Towards a protocol on fair compensation in cases of legitimate land tenure changes

Input document for a participatory process

Rethinking **Expropriation Law**

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A group of experts and stakeholders have been consulted during the drafting of this input document. They were involved at different stages, from participating in a scoping session to interviews or review of drafts. The full list of consulted experts and stakeholders is provided in section G.

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The **Rethinking Expropriation Law** project grew from an initial gathering of law scholars from around the world in September 2013 at the University of Groningen, The Netherlands. The group, further expanded, met again in Rome in September 2014. Both meetings resulted in two academic publications (Rethinking Expropriation I: Public Interest in Expropriation and Rethinking Expropriation II: Context, Criteria and Consequences of Expropriation), Eleven/Juta publishers 2015. Another follow-up meeting was held in June 2015 at the State Council in The Hague. For the 2015 meeting, a book on comparative aspects of expropriation law was prepared and launched at the meeting (Sluysmans, Verbist, Waring (eds) Expropriation Law in Europe, Kluwer/Wolters publishers 2015).

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Input document for a participatory drafting process

Preface

The Organising Committee of the Dutch Land Governance Multi-Stakeholder Dialogue has commissioned an investigation into the need and possibility to develop a protocol on fair compensation in cases of legitimate land tenure changes, with a focus on expropriation. This is in line with the Ministry's role in the Land Governance Multi-Stakeholder Dialogue. This dialogue involves government, civil society, business, finance and academia.

The protocol should serve as guidance for all relevant actors, such as representatives of affected people, governments, project developers, financers, donors and civil society organisation in cases where a fair compensation needs to be assessed. Land tenure changes, particularly relocation, are an impactful process for holders of tenure rights. The duty to avoid or at least minimize displacement is mentioned across a variety of voluntary guidelines, in both national and international legal systems, and in human rights conventions.

The focal point of this document is *fair compensation*. However, it is important to note that compensation can only be meaningfully discussed, and an assessment for 'fairness' can only take place if the preconditions of "genuine public purpose" and "due process" are met. All cases need to comply with international human rights law and conventions, applicable voluntary guidelines, and other legislation. These can, for instance, include the requirement of free, prior and informed consent (FPIC). It is important to mention that no protocol on fair compensation can legitimize expropriation without compliance with all mandatory legal preconditions.

This document is an input document, which aims to facilitate the drafting of a protocol. The goals of this input document are the following:

- To contextualize the issues and provide a common language.
- To help identify a potential goal and scope for the protocol starting from a review of problems in the field.
- To specify the key challenges and decisions that require special attention
- To provide technical material to support the discussion.

This input document was developed in consultation with experts from various organisations, including those affiliated with the Dutch Land Governance Multi Stakeholder Dialogue.

We cordially invite all interested readers to join the dialogue and participate in the development of the protocol on fair and rightful compensation. The input of stakeholders and experts is crucial for a well-supported result that can be widely used.

Executive Summary

Distribution of land is visibly altering, especially in developing countries This is in line with other trends such as urbanisation, agricultural commercialization, growing extraction of natural resources and expansion of infrastructure. Land tenure change is proceeding by changed legal norms in reform programmes, voluntary market transactions, or through the process of expropriation, in which the government claims land for a public purpose.

Changes in who holds which lands and how they acquired it, land tenure and expropriation in particular, should be in accordance with both national and international law, as well as human right principles. Additionally, a number of new guidelines have been developed, most notably the Voluntary Guidelines on the Responsible Governance of Tenure, Fisheries and Forests (VGGT) by the Committee on World Food Security of the United Nations. These guidelines aim to protect the rights, livelihoods and way of life of affected people and communities.

Unfortunately, many precedents demonstrate large-scale land tenure changes that result in a violation of rights or a deterioration of livelihoods and way of life of affected people and communities. This is caused by a lack of compliance with laws and conventions, and by a lack of guidance on the application of these laws and conventions. Or, the laws themselves, may be inconsistent and/or unclear, thus not be sufficiently protective of vulnerable landholders, such as the millions of customary landholders who do not hold formal title.

The assessment of prevailing guidance by this research team has identified compensation as a blank spot. Guidelines on the implementation of inclusive and sufficient compensation to all legitimate tenure holders, such as provided by the VGGT, are not sufficient. This holds for many aspects, for example for losses in the 'non-market' domain, such as social, cultural, religious, spiritual and environmental values, and for informal, customary and collective tenure rights. The Organising Committee of the Dutch Land Governance Multi-Stakeholder Dialogue has commissioned a study to investigate to what extent and how these blank spots can be targeted with a protocol on fair compensation.

In compulsory land tenure changes, rightfulness and legality depend on various factors. Genuine public purpose and due process have been identified as central pre-requirements to fair compensation. There is a *genuine public purpose* if the grounds for expropriating people are justified as the underlying project genuinely serves the public benefit and that this has been established after having followed a due process. With a *due process* the expropriation process is in line with all legal and procedural requirements. This includes meeting the requirement of Free, Prior and Informed Consent (FPIC) when this is applicable. If process and purpose pre-requirements are met, and adequate compensation is provided to affected people and communities for the loss of their tenure rights, it is possible to talk of fair compensation. Fair compensation should at least restore the livelihoods of affected people. People should not be left in a worse situation.

A protocol can help all central stakeholders with land tenure changes by defining minimum requirements and best practices. Besides giving direct guidance to involved stakeholders, the protocol aims to pursue legal change in order to have elements of compensation described more clearly and more fairly in hard and soft law, both on national and international level.

This protocol will be relevant for various stakeholders; examples are given below.

- Affected individuals and communities (possibly with the help of CSOs) can make better informed decisions in negotiations towards a negotiated settlement. Alternatively, they can demand to get what they deserve in an expropriation case.

- Governments can use the protocol to refine national legislation with uptake of existing guidelines and good practice examples.
- Companies and investors or donors see reduced risks if their rights and responsibilities are clearly spelled out

The process to develop a protocol should be endorsed and participated by a broad and international partnership of stakeholders, and independently monitored. Furthermore, it should build on existing efforts, academic knowledge and practical expertise, with the application of on-the-field testing. Finally, operational tools should also be developed to make the protocol easily applicable in specific situations.

In the first phase, of which this document constitutes the first step, the groundwork for the development of the protocol should be laid. This first phase entails four elements: an international and diverse partnership should be built, a governance structure for developing a protocol must be established, key scoping decisions should be addressed and a knowledge base should be developed.

- First of all, an international, multi-stakeholder partnership is conditional for a multi-perspective process, resulting in a protocol that is widely recognized as best practice and widely used.
- The governance structure is important to guard the quality of the development process, the final protocol and its implementation. Some suggestions on how to achieve this are presented.
- Key scoping decisions include for example main aim and target users, reference set of rules or practices, scope and depth of guidance on the prerequisites of legitimate land tenure change and the degree to which a protocol should be general or specific to certain land tenure change types and situations.
- Lastly, a knowledge base on compensation for land tenure change should be developed together with stakeholders, experts and practitioners.

Besides proposing the rationale for an international protocol on fair compensation and outlining some of the characteristics it should have (Sections A-D; summarized above), this document presents the results of preliminary research on the topic (Sections E-I).

Section E provides an overview of problems emerged during the consultation phase that call for further guidance around compensation. In line with the above, the problems are structured as problems mainly relating to ‘genuine public purpose’, to ‘due process’ and to ‘fair compensation’. Most attention is dedicated to the last category. Here, problems encountered are grouped among four key questions that should be answered: (i) who should receive compensation, (ii) which losses should be compensated, (iii) what forms of compensation are appropriate, and (iv) how should the amount of compensation be determined. Section F is a glossary of important terms. Section G lists the consulted experts in the process so far. Section H provides a collection of normative and informative literature references and two original reviews on compensation norms, a technical one on guidelines and a legal one on the uptake of the VGGT in national laws of 30 countries. Section I, lastly, contains two case studies on land tenure changes in Haiti and Timor Leste. The case studies illustrate concretely how compensation schemes create problems that could be prevented or mitigated by additional guidance.

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A. Motivation for a protocol on fair compensation

This section introduces the context of land tenure change, expropriation and compensation. It motivates why a protocol on compensation is of value

A.1. Why a protocol on fair compensation?

Distribution of land[1] is visibly altering, especially in developing countries[2]. This is in line with key trends[3] such as 1) industrialization, 2) urbanisation (which often necessitates transformation of land from agricultural to residential use), 3) growing extraction of natural resources (e.g., mineral resources, timber, plantation and other commercial agricultural development), 4) expansion of infrastructure (e.g., dams and roads) and 5) urban and rural redevelopment. Part of these land tenure changes involve expropriation[4] and can put the livelihoods and way of life of local communities and individuals at serious risk. In the worst cases, this can lead to the extinction of an entire culture.

Indeed, inconsistent and/or unclear laws, non-compliance with existing laws, and a lack of guidance have often led to a deterioration of the situation of affected people and violations of human rights[5]. Expropriation is placed within the domain of national legislation but should also comply with international law, conventions and standards, and human rights principles. Furthermore, sector specific guidelines may apply and international stakeholders often apply voluntary standards. These guarantee additional protection of the rights of people involved.

International legal instruments that concern expropriation are among others the *Universal Declaration of Human Rights* and related covenants, the *UN Declaration on the Rights of Indigenous Peoples* and the *ILO 169 Convention on Indigenous and Tribal Peoples*[6]. Other and more specific international principles developed around this issue include for example the *OHCHR Basic Principles and Guidelines on Development-based Evictions and Displacement* and CESCR General Comment 7 on the right to adequate housing and evictions.

The *Voluntary Guidelines on the Responsible Governance of Tenure (VGGT)* developed by the Committee on World Food Security are the most widely-used guidelines for land tenure changes. The FAO has also published *Land Tenure Studies 10: Compulsory acquisition of land and compensation.* Well-known institutional standards are the *World Bank* Environmental and Social Framework (and its predecessor on responsible land tenure, *Operational Directive 4.30*[7]) and the *IFC Performance*

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[1] A definition and typologies of land tenure changes in scope are given in section B. Here we use the term of land tenure changes and land acquisition interchangeably.

[2] See e.g. J. Lindsay, K. Deininger, Th. Hilhorst, 'Compulsory Land Acquisition in Developing Countries Shifting Paradigm or Entrenched Legacy?' Proceedings of the World Bank Land and Poverty Conference 2016. Washington DC, or F. Pearce 'Common ground Securing land rights and safeguarding the earth' Oxfam, International Land Coalition, Rights and Resources Initiative Report 2016.

[3] Ibid., and from consulted experts

[4] The term has synonyms like: 'compulsory acquisition', 'constructive taking', 'condemnation', 'seizure of land' or 'deprivation'. A Brief glossary of key definitions relevant in the protocol is given in section F

[5] See section I for a case studies illustrating this point.

[6] A number of documents specify important applicable requirements without specifically discussing land tenure changes, i.e. *Guiding Principles on Business and Human Rights* (OHCHR), the *UN Principles on Housing and Property Restitution for Refugees and Displaced Persons the 'Pinheiro Principles'* (UNHCR) and CERD recommendation 23 on Indigenous people. See also section H.1 for a selection of relevant international law instruments.

[7] Other key World Bank guidance that has been incorporated in the Environmental and Social Framework are Operational Policies 4.10 on Indigenouspeople and 4.12 on Involuntary resettlement.

Standard 5 (PS5). The Free, Prior and Informed Consent (FPIC) guide of the Roundtable for Sustainable Palm Oil (RSPO) is an example of sector-specific guidance.

International regulations, conventions and guidelines promote respect of human rights, secure land tenure rights and equitable access to land. They generally go well beyond most national laws[8] and are endorsed by a wide range of stakeholders. The VGGT in particular provide new standards to the two well-known requirements if land tenure change proceeds via expropriation: public purpose and compensation[9].

Regulations, conventions and guidelines specify an overarching duty to avoid (or minimize) expropriation[10] and an obligation to provide "fair" compensation whenever expropriation occurs. However, the question of what constitutes a "fair" compensation by changes of tenure rights is a key element of guidance that is not provided yet in much detail: how to determine whether the right amount of compensation – and compensation in the right form – is paid to the right people when expropriation takes place?

This absence of objective guidance on the conditions under which compensation is fair leaves local communities vulnerable to exploitation and human rights abuse. The large number of people that live and work on land that they do not have an official title to, are especially vulnerable in this regard as losing land does not only affect their asset levels, but also their entire livelihood and way to live (socio-cultural aspects). From the perspective of companies, investors and governments, lack of objective guidance leads to high transaction costs and reputational risks for private parties and often results in long lasting conflicts.

A clear and effective protocol[11] on fair compensation could help protect vulnerable communities by clearly stating what they should be entitled to. It could reduce risks for well-meaning companies and investors and potentially could reduce barriers to economic development. Furthermore, it could enable more realistic assessment (e.g., societal cost-benefit analysis) of projects by government and the private sector, at an early stage, which reflect the genuine losses to communities of displacement.

Besides directly guiding abovementioned stakeholders, a protocol can stimulate legal change in order to have elements of fair compensation described more clearly and more fairly in relevant elements of legislation.

A fair compensation protocol can also help investors to identify and address situations where national laws are not (sufficiently) in line with international law, in particular human rights principles, as well as international guidelines. This emerged during the consultation as a critical issue..

A.2. The goal of a protocol on fair compensation

The goal of such a protocol would be to provide guidance to people and organizations involved in fair compensation in cases of legitimate land tenure change. This guidance should help protect, restore or improve the livelihood and way of life of affected people when compensation is necessary, and

[8] As testified by many of the experts consulted (see section G for the list of consulted experts).
[9] L.C.A. Verstappen in: B. Hoops, E. Marais, H. Mostert, J.A.M.A. Sluysman, L.C.A. Verstappen (eds), Rethinking Expropriation Law, Volume I: Public Interest in Expropriation and Volume II: Context, Criteria, and Consequences of Expropriation, The Hague: Eleven International Publishing, 2015.
[10] E.g. par 16.8 in the VGGT: "States should […] explore feasible alternatives […] with a view to avoiding, or at least minimizing, the need to resort to evictions.".
[11] Alternative terms than "protocol" may be considered at a later stage if reputed more in line with the required type of guidance.

prevent infringements on the human rights of local communities. Furthermore, it aims to limit grievance and injustices, and potential civil conflict.

The protocol aims to do this by pursuing three objectives:

- Establishing the minimum requirements for compensation to be considered fair in terms of (i) the characteristics of the compensation itself as well as (ii) the preconditions of process and purpose that must be met by the land tenure change.
- Setting out good practice principles and approaches with regard to assessing and facilitating compensation that should be encouraged in practice (in a voluntary way).
- Aiming for legal change. Encouraging inclusion of the above elements in hard and soft law, both on national and international level as well as amending administrative mechanisms.

A.3. Success criteria

It is important to define success criteria for the protocol. An initial list based on the preliminary consultation is presented below. Success criteria can be based on the adoption, the usability, the relation to existing guidance, and the comprehensiveness of the protocol. The list of criteria should be validated and possibly refined in an early stage of the protocol development process.

Adoption on the international field

- The protocol gains international traction and is used by actors from different countries.
- It is accepted by a broad, international multi-stakeholder field – including Northern and Southern governments, investors, companies active in land-based investments, and NGOs and civil society – as a key standard to facilitate fair and rightful compensation, and leads to changes in national law regarding expropriation.
- It receives positive feedback for the process by which it was written (i.e. a participatory multi-stakeholder setting) and this process gains traction in other sectors and for other protocols.

Usability

- The protocol is sufficiently practice-oriented to be directly useable in the field by all stakeholders, including during equal negotiations.

Compliance and complementarity to existing guidance

- The protocol is grounded in shared principles that can be derived from international norms, but extends these as necessary.
- It is well-connected to existing regulation, legislation, guidelines and human rights standards, and relates to ongoing processes that are developing new guidance, around the topics of genuine public purpose and due process.
- It fills gaps that exist in current regulation, legislation, guidelines and human rights standards but does not re-invent elements that already exist.
- It proposes novel approaches and it explain and stimulate good practices.

Comprehensiveness

- The protocol follows sound methods for determining fair compensation, for instance for valuation, of tangible and intangible assets.
- It discusses all types of legitimate tenure rights, both informal and formal, t sufficient depth.

B. Suggested scope and use of the protocol

This section discusses central questions around the scope of the protocol. It starts with the link between fair compensation and the broader context of legal requirements for expropriation, summarized in the two categories of "genuine public purpose" and "due process". Other scoping considerations are discussed in the following section and the framework of problems that the protocol aims to address is presented. Text in *italics* denotes important decision nodes that need to be discussed during the next project phases. A summary of all these key scoping choices is given in section B.5. The last subsection discusses the stakeholders that can benefit from the protocol.

B.1. Fair compensation in relation to "genuine public purpose" and "due process"

The right to fair compensation is merely one aspect of a wider framework of rights linked to land and human rights. Any legitimate provision of compensation is therefore subject to certain preconditions and is only appropriate in specific circumstances. In compulsory land tenure changes, fairness, rightfulness and legality depend on various factors, of which fair compensation, although necessary, is not a sufficient one on its own. Most importantly, in order to be considered fair, land tenure changes have to meet a number of criteria in terms of genuine public purpose and due process[12] . These prerequisites are discussed below.

"Genuine public purpose" and "due process" as prerequisites for fair compensation

Genuine public purpose and due process are considered mandatory prerequisites for fair compensation (Figure 1)

There is a *genuine public purpose* if the grounds for expropriating people are justified as the underlying project genuinely serves the public benefit and that this has been established after having followed a due process. A *due process* guarantees that the expropriation process is in line with all legal and procedural requirements that ensure that law is respected and the affected people have a genuine chance to participate, negotiate and contest the expropriation.

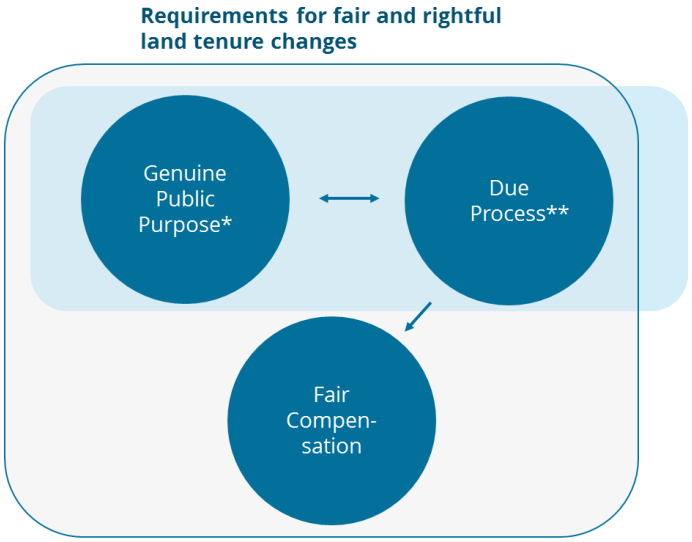

Figure 1: Schematic overview of three requirements for fair and rightful tenure change. Genuine public purpose is a core requirement in all cases involving expropriation. Due process must be guaranteed throughout all phases of tenure change, including the determination of genuine public purpose and of fair compensation. Note that the diagram does not imply a time sequence. Determination of fair compensation may take place early in the process (but with participation of all affected parties).

[12] Other authors refer to these three concepts as 'fair purpose', 'fair process' and 'fair compensation', see e.g., L. Alden Wily, 'Towards Best Practice In Public Land Acquisition', (Unpublished Guideline), 2013

These prerequisite of compensation can only be met if all requirements specified at different levels of the international, national and institutional normative context are met. Relevant human rights must be respected, the practice must be in line with national and international law and all applicable guidelines should be followed.

This includes for example meeting the legal criteria for interference with human rights (basis in law, necessity in a democratic society, proportionality to a legitimate objective with the least restrictive interference possible, and non-discrimination), receiving FPIC for proposed interference with Indigenous lands, territories and resources, and carrying out prior and independent Environmental and Social Impact Assessments. Affected communities should be given the right and the capacity to participate in the planning and processes that decide on the means for achieving the public purpose. This should include assessment of all options, including alternatives to expropriation. Any outcome must be subject to judicial review with the right to appeal[13]. Circumstances may be such that no amount of compensation can justify expropriation. One example would be in the context of an Indigenous or other highly land-connected community that has withheld their free, prior and informed consent.

It is beyond the scope of this document to fully specify these prerequisites and the overview above is not meant to be considered exhaustive. The protocol must be rooted in the legal context of compensation. A legal review of this context (including with respect to international human rights law) is therefore a crucial step for the development of such a protocol. If all the prerequisites are not met, land tenure change cannot proceed via expropriation and it cannot be lawful or legitimate.

In practice, meeting requirements of genuine purpose and process for compulsory land tenure change is subject to many problems[14], rather similar to those related to fair compensation. The (public) purpose of a compulsory land tenure change is often the object of debate, conflict and litigation. There is no such thing as an internationally accepted definition of what constitutes public purpose.[15] In many cases even national legislation does not give a clear definition, or provides a definition which is in contrast with international guidelines[16]. Existing guidelines are relatively well-

[13] P. van der Molen 'An Inventory of Human Rights Law Relevant for Surveyors', Peer reviewed paper for the FIG working week, 2015. and L. Verstappen, 'Rethinking Public Interest in Expropriation Law: Introductory Observations', book chapter in 'Rethinking Expropriation Law I: Public Interest in Expropriation' by B. Hoops, E. Marais, H. Mostert, J.A.M.A. Sluysman, L.C.A. Verstappen (eds), 2015, The Hague: Eleven International Publishing 2015.

[14] See section I for case studies. Also see M. Eerd and B. Banerjee (UN-Habitat and GLTN), 'Evictions, Acquisition, Expropriation and Compensation: Practices and selected case studies', Working Paper, 2013.

[15] FAO Land Tenure Study 10 lists a number of 'commonly accepted purposes': 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. A later article states "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."
See also B. Hoops, E. Marais, H. Mostert, J.A.M.A. Sluysman, L.C.A. Verstappen (eds), Rethinking Expropriation Law, Volume I: Public Interest in Expropriation and Volume II: Context, Criteria, and Consequences of Expropriation, The Hague: Eleven International Publishing, 2015.

[16] One of the main recommendations of the VGGT is a call on governments to clearly define the concept of public purpose (section 16.1). See section C.5 for a review of national legislation. The VGGT calls on governments to clearly define the concept (section 16.1)

developed with regards to process requirements[17]. However, these can often be disregarded, applied unsatisfactorily, or prove to be insufficient to prevent (all) violations of stakeholders' rights.

In the next phase, a decision should be taken about the extent to which the protocol must give guidance around its prerequisites of purpose and process of land tenure changes. In particular, the question must be answered to which degree the protocol should provide new guidance compared to what already exists in the cited normative references (see section H.1) is addressed by one of the many initiatives that are currently ongoing (see section D.6).

If these issues are addressed with insufficient depth, the protocol would come short of its goal of defining fair compensation in the context of lawful expropriation and international law. Some stakeholders have expressed concern that it might even encourage malpractice and human rights violations. However, if it would aim to create an entire new set of guidelines around issues as complex and broad as public purpose and the whole process of land acquisition, it risks to come short of its goal of addressing the existing challenges around land tenure changes in a timely manner.

B.2. Scoping suggestions

This section discusses a number of scoping considerations relating to the type of land tenure changes, affected people, impacts and compensation to be considered in scope.

Types of transactions: The protocol focusses on expropriation, i.e. where the government uses its right to acquire land, for the 'public benefit', from individuals or communities that have a formal or informal claim to the use of the land. Two important sub-categories can be defined:

- Where the government negotiates with the parties affected by a tenure change towards a consensus-based solution, but where the government can use its power of expropriation if negotiations fail.
- Where the government acquires land without the consent of people with legitimate tenure rights for a public purpose, using its power of expropriation. Sometimes the government expropriates on behalf of private parties.

Although the government is the party that holds the right of expropriation, they may or may not be the ultimate benefactor of the land tenure change. Private parties can also benefit from it in special cases where the genuine public purpose requirement is met. These types of transaction include acquisition of land for agricultural development, to build mines, dams, harbours, airports, roads and other infrastructures, and to develop urban land for residential, commercial or industrial purposes.

The protocol also has applications in several situations that do not qualify as expropriation. An example is in market-based transactions involving complicated tenure systems, where the protocol can inform all parties which set of outcomes can be seen as reasonable. Another example is market transactions where legitimate use rights of a third party are affected.

Affected people: all communities and individuals that lose legitimate (formal or informal) tenure rights should be entitled for compensation as in the scope of the protocol. As shown in section E about problems regarding land tenure changes, special attention should be given to vulnerable

[17] in particular the VGGT, FPIC literature, the World Bank's OD 4.13, IFC's PS 5 and Handbook for Preparing a Resettlement Action Plan and FAO's Land Tenure Studies 10. For land tenure changes involving Indigenous people, guidelines that define Free and Prior Involved Consent (FPIC) can be added to this list, as the United Nations Declaration on the Rights of Indigenous Peoples' state that land tenure changes cannot proceed without obtaining FPIC.

groups. This can include Indigenous people, who risk losing their way of living and in the worst case the death of their entire culture. It can further include holders of rights that are not legally acknowledged – who risk missing out on compensation – and groups that might be underrepresented. The last point is often the case for women, who risk being marginalized in the current situation.[18]

Impacts on people: Land tenure changes within the scope of the protocol entail both physical and economic displacement of individuals and households[19] (e.g., loss of land for farming). They can furthermore have possible negative impacts in the social, environmental, cultural, emotional, religious and spiritual domains for holders of tenure rights.

Physical displacement refers to the situation where affected people have to change their main location of living. Economic displacement is loss of land (or access to land) and natural resources that people depend on[20]. Lives of people are also affected if the change of tenure of land has other non-tangible (social) impact, such as affecting the social and cultural life of the group, along with cultural, emotional, religious, spiritual or environmental losses. Several approaches to compensation are currently being used (e.g., restoration, replacement value, revealed preference, stated preference and negotiations) and a clear protocol that points out what to use under which circumstances will be of added value. Redress, or reparation, of past violations of legitimate rights related to land tenure changes can be an additional subject to be addressed within the type of impact that could be in scope of a fair compensation protocol.

Types of compensation Compensation as in the scope of the protocol can come in the form of new land ("land-for-land"), in monetary form ("cash-for-land"), livelihood restoration or a combination.[2122]. Essential public services need to be restored. In addition, development projects may bring benefits to the affected population, such as employment, better access to infrastructure, etc. This is not always considered a form of compensation for the losses incurred, but can be part of the effort to improve livelihoods as a result of land tenure changes, as well as a way to share the benefits of the development.

Types of land: the protocol aims to be general in the types of land that can change tenure: urban, agricultural, pasture and natural or semi-natural land such as forests or grasslands are all in its scope. This also includes access to water for domestic use, stock watering, small irrigation, etc. Water

[18] Key references on gender and land tenure are Governing land for women and men by the FAO and B. Wehrmann, '"Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security" (VGGT) from a Gender Perspective', Analysis and Policy Recommendations; Oxfam Germany and Brot für die Welt, 2015

[19] It is therefore suggested to leave impact on businesses and other organizations out of scope, because of the specific challenges related to impacts on people and livelihoods.

[20] An interesting case is that of surface minerals. These are usually traditionally mined all over the world and a critical source of income to millions of community members. Loss of this should be compensated, as is indeed in the focus of the ICCM on rights at compulsory acquisition for mining.

[21] Land-for-land is often stated to be the preferred option, when this is attainable. This is supported by i.a., the OHCHR Basic Principles and Guidelines on Development-based Evictions and Displacement, paragraph 60: "Cash compensation should under no circumstances replace real compensation in the form of land and common property resources"

[22] Land-for-land is often stated to be the preferred option, when this is attainable. This is supported by i.a., the OHCHR Basic Principles and Guidelines on Development-based Evictions and Displacement, paragraph 60: "Cash compensation should under no circumstances replace real compensation in the form of land and common property resources"

tenure itself (and related fishing rights[23]) have not been explicitly addressed in the consultation phase, although fisheries are a central element of the VGGT. Water tenure can possibly be added to the scope at a later stage.

Geography: The protocol aims to be applicable in all geographies. It is more relevant however in developing regions of the world. Here, large scale land tenure changes place set individuals and communities in situations of high vulnerability, due to conditions of complex or uncertain land tenure rights, lack of functioning land markets and their significant dependence upon presence of land-based livelihoods. Given that legal systems vary widely among different geographies, some elements of guidance may be country or region specific. Tools that are developed based on the protocol, are an example.

Land acquisition in contexts with developed and efficient formal economies, legal systems and property rights systems is often performed with sufficient protection of the rights of affected people. These cases can however also benefit from the protocol whenever challenges relating to determining compensation arise.

Status of tenure changes: The protocol focusses on suggesting a way to guarantee that a planned land tenure change occurs in a fair and rightful manner. An additional application is in old cases which are still awaiting disputes settlement, e.g., because lending, certification or purchase agreements or humanitarian/legal considerations require this. In such cases, it is likely that not all (recommended) elements of 'due process' have been followed, and reparation elements are to be taken into account within compensation.

The degree to which a single protocol can be used in different contexts or if it should contain specific guidance for specific cases is an important consideration that needs to be evaluated in the next phase. Specific cases can both relate to the geography and to the type of tenure change (i.e. settled or forced). This decision should be informed by choices on goal and scope of the protocol. See also section B.5.

B.3. Problems around land tenure changes

The call for a protocol on fair compensation for land tenure changes is based on the observation that (large scale) land tenure changes are often not carried out within the requirements of international law and existing good practice voluntary guidelines[24]. A few examples to illustrate this point are presented in the case studies (section I). Problems are not restricted to the topic of compensation. The prerequisites of fair compensation, genuine purpose and due process of land tenure change are also fields were serious issues are reported.

From a systematic review of the problems around land tenure changes, three orders of problems emerge. Problems can relate to lack, non-applicability and non-adherence of legislation and regulation. Figure 2 gives a schematic representation of this classification. In principle, each order of problems calls for a different mitigation approach.

[23] See the IFC Good Practice Handbook *Addressing Project Impacts On Fishing-Based Livelihoods* for a recent discussion

[24] See for instance L. Alden Wily, 'Towards Best Practice In Public Land Acquisition', (Unpublished Guideline), 2013

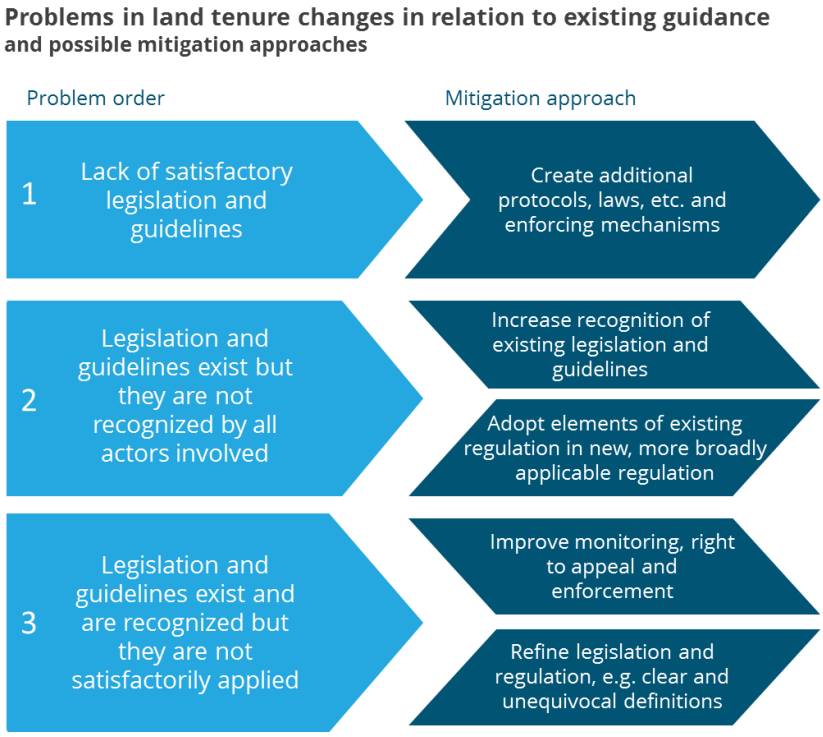

Figure 2: Schematic view of the causes of problems in land tenure change and possible approaches to mitigate them

In the first type of problems, lack of guidance is the key issue, and the creation of additional standards, guidelines, protocols or tools can mitigate this problem. In the second and third type, some guidance exists, but problems persist. The second type of problems is caused by the fact that not all actors recognize a given guidance (i.e. because it is in institutional standards or voluntary guidelines). Problems of the third type emerge because not all actors apply it fully[25] (i.e. guidance is not followed and there is no enforcement).

Table 1 provides an overview of problems around land tenure change that the protocol might help solve. These problems are categorized in two groups:

- Problems relating to the prerequisites of fair compensation, including those in the field of genuine public purpose and due process.
- Problems around fair compensation itself, relating to four key questions. Who to compensate? Which losses should be compensated? What forms of compensation are appropriate? How should the amount of compensation be determined?

When it comes to fair compensation, problems of type 1 and type 2 are common. Problems with genuine public purpose and due process are more often of type 2 and type 3. A more detailed description of the problems identified is given in Section E.

[25] As an example, projects that are funded by the IFC and involve land tenure changes are subject to an elaborate resettlement policy. Even if this is not perfect, it goes further than most national legislation in protecting the rights of affected people. In practice, the rules are not always adhered to, creating serious problems for the displaced population (third type of problem). Here, better monitoring or better support is probably the path to the solution, not an entirely new protocol. In projects where the IFC is not involved, process requirements are often less strict, because national legislation is in general less extensive- on this topic. This can lead to problems for affected people (second type of problem). A new protocol could help by identifying elements of existing regulation that should be adopted more broadly, e.g., as part of national legislation, but it should be careful not to try and reinvent the wheel.

Table 1:Overview of problems that a protocol on fair compensation can address. See section E for a detailed description.

Category	*Sub-category*	*Problems identified*
Problems relating to the pre-requisites of fair compensation	**Genuine public purpose**	- Definition - Basis in law - Necessity and proportionality - Minimization of impact - Private benefit - Non-discrimination
	Due process	- Identification of legitimate tenure rights holders - Right to consultation - Right to give and withhold free, prior and informed consent - Participation in the valuation - Inclusiveness - Capacity building and assistance - Free and balanced negotiation - Right to appeal - Timeliness - Dealing with changes of plans - Dealing with conflicts - Environmental impacts - Social and cultural impacts
Problem relating to compensation	**Who to compensate?**	- The informal end of the continuum of land rights - Gender inclusiveness - Holders of use rights - Collective rights and elite capture - Definition of Indigenous - Lack of historical records - Disputed lands - Strategic behaviour - Procedural aspects
	Which losses should be compensated?	- Non market values - Reparation for past irregularities - Transitional losses - Restore or improve
	What forms of compensation are appropriate?	- Land-for-land and cash-for-land - Land of equal value - Risks related to cash compensation - Project benefits - Share-holding - Equitable livelihood improvement - Monitoring - Conditions for reacquisition
	How should the amount of compensation be determined?	- Valuation of non-tangible assets - Valuation of tangible assets - Absence of active land markets - Compensation for delays - Financing

An important issue that must be considered in the next steps of developing a protocol on fair compensation is to what extent should the aim be to address problems that are not strictly due to lack of guidance (type 1), but also to unrecognized guidance (type 2) or unsatisfactory application of existing guidance (type 3). This choice should be made based on the intended focus, goal and users of the protocol.

B.4. Stakeholders that can benefit from a protocol on fair compensation

The key stakeholders in a change of tenure rights involving compensation consist of six groups: affected people, civil society, the Government, businesses, financers and donors.

- **Affected individuals and communities** who are at risk of being relocated or lose access to land and/or livelihood under land tenure changes. Their legally protected rights include property rights (including over customary lands), socio-economic rights (including rights to adequate housing, food and the maintenance of their means to a livelihood and subsistence) and their cultural identity.
  This is also motivated by their need for empowerment and equity. For indigenous and other highly land-connected peoples their collective right to self-determination requires protection of their rights to self-governance, including ownership, use, control and management of their traditional lands, territories and resources.
  A protocol can help affected individuals and communities make informed decisions during negotiations (towards a negotiated settlement) or can secure that they get what they deserve in an expropriation case. The protocol can be of particular benefit to groups that have non-formal rights to use land, including customary rights. Here, the protocol should spell out which rights they have and to what extent they are entitled to compensation.
  Within communities there can be also inequality in power and capabilities, especially between men and women or in the case of minorities, e.g., Indigenous communities. In that case, it is important that the rights of all individuals are protected.
- **Civil society organizations** are not directly affected by land tenure changes, but support communities in respecting their (human) rights. They bring about their concerns and can increase the negotiation weight. A protocol can help them in their work, as it makes clear which sets of outcomes are considered acceptable or unacceptable.
- **National, regional and local governmental branches.** The power of eminent domain resides with the government, as specified under national legislation. Governments are therefore always the actors that decide and execute expropriations. At which level of government this takes place can differ. We note that among the different layers of government, there is not always agreement[26]. Key agencies within governmental bodies that are involved with expropriation are the Ministries of the Interior, Infrastructure, Agriculture, Energy or Economic Development, police and armed forces, various levels of judiciary organs, land administration and spatial development departments of city or regional governments.
  Responsibilities of the government lie in serving the public interest, within the rule of law, in securing compliance with international and human rights law (e.g., ensuring requirements on FPIC are followed), but also in guaranteeing that the costs and benefits of the projects are proportionate.
  Governments can benefit from a protocol that lays out examples of good practices. These

[26] See e.g., the case example of Haiti in section I.1.

good practices can be incorporated in national legislation when it comes to specifying rights and duties in expropriation and the determination of compensation.

- **Companies.** These include project developers and businesses contracted to develop land for infrastructure, urban development, agriculture, resource extraction or industry. Companies can as such benefit from land tenure changes, including – indirectly – through expropriation. Companies do not have the right of eminent domain. However, governments often transfer expropriated land to companies if a private project is deemed to be in the public interest[27]. Companies involved in land based investments have the duty to respect international conventions and to take into account possible negative impacts relating to land rights from the feasibility phase, e.g., when human rights due diligence should be performed. Social, environmental and human rights impacts need to be assessed in an Environmental and Social Impact Assessment (ESIA). When projects can lead to displacement of people, certain financers require a Resettlement Action Plan.
  Companies can be involved in the negotiations around compensation for affected people and can be required to pay the compensation (or ensure that land-based compensation can be facilitated).
  Companies can profit from a protocol that clearly spells out their rights and responsibilities. This may mitigate the risk of civil conflicts, enable them to estimate levels of compensation in advance, and support them in negotiations with local communities and governments.
- **Investors** are not directly involved in the land acquisition process, but provide financial resources. They bear a responsibility similar to the funded companies that human rights are respected. Investors need to safeguard their own internal policies in terms of corporate social responsibility and environmental and social safeguards. In some cases, international finance institutions provide technical assistance for project design and implementation.
- **Donors and development finance institutions** – such as governmental international development agencies, the World Bank or the International Finance Corporation – have a similar role but their objectives are to serve the public good by reducing poverty, rather than to pursue financial profit. This is generally in line with the UN Sustainable Development Goals. They usually have elaborate internal policies that their investees need to follow. Of particular importance are Operational Directive 4.30 on Involuntary Resettlement of the World Bank and Performance Standard 5 on Land Acquisition and Involuntary Resettlement of the IFC.
  Investors and donors can benefit from a protocol on fair compensation, as it gives clarity on the process of compensation their investees need to facilitate and reduces several risks.

The next project phase should consider one main target user of the protocol or whether it should be developed as a universal protocol.

B.5. Key scoping decisions

An important outcome of the preliminary consultation around this input document is a list of key scoping decisions[28]. Addressing these decisions in the next phase of protocol development is important to make sure that the protocol will be focused and relevant and can be widely adopted.

- **Main aim or aims.** A protocol on fair compensation can pursue several objectives. The ones that were identified include:

[27] In practice this judgement is often difficult, as many countries have not clearly defined public purpose
[28] These are presented here but also mentioned throughout this report, and especially sections A and B in *italic*.

- **Promote legal change**, specifying recommendations to develop legislation that complies with international standards and best practices in countries where this is lagging[29].
- **Operationalize existing standard,** extracting key elements around compensation from existing international standards, both binding, institutional and voluntary ones, and make them more practical and applicable.
- **Develop new guidance on developing compensation schemes** by filling gaps in existing guidelines on issues relating to compensation with new operational tools developed with a participatory process.
- **Set out more ambitious requirements for the future**, setting a new, more ambitious standard of good practices to inspire organizations at the forefront to continuously improve responsible land based investment.

At an early stage of the process it needs to be discussed which of these objectives should have the highest priority, or if all have equal importance.

- **Target users.** Directly connected to the previous question, a clear identification of target users is an immediately helpful step. An overview of the stakeholders that may benefit from the protocol is provided in section B.4. It is possible to focus on one type of user, on a set of stakeholders. Alternatively, the protocol can develop a normative framework that is applicable for all stakeholders. Identifying the users of the protocol should be followed by mapping their key knowledge needs and specific capacity gaps.
- **Reference set of rules or practices.** The landscape of land tenure regulation, standards and guidelines is extremely diverse, in terms of level of detail, of applicability and of ambition. Furthermore, what is found in existing norms is not necessarily what is observed on the field. A clear outcome of the preliminary consultation is that a protocol that aims to improve practice and integrate existing guidelines needs to assume a reference point. Based on the answer to the questions of main aims and target users, the baseline situation that the protocol takes as a given and aims to improve needs to be specified. For example, the protocol could take as a starting point:
  - Some specified current practice of land tenure changes, whether or not they comply with existing regulation.
  - Binding international conventions and national laws only
  - Selected voluntary international or intergovernmental guidelines
  - Best practice institutional and private guidelines
- **Scope and depth of guidance on requirements of purpose and process.** Once the above decisions have been made, a key choice concerns the broader pre-requirements of fair compensation. The key question is which of the many problems related to *due process* and *genuine public purpose* should be addressed by a fair compensation protocol, and which ones should be left out of scope? For problems that are addressed, the depth of the guidance must be specified. This could range from simply stating that existing binding or voluntary norms must be adhered to, to summarizing how they can be applied; from pointing out best practices to filling in normative gaps with a new, negotiated standard.
  On the other hand, some problems could be left out of scope, either because too complex, too broad, or because they could hardly be mitigated by additional guidance. These decisions

[29] See for example H.3 for a review of the uptake of VGGT principles in national legislation

should be based on a discussion on the extent to which dealing with fair compensation requires specifying guidelines on due process[30].

- **General vs context specific guidance.** The extent to which different forms of transactions in different geographies can be covered within one protocol needs to be evaluated. Although some elements of fair compensation are definitely universal, others are very context specific. Features of tenure changes that may indicate the need for a dedicated sub-section of the protocol include the following.
    - The **type of land rights involved,** especially Indigenous rights, customary rights, collective rights and unrecognised rights.
    - The **voluntariness**, or whether a negotiated settlement is sought and a process of free, prior and informed consent is applied or not.
    - The **status**, or whether the tenure change is still in the planning phase, already initiated, already finalized, stalled due to a conflict or a change of plan, object of litigations, etc.
    - The **type of beneficiary**, whether the land is ultimately transferred to a public or private body.
    - The **geography** of the tenure change, which influences the legal framework, the range of tenure arrangements, the types of livelihoods and more important aspects.

  This list is an example of situations that may call for specific guidance and does not claim to be exhaustive. Ultimately, this decision should be taken based on an understanding of the trade-off between providing widely applicable guidance and helping to solve known specific issues.

These key scoping questions should be addressed in an early stage of the development of a fair compensation protocol, within a multi-stakeholder setting. Furthermore, these decisions should aim to define a scope that is complementing, rather than duplicating, other international initiatives that are currently developing tools and guidelines for fair compensation in cases of legitimate of land tenure change[31].

[30] Please refer to section B.1 for a description of the relation between the issue of fair compensation and its pre-requisite of genuine public purpose and due process. Section B.3 categorises problems with compensation based on their relation with existing guidelines. Section E contains a structured overview of the key problems emerged in the preliminary consultation around the topics of genuine public purpose, due process and fair compensation in cases of changes of land tenure.

[31] See section D.6 for an overview of existing international initiatives

C. Outline of the draft protocol

Suggested table of contents

The following outline is proposed for the protocol on fair and rightful compensation in cases of legitimate land tenure changes. Based on input during the next phases in the drafting of the protocol, new sections can be added and the order of sections might be subject to change.

The key choices made and to be made and a discussion on the content of the chapters are described in the remainder of this section.

Protocol on fair compensation in cases of legitimate land tenure changes

Preface

1 Introduction

1.1 *Goal*

1.2 *Scope*

1.3 *Normative and informative references*

2 Key definitions

3 Guiding principles

4 Prerequisites for fair compensation

4.1 *Genuine public purpose*
- Minimum requirements
- Recommended practice

4.2 *Due process*
- Minimum requirements
- Recommended practice

5 Fair compensation
- Minimum requirements
- Recommended practice

A Annexes
- *Describing the process of writing the protocol*
- *Key literature sources*
- *Key experts consulted (and available for further advice)*
- *…*

Title

The following titles for the protocol have been suggested by the consulted experts:

- Protocol on fair and rightful compensation for changes in land tenure
- Protocol for the fair acquisition of land
- Protocol for fair land access
- Protocol for fair compensation procedure on land acquisition
- Protocol on fair and rightful compensation in cases of expropriation
- Large scale changes in land tenure: Guidelines for fair compensation
- Protocol to address issues on compensation

We suggest to use '**Protocol on fair compensation in cases of legitimate land tenure change'** as a temporary working title for four reasons. First, this explicitly refers to compensation, which is the main focus of the protocol[32]. Second, 'land tenure' is sufficiently broad in scope: it can include all kinds of land ownership and use rights and systems, not only formal ownership rights. Third, the same applies to 'changes in land tenure'. This includes forced acquisition of land (with physical and/or economic displacement), but also negotiated settlements. Fourth, the addition of the word 'legitimate' clearly indicates that the possibility for fair compensation only applies to specific types of land acquisition. The protocol must firstly focus on situations where the preconditions of land tenure change are legitimate as a start, then add guidance on how to provide fair compensation.

The title is still open for change during the next phase in the process. Also the word 'protocol' is open for scrutiny. Some consulted experts have argued that 'guidelines' is a more appropriate term.

Preface

The preface to the protocol will contain a brief discussion of the context of the protocol (i.a. the need for additional guidance and the relation to (inter-)national regulation, legislation, guidelines and human rights standards). The preface can also be used to introduce the editorial board and the used methods

Section 1 (Introduction)

The introduction to the protocol collects the goal and scope of the protocol. The current state of ideas is given in sections 0 and B.2.

The introduction will furthermore contain the references used to write the protocol. References are classified as normative (providing guidance) and informative (merely giving information or discussing observations in the field). A selection of normative and informative references used for this input document, is given in sections H.1 and H.2 at the end.

Section 2: Key definitions

The protocol will give key definitions early on to facilitate the reading. A glossary of key terms that was compiled during the drafting on this input document is given in section F.

[32] As discussed in section B.1 the need to focus on genuine public purpose and due process is re-evaluated in a next phase. Putting these elements more central in scope might warrant a change in the title. Furthermore, some experts suggested to avoid using the word 'compensation'. In their opinion, the word 'compensation' points towards the idea that someone is compensated for an action which happened against his/her wish. They pointed out that the word 'compensation' would not be used in a consent based solution after free negotiations. Other consulted experts argued that this implication cannot be drawn. In their opinion, people that experience a loss can be 'compensated' for that loss in consensus-based cases as well. In fact the word 'compensation' is also used in connection with rewarding someone for a service.

Section 3: Guiding principles

This section will contain the key guiding principles for the protocol, such as proportionality, equity/equivalence and duties of respecting human rights, taken from all relevant Indigenous and human rights conventions and the VGGT.

Section 4: Prerequisites for fair compensation (genuine public purpose and due process)

Fair compensation in cases of expropriation can only be assessed meaningfully in the context of its purpose and the processes followed. In any case, the purpose should be genuinely public and the procedure should respect the rights of affected people.

Meeting the prerequisites for compensation includes accordance with the legal criteria for interference with human rights, i.e., basis in law, necessity in a democratic society, proportionality to a legitimate objective with the least restrictive interference possible, and non-discrimination. Minimal process requirements include those addressed in section B.1. This includes recognising that circumstances may exist where no amount of compensation can legally justify the expropriation. One example would be in the context of an Indigenous or other highly land-connected community that has withheld their free, prior and informed consent.

Both the sections on genuine public purpose and the one on due process will contain a subsection on minimum requirements and one on recommended practice. Minimum requirements are the minimum level necessary for a genuine public purpose and due process, based on international laws and norms. These should be followed in all cases where the protocol on fair compensation is applied. Recommended practice goes one step further and gives practical advice on how to obtain the best outcomes, based on best-case examples in the field.

The protocol will assess current legislation and regulation, as well as known ongoing efforts to update these and the perspective of human rights standards. Principles in international guidelines such as the VGGT are a starting point to assess genuine public purpose and due process – although in practice, key elements may need further refinement.

In other cases, sector specific and private standards can provide best-practice examples. Elements of these can be recommended for broader application if the protocol has the mandate to assess this. *In any case, the first step will be to determine what kind of guidance this protocol would need to provide on requirements of genuine public purpose and due process, and how this should be organized.*

Section 5: Fair compensation

The section on fair compensation forms the heart of the protocol. Section 5 will give a guideline on how to reach fair compensation. This is based on the guiding principles of section 3 and the problems encountered in the field, see e.g. section E.2 of this input document.

Similar to section 4, it has two levels. It gives guidelines to be followed for minimum requirements to be satisfied based on international law and norms, but also a discussion of recommended practice to reach the objectives of fair compensation, restore or improve livelihoods of affected people, based on best-case examples from the field.

D. The process towards a Protocol

Developing a protocol on fair compensation that meets the specified success criteria of section A.3 requires a carefully crafted approach.

Process requirements: Based on the results of the preliminary consultation performed, it is recommended to have a process which meets the following requirements:

- Endorsed and participated by a broad and international partnership of stakeholders.
- Independently monitored.
- Building on existing efforts, academic knowledge and practical expertise.
- Including on-the-field testing moments
- Include development of practical tools for specific stakeholders and contexts.

Outcomes: A protocol that set out guiding principles, requirements and guidance for fair compensation will be the main outcome. Next to the protocol, operational tools could be developed as well. Tools are operational translations of the protocol that provide a step by step guide for a specific user addressing a specific problem. The right type of tool should address most of the problems relating to fair compensation as set out in section E.2[33].

We divide the process towards a protocol in three broad phases: (1) the groundwork for the protocol, (2) protocol drafting and high level tools design (3) testing, refinement and operationalization. The rest of this section illustrates suggestions for key elements of the process more in detail.

D.1. Phase 1: Groundwork for the protocol

The first phase should lay the foundations of the protocol development process. This phase has already started and includes the development of this input document. Key elements of this phase as identified during the preliminary consultation are the following:

- Build an **international coalition** of organizations that want to endorse and support the protocol development and use and promote the protocol itself. Crucially the coalition should aim to include
    - Representative of stakeholder groups involved already, as presented in section G.
    - Affected people and organizations that represent affected people
    - Organizations working on similar protocols and guidelines as described in section D.6
- Establish a **governance structure**, with clear responsibilities for
    - Monitoring and quality assurance of the development process.
    - Monitoring and responsibility of the protocol use.

  An important pre-requirement for establishing the right governance structure is defining **the legal status** of the protocol.
- Address the **key scoping decisions** regarding main aims, baseline guidelines, depth of purpose and process guidance and context-specificity. More information about key scoping decisions is given in section B.5.
- Expand the **learning process** that supports the protocol development process, to make sure this builds on cutting edge knowledge and expertise. Tools to do this should include

[33] For example, a tool can guide the identification of legitimate tenure-holders that are eligible for compensation. Or it could provide a step by step guide in applying the protocol in countries that do not recognize customary land tenure rights, etc.

    - Build an **expert coalition** and hold **workshops** within the context of existing conferences and initiatives**,**
    - In depth **research report** on selected issues, including the national and international legal context, and valuation standards.
    - **Collection of good practices** and innovative approaches to solving specific compensation-related problems.
- Form a team of authors with specialists on key disciplines, including human rights law and valuation.

D.2. Phase 2 Shaping the protocol and high level tools design

The second phase is the phase where the protocol is developed based on the outcomes of phase 1. These are the key features of this drafting that can already be identified based on the preliminary consultation.

- **Iterative protocol drafting,** involving a core author team and external reviewers and contributors from organizations belonging to the international multi-stakeholder partnership that has been created in the first phase.
- **Find partners for field pilots.** During the drafting of the protocol, possible partners for field tests are contacted to identify opportunities to work together
- **High level design of tools**. A high level design of tools should identify which ones are most required by the stakeholders of land tenure changes to reach the goals of the protocol.
- **Independent quality assurance**. The final step of the protocol drafting should consist of an independent quality assessment that verifies whether the protocol meets the required criteria and complies with existing international laws and conventions. This is a necessary step before the protocol can be tested on the field.

D.3. Phase 3 Operationalization, testing and refinement

The third phase consists of testing and refining the protocol through means of development of tools and field testing, possibly in parallel with an open consultation with a broader group of stakeholders and prospective users.

- **Tools** that operationalize the protocol for certain situations where fair compensation needs to be assessed by specific users can be developed based on the outcomes of phase 2.
- **Field pilots** should be used to test the protocol and tools in the field, together with NGOs and businesses. This will help to assess the protocol's effectiveness and practicality and identify improvement points[34].
- After the testing on the field, the learnings should be taken up into the protocol and the tools in a **refinement step**. This process should meet the same requirements of participation and quality control of phase 2.

The results are a tested and consensus-based protocol and tools for fair compensation. These can be adopted by organizations in the international coalition that supported the process and promoted in the broader field of stakeholders to address fair compensation problems on the field.

D.4. Option to fast track field testing and tooling

The development of a set of tools and the field testing of the tools and the protocol could potentially be fast tracked. This could be deemed appropriate based on the timeline of potential test cases in

[34] Improvement of the protocol could possibly be accompanied by a public consultation process

the field and considerations on the maturity of the drafts being developed. The tools could be developed and tested in parallel with the iterative drafting process of the protocol itself. This fast tracking should not, however, bypass the step of independent quality assurance.

D.5. Governance

Considerations on the best governance structures should be based on lessons learnt from similar initiatives, the desired legal status of the protocol, and the needs and requirements of key actors supporting and promoting the protocol development. Based on the process requirements specified above, it is recommended to include the following elements in the governance structure.

- A Steering Committee that sets priorities and guards the progress on a high level is made of organizations that fund the process and/or external advisors selected by them.
- An independent stakeholder council should assess the quality of the protocol and its compliance with existing international law, standards and conventions.
- A team of authors will draft the protocol with input of experts and stakeholders under guidance and leadership of an editorial board, consisting of very senior experts and possibly stakeholder representatives.
- On a practical level, a facilitation team could support the team of authors both on a content level and on a practical level. It can coordinate external authors, academic input and validation, field pilots and input from other stakeholders in providing input to the authors.

D.6. Other ongoing initiatives on guidelines for land tenure change

The following initiatives have been identified that are working towards further guidance for land tenure changes. As the initiatives run in parallel to the draft protocol, it is recommended to establish a contact to determine how synergies can be created.

UN-Habitat-GLTN - Manual for the valuation of unregistered lands and properties based on global approaches and practices research. Draft manual was reviewed in a special Expert Group Meeting in Athens in September 2016

Dutch MSD on Land Governance - White paper 'Due Diligence Procedures for investors with respect to Land Governance' on responsibilities for private sector and financial institutions in implementing VGGT. Scope focusses on Dutch financial institutions. A final draft was finished in January 2016; Currently in the stage of testing and revision based on lessons learnt and feedback from actors with whom the VGGT case team will engage throughout 2016 in the context of the MSDLG

Landesa and UK Department for International Development - Responsible Investments in Property and Land (RIPL) project, to provide practical guidance in the implementation of the VGGT and the AU Guiding Principles. Aim is development of step-by-step "how-to-guides" called "Playbooks". The Playbooks are to be based on field research and stakeholder input, adaptable to different country contexts, and will be field tested within an investment project. Four-year project. Started in 2015.

Indufor, International Property Tax Institute and Foundation for Ecological Security - **Asset valuation tool**. The tool, under development, is to be used by communities, project developers and governments to fill the information gap and better inform all stakeholders of the estimated value of community lands and natural resources, particularly in environments where there is limited market data. Initial testing of the tool is to take place in mid-2016.

OECD and FAO - OECD Proactive Agenda: implementation of the OECD-FAO Guidance for Responsible Agricultural Supply Chains. Guidance was developed over a two-year period by OECD

and FAO with the support of a multi-stakeholder advisory group in 2014-2016. Pilot implementation project recently initiated.

UN-Habitat – The New Urban Agenda is an action-oriented document which will set global standards of achievement in sustainable urban development. It has been adopted in October 2016 at the United Nations Conference on Housing and Sustainable Urban Development, known as Habitat III. It is based on transformative commitments, including one on sustainable urban development for social inclusion and ending poverty, and one on sustainable and inclusive urban prosperity for all. These include aspects relating to land tenure and the nexus between housing and economic opportunities.

FAO and University of Reading - Development of international best practice standards for the valuation of agricultural land worldwide, addressing the issues surrounding market and non-market values in FAO-relevant contexts as stated in Article 18.2 of the United Nations' Voluntary Guidelines, which include social, cultural, religious, spiritual and environmental values. Draft document to be discussed at the Expert Group Meeting at the University of Reading in September 2016.

E. Problems for which a protocol could provide guidance

This section contains a structured overview of problems identified during the consultation phase for which a protocol could improve guidance.

Many of the problems relate to "genuine public purpose" and "due process", that are seen as prerequisites to fair compensation (see section B.1). These are discussed in subsection E.1. The problems in subsection E.2 relate directly to compensation.

E.1. Problems related to the prerequisites to fair compensation

i. Genuine public purpose

The genuine public purpose requirement applies to cases of expropriation. It deals mainly with the question of whether the grounds that the state uses for taking ownership of the land are genuinely to the benefit the public. The created impacts should be proportional and the purpose must be in accordance with international conventions and human rights law. In cases where FPIC must be guaranteed, no degree of public purpose can provide sufficient grounds for expropriation.

Most national constitutions, laws and guidelines refer to 'public purpose' in some way, but the degree to which this is specified diverges widely [35]. The VGGT specify that states should define in legislation what constitutes and does not constitute public purpose, in order to help prevent discretionary expropriations.

Problems in the field relating to genuine public purpose that are due to a lack of guidance include the following.

- **Definition.** What is a practical definition of 'public purpose' that can be independently assessed (and challenged when required) and is sufficiently transparent?
- **Basis in law**. This means there is a legal basis for the expropriation or other interference in land tenure, with reference to all applicable law, including both domestic law and binding international law. How can this be guaranteed?
- **Necessity and proportionality**. *Necessity*: For any expropriation or other involuntary interference in land tenure, human rights law dictates (among other conditions), that the action must be necessary in a democratic society. How can necessity be shown in practice? For example, where the desired outcome could be achieved without involuntary inference, the involuntary interference could not qualify as necessary. *Proportionality***.** This concept derived from international human rights law requires that any interference with a human right needs to be proportionate to achieving a legitimate public purpose objective for it to be lawful. This includes a requirement that any interference be the least restrictive means possible of achieving the legitimate public purpose objective. How should the benefits from a land-based development be compared to the costs to tenure rights holders? Are there ways to draw independently verifiable conclusions on the public benefit requirement? And if so, how should the scope of negative impacts be assessed, both on people with formal and informal tenure and use rights, both for tangible and non-tangible[36] losses?

[35] See e.g. J. Lindsay, K. Deininger, Th. Hilhorst, 'Compulsory Land Acquisition in Developing Countries: Shifting Paradigm or Entrenched Legacy?' World Bank draft 2016 and N. K. Tagliarino, 'Encroaching on land and livelihoods: How national expropriation laws measure up against international standards', World Resources Institute working paper, 2016.

[36] Non tangible impacts include i.e. social, cultural, emotional, religious, spiritual and environmental losses. For discussion, see e.g., F. Vanclay, A.M. Esteves, I. Aucamp, and D. Franks "Social Impact Assessment: Guidance for

- **Private benefit.** In which cases it is acceptable that a genuine public purpose also includes serving private interests?
- **Minimization of impacts.** Is the scale of expropriation necessary and suitable to realize the project? Are there alternatives to expropriation and methods to minimize the land requirements that need to be considered before a project that involves expropriation for public purpose can proceed? The principle of 'least restrictive interference' can be helpful in this step.
- **Non-discrimination**. Discrimination is unlawful in the domestic law of many countries, as well as being prohibited in international human rights treaty law and customary international law. It includes both *direct* and *indirect* forms of discrimination. *Direct* discrimination targets a particular societal group for disadvantageous treatment. *Indirect* discrimination occurs wherever the practical effects of an action or omission disproportionately disadvantage a particular societal group, even if that group has not been specifically targeted or singled out. How can direct and indirect discrimination be assessed in practice?

As discussed above, the public purpose is of critical importance in cases of expropriation. It is also central in cases where all involved parties reach a settlement in negotiations[37] but the government has the option to expropriate in case the negotiations fail. Public purpose needs not be proven for voluntary transactions. Elements of due process and fair compensation, on the other hand, are relevant for all types of transactions.

Because the issue of genuine public purpose is a complex topic, the question of to what degree a protocol on fair compensation must engage with it is not a simple matter. The challenge here is to determine what are the prerequisite regarding the purpose of tenure change that must be taken into account when talking about the fairness of compensation.

ii. Due process

Displacement is a very painful process for land users and displaced people[38]. It is widely acknowledged by leading voluntary and binding standards that land acquisition should only happen within the boundaries of international law. This means, for example, that the requirements of FPIC must be met when necessary and that all legitimate tenure rights should be recognized. All steps of the processes towards deciding on tenure change, relocating people and deciding on compensation for losses incurred need to be drafted and executed very carefully to minimize the harm to people and violations of their basic rights[39]. If procedures are transparent and people are carefully informed and engaged in the process, negative outcomes such as forced evictions can be prevented.

In practice this is still challenging, and many problems and violations of human rights arise around land tenure changes[40]. During the process of developing this input document, a number of problems

assessing and managing the social impacts of projects". Fargo ND: International Association for Impact Assessment, 2015

[37] Settlements based on Free, Prior and Informed Consent should be the norm for land tenure changes involving Indigenous people

[38] For a review, see e.g., M. Cernea, 'The Risks and Reconstruction Model for resettling displaced populations', World Development 25(10), 1997

[39] See e.g. International Finance Corporation, 'Handbook for Preparing a Resettlement Action Plan', 2002 and UN OHCHR, 'Basic principles and guidelines on development-based evictions and displacement', 2005

[40] See section I for case studies. Also see M. Eerd and B. Banerjee (UN-Habitat and GLTN), 'Evictions, Acquisition, Expropriation and Compensation: Practices and selected case studies', Working Paper, 2013.

were identified around the topic of due process which can specifically be addressed by specifying additional guidance.

- **Identification of legitimate tenure rights holders.** All reviewed guidelines agree that local communities should be identified and consulted during the process. How to guarantee that all affected holders of legitimate tenure rights are identified and involved. This should include individual and collective rights and both formally acknowledged rights and informal rights (e.g., agricultural customary right holders or slum dwellers)
- **Right to consultation.** How should the representativeness of consulted parties in the communities be determined? And how to make this a meaningful consultation, rather than a one-directional information session?
- **Rights to give and withhold free, prior and informed consent**. For indigenous and other highly land-connected peoples whose cultural and physical survival may be put at risk by involuntary changes in their land tenure, any such change will only be lawful if it has the free, prior and informed consent of the people in question. How can this right be properly ensured?
- **Participation in the valuation.** How can sufficient participation of local communities in the process be safeguarded in the valuation of the land?
- **Inclusiveness** Which mechanisms can ensure that community representatives are consulting the community in an inclusive way? And how to guarantee that both information and compensation reach the whole community, including vulnerable minorities, women and holders of collective rights?
- **Capacity building and assistance.** Under which circumstances should the local population be aided during the negotiation process, e.g. by civil society organisations, free legal advisors or resettlement consultants, and how should they be helped?
- **Free and balanced negotiation.** How to assess whether the balance of powers between negotiators is sufficient and that no undue pressure is applied. What actions to take to mitigate a misbalance when this is observed?
- **Right to appeal.** What requirements on grievance mechanisms and the right to appeal should be met, both regarding procedural and substantive requirements, including the entity of compensation and the purpose of an expropriation?
- **Timeliness.** How to minimize or avoid delays in the delivery of compensation, especially where affected people depend on the dispossessed resource for their livelihoods? And how to guarantee that late compensation lead to losses for affected people?
- **Dealing with changes of plans.** In cases of interruptions or major changes of plan during the project lifetime, how to protect the rights to land, property, food, sustainable livelihood, safety and security of affected people?
- **Dealing with conflicts.** In cases of ongoing conflicts around land acquisitions, what are the procedural requirements to prevent additional negative impacts for affected populations?
- **Environmental impacts.** What are the procedural requirements around the assessment and management of environmental issues and the Environmental Impact Assessment, in terms of i.e. transparency, right to appeal or independent monitoring?
- **Social and cultural impacts**. What are the procedural requirements and the reasonable substantive outcomes and recommendations in relation to the participatory assessment, avoidance and mitigation of social and cultural impacts?

Depending on which stakeholders are involved in the land acquisition, these problems can be considered directly due to an objective lack of guidance, to poor application and enforcement of

existing rules or to the fact that existing guidance on good practices is not commonly applied by all actors. The World Bank[41], among others, requires that Resettlement Action Plans are drawn for all projects where they or one of their subsidiaries are involved in. The international standards that set the content of the Resettlement Action Plans, typically go well beyond what is required in national legislation, especially in most developing countries. Similarly, the guidance around FPIC[42] is a mandatory requirement for changes of land tenure involving Indigenous people. This is considered as one of the best standards for consultation with people affected by a project, when applied correctly, and in practice it already contains some good practices to address many of the problems listed below.

E.2. Problems directly related to compensation

This section contains the problems that are experienced directly around the topic of fair compensation, that are due to lack of guidance. The problems are structured around four key questions

1. Who to compensate?
2. Which losses should be compensated?
3. What forms of compensation are appropriate?
4. How should the amount of compensation be determined?

i. Who to compensate?

- **The informal end of the continuum of land rights.** All reviewed laws and guidelines agree that registered landowners should be compensated. However, land rights manifest themselves in a variety of informal and unregistered forms as well. This diversity has been defined the continuum of land rights[43]. There is a lack of practical guidance regarding how to make sure that informal, customary and collective land tenure rights are taken into account[44]. Most reviewed international guidelines, FAO's Voluntary Guidelines on Governance of Tenure (VGGT), FAO's Land Tenure Studies 10, the World Bank's Environmental and Social Framework and the IFC's PS5 and PS7, accept that as their livelihoods are strongly impacted, informal right holders are eligible to compensation to restore their livelihood. In other words, all legitimate tenure holders as mentioned in the VGGT, independently of whether their tenure rights are legally recognized, should be entitled to compensation. In the case of Indigenous people, international law stipulates that customary rights are property rights and FPIC is a requirement. The protocol should provide clear criteria of eligibility for compensation and guidance on mapping the existing mosaic of tenure systems along the continuum of land rights. It should make requirements in human rights conventions and good practices in international standards more specific and actionable.
- **Gender inclusiveness.** The VGGT and the IFC Handbook for Preparing a Resettlement Claim both mention importance of 'gender-sensitive' compensation, reflecting the differences within society in land tenure between men and women. The IFC mentions that gender

[41] Reference to World Bank policy in this section refers mainly to Operational Directive 4.12. This policy was recently replaced by the bank's "Environmental and Social Framework'

[42] See e.g. FAO's 'Respecting free, prior and informed consent Practical guidance for governments, companies, NGOs, Indigenous peoples and local communities in relation to land acquisition', 2014

[43] See e.g. M. Barry, C. Augustinus (UN-Habitat), 'Framework for evaluating continuum of land rights scenarios', UN-Habitat and GLTN, 2015

[44] The situation of customary right holders differs widely among jurisdictions. For illustrative practices, the situation in the north and east of Uganda is very clearly described in the Land and Equity Movement in Uganda's document 'What land rights do people have under the rules of customary tenure?'

discrimination limits women's access to resources, opportunities, and public services necessary to improve the standard of living for themselves and their families. As a result, women are often the first to suffer when resettlement is planned or executed without sufficient consideration for gender. National legislation in many (developing) countries does not yet specifically consider gender specificity, leading for instance to prevalent payment of compensation to male heads of households[45]. Regarding gender, the VGGT provides an overarching framework, principles and guidelines, but does not enter into the description of specific tools and methodologies that provide more specific guidance on how to implement gender-equitable governance of land tenure[46]. This protocol can fill in some of the gaps identified.

- **Holders of use rights.** Besides legitimate land users, also people who experience other consequences of the land tenure changes (such as reduced access to water, environmental and ecosystem services) could be entitled to compensation according to some interpretations of existing guidelines.
- **Collective rights and elite capture.** Communal customary tenure systems allocate land between the members of a community. This is often not taken into account in compensation schemes leading to a high risk of elite capture[47], which may escalate in violent conflicts.
- **Definition of indigenous.** Key guidelines, including human rights standards, but also the VGGT and IFC performance standards require special care for Indigenous people. The expert consultation highlighted that, in practice, it can be difficult to determine who is and who is not Indigenous.
- **Lack of historical records.** Similarly, national laws or guidelines often state people rights in relation to historical events, e.g., granting (stronger) tenure rights to individuals and communities that have lived in a certain area for a minimum number of years. However, it can be impossible to independently verify such claims, as outsiders have difficulty to assess what happened in the past some contexts.
- **Disputed lands**. The person with registered land right may not be the legitimate rights-holder, if that land was unlawfully pre-acquired. Simply compensating the registered holder in such circumstances would be unjust, so guidance is needed on how to avoid this.
- **Strategic behaviour.** Another problem from the side of the buyer of the land is that of strategic behaviour from the side of the people arriving to the site after the announcement of the projects, but before the cut-off date, hoping to receive compensation. The protocol can guide the trade-off made in requiring proof of land use, to discourage this behaviour, while respecting the fact that written documents do not always exist and that people should still be able to make 'normal' changes to the land during the process. Participatory approaches of land use planning and community mapping are suggested directions.
- **Procedural aspects.** There are observed problems that are more process-related, but very important to determine who is eligible for compensation. These are the questions of who is authorized to decide, at which stage of the process this should be done and what are the safeguards, transparency requirements, judiciary review and grievance mechanisms.

[45] See also Annex 0 for analysis of national legislation and its consequences.

[46] B. Wehrmann, '"Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security" (VGGT) from a Gender Perspective', Analysis and Policy Recommendations; Oxfam Germany and Brot für die Welt, 2015

[47] Appropriation of rights to a communal land to a few more powerful individuals

ii. Which losses should be compensated?

All reviewed guidelines accept that value of land should be compensated, as well as the value of removed buildings and standing crops. Various guidelines however differ on what else should be compensated for.

- **Non market values.** The VGGT explicitly mention that "non-market values, such as social, cultural, religious, spiritual and environmental values" of land should be compensated as well. These however are hardly straightforward to identify and there is agreement that further guidance is required. The protocol should include some principles and a list of elements that are in scope for compensation in specific cases. The list should aim to be as complete as possible, although it should allow for the flexibility required by the diversity of possible situations. The IFC handbooks for preparing a Resettlement Action Plan and for addressing project-induced in-migration have been named as valuable starting points.
- **Reparation for past irregularities.** Reports from the field show that often land acquisitions do not proceed in full compliance with all procedural and legal requirements. This opens the question of what past irregularities and violations of people's basic rights should be redressed or repaired as part of a compensation scheme. This is not conventionally a part of compensation itself, because guidelines normally illustrate ideal situations where all guidance is applied from the start. In practice a protocol on compensation may specify additional requirements on compensation for cases where irregularities have occurred.
- **Transitional losses.** Other losses that can be incurred in a change of land tenure but are often excluded in compensation are so called "transitional losses", negative impacts occurring between the moment of displacement and the moment of receiving the actual compensation[48].
- **Restore or improve.** Closely related to the question of what losses should be compensated is the question of whether the aim should be to "restore" or "improve" the livelihood conditions that exist prior to the land tenure change. The IFC PS5 states that the aim should be to improve livelihoods, especially if affected people are poor. On the other hand, it can also be argued that full restoration should be the core component of compensation. Improvement of livelihoods should then constitute an important, additional benefit, external to the compensation itself. The affected population can profit from these benefits, as can neighbouring populations and a host population in the case of displacement.
  The protocol could explicitly choose the principle of equivalence ('no better and no worse') or the stronger version that aims at improving livelihoods, or give explicit guidance on when one or the other applies and how this should be assessed.

iii. What forms of compensation are appropriate?

- **Land-for-land and cash-for-land.** The two main forms of compensation are land-for-land and cash-for-land. Many stakeholders noted that land-for-land should be the preferred alternative. This is mirrored in some of the international guidelines[49]. However, land-for-land is not always attainable in practice, or very costly. Most likely, a blanket rule suggesting one form of compensation to the other is not feasible. Instead, the protocol should guide making

[48] It has been observed that another type of negative impacts are indirect impacts on the population of surrounding areas, without tenure rights on the considered land. Examples are inflation and reduction in food supply. These should be in any case identified by an impact assessment and, independently of whether they should be part of compensation in itself, they could be taken into account to prevent negative side effects.
[49] See for instance World Bank OD 4.30 "Experience indicates that cash compensation alone is normally inadequate", and OHCHR basic principles "Cash compensation should under no circumstances replace real compensation in the form of land and common property resources"

a choice based on local conditions, while keeping the objective of compensation (restoring and possibly improving livelihoods) in mind.

- **Land of equal value.** Land-for-land compensation requires a straightforward definition of 'land of equal value' (or 'of equal use') and criteria on the current use of the land (to protect other people's tenure rights on that land). This can include a number of considerations, from availability of public services and infrastructure, to irrigation and soil fertility.
- **Risks related to cash compensation.** Cash-for-land and cash compensation next to land, presents a risk whenever beneficiaries are often not used to handling large sums of cash. This can be mitigated by informing affected people carefully, by offering the option of support in accessing important assets and by offering a series of payments instead of a lump-sum payment. In general, access to financial systems mitigates the risk. Guidance in the process of supplying cash-based compensation, when applicable, would be useful.
- **Project benefits.** In addition to compensation for losses incurred by people, development project can give further benefits, that include training, (renewed) access to jobs, clean water, infrastructure, etc. The benefits may apply to a broader population. The protocol can help by guiding when such compensations are part of the larger (legal) agreement between communities and investors. The extent to which additional benefits can take the place of compensation for the losses incurred is also unclear.
- **Share-holding.** Going one step further, share-holding measures that return a share of the benefits from the land development to the original tenure rights holders, are often named as a best practice. The protocol could help to determine in which circumstances this is a feasible or desirable option.
- **Equitable livelihood improvement.** If the aim of compensation would be set to improving livelihoods, the protocol should give examples of how this can be achieved, as well as guidance under which circumstances only restoring the livelihood is sufficient. Furthermore, because improvement of livelihoods can cause inequality and frictions between affected people and neighbouring communities (so-called fence line communities), provisions should be made on how to prevent this.
- **Monitoring.** The rehabilitation of livelihoods is typically not evaluated regularly after the final compensations has been provided. If damaged livelihoods are not re-established specific measures could be prescribed. The protocol can guide this process, in particular by describing clear roles and responsibilities
- **Conditions for reacquisition.** Conditions for reacquisition of expropriated land should also be considered, for example in cases of non-fulfilment of crucial purpose or process prerequisite.

iv. How should the amount of compensation be determined?

- **Valuation of non tangible assets.** There is little guidance for valuation of losses in the cultural and social domain[50]. Cultural, emotional, religious, spiritual and environmental losses are difficult to value. The protocol should explore under which conditions these can be restored. If restoration is not possible, a fair compensation protocol must establish what are the costs to the landholders associated with expropriation. In some cases, this assessment might lead to the decision not to expropriate (as the decision is not 'proportionate' taking also these costs into account. In other cases, the expropriation is still proportionate and the protocol can guide what would constitute reasonable compensation.

[50] Although the IFC Performance Standard 8 on Cultural Heritage provides some guidance on process requirements

- **Valuation of tangible assets.** A second crucial question is that of how much compensation displaced people should receive for lost land and property, especially in case of cash-for-land compensation. A large share of the literature uses replacement value to guide this decision. Using replacement value is in line with the principle that evictees should not be worse off due to the expropriation: the money at market prices allows them to buy new property similar to the one they originally owned (or lived on)[51].
  An important corollary is that depreciation of buildings and other property that are lost under expropriation should not be taken into account when assessing the amount of compensation[52]. The reason is that if depreciation *would* be taken into account, the compensating sums can be too low to ensure that new property can be bought.
  When market value is chosen as a guiding principle, the protocol should give a clear definition of market value, describe alternatives if no market value is available and take a clear position on points such as depreciation, inflation and interest payments.
- **Absence of active land markets.** In a context where active and functional land markets do not exist, cash-for-land compensation poses several problems. First of all it places the responsibility to use the acquired cash to obtain new land on the displaced, instead of the government/ company/ investor that is responsible for causing the loss of land. Even when this is deemed to be the most viable option, however, alternative ways to establish the value. In practice proxies for the market price (e.g. taxation reports) are used as well as entirely different approaches, e.g. based on the average productivity of farm land over a given number of recent years. These practices can be useful in some contexts but can also be misleading, not leading to a professional and equitable valuation of the land, and clear guidance is needed. The protocol must give concrete guidance on how compensation can be determined in absence of active and functional land markets.
- **Compensation for delays.** There is a need to specify the timeframe when compensation should be provided. Guidelines usually urge for 'prompt' or even 'prior' compensation. When there is a time delay in payment of compensation, inflation will reduce the effective value of the compensation. A definition of fair compensation should take timing into account and also account for the period where people were waiting for compensation, e.g., by clearly defining under which conditions interest is due, and how much.
- **Financing.** Finally, there is a need to have a clear view on how to retrieve the amount that is necessary to compensate expropriated people, or who has the burden to pay the compensation.

[51] Where land markets are robust, replacement cost and fair market value should be roughly equivalent. However, land markets may often not exist or similar transactions may be very thin. Therefore, using "replacement costs" shifts attention usefully to the calculation of what it would really take in a given market to replace lost assets. See e.g. World Bank Public Private Partnership Insights "Compulsory Acquisition of Land and Compensation in Infrastructure Projects"

[52] See e.g., IFC Handbook for Preparing a Resettlement Claim, pg. 31.

F. Glossary (key definitions)

The consultation process has identified the following concepts, with proposed definitions based on the input of contributing experts and definitions used by international institutions[53].

Concept	Proposed definition	Note
Acquiring bodies	Government and private entities that carry out the expropriation, compensation, and resettlement processes, including government departments, ministries, and agencies or, in some cases, private entities, such as companies investing in land.	Definition taken from Tagliarino (2016), based on FAO Land Tenure Study 10.
Affected populations	Individuals or groups whose tenure rights are affected by expropriations.	Definition taken from Tagliarino (2016). Host communities are also affected by the influx of displaced people
Compensation	The provision of adequate recompense (in the form of non-monetary and/or monetary means) for any economic loss and/or other negative (social) impact experienced and/or inconvenience created that arises from some planned intervention and that affects an individual or the communities in which they are located/or otherwise affected	The definition is elaborated based on the input from consulted experts and it may be improved. It explicitly includes both monetary and non-monetary forms of compensation. Indeed, according to many guidelines, land-for-land compensation should be assessed before cash-for-land.
Compulsory acquisition	See Expropriation	
Customary rights	De facto rights which are acquired by the custom of a community. Customary rights are mostly flexible and locally-adapted. Customary land rights typically include communal rights to pastures and exclusive private rights to agricultural and residential parcels.	Adapted from FAO Land Tenure Study 3; 'customary land tenure' can be registered or not, and can be formalized or not, depending on the rules of different countries.
Displaced persons	Affected populations forced to vacate their land as a result of expropriation or other imposed land tenure changes that lead to economic and/or physical displacement.	Definition adapted from Tagliarino (2016)
Economic displacement	Loss of income streams or means of livelihood resulting from land acquisition or obstructed access to	This is the definition found in the IFC Resettlement Handbook.

[53] Including definitions from the IFC Resettlement Handbook, the Voluntary Guidelines on Governance of Tenure of Land, Forests and fisheries, and the UNHABITAT Working Paper I on Evictions, Acquisition, Expropriation and Compensation (2013)

	resources (land, water, or forest) resulting from the construction or operation of a project or its associated facilities.	
Expropriation	Process whereby a public authority, usually in return for compensation, requires a person, household, or community to relinquish (formal or informal) rights to land that it occupies or otherwise uses.	This is the definition found in the IFC Resettlement Handbook, with the fact that rights can be formal or informal has been made explicit. Expropriation is normally only justified in cases of public purpose.
Fair compensation[54]	A compensation is fair when human rights have been respected and the set of arrangements and benefits it entails are proportional to the losses incurred, allowing all affected parties that are affected to continue to meet their needs at the same or better standard than before.	The definition is elaborated based on the requirements of the VGGT and input from consulted experts.
Host community	Any community receiving displaced persons	Adapted from IFC PS5
Informal rights	All rights that lack explicit and official recognition, and protection by the state.	Adapted from FAO Land Tenure Study 3
Land governance	System of rules, processes, and structures through which decisions are made about access to land and its use	Definition taken from Tagliarino (2016), based on Palmer et al. (2009). Land can be governed under statutory or customary systems.
Land tenure (system)	The set of arrangements defining how people, communities and others gain access to land, determining who has rights to use which resources, for how long, and under what conditions. Land tenure systems may be based on written policies and laws, as well as on unwritten customs and practices.	The definition is taken from the VGGT.
Market value	Market value is the estimated amount for which an asset or liability would exchange on the valuation date in an arm's length transaction after proper marketing wherein the parties each acted knowledgeably, prudently and without compulsion	Definition from IVSC *International Valuation Standards 2013, frameworks and requirements*. The definition focuses on the tangible value of the asset or liability

[54] The term 'full compensation' is also used to refer to a similar concept.

Negotiated settlement	Agreement on the terms of a transfer of tenure rights between two parties where the party that is acquiring the rights has the ability to start a compulsory acquisition process.	This is the definition found in the IFC PS5 guidance. According to it a negotiated settlement is a specific case of acquisition of land where consent of the tenure right holder is achieved, that all parties prefer to the potential results of a compulsory acquisition case.
Replacement cost	The market value of the assets plus transaction costs. In applying this method of valuation, depreciation of structures and assets should not be taken into account	This is the definition found in the IFC Resettlement Handbook.
Physical displacement	Loss of shelter and assets resulting from the acquisition of land associated with a project that requires the affected person(s) to move to another location.	This is the definition found in the IFC Resettlement Handbook.
Resettlement	Re-establishment of people's houses (physical) or livelihoods (economic) at a 'resettlement site' after physical and/or economic displacement	The definition is elaborated based on the input from consulted experts
Tenure rights	The rights of individuals or groups, including Indigenous peoples and communities, over land and resources. Tenure rights include, but are not limited to, possession rights, use rights, and rental, freehold, customary, individual and collective tenure arrangements. The bundle of tenure rights can include the rights of access, withdrawal, management, exclusion, and alienation.	Definition taken from Tagliarino (2016)

G. List of consulted experts

H. The following experts and stakeholders have been consulted during the drafting of this input document, involved at different stages such as participating in scoping sessions, in interviews or reviewing drafts. The texts in this input document are the work of the authors, having interpreted the comments and contributions from the expert contributors. As such, the views expressed cannot be attributed to the experts. We also stress that comments or views expressed by the contributors do not necessarily reflect the views of the organisation or company that contributor is associated with.

I. Consulted experts and reviewers (ordered by organisation)

Name	*Organisation*	*Country*
Marijn de Haas	ABN AMRO	Netherlands
Barbara van Paassen	ActionAid	Netherlands
Antoine Bouhey	FIDH (former ActionAid)	France
Amos de Jong	Arcadis	Netherlands
Karin van Boxtel	BothENDS	Netherlands
Paul Wolverkamp	BothEnds/RSPO	Netherlands
Tom Lomax	Forest Peoples Programme	United Kingdom
Justin Kenrick	Forest Peoples Programme	United Kingdom
Tom Griffiths	Forest Peoples Programme	United Kingdom
Jorge Espinoza	GIZ	Germany
Frank Vanclay	University of Groningen	Netherlands
Nicholas Tagliarino	University of Groningen	Netherlands
Harold Liversage	IFAD	Italy
Mike McDermott	(independent)	Australia
Babette Wehrmann	(independent)	Germany
Liz Alden Wily	(independent)	Netherlands/ Kenya
Michael Windfuhr	Institut Für Menschenrechte	Germany
Santy Kouwagam	Leiden University	Netherlands
Olaf Brugman	Rabobank	Netherlands
Jan Grobler	Royal Dutch Shell	Netherlands
Katie Minderhoud	Solidaridad	Netherlands
Linlin Li	Zhejiang University (former University of Groningen)	China/Netherlands

H. Technical Input

This section provides additional information to facilitate the drafting of the protocol in the next phases and provide useful information to stakeholders that want to get involved. It contains normative and informative references, a legal review of the uptake of the VGGT in national law of 30 countries and a technical perspective on existing compensation guidelines.

H.1. Key normative references

This list presents the identified key international guidelines and standards dealing with the execution of responsible land tenure changes. These sources should be analysed to select normative references that will be used as a basis for the development of a protocol on fair compensation. The references are categorized in these three groups:

(i) International/intergovernmental conventions, principles and declarations (covering aspects of land tenure changes)
(ii) International voluntary standards and guidelines
(iii) Private and sectoral standards and guidelines.

This overview focusses on the international guidelines that are intended to supplement national laws to facilitate justified land tenure changes. Besides the international documents in the list, the expropriation laws of India, Brazil and South Africa have been mentioned during the consultation phase as indicative or interesting examples among developing countries. More information on national legislation is in section H.3 on legal perspective.

The lists contain key sources, but they are not exhaustive. For each guideline, an assessment has been made regarding the level of detail with which the topics of genuine public purpose, due process and fair compensation are covered.

International/intergovernmental conventions, principles and declarations (covering aspects of land tenure changes)

International and intergovernmental conventions, principles and declarations that do not cover specifically aspects of land tenures are not included in the list below, but they provide the overarching legal framework. The main ones are *The Universal Declaration of Human Rights, The American Convention on Human Rights, The African Charter on Human and Peoples' Rights, The European Convention on Human Rights, The International Convention on the Elimination of All Forms of Racial Discrimination, The International Covenant on Civil and Political Rights, The International Covenant on Economic, Social and Cultural Rights* and *The Convention on the Elimination of All Forms of Discrimination Against Women*.

Organization	Title	Genuine publ. Purp.	Due Process	Fair Compens.	Scope
ILO	ILO C169 - Indigenous and Tribal Peoples Convention				ILO convention on the rights of indigenous people
United Nations	United Nations Declaration on the Rights of Indigenous Peoples				Rights of indigenous people
Un OHCHR	Guiding Principles on Business and Human Rights ("Ruggie principles")				General on responsibilities of businesses - with key references to what national law should contain
UN OHCHR	Basic principles and guidelines on development-based evictions and displacement				UN guideline, frequently refers to respecting human rights
UN Committee on Economic, Social and Cultural Rights (CESCR)	General Comment 7: The right to adequate housing - forced evictions				Discusses forced evictions in the light of the right on adequate housing
Un Committee on the Elimination of Racial Discrimination (CERD)	General Recommendation No. 23: Indigenous Peoples				Indigenous peoples. Contains a note on (loss of) control over lands and territories

Figure 2: Key references for general guiding principles - Assessment of the degree of guidance on Genuine Public Purpose, Due Process and Fair Compensation is on a qualitative scale: low detail high detail.

International voluntary standards and guidelines

Organization	Title	Genuine publ. Purp.	Due Process	Fair Compens.	Scope
Committee on World Food Security of the FAO	Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security ("VGGT")				Endorsed by the Committee on World Food Security, after broad consultation (>1.000 participants, 130 countries). Guidelines are voluntary, but have wide following
FAO	Land Tenure Study 10 - Compulsory acquisition of land and compensation				Overview of 'good practices' according to FAO. Aimed at supporting specialists in land tenure and land administration
FAO	Respecting free, prior and informed consent				Aimed by FAO as practical guidance for governments, companies, NGOs, indigenous peoples and local communities in relation to land acquisition
FAO	Governing land for women and men				Technical guide that aims to assist implementation of the VGGT by providing guidance that supports the Guidelines' principle of gender equality in tenure governance.
African Union, ADB, UNECA	Guiding principles on land based investments in Africa				Guiding principles, defined in participatory process. Includes call for operationalization (mainly at country level)

Figure 3: Key references for international standards and guidelines. Same scale used as in figure 3. The list contains key elements, but is not exhaustive. The FAO Land Tenure Studies form a series, of which the tenth volume is most applicable for the scope of this document. Additional normative reference is provided by the other studies in the series.

Private and sectoral standards and guidelines.

Organization	Title	Genuine publ. Purp.	Due Process	Fair Compens.	Scope
United Nations Development Programme	Social and Environmental Standards				UNDP policy - Contains a Standard on Displacement and Resettlement
World Bank	Environmental and Social Framework - Setting Environmental and Social Standards for Investment Project Financing				World Bank Policy; incorporates former OD 4.12 (Involuntary Resettlement) and OD 4.10 (Indigenous Peoples)
IFC (World Bank)	Performance Standard 5: Land Acquisition and Involuntary Resettlement				IFC policy
IFC (World Bank)	Performance Standard 7: Indiginous people				IFC policy
IFC (World Bank)	Performance Standard 8: Cultural Heritage				IFC policy
IFC (World Bank)	Guidance Note 5 Land Acquisition and Involuntary Resettlement				IFC policy
International Valuation Standards Council	Standard for valuation of Development Property				Non-binding standard for valuation of development property
International Valuation Standards Council	International Valuation Standards 2013 - Framework and Requirements				Non-binding standard for valuation
International Federation of Surveyors (FIG)	Compulsory Purchase and Compensation				Recommendations for Good Practice
New Alliance and Grow Africa	Analytical framework for land-based investments in african agriculture.				Due diligence and risk management for land based investment in agriculture in Africa
Interlaken Group	Respecting Land and Forest Rights - A Guide for Companies				The Interlaken Group is an informal network of individual leaders from influential companies, investors, CSOs, governments and international organizations. Guidelines written in multi-stakeholder dialogue
RSPO Human Rights Working Group 2015	Free, prior and informed Consent Guide for RSPO Members				Policy of Roundtable for sustainable palm oil on FPIC

Figure 4: Key references for sector and private standards and guidelines. Same scale used as in figure 3.

H.2. Key informative references

The following informative references have been identified as providing valuable guidance for the topic of fair compensation:

- L. Alden Wily, 'Towards Best Practice In Public Land Acquisition', (Unpublished Guideline), 2013
- L. Alden Wily, N. Tagliarino, A. Vidal, and C. Salcedo-La Vina, 'Indicators of the Legal Security of Indigenous and Community Lands', 2016. Data file from LandMark: The Global Platform of Indigenous and Community Lands. Available at: www.landmarkmap.org.
- L. Alden Wily, 'Compulsory acquisition as constitutional matter – The Case in Africa', 2016
- M. Barry, C. Augustinus (UN-Habitat), 'Framework for evaluating continuum of land rights scenarios', UN-Habitat and GLTN, 2015
- M. Cernea, 'The Risks and Reconstruction Model for resettling displaced populations', World Development 25(10), 1997
- E. Daly et al. (FAO), 'Governing land for women and men - A technical guide to support the achievement of responsible gender-equitable governance land tenure', FAO, 2013
- M. van Eerd, B. Banerjee et al. (UN-Habitat), 'Evictions, Acquisition, Expropriation and Compensation: Practices and selected case studies', Working Paper, 2013

- A. Eisenberg, ‘’Public purpose' and expropriation: some comparative insights and the South African Bill of Rights’, S. Afr. J. on Hum. Rts. 207 1995
- B. Feiring, “Indigenous peoples’ rights to lands, territories, and resources”, International Land Coalition, 2012
- B. Hoops, E.J. Marais, H. Mostert, J.A.M.A. Sluysman and L.C.A. Verstappen (eds), ‘Rethinking Expropriation Law’, Expert Group on Expropriation Law, 2015
- B. Hoops, ‘The Public Purpose Requirement in Expropriation Law: A (Potentially) Rich Source of Safeguards against Arbitrary Expropriation’, Prepared for World Bank Conference on Land and Poverty, 2016
- ICCM (International Council on Mining and Metals), ‘Land acquisition and resettlement: Lessons learned’, Guidance note, 2015
- R. Knight, M. Brinkhurst and J. Vogelsang (Namati), ‘Community land protection facilitators guide’, Namati, 2016
- Land and Equity Movement in Uganda, ‘What land rights do people have under the rules of customary tenure?’, LEMU, 2010
- J. Lindsay, K. Deininger and Th. Hilhorst, ‘Compulsory Land Acquisition in Developing Countries Shifting Paradigm or Entrenched Legacy?’, World Bank draft working paper, 2016
- P. van der Molen, ‘An Inventory of Human Rights Law Relevant for Surveyors’, FIG Working Week paper, 2015
- D. Palmer, S. Fricska and B. Wehrmann, ‘Land Tenure Working Paper 11: Toward Improved Land Governance.’ FAO, 2009
- J. Sluysmans, S. Verbist and E. Waring (eds), ‘Expropriation Law in Europe’, Wolters Kluwer, Deventer, 2015
- N. K. Tagliarino, ‘Encroaching on land and livelihoods: How national expropriation laws measure up against international standards’, World Resources Institute working paper, 2016
- UN-Habitat, ‘Forced Evictions’, Fact Sheet no. 25, 2014
- F. Vanclay “International Principles for Social Impact Assessment”, Impact Assessment & Project Appraisal 21(1), 5-11, 2003
- F. Vanclay, A.M. Esteves, I. Aucamp, and D. Franks “Social Impact Assessment: Guidance for assessing and managing the social impacts of projects”. Fargo ND: International Association for Impact Assessment, 2015
- B. Wehrmann, ‘“Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security” (VGGT) from a Gender Perspective’, Analysis and Policy Recommendations; Oxfam Germany and Brot für die Welt, 2015
- World Bank, ‘Compulsory Acquisition of Land and Compensation in Infrastructure Projects’, PPP Insights, vol. 1, issue 3, 2012

H.3. Legal perspective: Adopting International Standards on Expropriation, Compensation, and Resettlement.

This section is a comparative analysis of the legal frameworks in 30 countries in the context of key principles included in the VGGT. It was written by Nicholas K. Tagliarino, PhD Candidate, University of Groningen, with editing from the other authors.

Adopting International Standards on Expropriation, Compensation, and Resettlement[55]

In June 2016, World Resources Institute and the University of Groningen published a working paper entitled *Encroaching on Land and Livelihoods: How National Expropriation Laws Measure Up Against International Standards*.[56] The paper gives a comprehensive analysis of national laws and regulations in 15 Asian countries (Afghanistan, Bangladesh, Cambodia, China, Hong Kong, India, Indonesia, Kazakhstan, Malaysia, Mongolia, Philippines, Sri Lanka, Taiwan, Thailand and Vietnam) and 15 Africa countries (Botswana, Burkina Faso, Ethiopia, Ghana, Kenya, Liberia, Namibia, Nigeria, Rwanda, South Africa, South Sudan, Tanzania, Uganda, Zambia and Zimbabwe).

The study reveals wide gaps between domestic expropriation laws and international standards established in Section 16 of the VGGT. For in-depth analysis of the legal framework in these countries, readers should refer to the original paper. Here, we present some of the key results and recommendations as relevant for an international protocol on fair compensation.

1. Genuine public purpose

Section 16.1 of the VGGT recommend that governments reform expropriation laws to provide a clearly defined list of public purposes to give courts guidance when determining whether proposed expropriation decisions serve genuine public purposes.[57]

Only four of the 30 countries assessed (Cambodia, India, Indonesia, and Mongolia) have expropriation laws that provide clear legal definitions of what constitutes a "public purpose" for expropriating land. In the other countries assessed, legal definitions of public purpose are vague, and laws often grant governments broad authority to declare what constitutes a public purpose. In Zambia, for example, any land can be taken whenever the president is "of the opinion" that the land is needed for a public purpose.[58] Provisions like these can allow executives to take land under the pretext of a public purpose without ensuring an actual public benefit is generated.

To conform to Section 16.1 of the VGGT, laws should subject government decisions to independent and impartial oversight by judiciaries to ensure proper checks and balances, and prevent executive and legislative branches from abusing or misusing expropriation power. Some argue that, in order to effectively limit the use of expropriation, laws should also require that governments conduct a cost-benefit analysis before expropriating lands, whereby the government weighs the costs borne by the affected populations and the environment against potential public benefits. Using this cost-benefit analysis, governments should consider conducting a "proportionality test" for proposed expropriation

[55]This section was written by Nicholas K. Tagliarino, PhD Candidate, University of Groningen, with editing from the other authors

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

[57] Section 16.1 of the VGGTs provides that "States should clearly define the concept of public purpose in law, in order to allow for judicial review...[and acquire only] the minimum resources necessary".

[58] Government of Zambia. 1970. Land Acquisition Act. Section 3. Available at: http://faolex.fao.org/docs/pdf/zam36114.pdf

projects.[59] This test would determine whether the expropriation project is *necessary* to serve a public purpose, whether the project is *suitable* (reasonably likely to achieve a public purpose), and whether the benefits deriving from the project are *proportionate* to costs borne by affected populations and the environment.

2. Transparent and participatory expropriation process:

Section 16.2 of the VGGT establishes that governments should ensure the planning is transparent and participatory, and identify, inform, and consult affected landholders at all stages of the expropriation process. However, of the 30 countries assessed, only India, Indonesia, and Vietnam require governments to survey, inform, and consult affected populations prior to expropriating land. If governments are not legally obligated to inform or consult affected populations about proposed expropriations, they may make expropriation decisions behind closed doors without allowing affected populations to participate meaningfully in these decisions. Inability to participate and monitor expropriation processes can lead to protests and resistance among affected populations. These conflicts may delay projects and increase costs for governments and companies. For this reason, it is crucial that governments and acquiring bodies conduct proper due diligence prior to conducting land acquisitions, and survey, inform, and consult affected populations in an open and participatory manner.

3. **Fair compensation: include legitimate tenure rights holders who hold land under customary tenure, including Indigenous Peoples and local communities.**

Section 3.1 of the VGGT provides that states "should . . . respect legitimate tenure rights holders and their rights, whether formally recorded or not". Where formal recognition is required to receive compensation, customary landholders without statutorily recognized rights, including Indigenous and local communities, may be vulnerable to expropriation without compensation.[60]

Only six of the 30 countries (Philippines, South Africa, Tanzania, Uganda, South Sudan and Zambia) adequately ensure that customary tenure rights and users of undeveloped areas are eligible for compensation. Legal change should aim to ensure that tenure rights are respected and that governments are required to compensate all legitimate tenure rights holders – including unregistered customary tenure rights holders and users of pastures and other undeveloped areas. In countries where registration is a prerequisite to receiving compensation, governments could additionally consider streamlining registration processes[61] that are time-consuming, inaccessible, and expensive to ensure lands held by Indigenous and local communities are not expropriated without proper payment of compensation.

4. **Fair compensation: comprehensive and gender-sensitive compensation**

Section 16.3 VGGT call for states to adopt a "fair valuation" of compensation, but does not provide a definition of "fair valuation". Additionally, the VGGTs call for state and non-state actors to adopt gender-sensitive approaches to tenure governance. Drawing on the 2008 FAO publication, *Land*

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[59] Hoops, B. (2015). More Safeguards Instead of a Ban of Economic Development Takings: The Kelo Case from a German Perspective. In B. Hoops, E. J. Marais, H. Mostert, J. A. M. A. Sluysman, & L. C. A. Verstappen (Eds.), Rethinking Expropration Law II: Context, Criteria, and Consequences of Expropriation. (pp. 137-192). Den Haag: Eleven International Publishing.

[60] RRI (Rights and Resources Initiative). 2015. "Who Owns the World's Land? A Global Baseline of Formally Recognized Indigenous and Community Land Rights." Washington, D.C.: RRI. Available at: http://www.rightsandresources.org/wp-content/uploads/GlobalBaseline_web.pdf

[61] Hanstad, T. 1998. "Designing Land Registration Systems for Developing Countries." American University International Law Review 13(3): 647–703. Available at: http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1358&context=auilr

Tenure Studies 10: Compulsory acquisition of land and compensation (FAO Handbook)[62] for insight on defining these terms, the WRI/Groningen working paper recommends that states provide 'comprehensive' compensation, defined as compensation that accounts for the following land value attributes: economic activities, improvements, and historical/cultural connections associated with the land. Additionally, 'comprehensive' refers to procedures that provide alternative land as a compensation option. 'Gender-sensitive' compensation refers to special legal protections ensuring women landholders, especially women who are at risk of being disproportionately burdened by expropriations, are adequately compensated. Compensation that is directly paid to the male head of household, "could be detrimental to the family's health and welfare"[63] in societies where women are considered dependents of their husbands, and have no direct rights to land.

None of the 30 countries have laws that adequately ensure the government will conduct a comprehensive and gender-sensitive valuation of compensation consistent with the VGGT. Of the 30 countries, only the Philippines has a law which adequately ensures that compensation reflects the historical and cultural values associated with Indigenous community land.[64] In the other countries, compensation procedures do not capture these land values, and thus compensation may be insufficient to cover the livelihood losses borne by Indigenous and local communities.[65] Furthermore, while India's expropriation law partially addresses gender issues,[66] compensation procedures in the other 29 countries are gender-neutral, meaning they are silent on whether compensation must reflect the differing ways in which women and men hold and use their land and resources.

To ensure compensation is comprehensive and gender-sensitive, states and acquiring bodies should consult male and female landholders regarding the ways in which they use their land, and their land's historical/cultural value. Consulting affected landholders and allowing compensation negotiations to take place may be a particularly important in rural areas, such as community-held pastures and burial grounds, where land markets are weak or non-existent, and thus "fair market value" is difficult to ascertain.

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[62] FAO. 2008. "Land Tenure Studies 10: Compulsory acquisition of land and compensation." Rome, Italy: FAO. Available at: http://www.fao.org/3/ai0506e.

[63] FAO. 2008. "Land Tenure Studies 10: Compulsory acquisition of land and compensation." Sections 4.37 and 4.46. Rome, Italy: FAO. Available at: http://www.fao.org/3/ai0506e.pdf

[64] Government of Philippines. 1997. The Indigenous Peoples' Rights Act of 1997. Available at: http://www.gov.ph/1997/10/29/republic-act-no-8371/

[65] A recent USAID study in Rwanda found that 77 percent of expropriated households surveyed experienced income loss after their land was taken, and their income dropped by an average of more than 30 percent. Rose, H., et al. 2016. "Implementation of Rwanda's Expropriation Law and Its Outcomes on the Population." Paper prepared for the Annual World Bank Conference on Land and Poverty. March 14-18, Washington, D.C.

[66] Under Indian law, widows, divorcees, and women deserted by families are considered a separate category of "affected families" entitled to compensation, meaning that gender is at least partially accounted for in the assessment of compensation. Government of India. 2013. The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation, and Resettlement Act. Section 3(m). Available at: http://indiacode.nic.in/acts-in-pdf/302013.pdf

H.4. Technical perspective: Review of fair compensation principles in key international standards and guidelines

As discussed in section B.1, the protocol will focus mainly on determining fair compensation, although in the context of pre-requisites of genuine public purpose and due process.

Four questions are central in the challenge of how to determine what compensation should be paid, namely (i) who qualifies for compensation, (ii) which losses should be compensated, (iii) in which form and (iv) what amount is appropriate[67]. This section reviews how normative guidelines on changes of land tenure by FAO, World Bank[68]/IFC and UN OHCHR address these key questions.

1. Who to compensate?

The FAO's Voluntary Guidelines on Governance of Tenure (VGGT) explicitly prescribe the inclusion of customary right holders in the compensation process (par 5.3: "legitimate tenure rights including legitimate customary tenure rights that are not currently protected by law"). By using this term, the document expresses the intention that legitimate tenure rights encompass not only ownership, but also all other forms of tenure: public, private, communal, Indigenous, customary, and informal. But the Voluntary Guidelines leave it up to the States ('s legislator) what rights can be categorised as 'legitimate tenure rights'

The World Bank also explicitly includes customary right holders as eligible for compensation, stating that "the absence of legal title to land [..] should not be a bar to compensation." (e.g. OD 4.30 par. 3e). Furthermore, it states that "households that have only partially lost their assets but are no longer economically viable should be entitled to full resettlement" (OD 4.30 par. 14). In the same paragraph they urge for early recording of numbers and names to mitigate the problem of people entering the area to take advantage of the benefits.

The FAO Land Tenure Study 10 also lists people without legal rights as eligible to compensation, but explicitly excludes compensation for the land itself: Compensation should address both de facto and de jure rights in an equitable manner following the principle of equivalence. Where occupants have no recognizable legal right or claim to the land occupied, they may be entitled to resettlement assistance and to compensation for assets other than land. Some form of fair payment for squatters is also important, particularly where their livelihoods are especially vulnerable and they are driven to informality out of necessity; and especially where government has condoned or encouraged the settlement in the first place. (FAO Land Tenure Study 10, par. 4.1).

Special attention to ensure that women and vulnerable groups benefit equitably from the compensation arrangements is present in multiple guidelines. An example is the IFC Handbook with a focus on resettlement claims. This Handbook includes a full section on this topic, prescribing practical arrangements, such as 'ensuring that land titles and compensation entitlements are issued in the name of both spouses'.

2. Which losses should be compensated?

[67] Issues relating to the process through which decisions regarding compensation are taken (role of independent valuators, monitoring, right of appeal, time of delivery), which are also core aspects of fair compensation, are not included in this review, as they are considered to fall within the broad header of "due process".

[68] Reference to World Bank policy in this section refers mainly to OP 4.12 and OD 4.30. These policies were recently replaced by the bank's "Environmental and Social Framework"

The VGGT explicitly specifies that “non-market values, such as social, cultural, religious, spiritual and environmental values” should be included (par. 18.2), although it does not specify how this can be done.

The IFC Performance Standard 5 identifies physical displacement, that merits compensation for land and other assets lost (par. 9), and economic displacement, that merits compensation sufficient to re-establish economic activities elsewhere. In this case, compensation for economic displacement should include lost net income during the period of transition and the costs of transferring and reinstalling machinery and other equipment (par. 27). The IFC’s Handbook for Preparing a Resettlement Action Plan (p. 43) additionally specifies which land and buildings next to a development should be eligible for compensation.

In IFC and World Bank standards, cultural and social components are not explicitly mentioned as a loss that merits compensation, although it is noted that the components should be taken into account in selecting a resettlement location (PS 5 par. 20; OD 4.30 par. 7)

The FAO Land Tenure Study 10 refers to national regulation in assessing which losses should be compensated. In par. 4.2 it gives a list of 13 elements, including personal hardship, that “depending on the jurisdiction, the total compensation may be based on”. A similar list is given in the ONHCR’s Basic Principles and Guidelines on Development-based Evictions and Displacement. ‘Economically assessable damage’ that should be compensated includes physical or mental harm, loss of earnings, moral damage and cost of required medical services (art. 60)

Closely related to the issue of what elements should be compensated for is the question of whether the goal should be to improve livelihoods rather than just restore them. Some guidelines ultimately recommend to go one step further than simply compensating for losses, and aim for improved living situations of people affected by resettlement, in line with the overall goal of development.

The IFC Performance Standard 5 specifies that displaces legitimate right holders should be offered “the choice of replacement property of equal or higher value, security of tenure, equivalent or better characteristics, and advantages of location or cash compensation where appropriate.”

The objective of the World Bank's resettlement policy is to ensure that the population displaced by a project receives benefits from it. One specific way of achieving this is mentioned, namely to provide resettled groups with sufficient investment resources and opportunities to share in project benefits. (OD. 4.30, par. 3a).

The valuation of land as such should be in accordance with the International Valuation Standards 2013 as well as the guidelines that are based on these guidelines, for instance the GLTN guideline on valuation of unregistered land and the Guideline on Agrarian Land currently under development at the FAO.

In 2012 the World Bank published a guidance note for public private partnerships stressing this[69]. After introducing the principles of equity and equivalence the note state that adequacy of compensation should be measured against the goal of ensuring that people are neither impoverished nor enriched, it may be appropriate to aim beyond equivalence, in particular in the context of a development project or program.

[69] Jonathan Mills Lindsay, 2012, Compulsory Acquisition of Land and Compensation in Infrastructure Projects, PPP Insights Vol. 1 Issue 3

On the other hand, the concept of equivalent compensation is central in FAO Land Tenure Study 10: Compulsory acquisition of land and compensation, which states that "Claimants should be paid compensation which is no more or no less than the loss resulting from the compulsory acquisition of their land" (par. 2.3).

3. What forms of compensation are appropriate?

The VGGT states that "Among other forms, the compensation may be, for example, in cash, rights to alternative areas, or a combination." (par. 16.3).

The World Bank explicitly states that cash compensation alone is normally inadequate (OD 4.30 par. 4). Land-based compensation requires assistance with the resettlement process and support during the transition period in the resettlement site as well as assistance in efforts to improve their former living standards, income earning capacity and production levels "or at least to restore them." (OD. 4.30, par. 3b). The IFC standard states a preference for land-based compensation, subject to feasibility (e.g. "Where livelihoods of displaced persons are land-based, or where land is collectively owned, the client will, where feasible, offer the displaced land-based compensation". PS5, par. 9).

The possibility to let affected communities share in the benefit of opportunities arising from the new project is a recurring issue. It is indeed part of the recommendations of the ICMM (International Council on Mining and Metals) and it is briefly mentioned in PS5 ('the client will also provide opportunities to displaced communities and persons to derive appropriate development benefits from the project', par.9). However, this approach can be considered not to be entirely in accordance with the principle of equivalent compensation, as e.g. referred to in FAO's Land Tenure Study 10.

4. How should the amount of compensation be determined?

The general standard of valuation of assets is set by the International Valuation Standards Counsel and most of the reviewed documents are based on their 2013 Guidelines, specifically applied to the valuation of land. In some cases, this extends to the valuation of specific types of land, e.g., unregistered land in the GLTN guideline.

The VGGT does not specify specific approaches to valuation, but instead stimulates "states and other parties" to "develop and publicize national standards" in accordance with international guidelines (par. 18.4)

The IFC and the World Bank use the term "full replacement cost", defined as market value plus any transaction costs, to determine the amount of compensation (PS 5 par. 3). The IFC Resettlement Handbook defines replacement costs separately for four types of assets, namely agricultural land, land in urban areas and household and public structures. The World Bank further acknowledges that "some types of loss, such as access to (a) public services; (b) customers and suppliers; and (c) fishing, grazing, or forest areas, cannot easily be evaluated or compensated for in monetary terms. Attempts must therefore be made to establish access to equivalent and culturally acceptable resources and earning opportunities. "(OD 4.30 par. 15).

The FAO's Land Tenure Study 10 refers to national legislation: "Most laws on compulsory acquisition broadly define equivalent compensation with reference to market value or 'just compensation'." (par. 4.12); "If market value is the basis of compensation, legislation should clearly state what is understood by market value." (par. 4.13). Paragraph 4.16 and 4.17 describe four alternatives to valuation based on market value (replacement cost model, tax valuation, land transaction data and agricultural productivity), without explicitly endorsing one of them.

I. Case studies

This section contains two case studies from external authors to illustrate the current problems in the practice of (large scale) land tenure change. In the further development of the protocol, additional case studies might be of value, in particular those that describe good practices.

I.1. Expropriation for the construction of the Caracol Industrial Park in Haiti: a problematic compensation scheme

This case study was written by Antoine Bouhey, collaborator of ActionAid on land rights, with editing from the other authors of the document.

Context: the Caracol Industrial Park

The Caracol Industrial Park (CIP) in Caracol, Northern Haiti, is one of the flagship projects of post-earthquake reconstruction in the country).[70] Inaugurated in October 2012 to create "up to 65,000 jobs once fully developped"[71], the park employed 9,200 people at the end of 2015, the majority of whom were working for SAE-A trading, a Seoul-based textile giant that supplies *Wal-mart*, *Gap*, Target and others.

The project was led by the Haitian government, and sponsored by the Inter-American Development Bank (IDB), the United States Department of State (USAID) and Korean Company SAE-A, who have committed to invest $460 million[72] in the project.

The project has the obligation to follow IDB's operational policies, including its resettlement policy[73], to ensure that the people affected by the project would receive fair compensations and rehabilitation. Indeed, the site was previously owned by 442 farmers[74] and their families, representing approximately 3500 people[75], who used this particularly fertile land to feed their families and sell their products in local markets. The women and men who lost their land suffered from a process that did not comply with these policies and received compensations that were neither adapted nor sufficient to compensate their loss and to rehabilitate their livelihoods.

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[70] Building Back Better? The Caracol Industrial Park and post-earthquake aid to Haiti. ActionAid, January 2015.

[71] US Department of State, Fast Facts on the U.S. Government's Work in Haiti: Caracol Industrial Park, 14 January 2014.

[72] $257 million pledged by the IDB through 7 loans approved between July 2011 and March 2016. $125.6 million disbursed by USAID between 2011 and 2013 for the Park's power plant and a housing project (a 72.4 million grant for port construction has been delayed and is not accounted in the above-mentioned $460 million). $78 million pledged by SAE-A "to develop operations in the Park".

[73] Involuntary Resettlement in IDB Projects, Principles and Guidelines. Inter-American Development Bank, November 1999. And Involuntary Resettlement, Operational Policy, and Background Paper. Inter-American Development Bank, October 1998.

[74] UTE and IDB initially identified 366 "People Affected by the Project" in their 2011 Social and Economic Baseline and Compensation and Rehabilitation Action Plan. The November 2013 Environmental and Social Management Report later referred to 382 affected families, while the November 2014 Environmental and Social Management Report mentions 442 affected families. UTE and IDB confirmed the latter number during a meeting held on 5 May 2016 between the Kolektif Peyizan Viktim Tè Chabè, its partners, UTE and IDB.

[75] The Haitian government and the IDB estimated that families comprised an average of 8 people.

Due process: very limited stakeholder involvement

The 246 hectares of land were demarcated by fencing in January 2011 without any prior consultations of local authorities and let alone of the affected population, and without any Environmental and Social Impact Assessment (ESIA) or compensation and rehabilitation plan. These documents were developed hastily in the months that followed the demarcation, and substantive consultations with the people affected by the project only started at the end of June 2011. Consultations were largely inadequate as they did not involve all affected households, were carried out on the basis of insufficient information and were conducted with a group of representatives that were not elected by the people affected by the project. In addition, the resettlement was conducted without analysis of women's specific situation, needs and agency, and thus let alone without any specific measure taken to ensure the respect of affected women's rights.

Environmental and Social Impact Assessment: potential harms to population acknowledged

The ESIA that was finalized in June 2011 stated that "*the ground of the chosen site is the most fertile in the whole area, even in dry periods. It is also the source of income for many occupants who have no other activity than cultivating this land. Entire families depend on these plots to feed their children and pay school fees, health care costs and reimburse debts. (...) Culturally, some families have occupied this land for several generations. These occupants have developed natural ties with the land, some nutrition habits. Almost every day and all year long, they pick leaves or vegetables that contribute to their diet. This is also where they have developed their vegetable garden in the shade of cash crops (...). The site fencing has caused significant damage to some gardens where crops were close to the fence*".[76]

Affected families report that the compensations did not restore their livelihoods

Since they lost their farm land, the living conditions of the majority of households affected by the project have deteriorated due to the loss of their land and the lack of fair and adequate compensation and rehabilitation. In 2016, the Kolektif Peyizan Viktim Tè Chabè, which gathers a majority of the families affected by the project, conducted an independent evaluation of the impacts of the compensation and rehabilitation action plan[77] and its implementation. They interviewed 58 heads of households (13% of the households affected by the project), the vast majority (54 out of 58) of whom is now in an unstable economic situation, with most (48 out of 58) being forced to incur debts regularly. 46 out of 58 of them reported being in a worse situation than before they lost their land, and 8 said some of their children migrated to the Dominican Republic for lack of economic opportunities. Households affected by the project mainly used their financial compensations for immediate and unavoidable expenses that they previously paid with the revenue they obtained from selling cash crops, as explained in the ESIA: food, school fees, debt repayment, etc. Some of those who had other land or economic assets were able to recover decent living conditions with the support of financial compensations. However, for the vast majority of them, these limited compensations were insufficient to restore their livelihoods.

The compensation scheme consisted of 3 components:

i) immediate compensations for lost harvests and lost food security

[76] *Etude des impacts environnementaux et sociaux. Koios Associates, June 2011, p.177.*

[77] *Plan d'action pour la compensation et le rétablissement des moyens d'existence des personnes affectées*. Erice AZ, September 2011.

ii) transitional compensations
iii) final compensations

i) ***Immediate compensations were insufficient and were not based on a rigorous calculation***

Lost harvests: Immediate compensation for lost harvests was paid from 2011 to 2013 – when the final compensations were distributed. It was calculated based on an estimate of the average net margin per hectare, set at US$1,450 per hectare per year. This was not equal to the actual production of each plot of land, but represented an estimate of the average production of the zone. However, the Socio-economic Baseline emphasized that net margins per hectare on 72 irrigated hectares (30% of land) were in the range of $3,118.75 per hectare per year, i.e. twice the amount that households received.[78]

Lost food security: immediate food security compensation, paid from 2011 to 2013, amounted to US$80 per household member per year (or $0.22 per day) and was largely insufficient. The amount was determined arbitrarily by allocating a sum of $246,000 (or $1,000 per hectare) for all families and then dividing this sum by the number of families and an estimate of the average number of people per family (which was eight). This amount is not based on a proper assessment of families' food security needs. Indeed, the National Council for Food Security (CNSA) estimates the nominal cost of a food basket containing 1870 kilocalories per day to be around $270 per person per year, more than 3 times the amount that each person received.[79]

Inflation correction: The compensation plan did not take into account inflation in the calculation of the immediate compensations paid in 2012 and 2013. Inflation rose nationally to 8.4% in 2011, and 6.3% in 2012.[80] Locally, market prices of the crops that victims were producing in Caracol underwent a substantial increase in the same period, in part due to the transformation of the most fertile agricultural land of the area into industrial land, as well as to other land grab cases in the area. For example, the price of the pound of black peas rose from 25 gourdes in January 2011 to 50 gourdes in January 2013 in nearby Cap Haïtien markets, a 100% increase (and 60% in Ouanaminthe).[81] Had people affected by the project continued to cultivate their lands in 2012 and 2013, they would have sold their production at higher prices. This loss of potential revenues was not taken into account by revaluing the compensation for 2012 and 2013.

ii) ***Transitional compensations: trainings did not benefit affected households***

Transitional compensation was supposed to take the form of trainings, so that people affected by the project could develop skills to either work in the industrial park or find alternative sources of food and revenues. However, only 7 heads of households (out of 442) benefitted from the trainings that INFP[82] provided to the people in the area that were interested in working for the Industrial Park.

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[78] *Ligne de base socioéconomique*. Erice AZ, August 2011, p.40.

[79] *Bulletin # 1: Le panier alimentaire en Haïti*. Conseil National pour la Sécurité Alimentaire et Ministère de l'Agriculture des Ressources Naturelles et du Développement Rural, June 2012.

[80] Inflation. International Monetary Fund Statistics.

[81] *Fiches de collecte de prix de marché*. Conseil National pour la Sécurité Alimentaire, 3 January 2011 and 2 January 2013.

[82] Institut National de Formation Professionnelle

iii) ***Final compensation: land-for-land deemed not feasible – poor alternatives provided***

Final compensations, as awarded in 2013, have also proved inadequate to compensate and rehabilitate the loss of people's agricultural land. In 2011, 365 out of the 366 households that were identified in the Ressettlement Action Plan[83] had chosen "land for land" final compensations instead of "cash for land" compensations. The "land for land" option was abandoned in 2013 by the Haitian government and the IDB, due to their inability to secure alternative land with equivalent yields for all households affected by the project. They did not provide clear public explanation or documents about this decision, despite demands from the Kolektif Peyizan Viktim Tè Chabè, which gathers a majority of the families affected by the project.

Instead, financial compensations amounting to five years of lost harvests were distributed to the vast majority of households. Thirty-five households identified as most vulnerable were either enrolled into a pension scheme (for the fourteen heads of vulnerable households that were older than 65 years old), or received land (eleven heads of households) or housing to rent (ten heads of households).

The demands issued by the people affected

The people affected by the project, local authorities and civil society organizations consider that financial compensations alone cannot ensure sustainable livelihoods' rehabilitation. They sent a charter of demands to the Haitian government, the IDB and SAE-A in June 2016, who have to the date of publication of this case study refused to meet with them to discuss their claims. They demand that a new compensation and rehabilitation plan is adopted, that includes additional and fair financial compensations, as well as individual support to each of the affected households. Such a support would include the strengthening and monitoring of their economic activities (farming, livestock, fisheries, food processing, salt harvesting, reforestation, masonry, etc.) and would involve identifying opportunities and factors that may generate revenues, with appropriate technical and management trainings provided by relevant organizations and institutions. This support would be undertaken in collaboration with relevant community based organizations (including farmers and fishermen organizations, economic development) and local institutions, and take women's rights and specific needs into account.

Guidance on fair compensation and responsible land governance to protect people's right and livelihoods

This case illustrates one of the many occurrences when, despite the existence of detailed guidelines on resettlement, land based investments have had devastating negative impacts on communities whose rights, livelihoods and Free, Prior and Informed Consent were not respected. This is partly due to the lack of detailed guidance regarding how financial compensations should be calculated and how rehabilitation should be conducted in order for each household to access conditions of living at least equivalent to those it enjoyed before losing its land. Land governance is also a key factor that can ensure the respect of informal and formal land rights. In that respect, the implementation of the *Voluntary Guidelines* on the Responsible Governance of *Tenure* of Land, Fisheries and Forests in the Context of National Food Security by all stakeholders involved in land-based investments is an important condition to ensure the respect of people's land rights and livelihoods.

[83] *Plan d'action pour la compensation et le rétablissement des moyens d'existence des personnes affectées*. Erice AZ, September 2011.

I.2. Expropriation without involvement of international institutions in Timor Leste - the Tasi Mane project

This case study was written by Bernardo Ribeiro de Almeida of Leiden University, who worked with UNDP in Timor Leste.

Land acquisition in Timor-Leste is a delicate topic. Centuries of colonialism, conflict, displacement and dispossession are the causes of many land-related grievances. Few Timorese ever obtained formal land rights during the centuries of Portuguese colonial administration and the 24 years of Indonesian occupation, and the legal validity of these land rights has remained unclear since independence in 2002. More important, the customary land rights that serve the great majority of Timorese have never been clearly recognized in law, which seriously threatens their holders' security. Several documented cases have revealed dispossession of customary land rights holders by the state, by arguing that the holders did not possess a formal land title. In these cases little or no compensation was paid, and no formal expropriation process was followed. Unclear land rights are, however, only one part of the problem of state land acquisition. The Timorese Constitution establishes that expropriation can only be carried out for public purposes and upon the payment of fair compensation, according to a procedure to be established in law. However, such a law has never been approved, and therefore such procedure does not exist.[84] Nevertheless, acquisitions/ expropriations continue to take place in this legal vacuum, including the case of Tasi Mane.

The Tasi Mane Project

The Tasi Mane Project is a grandiose infrastructure project through which the government intends to develop an oil and gas industry along the south coast, a mostly rural and impoverished area of the country. The government's justification for the project rests on the creation of jobs and the development of the Timorese economy that the project will supposedly bring. The project is divided into three main physical clusters: an international airport and supply base, a petrochemical refinery, and a liquefied natural gas plant, all connected by a four-lane highway. Land acquisition is paramount for the implementation of this project. This case study focuses on the land acquisition for the supply base.

Ad hoc land acquisition

In the absence of a clear legal process for acquiring land, the Timorese authorities used an ad hoc approach, with no clear plan to prevent negative social impacts and little legal support. The process started with consultations with the affected communities, but little information was provided about the real impacts of the project.[85] An environmental impact assessment conducted by an independent company after the consultation recommended the elaboration of a resettlement action plan, but this recommendation was not implemented. In the meantime the government conducted an ad hoc cadastral survey to collect information about individual ownership rights over the land within the proposed supply base area, including rights that had never previously been formally recognised. On the one hand, this recognition of informal rights establishes an important precedent of recognition of customary rights. On the other hand, this approach does not take into consideration the complex layers of rights and social connections that are part of customary land systems; by collecting

[84] Regarding land tenure legislation in Timor-Leste see Almeida, Bernardo (2016). *Land Tenure Legislation in Timor-Leste*. The Asia Foundation

[85] See chapter 15 of the environmental impact assessment conducted after the consultation, available at http://www.laohamutuk.org/Oil/TasiMane/SSB/EIA/SSB-EN-REP3_Vol%202%20Main%20Report%20Part%20B.pdf

information only about individual owners of land parcels, the process undermines the social structures dependent on that land, as well as other rights, such as land use rights. Consequently, more powerful members of the community are empowered by this approach, to the detriment of more vulnerable members.[86] For instance, those using land borrowed from family members were deprived of the use of that land without any compensation.

With the land 'owners' identified, land acquisition proceeded. The government never called this land acquisition an 'expropriation', but rather a 'voluntary sale'. First, the government signed an agreement with representatives of one of the affected communities to obtain their land for 150 years in exchange for 10 percent of the profits of the supply base.[87] Despite a public announcement of the agreement, its text remained secret, even to the members of the affected communities. When questions regarding the representation of the community, operability and legality of the agreement, and the legality of the cadastral survey started to emerge, the government approved a decree-law specifically targeting this land acquisition process. Without ever expressly mentioning expropriation, this decree-law attempted to legalize the ad hoc cadastral survey and gave two options to the affected people: sell the land or get a share of 10 per cent of profits of the supply base. However, even before the decree-law entered into force, the government started signing sale contracts with the people previously identified in the cadastral survey as owners of the land. While in theory the sale of land was voluntary, government made use of the influence of local resistance veterans to compel the affected people to sell their land.

The value to be paid as compensation was set in a government-decree, even before the approval of the above-mentioned decree-law: 3 US dollar per square metre, plus a fixed value for each crop. These values were based on a political decision, without any consultation or study to support them. There were also vague promises about jobs to the affected communities. No land-for-land or long-term compensation scheme was implemented. Without any possibility to negotiate compensation, nor any legal support, and at risk of being evicted without compensation, the affected people sold their land. The influx of money from compensations quickly converted land for subsistence agriculture into an expensive commodity, with prices not less than 3 US dollars per square meter, making it difficult for the affected people to obtain replacement land. The situation is especially problematic for those with no alternative land and those who spent much of the compensation on expensive goods, such as cars and motorbikes.[88] Furthermore, the promised jobs are not materialising, and the employment of many Indonesian workers in the construction of the nearby airport gave rise to protests and conflicts.

Without an initial social impact assessment, a resettlement plan and independent monitoring and evaluation of the land acquisition strategy, it is not possible to measure the current and future economic and social repercussions of this process. But it is evident in this case study that the ad hoc approach adopted both for expropriation and compensation has significant potential to endanger the livelihoods and social stability of the affected communities.

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[86] Regarding the complexity of customary land rights in Timor-Leste see among others McWilliam, Andrew and Traube, Elizabeth G., eds. (2011). *Land and Life in Timor-Leste – Ethnographic Essays*. ANU E. Press

[87] Important details such as the definition of profit were not established in this agreement.

[88] Regarding more details of the process and effects of this land acquisition see Cryan, Meabh (2015). 'Dispossession and Impoverishment in Timor-Leste: Potential Impacts of the Suai Supply Base' in *SSGM Discussion Paper 2015/15*. Australian National University