

Article

# The Status of National Legal Frameworks for Valuing Compensation for Expropriated Land: An Analysis of Whether National Laws in 50 Countries/Regions across Asia, Africa, and Latin America Comply with International Standards on Compensation Valuation

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**Abstract:** The challenges associated with determining fair compensation for expropriated land have been extensively discussed and debated among scholars, practitioners, policymakers, and the public. However, to date, a comprehensive study of national-level compensation procedures established by law considering whether such procedures meet internationally recognized standards on compensation valuation has not been conducted. This article aims to bridge this gap by serving as a reference point and informing “fair compensation” debates among scholars, practitioners, and policymakers. This article examines national-level legal provisions on compensation in 50 countries/regions across Asia, Africa, and Latin America against a set of legal indicators that are based on international standards on the valuation of compensation. The legal indicators focus on the substantive and procedural requirements pertaining to the calculation of compensation. The indicators ask whether laws require assessors to account for various land values when calculating compensation, and whether there are legal processes in place that allow affected persons to negotiate compensation amounts, receive prompt payments, and hold governments accountable by appealing compensation decisions in courts or before tribunals. The results of the study show that most of the 50 countries/regions assessed do not have national laws that comply with internationally recognized standards on the valuation of compensation. Based on the findings from the legal indicator analysis, this paper presents a set of recommendations for reforming compensation procedures to bring them into conformity with international standards.

**Keywords:** compensation; land valuation; expropriation; land tenure; compulsory acquisition; land investment; involuntary resettlement

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## 1. Introduction

Empirical research conducted in many countries shows that the amount of compensation granted to affected landholders is often insufficient to reconstruct their livelihoods subsequent to expropriation [1]. Banerjee and Van Eerd found that, in Cambodia, Indonesia, Nigeria, Sri Lanka, and the Philippines, the compensation and resettlement assistance provided to affected populations was not enough to cover their losses, allow them to purchase alternative land, and sustain an adequate standard of living after their land was expropriated [2]. In China, a survey of 476 expropriation cases conducted by Keliang and others revealed that 65.5 percent of affected farmers were dissatisfied with the amount of compensation allotted [3]. The World Bank’s Land Governance Assessment Framework (hereinafter “LGAF”) found that affected populations in Afghanistan, Brazil, Ethiopia, South Africa,

South Sudan, Tanzania, and other countries were in many cases not granted sufficient compensation for expropriated land [4]. In Nigeria, for example, the LGAF study found “a large number of acquisitions occurs without prompt and adequate compensation, thus leaving those losing land worse off, with no mechanism for independent appeal even though the land is often not utilized for a public purpose” [5]. The recurring problem of insufficient compensation begs the question of what can be done to diminish the impoverishment risks associated with expropriation and forced displacement, and ensure that affected landholders are not worse off than before their land was compulsorily acquired.

### *1.1. Legal Reform as a Potential Solution to Insufficient Compensation*

According to the “legality” principle, government actions should be limited by enacted laws that are clearly written with adequate precision and clarity; governments should not be allowed to make arbitrary decisions that violate the law [6]. A basic assumption underlying the recommendations made in this article is that robust compensation procedures established by law, coupled with respect for the rule of law, can help ensure that expropriations promote sustainable development outcomes that balance property rights with the public interest. Moreover, if the governments and private actors respect and enforce laws that provide robust compensation entitlements to affected populations, then those populations will be more likely to obtain sufficient compensation when their land is expropriated. This article focuses exclusively on the written law in these 50 countries/regions; it does not assess whether laws are effectively implemented in practice. This article does not comprehensively examine the wide range of possible outcomes that may occur in countries where laws do not exist or the rule of law is not respected. An analysis of the actions of governments in countries with non-existent or weak rule of law is beyond the scope of the article. In such countries, if governments and private actors fail to respect the rule of law, land may be confiscated due to conflict or other reasons, even when such confiscation does not serve a genuine public purpose. Without enforceable legal rights, affected populations may be unable to seek redress in court in cases where governments and private actors fail to provide fair compensation.

Assuming rule of law is an essential “precondition” of good governance [7] then clear and effective legal procedures may be necessary to ensure responsible land governance standards are met. As argued by Raz, the rule of law must provide people with effective guidance [8–10]. If decisions on compensation valuation are made in an ad hoc manner, then the rule of law may be contravened. In theory, if compensation procedures require assessors to account for all of the losses borne by affected populations, and acquiring bodies obey the rule of law, affected populations may be less likely to endure impoverishment and other risks associated with expropriation and inadequate compensation. As stated by Cernea, “all forced displacements are prone to major socio-economic risks, but not fatally condemned to succumb to them” [11].

If compensation procedures contain gaps or ambiguities, or if such procedures grant broad discretion to governments or acquiring bodies [12] to determine what constitutes “fair compensation”, there may be an increased risk of insufficient compensation being paid to affected populations. Unless compensation procedures provide adequate redress mechanisms (e.g., a right to challenge compensation decisions in court or before a tribunal), affected populations may be unable to hold governments and acquiring bodies accountable for compensation decision-making. For this reason, it is important to consider whether national legal frameworks establish robust compensation procedures that ensure sufficient compensation is paid to affected populations.

This article examines national-level compensation procedures in 50 countries/regions across Asia, Africa, and Latin America against a set of legal indicators based on the *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries, and Forests in the Context of National Food Security* (2012) (hereinafter “VGGTs”) [13]. The indicators analyze whether laws require assessors to account for various types of land values when calculating compensation, and whether there are legal procedures in place to ensure that affected populations have the right to negotiate compensation amounts, receive

prompt payments, and hold governments accountable by appealing compensation decisions in court or before a tribunal.

### *1.2. Road Map*

This article is divided into six sections. Section 2 discusses internationally recognized standards on the valuation of compensation. Section 3 discusses the article's background and methodology, Section 4 discusses the usefulness of this article, Section 5 presents the research findings and analysis, and Section 6 draws conclusions and recommends legal reforms that help ensure fair compensation for affected populations.

## **2. International Standards on the Valuation of Compensation**

Why should governments follow international standards on fair compensation? The principles of fairness and justice suggest that a person should not be forcibly removed from his or her land for a public purpose without payment of compensation that is commensurate of his or her losses. The U.S. Supreme Court, for example, ruled that the 5th Amendment Takings Clause is "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole" [14]. The principles of fairness and distributive justice dictate that governments should not impose disproportionate costs on the few in order to benefit the many. To ensure that the burdens on landholders are proportionate to the value of the public benefit generated by expropriation, the government must determine a level of "fair" compensation for expropriated land. However, the level of compensation provided by governments and private actors, following domestic legal frameworks that base compensation on market value, has often been insufficient to cover the losses borne by affected landholders [15].

To address this concern, the VGGTs and international standards were formulated to protect affected landholders from impoverishment and other risks, including landlessness, joblessness, food insecurity, increased morbidity, and marginalization [16]. These international standards aim at addressing the historic injustices suffered by affected landholders. For this reason, it may be in the best interest of governments to comply with these international standards if they wish to ensure that affected populations avoid the adverse socioeconomic impacts of expropriations commonly cited in empirical research.

This article assesses the laws of 50 countries/regions against a set of indicators that are based on the VGGTs and other international standards on the valuation of compensation [17]. The indicators are primarily based on the VGGTs because they are the first comprehensive, internationally agreed-upon standards on land tenure governance. In 2012, the Committee on World Food Security of the United Nations, a body consisting of 193 member countries, officially endorsed the VGGTs. The VGGTs developed as a result of stakeholder consultations with governments, international NGOs, civil societies, and private companies [18]. Although the VGGTs are not legally binding on state and non-state actors (e.g., private companies), they reflect widely accepted international human rights norms, such as the right to property, the right to housing, the right to an adequate standard of living, and other rights established in the Universal Declaration of Human Rights, International Covenant on Economic Social and Political Rights, ILO Convention 169, and the UN Declaration on the Rights of Indigenous Peoples [19]. Private companies, governments, NGOs, and other stakeholders are increasingly accepting the VGGTs as the new international standard on land tenure [20].

The VGGTs cover a range of issues pertaining to land tenure governance, such as administration of tenure, allocation and valuation of tenure rights, protection of customary and informal tenure systems, women's land rights, and other topics. Overall, the standards established in the VGGTs aim at improving land governance and protecting the tenure rights of all persons, particularly marginalized and vulnerable groups. Section 16 of the VGGTs establishes a set of best practices for expropriating land and compensating and resettling affected populations.

Section 16.3 of the VGGTs provides that “States should ensure a fair valuation and prompt compensation in accordance with national law. Among other forms, the compensation may be, for example, in cash, rights to alternative areas, or a combination”. The VGGTs do not define the term “fair valuation,” which presumably means that states are permitted to develop their own definitions of “fair valuation” in national laws. Section 16.5 of the VGGTs provides that “all parties should endeavor to prevent corruption, particularly through use of objectively assessed values, transparent and decentralized processes and services, and a right to appeal”. Furthermore, section 18.2 of the VGGTs establishes additional standards on land valuation and states “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”.

While the VGGTs do not define the term “fair valuation”, there are several other international guidance documents that shed light on the meaning of “fair valuation”. For example, the Food and Agricultural Organization of the United Nations (FAO) publication, *Land Tenure Studies 10: Compulsory acquisition of land and compensation* (hereinafter “FAO Handbook”), published in 2008, presents good practices for conducting compulsory acquisitions and compensating affected populations [21]. Although the FAO Handbook is not officially endorsed by the international community, it reflects what FAO and its many international collaborators consider to be good practices for ensuring equitable access to land and increasing land tenure security. The FAO Handbook provides guidance on determining compensation and recommends that compensation should be based on the principles of equity and equivalence. These principles mean that affected persons should receive “no more or no less than the loss resulting from the compulsory acquisition of their land”. The FAO Handbook is discussed in more detail in subsequent sections of this article.

While the VGGTs and the FAO Handbook together form the basis of the indicators analyzed in this article, it is important to acknowledge other international instruments that establish standards on land valuation and compensation for expropriation. For example, the 2016 World Bank Environmental and Social Standard 5 on Land Acquisition, Restrictions on Land Use and Involuntary Resettlement (ESS5) establishes that compensation should reflect the “replacement cost”. “Replacement cost” is defined as a method of valuation yielding compensation sufficient to replace assets, plus necessary transaction costs associated with asset replacement [22]. Standards on the valuation of compensation are also established in the United Nations Basic Principles and Guidelines on Development-Based Evictions and Displacement, IFC Performance Standards 5 and 7, the Asian Development Bank Handbook on Resettlement, the Centre on Housing Rights and Evictions Pinheiro Principles, and the UN Human Rights Commission Principles and Guidelines on Development-based Evictions and Displacement establish best practices. Several of the standards established in these instruments are similar to those established in the VGGTs. While the international instruments discussed in this section are noteworthy, the focus of the legal indicator assessment is on the VGGT standards since they were the first standards on land tenure governance that are backed by international consensus of governments, international NGOs, civil society, and the private sector.

### 3. Background and Methodology

This article examines whether national laws in 50 countries/regions across Asia, Africa, and Latin America provide compensation procedures that comply with international standards on the valuation of compensation. This article is part of a series of articles that are being developed as part of the author’s PhD research project at the University of Groningen Faculty of Law. The overall objective of this PhD research project is to assess whether national laws in 50 countries across Asia, Africa, and Latin America comply with international standards on expropriation, compensation, and resettlement. The 50 countries/regions assessed in this article (and this PhD research project) are listed in Table 1:

**Table 1.** The countries and regions that are examined in this legal analysis.

List of Countries			Regions
Asia	Africa	Latin America	
1. Afghanistan	1. Angola	1. Argentina	1. Hong Kong
2. Bangladesh	2. Burkina Faso	2. Belize	2. Taiwan
3. Bhutan	3. Botswana	3. Brazil	
4. Cambodia	4. Eritrea	4. Ecuador	
5. China	5. Ethiopia	5. Honduras	
6. India	6. Ghana	6. Mexico	
7. Indonesia	7. Kenya	7. Nicaragua	
8. Laos	8. Lesotho	8. Peru	
9. Kazakhstan	9. Liberia	9. Trinidad and Tobago	
10. Sri Lanka	10. Namibia		
11. Malaysia	11. Nigeria		
12. Mongolia	12. Rwanda		
13. Myanmar	13. South Africa		
14. Nepal	14. South Sudan		
15. Papua New Guinea	15. Sierra Leone		
16. Pakistan	16. Swaziland		
17. Philippines	17. Tanzania		
18. Thailand	18. Uganda		
19. Vietnam	19. Zambia		
	20. Zimbabwe		

There are several reasons why these 50 countries/regions were chosen. The author began this project in 2014 at the World Resources Institute's (WRI) Land and Resource Rights Initiative (LRR) with initial research support from the Harvard Law and International Development Society [23]. In 2014, 30 countries/regions in Asia and Africa were chosen randomly for the initial stage of this legal indicator study. This initial list of countries/regions was altered slightly so that the study would cover a broad geographical area in Africa, Asia, and Latin America. WRI's LRR focuses on securing land rights for the rural poor, including indigenous and local communities with customary tenure, and thus the primary focus of the initial study was on the expropriation of land held by informal and customary landholders. For this reason, the list of 30 countries/regions was altered slightly to include countries with large populations of informal and customary landholders. The list of countries/regions was also altered slightly to ensure that the study covers mostly low- and middle-income countries because contestation over land and resources tends to be more active in countries with such income levels. These 30 countries' or regions' laws were analyzed, and the findings from the analysis were published in a World Resources Institute Working Paper entitled *Encroaching on Land and Livelihoods* in June 2016. In 2016, in order to expand the study to fulfill requirements for the author's PhD dissertation, the author randomly chose an additional 20 countries (nine Latin American countries, five additional African countries, and six additional Asian countries) in order to increase the number of countries or regions assessed to 50 and to ensure the study covers some Latin American countries. In a few cases, countries/regions without laws or regulations available online were removed from the list of additional countries, and replaced with countries for which laws, regulations, and information were available online.

Since the VGGTs do not define the term "fair valuation" of compensation, the author drew on the FAO Handbook for guidance on interpreting this term. The author chose 10 indicators based on the various guiding principles established in Chapter 4 of the FAO Handbook on Valuation, Compensation, and Taking possession (see Table 2). As discussed in Section 2 of this article, the FAO Handbook reflects what FAO and its many international collaborators consider to be good practices for ensuring equitable access to land and increasing land tenure security. While these 10 indicators cover many of the issues associated with the valuation of compensation, they do not cover all aspects of land expropriation. For instance, the indicators above do not address the many issues associated with resettlement and reconstruction of the livelihoods of landholders displaced by expropriation. As part of the author's

PhD dissertation, these additional issues regarding resettlement and reconstruction will be analyzed in the author's forthcoming article [24]. Answering the questions posed by these indicators entailed analyzing a broad range of national-level laws, including national constitutions, land acquisition acts, land acts, community land acts, agricultural land acts, land use regulations, and some court decisions.

**Table 2.** The list of the compensation valuation indicators that are used to assess the national legal frameworks in this article.

List of Compensation Valuation Indicators	
1.	Does the law allow for assessors to follow an alternative approach (e.g., "replacement cost" approach) instead of a "fair market value approach" to calculating compensation in cases where land markets are weak or non-existent?
2.	Does the law provide compensation for unregistered customary tenure rights held by Indigenous Peoples and local communities?
3.	Does the law establish special protections for women landholders regarding compensation entitlements?
4.	Does the law require assessors to take into account the loss of business and other economic activities?
5.	Does the law require assessors to take into account the improvements (i.e., attached and unattached assets on the land (e.g., crops, buildings) made on the land?
6.	Does the law require assessors to take into account intangible land values (e.g., cultural, social, historical land values)?
7.	Does the law provide affected populations with the right to opt for alternative land instead of compensation in cash?
8.	Does the law provide affected populations with the right to negotiate the amount of compensation?
9.	Does the law require that compensation must be paid prior to the taking of possession of the land or within a specified timeframe thereafter?
10.	Are affected populations granted the right to appeal decisions on the amount of compensation in court or before a tribunal?

The indicators examine whether laws establish explicit or implicit requirements for valuing compensation for land. The indicators ask yes or no questions about the legal provisions established in expropriation and other national land laws. Where laws only partially satisfy the question asked by the indicator, "partial" is an answer option. In some cases, a "partial" score was granted where laws partially address the issue raised by the indicator, but the legal provisions are not clear or widely applicable enough to elevate the score to a "yes". For instance, when assessing the indicator which asks whether laws require assessors to account for improvements made on the land, a "partial" score was given where the law only requires the assessor to account for some (but not all) improvements made on the land. Regarding the procedural requirements (e.g., a right to negotiation and appeal), if a legal provision only grants the right to negotiate or appeal compensation decisions under certain circumstances, then a score of "partial" is given. Additionally, if a law only applies to certain land areas (e.g., urban areas) or to certain types of landholders (e.g., Indigenous Peoples), then a score of "partial" is given. In the absence of explicit or implicit indication from the law that questions asked by the indicators can be answered with a "yes" or "partial", the indicator scores received a "no" score, meaning the question posed by the indicators above were answered in the negative.

This PhD study marks the first instance in which indicators are used to measure expropriation, compensation, and resettlement procedures in 50 developing countries/regions; however, indicators have often been used to measure national laws in other studies [25]. By measuring country legal frameworks on a scale of no, partial, and yes, this method allows for one to see how the laws in various countries/regions measure up against each other and against international standards. Through this methodological approach, the indicator scores can be shown graphically in color-coded charts (see Section 5).

While every attempt was made to ensure that only accurate, reliable, and current information was used to answer the compensation valuation indicators, there are several important caveats regarding this article. First, it focuses on legally binding national-level statutory and regulatory laws relating to compensation; it does not assess non-binding policies. Second, the analysis focuses on compensation

procedures as they are written into laws, and does not comprehensively assess whether compensation procedures are implemented or enforced in practice. In some of the countries/regions assessed, the government and private actors may not respect the rule of law or otherwise enforce legal procedures. Some of the countries/regions assessed have long histories of land conflict, which may affect the degree to which the rule of law and property rights are respected by governments and private actors. While an in-depth, multi-disciplinary study of whether the law is respected and enforced on the ground is necessary to obtain a comprehensive analysis of expropriation and compensation practices, the author did not have the financial and other resources needed to assess whether laws are well implemented or enforced in these 50 countries/regions. Instead, the analysis is based on a desk review of national-level expropriation laws, land laws, and secondary sources available online, including the World Bank's LGAF assessments. Third, the analysis examines whether compensation is provided when land is expropriated; this article does not address compensation for other types of land transfers (e.g., voluntary land transfers) [26]. Fourth, the analysis focuses on compensation for land, and does not assess whether compensation is provided for water or subsoil rights (e.g., mineral rights). Fifth, the analysis focuses on national-level laws and does not include an assessment of sub-national laws (e.g., state and district level laws). In some countries or regions, government officials and private actors deliberately use subnational laws and policies in order to avoid following more progressive laws enacted that national level [27]. In India, for example, state-level laws are currently undermining some of the requirements established in the progress LARR Act, 2013 that are designed to protect local landholders [28]. However, given the broad range of subnational laws in the 50 countries/regions, it was not feasible to conduct a comparative assessment of subnational laws using the methodology adopted for this paper. Sixth, while the analysis covers a broad range of legal instruments (see Land Portal's Land Book country pages), there may be additional laws that are not available online and therefore not accounted for in the analysis. Seventh, some of the laws assessed, particularly the laws of the Latin American countries, were unofficial English-translated versions of laws originally written in non-English languages. Seventh, the findings are based on the author's legal interpretations of the laws assessed. For some of the countries, country-level experts reviewed the findings. Eighth, the research was conducted up until December 31, 2016, and so any laws passed after this date are not accounted for in the analysis.

#### **4. The Usefulness of this Research**

This article has academic value because it presents an innovative methodology for conducting broad comparative legal research. By reviewing legal provisions against a set of indicators (i.e., questions pertaining to the law), and categorizing the answers to these indicators into color-coded charts, this analysis allows the reader to see how the laws in various countries/regions measure up against each other and against international standards [29]. Scholars can adopt this approach and develop legal indicator analyses of other research areas.

By highlighting gaps in the law and pinpointing which legal provisions must be amended to adopt international standards on compensation valuation, this study can help inform debates on "fair compensation" among scholars, practitioners, policymakers, affected populations and other actors. The findings from the research establish a benchmark for progress, which can assist civil society organizations and activists in measuring government progress towards adopting the VGGT standards on compensation in domestic laws.

This article can also support the creation of new international compensation standards and guidance documents, such as the new Protocol on Fair Compensation, an ongoing project funded by the Dutch Land Governance Multi-stakeholder Dialogue [30]. By serving as a reference point for law and policy makers, this article can support and influence legal reforms to compensation procedures [31]. Affected populations can use the research findings to better understand their compensation rights, advocate for legal reforms, and hold governments and acquiring bodies accountable for compensation decision-making. This analysis can also support companies engaging in activities that involve

expropriation, compensation, and resettlement. Companies can use this article to understand international standards and best practices, and also the domestic legal frameworks of the countries in which they make land investments and implement activities that require expropriation of land.

## 5. Research Findings

This section is divided into four sub-sections. The first sub-section focuses on whether national laws in the 50 countries/regions assessed ensure fair compensation for poor and marginalized groups. The second sub-section focuses on whether national laws ensure a comprehensive valuation of compensation. The third sub-section focuses on whether national laws establish compensation procedures that provide affected populations with a right to negotiate, receive prompt payment of compensation, and appeal compensation in courts or before tribunals. The fourth sub-section draws overall conclusions from the 10 compensation valuation indicators and shows findings by country [32].

### 5.1. Compensation for Poor and Marginalized Groups

There are at least three reasons why compensation procedures may disproportionately burden poor and marginalized groups, such as women and Indigenous Peoples and local communities who hold land under customary tenure [33]. First, poor and marginalized groups may be disadvantaged by legal systems that base compensation on the “fair market value” of their property and improvements made on the property. Second, compensation eligibility requirements may preclude communities with customary tenure rights from submitting claims for compensation. Third, women landholders may be disadvantaged by gender-neutral compensation procedures, which fail to provide special protections ensuring that women are able to obtain compensation. Each of these reasons is discussed in detail below.

#### 5.1.1. The “Fair Market Value” Approach

In many countries, compensation is based on the “fair market value” (hereinafter “FMV”) of land, which is commonly defined as the amount a willing seller would pay and a willing buyer would accept in an open market. However, as discussed in Section 2 of this article, the VGGTs call for states that account for non-market values such as social, cultural, religious, spiritual, and environmental values. Additionally, the World Bank Environmental and Social Standards (ESS5) and IFC Performance Standard 5 establish that compensation should be based on the cost of replacing the expropriated property (i.e., replacement cost approach) [34]. In countries with robust and functioning land markets, the replacement cost should be roughly equivalent to fair market value, but this is not always the case. Where land markets are weak or non-existent, the fair market value may be less than the replacement cost. In such cases, the “replacement cost” approach, or a combination of the FMV and replacement cost approach, may be preferable since it focuses more on the amount it would actually take to replace lost assets [35]. The FAO Handbook points to this issue, and states that:

“Assessing the market value of a land parcel is not always simple, particularly where land markets are weak. A variety of complex factors must often be considered . . . It may not always be possible to determine compensation based on market value. Alternative approaches vary depending on the political economy of a country, the qualities of the land acquired, and the nature of the land rights.”

Empirical research shows that compensation based on FMV can be insufficient to cover the losses borne by affected landholders. In Peru, for example, the World Bank’s LGAF study found that the market value approach was not always successful in ensuring that affected populations maintain their economic status after expropriation [36].

FMV can provide sufficient compensation in areas where functioning land markets exist. With adequate access to information on the market price of nearby properties of similar size and quality, it may be possible for assessors to correctly determine FMV of expropriated properties. However,

FMV is an ineffective basis on which to calculate compensation in areas where land markets are weak or non-existent [37]. As Merrill wrote, “the concept of fair market value is essentially a fiction in the context of takings of property” due to the lack of information available to accurately measure land values [38]. Even the United States Supreme Court observed that in some cases FMV may not be the appropriate standard to apply, such as when “FMV has been too difficult to find, or when its application would result in manifest injustice to the owner or public” [39].

In many developing countries, rural communities, including indigenous and local communities with customary tenure, have never sold rights to their ancestral lands. Therefore, it is difficult to ascertain the market value of the land. In these countries, governments often impose restrictions or limitations on the ability of rural landholders to sell their land, which makes it difficult to ascertain the land’s market value. In India, for example, tribal landholders cannot accurately assess the FMV of land because restrictions on alienation have prevented tribes from selling their land since the 1970s [40].

Scholars have extensively discussed and debated the inherent pitfalls of the (FMV) approach. For example, they argue that the “fair market value” approach incentivizes governments to target poor and marginalized landholders with lower valued properties rather than expropriate the properties of the rich and politically influential. According to Stern,

“Blight condemnations, urban renewal programs, and redevelopment projects which often serve as the ‘public use’ justification for eminent domain- all affect, not coincidentally, assets belonging to poor property owners . . . Stronger communities are more likely to have the resources and influence to avoid the damaging effects of eminent domain without government assistance. Politically strong communities may use their political ties and influence to fend off expropriation, and economically strong communities may be safe because of the high costs that the state would incur by taking their land.” [41]

In areas where the cost of expropriating land is relatively inexpensive, government may be incentivized to overuse its expropriation power, which, in turn, could threaten land tenure security. Landholders may be more likely to protest and appeal expropriation and compensation decisions, resulting in delays in implementation of development projects. As argued by Bell and Parchomovsky, “takings law permits under compensation whenever the reserve value of the proper owner exceeds market price . . . partial compensation will lead the government to take too much land . . . by failing to pay full compensation for its taking, the government incentivizes property owners to oppose potentially society beneficial projects” [42,43]. Similarly, Dykolbotn and Freilich examine how benefit-sharing on the part of the affected landholder can rarely be achieved when compensation is set at pre-project “market value” levels [44,45].

The FMV approach to valuing compensation is also criticized by scholars as an inadequate approach because it fails to capture the affected landholders’ personal, sentimental attachments to the land. Stern, for example, examines the ways in which expropriation leads to a “loss of communality” and how compensation at market value fails to capture this loss of interpersonal ties. Cernea and Vanclay highlight the failure of FMV compensation to account for intangible or personal land values and the consequential several emotional pain and other harmful social impacts endured by affected populations [46,47]. Dagan argues that transaction costs and subjective preferences may cause affected landholders to “oppose the forced transfer of their proprietary rights against its fair market value, and shift the burden to other landholders resulting in unjust and inefficient outcomes.” Krier and Serkin highlight the failure of FMV compensation to bridge the gap between market and subjective values [48]. Radin writes that “[FMV] seems quite wrong in cases where property interests are apprehended as personal and incommensurate with money” and rejects the use of FMV for family homes and other property with personal value [49].

Lee, on the other hand, disagrees with the argument that FMV does not account for sentimental value. He states that FMV is in fact capable of capturing “sentimental values . . . [for example] willing sellers’ reservation prices will include the value of their sentimental attachments and that value will be reflected in the resulting market price for their properties” [50].

The first legal indicator examines whether national laws enacted in the 50 countries/regions assessed allow assessors to calculate compensation using alternative methods to FMV. It was found that eight of the 50 countries/regions [51] establish alternative approaches to calculating compensation, which can be applied in cases where land markets are weak or non-existent. Tanzania's Village Land Regulations, 2001 provides "the market value of any land and unexhausted improvement shall be arrived at by use of a comparative method evidenced by actual recent, sales of similar properties or by the use of income approach or replacement cost method where the property is of a special nature and not saleable" [52]. Similarly, in Sierra Leone, the "replacement cost" approach may be used to calculate compensation if the land is devoted to a purpose of such a nature that there is no general demand or market for land for that purpose [53].

Five of 50 countries/regions received a "partial" score because their laws indicate that alternative approaches to FMV may be used in certain circumstances [54]. However, these countries' laws do not specifically state whether alternatives to FMV may be applied whenever land markets are weak or non-existent. Section 26(3) of India's LARR Act, 2013, for example, provides that "where the market value ... cannot be determined for the reason that ... the land is situated in such area where the transactions in land are restricted by ... the State Government ... shall specify the floor price and minimum price per unit area of the said land based on the price calculated ... in respect of similar types of land situated in the immediate adjoining areas." The answer is partial because it is unclear which approach the State Government is required to adopt when establishing a floor price/minimum price of the land.

The remaining 37 countries/regions received a "no" score because their laws establish FMV as the required approach and do not provide alternatives to FMV in cases where land markets are weak or non-existent [55]. In these 37 countries/regions, compensation is primarily based on the market value of the land at the time of the acquisition, meaning that poor and vulnerable landholders living in parts of these countries where land markets are weak or non-existent may be at risk of being insufficiently compensated.

### 5.1.2. Compensation for Unregistered Customary Tenure Holders

The VGGTs do not explicitly define the term "legitimate tenure rights holders", but Section 3.1 provides that states "should respect legitimate tenure rights holders and their rights, whether formally recorded or not". Section 9 of the VGGTs establishes that the tenure rights of Indigenous Peoples and other communities with customary tenure must be respected and protected. Section 9.5 provides that "Where indigenous peoples and other communities with customary tenure systems have legitimate tenure rights to the ancestral lands on which they live, States should recognize and protect these rights". Furthermore, the World Bank Environmental and Social Standards (ESS5) and the IFC Performance Standards 5 and 7 require borrowers to pay affected populations regardless of legal status; in these Standards, no distinction is made between customary and statutory rights.

Compensation procedures may put unregistered customary tenure holders, including Indigenous Peoples and local communities, at a disadvantage. Under national legal frameworks, customary tenure rights may not be considered "legitimate" objects of compensation; compensation procedures may only be granted to registered private property owners and other landholders with statutorily recognized tenure rights [56]. Under such legal regimes, communities that hold land under customary tenure without statutorily recognized rights may be effectively precluded from submitting claims for compensation because registration and titling procedures can be difficult to access, costly, and time-consuming for communities with customary tenure rights [57]. In Peru, for example, indigenous forest communities must clear 27 bureaucratic hurdles to achieve official recognition and formal land titles; this process can take more than a decade [58]. Such legal hurdles to obtain compensation are potentially very problematic given that, globally, up to 2.5 billion people hold land under customary tenure. It is estimated that nearly 70% of the world's land is unregistered, and that only a fraction of the world's land is legally recognized as owned or controlled by Indigenous Peoples and local

communities with customary tenure [59,60]. According to Wily, “provisions for compensation at compulsory acquisition are meaningless for those who are not deemed to be lawful owners or whose lesser interests are not due recompense . . . this most acutely affects untitled customary landholders and slum dwellers with longstanding occupancy. Together they may number 1.8 billion [in Africa] in 2040” [61].

The second legal indicator asks whether national laws provide compensation regardless of whether communities formally register their lands or not. It was found that seven of the 50 countries/regions provide compensation for community tenure rights regardless of whether those rights are formally registered or not [62]. For example, Article 5 of Laos’ Decree on the Compensation and Resettlement of the Development Project, 2005 states, “All individuals and entities residing or making a living within the area to be acquired for a project as of the formally recognized cut-off date would be considered as project affected persons (APs) for purposes of entitlements to compensation, resettlement and rehabilitation assistance”. Likewise, according to South Sudan’s 2009 Land Act, compensation is granted to all affected populations who hold land under customary occupation [63].

Eight of 50 countries/regions received “partial” scores, indicating that compensation may be provided for some (but not all) communities with unrecorded tenure rights [64]. For example, South Africa’s Section 2(3) of the Interim Protection of the Informal Land Rights Act (IPILRA), 1996 (amended 2015) grants informal tenure rights holders the right to compensation when they are deprived of their land rights [65]. However, the IPILRA, 1996 excludes “tenants” from protection under the Act.

The remaining 35 countries/regions have legal frameworks that do not grant communities with unregistered customary tenure the right to obtain compensation when their land is expropriated [66]. In these countries/regions, registration of customary tenure rights is a prerequisite to obtaining compensation.

### 5.1.3. Special Protections Ensuring Women Landholders Receive Fair Compensation

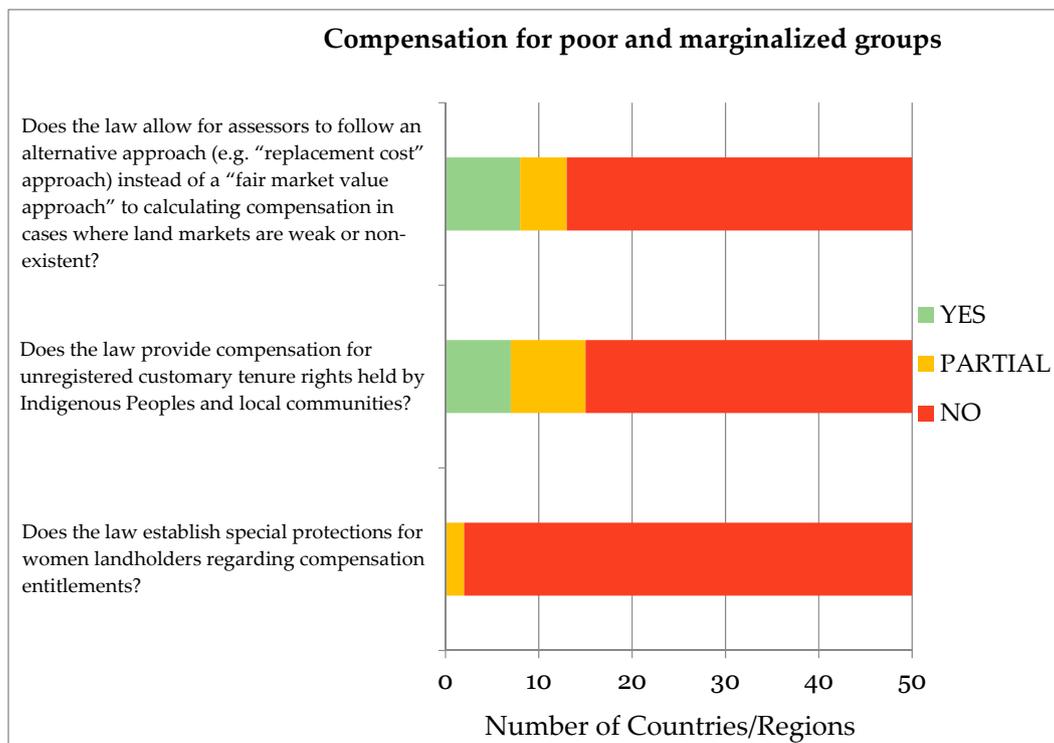
Section 3b of the VGGTs establishes that states should promote gender equality, which is defined as “ensur[ing] the equal right of women and men to the enjoyment of all human rights, while acknowledging difference between women and men and taking specific measures aimed at accelerating de facto equality when necessary. States should ensure that women and girls have equal tenure rights.” In addition to Section 3b, other sections of the VGGTs call for states to adopt gender-sensitive approaches to tenure governance, including Sections 4.4, 4.7, 5.3, 5.7, and 10.1. Additionally, Section 16.1 of the VGGTs calls for states to “respect all legitimate tenure rights holders by providing just compensation”, and women landholders are a subset of “legitimate tenure rights holders”. Similar to the VGGTs, the World Bank ESS5 provides that “particular attention will be paid to gender aspects and the needs of the poor and the vulnerable”.

Compensation procedures may place a disproportionate burden on women landholders if procedures do not establish special protections ensuring women are appropriately compensated. Throughout the world, women in rural areas play an important role in sustaining rural societies by caring for household members, attending to family vegetable gardens, feeding animals, collecting firewood, and supplementing income with jobs outside of the home [67]. However, compared with men, women only have rights and access to a small fraction of land [68].

The effect of gender-neutral compensation procedures, particularly in patriarchal societies, may be particularly burdensome for women landholders [69]. In societies where women are considered dependents of their husbands and have no direct right to land, compensation is usually paid to the male head of the household. As the FAO Handbook explains, if compensation is paid to the male head of household, the “needs of women and children may be ignored as the money vanishes, to the detriment of the family’s health and welfare”. In such cases, women are put at risk of being disproportionately burdened by expropriations. According to La Vina, the loss of access to farmland hits women harder than men in many communities, and women are often excluded from compensation

and benefit schemes [70]. Where compensation comes in the form of employment opportunities, these opportunities usually favor men [71].

The third legal indicator asks whether national laws establish special protections for women landholders ensuring they are entitled to fair compensation. For this indicator, the author investigated whether the compensation procedures assessed explicitly provided special protections for women landholders for the purposes of obtaining compensation upon expropriation [72]. In other words, if the compensation procedures were written in gender-neutral terms, a score of “no” was given. For this indicator, it was found that only two of the 50 countries/regions assessed (India and Laos) have compensation procedures that partially protect women from expropriation without fair compensation. Under India’s LARR Act 2013 and Laos’ Decree on Compensation and Resettlement for Development Project, 2005, widows and divorcees are considered a separate category of affected persons entitled to compensation, meaning that women are at least partially protected as legally recognized class of persons entitled to compensation. At the same time, these two countries did not receive a “yes” score because they do not ensure that women will be protected in every case (e.g., in cases that do not involve expropriation of land rights held by widows and divorcees). The findings from the three indicators discussed in this sub-section are displayed in Figure 1.



**Figure 1.** The findings from the indicators assessed in this study that focus on compensation for poor and marginalized groups.

## 5.2. Valuation of Compensation

### 5.2.1. Compensation for Loss of Economic Activities and Improvements Made on the Land

As discussed in Section 2, the VGGTs call for a fair valuation of compensation but do not define the term “fair”. The FAO Handbook provides additional guidance on valuation, and states:

“Compensation should be for buildings and other improvements to the land acquired; for the reduction in value of any land retained as a result of the acquisition; and for any disturbances or other losses to the livelihoods of the owner and occupants caused by the

acquisition and dispossession. The disturbance accompanying compulsory acquisition often means that people lose access to the sources of their livelihoods. This can be due to a farmer losing agricultural fields, a business owner losing a shop, or a community losing its traditional lands.”

For rural farmers, grazers, hunters, and other landholders whose land is their primary source of income, accounting for the land’s economic activities and improvements in the assessment of compensation is particularly crucial [73]. When rural farmers cultivate and sell crops from their lands, expropriation may leave them without a source of income. A recent USAID study in Rwanda found that 77 percent of expropriated households surveyed experienced income loss after their property was expropriated [74]. Moreover, if compensation procedures fail to account for the land’s buildings, crops, and other improvements, affected populations who built, used, and maintained these improvements might be worse off than they were before their property was taken. For example, the World Bank LGAF study of Brazil found “although compensation is generally paid for ownership and other rights (e.g., use rights, access rights, etc.), in the majority of cases the level is insufficient for the displaced households to either afford comparable assets or maintain their prior social and economic status” [75].

The fourth legal indicator asks whether the law requires assessors to account for the loss of business or other economic activities when calculating compensation. It was found that 27 of 50 countries/regions provide compensation for economic activities associated with the land [76]. For example, Indonesia’s law provides losses for other appraisable losses, such as loss of business or job, cost of change of location, and cost of changing profession [77].

Ten of 50 countries/regions received “partial” scores because their laws suggest that compensation may reflect some (but not all) types of economic activities [78]. However, these countries’ laws are not entirely clear regarding whether assessors must account for economic activities in every case. For instance, in South Sudan, while the law does not explicitly require that compensation reflect the economic activity attached to the land, Section 75 of the 2009 Land Act requires that compensation levels reflect “the purpose for which the land is being utilized.” It can be inferred from this provision that economic activities may be accounted for in the valuation of compensation, at least in some cases.

Thirteen countries/regions have national laws that do not explicitly or implicitly provide compensation for economic activities associated with the land [79]. In these countries, compensation is based on FMV without additional provisions indicating that business and other economic activities are compensable. In these countries/regions, business owners and other landholders who use their land for economic purposes may be at risk of receiving insufficient compensation.

The fifth legal indicator asks whether assessors must account for the value of improvements made on the land when calculating compensation. It was found that 32 of 50 countries/regions have laws that provide compensation for improvements made on the land [80]. According to Belize’s law, the Land Acquisition (Public Purposes) Act, 2000 provides that “in assessing the compensation payable the Board shall assess separately the compensation payable in respect of . . . developed land and any buildings standing on the land” [81].

Eleven of 50 countries/regions received “partial” scores because their laws suggest that compensation may reflect some (but not all) of the improvements made on the land [82]. Under Kazakhstan’s Article 67 of Law on State-Owned Property, 2011 provides that “the value of buildings and other real estate on the land is included in the compensation.” However, since the law does not account for other types of improvements aside from buildings and other real estate (e.g., crops), the answer is “partial” [83].

Seven of 50 countries/regions have laws that do not require assessors to take into account the value of improvements when calculating compensation [84]. In these countries/regions, affected populations that built, used, and maintained improvements on their land may receive compensation that is insufficient to cover their losses.

### 5.2.2. Compensation for Intangible Land Values (e.g., Cultural, Spiritual, and Historical Values)

As mentioned above, section 18.2 of the VGGTs calls for policies and laws related to valuation to take into account non-market values, including social, cultural, religious, and spiritual values. In addition to the VGGTs, Article 5 of International Labour Organization Convention 169 (the Indigenous and Tribal Peoples Convention) calls for recognition of intangible, non-market values and states, “the social, cultural, religious and spiritual values and practices of [Indigenous and tribal peoples] shall be recognized and protected.” Moreover, the United Nations Declaration on the Rights of Indigenous Peoples and IFC Performance Standard 7 indicate that ancestral territories and other lands used for religious, cultural, and traditional practices must be protected and respected [85].

Land has cultural, historical, religious, and sentimental value. This is especially true for Indigenous Peoples and local communities that have used their lands for traditional norms and practices for centuries. It may be difficult to assess the value of intangible losses; for instance, how can the government put a price tag on graveyards, historical places of worship, and other cultural heritage sites? There is a diversity of viewpoints among scholars regarding the conceptualization of compensation for intangible land values. Some scholars propose allowing affected populations to take a “self-evaluation” in order to ascertain intangible land values. Bell and Parchomovsky, for example, propose basing compensation on the affected populations’ self-assessed valuation in order to establish subjective valuation as the applied measure of compensation [86]. Likewise, Lunney also argues in favor of using the landholder’s subjective preferences and proposes defining “just compensation” as the amount of compensation “that made the landowners indifferent between accepting the payment and the loss they experienced” [87].

Wyman, on the other hand, argues against considering the subjective preferences of affected populations when calculating compensation because it would cause some subjective values to be prioritized more than others [88]. She proposes compensation rules would make affected populations objectively indifferent to expropriations. The measure would not be the “takee’s personal assessment of her losses . . . rather, it would be a considered judgment by outsiders about the amount of compensation required to allow a takee to enjoy the elements of a socially valuable life to the same extent that she enjoyed them before the taking.”

The sixth legal indicator examines whether assessors must account for intangible land values when calculating compensation. For this indicator, the author investigated whether laws establish any procedures by which intangible land values, such as historical, cultural, or personal values, may be reflected in the calculation of compensation. It was found that only two of 50 countries/regions (Bhutan and the Philippines) have laws that explicitly require acquiring bodies to consider the land’s intangible land values (e.g., historical, cultural, and spiritual values) when assessing compensation. According to Bhutan’s Land Act, 2007, for example, “the valuation of the land and property shall consider . . . other elements such as scenic beauty, cultural and historical factors, where applicable” [89]. The Philippine’s Indigenous People’s Rights Act, 1997 helps ensure that compensation payments reflect the historical/cultural connections associated with land. In addition to establishing special protections for ancestral lands held by Indigenous Peoples, the Act establishes an Ancestral Domains Fund, which can be used to compensate Indigenous Peoples when their ancestral domains are expropriated [90].

Seven of 50 countries/regions received “partial” scores because their laws require assessors to account for intangible land values to some extent [91]. However, these countries’ legal provisions do not ensure that intangible land values will be accounted for in every case. Article 20(3) of the Ghana’s Constitution, for example, requires that “where compulsory acquisition or possession of any land affected by the State . . . involves displacement of any inhabitants, the State shall resettle the displaced inhabitants on suitable alternative land with due regard for their economic well-being and social and cultural values.” However, Ghana received a “partial” score because Ghana has not passed legislation or regulations, which define the term “due regard” or otherwise provide guidance on implementing this provision.

The remaining 41 countries/regions assessed have laws that do not require that intangible land values (e.g., cultural, spiritual, and historical values) will be reflected in the assessment of compensation [92]. In these countries/regions, Indigenous Peoples and local communities may suffer irreparable damage and livelihood losses if their ancestral lands are expropriated.

### 5.2.3. The Right of Affected Populations to Opt for Alternative Land Instead of or in Addition to a Cash Payment of Compensation

As discussed in Section 2, Section 16.3 of the VGGTs provides that “among other forms, the compensation may be, for example, in cash, rights to alternative areas, or a combination.” For farmers and rural landholders whose land is their primary source of income and livelihood needs, cash compensation payments may be insufficient to revitalize their livelihoods subsequent to expropriations. The World Bank Environmental and Social Standards and the IFC Performance Standards obligate borrowers to provide land-based compensation or in-kind compensation. Likewise, the FAO Handbook states:

“providing suitable alternative land may be difficult in the light of current population pressures on the land . . . However, many owners and occupants may prefer to receive land as compensation rather than money . . . resettlement of vulnerable people on alternative land is required when the loss of their land means a loss of their livelihoods.”

In Bangladesh, for example, where national laws do not provide alternative land as a compensation option, 77 percent of the affected households surveyed stated that compensation payments did not sufficiently cover their losses, and 90 percent stated they were unable to use the cash to purchase land equivalent in area to the land they lost [93]. According to Lindsay, “Some land rights that are critical to rural livelihoods . . . may simply not be susceptible to monetization – their loss may only be genuinely addressed by providing [alternative land]” [94]. Stern proposes limiting the circumstances in which “alternative land” may be provided as compensation to some extent. He states:

“the establishment of an ongoing relationship with the state and individuals who have been subject to expropriation creates financial uncertainty and entails significant negotiation and monitoring costs that exceed those associated with one-shot compensation. Therefore, the use of a direct resettlement remedy should be limited only to instances where the collective dimension of the state’s pluralistic obligation arises.”

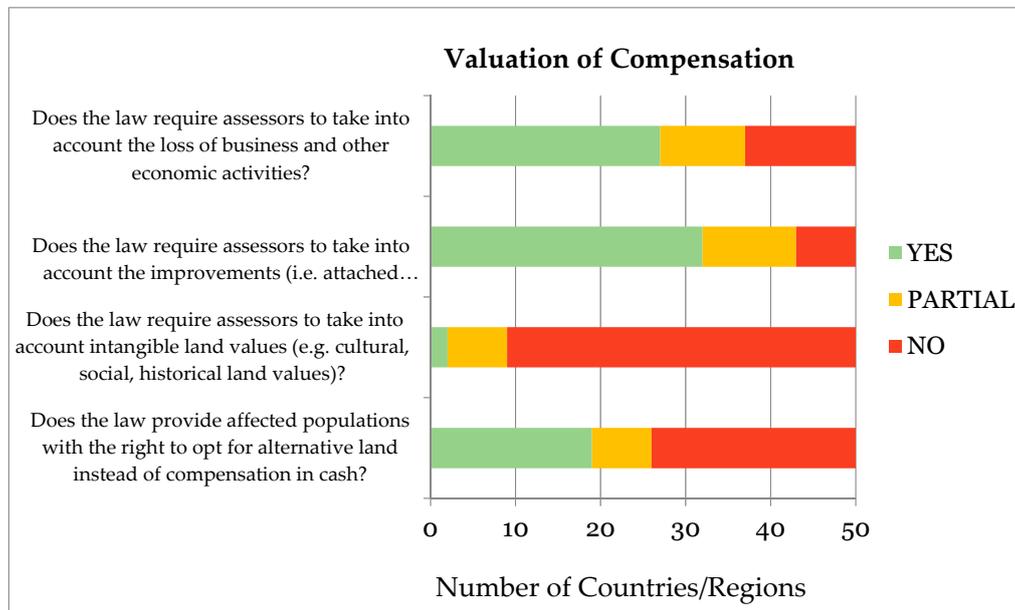
He notes that this obligation may arise in cases where land held by large communities is expropriated.

The seventh legal indicator asks whether affected landholders are granted the right to opt for alternative land as a compensation option, if such land is available. It was found that 19 of 50 countries/regions have laws that provide affected populations with a right to opt for alternative land instead of or in addition to compensation [95]. For example, article 14 of Afghanistan’s Law on Land Expropriation, 2000 provides “Instead of paying the price for an expropriated land to the owner of such land, another piece of land, equivalent to such land, may be distributed to the owner upon his agreement. If such new land has a grade higher than that expropriated, the owner shall pay the difference to the Emirates and vice versa.”

Seven of 50 countries/regions have laws that suggest alternative land may be provided in some cases; however, it was unclear, based on the wording of these countries’ laws, whether alternative land may be provided as a compensation option in every case [96,97]. For example, Article 12 of Argentina’s Ley No. 21.499, 1977 establishes that compensation must be paid in cash, except when the payment for the expropriated property is made in another kind of value [98]. This provision suggests that compensation may be payable in alternative land, although the provision is unclear.

Twenty-four of 30 countries/regions have laws that do not explicitly or implicitly provide alternative land as a compensation option [99]. In these countries/regions, compensation must

be paid in cash, which can provide a number of problems, especially if the affected landholders are not accustomed to managing large sums of money. If the expropriation causes farmers to lose land that is especially fertile, they may be at particular risk of impoverishment if the money provided is not enough to allow them to purchase productive alternative land. The findings from the indicators discussed in this sub-section are displayed in Figure 2.



**Figure 2.** The findings from the indicators assessed in this study that focus on valuation of compensation. Note: “Assessors” as used here means the government authorities or private entities that are legally authorized to conduct the valuation of compensation.

### 5.3. Prompt Payment and Objective Assessment of Compensation

This section discusses whether national laws establish procedures that are aimed at ensuring compensation is objectively assessed and promptly paid. The legal indicators in this section examine whether there are legal processes in place that allow affected populations to negotiate compensation amounts, receive prompt payments, and hold governments accountable by appealing compensation decisions in courts or before tribunals.

#### 5.3.1. The Affected Populations’ Right to Negotiate Compensation Amounts [100]

Although the VGGTs do not explicitly call for states to provide affected landholders with the right to negotiate compensation levels, negotiation proceedings may help countries adopt section 16.6 of the VGGTs, which provides that states should “prevent corruption through the use of values that are objectively assessed using transparent and decentralized processes.” The FAO Handbook states that “fair and transparent negotiations [between governments and affected populations] help break down the barriers between the acquiring agency and the people whose land is being acquired, and can allow each party to have a better understanding of the needs of the others.” Additionally, good faith negotiating between parties can reduce the chance of delays later in the expropriation process; for instance, delays that arise when affected populations are unsatisfied with their compensation amounts and decide to appeal to courts.

Fair negotiations may prevent outcomes such as those witnessed in Tanzania, where compensation allotments were reportedly calculated behind closed doors, were perceived as arbitrary, and caused mistrust of the government [101]. After long delays, affected landholders in Tanzania were asked to either “take it or leave it” and were not given the chance to negotiate.

Scholars have examined and deliberated various approaches to negotiating fair compensation. Bell and Parchomovsky, for instance, argue that since the “subjective value [of property] is neither observable nor readily ascertainable by third parties; only the aggrieved property owners know the true value of their land”, it may be useful to include a self-assessment apparatus by which landowners set the compensation rate, which must be either accepted or rejected by the government, but, if the government rejects the compensation rate, the landowners can keep their land but cannot sell their land for a price below the proposed compensation rate [102]. If they do sell their land for a price below the proposed rate, they must pay the difference to the government. Bell and Parchomovsky argue that this “self-assessment apparatus” would ensure fair compensation and balance the interests of the government and affected populations. By imposing restrictions on alienation, this “apparatus” is designed to discourage landholders from exaggerating the subject value of their property.

The eighth legal indicator examines whether affected populations have the right to negotiate compensation amounts. It was found that 27 of 50 countries/regions have laws that provide affected populations the right to negotiate compensation levels [103]. In these countries/regions, affected populations do not necessarily have the final say regarding compensation amounts, but are granted the right to submit claims for compensation, and reach an agreement on the amount with the government. If they disagree with the government’s final decision then affected populations can often appeal the compensation decision in court or before a tribunal (see Section 5.3.3 below). Papua New Guinea’s 1996 Land Act, for example, provides that affected persons and the Minister must reach an agreement on compensation [104]. Likewise, Article 37 of Indonesia’s Law provides “the Land Administrator shall conduct a negotiation with the Entitled Parties within 30 working days of the submission of the results of appraisal of the Appraiser to the Land Administrator for determination of the form and/or the amount of Compensation under the results of appraisal of Compensation.”

Eight of 50 countries/regions have laws that provide affected populations with the right to negotiate compensation under certain circumstances [105]. However, these country/regional laws impose certain limitations on the rights, which triggered a score of “partial” for this indicator. For example, Article 6 of Rwanda’s Law No. 18/2007 provides that “if necessary, the owner of the actives shall negotiate with the person to be expropriated and shall give him or her just compensation in accordance with relevant laws and in consultation with competent authorities.” The answer is “partial” because this legal provision indicates that a right to negotiate may only be granted “if necessary”; a right to negotiate is not guaranteed in every expropriation case.

Fifteen of 50 countries/regions have laws that do not provide affected populations with the right to negotiate compensation amounts [106]. Without a right to negotiate compensation levels, affected populations may become dissatisfied and protest compensation decisions. In Ethiopia, for example, where Law No. 455/2005 does not grant affected populations the right to negotiate compensation levels “many scholars underscore the little participation of community in compensation decision-making and benefit packages, which implies government is the sole decision maker in compensation and benefit package computation. Many Ethiopians are dissatisfied on the limited involvement of affected communities in the compensation computation process and on the level of compensation payment” according the World Bank’s LGAF study [107,108].

### 5.3.2. Delays in Compensation Payments

Section 16.3 of the VGGTs calls for states to provide “prompt” payments of compensation. However, there is no specified deadline established by the VGGTs. The FAO Handbook states that laws should ensure that people receive full payment of the agreed-upon compensation sum in a timely manner, and that governments should be prohibited from taking possession of acquired land until after a substantial percentage of compensation has been paid. Delays in payments could potentially result in the impoverishment of affected populations.

Without a legally imposed deadline for paying compensation, acquiring bodies may be less likely to pay compensation within a short timeframe. Empirical research shows that payment

of compensation is often delayed in many countries. A recent USAID survey in Rwanda found that payments of compensation for expropriation were, on average, delayed by 16 months past the legally imposed deadline for compensation payments. In Ghana, compensation was not paid for approximately 90 percent of all land expropriated between 1966 and 2001 [109]. As of 2001, there were hundreds of pending cases in courts petitioning the government to either pay compensation or return lands to indigenous landholders. In China, the promise of cash compensation payments was unfulfilled in approximately one-third of the 476 land expropriations surveyed. In Kenya, landowners are often not compensated promptly, according to the World Bank's LGAF study [110]. In Nigeria, the LGAF study found:

“The speed at which compensations are paid to property owners is also very slow. This may be attributed to the lack of planning on the part of the expropriating institution and the inadequate understanding of the need to pay compensation on the part of the government, which results in the poor budgetary allocation to the institutions saddled with the responsibility of land acquisition in the country.” [111]

The ninth legal indicator asks whether laws mandate that affected populations receive payment prior to the taking of possession or within a specified timeframe thereafter. It was found that 21 of 50 countries/regions have laws that require governments to pay compensation before acquiring land or within a specified timeframe thereafter [112]. For example, Article 93 of Vietnam's Law on Land, 2013 provides that “within 30 days after decision on the land recovery by the competent state agency takes effect, agencies and organizations in charge of compensation shall pay compensation and support to people whose land is recovered.”

Thirteen of 50 countries/regions received “partial” scores because their laws establish deadlines for compensation payments but also provide exceptions by which the deadline may be extended [113]. In Trinidad and Tobago, for example, the answer is “partial” because claimants can petition for advance payment of compensation, made before possession of their land is taken; however, without a petition, advance payment is not required by law [114].

Sixteen of 50 countries/regions have laws that do not require prior payment of compensation or payment within a specified timeframe [115]. For example, according to Tanzania's Land Acquisition Act 1967, the Minister can pay compensation “at any time” after the publication of the acquisition notice in the *Gazette* [116].

### 5.3.3. A Right to Challenge Compensation Decisions in Court or before a Tribunal

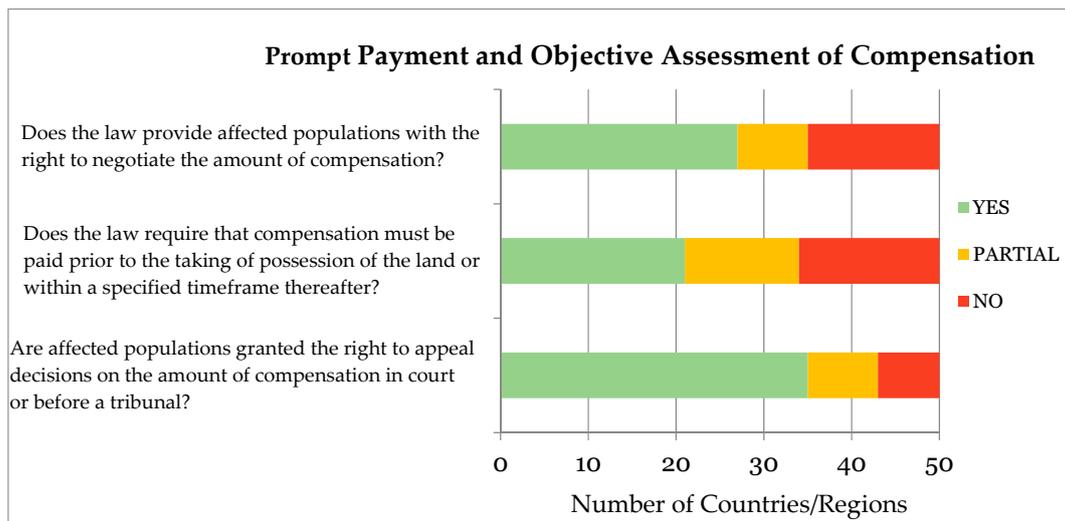
Section 16.3 of the VGGTs calls for states to provide a right to appeal compensation decisions. Avenues of redress may be needed when governments use incorrect or illegal procedures for calculating compensation and, consequently, affected populations are allotted insufficient compensation. Subjecting compensation decisions to judicial or tribunal review reduces the risk that compensation will be illegally or insufficiently assessed. According to Cotula, “effective judicial review processes . . . prevent and remedy abuse. This includes complaints . . . on the amount of compensation and/or on the quality of in-kind compensation; on who should be entitled to the compensation; on delays in the payment of compensation; and on other aspects” [117].

The tenth legal indicator examines whether national laws provide affected populations with a right to challenge compensation decisions in court or before a tribunal. It was found that 35 of 50 countries/regions have laws that grant affected populations the right to challenge compensation decisions in court or before tribunals [118]. For example, under Brazil's Decree-Law No. 3.365 regulating land expropriation for public use (1941) indicates that affected persons have a right to appeal the decision that fixes the prices of compensation [119].

Eight of 50 countries/regions have laws that partially grant affected populations the right to challenge compensation decisions [120]. However, these laws impose certain limitations on the right to challenge compensation decisions in court or before a tribunal. For example, in Swaziland, Section 10

of the Acquisition of Property Act, 1961 (No. 10 of 1961) provides that the Board of Assessment shall rule on disputes regarding compensation claim, but there is not clear provision which grants affected persons the right to challenge compensation decisions in court or before a tribunal [121].

Seven of 50 countries/regions have laws that do not provide affected populations with the right to challenge compensation decisions in court or before a tribunal [122]. In these seven countries, affected populations must either take or leave the amount of compensation granted to them, and have no means of legal redress if they are dissatisfied with compensation allotment. The findings from the indicators discussed in this sub-section are displayed in Figure 3.

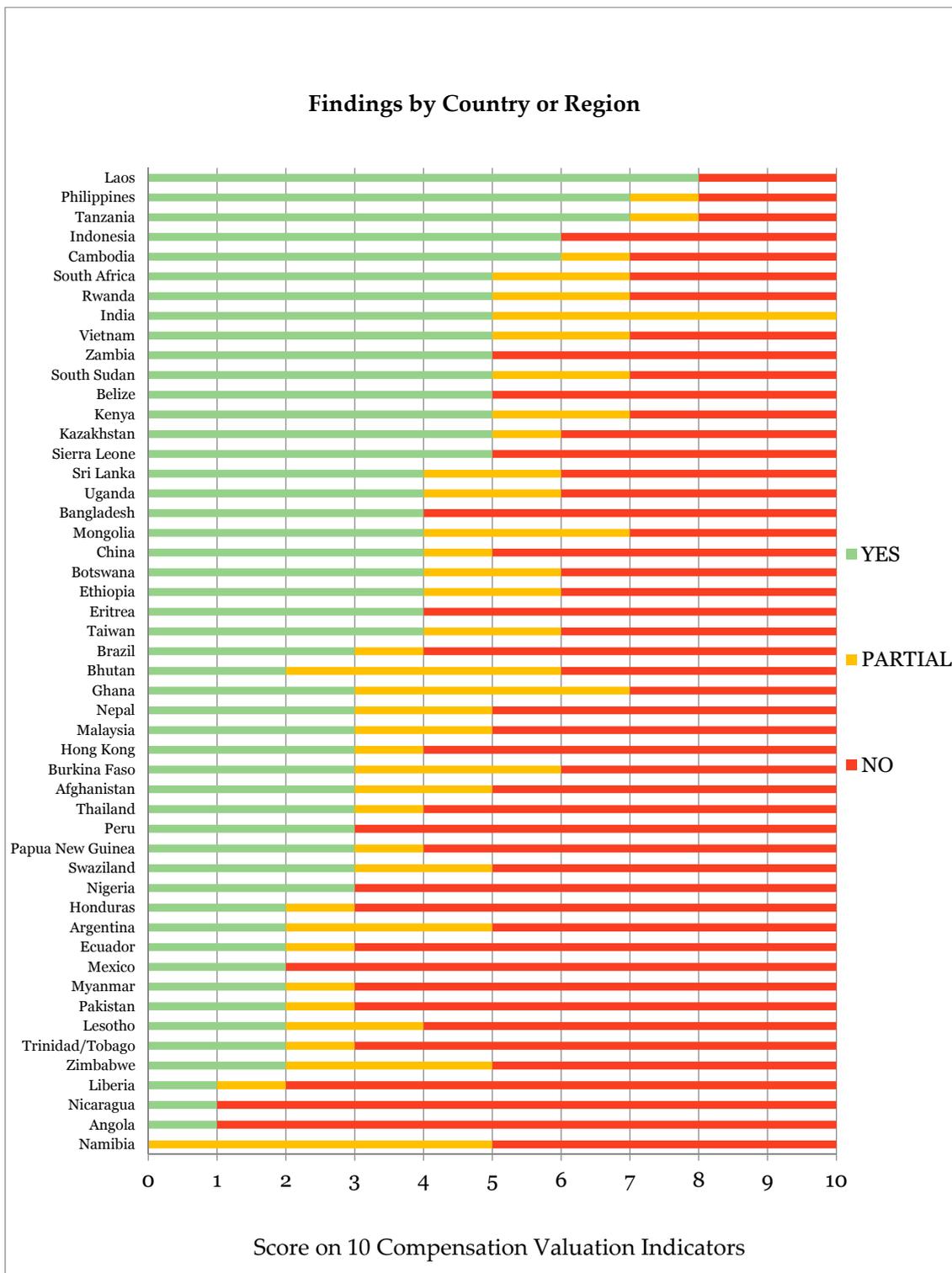


**Figure 3.** The findings from the indicators assessed in this study that focus on prompt payment and objective assessment of compensation.

#### 5.4. Overall Conclusions from the 10 Compensation Valuation Indicators

Figure 4 aggregates the findings from the 10 compensation valuation indicators and shows the total yes, partial, and no scores for each country. The chart shows that Laos, Philippines, Tanzania, Indonesia, and Cambodia have the laws that are closest to adopting the VGGTs. However, the chart shows that none of the 50 countries/regions assessed scored a “yes” for all 10 indicators chosen for this study. This indicates that all of that national laws assessed must be reformed in order to fully comply with international standards on valuation of compensation. The chart also shows that Liberia, Angola, Namibia, and Nicaragua lag behind many of the other countries because their national laws mostly fail to adopt international standards on the valuation of compensation.

Figure 4 also shows that the Asian and African countries assessed achieved better scores on the indicators than the Latin American countries assessed. While Belize received five “yes” scores on the indicators, the remaining eight Latin American countries assessed (Argentina, Brazil, Ecuador, Honduras, Mexico, Nicaragua, Peru, and Trinidad and Tobago) received fewer than three “yes” scores on the indicators.



**Figure 4.** The indicators scores received by each country for the 10 compensation valuation indicators assessed in this study.

## 6. Recommendations

This article establishes a benchmark for progress to assist civil society organizations, NGOs, policymakers, advocates, affected populations, investors, and other stakeholders in measuring government progress towards adopting VGGT standards on compensation in domestic laws. Some

countries, such as Laos, Philippines, Tanzania, Indonesia, and Cambodia, have enacted laws with relatively robust compensation procedures that largely adopt the VGGT standards on compensation. However, there is ample room for progress. In most of the 50 countries or regions assessed, there are a number of gaps in national laws that put affected populations at risk of being insufficiently compensated upon expropriation. These legal gaps must be filled if national laws are to adopt the VGGT standards on compensation. Robust compensation procedures are necessary but insufficient to ensure communities are sufficiently compensated. Governments must also respect and enforce robust compensation procedures.

Based on the findings from the research, the author proposes four recommendations for ensuring international standards on compensation valuation are adopted and sufficient compensation for legitimate tenure rights is provided:

**(1). Law should ensure that compensation procedures respect and protect the tenure rights of poor and marginalized groups.** In cases where land markets are weak or non-existent, laws should be flexible and provide alternatives to the “fair market value” approach to calculating compensation. As discussed in Section 5, the “replacement cost” approach may be a suitable alternative to fair market value since it requires an assessment of what it would really take in a given market to replace lost assets. Section 10 of Tanzania’s Village Land Regulation, 2001, is a good provision for countries or regions without robust land markets to adopt because it grants assessors flexibility to follow a variety of approaches when calculating compensation [123]. The law should provide clear and specific guidelines for valuing compensation that are flexible enough to allow for the determination of full compensation in special cases where land markets are weak or non-existent.

To conform to the VGGTs, governments must protect and respect the legitimate tenure rights of communities with customary tenure rights. Although the term “legitimate” is left undefined in the VGGTs, this term is defined in other international instruments as including both legal legitimacy (rights recognized by law) and social legitimacy (rights that have a broad acceptance among society) [124]. For this reason, states should initiate flexible systems that look beyond registered property rights when determining who is entitled to compensation. In order for governments to adequately and effectively assess the “social legitimacy” of tenure rights held by IPLCs, they should survey the affected land and conduct in-person consultations and negotiations with affected landholders. Governments should consider adopting the legal provisions established in the laws of the Philippines, South Sudan, Tanzania, Uganda, and Zambia, which formally recognize community land rights regardless of whether those rights are registered. In these countries, customary tenure rights are formally recognized automatically once the community proves it has customarily occupied and used the land. As an alternative to registration, states could also adopt Rwanda’s compensation provision, which allows for affected persons to claim compensation by submitting written testimony from their neighbors stating that they own the expropriated land [125].

The finding that only two countries (India and Laos) have enacted laws which establish special protections for women relating to compensation is particularly problematic given the risk that expropriations may disproportionately burden women landholders. More countries need to establish compensation procedures that require governments to respect women’s land rights and follow a gender-sensitive approach to providing compensation, which accounts for the varying ways in which women and men use land. As discussed in the FAO Handbook, compensation that is directly paid to the male head of household could be detrimental to the family’s health and welfare “since the needs of women and children may be ignored as the money vanishes”.

**(2). Laws should establish procedures that ensure a comprehensive valuation of compensation, accounting for all of the losses borne by affected populations.** For compensation to comprehensively reflect all of the losses borne by affected populations, compensation payments should reflect the land’s historical and cultural value, in addition to economic activities and improvements associated with the land. Consultations with male and female landholders about the ways in which they use their land, and their land’s historical/cultural value, can be an effective measure to ensure that compensation

is sufficient. In order to ensure adequate compensation for farmers, herders, gatherers and other landholders who use land as a primary source of income and livelihood needs, laws should provide affected populations the right to opt for alternative land instead of cash as a compensation payment. Such land must be suitable for affected populations to maintain an adequate standard of living (e.g., through cultivating or grazing purposes). Moreover, laws should require valuers to research relevant customary laws and practices to ensure that its approach to assessing compensation is acceptable to members of the community [126]. The FAO Handbook further recommends “when there is a shared use of a resource such as forest land or pastures, the total value should take into account the value of each affected community member.”

**(3). Laws should establish measures that ensure compensation is promptly paid and objectively assessed.** Governments and acquiring bodies should be legally obligated to pay compensation to affected populations prior to taking possession of the expropriated property. Laws should ensure that affected landholders can negotiate compensation amounts and appeal compensation decisions to courts or tribunals. In addition to protecting the interests of affected populations, negotiating with affected landholders can benefit acquiring bodies by reducing costs from project delays that occur when landholders or appeal acquisition projects [127,128]. Laws should grant affected populations the right to challenge compensation decisions in court or before a tribunal. Legal avenues of redress enable affected population to hold governments and acquiring bodies accountable for poor compensation decisions; for instance, if assessors use incorrect methods of valuation resulting in partial compensation to the affected landholder.

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## References and Notes

1. “Expropriation” is the power of government to acquire privately held tenure rights, without the willing consent of the tenure holder, in order to serve a public purpose or otherwise benefit society. In this paper, “expropriation” refers to eminent domain, takings, compulsory purchases, compulsory acquisitions, and other names given to this government power around the world. “Affected populations” are the populations whose tenure rights are affected by expropriation. “Tenure rights” are the rights of individuals or groups, including Indigenous Peoples and communities, over land and resources. Tenure rights include, but are not limited to ownership, freehold possession rights, use rights, and rental, customary and collective tenure arrangements. The bundle of tenure rights can include the right of access, withdrawal, management, exclusion, and alienation.
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10. Dagan notes that “at times, commitment to the rule of law implies allowing, or even preferring, that the social practice of a legal topic be formed around a vague but informative standard . . . [but] by contrasts, open-ended references to justice, fairness, good faith, or reasonableness . . . fail to ensure proper predictability or properly constrain law appliers. They should therefore be criticized as an invitation to ad hoc discretion, which affronts the rule of law.”
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25. See e.g., the Environmental Democracy Index ([www.environmentaldemocracyindex.org](http://www.environmentaldemocracyindex.org)); LandMark indicators on the legal security of indigenous and community lands ([www.landmarkmap.org](http://www.landmarkmap.org)); World Resources Institute Rights to Resource Map (<http://www.wri.org/resources/maps/rights-to-resources>).

26. In parts of Africa and other regions, where all land is legally owned “or held in trust for the people” by the government, governments are not always required to follow expropriation procedures when infringing on land and resource rights. For instance, governments can often designate, convert, lease, allocate, grant concessions to, or otherwise alienate land classified by law as “state-owned” without following expropriation procedures. The legal question of whether expropriation procedures should apply is complex and can only be answered on a case-by-case basis. This paper examines whether compensation rights are recognized and protected by law, assuming that national-level expropriation procedures apply.
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32. See [www.landportal.info](http://www.landportal.info) for detailed explanation of indicator scores for each country.
33. Adopting *LandMark’s* definition of “communities”, this paper defines “communities” (or “IPLCs”) as “groupings of individuals and families that share interests in a definable local land area within which they normally reside . . . (1) [communities usually] have strong connections to particular areas or territories and consider these domains to be customarily under their ownership and/or control. (2) They themselves determine and apply the rules and mechanisms through which rights to land are distributed and governed . . . (3) Collective tenure and decision-making characterize the system. Usually, all or part of the community land is owned in common by members of the community and to which rights are distributed”. Wily, L.A.; Veit, P.; Smith, R.; Dubertre, F.; Reytar, K.; Tagliarino, N. *Guidelines for Researching, Scoring and Documenting Findings on ‘What National Laws Say About Indigenous & Community Land Rights’ Methodology Document from LandMark: The Global Platform of Indigenous and Community Lands*; LandMark: Washington, DC, USA, 2016. Available online: [www.landmarkmap.org](http://www.landmarkmap.org) (accessed on 24 February 2017).
34. ESS5 provides “Where functioning markets exist, replacement cost is the market value as established through independent and competent real estate valuation, plus transaction costs. Where functioning markets do not exist, replacement cost may be determined through alternative means, such as calculation of output value for land or productive assets, or the un-depreciated value of replacement material and labor for construction of structures or other fixed assets, plus transaction costs. In all instances where physical displacement results in loss of shelter, replacement cost must at least be sufficient to enable purchase or construction of housing that meets acceptable minimum community standards of quality and safety.” World Bank. *Environmental and Social Framework*; World Bank, Washington, DC, United States, 2016; p. 89.
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80. Afghanistan, Angola, Bangladesh, Belize, Botswana, Brazil, Burkina Faso, China, Ethiopia, Honduras, India, Indonesia, Kenya, Laos, Mexico, Mongolia, Myanmar, Nepal, Nigeria, Pakistan, Peru, Philippines, Rwanda, Sierra Leone, South Africa, South Sudan, Taiwan, Tanzania, Trinidad and Tobago, Vietnam, Zambia, Zimbabwe.
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96. Argentina, Bhutan, Botswana, Burkina Faso, Ethiopia, Taiwan, Zimbabwe.
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100. The term “negotiate” as used here refers to the right to submit written or verbal claims for compensation, or, in some cases, “reach an agreement” with the government, as stated by the law. The term “negotiate” does not necessarily mean that affected populations have the final say regarding compensation amounts. In most cases, the government makes the final decision, but this decision is appealable in court or before a tribunal.
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124. Palmer, D.; Frickska, S.; Wehrmann, B. *Land Tenure Working Paper 11: Toward Improved Land Governance*; FAO: Rome, Italy, 2009.
125. Government of Rwanda. Law No. 18/2007 Relating to Expropriation in the Public, 2007, article 18.
126. The Asian Development Bank’s Summary of the Handbook on Resettlement: A Guide to Good Practice (1998) provides a broad range of losses which should be accounted for in the assessment of compensation, including agricultural land house plot (owned or occupied), business premises (owned or occupied), access to forest land, traditional use rights, community or pasture land, access to fishponds and fishing places, house or living quarters, other physical structures, structures used in commercial/industrial activity, income from standing crops, income from rent or sharecropping, income from wage earnings, income from affected business, income from forest products, income from fishponds and fishing places, income from grazing land, subsistence from other shrines, religious sites, places of worship and sacred grounds, cemeteries and other burial sites, and other factors.

127. In India and other countries where displaced persons are usually not consulted during the resettlement process, inability to participate and monitor the resettlement process can lead to protests and resistance among affected populations. These conflicts may delay projects and increase costs for governments and acquiring bodies.
128. Hemadri, R. *Dams, Displacement, Policy and Law in India*; World Commission on Dams: Cape Town, South Africa, 1999.



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