February 25, 2005

To: **Honorable Patricia Hajabakiga, Minister of State**
Ministry of Lands, Environment, Forestry, Water and Natural Resources

From: **Dave Bledsoe, Rural Development Institute**
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Re: **Findings, Comparative Experience, and Recommendations on Expropriation**

Executive Summary

Coming on the heels of Rwanda's new Land Law, a revised Expropriation Law must carefully define three elements of expropriation in order to carefully balance the need of the state to reasonably manage and develop land against the right of private landholders to tenure security. First, the specific permissible purposes for expropriation must be clearly articulated in order to define the extent of the state's expropriation power. Second, the method of valuing land for expropriation must be set at a level sufficiently high to fairly compensate landholders. Third, the process of expropriation must be defined to include notice to landholders, a fair and transparent process, an opportunity to appeal and timely payment of compensation.

Based on our findings, analysis of the Land Bill, and international comparative experience, we provide the following recommendations for Rwandan policymakers (each of which is explained in detail in the full memo):

Permissible Purpose for Expropriation

1. Adopt a statutory list of permissible public interest purposes under which the state can expropriate land. A list of the specific purposes for which expropriation is permitted would guide governmental authorities when making decisions about

land management and provides enhanced land tenure security to landholders by limiting the discretionary power of government actors.

2. Carefully define the circumstances under which the state can expropriate land for villagisation to ensure compliance with the "public interest" requirement of the Constitution. Moreover, the law should require the state to abide by general expropriation guidelines regarding process and compensation when expropriating land for villagisation.

3. Further clarify when the state can take land due to non-exploitation and ensure that general expropriation processes and valuation rules are applied when land is taken for non-use. Specifically, the Expropriations Law should define what constitutes "non-use," "exploitation," and "seriously destroyed" for the purposes of permanent taking as reference in the Land Law.

4. *Limit expropriation to clearly public purposes.* We recommend that the state not be permitted to expropriate land for private or commercial interests. Rather commercial interests in need of land for development should negotiate directly with landholders to purchase land rights for development. If Rwandan policymakers decide to permit expropriation benefiting private commercial interests, the circumstances under which such takings would be permitted should be carefully limited and defined to ensure that the expropriations meet the public interest requirement of the Constitution.

Land Use Planning and Expropriation

5. Adopt a land use planning law or regulation to guide planners. While not strictly related to expropriation, land use master planning can result in expropriation depending on how land use plans are implemented. A master planning law or policy should provide guidance on the appropriate process for planning, including what levels of government have authority over planning; provide for public participation and comment during the planning process; define appropriate restrictions on use; and explain how to handle non-conforming uses.

6. Permit non-harmful, pre-existing, non-conforming uses to continue. Rwanda should permit non-conforming (irregular), pre-existing uses to continue under new master plans just as many other countries permit in order to preserve landholders' investments in land. If a landholder changes his or her use of the land, they could then be required to conform to the new master planning use requirements.

7. Where possible, formalize and upgrade informal settlements in place or, if not possible because of health or safety concerns, expropriate the land of very limited numbers of informal occupants and resettle them with compensation for the expropriation.

Valuation and Compensation

8. Base compensation for expropriation on market (replacement) value. Government representatives uniformly agreed that current compensation levels are insufficient because they do not include the value of land, and because the compensation tables are out of date. There are administrative problems as well. While Rwanda's land market is presently informal, a review of locally-held transaction records, combined with limited surveying, could be used to create a base set of data on market value for use in valuing expropriated property.

Expropriation Process

9. Ensure that timely and detailed notice is provided to targeted expropriation landholders. Notice requirements should call for individual, written notification of landholders made by personal delivery of a notice of an intent to begin an expropriations process.

10. Ensure that a transparent expropriation process is created that includes landholders and other stakeholders.

11. Clearly define governmental agency roles and responsibilities regarding expropriation. Ministerial changes since the time the 1996 Expropriations Law was passed as well as the changes in governance due to decentralisation, should both be addressed in the forthcoming law.

12. Permit landholders to appeal expropriation decisions. Grounds for appeal should include: (1) whether the proposed public purpose legitimately complies with the requirements for a public purpose set out in the Expropriations Law; (2) whether all or a part of the land is actually necessary for the proposed public purpose; and (3) whether the compensation was determined in accordance with law.

13. Require that full compensation must be provided to landholders before they are required to vacate their landholding.

Introduction

With the new Land Law expected to pass shortly, creating a new or revised Expropriation Law is a necessary next step to further define the state's expropriation powers, and creating certainty for state actors and tenure security for landholders.[1] At MINITERE's request, during our January 24 to February 2 visit to Rwanda, we concentrated our efforts on this topic. This memo describes our findings and recommendations. We have also included a discussion of comparative international experience throughout the memo.

Every country has retained the state power to expropriate land – also called "compulsory acquisition," "eminent domain," and "land taking" – which can be defined as the right of the state to acquire land from private owners or landholders.[2] To control this extraordinary power, countries have developed guidelines governing the purposes for which the state can expropriate land, the level of compensation that the state must pay to the owner of the land (or other right holders), and procedures that the state must follow to expropriate the land.

These guidelines vary according to each country's balancing of private and public interests in land, but the presence of fair guidelines is essential to the stable functioning of land markets and economic development. If expropriation rules and practices do not adequately protect private land rights, the result is reduced tenure security, depressed land values, and increased reluctance of banks to accept land as security for loans.

This memo is divided into three sections, mirroring these three general guidelines: (1) permissible purposes for expropriation; (2) compensation and valuation; and (3) expropriation procedures.

I. Permissible Purposes for Expropriation

In Rwanda, while the state expects to retain ultimate ownership over all land, individuals hold the land under informal "ownership," and will have at least long-term use rights to land. Recognizing the importance of secure land rights for stability, investment, and economic growth, the Rwandan Constitution acknowledges but also limits the government's power to expropriate land rights to purposes that serve the public interest. Article 29 of the Constitution states, "The right to property may not be interfered with except in public interest, in circumstances and procedures determined by law and subject to fair and prior compensation." Thus, the Constitution makes clear that land can only be expropriated for the public interest. The Land Bill provides further clarification on

[1] In this paper, the term "landholder" refers to land occupants, both those with formal title and those without.

[2] In this paper, the term "land" includes buildings and other property permanently attached to land.

the permissible purposes for expropriation and how "public interest" is to be interpreted. Specifically, the Land Bill states:

> "Land is part of the common heritage of all Rwandans: past, present and future generations.
>
> Apart from the right given to people, the government has the overall authority over land, this is done in public interest and for economic development and social welfare, in accordance with the laws and regulations.
>
> Therefore, the government has the right to expropriate in the case of activities of public interest, grouped settlement, general land use planning for national land management interest."[3]

Thus, the law recognizes that the state should only use its exceptional power to deprive landholders of their land rights for purposes that serve the following three purposes: (1) public interest; (2) grouped settlement; and (3) land use planning and national land management interest. The latter two purposes, in order to abide by the Constitution, must be for the public interest. We will discuss each of these permissible purposes in turn and how policymakers might more fully elaborate on and define these terms in a forthcoming Expropriations Law.

I.A. Public Interest

The first purpose, "public interest," as left broadly defined in the Land Bill, would presumably include a long list of public utility uses, such as hospitals, schools, roads, public utilities, etc. In the forthcoming Expropriations Law, Rwandan policymakers will need to decide whether and to what extent to further tailor and define "public interest" purposes.

All states reserve the right to expropriate land for the public purposes or for the public interest. Varying definitions of "public purposes" embody each society's balance of the rights of private landholders with the public's need to use land. Expropriation laws define the circumstances under which the state can expropriate land through general guidelines, through a list of allowable public purposes, or through a combination of the two.[4]

1. General Guidelines for Establishing "Public Purpose"

In countries that use "general guidelines" for expropriation, the constitution or statute provides that the state can expropriate land only for a "public purpose," but does not define which purposes are public. This gives the state executive

[3] Rwandan Land Bill Art. 3 (May 2004 version).

[4] MICHAEL KITAY, LAND ACQUISITION IN DEVELOPING COUNTRIES (1985) at 40-41.

and the courts considerable discretion to determine which purposes qualify as "public."[5]

The United States is an example of a country that combines general guidelines and list provisions, with the general guidelines contained in the federal Constitution and lists contained in statutes enacted by state legislatures. The Fifth Amendment of the US Constitution provides in part: "nor shall private property be taken for public use, without just compensation."[6]

Under German law, both the federal government and the *laender* (states) can expropriate land for the "common benefit." Examples of the allowable purposes for expropriation include the construction of roads, airports, power stations or cable railways. The state can expropriate private land only if the state has no alternative means of acquiring the needed land.[7]

Vietnam's approach, adopted in its 1993 Land Law, provides that "where necessary, the State shall, for purposes of national defense, security, national or public interest, recover possession of land which is currently being used." The Hong Kong Lands Resumption Ordinance authorizes the chief executive of Hong Kong to expropriate land for "public purposes."[8]

2. Use of Statutory Lists to Define "Public Purpose"

Statutory lists allow the state to expropriate private land only for certain specifically listed purposes, such as schools, roads and government buildings. In general, statutory lists give much less discretion to the executive and judicial branches of government than do general guidelines.

Such lists can be "exclusive;" that is only purposes specifically defined within the list are permitted. Alternatively, "non-exclusive" lists, which allow expropriation for purposes falling within the list or within general guidelines, are more common for the flexibility that they permit policymakers. Such non-exclusive lists provide guidance to public officials regarding uses that qualify as "public uses," but also give the executive some discretion to determine whether a non-listed use may qualify as a public use within the meaning of the statute. For example, in the US

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[5] *Id.* Kitay observes that statutes may replace the term "public" by *social, general, common, or collective,* and may replace the term "purpose" by *need, necessity, interest, function, utility, or use.*

[6] U.S. CONSTITUTION, Amend. V.

[7] Dr. Christian Grimm, "Rural Land Law in Germany" (May 1998) (unpublished manuscript on file with Rural Development Institute).

[8] Laws of Hong Kong ch. 124, sec. 3.

State of Washington the state law provides a detailed list of public uses, but also allows public officials to expropriate land "for any other public use."[9]

Poland has a detailed but non-exclusive list for expropriation. Polish law provides that the state may expropriate property only "in cases in which public welfare cannot be promoted without curtailing or revoking the right to the ownership of real estate ....and the real estate cannot be contractually acquired." The law then limits the purposes for which the state may expropriate land to such projects as roads, communication systems, environmental protection, public offices, water and liquid waste treatment, flood banks, schools, hospitals, nursing homes, sanitary facilities, cemeteries, national defense and public safety, multifamily housing and "other obvious public goals." The inclusion of "other obvious public goals" would seem to allow the state executive some flexibility to expand the list of permissible purposes.

Kenya, first requires that land to be expropriated be necessary for the purposes of a public body and then provides a list of the specific types of purposes that land can be taken for: "where the Minister is satisfied that any land is required for the purpose of a public body, and that … the acquisition of the land is necessary in the interests of defence, public safety, public order, public morality, public health, town and country planning or the development or utilization of any property in such manner as to promote the public benefit …"[10]

Similarly, Thailand's Constitution provides a specific, yet non-exclusive list of public purposes for which the state can expropriate land: "The expropriation of immovable property shall not be made except by virtue of the law specifically enacted for the purpose of public utilities, necessary national defense,

[9] Rev. Code Wash. 8.12.030 provides: "*Condemnation authorized--Purposes enumerated:* Every city and town and each unclassified city and town within the state of Washington, is hereby authorized and empowered to condemn land and property, including state, county and school lands and property for streets, avenues, alleys, highways, bridges, approaches, culverts, drains, ditches, public squares, public markets, city and town halls, jails and other public buildings, and for the opening and widening, widening and extending, altering and straightening of any street, avenue, alley or highway, and to damage any land or other property for any such purpose or for the purpose of making changes in the grade of any street, avenue, alley or highway, or for the construction of slopes or retaining walls for cuts and fills upon real property abutting on any street, avenue, alley or highway now ordered to be, or such as shall hereafter be ordered to be opened, extended, altered, straightened or graded, or for the purpose of draining swamps, marshes, tidelands, tide flats or ponds, or filling the same, within the limits of such city, and to condemn land or property, or to damage the same, either within or without the limits of such city for public parks, drives and boulevards, hospitals, pesthouses, drains and sewers, garbage crematories and destructors and dumping grounds for the destruction, deposit or burial of dead animals, manure, dung, rubbish, and other offal, and for aqueducts, reservoirs, pumping stations and other structures for conveying into and through such city a supply of fresh water, and for the purpose of protecting such supply of fresh water from pollution, and to condemn land and other property and damage the same for such *and for any other public use* after just compensation having been first made or paid into court for the owner in the manner prescribed by this chapter." [Emphasis added.]

[10] Land Acquisition Act (Kenya) (1970, revised 1983).

exploitation of national resources, town and country planning, promotion and preservation of the quality of the environment, agricultural or industrial development, land reform, or other public interests . . . ."[11]

A broad survey of developed and developing countries indicates that the public purpose doctrine most often includes the following permissible uses:

- Transportation uses, including roads, canals, highways, railroads, sidewalks, bridges, wharves, piers, and airports;
- Construction of public buildings, including schools, libraries, hospitals, factories, churches, and public housing;
- Military purposes;
- Public utilities such as water, sewage, electricity, gas, irrigation and drainage works, and reservoirs;
- Public parks, playgrounds, gardens, sports facilities, and cemeteries;
- Agrarian reform.[12]

Except where a country employs an exclusive list of circumstances under which expropriation is permissible, statutory expressions of the public purpose doctrine will always require public officials and courts to interpret the statute to determine whether a use that is not listed in the statute qualifies as a public purpose. This is especially true for expropriation statutes that contain broad general guidelines.

***Recommendation**: Adopt a statutory list of permissible public interest purposes*

We recommend that Rwanda's Expropriation Law adopt a list provision that carefully outlines the specific public interest purposes under which the state can expropriate land. Such a list will provide clear guidance to local authorities, land holders and the public at broad of the appropriate purposes for expropriation in the "public interest." Such clarity will greatly enhance the tenure security and investments of all land holders. The sample list given below could be used as a starting point for crafting a list that would be appropriate for Rwanda.

> The government is permitted to expropriate land rights and improvements to land for the following "public interest" purposes:

[11] CONSTITUTION OF THE KINGDOM OF THAILAND, ch. 1, sec. 49.

[12] *See* KITAY, *supra* note 4 at 43-44. Expropriation of land for agrarian reform is generally permitted where landowners have not made full use of the land, or to expropriate the excessive portions of very large, privately owned plots.

a. Public road and railroad
b. Drainage
c. Waterworks
d. Power line
e. Gas
f. Public telecommunication system
g. Airport
h. Harbor
i. Bus terminal
j. Reservoir
k. Dam
l. Flood control dike
m. Lava control construction
n. Vital irrigation construction
o. Waste processing installation
p. Final pump site
q. Conservation area and area for nature reserve and culture conservation
r. Vital facilities directly concerning the regional and national security
s. Public hospital
t. Public sport facility
u. Public market
v. Public school and university
w. Land redistribution to households possessing little or no land

I.B Grouped Settlement

The second purpose for expropriation, "grouped settlement," specifically permits the state to expropriate land in continuance of its *Imidugudu* or villigasation policy. In order to comply with the Constitution, expropriation for grouped settlement must still be for the broader public interest.

Importantly, while the Land Bill permits expropriation for villigasation, it bars the use of expropriation for land consolidation. Specifically, the Land Bill clarifies that rural land consolidation is not an appropriate use of the state's expropriation powers. Rather, the law clarifies that the state can encourage land consolidation, but cannot force land consolidation by use of the expropriation power. Specifically, the Land Bill states that "the Minister in charge of Agriculture and Livestock shall have the right to *request* the consolidation of smaller plots into sizable land in conjunction with local authorities and the community in order to improve land management and productivity."[13]

[13] Rwandan Land Bill, Art. 20 (May 2004 version).

Recommendation: *Define when the state can expropriate land for villagisation and require the state to abide by general expropriation guidelines regarding process and compensation when expropriating land for villagisation.*

Policymakers should answer any outstanding questions regarding the villagisation program within the broader context of villagisation policies (rather than through an Expropriations Law); however, the Expropriations Law should specify when the state can expropriate land for villagisation. For example, expropriation for villagisation could be limited to circumstances where a particular site is reasonably necessary for villagisation and the land cannot be acquired by means other than expropriation, such as purchase from a willing private owner or acquired from a pool of existing publicly held land. Importantly, the Expropriations Law should specify that the same procedures and valuation methods be used for expropriation for villagisation, as would be done for any other expropriation.

I.C Land Use Planning and Management

The third permissible purpose for expropriation stated in the Land Bill is for "general land use planning for national land management interest." Once again, in order to comply with the Constitution, any takings for this purpose must be for the public interest.

Through our discussions with government stakeholders and further analysis of the Land Bill, it seems that this purpose can be broken down into two smaller categories: (1) expropriation to ensure that land rights are being exploited by their holders; and (2) expropriation to ensure compliance with land use plans and zoning.

1. Land Right Exploitation

The Land Bill itself provides further, specific guidance on when and how the state can take land due to lack of exploitation. Specifically, the Land Bill provides that the state can permanently confiscate land if: (1) it is being seriously destroyed (Article 75); (2) for non-use if the landholder's land was previously temporarily taken for non-use (Article 77); (3) if the landholder's land was temporarily taken for non-use for six years and the landholder has not applied to receive the land back (Article 77); or (4) if town land has not been exploited after a three year period (Article 77).

Recommendation: *Further clarify when the state can take land due to non-exploitation and ensure that general expropriation processes and valuation rules are applied.*

The Expropriations Law should further clarify what constitutes "non-use," "exploitation," and "seriously destroyed" for the purposes of permanent taking. In defining these terms, landholders should be ensured a fair level of flexibility in

deciding how to manage their land. For example, a landholder should have the option of using land for what might possibly be considered less-intensive uses, such as pasturing, tree crops, or fallowing, without fear of takings. Thus, it should be clear that less-intensive use is not the same as "non-use" and should not result in a taking. Clear definitions of these terms will be necessary to curb potential abuses by government officials and to ensure landowners have the flexibility to manage their land rights.

2. Land Use Planning and Zoning

Using expropriation to force compliance with land use master plans raises several potential red flags and could easily serve to undermine tenure security, decreasing land values and discouraging investment. Policymakers should act cautiously to balance public purposes that might be served by land use planning against costs to private landholders.

In the Rwandan context, expropriation and master planning includes four key topics that should be explored and answered by policymakers. First, to what extent, if at all, should the state's expropriation power be used to acquire land for the benefit of private commercial interests? Second, and related to the first point, how should pre-existing uses that do not conform to subsequently adopted land use plans be treated? Third, what protections from expropriation should informal settlers be granted? Finally, and somewhat less related to expropriation specifically, what principles should guide the creation of land use master plans? Each of these four topics is described in turn, with recommendations provided for each.

a. Expropriation for Commercial Purposes

Strict implementation of master plans, as currently envisioned by policymakers, could result in expropriations. For example, if an area that is currently used for residential purposes is zoned commercial, several City of Kigali representatives informed us that residents can be expropriated and forced to vacate their land if a commercial developer is ready and willing to develop the land in accordance with the master plan. This essentially results in an expropriation of land for the benefit of a private commercial interest. This principle would seemingly also apply in non-urban contexts as master plans are developed. For example, the January 28-30, 2005 issue of The New Times reported that the government plans to evict 100 families from the shores of Lake Kivu in order to make land available for the tourism industry, presumably in accordance with a tourism development plan.

While there are undoubtedly some cases where expropriation for commercial purposes also benefits the wider public interest through economic development, special care should be taken to ensure that the state's extraordinary expropriation powers are not being used solely for the benefit of private parties and private commercial interests. The Expropriations Law is the tool that

policymakers should use to clearly define whether expropriation can be used for commercial purposes, and if so, under what specific circumstances.

In many countries, the laws do not allow use of government power to assist private corporations or individuals to acquire private land for commercial development activities. Instead, such countries allow use of government power for acquisition of private land only for uniquely public development activities that are "non-commercial," such as construction of public roads, public hospitals, public schools, etc. According to the laws of these countries, private corporations and individuals who engage in commercial activities must purchase land rights from private owners by negotiating with each individual owner.

In the US, the federal Constitution forbids the federal legislature and state legislatures from authorizing expropriation of private land for private use. Similarly, international law, as expressed by a 1962 United Nations General Assembly Resolution, states that the compulsory acquisition of land "shall be based on grounds of reasons of public utility, security, or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign."[14]

Some countries do allow expropriation of land for use by private businesses. In almost all cases, however, countries require the government to tie the expropriation of land benefiting a private interest directly to a benefit that will serve the greater public interest and only benefit the private commercial interest incidentally. Allowing expropriation of private land to serve commercial interests confers broad powers upon public officials and opens the door to abuse. Abuse can occur not only where the expropriation is on behalf of a private business, but also in settings where public entities are involved in commercial activities.

The Philippine Supreme Court has equated public use with "public advantage" and "public benefit" to limit the circumstances under which land could be expropriated for seemingly commercial purposes:

> The Court has found permissible uses that (a) enlarge the resources, increase the industrial capacity, and promote the productive power of a considerable number of inhabitants in any part of the State; (b) lead to the growth of towns and the creation of new resources of the employment of capital and labor; and (c) contribute to the general welfare and the prosperity of the whole community.[15]

[14] United Nations General Assembly Resolution on Permanent Sovereignty over Natural Resources of 1962 (GA Res. 1962; Paragraph 4).

[15] KITAY, *supra* note 4 at 48, *citing* HAIM DARIN-DRABKIN, LAND POLICY AND URBAN GROWTH 79 (1977).

The concept of using expropriated land for industrial growth is not unique to the Philippines. India, Korea, and Singapore are all examples of countries that allow state expropriation for the benefit of private industrial growth.[16]

In Malaysia, prior to 1991, state governments could only expropriate land for "public utility." This meant that the government could use expropriated land only to build schools, hospitals, roads, and other projects that qualified as "public utilities." In 1991 the parliament amended the law to replace the term "public utility" with the phrase "for any purpose beneficial to the economic development of Malaysia."[17] Thus, the state can now expropriate private land for any use (including development by any person or corporation) that the state authority considers beneficial to the economic development of Malaysia.[18] This includes such uses as mining, housing, agriculture, business, industry and recreation.[19] The highly discretionary nature of the expropriation law and the broad powers vested in the government to take agricultural land has led to a series of protests by those whose land was expropriated.[20]

***Recommendation**: Limit expropriation to clearly public purposes.*

We recommend that the government not expropriate land for private or commercial interests and that commercial interests in need of land for development negotiate directly with landholders to purchase land rights for development.

This approach – allowing use of government power only for non-commercial development purposes – has several merits.

First, this approach ensures that landowners receive full market value for their land since no landowner will sell his land to the developer unless the landowner is satisfied with the price offered by the developer. If the private corporation is able to use government power to acquire the land, the corporation will expect to pay less than market value for the land.

Second, this approach reduces resistance to the private development by the local community since it reduces or eliminates the use of coercive tactics by the developer. Such tactics are not necessary because the development does not financially injure local families who voluntarily sell their land. In other words, the

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[16] *Id.* at 47.

[17] Murray Hiebert, "Just Compensation?," *FAR EASTERN ECONOMIC REVIEW 14 (Mar. 9, 1995).*

[18] The Land Acquisition Act of 1960 was last amended in 1991, and was revised and published in the Gazette in 1992. N. KHUBLALL, COMPULSORY LAND ACQUISITION – SINGAPORE AND MALAYSIA 231 (1994).

[19] JPPH, "Land Acquisition" (visited Aug. 7, 2001), <http://www.jpph.gov.my/jpph2.htm>.

[20] Hiebert, *supra* note 17.

private developer can act as a partner that coordinates activities with the community rather than as an outside force that injures the community.

Third, the voluntary acquisition of land for private development greatly reduces the role of government in the process of private development. Government officials would still need to approve development plans and provide various permissions to the developer, but the officials would not be involved in disputes regarding the price of land and other controversies. This would allow government officials to focus their efforts on acquiring land for purely public development needs, such as public schools, etc. This would also reduce public perceptions that government officials engage in rent seeking rather than acting in the public interest.

If Rwandan policymakers do decide to permit expropriation benefiting private commercial interests, the circumstances under which such takings would be permitted, should be carefully limited and defined in the following ways:

First, expropriation for commercial purposes should only be permitted in circumstances where there is clearly a broader public benefit expected from the development, such as substantial job creation. Language, such as that adopted by the Philippines court (described above) should be inserted into the Expropriations Law to clearly define when takings that benefit a private commercial interest can be undertaken because they also serve a wider public interest.

Second, expropriation for commercial purposes should be limited to cases where the land could not be acquired via voluntary negotiation with the current landholder and where alternative suitable land is not available.

Third, the process for acquiring such land must be public and transparent and should provide an opportunity for comment by the public. For example, proposals to acquire land for commercial purposes should be published and the locally affected population should be personally notified by announcement or letter.

Fourth, such acquisitions should require approval by local, district, provincial and central governments.

b. Non-Conforming, Pre-existing Uses

When new land use plans are developed it is likely that existing land uses will not conform with the new plans. For example, an area of a city previously used for residential purposes may be designated for commercial purposes in the master plan due to its proximity to a major roadway or special economic zone. These land uses that were permitted prior to the new plan, but are not in compliance with the new plan are termed “non-conforming, pre-existing uses.”

In order to protect the tenure security and investments of these non-conforming, pre-existing uses, governments typically permit such users to continue using the land in non-conformance under special circumstances.

In the US, if a non-conforming use existed prior to the adoption of the zoning ordinance it will ordinarily be permitted to continue if it was a lawful use before the zoning ordinance was adopted. Such non-conforming uses are protected in order to ensure that changes in zoning requirements do not result in an unlawful expropriation of an individual's property rights.

While individual's rights to land should be protected, it is recognized that the state does have a legitimate interest in rational land use planning. In search for a fair method of dealing with the problem of non-conforming uses, some state legislatures in the US grant non-conforming users a grace period during which he or she can continue the non-conforming use in order to re-coup investments made ("amortize the investment"). At the close of this period the user retains the land right, but is required to discontinue the non-conforming use. For example, in the US city of Chicago, such amortization periods range from 13 to 15 years for some types of commercial developments. Chicago does not apply this time limit for non-conformance to residential uses.[21]

Alternatively, some US cities permit non-conforming uses to continue and only require the land owner to comply with the new zoning ordinance if the development or use of the land is changed or increased. For example the US city of Denver has the following provision in its municipal code describing the continuance of non-conforming uses:

> "Upon performance of and compliance with the following conditions and requirements and subject to the provisions relating to termination hereinafter set forth, any nonconforming use may be continued in operation on the same land area and on the same floor area in a structure which was occupied by the nonconforming use on the date the use first became a nonconforming use and the land area and the floor area in a structure shall not be increased. Unless a nonconforming use is changed as hereinafter permitted, the continuance authorized hereunder shall not be construed to permit increase in the number of dwelling units, a reduction of the ratio of land area to the number of dwelling units or any change whatsoever in any aspect of and feature of or in the character of the nonconforming use."[22]

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[21] Byron Shibata, *Access to Justice: The Social Responsibility of Lawyer: Land-Use Law in the United States and Japan: A Fundamental Overview and Comparative Analysis,* 10 Wash. U. J.L. & Pol'y 161 (2002).

[22] Denver Municipal Code Art. IX. § 59-631 (b).

Japan similarly, permits non-conforming uses to continue indefinitely, so long as the non-conforming use is not altered and so long as public safety or sanitation are not impacted by the continuance of the non-conforming use.[23]

Land use planners anticipate that over time these pre-existing, non-conforming uses will phase out as current occupants move or transfer their land rights voluntarily to other private parties wanting to use the land in conformance with the new zoning requirements. For example, a homeowner will have an incentive to voluntarily sell to a commercial developer, first, because the land rights will be worth more due to the change in zoning and the owner may want to access this increased equity. Second, the owner may be encouraged to move because the nature of the city around him or her will be changing from that of a residential community to that of a commercial district and he or she may want to move to another residential setting.

Recommendation: *Permit non-harmful, pre-existing, non-conforming uses to continue.*

To ensure a high level of tenure security and preserve landholders' investments in land, Rwanda should permit non-conforming, pre-existing uses to continue under new master plans. If a landholder changes his or her use of the land, they could then be required to conform to the new master planning requirements.

If policymakers choose not to permit pre-existing uses to continue they should carefully tailor takings of land to ensure compliance with planning and zoning to those instances where the new use planned will clearly benefit the broader public through economic growth. Cases where an expropriation would solely result in a taking for the sake of meeting the master plan should not be permitted. In these cases non-conforming users should be encouraged to bring their use up to the level of the master plan (through tax incentives or resettlement options), but should not have their land taken for the sole purpose of it being granted to private interests for development.

c. Informal Settlements

Informal settlements must also be carefully considered in the development of urban land use plans. Over the course of the past decade informal settlements have sprung up around Kigali and other urban centers due to the influx of returning refugees and internally displaced persons. The problem of appropriately zoning and upgrading these areas will be important as planning activities going forward. The World Bank is working closely with the government on an urban development project that will include extending basic infrastructure to some of these squatter settlements.

[23] Shibata *supra* note 21.

Importantly, all of the stakeholders we met with, including government representatives, recognized that these settlers, despite their lack of formal rights, should be provided some form of protection under the law. It was recognized that moving these populations is difficult, expensive, and unpopular, and most stakeholders were of the opinion that, unless these settlements are in unsafe or unsanitary areas, that they should be permitted to remain, and be upgraded and provided with infrastructure over time. Where these settlements must be moved, most recognized the need to resettle these families elsewhere or to provide them with sufficient compensation to move to new land and re-build their homes.

Recommendation: *Where possible formalize and upgrade informal settlements in place or if not possible, due to health or safety concerns, expropriate them and resettle them with compensation for the expropriation.*

This recommendation is in accordance with the thinking of most policymakers in Rwanda consulted and also agrees with recommendations by the UN. UN HABITAT[24] recommends that policymakers formally recognize that such squatters have the continued right to live in the city. Such recognition means that these settlements should be respected in land use plans and that slum residents should not be evicted unless they are located in unsafe areas. If they are evicted, they should be resettled elsewhere. The occupancy rights of these informal landholders should be officially and formally acknowledged to create the tenure security requisite for settlers to have the confidence to invest in improvements. This recognition may not include full formal title, but might include less formal certificates of occupancy for neighborhoods or individuals.

In addition to the recognition of their tenure rights, these settlements should be included in plans for infrastructure upgrades where appropriate, such as improved access roads or walkways, water and sanitation, electricity and other public services provided to “formal” neighborhoods.

Recommendation: *Compensate expropriated informal landholders who have settled and made improvements to land in good faith.*

Positively, informal landholders were deemed eligible for compensation by the government representatives we met with, including those who have settled upon or otherwise developed the land informally and without official sanction or permits. That is, rights to compensation are created by unsanctioned occupation and irregular development. The government generally recognizes informal transactions in the informally held land as it goes about determining which occupiers are due compensation and we recommend that this policy continue. It is important to note that this sort of informal development represents significant capital investment that can further spur economic development.

[24] *See e.g.,* UN HABITAT, Handbook on Best Practices Security of Tenure and Access to Land: Implementation of the Habitat Agenda (2003).

d. Land Use Planning Guidelines and Law

To our knowledge Rwanda does not currently have an effective land use planning law. The City of Kigali apparently had a master plan that was created several decades ago and has since gone out of date. Policymakers are now beginning to look at land use planning again and the City of Kigali in particular is currently undertaking a master planning process.

First, because planning is just beginning, careful consideration will have to be given to private individuals who have made good faith investments in land development before the new land use plans were adopted. Sudden changes in land use plans can negatively impact private landholders. For example, we learned of one individual who had purchased a land use right and received the authorization of the local authority to develop and build on the plot of land. Based on these permissions and assurances, the landholder began to develop and invest in the land by constructing a house. When the house was nearing completion, the landholder was told to cease construction because the land his house was being constructed on had been designated for the expansion of the airport. This change in land use designation, which was in conflict with assurances given by local authorities, will likely eventually result in the expropriation of this land from the individual, wasting his initial investment, decreasing land tenure security, and discouraging others from investing in land improvements. Creating long-range plans, coordinating with local authorities, and giving landholders notice of development plans will save such wasted investments from being made and enhance tenure security for all.

Recommendation: *Adopt a land use planning law or regulation to guide planners.*

Rwanda should adopt a formal land use planning law to guide local planning activities. The City of Kigali is in the process of creating a city master plan; however, this planning process is apparently not guided by an overarching planning law. Such a planning law would provide guidance on the appropriate process for planning, including what levels of government have authority over planning (curing the conflict between the local authority and the city in the airport example provided above), provide for public participation and comment in the planning process, define appropriate restrictions on use, and explain how to handle pre-existing non-conforming uses.

While this recommendation is somewhat outside the scope of the topic of expropriation, it is closely related in the Rwandan context. We provide the following general guidance on land use master planning for use when drafting land use planning policies and laws.

1. Administrative levels of land use planning. The land use planning law should define the administrative levels at which planning will be conducted. In the United States and Western Europe most detailed land use planning and regulation is done at city or county levels. Local efforts tend to better reflect the community issues and needs. The land use plans and the administrative process can better reflect local characteristics and desires. Some regional and centralized (national) planning may, however, be desirable to provide a broad, general framework for developing local plans.

2. *Composition of planning bodies.* The land use planning law should clearly define the composition of each planning body so that members of the community understand the institution and its culture. Opportunities for citizen involvement with the planning body should be provided.

3. Authority and responsibilities of planning bodies. The land use planning law should clearly define the authority and responsibilities of each planning body (local, regional, and national) to avoid duplication of effort, conflicts, and confusion.

4. Procedures for adopting, modifying, and administering plans. The land use planning law should clearly identify the procedures for adopting, modifying, and administering any land use plans; this is the first step toward ensuring adequate landholder participation.

5. Relationships among planning levels. The law should clearly define relationships among national, regional, and local planning functions. Relationships between different planning functions at the same level should also be defined.

6. *Public participation in planning process.* The extent of public input into and communication about the planning process should be defined and processes should be established for obtaining and using the input. An opportunity for extensive public input into local and regional planning is required in the United States and Western Europe. Input to national planning processes is typically directed through elected officials. Public communication about planning and plans is extensive at all planning levels. Extensive communication with the public about planning helps to prevent "insider" use of planning information and related corruption.

7. *Nature and discretion of administering entity.* The law should define the nature of the administering entity (as distinct from the planning body) and establish levels of discretion. If the administering body lacks discretion as to granting development rights, the process is primarily self-administering. That is, landholders can develop property in any way that is consistent with the plan. Increased levels of discretion can lead to a greater administrative burden, slower approvals, and corruption.

8. *Environmental regulations.* The law should recognize and/or determine the related environmental regulations that will be imposed on the development process. This effort frequently occurs at the national level, while monitoring and enforcement are delegated to regional and local governments. All levels of government should be aware of and balance the costs created for both government and developers by environmental regulations and the external costs created by unregulated pollution and resource consumption.

9. *Use purpose controls.* As a part of the detailed comprehensive planning process, the land use planning law should establish use purpose controls. Zoning codes are the primary method for this process.

10. *Density controls.* In light of existing and proposed infrastructure, density controls must be established. These controls should permit landowners to maximize use of the property within the established use strictures.

11. *Public infrastructure planning.* Land use plans should include infrastructure (roads, sewer, water, schools, parks, and other public support functions) planning.

12. Protection of historical and cultural treasures. Land use planning laws should protect historic districts and landmarks in a way that preserves cultural treasures but does not unnecessarily stifle appropriate development.

13. Non-conforming pre-existing uses. When land use laws or regulations impose new land use standards, the law should appropriately protect pre-existing uses that are inconsistent with the new standards while providing for the opportunity and freedom to undertake appropriate development.

14. Vesting of development rights. Land use planning laws and approval processes should provide for vesting and protection of the right to develop property pursuant to a current plan. Vesting might occur at the time the construction permit is issued or when the development application is submitted.

15. Modifying land use plans. Land use planning regulations must establish frequencies and principled procedures for modifying local plans (subject to public participation). *Ad hoc* modifications on the part of local officials should be prohibited.

16. Departing from local plan. To the extent consistent with the considerations under point seven as applied to the particular country setting, the law should grant some flexibility to the administering body allowing it to depart from local plan. Such departure should be allowed only in certain defined circumstances, be implemented pursuant to clear guidelines, and follow specific procedural rules.

Variances from the local plan should only be granted pursuant to a clearly defined and objective application and approval process.

II. Compensation and Valuation

The compensation methodology set forth by the 1996 Expropriation Law provides for compensation for the improvements and structures built on the expropriated land. The 1996 law does not provide for compensation for the value of the land itself. In addition, compensation given for improvements and structures on land is very low. The schedules that set out the compensation amounts in the 1996 law are complicated and outdated, never having been updated (although the law requires that they be updated every 18 months). The law provides that, if the schedules are not updated, they are deemed confirmed. Moreover, the compensation schedules provide for the same amount of compensation for improvements located in urban areas as for improvements located in rural areas despite obvious differences in market value. Because of the low-level of compensation under the old law, Kigali city officials say that many landholders who are subject to expropriation are holding out in the expectation that the new land law and a new expropriation law will provide for higher compensation amounts.

The inadequacy of current compensation is recognized by all. For example, the World Bank sponsored regularization and infrastructure project is extending basic services to six irregularly developed urban residential areas. For compensation of those who lose their land plots because of road and other infrastructure construction, the compensation schedules in the 1996 law will be increased by a factor of 2.5, so as to recognize the unrealistic compensation levels provided for by the 1996 schedules.

However, even under the 1996 law, expropriation compensation costs can be high for the government. Kigali city representatives noted that much of the irregular development within the city is substantial, sophisticated and has required significant funds to build. These representatives indicated that sanctioned urban and peri-urban development investment is constrained by the high costs of compensation. City officials even report that there is speculation in irregular development, with structures being built on irregular properties in the hope that future expropriation will yield compensation windfalls. City officials report that the right to disagree with proposed compensation amounts and to obtain an outside appraisal of property value has, in some cases, made the expropriation process unduly complicated and costly. In other areas, where a right to disagree is not extended to the landholders, the compensation schedules are strictly applied despite their lack of currency.

All call for a simpler approach to calculating compensation amounts and noted the need for an approach that takes into account the replacement value of the land holding.

II.A International Models of Valuation and Compensation

The amount of compensation awarded to owners or users of expropriated land can have important implications for other owners. Under-compensation discourages landowners from making improvements to their land in fear that they will be unable to recover the value of those investments upon expropriation.[25] Another effect of under-compensation is that banks will be less willing to loan money on certain types of property that the banks believe the state is more likely to expropriate.[26]

Over-compensation, on the other hand, can discourage state expropriation of land for legitimate public uses. For example, in some Asian and Latin American settings, the "market value" of some agricultural land may greatly exceed any reasonably capitalized flow of income from the land, and may reflect perceived prestige gained from ownership of large landholdings, or the political power that may arise from ownership of such landholdings.

The method used by Rwanda's 1996 Expropriation Law is essentially a "materials replacement cost" approach that compensates only for the materials used for the immovable improvements that are upon the land (buildings, structures and production trees). The 1996 law does not compensate for the value of the labor that would be required to configure the materials into the expropriated improvements. Rwanda now wishes to compensate those subject to expropriation for the value of the land, as well as for the structures. That is, it is a "full replacement cost" approach that is sought, which essentially seeks to put the landholder into the position that he would be in if no expropriation had occurred. This mirrors the requirement of the new Constitution that calls for full and fair compensation to be granted to landholders when private property is expropriated.

There are three basic approaches used around the world to determine the full replacement cost of land and related improvements. The most popular, accurate, and meaningful approach is based upon the market value of the land. Each approach is described below.

1. Compensation Based on Market Value

Most expropriation laws broadly define the level of compensation for expropriation as "fair market value" or "just compensation."[27] However, there are

[25] Jack L. Knetsch, *Land Use: Values, Controls and Compensation, in* LAW AND ECONOMIC DEVELOPMENT: CASES AND MATERIALS FROM SOUTHEAST ASIA 306-307 (Euston Quah & William Neilson eds., 1993).

[26] *Land Acquisition Act to Be Amended Says Ministry,* THE STRAITS TIMES, Oct. 16, 1986, *cited in* Knetsch, *supra* note 25, at 307.

[27] MICHAEL G. KITAY, *supra* note 4 at 50.

different methods for determining the market value and just compensation. In keeping with Rwanda's goals, the underlying goal of "just compensation" is to leave the owner or user of the expropriated land in the same economic circumstances as before the expropriation. In other words, the expropriation should not cause the owner to become either wealthier or poorer. A survey of developed and developing country practices reveals a variety of methods for determining "just compensation."

Much like the Rwandan Constitution, the United States Constitution requires "just compensation" whenever the state expropriates private property.[28] In the US the basis for determining just compensation is the full market value of the land to be expropriated, which is defined as the amount a willing buyer would pay a willing seller. The state must fully compensate the owners of the property, putting the owners in a similar position to where they would be if the property had not been expropriated. Moreover, if the landowner incurred any damages during the process of the expropriation, the state must financially compensate the owners for the damages.[29] The state must pay in cash unless the landowner agrees to accept some other form of compensation.[30] The determination of market value cannot reflect any changes in the value of the land arising from the expropriation itself. In other words, if the announcement of the expropriation causes the land suddenly to become more or less valuable, this change in value is not considered, and the state must pay the market value that existed immediately prior to the announcement. The land is generally valued at the price of other comparable properties,[31] which, if necessary, is determined by a jury that hears relevant evidence. Almost always, the state must pay before the landowner vacates the land. In emergency situations, the state may seize the land immediately and later compensate the owner (a "quick-taking") after a court has determined fair market value. This practice is found in many countries.[32]

The Philippines bases compensation for expropriated land on the cost of expropriation of the land, the current value of similar properties, the nature of the land, the actual use and income derived from the land, the value stated by the

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[28] UNITED STATES CONSTITUTION art V.

[29] ALAN T. ACKERMAN, CURRENT CONDEMNATION LAW: TAKINGS, COMPENSATION, AND BENEFITS 55 (1994) at 57.

[30] *See Shoemaker v. United States,* 147 U.S. 282 (1893); *Riley v. District of Columbia Redevelopment Land Agency*, 246 F.2d 641 (D.C.Cir. 1957). US law provides a long list of non-monetary benefits that the state can offer to the landowner in lieu of financial compensation. Most of these include improvements to the land or neighborhood (where the property was expropriated), in such a way as to benefit the landowner. However, as stipulated by the constitution, the state must first offer compensation in monetary form, protecting the landowner from being forced to accept non-monetary compensation. The landowner always retains the option to reject non-financial compensation. *See* ACKERMAN, *supra* note 29 at 184.

[31] *Id*. at 1.

[32] ROGER BERNHARDT & ANN BURKHART, REAL PROPERTY IN A NUTSHELL 470 (2000) at 451-452.

owner, tax declarations, and information presented by government assessors.[33] Thailand's Constitution states that compensation "shall be fairly assessed with due regard to the normal purchase price, mode of acquisition, nature and situation of the immovable property, and loss of the person whose property or right thereto is expropriated."[34]

In Great Britain, the expropriating authority first negotiates with all interested parties to reach an agreement on compensation. If the parties cannot agree, the Lands Tribunal determines the appropriate compensation according to the following principles: (1) no allowance is made for the fact that the expropriation is compulsory; (2) the value of the land is deemed to be the amount for which a willing seller would have sold the land on the open market; (3) the suitability of the land for a special use is not considered if the owner would require statutory approval for that use; (4) no consideration is given to any item of value related to a use of the property that is illegal, detrimental to the health of the occupants, or detrimental to public health; and (5) if it is impossible to determine the market value for a particular piece of land due to the lack of a market for the purpose of the land, the compensation can be based on the reasonable cost of providing the landholder with a comparable piece of land.[35] Under certain circumstances, the landowner may receive compensation for the depreciation in the value of adjacent land that is not expropriated.[36]

In India, the government has a right to expropriate land for public purposes and for companies, and must compensate "persons interested" in the land. [37] The state must pay for the expropriated land, and must consider: (1) market value of the land on the date of the government's notice of expropriation; (2) damage sustained by reason of the expropriation of any crops or trees on the land at the time of expropriation; (3) damage sustained at the time of expropriation of the land by reason of severing such land from other land; (4) damage sustained by the interested person at the time of expropriation of the land as the result of injury to his other property or his earnings; (5) reasonable expenses incurred by the interested person related to moving his business or residence; (6) and bona-fide damage resulting from diminution of profits of the land between the time of the

[33] REYNALDO ARALAR, AGRARIAN REFORM COOPERATIVES AND TAXATION 35 (1989).

[34] CONSTITUTION OF THE KINGDOM OF THAILAND, ch. 1, sec. 49.

[35] Land Compensation Act, 1973, sec. 5 (Eng.).

[36] KEITH DAVIES, LAW OF COMPULSORY PURCHASE AND COMPENSATION 136 (4th ed. 1984).

[37] Section 3(a) defines "land" to include "benefits to arise out the land, and things attached to the earth or permanently fastened to anything attached to the earth." Therefore, all rights in the land, such as a right to collect rents and profits on the land, usufructory rights, and rights of way are covered under the Act and are compensable. THE LAND ACQUISITION ACT AND YOU 9 (Kalpana Vaswani, Vasudha Dhagamwar & Enakshi Thukral, eds. 1990).

publication of the declaration and the time that the collector takes possession of the land.[38]

Similar to Rwanda's proposed approach to land tenure types and administration, in Hong Kong, the state retains ownership of all land and leases it for long terms to individuals and corporations.[39] If the chief executive orders expropriation of the land (which has the effect of canceling the state lease) and the lessee does not accept the state's offer of compensation, the issue is automatically referred to the Lands Tribunal. The tribunal establishes the compensation on the basis of: (1) the value of the land, buildings and easements on the date of expropriation; (2) loss or damage due to the severance of the land or building from any other land of the lessee; (3) loss or damage due to removal of the business; and (4) expenses that the lessee reasonably incurred for moving. The tribunal can also consider the following when establishing compensation: (1) the nature and existing condition of the property; (2) no compensation for anything added to the property after notice was given; (3) no compensation for illegal uses; (4) no additional compensation based on the fact that the expropriation was compulsory and not voluntary; (5) no additional compensation for land in a specially zoned area; (6) no compensation for use not permitted under the state lease; (7) no compensation for any expectation of grant renewal or extension of the lease; and (8) compensation must equal the amount for which the lessee could transfer the lease to a willing buyer on the open market.[40]

Poland's expropriation law provides that within 14 days of when the expropriation decision is final, the state must make a lump sum payment based on the market value of the expropriated land and structures on the land. Upon consent by the land right holder, the assessment of compensation may be delayed for a period of three months after the expropriation ruling becomes final. If compensation is postponed, the issuing agency is required to issue a separate compensation order. Delays in the payment of compensation by the state are subject to penalties under the Civil Code. Value of the land is calculated in terms of the day upon which the expropriation ruling is made, and changes in the legal status of the real estate made after the initiation of expropriation proceedings have no effect on the form and amount of compensation. The Polish law provides: (1) experts may be consulted to determine the level of compensation; (2) compensation may be in the form of substitute real estate rather than cash, but only at the request of the owner or right holder of the expropriated land; (3) the value of the replacement real estate should correspond to the value of the expropriated real estate, with any differences in value equalized through cash compensation; and (4) the value of the replacement real estate is determined

[38] Land Acquisition Act of 1894 (as amended) sec. 23(1).

[39] Following reversion of Hong Kong to Chinese rule, the state extended land leases according to the existing lease contracts. Laws of Hong Kong ch. 40.

[40] Laws of Hong Kong ch. 124, sec. 8 (role of tribunal), sec. 10 (compensation criteria) and sec. 12 (additional compensation criteria).

according to the same guidelines used for determining compensation for expropriated real estate.

Brazil's 1956 expropriation law sets out the following determinants of "just compensation": (1) the assessed value for tax purposes; (2) expropriation costs of the property; (3) profits earned from the property; (4) location of the property; (5) condition of preservation of the property; (6) insured value of the property; (7) market value over the past five years of comparable property; and (8) valuation or depreciation of remaining property after the sought land is expropriated.[41]

While something approximating market value is considered to be the fairest level of compensation, even full market value may under-compensate landowners by failing to take into account any non-economic interests attached to the land – such as proximity to a school, workplace or place of worship – that are not reflected in the market price.[42] Although it is difficult to assign a value to these non-economic interests, states can account for them by adding a percentage premium to awards for residences or other properties that have special significance to owners, or through additional compensation for costs of relocation and disturbance.[43] For example, Great Britain provides for special compensation in case expropriation of agricultural land disturbs a farmer's operations.[44]

2. Compensation Based on the "Earnings" Approach to Valuation

The earnings approach to valuing land is based upon the capitalization of earnings from the land, and can by summarized by the following three-step procedure:

1. Determine the annual profits of the land, which for agricultural land equals total farm produce income (or value if the crop is consumed by the farmer) from the land minus total farming expenses. For agricultural or urban land for which there is a land rental market, the profits might be in the form of an amount that the landholder could obtain annually by leasing the land to another.

2. Determine what average annual return the average investor in Rwanda will demand for an investment with comparable risk as the farming operation or land rental.

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[41] KITAY, *supra* note 4 at 50, citing Expropriation Law 1956 (Brazil).

[42] Knetsch, *supra* note 25 at 307.

[43] *Id*. For example, under the India Land Acquisition Act of 1894, owners were entitled to an award of an additional 15 percent of market value as *solatium* in consideration of the compulsory nature of the expropriation. KITAY, *supra* note 4 at 51.

[44] Land Compensation Act ,1973, sec. 34 (Eng.).

3. Capitalize the profitability of the land by dividing the per hectare profitability by the average return demanded on investment. The result is the per hectare value of the land.

Example: Assume the owner earns $140 per hectare and has expenses (including seeds, fuel, rental of equipment, taxes, etc.) of $40 per hectare. Also assume that the average investor in Rwanda can earn 10 percent annual return on an investment that is about as risky as buying (or leasing) and operating a farm. In this case, the value of the land is $1000 per hectare, calculated as follows:

1. Annual profitability per hectare = $140 - $40 = $100.

2. Assume that other Rwandan investors require an annual return of 10 percent on their investment.

3. Divide $100 by 10% ($100 / 0.10 = $1000)

If the average annual return demanded is 5 percent, then the value of the land is $2000 per hectare ($100 divided by 5 percent). If the average annual return demanded is 20 percent, then the value of the land is only $500 per hectare ($100 divided by 20 percent).

Regarding the second step, the fact that the investment involves lease or purchase of land should be taken into account when choosing what types of investments will be compared against determine the average demanded return. If the purchaser of the land assumes that the land can be resold for at least its purchase price, then this investment is not very risky compared to many investments. It is not appropriate to compare purchase of agricultural land with a high-risk investment in which the investor might lose all of her capital.

Also, the formula does not take into account speculation regarding the future value of land. The formula assumes that the development value of the land will become neither more valuable nor less valuable over time. Some investors might be inclined to accept a lower than market rate of return on their investment if they predict that the land will become more valuable in the future as agricultural land begins to be used for housing and other developments. Such predictions would tend to offset, at least partially, any negative effects of inflation. Such predictions are also very subjective and therefore difficult to quantify.

3. Compensation Based on the Normative Value Approach

The normative value approach, probably used most frequently in the Former Soviet Union and for the calculation of land and building values for purposes of taxation, is based on a more or less administrative assignment of weights to land use (or potential use) characteristics. The characterizations and weights are

then used to set land (or building) "values." For example, based upon cadastral information and upon land use plans, different types of land use (or potential use) are "valued" relative to one another. At some point, creation of a base value for one of the value categories permits all of the categories to be valued relative to one another. It is possible to periodically update the values using an index based upon consumer price increases or other economic factors.

The normative land values, while not being arbitrary, do not necessarily (or at best, entirely) relate to economic use or value. For this reason, critics observe that the approach may not be useful for calculating expropriation compensation, where the goal is to put the party subject to expropriation in a position the same or similar to the position he was in before the expropriation. Rather, the normative approach may best serve for purposes of setting bases for taxation, where a fundamental goal is relative fairness of tax burdens.

Recommendation: *Base compensation for expropriation on market (replacement) value.*

Government representatives have stated almost universally that any expropriation compensation approach should acknowledge and compensate for the value of the land, in addition to the value of the improvements upon the land. In other words, compensation for expropriation should essentially provide for the "replacement cost" of the improvements and the land. Of course, the current approach to calculating compensation for improvements, except for the outdated cost schedules, endeavors to provide for the replacement cost of the improvements upon the land.

MINITERE's conclusion that land will remain the property of the state and that land rights will consist of use or concession rights will make it more difficult to establish a formal land market because the extent and duration of the concession rights will initially be uncertain and undocumented. However, the new land law's provision for bequest, succession, inheritance, purchase, lease and gift of land use rights ought to lead to the creation of a formal land market if the government can bring the majority of land transactions within the formal system.

When queried about land values, local officials in Kigali Ngali said that landholders are very certain about the value of land. Informal transactions in peri-urban land are frequent, with written and witnessed contracts setting out the bargain between the buyer and seller. These transactions are usually done pursuant to an approval by sector or district officials, and the details of the transaction are "registered" with the local government. However, the "purchase" prices are frequently understated in the documentation because the parties wish to avoid some of the 6 percent transaction tax. Purchase prices are relatively high. In some parts of Kigali Ngali, prices of $1 to $2 million francs are seen for one hectare of land. The conveyed land rights are typically seen to be perpetual ("forever") in length, as long as the right is documented at the local level. To

avoid conflict with the notion that the government “owns” the land, the purchase and sale contracts are written such that the transaction conveys only improvements (buildings, trees, and the like) situated upon the land.

Given the reality of current land transactions, and given the expectation that land transactions will continue under the new land law, the approach to calculating expropriation compensation should rely primarily on market values and comparative transaction data. This conclusion is born as much of the reality that other options are for the most part unattractive – neither the earnings approach or the normative value approach would reliably yield a “replacement cost” amount. Plus, the normative value approach (as does the existing approach) would require a significant administrative burden to remain current.

Given the current problems with land transaction records (understated prices, fictional conveyance of only the improvements, incomplete documentation, and others), initial attempts to determine market values will need to rely on polls and interviews with landholders and with those wishing to obtain rights as to land value perceptions. Despite the tendency to obtain inflated values, even those landholders within or near the areas subject to expropriation should be interviewed. Their value information can be appropriately discounted. Transaction records should also be consulted, even if the accuracy of the recorded prices is suspect. These records should be relied upon alone, but at least they can provide an additional reference point. Plus, the tendency to include them in the analysis will prompt landholders to more accurately report transaction prices.

The ministries most active in expropriations (MININFRA and MINITERE, for example) should develop a small staff of valuers. These valuers can probably be the same staff members who are now calculating compensation amounts using the existing approach. Plus, creation of private valuers should be encouraged over time, through government use of contracted private valuers for some of the expropriations.

Before the details of a compensation calculation process are set, some initial research will be needed to gather information on existing land transactions and markets. The scope of these transactions should be determined in each province, and the extent of existing documentation should be confirmed. This initial research does not have to be exhaustive or burdensome. It could probably be conducted in 3 or 4 days in each province.

III. Expropriation Process

Both the National Land Policy and the 2003 Constitution (in Article 29 and elsewhere) provide for the sanctity of private property and for the protection of individual rights through due process of the law. Given the clear and strong embrace of these principles, the Government of Rwanda will likely decide to create a transparent expropriation process that includes significant and meaningful notice, a way for citizens to be heard and to participate in the expropriation process, and a path for appeal that protects against inappropriate expropriation and/or compensation.

Under expropriation laws in other parts of the world, procedural guidelines for expropriation provide a way to impose important constraints on state power and protect the rights of landowners or land rights holders against arbitrary expropriation of land. Effective protections include: (1) notice to landholders of the state's decision to expropriate the land; (2) participation of affected landholders in transparent proceedings; (3) an opportunity for landowners to appeal the expropriation decision; and (4) timely payment of compensation. Each of these four topics is described in turn with recommendations.

III.A Notice to Landholders

Most expropriation statutes require that the state notify landholders regarding the state's desire to expropriate land. The specific timing and form of notice varies greatly by jurisdiction.

In some countries the law requires the state to notify each landowner who will be affected by the expropriation. In Great Britain, the ministry, a local government, or other authority that desires to expropriate land must describe the land to be expropriated by reference to a map, must publish a notice of the expropriation in at least one local newspaper, and must notify each owner, lessee and occupier of land affected by the proposed expropriation order.[45] Similarly, in Poland, a state agency that wishes to expropriate a parcel of real estate for public purposes must first notify all affected land right holders of its desire to obtain the land.[46] In the Philippines, after the Department of Agrarian Reform (DAR) identifies the land to be expropriated, it must send letters to the landholders and post notices in specified public buildings. The notices must include, among other things, the amount of compensation being offered for the land.[47] In Hong Kong, the state must provide a copy of the notice to the lessee who leases from the state, publish the notice in the newspaper, and post the notice in a conspicuous place on the land to be expropriated. The notice provisions are especially important

[45] Acquisition of Land Act 1981 (Eng.).

[46] Law On Land Use Management and Expropriation of Real Estate 1991(Poland), arts. 49.3, 51 and 53.1.

[47] Agrarian Reform Law of 1988, cited in ARALAR, *supra* note 33, at 34-35.

because the law provides that the land is deemed to be expropriated one month after service of notice.[48]

In other countries, the law requires the state to post notice at the land that is proposed for expropriation. For example, in Italy, after the municipality has drafted an urban development plan, it must post for 15 days a copy of the plan that indicates which parcels of land will be expropriated. The municipality does not provide each affected landowner with individual notice, but all landowners can inspect the posted plan to discover the new zone designation of their land.[49]

It is possible to craft notification provisions that are unfair.[50] For example, in Peru, a judge must notify the property owner of the state's decision to expropriate his land. If the court cannot find the property owner, the state must publish notice in the newspaper of the provincial capital for three days. If the owner fails to respond within three days of either the delivery of actual notice or the last publication date, the owner is deemed to have accepted the state's designation of the parcel to be expropriated and to have accepted the state's appraisal of the parcel's value. Three days is much too short a period for response.

Recommendation: *Ensure that timely and detailed notice is provided to landholders targeted for expropriation.*

The expropriation law notice requirements should call for individual, written notification of landholders made by personal delivery of a notice of an intent to begin an expropriations process. The notice should include:

1. The date the notice is made;
2. The name, location, and contact information for the acting government entity (Kigali city, MININFRA, or other);
3. A description of the total area to be expropriated, as well as a description of the individual parcel;
4. A description of how to provide input about the purpose of the taking and the selection of the particular land to be taken;
5. A description of the full expropriation process that will follow (including an explanation of when the compensation offer will be made and upon what basis it will be calculated); and
6. Mention of any appeal rights and when they can be exercised.

[48] Laws of Hong Kong ch. 124, sec. 4.

[49] Danilo Agostini, "Rural Land Law in Italy" (May 1998) (unpublished manuscript on file with Rural Development Institute).

[50] The Peruvian example is from KITAY, *supra* note 4 at 60.

The notices should also be posted on the buildings on the land subject to expropriation, as well as in a single location in the offices of the appropriate government entity. Finally, notice of the expropriation should be publicized in the primary local newspaper over the course of several editions. To accommodate the reality that many citizens will be unable to read any expropriation notice, a government representative should make a good faith effort to personally contact landholders and explain the proposed expropriation and the related process. A public meeting should be permitted as a feasible alternative to individual contact, if a majority of landholders can be reached through such a meeting.

III.B Participation by Landholders in Transparent Proceedings

Unambiguous guidelines must define the process of expropriation such that the duties and expectations of both administrative bodies involved in expropriation and the public impacted by expropriation are clear.

1. Clarity in the Roles of State Actors in Expropriation

The current expropriation process in Rwanda needs to be re-worked in order to comport with on-the-ground capacity and also with the decentralization process and objectives. Rwanda's 1996 Expropriations Law provides for the formation of an expropriation commission at the provincial level, which is to be led by the *prefait*. The decentralization plan being implemented across Rwanda will push responsibility for the expropriation down to the district or sector level. The longer-term decentralization plan calls for the gradual phase-out of provincial government. The provincial commission, as currently constituted, is supposed to review and approve the expropriation evaluation report that is to be prepared at the provincial or district level for each expropriation. The evaluation report shows the demarcated land subject to expropriation, lists the landholders who will be compensated, and shows the basis for the proposed compensation amount. The basis for compensation is an inventory of improvements and features located on the land. The landholders are expected to endorse the expropriation evaluation report.

In Kigali Ngali, the provincial representatives responsible for managing expropriations explained that their provincial commission in fact does not meet to review and approve expropriations. Rather, the *prefait* relies upon recommendations from these representatives and a few of the other commission members to support the commission's expropriation approval.

Expropriations for purposes of rural villagisation are administered by MININFRA as a part of the ongoing local planning and villagiasation projects. MININFRA reported that it has sufficient funds to pay anticipated expropriation compensation over the 3-year program planning period. When a land parcel is identified for expropriation as a part of the villagisation program, MININFRA asks MINITERE technicians to prepare the needed evaluation report. If other ministries

undertake an expropriation, they also request MINITERE to prepare the evaluation report (while informing MININFRA and MINIFIN of the intended expropriation). MININFRA representatives reported that other ministries needing to expropriate land sometimes do not have the funds within the project budget to compensate landholders. Clarity in the roles and responsibilities of each government entity involved in expropriation will be necessary in the future Expropriation Law in order to eliminate any current confusion over roles and funding.

Recommendation: *Clearly define governmental agency roles and responsibilities regarding expropriation.*

Evolving ministerial responsibilities and the decentralization process, require that the current expropriation proceedings be updated to fit the current on-the-ground situation. Further dialogue is needed concerning which levels of government should be permitted to expropriate land and with what checks and balances.

2. Landholder Participation in Expropriation

Looking at international experience, direct involvement of the land user in expropriation proceedings may take a variety of forms.

Some countries allow landowners to present their objections in person. For example, in Great Britain, all recipients of the expropriation notice have the right to object to the order and present their arguments either publicly or before an appointed person. The Secretary of State reviews all objections and makes the final decision regarding whether to allow the acquisition. The Secretary must notify the expropriating authority and each landowner who objects, providing them with his written decision and the reasons for the decision.

Italian expropriation procedures provide extensive opportunities for landowner involvement.[51] After the municipality has posted notice of its plan to expropriate land, affected landowners can submit written objections. The law allows objections on the following grounds: (1) the municipality did not undertake sufficient analysis prior to announcing the plan; (2) the municipality could obtain land through methods other than expropriation; or (3) the municipality could expropriate land in areas where there are less efficient farms. The municipality must answer all objections in writing, and can alter the original urban development plan based on the objections. The municipality must then submit the development plan to regional authorities, which have authority to approve the plan as submitted or to require the municipality to change the plan. Expropriation cannot proceed until the regional officials approve the development plan.

[51] Discussion of the Italian procedure is based on Agostini, *supra* note 49. The most common type of expropriation of agricultural land is the rezoning of agricultural land into urban land.

Other countries require the state to demonstrate that it has negotiated with landowners. For example, in Poland, after the expropriating agency notifies landowners of its intention to expropriate their land, the agency must negotiate with the land right holders for not less than three months to attempt to acquire the property through contractual agreement. After the time limit for negotiations has expired, the expropriating agency provides a recommendation for expropriation. The agency must append to the recommendation a record of negotiations with affected right holders and the following attachments: (1) a ruling on the siting of the proposed; (2) a map of the expropriated area; (3) a certified copy of the land register attesting to the right of ownership of the affected land; and (4) if the land is not registered, certified copies of documents attesting to the right of ownership and existing liens. The district level government reviews the recommendation and issues an expropriation decision. The decision should include the purpose of the expropriation, the amount of compensation, and instruction on means of appeal.

In the Philippines, after the Department of Agrarian Reform (DAR) posts notice of the expropriation, the landowner has 30 days to inform the DAR whether he accepts the offer. If the owner accepts the offer, the DAR must pay the landowner within 30 days after transfer of the land. If the owner rejects the offer, he has 15 days to submit his demand for compensation, explaining the justification for the demand. The DAR must then decide the case within 30 days of receipt of the landowner's demand. If the landholder again disagrees with the DAR's decision, he may submit the matter to court for final determination of just compensation.[52]

In Honduras, the landowner has the right to appoint one expert to a three-person committee that determines valuation.[53] In Brazil, the court makes the final determination of the amount of compensation, but each party has the right to appoint an assistant to the court-appointed expert who prepares the advisory report concerning the land's value. In Nicaragua, a hearing is held at which the owner has the right to challenge the indispensability of the property and make an "inadequate remainder" argument if the expropriation is partial.[54]

***Recommendation**: Create a transparent expropriation process that includes landholders.*

While it is probably not appropriate for landholders to serve as the final decision maker as to whether a public purpose is legitimate or whether appropriate land

[52] ARALAR, supra note 33 at 34-35.

[53] Discussion of the procedures in Honduras, Brazil and Nicaragua is based on ARALAR, *supra* note 33, at 61.

[54] *Id*. An inadequate remainder is the remaining portion of the owner's property after a partial expropriation, where that portion is practically useless. Under Nicaraguan law, the owner has the right to compel expropriation of the entire property if a partial expropriation would result in an inadequate remainder.

has been selected for related expropriation, landholders should have some role in the expropriation process.

After the expropriating government entity notifies the landholders of the intention to expropriate their land, the government entity should negotiate, using the compensation calculation approach outlined in the new expropriations law, with the landholders for up to a three-month period in an attempt to acquire the property through contractual agreements with each party. The adopted compensation approach would be used to develop the initially-offered compensation amount. If the three-month period expires without a negotiated agreement, the expropriating entity should state in writing its recommendation for expropriation and the compensation amount, and append to it a record of the negotiations, along with the following attachments: (1) the record of the site selection process for the proposed public use; (2) a map of the area to be expropriated; (3) copies of records of personal notifications of the parties and copies of the posted and published notices; (4) if applicable, a copy of any related land registration documents; and (5), if so desired, a statement by the landholder as to why the expropriation is not in keeping with law and/or that the proposed compensation amount was calculated in a way that does not comport with the method set out in the law.

A provincial-level ministerial representative from a ministry uninvolved in the expropriation (MINIJUST, for example) should then review the recommendation and issue an expropriation decision. The decision should either (1) ratify the expropriation recommendation and compensation amount, or (2) reject the recommendation and/or proposed compensation amount and return it to the originating government entity for revision and re-negotiation (or re-submittal if an agreement is not reached within 30 days). Reasons for rejection should be in writing and should also be communicated to the landholder. Grounds for rejecting the compensation amount should be limited to the fact that the offered compensation appears clearly to have been arrived at in a way that is not in keeping with the prescribed approach to calculating compensation. Grounds for rejecting the expropriation recommendation should be limited to the fact that the taking is plainly not for a public purpose (as set out in the Expropriations Law) or that an alternative site selection was clearly feasible and preferable to the selected site.

III.C Opportunity to Appeal

The right of appeal provides the landowner an important defense against arbitrary decisions by officials.[55] Appeal rights vary substantially by jurisdiction, and may focus on the state's decision to expropriate, the state's choice of which land to expropriate, and the state's decision of how much compensation to pay.

[55] Unless otherwise noted, discussion of landowner appeals is based on KITAY, *supra* note 4 at 64-65.

Most countries limit the ability of landowners to argue that the state does not have the right to expropriate the land. US courts will consider such arguments only if the expropriation appears to benefit private interests excessively, or if the state appears to be using the expropriation to oppress a landowner. Mexico also allows landowners to argue that the state's expropriation benefits private interests more than public purposes.

In some countries, landowners can appeal the state's designation of the land to be expropriated. For example, in El Salvador, the court has authority to review: (1) whether all or a part of the land is necessary for the proposed public purpose, and (2) whether other landowners should share in the burden of the expropriation. In Mexico, if the landowner challenges the designation, the expropriating agency bears the burden of proving that the designated property is "suited and necessary."

Many countries allow landowners to appeal to the court regarding the state's determination of the value of the expropriated land. In Nicaragua, for example, a court can review the compensation determination based on fraud or calculation error.

Recommendation: *Permit landholders to appeal expropriation decisions.*

Upon ratification by the disinterested ministerial reviewer, but before the compensation is paid and the expropriation occurs (which should not occur sooner than 20 days following the ratification), the landholder should be able to appeal the matter to the provincial court that would have jurisdiction over the land parcel (by virtue of its location). Cost of appeal should be born by the appealing landholder, although there should be no requirement that a lawyer represent the landholder or that pleadings (beyond the initial appeal request) be in writing. When the court hears the appeal, oral testimony should be allowed.

Grounds for appeal should include: (1) whether the proposed public purpose legitimately complies with the requirements for a public purpose set out in the expropriations law; (2) whether all or a part of the land is actually necessary for the proposed public purpose; and (3) whether the compensation was determined in accordance with law. When the landholder challenges the public purpose designation, the expropriating entity should bear the burden of showing that the public purpose meets the legal definitions and that the designated property is "suited and necessary" to the proposed public purpose. As well, landholders should be permitted to appeal to the provincial court regarding the government entity's determination of the compensation value of the expropriated land. However, grounds for appeal should be limited to a claim that the compensation was calculated in a manner not in keeping with the approach set out in the law, or on the basis of fraud or calculation error.

III.D Timely Payment of Compensation

The 1996 law provides that the compensation should be paid to the landholder before the landholder is forced to move from the land. In reality, because funds are frequently not available to pay compensation, landholders often have to wait for their compensation for years after having been moved from the land. In other cases, where the landholders are not moved from the land before being given payment, the lists of landholders due compensation need to be revised (by adding parties) by the time the compensation funds become available.

Compensation funds are frequently omitted from the budgets for the projects that prompt expropriation. In other cases, landholders that do not agree to accept the amount offered in compensation (after being offered an initial sum, appealing the amount offered, and rejecting a subsequent offer at the same or a slightly higher amount) are put off the land by the police without receiving any compensation. The appeal for a higher compensation amount goes unresolved.

Recommendation: *Require that full compensation be provided to landholders before they are required to vacate their landholding.*

The government should pay the compensation to the landholder before the landholder is forced to vacate the land. Under no circumstances should there be an expropriation without payment of the due compensation.