
III. Expropriation Laws and Practices: India

A. General Background

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

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

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

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

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

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

¹⁴⁸ Id., 6.

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

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

Well-known and documented problems with development-caused forced displacement in India¹⁵⁰ have stimulated the search for a better development-caused forced displacement policy and legal framework. The main policy and legal instruments governing development-caused forced displacement actions in India are based on land expropriation or acquisition¹⁵¹ measures introduced in the 19th century. The centerpiece legislation was, and remains, the Land Acquisition Act (LAA) of 1894, as amended.

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

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

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

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

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

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

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

¹⁵⁰ See *supra* note 146 and related text.

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

¹⁵² Pandey, 1998, *supra* note 146(10).

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

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

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

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

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

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

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

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

B. The Land Acquisition Act

1. Acquisition Purposes

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

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

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

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

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

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

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

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

2. Scope and Process

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

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

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

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

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

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

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

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

¹⁶¹ Id. § 3(a).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

¹⁶⁵ LAA, § 4(1).

¹⁶⁶ Id. § 4(1).

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

¹⁶⁸ H. Mander, *supra* note 146(5059–5060).

¹⁶⁹ Id. § 5-A.

¹⁷⁰ Id. § 6.

¹⁷¹ Id. § 7.

¹⁷² Id. § 9(1).

¹⁷³ Id. § 9(2–4).

¹⁷⁴ Id. § 14 and 15.

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

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

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

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

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

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

3. Compensation

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

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

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

a. 30% “solatium”

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

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

¹⁷⁵ Id. § 11(1).

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

¹⁷⁷ Id. § 31(3).

¹⁷⁸ Id. § 11A.

¹⁷⁹ Id. § 18.

¹⁸⁰ Id. § 16.

¹⁸¹ Id. § 11(2).

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

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

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

b. Damages from the taking

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

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

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

c. Moving expenses¹⁸⁶

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

d. Interest

In addition to the market value and other compensation, the interested person is entitled to 12% annual interest on the market value¹⁸⁸ calculated from

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

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

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

e. Market value

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

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

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

¹⁸⁵ Id. § 23(1).

¹⁸⁶ See supra note 183.

¹⁸⁷ Id. § 23(1).

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

¹⁸⁹ LAA, § 23(1A).

¹⁹⁰ Id. § 23(1A).

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

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

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

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

C. Valuation: Defining "Market Value"

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

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

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

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

1. Comparable Sales Method

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

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

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

Why do the sales deeds understate the actual value? Most states impose a transaction tax¹⁹⁷ on sales of immovable property. This transaction tax has typically ranged from 10–14% of the sales price. Parties to a transaction thus have had a substantial incentive to understate the sales price. In recognition of this prob-

¹⁹³ Id. § 24.

¹⁹⁴ Special Tahsildar, L.A. v. Mangala Gauri AIR 1992 SC 666.

¹⁹⁵ See K. Pasayya v. Special Tahsildar AIR 1995 SC 1641.

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

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

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

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

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

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

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

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

2. Capitalization of Income Method

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

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

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

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

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

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

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

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

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

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

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

3. Expert Opinion

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

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

4. Valuation in the NHAI Handbook²⁰⁴

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

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

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

- (i) Capitalizing income of agricultural land based on collection of primary data using a multiplier of 20.²⁰⁶
- (ii) Capitalizing income of agricultural land based on established Department of Agriculture rates for costs and output value using a multiplier of 20,²⁰⁷ and
- (iii) Comparable sales based on sale deeds.²⁰⁸

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

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

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

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

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

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

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

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

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

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

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

D. Compensation and Valuation Problems

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

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

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

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

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

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

²¹⁰ See *supra* note 146 and related text.

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

- (v) The government land grantees do not receive adequate or sometimes any compensation. Most state governments have implemented land reform or government land allocation programs from which poor households have received land. In many cases, these poor government land grantees do not have the right to sell the land, either temporarily or permanently. When the government has subsequently acquired such land compulsorily, the courts have ruled that such land—because it is inalienable—should be compensated at a much lower rate. In numerous other cases, the competent authorities have decided that such households were not entitled to any compensation.²¹² This is a clear injustice.
- (vi) Under-compensation due to delays in compensation payments, including cases where the statutory stipulated interest is not paid. Although the LAA contains a useful provision entitling interested persons to interest payments during delays, this provision does not apply to all delays and it is often not implemented.²¹³
- (vii) Subtraction of a portion of the compensation money by corrupt officials before it reaches the APs. This is a common, well-documented, and often even widely expected in India, where such “bribes” are too often ingrained into patterns of governance.
- (viii) Asset appreciation occurring after the determination of compensation. This results in a failure to reach replacement costs. By law, the valuation cannot consider this increase, yet the purchase price of replacement land in the vicinity will be affected. So the amount of cash compensation, even if properly valued by law, is based on pre-project rates, which is not enough for recipients to purchase equivalent land at higher post-project rates.
- (ix) Land-for-land compensation options often not considered or offered. The LAA gives the collector the option to offer land-for-land compensation in lieu of cash compensation, but does not require it. As a result, land-for-land compensation is rarely given the serious consideration it deserves.
- (x) An over reliance on cash compensation in cases where recipients are not accustomed to handling cash. The literature is replete with such examples, leading to misdirection by the recipients of compensation money, leaving them both assetless and cashless.²¹⁴
- (xi) Persons not entitled to damages if the acquisition proceedings lapse. LAA requires the collector to declare an award within 2 years from the date of publication of the declaration. Otherwise, the acquisition proceedings lapse. If the acquisition proceedings do lapse, the person is not entitled to receive any damages, which he would otherwise be entitled to if acquisition proceedings were formally withdrawn under Section 48(1) of the LAA.
- (xii) National Highway Act and other central acquisition laws do not provide for the 30% solatium. LAA provides for a “solatium” equal to 30% of market value because of the involuntary nature of the land acquisition.
- (xiii) However, the National Highway Act and several other central acquisition laws²¹⁵ do not provide for this 30% solatium.²¹⁶ While we found evidence that the solatium is

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

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

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

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

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

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

E. Recommended Reforms

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

1. Recommended Land Valuation Methodology for India

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

- (i) RDI developed a rudimentary survey methodology for doing this in the state of Andhra Pradesh that worked well in trials. It leverages local knowledge. In most villages in India, land markets are sufficiently active and market values based on recent sales are common knowledge. Thus, the survey collects data through key informant interviews²¹⁷ as to the average prices for various types of land. It will be important to identify various classifications of land based on irrigation availability, land quality, and location. The information from these more reliable primary sources is then compared to the secondary data from the sub-registrar's office and the highest value is used. In a great majority of cases, the primary data values will be higher.

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

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

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

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

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

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

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

2. Other Compensation and Valuation Considerations for ADB Projects

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

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

on government land should probably differ from the required time of possession on private land, with the required time of possession on government land relatively shorter. Indian revenue and forest laws often have provisions that allow for formalizing the rights to long-term possessors on government land.²²⁰ These laws typically require a long period of uninterrupted possession, often 20 years or more, and apply only for those who fall under some income or landholding threshold. These legislative provisions also typically require claims to be supported by written documentary evidence, which is a substantial obstacle for the typical illiterate claimant (especially when the requirement is to show 20 years or more of uninterrupted possession). For non-titled possessors on private land, India has legislative provisions on adverse possession²²¹ laws that, in general, allow non-titled possessors to acquire or perfect title after 12 years of continuous, adverse possession on another’s land.²²² At the very least, ADB could consider urging the competent authority to implement the existing legislative provisions relating to “regularizing encroachment” on public land and facilitate adverse possession claims on private land to help ensure that more nonformalized possessors are legally entitled to possession. ADB should also consider establishing project-specific requirements that make nonformalized possessors eligible for compensation when they can show they have been on the public land for at least 3 years before the initial notice of land acquisition or on private land for at least 12 years.²²³ All such claims should be verified through written evidence when possible and available, but also through oral evidence of nearby residents, verified by project implementers.

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

²²⁰ These provisions and the related processes are called “regularizing encroachment.”

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

²²² See Narayana, P.S. 2000. *Law of Adverse Possession*.

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

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

the livelihoods of poor, rural households.²²⁴ Adequate space around the house provides for the possibility of planting “kitchen gardens,” keeping livestock, and conducting other economic activities that provide important supplemental nutrition and income for the family. The ADB Handbook on Resettlement states that those losing residential land should be given alternative house plots of at least 60 square meters (m²). This is insufficient. Research findings in India indicate that significant nonresidential benefits such as nutrition, income, status, increased credit access, etc. are unlikely to be achieved unless the (rural) house plot is 100 m² and is ideally achieved when the plot is 300–500 m².²²⁵ The additional land required is not substantial in terms of either space or costs, but provides important livelihood benefits to the project-APs.

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

3. Topics for Broader Policy Dialogue with Indian Government

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

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

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

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

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

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

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

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

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

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

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

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

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

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

F. Closing Remarks

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

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