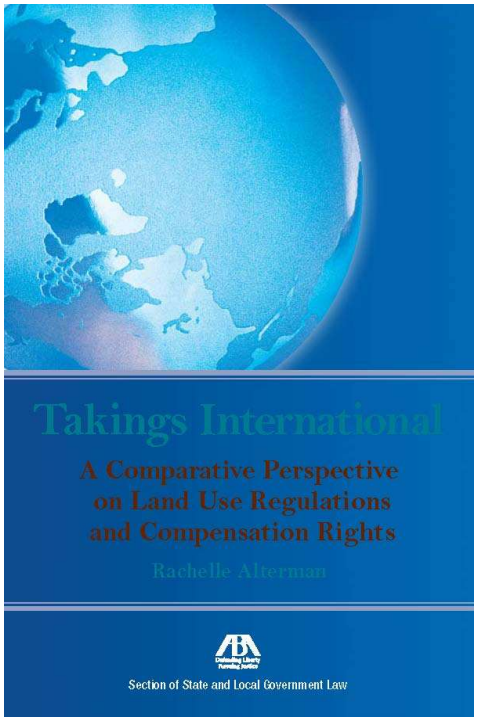

Takings International

A Comparative Perspective on Land Use Regulations and Compensation Rights

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Chapter 2

Pre-Publication Version

Chapter 2
Comparative analysis: A platform for cross-national learning

Rachelle Alterman

The laws and practices related to regulatory takings vary greatly around the world. The platform of comparative knowledge presented in this chapter will, I hope, enable cross-national sharing and learning about how various countries come to grips with one of the tough questions endemic to land use regulation everywhere: How should the negative economic consequences of regulation on property values be shared? [1] The comparative lenses provide a sense of scale and proportionality, and allow the readers to come to their own conclusions[2].

A preview conclusion for American readers is that on a comparative "scale" of compensation right, US takings law generally occupies a middle position. At the same time, the volatility of the property rights debate on regulatory takings in the USA has no parallel in the other countries.

Both sides of the property rights debate in the USA may be able to glean new concepts and ideas to support their position from the wide assortment of legal structures and doctrines found among the thirteen countries. The reports from the different countries indicate that a variety of approaches from both sides of the scale seem to "work" in practice. Those who seek a rapprochement too can identify middle-of-the road approaches that may have created a balance between property rights and the public interest without causing an unbearable financial burden on government and without retarding good planning and regulation policies. My hope is that the comparative analysis will stimulate new thinking and be able to quell some of the fire on both sides of the debate.

Analytic approach

The purpose of the comparative analysis is to present a coherent picture of the many differences in regulatory takings laws among democratic countries, as represented by the thirteen countries in this book.

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[1] This book, and this chapter, focus on the downwards effect on property values. The other side of the coin deserves a separate analysis. Some comments about this relationship were presented in Chapter 1. I showed that the commonly held assumption that the two sides of the economic effects are strongly linked, does not hold in fact in most countries.

[2] The potential usefulness of comparative research for planning policy is analyzed in: Paul Kantor and Hank V. Savitch *How to Study Comparative Urban Development Politics: A Research Note*, 29(1) INTERNATIONAL JOURNAL OF URBAN AND REGIONAL RESEARCH, 135–151 (2005); and in Pickvance *Four varieties of comparative analysis,* 16 JOURNAL OF HOUSING AND THE BUILT ENVIRONMENT: 7–28 (2001).

Comparative approach

As noted in Chapter 1, in this study, I am not guided by a normative doctrine; nor do I seek to make normative recommendations. This chapters' purpose is to systematically report about similarities and differences in current laws and practices in a large sample of countries. Hopefully, this pioneering research will provide the foundation for further comparative analysis and for a more informed debate on regulatory takings within and across countries. Perhaps a cross-national normative doctrine will emerge sometime in the future.

Comparative analysis of regulatory takings must contend with complex differences that often do not fall elegantly into coherent categories and show internal inconsistencies. Some of the findings may also seem, from a cross-national perspective, as "out of synch" with other attributes one knows about a particular country. These are the facts. The current state of comparative knowledge is very far from being able to provide "explanatory variables". In any case, my assessment is that whatever explanatory factors are to be found in the future, they will likely be anchored more in the realm of political science than in the realm of law. I shall return to this point in Chapter 3.

This comparison is written largely with American readers in mind, and so uses terminology that Americans are accustomed to. Given the hundreds[3] of scholarly papers and books on the takings issue published in the USA, I as a non-American do not purport to contribute anything new to the analysis of US law. The brief summaries on the USA were written as introductions for non-American readers and in order to place US law within the flow of the comparative discussion.

For the information on the law of the 13 jurisdictions, I have relied on the legal reporting and analysis provided by the authors of the country chapters[4]. In some cases I supplemented these with additional literature or with my own prior research on related topics. In this comparative chapter, I have tried to strike a balance between the need to discuss specific details so as to avoid "flattening out" the differences, and the need to draw a coherent and comparable picture. Not all the details of each country's laws are analyzed here, only major topics were selected for comparison. The analysis in this chapter is therefore not a substitute for legal authority for each country. And in order not to overload this chapter with the legal sources from all thirteen countries, I have not repeated all the sources here, except for direct citations. For the sources and detailed analysis, see the relevant country chapter.

Comparative analysis needs structure. Wanting to avoid an *a-priori* normative structure, I relied on an "inductive" approach to identify useful dimensions for comparison. The most important dimension to emerge from the thirteen country chapters is the broadness of compensation rights that the laws of each country grant for three major types of regulatory takings (defined below). I was able to create a rough rank-order of the countries (the same order that guided the order of the country chapters).

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[3] This is a conservative estimate. A Lexis Nexis search with both the terms "regulatory takings" and "land use" yields over a thousand items – beyond the engine's tolerance.

[4] A distinction should also be made between the descriptive legal analysis in the country chapters and prescriptive-critical views made by some of the authors (encouraged by my guidelines). The latter views may not reflect a consensual view in a particulate country.

The countries were grouped into three clusters, representing three ordinal degrees of compensation rights. Within each cluster too, the countries are analyzed according to a rough rank-order:

- Cluster 1: minimal compensation rights - Canada, Australia, the UK, France and Greece
- Cluster 2: moderate or ambiguous compensation rights - Finland, Austria and The USA
- Cluster 3: extensive compensation rights - Poland, Germany, Sweden, Israel and the Netherlands.

Three main types of regulatory takings

The reports from the thirteen countries indicated that a useful way to organize the comparative analysis would be according to three main types of regulatory takings. I call these:

- major takings
- partial takings due to direct injuries
- partial takings due to indirect injuries

The first two are well know to American readers, the third less known. "Major taking" refers to situations where regulation extinguishes all or nearly all of the property's value. The laws of all the countries in this book address this type of taking in some way. In US jurisprudence this is known as a "categorical" or "*per se*" taking[5] (US case law also recognizes a second type of categorical taking – a physical taking – but this is not relevant to this book[6]). Other countries have different terms to denote a drastic decline in property value due to regulation. In Canada, a major taking is sometimes called "constructive expropriation[7]" or "de facto taking";[8] in Greece it has been called "de facto expropriation" (as literally translated into English), in Poland - "planning expropriation", and in Switzerland it is called "material expropriation"[9]. For the comparative analysis, I shall use a neutral term, a *"major taking"* (or a *major injury)* as distinguished from a "*partial taking*" (or a *partial injury).* (I have avoided the term "full taking" in order not to confuse with a physical taking).

Because the law of several countries including the USA draws a clear distinction between categorical and partial takings, I have kept this distinction both in the guidelines to the

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[5] See the chapter on the USA by Roberts and any text on takings in an American land use law, for example: DAVID L. CALLIES, ROBERT H. FREILICH, AND THOMAS E. ROBERT, CASES AND MATERIAL ON LAND USE 334 (4th ed., 2004.).

[6] American jurisprudence draws a clear distinction between regulatory and physical takings and different principles apply. See Thomas E. Roberts, Tahoe-Sierra and Takings Law IN TAKING SIDES ON TAKINGS ISSUES: THE IMPACT OF TAHOE –SIERRA. 5-14 (Thomas E. Roberts ed., 2003)_..

[7] See Raymong E. Young, *Canadian Law of Constructive Expropriation.* 68 SASKATCHWAN LAW REVIEW 345 (2005)The Canadian Supreme Court too has used the term "de facto expropriation"

8. Canadian Pacific Railway Co. v. Vancouver (City), [2006] 1 S.C.R. 227, *available at* http://scc.lexum.umontreal.ca/en/2006/2006scc5/2006scc5.pdf.

[9] Switzerland is not inluded in this book. See Enrico Riva *Regulatory takings in Amreican law and "material expropriation" in Swissh law – a comparison of the applicable standard, in* COMPARATIVE URBAN PLANNING LAW, 167-173 (James A. Kushner ed., 2003)(1984)..

contributing authors and in this comparative chapter. Understanding the law on major takings is important for understanding the other two, more contentious, types of takings.

The second and third types of takings are both "partial", referring to laws that entitle landowners to compensation when property values suffer only a small or moderate decline. Several countries in this book (not including the USA) recognize takings caused not only by direct injuries but also by indirect ones. There is much less convergence among the countries where partial injuries. The degree of compensation rights granted for partial injuries is therefore the "litmus test" for the rank order of countries along the "scale" of compensation rights.

Direct injuries are caused by regulatory decisions that apply to the same plot of land that suffers the depreciation. This is the usual conception of a regulatory taking. Indirect injuries may be caused by regulatory decisions that apply to *other* plots of land in the vicinity (the precise geographic definition varies). Indirect injuries may arise from anticipated or actual negative externalities that cause depreciation in value (this type of injury is usually partial). Some types of damages from externalities may also be actionable under the general nuisance law in each country. In this book we are interested only in laws that create special causes of action for indirect land use injuries beyond the general private law of damages.

More countries grant compensation rights for direct injuries than for indirect ones, but this does not indicate that indirect injuries are necessarily a less important issue. For landowners, indirect injuries may be substantial. They may also raise questions of distributive justice. For government agencies, extensive compensation rights for indirect injuries can lead to unbearable burdens of claims. In determining the rank-order of the countries I therefore took into account not only the law on direct injuries but also on indirect ones.

Before delving into the comparative analysis of each of the three types of takings, it is appropriate to begin with a brief review the constitutional framework in each of the countries. This chapter will thus be divided into four major sections, representing four topics for comparison: 1) constitutional protection of property; 2) major takings (where all or most economic value is extinguished); 3) partial direct takings; and 4) partial indirect takings.

Under each of the four topics I first present a comparative overview, and then discuss the laws of each country according to the order of clusters. Readers who are not interested in the discussion of each of the countries under each topic, can select the four comparative overviews and the final conclusions. The conclusions are presented in Chapter 3, with a special view to Americans engaged in the property rights debate.

Constitutional/ human rights protection of property rights

The first step in the comparative analysis is to ask whether property rights are constitutionally protected in each of the countries. In all the countries except the USA[10] there is also statutory law

[10] A small minority of US states have enacted statutes that grant statutory causes of action for a limited set of partial takings. These statues have had a limited effect – excepting Measure 37 in Oregon until it was repealed. See the US chapter by Roberts and other literature sources, such as: Joni Armstrong Coffey. *High Hopes, Hollow Harvest: State Remedies for Partial Regulatory Takings*. 39(3)THE URBAN LAWYER 619-632 (2007)[; Stacy M. White , *State Property Rights Laws: Recent Impacts and Future Implications*. LAND USE LAW AND ZONING DIGEST (July: 3-9, 2000)

that regulates takings and compensation, whether or not property rights are constitutionalized. The question here is whether one can discern a relationship between the degree of constitutional protection of property and the contents of statutory law and its interpretation by the courts.

The brief survey presented below does not purport to be an in-depth comparative analysis of constitutional property law. Others have done so, most notably Alexander in a 2006 book devoted to four countries (the USA, South Africa, Germany and to a lesser extent, Canada)[11].

Comparative overview

A few comparative observations are followed by a closer look at the language of the national constitutions of each country. This section focuses on domestic law and not on international law[12]. However, due to the large number of European countries in this volume – nine out of thirteen – and the growing importance of the European Convention on Human Rights and Fundamental Freedoms (ECHR), I have asked each of the European authors to discuss its impact on domestic law. A brief introduction to the ECHR protection of property is presented below.

The comparative analysis shows that the large differences among the thirteen countries in the law of regulatory takings can be only partially attributed to different degrees of constitutional protection of property. The constitutional protection of property apparently allows a wide margin of tolerance not only for differences in the law on regulatory takings, but even on expropriation (condemnation) law, as Alexander has shown[13].

Among the countries where there is a clear link between the constitutional standing of property and regulatory takings law are the three countries where property is not constitutionalized. These countries are Canada, the UK (until 1998) and Australia (the latter's constitutional property protection is indirect and weak). The laws of these three countries also grant minimal compensation rights for regulatory injuries. The reverse, however, does not hold: France does have a legacy of constitutional protection of property, but its laws offer a very low degree of compensation rights for regulatory injuries. On the opposite side of the spectrum is Israel, which grants landowners the highest or second-highest degree of compensation rights. The major case law that created the broad compensation rights was delivered before constitutional protection of property was enacted in 1992.

The constitutions of ten among the countries in the set currently protect property, but there is little similarity in their laws on regulatory takings. These cover the full spectrum of degrees of compensation rights. France, Greece and Finland grant only minimal or very moderate compensation rights for regulatory takings, yet the constitutions of these countries do protect property. At the other end of the spectrum are the five countries with extensive compensation rights (Poland, Germany, Sweden, Israel and The Netherlands). One would not be able to predict this based on differences in the language of their constitutional protection of property.

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[11] GREGORY S. ALEXANDER. THE GLOBAL DEBATE OVER CONSTITUTIONAL PROPERTY: LESSONS FOR AMERICAN TAKINGS JURISPRUDENCE (Chicago University Press, 2006). Donna R. *Christie A Tale of Three Takings: Taking Analysis in Land Use Regulation in the United States, Australia and Canada*. 32(2) BROOKLYN JOURNAL OF INTERNATIONAL LAW 345-403 (2007)[.

[12] For an analysis of regulatory takings in international law see: Jon A. Stanley *Comment: Keeping big brother out of our backyard: regulatory takings as defined in international law and compared to American Fifth Amendment jurisprudence*. 15 EMORY INT'L L. REV. 349-389 (2001).

[13] Alexander, *supra* note 11

The following subsections present a closer look at the constitutional provisions of the countries in each of the three clusters. But first, a brief introduction to the ECHR, that provides an additional constitutional layer to nine of the thirteen countries.

The protection of property under the European Convention

The European Convention for the Protection of Human Rights and Fundamental Freedoms (sometime abbreviated ECHR) was prepared by the Council of Europe and signed in Rome in1950[14]. Also established was the European Court of Human Rights (also abbreviated ECHR). All forty seven members of the Council have by now ratified the Convention. The contracting States are bound to secure to everyone within their jurisdiction the rights and freedoms protected by the Convention. The Convention gives individuals as well as states the right to petition the Court. Its judgment in any particular case is binding on the States which are parties to the dispute[15]. The national authorities are expected to provide effective remedies to anyone whose rights are violated[16].

The protection of property is clearly established under Article 1 of the First Protocol to the ECHR:

> *"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No 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.*
>
> *The preceding provisions shall not, in any way, impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."*[17]

Other articles of the ECHR have also been applied in deciding takings cases, especially Article 8 (protecting private life, family life, and the home). A detailed analysis of ECHR jurisprudence is beyond the scope of this book[18], except to note that several decisions that applied Article 1 did relate, directly or indirectly, to regulatory takings. Indeed, the first case in which the ECHR found a violation of the First Protocol was a regulatory taking case against Sweden, decided in

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[14] The full text of the ECHR is available on: http://www.echr.coe.int/nr/rdonlyres/d5cc24a7-dc13-4318-b457-5c9014916d7a/0/englishanglais.pdf

[15] MARY ANN GLENDON, PAOLO G. CAROZZA AND COLIN B. PICKER, : European Human Rights Law , Chapter 14 in COMPARATIVE LEGAL TRADITIONS: TEXT, MATERIALS AND CASES OF WESTERN LAW, Thomson-West – American Casebook Series, 2007 at 747.

[16] Article 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms. *Id*

17. Protocol 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11, art. 1, Mar. 20, 1952, Europe. T.S. No. 9, *available at* http://conventions.coe.int/treaty/en/Treaties/Html/009.htm.

[18] A detailed analysis of this body of jurisprudence is beyond the scope of the present paper. For a summary of ECHR decisions pertaining to the right to property, , see AIDA GRGIÆ, ZVONIMIR MATAGA, MATIJA LONGAR AND ANA VILFAN, THE COUNCIL OF EUROPE HUMAN RIGHTS HANDBOOKS SERIES, No. 10, (2007). Available at: http://hrls.echr.coe.int/uhtbin/cgisirsi.exe/TzQterbVHc/COURTLIB/216390020/9 For an analysis of the tests developed by ECHR jurisprudence regarding property protection see Hendrik D. Ploeger and Danielle A. Groetelaers *The Importance of the Fundamental Right to Property for the Practice of Planning: An Introduction to the Case Law of the European Court of Human Rights on Article 1, Protocol 1,* 15 (10) EUROPEAN PLANNING STUDIES 1423-1438 (2007).

1982[19]. This decision led to the enactment of a new Swedish planning act in 1987 which entrenched compensation rights for both major and partial takings.

Several of the countries in this book (Sweden, Greece, Poland, Finland) have been held in violation for regulatory takings cases, either directly by the ECHR, or indirectly by domestic courts that cited the ECHR (UK, France). Most of these cases relate to major takings or to overly-long temporary freezes. On the basis of ECHR jurisprudence, a few countries, including Sweden and Finland, introduced changes in their statutory law, and in some countries, including France and the UK, case law has been influenced, as reported by the authors. By contrast, the authors of the Greek, Polish and Austrian chapters comment that their country's courts have not paid much heed to the ECHR decisions.

The comparative analysis shows that the impact of ECHR is sometimes in the *perception* of what its jurisprudence implies. The authors of all the European countries except Poland and Greece report that the perception in their country is that their takings law is in compliance with the ECHR – regardless of whether that law grants broad or narrow compensation rights. On the one extreme is France, with an explicit statutory clause denying compensation even for major regulatory takings, and several among Austria's nine states where all that a landowner may receive even where a major taking occurs is indemnification of some expenditure on services. On the other extreme are Germany, post-1987 Sweden and the Netherlands. In these countries, the laws grant compensation rights even for partial takings of small magnitudes and are not in violation of the ECHR. Yet, paradoxically, in the Netherlands – the country with the broader compensation rights – there is an exaggerated perception of what ECHR jurisprudence implies. In 2007-8, when the Dutch government proposed to revise the law to introduce a very modest threshold for partial injuries, the Parliament decided to apply the threshold to indirect injuries only. The reason was that legislators were concerned that if such a threshold were applied to direct injuries, this might be in breach of the property protection clause of the ECHR.

There are two conclusions about the impact of the ECHR on the laws of the nine European countries. The first conclusion is that the ECHR's interpretation of the property protection clause has shown a high degree of tolerance for national variations in regulatory takings law. So, after decades of ECHR jurisprudence, the differences in approaches to regulatory takings among the European countries have remained almost as great as they were in the past. The second conclusion is that ECHR decisions increasingly do place some limits on the more extreme expressions of the no-compensation side of the scale. The laws of France, Greece several Austrian states and perhaps also Finland may in the future have to revise some of their statutory or case law on *major* takings.

Let's take a closer look at the constitutional protection of property in each of the countries, moving from those with minimal compensation rights to those with maximal rights.

Constitutional property protection: Cluster 1 Countries:

The law on regulatory takings in the countries in this cluster - Canada, Australia, the UK, France and Greece - grants only minimal or no compensation rights. There are however significant differences among these countries in the language of the constitutional protection of property.

[19] *Sporrong and Lönnroth v. Sweden* .7151/75;7152/75 [1982] ECHR 5 (23 September 1982).

The first three countries in this cluster are members of the Commonwealth. Two non-Commonwealth countries – France and Greece - are also in this cluster. The five countries have very different approaches to constitutional protection of property.

Canada ranks as offering the lowest degree of compensation rights among the thirteen countries. As Schwartz and Buechert note in their chapter, Canadian scholarly writing and jurisprudence frequently contrasts Canadian law from the American "regulatory takings" doctrine[20]. Unlike most other countries in this book, in Canada there is no constitutional protection of property. The Canadian Bill of Rights of 1960, which applies only to federal government actions, says only that measures infringing on property rights must satisfy rules of procedural, not substantive, fairness. The drafters of the 1982 Canadian Charter of Rights and Freedoms intentionally refrained from recognizing property rights, in many cases for reasons specific to their own provincial economic interests, but also because many of the drafters feared that Canadian courts would use such rights to block social welfare legislation[21]. Most provinces have statutory law that pertains to regulatory takings in some way. Despite the absence of a constitutional protection some of these statutes grant somewhat more generous protection for regulatory takings than the constitutional rights. Generally, however, in the absence of explicit or implied right to compensation in the legislation, private owners are not protected from government takings.

The ideological position that underpins the absence of constitutional protection for property in Canada is well mirrored in Canadian law regarding regulatory takings. As the chapter's authors and others[22] have noted, the only impetus towards somewhat greater compensation rights has come from Canada's external obligations.

The second Commonwealth country is **Australia.** Its Constitution does refer to property but provides very minimal protection. Section 51 of the Australian *Constitution* of 1900 says*:*

"The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:…(xxxi) The acquisition of property on just terms from any state or person for any purpose in respect of which the Parliament has power to make laws."[23]

As explained by the author of the Australian chapter and by others[24], the language of the Constitution provides very weak protection of property. Sheehan explains that even where

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[20] See also: Young, *supra* note 7,; David Schneiderman NAFTA's Takings Rule: *American Constitutionalism Comes to Canada* 46 U.T.L.J. 499 at 501(1996). Cited in Russell Brown, Legal Incoherence and the Extra-Constitutional law of Regulatory Takings: The Canadian Experience (February 2008) (Unpublished paper presented at the Second Annual Conference of the International Academic Association of Planning, Law and Property Rights, Warsaw**.**

[21] In addition to the authors of the Canada chapter this point is also noted by Christie, , *supra* note 11; Philip W. Augustine *Protection of the Right to Property Under the Canadian Charter of Rights and Freedoms,* 18 OTTAWA L. REV. 55, 67 (1986),; Richard W. Bauman, *Property Rights in the Canadian Constitutional Context*, 8 S.A.J.H.R. 344 (1992); and Jean McLean, *The Implications of Entrenching Property Rights in Section 7 of the Charter of Rights*, 26 *Alta. L. REV*. 547 (1988).

[22] Brown, , *supra* note 20,.

[23] An Act to Constitute the Commonwealth of Australia, 1900. Available in : http://www.aph.gov.au/SEnate/general/constitution/par5cha1.htm

[24] In her comparative study of Australia, Canada and the US, Donna Christie says about the Australian Constitution's protection of property that: "Australia's constitution… contains no bill of rights, only constitutional authorization to

compulsory acquisition is concerned, the states in the Australian federation are not constitutionally bound to provide compensation on just terms (or indeed any compensation)[25]. The weak protection of property is consistent with both constitutional and statutory law on regulatory takings, which grants no compensation rights except in some types of major injuries.

The **United Kingdom** is a very different from Canada and Australia (and the USA), both constitutionally and in its statutory law on regulatory takings. Until 1998, the UK did not have a law expressly protecting human rights. In 1998 the UK enacted the Human Rights Act which broadly incorporates into UK law the rights under the European Convention. This Act therefore provides explicit protection of property, but its adoption did not bring any change in the legislation, and has had only minor impact on case law regarding regulatory takings.

Despite the absence of constitutional protection of property, since 1909, the UK has had what is probably the world's longest legislative history on planning in general and on compensation rights in particular.[26] In the early years of the 20th century, the UK that first enacted compensation rights for regulatory takings. At the same the UK parliament also set rules regarding the capture of windfalls (called "betterment"). In 1947 development rights were abolished, and subsequently compensation rights as well, yet windfall capture continued for a few more years and was repeated, in various forms, several more times in subsequent years[27]. However, even without compensation rights, UK law ensures that property values are rarely injured by land use regulation. The "secret" lies in the special way in which development is regulated.

UK law on regulatory takings is among the few in this book with a clear doctrinal underpinning, in which the pieces do fit together into a coherent and consistent whole. A major 1947 reform of the British planning law removed all prospective development rights. A one-time compensation fund was set up to pay compensation to cover claims of all unbuilt development rights.[28] From then on, statutory plans would no longer grant development rights. Requests for development permission would be approved case by case. Thus, in the absence of a concept of development rights, the notion of compensation rights for regulatory takings became largely superfluous. However, in cases of major takings, there are compensation rights, as will be explained in the next section.

Among the countries on the European Continent, **France** is the most restrictive in the rights it grants landowners for regulatory injuries. Although the French Constitution of 1958 does not contain a property protection clause, the preamble to this document cites the 1789 Declaration of Human Rights. The Declaration famously states in Article 2:

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acquire property on just terms, buried deep in a long list of areas subject to federal government jurisdiction and regulation, and generally intended to empower government within certain limits".(Christie , *supra* note 11)..

[25] See also: Murray J. Raff, Planning law and compulsory acquisition in Australia., in TAKING LAND: COMPULSORY PURCHASE AND REGULATION IN ASIAN-PACIFIC COUNTRIES. pp. 27-74 (Tsuyoshi Kotaka and David L. Callies eds, 2002)

[26] See for example: , VICTOR MOORE. A PRACTICAL APPROACH TO PLANNING LAW 1-7 (2005); or MALCOLM GRANT URBAN PLANNING LAW , 643-647 (1982)..

[27] Malcolm Grant, *Compensation and Betterment, in* BRITISH PLANNING 62-76 (Barry Cullingworth ed., 1999); Rachelle Alterman. Land value recapture: Design and evaluation of alternative policies. Occasional Paper No. 26, Center for Human Settlements, University of British Columbia (1982).

[28] Grant *id.*

"The aim of all political association is the preservation of the natural and imprescriptible rights of man. These rights are liberty, property, security, and resistance to oppression".[29]

The highest court of France – the Conseil d'état - has ruled that this preamble brings the Declaration into the Constitution[30] and empowers the Court to strike down legislation that contradicts the Declaration. Unlike the US Constitution, the language of the French constitutional property protection does not restrict itself to situations of "takings".

However, as explained by Renard in the French chapter, the Conseil D'état (unlike the American Supreme Court) has ruled that most types of land use regulations are outside the scope of the constitutional protection of property[31]. Furthermore, France is the only country in the set where the planning statute says explicitly that "no compensation will be paid for zoning restrictions introduced by the [law], in particular… restrictions to land use, development rights, heights of buildings, etc."[32] The absence of compensation rights for land use regulations is an entrenched doctrine in France. However, a 1998 decision the Conseil d'état referred to the ECHR and decided that in very extreme cases, compensation may be granted. In addition, there are a few exceptions where statutory law grants modest compensation rights even for partial takings. So French takings law may have somewhat softened its entrenched no-compensation doctrine.

The last country in the first cluster of countries is **Greece.** Article 17 of the Greek Constitution states that

"Property is under the protection of the State; rights deriving there from, however, may not be exercised contrary to the public interest". The Constitution states further that *"no one shall be deprived of his property except for public benefit which must be fully proven… and always following full compensation…"* [33]

Greek case law has interpreted the language of the Constitution as not applicable to most types of restrictions that land-use planning may impose on property. Statutory law in Greece for the most part reflects this constitutional approach. At the same time, Greek law does grant compensation rights for special types of partial injuries. The ECHR has held that denial by Greece of compensation in some cases (mostly major takings) is in violation of the European Convention.

It is may be that, under the influence of ECHR jurisprudence, both French and Greek law on regulatory takings will evolve a somewhat more moderate approach.

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[29] This translation from the French is taken from http://www.hrcr.org/docs/frenchdec.html. The original French text is: "Le but de toute association politique est la conservation des droits naturels et imprescriptibles de l'homme. Ces droits sont la liberté, la propriété, la sûreté et la résistance à l'oppression." http://admi.net/ddhc.txt

[30] See for example: LORD IRVINE OF LAIRG, HUMAN RIGHTS, CONSTITUTIONAL LAW AND THE DEVELOPMENT OF THE ENGLISH LEGAL SYSTEM: SELECTED ESSAYS, 280 (2003). There, the author explains the role of the courts in the English system compared with the France; for full texts in English see JOHN BELL, FRENCH CONSTITUTIONAL LAW. (Clarendon Press, 1995)

[31] The major decision in this direction, delivered in 1998, is based not on French constitutional law but on the ECHR.

[32] article L 160-5 of the Code d'urbanisme as translated by Vincent Renard, the author of the chapter on France. For the French Code see: http://www.droit.org/jo/copdf/Urbanisme.pdf

[33] 1975 Syntagma [SYN] [Constitution] 17 (Greece) as revised by the parliamentary resolution of April 6th 2001 of the VIIth Revisionary Parliament.
For an English translation of the Constitution see: http://www.parliament.gr/english/politeuma/syntagma.pdf

Constitutional property protection: Cluster 2 Countries

Next on the scale are cluster two countries - Finland, Austria and the USA - whose laws grant somewhat broader compensation rights than the laws of countries in the first cluster, but leave considerable ambiguity. While all three countries have constitutional protection of property, its contents vary significantly.

In **Finland** the property clause of the Constitution states:

"Property of everyone is protected... [p]rovisions on the expropriation of property, for public needs and against full compensation, are laid down by an Act."[34]

The language of the first phrase allows for a wide range of interpretations. However, as Katri Nuuja and Kauko Viitanen explain, the Constitution is rarely applied by the courts in regulatory taking cases and there is very little case law on the issue[35]. The prevailing legal assumption is that landowners must bear restriction on property unless there is an explicit statutory provision for compensation rights.

Although the Finnish constitution does not refer explicitly to the doctrine of the "social obligation of ownership[36]", the Finnish authors emphasize the importance of this philosophy in law and practice. However, the expression of this doctrine in the law on regulatory takings is inconsistent. On the one hand, Finnish law recognizes a taking only when there is a major injury. But on the other hand, Finnish law grants compensation rights for some types of partial injuries. In the absence of significant jurisprudence on the topic, the linkages with the language of the constitution are not clear.

Austria is included in the middle cluster because among the nine states in this federal jurisdiction one finds a wide variety of degrees and formats of compensation rights, with no overarching law.

The Austrian Basic Law on the General Rights of Nationals of 1867, which is equivalent to a Bill of Rights, states that "property is inviolable". Karin Hiltgartner explains that despite the potentially broad scope of this language, the Austrian Constitutional Court has interpreted it narrowly, as not even ensuring the right to full compensation for eminent domain. (That right was finally recognized by the Court in 1972, but on the basis of the equality clause rather than the property clause.) In case of eminent domain, some of the state constitutions provide a somewhat wider scope of property protection.

Unlike in the USA, in the absence of jurisprudence on regulatory takings, one can hardly discern the influence of the Austrian constitutional canopy on state laws. The planning statutes of the nine states contain a wide array of approaches to regulatory takings. In some states compensation rights are extremely restrictive, but in other states they are broader.

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34. Suomen perustuslaki [SP] [Constitution] (731/1999) § 15 (Fin.).

[35] The authors of the Finnish chapter report that currently there are two pending cases.

[36] For an in-depth analysis of this concept see Alexander , *supra* note 51, ¶¶ 97-147; and Hanoch Dagan *The Social responsibility of ownership* 92 CORNELL L. REV. 1255-1272 (2007),.

The USA is the third country in this cluster. The Fifth Amendment to the US Constitution, so well-known to American readers, states: …. *nor shall private property be taken for public use without just compensation*[37]. Most US State constitutions have similar clauses[38].

Much of the heated debate about the "takings issue" raging among scholars and civil society groups in the USA still revolves around the correct interpretation of the "takings clause". This debate is conducted along a clear ideological demarcation line: Those "pro government" seek to interpret the takings clause as referring only or mostly to physical takings; whereas those who are "pro property rights" would like to read into the takings clause a right to compensation not only for major depreciation in property values but for minor ones as well.[39]

Although US law about regulatory takings differs in some ways from its counterparts in other countries, the language of the Constitution is not the main reason. The takings clause is not too dissimilar from the language of several other constitutions[40]. The main difference is in the role played by constitutional law - by far the strongest among the countries in this book. Unlike most countries, American takings law is still decided largely by direct application of the Constitution, usually unmediated by statutory law. The few states that have enacted "regulatory takings statutes", these mostly do not cover the broad situation of potential regulatory takings but add only a few special causes of action beyond constitutional takings law[41]. The absence of statutory law should, of course, not be attributed to the federal constitutional structure. In Canada and Australia, two other federal countries (that also happen to share the common-law legal tradition with the USA), statutory law on the state (provincial) level plays a more important role (perhaps more so in Australia than in Canada). Thus, in the absence of statutory law in the USA, after many decades of jurisprudence, there is still a high degree of uncertainty[42]. The Supreme Court has not created many "bright line" rules, preferring to leave decisions to a case by case analysis.

Constitutional property protection: Cluster 3 Countries

In this cluster of five countries, the legislators or the courts have established broad compensation rights for regulatory takings, including partial takings. What do the constitutions of these jurisdictions say about property?

The first in this cluster is **Poland,** a post-communist state. The gross infringements of property rights in the past have led to a clear framing of such rights in the 1997 Constitution. Article 64 states:

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[37] US Constitution, Amendment V (1791).

[38] PETER W. SALSICH JR. AND TIMOTHY J. TRYNIECKI. LAND USE REGULATION 1 (American Bar Association, 2003).

[39] Among the many who make this point, see DONALD L. ELLIOT A BETTER WAY TO ZONE: THE PRINCIPLES TO CREATE MORE LIVABLE CITIES 111(Island Press, 2008).

[40] A similar point is also made by Alexander, *supra* note 11 in his analysis of the constitutions of the USA, South Africa, .Germany, and to a lesser extent also Canada.

[41] Armstrong, *supra* note 10, . White, *supra* note 10

[42] Many American authors make a similar point regarding insufficient clarity and inconsistencies. See for example: David L. Callies, Robert H. Freilich and Thomas E Roberts, *supra* note 5, . See also: Edward J. Sullivan and Kelly D. Connor, *Making the Continent Safe for Investors – NAFTA and the Takings Clause of the Fifth Amendment*,. in CURRENT TRENDS AND PRACTICAL STRATEGIES IN LAND USE LAW AND ZONING, 47-83 (Patricia E. Salkin, Ed.,,2004). At p. 67 the authors argue that the degree of certainty and uniformity intended by the Federal Constitution has not been accomplished in the field of takings law.

"...Everyone shall have the right to ownership, other property rights and the right of succession. [And] everyone, on an equal basis, shall receive legal protection regarding ownership, other property rights and the right of succession". Another clause in the Polish Constitution is similar to the US Constitution's Fifth Amendment, saying that: *"expropriation may be allowed solely for public purposes and for just compensation".*[43]

Soon after the demise of communism, in 1990, the Constitutional Court interpreted this clause as covering all forms of takings, not only eminent domain. On a doctrinal level, constitutional property rights in Poland are qualified by social considerations. As the Constitutional Court has put it in a 2005 decision ".. .the social aspect of ownership is now unanimously recognized". However, as noted by Miroslaw Gdesz, there is no jurisprudence as yet to interpret "social obligations" and the notion remains largely theoretical. The social aspect of ownership is not easily visible because Polish statutory law on regulatory takings is in general, highly protective of property rights. This is indicated by the existence of a right to compensation not only for cases where no economic value is left but also for partial regulatory takings. The reason I have ranked Poland somewhat lower than the other four countries in this cluster is that the statute sets several conditions that make it somewhat more difficult for Polish landowners to win a compensation claims compared with their counterparts in the other four countries in this cluster.

The case of **Germany** is of special interest because alongside broad protection of property, the German constitution famously sets out the obligations that property entails[44]. Article 14 of the 1949 Basic Law states:
(1) "Property and the right of inheritance shall be guaranteed. Their content and limits shall be defined by the laws. (2) Property entails obligations. Its use shall also serve the public good. (3) Expropriation shall only be permissible for the public good. It may only be ordered by or pursuant to a law that determines the nature and extent of compensation. Such compensation shall be determined by establishing an equitable balance between the public interest and the interest of those affected"[45].

In view of the language about social obligation, one may have expected that German law on regulatory takings would grant only minimal compensation rights. The wording of the German Constitution does not even call for full compensation in cases of expropriation. Yet the statutory rights for compensation for regulatory injuries are rather broad, covering even miniscule partial takings. The doctrine of the "social responsibility of ownership " is perhaps expressed in the special type of time limit which is central to the German approach to regulatory takings.

Swedish law on regulatory takings bears great similarity to German law, but this is less apparent in the language of its constitutional protection of property. The property clause of the Swedish Constitution of 1974 is among the broadest in the set of countries. Section 18 speaks of

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[43] KONSTYTUCJA RZECZYPOSPOLITEJ POLSKIEJ [KRP] [CONSTITUTION OF THE REPUBLIC OF POLAND] Dz. U. of 1997, No. 78, item 483 (adopted Apr. 2, 1997) (amended Apr. 4, 2001).
[44] For an in-depth discussion of this doctrine see ALEXANDER, *supra* note 11.
[45] Grundgesetz für die Bundesrepublik Deutschland [GG] [Basic Law] May 23, 1949, Bundesgesetzblatt, Teil I [BGBl. I] at 1, as amended, art. 14 (F.R.G.).

"restrictions by the public administration" so it can be interpreted as directly applying not only to eminent domain but also to land-use regulation[46]:

"The property of every citizen is protected in such a way that no one may be compelled, by means of compulsory purchase or any other such disposition, to surrender his property... or to tolerate restriction by the public administration of the use of land or buildings, other than when necessary to satisfy urgent public interests.
Any person who is compelled to surrender property ... shall be guaranteed compensation for his loss. Such compensation shall also be guaranteed to any person whose use of land or buildings is restricted by the public administration in such a way that ongoing land use in the affected part of the property is substantially impaired or injury results which is significant in relation to the value of that part of the property concerned. Compensation shall be determined according to principles laid down in law."

In the Swedish case, the statutory law on regulatory takings well reflects the language of the constitutional property protection, and is indeed among the broadest in this book. Similarly to German law, in Sweden too the balance with social or other considerations is struck through a special type of time limit.

The two last countries in the set – Israel and the Netherlands – have extremely broad compensation rights for regulatory takings. Despite the similarities in their laws, they are totally unrelated in legal history, culture, or geography.

Israel's law about regulatory takings is ranked as somewhat less extreme than the Netherlands' but one could also argue the reverse. Israel's 1992 Basic Law: Human Dignity and Liberty seems to correlate well with the broad statutory compensation rights. Article 3 states[47]:

"There shall be no violation of the property[48] of a person."

Article 8 permits incursions onto protected rights if the incursion: *1) [Was] enacted in a law… 2) Befits the values of the State of Israel; 3) Is for a proper purpose; 4) Is of an extent no greater than necessary."*

The High Court of Justice and the Supreme Court have interpreted this protection as covering not only eminent domain, but also regulation of land use. Old statutes were "grandfathered in". New laws concerning property, including planning law, must pass the 4-pronged test to survive constitutional challenge.

However, the linkage over time between the broad language of the constitution and the extremely generous compensation rights is, in part, a legal mirage. The statute that grants compensation rights predates the Basic Law by 46 years. The main court decisions that

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[46] Regeringsformen [RF] [Constitution] 2:18 (Swed.)
[47] The Basic Law: Human Dignity and Liberty was enacted in 1992. Laws of the State of Israel. English translation can be found in: http://www.knesset.gov.il/laws/special/eng/basic3_eng.htm
[48] Although most of the land in Israel is publicly owned, leasehold tenure is defined by most laws, including planning and tax laws, as equivalent to private ownership. Leaseholders are eligible for compensation rights for regulatory takings on exactly the same terms as freehold. For more on Israel's public leasehold regime see: Rachelle Alterman, Rachelle *The Land of Leaseholds: Israel's Extensive Public Land-Ownership in an Era of Privatization*. Chapter 6 in LEASING PUBLIC LAND: POLICY DEBATES AND INTERNATIONAL EXPERIENCES115-150. (Steven C. Burassa and Yu Hung Hong eds., The Lincoln Institute of Land Policy, 2003)..

interpreted the language of the statute so broadly – including the decision to recognize indirect partial takings and low levels of injury as compensable - also predate the Basic Law. In fact, in recent years the courts have taken a few modest steps in the reverse direction, despite the constitutional protection of property. Today the broad constitutional protection of property has become a potential stumbling block before the necessary reform of regulatory takings law to rein in some types of run-wild claims.

Finally, the **Netherlands** grants its landowners the most generous compensation rights in this book. The language of its constitutional protection of property is indeed quite broad. The 2002 Dutch Constitution says:

"In the cases laid down by or pursuant to Act of Parliament there shall be a right to full or partial compensation if in the public interest the competent authority destroys property or renders it unusable or restricts the exercise of the owner's rights to it."[49]

This text clearly protects property beyond a physical taking, but its language does not necessarily mandate compensation rights for partial takings to the extreme offered by Dutch law. The protection of property in the Dutch Constitution and especially the perception by the Dutch parliament of the protection mandated by the ECHR have placed limits on the extent of the 2008 legislative initiative for a (rather modest) revision of the law on regulatory takings.

Compensation rights for major takings

The second topic for comparative analysis focuses on situations where regulation eliminates all or nearly all of a property's value. As noted, this type of taking is discussed separately from partial takings because in the USA and several other countries, there is a legal distinction between major and partial takings. There is a much greater consensus among the set of countries regarding major takings, discussed in this section, than on partial takings (direct or indirect) discussed in the following two sections.

Comparative overview

The laws of most – but not all - countries in this book recognize a taking in cases of extreme regulatory injuries[50]. But a closer look at those countries reveals many differences. These are not always as dramatic as the differences in partial takings law (see the next section), but they do provide opportunities for cross-national learning about underlying rationales and remedies.

The regulatory takings laws of many countries distinguish between two types of major takings based on the permitted land use after the rezoning. Will it be a private-type or a public-type use? There are different public and planning rationale for these two types of takings.

Where the rezoning is to a public-type use but the public authority has no intention of exercizing its eminent domain powers or procrastinates, this is enough to cause a plunge in property values.

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[49] Grondwet voor het Koninkrijk der Nederlanden [GW.] [Constitution of the Kingdom of the Netherlands] art. 14, para. 3 (2002), *available at* http://www.minbzk.nl/contents/pages/6156/grondwet_UK_6-02.pdf.

[50] This is true for other countries not included in this book. See Kyung-Hwan Kim *Compensation for regulatory takings in the virtual absence of constitutional provision: the case of Korea,* 11 JOURNAL OF HOUSING ECONOMICS 108-124 (2002). See also TSUYOSHI KOTAKA AND DAVID L. CALLIES (EDS.) TAKING LAND: COMPULSORY PURCHASE AND REGULATION IN ASIAN-PACIFIC COUNTRIES (University of Hawai'i Press, 2002).

The problem is that in the twilight zone between land use designation and eminent domain, the landowners may find themselves holding title to a greatly-devalued property (and perhaps having to pay taxes). They do not know if and when the public authority will take title and pay compensation. In many countries around the word[51], including some in this book, this is a major problem (or was so in the past) and is often the subject of litigation on regulatory takings. This problem has also engaged the ECHR and, as already noted, was the basis of its first major decision on property[52]

There are various reasons why this type of major takings occurs on a large scale. One reason is the built-in uncertainty entailed by long-range planning, where a public authority is not certain what will be the specific location of some public service in the future, but wishes to prevent private development so as not to close options. Another reason is governments' financial constraints or lethargy in exercizing eminent domain. In countries where local authorities are more affluent and well administered, the extent of this type of taking has declined over time.

The definitions of what constitutes public use differ among the countries, as will be analysed in greater detail below. Some countries include only roads and similar infrastructure; other countries also include more amenities and public buildings. An issue of growing importance in many countries is whether a designation of private land for open space should be viewed as a public use, or whether open space can still be regarded as a private use.

Another question is what manner of zoning for a future public use would provide grounds for a compensation claim: Must the designation also carry an authorization of government to exercise eminent domain? Must the designation be by a legally binding plan or is a policy plan enough? Must the designation be detailed in scale so that particular parcels can be identified, or can the "shadow" of a designation in a smaller-scale map also serve as grounds? Distinctions such as these are discussed in the country chapters.

There are also differences in the remedies. Where the property is designated for some public-type use, does the landowner have the right to oblige government to take the title to the property, or the right to claim compensation while keeping title until (and if) the authority decides to take the property? The first type of remedy is well established as a routine action in some countries, but is not available in others. In the USA this type of remedy is sometimes called "inverse condemnation", but this term is also used in the broader sense of denoting a monetary compensation claim for a regulatory taking[53] In the UK the take-title type of claim is also known as "planning blight" or "reverse compulsory acquisition". In one of Austria's states it is known as "redemption". The clearest term - translated from German – is "*transfer of title"* claim. I shall adopt it for the comparative review.

The second type of major taking leaves private land in private use. The growing environmental awareness in recent decades has led the governments of all the countries in this book to designate extensive areas of private land for open space, agriculture only, or other conservation goals. When such a designation does not take away any pre-existing development rights, in most

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[51] Kyung-Hwan, , *supra* note 50.

[52] See above section for the discussion on the ECHR. For basic information see: http://www.echr.coe.int/echr/

[53] See for example the discussion of this term in Callies, Freilich and Roberts, *supra* note 5, ¶¶ 295; See also its broad usage in Alexander, *supra* note 11 ¶¶ 121.

countries – with a few exceptions – this would not be regarded as a regulatory taking. But when existing development rights are "downzoned", the issue of whether there is a taking comes up in most countries. The legal answers differ somewhat among the countries.

In the following survey of the thirteen countries, I discuss some of the differences and similarities regarding major takings of both the public and private types.

Major takings: Cluster 1 countries

The five countries in this cluster – Canada, Australia, the UK, France and Greece - grant landowners only minimal compensation rights for regulatory takings, but there are differences in degree. Two Commonwealth countries, Canada and Australia, compete for the title of "most restrictive laws on regulatory takings". Their legal "mother", the UK, is somewhat less restrictive. France and Greece also share a restrictive doctrine, but their laws offer enough exceptions to affect their overall classification.

Under **Canadian** law**,** in order to qualify for compensation, a landowner must generally show that there has been a removal of all reasonable uses of the property; case law has not recognized anything less. As Schwartz and Bueckert explain, in order to win a "constructive acquisition" claim, landowners must additionally show that the government has gained a *direct* benefit. Some Canadian authors, such as Young[54], are critical of this tough test, but it was reiterated in a 2006 Supreme Court decision.[55] Had Canada been in Europe, some aspects of its law on major takings may not have survived ECHR scrutiny.

There are some differences among the various provincial statutes, some of which provide somewhat greater protection against major takings than others. In British Columbia, planning decisions are generally not compensable[56] but a bylaw that zones private land for public uses does trigger the right to compensation.[57]. In Alberta, legislation requires that land wiped out by zoning be acquired by the municipality.[58] In Ontario, there's no statutory protection, but it is the long-standing policy of the Ontario Municipal Board that if lands in private ownership are to be zoned for conservation or recreational purposes for the benefit of the public as a whole, then the appropriate authority must be prepared to acquire the lands within a reasonable time otherwise the zoning will not be approved.[59]

In **Australia** the right to "inverse compulsory acquisition" is as narrow as in Canada. As noted in Sheehan's chapter, the generally applicable test for a successful claim (though there are some differences among the states) is that the land be reserved exclusively for a public purpose and that private usage be totally denied.[60] Sheehan criticizes this restrictive test and discusses its implications for the practice of extensive zoning for open space without leaving even minimal economic value. He also criticizes the widespread practice whereby governments reserve land for a public purpose many years in advance of an intention to acquire the land. In some of

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[54] Young,*supra* note 7.
[55] Canadian Pacific Railway Co. *v.* Vancouver (City), [2006] 1 S.C.R. 227, 2006 SCC 5
[56] Subject to the tests in the CPR decision, *supra*
[57] Local Government Act, R.S.B.C. 1996, c. 323, s. 914(2).
[58] Municipal Government Act, R.S.A. 2000, c. M-26, s. 644.
[59] Re Nepean Restricted Area By-law 73-76 (1978), 9 O.M.B.R. 36; Russell v. Toronto (City) (1997), 36 O.M.B.R. 169.
[60] See also: Raff *supra* note 25, ¶¶. 41.

Australia's states there are further restrictions, such as the need to prove special hardship in order to qualify for an inverse compulsory purchase claim.

Current **UK** law is more generous to landowners than the laws of the UK's former colonies. It also presents a well thought-out rationale. Although in the UK, a major reform in 1947 established a system where there would be no development rights (see above section), the law recognizes diminution in value caused even by a land-use designation in a non-binding plan.

UK law gives landowners two optional courses of action for making claims in situations of major takings. As explained by Michael Purdue, in both types of claims, the landowner has the right to demand that the government acquire the land, but the grounds are different. The first procedure, called "planning blight", is available only when a local plan designates private land for a public use. The plan does not have to be officially approved, may even be diagrammatic, and still give cause for a compensation claim. In this type of claim, the property may still have some beneficial use, but the landowner needs to prove that if sold, the property would obtain a price significantly below what it would have obtained without the designation for public use. In addition, the public use must be government operated.

The second procedure, called "purchase notice", is available for any land use designation, not necessarily a public use. The threshold condition, however, is more difficult to prove than for planning blight. The landowner must show that the property has no beneficial use at all; it is not enough to prove that the property has no economically beneficial use. In addition, the landowner's request for "planning permission" first be refused, or a valid permit revoked. Purdue criticizes the threshold requirements for the "purchase notice" action, arguing that the landowner should only be required to prove that the property no longer has any *economic* value, as in planning blight. He attributes the very low number of claims to the overly exacting conditions.

Over all, UK law grants compensation rights for major takings of both the public and private types of land uses. Michael Purdue comes to the reasonable conclusions that UK law on regulatory takings is in compliance with the ECHR.

Now to the two last countries in the first cluster, both in Southern Europe. **French** law was until recent years narrower in compensation rights than even Canada or Australia, recognizing major takings only where a transfer of title claim would hold. A slight expansion of the definition of a major taking was introduced by a1998 ruling of the Conseil d'état. The Court based its decision not on French but on the ECHR, ruling that if a zoning decision can be considered "abnormal and extraordinary" in reducing property value, the injury may be compensable. However, Vincent Renard argues that this decision has not led to many claims because of its highly restrictive language[61]. At the same time, transfer of title claims are widely used in practice, whether as direct remedies or as deterrents to government's misuse of powers. Once a local plan designates land for a public use, the owner can demand that government acquire the land. This also holds when an entire area is declared for redevelopment, even though this may not necessarily lead to development by the public sector.

[61] In the French chapter Renard also notes that French law provides a more effective protection for landowners when a landowner can show that a public authority has zoned land for a low-value use and later takes the land. If the landowner can show "intentional injury" then there may be a right to compensation. This remedy has been quite effective in reducing the misuse of zoning powers.

An additional type of compensation right in French law applies to private land included in a national park. If the landowner has lost more than 50% of the income, he or she can oblige government to purchase the land. Perimeters surrounding water catchment areas are also compensable[62]

The 1998 decision mentioned above has raised the likelihood that French takings law would survive a challenge before the ECHR. However, that depends on how widely French courts will interpret the slight degree of recognition of (major) regulatory takings.

Greece is the last country in the first cluster**.** Unlike the UK, France, Australia and several other countries in this volume, Greek law does not grant landowners the right to initiate action to oblige government to take the title of private property in cases of extreme injury. Georgia Giannakourou and Evangelia Balla report that the Greek Supreme Court has never endorsed the notion of "*de facto* expropriation" (as they call it) which could engender a constitutional right to force expropriation or compensation. For example, the Court denied the existence of a major taking in a case where an out-of-plan site could not be developed for 25 years due to archeological findings. Greek public administration has been notoriously inefficient in taking title to land designated for public services, leaving many landowners in limbo. It is no surprise that Greek takings law has been found to be in violation of the ECHR several times.

On the other hand, Greek law does grant compensation rights in cases where properties, included within areas cover by plans, are zoned for public uses. In such cases, the law draws a distinction between land designated for roads and public open spaces, and land designated for public buildings. In the former case, the very designation for public use includes the power to take the land. So where land is designated for roads or open spaces, landowners can expect to obtain compensation once the title is taken. However, in practice the procedures in Greece may take decades, and landowners have no redress in the meantime. Case law of the Council of State ruled that after 8 years, the landowner may petition the authorities to lift the public designation.

Where land is designated for public buildings (other than roads or open space), landowners may encounter even tougher hurdles because the designation for a public use does not grant government an "automatic" right to take the land. Furthermore, it is not known in advance which public body will finally be responsible for carrying out eminent domain. There is no statutory time limit, but the 8-year ruling of the Council of State holds here too. But even if a landowner has succeeded in lifting the designation for public use, he or she cannot be assured or regaining development rights, and there is no compensation for the interim period.

In areas not covered by plans – usually meaning outside urban areas – there is an additional legal complication unique to Greece[63]. In many Greek out-of-town areas there is a special property right (which I shall call "traditional) whereby any parcel of private land has "inherent" development rights for single-family homes as long as the parcel is of a minimal size and has

[62] Although easement-type exactions are not the direct focus of this book, American readers who follow US case law on beach access may find it interesting that in France (unlike some other countries in the set) pedestrian passage rights along coastlines are compensable.

[63] This type of right exists in Cyprus as well. My personal knowledge, based on through several interviews with Cypriot planners during visits to Cyprus, and on a graduate thesis by a Cypriot student that I supervised (unpublished).

road connection. With growing environmental protection, there are increasing conflicts with landowners' expectations. The courts have not recognized these expectations when rural areas are designated for nature conservation. The courts also ruled that land outside urban areas should always be assumed to retain reasonable economic value in agricultural use. An appeal to the ECHR was successful. The Court ruled that a blank assumption about reasonable value is unacceptable and instructed that each rural property should be evaluated individually.

Understandably, the authors of the Greek chapter are very critical of Greek law on major takings. Their hope is that the decisions by the ECHR will have more influence on domestic law than they have had in the past so as to fortify compensation rights for major takings.

Major takings: Cluster 2 Countries

The three countries in this cluster – Finland, the USA and Austria - generally grant somewhat broader compensation rights than the countries in the first cluster, especially on major takings. But unlike the countries in the third cluster, the laws of these three countries leave much ambiguity or uncertainty.

In **Finland,** there is a disparity between the ostensibly broad language of the planning statute regarding compensation rights and the lack of claims in practice. The takings issue is not a controversial one, it is rarely litigated and there is not much jurisprudence to interpret the statute.

Finnish legislation grants compensation rights for major takings if the landowners can no longer use the land "in a manner generating reasonable return" or if the restriction causes "significant inconvenience"[64]. These criteria could be interpreted as granting either wide or narrow compensation rights, but in the absence of significant case law, the interpretation in practice is dominant.

In areas of the country where there aren't as yet valid detailed plans but only higher-level plans (not the major part of the country today), the principle of "money or permit" applies. This means that a building permit must be granted if its denial would cause "substantial harm" to the applicant. Alternatively, the authority must provide compensation or take the land. If the property is designated for a purpose other than private development the authorities are expected to take the land or pay compensation. Although in Finland landowners do not have a statutory "transfer of title" right, there are hardly any challenges in the courts.

Are Finnish landowners simply complacent or are there other explanatory factors? A full answer is beyond this book's objective, but I will offer a few conjectures for further research. Finland is regarded as having one of the most trusted and accountable governments in the world[65], so possibly, where necessary, Finnish public officials take timely action to take title and pay compensation. The authors of the Finnish chapter add that planning officials are careful to avoid situations where land use controls reduce land values below an acceptable threshold (vague though it may be). Finnish planners also have a long history of relying on negotiated

[64] This language, and similar criteria in the laws of other countries, may remind American readers of the "goes too far" criterion in the formative US Supreme Court decision of Pennsylvania Coal v. Mahon ,S. Ct 260 US 393 [1922].

[65] The international corruption scale is one such indicator. Finland was ranked among the countries with the lowers level of corruption in the world. This reflects strong trust in government. See http://www.transparency.org/news_room/in_focus/2008/cpi2008/cpi_2008_table

solutions. Planning authorities are also careful to treat landowners equally; in Finland the equal treatment criterion of due process is an important consideration in the determination of whether the injury of land use restrictions goes too far. And perhaps Finnish landowners are simply less litigious than their American counterparts. Other factors may also help to understand the Finnish picture. Most of the land outside urban centers is used for forestry or for agriculture, and these uses often do in fact supply a "reasonable return". Together, these factors may account for the low level of litigation.

Although the Finnish authors assess that Finnish law is generally in compliance with the ECHR, they raise the possibility that Finland may have to broaden its compensations rights somewhat to avoid successful challenges.

Second in this cluster is **Austria,** a small federal country with nine member states**.** Although Austrian regulatory takings law is very different from Finland's, the two countries share the low levels of public attention to regulatory takings and of litigation. These characteristics persevere even tough in recent years Austrian cities have been "shrinking' and planners have had to roll back many vacant areas zoned for development.

The absence of case law in Austria is especially striking because there are major differences among the nine states – some granting moderate compensation rights, other granting almost none. Austria's nine states are thus a good "laboratory", presenting a wide set of rationales, some unique to Austria alone. Unlike the other federal countries in this book (the USA, Canada, Australia and Germany), in Austria one cannot point to many shared principles on regulatory takings among the nine states. Although Austria's Constitutional Court has not recognized even major restrictions as meriting compensation, the planning statute of each of the nine states does grant some compensation rights – but these differ from state to state. Viewed from a comparative perspective, these present a rather erratic assortment of rules.

Austrian state planning laws do not draw a general distinction between major and partial takings. Instead, five of the nine statutes grant compensation for major takings only (Burgenland, Carinthia, Upper Austria, Salzburg and Vienna), while the other four potentially recognize less drastic restrictions as well (The Tyrol, Vorarlberg, Lower Austria, and Styria). In the absence of case law, the import of these distinctions is not clear. Another difference among the Austrian states is in the type of injurious land use. In Carinthia, it is not enough that the rezoning removed all development rights; the reclassification must be to open space. In Salzburg, rezoning to either open space or transportation qualifies. IN the other states, no land use is specified. Vienna is the only state where the statute gives a quantitative threshold for a taking - 83%. Alongside the many differences, they states share one pre-condition: In Austria, as in several other countries in this book, to qualify for any remedy, the property must be fit for development (lot size, road access). Planning decisions that reduce the value of – say - speculative agricultural land, do not qualify for compensation in any form.

The most interesting grounds for compensation – ones I have not encountered anywhere else - are found in Upper Austria and Styria[66]. Their planning statutes grant compensation rights in a specific situation where there is a *comparative*, not absolute, injury: If a plan amendment singles out one plot to r*emain* classified as green, whereas all or most of the plots surrounding it are

[66] Vorarlberg law too grants the same grounds for compensation claims, but also the more common grounds type of injury in absolute terms.

rezoned from "green" to development, the landowner has a right to compensation. The condition is that the value of the property has declined due to the rezoning of the surrounding plots. The landowner is entitled to the difference in the plot's value before and after the revision of the plan.

The rationale is obviously grounded in distributive justice. The author of the Austrian chapter does not offer any economic rationale for this type of taking. My guess is that, in addition to "special sacrifice", the economic rationale pertains to the *expected* development rights. So long as contiguous private plots are all classified as green, landowners can entertain hopes that at some point the properties will be rezoned for development. But once a new plan reclassifies the surrounding plots but singles out one to remain green, the market expectations are frustrated, and the property's value may plunge.

The differences among the nine states in the remedies available to landowners are also polarized. The only shared remedy (except for the state of Vienna) is the right to indemnification for expenditures on water, road and similar infrastructure that landowners incurred while relying on the previous plan. This notion recalls the "investment backed expectations" criterion in US jurisprudence[67]. But unlike in the USA, in Austria the expenditures that may be covered are well defined by the statutes and case law so both sides know the rules in advance[68]. Beyond this shared remedy, there are extreme differences among the states.

The states of Burgenland and the Tyrol grant the lowers level of compensation rights in Austrian and arguable in this entire book. Landowners may only be indemnified for the above costs, and not for decline in property value. In Burgenland, to qualify for this remedy the landowner must also suffer undue hardship. All other states except Vienna grant an additional – and all-important - type of right: compensation for the decrease in the value of the property due to the plan revision. There are differences in time frames among the states. In Carinthia, to qualify, the land must have been purchased within the *past* 25 years[69], while in Salzburg the amending plan must have been approved within ten years of the *original* plan. In Vorarlberg, Lower Austria, Upper Austria and Styria there are no time limits. Vienna is unique because the only remedy available is a transfer of title claim (called "redemption").

If one takes into account the differences in grounds for claims and in remedies, then Austrian states could be ranked in the following order, indicating increasing degrees of "generosity "to landowners: Burgenland, the Tyrol, Upper Austria and Styria, Carinthia and Salzburg, Vorarlberg, and Lower Austria. Vienna is in a category of its own, where landowner can receive monetary compensation only if they transfer of title.

An outsider wonders how Austrian landowners and developers tolerate such erratic differences among states in a country where the distances are no more than between two adjacent towns. This reality contrasts with the USA where there is a basic similarity in regulatory takings law

[67] See the chapter on the USA by Thomas Roberts. See also the discussion on "investment backed expectations" in Barlow Burke *Understanding the Law of Zoning and Land Use Controls* 45 (Lexis Nexis 2002)..

[68] In Vorarlberg alone, reimbursement rights extend to areas originally classified as "expected" development.

[69] The rationale is that if a landowner did not utilize the development rights for a long time before the rezoning, then he or she would lose the right to compensation. This type of rationale is central to German and Swedish law, as will be discussed later

among most of the states[70]. Yet unlike in the USA, the "takings issue" in Austria draws little public attention, few claims and not very much litigation. If the law of some of the more restrictive states were appealed to the ECHR, Austrian law may not survive the challenge. Yet so far, as Karin Hiltgarten notes, Austrian courts rarely refer to the ECHR. The Austrian author provides a partial explanation for the Austrian mystery. Austrian planning authorities, like their Finnish counterparts (and those of other countries to follow) rely widely on negotiations before they impose regulations. There may be other social-cultural and economic factors that may help to understand the Austrian mystery, but these are beyond the scope of this analysis.

The **USA** is next in the rank-order. Unlike Austria, but similarly to the other federal jurisdictions, the US does have an overarching law of regulatory takings, based on the interpretation of the Constitution. There are only a few states with special takings statutes, but these do not replace the overarching law; they only grant additional compensation rights in some circumstances, as explained by Thomas Roberts in the US chapter.

The shared law on takings in the USA is the most complex in this book. Despite having by-far the largest body of jurisprudence and learned analysis, American law still leaves many questions open and considerable uncertainty, as indicated by the high degree of litigation and the prominence of the "takings issue" in American land use law. The questions left to case by case assessment are not lesser in major takings than in partial takings (discussed in the next section).

In the US, the law on major regulatory takings does not draw a distinction similar to the UK's "planning blight" (designation for a public-type use only) and "purchase notice" (designation for any use). The US Supreme Court has made a somewhat different distinction. Where a regulation deprives a landowner of all economically viable use, this would be regarded as a "categorical" taking (also known as *per se* taking[71]), as distinct from "partial takings" (discussed in the next section). The Court added a qualification: If the regulation goes no further than would be allowed by "background principles" of property law or private nuisance law, the regulation would not be regarded as a categorical taking despite its economic severity. (These exceptions have few parallels in other countries in this book). As Roberts notes, even where categorical takings are concerned, there are several unresolved questions, including whether the property must have lost *all* its value before the case can be considered a categorical taking.

At first sight, the key rules in American law on categorical takings seem similar to those of most other countries in this book. There is, however, an important difference that is not easily visible. In most other countries in the set, there is no legal right to compensation unless there has been a change in regulation that diminishes development rights. Landownership in and of itself does not encompass a right to develop. By contrast, in the USA, refusal to rezone or grant a development permit can be challenged as a taking if the property has no “economically viable use”, even if the loss of value was not the result of any change in regulation. For example, refusal to zone or grant a development permit for a property zoned as "exclusively agriculture" or

[70] The few US states where there are special state laws about regulatory takings – Florida, Texas and Oregon – are much larger than Austrian states, providing the same regulatory regime for millions of landowners and developers rather than differentiating among small distances and population numbers.

[71] See the US chapter by Roberts. See also: DANIEL R. MANDELKER, JOHN M. PAYNE, PETER W SALSICH, JR., AND NANCY E. STROUD PLANNING AND CONTROL OF LAND DEVELOPMENT: CASES AND MATERIALS 140 (Lexis Nexis, 2005).

with no zoning, could perhaps be challenged as taking in the USA if the current use is no longer economically viable.

This is not a marginal difference. It stems from diverging conceptions of property rights and development rights. In the era of environmental policy where many countries around the world are increasing the regulatory protection of open spaces and agricultural uses, this difference in doctrine has direct implications on the feasibly of achieving this goal.

Major takings: Cluster 3 countries

Countries in this group grant the broadest compensation rights for regulatory takings, especially on partial takings. For the most part, their laws on major takings also grant broad compensation rights. There are some inconsistencies and interesting differences in rationales or specifics.

Poland is first in this cluster because, although its law generally grants broad compensation rights, the laws also set a few limitations that render them somewhat more restrictive than the laws of the other four countries.

Poland's post-communism law reflects strong ideological protection of property rights. This can be seen both in the law on partial takings (discussed in the next section) and in the law of major takings. The 2003 Polish planning law defines what it calls "planning expropriation" thus: "If the use of a property … has become impossible or is limited in an essential manner.."[72] due to a revised land use plan or building regulations, the landowner may demand compensation. The statute makes a clear separation between major and partial takings by regulating these in two different clauses. A clear distinction between major and partial takings may be important to landowners because the law makes it easier to claim compensation for a major taking than for a partial one, but to date (early 2009) there is no significant case law to interpret "impossible or limited in an essential manner". Miroslaw Gdesz, proposes a 50% demarcation line. In his opinion, any greater diminution should be regarded as "planning expropriation".

As in many other countries, Polish law offers a special remedy for situations where land is designated for public use but is not taken within a reasonable time frame. Such cases are rampant in Poland, especially due to the transition from the communist regime. A 1994 statute grants landowners the right to a transfer-of-title claim. However, interim regulations exempted the authorities from paying compensation for designations made in plans approved before 1995. Four such cases reached the ECHR. In these cases, plots of land were designated for public purposes for ten to twenty-four years but were neither expropriated nor compensated. The ECHR found Poland in violation of the property protection clause of the Convention.

We move now to Germany and Sweden whose takings laws are similar to each other and dissimilar to all others in this book. Both can serve as interesting models.

German law on major takings is perhaps the clearest and most internally consistent among the countries in the set, as is well reflected in Gerd Schmidt-Eichstaedt's analysis. German law leaves few "loose ends" on any topic. There is little uncertainty either for the landowners or for the public authorities. Since statutory compensation rights refer to any degree of diminution in property values due to land-use planning decisions (beyond an "insignificant", meaning *de minimis* level), major takings are of course also covered.

[72] Poland: Land Planning Act of 2003, Dz. U. of 2003, No. 43, item 296, art. 36(1) (Pol.).

Similarly to many other countries, German law draws a distinction between designations for private-type and for public-type land use. Where the land use category is among fourteen specific public-type uses and the municipality does not act quickly to acquire the property, the landowner can initiate a "transfer of title" claim. However, if the authorities can show that it is "economically reasonable" for the landowner to continue holding the property until the municipality wishes to take the title (for example, if there is income from rent), the authorities may deny the claim and postpone eminent domain. Because a regulatory taking is regarded as illegal, the landowner's right to submit a transfer of title claim and receive compensation has no time limit. This contrasts with "downzoning" from one private-type land use to another where there is a special type of time limit, to be discussed under "partial takings".

Swedish planning law regarding major takings is very similar to Germany's. Its origin, however, is very different. While German law was internally generated, Swedish law was a response to an external prod. In 1982, the ECHR's landmark decision on major takings held Sweden in violation of the European Convention. In *Sporrong and Lönnroth v. Sweden*[73], two plots of land in Stockholm had been under an expropriation order for twenty-three and ten years respectively, yet titles were not taken and compensation not paid. Pursuant to this decision, all relevant legislation was changed to ensure that such cases would not recur. In 1987 Sweden introduced a new planning law and used that opportunity to introduce compensation rights for partial takings, well beyond what the *Sporrong* decision required.

Swedish planning statute, like German law (and of more countries), distinguishes between private-type and public-type land uses[74]. Where property is re-designated for a public-type land use, the landowner can submit a transfer of title claim, regardless of the time that has passed since the approval of the original plan. As explained by Thomas Kalbro, this right applies to a broadly defined set of public services, including some (like schools) that may be operated by a private body. But, as in Germany, where the rezoning is to a private type use, there is a special type of time limit. This concept is discussed in greater detail under "partial takings", because there it applies to both Germany and Sweden.

The last two countries, **Israel** and **The Netherlands** also share many aspects of the laws on regulatory takings (see Fred Hobma's chapter for The Netherlands and my own for Israel). But unlike the Germany-Sweden pair, Israel and the Netherlands do not share any constitutional or political traditions. The laws in both countries grant landowners very broad compensation rights both for major and for partial takings - the most extensive among the set of countries.

Unlike some other countries discussed above, Dutch and Israeli laws do not distinguish between public-type and private-type land uses[75]. In both cases, once a property is designated for a use that causes depreciation in value, it is up to the landowner to initiate a compensation claim. Neither country recognizes a separate "transfer of title" claim that a landowner must initiate.

Despite the similarity in the laws of these two countries, there is an importance difference in practice. In the Netherlands, local governments have a long tradition of purchasing private land

[73] 7151/75;7152/75 [1982] ECHR 5 (23 September 1982).
[74] This point is not highlighted in the Swedish chapter. The following is based on my further communication with the author, Sept. 28 2008.
[75] This point is not highlighted in the Dutch chapter. The following is based on my further conversations with the author, Sept. 2-3 2008.

for public use and large scale land banking. They have the financial sources[76]. In Israel, by contrast, municipalities have few financial resources of their own yet need land for public services[77]. Municipalities therefore often find it necessary to postpone eminent domain in order to postpone payment of compensation. The incidence of major takings is thus probably higher in Israel than in The Netherlands (proportional to country size).

Thus, in both countries, where a plot of land is designated for a public use in advance of eminent domain, the landowner may take separate action to receive compensation for the decline in value attributable to the plan amendment - often meaning the major part. Once the title too is taken, the authority should compensate for the remaining value.

This "two stage" compensation rule (as it is known in Israel) holds both "good news" and "bad news" for landowners. The good news is that unlike several other countries in this book and many more around the world, in Israel, injured landowners do not have to wait until the property title is taken. They may claim compensation immediately after an injurious plan is approved, to cover that portion of the decline in value– usually a substantial part – which resulted from the plan revision. The "bad news" for landowners is that it's the landowners' responsibility to submit a compensation claim for the first-stage diminution in value. The landowners will have to face the administrative and legal procedures again once the title is taken. In both Israel and the Netherlands, landowners are responsible for finding out that the plan has been amended. The authorities are obliged to serve a personal notice only at the eminent domain stage. At this point, the laws of the two countries diverge in their implications for landowners. In Israel, if the landowner did not submit the stage-one compensation claim in time, he or she may forfeit the entire portion of the first stage depreciation. By the time expropriation is undertaken, the property value will usually have plummeted. In contrast, Dutch landowners may wait patiently for the latter stage, when they will be eligible for the full compensation value. Thus in Israel, the absence of a personal notice is not just an administrative matter – it can cause landowners major losses.[78]

Compensation rights for (direct) partial takings

Compensation rights for partial takings are potentially less consensual than for major takings. Comparative analysis of these laws may therefore highlights underlying ideologies more clearly than the laws on major takings. In the USA, much of the "property rights" debate focuses on partial takings (of the direct type; indirect takings are not a public issue in the USA). The variety of legal regimes presented here can enrich the debate in the USA and other countries. Both sides can find supporting arguments as well as some middle roads.

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[76] Although land banking practice is reduced today, it is still a major tradition. See Barry Needham, One hundred years of public land leasing in the Netherlands" in LEASING PUBLIC LAND: POLICY DEBATES AND INTERNATIONAL EXPERIENCES, 61-82 (Steven C. Bourassa and Yu-Hung Hong eds, Lincoln Institute of Land Policy 2003). See also EDWIN BUITELAAR THE COST OF LAND USE DECISIONS: APPLYING TRANSACTION COST ECONOMICS TO PLANNING AND DEVELOPMENT, 65-67 (Blackwell Publishing, 2007). .

[77] For more detail about the various ways in which Israeli local governments try to 'square the circle' and secure land for public services see: Alterman, *supra* note 48,.

[78] In my chapter on Israel, I discuss some of the consequences of the absence of a personal-notice obligation.

Comparative overview

One would think that countries with minimal compensation rights even for major takings would not recognize partial takings as compensable. Yet in three among the first cluster – the UK, France and Greece - there are some minor exceptions. More significant compensation rights for partial takings are granted by countries in the second cluster (Finland, Austria and the USA), but the threshold may be high or the criteria replete with uncertainty. In the third cluster (Poland, Germany, Sweden, Israel and the Netherlands) compensation rights for partial takings are an integral part of an overall compensation doctrine and their legal boundaries are relatively clear in statutory law. These countries recognize even small injuries as compensable.

The most striking finding is the wide differences among the laws on partial takings. They vary in how they define partial takings, in whether there is a compensation threshold, in the time frame, and in whether there are preconditions for exercizing compensation rights. The countries also differ in the incidence of claims and the degree to which these create a financial burden on local governments. Of the five countries with extensive compensation rights for partial takings, only two – Israel and the Netherlands – the extent of claims has become a problem that requires legislative change. In two other countries – Germany and Sweden – the law on partial takings seems to have struck a balance between protection of property rights and capacity to pursue the public interest. Poland is a country in transition and, I would conjecture, its law is in transition.

One would think that partial injuries are less likely to raise constitutional questions about property rights than major injuries. Indeed, none of the ECHR decisions about the nine European countries in this book concern partial takings. Yet in the US, Israel and the Netherlands partial takings have given rise to constitutional questions similar to major taking.

Direct partial takings: Cluster 1 countries

Canada and Australia are consistent in their no-compensation doctrine, and do not recognize partial takings. But three among them – UK, France and Greece – have a few exceptions where the law does grants a modest form of compensation rights for partial takings.

On its face, **UK** planning law does not recognize partial takings. There cannot be a situation equivalent to an area-wide "downzoning" because the right to develop is granted on a case by case basis, for five years only[79]. But if "planning permission" is revoked or modified before its five-year term expires, this can be viewed as a type of partial taking (because in theory, another request for planning permission can be submitted in the future). As Michael Purdue explains, landowners are then entitled not only to compensation for expenditures and losses attributable to the revocation, but also for depreciation in land value and loss of anticipated profits. However, in practice revocations are very rare and made only when there is an overwhelming public consideration for a policy change. Each revocation decision must be confirmed by the national minister. The low number of revocations reflects the high degree of uncertainty at the stage they are issued on a discretionary basis.

Although the **French** non-compensation doctrine is well entrenched, there are some exceptions. As explained by Renard, a statute that regulates forest land grants in-kind compensation rights

[79] PHILP BOOTH , PLANNING BY CONSENT: THE ORIGINS AND NATURE OF BRITISH DEVELOPMEN T(2003) *Control*. London: Routledge; Moore, , *supra* note 26.

when private land is designated as "listed wood area". The landowner may request that up to 10% of the area be declassified (or to be given municipal land in exchange). In exchange, the landowner must grant the rest of the property to the municipality free of charge. The value of the declassified area must not exceed the value of the land granted. This instrument has helped to mitigate landowners' resistance to the designation of protected forestland. Another example relates to property under high power lines or adjacent to them. A contractual arrangement by the relevant national bodies, rather than a statute, grants landowners compensation rights for partial takings. Chasing such potential claims is a vibrant business for lawyers.

Other types of in-kind compensation in France have emerged in practice. Renard analyses various instruments that planning bodies use to meet landowners' demand to distribute the regulatory burdens more equitably. These instruments include attempts to use "transfer of development rights" for open space preservation as a growth-management instrument (an idea "exported" from the USA to an increasing number of countries[80]). Renard also notes the wide reliance on negotiated practices and ad-hoc plan amendments and exceptions.

So far, French jurisprudence has not recognized partial takings beyond these exceptions. But the wording of the landmark 1998 decision by the French Court mentioned in the previous section ("abnormal and extraordinary" injury) holds the possibility of extension to partial takings.

Greek law is almost as resolute as French law in saying "no" to compensation rights for partial diminutions in property values, but there are two important exceptions – nature conservation and historic preservation. A special statute for nature conservation zones grants compensation rights for land "substantially affected" by regulation. Giannakourou and Balla interpret this phrase as granting compensation rights also for partial takings of significant levels. However, the Greek government has not enacted the regulations so the statute is dormant. In view of the increasing area being zoned for nature conservation under EU impetus, this statute is likely to become a legal and policy issue.

Interestingly, Greek law also singles out archeological and historic preservation and grant compensation grants for some forms of partial takings. In view of the importance of historic preservation for Greek history and tourism, perhaps this attention reflects the parliament's desire to facilitate implementation. A national statute grants compensation rights for "restrictions in the use of the property". However, no threshold criteria have as yet emerged, either from case law or in practice. A more important national statute authorizes government to use a compensatory in-kind mechanism for historic preservation and open-space conservation. The mechanism is similar to US-born "transfer of development rights", but unlike in the USA, the Greek mechanism is anchored in a national statute. The Greek Constitution's property protection clause was revised specifically in order to permit alternatives to monetary compensation.

Direct partial takings: Cluster 2 countries

The law of the three countries in this cluster – Finland, Austria and the USA – recognize partial takings to some degree. However, winning a compensation claim is highly uncertain.

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[80] See: Alterman, Rachelle, *A View from the Outside: The Role of Cross-National Learning in Land-Use Law Reform in the United States*, in PLANNING REFORM IN THE NEW CENTURY. 309-320 (Daniel R. Mandelker, ed, 2005).. .

Although in **Finland,** as in cluster one countries, the general doctrine implies that there are no compensation rights for partial injuries, there are significant exceptions. The first exception relates to traditional property rights. Similarly to Greece, in Finland too rural property rights were traditionally viewed as encompassing permission to develop a limited amount of housing and related uses. These rights still prevail in some parts of Finland. If land is zoned for exclusive agriculture or forest use, for example, landowners may have the right to compensation amounting to the value of the unused traditional development rights, beyond the value of agricultural or forestry use (which also leave a "reasonable return" in most parts of Finland.

The second exception is similar to Greek law regarding historic preservation. As explained by Nuuja and Viitanen, statutory law in Finland provides that if an owner cannot use a protected building in an ordinary manner or produce a reasonable return, the owner is entitled to full compensation from the state or local government, provided that the damage is not minor. In addition, special expenses to maintain the cultural value of buildings are also indemnified.

In view of the Finnish constitutional property protection, the chapter's authors raise the possibility that in the future the courts may interpret compensation rights for partial takings more broadly or may do so in view of ECHR jurisprudence.

Now, a second look at **Austria's** nine states and their varied regulatory takings law, this time on partial takings. In four of the nine states, the language of the planning statues indicates that partial injuries too may be compensable. In the Tyrol the statute says that injuries that "reduce development rights" are to be compensated; in Vorarlberg the criterion is "restrict development rights", in Lower Austria the criterion is "rule out or considerably limit development rights", and in Styria, "decrease the value of the plot". This type of language clearly differs from language such as "abolish" or "prohibit" development rights, as used in the remaining states. The author of the Austrian chapter explains that there is no case law to give substance to these differences.

In view of the rarity of compensation claims and the small number of litigated cases even on major takings, the many questions one can ask about Austrian law on partial takings will probably have to wait many years for answers. As noted in the previous section, the non-issue status of the "takings issue" is partially due to the considerable reliance on negotiated solutions.

The **USA** is last in the middle cluster. On partial takings too, US law in a middle-of-the-road position. Unlike the countries discussed so far, but like the countries in the third cluster, US law does recognize a general concept of partial takings. However, contrary to the image that US takings law carries outside, it is much harder to win partial takings challenges in the USA than in the cluster-three countries.

On partial takings, as on major takings, US law is dissimilar to the laws of most other countries. In the other countries, constitutional law is not applied directly to adjudicating regulatory taking challenges. National statutory law[81] determines whether compensation is due for partial injuries, the approximate threshold, the types of compensable government decisions, or other conditions. US law on partial takings is arguably even more complex than US the law on categorical takings because partial takings potentially cover a wider variety of factual situations than major takings and because of the open-ended tests provided by the Supreme Court,

[81] Austria is an exception, but there all nine states have statutory law on regulatory takings.

As reported by Thomas Roberts in the US chapter, a landmark 1978 US Supreme Court decision established a three-factor test to determine whether compensation rights are due for partial decline in value. This test is still applied by US courts today. If a court determines that the case at hand does not meet the criteria for a "categorical" taking, then the three-factor test is applied *ad hoc*.

The first factor asks about the extent of economic impact on the claimant. Case law has established that the diminution in value must be substantial. There is no set figure. Case law has suggested 60%, 70%, 85%, or even higher[82]. These thresholds are very much higher than the thresholds set by the laws of the five countries in the third cluster.

The second factor determines the extent to which the regulatory decision interfered with the landowner's "investment-backed expectations". These express the Court's view that property owners should not receive compensation from the public purse unless they can show that they have relied on the development rights in a concrete way. The reliance rationale also underlies the regulatory takings laws of most other countries in this book, but usually the definition of "investment-backed expectations" would be clearer. In the USA, case law remains paramount and complex, leaving considerable uncertainty for all sides.

Roberts explains that the third factor, the "character of the government decision", was interpreted in the past as the need to investigate the balance between the public interest and the injury to the landowner, but a 2005 US Supreme Court decision clarified that this test addresses the question of whether the alleged taking involved a physical invasion. A balancing test belongs to what Americans call "substantive due process" rather than takings law.[83].

Among the few US states that have enacted regulatory takings statutes, Oregon is of special interest because its vicissitudes are indicative of the intensity of the debate in the USA and the instability it has generated. Oregon's Measure 37 adopted in 2004 was not only the most extreme in the USA, it is also among the most extreme in this thirteen-country book. Measure 37 was replaced in 2007 by Measure 49. The latter can be classified as belonging to the "moderate "cluster.

Measure 37 granted landowners full compensation rights for any type of land-use related regulatory decisions - not only planning and zoning-related decisions, but also environmental decisions. The statute also granted compensation rights for decisions by any government body, up to state level. Measure 37 did not provide tests for "investment backed expectations", nor a quantitative threshold. As may be expected, Measure 37 drew much criticism. The comparative analysis presented in this chapter enhances the critical perspective.

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[82] See also: DOUGLAS T. KENDALL, TIMOTHY J. DOWLING AND ANDREW W. SCHWARTZ, TAKINGS LITIGATION HANDBOOK: DEFENDING TAKINGS CHALLENGE TO LAND USE REGULATIONS, 209-219 (Community Rights Council , USA.. 2000)..

[83] The laws of most of the other countries in this book also view due process questions as belonging to judicial review. In a few countries, however, substantive due process is one of the considerations for determining whether compensation is due for a partial taking. For example, recent Supreme Court decision in Israel introduced the possibility of a "balancing test" as an additional consideration beyond the now relatively-clear quantitative threshold. However, the court was split and it is not clear from the decision whether the majority of the judges joined this rationale or whether it was an *obiter dictum* and was not necessarily part of the majority's decisions.

One of the most problematic aspects of Measure 37 was the statute's retroactive rule. Compensation rights extended to any restriction imposed since the property in question was acquired by the current owner or by a close family member, going as far back as 1950. Instead of adopting an objective, across-the-board time rule that would be applicable to all properties, as most countries have done, Measure 37 adopted a subjective rule. The right to receive compensation depended on the regulatory history of each plot and of each family history. As Sullivan[84] notes, this rule required officials to become genealogy experts (and archaeologists as well). The retroactive rule was to last only two years. This meant that the taxpayers who happen to be in Oregon in 2004 were expected to pay compensation for the benefits enjoyed by three previous generations. This type of time-pile is unlikely to work anywhere.

The outcome is recounted by Bianca Putters in the Oregon chapter. An avalanche of claims ensued in a short time because landowners wanted to use the two-year window allowed for the retroactive claims. The cumulative size of the claims was so overwhelming that in many cases the various levels of governments were obliged to waive the regulatory decisions they had taken for the public good. This type of paralyzing impact is unprecedented in any other country.

Measure 37 was largely replaced by Measure 49 in 2007, significantly reducing the previous excesses. Measure 49 is based to a large degree on the desire to provide interim remedies for current claims and to rein in future claims. It is difficult to identify any clear rationale in this exceedingly long and complex text with a variety of specific in-kind remedies, tailor-made to solve very specific types of circumstances.

Direct partial takings: Cluster 3 countries

The discussion has reached the group of countries with the broadest compensation rights for injuries of least magnitude. The planning laws of the five countries in this cluster recognize even small degrees of injuries as compensable. The order of the countries is once again – Poland, Germany, Sweden, Israel and the Netherlands.

In principle, **Polish** planning law grants compensation rights "from the first zloty" of depreciation in property value. There is no minimum threshold (though a rational claimant wills likely take transaction costs into consideration). The main statutory planning decisions that may adversely affect property values – plan amendments and issuance of development permission - are both compensable. Development permits are very important because the majority of Poland, including the main cities, is not yet covered by statutory plans. [85] The statute of limitations is five years from the time the amended plan or development decision came into force – among the longest in the set of countries.

However, Polish law places a tempering pre-condition that claimants must meet, which is not required in the case of major takings. Claimants must be able to demonstrate that they have transferred the property and that its sale price was less than it would have obtained under the former plan or permit. The level of compensation is based on appraisal. The Polish Supreme Administrative Court has ruled that "transfer" excludes gifting to close relatives.

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[84] Edward J. Sullivan *Year Zero: The Aftermath of Measure* 37. 36 ENVIRONMENTAL LAW 131-163 (2006).

[85] Furthermore: Once a claim is submitted, the municipality no longer has the power to take title to the property. This type of rule is not found in other countries in this book. Its rationale is, probably, to remove a possible deterrent to landowners' compensation rights.

Interestingly, this condition in Polish law is, in a way, the converse of the condition in Oregon's measures 37 and 49 where the claimant must show that the property has *remained* in the family. The Polish rationale is probably to ensure that the diminution in the property's value reflects a real economic loss for the owner. A secondary intention may have been to sieve out potential claimants who may not want to transfer their property in order to receive compensation.

So far, not many partial-takings claims have been made in Poland. The main reason, according to Miroslaw Gdesz, is not the transfer requirement (which can easily be bypassed by means of a "creative" contract), but the reason is the insufficient information available to landowners. Gdesz postulates that the number of claims will rise, since Poland is a transition state experiencing a rapid pace of change on the socio-economic, political and legal levels. It would be interesting to follow the Polish story. As real estate prices and private wealth increase and social and legal norms change, will compensation claims become a financial burden on local government, as happened in Israel and the Netherlands (discussed below), or does Polish law contain the kind of checks and balances that will make is a workable formula, as in Germany and Sweden?

Unlike Poland, **German** law on partial takings has been on the books and in practice for many decades and after some "fine-tuning", seems to have found a balanced "formula". Germany also has one of the world's longest histories of planning regulations in general.[86] The German approach differs in rationale from all other countries in this book, except for Sweden.

In Germany, the federal planning statute that regulates land-use planning makes a clear distinction between major takings and partial takings. As noted in the previous section, major takings that involve designation of land for a public-type use do not have a time restriction[87]. In partial takings, by contrast, a time restriction of seven years is a key factor and part of the underlying balancing rationale. This special type of time period is counted from the date of approval of the *original* plan that granted the development rights[88], not from the date of approval of the injurious decision. This special time limit was introduced by a 1976 amendment to the statute, as a way of creating a better balance between protection of property rights and leeway for planning public. Prior to the amendment, compensation rights had no time limit.

The implications of the seven year limit – called "plan liability period" - is that if a plan is amended or revoked during that period, landowners have the right to receive full compensation for the decline in the property's value (so long as the level of injury is beyond a *de minimis*

[86] Sonia Hint, The Devil is in the Definitions: Contrasting American and German Approaches to Zoning. JOURNAL OF THE AMERICAN PLANNING ASSOCIATION, 436-454. (Autumn 2007).

[87] This rule is not derived directly from the statute but from a 1999 decision by the German Federal Court of Justice.
[88] If adequate infrastructure is not yet available to permit development, the date is postponed accordingly

threshold[89]). But once the seven year period expires, and if the plot is not yet built up[90], the municipality may reduce or take away the development rights with no compensation at all. This seven year limit should not be confused with a "sunset" period. Under German law, the plan and the development rights continues to be valid beyond the seven years. The implementation period is also different from a standard statute of termination. In the German statute this is set at an additional three years from the date of approval of the revised (injurious) plan.

Understanding the rationale for the seven-year limitation is key to appreciating German (and Swedish) law on partial takings. This rationale goes well beyond the rationale for statutes of limitations - to enable governments to estimate expenditures. The purpose of the plan liability period is to establish new "rules of the game" between public planning authorities and landowners. I prefer the Swedish term for a similar rule – "*plan implementation period"* – because it better captures the underlying rationale. The plan-implementation period places both landowners and the municipality on a platform of mutual expectations. The landowners have some incentive to ask for building permission within that period; otherwise they are taking the risk that the development rights might later be reduced without compensation. The municipality on the other hand is signaling that it does not foresee the need to revise the plan downwards within the next seven years. However, to revise a plan at any time the municipality must have material conditions and thus is not authorized to use the implementation period simply as a grown management instrument. The implementation period does not represent a contractual commitment and the rights are not formally vested. Both sides simply gain greater certainty than is offered in the usual land-use regulation arena, while retaining freedom of decision.

The statute sets another limitation on compensation rights. As in Austria, Finland and Poland discussed above and Sweden to follow, the right to compensation applies only to detailed statutory plans and not to more general or higher-order plans. Detailed plans usually specify land use and permitted development, and sometimes also include subdivision or urban-design rules.

There are three exemptions from the seven-year rule, where the authorities are obliged to extend the period of implementation. First, if the *existing* use (actually on the ground) is of higher value than the development rights under the downzoning plan, the landowner always has the right to compensation for the difference and cannot be required to phase out "nonconforming" uses[91]. Second, if the landowner was unable to obtain a permit for objective reasons – such as a development moratorium. Third, if a building permit valid beyond the seven years is revoked before it expires.

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[89] The German statute does provide an ostensible threshold, stating the condition that the value depreciation be "not insignificant ". However, as Prof. Schmidt-Eichstaedt explains, in effect this means full compensation because the term "not insignificant" is interpreted in practice as exempting only *de minimis* claims; there has not been any case law to the contrary. Such claims are rarely submitted anyhow because the transaction costs may be higher than the sum awarded and the long proceedings. See also See also: Katharina Richter , *Compensable regulation in the Federal Republic of Germany* In COMPARATIVE URBAN PLANNING LAW, 185-189 (James A. Kushner ed, Carolina Academic Press, 2003) (1988)

[90] If the amending plan permits less than already built up, the municipality must full compensate for the built-up rights.

[91] The only option open to government if it wishes to terminate existing use is to take the title (and pay compensation).

The statute also specifies three situations where landowners may be denied compensation even within the period of liability. Importantly - as in Austria but unlike the USA - compensation rights apply only to serviced land. The conception is that the public purse should not become tantamount to an insurance policy for an investor who buys up unsubdivided and unserviced land or a farmer who holds such land. Nor can landowners oblige the municipality to supply the infrastructure at a particular time.[92] But if a landowner makes a reasonable offer to build the required infrastructure, the municipality is obliged to accept it. A second, interesting situation where municipalities are exempt from paying compensation is where many landowners in an area consistently under-utilize the development rights. The municipality may then regard this level of development as reflecting the dominant demand and may downzone without liability to pay compensation. A third situation where municipalities are exempt was added by a 2004 amendment to the planning statute. It authorizes the planning authorities to approve plans with temporary land uses scheduled to self-terminate. If the use is not withdrawn prior to the date set, the authorities are exempt from compensation in case the plan is amended.

In addition to compensation for reduction in property values, German landowners have the right to indemnification for specific types of expenditures incurred while relying on the plan. This right does not elapse even after the end of the seven years. Compensable expenditures are fees for architects, engineers, and levies paid. The right for indemnification holds even if the property is not developable and infrastructure is not yet installed. German law also grants landowners full compensation rights for any development moratoria beyond four years.

German law is a model of great internal consistency and predictability. Unlike American regulatory takings law[93], German law does not leave much uncertainty about the eligibility for compensation. The success of the German approach to compensation for partial takings is indicated by the low number of claims submitted. The "rules of the game" apparently work: Municipalities do their best to avoid injurious amendments to statutory plans during the implementation period, and landowners who intend to develop try to avoid procrastination. German law is unlikely to be challenged by an appeal to the ECHR.

Sweden follows Germany. Swedish law on partial takings bears a strong resemblance to Germany's post-1979 law and one may assume that cross-national learning did take place, especially since the laws of these two countries differ from all others in this book. Sweden's planning statute where compensation rights for regulatory takings are anchored is of more recent vintage than Germany's. Interestingly, even though the ECHR decision noted above (which held Sweden in breach of the property protection clause of the European Convention on Human Rights) concerned a major, not a partial taking, the Swedish parliament decided to adopt the German model and extend compensation rights to partial takings as well. Swedish law is even more generous to landowners than German law. The depreciation is caused by approval of a plan amendment, Swedish law does not set any minimum threshold – even *de minimis* injuries are compensable. However, Swedish law regarding partial takings shows somewhat less internal consistency than German law. As noted by Thomas Kalbro, some of the internal inconsistencies are difficult to explain.

[92] See Richter *supra* note 89.
[93] See the chapter by Roberts on the USA.

As in all five countries in this cluster, the major type of decision that can trigger a compensation claim is an amendment to a legally binding plan. In Sweden, as in Germany, Poland, Austria and Finland, such plans must be local detailed plans; higher-order or non-statutory plan decisions are not compensable.

Similarly to German law, the Swedish statute also makes the right to receive compensation contingent upon the time that has passed since the approval of the plan that had originally granted the development rights. The two regimes diverge on whether the time period is preset (Germany) or discretionary (Sweden). IN Sweden, each plan must set its own time frame - ranging between five and fifteen years (if no time is set, the default is fifteen years). Appropriate called the "implementation period", the flexible time period can fulfill the timing-control rationale even better than its German counterpart. Presumably, when Swedish planning bodies are called upon to set an implementation period, they can fine-tune it according to the specific economic and physical contexts surrounding the particular plan.

In Sweden, as in Germany, if a plan is amended before the implementation period lapses, landowners are entitled to full compensation for depreciation in property values. Unlike their counterparts in Poland (but like those in other countries), Swedish landowners need not prove that they have suffered an out of pocket financial loss (for example, because the property was sold for a lower value than its purchase price). But the right to compensation does not cover the loss of "expectation value" based on wished-for future development rights.

A further similarity to Germany is that in Sweden too, the "implementation period" does not affect the validity of the plan itself. Kalbro notes that in practice, the majority of plans remain in force after the termination of the implementation period. And as in Germany, the implementation period should not be confused with the termination period, which in Sweden is two years, counted from the date of approval of the injurious plan. Once the implementation period expires, if the landowner has not applied for permission to utilize the development rights, the unused rights can be removed without compensation. However, like in Germany, existing, built-up use cannot be rendered "nonconforming" unless the municipality takes the title. In addition, if a landowner has encountered direct expenditures while relying on the original plan and the property is later taken, these expenditures must be indemnified.

Swedish planning law grants several special causes of action for partial takings. It is interesting that Sweden, like Greece and Finland, and to a letter extent also Germany[94], has a special compensatory regime for historic preservation). If a detailed plan designates a valuable building for protection, and the *current* land use is impaired, the landowner has the right to compensation. The law says that the injury must be "substantial" to be compensable, but Kalbro explains that this term is interpreted to refer to a rather low level that the owner must tolerate. The threshold level is not to be deducted from the compensation paid. Swedish law grants an additional type of compensation rights for historically valuable buildings. It the authorities impose a demolition

[94] Historic preservation is not discussed in the German chapter. This statement is based on my further communication with the author, Gerd Schmidt-Eichstaedt, who wrote: "There are specific rules in the German state law (because monument protection is a matter of the States).The State laws say: The owner of a historic building has to tolerate specific binding regulations, basically without compensation, because the special quality of a historic building justifies special restrictions. But: If the economic consequences of a restriction are unreasonable (unzumutbar), the owner has the right to get some compensation (not full compensation) or to give the plot to the public to the market price (which is low - due to the special regulations)." Electronic communication, Nov. 12 2008.

prohibition and the injury if "significant" (interpreted to be in the order of fifteen percent), landowners have the right to compensation. In this case, the threshold level is to be deducted from the sum of compensation.

In addition to injuries caused by plans, Swedish law recognizes some limited types of refusals to grant building permits as also compensable, for example refusal to grant a permit to replace a demolished buildings or to carry out site improvement. Once the grounds for such claims are established, Swedish law either sets no threshold, or a low threshold of 10-15%[95].

Beyond planning law, Sweden, like Finland and Poland, has enacted a statute that sets up a specialized law of damages for land use. This law provides causes of action both against government bodied and against private entities. Where land is designated as parks, nature reserves and "cultural reserves", landowner may claim compensation for decline in property values if they can show that they have incurred "significant difficulties".

To conclude about Swedish law on compensable partial takings: It is apparently well integrated into practice and publicly accepted. An indicator is the relatively small number of appeals that reach the higher courts. The only criticism that Thomas Kalbro makes is about the uneven threshold levels. He cites the unheeded recommendation for a uniform threshold of 10%, made by the Legislative Commission that preceded the 1987 law. For those who see the German model as attractive, Sweden presents a somewhat more flexible (though less consistent) alternative.

Now to the extreme edge of the compensation-rights scale. It is difficult to decide which of the two – **Israel or the Netherlands** – should get the "title" for having the most extreme protection of property interests. In some ways the Netherlands is the most extreme, in other ways Israel deserves this title.

As counterintuitive as this may seem, the compensation laws for partial takings in Israel and the Netherlands bear greater similarities to each other than to any other country in this book, and are set apart from all the rest. Yet the somewhat-counterintuitive facts are that these countries do not share a common legal or cultural history and there is no evidence of any cross-transplantation. Both countries grant full compensation rights for partial takings, with either no minimal threshold or a very low one and, as discussed in the next section, only these two countries also grant general compensation rights for *indirect* takings.

Even the histories of how these two laws evolved bear striking – but coincidental - similarities. In both countries, the dramatic expansion in the legal bases for compensation rights was not based on a statutory revision but on case law that gradually assigned new interpretations to a long-existing statute, and on a general administrative change in the mid-1990s that, as an unintended consequence, made it much easier for landowners to make and win claims. There are, however, a few differences between the two countries. These differences mostly revolve around fine points, not on principle. Yet some of these seemingly minor points have made the difference between a still-manageable compensation system (the Netherlands), and one that has recently gone out of control and requires urgent legislative revision (Israel).

Israel is discussed first because in its underlying legal principles (but not in practice) it grants somewhat less extensive compensation rights than Dutch law. The foundations of the current

[95] In two of the four types of claims for refusal to grant permits, the thresholds are to be deducted from the amount of compensation. For details see the Swedish chapter.

Israeli legislation on regulatory takings date back to 1936[96]. The language of the current statute (regarding direct injuries) is almost identical to the old statute. In 1995, it was amended to extend the termination period to three years. At the same time, six quasi-judicial committees were established nationally, and were authorized to hear a variety of planning appeals against local governments, including rejections of compensation claims. This change had an unintended consequence of "opening the gates" to a flood of claims, now may much faster and more accessibly.

The major impetus for expansion of compensation rights did not come from these minor statutory revisions but from Supreme Court jurisprudence. As noted in the section on constitutional law, many of the major interpretative decision that expanded compensation rights were delivered before constitutional protection of property was enacted in 1992. A planning or legal practitioner of the 60's or 70's would hardly recognize current law and practice. Here are some of the most important ways in which case law expanded compensation rights in Israel.

The first example of expansive interpretation is the question, what levels of statutory plans are compensable. The statute grants landowners the right to claim compensation whenever approval of a "statutory plan" (or revision) adversely affects the property[97]. (Israeli law does not grant compensation rights for any types of land-use decisions other than approval of a new or amended statutory plan.[98]) Unlike most other countries (but similarly to the Netherlands), Israeli courts have interpreted the term "plans" beyond what the original legislators intended, to include not only local-level plans but also district and national-level plans. Recent higher-level plans that seek to protect open spaces have drawn huge numbers of claims. Furthermore: the plans do not have to be detailed and show the exact plots to which the injurious provisions apply; it is enough to show an appraisal that a rough indication in a small-scale map – whereby specific plots cannot be identified - might affect property values. This hold even if a future detailed plan may not in fact locate the injurious land use on the claimant's plot.

A second example of expansive interpretation refers to the all-important qualifying clause – the "safety valve" also on the books since 1936. The evolution of case law on this clause has led, in my view, to another divergence from the likely intention of the original legislators. The clause says that if the type of injurious provision falls among a long list of provisions (the list encompasses most of the usual rules set by plans), there would be no right to compensation, unless the restrictions go "beyond what is reasonable under the circumstances" and unless "justice" considerations require that compensation be paid. These criteria are Israel's equivalent to the "goes too far" of a landmark US Supreme Court decision[99]. As the discussion of other countries has shown, threshold terms such as "reasonable" are interpreted very differently from country to country. In Israel, until the 1980s there were very few claims for partial takings, so

[96] Although this statute predates the State of Israel, upon the State's founding in 1948, this legislation, along with most others enacted under the British Mandate, was recognized as Israeli legislation

[97] The original term in the 1936 legislation was "injuriously affects". This terminology is typical of British legislation of the time and is still to be found in the statutes of former British colonies.

[98] Uncompensated decisions include an imposition of area-wide conditions on the issuance of building permits (for a limited period); a declaration of a "nonconforming use"; a subdivision plat; refusals to grant variances; or regulations enacted by the Minister in charge.

[99] Pennsylvania Coal v. Mahon, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922). See the US chapter by Roberts.

there was little jurisprudence on this point[100]. As more cases came before the Supreme Court, the term "reasonable" gained substance. Case law gave it a mainly[101] quantities interpretation. The threshold level declined gradually, lately reaching about ten percent. The threshold sum is not to be deducted from the full compensation. Compared with the US "goes too far", Israeli case law today provides much clearer guidelines.

The "justice" criterion has received very little case law and is still open to interpretation. Nor is there guidance on the relative weight of justice and reason. An injury that is above the quantitative threshold is unlikely to be denied on the basis of the "justice" criterion alone, but the reverse may hold. In interpreted "reasonable" and "justice" for partial takings, Israeli jurisprudence has not developed any doctrine similar to "investment backed expectations" so cardinal in US law on partial takings, nor any rules that expect landowners to utilizing the development rights within a reasonable time frame, as required by German, Swedish and Dutch law. So, all in all, the "safety valve" that the original legislators had inserted into Israeli law has been interpreted as exceedingly wide open to claims. Even development moratoria pending approval of another plan are not exempt from compensation claims.

The points discussed so far, despite their broad interpretation, would have still permitted the authorities to cope with the number and amount of claims. What has thrown the Israeli compensatory regime "out of balance" is an interpretative question of little legal importance but great financial implications. The question is whether compensation rights extend beyond the lost value of the current development rights, to also cover "expected" development rights that the downzoning decision has ostensibly thwarted. This is a major issue because recent national and district plans have designated extensive tracts of land currently classified as agriculture, as zoned for "protected open space" or the like. In a high density and high growth country, this would mean that the property values in the growth regions of the country would decline because the market "expectation" for rezoning at some future time would be disappointed. Such claims account for a significant portion of the total value of claims. The courts lean to this interpretation, and this has made current Israeli compensation law unmanageable.

Since the mid 1990s, the number of claims has risen sharply and amounts to hundreds of thousands of dollars of claims still undecided[102]. Many lawyer and land appraisers solicit potential claimants. The financial burden on local governments – and thus potentially on the national budget - is huge. Israeli planning practice tries, within reason, to avoid planning decisions that might trigger compensation claims, but without jeopardizing planning goals. Israel law, unlike its Oregon counterpart, does not authorize planning bodies to turn back whenever they encounter a compensation claim. Nevertheless, compared with the excesses of Oregon's Measure 37, Israeli compensation law has proved to be more "workable".

The Israeli government proposes to revise the statute so as to clarify that "expectation values" are not compensable, and that only precise identification of the injured parcel on a detailed plan, not a higher-level plan, would be grounds for a compensation claim. A draft bill will probably be

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[100] RACHELLE ALTERMAN AND ORLI NAIM, COMPENSATION FOR DECLINE IN LAND VALUES DUE TO PLANNING CONTROLS (1992, Hebrew).

[101] It is still not clear whether Israel's "goes too far" is only a quantitative measure, or whether the public purpose or distributive justice considerations should also be taken in account (as other Supreme Court judges have suggested). See my chapter in Israel (Alterman).

[102] Some of the claims load is due to indirectly injuries discussed in the following section.

submitted in 2009. A major issue during Knesset scrutiny will likely be whether the revision is in accordance with the constitutional protection of property and will survive court challenges. Once the problematic issues noted above are resolved, the size of claims for direct partial takings will likely be reined in.

Finally, we turn to **the Netherlands -**at the very edge of the scale. In some ways it offers even more extensive compensation rights than Israeli law or Oregon's Measure 37. The breadth of compensation rights under Dutch law is expressed in several ways.

To be eligible for compensation, Dutch landowners need only suffer a tiny decline in property values - lower even than Israel's. Similarly to Israel, the low threshold would not be apparent from the criterion stipulated in the Dutch planning statute - "insofar as the loss cannot reasonably be expected to be borne by the applicant"[103]. Initially, as Fred Hobma explains, case law interpreted this criterion as indicating a presumption against compensation rights except for major takings. Very few claims were submitted. A 1993 book on Dutch land policy states: …"This sort of compensation is a 'non-issue'. Compensation is rarely paid…".[104] However (and with striking similarity to the Israeli story), since the later 1980s, case law gradually created a change in doctrine, recognizing compensation rights even for low levels of partial injuries. The number of claims rose sharply. A change in the administrative court structure in the mid-1990s gave this process an additional boost[105].

Of all the countries in this book (except the USA[106]), Dutch law defines the broadest range of planning decisions as qualifying for compensation for partial takings. All types of local plan-related decisions are compensable, as well as several provincial planning decisions and several national-level planning decisions. This definition is even broader than in Israeli law because the latter does not grant compensation rights for anything that is not called a "plan". Unlike Israel (or even Oregon's Measure 37) the Dutch statute explicitly recognizes landowners' right to receive compensation even for loss of business income.[107] Dutch case law also grants compensation rights – including loss of income - even for temporary restrictions as brief as one year (except for temporary nuisances related to construction). The 2006 amendment excludes only temporary construction-related nuisances. The procedural rules are also exceptionally 'friendly" to landowners. They need only argue that there has been an injurious decision and are not obliged to supply proof of a causal relationship or an expert appraisal. These burdens rest on the

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[103] Wet ruimtelijke ordening 2006 [Spatial Planning Act] art. 6.1 (Neth.). As of December 2008 there was no official translation of the 2008 Dutch Spatial Planning Act. Fred Hobma and I are relying on an informal translation provided by the Dutch government. On file with Rachelle Alterman

[104] D.B. NEEDHAM, B. KRUIJT AND P. LOENDERS. URBAN LAND AND PROPERTY MARKETS IN THE NETHERLANDS 72 (University College of London Press, 1993).

[105] This point, not highlighted in the Dutch chapter, is based on conversations I have had with another Dutch leading authority, Prof. Dick Lubach, in December 2005 and Nov. 2008; in The Netherlands

[106] USA law does not limit the types of decisions because it is largely based directly on constitutional rights. However, the grounds for compensation claims for partial takings in the USA are more limited in other ways than in The Netherlands.

[107] The Israeli Supreme Court has recently clarified this point, interpreting the silence of the statute on compensation of income, as indication that there is no legal right to this type of compensation. However , the Court left a small opening for special cases where there is a special dependence on the previous land use plan, such as where altered road access has caused a direct loss..

authorities. Furthermore: Until 2005, the right to submit compensation claims had no time of limitation. Since 2008 it is set at a generous five years.

However, Dutch law has a qualifier that tempers the breadth of compensation rights. Landowners are expected to take reasonable action to minimize the damage to local governments and should not take for granted that current development rights will continue indefinitely. It is landowners' responsibility to apply for a building permit within reasonable time. Neither in Israel nor in Poland (nor in Oregon's Measure 37) does the law impose similar duties on landowners. The rationale for the Dutch qualifier is reminiscent of the German and Swedish "implementation time" concepts, but while the German and Swedish laws set a specific time period, known to both sides, Dutch law assigns the determination of what is reasonable to a case by case review, leaving much uncertainty. There are also no compensation rights for what the Dutch aptly call "planning shadow damages". This refers to decline in property value or income that occurred prior to the actual planning decision.

To quell the claims wave somewhat, a 2005 revision of the statute introduced a modest administrative fee. Although this measure probably does help to sieve out small claims, it does not deter the flourishing business where (as in Israel) lawyers or other professionals seek out potential claimants and offer their services without up-front charges.

The continuing wave of claims led the Dutch government to initiate a 2006 statutory amendment (in force since July 2008). The amendment added a qualifier: "Losses falling within standard social risk shall be borne by the applicant.[108]" However, as noted by Hobma, it is too soon to know how the courts will interpret this additional criterion. I would conjecture that the courts might interpret this phrase narrowly, based on a comparison of direct and indirect takings. For direct partial takings, the parliament decided not to include any quantitative guideline, whereas for indirect takings (discussed in the following section) the parliament introduced a quantitative threshold of at least two percent (only). The courts might therefore regard the two percent figure as a broad-brush benchmark by which to interpret "normal social risk" for direct takings as well – especially since direct injures are regarded as more worthy of protection than indirect injuries.

Even before these small statutory amendments, the damage-minimization duty in Dutch law is probably responsible for making the number and size of claims much more tolerable than under Israeli law or Oregon's' Measure 37. In late 2008 Dutch officials expressed optimism that the changes introduced by the 2008 law, though small, will succeed in creating a better balance between property rights and planning needs.

Compensation rights for indirect injuries

The final type of regulatory takings is the least known or discussed. The underlying normative question is whether a landowner should have the right to compensation by a government body for a reduction in property value caused by a planning decision that applies to an *adjacent* property. Two examples: First, designation of a highway route leads to depreciation of the value

[108] Wet ruimtelijke ordening 2006 [Spatial Planning Act] art. 6.2 (Neth.) As of December 2008 there was no official translation of the 2008 Dutch Spatial Planning Act. Fred Hobma and I are relying on an informal translation provided by the Dutch government. On file with Rachelle Alterman

of adjacent properties, especially those on an access-restricted highway, or those zoned for housing. Second: zoning for a high rise building may block the view for adjacent properties or may increase traffic and noise, thereby reducing the neighbors" property values.

This book addresses only the realm of public law, not the general law of damages. Of course, some such cases may be actionable under nuisance laws. But where public law recognizes indirect takings as compensable, a government body would be the one to pay the compensation, even if the rezoning that caused the negative externalities was requested by a private developer. In such cases, the basic rationale behind the right to compensation becomes shaky. Nevertheless, compensation rights for indirect takings do exist in a few countries, and in a variety of formats.

Comparative overview

Initial comparative analysis indicated that it would be useful to classify compensation rights for indirect injuries into three types:

- Injuries when only part of a parcel is taken by eminent domain ("severance") and the remainder suffers diminution in value from externalities stemming from the use of the portion taken ("injurious affection"[109])
- Injuries that stem from public infrastructure nearby. Often, such situations also involve physical taking of a neighbor's land for the infrastructure, in whole or in part. In that case, that landowner is compensated. I shall call this a "public to private" injury.
- Injuries stemming from rezoning of a nearby parcel for a more intensive private-type use. I shall call these "private to private" injuries.

The comparative findings show that these three categories can be tentatively ranked according to incidence: Most of the countries in our set do grant the first type of compensation right; about two-thirds grant the second type of right; and only a few countries grant the third type of right. The first type of indirect injuries is not covered in this chapter because the rules governing it are usually part of eminent domain law - a topic outside the scope of this book.[110]. Left for discussion are the two remaining categories – "public to private" and "private to private" injuries.

The question posed here, for each country, is whether direct and indirect injuries are part and parcel of the same legal doctrine or whether they in fact are governed by separate laws and legal concepts. In only two among the five countries – Israel and the Netherlands – direct and indirect takings are part of the same legal doctrine, separated only by relative geographic location. And only in the Netherlands, indirect takings are explicitly part of the original planning statute; in Israel indirect takings are a product of case law, subsequently inserted into the legislation. In all the other countries, the laws treat direct and indirect injuries (whether or not the latter are recognized) as separate fields of law. In some countries the laws on the two types of injuries are not only distinct; they are also logically inconsistent with direct takings. The reason may be that the law on indirect takings may have been an "add on" rather than an integral part of the

[109] This term has various meanings. In a context related to eminent domain it has this meaning. For a discussion of the various usages of the term "injurious affection", see . *Compensation for Injurious Affection*: Discussion paper (Land Reform Commission of Western Australia -Government of Western Australia , October 2007). See also Raff, *supra* note 25).

[110] I did ask the authors to touch upon this issue and most have done so, in brief.

regulatory takings law. In Finland, for example, compensation rights for direct partial takings are quite limited, whereas for indirect injuries these rights are relatively generous.

Indirect injuries: Cluster 1 countries

Given the narrow compensation rights even for direct partial injuries in this cluster, it is not surprising that in four of the five countries - **Canada, France, Australia and Greece** – there are no compensation rights at all for indirect injuries. This is true (with a few exceptions) even for injuries due to public infrastructure. The Australian and Greek authors are very critical of the lack of compensation rights for such injuries. The other authors are implicitly critical.

UK law is an exception. Despite the narrow compensation right for direct partial injures, UK law does grant compensation rights for some types of injuries from public infrastructure. Compensation for indirect injuries from public infrastructure is only payable if there is statutory immunity from actions in nuisance against the public authority responsible for the public work. This type of limitation does not necessarily hold in other countries.

Michael Purdue explains the gross disparity that had prevailed in the past between landowners who were "lucky" to have part of their property taken, and landowners adjacent to the same public infrastructure whose land was not taken. Only the former were eligible for compensation for "injurious affection". This anomaly was remedied in part by a 1973 statute which provides compensation rights for depreciations caused by adjacent public infrastructure. However, the statute only addresses injuries resulting from noise, vibration, smell and artificial lighting. Other losses of amenity such as privacy or loss of view are not compensated, nor is intensification of an existing use[111]. Purdue expresses criticism that the rights of landowners adjacent to public works still remain lesser than the rights of those whose property had been severed.

Indirect injuries: Cluster 2 countries

Among this cluster's three countries, the laws of **Austria** and the **USA** do not offer compensation rights for indirect injuries. Thomas Roberts notes that with some exceptions, US courts have not developed a significant body of law on this aspect of regulatory takings.[112] The few US state statutes on regulatory takings do not address this type of injury.

In **Finland** there is a disparity between direct and indirect takings. The law on indirect injuries grants more generous compensation rights than on some types of direct partial takings. When land designation for public infrastructure causes value depreciation of adjacent land, Finnish landowners may have more than one legal avenue for making a claim. Landowners adjacent to public roads have special compensation rights. As Nuuja and Viitanen explain, the idea is that the rights of landowners indirectly affected by highway should be the same as the rights of

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[111] This limitation was narrowly interpreted by the Court of Appeals in a 2005 decision.

[112] An interesting exception is Colorado constitutional takings law. In a survey of takings clauses in state constitutions in the USA- PETER W. SALSICH AND TRYNIECKI. & TIMOTHY J. TRYNIECKI,LAND USE REGULATION: A LEGAL ANALYSIS & PRACTICAL APPLICATION OF LAND USE LAW. 13 (2nd ed. Chicago, Ill.: Section of Real Property, Probate and Trust Law, American Bar Association, 2003.),- note that in the Supreme Court of Colorado has interpreted the difference between the language of the Colorado takings clause and that of the Fifth Amendment of the federal Constitution (the addition of the word "damages" in the phrase "...taken or damaged for public use…" as denoting broader compensation rights. The Court interpreted this broadening to refer to "situation in which the damage is caused by governmental activity in areas adjacent to the landowner's land". Animal Valley Sand and Gravel, Inc. v. Bd. Of County Comm'rs, 38 P.3d 59, 63 (Colo. 2001).

landowners whose property had been partially taken and who are therefore assured to receive compensation for injurious affection. There is no threshold level in these cases. Indeed, Finnish landowners adjacent to public roads are regularly compensated in practice by the highway authorities[113]. Another compensation avenue is based on eminent domain law. Landowners indirectly affected by a physical taking for a public purpose – not only for highways - have the right to be treated similarly to those whose property had been physically taken. In this cause of action, there are threshold conditions: the damage must be significant; it must be compensable in a physical-taking situation; and it is reasonable to grant compensate under the circumstances[114].

A third avenue for claiming compensation from public bodies is Finland's "Act on Compensation for Environmental Damage". This statute is partly in the realm of public law and partly in private law. It gives landowners specific causes of action for claiming compensation for land-use related damages. The law encompasses both public-to-private and private-to-private injuries. The bodies that directly benefit from a specific land use designation are the ones responsible for paying compensation. The definition of "environmental damages" includes a rather broad range of negative externalities. The law sets a threshold of tolerance: "Compensation shall be paid… only if toleration of the nuisance is deemed unreasonable... [under] local circumstances, the situation resulting in the occurrence of the nuisance, and the regularity of the nuisance elsewhere in similar circumstances". The Environmental Damage Act has made it possible for landowners to claim compensation more easily than under the general law of damages. Compensation rights under the Act may be important as backdrops to negotiations between landowners and public agencies in charge of infrastructure projects.

Indirect injuries: Cluster 3 countries

The discussion has reached the cluster of countries with a doctrine highly favoring compensation rights. Yet only two among the five countries – Israel and the Netherlands – grant the same broad compensation rights for indirect injuries as for direct takings; whereas the laws of Poland, Germany and Sweden offer lesser - and different - rights for indirect injuries.

Polish law on indirect injuries is inconsistent. On the one hand, there are no compensation rights for "injurious affection" stemming from infrastructure – not even in cases of severance. As Miroslaw Gdesz explains, this is currently a very contentious issue in Poland because the government is developing a network of highways to make up for decades of neglect by the communist regime and thousands of landowners are suffering injuries. On the other hand, Polish planning law does grant compensation rights for indirect injuries, but these hold only for "conditions of development" decisions (*ad hoc* development permits where there are no statutory plans). However, this right is still dormant because few landowners are aware of it.

In addition, Poland, like Finland (and Sweden), has enacted an Environmental Protection Law. It entitles landowners to compensation for land use decisions about adjacent properties. But unlike Finland and Sweden, Polish law grants this right only when government declares a Limited Use

[113] Based on conversations with Finnish academics and practitioners, most recently - an interview with Prof. Ari Ekroos of the School of Law, Helsinki University of Technology. During a meeting in Belgium in October 2008.
[114] In addition, the law grants landowners the right to compensation whenever the value of their property has declined because a public agency has altered the access to that property from a road or public open space.

Zone for projects with significant impacts on the environment. Only a few such zones have been declared to date.

In **Germany t**here are no general compensation rights for indirect injuries do to land-use planning decisions, but there are special regulations regarding public infrastructure. Claims for indirect injuries can be made either through the civil courts or, where public bodies are concerned – through the adminstrative courts In contrast with its law on direct partial takings, German law on indirect takings leaves much to discretion. The general principle is that landowners should tolerate adjacent public uses, but once the adverse effects go beyond what is regarded as "unacceptable', landowners have the right to demand either compensation or transfer of title. What is regarded as unacceptable varies according to the land use in question: the tolerance level for housing adjacent to highways is likely to be lower than for other uses.[115] In Germany, as in Finland (and Sweden to follow), the legal right serves as an important backdrop to negotiated compensation. Airports are a special case. A law that forbids construction of new housing near airports grants specific compensation rights.

Moving on to **Sweden** one finds that the similarity encountered so far between Swedish and German law no longer holds. The Swedish planning statue does not grant compensation rights for indirect injuries from planning decisions, except in a few very special situations[116]. But Sweden, like Finland, has enacted a special statute, called Environmental Code, which establishes a cause of action to claim compensation for damages related to land use decisions, for both direct and indirect injuries. The Swedish Code too is partly in the realm of public law and partly in private law. The Environmental Code sets two interesting threshold criteria similar to its Finnish counterpart. First, the new or more intensive land use (including higher density) must not be a *common occurrence* in that type of locality. Second, the depreciation in market value must be *of some significance.* As members of society, landowners are expected to tolerate some damage. But Thomas Kalbro reports that this threshold is interpreted in practice as 2% -5% (I would add, "only"). Injuries from major highways and similar public infrastructure are often regarded as compensable and landowners are routinely compensated[117] whether by submitting an official claim or by negotiating with the highway agencies and similar utilities.

Now to the final set of countries discussed in this chapter. As already noted, **Israel** and **The Netherlands** are the only two countries in this book – possibly in the world – where the law grants broad compensation rights for both direct and indirect injuries and where these are routinely exercised.

There are six major similarities but also some differences between the laws of the two countries. First, in both, the same basic eligibility criteria hold for direct and indirect injuries. Second, in both countries (and unlike many others), the laws do not draw a distinction between injuries stemming from public or private land uses. It thus makes no difference whether a property's value declines between a neighboring plot is rezoned for a new highway or for high-density housing. Third, as illogical as it may seem, in both countries, claims are to be submitted to the

[115] Based on further communication with the author of the German author, Gerd Schmidt-Eichstaedt, by phone and email

[116] Swedish law grants landowner the right to compensation whenever the value of their property has declined because a public agency has altered the access to that property from a road or public open space.

[117] Based on conversations I have had with the author of the Swedish chapter, Thomas Kalbro and with various other Swedish practitioners and academics.

government body that approved the rezoning and not to the public or private entity that benefits from the rezoning. Fourth, in both countries the magnitude of injury that qualifies for compensation is similar to the thresholds magnitude for direct injuries (but on this point there is a minor difference, to be discussed shortly). Fifth, in both, claims for indirect injuries account for a significant portion of the total claims and have become a financial burden and so in both countries, initiatives for statutory revision have emerged since 2005.

Finally, in both countries, an informal 'bypass mechanism" emerged bottom-up. This mechanism attempt to resolve the inherent paradox surrounding indirect takings of the private-to-private type: the expectation that the public purse would pay compensation for injuries that arise because a private entity wanted to benefit from an "upzoning". To avoid this anomaly, local government in both countries gradually developed a practice of transferring the burden of compensation to the party that benefits from the rezoning. The mechanism is an indemnification contract that local governments increasingly impose on developers before they approve an amendment to a plan or a similar planning decision. The Dutch Supreme Court ruled that this practice is illegal unless it is explicitly grounded in a statute. This led to a 2005 revision of the Dutch legislation. In Israel the few Supreme Court decisions that touched on this practice have not (yet?) voided it. This is a topic that will likely need legislative authority in Israel too (unless compensation rights for private-to-private injuries are totally abolished).

There are also two points of divergence between the two countries. Although minor, these differences provide a prism for understanding some underlying differences.

While in both countries the right to compensation for indirect injuries is explicitly anchored in the planning statute, this right has different origins. In the Netherlands the right to compensation for indirect injuries is based on explicit text in the statute. In Israel, the original statute was silent on the question of whether indirect injuries are also covered. Compensation rights for indirect injuries were born from a 1979 Supreme Court decision that interpreted the statute's silence as encompassing indirect injuries. The decision did not set any geographic boundaries. Fearing a tsunami of claims, the Knesset revised the statute in 1983, striking a compromise position. As a result, the laws of the two countries recognize differing geographic distance. Dutch law is the same as the Israeli Supreme Court decision: There are no geographic limits. The Israeli statute limits the geographic scope to properties *bordering the boundaries* of the injurious plan. The term "bordering" is still ambiguous. A 2005 Israel Supreme Court decisions ruled that, in most cases, the term should refer to abutting properties, but left room for exceptions such as a narrow road or path. The Court thus left leeway for different interpretations and for uncertainty.

The second divergence pertains to the threshold value. Until a 2008 revision of the Dutch statute, the laws of both countries had identical threshold criteria for both direct and indirect injuries. Israeli law still does. But the increasing number of claims for indirect injuries led the Dutch government to prepare a bill for a new planning statute. The bill proposed that both direct and indirect injuries would have to exceed a threshold to be compensable, so as to reflect the share that landowners should carry as members of society. As already noted, the Parliament objected to the proposal to impose a threshold on direct takings because it feared this might be regarded as an infringement of constitutional property protection in the ECHR. The threshold level proposed by the government was five percent (I would add, only five percent). However, as Hobma explains, the Dutch Parliament thought that five percent was too high and lowered it to two percent. The revised law is very new, so there is neither case law nor systematic administrative

information on how local governments are using it[118]. Dutch government officials estimate that the threshold, though low, has had an immediate tempering effect on the number of claims for indirect injuries because many claims for indirect injuries are of small magnitude.[119]

The bill drafted by the Israeli government to be introduced during 2009 goes much further than the Dutch statutory revision. The bill proposes to abolish most grounds for compensation for indirect injuries (plus changes regarding direct takings, already discussed above). Despite its importance, the bill has not captured public attention (perhaps because the Israeli public has a plateful of other issues). The Association of Land Appraisers is lobbying to quash the bill. A more serious issue is whether a bill that takes removes existing compensation rights will survive constitutional scrutiny. My assessment is that it will, with the help of the evidence from the comparative analysis offered in this book.

The conclusions from the comparative analysis are presented in Chapter 3.

[118] My conjecture is that the administrative bodies and the courts will not often diverge from the threshold specified in the statute.

[119] Conversations with officials of the Dutch Ministry of Housing, Spatial Planning and the Environment conducted in October 2008. The new statute came into force in July 2008.