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# LAND EXPROPRIATION POLICY SUITABLE FOR TIMOR-LESTE

## ECONOMIC CONSIDERATIONS



**JULY 2005**

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# CONTENTS

<b>ACRONYMS</b> .....	ii
<b>1. BACKGROUND</b> .....	1
<b>2. NEED FOR LAND EXPROPRIATION IN TIMOR-LESTE</b> .....	2
<b>3. REVIEW OF INTERNATIONAL AND COMPARATIVE LAW REGARDING PUBLIC INTEREST</b> .....	3
3.1    PUBLIC INTEREST UNDER INTERNATIONAL LAW .....	3
3.2    PUBLIC INTEREST UNDER SOUTH AFRICAN AND COMPARATIVE CONSTITUTIONAL LAW .....	3
<b>4. REVIEW OF INTERNATIONAL AND OTHER COMPARATIVE LAW REGARDING COMPENSATION</b> .....	5
4.1    COMPENSATION ACCORDING TO INTERNATIONAL LAW .....	5
4.2    COMPENSATION ACCORDING TO SOUTH AFRICAN AND COMPARATIVE CONSTITUTIONAL LAW .....	6
<b>5. REVIEW OF DIFFERENT COUNTRY CASES REGARDING EXPROPRIATION PROCEDURE, COMPENSATION MECHANISM AND RELATED POLICIES</b> .....	8
<b>6. PROPOSED PROCEDURAL FRAMEWORK FOR LAND EXPROPRIATION IN TIMOR-LESTE</b> .....	11
<b>BIBLIOGRAPHY</b> .....	12

# ACRONYMS

ECHR	European Court of Human Rights
GA	General Assembly
GIS	Geographic Information System
MAFF	Ministry of Agriculture, Forestry and Fisheries
PCIJ	Permanent Court of International Justice
UNDP	United Nations Development Programme

# 1. BACKGROUND

Timor-Leste has approximately 15,000 km<sup>2</sup> of land area. Generally, the land can be conveniently divided into the following six ecological zones: mountainous areas, highland plains, moist lowland areas (along the southern coast), arid lowland areas (along the northern coasts), marine and coastal areas, and urban areas (UNDP/NORAD 2002). Currently, there is no up-to-date and reliable information available on land use and land cover in Timor-Leste. The last comprehensive assessment dates back to Indonesian aerial photography carried out in 1993 (Table 1). Based on that information, nearly 14% of the country's land is non-productive.

**TABLE 1: AREAS OF LAND USE BY CATEGORY, 1993**

Land Use Category	Area (Hectares)	Distribution (Percent)
Forest		
Lowland	761,486	51.0
Highland, coastal and other	92,768	6.2
Agricultural Land		
Estate Crops	74,578	5.0
Food and other	336,400	22.5
Non-productive Land	203,152	13.6
Cities, Towns, Villages	19,934	1.3
Lakes	5,080	0.3
<b>Total</b>	<b>1,493,398</b>	<b>100.0</b>

Source: MAFF, Agricultural Land Use and GIS Unit

The absence of efficient and effective policy on land use in Timor-Leste has jeopardized and impeded efficient use of available and productive land in the country. Large parcels of unutilized public lands exist in different parts of the country. Those parts of public lands now in use are underutilized. Cases likewise exist where nationals own excessive landholdings and where foreign nationals similarly control productive land. This argues for a clear-cut policy and guidelines for managing scarce land resources for the economic benefit of nationals and the country as a whole. Informed by review of international law, comparative country cases, and the Timor-Leste context, this report proposes policy options for land expropriation in East Timor.

## 2. NEED FOR LAND EXPROPRIATION IN TIMOR-LESTE

Expropriation refers to a government action in taking or modifying property rights in the exercise of sovereignty. The government of any country has the right to take private property for a public purpose. In principle, expropriation involves the owner receiving “just compensation” to indemnify him/her for his/her economic loss. Legally, the government can take property from a private owner for public use by virtue of the superior dominion of its sovereignty over all lands within its jurisdiction. In practice, expropriation means the taking over of private property by a government, often without fair compensation but usually with a legal assertion that the government has a right to do so. In the case of land, expropriation is seen as necessary to acquire space for public infrastructure projects, and also if land is underutilized, some farmers own excessive amounts of land, or where absentee landlords control land. This mainly occurs in countries where property laws are not concrete and well defined. Expropriation also occurs when there are legal implications.

Mainly, expropriation is intended to facilitate achievement of public purposes. In certain cases, expropriations of privately owned land are intended to address “pressing security needs.” In addition, certain abandoned properties should be expropriated for public uses. Other reasons also justify the need to expropriate land, such as when foreign nationals possess excessive land, landlords mistreat workers, etc.

In Timor-Leste, large parcels of public lands in different parts of the country are not in use; parts of public lands which are in use are underutilized; and, in some cases, foreign nationals hold excessive land. In addition to public lands, some abandoned private properties should likewise be expropriated for public uses. Finally, government may acquire land parcels for public infrastructure projects.

# 3. REVIEW OF INTERNATIONAL AND COMPARATIVE LAW REGARDING PUBLIC INTEREST

## 3.1 PUBLIC INTEREST UNDER INTERNATIONAL LAW

The right to expropriate property is not absolute; international law places limitations on governments' discretionary powers in this regard. The 1962 United Nations General Assembly Resolution on Permanent Sovereignty over Natural Resources (GA Res. 1962: Paragraph 4) stated that expropriation "shall be based on grounds or reasons of public utility, security, or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation in accordance with the rules in force in the state taking such measures in the exercise of its sovereignty and in accordance with international law." This resolution is closely connected to the principle of self-determination, and it is important to note that it characterizes expropriation as a right inherent in sovereignty. This means that expropriation is *prima facie* lawful, provided that individual acts of expropriation meet the conditions established by international law.

In 1926, the Permanent Court of International Justice (PCIJ) took the position in the *Upper Silesia* case that "expropriation for reasons of public utility, judicial liquidation and similar measures" was lawful. In a case against the government of Sweden, the European Court of Human Rights (ECHR) stated that a fair balance must be struck between the demands of the general interest and the requirement that the individual's fundamental rights be respected. In addition to these requirements, international case law suggests that lawful expropriation must not be discriminatory, in the sense of its being deliberately directed against land-holding nationals of only a single foreign country.

## 3.2 PUBLIC INTEREST UNDER SOUTH AFRICAN AND COMPARATIVE CONSTITUTIONAL LAW

South African law sets out more detailed criteria for the definition of "public interest" in the context of expropriation. Article 25 (2) of the South African Constitution allows for expropriation "for public purposes or in the public interest." The term "public purposes" is usually defined in contrast to "private purposes." It would cover an expropriation by the state for the purposes of carrying out its administrative obligations such as building a road, a bridge or a hospital. An expropriation undertaken specifically to benefit a private individual or to advance the state's commercial ventures would serve "private," not "public" purposes, and would therefore be inadmissible.

The same would not necessarily hold, however, for expropriations involving transfer of land from one private party to another in cases of land reform. Where an expropriation is intended to benefit the public at large rather than a private individual, even though it effectively results in a benefit accruing to a particular individual (e.g., expropriation to redistribute land under a land reform program), the transaction would nevertheless still clearly meet the test of public interest, and would therefore be constitutional. Courts thus have only limited scope to set aside an expropriation on the grounds of its purpose and are

generally inclined to respect the choices made by the legislature or executive as to where the public interest lies.

Article 14 (3) of the German Constitution provides that “expropriation shall only be permissible in the public interest.” The public interest requirement has been interpreted to mean that expropriations cannot be undertaken solely for the benefit of the state’s commercial interests or those of a private person. It is possible, however, for a private person to benefit from an expropriation as long as the expropriation is undertaken in the execution of a public necessity. Expropriations for the purpose of land reform have also entered into case law in Australia, the Council of Europe and the United States. Those decisions are summarized as follows: “Generally, the position is that a broad, general program of land reform can be in the public interest and that individual expropriations would be for a legitimate purpose if they form part of such a program, even though the intention is to give or transfer the expropriated land, in terms of that program, to a private person.” (Treeger 2004)

To dispel any lingering doubts in this regard, Article 25 (4) of the South African Constitution stipulates that the term “public interest” must be interpreted so as to include “the nation’s commitment to land reform” and “reforms to bring about equitable access to all of South Africa’s natural resources.” Any property redistribution program thus clearly falls within the ambit of the public interest. Article 25 (1) of the South African Constitution, however, requires that deprivation may only take place in terms of a law of general application and further provides that “no law may permit arbitrary deprivation of property.” This means that the government should exercise its powers in terms of clear rules and principles set out in advance. The exercise of power is defined as arbitrary where it does not follow rules or precedents. Even if authorized by a law of general application, a deprivation will be unlawful if its effect is to allow for “arbitrary” expropriation of property. Arbitrary action has been described in South African administrative law as action that is “capricious or proceeding merely from the will and not based on reason or principle.”

# 4. REVIEW OF INTERNATIONAL AND OTHER COMPARATIVE LAW REGARDING COMPENSATION

## 4.1 COMPENSATION ACCORDING TO INTERNATIONAL LAW

In international law, payment of compensation is also a prerequisite for valid expropriation of private property by a sovereign state. The right to expropriate is within the competence of a sovereign state, but the compensation requirement imposes a legal condition on this competence.

Since the beginning of the last century, the majority of states have supported an “international minimum standard” or a “moral standard for civilized states” for determining compensation. The Declaration of the United Nations General Assembly on Permanent Sovereignty over Natural Resources adopted in 1962 affirms this standard. It has also enjoyed the support of many tribunals and claims commissions.

The international standard is in line with the “Hull formula,” enunciated by United States Secretary of State Cordell Hull in 1938 and subsequently adopted by industrialized nations. This formula requires that compensation must be “prompt, adequate and effective.” In essence, this means that the nationalizing state should make payment in a currency that can be readily used (not, for example, devaluated local currency), that it should reflect the full value of the expropriated property, perhaps incorporating an element for future lost profits, and that it must be handed over within a reasonable time after the expropriation, failing which, interest should be paid. Developing states, however, have objected to this formula, not least because it requires them to pay out substantial capital sums when the very reason for the expropriation may have been that they were in serious financial difficulty. These states instead support the view that the alien can only expect equal treatment under the local law because he or she submits to the local dispensation, with its built-in benefits and burdens, and because to accord the alien special status would be contrary to the principles of territorial jurisdiction and equality. Developing states consequently favor “appropriate” or “just” compensation, which is taken to mean compensation assessed with reference to the economic viability of the nationalizing state, the importance of the expropriated property and the benefits which the foreign national has already acquired through commercial activities in the state. “Just” compensation in such cases will almost certainly not amount to the market value of the property and will not include an amount for the loss of future profits.

This disagreement over legal principles reflects political and ideological differences; actual awards, therefore, tend to steer a middle course. Today, the standard of “appropriate compensation” seems to enjoy the greatest support, and it has been approved by several arbitration awards. In one case against the Kuwaiti government in 1982, the tribunal found that in order to arrive at “appropriate” compensation, it was necessary to consider all the circumstances of the case, with special reference to the legitimate expectations of the parties.

Furthermore, European Court of Justice jurisprudence offers an apposite solution with respect to expropriation of the property of nationals. In one case against the government of the United Kingdom (1985), the applicants maintained that the system of leasehold enfranchisement had deprived them of their possessions without adequate compensation. They additionally argued that they were entitled to prompt, adequate and effective compensation in accordance with the general principles of international law referred to in Article 1 of the First Protocol of the European Charter for Human Rights. The court rejected these arguments on the grounds that this reference to international law does not apply to the state's acquisition of the property of its own nationals, but is designed for the protection of aliens. The court reaffirmed this ruling in a similar case against the government of the United Kingdom (1986), which dealt with the nationalization of various industries. In addition, the court stated that under Article 1 of the First Protocol, the acquisition of property without payment of an amount reasonably related to its value would normally constitute a disproportionate interference, which could not be considered justifiable, but that Article 1 did not guarantee a right to full compensation in all circumstances, since legitimate objectives of "public interest," such as measures aimed at economic reform, might call for less than full reimbursement.

In so doing, the court drew a crucial distinction between compensation for the expropriation of nationals' assets and aliens' assets, and furthermore brought to the fore the notion of just compensation being determined with due regard for both public interest and the interests of the expropriated individual. This train of thought is also followed by the South African Constitution with respect to compensation for expropriated property.

#### **4.2 COMPENSATION ACCORDING TO SOUTH AFRICAN AND COMPARATIVE CONSTITUTIONAL LAW**

Article 25 (3) of the South African Constitution stipulates that compensation for expropriated property must be "just and equitable" in its amount, timing and manner of payment. The formula was already considered by the Land Claims Court in Former Highlands. Ordinarily, according to foreign property rights jurisprudence, "just and equitable" compensation would mean market value compensation.

Article 25 also indicates that compensation below market value or, conceivably, above market value, may in some circumstances be just and equitable and therefore constitutional. Article 25 (3) requires a balancing test between the public interest and the interests of those affected by the expropriation when calculating the amount of recompense for expropriation and thereby requires that account be taken of "all relevant factors," including:

- a) the current use of the property;
- b) the history of the acquisition and use of the property;
- c) the market value of the property;
- d) the extent of direct state investment and subsidy in the acquisition and beneficial improvement of the property; and
- e) the purpose of the expropriation.

Though the market value of the property concerned is only one of the criteria, the Land Claims Court pointed out that, apart from factor d), which deals with the extent of state investment and subsidy, market value is the only factor listed in Article 25 (3) that is objectively quantifiable. Once market value has been determined, the court can then attempt to strike an equitable balance between private and public interests. The interests of the expropriated party may raise the compensation to above market value. Similarly, the public interest may reduce the compensation to an amount which is below market value. The order of analysis, according to the Land Claims Court, is therefore first to determine the market value of the

property and thereafter subtract from or add to this amount, on the basis of other relevant circumstances, which both “just and equitable” compensation and reference to the list in Article 25 (3) may require. As to market value, the Land Claims Court adopted a test known to Commonwealth expropriation jurisprudence as the Pointe Gourde principle. In Pointe Gourde, *Quarrying & Transport Co Ltd vs. Sub-Intendent of Crown Lands (Trinidad)*, the principle was established that market value at the time of expropriation must be determined by disregarding any increase or decrease in the market value of the expropriated property arising from the carrying out of, or the proposal to carry out, the expropriation scheme. This is necessary because a planned expropriation often has the effect of distorting the market.

As to the other factors listed in Article 25 (3), no precise method for calculating values that are based on considerations of equity and justice exists, and the court’s decision in each individual case will thus determine the method and outcome of this process. For example, the current use of the property may be relevant where property is currently not utilized by its owner or where it is held simply for speculative purposes. In such a case, compensation calculated at less than market value may be just and equitable. Similarly, the history of acquisition and use can also prove to be a decisive factor in a downward adjustment of compensation. This was notably the case against the government of South Africa (1999), where land occupied by labor tenants had been bought below market value after the promulgation of the Land Reform (Labor Tenants) Act (Act 3 of 1996), which protects labor tenants from eviction. Awarding the market value would have been unfair and would not have reflected an equitable balance between the public interest and the owner’s interests. This factor would usually also cover cases where property was acquired from the outgoing government for less than market value. Thus, the incumbent government might be able to reverse the process by which state assets were transferred cheaply into private hands in the period leading up to the first democratic elections in South Africa.

# 5. REVIEW OF DIFFERENT COUNTRY CASES REGARDING EXPROPRIATION PROCEDURE, COMPENSATION MECHANISM AND RELATED POLICIES

Section 49 of the Constitution of the Kingdom of Thailand specifies that 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, 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. The Constitution provides for fair compensation in due time to the owner thereof as well as to all persons having the rights thereto, who suffer loss by such expropriation, as provided by law. The amount of 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. According to the Constitution, the law on expropriation of immovable property shall specify the purpose of the expropriation and shall clearly determine the period of time to fulfill that purpose. If the immovable property is not used to fulfill such purpose within such period of time, it shall be returned to the original owner or his or her heir. The return of immovable property to the original owner or his or her heir and the claim of compensation paid shall be in accordance with the provisions of the law.

Article 3 of the Turkish Expropriation Law specifies that the administration shall expropriate the immovable properties, resources and easement rights required for the performance of public services or initiatives they are liable to carry out as per the relevant laws provided that costs thereof are paid in cash and in advance or in equal installments depending on the cases. Expropriation proceedings shall not be initiated prior to provision of sufficient allocations by the administration. Similarly, Article 4 of the law specifies that in lieu of expropriating the immovable property, right of easement applicable through expropriation shall be established on certain sections of the immovable property or on the resource provided that such proceedings meet the purpose.

The 1998 Land Management Law of the People's Republic of China specifies that any expropriation of Basic Arable Land, no matter how small, requires approval by the State Council. New rules governing conversion and expropriation or taking of other agricultural land are specified in detail in Articles 43-65 of the Land Management Law. These rules contain several significant improvements to China's previous legal framework for land expropriation:

1. The law explicitly states a preference for using state-owned land rather than collectively owned land for construction purposes.
2. The law implies a strong preference against using agricultural land under current production for construction purposes.

3. Most conversions of land from agricultural use to construction use, and all expropriations of land, require the approval of the provincial-level government or a higher instance.
4. The level of compensation for state expropriations of arable land has been raised, and is adjustable by the State Council based on the current level of social and economic development. According to Article 47, compensation for arable land expropriations includes basic land compensation, compensation for young crops and fixtures, and resettlement subsidies. The basic land compensation amount has been raised to 6-10 times the value of the average annual output of the arable land over the three years prior to expropriation (from 3-6 times in the 1986 Land Management Law). The maximum resettlement subsidy for each hectare of expropriated land has been capped at 15 times the average annual output value over the prior three years (up from 10 times in the 1986 Land Management Law). Standards for surface fixtures and young crops are to be stipulated by provinces, autonomous regions, and provincial-level municipalities.
5. When land is withdrawn by the collective landowner for public welfare purposes, land use right holders are entitled to “appropriate compensation” under Article 65. The same compensation standard applies to withdrawal of land that is already state-owned for public purposes under Article 58. However, very little arable land will already be state-owned and subject to this provision.
6. Although the meaning of “appropriate compensation” is unclear, this provision nonetheless represents an improvement over the 1986 Land Management Law, under which no compensation was required when arable land was withdrawn by the collective for public welfare purposes. Requiring compensation for the farmer-user when the land is withdrawn for public purposes is not only equitable, but also makes economic sense because it will improve farmers’ confidence that they will be compensated for long-term land improvements even if land is withdrawn. It will thus motivate them to make such improvements.

The Constitution of the Republic of South Africa, 1996 (Act 108 of 1996) provides for property (which includes land) to be expropriated for public purpose or public interest, and that public purpose and public interest include the nation’s commitment to land reform. In terms of the White Paper on land policy, expropriation will be considered in situations where there is no reasonable alternative land and the owner either will not sell or will not negotiate a fair price. In considering a fair price, regard must be given to the compensation formula set out in the Bill of Rights. Section 25(3) of the Constitution provides that the amount of compensation must be just and equitable and should take the following into consideration:

- current use of the property;
- history of the acquisition and use of property;
- market value of the property;
- extent of state direct investment and subsidy in the acquisition and beneficial capital improvement of the property; and
- purpose of the expropriation.

South Africa has adopted the following procedural framework for expropriation of land and related property.

STEPS IN THE EXPROPRIATION CYCLE	PROCESS	ACTION REQUIRED	TIME FRAME
Decision on whether to consider expropriation	Adhere to criteria Determine compensation	Valuation	
Preparing for the hearing: Recommendation of expropriation and compensation	Approval memorandum to DG Notice of recommendation for expropriation Memorandum of jurisdiction for expropriation	Submission to DG	
The hearing: Serving the notice of recommendation, compensation and memorandum for justification	How to deliver What if the owner responds	Deliver notice of recommendation of expropriation to owner of property	21 days
Preparing for expropriation	Prepare memorandum to Minister, and notice of expropriation and compensation	Submission to Minister	6 days
Serving the expropriation and compensation notice		Deliver expropriation & compensation notice to owner of property	2 weeks
Payment of compensation		Hand over money to owner of property	60 days
Registration and transfer	Preparation for registration Preparation for transfer	Register expropriation with Registrar of Deeds Conveyance deed to transfer of property	

Article 16 (2) of the Namibian Constitution is concerned with the expropriation of property. It provides for the state, or a competent body authorized by law, to expropriate property in the public interest, subject to payment of just compensation and in accordance with requirements and procedures to be determined by an Act of Parliament. The Namibian Constitution does not, however, define what constitutes “public interest.” Article 25 of the Agricultural (Commercial) Land Reform Act deals with compensation for expropriation. Although it does not specify the amount of compensation to be paid for land that is expropriated, it does establish relevant criteria for assessment of the amount of compensation.

According to Article 14 (1) of the Agricultural (Commercial) Land Reform Act, the Minister of Lands, Resettlement and Rehabilitation may, after consulting with the Land Reform Advisory Commission (Article 3), decide to expropriate any farm identified as being suitable for resettlement. The Commission, which represents all stakeholders, was established in accordance with Article 4 of the Agricultural (Commercial) Land Reform Act in order to assist the Minister in administering the Act. Article 14 of the Act is in line with Article 18 of the Namibian Constitution, which accords persons aggrieved by governmental actions the general right to seek redress before a competent court or tribunal.

# 6. PROPOSED PROCEDURAL FRAMEWORK FOR LAND EXPROPRIATION IN TIMOR-LESTE

1. A national government agency should be responsible for handling any kind of expropriation-related issues. The Directorate of Land and Property (in coordination with other related agencies) can handle these actions.
2. Any expropriation should serve a public purpose and, while doing so, should follow the legal and other provisions established in international and other comparative constitutional laws. The government should arrange to provide for a fair amount of compensation in expropriation. When expropriating public unutilized and underutilized land, there is no need to provide compensation amounts. In such cases, however, government should make clear that the expropriated land will be utilized for public purposes or it can be redistributed to nationals with the goal of putting that land into the best alternative uses.
3. Regarding private property held by nationals, the framework should provide for fair compensation. The amount of compensation may vary with the nature of compensation. If the government expropriates whole property, full compensation should be provided and the compensation amount should be based on current use of property and its current market value. However, the compensation amount should reflect the history of acquisition and use of property. Sometimes the purpose of expropriation also will affect the amount of compensation. In a case of a partial expropriation, or where the expropriation is a very small portion of property, the government may not be liable to provide any amount of compensation.
4. If individuals whose property is being expropriated do not agree with the government decision to expropriate, however, the government should establish legal and administrative provision ensuring that the opponent can register his/her disagreement and negotiate the final agreement. If the property owner does not agree with either the amount, or the proposed time and manner of payment of compensation, he or she should have the opportunity to file a complaint with the related authority and should attempt to reach an agreement with regard to compensation.
5. Government can provide the compensation amount in cash or alternately, it can provide an equivalent amount of the same kind of land in another place. As the Timor-Leste government in present circumstances is not in a position to provide cash compensation (expropriation of private property), land exchange could be a better alternative. It can provide its unutilized public lands in exchange for private property expropriated for different kinds of public purposes.

These suggestions are not exhaustive, and detailed guidelines and policies for expropriation considering every aspect should be prepared. An immediate need for Timor-Leste is to identify the property which should be expropriated, followed by formulation of a detailed expropriation law informed by other international law and country cases. Finally, it should formulate a detailed procedural framework for expropriation.

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