration; smell; fumes; smoke; artificial light; or discharge unto the land of any solid or liquid substance. Anything outside these is not to be compensated for.	Not applicable.
Compensation for adverse effects of the development	Acquiring authorities are given certain discretionary powers to reduce the impact of their development works in agreement with those whose premises are affected.	There is no similar provision except a general claim for damage.
Fees	The acquiring authority would usually pay legal and surveyors fees to the landowner or occupier for negotiating claims.	There is no provision for such payments in the statutory enactments.

Table 2 presents a comparative review based on compensation where no land is taken, as obtains in oil and gas right-of-way acquisitions. Provision is made for the payment of compensation for a reduction in value of land adjacent to public development works if the land is affected by the work and subsequent use. Once pipelines are buried, access or trespass might be restricted. Moreover, farmers on adjacent lands may no longer be able to gain access to their land as a result of the acquisition.

CONCLUSION

Valuation for compensation has a different goal from other forms of valuation because it is expected not only to ascribe value to property but also to ensure that the claimants are (as much as practicable) put in the same position as they would have been had their landed property assets not been acquired compulsorily. The end product of the process might be to achieve adequate compensation as a replacement for the value of loss occasioned by the acquisition. If the process of assessment is transparent, then it might also be possible to have a standard measure by which to assess the adequacy or otherwise of the value so determined. All things being equal and assuming that the process itself is comprehensive and complete, it can then be expected that, once all the component parts of the process are assembled together, the end result interpreted in terms of value would be acceptable to the parties involved. In practice, however, this is not the case.

The article has identified major concerns in the process of valuation for compensation within the Niger Delta region of Nigeria. The structure of the process of valuation for compensation in Nigeria with particular reference to the Niger Delta region lacks clear definition, description and depth when compared with similar statutory valuation processes elsewhere and it is found to be wanting in many key areas. This faulty structure has introduced confusion, encouraged multiple interpretations and affected the entire implementation process, resulting in the general feeling that compensation is inadequate.

There is an urgent need for reforms in various enactments regarding compulsory acquisition and the assessment and payment of compensation. Key issues to be addressed in such reforms include: the rights of landowners; a clearly defined responsibility for assessment; and the basis of valuation. Statutory reforms should be followed closely by a compensation code that would among other things provide clear and simple explanations and interpretation of different statutes and show their interrelationships and interdependence in a clear and logical way. This would help to reduce the conflict present in the process in its current state.

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Critères distinctifs de l'indemnisation préalable à l'expropriation de biens fonciers en Argentine

La constitution nationale de l'Argentine reconnaît à la personne le droit de posséder une propriété privée. Cependant, ce droit est assujetti à certaines réglementations et l'État peut déposséder le propriétaire de façon forcée pour cause d'utilité publique. Cette procédure s'appelle l'expropriation.

Cet article présente une analyse comparée des lois en vigueur en Argentine pour l'établissement de l'indemnisation préalable pour les biens fonciers expropriés. En Argentine, la loi n° 21499 constitue le cadre juridique de l'expropriation pour l'ensemble du territoire national. Néanmoins, dans le cadre du système fédéral du pays, chaque province a le pouvoir de mener les procédures selon ses propres lois en matière d'expropriation. Cet article montre que des critères d'unification sont nécessaires afin de garantir une valeur équitable pour toutes les parties sur l'ensemble du territoire argentin pendant la procédure d'expropriation.

Criterios distintivos de la compensación previa por la expropiación de bienes raíces en la Argentina

La Constitución de la Argentina reconoce el derecho individual a la propiedad privada. No obstante, el derecho está sujeto a determinados reglamentos, y el Estado puede privar al poseedor de su propiedad con carácter forzoso a fin de lograr un objetivo de utilidad pública. Este proceso se conoce como expropiación.

En este artículo se presenta un análisis comparativo de las leyes en vigor en la Argentina con objeto de examinar la compensación previa por bienes raíces expropiados. La Ley 21499 constituye el marco jurídico para la expropiación en todo el territorio nacional. Sin embargo, en el contexto del sistema federal argentino, cada provincia tiene jurisdicción para llevar a cabo los procedimientos con arreglo a sus propias leyes sobre expropiación. En este artículo se destaca la necesidad de establecer criterios unificadores para garantizar un valor justo para todas las partes en la totalidad del país en el contexto de los procesos de expropiación.

Distinctive criteria for previous compensation to real property expropriation in Argentina

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The national constitution of Argentina recognizes a person's right to own private property. However, this is subject to certain regulations and the state can deprive the owner of property on a compulsory basis in order to achieve a public utility aim. This process is known as expropriation.

This article presents a comparative analysis of the laws in force in Argentina for determining previous compensation to real property expropriation. In Argentina, Act No. 21499 constitutes the legal framework for expropriation for the whole of the national territory. Nevertheless, within the country's federal system, each province has the jurisdiction to conduct proceedings according to its own expropriation laws. This article emphasizes that unifying criteria are needed in order to guarantee fair value for all parties throughout Argentina during the expropriation process.

INTRODUCTION

The national constitution of Argentina (the Constitution) recognizes the subjective right to private property subject to the regulations that determines its exercise. In order to achieve a public utility aim, the state can deprive the owner of real property on a compulsory basis, following specific procedures and paying fair previous monetary compensation. This process of public law is known as expropriation.

Under the Constitution, the federal system of government implies the coexistence of a national state with limited powers and provinces with broad powers, only defined and mostly exercised by the delegated powers (Sections 121 and 126 of the Constitution). As a result, expropriation legislation is under the jurisdiction of the provincial states as it has not been delegated from the provinces to the national state.

In general, in correspondence with the national constitution, the provincial constitutions affirm in their declarations of rights and guarantees that real property is inviolable and that no inhabitant can be deprived of it except by virtue of judgment founded in accordance with the law and that expropriation for reasons of public utility must be qualified by law and previously compensated.

The Constitution attributes to the legislative power the liability for assessing the public utility through a formal act. The jurisdiction to assess the public utility corresponds to the National Legislative Congress and to the local legislatures, as a consequence of the federal system of government.

Compensation is an economic offset owed to the person whose property has been expropriated for the sacrifice imposed in the public interest. It includes the objective value of the real property and the damages that may be a direct consequence of the expropriation. The "objective value" is what the property is worth in the open market for this type of property and corresponds also to the location of the property and the time of its expropriation.

Personal circumstances, affective values and hypothetical profits are not taken into account in determining the compensation. In addition, damage to profits is not paid and, in real estate matters, the panoramic value or the value derived from historical facts is not considered either (unless that historical value is the reason for the expropriation). On the other hand, the value of the real property must be estimated without considering the increased value that the proposed building project could determine (and which is the cause of the declaration of public utility).

DETERMINATION OF PREVIOUS COMPENSATION

The amount of compensation paid for expropriations is determined by conciliation or trial.

Conciliation means that there has been agreement between the parties regarding the values estimated by the corresponding appraisal court or valuation jury in provincial state jurisdictions. On the other hand, when determined by trial, a judge sends a judicial file to the appraisal court or valuation jury within whose jurisdiction the expropriated property lies in order to obtain a report on its value and so be able to pronounce judgment.

Argentina also has a national appraisal court that establishes property values for properties whose acquisition, alienation or countable value could be required by national, binational or multinational organisms of which the national state is part or by provincial or municipal authorities. This court functions to assist itself or other bodies that supervise, control or audit the appraisals required by either a legal entity or a physical person.

In addition, some provinces (e.g. San Juan) also have their own appraisal courts. Instead of an appraisal court, others provinces have a valuation jury – generally made up of the authorities of the Cadastral Administration, Registry of Real Property and the Director of Revenue.

Act No. 21499 constitutes the legal framework for expropriation in the national territory. However, as noted above, in territorial matters each province has its own jurisdiction concerning proceedings with regard to its own provincial laws on expropriation.

Where the state wishes to take possession of expropriated property, it must pay compensation in advance. However, the problem is that the amount of such compensation corresponds to the proceedings established by each jurisdiction. Argentina has 23 provinces or jurisdictions with the authority to establish their own proceedings.

Act No. 21499 establishes that a judge will grant possession once the expropriator has deposited the value corresponding to the appraisal determined out by the national appraisal court. However, some provincial laws establish that the amount to be deposited will consist of the fiscal valuation plus a percentage fixed by each jurisdiction, which fails to ensure that the compensation is fair.

Each province relies on its respective Tributary Code to relate the cadastral estimate to the tax base of the parcel, on the basis of which tax is paid annually. For most provinces, the fiscal estimate is synonymous with the cadastral estimate.

The cadastral estimate of a building is determined annually by the territorial cadastre, which uses basic zonal values that are ascertained in advance and updated periodically (usually annually). These values correspond to the land free of improvements and to the improvements. For urban and suburban zones, the basic value of the land free of improvements corresponds to the square metres by block. However, for rural and subrural areas, it corresponds to sectors of equal value per hectare. This approach privileges rapidity and efficiency for the cadastral organism at the expense of exactitude.

Thus, it is possible for the fiscal estimate to be lower than the objective value of the property and consequently for the compensation to be unfair. In the case of improvements for urban zones, value is added for construction work carried out. In rural and subrural areas, construction,

fencings, plantations and facilities are also considered.

In the cases considered in this article, the values are derived either from the determinations of an appraisal court or from the increased fiscal estimate in a pre-established percentage. In either case, the deposited amount represents a provisional value. The final value is determined through the expropriation procedure.

A comparative analysis of the laws in force in Argentina to establish compensation for expropriated real property indicates the particularities that appear between the different provinces. This analysis serves to underline the necessity of combining criteria throughout Argentina in order to ensure an integrally fair value for all parties.

MATERIALS AND METHODOLOGY

A descriptive design identified each of the proceedings established in the corresponding expropriation laws of the different Argentine provinces in order to determine the value that allows the state to take possession of real property in the public interest. Likewise, a comparative design allowed an analysis of such proceedings to distinguish the different considerations relating to previous compensation.

The cases can be classified into two groups. In both, the real property values are the result, on the one hand, of land free of improvements and, on the other hand, of the improvements to buildings, facilities and plantations as appropriate. The basic value of the land free of improvements for urban and suburban areas corresponds to the square metre (above). However, for rural and subrural areas, it corresponds to the hectare.

The two groups are:

- Group A: Cases where the state can acquire the real property with compensation established by mutual agreement. The compensation will be no higher than the fiscal valuation increased by a stated percentage by each jurisdiction. If the owner of the expropriated land disagrees with the evaluation, he/she can accept that the value of the real property be determined by an appraisal jury (created in Catamarca by Decree 249/57). If the expropriated landowner withdraws from these two forms of conciliation, the difference is decided in summary proceedings in which the judge states the compensation according to the acts and judgments prepared by the appraisal jury. In this instance, the appraisal jury must include a representative of the landowner among its members.
- Group B: Cases where compensation arises from the value determined by technical agencies specialized in real property valuation. The depositing of the amount determined in this way does not exclude the possibility of a subsequent discussion during the expropriation trial.

Group A includes the procedures used in most Argentine provinces. For example, in the Province of Catamarca, Act No. 2210 establishes that the compensation in common agreement may exceed the increased fiscal estimate by no more than 30 percent. However, as indicated above, the fiscal value does not always represent the objective value of real property.

Figure 1 illustrates how compensation is established in different Argentine jurisdictions by mutual agreement.

Membership of the appraisal jury is made up of the Director of Revenue, the Cadastral Administration Director and the Director of the Registry of Real Property. These public officials are appointed to the appraisal jury by the provincial executive authorities for a set term – normally four years. The appraisal jury is assisted by two secretariats: the administrative and legal secretariat; and the technical secretariat.

Because the responsibility for determining the market value of the expropriated property lies with the technical secretariat, this will generally be headed by a professional from the Cadastral Administration (the agency that provides

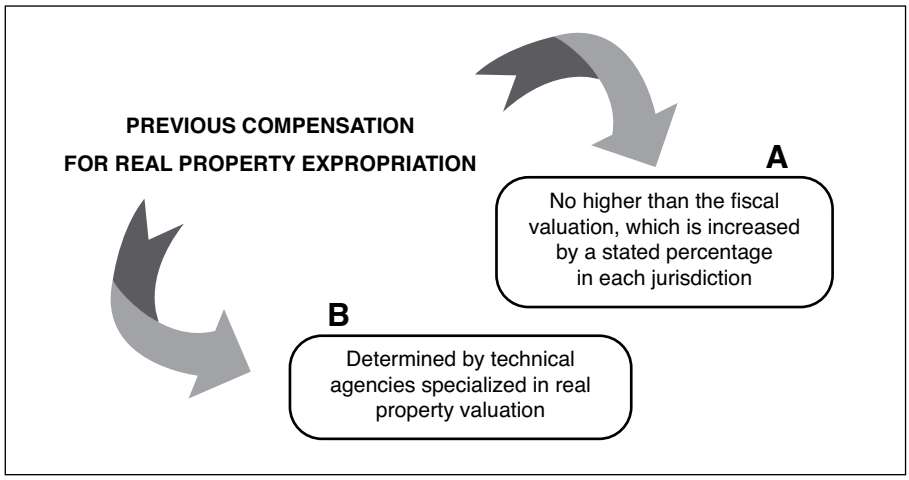

FIGURE 1
Mutual agreement compensation methods

the basic values of the real property for fiscal purposes). Thus, it is not surprising that the values determined by the jury are not that dissimilar to the fiscal valuations.

In practical terms, the expropriation process entails submitting a declaration of the public utility project, together with a survey map specifying the real property to be expropriated. Once the expropriation has been authorized, the State Prosecutor's Office commences the corresponding expropriation trial, enclosing the receipt of the fiscal valuation deposit increased by 30 percent.

Taking the expropriations carried out in the Province of Catamarca in the period 2005–06 as examples, an appraisal jury (which included the representative of the owner of the expropriated property) intervened – at the request of the judge – in all cases as mutually agreed compensation had not been achieved in any of the cases examined.

Group B corresponds to expropriations covered by Act No. 21499 and by the expropriation laws of the provinces that have an appraisal court (as in San Juan). Both cases imply the convening of appraisal courts, assisted by property valuation experts independent of the state agencies (such as the Cadastral Administration, which establishes the basic values of real property for fiscal purposes).

From conclusions issued by the National Appraisals Congresses, the creation of independent appraisal courts in all Argentine provinces has been recommended both for expropriation purposes and also for appraisals concerning the purchase and sale of property by the state. However, the provincial legislatures have not introduced bills to enable the creation of such courts.

CONCLUSIONS

In terms of previous compensation for real property expropriation, the amount deposited by the state when bringing an expropriation trial represents a provisional value, with the final amount being determined through the expropriation process. This final amount can differ from the fiscal valuation and significantly exceed the value referred to in the legal provisions.

It must be underlined that the basic property values in the different provincial jurisdictions refer to land free of improvement and also to the improvements of buildings, facilities and plantations, as appropriate.

In provinces where there are no appraisal courts independent from the state agencies (such as the Cadastral Administration), compensation for expropriation is rarely determined by mutual agreement.
The owner whose property has been expropriated withdraws from the forms of possible conciliation and has to look for a skilful valuer to perform the particular valuation to demand and conciliate the final price of the expropriated real property.

In general, the values determined by appraisal courts are closer to the objective value and, consequently, the discussions that may arise between the parties involved are concerned with smaller amounts.

The creation of appraisal courts as independent institutions with expert and stable members in each of the provinces will ensure equity and impartiality in determining fair compensation for real property expropriation as enshrined in the Argentine Constitution.

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L’indemnisation lors des achats forcés de propriétés résidentielles au Bélarus

L’acquisition forcée est utilisée dans de nombreux pays pour assurer le renouvellement du tissu urbain. Cet article analyse l’indemnité versée pour l’achat forcé de propriétés résidentielles au Bélarus. Il examine la législation et des études de cas et utilise les critères de la valeur vénale pour estimer la situation des propriétaires dépossédés avant et après l’acquisition de propriétés résidentielles.

L’article montre que l’indemnisation au Bélarus est assurée sous différentes formes et que les protections des propriétaires résidentiels sont si fortes – qu’en fait, les indemnités versées au propriétaire sont souvent supérieures à la valeur vénale. L’article conclut par une analyse des avantages et inconvénients de l’actuel système d’indemnisation.

Compensación en la compra forzada de propiedades residenciales en Belarús

La adquisición por expropiación se emplea en muchos países para velar por la renovación urbana. En este artículo se aborda la compensación otorgada por la adquisición por expropiación de propiedades residenciales en Belarús. Se examinan la legislación y estudios de casos y se aplica el criterio del valor de mercado para estimar la situación de los propietarios de tierras desposeídos antes y después de la adquisición de propiedad residencial.

En el artículo se muestra que la compensación en Belarús se proporciona de diferentes maneras y que la protección de los poseedores de propiedad residencial es bastante fuerte: en la práctica, la indemnización pagada a los propietarios es con frecuencia superior al valor de mercado. El artículo concluye con un examen de los aspectos positivos y negativos del actual sistema de compensación.

Compensation in compulsory purchase of residential property in Belarus

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Compulsory purchase is used in many countries in order to ensure urban renewal. This article looks at compensation paid for the compulsory purchase of residential properties in Belarus. It examines legislation and case studies and uses the criterion of market value to estimate the position of dispossessed landowners before and after residential property acquisition.

The article shows that compensation in Belarus is provided in different forms and that protections for residential property owners are quite strong – indeed, compensation paid to property owners is often above the market value. The article concludes with a discussion of both the positive and negative aspects of the current compensation system.

INTRODUCTION

The security of property rights plays an important role in economic development. However, the state almost always retains the power to take land from the landowners against their wishes. The right of the state to acquire land by compulsory purchase affects the possibility for the owners concerned to extract benefit from their investment. The only protection for these owners is to receive adequate compensation. The procedure regulating land takings has to balance the interests of buyer, seller and third parties and minimize the transaction costs of the process. For the transitional economies of Eastern Europe, a satisfactory system of compensation for compulsory purchase is one measure of the extent to which they have developed an efficient property market (Grover, 1999).

This issue is currently of great importance in Belarus, especially in the city of Minsk. Approximately 10 percent of the city area is occupied by individual housing. The quality of most of this housing is low. Given the great demand for and lack of housing in the city, the renewal policy intends to transform low-density areas to high-density ones. Among residential properties, approximately 4 500 land parcels are not allowed to be privatized and instead are destined to be demolished in the long run (according to the master plan). In this situation, proper compensation is the only way of offsetting the negative consequences of compulsory purchase.

The urgency of the problem is demonstrated by the adoption of new measures concerning the determination of losses, ordering and conditions of payment that came into force in January and March 2007.

The compulsory acquisition of residential real property can mean housing deprivation for the owners and their families. As a result, the state must protect them from homelessness. Moreover, as dispossessed owners are frequently not satisfied with the compensation they receive, one question that must be asked is whether the compensation paid is high enough.

The aim of this article is to analyse whether the compensation paid to dispossessed residential property owners in cases of compulsory acquisition guarantees security of land tenure and can

be considered fair. Specifically, this article considers the compulsory purchase of single-family houses; it does not examine the issues of partial takings or third-party interests. In order to form an objective picture, the problem was investigated through an analysis of legislation and case studies with the underlying concept that the creation of a fair system of compensation "has regard to the *de facto* situation rather than allowing claims on the often uncertain strict *de jure* rights" (UN ECE REAG, 2000).

LEGAL BASIS FOR COMPENSATION IN COMPULSORY ACQUISITION IN BELARUS

Land acquisition in Belarus is regulated by a large number of legal acts, such as the Constitution, Civil Code, Land Code, Housing Code, a number of acts of the Council of Ministries, and Presidential Decrees. One reason for this large number of acts lies in the fact that land and buildings are acquired separately.

Land acquisition is in fact the acquisition of "interest" in the land and is strongly linked to the "holding right". In Belarus, the land-tenure system is quite complicated. In the past, there were different orders of compulsory acquisition for private land and state land or land that is held in life heritable possession or lease right. However, since January 2007, the rules for compensation have been the same.

There are a number of ways to receive compensation for a residential property – for example, monetary compensation or alternative rehousing. The latter can be in the form of:

- the construction or purchase of a house equivalent to the one demolished in terms of accomplishment and total area;
- the purchase of an apartment located in the same city or town (or for small settlements in the same district) with a total area of 15–20 m^2/person registered in the house acquired (apartment size is based on the minimum social housing standards established in Belarus);
- transfer of the house to another land parcel granted by local authority if technically possible.

The last two possibilities are additional guarantees provided by the Housing Code.

Until January 2007, the basis of monetary compensation was unclear and determined by "appraisal commissions". These consisted of surveyors, representatives of financial departments of the local authority and others at the discretion of local authorities or at the landowner's request. There was no obligatory condition to have a qualified valuer in the commission. Since 2007, compensation has been assessed by a limited number of state organizations using qualified valuers.

According to the new regulations concerning the determination of compensation stemming from building demolition, the monetary compensation takes into account:

- the value of constructions (for a single-family house the value should be equal to the market value but not less than construction cost less depreciation [the depreciated reproduction cost]);
- the cost for relocation of constructions;
- the losses caused by the disturbance or limitation of landowners, users, lessees;
- the profit lost.

The date of the compensation payment is the date of the state registration of house purchase agreement but not earlier than the date of the termination of the land right. The latter is made by the decision of the local authorities.

The compensation is paid by the body to which the land is transferred but not by the state or local authority. This feature is common to the former communist counties (Grover, 1999).

CASE STUDIES

For the purpose of this research, actual compensation was compared with the market value of the expropriated property, as this is the most commonly used basis for compensation throughout the world (Jackson, 2001; Murning *et al.*, 2001; Viitanen, 2002; Kalbro, 2004; Colwell and Trefzger, 2006). The choice of properties was determined primarily by the availability of the necessary data that could enable

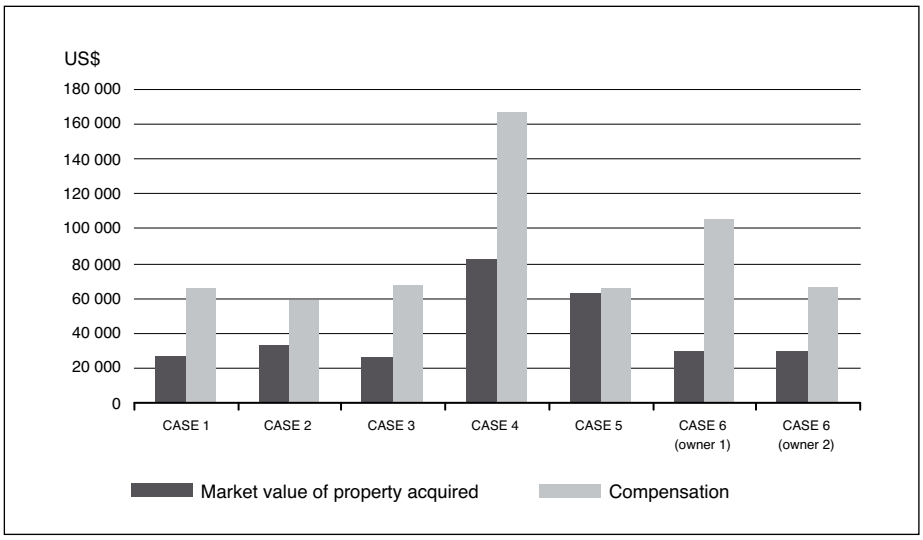

FIGURE 1
Comparison of compensation in monetary terms

comparisons, their close location to one another (to simplify market valuation) and the acquiring party (state building company and private developer). In all cases, the land was acquired by compulsory purchase for residential redevelopment.

All properties were appraised using a sales comparison approach (IVSC, 2005). In this approach, the market value of a property is determined using information about similar properties that have recently been sold on the market. The residential property market is the most developed in Minsk and the sales comparison approach can be used with an acceptable degree of accuracy.

In all cases, agreements between the acquiring party and property owners were signed. However, these had been made under the threat of compulsory acquisition. In those cases where the developer was a state company, the compensation was equal to the minimum level provided for by legislation. In those cases where the developer was a private company, it was not possible to obtain information as to what was used as a basis of monetary compensation. Figure 1 shows the comparison of compensation received with the market value of the property acquired by compulsory purchase.

It can be seen that in all cases the property owners' financial situation improved after the acquisition. On average, the amount of compensation was 2.3 times that of the market value. Only in Case 5 was the amount of compensation close to the market value. However, the treatment of landowners is not equal under the existing system. This is most clearly evident from Case 6. Here, two owners had equal shares in a property but one received compensation that was 1.6 times higher than that paid to the other owner.

As there are several possibilities as to what form compensation takes, the frequency of the different types of compensation paid has been analysed. The most popular form of compensation (56 percent) is alternative rehousing in the form of an apartment corresponding to the equivalent social standards. Only one owner chose equivalent rehousing in the form of new house construction. Monetary compensation was used in 33 percent of cases. In several cases, monetary compensation was combined with an alternative rehousing. Monetary compensation was paid only in cases where the acquiring party was a private company. This can be explained by the uncertainty of the rules for estimating monetary compensation before 2007 when private companies had more flexibility in negotiations.

The quality of the properties acquired by compulsory purchase was estimated using the contribution of construction to the market value of properties. In valuation theory, a number of principles reflect the relation between the components of real property (The Appraisal Institute,

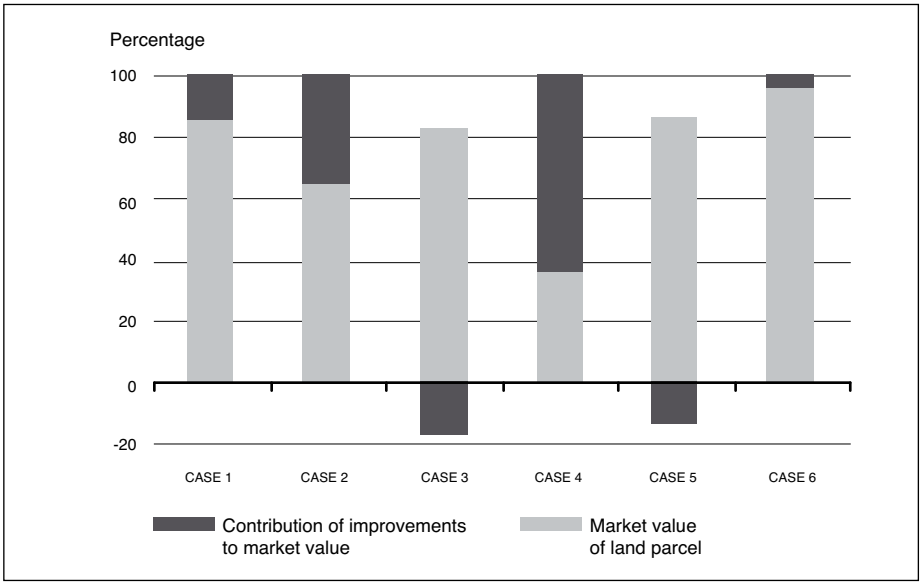

FIGURE 2
The structure of market value of properties acquired

2001). One of them is the principle of contribution, which states that the value of any component of a property is measured by how much it adds to market value by reason of its presence or detracts from the market value by reason of its absence. A second one is the principle of balance. Balance is achieved when adding improvements to land and structure will increase the property value. Figure 2 shows the contribution of buildings to the market value of properties for every case analysed.

Only one property (Case 4) was acceptable in terms of housing quality, total house area and necessary engineering services. In Cases 3 and 5, the buildings do not contribute anything to the market value of the real property unit. The market value of the land parcel is higher without the existing buildings. In all other cases, the contribution of the buildings to the total market value of the properties is less than 35 percent. It can be concluded that the quality of these residential properties is low and that their current use does not correspond to their highest and best use. There can be different reasons for this – for example, the poverty of the residents or restrictions imposed by local authorities on reconstruction. In the market, this type of housing is generally bought by rich people for demolition in order to allow new building.

Owners with low-quality housing usually prefer compensation in the form of new apartments using additional social guaranties provided by the Housing Code. Owners with normal and high-quality housing normally prefer the construction of a new, similar single-family house.

DISCUSSION AND RECOMMENDATIONS

There is a variety of ways in which compensation for compulsory land acquisition can be settled in Belarus. The owner is free to choose any of them. As noted above, the possibilities are generally divided into two groups:

- compensation in monetary form;
- compensation in the form of alternative rehousing.

There are various ways of obtaining compensation in the form of alternative rehousing. However, the measure of equivalence in cases where the owner chooses alternative rehousing is not clear. This is because valuation is compulsory only where the owner requires monetary compensation. Concerning the purchase or construction of a new house, there is a condition about equivalence of accomplishment and total area with a demolished one. No one compares the market value of two properties. The transfer of a house can be made on another land parcel with a market value that is more or less than that of the property acquired. The conditions governing how apartments are granted are also uncertain. A total

area of 15–20 m^2/person is considered the minimum social standard. However, the location in the same city or town does not guarantee the same market value as that of the property taken. As a result, property owners can benefit in cases of alternative rehousing but they can also lose. Everything depends on their knowledge of the law.

One recommendation is that compensation should be assessed in every case (also where it is provided in a form of alternative rehousing) and that the market value should be used as a measure of equivalence. This would decrease the number of dissatisfied persons and allow the procedure to be more transparent for every participant. Dispossessed owners would realize all additional gains they have accrued and, moreover, this approach would provide protection for non-experts.

In general, compensation in the form of alternative reinstatement slows the development process. As a result, its use should be minimized. However, several peculiarities should be taken into account in the case of Belarus:

- significant increases in residential real property prices;
- poor real property markets (few transactions) in some regions;
- uncertain period between valuation date and the date of compensation payment.

Taking into account these conditions and the fact that compensation in the form of rehousing gives more protection for the individuals concerned, it is reasonable to retain it at least in the short run.

Nonetheless, the difference between monetary compensation and alternative rehousing should be eliminated. This refers first of all to depreciation. In the case of monetary compensation, depreciation is subtracted from the market value. However, in the case of alternative rehousing, the owner does not have to reimburse it. Making the conditions for two possibilities equal will facilitate the development process.

Among the non-monetary forms of compensation available in Belarus, it is necessary to distinguish one opportunity that is not "compensation" for property taken. This is alternative rehousing in the form of granting apartments. The state established this procedure in order to improve living conditions for people at the moment of compulsory purchase of their property. The apartment size is based on the minimum social housing standards established in Belarus and does not depend on the value of the property taken. This is why the additional benefit received by owners should not be treated as compensation.

The new law has brought more clarity and predictability about the basis of monetary compensation – market value. There is also a special requirement that determination of losses (compensation) has to be made by special bodies with qualified appraisers. However, the limitations imposed on private valuation companies are not equitable because appraisers working there have to prove their qualification in the same way as appraisers working for state enterprises.

The additional condition in the law that losses cannot be less than the depreciated reproduction cost is relevant for areas where the value of property is low in terms of market value and where construction costs are more than market value. In these markets, valuations that use a sales comparison approach can be problematic and the great number of adjustments makes the result doubtful. However, the depreciated reproduction cost does not include the land value (while the market value includes the value of both land and buildings). Instead of depreciated reproduction costs, it is more reasonable to use the market value obtained in the cost approach as the lowest level of compensation. Moreover, the estimation of reproduction cost allows the consideration of all improvements made by the property owner. This can cover some excessive improvements to property that are not recognized by the market (equipment for disabled people, luxury improvements, etc.).

Special valuation rules are still lacking in legislation concerning valuation date, highest and best use of the property, consideration of illegal property improvements, disregarding changes in value caused by compulsory acquisition, etc.

The date of valuation is unclear and is not dependent on the date of compensation payment. Given the drastically increasing prices of real properties in Minsk (about 35–40 percent per year), it would be rational to calculate or correct compensation just before payment. The fact of constantly rising prices gives the advantage to taking compensation in the form of alternative rehousing.

As mentioned above, land parcels and constructions are acquired separately. This can lead to confusion during the valuation process and abuse by property owners when they require different compensation for the land parcel and the house. Market value implicitly includes the value of the whole unit (land and buildings). It is necessary to take measures to prevent double compensation.

CONCLUSION

Compensation in a compulsory purchase procedure is a way of protecting property owners. This article has examined whether the compensation to residential property owners in the case of compulsory purchase in Belarus is fair. In all the cases analysed, the dispossessed owners were better off after acquisition. However, the limited number of cases analysed does not allow a general conclusion. There is also a theoretical possibility that owners can receive compensation that is less than the market value. This could occur under the existing legislation in cases when the owner chooses alternative rehousing because of an absence of compulsory valuation. Undercompensation can occur where the property owner lacks sufficient knowledge of the law. Nonetheless, the safeguards are very strong and owners can always apply for additional benefits.

The compensation rules can be characterized as "too fair" but unstable in relation to the property owners whose properties are acquired by compulsory purchase. However, the interests of all parties should be balanced. Therefore, it is reasonable to investigate the position of other parties participating in the development process in addition to the general practice of providing social housing for other persons.

In general, only some issues of compensation in compulsory acquisition have been addressed by the new legislation of 2007 – mainly concerning monetary compensation. However, the new law has not brought clarity regarding compensation in the form of alternative rehousing, valuation rules, etc. As a result, the problem needs more complex analysis, and further improvements to the legislation are necessary.

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Les questions d'estimation des terres dans les demandes d'expropriation en Turquie

En Turquie, les demandes d'expropriation de terre présentent des problèmes à la fois pour l'État et pour les propriétaires. Un nombre important de procédures d'expropriation entraînent des désaccords entre l'État et les propriétaires, ce qui se traduit par des poursuites judiciaires. Cela est souvent dû au fait que la valeur de l'expropriation est différente de la valeur vénale, ce qui fait qu'il y a des problèmes quant aux méthodes de calcul des prix des terres retenues pour obtenir la «valeur réelle». Il y a également trois autres questions importantes: i) les retards de paiement d'indemnités complémentaires aux propriétaires; ii) la prise de possession sans expropriation officielle; et iii) l'expropriation de facto.

La Turquie ayant manifesté sa volonté d'adhérer à l'Union européenne, cette question nationale prend actuellement des dimensions internationales. Les actions en justice contre les exécutions d'expropriations en Turquie commencent déjà à être portées devant la Cour européenne des droits de l'homme. Pour éviter ce problème, l'indemnité versée pour les terres expropriées doit être déterminée selon certains critères objectifs d'estimation des terres.

Cet article décrit le système et processus actuels utilisés pour le calcul de la valeur des terres pendant les procédures d'expropriation en Turquie. Il essaie de comprendre pourquoi la valeur de l'expropriation est souvent différente de la valeur vénale dans le contexte de certaines juridictions civiles. Il analyse enfin la façon dont les récents amendements apportés à la loi du pays sur l'expropriation peuvent conférer davantage de droits aux propriétaires fonciers en Turquie.

Cuestiones relativas a la valoración de tierras en la realización de expropiaciones en Turquía

La realización de expropiaciones de tierras en Turquía presenta problemas tanto para el Estado como para los propietarios de tierras. Un número significativo de procedimientos de expropiación causan desacuerdos entre el Estado y los propietarios de las tierras, lo cual conduce a pleitos. A menudo esto se debe a que el valor de la expropiación es distinto al valor de mercado, de modo que se plantean problemas respecto al modo en el que se determina el precio de las tierras para obtener el "valor real". Asimismo se consideran otras tres cuestiones fundamentales: i) los retrasos en el pago de compensación adicional a los propietarios de tierras; ii) la confiscación sin expropiación oficial; iii) la expropiación de facto.

A causa de la prevista adhesión de Turquía a la Unión Europea, este problema nacional está convirtiéndose en la actualidad en un problema internacional, como demuestra el hecho de que ya se hayan empezado a presentar demandas ante el Tribunal Europeo de Derechos Humanos contra expropiaciones realizadas por Turquía. Para prevenir este conflicto, la compensación otorgada por la tierra expropiada debe determinarse con arreglo a criterios objetivos de valoración de tierras.

En este artículo se analizan el sistema y el proceso actualmente seguido para determinar el valor de la tierra en el contexto de los procesos de expropiación en Turquía. Además, se examina por qué el valor de expropiación es a menudo diferente del valor de mercado en el contexto de algunas jurisdicciones civiles. Por último, se examinan las enmiendas introducidas en 2001 en la Ley sobre Expropiación de Turquía y el modo en que éstas pueden conceder más derechos a los propietarios de tierras en dicho país.

Land valuation issues of expropriation applications in Turkey

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In Turkey, land expropriation applications present problems for both the state and landowners. A significant number of expropriation implementations cause disagreements between the state and landowners, resulting in court proceedings. This is frequently because the expropriation value is different from the market value, so there are problems in how land prices are determined in order to obtain "real value". There are also three other key issues: (i) delays in payment of additional compensation to landowners; (ii) seizure without official expropriation; and (iii) de facto expropriation.

With Turkey bidding to join the European Union, this national issue is now becoming an international one. Lawsuits against Turkish expropriation implementations are already being brought to the European Court of Human Rights. To avoid this problem, the compensation paid for expropriated land needs to be determined according to some objective land valuation criteria. However, Turkey lacks both the necessary data and an efficient land assessment policy for determining value.

This article discusses the system and process currently used for determining land values in expropriation implementations in Turkey. It looks at why the expropriation value is often different from the market value in the context of some civil jurisdictions. Finally, it discusses how recent amendments to the country's expropriation law have given more rights to landowners in Turkey.

INTRODUCTION

Turkey has a compulsory cadastral system and there is an emphasis on the importance of land and human-related activities. Based on the country's constitution, every citizen has property rights. These private rights can only be restricted when a public interest is concerned. To regulate these public land requirements, Turkey ratified Expropriation Law No. 2942 in 1983. Since then, many expropriation cases have been brought to the courts by landowners dissatisfied with the compensation payment. The origin of this problem lies in the determination of the land price in order to obtain the real value. A significant number of expropriation implementations cause disagreement between the state and owners. With Turkey bidding to join the European Union, this national problem will become an issue of international law as lawsuits against expropriation implementations in Turkey are now being brought to the European Court of Human Rights (ECHR).

This study has examined the cases related to Turkish expropriation appearing before the ECHR over a ten-year period (data obtained from the ECHR Web site at www.echr.coe.int/ECHR). In the light of this issue and the significant numbers of such cases coming before the national courts, the Turkish authorities amended the law in order to reduce the number of objections to expropriation. Expropriation Law No. 2942 has been significantly modified by Law No. 4650, effective as of April 2001. However, there remains a need to provide an effective land assessment procedure for expropriation in Turkey.

The Member States of the Council of Europe affirm under Article 1 of the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11 (Council of Europe, 2004):

> *"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.*
>
> *"The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."*

According to the established case law of the ECHR and the former European Commission of Human Rights, three distinct rules apply to ownership of property. The first rule contains a general guarantee of the right to property (Article 1, first paragraph). The second covers deprivation of possessions and subjects it to certain conditions (Article 1, first paragraph). The third rule recognizes that the contracting states are entitled, among other things, to control the use of property in accordance with the general interest (Article 1, second paragraph).

Under Turkish law, the state is entitled to acquire private lands for a public purpose in return for payment to the affected owners and users of the land within the framework of the Expropriation Law. Article 46 of the Turkish Constitution allows for the confiscation of property with compensation by a public agency for the public benefit. The seizure of movable and land property belonging to private persons by public corporations and bodies to be used for public purposes without the consent of the owner in accordance with the decisions made by authorized bodies and with the cost prepaid is termed "expropriation". Real estate subject to private ownership may be expropriated by the competent administrative authorities where required by the public interest. Expropriation can be realized only for the purpose of providing public services or conducting public initiatives. Compensation for expropriated real estate shall be paid in cash and in advance or, in specific situations foreseen by the law, in equal instalments.

BACKGROUND TO TURKEY'S EXPROPRIATION LAW

During the Ottoman period, no legal readjustment regarding expropriation or eminent domain was observed until the administrative reforms of 1839. During this time, Islamic law was in force in Turkey and expropriation through purchase of the land from the owner was rare – most public services were provided through charitable foundations. The first mention of expropriation can be found in an 1848 legal document on building regulations (*Ebniye Nizamnamesi*), which was drawn up to enable a readjustment of city sites demolished by fires and the opening of roads in Istanbul. This makes the following statement regarding expropriation: "in the case that the government intends to purchase a land, the owner shall be obliged to sell it or to demolish the harmful structure desired to be eliminated". The conditions, methods, authorities of and payments for expropriation are mentioned in different legal texts issued after this date. Item 21 of the first constitution (adopted in 1876) stipulated that expropriation could be carried out only on condition that it was for public interest and in return for cash payment.

The "Decree on Expropriation in the Name of Public Interest" (passed in 1879) was the first comprehensive law on expropriation in the Republic of Turkey. This was replaced by the "Municipal Expropriation Law" in 1939 and the "Expropriation Law" in 1956 (Ersoy, 2005). Today, the Expropriation Law (No. 2942) and laws concerning amendments thereto (including Law No. 4650) apply.

THE PROCESS

Commencement of expropriation

In Turkey, expropriation procedures begin following a decision by the state

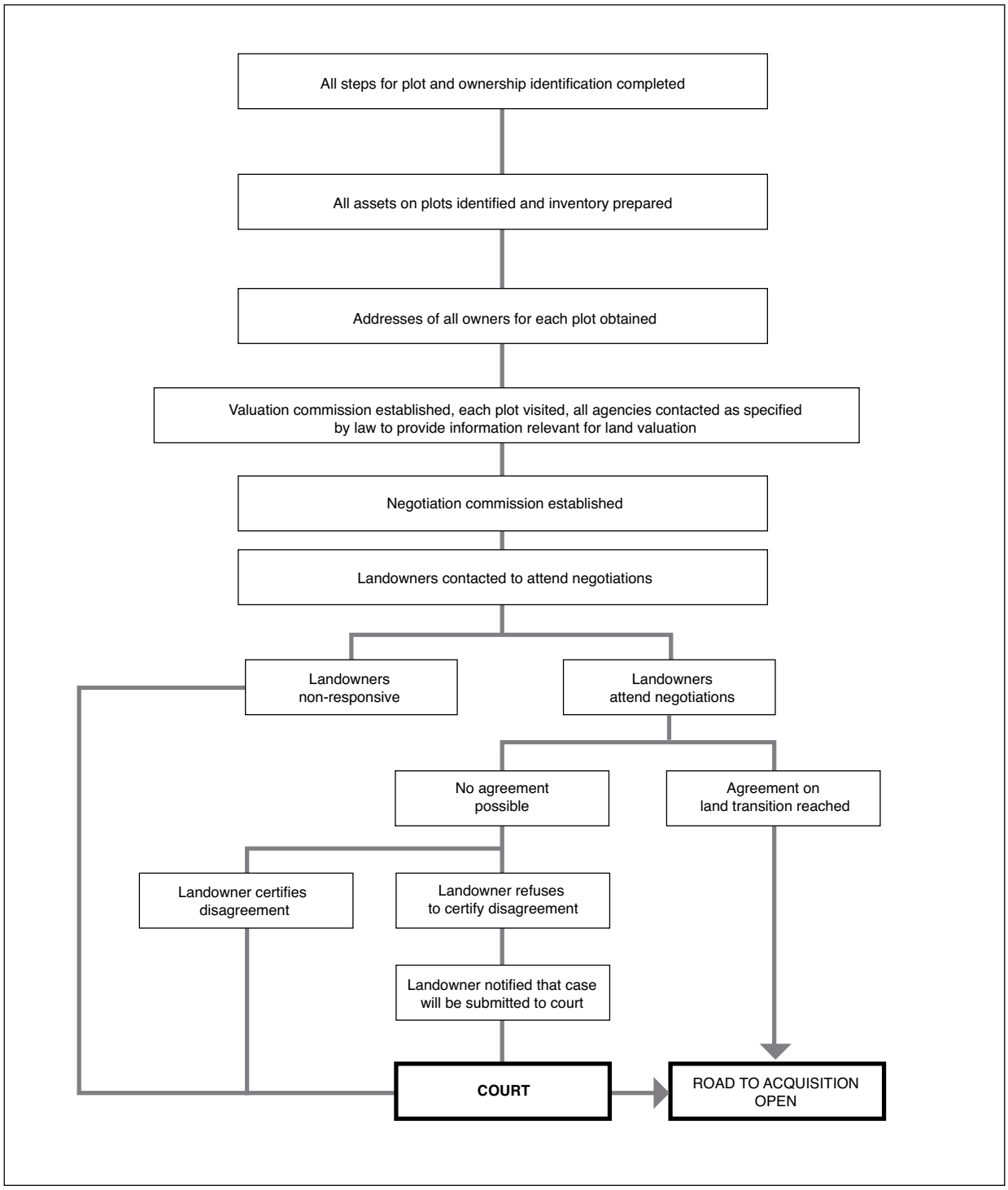

FIGURE 1
Main steps in the expropriation process, Turkey
Source: IFC, 2002.

or the municipal authorities that the implementation of a project will necessitate the acquisition of land for public use (Uzun, 2000). Feasibility studies that have been conducted for each subproject provide information on the need to carry out an expropriation process. Figure 1 describes the main steps in the expropriation process.

Valuation

A valuation commission assesses the value of the land to be expropriated. According to Article 8 of the Expropriation Law, expert opinion on the value of the land must be sought. This can be provided by local and central agencies, real estate agents and chambers of commerce. The standard applied in assessing the value of the land and

property assets is that of full replacement cost. Valuation procedures, as specified by law, allow for a fair and transparent process of compensation to all owners.

The process of valuation begins with the selection of a valuation commission within the expropriation agency (Uzun and Yomralioglu, 2005; Yomralioglu, Uzun and Nisanci, 2002). A valuation commission is initially established by the authorities with six participants assigned to undertake the task of evaluation and valuation of the land to be expropriated. The participants are nominated by authorities and include relevant municipal and utility officials. The responsibilities of the valuation commission are:

- assess the land value by conferring with the relevant state authorities and local real estate agencies;
- compile the acquired data and analyse them according to a prescribed methodology;
- assign monetary values to the land and other immovable assets.

The valuation commission calculates, on a plot-by-plot basis, the capitalized income loss from assets, and this is applied to both temporary and permanent expropriations within the confines of the law. In calculating the net income from land, the following are taken into account:

- type and quality of the property or resource;
- surface area;
- the value of all distinctive characteristics that can affect the overall value of the land;
- tax statements, if any;
- an estimate made by official authorities on the date of expropriation;
- the net income of the land, immovable property or resources according to the locations and conditions valid on the date of expropriation, and the determination of its value based on its original condition. The formula used is $K = R/f$, where K is the value (expropriation compensation), R is the net income (gross income minus production costs) and f is the capitalization rate (a type of risk related to the capital invested in agricultural land);
- the sale amount of similar land sold before the date of expropriation;
- official unit prices, construction cost estimates and depreciation of buildings on the date of expropriation;
- other objective measurements that may influence the determination of valuation.

The valuation of agricultural land rests on the capitalization of net income from the land. As such, it takes into account all of the above considerations. However, urban land is not valued on the basis on its net income but on the comparison of its market value before and after construction (Nisanci, 2005; Yomralioglu, 1993).

Announcement

The announcement of intent to expropriate occurs when the municipality or the municipal utility notifies the owner of the property to be expropriated by an official registered letter. The notification must: (i) mention the intent of the municipality or municipal utility to purchase the land through a negotiated settlement; (ii) describe clearly the steps in the land acquisition process; and (iii) describe clearly the provisions for appeal available to the landowner at each relevant step.

Transaction

The compulsory purchase of land can take place through two processes: (i) negotiated settlement; or (ii) court settlement.

Negotiated settlement

Where the owner of the land agrees to a negotiated settlement, then the discussions between the state and municipal utilities will finalize the transaction. The state or municipal utilities should make it clear that negotiations will last for no more than three months and provide the landowner with a description of the land acquisition steps and the owner's rights to due process and appeals at each step. Failure to reach a negotiated settlement will result in a court settlement. Once there is agreement on the price, the expropriation should be registered

in the land office and the expropriation fee will be paid, as per Article 8 of the Expropriation Law.

Court settlement

A court settlement will occur if: (i) the negotiated settlement fails; or (ii) the landowner, after receiving notification from the state or municipal utility, declines to negotiate. Prior to requesting a court settlement, rights to due process and appeals will be explained fully to the landowner. A lawsuit will be filed by the state or municipal utility with a relevant court for valuation and registration, pursuant to Article 10 of the Expropriation Law. The basis for calculating the compensation payable for the land and property is full replacement value.

Non-agreement

In the event of non-agreement, the institution applies to the court for a land appraisal and for registration of the land in the name of the institution with rights of use, possession and control. A public announcement of the process is made through the media and the court summons the landowner. A trial date is set within a 30-day period. If the landowner and institution do not agree before the court on the land price, the court assigns independent experts to appraise the land within ten days. The court then sets a new trial date within 30 days and submits the results of the appraisal to the institution and to the landowner. In the event of non-agreement on this court-supervised appraisal, the court can appoint other appraisers within a 15-day period. Following the second appraisal, the court will establish a final expropriation price. The following steps will then be taken:

- The price determined will be deposited in a national bank account in the name of the landowner.
- A bank receipt for the deposit will be submitted to the court.
- The court will decide on the title registration change and communicate the new title deed registration to the Land Registry Directorate. This completes the registration in the name of the institution with rights of use, possession and control. The landowner still has the right to appeal the valuation decided in the court, but not the expropriation of the land (Figure 2).

TURKISH EXPROPRIATION CASES AND THE EUROPEAN COURT OF HUMAN RIGHTS

Between 1 January 1992 and 30 March 2003, 354 expropriation cases concerning Turkey came up before the ECHR. Tables 1 and 2 show the distribution of the number of cases and the annual number of cases and aggregate amounts for pecuniary damage paid to applicants by Turkey's expropriating authorities.

Types of cases

The ECHR does not rule on land valuations that have been assessed by the valuation commissions and determined by the domestic courts; the land's value is not reassessed by the ECHR. In all cases of expropriation, the court examines only whether a fair balance has been maintained between the demands of the general interest and the requirements for the protection of the individual's fundamental rights. For applications lodged with the ECHR, applicants refer to Article 1 of the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11 (above).

Based on the above article, the expropriation cases considered in Tables 1 and 2 can be placed into three main categories (Table 3).

Delay in payment of additional compensation

In these cases, the compensation applicants had not received a payment reflecting the increase in inflation during the period between the date the amount was fixed and the date of actual payment. Abnormally lengthy delays in the payment of compensation for expropriation lead to increased financial loss for those whose

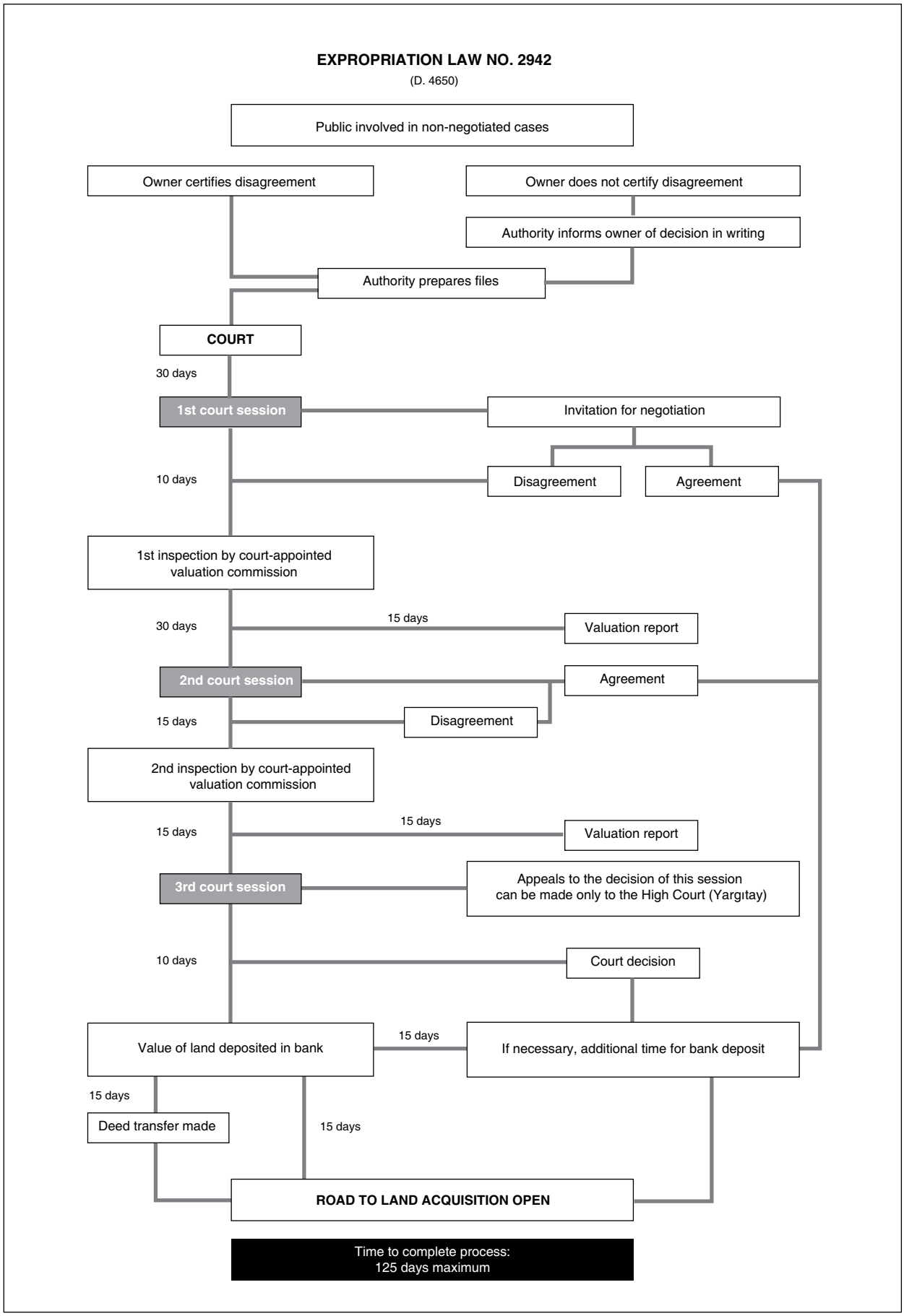

FIGURE 2
Steps in the expropriation process in the event of non-agreement, Turkey
Source: IFC, 2002.

TABLE 1

Expropriation cases brought before the ECHR and involving Turkish institutions, 1992–2003

Expropriating authorities	Cases (no.)	Percentage (%)
National water board	206	58.0
National roads and highways authority	107	30.3
Provincial private administration offices	11	3.2
Municipalities	9	2.5
Ministry of Construction and Settlement	8	2.3
Ministry of Defence	7	2.0
National airports	6	1.7
Total	354	100

TABLE 2

Pecuniary damages of expropriation cases brought before the ECHR and involving Turkish institutions, 1992–2003

Year	Cases (no.)	Total pecuniary damage (EUR)
1992	140	1 042 134
1995	7	669 796
1996	13	6 755 569
1997	20	2 399 567
1998	19	2 271 984
1999	40	3 163 591
2000	14	1 630 370
2001	44	785 614
2002	36	249 059
2003	21	550 678
Total	354	19 518 362

TABLE 3

Distribution by type of expropriation cases brought before the ECHR and involving Turkish institutions, 1992–2003

Types of cases	Cases (no.)
Delay in payment of additional compensation	344
Seizure without an official expropriation	9
De facto expropriation	1
Total	354

land has been expropriated. This can place them in a position of uncertainty, especially when the monetary depreciation is taken into account.

Applicants to the ECHR complained that the additional compensation for expropriation that should have been obtained from the authorities had fallen in value. This was because the default interest payable had not kept pace with the high rate of inflation in Turkey. Therefore, injured parties claimed for losses sustained as a result of inflation, citing Article 1 (above). As a result, the ECHR determined that there had been a violation of said Article 1. The relevant rule has now been changed following amendments to the Expropriation Law (which includes Law No. 4650).

Seizure without an official expropriation

These cases concerned plots of land that had been seized illegally and without any payment to the owners by the administration for different purposes, such as dam and road construction. Turkey's domestic courts had cancelled the registration of the applicants as owners of the land and transferred the property to the national authorities on the grounds that it had been occupied by them in the general interest for more than 20 years without interruption. It was time-barred as the authorities had been in possession of the land for more than 20 years. This rule set out in Article 38 (Extinction of rights) of the Expropriation Law provides:

> *"In the case of immovable property subject to expropriation where the expropriation procedure has not ended or of immovable property whose expropriation has not been requested but which has been assigned to public-service use or on which buildings intended for public use have been erected, all the rights of owners, possessors or their heirs to bring an action relating to that property shall lapse after twenty years. Time shall begin to run on the date of the occupation of the property."*

The ECHR decided that there had been a violation of Article 1. On 10 April 2003, the Constitutional Court annulled Article 38 of Law No. 2942.

De facto expropriation

The applicants claimed that they had been deprived by the authorities without compensation of plots of land that belonged to them. The ECHR ruled that the administration should pay the applicant compensation, starting from the date of de facto expropriation.

TABLE 4
Main modifications to the Expropriation Law

	Before	After
Respect for customary ownership rights and traditions	Earlier land acquisition practices did not require full investigation of customary rights and rights of heirs. The authority expropriating the land could obtain rights to its use by merely depositing the cash value of the land estimated by a local land commission and leave it to the owners to sort out their claims. Thus, rightful customary owners or heirs had to wait for the completion of lengthy legal processes before receiving payment.	The law now requires the authority, not the people, to determine these rights. The authority is responsible for the identification of the rightful owners. It is responsible for locating these owners and proving that it has carried out the negotiation process.
Putting people rather than their assets first	Dialogue and partnership with landowners and their communities in the land acquisition and resettlement action plan preparation process was not required. There was a clear assumption and practice that people would not agree with the land valuation presented by the authority. If the assets lost were of low value, as was the case in linear projects, people were simply forced to accept the little they were offered; if the assets were valuable, they were required to endure never-ending court procedures.	The law now forces the authority to treat all owners equally and with respect. It forces a partnership between the owners and the authority. It also ensures that all claims to land are recognized and considered by the authority. By making it difficult, time-consuming and costly for the authority to acquire land outside the framework of a negotiated solution, it forces the authority to be far more people-focused and far more participatory than before.
Assuming the financial burden of ownership establishment and non-negotiated solutions	Affected parties were required to bear the cost of non-negotiated solutions. This meant that the owners were responsible for seeking recourse. Even where they joined with other affected parties to reduce the transaction costs, they still had to pay a significant portion of the compensation they received for legal fees. This situation created a particular disincentive for populations affected by linear projects as owners lost small portions of land and expected to receive a limited amount of compensation; as such, they could not risk high legal expenditures.	The law now passes the transaction costs of land acquisition from the owners to the authority. It thus provides equal right to recourse to the poor and the wealthy. It also ensures equity among other social groups, regardless of ethnicity, etc. The costs of owner identification, owner notification and negotiation meetings are borne by the authority. If negotiations fail, it is the authority that has to turn to the courts and thus bear the relevant expenses. The authority also assumes the costs of the establishment of the customary rights and the rights of the heirs.
Land for land	Only cash payments were offered in return for expropriated land, except in cases where investment projects caused resettlement. International policies, however, favour land-for-land arrangements.	Under the Baku–Tbilisi–Ceyhan Pipeline Project, the land requirement from any single owner is relatively small. Moreover, the landowners will be able to use their land once the construction is completed. Even where some smallholders may lose a substantial portion of their land to a project, they would rather receive cash compensation and buy replacement land themselves if they so wished. Past attempts to provide replacement land have only met with discontent as the market performs better than the public agencies.
Interest income from compensation	People could not earn interest payments at the market rate if they challenged their compensation payments. This caused major damage in an economy where banks offered nearly 100 percent interest.	Disputed payments kept by a trustee for an owner now earn interest at the market rate. Thus, by challenging the valuation decisions, owners will not incur a financial loss.
Payment for assets	Owners had to wait many years for payment if they disagreed with the initial price offered for their land and other assets. Each legal claim took years to reach a conclusion (in a highly inflationary economy). Even when the courts granted the claim of an owner, the compensation value would be eroded; thus, the owner had to initiate another appeal. There are outstanding valuation claims associated with projects that started several decades ago.	The law now requires that full payment for the land/assets be made in the personal bank account of a legitimate owner before the authority can acquire the land. It stipulates that the courts give priority to these hearings and obliges the legal system to act within pre-established deadlines. Valuation claims are heard and settled before the ownership transfers are made. No land/assets can be acquired or expropriated prior to full cash payment; thus, there is no risk of erosion of compensation payments.

Source: IFC, 2002.

MODIFICATIONS TO THE EXPROPRIATION LAW

The Constitution of Turkey as amended in October 2001 includes major elements to protect the public interest and private owners during the expropriation process. Private users cannot benefit from expropriating public lands and assets without paying compensation to the public at large. Even when land is acquired for public interest, expropriation agencies cannot benefit from the expropriation of private lands and assets without paying into a private bank account – in advance of actual land appropriation and project

construction – the value of the expropriated assets. On the other hand, the project gains use of the expropriated land and assets, and project construction can begin once this legal path has been followed and completed.

Significant amendments to Expropriation Law No. 2942 will mean significant advantages for people affected by projects that require land expropriation. The authority carrying out the expropriation process is now obliged to determine the value of immovable assets and then invite the landowners to negotiate if they disagree with the value proposed. The payments for the expropriation must be made to the relevant people within 45 days following the agreement date.

Until recently, public authorities that needed land for "public interest" could acquire land without a genuine effort to establish "rightful owners" and without due process. However, the Expropriation Law as amended by Law No. 4650 requires that owners be identified and that their addresses be established. The law demands that the owners be contacted in writing, and asked to come forward and negotiate a price for their land. Should negotiations fail, the land cannot be acquired prior to a court decision. The court will seek proof that every effort has been made to locate the owner before making its decision. In addition, some further significant modifications have been made to the Expropriation Law (summarized in Table 4).

CONCLUSIONS

The Constitution of Turkey gives every citizen property rights; these private rights can be restricted only where the public interest is concerned. In Turkey, compulsory acquisition of private land has been regulated by the Expropriation Law since 1983. Since then, many expropriation processes have been brought to the courts by landowners because they have not been satisfied with the compensation payment. The origin of this problem lies in how the land price is determined in order to obtain the real value. A significant number of expropriation implementations have caused disagreement between the state and landowners. As has been noted above, now that Turkey is seeking to join the European Union, this national problem has become an issue of international law with lawsuits against Turkish expropriation implementations being brought to the ECHR.

The Turkish authorities have realized the importance of this issue and have amended the law significantly in order to reduce the number of such cases. Today, public authorities that require land for "public interest" can no longer acquire land without a genuine effort to establish "rightful owners" and without due process. However, an effective land assessment procedure in expropriation still needs to be developed in Turkey.

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