
V. General Recommendations

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

A. Compensation and Valuation

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

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

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

- (ii) The Handbook’s definition²⁷¹ and the Operations Manual’s definition of “replacement cost” is limited to situations where markets are functioning. The definition presumes the existence of land markets. It implies that replacement cost applies only to situations where markets reflect reliable information about prices and availability of alternatives to the assets lost. Yet, it does not address explicitly and clearly how to define replacement cost in situations where those conditions are absent.
- (iii) The Handbook’s definition of replacement cost appears to focus on market cost of the expropriated asset rather than the market cost of an appropriate replacement for the expropriated asset. The market cost of the expropriated asset is not necessarily the same as the market cost of an appropriate replacement for the expropriated asset. Replacement cost should include ideally a focus on the cost of the replacement asset.

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

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

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

1. Component 1: Market Value

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

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

a. Land

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

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

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

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

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

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

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

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

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

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

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

Box 6: Land for Land

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

Where land-for-land is given for home plots in rural areas, ADB should strive to provide plots of sufficient size to include a kitchen garden and area for livestock. Based on research findings from India on sufficient size, such plots should be at least 300 square meters (m²), not 60 m² as the ADB Handbook currently recommends.

Source: The authors.

b. Structures

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

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

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

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

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

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

c. Common property resources

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

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

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

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

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

d. Crops

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

e. Trees

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

2. Component 2: Premium

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

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

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

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

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

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

3. Component 3: Transaction Costs

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

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

4. Component 4: Interest

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

5. Component 5: Direct Damages

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

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

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

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

B. Procedural Mechanism

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

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

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

1. Initial Notice

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

2. Formal Declaration

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

3. Public Negotiation and Consultation

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

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

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

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

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

4. Adjudication

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

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

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

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

5. Payment of compensation

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

6. Taking Possession

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

C. Supporting Institutions

1. Training Judges and Lawyers

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

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

2. Establishing Special Land Tribunals

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

3. Offering Legal Aid

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

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

may offer representation at formal proceedings.

Almost all legal aid centers share two common characteristics: accessibility and independence. The legal aid offices should be near areas where land grievances often occur. The lawyers should regularly travel to rural areas to educate farmers and local officials, meet with potential clients, and represent clients in negotiation or adjudication proceedings. The operation of legal aid offices should also be free from the government's direction or interference. This is vital because governments themselves are parties to cases involving expropriations.

4. Developing Administrative Capacity in Handling Compensation and Rehabilitation Issues

Most governments of developing countries are ill equipped to identify and resolve compensation and rehabilitation issues. Often the agency in charge of construction of the projects is carrying out the responsibility of providing necessary services to APs. In some settings, multiple agencies are involved with conflicting or overlapping authorities and agendas.

The first need is to develop and train staff members and professionals who are capable of identifying and resolving issues relating to compensation and resettlement. There should be a special agency or office that assumes the overall responsibility and the coordinating functions. Appropriate legal framework should be established as well to govern the displacement process, which is glaringly lacking in many settings and is typically dictated by the construction schedule of the project or administrative expediency.