

INTERNATIONAL COMPARATIVE PROPERTY RIGHTS:  
A CROSS-CULTURAL DISCIPLINE COMES OF AGE

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INTRODUCTION

The decision to hold the annual Brigham-Kanner Property Rights Conference in Beijing, China provided an opportunity for academics and practitioners from the United States to consider our notions of property rights in the context of a global economy. The topic is timely as just last year Professor Rachelle Alterman observed in her book, *Takings International: A Comparative Perspective on Land Use Regulations and Compensation Rights*, “[a]lthough this topic should be a prime target for cross-national research, very little has been published.”<sup>1</sup> Yet, it is critically important that in this era of globalization, we begin to understand the differences and similarities that exist in property rights regimes across the world as clients have become more “international” in both travel, business dealings, and investments. Opening up international trade has enriched much of the developing world, and helped rapid economic growth in developing countries, further helping the prosperity of these people living in these places.<sup>2</sup> However, as global economy grows and reaches new corners

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1. RACHELLE ALTERMAN ET AL., *TAKINGS INTERNATIONAL: A COMPARATIVE PERSPECTIVE ON LAND USE REGULATIONS AND COMPENSATION RIGHTS* xix (2010). In fact, Alterman observes, “Despite the importance of this subject for cross-national knowledge exchange, it has not drawn much attention from researchers.” *Id.* at 3. Professor Alterman further explains, “The state of research and method building on public law related to property is especially rudimentary.” *Id.* at 12.

2. JOSEPH E. STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS* 4 (2002) (“People in the West may regard low-paying jobs at Nike as exploitation, but for many people in the developing world, working in a factory is a far better option than staying down on the farm and growing rice.”).

of the world, it brings with it different factors, all of which can influence the property regime in each nation it touches upon. For example, strong protection of private property rights is believed by some to be the backbone of capitalism and explains why capitalism has been successful in developed nations compared to developing nations. This fact remains, despite the estimate that “the total value of the real estate held but not legally owned by the poor of the Third World and former communist nations is at least \$9.3 trillion.”<sup>3</sup> This makes it more important today for lawyers in the United States to be able to generally inform clients of potential risks when they desire to make investments in overseas real property. Although the ethical provision of legal advice may require partnering with foreign law firms and local counsel, the reality is that general descriptions of the real property regimes in emerging economic powers and/or in countries offering desirable labor forces and plentiful land require some basic knowledge for U.S. practitioners. However, the concept of “property” can differ so radically when viewed through cross-cultural lenses that it can present a number of difficulties for unfamiliar practitioners.

The right to property, specifically real property, is a global concept that directly affects people and nations in many different ways. All people view property rights through a different lens, and this has made the field of property rights a particular mix of social rights, economic rights, and civil rights across the world.<sup>4</sup> This makes research in this area a fascinating blend of social norms, economic demands, civil rights, psychological needs, and political pressures. These often differing viewpoints on property sometimes clash and sometimes meld as we enter into the global age. Property rights regimes throughout the world are “closely intertwined with national identity, societal values, and sovereignty (or lack thereof, in the case of military conquests, imperialism and colonialism).”<sup>5</sup> While in the United States we turn to the law to study the evolution of property rights, in other countries the history may be discovered in study of anthropology and other disciplines.<sup>6</sup>

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3. HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE* 35, 218 (2000).

4. Emily Bourdeaux Smith, *South Africa's Land Reform Policy and International Human Rights Law*, 19 WIS. INT'L L.J. 267, 267 (2000–2001).

5. Amnon Lehari, *The Global Law of the Land*, 81 U. COLO. L. REV. 425, 437–38 (2010).

6. For example, Annette Stomp, a Ph.D. candidate at the Swiss Federal Institute of Technology Lausanne (EPFL), reports that in her research “anthropology is often overlooked

Another challenge in researching and describing property rights from an international comparative perspective is the differences in descriptive language used to discuss this area of the law. For example, in the United States the land use planning and regulatory community organizes property rights discourse around two main themes: regulatory takings and eminent domain or condemnation law. In other countries, these descriptors can be meaningless and may be referred to as planning compensation rights, expropriation, and compulsory purchase.<sup>7</sup> An additional factor is the disparate forms of treatment afforded to property owners in different countries, especially when comparing those given to citizens of that country compared to foreign investors. Some foreign governments may pose a significant threat to the property rights of foreign property owners through the use of expropriation; others may give greater protections to foreign property owners through international agreements, while others may not discriminate between the two classes.

This article is intended to provide an overview of the differences and similarities among a select group of nations through an examination of their real property protection regimes. The countries selected in this paper—South Africa, India, Chile, Singapore and Ghana—were chosen to illustrate how geographical, social, and economic diversity all contribute to different property rights cultures and legal approaches. Part I of this article examines general international or global factors that affect property rights. Part II offers a focused look at the historical and cultural development of property rights in the five selected countries. Part III follows with a discussion of some of the domestic factors present in these five different countries that contribute to or influence the development and enforcement of different property rights regimes. The article concludes with a discussion about the importance of understanding the property

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by urban planners, lawyers, etc., but provides a wealth of information on property rights and tenure systems, and not only 'tribal' or 'traditional' societies. After all, ideas last for hundreds of years and are often carried over into what become 'modern' societies." E-mail from Annette Stomp, Ph.D. Candidate Urban Geography, EPFL (Swiss Federal Institute of Technology Lausanne) to Patricia Salkin, Raymond & Ella Smith Distinguished Professor of Law, Associate Dean and Director of the Government Law Center of Albany Law School (9/19/2011) (on file with the author).

7. Rachelle Alterman, *Regulatory Takings and the Role of Comparative Research*, in RACHELLE ALTERMAN ET AL., *TAKINGS INTERNATIONAL: A COMPARATIVE PERSPECTIVE ON LAND USE REGULATIONS AND COMPENSATION RIGHTS* 8 (2010).

rights regimes in other countries to better enable practitioners to provide responsible legal counsel to clients.

## I. INTERNATIONAL FACTORS AFFECTING PROPERTY RIGHTS

There are a number of international factors that affect property rights in nations across the world. What follows is a brief discussion of the influence from some of the declarations, treaties, agreements, and institutions that have international repercussions on property rights, which accordingly contribute to the need to address property rights on an international scale.

### A. *Section 17 of the Universal Declaration of Human Rights*

Despite being referenced in a number of international policy documents, there is no succinct definition on the right to land in international law. However, a basis for the right to land in international law is arguably found in the Universal Declaration of Human Rights,<sup>8</sup> developed by the Commission on Human Rights, which was tasked by the United Nations to draft an International Bill of Human Rights.<sup>9</sup> The Declaration identified or referenced property as a human right in several sections. In particular, Article 17 states that “(1) [e]veryone has the right to own property alone as well as in association with others. (2) No one shall be arbitrarily deprived of his property.”<sup>10</sup>

Despite these progressive concepts towards property ownership, Article 17 is viewed as more of a protection on liberal property rights, and not applicable to economic or redistributive land rights.<sup>11</sup> As such, the Declaration does not further define what the right to own property encompasses or what an arbitrary deprivation of property includes.<sup>12</sup> The vague language of Article 17 was included so that some provision for property rights was made in the Declaration, as the topic of property rights had become controversial during deliberations.

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8. Elisabeth Wickeri, “*Land Is Life, Land Is Power*”: *Landlessness, Exclusion and Deprivation in Nepal*, 34 FORDHAM INT’L L.J. 930, 1000 (2011).

9. Smith, *supra* note 4, at 272.

10. Universal Declaration of Human Rights, GA Res 217 (III) A, art. 17 U.N. Doc. A/RES/3/217 (III) (Dec. 10, 1948), available at <http://www.un.org/en/documents/udhr/index.shtml>.

11. Wickeri, *supra* note 8, at 1007.

12. Universal Declaration of Human Rights, *supra* note 10; Smith, *supra* note 4, at 273.

Earlier proposals for Article 17 had attempted to address the familiar American property law concept of “public purposes” and “just compensation,” while other proposals sought complete deferral to the in rem jurisdiction of the property.<sup>13</sup>

The Declaration did not initially pass as a binding resolution on signatory states, as ideological differences amongst nations on “human rights in general or property rights in particular” made it impossible to get the necessary consent.<sup>14</sup> Notably, apprehension towards socialism and land redistribution systems has stymied the expansions of a universal standard for international property rights protections.<sup>15</sup> However, over the decades following its drafting, the Declaration eventually became customary international law,<sup>16</sup> despite the fact that there has never been a universal agreement on the scope of Article 17, nor have subsequent human rights treaties included the right to property because of the wide disagreement on the language of a property provision.<sup>17</sup> Regardless, it has been well documented that constitutions, statutes, and judicial opinions drafted in the latter half of the twentieth century have been influenced by, and sometimes have expressly adopted, the provisions of the Declaration.<sup>18</sup>

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13. Wickeri, *supra* note 8, at 1006–07.

14. Smith, *supra* note 4, at 272–73.

15. Wickeri, *supra* note 8, at 1006. Note that Article 1 of the First Protocol to the European Convention on Human Rights, applicable and enforceable by all citizens of all the forty-four European nations which have ratified the Convention, is outside of the scope of this paper, since we have focused on non-European states. Article 1 holds that “[n]o one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.” See Amnon Lehari & Amir N. Licht, *BITS and Pieces of Property*, 36 *YALE J. INT’L L.* 115, 136 (2011) (citing Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, Mar. 20, 1952, 213 U.N.T.S. 262).

16. Applicability of Article VI, Section 22 of the Convention on the Privileges and Immunities of the United Nations, Advisory Opinion, 1989 I.C.J. 177 (Dec. 15).

17. Wickeri, *supra* note 8, at 1007. Note that explicit rights to land in international law have developed for two groups: indigenous people and women. See *id.* at 1019 (citing Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1898, 1650 U.N.T.S. 383); United Nations Declaration on the Rights of Indigenous Peoples, art. 26(1), G.A. Res. 61/295, U.N. Doc. A/Res/61/295 (Sept. 13, 2007); Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13.

18. See Egon Schwelb, *The Influence of the Universal Declaration of Human Rights on International and National Law*, 53 *AM. SOC’Y OF INT’L L.* 217 (1959); B.G. RAMCHARAN, *HUMAN RIGHTS: THIRTY YEARS AFTER THE UNIVERSAL DECLARATION* 3–10 (1979); Knight v. Florida, 528 U.S. 990, 994 (1999); Public Prosecutor v. F.A.v.A. (Neth.), 1951 *Y.B. ON HUM. RTS.* 251, 251–52.

### *B. Customary International Law*

In some countries, property rights provide different protection for foreign investors and citizens of that country. Until World War II, customary international law required countries who hosted foreign investors and property owners to follow the “Hull Rule,” where if that host government expropriated the property of foreign investors, it was required to give “prompt, adequate and effective compensation” to the former, foreign owner.<sup>19</sup> The Hull Rule remained in effect through the Second World War, as most of the states who objected to the “prompt, adequate, and effective” standard of compensation were colonies, still subject to rule of their master nations.<sup>20</sup>

The Hull Rule fell out of favor in the post-colonial period following World War II. These newly established developing and communist states, who traditionally disagreed with the standard of compensation set forth by the Hull Rule, engaged in short-lived nationalization programs, seizing the property of foreign investors.<sup>21</sup> This led to inevitable disputes between the new states, who favored the use of independent investment agreements (discussed below) between it and the foreign nation, and the home nations of foreign investors, who still sought the protection and compensatory regime provided by the Hull Rule.<sup>22</sup>

Today, it is generally accepted in international law that a state has the right to expropriate a foreign investor’s property so long as: (1) it is for a public purpose, (2) it is not done in a discriminatory manner, and (3) compensation is paid.<sup>23</sup> Although this may seem

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19. Andrew T. Guzman, *Why LCDs Sign Treaties that Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VA. J. INT’L L. 639, 641 (1998). The Hull rule was formulated by the United States former Secretary of State Cordell Hall in response to the growing number of expropriations the Mexican Government accomplished against United States investors between 1915 and 1940. Hull, corresponding with the Mexican Minister of Foreign Affairs, articulated the rule that would later carry his namesake as: “The Government of the United States merely adverts to a self-evident fact when it notes that the applicable precedents and recognized authorities on international law supports its declaration that, under every rule of law and equity, no government is entitled to expropriate private property without provision for prompt adequate and effective payment therefor.” *Id.* (quoting 3 Green H. Hackworth, *Digest of International Law* § 228, at 658–59 (1942)).

20. *Id.* at 646.

21. *Id.* at 647.

22. *Id.* at 642.

23. Rahim Moloo & Justin Jacinto, *Environmental and Health Regulation: Assessing*

like an uncomplicated standard, in reality it is not; each of the three factors have been the subject of considerable debate. International tribunals have consistently struggled to define what a public purpose is because it “is a broad concept which is not readily susceptible to objective analysis and examination neither by states nor tribunals.”<sup>24</sup> Often, the public purpose reasoning will be lumped in with a finding of discrimination against the foreign investor on the part of the expropriating state.<sup>25</sup> Similarly, the issue of compensation provides more questions than answers in international law,<sup>26</sup> although it is generally held that there is a right to compensation in at least some amount.<sup>27</sup> Developed states tend to adhere to the Hull Formula’s idea of “full compensation,” while developing states believe that compensation should be “appropriate,” and reflect the subjective and relevant circumstances facing the host state.<sup>28</sup>

Although the standards and applications of customary international law are subject to debate,<sup>29</sup> provisions of many constitutions address Customary International Law, making it relevant in the discussion of each country’s property regime. For example, Sections 231–233 of the South African Constitution, discussed in Part II of this article, includes various provisions for the inclusion of customary international law. The Indian Constitution similarly recognizes a “respect for international law,”<sup>30</sup> as does the Ghanaian Constitution.<sup>31</sup>

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*Liability Under Investment Treaties*, 29 BERKELEY J. INT’L L. 1, 11 (2011); Yvonne C. L. Lee, *The Governance of Contemporary Sovereign Wealth Funds*, 6 HASTINGS BUS. L.J. 197 (2010).

24. Kaj Hober, *Investment Arbitration in Eastern Europe: Recent Cases on Expropriation*, 14 AM. REV. INT’L ARB. 377, 385 (2003).

25. *Id.*

26. *Factory at Chorzów, Merits*, 1928 P.C.I.J. (ser. A) No. 17, at 46–47 (Sept. 13).

27. Hober, *supra* note 24, at 387.

28. Hober, *supra* note 24, at 385 (citing The United Nations Charter of Economic Rights and Duties of States, adopted by the General Assembly on December 12, 1974, Art. 2(c) at 9. The position of the developing nations policy of expropriation was included into Article 2 of the 1974 United Nations Charter of Economic Rights and Duties of States, which held that each state could expropriate foreign property so long as they paid “appropriate” compensation. See U.N. Charter of Economic Rights and Duties of States, G.A. Res. 3281 (XXIX), U.N. GAOR, 29th Sess., U.N. Doc. A/RES/29/3281 (Dec. 12, 1974). Under Article 2 host nations are also not required to give preferential treatment to foreign corporations. See Jeswald W. Salacuse & Nicholas P. Sullivan, *Do BITS Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 HARV. INT’L L.J. 67, 69 n.12 (2005)).

29. See Ernest A. Young, *Sorting Out the Debate Over Customary International Law*, 42 VA. J. INT’L L. 365, 461 (2002).

30. INDIA CONST. art. 51(c).

31. GHANA CONST. (1992) § 73.

### *C. International Investment Agreements*

Although there are a number of international investment agreements (“IIAs”) that affect property rights, the two most often discussed and most influential to property rights are Bilateral Investment Treaties (“BITs”) and Free Trade Agreements (“FTAs,” for example, NAFTA). These agreements are “essentially instruments of international law.”<sup>32</sup> Since the end of World War II there have been approximately 3,000 international investment agreements signed. Today, these agreements “[f]or all practical purposes, . . . have become the fundamental source of international law in the area of foreign investment.”<sup>33</sup>

The goal behind IIAs is to “protect and promote” international investment among the signatory nations. To accomplish this goal, IIAs generally consist of two basic promises among the signatory states: first, to treat investors and investments from other signatory states in accordance with the IIA, and second, each of the signatory states will agree on some sort of enforcement mechanism to see that the IIA is upheld.<sup>34</sup>

These agreements are often criticized for the roles that foreign governments play in the domestic issues of developing nations. For example, following the 1994 APEC (Asia-Pacific Economic Cooperation) meeting, the United States encouraged its firms to invest in Indonesia at suspiciously favorable terms. When that Indonesian government was overthrown, in part due to widespread corruption, the United States pressured the new regime to fulfill the original contract.<sup>35</sup>

#### *1. Bilateral Investment Treaties*

Bilateral Investment Treaties (“BITs”) are agreements negotiated between two nations—usually developed and developing countries. BITs were developed to address foreign investors’ fears of losing their investments without compensation in developing countries which had launched large expropriation programs following World

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32. Jeswald W. Salacuse, *The Emerging Global Regime for Investment*, 51 HARV. INT’L L.J. 427, 427 (2010).

33. Jeswald W. Salacuse, *The Treatification of International Investment Law*, 13 L. & BUS. REV. AM. 155, 175 (2007) (citing Patrick Juillard, *L’Évolution des Sources du Droit des Investissements*, 250 RECUEIL DES COURS DE L’ACADÉMIE DE DROIT INTERNATIONAL 21, 74 (1994)).

34. Salacuse, *supra* note 32, at 428.

35. STIGLITZ, *supra* note 2, at 71.



War II.<sup>36</sup> By providing this protection to foreign investors, it also allowed developing nations to gain a new-found credibility to foreign investors, helping these new nations attract and gain more access to more foreign investment.<sup>37</sup>

Today, BITs are the dominant form of regulation between countries engaged in international trade. There are currently over 2,500 BITs affecting the property rights of both foreign investors and host governments.<sup>38</sup> Further, almost every country is involved in at least one BIT.<sup>39</sup>

The content of BITs are usually distinct from each other, based on the needs and realities of the relationships of the two countries. However, there are usually similar provisions amongst them which usually address a few common topics: the treatment to be afforded to the property of foreign investors; that this treatment should be in accordance with international law standards; the relaxation of restrictions regarding capital transfers in and out of the host country; forum selection clauses which allow disputes to be subject to international binding arbitration; and—channeling the Hull Rule—that direct or indirect expropriation should be given prompt, adequate and effective compensation.<sup>40</sup> However, the most important provision of every BIT is protection against expropriation.<sup>41</sup> BITs commonly require host nations to provide compensation for expropriation.<sup>42</sup>

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36. For example, in 1951 Iran expropriated British petroleum assets. In 1955, Libya expropriated American petroleum assets. In 1956, Egypt nationalized the Suez Canal to the dismay of its original Anglo-French owners. In 1959 Cuba nationalized a number of foreign-owned investments. From 1960 to 1972, 875 acts of expropriation occurred in 62 countries. The threat of expropriation continues to this day, as recent expropriations (both regulatory and direct) have occurred in Chad and Russia. Amnon Lehari & Amir N. Licht, *BITs and Pieces of Property*, 36 *YALE J. INT'L L.* 115, 121 (2011) (citations omitted).

37. Guzman, *supra* note 19, at 642 (finding that, ironically, BITs, despite being favored by developing nations, tend to provide more protection to foreign investors than the traditional Hull Rule ever did).

38. Jose E. Alvarez, *Contemporary Foreign Investment Law: An "Empire of Law" or the "Law of Empire?"*, 60 *ALA. L. REV.* 943, 958 (2009).

39. Every country in the world except for Monaco is a party to a BIT. See United Nations Conference on Trade and Development, *The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries*, at 2, U.N. Doc. UNCTAD/DIAE/IA/2009/5, (Jan. 12, 2009).

40. Alvarez, *supra* note 38, at 957–58 (citations omitted).

41. Hober, *supra* note 24, at 380 (noting that “[f]rom the perspective of a foreign investor the most important provisions in any international treaty for the protection of foreign investment are the provisions dealing with protection against expropriation. These provisions do in fact constitute the heart and soul of every BIT. The ultimate purpose of every BIT is to protect against expropriation.”).

42. Jordan C. Kahn, *Investment Protection Under the Proposed ASEAN-United States Free*

## 2. Free Trade Agreements

Free Trade Agreements (“FTAs”) are agreements between two or more nations or regions that seek to open up economic activity between the participating countries. FTAs began to appear with more frequency during the late 1980s and early 1990s.<sup>43</sup> There are currently over 300 FTAs worldwide.<sup>44</sup>

Generally, FTAs address and build upon standards of international trade.<sup>45</sup> However, some FTAs go so far as to address expropriation. For example, Section 1110 of the North American Free Trade Agreement (“NAFTA”) restricts expropriation, allowing it only when the host country acts with a public purpose and provides just compensation in the form of fair market value.<sup>46</sup> NAFTA further applies this expropriation language to expropriation which “directly or indirectly” occurs.<sup>47</sup>

## D. International Institutions

International organizations have long been strong proponents of “well-defined and well-protected property rights” as a means of encouraging investment and overall economic prosperity.<sup>48</sup> These organizations believe that effective articulation, protection, and enforcement of property rights are a fundamental characteristic of a strong economy.<sup>49</sup> The three main international institutions affecting property rights, whom are often the target of scorn around the world, are the International Bank for Reconstruction and Development (otherwise known as the World Bank), and International Monetary Fund, and the World Trade Organization.<sup>50</sup>

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*Trade Agreement*, 33 SUFFOLK TRANSNAT'L L. REV. 225, 230 (2010).

43. *Id.* at 243.

44. Jose E. Alvarez, *A BIT on Custom*, 42 N.Y.U. J. INT'L L. & POL. 17, 20 (2009).

45. For example, the World Trade Organization. See Trade Agreements, OFF. U.S. TRADE REPRESENTATIVE, <http://www.ustr.gov/trade-agreements> (last visited June 24, 2012).

46. North American Free Trade Agreement, U.S.–Can.–Mex., art. 1110, Dec. 17, 1992, 32 I.L.M. 289 (“Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place (‘date of expropriation’).”).

47. *Id.*

48. Amnon Lehavi & Amir N. Licht, *BITS and Pieces of Property*, 36 YALE J. INT'L L. 115, 139 (2011).

49. *Id.*

50. STIGLITZ, *supra* note 2, at 3, 10. (noting that “[v]irtually every major meeting of the International Monetary Fund, the World Bank and the World Trade Organization is now the scene of conflict and turmoil”).

### 1. *World Bank and International Monetary Fund*

The World Bank and the International Monetary Fund (“IMF”) were established in 1944 by the United Nation’s Monetary and Financial Conference in Bretton Woods, New Hampshire.<sup>51</sup> The World Bank was created with the primary purpose of rebuilding Europe after World War II.<sup>52</sup> The IMF, on the other hand, was created to prevent future international economic depressions.<sup>53</sup> Currently, each of these institutions lends money and provides economic guidance to developing nations, although many of these loans are subject to these nations taking and implementing the advice of both the IMF and the World Bank.<sup>54</sup> In some cases loans from the World Bank to developing nations are conditioned on approval from the IMF, which often lobbies for developing nations to adopt certain policies involving rapid privatization of markets<sup>55</sup> and discouraging government interference to trade barriers<sup>56</sup>—sometimes before these new countries have an adequate regulatory framework in place.<sup>57</sup> The World Bank has supported and provided financial incentives for developing countries to both formalize property rights and create titling systems.<sup>58</sup> Both the IMF and the World Bank have been criticized for their belief in strong property rights systems and a means to encourage economic growth. All five nations discussed in Part II have voting power in the IMF.<sup>59</sup>

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51. *Id.* at 11.

52. *Id.* at 11.

53. *Id.* at 12.

54. *Id.* at 13.

55. *Id.* at 54.

56. *Id.* at 59 (emphasizing the importance of noting that the IMF has acknowledged that some of its policies have ultimately done more harm than good. However, it is important to keep these factors in mind when considering the legacy they may have, if any, in the property regimes of these developing nations.).

57. *Id.* at 73–74.

58. Michael Trebilcock & Paul-Erik Veel, *Property Rights and Development: The Contingent Case for Formalization*, 30 U. PA. J. INT’L L. 397, 400 (2008) (citing WORLD BANK, WORLD DEVELOPMENT REPORT 2005: A BETTER INVESTMENT CLIMATE FOR EVERYONE 2, 80–84 (2004)), available at [http://siteresources.worldbank.org/INTWDR2005/Resources/complete\\_report.pdf](http://siteresources.worldbank.org/INTWDR2005/Resources/complete_report.pdf); see also Ahmed Galal & Omar Razzaz, *Reforming Land and Real Estate Markets* 20–21 (World Bank Policy Research, Working Paper No. 2616, 1999), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=636201](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=636201).

59. IMF, IMF Members’ Quotas and Voting Power, and IMF Board of Governors, <http://www.imf.org/external/np/sec/memdir/members.aspx> (last visited June 24, 2012).

## 2. World Trade Organization

The World Trade Organization (“WTO”) was established in 1995 as a result of international trade negotiations under the Uruguay Round Agreement Act and the General Agreement on Tariffs and Trade (“GATT”).<sup>60</sup> The WTO currently has 153 member nations, who account for approximately ninety percent of the world’s trade,<sup>61</sup> and further includes all five nations discussed in this paper.<sup>62</sup> The WTO is run by the member nations, operates as a forum for trade negotiation among nations, and further has a system of trade rules.<sup>63</sup> The trade rules of the WTO cover agreements for the basic areas of trade (goods, services and intellectual property), dispute settlement, and reviews of governments’ trade policies.<sup>64</sup> The rules, which are actually agreements among the member nations, are renegotiated periodically among member nations.<sup>65</sup> However, the WTO rules do not give foreign investors a cause of action for compensation when governments expropriate their property.<sup>66</sup>

## II. PROPERTY REGIMES AND EMINENT DOMAIN THROUGHOUT THE WORLD

In addition to the myriad of international factors, there are a variety of intranational factors which also can affect the property rights of citizens, as well as foreign investors. Property rights throughout

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60. World Trade Org., Annual Report 2 (2011), available at [http://wto.org/english/res\\_e/booksp\\_e/anrep\\_e/anrep11\\_e.pdf](http://wto.org/english/res_e/booksp_e/anrep_e/anrep11_e.pdf) (last visited June 24, 2012).

61. *Id.*

62. World Trade Org., Members and Observers, [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm) (last visited June 24, 2012).

63. World Trade Org., Annual Report 2, *supra* note 60.

64. World Trade Org., Understanding the WTO: The Agreements, [http://wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/agrm1\\_e.htm](http://wto.org/english/thewto_e/whatis_e/tif_e/agrm1_e.htm) (last visited June 24, 2012).

65. *Id.* (demonstrating that many have been in the process of being negotiated since 2001, in the Doha Development Agenda).

66. Bradly Condon, *Smoke and Mirrors: A Comparative Analysis of WTO and NAFTA Provisions Affecting the International Expansion of Insurance Firms in North America*, 8 CONN. INS. L.J. 97, 122 (2001–2002); see also Victor Mosoti, *The WTO Agreement on Trade Related Investment Measures and the Flow of Foreign Direct Investment in Africa: Meeting the Development Challenge*, 15 PACE INT’L L. REV. 181, 191–92 (2003) (“The TRIMS Agreement does not explicitly address performance requirements falling outside Articles III and IX of the GATT 1994, such as export requirements per se, de-linked from imports. Nor does it deal with foreign investment per se and its protection such as minimum standards in respect of expropriation.”).

the world can be guaranteed, or merely licensed to property holders through an applicable constitution, statute, custom, or a mix of the above. As already discussed, the property rights afforded through these legal regimes are a result of a variety of factors, although many nations have begun to give at least the statutory appearance to what American practitioners would recognize as eminent domain.

The five nations selected for review herein make different provisions for what constitutes a “public use” and “just compensation.” As demonstrated below, some countries provide in-depth explanations and procedures for both terms, some only deal with one term, while other nations purposefully either have left them undefined or unaccounted for. It is important to note that different historical, political, cultural and/or economic factors influence each country, and these have all contributed to that nation’s past or current interpretations of property rights.<sup>67</sup> As with the thirteen mostly European Union (“EU”) countries studied by Professor Alterman, our findings also conclude that there is no universal approach or a dominant approach when it comes to comparisons on property rights laws.<sup>68</sup> Alterman’s study organized the countries into clusters representing degrees of compensation rights and in rank order she reported on countries with minimal compensation rights (Canada, the UK, Australia, France and Greece); countries with moderate or ambiguous compensation rights (Finland, Austria, and the United States); and countries with extensive compensation rights (Poland, Germany, Sweden, Israel and the Netherlands).<sup>69</sup> Rather than trying to neatly fit the five countries discussed below into any category, we highlight the practical problems facing these regimes and how those and other factors have not only shaped the relevant constitutional property provisions but also the application of these provisions in practice. With respect to application, many of the “takings clauses” look to provide strong protection on paper, but in reality these governments either have been unwilling, or unable to keep their end of the bargain when it comes to interpretation or enforcement of these provisions.

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67. Professor Alterman reminds those who engage in comparative property rights analysis that, “Transplantation of laws, is of course, neither possible nor desirable. Laws are grounded in legal systems and institutions and reflect public policies. The latter are grounded in socio-political and cultural milieus that cannot—and should not—be replicated.” Alterman, *supra* note 7, at 8.

68. *Id.* at 13.

69. *Id.* at 23.

*A. South Africa*

The government of South Africa (“GOSA”) and the property rights regime established there is continually measured against the progress it has made in shedding the unfortunate legacy of Apartheid. Apartheid, however, has been exceptionally influential in terms of land ownership and the governmental attitude towards eminent domain.

By the end of Apartheid, white people owned 87% of all land, despite only making up 15% of the population.<sup>70</sup> Not surprisingly, the inequitable distribution of land ownership made the redistribution of wealth—specifically through land reform—an obvious goal for the new post-Apartheid government, as land reform was believed to be the “bedrock of any true social transformation in South Africa.”<sup>71</sup> Consequently, a new Constitution was to be adopted by this new government. The question of including a provision on property rights became one of the most contentious issues during its drafting.<sup>72</sup>

The general public opposed any property clause in their new Constitution, fearing that a constitutional property guarantee would protect the rights of apartheidian land owners, or significantly hamper any land reform policies that the incoming government would seek.<sup>73</sup> These concerns, if realized, would leave the new Constitution and its government without credibility and the object of scorn for the general population.<sup>74</sup>

Inside the actual constitutional debates the property issue was similarly contentious, although most delegates agreed that a property clause was necessary for the new Constitution.<sup>75</sup> It was the exact formulation of the clause that garnered significant attention.<sup>76</sup> The National Party (“NP”), largely representing the interests of the white

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70. See Zola Skweyiya, *Towards a Solution to the Land Question in Post-Apartheid South Africa: Problems and Models*, 21 COLUM. HUM. RTS. L. REV. 211, 213 (1989).

71. GREGORY S. ALEXANDER, *THE GLOBAL DEBATE OVER CONSTITUTIONAL PROPERTY: LESSONS FOR AMERICAN TAKINGS JURISPRUDENCE* 155 (2006).

72. *Id.* at 155–56.

73. *Id.* at 155.

74. *Id.* at 156.

75. *Id.* at 155 (noting “[t]hat there would be a property clause in the new constitution was virtually a foregone conclusion. Even the staunchest opponents conceded as much, directing their energies instead on content.”) (citations omitted).

76. *Id.* at 155–56.

minority, sought a high degree of protection for property rights, hoping to prevent any land redistribution.<sup>77</sup> The African National Congress (“ANC”) similarly sought a property clause; however, it wanted one which provided for a limited protection for property rights, one which made private property rights subject to the public interest and social obligations of the new nation.<sup>78</sup>

These debates eventually led to the modern property clause, one which was criticized by both sides as being the product of compromises and “sheer exhaustion.”<sup>79</sup> Although neither the NP nor the ANC was satisfied with the final property clause, both realized “that they had run out of time and energy.”<sup>80</sup> The only compromises achieved were the provisions dealing with deprivations and expropriations, the rest would be left to the resolution of the Constitutional Court.<sup>81</sup>

Drafted in 1996, Section 25 is the property clause of the current South African Constitution. Section 25 provides detailed treatment of the protections afforded to property, as well as the government’s power of eminent domain.<sup>82</sup> Section 25 of the Constitution prohibits the deprivation of property “except in terms of law of general application and no law may permit arbitrary deprivation of property.”<sup>83</sup> The section puts familiar restrictions on the usage of expropriation; allowing it only “for a public purpose or in the public interest”; and “subject to compensation.”<sup>84</sup>

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77. *Id.* at 156–57 (stating that “[t]he NP justified a high degree of protection for property rights by claiming that ‘the prospect of acquiring property is the principal incentive to hard work, thrift, responsibility and the development of the individual’s full potential.’”) (quoting Matthew Chaskalson, *Stumbling Towards Section 28: Negotiations over the Protection of Property Rights in the Interim Constitution*, 11 S. AFR. J. HUM. RTS. 222, 224 (1995)).

78. *Id.* at 157.

79. *Id.* at 159 (finding that “[n]either side, those favoring a strong entrenched property right and those opposing anything that threatened fundamental land reform, was happy with the final product, but, pragmatically acceding to the twin realities that *some* kind of property clause was inevitable and that *some* room for land reform had to be created, both sides apparently could agree that they had run out of time and energy.”).

80. *Id.*

81. *Id.*

82. Hanri Mostert, *Engaged Citizenship and the Enabling State as Factors Determining the Interference Parameter of Property: A Comparison of German and South African Law*, 127 S. AFRICAN L.J. 238, 239 (2010) (stating that “[a]ccordingly, the South African property clause is characterized by an inherent tension between its dichotomously protective and reformative aspects”).

83. S. AFR. CONST. 1996 § 25(1).

84. *Id.* § 25(2).

### 1. *Public Purpose*

Section 25(2) of the South African Constitution states that expropriation can only be done “for a public purpose or in the public interest.”<sup>85</sup> This is informed by Section 25(4) which defines the public interest as including a social obligation on current property owners by stating that “the public interest includes the nation’s commitment to land reform, and to reforms to bring about equitable access to all South Africa’s natural resources.”<sup>86</sup> By defining the “public purpose” provision in their property regime, the South African Constitution does not leave an uncertain interpretation to be adopted by their judiciary, and further “leave[s] no doubt that private property rights are subject to the social needs for a land [reform]” policy in South Africa.<sup>87</sup>

The public purpose provision of Section 25 is further bolstered by the socioeconomic rights provisions in the South African Bill of Rights.<sup>88</sup> These provisions plainly mandate that the new government engage in the redistribution of wealth, which illustrates the intent of the drafters that the South African Constitution be transformative in character.<sup>89</sup> As part of this constitutionally sanctioned public interest, the GOSA has committed to redistributing up to thirty percent of farmland to black citizens by 2014 under this eminent domain power.<sup>90</sup>

### 2. *Compensation*

Compensation is specifically addressed in Section 25(3) of the South African Constitution, which uses a factor based test to determine the amount of compensation due to anyone whose land is expropriated. Section 25(3) reads:

The amount of compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance

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85. *Id.*

86. *Id.* § 25(4) (continuing to state that property is not limited to land).

87. ALEXANDER, *supra* note 71, at 161.

88. S. AFR. CONST. 1996 § 25(6)–(9).

89. ALEXANDER, *supra* note 71, at 161.

90. U.S. Dep’t of State, Bureau of Economic, Energy and Business Affairs, 2011 Investment Climate Statement—South Africa, <http://www.state.gov/e/eb/rls/othr/ics/2011/157358.htm> (last visited June 24, 2012).



between the public interest and the interests of those affected, having regard to all relevant circumstances, including—(a) the current use of the property; (b) the history of the acquisition and use of the property; (c) the market value of the property; (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and (e) the purpose of the expropriation.<sup>91</sup>

Subsection (b) is directly addressed to parcels of land which are remnants of Apartheid, as it allows the government to consider how the land was acquired and can thus discount the compensation due. Section 25(3), as a multifactor provision, shows that the fair market value of the land should be merely the beginning of what compensation is owed to the landowner, which should then be discounted or enhanced by the factors outlined in section 25(3). The factors laid out in 25(3) have been used with relative frequency by the courts, who often consider matters outside of the fair market value of the property when valuing a taking.<sup>92</sup> South African courts have gone further, and even applied the multifactor compensation test of Section 25(3) to expropriated property which was unrelated to Apartheid—not giving market value compensation where it might be expected.<sup>93</sup>

### 3. *Judicial Interpretation*

Given the GOSA's stated dedication to a land reform policy, onlookers have urged courts to "interpret section 25 in its broader social and political context."<sup>94</sup> Further stating that "the only sensible and legitimate interpretation of section 25 is therefore one that allows (and actually obliges) the courts to strike an equitable balance between the protection of existing rights and the public interest (which includes land reform goals.)"<sup>95</sup> Currently, there is sparse case law,

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91. S. AFR. CONST. 1996 § 25(3).

92. ALEXANDER, *supra* note 71, at 150 (citing *Khumalo v. Potieter*, 2000 (2) All SA 456 (LC); *Ex parte Former Highland Residents*; *In re Ash v. Development of Land Affairs*, 2000 (2) All SA 26 (LCC)).

93. Tom Allen, *Property as a Fundamental Right in India, Europe and South Africa*, 15 ASIA PAC. L. REV. 193, 217 (2007) (stating that "the South African courts have been remarkably willing to go along with arguments that full compensation for expropriation is not required, even where there is no connection with the correction of apartheid laws.").

94. *Id.* at 216.

95. A.J. VAN DER WALT, CONSTITUTIONAL PROPERTY LAW 26 (2005).

both in lower courts and the Constitutional Court, which interprets Section 25.<sup>96</sup> However, the Constitutional Court has set out an analysis for any constitutional property challenge under Section 25 in *First National Bank of SA Ltd. V. Commissioner, South African Revenue Service*<sup>97</sup> (“*FNB*”).

Although *FNB* dealt with commercial property, its holding is still relevant to most, if not all property rights in South Africa. In *FNB*, a car importer (debtor) had taken a loan out with First National Bank (creditor) and used the cars he imported as collateral on the loan. Complicating this, the debtor also owed a large amount of unpaid customs and duties to the South African Revenue Service (“SARS”). To secure payment, SARS put a lien on the motor vehicles—the same ones which were collateral for the creditor’s loan. The motor vehicles which SARS had put a lien on were unrelated to the outstanding debts, and the bank challenged that the statute which authorized the lien was an unconstitutional interference with the bank’s property.<sup>98</sup> Before analyzing the question, the Court noted that “[t]he purpose of section 25 has to be seen both as protecting existing private property rights as well as serving the public interest, mainly in the sphere of land reform but not limited thereto, and also as striking a proportionate balance between these two functions.”<sup>99</sup>

The Court then answered the question by laying out a six-step analysis for constitutional property challenges under Section 25.<sup>100</sup> First, the court must find whether the affected interest is actually “property.” Although the Court did not define property in the *FNB* case, it still noted that property would clearly include chattel and land.<sup>101</sup> Second, the court must find whether there has been a deprivation of property by the state.<sup>102</sup> The court again did not define deprivation in *FNB*, but has, in subsequent case-law, given a wide reading

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96. ALEXANDER, *supra* note 71, at 150.

97. *First National Bank of SA Ltd. t/a Wesbank v. Commissioner*, 2002 (4) SA 768 (CC), available at <http://www.saflii.org/za/cases/ZACC/2002/5.html>.

98. *Id.*

99. *Id.*

100. *Id.* See also ALEXANDER, *supra* note 71, at 162.

101. *First National Bank of SA Ltd. t/a Wesbank v. Commissioner*, 2002 (4) SA 768 (CC) § 51 (noting that “[a]t this stage of our constitutional jurisprudence it is, . . . practically impossible to furnish—and judicially unwise to attempt—a comprehensive definition of property for the purposes of section 25. Such difficulties do not, however arise in the present case.”).

102. *Id.* at § 57.

to what constitutes a deprivation.<sup>103</sup> The third and biggest step is that the court must determine whether the deprivation was arbitrary per Section 25(1). The court found that the meaning of “arbitrary” is “when the ‘law’ referred to in section 25(1) does not provide sufficient reason for the particular deprivation in question or is procedurally unfair.”<sup>104</sup> Accordingly, the court set out a multifactor analysis to help other courts determine the arbitrariness of the law, a step which leaves considerable judicial discretion.<sup>105</sup> However, even if the court finds an arbitrary deprivation in step three, under step four courts are allowed to justify the arbitrary deprivation under section 36 of the Constitution. This step is considered to be redundant, as a court’s analysis here would focus on the same factors as in step three, and

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103. ALEXANDER, *supra* note 71, at 166 (citing *Mkontwana v. Nelson Mandela Metropolitan Municipality* 2005 (1) SA 530 CC).

104. *First National Bank of SA Ltd. t/a Wesbank v. Commissioner*, 2002 (4) SA 768 (CC) § 100.

105. Whether a law is arbitrary depends on:

(a) It is to be determined by evaluating the relationship between means employed, namely the deprivation in question, and ends sought to be achieved, namely the purpose of the law in question.

(b) A complexity of relationships has to be considered.

(c) In evaluating the deprivation in question, regards must be had to the relationship between the purpose for the deprivation and the person whose property is affected.

(d) In addition, regard must be had to the relationship between the purpose of the deprivation and the nature of the property.

(e) Generally speaking, where the property in question is ownership of land or a corporeal moveable, a more compelling purpose will have to be established in order for the depriving law to constitute sufficient reason for the deprivation, than in the case when the property is something different, and the property right something less extensive. This judgment is not concerned at all with incorporeal property.

(f) Generally speaking, when the deprivation in question embraces all the incidents of ownership, the purposes for the deprivation will have to be more compelling than when the deprivation embraces only some incidents of ownership and those incidents only partially.

(g) Depending on such interplay between variable means and ends, the nature of the property in question and the extent of its deprivation, there may be circumstances when sufficient reason is established by, in effect, no more than a mere rational relationship between means and ends; in others this might only be established by a proportionality evaluation closer to that required by section 36(1) of the Constitution.

(h) Whether there is sufficient reason to warrant the deprivation is a matter to be decided on all the relevant facts of each particular case, always bearing in mind that the enquiry is concerned with “arbitrary” in relation to the deprivation of property under section 25.

*Id.*

“if a measure is held to be arbitrary because it is procedurally unfair or provides insufficient reason for the property deprivation, it will not meet the requirement of section 36.”<sup>106</sup> Next, under step five, the court must determine if the deprivation constitutes an expropriation under Section 25(2).<sup>107</sup> Again, this step is considered redundant, because the *FNB* court noted that expropriations are a narrower class of deprivations, and thus any law which takes property without compensating the owner will be found to be arbitrary under Section 25(1) (already addressed in step three) and Section 36 (already addressed in step four).<sup>108</sup> Finally, the analysis concludes with step six: assuming the taking constitutes an expropriation, it will be justified so long as it is for a public purpose or in the public interest and is subject to compensation per Section 25(2); further, the amount of compensation must be just and equitable subject to Section 25(3).<sup>109</sup>

The *FNB* decision, although leaving room for questions, has been applauded for its analysis of the property clause in the respect that it “leave[s] possibilities for future decisions with transformative potential open rather than close them down.”<sup>110</sup> *FNB* is still “the most comprehensive consideration to date of the structure and application of [section] 25 to particular disputes. . . . As such, it remains . . . a valuable account of the framework for constitutional property protection and regulation in South Africa.”<sup>111</sup>

106. ALEXANDER, *supra* note 71, at 169.

107. See S. AFR. CONST. 1996 § 25(2) (explaining that “[p]roperty may be expropriated only in terms of law of general application—(a) for a public purpose or in the public interest; and (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court”).

108. ALEXANDER, *supra* note 71, at 170 (noting that this leaves less certainty to how courts in South Africa will deal with “inverse condemnations”).

109. The amount of compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including—

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

See S. AFR. CONST. 1996 § 25(3).

110. A.J. van der Walt, *Striving for the Better Interpretation—A Critical Reflection on the Constitutional Court’s Harksen and FNB Decisions on the Property Clause*, 121 S. AFRICAN L.J. 854, 877–78 (2004).

111. Mostert, *supra* note 82, at 242.

#### 4. *Eminent Domain in Practice*

Despite the sophisticated and progressive approach to property in South Africa, in practice the GOSA rarely uses its power of eminent domain. This hesitancy is due to both domestic and international factors.<sup>112</sup> Domestically, government representatives—particularly those who represent rich white farmers—have lobbied against the use of expropriation, and instead favor the use of private compensation agreements if any land must be taken at all.<sup>113</sup> This is in stark contrast with the majority of poor blacks and colored people, who would like a more aggressive eminent domain policy by the GOSA.<sup>114</sup> Although as the majority the poorer population does have notable political power, the GOSA has tended to side with the considerable economic power of the lobbyists and their wealthy constituents who are important for continued local investment—a source of economic well-being which the GOSA would not care to upset.<sup>115</sup>

Internationally, the World Bank continues to discourage the use of an expropriation-based land reform policy by the GOSA, and instead also favors the continued use of private compensation agreements.<sup>116</sup> Cumulatively, the use of private compensation agreements has delayed the GOSA's goal of redistributing thirty percent of farmland

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112. Smith, *supra* note 4, at 267 (finding that “[l]and reform efforts in South Africa are essential in moving away from an apartheid state, but are caught between protecting civil or economic rights.”).

113. Bernadette Atuahene, *Property Rights and the Demands of Transformation*, 31 MICH. J. INT'L L. 765, 786 (2010).

114. *Id.* at 788.

115. *Id.* at 788, n.104 (pointing out that this arrangement of appeasing the rich minority in South Africa is notable—the ANC (the dominant political party in South Africa) faces no real electoral threat, so their continued compliance to negotiated land reform despite the wishes of the majority of the public shows a conscious policy choice on their part).

116. *Id.* at 786 (stating that “economists [from the World Bank] have set the tone for what other foreign donors and investors view as acceptable land reform policies. Since Southern African countries require foreign assistance and investment to complete their land reform programs, the governments are somewhat constrained by the neoliberal views of these influential economists.”). See also KLAUS DEININGER, MAKING MARKET ASSISTED LAND REFORM WORK: INITIAL EXPERIENCE FROM COLOMBIA, BRAZIL, AND SOUTH AFRICA, IN AGRICULTURE AND THE ENVIRONMENT: PERSPECTIVES ON SUSTAINABLE RURAL DEVELOPMENT 156, 169 (Ernst Lutz ed. 1998) (noting that “[t]he choice of land redistribution rather than expropriation (which, as in Colombia, can still be used as an instrument of last resort) was based on the need to maintain public confidence in the land market and more generally to affirm the government's respect for individual property rights. It also reflects the recognition that expropriation in other countries has been neither rapid nor cheap.”).

by 2014. By 2010, the GOSA had approved approximately 10% of the land required for this goal but the actual amount of land actually taken has been less.<sup>117</sup> More troublingly, 90% of the farms located on redistributed farmland have failed, sometimes resulting in that same land being sold back to its original owners at a discount.<sup>118</sup> From the inception of land reform until 2010, the GOSA has spent approximately \$4 billion on the private compensation policy, which is now believed to require another \$10 billion dollars as well as an additional decade to be completed.<sup>119</sup>

However, in the rare instance the GOSA does use its eminent domain power, it is still not done in the manner envisioned by the Constitution. Most notably, the compensation paid is usually just the fair market value of the taking, instead of the pragmatic considerations outlined in Section 25(3) of the Constitution. This is the result of a variety of practical shortcomings. Frequently, property assessors in South Africa value property inaccurately—plainly forgetting to take into account the factorial framework of Section 25(3) and discount the price.<sup>120</sup> However, even when the assessors do value property correctly, the government is often forced to pay fair market value anyway, or else be forced to litigate in a court system that is “slow, understaffed, underfunded and overburdened.”<sup>121</sup> As one government official put it, “[the government] doesn’t like to refer disputes around price to the court because it will take forever. It can drag on for over two years before the matter is resolved.”<sup>122</sup>

However, it is good news for foreign investors that the threat of expropriation remains low in South Africa. The United States Department of State has taken notice that the GOSA rarely uses its eminent domain powers and instead continues to use compensation agreements with private landowners before any expropriation is

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117. Annual Report (1 April 2009–31 March 2010), S. Africa Dep’t of Rural Dev. and Land Reform 27, available at <http://www.info.gov.za/view/DownloadFileAction?id=133156>.

118. See Robyn Dixon, *Failure of South African Land Reform*, LOS ANGELES TIMES (Nov. 21, 2010), available at <http://articles.latimes.com/2010/nov/21/world/la-fg-south-africa-farms-20101121>.

119. *Id.*

120. Atuahene, *supra* note 113, at 786.

121. Heritage Foundation, South Africa, in 2011 Index of Economic Freedom, available at <http://www.heritage.org/index/Country/SouthAfrica>. See also Atuahene, *supra* note 113, at 786.

122. Atuahene, *supra* note 113, at 790 (citing Interview with Blessing Mphela, Acting Chief Lands Claims Comm’r, Dep’t of Land Aff., in Johannesburg, S. Afr. (May 15, 2008)).

formalized.<sup>123</sup> The GOSA has only twice used expropriation to get land—each time to take possession of farmland—and in each instance paid the owners the fair market value of the takings.<sup>124</sup>

### B. India

India, upon gaining independence, set out with a similar set of reform-oriented goals as South Africa, including land reform and the redistribution of wealth. Under the Indian Constitution, all fundamental rights, which are found in Part II of the Constitution, are guaranteed and protected by the Indian Supreme Court. Any law which offends a fundamental right is to be voided by the Court, which is politically insulated through both the Constitution and civil law system of India.<sup>125</sup> However, Part IV of the Constitution contains “Directive Principles of State Policy” which directed the Government of India (“GOI”) to raise the quality of life in India through social reform.<sup>126</sup> Part IV’s aim for social reform was directed to the legislature and the executive branches of the GOI, and were “not . . . enforceable by any court.”<sup>127</sup> Together, these two sections created an uncomfortable tension in India’s original property regime.

Property was originally dealt with in Part II of the Indian Constitution, notably Articles 19 and 31 of the original constitution which provided that:

19(1) All citizens shall have the right—(f) to acquire, hold and dispose of property, and . . .

31(1) No person shall be deprived of his property save by authority of law.

31(2) No property, movable or immovable, including any interest in, or in any company owning, any commercial or industrial undertakings, shall be taken possession of or acquired for public purposes under any law authorizing the taking of such possession

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123. U.S. Dep’t of State, Bureau of Economic, Energy and Business Affairs, 2011 Investment Climate Statement—South Africa, <http://www.state.gov/e/eb/rls/othr/ics/2011/157358.htm> (last visited June 24, 2012).

124. *Id.*

125. John Armour & Priya Lele, *Law, Finance and Politics: The Case of India*, 43 LAW & SOC’Y REV. 491, 511 (2009).

126. Tom Allen, *Property as a Fundamental Right in India, Europe and South Africa*, 15 ASIA PAC. L. REV. 193, 194 (2007).

127. *Id.* at 194–95 (citing INDIA CONST. art. 37 (1947)).

or such acquisition, unless the law provides for compensation for the property taken possession of or acquired and either fixes the amount of the compensation, or specifies the principle on which, and the manner in which the compensation is to be determined and given.<sup>128</sup>

By placing property in Part II of the Constitution, it was designated as a fundamental right, giving it both the protection of the Indian Supreme Court as well as providing for compensation for expropriations.<sup>129</sup> However, this protection was in stark contrast with some of the Constitution's social reform policies in Part IV, which among other things provided the GOI with the goal of land reform and economic restructuring, creating a tension of the GOI's attitude towards property and land rights.<sup>130</sup>

Surprisingly, this was not a drafting oversight by an overanxious new nation. Including property as a fundamental right was by design of the Indian Prime Minister, who intended that including property as a fundamental right would give judicial protection for only small expropriation projects, and "would apply only to limited government expropriations and not to large-scale social engineering programs."<sup>131</sup>

This would not be the case, leading to years of contention between the judiciary and GOI.<sup>132</sup> The Indian Judiciary, per Part II of the Constitution, immediately began treating all property as a fundamental right, often upending new legislation, even laws which were passed in the name of land reform<sup>133</sup> and for the economic improvement of the nation.<sup>134</sup> The legislature, desirous of engaging in redistributive land reform policies, per Part IV of the Constitution, grew frustrated by the judiciary's zealous protection of property rights. This began a pattern of constitutional "one-upmanship" over the course

128. INDIA CONST. art. 31 (1947).

129. See Armour & Lele, *supra* note 125, at 511; Manoj Mate, *The Origins of Due Process in India: The Role of Borrowing in Personal Liberty and Preventive Detention Cases*, 28 BERKELEY J. INT'L L. 216, 218 n.7 (2010).

130. Allen, *supra* note 93, at 195.

131. ALEXANDER, *supra* note 71, at 50.

132. *Id.* (noting that "[m]any commentators believe that it was precisely the undemocratic consequences of judicial review [of land reform measures in India] that led to the eventual demise of constitutional property in India."). For a full history, see generally A.J. VAN DER WALT, CONSTITUTIONAL PROPERTY CLAUSES: A COMPARATIVE ANALYSIS 192–206 (1999).

133. See *Kameshwar Singh v. State of Bihar* [1951] A.I.R. Patna 91.

134. ALEXANDER, *supra* note 71, at 50.



of the next three decades, where Supreme Court decisions about the property clause would be met with legislation, and vice versa.<sup>135</sup>

For example, after the Court found that it could review the compensation provided after expropriation,<sup>136</sup> the legislature amended the constitution to put compensation outside the realm of judicial review.<sup>137</sup> Even after this amendment, the Supreme Court continued to review compensation, finding that although they no longer had the power to review compensation, they still did had the power to strike down laws which either didn't provide, or provided only illusory compensation.<sup>138</sup> Eventually after years of going back and forth the issue, the GOI, frustrated with the judiciary's "status-quoist [sic] and over-protective approach toward property rights"<sup>139</sup> passed the Forty Forth Amendment to the Constitution in 1978, which completely deleted property as a fundamental right.<sup>140</sup> Critics argued that during the thirty or so years that property was a fundamental right in India, "no meaningful progress was made in redistributing land."<sup>141</sup> The replacement statute, which is the current embodiment of India's property regime, is found in section 12 of the Constitution.<sup>142</sup> The current constitutional property provision in India simply reads "[n]o person shall be deprived of his property save by authority of law."<sup>143</sup>

There are a variety of laws which govern the Indian takings process in addition to the constitutional provisions for property in India. Among these laws are: the Land Acquisition Act of 1894,<sup>144</sup> the National Highways Act, and the Indian Railways Act. Additionally, various states in India have their own takings legislation.<sup>145</sup>

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135. See Armour & Lele, *supra* note 125, at 511.

136. *Id.* (citing State of West Bengal v. Bela Banerjee (1954)).

137. *Id.* at 512 (citing Constitution (Fourth Amendment) Act (1955)).

138. *Id.* (citing Vajravelu v. Special Deputy Collector (1965)).

139. ALEXANDER, *supra* note 71, at 50 (quoting K.N. Goyal, *Compensation: Down but Not Out*, 38 J. INDIAN L. INST. 1, 2 (1996)).

140. *Id.*

141. *Id.* at 51 (citing John Murphy, *Insulating Land Reform from Constitutional Impugnment*, 8 S. AFR. J. ON HUM. RTS. 362, 382–83(1992)).

142. INDIA CONST. art. 300A.

143. *Id.*

144. Land Acquisition Act, 1894 (India) (amended 2007).

145. Ashwin Mahalingam & Aditi Vyas, *Comparative Evaluation of Land Acquisition and Compensation Processes Across the World*, 46 ECON. & POL. WKLY. 94, 94–102 (Aug. 6, 2011). Recently, various state governments in India have begun to compete over the inclusion of resettlement and rehabilitation policies for those affected by land acquisitions with the goal of garnering political support in the state and national elections. See also E-mail from Dr. Anil

However, the primary law that still governs land acquisition in India is the Land Acquisition Act of 1894 (“LAA”).<sup>146</sup> The LAA is a statutory vehicle that allows the government to exercise its eminent domain power for public purposes in exchange for fair and reasonable compensation.<sup>147</sup> The LAA has undergone periodic revisions, including a comprehensive amendment in 1984.<sup>148</sup> The LAA sets forth four steps to accomplish expropriation. First, the GOI must make a determination that the property is required for a public purpose; second, the GOI must identify the affected parties; third, there must be a fair process where the affected parties are to be notified and given an opportunity to express their concerns about the project; and fourth, the GOI must negotiate with the affected party to reach an acceptable compensation agreement.<sup>149</sup>

### 1. *Public Purpose*

The Land Acquisition Act (“LAA”) includes explicit provisions for when an expropriation may be done in accordance with the public purpose;<sup>150</sup> or even a private purpose.<sup>151</sup> The LAA defines a public purpose broadly, allowing for the inclusion of many proposed projects to have a sufficiently public purpose.<sup>152</sup> Notably, this definition states

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Kashyap, University of Ulster, Belfast, to Patricia Salkin, Raymond & Ella Smith Distinguished Professor of Law, Associate Dean and Director of the Government Law Center of Albany Law School (discussing the State of Haryana’s (located in India’s capital region) development of policy initiatives for those affected by takings, notably paying market value for the taking, with further compensation incentives for those who forgo litigation over the taking; additionally, these benefits may include employment, tax exemptions, and replacement land for the affected landowner) (Oct. 4, 2011) (on file with the author).

146. Saptak Sanyal & Aditya Shankar, *Property Rights and Sustainable Development in India*, 22 COLUM. J. ASIAN L. 235, 243 (2009).

147. *Id.* at 239.

148. Bhaskar Majumder, *Land Acquisition for Industrialization in India: Displacement of People and the Role of the State*, in DEVELOPMENT AND CONFLICT IN THE 21ST CENTURY 36 (Otto F. von Feigenblatt, ed.) (2010).

149. Mahalingam & Vyas, *supra* note 145, at 94–102.

150. The Land Acquisition Act, No. 1 of 1984; India Code (1993) § 3(f).

151. *Id.* § 40.

152. (f) [T]he expression “public purpose” includes:

- (i) the provision of village sites, or the extension, planned development or improvement of existing village-sites.
- (ii) the provision of land for town or rural planning;
- (iii) the provision for land for planned development of land from public funds in pursuance of any scheme or policy of Government and subsequent disposal

that the acquisition of land for companies is not considered a public purpose.<sup>153</sup> Instead, for private companies, the LAA provides a separate set of requirements for private companies seeking to acquire land under Part VII of the Act, mostly involving the acquisition of land to provide housing for employees.<sup>154</sup> However, the distinction between public and private purposes under the LAA remains vague, even with judicial interpretation.<sup>155</sup>

In practice, the distinction between a public and private purpose has become even vaguer. Despite the LAA's promulgation that expropriation for a private company is not a public purpose, there have been many instances where the GOI has expropriated land on behalf

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thereof in whole or in part by lease, assignment or outright sale with the object of securing further development as planned;

(iv) the provision of land for a corporation owned or controlled by the State;

(v) the provision of land for residential purposes to the poor or landless or to person residing in areas affected by natural calamities, or to persons displaced or affected by reason of the implementation of any scheme undertaken by Government, or any local authority or a corporation owned or controlled by the State;

(vi) the provision of land for carrying out any educational, housing, health or slum clearance scheme sponsored by Government or by any authority established by Government for carrying out such scheme, or with the prior approval of the appropriate Government, by a local authority, or a society registered under the societies Registration Act, 1860 (21 of 1860), or under any corresponding law for the time being in force in a state, or a co-operative society within the meaning of any law relating to co-operative societies for the time being in force in any State;

(vii) the provision of land for any other scheme of development sponsored by the Government or with the prior approval of the appropriate Government, by a local authority;

(viii) the provision of any premises or building for locating a public office, but does not include acquisition of land for companies.

*Id.*

153. *Id.* § 3(f)(viii).

154. The Land Acquisition Act, No. 1 of 1984; India Code (1993) § 38-44B. *See also* § 40.

Public Enquiry: (1) Such consent shall not be given unless the [appropriate Government] be satisfied. [either on the report of the Collector under section 5A, sub-section (2), or] by an enquiry held as hereinafter provided:

(a) that the purpose of the acquisition is to obtain land for the erection of dwelling houses for workers employed by the Company or for the provision of amenities directly connected therewith, or

[(aa) that such acquisition is needed for the construction of some building or work for a Company which is engaged or is taking steps for engaging itself in any industry or work which is for a public purpose, or]

(b) that such acquisition is needed for the construction of some work, and that such work is likely to prove useful to the public.

155. Sanyal & Shankar, *supra* note 146, at 244, n.47 (citing *Devinder Singh v. State of Punjab*, (2008) 1 S.C.C. 728; *Pratibha Nema v. State of Madhya Pradesh*, A.I.R. 2003 S.C. 3140).

of private companies under the broad language of subsection (iii), which allows the expropriation of land for a public purpose as long as it is sponsored by, or has the approval of the GOI.<sup>156</sup> As long as the GOI provides some revenue towards the expropriation, it will qualify as a “public purpose” under the Act, allowing private companies to acquire land under the tenuous guise of a public purpose.<sup>157</sup>

The expropriation of land on behalf of private, for profit companies is a controversial subject in India.<sup>158</sup> For example, in October 2010 the state government of Himachal Pradesh was accused of acquiring land on behalf of a power corporation seeking to clear a forest for the construction of a Dam. These land acquisitions were alleged to have continued even though the application for the project had been rejected by the Union Ministry of Environment and Forests and despite unpopularity among the public who feared displacement.<sup>159</sup>

## 2. Compensation

Landownership is source of prestige and reputation in Indian society; it is seen as both a wise investment, as well as a source of societal standing. Therefore, compensation is especially important to expropriated landowners in India.<sup>160</sup> Despite not defining “compensation,”<sup>161</sup> the LAA includes several considerations for determining the compensation of takings, including the market value of the land, assets present on the land, income made from the land, as well as giving government officials the discretion to raise the amount of compensation.<sup>162</sup>

However, compensation is often discounted by a number of practical factors in the expropriation process. Often, the GOI will only identify a minimum number of affected parties to the taking, completely barring sharecroppers, encroachers and laborers from any compensation on the land.<sup>163</sup> This is problematic as in India the majority of people,

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156. *Id.* at 244, n.45 (citing The Land Acquisition Act, No. 1 of 1984; India Code (1993) § 3(f)(iii)).

157. *Id.* at 245.

158. *Id.* at 239 (citations omitted).

159. ASIAN CENTRE FOR HUMAN RIGHTS, *India Human Rights Report Quarterly*, 31–32 (October–December 2010), available at <http://www.achrweb.org/ihrrq/issue2/ihrrq-oct-dec-2010.pdf> (last visited June 24, 2012).

160. Mahalingam & Vyas, *supra* note 145, at 94–102.

161. Sanyal & Shankar, *supra* note 146, at 247.

162. Mahalingam & Vyas, *supra* note 145, at 94–102.

163. *Id.*

especially the aforementioned sharecroppers, encroachers, and laborers who live in areas which are prone to expropriation, will usually not have legal title to their land, and will be passed over from receiving any compensation at all.<sup>164</sup>

The required negotiations under the LAA can also take a long amount of time, in some cases up to three years even if the affected landowner has no objections to the taking. Further, the assessor of the land has up until two years after notifying the landowner of the taking on deciding on what compensation will be awarded.<sup>165</sup> However, in most cases no negotiation happens at all, as there is often little attempt by the GOI to engage in meaningful negotiation with the landowner.<sup>166</sup> Local officials are given a lot of discretion to value the property under the LAA, as there is no formula for determining compensation, which often leads to a subjective, and often undervalued, assessment of the property.<sup>167</sup> Further, although the LAA requires affected landowners to be paid before or during the taking,<sup>168</sup> that is rarely, if ever the case.<sup>169</sup> A landowner who is dissatisfied with their compensation can go to the judiciary, where courts often take years to issue decisions.<sup>170</sup> In the unlikely event a landowner does have the patience to take a claim to court, the court will apply a number of factors in determining the compensation owed, including the fair market value of the property (from when the landowner was notified of the expropriation), damages sustained by the landowner resulting from the expropriation, and the reasonable costs associated with moving.<sup>171</sup> Cumulatively, compensation is often much lower than the fair market value.<sup>172</sup>

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164. R. Rangachari et al., *Large Dams: India's Experience*, in WORLD COMMISSION ON DAMS CASE STUDY 111 (2000); see also Mahalingam & Vyas, *supra* note 145, at 94–102.

165. The Land Acquisition Act, No. 1 of 1984; India Code (1993) § 11.

166. Mahalingam & Vyas, *supra* note 145, at 94–102.

167. Sanyal & Shankar, *supra* note 146, at 245; Mahalingam & Vyas, *supra* note 145, at 94–102.

168. The Land Acquisition Act, No. 1 of 1984; India Code (1993) § 17.

169. Sanyal & Shankar, *supra* note 146, at 247. See also Satendra Prasad Jain v. State of Uttar Pradesh, A.I.R. 1993 S.C. 2517 (finding that “eighty percent of the estimated compensation was not paid to the appellants although [the LAA] required that it should have been paid before possession of the said land was taken but that does not mean that the possession was taken illegally or that the said land did not thereupon vest in the first respondent.”).

170. Heritage Foundation, India, in 2011 Index of Economic Freedom, available at <http://www.heritage.org/index/Country/India>.

171. The Land Acquisition Act, No. 1 of 1984; India Code (1993) § 11.

172. Mahalingam & Vyas, *supra* note 145, at 94–102.

### 3. Recent Developments

Recently, the GOI has begun to adopt a national policy for rehabilitation and resettlement for people who are negatively affected by the involuntary dispossession of their land, in addition to other reforms in their use of eminent domain.<sup>173</sup> With this in mind, in 2007 the GOI drafted the Land Acquisition (Amendment) Bill, which acknowledges the need for resettlement procedures, as well as increased compensation to disposed landowners. This includes additional forms of compensation, including replacement land, annuities, transportation allowances, and replacement housing in some instances.<sup>174</sup> Additionally, the Bill provides an expanded definition for “public purposes” relative to the LAA.<sup>175</sup> The bill remains highly controversial, both to private landowners concerned with both resettlement procedures and the giving of land to a private company as a public purpose, as well as with private corporations who find the bill to be impractical and anti-development.<sup>176</sup>

In terms of foreign investment, although there have been few instances of direct expropriation since the 1970s, the GOI has been accused of having “a poor track record of honoring and enforcing agreements with U.S. investors in the energy sector.”<sup>177</sup> In 2006 the Supreme Court of India awarded a decision in favor of a U.S. firm which had done work in India during the 1980s.<sup>178</sup> However, because the judiciary in India is notoriously backlogged, many foreign investors use alternative dispute resolution.<sup>179</sup>

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173. Majumder, *supra* note 148, at 36. *See also* The National Rehabilitation and Resettlement Policy (2007), Government of India, Ministry of Rural Development.

174. Maitreesh Ghatak & Parikshit Ghosh, *The Land Acquisition Bill: A Critique and a Proposal*, 2 (Center for Development Economics at Delhi School of Economics, Working Paper 204, September 2011).

175. Majumder, *supra* note 148, at 36–37.

176. Jason Overdorf, *India Proposes New Bill for Eminent Domain*, THE GLOBAL POST (Boston) (Sept. 7, 2011), *available at* <http://www.globalpost.com/dispatches/globalpost-blogs/the-rice-bowl/india-proposes-new-bill-eminent-domain> (last visited June 24, 2012).

177. U.S. Dep’t of State, Bureau of Economic, Energy and Business Affairs, 2011 Investment Climate Statement—India, <http://www.state.gov/e/eb/rls/othr/ics/2011/157294.htm> (last visited June 24, 2012).

178. *Id.* (noting that the GOI eventually paid a settlement that was “significantly less than the amount awarded under the Court’s order”).

179. *See* Heritage Foundation, India, in 2011 Index of Economic Freedom, *available at* <http://www.heritage.org/index/Country/India> (last visited June 24, 2012).

*C. Chile*

Chile has been hailed as “the benchmark and model for growth in Latin America” containing constitutional stability as well as a “solid property rights regime.”<sup>180</sup> Chile offers sound protection for private property and contract rights, and enforces this through an “efficient and transparent” judiciary.<sup>181</sup> Although an ideologically diverse set of rulers presided over Chile during the twentieth century, the legal basis for its property regime has remained comparatively consistent.

Chile gained its independence permanently in 1818.<sup>182</sup> The time period following independence was marked by political instability until the early 1830s.<sup>183</sup> Various presidents took power and drafted their own constitutions, none of which lasted until the Constitution of 1833<sup>184</sup> which gave the Chilean Constitution “modern” protections to its property clause, restricting the governmental power of expropriation unless it was done for a public purpose decided by law, and provided “indemnification” for the aggrieved party.<sup>185</sup> However, the late nineteenth and early twentieth century saw Chile surrounded in a governmental system that was stalled in political stalemates, a politically active military, and a substantial labor and social unrest which was leading to a rapidly unionizing population.<sup>186</sup> Military coups in 1925 led to the drafting of a new constitution, a task which focused on property as well as issues related to it.<sup>187</sup>

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180. Rafael X. Zahralddin-Aravena, *Chile: Free Trade Agreements, Chile and the Entrepreneur*, 5 SW. J.L. & TRADE AM. 273, 296, 322 (1998).

181. Heritage Foundation, Chile, in 2011 Index of Economic Freedom, available at <http://www.heritage.org/Index/Country/Chile> (last visited June 24, 2012).

182. M.C. Mirow, *Borrowing Private Law in Latin American: Andres Bello's Use of the Code of Napoleon in Drafting the Chilean Civil Code*, 61 LA. L. REV. 291, 293 (2000–2001).

183. *Id.*

184. *Id.*

185. CHILE CONST. (1833), art. 12(5).

The inviolability of every description of property, without distinction, whether belonging to Individuals or to Communities; no one being liable to be deprived of his property, except by virtue of a Judicial Sentence; unless the service of the State, duly declared by a Law, shall require the use or appropriation of such property; in which case the party shall be previously indemnified, either by a Special Agreement with the Government or by the Award of a Jury.

186. M.C. Mirow, *Origins of the Social Function of Property in Chile*, 80 FORDHAM L. REV. 1183 (2011).

187. *Id.* at 1187–88 (providing an example of the socioeconomic impact of the nitrate industry in Chile).

By the time of drafting the Chilean Constitution of 1925, the attitude towards property rights in Chile had changed. The constitutional debates focused on the need for strong property protections, yet acknowledged the public's disapproval of large land estates and uncultivated land. The new property provision hoped to provide strong security to property rights, while at the same time limiting it to accommodate the necessary progress required for the country.<sup>188</sup> The 1925 Constitution reflected this attitude towards property through its inclusion of second section in the property provision. The new provision, Article 10(10), still provided for the classic public purpose and compensation framework, but additionally provided that property ownership was subject to "the maintenance and property of the social order."<sup>189</sup>

By including this new "social order" provision, new and previously unheard of land projects were now possible under the new Constitution. These projects, undertaken by the government over the course of the next forty years, were characterized by growing socialist government policy towards property, which included a large scale land and agrarian reform legislation during the 1960s.<sup>190</sup>

Socialism was explicitly adopted as a platform by the incoming Chilean government from 1970 to 1973. During this time, President Salvador Allende engaged in Chile's most aggressive policy of state ownership towards property, nationalizing industry and expropriating millions of hectares of land yearly.<sup>191</sup> However, this aggressive

188. *Id.* at 1200–05.

189. Chilean Constitution (1925), art. 10(10).

The inviolability of all properties, without any distinction.

No one can be deprived of his property, or of a part of it, or of the right that he should have to it, except by virtue of a judicial sentence or of expropriation for reasons of public utility, qualified by law. In this case the indemnification that is arranged with him or that is determined in the corresponding trial will be previously given to owner.

*The exercise of the right to property will be subject to the limitations or rules that the maintenance and the progress of the social order require, and in that sense, the law can impose obligations or impositions of public utility in favor of the general interests of the State, of the health of the citizens and of public welfare.*

190. Mirow, *supra* note 186, at 1208 (explaining that "[Article 10(10)] led to proposals to limit large land estates, to ensure the exploitation of agricultural lands, and to direct urban development. The social-function norm of property had won the day.")

191. *Id.* at 1211–12.



governmental takings policy would last until the successful military coup of 1973, led by General Pinochet.

The incoming Pinochet regime was noted for its economically liberal attitude towards property, and would have an economic legacy in Chile noted for its “neo-liberal, free-market reforms.”<sup>192</sup> Most believed that the ideological philosophy of Pinochet, combined with the aggressive takings agenda by the previous government, would lead the new Pinochet-led government to frame property in a new constitution as “unassailable, absolute, natural right,” and do away with the “social order” provision of the 1925 Constitution.<sup>193</sup> Surprisingly, that was not the case. When drafting a new Constitution the Pinochet government instead embraced the social order provision of the previous constitution. Ironically, the Pinochet government went even further than the previous property provision, defining a “social function”<sup>194</sup> in the new Constitution, and further giving a more detailed provision for property, allowing the government close to complete control over property if necessary.<sup>195</sup> The democratic governments which followed Pinochet, taking power in the 1990s, have in large part continued with this traditional Chilean property model.<sup>196</sup>

### 1. *Public Purpose*

As discussed above, the current Chilean Constitution goes into greater depth than the classic notion of what constitutes a public purpose, by combining it with the “social function” concept born in the 1925 Constitution. The text of the 1980 Constitution gives a broad articulation on property rights, providing for intellectual as well as real property.<sup>197</sup> Further, the Constitution gives the Chilean government “absolute, exclusive, inalienable and permanent domain” over

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192. *Id.* at 1212 (noting that evidence of this attitude can be found in the current constitution, for example, article 19(21) of the Chilean Constitution guarantees all citizens “[t]he right to develop any economic activity which is not contrary to morals, public order or national security, respecting legal norms which regulate it.”).

193. *Id.* at 1214.

194. CHILE CONST. (1980) art. 19(24) (stating that “[o]nly the law can establish the manner to acquire property and to use, enjoy and dispose of it, and the limitations and obligations which derive from its social function. This comprises all which the general interests of the Nation, the national security, public use and health, and the conservation of the environmental patrimony, require.”).

195. Mirow, *supra* note 186, at 1213–14.

196. *Id.* at 1214.

197. CHILE CONST. (1980), art. 19(24).

all mineral, fossil fuel and hydrocarbon on its territory,<sup>198</sup> which can be subsequently licensed out by the government.<sup>199</sup>

Under Section 19(24) of the Constitution no one can “be deprived of his property, of the assets affected or any of the essential facilities or powers of ownership, except by virtue of a general or a special law which authorizes expropriation for the public benefit or the national interest, duly qualified by the legislator.”<sup>200</sup> However, the social function obligation of the Constitution broadens the scope of what is considered a public purpose in Chile, and states that:

[o]nly the law may establish the manner to acquire property and to use, enjoy and dispose of it, and the limitations and obligations derived from its social function. Said function includes all requirements of the Nation’s general interests, the national security, public use and health, and the conservation of the environmental patrimony.<sup>201</sup>

Further, Section 19(24) provides the government with exclusive dominion over a majority of the nation’s natural resources, giving the State “absolute, exclusive inalienable, and imprescribable domain over all mines, including guano deposits, metalliferous sands, salt mines, coal and hydrocarbon deposits and other fossil substances, with the exception of superficial clays, despite the ownership held by individuals or [corporations] over the land which the above should be contained.”<sup>202</sup> A person who suffers an expropriation will find similar depth in the due process they are afforded by the constitution.<sup>203</sup>

## 2. Compensation

Compensation is also guaranteed, and outlined in great detail under the Chilean Constitution. Under section 19(24), “[the aggrieved

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198. *Id.*

199. Larry B. Pascal, *Summary of Oil and Gas Developments in South America (2006)*, 13 L. & BUS. REV. AM. 521 537 (2007).

200. CHILE CONST. (1980), art. 19(24).

201. *Id.*

202. *Id.*

203. *Id.* (providing that “[t]he expropriated party may protest the legality of the expropriation action before the ordinary courts of justice. . . . In case of protest regarding the justifiability of the expropriation, the judge may, on the merit of the information adduced, order the suspension of the material possession.”).

party] shall, at all times, have the right to indemnification for patrimonial harm actually caused, to be fixed by mutual agreement or by a sentence pronounced by said courts in accordance with the law. In the absence of an agreement [to sell the property], the indemnification shall be paid in cash.”<sup>204</sup> Section 19(24) further provides that compensation is to be determined, if an agreement cannot be reached between the landowner and the government, the compensation provided “shall be provisionally determined by experts in the manner prescribed for by law.”<sup>205</sup> Section 19(24) further holds that expropriated property can only be conveyed once compensation, in the form of an advance cash payment, is made.<sup>206</sup>

Despite the extensive treatment that the Chilean Constitution gives to property protection, expropriation is extremely rare.<sup>207</sup> Foreign investors should be especially confident to know that both the military regime, which ruled from 1973–1990, as well as the subsequent democratic governments have not nationalized industries, “and nothing suggests that any form of expropriation is likely in the foreseeable future.”<sup>208</sup>

#### D. Singapore

Singapore is one of the most densely populated countries in the world, with 7,126 people per square kilometer.<sup>209</sup> Additionally, the total amount of land which makes up Singapore is less than three hundred square miles, making it only about three times the size of Washington D.C.<sup>210</sup> Given the scarcity of land, land acquisition in

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204. *Id.* (continuing to mandate that the government may not take possession of the expropriated property until “total payment of the indemnification”).

205. *Id.*

206. *Id.* See also Edward A. Fallone, *Latin American Laws Regulating Foreign Investment*, in *Going International: Fundamentals of International Business Transactions*, ALI-ABA Course of Study Materials, July 8, 1996.

207. Heritage Foundation, Chile, in 2011 Index of Economic Freedom, available at <http://www.heritage.org/Index/Country/Chile> (last visited June 24, 2012).

208. U.S. Dep’t of State, Bureau of Economic, Energy and Business Affairs, 2011 Investment Climate Statement—Chile, <http://www.state.gov/e/eb/rls/othr/ics/2011/157257.htm> (last visited June 24, 2012).

209. See, Singapore Dep’t of Statistics, *Statistics*, <http://www.singstat.gov.sg/stats/keyind.html> (noting that there are over 5 million people residing on an area of land that is 712.4 sq. km.).

210. U.S. Dep’t of State, Bureau of Economic, Energy and Business Affairs, Background Note: Singapore, <http://www.state.gov/r/pa/ei/bgn/2798.htm> (last visited June 24, 2012).

Singapore is viewed as “a necessity to facilitate development for economic progress.”<sup>211</sup> The Government’s landholding in Singapore has steadily risen since its modern inception; in 1969 the state owned 49% of land, in 1975 the state owned 65% of land.<sup>212</sup> Today, close to 90% of households in Singapore reside in structures that were built and once owned by the government.<sup>213</sup>

Singapore was part of Malaysia from 1963 until 1965, when it separated over political friction with the central Malaysian government to form its own country.<sup>214</sup> Upon separation, one of the largest concerns became whether or not to constitutionally guarantee property rights for its citizens, as was the case in Malaysia.<sup>215</sup> Ultimately, the government decided against it, primarily concerned about litigation resulting from disputes over compensation in eminent domain cases.<sup>216</sup> In particular, the government was concerned with certain compensation issues and drafted what would become the Land Acquisition Act (“LAA”) in light of these concerns. These concerns, articulated below, would set the tone for the Singaporean attitude towards property ownership throughout the course of its history:

Firstly, that no landowner should benefit from development which has taken place at public expense and secondly, that the price paid on the acquisition of land for public purposes should not be higher than what the land would have been worth had the Government not carried out development generally in the area . . . .<sup>217</sup>

Singapore’s languor for constitutionally guaranteed compensation reflected its belief that, given the scarcity of land, the public interest

211. Bryan Chew et al., *Compulsory Acquisition of Land in Singapore: A Fair Regime?*, 22 SINGAPORE ACAD. L.J. 166, 187 (2010).

212. NICHOLS ON EMINENT DOMAIN, Ch. 1A, § 1C.10 (Matthew Bender, 3d ed).

213. Jianlin Chen, *Curbing Rent-Seeking and Inefficiency with Broad Takings Powers and Undercompensation: The Case of Singapore from a Givings Perspective*, 19 PAC. RIM L. & POL’Y J. 1 n.359 (2010) (citation omitted).

214. U.S. Dep’t of State, Bureau of Economic, Energy and Business Affairs, Background Notes: Singapore, <http://www.state.gov/r/pa/ei/bgn/2798.htm> (last visited June 24, 2012).

215. NICHOLS, *supra* note 212.

216. *Id.* (noting that “[a Constitutional guarantee to property would] leave open the door for litigation and ultimately for adjudication by the Courts as to what is or is not to be adequate compensation.”) (citing Singapore Parliamentary Debates, vol. 25, col. 1051).

217. Chew et al., *supra* note 211, at 169 (quoting Singapore Parliamentary Debates, Official Report (22 June 1966) vol. 25 at col. 133 (EX Barker, Minister for Law and National Development)).

of the nation would be best served by limiting the costs of development and infrastructure.<sup>218</sup> The LAA reflected this policy of frugality, and originally determined compensation for expropriated landowners to be either: the market value on the notice date of the taking, or the market value on a statutorily determined date—November 30th, 1973—whichever was lowest.<sup>219</sup> This led to problematic compensation for landowners, as Singapore’s property values steadily increased in the 1970s, before exploding in value into the 1980s.<sup>220</sup> By the 1980s the statutory date was completely outdated, and resulted in inequitable compensation being paid to landowners.<sup>221</sup> Finally, in 1986, the LAA was revised to update compensation values—although “after a number of major acquisitions had been [given notice they would be taken], as large tracts of lands were needed for infrastructure development such as the construction of the mass rapid transit system, drainage improvement, road widening and urban redevelopment in various parts of Singapore.”<sup>222</sup> However, had the LAA updated the compensation due earlier, it could have resulted in vast fiscal problems for a young nation trying to acquire scarce lands to further the public interest.<sup>223</sup> The compensation provisions of the LAA would continue to be updated, and in shorter intervals, up until 1995.<sup>224</sup> The LAA underwent no review between 1995 and 2007 due to the 1997 financial crisis in Asia, and the outbreak of SARS in 2003—each of which forced property values to below their 1995 values.<sup>225</sup>

It is important to note that during the 1980s and 1990s, despite what the Act provided, many landowners were able to get closer to fair-market value when their property was taken by the Government. The Government of Singapore did relieve a majority of inequitable

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218. *Id.* at 170.

219. *See id.* at 170–71; NICHOLS, *supra* note 212.

220. Chew et al., *supra* note 211, at 171.

221. *Id.*

222. *Id.* at 172.

223. *Id.* (stating that “[c]learly the compensation regime in the early years was structured in favor of the tax-paying public, who had to bear the cost of public development rather than a small group of individual landowners. Although this was obviously unfair from the landowners’ point of view, it was nevertheless reasonable from the State’s perspective.”).

224. *Id.* (noting that “[t]he interval between the revision in 1973 and 1986 was 13 years. The interval between the review in 1986 and 1992 was a short period of six years. The 1992 and 1995 reviews were only three years apart. This showed a change over time to compensate at a value closer to the value at the date of [notice].”).

225. *Id.* at 173.

compensations by making *ex gratia* payments to aggrieved landowners, giving them additional compensation for their taking, which usually made up the difference between the statutory compensation and the market value compensation due for the property.<sup>226</sup> *Ex gratia* payments originally began to help small landowners whose compensation was insufficient to find replacement housing; however, the concept was often progressively used to reflect changing circumstances.<sup>227</sup> By 2001, *ex gratia* payments were given to all types of properties and a cap on the amount given was gradually increased to deal with any inequities resulting from statutory dating on compensation.<sup>228</sup>

In 2007, the government of Singapore officially abolished their compensation provision in the LAA. The reason for this, per the government was that “Singapore today has become more developed and urbanized. Land acquisitions now affect far more people than those carried out in 1970s or 1980s. Today many more Singaporeans own private properties. It is often that Singaporeans sink a major portion of their life savings and future earnings into their property.”<sup>229</sup>

### 1. *Public Purpose*

Under the LAA, the President of Singapore may expropriate land when it is needed “(a) for any public purpose; (b) by any person, corporation or statutory board, for any work or an undertaking which, in the opinion of the Minister, is of public benefit or of public utility or in the public interest; or (c) for any residential, commercial or industrial purposes.”<sup>230</sup> This provision gives the President broad discretion in the use of eminent domain power, and once a notification is entered in compliance with the LAA, it is considered to be “conclusive evidence that the land is needed for the purpose specified therein.”<sup>231</sup> This provision leaves little room for judicial review of a “public purpose” in Singapore,<sup>232</sup> though the state’s eminent domain power is subject to stringent procedural oversight at the executive level.<sup>233</sup>

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226. *Id.* at 176.

227. *Id.*

228. *Id.*

229. *Id.* at 173 (quoting Singapore Parliamentary Debates, Official Report (11 April 2007) vol. 83 at col. 500 (Prof. S. Jayakumar, Deputy Prime Minister and Minister for Law)).

230. Land Acquisition Act, c. 152, § 5(1)(a)–(c) (1985) (amended 2007) (Sing.).

231. *Id.* § 5(3).

232. NICHOLS, *supra* note 212.

233. Singapore Parliamentary Debates, Official Report (11 April 2007) vol. 83 at cols. 377 and 378 (Prof. S. Jayakumar, Deputy Prime Minister and Minister for Law) (stating that “all

The judiciary is compliant with this broad grant of statutory power to the executive branch, and has acknowledged that “[t]he Government is the proper authority for deciding what a public purpose is. When the Government declares that a certain purpose is a public purpose, it must be presumed that the Government is in possession of facts which include the Government to declare that the purpose is a public purpose.”<sup>234</sup> When it has had opportunity to comment, the Singaporean judiciary has supported a broad reading of a “public purpose” under the LAA. Specifically, the judiciary has found that a “public purpose” under subsection (5)(a) of the LAA was meant to have an expansive reading according to legislative intent, and “might conceivably include the acquisition of land for resale to private developers.”<sup>235</sup> In practice, the government of Singapore has used its expropriation power on numerous occasions to give property over to private development.<sup>236</sup> Despite the broad power given to the state in determining what would constitute a public purpose, it has spurred close to no litigation in Singapore.<sup>237</sup>

## 2. Compensation

As discussed above, compensation has spurred plenty of controversy in Singapore. Compensation is currently determined by a multistep process, in which the government must first identify and notify all “persons interested” of the impending expropriation, and then negotiate an offer for the property before a taking may occur. After the President publishes the notification of an impending taking, “persons interested” are those who may seek compensation, and are defined as “every person claiming an interest in compensation to be made on

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proposals for land acquisition are carefully considered. Government agencies that initiate acquisition must provide full justifications on why the acquisition is necessary. They would also have to ensure that prior approval is obtained for the intended use before requests for acquisition can be considered. For major acquisitions, the proposals will also have to be presented to a Ministerial Committee comprising the Minister of Law, Minister for National Development and which sometimes can include other Ministers like the Minister for Transport if it concerns land acquisition related to MRT or major expressway development. Finally every proposal for land acquisition must be submitted to Cabinet for approval.”).

234. *Galstaun v. Attorney-General* (1981) 1 M.L.J. 9 at 10, per Chua J.

235. *Teng Fuh Holdings v. Collector of Land Revenue*, 2006-3 Sing. L. Rep. 507, 523–24 (Sing. High Ct.).

236. See Chen, *supra* note 213, at 9, n.47 (giving examples of the government of Singapore taking land for private development).

237. NICHOLS, *supra* note 212.

account of the acquisition of land under [the LAA], but does not include a tenant by month or at will.”<sup>238</sup> Practically speaking, it includes “anyone with a legal or beneficial interest in the land.”<sup>239</sup> All of the designated “persons interested” must appear before collectors within 21 days of receipt of notice, and give their own valuation of their own land.<sup>240</sup> Based on this, collectors will issue awards of compensation.<sup>241</sup>

Compensation is determined under the LAA using a multifactorial approach which not only show factors which should be considered in the valuation, but also promulgates factors which should not be considered in the valuation. Compensation should only take into account: damages which may result from severing a piece from the land; damages from the taking which affect other property; the “market value” of the expropriated property;<sup>242</sup> whether the party has to move his residence or place of business as a result of the taking; moving costs associated with a forced move; and increases in value to *other land* of the interested party which will result from the taking—not the increases in the taking itself.<sup>243</sup> In some instances, the compensation has deducted from the compensation due based on what the expropriated land would be used for.<sup>244</sup> On the other hand, compensation cannot take into account: the urgency of the taking; “any disinclination of the person interest to party with the land acquired”; damages sustained which would not support a valid cause of action against a private party; damage likely to be caused to the taking after the notice date; increases in the value of the land taken, improvements

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238. Land Acquisition Act, c. 152, § 2(1) (1985) (amended 2007) (Sing.). *See also id.* § 2(2) (including trustees and guardians acting in their fiduciary capacity).

239. NICHOLS, *supra* note 212 (requiring that anyone designated as a “person interested” must appear before the collector within 21 days of notice).

240. Land Acquisition Act, c. 152, § 8(3)(b)(i)–(ii) (1985) (amended 2007) (Sing.).

241. *Id.* § 8(4).

242. *See id.* §§ 33(1)(a), 33(5)(e) (noting that market value is not defined, but instead determined by either the date of the acquisition of land, if made after 2/12/07 pursuant to § 33(1)(a) or the price which a bona fide purchaser would pay for the land, “after taking into account the zoning and density requirements and any other restrictions imposed [by law].”); Chew et al., *supra* note 211, at 174–75.

243. Land Acquisition Act, c. 152, § 33 (b)–(f) (1985) (Sing.).

244. Chen, *supra* note 213, at 11 (relating that “[i]n a land acquisition exercise for the construction of a mass transit station, the government acquired a small plot of land originally used as a car park on private residential property. A nominal S\$1 was paid as compensation since the gains in the property value from the eventual construction of the mass transit station (estimated by industry sources to be \$18,000,000) are much more than the value of the 220 square meters of land acquired.”) (internal citation omitted).



made to the land after notice of the taking was given; liens, assignments and other dispositions affecting the land unless registered with the government; and evidence of the value of comparable properties, unless they are from bona fide sales.<sup>245</sup> Taken together, the compensation due usually is “the price that a bona fide purchaser might reasonably be expected to pay for the land on the basis of either its existing use or the purpose designated by post-acquisition zoning, again whichever is the lower figure.”<sup>246</sup>

Once compensation is determined by the collector, in practice it is treated as an offer—one which can be accepted or rejected by the landowner. The government of Singapore recommends that any agencies which are planning to expropriate property should attempt to negotiate with the landowner, and only then, when negotiations fall through, the agency may use its eminent domain power.<sup>247</sup> If the landowner rejects the offer, he may take his valuation to an Appeals Board which can increase, reduce or confirm the initial compensation award based on the factors discussed above.<sup>248</sup> The Appeals Board’s subsequent decision on the amount of compensation owed is final and binding.<sup>249</sup> Once compensation is determined and paid to the landowner, the government of Singapore may take possession of the expropriated property.<sup>250</sup>

As previously noted, because Singapore’s property rights are found in legislation and are not protected by their Constitution, the judiciary has not recognized regulatory takings.<sup>251</sup> As precarious as the statutory property rights system in Singapore may seem, Singapore has been a haven for foreign investment. Singapore has not expropriated foreign owned property, and further has no laws which mandate that foreign investors must hand ownership over to local interests. Further, Singapore has signed many Bilateral Investment Agreements with a

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245. Land Acquisition Act, c. 152 § 34 (1985) (Sing.).

246. *Id.* § 33(5)(e).

247. Mahalingam & Vyas, *supra* note 145, at 94–102.

248. Land Acquisition Act, c. 152 § 23 (1985) (Sing.).

249. *Id.* §§ 29–30 (noting that there is a right to appeal to a court on a point of law, but otherwise this is the end of the inquiry for an aggrieved landowner).

250. *Id.* § 16.

251. Chen, *supra* note 213, at 12 (citing TAKING LAND: COMPULSORY PURCHASE AND REGULATION IN ASIAN-PACIFIC COUNTRIES 4 (Tsuyoshi Kotaka & David L. Callies eds., 2002)) (noting that Japan and Korea are the only Asian Pacific nations which have doctrine similar to regulatory takings).

wide range of countries, which promote and protect nationals and companies of countries—specifically prohibiting against expropriation for an initial fifteen year period, which is continued unless terminated.<sup>252</sup> Additionally, the judiciary of Singapore is noted to be efficient and provides relatively good protection for private property.<sup>253</sup>

### *E. Ghana*

Today, Ghana is experiencing a period of relatively strong economic growth.<sup>254</sup> However, this growth has illustrated to the rest of the world the problems of property ownership—particularly land ownership—in Ghana.<sup>255</sup> Examinations of the country suggests that “getting clear title to land [in Ghana] is often difficult, complicated and lengthy,”<sup>256</sup> and the process for getting title “includes six government offices, and three to four years.”<sup>257</sup> Litigation over who has rightful title to land “has become so common that sellers make a point of emphasizing in their advertisements when a plot of land is for sale and its ownership is not contested.”<sup>258</sup> Further complicating matters is the presence of customary law. In Ghana today, 80% of land is held on a customary basis and is not titled.<sup>259</sup>

In pre-colonial Ghana, land rights included elements of economic, political and even religious standing.<sup>260</sup> Land rights were viewed as a community asset, and the central authority of these communities rested with their chiefs, who distributed the land as they saw fit.<sup>261</sup>

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252. U.S. Dep’t of State, Bureau of Economic, Energy and Business Affairs, 2011 Investment Climate Statement—Singapore, <http://www.state.gov/e/eb/rls/othr/ics/2011/157355.htm> (last visited June 24, 2012).

253. Heritage Foundation, Singapore, in 2011 Index of Economic Freedom, *available at* <http://www.heritage.org/index/Country/Singapore> (last visited June 24, 2012).

254. SANDRA F. JOIREMAN, *WHERE THERE IS NO GOVERNMENT: ENFORCING LAND RIGHTS IN COMMON LAW AFRICA* 112 (2011) (stating that from 1995 to 2008 Ghana has consistently had annual economic growth rates around 5%).

255. *Id.*

256. Heritage Foundation, Ghana, in 2011 Index of Economic Freedom, *available at* <http://www.heritage.org/index/Country/Ghana> (last visited June 24, 2012).

257. JOIREMAN, *supra* note 254, at 113.

258. *Id.* at 112, 114 (noting that “land cases are being filed at a rate higher than that at which they are decided, and the backlog in proceedings means that it may take five or six years to hear a case.”).

259. *Id.* at 113 (stating that the remaining 20 percent is owned by the government for development purposes, which has been further allocated to individuals).

260. *Id.* at 34.

261. *Id.* at 34, 114 (explaining that chiefs in Ghana have a responsibility to allocate land to

Upon the colonization of Ghana, however, these chiefs negotiated directly with the colonizing British settlers. With no central land registry, a number of problems ensued: chiefs often sold land they had no right to, or would pocket the proceeds of the sale rather than share it with the community, or would sign agreements which they did not understand.<sup>262</sup> Regardless, property rights in Ghana took a major hit under this colonial system: chiefs were incentivized to continue the sale of land to the British, who not only paid them, but supported and propped up the chiefs as the central power in their communities.<sup>263</sup> The strong customary authority of both chiefs in Ghana has persisted into the present day.<sup>264</sup>

Ghana's property regime, notably its land law, continues to be heavily influenced by this customary law system, despite the appearance of a relatively simple constitutional and statutory framework.<sup>265</sup> Traditional customary law has dominated the development of property rights in Ghana, instead of a more formal rule of law.<sup>266</sup> Today customary law operates as a separate property rights regime over approximately 75% of the land in sub-Saharan Africa, and 80% of land in Ghana.<sup>267</sup> Although customary law varies regionally within Ghana,<sup>268</sup> customary law in western Africa generally views land from

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those who need it, as well as for community projects, and that chiefs also resolve disputes around land ownership in their communities and have the right to sell land).

262. *Id.* at 35.

263. *Id.* at 36 (emphasizing that “[i]n adopting a system of indirect rule [the British] buttressed up the authoritarian aspect of the power of chiefs who frequently abused it in a way that they could rarely have done in traditional society without deposition.” (citations omitted)).

264. *Id.* at 113.

265. George A. Sarpong, *Improving Tenure Security for the Rural Poor, Ghana—Country Case Study*, Report for the Food and Agriculture Organization of the United Nations, 2 (2006), available at [ftp://ftp.fao.org/sd/sda/SDAR/sard/Ghana%20case%20\(final%20publica\).pdf](ftp://ftp.fao.org/sd/sda/SDAR/sard/Ghana%20case%20(final%20publica).pdf) (last visited June 24, 2012). See also Ronald C. Griffin, *Ghana Journey: Private Investment, Public Funding, and Domestic Reforms*, 6 FLA. A & M U. L. REV. 109, 116 (2010) (noting that “[i]n Ghana, nobody owns real estate. Fee simple is a foreign concept. Vast stretches of land are soaked with spiritual and religious properties. A bunch belongs to the President of the Republic. The rest belongs to national tribes. Uncultivated and unoccupied land belongs to stools (tribal trusts managed by chiefs). Strangers can hold stool land and cultivate some, provided they pay the chiefs one third of their harvested crop.” (citations omitted)).

266. Ryan Bubb, *States, Law, and Property Rights in West Africa* 3 (March 21, 2011) (finding that de facto property rights on either side of the border between Ghana and Côte d’Ivoire were extremely similar, especially in comparison with the property rights in different regions), available at [http://www.law.stanford.edu/display/images/dynamic/events\\_media/States\\_Law\\_and\\_Property\\_Rights\\_in\\_West\\_Africa.pdf](http://www.law.stanford.edu/display/images/dynamic/events_media/States_Law_and_Property_Rights_in_West_Africa.pdf) (last visited June 24, 2012).

267. JOIREMAN, *supra* note 254, at 113.

268. Joseph Blocher, *Note, Building on Custom: Land Tenure Policy and Economic Development in Ghana*, 9 YALE HUM. RTS. & DEV. L.J. 166 (2006).

a communal viewpoint.<sup>269</sup> Not surprisingly, with this heavy influence, the Government of Ghana (“GOG”) has incorporated customary law into the Ghanaian land regime.<sup>270</sup>

Customary law can be viewed as both a positive and negative attribute to the land rights of its constituents. As a flexible and dynamic system, customary law is beneficial to environmental conservation efforts in Africa.<sup>271</sup> However, the use of customary law has emphasized the differences in regional land systems across Ghana, especially those governed by statute and those governed by customary law.<sup>272</sup> Perhaps most problematically, customary law is unwritten, and is “defined by those who administer it, often for their own benefit”; leading to the enrichment of those few who possess the authority to interpret law and make land transactions.<sup>273</sup> This has resulted in outbreaks of violence for these positions of power in customary law systems.<sup>274</sup> This violence is further perpetuated by different ethnic groups seeking land ownership. The statutory and constitutional regime of Ghana is founded on notions of equality across the entire citizenship of Ghana, whereas customary law merely “was formed to organize and control ethnic groups; it is rooted in place and ethos.” Customary law therefore favors those with some form of ties to the community, disadvantaging and prejudicing land ownership among poorer or migrant classes in Ghana.<sup>275</sup> The mixture of all of these competing influences has resulted in difficulty in the enforcement of land rights in Ghana, particularly among the poorer classes.<sup>276</sup>

In addition to the challenge of a customary law system, Ghana has many practical problems with its statutory and constitutional law for managing property, particularly land. Reported problems include: ineffective land administration, indeterminate boundaries of land, inadequate land security, land racketeering.<sup>277</sup> “[L]and records can be incomplete or non-existent and, therefore, clear title may be

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269. See Bubb, *supra* note 266, at 3.

270. See *id.*

271. JOIREMAN, *supra* note 254, at 41.

272. *Id.* at 42.

273. *Id.* at 40.

274. *Id.* at 42 (stating that “[i]n 2008, struggles over succession in a Ghanaian chieftainship resulted in 20 deaths as well as a greater number of wounded people.”).

275. *Id.* at 43.

276. Sarpong, *supra* note 265, at 5.

277. *Id.*

impossible to establish.”<sup>278</sup> The Ghanaian judiciary, due to resource constraints and inefficiencies, is slow and ineffective at enforcing decisions,<sup>279</sup> and has “not been given, nor do they consider that they need a precise definition of customary law” and instead generalize customary law.<sup>280</sup> However, “[t]he most telling evidence of [Ghana’s] statutory land law’s failure is the fact that most people ignore it whenever possible.”<sup>281</sup>

In light of the institutional shortcomings of the Ghanaian property regime, many landowners in contemporary Ghana instead protect their property privately, through the use of “Land Guards.” Land Guards are simply individuals or groups of individuals—often former security or police officials—who are paid by landowners to protect their land.<sup>282</sup> Land Guards protect land from encroachment by squatters and trespassers—often through the illegal use or threat of force.<sup>283</sup> Despite its illegality, the use of force is considered “critical” to the Land Guards’ ability to protect the landowners’ property interest, yet there have been numerous reports of Land Guards using force against police, citizens, and even the Land Guards of neighbors.<sup>284</sup> More problematically, some citizens with competing claims to land will sometimes hire Land Guards to protect their disputed land—Land Guards don’t care who the rightful owner of the land is, but who is paying them.<sup>285</sup> Despite these problems, public opinion in Ghana is split on Land Guards: most people consider them necessary to the protection of land claims, yet they are also considered a threat to local governments, and the well-being of the nation.<sup>286</sup>

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278. U.S. Dep’t of State, Bureau of Economic, Energy and Business Affairs, 2011 Investment Climate Statement—Ghana, <http://www.state.gov/e/eb/rls/othr/ics/2011/157283.htm> (last visited June 24, 2012). See also Sarpong, *supra* note 265, at 5 (noting that “several groups are affected by land tenure . . . stool who have customary freehold but not written agreement confirming their interest in the land; women, whose rights are usually secondary to those of their husbands, fathers, brothers or sons; and migrants without firm written claims to land.”).

279. Heritage Foundation, Ghana, in 2011 Index of Economic Freedom, *available at* <http://www.heritage.org/index/Country/Ghana> (last visited June 24, 2012).

280. Blocher, *supra* note 268, at 166 (citing GORDON WOODMAN, CUSTOMARY LAND LAW IN THE GHANAIAN COURTS 40 (1996)).

281. *Id.* at 189.

282. JOIREMAN, *supra* note 254, at 115.

283. *Id.*

284. *Id.*

285. *Id.* at 112.

286. *Id.* at 116–18 (explaining that police in Ghana are traditionally thought of as corrupt and untrustworthy, although the Government has begun anti-corruption programs, especially among the police force. Regardless, it will take time to restore the public trust.).

However, even with the difficulties in the Ghanaian property regime, the GOG has prioritized attracting foreign investment through the use of domestic and international tools. To attract international investment, the GOG has passed and enforced a number of investment laws aimed at protecting foreign investment from expropriation. Although there have not been any recent cases of expropriations by the GOG, there have been a few instances where foreign investors have either filed for international arbitration against the GOG or agreed to sell investments to the GOG.<sup>287</sup> Domestically, the GOG has guaranteed the protection of property rights in their Constitution.

The current Ghanaian Constitution guarantees the private ownership of land, and “[e]very person has the right to own property either alone or in association with others. . . .”<sup>288</sup> The government may only interfere with this right “in accordance with land and as may be necessary in a free and democratic society for public safety or the economic well-being of the county, for the protection of health or morals, for the prevention of disorder or crime or for the protection of the rights or freedoms of others.”<sup>289</sup> The 1992 constitutional guarantees on property rights are meant to act as limits on previous legislation which empowered the GOG’s use of eminent domain. The GOG still maintains power to take land under a variety of previous legislation however, including the 1962 Administration of Lands Act, the 1962 State Lands Act, the 1963 Lands Act and the 1965 Public Conveyance Act, so long as the taking complies with the constitutional requirements of a public purpose and compensation.<sup>290</sup>

### *1. Public Purpose*

Under Section 20(1), property cannot be taken by the government unless two conditions are satisfied:

- (a) the taking of possession or acquisition is necessary in the interest of defence, public safety, public order, public morality, public health, town and country planning or the development or

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287. U.S. Dep’t of State, Bureau of Economic, Energy and Business Affairs, 2011 Investment Climate Statement—Ghana, <http://www.state.gov/e/eb/rls/othr/ics/2011/157283.htm> (last visited June 24, 2012).

288. GHANA CONST. (1992) § 18(1).

289. *Id.* § 18(2).

290. Sarpong, *supra* note 265, at 5.

utilization of property in such a manner as to promote the public benefit; and  
(b) the necessity for the acquisition is clearly stated and is such as to provide reasonable justification for causing any hardship that may result to any person who has an interest in or right over the property.

Section 20(1)(a) gives detailed, and rather broad language for governmental justifications which would be sufficient for a “public purpose” for the government to use its eminent domain power. If the GOG does not end up using the land in the public purpose, the former landowner is given the first option to purchase the property for the price of the original compensation or an amount which is “commensurate with the value of the property at the time of the reacquisition.”<sup>291</sup>

## 2. Compensation

Compensation is addressed in section 20(2) which provides that the GOG can only use its eminent domain power if done under a law which provides for “(a) the prompt payment of fair and adequate compensation; and (b) a right of access to the High Court by any person who has an interest in or right over the property. . . .” Further, under 20(3), if anyone is displaced by the taking, the GOG needs to “resettle the displaced inhabitants on a suitable alternative land with due regard for their economic well-being and social and cultural values.”<sup>292</sup>

These provisions were adopted in response to the pre-constitutional state of takings in Ghana where no compensation was paid.<sup>293</sup> However, there is still concern that some takings have continued to occur in Ghana without any compensation being provided.<sup>294</sup> Further, there is concern regarding the GOG’s use of its eminent domain power, specifically in the mineral rich mine towns.<sup>295</sup> It has been reported that

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291. GHANA CONST. (1992) § 20(6).

292. *Id.* § 20(3).

293. Sarpong, *supra* note 265, at 4–5.

294. *Id.* at 5.

295. Adjei Agyei-Baah, *Govts and Power of Eminent Domain: An Infringement of Peoples Rights*, Ghanaian CHRON. (Aug. 13, 2009), available at <http://www.modernghana.com/blogs/232694/31/govts-and-power-of-eminent-domain-an-infringement-.html> (last visited June 24, 2012). See also GHANA CONST. (1992) § 257(6) (stating that “[e]very mineral in its natural state in, under or upon any land in Ghana, rivers, streams, water courses throughout Ghana, the exclusive economic zone and any area covered by the territorial sea or continental shelf is property

almost 80% of those affected by the GOG's use of eminent domain were dissatisfied with the rendered compensation given.<sup>296</sup>

### III. DOMESTIC FACTORS AFFECTING PROPERTY RIGHTS

The five nations highlighted above are each at different points in their development and each face different and significant challenges in the enforcement and implementation of their property rights regime. The unique domestic and international characteristics of these nations, however, may influence their approach to property rights. Some of these factors may be idiosyncratic, and others may be applicable to other nations throughout the world. It is interesting, and perhaps a point worthy of further research, when these factors—however idiosyncratic they may seem—appear to affect other countries in surprising ways. Based on only the five nations briefly described above, a number of factors appear to influence their property rights regime, including the application and enforcement of property rights, the constitutional guarantee of compensation for takings, the impact of each country's judiciary, any stated governmental land policies, the history and tradition of that country or the people who reside there, as well as the social attitude towards property rights. Interestingly some of these factors have cross-national significance, affecting a number of nations in different ways; some factors, on the other hand, may be completely idiosyncratic. These factors are in no way to be considered exhaustive—even among the five countries discussed above—as they are in many ways a subjective observation based on a small sample size.

#### *A. The Application and Enforcement of Property Rights*

The application and enforcement of property rights is perhaps the broadest of these factors, and in some cases, the least transparent. Each of these countries has their own prerogatives and policies for spurring economic growth through both domestic and international sources. Each of these nations has done this through the protection of property in different ways, often faced with the practical realities of the political systems they have inherited.

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of the Republic of Ghana and shall be vested in the President on behalf of, and in trust for the people of Ghana.”).

296. Agyei-Baah, *supra* note 295 (citations omitted).



For instance, the consistency of a compensation policy has been an issue of contention in both South Africa and India. In South Africa the government is prone to pay fair market value for any expropriated property because of the variety of pressures it faces, including the amount of time litigation takes in the country, domestic and international political pressure, and even things as trivial as the frequently inaccurate valuation of property by property assessors.<sup>297</sup> In India, its government is prone to pay well below market value because of the lack of oversight in the takings process, the amount of discretion government officials are given in determining compensation, as well as the futility of a landowner engaging in a meaningful appeal.<sup>298</sup> Singapore, on the other hand, operates in a society where it is able to not only omit any constitutional guarantee, but where it is usually statutorily required to pay less than fair market value. However, the effectiveness of *ex gratia* payments to placate former landowners is certainly open to interpretation and further research.

On the other end of the spectrum, in Ghana the governmental shortcomings in the application and enforcement of private property rights at any level has been so profound it has spurred its own industry. The incomplete reach of the government, along with an ineffective judiciary, has led to the phenomena of many landowners paying for Land Guards to prevent encroachment and has put landowners in the uncomfortable position of paying for this necessary service, despite the social unrest they cause.<sup>299</sup> Additionally, the legacy of customary law continues to transcend the population, further complicating property ownership.

### *B. Compensational Guarantee in the Constitution*

The promise of compensation in a constitution was a similarly transcendent issue across a number of the countries examined. Three of the countries discussed have had the protection of their property rights influenced by the governmental decision of whether or not to guarantee the right to compensation in their constitutions. This has often been tied to that country's concept of what a "public purpose" should include. For example, Singapore purposefully left a property clause out of their Constitution because of the belief that leaving out

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297. See *supra* notes 116–26 and accompanying text.

298. See *supra* notes 166–74 and accompanying text.

299. See *supra* notes 286–90 and accompanying text.

compensation was in the best interest of the small country.<sup>300</sup> The government had a simple fear of the escalating costs associated with the constitutional guarantee to compensation<sup>301</sup> as well as concern with private landowners being unjustly enriched by governmental infrastructure development which was essential to the tiny nation.<sup>302</sup>

Singapore's concern over the compensation clause appears to be somewhat vindicated by the Indian experience with their property clause. Each was concerned over spurring efficient growth in their country, and India's guarantee of property rights arguably obstructed its ability to take as many meaningful steps in development as it would have liked.

Ghana, on the other hand, consciously sought to include the guarantee of compensation in its recent Constitution in order to address the lack of compensation which originally characterized its takings law. The new Ghanaian Constitution went even further, including a provision that required displaced residents to be resettled on land which considers "their economic well-being and social and cultural values."<sup>303</sup>

### *C. Judicial Impacts*

The role of the judiciary can significantly influence the strength of property rights protection. The judiciary, in most of the nations examined, has impacted the development of property rights, even when, in some cases, they can no longer reach many issues surrounding the right to property.

The most well-known example occurred in India, where the courts' prolific attempts at championing the right to property eventually led to the legislature shutting them out of the property arena by amending the constitution.<sup>304</sup>

In other nations, like Singapore, where the judiciary's influence on property rights has been restricted, the judiciary has been largely compliant with the government, even when called upon to give their opinion. The Singaporean judiciary's accommodating nature is probably surprising to many American readers, as the Singaporean government

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300. Chew et al., *supra* note 211, at 170.

301. Singapore Parliamentary Debates, (22 June 1966) vol. 25, col. 1051.

302. Singapore Parliamentary Debates, Official Report (22 June 1966) vol. 25, col. 133 (EX Barker, Minister for Law and National Development).

303. GHANA CONST. (1992) § 20(3).

304. See *supra* notes 136–47 and accompanying text.

makes extensive use of its eminent domain power.<sup>305</sup> Still in other nations, like South Africa, the courts have, for the most part, been on the same page as the legislature, tempering the property rights afforded to their citizens with the important land reform policy there.<sup>306</sup>

Even in countries where the judiciary lacks many resources and is largely inaccessible to much of the population, it still affects property rights. For instance, in Ghana, the population's reliance on Land Guards and customary law reflects the efficiencies of the judicial system.

#### *D. Government Land Policy*

Countries that had land policies often (unsurprisingly) saw these policies impact all of the property rights of that country. The rationale behind these land policies were not always the same. For some, it was focused on post-colonial social justice; for others, economic development and smart-growth were at the forefront of the land policy. The governments of four highlighted counties had an overt land policy: two based on social and economic reform through land distribution (Chile, India and South Africa) and the other largely focused on economic development (Singapore).

Of all the factors, a land reform policy is perhaps the most polarizing topic among the populace of the respective countries examined. As demonstrated through the South African, Chilean and Indian experiences, the constitutional debate surrounding property rights in these countries led to their modern concept of property.

Interestingly, South Africa and India, two nations with similar land reform policies and goals, each saw the constitutional protection of their property rights go in completely opposite ways. South Africa, a country concerned with shedding the shadow of Apartheid, framed property not only as a right but a social obligation. To avoid being tied to the legacy of Apartheid, they went further, giving a broad and detailed treatment to their property provision, making

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305. *Teng Fuh Holdings v. Collector of Land Revenue*, 2006-3 SING. L. REP. 507, 523-24 (Sing. High Ct.). Further, the Singaporean judiciary, like most Asian-Pacific countries, does not even recognize regulatory takings. See Chen, *supra* note 213, at 12 (citing *TAKING LAND: COMPULSORY PURCHASE AND REGULATION IN ASIAN-PACIFIC COUNTRIES* 4 (Tsuyoshi Kotaka & David L. Callies eds., 2002) (noting that Japan and Korea are the only Asian Pacific nations which have doctrine similar to regulatory takings)).

306. *First National Bank of SA Ltd. t/a Wesbank v. Commissioner*, 2002 (4) SA 768 (CC).

sure that a “public purpose” was defined to include the land reform policy.<sup>307</sup> India, although similarly devoted to a land reform policy, eventually ended up removing the guarantee of property rights from their Constitution. Already nervous about including a property rights guarantee because of their desire to implement land reform, the original Indian Constitution defined property as a fundamental right only because the Prime Minister at the time had indicated to the legislature that a property guarantee would not interfere with their land reform policy.<sup>308</sup> However, when the judiciary began to strike down land reform legislation based on the property clause of the Constitution, the legislature eventually removed property as a fundamental right, and stripped it down to the bare-bones constitutional provisions that exist today.<sup>309</sup>

Similarly, in Chile, land reform was discussed during constitutional debates. The Chilean government and people had taken issue with the large estates of land ownership throughout the country in its early days. This was among the concerns which drove Chile to include the “social function” in its property provision, and similarly gave future governments the ability to engage in widespread land and agrarian reform in the 1960s.

Singapore, on the other hand, was only interested in a land use policy that would ensure its rapid development. Like India, Singapore avoided including compensation—or a right to property at all—in its Constitution.

### *E. History and Tradition*

All nations and governments are shaped by their history and tradition which influence property rights afforded to the citizens of that country. Although relatively recent government regimes have been highlighted in this article, it has illustrated that in some cases new traditions can be borne affecting a nation’s property regime, such as in Chile; while in other cases tradition can be so engrained, it can resist any change to property rights, such as in Ghana.

In the case of Chile, although it has adopted a relatively recent “social function” obligation in property rights, this policy has continued.

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307. S. AFR. CONST. 1996 § 25(4).

308. ALEXANDER, *supra* note 71, at 50.

309. *See* INDIA CONST. art. 300A.

Despite the vast economic ideological differences controlling governments have had in Chile—Socialism to laissez faire—each has continued the historical broad “social function” clause of the Constitution.

On the other hand, in Ghana property rights have been influenced by customary law for thousands of years. Customary law appears to be so engrained that it has been a source of conflict for property rights; over 80% of Ghana has included customary law in its property rights regime.<sup>310</sup> Unfortunately, the influence of customary law in its property rights regime has still not completely melded with the current needs of a rapidly modernizing country, leading to many problems in urbanizing areas.<sup>311</sup>

Landownership can also be a source of social and economic privilege. In Indian society, landownership is a source of standing and respect.<sup>312</sup> Similarly, in Ghana landownership signals economic, political, and religious good standing.<sup>313</sup>

#### *F. The Social Obligation of Property*

Many of the countries examined in this paper have gone noticeably far in their property rights regime, establishing “an overriding obligation” on the ownership of property.<sup>314</sup> This social obligation has been a noticeable trend in constitutional law, one which arguably traces its roots to the German Basic Law.<sup>315</sup> Under the German Basic Law, or German *Grundgesetz*, property rights, as well as land use, are subject to a social obligation which balances the interests of the general population against the individual and can allow the government more broad powers to use their eminent domain power.<sup>316</sup>

For example, the Constitutions of South Africa and Chile have explicitly acknowledged the social obligation of property ownership.<sup>317</sup> Each of these clauses originated, at least in part, with the call for land

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310. JOIREMAN, *supra* note 254, at 113.

311. *See supra* notes 200–06 and accompanying text.

312. Mahalingam & Vyas, *supra* note 145, at 94–102.

313. JOIREMAN, *supra* note 254, at 34.

314. ALEXANDER, *supra* note 71, at 7.

315. *See* Mostert, *supra* note 82, at 245, 255 (citing Grundgesetz für die Bundesrepublik Deutschland, art. 14).

316. Gregory Alexander, *Property as a Fundamental Constitutional Right? The German Example*, 88 CORNELL L. REV. 733 (2003).

317. S. AFR. CONST. 1996 § 25(4); Chile Const. (1980), art. 19(24).

reform as an influential issue during the drafting of each nation's respective constitution. In South Africa in particular, the social obligation concept of German property law has been particularly influential, in both the actual constitutional text of property, as well as the developing jurisprudence of property cases in the South African Judiciary.<sup>318</sup>

Singapore, despite lacking a constitutional protection of property, appears to have somewhat taken notice of this social obligation to property, as the people and judiciary have largely been compliant with the government's broad grant of authority and extensive use of eminent domain.<sup>319</sup>

### CONCLUSION

There are many factors that influence the property rights regime in a given nation, making it difficult to conduct meaningful comparative analysis if the purpose of such inquiry is to determine whether concepts and protections may be portable from one jurisdiction to another. However, an examination not just of the words that comprise constitutional and statutory property rights protections in developing countries, but also an awareness of the domestic and international influences leading to certain protection policies, can aid practitioners in better assessing the strength and weaknesses of the not only the protections afforded but the available enforcement mechanisms and the potential for likely fiscal compensation when appropriate, to best advise clients who possess global marketplace interests. Most of all, however, property rights are a fascinating combination of social ambitions tempered by practical realities. The property rights of every country are forged from traditions that are often older than the country itself, yet are still molded to accommodate the future of a society. As the world grows smaller and practitioners face the increased pressure to be aware of the cultural influences that can shape a property regime, all must be aware that the essence of a given society's property regime is often made from a complex array of socioeconomic factors.

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318. For more detailed treatment on the social obligation of property in South African jurisprudence, see Mostert, *supra* note 82, at 255, 268.

319. See NICHOLS, *supra* note 212, at Ch. 1A, § 1C.10; Galstaun v. Attorney-General (1981) 1 M.L.J. 9 at 10, per Chua J.