

Ensure fairness in unregistered and customary land acquisition

Satoshi Ishihara (World Bank)

Mike McDermott (International Land Policy and Valuation Consultant)



Mike McDermott

International Land Valuation and Policy Consultant

Australia

mikemackd@hotmail.com



IFI's resettlement standards typically require compensation for asset loss and assistance to livelihood restoration

The World Bank Environmental and Social Standard 5:

Compensation for land at replacement value

People with a **recognized or recognizable claim** to the affected land are eligible for compensation at replacement value, even without formal legal rights to the land

Assistance for Livelihood Restoration

Affected people should be assisted in their efforts to **improve, or at least restore, their livelihoods and living standards.**



Photo: World Bank

Determining “recognizability” of a claim to unregistered or customarily land, and assessing their value, is not easy:



Which rights are “compensable” or “marketable” is not necessarily clear in existing legal framework



Land market is weak or non-existent, making proper valuation difficult



Many tenure rights are overlapping and unclear, and confirming who has what rights is often complex and time-consuming



Reliable geospatial data are often not available



Some rights (eg, customary rights) may be legally recognized, but not compensable unless documented



Many governments use schedules or averages for valuation



Replacement lands are often not readily available, and the “market value” of affected lands may not be sufficient to restore livelihoods



Required skillsets go beyond what most valuers are trained at

Contents



- ❑ What International Valuation Standard says about valuation of unregistered and customary land
- ❑ Recent efforts to develop technical guidelines on valuation of unregistered lands (e.g., UN Habitat GLTN, 2021).
- ❑ Case studies from Indonesia, Nepal, Sri Lanka and Uganda to illustrate recent legal and regulatory developments and remaining challenges
- ❑ What we can do to ensure fairness in compulsory acquisition of unregistered and customary lands

Valuation of Ancestral Land

- ❖ How do you assess the value of your ancestors? If their spirits dwell in the land they are buried in, how do you value them?
- ❖ If you want to buy or sell them, will there be a market for them?

The normative standards are articulated by the International Valuation Standards Council.

IVS define market value:

“Market value is the **estimated amount** for which an asset or liability should exchange **on the valuation date** between **a willing buyer and a willing seller** in **an arm’s length transaction**, after **proper marketing** and where the parties had each acted **knowledgeably, prudently** and **without compulsion.**” (IVSC 104).



Valuation of Ancestral Land

Market value: “marriage of true minds without impediment”

In cases of expropriation, affected parties should be provided with enough money to purchase another property **neither better nor worse than the one that was taken from them.**



So, what does this mean?

- ❖ **The market value assumes willing sellers.** If you aren't willing to sell, you aren't in the market and don't meet the definition's requirement.
- ❖ **A valuer's role:** estimate what will make monetary compensation fit for purpose, **not to make anyone happy.**

Principle of Equivalence and Other Forms of Compensation for Land Acquisition



The Principle of Equivalence are recognized in many International laws that compensating for market value alone is not enough to satisfy the Principle of Equivalence.

The principle of equivalence stipulates that individuals who have their property taken should not be in a worse position after the taking than they were before.



Different forms of compensation for land acquisition, include:

- ❖ Special **value to the owner**
- ❖ Costs for the disturbance involved in the taking
- ❖ Injurious affection or severance reducing the value of any land not taken
- ❖ Allowance called “solatium”:
 - provided as a solace for intangible losses
 - not reducible to monetary terms
 - monetary compensation is the best that can be done at the time

Values and Market Value Transactions

- ❖ Market value: transactions between people who are willing, knowledgeable, prudent and acting without compulsion
- ❖ People who engage in market value transactions hold many other values that may impact markets
- ❖ Market values exist among a sea of values, some of which are not for sale while others are available for sale to some extent.
- ❖ A valuer must understand the highest amount that the legal users of the property would pay and the reasons why they would pay it.
- ❖ The valuer should know the motives, values, and priorities of the highest and best legal users of the property.
- ❖ Emotional attachment to the land is unique to the individual and their ancestors, and cannot be easily transferred to another person for a price.



Land Acquisition in Isolated Indigenous Land

United Nations Declaration the Rights of Indigenous Peoples

8.2. States shall provide effective mechanisms for prevention of, and redress for:

- a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;
- b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;
- c) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights;
- d) Any form of forced assimilation or integration ...

Land acquisition in isolated indigenous land

FAO Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (VGGT)

Article 16 addresses expropriation and compensation matters in general, and Article 18 addresses valuation related matters:

18.2 Policies and laws related to valuation should strive to ensure that valuation systems take into account non-market values, such as social, cultural, religious, spiritual and environmental values where applicable.



Examining the Limitations of Market Value in Accounting for Indigenous Land Rights

Many non-market values, such as social, cultural, religious, spiritual and environmental values are **not always active** in property markets.

Question:

To what extent can the market value and the other heads of compensation account for such personal identity, social, cultural, religious, spiritual and environmental values in the market value of land, and when all that is said and done, what values of affected parties are disrupted and remain unaccounted for in terms of the UN Declaration on the Rights of Indigenous Peoples?”



Examining the Limitations of Market Value in Accounting for Indigenous Land Rights

ANSWER (WHAT TO DO):



The valuer's limitations and need for other professional disciplines and the valuer should alert the client to any such need.



The value often needs to work with other experts (i.e. planners, engineers, lawyers, etc.).



Appropriate expertise for assessing the impact of land acquisition and resettlement needs to be identified (i.e. resettlement officers, academics, socio-cultural anthropologists, sociologist, psychologist, etc.) .



The current compensatory measures established for expropriations within a homogenous society have limitations in addressing the rights of indigenous communities.

How to compensate for the identity and competency disruptions, skills obsolescence, and the like that may well arise when expropriating unregistered land?

Implementing Indigenous Rights and Non-Market Values in Land Valuation Practices

HOW TO IMPLEMENT IT:

- ❖ The UN-recognised rights of indigenous people in legal domains where those concerns are not recognised as compensable
- ❖ The IVS recognition that informal rights can have value
- ❖ The FAO's VGGT recommendations that they be considered in valuations
- ❖ The issues around non-market values identified in the UN-HABITAT/GLTN's Valuation of Unregistered Lands Policy and Manual

What can be done when national laws don't recognize Indigenous Rights and Non-Market Values?

- ❖ Donor organizations **can** mandate loan recipients to apply them **as loan covenants**, using their safeguard policies as a leverage

But it'd be ideal if countries amend their laws and regulations to recognise them

Case studies from Indonesia, Nepal, Sri Lanka and Uganda

- Scope of Eligibility and Documentation of Land Rights
- Scope of entitlements and Valuation methodology
- Restoration of livelihoods and living standards



Satoshi Ishihara

Sr Social Development Specialist, the World Bank

Indonesia

sishihara@worldbank.org

[linkedin.com/in/satoshi-ishihara-25090218](https://www.linkedin.com/in/satoshi-ishihara-25090218)



Scope of Eligibility and Documentation of Land Rights

Many countries recognize compensation eligibility only if one has documented evidence of ownership or tenancy, but many legitimate land users:

- ❖ Do not have a documented evidence of their land use, let alone ownership
- ❖ Have lived on the land or used land-based resources for many, many years in good faith, maybe since before the introduction of cadastral systems

Eligibility of informal land occupants are gradually getting recognized through legal or policy measures

- ❖ **Indonesia and Uganda:** informal land occupants are eligible for compensation without documented evidence of ownership
- ❖ **Nepal:** new amendment of Land Act grants legitimate informal land occupants tenure rights and make them eligible for compensation
- ❖ **Unclear procedures, overlapping claims** and **vested interests** complicate who has recognizable rights (and what rights they have)
- ❖ Multiple stakeholders often have received recognizable rights from different agencies, putting some of them, in particular vulnerable groups, in **legal limbo**

Indigenous tenure rights are not recognized in many countries, and even where they are, procedures are unclear

Uganda recognizes customary tenure rights and compensation eligibility without documented evidence of land rights



Land Act (1998): recognizes customary tenure based on:

- ❖ Certificate of Customary Ownership (CCO), issued by the District Land Board; or
- ❖ Formation a Communal Land Association (CLA)



Visible proof and **local testimonies** of occupancy play a significant role for eligibility for compensation.



Compensation may be paid to the community: empowered to decide how to use the compensation received, under the leadership of elders



Indonesia: compensation eligibility of unregistered and informal land users is getting clarified

Basic Agrarian Law (1960): land rights can be granted if **20 years of consecutive occupation** can be proven

Government Regulation 19/2021 clarified compensation eligibility among unregistered land users

- ❖ Outdated-certifications
- ❖ Formal registration as a customary community
- ❖ Holders of various tenure rights
- ❖ Land occupation in good faith
- ❖ Documentary evidence of occupation issued by a government agency

Presidential Regulation 62/2018 recognizes compensation eligibility of informal land users:

- ❖ **Valid ID cards** issued by the local government
- ❖ Consecutive occupancy in good faith **>10 years**
- ❖ **No conflicting claims**



Sri Lanka has gradually expanded compensation eligibility without documented evidence of land rights



Prevailing law (LAA 1950): limits compensation eligibility only to those who have **documented evidence of ownership**



The 2001 National Involuntary Resettlement Policy (NIRP):

- ❖ Intended to address gaps between LAA and international resettlement standards
- ❖ Recognizes compensation eligibility of bona fide landowners without documented evidence of ownership
- ❖ Squatters and encroachers are eligible for resettlement allowance

NIRP provided a safeguards framework for IFI projects, and informed subsequent regulatory expansions on compensation eligibility (LAR 2008 and LAR2013)



Photo: World Bank

Nepal: 8th amendment to Land Act grant land rights to informal land occupants

Land Acquisition Act (1977)

Unregistered landowners and tenants **are not eligible** for compensation for loss of land

8th Amendment (2019) of the Land Act of 1964

- ❖ Informal land occupants >10 years of consecutive occupation are **granted land rights**, and **become eligible for compensation** in case of loss
- ❖ Transfer of ownership not allowed for 10 years, except among family members
- ❖ Compensation eligibility within 10 years of the granting of ownership rights not clear



Scope of entitlements and Valuation methodology

In most countries, compensation is based on “market value”

“Market value” of unregistered and customary lands is difficult to determine

- ❖ Many data needed for standard valuation methods are missing
- ❖ Unbundling overlapping tenure rights needs a broad range of skills

“Market value” may not be a good basis for compulsory acquisition, as there is no “willing-seller”



Countries now recognize a **broader range of losses** as compensable



Good stakeholder engagement and **Social Assessment** to identify and value all compensable losses



A multi-disciplinary team of experts to identify and value all compensable losses



The standard valuation methodology may be applicable to **Indigenous tenure rights**, but the challenge will be greater

Sri Lanka significantly broadened the scope of entitlements through regulatory changes

A series of regulatory expansion followed the enactment of NIRP (2001)

ADB Southern Transport Development Project:

- ❖ Fully applied NIRP
- ❖ Land Acquisition and Resettlement Committee (LARC) for compensation valuation
- ❖ 10 – 20 perches (0.025-0.05ha) of land provided to each squatter

Land Acquisition Regulations 2008 (LAR 2008):

- ❖ Compensation for injurious affection, severance, disturbances, and livelihood losses

Land Acquisition Regulations 2013 (LAR 2013)

- ❖ “Ex gratia compensation”
- ❖ LARC to work with the APs to determine their entitlements and compensation
 - i. Difference between the “replacement value” and statutory compensation
 - ii. compensation for loss of income
 - iii. Transition support including temporary housing rent, income support
 - iv. Assistance to vulnerable groups (house construction advice, income-generating activities, training, etc.)
- ❖ Super LARC (which includes a PAP representative) for AP with grievances
- ❖ Applicable only to 18 projects approved by the Parliament

Uganda applies standard valuation methodology to communal lands too

Guidelines for Compensation Assessment Under Land Acquisition (2017): provides principles for compulsory land acquisition and compensation

- Compensation is based on the principle of fairness, adequacy, and prior and prompt compensation. PAPs must not be worse off in financial terms
- PAPs shall be properly informed and consulted on valuation and compensation processes
- Bundles of rights should be identified and recognized. PAPs with no legal recognition may be compensated for rights established before the cut-off date

Value of customary lands is assessed with the standard valuation methodology

- ❖ Market values of individual assets assessed, and their cumulative value given to “the community”
- ❖ Compensation is often used to build common assets for the benefit of the community
- ❖ Good stakeholder engagement is critical to fully mitigate significant impacts on individual community members



Indonesia recognizes “non-physical value” of land assets

Compensation should be based on “fair replacement value”



PHYSICAL Component

Value intrinsic to the property based on the market value



NON-PHYSICAL Component

Loss to the owner as a direct result of land loss:

- ❖ “Premium” (compensation for lost income and other losses directly resulting from land acquisition incl. solatium)
- ❖ Transaction cost
- ❖ Compensation for waiting time
- ❖ Residual land and other physical losses

Challenge: (i) only losses “**that can be calculated**” can be compensated; (ii) **no accepted methodology** exists for intangible losses; (iii) “**solatium**” is often used as a substitute of depreciation

Indonesia Asahan 3 project

- ❖ The project initially offered affected people compensation only for affected non-land assets because land had been registered as state forest land
- ❖ Affected people demanded compensation for land loss on the ground of genuine land occupation for generations, which grants them land rights per the Basic Agrarian Law and make them eligible for compensation for land loss too
- ❖ The “legal limbo” delayed the project start for more than 5 years, and the project faced imminent risk of cancellation
- ❖ As a solution, “social impact” due to loss of the “non-physical component” of affected land was assessed and their monetary values paid as compensation, as an “other premium” recognized in the national valuation standard
- ❖ “Social impact” was assessed by a local social scientist, and the monetary values evaluated by a local certified appraiser, which helped ensure that compensations for “social impact” were commensurate to the value of actual losses including the loss of land
- ❖ Compensations thus revised were accepted by 85% of affected people compared to 5% for the initial compensation offered. The remaining affected people also accepted compensation after adjustments following court cases.

NSUP Kotaku of Indonesia

- ❖ An in-situ slum upgrading project which creatively used existing legal and regulatory space to provide 95% of informal residents in slum areas with an improved housing with ownership rights.
- ❖ Only those who have another house elsewhere and who are thus considered non-poor, and those who elect not to register residency in Surakarta city after having fully informed of the project benefit, were excluded from the Project. They receive cash compensation for non-land assets at replacement value.
- ❖ The existing community engagement platform was used for the determination of eligibility, census taking and development of asset inventory, helping minimize the risk of elite capture and exclusion errors.
- ❖ A strong leadership and commitments in political leaders of Surakarta city for more than a decade were key to the proactive use of existing legal and regulatory space by the Project.
- ❖ Implementation has been delayed due to lengthy land ownership transfer processes within the government – it took four years to transfer land ownership from the Ministry of Public Works and Housing to be the Surakarta-government. Ownership can be transferred to slum residents only afterward.



Restoration of livelihoods and living standards

Income losses from land loss are getting recognized compensable in some countries

- ❖ Income restoration may take more time than compensation can cover
- ❖ Need additional support to restore a “sustainable livelihoods system”?

But “Values to the owner” are not compensable in most countries

Many “values to the owners” are difficult to quantify, or put \$\$ value on

- ❖ “Non-transferable rights”
- ❖ Customer networks, safety net, and “social capital”

Social Assessment may not identify all compensable losses, leaving some losses unmitigated



Photo: World Bank

Nepal: adopted *Policy on Land Acquisition, Compensation and Resettlement in Infrastructure Development Projects* (2014)

The Policy support income restoration beyond compensation for affected physical assets

- ❖ Severely affected, most vulnerable, opportunity-deprived groups incl. **marginalized Indigenous groups**: eligible for an inclusive livelihood program
- ❖ **Easy, simple, and transparent consultations** to identify and assess needs of severely affected people and vulnerable groups



Indonesian National Valuation Standard (SPI 204) Recognizes “premium” as part of “non-physical component” to mitigate loss of “value to the owner”

“Premium” includes:

- ❖ **Income loss** as a direct result of land acquisition
- ❖ **Solatium**
- ❖ Other losses **directly resulting from land loss** that are not captured in any other losses, and which are **measurable**

Challenges and limitations:

- ❖ Lack of methodological guidelines – how to measure “emotional loss”?
- ❖ What about losses that are not a direct result of land loss?
- ❖ IP’s traditional territories are valued and compensated as would be for private lands – what remains restored?
- ❖ The valuers are concerned about allegation of corruption for lack of clear guidance
- ❖ What is the “fair value” to the owner that needs to be compensated with taxpayer’s money?

Key Findings

- 01** | Some countries recently adopted policies or regulations to recognize compensation eligibility of legitimate users of unregistered and customary lands – is this a continuing trend?
- 02** | A combination of methods is used to establish a legitimate use without documented evidence of ownership, including visual evidence of occupation and testimony by neighbors and the local government
- 03** | Standard valuation methodologies for private lands may be used for communal lands, but participatory processes with grievance mechanisms are critical to ensure no significant impacts remain unmitigated for directly affected community members
- 04** | Some non-transferrable rights and intangible values incl. spiritual values of cultural heritages, may not be captured in the standard valuation methodology – do they need to be assessed and mitigated separately?
- 05** | Compensation for loss of physical assets alone is often insufficient to restore livelihoods – should all support for livelihood restoration be rolled into compensation?
- 06** | SA should identify all losses, and provide guidance on how best to mitigate them, including “values to the owner” and “losses to the community”, focusing on vulnerable people and severe impact
- 07** | The land is the backbone of many communities, incl. many IP communities, and holds them together. How to recognize such “values” and mitigate their losses? Compensation may not be a good instrument

Question and Answer.

Question #1

“To what extent can the market value and the other heads of compensation account for such personal identity, social, cultural, religious, spiritual and environmental values in the market value of land, and when all that is said and done, what values of affected parties are disrupted and remain unaccounted for in terms of the UN Declaration on the Rights of Indigenous Peoples?”

Market value:

- ❖ Only insofar as the values are expressed in that market by those with the motives, means and opportunities to do so, and who do so in terms of the market value definition.
- ❖ This is the value required by most legislation, chosen so the dispossessed persons can go off and buy equivalent land somewhere else.

But the IVS recognise other values potentially more fit for purpose:



Investment value:

The value of an asset to the owner or a prospective owner given individual investment or operational objectives (may also be known as worth) (IVS 20.11).



Equitable value:

This is the estimated price for the transfer of an asset or liability between identified knowledgeable and willing parties that reflects the respective interests of those parties (IVS 20.6).

Fair Market value:

20.07 | Fair Market Value

1. The Organisation for Economic Co-operation and Development (OECD) defines “fair market value” as the price a willing buyer would pay a willing seller in a transaction on the open market.
2. For United States tax purposes, Regulation §20.2031-1 states: “The fair market value is the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts”

20.08 | Fair Value (International Financial Reporting Standards)

IFRS 13 defines “fair value” as the price that would be received to sell an asset or paid to transfer a liability in an orderly transaction between market participants at the measurement date).

Therefore, for most intents and purposes, including ours, it does not offer more than market value.

Question #2

“Under which “values” do spiritual values including intangible values people attach to cultural heritage; “community cohesion” (which create what is called social capital and generate positive values for beholders of such values as a basis of, for example, informal safety net); and “ecosystem services” that provide a basis of our existence, sources of livelihoods, etc. belong?”

Equitable Value:

Equitable Value; Yes, insofar as they can be agreed in terms of monetary values.

Investment Value:

Yes, depending upon how far the definition of investment can be stretched, and how far monetary valuation can compensate for these.

Market and Fair Market Values:

Yes, but only insofar as there is supply and demand for them in the market. Again: I can give or sell you my legitimate property rights over land, but they are neither the land nor my personal history and identity attachments to it.

So, all are possible to some degree, but all may be insufficient when intercultural.

Question #3

“Under what contexts can such “values” be counted in compensation in the context of compulsory acquisition?”

As described above all are possible to some degree, but all may be insufficient, particularly in cases of intercultural transfers, and yet still be the best that can be done at the time.

Question #4

“What concrete challenges do valuers face in estimating/monetizing such values?”

While information technology has often atrophied the need for valuers to examine the circumstances of sales and other evidence to determine how robust it is as evidence for the relevant form of monetary value (market, investment, or equitable), that skill remains core to any professional valuation.

Let's continue the conversation!

Post questions and comments in the IAIA23 app.



Satoshi Ishihara, Mike McDermott

*World Bank, International Land Valuation and Policy Consultant
Indonesia, Australia*

sishihara@worldbank.org, mikemackd@hotmail.com

[linkedin.com/in/satoshi-ishihara-25090218](https://www.linkedin.com/in/satoshi-ishihara-25090218)