

COMPENSATION FOR LAND USE RESTRICTIONS—KENYA, UGANDA AND ZAMBIA, IN COMPARISON TO THE UNITED STATES OF AMERICA

November 2013



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AFRICA BIODIVERSITY COLLABORATIVE GROUP



This report was made possible by the generous support of the American people through the United States Agency for International Development (USAID) under the terms of Cooperative Agreement No. RLA-A-00-07-00043-00. The contents are the responsibility of the Africa Biodiversity Collaborative Group (ABCG). Any opinions, findings, conclusions, or recommendations expressed in this publication are those of the authors and do not necessarily reflect the views of USAID or the United States Government. This publication was produced by **World Resources Institute** on behalf of ABCG.



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EXECUTIVE SUMMARY

The purpose of this research was to study and document compensation policies, laws and practices for property losses that result from government-imposed restrictions on the use of privately-held land, including customary (community/trust) land in Kenya, Uganda and Zambia, in comparison to the United States of America (U.S.A.). The study was conducted largely through literature review and personal interviews in Nairobi over a period of three months, beginning in June 2013.

Analysis of the policies, laws and practices of compensation for land use restrictions in the three selected African countries has been compared to the existing situation in the United States, where takings jurisprudence has developed and matured, over many years. This study finds that in the United States, there is constitutional (at federal and state level), statutory and case law that support the principle that where government regulation goes too far or takes the nature of divestiture of property title, affected property owners shall be compensated, justly. The reason is that government must not burden individual property owners with public service responsibilities that the public, as a whole, should bear. Additional reasons include the need to garner and retain public support for environment conservation and other land-based government programs. For the reasons, where claims have been made in courts and other dispute resolution bodies, the government in the United States, at federal, state and local levels, compensate land and other property owners for: government physical occupation of private land in a widely construed sense, prohibition of use of rights of way, diminution of water rights, easements, denial of development approval, and for many other land use restrictions. However, the U.S. legal system, especially regulatory takings jurisprudence, does not support compensation for every kind of alleged taking. The general conclusion on assessment of the situation in the United States is that it has enough best practice in terms of regulatory takings policy, law and actual practice that could help strengthen land tenure security, environmental conservation efforts and sustainable development in a country.

Finding on the U.S provided the “lense” with which to analyze the situation in the three selected African countries to answer the following questions: (i) which specific land use restrictions obligate the government to pay land holders compensation for their losses, namely: loss of land, loss of use and loss of land value; (ii) what specific types of property losses are eligible for compensation? (iii) what are the procedures for assessing and valuing property losses and what are they based on (open market values, replacement costs, et cetra)? (iv) how and when must compensation payment be made - is it before or after imposition of regulation? (v) could an affected landholder request that the affected land be acquired by the government? (vi) what has been government practice regarding compensation for property loses from private land use restrictions? (vii) what compensation matters from private land use restrictions have been taken to court and how has the court ruled? and (viii) what reforms are needed to ensure fair application of private land use restrictions?

After analyzing policies and many laws of the selected three African countries, including case law, this study finds that in the countries, there exists a comparable situation, as regards government imposition of land use restrictions and the provision for compensation therefore. The general policy, as reflected in national constitutions of all three countries is, first and foremost, that every national of the countries is guaranteed the right to own property and property must not be taken away without just, due or reasonable compensation. However, that position will not bar government from imposing land use restrictions for a variety of public purposes, except that whenever such restrictions are imposed, statutory compensation shall be paid. In that regard, the study finds that the following specific land use restrictions obligate governments of the respective countries to pay land holders compensation for their losses:

In Kenya, policy and law, as reflected in practice, authorize compensation for various kinds of use restrictions including: land use restrictions imposed by the physical presence of wildlife on private lands (The Wildlife management and Conservation Act); easements, entry orders, access orders, public rights of way, way leave, communal rights of way, damage caused by official entry upon land, and restrictions imposed by government authorized mining activities (The Land Act of 2012); environmental easements, environmental conservation orders and other use restrictions (The Environmental Management and Coordination Act (EMCA), No. 8 of 1999); land preservation orders (The Agriculture, Fisheries and Food Authority Act, No. 13 of 2013); and establishment of nature reserves (The Forests Act, Chapter 385 of 2005).

In Uganda, the law permits compensation for various private land use restrictions imposed by: government entry onto private lands, damage occasioned by government entry upon private lands, government physical occupation of land, severance of land that is excessive or harmful to the remainder (Land Acquisition Act, Chapter 226); environmental easements (The National Environmental Act, Cap 153 of 1995); wildlife use rights (Uganda Wildlife Act, Chapter 200 of 1996); easements and water use rights (The Water Act, Chapter 152); mining activities (The Mining Act, Chapter 148 (2003); use restrictions imposed during construction of railways (Uganda Railways Corporation Act, Chapter 331); use restrictions imposed by petroleum production and development works (Uganda Petroleum Production and Development Act, No. 3 of 2013); and for any disturbance of land rights that might impose use restrictions.

In Zambia, a number of laws expressly authorize compensation for land use restrictions: imposed by official entry upon land and works thereon (Land Acquisition Act, Chapter 189); imposed by public utility wayleave (Electricity Act, Chapter 433); amounting to “disturbance of rights” (Mines and Minerals Act, Chapter 213); of water rights as property and official entry and water works on private lands (Water Act, Chapter 198); imposed by grant of access to private land for petroleum-related activities; amounting to disturbance of land rights (Petroleum Exploration and Production Act, Cap. 440); resulting from railway line and termini deviations (Zambia Railway (deviations) Act); and use restrictions imposed by pipeline construction preparatory works and pipeline wayleave (Zambia-Tanzania Pipeline Act).

This study finds that the specific types of losses that are eligible for compensation include; loss of land (especially in the case of government physical occupation), loss of use of land, loss of land value, damage to land itself and property thereon and disturbance of land rights, a category of compensable loss that appears to cover all other interferences with private land use rights.

In terms of procedures for compensation assessment, various mechanisms exist in the three countries, including tribunals, courts of law and administrative structures (ministers, district commissioners and, to a lesser extent, chiefs, in the case of Zambia). Some of the countries, such as Kenya and Zambia, have maintained statutory guidelines (in the form expressed principles, in Kenya) to guide the process of compensation assessment. In all three countries, the practice, as indicated in court decisions and out of court settlements (and in section 111 and 112 of Kenya's Land Act) clarifies that open market value provides the basis of assessment of compensation.

In all three cases, timing of compensation is, unlike cases of compulsory acquisition, after the fact. Court evidentiary requirements suggests that a use restriction would have to first impose losses in order for a claimant to discharge the burden of proof of loss. However, there are a few laws, such as Kenya's Energy Act (sections 46, 47 & 48) which require compensation negotiation and payment before accessing private land for power installations. This was confirmed during interviews to be the current practice of Kenya Power which is also intended to prevent irate land owners from destroying power lines and other equipment installed before compensation. Zambia also has land use restrictive laws, including mining laws that permit acquisition of mining and mineral prospecting permits over privately held land and require compensation to be paid in advance of access to land. However, in practice, that is hardly the case.

In all three countries, there is nothing in the law to prevent affected land owners from requesting government and those acting under their authority, such as investors, to acquire affected land. In some of the countries, especially Kenya, the statutory establishment of a land bank provides a powerful incentive for government to acquire private land on offer, given the scarcity of public land in the wake of a devolved structure of government requiring establishment of government structures in all forty seven counties.

Compensation matters from private land use restrictions that have been taken to court for determination range from questions concerning the proper person to receive compensation to the correctness of compensation assessment (especially where market value is not applied) to (in at least one Zambian case) alleged fraud on the part of responsible government officials in determination and payment of compensation. Courts have stated that the proper person to be paid compensation is either the land owner or a person using or holding property with his authority who has suffered loss from use restrictions. Where property is undervalued, courts insist on open market value, as of the date of payment of compensation.

In conclusion, this study makes suggestions for reforms that are necessary to ensure fair application of private land use restrictions, including the need to strengthen existing institutional structures for compensation.

**COMPENSATION FOR LAND USE RESTRICTIONS - KENYA, UGANDA AND ZAMBIA, IN
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INTRODUCTION TO THE STUDY

The purpose of this research is to study and document compensation policies, laws and practices for property losses that result from government-imposed restrictions on the use of privately-held land, including customary (community/trust) land in Kenya, Uganda and Zambia, in comparison to the United States of America (U.S.A.). This research is based on findings and recommendations of previous WRI-ABCG research on private land use restrictions in Kenya, Uganda and Tanzania which found, among other things, that: in addition to government authority to compulsorily acquire private land (through the exercise of the power of eminent domain), governments have significant authorities to restrict the use of privately held land (through the exercise of police powers), principally for public purposes including environmental management; the impacts of government regulations on private land holders vary widely, depending on the specific restriction, with some restrictions amounting to what has been recognized in some jurisdictions as a regulatory taking; and that some landholder losses from some government restrictions, such as losses resulting from imposition of environmental easements in Kenya, are eligible for compensation, while losses from other restrictions are not.

Previous studies determined that besides cases of government compulsory acquisition of land which, obviously, leads to land transfer from the private to the public domain, certain kinds of government restrictions on or control of private land use have the effect of land deprivation while others actually and potentially significantly diminish the economic and subsistence benefits of one's land. Where the value of private land is lost or the economic and subsistence benefits of land are significantly reduced by government regulation to meet public purposes, including environmental conservation, without compensation, a number of adverse consequences are likely to result, to the detriment of both land owners and government programs as follows:

First, affected landholders, alone, bear the costs of achieving certain public purposes and such losses could weigh heavily, especially on rural land owners who are dependent on their land and related natural resources for their livelihoods and well being, without alternative sources of income and subsistence. In such circumstances, individual land holders and communities would be disproportionately affected in comparison to the rest of the population. Secondly, affected land holders would bear the cost of achieving public purposes at the expense of their livelihoods and development. Third, failure to compensate for land use restrictions would pose a threat to environmental conservation as efforts to achieve public purposes, including environmental conservation, would attract resistance and not the desired public support. In Kenya, in one case in which the National Environment Management Authority (NEMA) sought to achieve protection of the breeding ground of cheetah, an endangered species, by restraining a land owner from partnering with an investor to establish a tourist facility on his land, the land owner threatened to clear the land, cultivate it and make it impossible for wildlife to be present on the land.¹

Moreover, absence of compensation in the face of land deprivation through government regulations could generate insecure land-tenure systems that lead to low investment in land-based activities and productivity. In many jurisdictions including Kenya, failure to

compensate for land use restrictions may also amount to abridgement of human rights, specifically, the right to own and use property.

For the foregoing reasons, this study seeks to analyze government policies, laws and practices in Kenya, Uganda and Zambia to determine and document provisions for compensation for government restrictions on the use of privately held land, in comparison to policies, laws and practice that prevails in the United States of America which has mature jurisprudence on recognition of and compensation for certain land use restrictions amounting to what is widely and legally recognized as regulatory taking. The objective of analysis of the policies, laws and practice between the two continents is to first determine whether in the selected countries, governments, similarly recognize and compensate for certain kinds of land use restrictions to rule out the possibility of negative consequences of such regulation and form the basis of support for government regulatory actions for environmental conservation, among other things. Secondly, if and where compensation policies, laws and practices do not exist, the examples (of policy, law and practice) provided by the United States will serve as best practices for other countries to strengthen environmental conservation efforts as well as ensure land tenure security and sustainable development. In the process of analysis as stated, this study seeks to answer the following questions:

- (i) which specific land use restrictions obligate the government to pay land holders compensation for their losses, namely: loss of land, loss of use and loss of land value;
- (ii) what specific types of property losses are eligible for compensation?
- (iii) What are the procedures for accessing and valuing property losses and what are they based on (open market values, replacement costs, et cetra)?
- (iv) How and when must compensation payment be made- is it before or after imposition of regulation?
- (v) Could an affected landholder request that the affected land be acquired by the government?
- (vi) What has been government practice regarding compensation for property loses from private land use restrictions?
- (vii) What compensation matters from private land use restrictions have been taken to court and how has the court ruled? and
- (viii) What reforms are needed to ensure fair application of private land use restrictions?

This comparative study necessitates a presentation of the United States jurisprudence on regulatory takings to form the basis of understating of the concept, especially for readers in countries without comparable policies, laws and practices. Presentation of United States Jurisprudence also lays the basis for comparison, in subsequent sections of this work that address pertinent issues, such as assessment of compensation and timing of compensation payment.

Research Methodology

This research has been conducted primarily through review of available literature on the subjects, analysis of existing laws, including case law and policies and both personal and telephone interviews, in Nairobi, with persons knowledgeable on the subject. The focus of the study is Kenya, Uganda and Zambia, the United States serving principally for purposes of comparison. Both Kenya and Uganda were chosen on the basis that first, the two countries were the subject of a previous study on existing land use restrictions. Secondly, information on issues of concern, including relevant legislation of the two countries, is more readily available. Zambia was added to this study because it is a country where the government, at the behest of donors, has implemented market-based tenure reforms, based on a new legislation whose development also received both local and external support. The land legislation aims to improve the security of land tenure and promote development through investment and hence the need to compensate for use restrictions that might impact negatively on land. The situation prevailing in the three countries in terms of compensation for land use restrictions shall be considered to be indicative of the situation prevailing in other African countries.

ORGANIZATION OF THE REPORT

This Report is presented in sections. Section I presents takings jurisprudence in the U.S.A. to form the basis of comparison with the selected African countries. Section II presents an analysis of the policies, laws and practices (as reflected in case law) of compensation for land use restrictions in Kenya. Section III presents the situation in Uganda and Section IV presents the situation in Zambia. The Report concludes, with suggestions for reforms that could adequately ensure fair application of private land use restrictions.

SECTION I

REGULATORY TAKINGS IN THE UNITED STATES

In the United States, regulatory takings is recognized, not just as a concept or examinable subject, but also in law, as an adverse effect of government action on property ownership and use that, of necessity, attracts compensation.

Definition of Regulatory Taking

Regulatory taking may be described as a situation in which a government regulates private property to the extent that the regulation effectively amounts to taking of the property by the government, without formally invoking eminent domain powers, that is, without actually divesting the property owner of title to the property. Government may regulate private property to the extent that it deprives a property owner of all or a substantial proportion of the beneficial uses of property, for example, by physically occupying property and by placing regulatory restrictions on private property use including doing something that denies access to the property. In such cases, government precludes property owners from being capable of deriving meaningful economic benefit from their property.² Such cases are also referred to as inverse condemnation because actions for compensation are brought by the affected property owners and not by the condemnor (usually government or some government agency). In such cases of government restrictive actions, government does not intend to acquire private property. Where a taking has occurred, at the instance of federal or state government, affected property owners and other users often make claims for compensation, based on the Fifth Amendment to the United States Constitution, as supported by the Fourteenth Amendment to the same Constitution. Compensation claims may also be based on constitutions of a few states, such as the Constitution of California, and on state compensation laws that have provisions for compensation for land use restrictions.

Federal Constitutional Basis for Regulatory Taking

The Fifth Amendment to the United States Constitution, which forms the basis of regulatory takings, provides, in totality, that:

“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; ***nor shall private property be taken for public use, without just compensation.***” [Emphasis added]

It is the last part of Article V of the Fifth Amendment that confers the right to property and protection from government taking of property without just compensation. Such clauses exist, not only in the Federal Constitution, but also in state constitutions. For example, the California Constitution, Article 1, section 19, states that private property may be taken or damaged for public use only when just compensation has first been paid. The provisions of the U.S. Constitution do not prohibit the United States from acquiring property from private owners; it sets the condition that when property is taken, just compensation shall be paid. Provisions of the Fifth Amendment are made applicable to states by the Fourteenth Amendment to the same Constitution³ which

supports compensation payment requirement by setting compensation payment as a due process requirement. Other federal laws that support claims for compensation for regulatory taking (to a lesser extent) are: the Civil Rights Act which authorizes damage actions against local authorities for violating any rights, privileges or immunities secured by the Constitution and other laws,⁴ the Tucker Act⁵ and a number of state laws enacting statutory compensation remedies (Florida, Texas, Oregon and Arizona).⁶ It is noted that the provisions of the US Constitution compare well with those of Kenya Uganda⁷ and Zambia which are expressed in almost similar terms.

The Constitution of the United States does not define what constitutes property. This was recognized in *Phillips v. Washington Legal Foundation*⁸ and in *Conti v. United States*,⁹ in which the court stated that property interests are created and their dimensions defined by existing rules or understandings that stem from an independent source such as state law and principles of nuisance and property law existing when the property was acquired. Regarding takings claims, case law has defined property to include: all interests in land, from fee simple to leaseholds, including buildings, easements, liens, life estates, restrictive covenants, some future interests,¹⁰ options to purchase,¹¹ right of refusal,¹² water rights (though of a qualified nature),¹³ mineral rights,¹⁴ unpatented mining claims¹⁵ and usable airspace up to the floor of public air space.¹⁶

Also held to be property under the Fifth Amendment to the Constitution are: franchises,¹⁷ money,¹⁸ debts of a lender,¹⁹ certain contract rights,²⁰ patents and copy rights,²¹ trade secrets²² and causes of action that have been reduced to final unreviewable judgments.²³ This study finds that although some of the property that fall for compensation under takings law in the United States, such as mining rights, water rights and obviously, land and buildings are the same as those of the three African countries studied, so far, none of the countries' compensation courts and other forum has specifically stretched the definition of property to include right of refusal and other intangible forms of property, even though most of the compensation provisions define property in very wide terms that could, arguably, include virtually all kinds of property, to reach and even surpass United States definitions. A survey of cases indicates that takings clauses apply to property that is either taken or damaged.

It is noted that property is not limitless for purposes of takings claims. The following have been held *not* to be property: permits and licenses, when not transferable and revocable, government benefits, unless contractual, uses/access dependent on government authorization, the mere ability to conduct a business as something separate from the business's tangible and intangible assets and wildlife, prior to its being reduced to possession.²⁴

What Amounts To A Regulatory Taking

The next point to consider is what amounts to regulatory taking for purposes of compensation under United States law. It should be clarified that in the United States law, regulatory taking includes instances of what is known as a physical taking

especially in cases of government physical occupation of land while in the three African countries studied, physical taking of property is commonly understood to be a separate consideration, referring to compulsory acquisition, through the exercise of eminent domain power of the state. In the United States, in most cases, acquisition of private property by the federal government in what would, in Kenya, Uganda and Zambia, be compulsory acquisition, is accomplished through direct condemnation proceedings in the United States district courts.²⁵ In such cases, the United States typically indicates intent to acquire private property for some public use²⁶ and the only issue for the court to resolve is the amount of compensation to be paid to the current owner. Just compensation that is required by the Constitution is based on the fair market value of the property on the date it is acquired.²⁷

Besides physical acquisition of property or, as more commonly known in Africa, compulsory acquisition for public purposes and in contrast to it, regulatory taking occurs when government: physically occupies private property, does something that places something physically on one's land thus restricting its use or places restrictions on property that denies the property owner economic benefits of it. Not every deprivation of use, possession or control of property constitutes a taking for purposes of compensation. The nature or character and extent of invasion of property right determines whether or not a taking has occurred. The underlying principle is that a compensable taking occurs when a burden is imposed on an individual's property which, in all fairness and justice, should be borne by the public as a whole.²⁸ The types of interferences with property ownership and use that amount to a taking are as varied as (state, local and federal) governments' restrictive actions. Therefore, for ease of appreciation of the nature of takings claims based on the Fifth Amendment to the U.S. Constitution (backed by the Fourteenth amendment to the same Constitution), two categories of takings have been identified, namely: physical taking, in which case, claims arise when a physical occupation or complete destruction of property occurs as a result of some governmental action and regulatory takings which arise from some regulatory action by the government that precludes all or substantially all viable use of the property.²⁹ However, for purposes of clarity and comparison, this study does not categorize takings types, having found that even in cases where the United States banked rights of way and/or easements acquired over private lands, the court found a regulatory taking, without necessarily categorizing it as a physical taking.

The position in this study, based on assessment of relevant U.S. jurisprudence, is that taking occurs whenever government action or regulation, imposes restrictions on private use of land, including cases where government, by its action or regulation, prohibits land use, physically occupies private property or causes something to physically occupy property and/or undertakes public service activities on land for public purposes. The following presentation illustrates government restrictive actions that courts in the United States have found to amount to regulatory takings and issued awards for compensation. It will be noted that challenges to governmental restrictive actions are not limited to federal government; they extend to actions of states and state agencies, including local authorities, such as cities. The analysis of cases includes comparison to the situation in Kenya, Uganda and Zambia whose details are presented

in subsequent sections. The key point is that in similar cases, courts in the three African countries and other dispute resolution bodies are prepared to award compensation where government restricts land use, based on a number of laws which expressly provide for compensation. The *grund norm* for compensation laws and awards appear to be the national constitutions which not only guarantee property ownership rights but also provide for compensation in cases where property is taken for public purposes. One of the contrasts is that while in the United States, affected property owners have to raise and base their claims on the Fifth Amendment to the Constitution and, in some cases, to the Fourteenth amendment and the Tucker Act also, in the three African countries, there are many laws, including case law and policies expressly providing for compensation payment in cases where government restricts land use for public purposes.

The Nature of governmental regulation/restriction that constitutes a taking - government restriction of mining rights

It is deemed appropriate to begin with the case of *Pennsylvania Coal Co. v. Mahon*,³⁰ which illustrates, not only one of the forms of government restrictions that amount to a taking but is also a case in which the United States Supreme Court, for the first time, established the rule that *whether a regulatory act constitutes a taking requiring compensation depends on the extent of diminution in the value of the property*. The rule, known also as the diminution-of-value test, overrides other tests previously set, such as the permanent physical occupations test.³¹

Brief facts of the case are that in an 1878 deed, the Pennsylvania Coal Co. granted to H.J. Mahon the surface rights to a parcel of land, but retained the mining rights to the land, and Mahon accepted any risk from, and waived all claim for damages resulting from mining below the property. In 1921 the Commonwealth of Pennsylvania passed the Kohler Act, which prohibited the mining of anthracite coal in such way as to cause the subsidence of, among other things, any structure used as a human habitation. Prior Pennsylvania law had recognized that such pillars of coal necessary to support the land surface were an estate in land (a "support estate"), separate from the rights in removable coal. Pennsylvania Coal issued notice to Mahon that it planned to mine for coal under the Mahon's habitation and Mahon brought suit to prevent Pennsylvania Coal from mining under his land, basing his case on the Kohler Act.

Mahon sued in the Court of Common Pleas to restrain Pennsylvania Coal from conducting mining, but the court denied the injunction, holding that the application of the Kohler Act to this case would be unconstitutional. The Supreme Court of Pennsylvania reversed, holding that the statute was a, "legitimate exercise of the police power" and granted an injunction.³² *Pennsylvania Coal Co.* appealed to the Supreme Court. The Court rules that the Kohler Act as applied to the property in question constituted an exercise of eminent domain, requiring compensation. In other words, although the Act authorized the responsible agency to exercise police powers in the interest of protection of support of private lands, it did amount to taking away property, namely: mining rights, in a situation where the holder of surface rights had contracted to take

the risk of mining underneath his land. In setting the rules as already stated, the Court stated recognized that the damage done by the statute is significant, insofar as it abolishes an estate in land and a binding contract and that the statute, in general, purports to extinguish the mining rights which are valuable properties under surfaces owned by the public and the government. The rule/test established in the case was subsequently applied in many cases to determine whether or not a regulatory taking has occurred, for purposes of compensation.

Other cases in which federal, state and local governments have awarded compensation for use restrictions under the takings doctrine

The following cases demonstrate: the nature of property use restrictions that amount to regulatory taking for purposes of compensation; the reliability of the Fifth Amendment and the Fourteenth Amendment to the United States Constitution as well as the Tucker Act in supporting compensation claims, threshold issues, which may also be understood as the tests to be applied in determining whether a taking has occurred and the basis of assessment of compensation for regulatory taking.

(i) *United States v. Causby*³³- Compensation for loss use of a land owner's air space resulting from government invasion of the air space

It was stated in the introductory part of this section that in the United States, property has been defined to include the air space above privately owned land. In this regard, the case of *United States v. Causby*,³⁴ provides a good example, not only of the court's recognition of the government's imposition of use restriction but also of the compensable nature of the government's invasion. In the case, a landowner sued the federal government for interfering with his enjoyment and use of property by subjecting him to incessant low-level military flights well below the federally recognized aviation airspace. The court ordered for his compensation, stating that the landowner owns at least as much of the space above the ground as he can occupy or use in connection with the land and that the fact that he does not occupy it in a physical sense-by the erection of buildings and the like-is not material. It was found, as in other cases of a similar nature, that damages were not merely consequential; they were the product of a direct invasion of the land owner's domain. It is noted that flights over private land do not constitute a taking, unless they are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land.

(ii) *First English Evangelical Lutheran Church v. Los Angeles County*³⁵ - compensation for use restriction resulting from government prohibition of buildings within a flood plain

First English Evangelical Lutheran Church operated a retreat center for handicapped children on its property and named the camp Lutherglen. After a serious flood destroyed all the buildings in Lutherglen, the County of Los Angeles adopted an interim ordinance prohibiting building within the floodplain. The Church sued, seeking damages, alleging that the ordinance denied them all use of Lutherglen. The Superior Court struck the allegation, reasoning that damages were unavailable for an inverse condemnation. In

California a plaintiff was procedurally first required to get the court to declare that a challenged regulation was excessive. After the regulation was declared excessive the regulator could discontinue the regulation or pay just compensation. The Court of Appeal affirmed the decision and the California Supreme Court denied review. Upon further appeal to the Supreme Court, the Court held that the complete destruction of the value of property constituted a taking under the Fifth Amendment to the United States Constitution even if that taking was temporary and the property was later restored. The Court further held that a temporary regulatory takings requires just compensation, as in any other kind of takings.

(iii) *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987)- An easement constitutes a taking and is compensable

In the case, the United States Supreme Court reviewed a regulation under which the California Coastal Commission required that an offer to dedicate a lateral public easement along the Nollans' beachfront lot be recorded on the chain of title to the property as a condition of approval of a permit to demolish an existing bungalow and replace it with a three-bedroom house. The Coastal Commission had asserted that the public-easement condition was imposed to promote the legitimate state interest of diminishing the "blockage of the view of the ocean" caused by construction of the larger house. The Court ruled that a requirement by the CCC was a taking in violation of the Fifth and Fourteenth Amendments. It also ruled that in evaluating such claims, it must be determined whether an "essential nexus" exists between a legitimate state interest and the permit condition.

(iv) *United States v. Welch*³⁶- A private right of way is land and its destruction is a compensable taking.

The claimants owned land south of and adjoining a strip of about three acres of land lying along the Four Mile Creek and running east and west. They had a private right of way at right angles to the creek, northerly, across land of other parties to the Ford County Road, which ran parallel to the creek and at some distance from it. This was the only practical access/outlet from the plaintiffs' farm to the county road. The intervening three-acre strip of land lying along the side of Four Mile Creek and running east and west was taken by a federal agency, thus cutting off the plaintiffs' use of the way. The court held that a private right of way is an easement and is land, and its destruction for public purposes is a taking for which the owner of the dominant estate to which it is attached is entitled to compensation.³⁷ The court found that cutting off of the use of the way/access amounted to a taking of the access for which it awarded the claimants the sum of \$300. It also found that taking of the land owners' access reduced the value of the land and for loss of land value, it awarded them the sum of \$1,700.

(v) *Dolan v. City of Tigard*³⁸- imposition of the requirements that a developer dedicates part of his land to a public greenway and develop a pedestrian and bicycle pathway on his land amounts to a regulatory taking

In the case, the City imposed a land dedication requirement similar to land improvement and development requirements that existed in the now repealed Agriculture Act, Cap 318 and some of the conditions that may be imposed on an EIA licence in Kenya and Uganda. The Petitioner Dolan, owner and operator of A-Boy Plumbing & Electrical Supply store in the city of Tigard, Oregon, applied for a permit to expand the store and pave the parking lot of her store. The city planning commission granted conditional approval, imposing the condition that Dolan dedicates land to a public greenway along an adjacent creek, and develop a pedestrian and bicycle pathway in order to relieve traffic congestion. The decision was appealed to the Oregon State Land Use Board of Appeals (LUBA), alleging that the land dedication requirements were not related to the proposed development, and thus constituted an uncompensated taking of her property, which is disallowed by the Fifth Amendment. LUBA found a reasonable relationship between the development and both conditions of the variance, as the larger building and paved lot would increase runoff into the creek, and the impact of increased traffic justified the requirement for a pathway. The decision was subsequently affirmed by the Oregon State Court of Appeals and the Oregon Supreme Court. Dolan further appealed to the Supreme Court of the United States. The Supreme Court overturned the state Land Use Board of Appeals and the decision of Oregon appellate courts. The Court held, among other things, that the requirement for a *public* greenway (as opposed to a private one, to which Dolan would retain other rights of property owners, such as the right of exclusive access), was excessive, in other words, regulation had gone *too far*. In other cases, the Supreme Court and other courts in the U.S. have established that a taking occurs where regulation goes too far.

(vi) *Loretto v. Teleprompter Manhattan CATV Corp.*³⁹ is a case that is reminiscent of Kenyan and Ugandan cases involving claims for damages and/or compensation for public utility company installation on private lands of power lines and other equipment.

In *Loretto*, a New York statute required landlords to install CATV cable facilities on the roof of their buildings as part of a city-wide cable network designed to bring cable services to the entire city. Landlords were required to provide a location for 6 feet (1.8 m) of cable, one-half inch in diameter and two 4" x 4" x 4" metal boxes at a one-time charge determined by the Cable Commission at \$1. Property owners challenged the requirement, stating that it would result in a permanent physical presence of the CATV cable facilities on their property and amount to a taking of the property, which would reduce their value. The City argued that the invasion of property was minimal in comparison to the community wide benefit that it would confer. The Supreme Court ruled that a regulation is generally considered a *per se* taking when it forces land owners to endure a permanent physical occupation on their land, such as the permanent physical presence of cable lines on a residential building. The Court argued that any permanent physical presence destroyed the property owner's right to exclude, long recognized as one of the key rights in the "bundle of rights" commonly characterized as property.

It is noted that when the character of the governmental action, is a permanent physical occupation of property, courts in the U.S. uniformly have found a taking to the extent

of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner.

(vii) *Lucas v. South Carolina Coastal Council*,⁴⁰

South Carolina's Coastal Zone Management Act of 1977 required owners of coast land in "critical areas" near beaches to obtain permits from Respondent South Carolina Coastal Council before committing the land to new uses. In 1986, David H. Lucas purchased beachfront properties comprising two vacant oceanfront lots in the Beachwood East Subdivision on the Isle of Palms in Charleston County, South Carolina for \$975,000. Subsequently, in 1988, the State passed the Beachfront Management Act (1988),⁴¹ which increased the regulations on the use of coastal land by prohibiting construction of buildings near the beach to prevent erosion and preserve the beach. The Act effectively deprived Petitioner Lucas of his ability to erect homes on his properties and filed suit, asserting that the restrictions on the use of his lots was a taking of his property without just compensation. South Carolina Coastal Council, the responsible state agency, argued that the Beachfront Management Act is a valid exercise of the police power, as the beach/dune area of the shores is a valuable public resource, and the erection of structures on that land contributes to erosion and destruction of that resource. It also argued that all property in the state is held subject to the limitation that the state may regulate the property in such a way as to remove all value.

The trial court agreed and awarded Lucas \$1,232,387.50 as just compensation for the regulatory taking. The government of South Carolina appealed, and the Supreme Court of South Carolina reversed.⁴² Lukas appealed to the Supreme Court of the United States, seeking a reversal of the South Carolina Supreme Court judgment, reinstatement of the trial court judgment, and declaration that the Beachfront Management Act constituted a taking of his property.

The Supreme Court held that the South Carolina Supreme Court erred in holding that the Beachfront Management Act was a valid exercise of the police power and did not constitute a taking. It remanded the case to the South Carolina Supreme Court for determination of the issue of compensation. Upon remand, the South Carolina Supreme Court⁴³ granted the parties leave to amend their pleadings to determine what the actual damages were. The Court awarded Lukas \$850,000 in compensation for the two lots.⁴⁴

The case of Lucas is significant in establishing a *Per se* total regulatory taking test. In that case, the court stated that government regulation results in a total taking of private property when regulation completely eliminates the economic use (and, seemingly, value also) of land. The test shall be elaborated among one other dominant test to explain what circumstances of property owners facing government regulation must meet for courts to decide that a compensable taking has occurred.

The foregoing are just a few of the numerous regulatory takings cases that have been presented to both federal and state courts.

REGULATORY TAKINGS TESTS

When a land or other property owner challenges government's regulatory action and/or claims compensation for such action on the basis that regulatory action amounts to a taking of property, courts are placed in a situation where they must apply certain determinant tests to arrive at the conclusion whether or not a taking has occurred and, in almost every case, courts base their determinations on established takings tests that are explained in this section. First, it is necessary to elaborate the principles upon which regulatory takings claims, tests and compensation award decisions are based.

Takings Principles

A bedrock principle of the Fifth Amendment clause, which has become widely known as the takings clause is that it was designed to *bar government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.*⁴⁵ This principle is often pronounced at the beginning of many takings decisions. The principle stands as an admonition that takings decisions should be tempered with a sense of what is fair to the property owner and to the government, in the totality of circumstances. Another principle, more recently pronounced, is that regulatory takings law seeks to identify regulatory situations that are the "functional equivalent" of appropriation, ouster or divestiture of private property title.⁴⁶ The latter principle create doubt as to whether there is adequate latitude within which the fairness and justice principle could operate. Be that as it may, the two principles (disproportionately) guide courts in applying legally recognized tests to determine whether a taking has occurred as a result of land use restriction, for purposes of compensation.

The Tests

A question could be simply posed as follows, to better appreciate the applicability of takings tests: when a property owner alleges that a federal, state or local agency has "taken" his/its property without necessarily divesting him/it of property title and he/it is therefore seeking compensation, what is it that the property owner must prove, to discharge the burden of proof that a taking has occurred? On the part of courts, what elements shall they be looking for, whose presence or absence determine whether or not there is a taking?

(i) Physical occupation of property

If facts of a matter permit, an affected property owner could argue that government has physically occupied his/its property and thereby effected a *per se* taking. In such cases, courts will consider whether government or some government agency is physically present on one's land or some other property, has placed something on one's land or other property, allowed something (such as floods) to be physically present on one's private property or does something that exerts physical presence of government on one's property. As already noted, property is comprised of various kinds of interests and rights, including the air space above ones land. A survey of cases indicates that a

taking may more readily be found when interference with private property is of the nature of physical invasion of property by government. A case in point whose facts have already been presented is *United States v. Causby*.⁴⁷

(ii) “Total Taking” Rule

In 1922, the Supreme Court of the United States announced that taking of private property could occur under the Fifth Amendment to the United States Constitution through government regulation that “goes too far”⁴⁸ - in the absence of any physical invasion or appropriation of the property. In subsequent cases, the Supreme Court and other courts faced with takings claims developed tests to determine when a regulation “goes too far” and thus constitute a taking. The total takings rule was developed by court to determine when a regulation goes too far, in the case of *Lucas v. South Caroline Coastal Council*⁴⁹ in which the Court stated the rule as follows:

“Government regulation completely eliminating the economic use (and seemingly value, too) of land is a per se “total taking.”⁵⁰

The *per se* total regulatory takings test established in the *Lucas* case is one of the two more dominant tests for regulatory taking. The other dominant test which shall be discussed in this section is the partial regulatory taking test established in the *Penn Central* case. In applying the test, courts consider whether, without physically acquiring property, government has imposed a regulation which restricts land use permanently or indefinitely and thereby completely eliminates use and/or value of property. The test requires total loss of both economic use and value of property. However, currently, most courts in the United States define the test in *Lucas* case simply by referring to economic, beneficial or productive use, without mention of value, which the Federal circuit uses the terms use and value interchangeably.⁵¹ A question may be raised concerning how total a total taking must be of use and value in order for a party claiming on the basis of *Lucas* test to succeed. The answer is that a claimant must be left with a mere “token interest” in the property.⁵² A court has stated that a party whose property deprivation is one step short of complete, suffering a 95% value loss would not qualify under the total takings test, though they may claim partial regulatory taking under the *Penn Central* test discussed next.

(iii) Partial regulatory taking test

The test applies where government restriction of private property use falls short of completely eliminating its use and/or value. The test was established in the case of *Penn Central Transportation Co. v. City of New York*,⁵³ and is also known as the *Penn Central* test. In setting the test, the court stated that to determine whether a partial regulatory taking has occurred, one (a court) has to examine the government action complained of for its: (1) economic impact on the property owner; (2) the degree of interference of the use restriction with the property owner’s distinct or reasonable investment-backed expectations; and (3) the character.⁵⁴ The test is not a set formula. It is a factual inquiry, on a case-by-case basis. One might consider it more like an analytical framework than as a true test.

Where the test in *Penn Central* is invoked, a court has to consider all of the three factors comprising the test but each factor, if sufficiently compelling, could be conclusive that a partial taking has occurred, in which case, the other two tests would be dispensed with. Regarding economic impact, the court, in *Penn Central* did not state whether preference shall be given to measuring economic impact in terms of remaining economic use or remaining market value. However, most courts focus on remaining economic use. Analysis of court decisions indicates that economic use embraces more than just use that returns a profit. It refers to any use that generates significant market value to the affected property, such as being able to continue living in an already built residence.⁵⁵ In accordance with general rules or principles of land valuation, a economic use must show reasonable probability that the affected land is physically adapted for a claimed use and that there will be a demand for such use in the reasonably foreseeable future such that uses not considered to be economic uses in one case may be so considered in another.⁵⁶

In calculating value loss, courts assess the economic impact factor by percentage value loss. The calculation is often said to be based on a comparison of the market value of the property immediately before and after the restriction was imposed.⁵⁷ Market value is based on a property's highest and best use. The dominant approach in determining market value is the comparable sales approach, where sales of parcels similar to the one alleged to have been taken exist. Alternatively, courts may use an income-capitalization approach, in which the present value of the property in question is computed from reasonably anticipated future earnings. In *Lukas*, Kennedy, J., concurring, emphasized that the determination of value must be considered with reference to the owner's reasonable, investment-backed expectations. Risks and other variable stemming from future occurrences are often discounted.⁵⁸

In actual situations, application of the tests mean that when an affected party approaches a court, such as the Court of Federal Claims, he/it must state the effect that the offending regulation has had on their property, to form the basis of their compensation claims. Considering monetary limitation of court jurisdiction, specification of a claim to suit the application of a particular test also helps to determine the amount of compensation that a party is likely to claim and whether or not the court presented with the matter would have jurisdiction to make an award.

In the analysis of reasonable investment backed expectations, questions are often asked regarding whether a claimant had actual investment backed expectations at the time the investment was made or the property acquired and whether the expectations were objectively reasonable. In *Ruckelshaus v. Monsanto*,⁵⁹ a taking was found when the government frustrated statutorily created expectations that submitted trade secrets would be kept confidential. This study further found that in assessing economic loss to a property owner and the degree of interference with expectations, the court compares what was taken from the property owner with what the owner still has. It means that assessment of what was taken is not conducted in isolation.⁶⁰ In assessing what a property owner still has, courts often define the extent of a claimant's property to

include it in the analysis. This is known as the “parcel as a whole” rule or the denominator issue.

Regarding the character of government action as part of the partial taking test analysis, various factors are considered including whether or not regulation occasions or leads to physical invasion of private property by government, in which case, a taking may more readily be found. Factors that do not form part of consideration of character are the relative goodness of the governmental action complained of.⁶¹

(iv) Other tests based on the Fifth Amendment

There are a few other tests that were applied in special situations which determine that taking occurs where government substantially or unreasonably interferes with the right of an owner of, for example, land abutting a public highway to access a highway,⁶² but such special situation tests seem to be displaced by the tests in the two cases and therefore, the test shall not be detailed in this study.

(v) Thresholds set in states’ statutory compensation remedies

Besides the takings tests that have been established through case law, largely by the Supreme Court of the United States, tests or thresholds for compensating property owners have been set in a number of state’s property laws which have enacted statutory compensation remedies for land use restrictions. The states with such laws include Florida, Texas, Oregon and Arizona whose property rights laws typically establish thresholds for compensation that are much lower than the tests established under the Takings Clause of the U.S. Constitution. Therefore, before a party files a claim for compensation for regulatory taking, it is necessary to first determine whether his state has enacted statutory compensation remedies.

It is further clarified that generally, a property owner could maintain a taking claim only if he owned the property as of the date of the alleged taking. Therefore, the right to compensation cannot be passed to a subsequent purchaser.⁶³ This is a basic *locus standi* rule. Also, a taking must be for a public use or public purpose. If it is not, the government action is void, and a purported use restriction could be pursued through an action in tort.

Just Compensation

The Fifth Amendment to the United States Constitution and, in part, the Fourteenth Amendment, require payment of *just* compensation, in terms similar to those of the national Constitutions of the three African countries studied. This study establishes that in the United States, just compensation is based on the fair market value of property at the time it is acquired (in the case of compulsory acquisition)⁶⁴ and the value of property on the date the restriction was imposed.⁶⁵

Timing of Compensation

This study finds that unlike cases of compulsory acquisition which are preceded with condemnation hearings during which issues concerning compensation and assessment thereof are considered, in cases of regulatory taking, compensation is often paid after the fact, as is also, often the case in the three African countries studied. In the United States, the various tests explained, which courts apply to determine whether or not a taking has occurred are dependent on existing taking conditions; otherwise, a claimant would fail a test. In the African countries studied, there are no specific tests to be applied (though guidelines exist in countries such as Kenya) due to the existence of statutory provisions for compensation but the language of many of the statutes and the practice, as appears from case law indicates that compensation is paid after the fact, even though there is nothing in the laws to stop payment before imposition of use restrictions.

Summary of Findings on U.S. Takings Law and Practice

On the basis of elaboration in the foregoing section, which presents only a few of the numerous regulatory takings cases in the U.S., this study finds that in the U.S. various kinds of land and other property use restrictions obligate federal, state and local governments to compensate property owners for resultant losses and damage, including: physical occupation of land and other property, deprivation of rights of way, imposition of onerous development requirements and government installations on private lands, just to mention a few. It has also been found that land use restrictions of many kinds which, in the U.S., amount to regulatory taking, are similar to use restrictions that have been imposed in the African countries selected for this study, except that in the United States, property is broadly defined to include some items that have not yet been expressly defined as property in Africa, for purposes of compensation for use restrictions, even though there is nothing in any law to stop that from happening.

This study also finds that in the United States, there is adequate law and policy that form the basis of compensation payments, based on the Fifth amendment of the United States Constitution, whose application is extended to states by the Fourteenth Amendment to the same Constitution but these are not the only legal bases for compensation awards; there are state constitutions, such as the Constitution of California, with compensation requirements and state laws with similar requirements, such as the compensation award provisions of Texas, Oregon, Arizona and Florida. It has been explained that the aim of the provisions of the Fifth Amendment to the Federal Constitution, which reflects the basic policy on government land use restrictions, is to bar government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole. It is a matter of justice and fairness but that is not all; if affected land owners are not compensated for use restrictions, negative consequences are likely to result, including derailment or delay of government programmes and environment and natural resource depredation.

For the foregoing reasons, various kinds of property losses, including loss of land and loss of land value attract compensation and property, for purposes of takings compensation, is widely defined, to include the air space above one's land and areas above and below ground surface (especially for mining and ground water harvesting purposes).

This study further finds that in the United States, procedures have developed, over many years, not only for determining what amounts to regulatory taking for purposes of compensation (based on legally recognized tests) but also for assessing the amount of compensation payable, based on open or fair market value of property. The open or fair market value of property is an estimate of the market value of a property, based on what a knowledgeable, willing, and unpressured buyer would probably pay to a knowledgeable, willing, and unpressured seller in the open market.

Regarding timing of compensation, much of the supportive U.S. laws are silent, as regards regulatory taking (unlike compulsory acquisition for which compensation shall, obviously be paid before acquisition), with a few exceptions, such as the California Constitution which expressly requires compensation *before*. As already stated, case law, including the applicable tests for determining whether or not a taking has occurred, suggests that compensation payments are made, in most cases, after imposition of a use restriction. In at least one case, this study found an affected land owner who was willing to have his land acquired by another, not by government, but by a private developed backed by a government program. [1]. Moreover, this study did not find any U.S. law that bars affected land owners from requesting that their affected lands be purchased by government. In any case, in efforts to preserve railway tracks for future uses, federal and state governments supported a land acquisition and retention exercise in the nature of a land bank program [2]. Therefore, there is a possibility that an affected land owner could ask federal, state or local government to purchase land that is actually or potentially affected. This study also finds that most of the compensation claims in the United States are settled by court, including the supreme Court of the United States. Overall, successful court intervention, through compensation awards, in cases of imposition of land use restrictions, assure justice and fairness, especially to affected land owners. Of course what government may suffer monetarily cascades, generally, to the public.

Analysis of Policy, Law and Practice of Compensation for Land Use Restrictions in Kenya, Uganda and Zambia

Against the backdrop of the foregoing findings on regulatory takings compensation in the United States, this study analyzes the policies, laws and practices of compensation for land use restrictions in three selected countries, namely: Kenya, Uganda and Zambia and presents findings on: the specific land use restrictions which obligate government to pay land holders compensation for their losses, specific types of property losses that are eligible for compensation, existing procedures for accessing and valuing property losses and basis thereof, how and when compensation payments are made, whether an affected landholder could request that the affected land be acquired by the

government, government practice regarding compensation for property loses from private land use restrictions as demonstrated by case law and other procedures, and the nature of compensation matters from private land use restrictions that have been taken to court and how courts have ruled. Subsequently, the study presents suggestions on reforms that are necessary to ensure fair application of private land use restrictions.

SECTION II

Analysis of Policy, Law and Practice of Compensation for Land Use Restrictions in Kenya

Introduction:

The Republic of Kenya has an area of approximately 582,646 sq. km. comprising 97.8% land and 2.2% water surface. Although agriculture forms the main subsistence and economic activity in Kenya due to low industrial capacity, only 20% of the land area can be classified as medium to high potential agricultural land. The rest of its land is mainly arid or semi-arid. Forests, woodlands, national reserves and game parks account for ten percent (10%) of the land area, i.e. 58,264 square kilometres. The country's population according to 1999 Population Census was 30.4 million, with an annual growth rate of 2.9% and is expected to rise to 55 million by 2050. Currently, the population is estimated to be 39 million. Approximately seventy five per cent (75%) of the population lives within the medium to high potential agricultural areas, consisting of only 20% of the land mass, while the rest of the population lives in the vast Arid and Semi-Arid Lands (ASALs). The limited quantity of the country's productive land makes it a critical resource for both subsistence and development, not to mention that the consequence of land distribution in terms of agricultural productivity is that size and distribution of land vary widely as does population density, which ranges from as low as 2 persons per square kilometers in the ASALs to a high of over 2000 persons per square kilometre in high potential areas.

Against the backdrop of the foregoing circumstances, the national Constitution, environmental laws, agricultural laws and water laws, among others, impose on private land owners land use restrictions for a variety of purposes, including environmental conservation and orderly development planning. This is in addition to government power of eminent domain that authorizes it to compulsorily acquire land for public purposes, such as construction of schools and hospitals. The land and population distribution situation is such that unless mechanisms are integrated in national policies and laws for just, adequate and prompt compensation, regulatory controls of land use activities could lead to both underdevelopment and increased land use conflicts.

Policy and Legislative Developments Impacting private Land Use since the Study on Government Restrictions on Private Land Use

Since the study on government restrictions on the use of private land in Kenya, a number of significant policy and legislative changes with implications for compensation have been made, including the passage of a new national Constitution (2010) and an overhaul of the country's land laws. The national constitution, in Article 66(1), lays the basis for both government control of private land use and compensation by stating that:

“The State may regulate the use of any land, or any interest in or right over any land, in the interest of defense, public safety, public order, public morality, public health, or land use planning.”

The foregoing are the public service purposes for which government may restrict private land use. However, the provisions add, in article 66(2), that,

“Parliament shall enact legislation ensuring that investments in property benefit local communities and their economies.”

The provisions of Article 66(2) are understood to imply that although government may control and thereby, restrict private land use, there ought to be a way or ways to ensure that benefits of investments through private land use are not negated by government controls.

In addition to the new Constitution, a number of laws have recently been passed, including a number of land laws. Among the newly introduced land laws are: The Land Act of May 2012 which repeals the Wayleaves Act, Cap. 292 and The Land Registration Act of April 2012 which repeals: The Indian Transfer of Property Act of 1882, the Government Land Act (Cap. 280), The Registration of Titles Act (Cap. 281), The Land Titles Act (Cap. 282) and the Registered Land Act (Cap. 300). The Environment Land Court Act, No. 19 of 2011 was also passed to establish an Environment and Land Court (ELC) as required by Articles 162(2)(b) and 165(5) of the national Constitution which divests the High Court of jurisdiction over all matters concerning land and the environment. The full import of the ELC Act is that only the ELC has jurisdiction over land and environment matters, including matters concerning compensation. Further, a National Land Commission Act, No. 5 of 2012 was passed to implement Article 67 of the Constitution which establishes a National Land Commission (NLC) with powers to, among other things, to: recommend a national land policy to the national government; manage public land on behalf of the national and county governments; conduct research related to land and the use of natural resources, and make recommendations to appropriate authorities; monitor and have oversight responsibilities over land use planning throughout the country; develop and encourage alternative dispute resolution mechanisms in land dispute handling and management; manage and administer all unregistered trust land and unregistered community land on behalf of the county government; develop and maintain an effective land information management system at national and county levels; ensure that public land and land under the management of designated state agencies are sustainably managed for their intended purpose and for future generations; and monitor the registration of all rights and interests in land (section 5(1) & (2) of the National Land Commission Act).

Agricultural laws, numbering about 250, of which some made provisions for some of the government restrictions on private land use included in the last study, have also been overhauled and in their place, Parliament recently enacted The Agriculture, Fisheries and Food Authority Act, No. 13 of 2013. Also significant is the coming into force of *Sessional Paper* No. 3 of 2009, which is The National Land Policy. The National Land Policy, which is the first official policy on land since Kenya's independence, lists land use management, as one of the outstanding issues that it seeks to address.

The following section analyzes the policy, legal and practical position concerning compensation for private land use restrictions and presents information on: (i) the kind of land use restrictions that obligate the government to pay land holders compensation for their losses and whether compensable losses are for loss of land, loss of use and loss of land value; (ii) the specific types of property losses that are eligible for compensation; (iii) the procedures for accessing and valuing property losses; (iv) what valuation of property losses is based on [the basis of valuation of property losses] (open market values, replacement costs, et cetera); (v) how and when compensation payment must be made (is it before or after imposition of regulation?); (vi) whether an affected landholder could request that the affected land be acquired by the government? Analysis begins with the National Land Policy.

Objectives of the Kenya National Land Policy- *Sessional Paper* No. 3 of 2009

The overall objective of the National Land Policy is to secure rights over land and provide for sustainable growth, investment and the reduction of poverty in line with the Government's overall development objectives. Therefore, it appears to affirm private property, specifically, land rights and to assure private utilization of the land for sustenance and development. Specifically, the Policy seeks to offer a framework of policies and laws designed to ensure the maintenance of a system of land administration and management that will provide: (a) all citizens with the opportunity to access and beneficially occupy and use land; (b) economically viable, socially equitable and environmentally sustainable allocation and use of land; (c) efficient, effective and economical operation of land markets; (d) efficient and effective utilization of land and land-based resources; and (e) efficient and transparent land dispute resolution mechanisms.⁶⁶ The objectives include those that relate closely to land use and private use rights as well as compensation. While it seeks to assure all Kenyans access to and use of land and operational land markets to support land-based investments, the Policy integrates the element of sustainability of land use by requiring, among other things, environmentally-sustainable use of land, which necessitates government intervention in land use practices.

The need to achieve sustainable balance between land use and benefits that may be derived therefrom and sustainability of use attracts a number of principles to guide land management and dealings in land, including: secure land rights, which again, affirms private use rights; effective regulation of land development which intimates government intervention in private land use practices; and vibrant land markets, a concept which the Policy officially introduces for the first time. In addition, land

acquisition, ownership and use shall be guided by the principle of transparent and good democratic governance of land.⁶⁷ These are just a few of the official policy principles of land ownership, use and management which exhibit government's efforts to balance land use and benefits derived therefrom with sustainability of use. The principles provide basis for policy provision for government compensation for both compulsory acquisition of land and government land use restrictions that deprive land owners of use rights or diminish the economic and subsistence value of their land.

Relevant Policy Provisions

The Land Policy legitimizes both private land use restrictions and compulsory acquisition of land and interests thereof, not just for the traditional public purposes (public health care services, schools, et cetera), but also for, among other novel objectives, investment purposes in accordance with national development objectives.⁶⁸ The Policy also demands enactment of a substantive land Act.⁶⁹ Provisions of the Land Act of 2012, which was enacted in response to the Policy demands are analyzed in proceeding sections of this work to determine, among other things, whether they make specific provisions for timing of compensation payment. In addition, the policy makes provisions for compensation for various categories of land use restrictions as presented below.

Land Policy Provisions for Compensation for Government Land Use Restrictions

First, the Policy sets out the need to control private land use activities, stating that ineffective regulation of private property use rights has resulted in the emergence and persistence of unplanned settlements and environmental degradation, which have become commonplace. In response, it recommends the establishment, in the Constitution, first and foremost, of an adequate framework for the fiscal management of land and land based resources, especially, a firm frame work for, among other things, "*Regulation of the use of all categories of land in the public interest.*"⁷⁰ Further, the Policy specifically recognizes that: in the regulation of property use rights, governmental power of development control (as well as the power of compulsory acquisition) has never been exercised effectively or accountably, thus raising constitutional rights issues; it is the power of the state to regulate property rights in urban and rural areas and is derived from the state's responsibility to ensure that the use of land promotes the public interest but development control has not been extensively used to regulate the use of land and to ensure sustainability; and that development control is exercised by various government agencies whose activities are uncoordinated with the result that the attendant regulatory framework is largely ineffective.

Secondly, the Policy proposes response measures to streamline the exercise of power to restrict private land use to, among other things, make it compliant with constitutional rights to property. It states that: "*...the exercise of these powers should be based on rationalized land use plans and agreed upon public needs established through democratic processes*"⁷¹; the government shall align the power of development

control with the Constitution; harmonize the institutional framework for development control; and most importantly for purposes of this study, empower all planning authorities in the country to regulate the use of land, “...taking into account the public interest.”⁷²

A careful analysis of the Policy discloses that the public interest is, in the case of land use control, constituted by ownership and use rights over both land and land-based resources, including minerals and wildlife and related habitat.⁷³ Therefore, in order to protect the rights and interests of individuals and communities over land and land-based resources while exercising development controls and related restrictions, the government shall not only establish legal frameworks to recognize the private rights of communities and individuals, but also “...devise and implement participatory mechanisms for compensation for: (i) loss of land and related non-renewable natural resources; (ii) loss of land where this is deemed important in the public interest for the sustainable management of renewable natural resources; and (iii) damage occasioned by wild animals.”⁷⁴

Upon construction of the policy provisions, it may be deduced that in the case of restriction of private land use, compensation shall be paid: (i) where such restriction, for purposes of development control or environmental conservation, is direct and results in loss of land, loss of land use, and/ or loss of land value; and (ii) where such restriction is indirect, for example, by prohibiting land use activities in relation to wild life and thus occasion loss of land use or loss of land value. Previous OCRA-WRI studies found that in many parts of Kenya, wildlife is not confined to protected wildlife areas and often encroach on neighbouring lands, including farms where they graze, breed and water and in the process, occasion great damage to livestock, crops and other property of park-adjacent communities and families, not to mention loss of human life that usually also result from fatal wildlife attacks. In such circumstances, wildlife encroachment onto park-adjacent lands which is encouraged largely by wildlife and related laws and policies prohibiting killing or maiming of wildlife, result from government restrictions on their killing or maiming and therefore such restrictions too, have been recognized by the Policy as a form of restriction occasioning loss of use of land, loss of land value and loss of land-based resources that deserve compensation.

With regard to losses of land use, land value and other land-based resources resulting from government restriction of land use, the government shall not only pay direct compensation; it shall also, as a form of compensation, design legislative and administrative mechanisms for determining and conferring *sharing of benefits emanating from land based natural resources* by communities and individuals. Thus compensation is also paid by way of sharing of benefits derived from the resources in the case of, among others, park adjacent communities, forest adjacent communities and individuals and communities affected by government acquisition of private land for mining and related purposes. Where land based resources of communities and individuals are managed by national authorities for posterity, benefit-sharing, as a form of compensation, shall be mandatory.⁷⁵

Compensation for Land Use Restrictions under the Wildlife Management Policy- Sessional Paper No. 3 of 1975

The Wildlife Policy of 1975, which is the first and only existing policy on wildlife, seeks to optimize returns from wildlife, taking into account returns from other forms of land use.⁷⁶ It places emphasis upon finding means to secure optimum returns from wildlife resource and legitimizes the use of regulations and legislation to control wildlife poaching and other prohibited activities in not only national parks but also in game reserves and wildlife areas, much of which falls on privately owned lands, such as animal hunting, capture, processing, unlicensed dealing in animal trophies and maiming of animals.⁷⁷ The Policy recognizes that although it supports the establishment of protected wildlife areas,

“... in most of the areas, the animals migrate over much larger areas than are included within the Park/Reserve, and it would be both infeasible and undesirable to extend the boundaries of the park/reserve to cover the whole ecosystem.”⁷⁸

The Wildlife Policy also recognizes that wildlife presence and regulations established for their conservation will impose costs and losses on land owners in migration, dispersal and other park-adjacent areas,⁷⁹ which means that by imposing and enforcing wildlife regulations, the government, in effect, restricts land uses of park adjacent communities. It is recognized that such restrictions would make it impossible for a majority of land owners in some migration areas to secure meaningful returns from their land and may, as a result, not support wildlife conservation.⁸⁰ Land owners may also kill animals, “out of necessity”⁸¹ for example, in cases of immediate danger to life⁸² and yet, for the survival of wildlife, their killing must be prohibited.

For the foregoing reasons, especially official recognition that wildlife management and enforcement of related regulations would impose limitations or restrictions on land owner uses of their land such that, for example, it becomes impossible for a land owner to grow wheat on his land adjacent to a protected wildlife area,⁸³ the policy recommends various forms for compensation for various losses in order to meet specified objectives. For loss of use of land and land value exerted by the presence of wild animals which make it impossible for land owners to utilize their land, the policy proposes, “... *payments of some returns from tourism within the Park/Reserve to these land owners.*”⁸⁴ In addition, and in order for land owners in migration areas not to suffer net damage from supporting wildlife on their land, including damage to water pipes, ranch facilities and other property, the government “... *shall pay to land owners in migration areas of parks grazing fees scaled to the costs of migratory herds imposed on them, after taking into account any direct benefits received by these land owners from migrating wildlife herds, in the form of revenues from hunting, cropping and tourist facilities on their land.*”⁸⁵ In Kenya, wildlife hunting is totally prohibited by law. Therefore, revenues from hunting no longer apply.

Further, the Policy provides for compensation, by the national government, for loss of life and injury from wildlife, except in cases where such loss and injury occur in the course of illegal activities.⁸⁶ For such losses, “*Rates of compensation, assessment and settlement of claims shall be carried out through District Committees...*”⁸⁷ The Policy also authorizes compensation for property damage occasioned by wildlife, including damage to crops and livestock, to be paid by local governments in areas where there is communal lands, held in trust previously by county councils and now, by communities themselves and where the land is not registered, by counties.⁸⁸ Currently, Kenya Wildlife Service (KWS) is working to establish county wildlife committees to take responsibility for such payments, in line with the devolved structure of government.⁸⁹

The Policy also provides for indirect land owner compensation for loss of use of their land in order to prevent land owner retaliatory activities against wildlife and attract their support for wildlife conservation. This is to be and has been accomplished through support of park-adjacent communities to establish wildlife conservancies in order to derive benefits from wildlife related use of their land because other beneficial uses are rendered impossible by the presence of wildlife in the areas.⁹⁰ The Policy also requires wildlife officers to provide wildlife extension services to park-adjacent land owners to enable them establish and operate wildlife ranches and conservancies.⁹¹ It is noted that the national Constitution, Article 69(1) thereof, supports natural resource benefit sharing, not just as a form of compensation, but as a means of conferring upon communities the benefits of natural resources within their areas. In that regard, the provisions obligate the national government to, “ensure sustainable exploitation, utilization, management and conservation of the environment and natural resources, and to ensure the equitable sharing of the accruing benefits.”⁹²

Compensation for all of the kinds of losses provided for, including bodily injuries and loss of human life is to be made ex post facto, that is, after harm has already occurred, except in the case of alternative forms of compensation such as benefit sharing schemes, including assistance to establish wildlife conservancies and payment to land owners of portions of wildlife revenues generated through tourism, which may be made periodically, on an on-going basis. Methods or modes of calculation of compensation are left entirely for determination by KWS and local authorities, through District Committee’s and soon, county committees (that are still in the process of establishment).

Compensation under the Wildlife (Management and Conservation) Act, Chapter 376

All the foregoing compensation payments have been effected through Cap. 376 which, in sections 32 and 33 among others, prohibit wounding, maiming and capture of animals; in section 29 prohibits hunting on private land unless one is registered as a hunter and possesses a hunting licence (which is very hard to obtain); in section 17, prohibits grazing livestock in protected wildlife areas and in sections 14 and 15, among others, prohibit cultivation and pursuit of animals in protected wildlife areas including areas designated as such on private lands, outside of national parks and reserves. The effect of the provisions, read together with Subsidiary Legislation made under the law, based

on the wildlife policy, is to restrict use of private land with wildlife on it, whether or not the land lies adjacent to a protected wildlife reserve.

In order to ameliorate land owner property losses, the law makes provisions for the various kinds of compensation legitimized by the Wildlife Policy, including, in section 62 thereof, compensation, compensation for property damage occasioned by wildlife. However, by a 1990 amendment to the law, compensation for property damage occasioned by wildlife was removed. In response to insurmountable challenges raised by lack of compensation for property damage, including uncontrollable retaliatory wildlife killings, KWS has amended Cap 376 to re-introduce provisions for compensation for that kind of property damage.⁹³ The amendment is pending for Parliamentary approval.

The Land Act, No. 6 of 2012

The Land Act was passed in fulfillment of requirements of both the National Land Policy and the national Constitution, Article 68(a), which obligated Parliament to revise, consolidate and rationalize existing land laws. The law fulfills the purpose, as well as provide for the sustainable administration and management of land and land based resources, and related purposes.⁹⁴

To meet the specified objectives, the Act, being the substantive law that governs ownership, acquisition and use of the three categories of land in Kenya (public land, private land and community land) makes provisions on various kinds of land related matters in 163 sections, including provisions for compulsory acquisition of private interests in land and mandatory compensation therefore (Part viii, sections 107 - 133) and easements and analogous rights including the right to compensation for certain kinds of easements (Part X, sections 136 - 149). In addition, the law makes provisions recognizing the Environment and Land Court that has exclusive jurisdiction over land and environment matters, including matters concerning compensation for land (Part xi, section 150) and establishes a Land Compensation Fund (section 153), out of which compensation shall be made for compulsory acquisition and certain kinds of government restrictions of private land use.

Land Use Restrictions that obligate the government to pay land holders compensation for their losses under the Land Act

The Land Act makes elaborate provisions for compulsory acquisition which integrate and express new ideas and concepts concerning compensation payment, including provisions for additional compensation, interest on compensation funds and damages for any damage that occurs during the process of compulsory acquisition.⁹⁵ The law also makes elaborate provisions for compensation for land use restrictions, which shall form the focus of this section. Notably, it also specifies market open market values as the basis of assessment of compensation (section 111 and 112).

The Land Act permits the imposition of various kinds of private land use restrictions for the benefit of both private and public bodies. It also permits payment of compensation by private bodies, in cases where private land use restrictions are imposed for the benefit of private bodies and by government, in cases where private land use restrictions are imposed at the instance of government and for the benefit of the government as such or the benefit of the public, through government. The following are specified kinds of land use restrictions for which compensation may be paid:

(i) Compensation for Easements- creation of easements over privately owned land or privately leased land is authorized by section 138 of the Land act which defines easements as: rights to do something over, under or upon the servient land; any right that something should not be so done; any right to require the owner of servient land to do something over, under or upon that land; and any right to graze stock on the servient land.⁹⁶ Such rights created over another's land have the effect of restricting the use of the land over which they are created and may, depending on the nature of the activity conducted thereon, reduce the value of the servient land. Depending on the nature of activity for which they are sought, easements may also result in damage to the property of the holder of the servient land.

Unless an easement has been created for specific period of time which will terminate at a fixed date in the future or on the happening of a specific event in the future or on the death of the grantor, the grantee or some other person named in the grant, *an easement burdens the servient land and runs with the land for the same period of time as the land or lease held by the grantor who created that easement.*⁹⁷ Therefore, although the Land act does not explicitly provide for compensation, it permits parties- the one seeking to establish an easement over another's land and the land owner or lease holder to "negotiate" terms of an easement, including compensation. Payment of compensation for easements is implied in the provisions of section 139, especially in subsection (3)(a) which specifies that in determining an application to Court where an easement is denied, the Court shall take into consideration "...the nature and conduct of negotiations between the owner of the dominant land and the owner of the servient land" and, having had regard to the nature of negotiations, issue orders, including orders for: "*the making good of any damage caused by entry on or over the servient land, or work on or over the land; or ... the reimbursement of the owner of the servient land for any costs, expenses or loss arising from the entry.*" (section 139 (4)(g) (ii) & (iii).) The law provides for payment of compensation for any loss arising from the exercise of restrictive easements but does not state the nature of loss that shall be compensated. However, the loss may be understood to include losses resulting from reduction in land value occasioned by easement works such as laying of underground cables and pipes and overhead power lines; damage to land owner's installations and any facilities and machinery attached to the land, any loss of business and any physical damage to land, such as land or soil contamination. It is noted that restrictions to private land use by way of easements is also permitted by section 98 of the Land Registration Act. No. 3 of 2012, but without provisions for compensation.

(ii) Compensation for land use restriction by way of entry order issued by Court

Where a private land owner refuses or declines to grant an easement through private negotiation, private use of his land may be restricted by an order of court, known as an entry order, granted under section 139(1) of the Land Act.

Such an order entitles the recipient thereof to enter into or through privately held land for the purpose of erecting, repairing, adding to, painting or demolishing the whole or any part of any structure on the dominant land⁹⁸ or doing any other necessary or desirable thing on that land (section 139(1)). In the process, the holder's activities may, in various ways, restrict the private owner or occupier's land use and/or cause him damage. Therefore, in deciding to issue an entry order, the Court may also issue an order for compensation, similar to compensation for easement, as explained in (i) above.

Further, if, in the course of entry into land or in the course of doing any of the foregoing matters, damage is caused to the land or anything attached to it or to any of the activities conducted thereon by the land owner, the Court may issue an order, under section 139(4)(g) for: *the making good of any damage caused by entry on or over the servient land, or work on or over the land; or the reimbursement of the owner of the servient land⁹⁹ for any costs, expenses or loss arising from the entry.*"

(iii) Compensation in cases of Access Order- One's private use of land may be restricted by the operation of an access order, issued by the Court to an owner of landlocked land, upon application, granting reasonable access to the (burdened) land.¹⁰⁰ The law specifies, in section 140(6) that an access order shall be deemed to have all the characteristics and incidents of an easement and the land over which it has been granted shall be deemed to be the servient land and landlocked land shall be deemed to be the dominant land.¹⁰¹ Therefore, compensation is payable for any loss of use of the servient land, loss of land value, loss income from business based on the servient land and any damage resulting from the activities of the owner of the dominant land, including damage to facilities, installations, machinery and physical harm to the servient land itself.

(iv) Compensation in respect of public rights of way- Section 143 of the Land act establishes two kinds of right of way, namely: (1) wayleave and (2) communal right of way.

(a) Compensation for wayleave

Wayleave is a right of way created for the benefit of the national or county government, a local authority, a public authority or any corporate body to enable all such institutions, organizations, authorities and bodies to carry out their functions. Such functions include installation of power lines, gas pipes and oil pipelines, among others. The law, in section 146, prescribes the procedure for creation of wayleaves- through cabinet secretaries within whose mandate matters requiring wayleave fall or by the NLC, of its own. Applications initiated by cabinet secretaries must be channeled through the NLC. In addition, state departments, county governments, public authorities and public corporate bodies may also initiate the process of creation of wayleave, through the NLC. The law requires the process to be democratic, including public comments

and hearing, if necessary.

Wayleaves restrict private use of land because where established, they authorize persons in the employment of, or who are acting as agents of or contractors for any of the public organizations, authorities, agencies and bodies to enter on the servient land for the purpose of executing works, building, maintenance of installations and structures, insetting all such works, installations and structures on the servient land and to pass and re-pass along the wayleave to execute the purposes of those organizations, authorities, bodies, et cetra. Therefore, *“compensation shall be payable with respect to a wayleave, in addition to any compensation for the use of land, for any damage suffered in respect of trees, crops and buildings as shall, in cases of private land, be based on the value of the land as determined by a qualified valuer.”*¹⁰²

The law clarifies that in the case of wayleave, compensation shall be paid for the establishment of the wayleave itself and for loss of use of land in the place where the way leave is established. Such compensation shall be based on the value of the land as determined by a qualified land valuer. In addition, compensation shall be paid for any damage a land owner suffers to crops, trees, buildings and any other property attached to the land and any damage caused as a result of any preliminary work undertaken in connection with surveying or determining the route of that wayleave.¹⁰³ The duty to pay compensation for wayleave lies with the state department, county government, public authority or corporate body that applied for it and that duty shall be complied with *promptly*.¹⁰⁴ This does not specify whether compensation shall be paid before or after establishment of a way leave but considering the notices that the law requires to be served on the owner of land and all others dependent on it including all persons occupying land in accordance with customary pastoral rights (section 144(4)), one may conclude that wayleave shall or should take effect after payment of compensation.¹⁰⁵

If the person entitled to compensation under the foregoing section and the body under a duty to pay that compensation are unable to agree on the amount or method of payment of that compensation or if the person entitled to compensation is dissatisfied with the time taken to pay compensation, to make, negotiate or process an offer of compensation, that person may apply to the Court to determine the amount and method of payment of compensation and the Court in making any award may, make any additional costs and inconvenience incurred by the person entitled to compensation.¹⁰⁶

(b) Compensation for communal right of way.

A communal right of way is established under section 143 (2)(b) and 145 as a right of way created for the benefit of the public for the public to pass and re-pass along the established way and in areas designated for that purpose and to undertake recreational activities or other prescribed activity of the kind permitted in that designated area. The provision, in part, implements the requirement of article 68(c)(iv) which obligates Parliament to enact law to protect, conserve and provide access to all public land.

Establishment of a communal right of way could be initiated by a county government,

an association, or any group of persons, through an application to the NLC. The NLC may also, on its own, initiate the process of creating a public right of way. The process must go through the prescribed procedure, including public notice and comment, making of presentations and objections, hearing and inquiry where necessary and finally, issuance of public notices of the making thereof.

Section 147 (1) of the Land Act requires compensation to be paid to land owners for public rights of way before the responsible Cabinet Secretary submits to the Registrar of Lands documents to gazette and register an area of land as a public access way or road. As in the case of wayleave, compensation for public right of way shall be based on the value of the land as determined by a qualified valuer (section 148(1)). Any person who is not satisfied with the amount of compensation offered for a public right of way may approach the Court for redress (section 148(5)).

(v) Compensation for damage caused by government agencies during entry into and inspection of public land

In limited circumstances, the law, in section 155 of the Land Act, allows compensation to be paid to private persons occupying or utilizing public land for private purposes without express lawful authority, where the land, their property thereon or their land use is damaged by entry and inspection of the land by a government agency. A person having an interest in or occupying public land for private purposes must be served with prior notice of an intended inspection. Further, if, in the course of inspection, damage is occasioned to the private occupier, for example, to his business occasioning financial losses, machinery, facilities, installations, buildings or works, which would include mineral prospecting and mining activities, then compensation must be paid for “... *any damage to the land or anything...*” belonging to or in the use of the private occupier/user.¹⁰⁷ The NLC is responsible for payment of compensation in such circumstances and the law provides basis for determination of compensation by stating that the “...Commission, shall forthwith appoint a person to assess the damage and pay promptly *compensation based on that assessment to the person whose land or thing on the land have been damaged.*”¹⁰⁸

The NLC has to carry out investigation of the occupants circumstances of occupation, taking into account the following factors: the nature of occupation, the length of time that the person has been occupying the land, whether the occupant honestly believes that the land is his/hers, the age of the occupant; and, under section 155(4)910, “*whether in all the circumstance, it would be reasonable to pay any sum of money to the person on account of being required to vacate the land...*” In such cases case, compensation is paid for loss of use of the land or as a form of relief to one who has lawfully occupied and utilized public land but has to face difficulties of vacating and finding alternative livelihood, in addition to compensation for any damage to the occupier’s property on the land. In certain circumstances, the Land and environment Court may “...vary the amount of any payment to be paid, or where no payment has been offered, order that payment as the court shall think just be made to the person on vacating of the land...”¹⁰⁹

(vi) Compensation for restriction of use of land over which minerals are discovered

Until the new Constitution of 2010 was passed, minerals were never, clearly the property of state especially minerals on privately owned land because the land remained private and, in the belief and practice of many, access to minerals on privately owned land depended upon agreement with land owners. The Constitution has drastically changed that position by defining public land to include, “all minerals and mineral oils as defined by law.” (Article 62(1)(f). This means that where there are minerals on private land, there exists public land within private land and obviously, any attempt to undertake prospecting or mining works has the likelihood of restricting the private owner’s land use activities. Matters are made more intricate by the provisions of article 62(2) of the Constitution which vests public land in and to be held by the national government in trust for the people of Kenya and to be administered on their behalf by the NLC. Moreover, public land, here, minerals on privately owned land, shall not be used or disposed of except in terms of an act of Parliament specifying the nature and terms of disposal or use.

Although there is an obvious likelihood that use of minerals as public land on private land by the government itself or its licensees would restrict a private land owner’s use of the land, the Constitution itself has no provisions for compensation of mineral-rich land owners. (Constitutional provisions of Article 99(2) requiring Parliament to enact legislation to ensure that investments in property benefit local communities and their economies are too general to be understood to include compensation of mineral-rich land owners). The existing and old Mining Act, Chapter 306, also contains no provisions for compensation of mineral-rich land owners. However, a Mining Bill has been drafted which, in clause 122, recognizes the likelihood of loss and damage to land owners’ property as a result of mining and related activities and in response, provide for payment of prompt, adequate and fair compensation of landowners, by the holder of a mineral right. Payment shall be made upon demand by land owner or occupier.

Establishment of A Land Compensation Fund

In order for the government to be able to pay compensation for all of the legislated kinds of private land use restrictions, section 153 (1) of the Land Act establishes a Land Compensation Fund,

“to provide compensation to any person who, as a result of the implementation of any of the provisions of this Act by the National Government, county government, urban area or city or any public, suffers any loss or deprivation or diminution of any rights or interests in land or any injurious affection in respect of any ownership of land.”

The Fund shall be administered in accordance with the provision relating to public Funds under the law relating to public finance management.¹¹⁰

In order to institutionalize and facilitate payment of market-based compensations for land use restrictions as well as payments for compulsory acquisitions of land, the National Land Policy requires the government to: (a) *“Facilitate the commercialization of land rights subject to principles of equity, sustainability and public policy considerations such as security; and (b) Develop structures and instruments that will make the land market operations more efficient and effective, including streamlining existing land transaction procedures.”*¹¹¹ Land markets deal with the value, transfer, lease, and mortgage of interests in land. Efficient land markets can facilitate access to land.¹¹²

Could an affected landholder request that land affected by use restrictions be acquired by the government?

The answer is a resounding, yes. The law, in the various sections of the Land Act that have been presented in the preceding section, permit negotiations between private land owners and government agencies. Request that government acquires land burdened by regulations may be based on the permitted negotiations. They may also be made of the land owner’s own initiative because there is nothing in the law to prohibit such initiatives. In the present circumstances in the country, where government land or public land or hardly available and yet both national and the forty seven county government need a lot of land to carry out their mandate, a government agency would be “lucky” to receive land owner invitation or request to purchase private land. Moreover, the government itself recognizes the shortage of land for public purposes in the country and has legislated establishment of a national Land Bank to be established as provided for in section 122 of the Land Act.

If private land owners do not willingly offer their land for land bank acquisition, the only option for the government would be compulsory acquisition, on a large scale and that may undermine the principles of land policy expressed in the national Constitution (equitable access to land, security of land rights, sustainable and productive management of land resources, transparent and cost-effective administration of land, et cetra, Article 60(1)) and land management and administration principles expressed in section 4 of the Land Act.

**The Environmental Management and Coordination Act (EMCA), No. 8 of 1999:
Compensation for Environmental Conservation Restrictions-**

The EMCA and various regulations and quality standards made thereunder provide for various kinds of land use restrictions for environmental conservation and sustainable development purposes, with and without additional provisions for compensation. This section presents findings on provisions of the law authorizing land use restrictions for a variety of ecological purposes, with corresponding provisions for compensation for loss and/or damage that may be incurred by private land owners where and when statutory restrictions are placed on privately held or leased land or over private use of land.

(i) Compensation for environmental easements

Section 112, 113 and 115 authorize courts in Kenya, now, specifically, the Environment and Land Court (ELC) to grant an environmental easement to facilitate conservation and enhancement of the environment, upon an application being made by a private party or public agency. In effect, an environmental easement imposes one or more obligations on a land owner in respect of use of his land, which then becomes known as “the burdened land”. Usually, such land is close to or part of an environment that is intended to benefit from the easement. An easement may be imposed in perpetuity or for a term of years. Section 112(5) states the effect of an environmental easement, namely: to restrict a private land owner’s use of his land or his interest or right thereon. A land owner may, for example, be restricted in the kind of crops or trees to be planted on his land or restricted from utilizing his land at all.

Section 112(5) and 116(1) - (5) recognize the burden, loss and damage that may be occasioned by an environmental easement and provides for compensation of the land owner or other user of the burdened land by the applicant for an environmental easement, unless the court is satisfied that an environmental easement is of national significance, in which case, compensation shall be paid by the government (section 116 (4)). In the case of environmental easements, compensation is paid for “... *lost value of the use of the land*” (section 116(1)). The amount of compensation is determined in accordance with section 116(1) of EMCA which states that compensation will be “*commensurate to the lost value of the land.*” Also, a person affected by imposition of an environmental easement may apply for compensation to the court that imposed the easement, stating the nature of his interest in the burdened land and the compensation sought (section 116(2)).

Payment of the statutory compensation is to be made after imposition of easement. After the fact payment is expressly stated in section 116(1) which states that any person who has an interest in land *which is the subject of an environmental easement* shall be entitled to compensation commensurate with the lost value of the use of the land. This means that only one who has already suffered imposition of easement may be eligible for compensation. After the fact payment of compensation is also implied in the provisions of section 112(5) which, in effect, states that payment shall be made to one who, *at the time of imposition* of easement or conservation order, had an interest in the burdened land.

(ii) Compensation for environmental conservation orders

Section 112 of EMCA empowers courts to issue environmental conservation orders to “...be imposed on burdened land...” for one or more of the following purposes: preservation of flora and fauna, preservation of the quality and flow of water in a dam, lake, river or aquifer, preservation of any outstanding geological, physiological, ecological, archaeological or historic features of the burdened land, preservation of scenic view, preservation of open space, to permit people to walk in a defined path across a burdened land, to preserve natural contours and features of the burdened land, to prevent or restrict the scope of any activity on the burdened land which has as its object mining and working of minerals, to prevent or restrict the scope of any

agricultural activity on the burdened land, to create and maintain works on the burdened land so as to limit or prevent harm to the environment and to create or maintain migration corridors for wildlife (section 112(4)(a) - (k)). Section 114 requires environmental easements to be registered against title to land.

Environmental conservation orders are both directly and indirectly restrictive. They authorize restriction of land use by way of limiting one's land-based activities as well as compel land owners to undertake activities on their land, with the effect of restricting their land use. Under section 116(1) of EMCA, a land owner or holder shall be entitled to compensation that is commensurate to the lost value of the land. As in the case of easements, compensation for environmental orders is to be made *ex post facto*. It is noted that in accordance with section 112(k) of EMCA, KWS, in collaboration with local and external partners, established a program for preservation of wildlife migration corridors adjacent to Nairobi National Park but instead of applying to court for an environmental easement or conservation order, creation and maintenance of wildlife migration corridors and payment of compensation to affected land owners was a negotiated process between KWS, Friends of Nairobi National Park and partners on one hand and park-adjacent land owners on the other.

As in the case of environmental easements, compensation payment for environmental conservation orders shall be made by the person who applied for the order, unless issuance of the order is in the national interest, in which case, the government shall make payment (section 116(4)).

Could one whose land use is restricted for ecological purposes request the government to acquire the burdened land? A similar question was raised concerning restrictions under the Land Act and an answer provided. It is deemed necessary to raise the question again, especially considering the objectives of restrictions intended for ecological purposes. The answer here, based on relevant provisions of EMCA, lead to the conclusion that in the case of restrictions for ecological purposes, acquisition of the burdened land is more likely, at the instance of the government. The answer is based on the provisions of section 116(5) of EMCA which state that:

“The court, in determining the compensation due under this section shall take into account the relevant provisions of the Constitution **and any other laws relating to compulsory acquisition of land.**” [Emphasis added]

(iii) Compensation for other land use restrictions

In addition to easements and environmental conservation orders, private land use restrictions, as the previous study indicates, may also be imposed under EMCA through the following agency actions: declaration of any area of land, sea, lake or river to be a protected natural environment for the purpose of promoting and preserving specific ecological processes, et cetera (section 54(1)); declaration, by gazette notice, of an area to be a protected coastal zone (section 55(1)); implementation of program to eliminate substances and activities that deplete the ozone layer (section 57); gazettement and

protection of wetlands (section 42 and Wetlands Regulations developed by the National Environment Management authority-NEMA); gazettement and protection of lake shores, wetlands, river banks, coastal zones and forests as areas of traditional interests (section 43); implementation of measures, including afforestation, for protection of hill sides, hill tops, mountain areas and forests (section 44); undertake afforestation and re-afforestation activities in targeted hill tops, hill slopes and mountain areas which would compel any body with an interest, including customary rights in affected land (section 46); gazettement and implementation of measures to protect water catchment areas (section 47(f); and undertake actions for conservation of biological resources *in-situ* and *ex-situ* (sections 51(1) and 52).

For all of the foregoing land use restrictions under EMCA, there is no explicit provision for land owner compensation but section 57 of the same law empowers the minister, now Cabinet secretary, responsible for finance to propose to government, on the recommendation of the Environment Council,

“... tax and other fiscal incentives...to induce or promote the proper management of the environment and natural resources or the prevention or abatement of environmental degradation...” [Emphasis added].

There is no statutory limit on the nature of fiscal incentives that may be devised for ecological purposes, so long as they are lawful. This means that direct payment of compensation to land owners and other users affected by land use restrictions placed under EMCA could be made as one of the incentives authorized by law.

(iv) Possibility of compensation for land use restrictions imposed by EIA and Audit Regulations under EMCA

EIA requirements in sections 58-64 of EMCA and the EIA and Audit Regulations (issued by Legal Notice No. 191 of 2003) present the most commonly used government mechanism for restricting private land use, with far-reaching consequences in some cases, yet there is currently no statutory provision for compensation for use restrictions that they impose. Therefore, it is no wonder that enforcement of EIA provisions of EMCA has generated the clearest indication of landowner preparedness to present to the government claims of a regulatory takings nature arising from restrictions imposed for environmental conservation purposes.

The basic idea behind an EIA is that the government should predetermine the impacts that a development might have on the surrounding environment, and on that basis, make a prior determination to prohibit it, allow it conditionally, or allow it unconditionally.¹ The Second Schedule to EMCA lists the kinds of activities requiring an EIA that may attract imposition of land use restrictions as a consequence of the EIA and

¹ Environmental Management and Co-ordination Act, (1999) §63 (Kenya)Cite?

audit process.² Additionally, any activity that is out of character with its surroundings requires an EIA.³

EIA and audit regulations specify the procedure to be followed by developers, also known as project proponents, in conducting EIAs prior to approval and licence of a development. The process involves preparation of a project report describing the nature of the development to be undertaken, the proposed location, materials to be used, the environment of the locality (baseline information on the environment of the locality), likely negative impacts, and a plan for mitigating negative environmental impacts.⁴ If the National Environment Management Authority (NEMA), to which a developer submits a project report, determines from the report that a development is likely to have significant impacts on the environment or that a developer's proposed mitigation measures will not adequately address likely negative impacts, NEMA shall require a developer to undertake a full EIA study, to be conducted on behalf of a developer by an EIA expert.⁵ At the end of the whole process, including public participation, NEMA may decide to reject the project, meaning that an intended land use is prohibited, approve the project with conditions intended to safeguard the environment, meaning that an intended land use is partially restricted, or approve the development unconditionally.⁶

Through the EIA process briefly discussed, the government has, through NEMA, restricted private land uses of many kinds in the interest of environmental conservation, including conservation of biological diversity. For example, the government has, through NEMA (hereinafter, the Authority), restricted a private landowner to developing a maximum of four floors, down from the eight floors that the landowner was in the process of building, to house twenty one units on its private land known as Plot No. 209/4902 in Riverside Gardens on Riverside Drive in Nairobi.⁷

Regardless of the far-reaching nature and consequences to land owners of the EIA restrictions, there is no statutory provision for compensation for land use restrictions imposed by EIA and audit laws and regulations. In the absence of provisions for compensation for EMCA land use restrictions through EIA processes and outcome, affected land owners and other users are increasingly asserting, in court, their constitutionally guaranteed property ownership rights to make various claims for

² Environmental Management and Co-ordination Act, (Kenya)

³ Environmental Management and Co-ordination Act, (Kenya), Second Schedule, titled, "Projects to Undergo Environmental Impact Assessment."

⁴ EIA and Audit Regulations, Regulation 7(g) & (h) of the EIA and Audit Regulations (Legal Notice No. 101 of 2003)(Kenya)

⁵ Environmental Management and Co-ordination Act, (1999) §59 (Kenya) and Regulation 7(3) of the EIA and Audit Regulations (Legal Notice No. 101 of 2003)(Kenya)Cite? EIA and Audit Regulations, (2003)(Kenya)

⁶ Environmental Management and Co-ordination Act, (1999) §60 (Kenya) and s 10 & 23 of the EIA and Audit Regulations (Legal Notice No. 101 of 2003)(Kenya)Cite? EIA and Audit Regulations, (2003)(Kenya)

⁷ Phenom Limited v. National Environment Management Authority & Riverside Gardens Residents' Association - NE/04/06/2005 (Kenya)_at page 1

compensation, including claims of a regulatory takings nature, meaning that they are claims based on assertions that by restricting their planned or preferred land uses, the government takes away their right to use their private property and/or takes away the value of their property and therefore, the government should pay them compensation. For example, in *Malindi Green Town Movement & Others v. NEMA & Another*,⁸ the government, through the National Environment Tribunal, stopped a developer from constructing two luxury villas at the coast and thereby prohibited an investor from undertaking the desired development at all, and a claim of a regulatory takings nature emerged. The appeal against NEMA's grant of development approval was filed by an environmental conservation organization against the Authority's approval and license of the establishment by a developer of seven luxury villas on the basis, among others, that the process of approval was flawed, and that stakeholders were not properly involved in the process of approval of the development.⁹

In reply to the appeal, the investor raised the constitutionally guaranteed property right to utilize the land, which it stated was being infringed by parties seeking to stop the development.¹⁰ Before the Tribunal concluded hearing the appeal, the investor filed a judicial review application in the High Court, claiming that by challenging its right to own and develop the property in question, both the Tribunal and the appellants had infringed its rights to own and use property.¹¹ The investor emphasized that the rights were derived from section 75 of the former constitution, which had elaborate provisions for protection of the right, now to some extent incorporated in Article 40 of the current national Constitution. The investor sought orders of prohibition to stop the Tribunal from continuing to infringe the right by stopping it from proceeding with hearing. The High Court granted the order of prohibition on the ground that the appellants did not have *locus standi* to prefer the appeal against NEMA's grant of development approval and in the process, directed the investor to present its property rights claims to the Constitutional Court.¹² The Tribunal's appeal against the decision to the High Court is still pending for determination.¹³

One of the points of concern for the Tribunal in *Malindi Green Town Movement* was that an aggrieved party, a developer, had responded to the application of regulatory restrictions with a property rights claim, based on constitutional provisions.¹⁴

A similar property rights claim of a takings nature was raised in the case of *Maasai Mara North Conservancy v. NEMA & Wasafiri Camp Limited* (NET/40/2009) and the related Constitutional Petition No. 68 of 2010- *Kerio Ole Naimodu v. Maasai Mara North Conservancy Ltd. & Kenya Tourism Federation*. In the appeal before the Tribunal, in NET/40/2009, appellants challenged the Authority's failure to enforce the Tribunal's

⁸ *Malindi Green Town Movement & Another v. NEMA, Silversand Camping Site Ltd & Another* (2005) NET/06/2005 (Kenya) at pages 3 - 12(2nd Respondent's evidence)

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Republic v. NET, NEMA, Malindi Green Town Movement & Malindi South Residents Association* (High Court Miscellaneous Application No. 391 of 2006)

¹² *Id.*

¹³ *Republic v. NET, NEMA and Malindi Green Town Movement & Malindi South Residents Association*).*Id.*

¹⁴ in *Malindi Green Town Movement* - THIS FOOT NOTE SHOULD BE DELETED

judgment in NET/06/2005 by preventing the developers from proceeding with establishment of a tourist facility on a cheetah breeding ground. By the time of filing the appeal, land initially meant for the development had been merged with others, including a lot belonging to Kerio Ole Naimodu, the petitioner in the Constitutional Court, and leased to an investor as a partner with the landowners in Leopard Gorge Conservancy, for the establishment of a tourist facility.

Before the appeal was heard, Ole Naimodu, one of the land owners, filed a constitutional petition in the High Court in which he elaborately asserted his rights under sections 74-81 of the former constitution and sections 27 and 28 of the Registered Land Act (now repealed and replaced, in part, by the Land Act of 2012). Naimodu's petition argued that: (1) he had both constitutional and statutory rights of absolute ownership over his land; (2) the rights were constitutionally guaranteed and protected; (3) he had the right to protection from deprivation of property without compensation; (4) that he had a legal guarantee to utilize his land for subsistence and commercial activities; (5) that he had the right under section 76 of the constitution not to be held in slavery or servitude in relation to the use of his property; (6) that he had the right not to accept entry by others into his land except by his consent under section 76 of the constitution; (7) that leopards that strayed on his property should be moved to Maasai Mara Game Reserve in respect of his property rights; (8) that section 80 of the constitution guaranteed him the right not to be hindered in the enjoyment of his freedom to associate with others for protection of his property interests; and (9) that on the basis of his Title Deed, he had the right to live on the land and undertake any agricultural or other development activity thereon. He also claimed that by presenting an appeal to the Tribunal against the grant to his lessee of development approval and license by the Authority, the Appellants were depriving him of his property and contravening his constitutional right to enjoy the property. In addition, he claimed that by stating that the Leopard Gorge area constituted by part of his land was a cheetah breeding ground that should not be interfered with, Appellants elevated the rights of animals above his constitutionally protected property rights.¹⁵

The claim by the petitioner that presenting an appeal to the Tribunal against the grant to his lessee of development approval and license by the Authority and his joint use of the land amounted to deprivation of his property is the aspect that comes close to claiming that application of EIA regulations deprive private land owners of the use of their property. However, the petitioner did not ask the Constitutional Court for compensation. He sought to stay proceedings in the Tribunal and obtain an order restraining appellants in the Tribunal appeal from filing further cases against his use of the property. The Constitutional Petition has not yet been heard, but the Court has issued an order staying proceedings in the Tribunal.¹⁶

It appears that as people become more enlightened, landowners are likely to advance their claims beyond the assertion of constitutional right to use property, to outright claims for compensation for land-based activities rendered impossible or limited by the application of official regulations, including EIA provisions, especially in light of the

¹⁵ *Maasai Mara North Conservancy v. NEMA & Wasafiri Camp Limited* (NET/40/2009)

¹⁶ *Maasai Mara North Conservancy v. NEMA & Wasafiri Camp Limited* (NET/40/2009)

newly introduced provisions of the current constitution regarding property ownership and use as explained in the following paragraphs.

Constitutional Provisions that seem to lend credence to claims of a regulatory takings nature in the case of use restrictions imposed by EIA and audit regulations

Although the Constitution provides, in Article 66(1), that the State may regulate the use of any land, or any interest in or right over any land, in the interest of defense, public safety, public order, public morality, public health, or land use planning;¹⁷ some of its provisions seem to lend credence to claims for compensation in cases of “regulatory taking.” Provisions of concern include: (1) Article 40(2)(a), which provides that:

“Parliament shall not enact a law that permits the State or any person: (a) to arbitrarily deprive a person of property of **any** description or of any interest in, or right over, any property of any description; (b) to limit, or in **any way** restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27(4).”¹⁸

(2) Article 40(3), which specifies that:

“The State shall not deprive a person of any property of any description, or of any interest in, or right over, property of any description, unless the deprivation: (a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five,¹¹³ but negates regulation for specified purposes unless land is first acquired); or (b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that (i) requires prompt payment, in full, of just compensation to the person; and (ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.”¹¹⁴

The constitutional provisions specified in the foregoing paragraphs provide basis for land owners faced with private land use restrictions to advance claims for compensation for EIA-based restrictions, in the absence of statutory provisions for compensation for such land use restrictions.

Compensation under the Agriculture, Fisheries and Food Authority Act, No. 13 of 2013

The Act¹¹⁵ repealed and replaces the Agriculture Act, Chapter 318 of the laws of Kenya. It makes provisions, among others, for a variety of land development and preservation

¹⁷ CONSTITUTION, art. 66(1)(2010)(Kenya)

¹⁸ CONSTITUTION, art. 40(2)(a)(2010)(Kenya).

“Any interest in any property of any description” above could be understood to extend to development interests that one could now argue to be beyond government’s limitation, unless it is deemed that there is an internal conflict between the above provisions and Article 66(1).

mechanisms with likely impacts on private land use activities with and without provisions for compensation. This section presents restrictions on land use activities that are compensable. In the process, those for which compensation is not statutorily authorized are also mentioned.

Compensation for Lessees' compliance with land preservation orders

The Act, in sections 21 and 22, empowers the Cabinet Secretary for Agriculture to make rules on preservation, utilization and development of agricultural land in Kenya generally, or in any part thereof that may, among other things: prescribe the manner in which owners (whether or not also occupiers) shall manage their land in accordance with rules of good estate management; provide for controlling the erection of buildings and other works on agricultural land; and provide for such exemptions or conditional exemptions from the provisions thereof as may be desirable or necessary.

In addition, land preservation guidelines may also be imposed under section 32, prohibiting certain land use activities, requiring private land owners to undertake certain activities on their land, such as afforestation, requiring the uprooting or destruction, without payment of any compensation therefor, of any vegetation which has been planted in contravention of a land preservation order; and requiring the supervision of unoccupied land.

Application of land preservation guidelines may be limited in time to certain periods or seasons of the year, to certain persons, classes of persons or to certain areas of the country and land preservation orders may be issued to enforce them. Although the objective is to ensure that land owners and occupiers maintain efficient production as respects both the kind of produce and the quality and quantity thereof, the preservation guidelines and order and enforcement thereof is likely to have negative impacts on land owner's, at least, in their own perception. However, compensation is provided for only where land preservation guidelines or orders are executed by a lessee (section 38(1)). Moreover, compensation is payable to the lessee by the lessor/landlord and not the government that enforces the guidelines and related orders (section 38(1)). The Act does not provide the basis for calculation of lessees' compensation but presumably, it would be based on the cost incurred in executing a land preservation order. Also, there is no provision for timing of compensation payment but construction of the relevant provisions leads to the conclusion that it would be after implementation of the restrictive guidelines and orders. In this regard, section 38 provides as follows:

“No claim for compensation under this section shall be enforceable unless before the expiration of two months after the termination of the lease the lessee has served notice in writing on the lessor of his or her intention to make the claim. and a notice under this subsection shall specify the nature of the claim and particulars of the expenditure incurred by the lessee.” (section 38(2)).

Further, section 38(3) which also implies after the fact payment, states that:

“The lessor and the lessee may, within the period of four months after the

termination of the lease, by agreement in writing, settle a claim under this section, and the county government may, upon the application of the lessor or lessee made within that period, extend that period by three months.”

Other land use restrictions that the law authorizes include imposition and enforcement of land development guidelines,¹¹⁶ and entry into private land and eradication of weeds considered to be noxious or invasive.¹¹⁷

The Energy Act - Compensation for Loss of Use, Loss of Land Value and Property Damage

The Energy Act, No. 12 of 2006 repealed and replaced the Electricity Power Act and is the law that currently governs the generation and distribution of electricity in the country. In order to meet the specified objectives, the law establishes a number of government agencies, including Kenya Power and Energy Regulatory Commission and confers upon them specified mandates related to electricity generation and distribution, among other functions.

The Energy Act recognizes that land-based activities of Kenya Power, the utility company that it establishes, the Energy Regulatory Commission and other agencies that it creates, require access to privately owned lands, in addition to public lands such as road reserves, and that the activities may restrict private land use and/or cause damage to land and other property. Therefore, the Act, in section 42, prohibits Kenya power and related statutory agencies from entering into privately owned land for execution of their mandate unless and until they first secure private landowners’ consent, which must be based on provision by the company, of sufficient particulars of entry and intended activities in a notice of intended entry (section 46).¹¹⁸

(i) Compensation for Wayleave

Section 47 of the Act expressly provides for land owner compensation for grant to the company by land owners, permission or wayleave, for entry upon their land to construct or lay an electricity supply line or conduct a survey of the land to determine a power supply line route. The relevant provisions of section 47(1) provide that:

“An owner, after receipt of the notice and statement of particulars under section 46, may assent in writing to the construction of the electric supply line upon being paid such compensation as may be agreed and any assent so given shall be binding on all parties having an interest in the land, subject to the following provisions Act.”

Analysis of court cases involving the company’s access to and use of privately owned land indicate that the above provisions govern a number of matters concerning the company’s activities in relation to privately owned land. First, the provisions, read together with section 46 of the law, make it illegal for the utility company to enter upon any privately owned land without first notifying a land owner and obtaining his

consent. Cases analyzed, which are presented later in this section, show that if the company's agents or employees enter upon any land without prior notice and compensation, they would be liable to injunctive orders at the instance of affected land owners.

(ii) Compensation for loss of use of land

In addition to compensation for entry upon land, section 47(i) of the Act obligates the power company and related agencies to pay land owners and other users compensation for land use restrictions imposed by their activities in the form of loss of use of land and loss of land value. The relevant provision states that they shall be:

“...entitled to compensation for any loss or damage he may sustain by the construction of the electric supply line, so long as the claim is made within three months after the construction of the electric supply line.”

During interviews with the company's responsible officers, it was confirmed that land owners usually cite loss of use of land and loss of land value as the basis of their claim for compensation prior to electricity works. The company's practice in determination of claims, payment of compensation, and procedures established for that purpose, based on information gathered during interviews, are presented in the next section of this report.

(iii) Compensation for damages occasioned by the company's activities on private lands

Both the statutory provisions and case law indicates the position that in addition to compensation for wayleave, loss of use and loss of land value, land owners, other occupiers and users are entitled to compensation for any damage that the company may cause to any property on the land, upon entry for survey or for other utility company purposes, including construction of power lines and undertaking of repairs.

The Forests Act, Chapter 385 of 2005:

Compensation for private land declared to be a nature reserve

The specified objectives of the Forests Act whose operation commenced in January 2007, almost two years after its enactment, is to provides legal basis for the establishment, development and sustainable management, including conservation and rational utilization of forest resources for the socio-economic development of the country. The Act appears to adopt a cautious approach with regard to private land use restrictions and authorizes such restrictions in few cases. Of the two instances in which the law authorizes official forest-related activities on private land, it provides for compensation in one case, namely: where private land is declared a nature reserve.

For the establishment of nature reserves, section 32 (1) of the Forests Act provides that upon the recommendation of the Kenya Forest Service, the Minister (now cabinet secretary) may, in consultation with the Minister (cabinet secretary) responsible for

local authorities, by notice in the Gazette, declare any forest area, or woodland or any part thereof, which has a particular environmental, cultural, scientific, or other special significance, to be a nature reserve for the purpose of preserving its biodiversity and natural amenities thereof. It provides further, in sub-section (2) of section 32, that where a nature reserve declared in pursuance of section 32(1) occurs within a private forest, compensation shall be paid to the land owner/owner of the forest. The cabinet secretary in charge of matters concerning forests, currently the Cabinet Secretary for environment and Mineral Resources has the responsibility to make compensation payment. The language of the statute implies that compensation payment shall be paid in all such cases after the fact. The law further specifies the manner of determining the amount of compensation by stating that compensation shall be paid in an amount arrived at by an independent valuer appointed by the Board of the Kenya Forest Service (established by section 6 of the Act) on the recommendation of the relevant professional body.

The Forest Act authorizes private land use restrictions to accomplish other purposes, where local authority forests are created, on any land within the jurisdiction of a local authority (section 24). This is the only instance in which the law authorizes forest-related activities on private land (as well as government land) without compensation. Forest conservancies and state forests are also to be established, but on land that either already belongs to government or land purchased by government for that purpose (sections 13 and 23).

The Water Act: Compensation for Wayleave

An analysis of the Water Act discloses that it makes provisions for a number of water conservation and supply installations, including underground pipes that would impose upon private land owners various forms of land use restrictions, to allow public supply of water. In the interest of fairness and justice, the Third Schedule provides a compensation scheme, requiring water service providers to negotiate with land owners, in the first instance for the grant and compensation for wayleave. In the absence of agreement, compensation issues may be determined by the Water appeals Tribunal established by the law.

Kenya Government Practice Regarding Compensation for Property losses from Private Land Use Restrictions

Kenya government practice regarding compensation for land use restrictions reflect a number of things, namely: in practice, the government, directly and through the various public service agencies, does pay compensation in many deserving cases; payment of compensation is often based on permissive laws; various kinds of property losses and damage are, in practice, compensated, including loss of water rights; compensation payments are made through various mechanisms/by various government agencies, including direct payment by utility companies based on agreements with land owners and courts, through orders for compensation payment; compensation is often paid after occurrence of property damage/and or loss; in assessing payable compensation, government agencies, including courts, take into consideration market values; government recognizes that the purposes for which private land uses are restricted are

public but hold the view that individual land owners cannot be burdened to bear the cost of public service provision without compensation; and certain government restrictions of private land use amount to deprivation of property that is, without compensation, prohibited by the Constitution. The following analysis of cases elaborate some of the findings.

(1) *Joseph Njuguna Gachoka & Three Others v. Kenya Power & Lighting Company*, Kenya High Court Civil Case No. 40 of 2003

Kenya Power, the only public power utility company in Kenya, sought to construct a power line, in a government project known as Olkaria-Dandora Power Line Project. A segment of the power lines in the project was to be constructed on the Plaintiffs/claimants' land located about 150 miles from the City of Nairobi and titled: Ndumberi/Ndumberi/2501, Ndumberi/Ndumberi/1874 and Ndumberi/Ndumberi/1695. Therefore, the company approached the claimants sometime in 1998, asking for their permission to pass electric power lines over their parcels of land and the claimants agreed, in the belief that the proposed power supply would be in the public good and, most importantly, that the power company would only construct single domestic lines that do not impose serious restrictions over their land, and are not much of a nuisance, that the lines were to be only ten metres into their land and that arrangements for their compensation would be made. However, after they granted permission, the power company, they were shocked to see the company workers encroaching into their land from neighbouring plots where they had already put up huge voltage metal towers/pillions that would result in bigger power lines hanging deep into their lands, instead of the agreed 10 metres. Also, the power company did not agree to compensation proposals made by the claimants even though it was advancing its power line construction onto their land.

Consequently, the land owners filed an application for injunction, seeking to stop the power company from constructing the huge power lines on their land on grounds that: there was no agreement between them and the power company for construction of the kind of power lines that they were in the process of constructing on their land; there was no agreement for compensation between the land owners and the company; and that the threatened entry and construction of power lines by the power company on their land violated their constitutional protection against deprivation of property without compensation and was contrary to the provisions of the Electricity Power act of 1997(now replaced by the Energy Act of 1996) and in contravention of the national Constitution.

After hearing, the High Court in Nairobi the court found, among other things, that construction of huge power lines/pillions would be a permanent feature on the claimants' land and for safety reasons, appellants would have to restrict, as much as possible, their use of the portions of their land affected by the power lines, known as "trace areas." Over trace areas, the land owners would have to assign certain rights and privileges to the power company and the land owners would have no say thereafter, as to whether the power lines remain or be removed. The Court ruled, against the

power company's argument that the injunction sought would bar it from executing its statutory mandate under the Act and halt an almost complete power line project, that although the power line project was in the public interest, would be beneficial to the claimants and others and had, of necessity to pass through the claimants' land, the claimant land owners must be compensated *for use of their land* by the company. Further, the Court stated that: it is a known fact that the existence of electric cables on privately owned lands pose a risk; the land owners must be compensated in the case of entry into their land for public use; the claimant land owners had to be compensated adequately in accordance with the law; and that the amount of compensation could be negotiated by the parties, but it was not a matter of the company offering the land owners a figure for them to accept and that such highhandedness by the company had frustrated negotiations. The Court further stated that the power company must abide by the law and treat citizens as equal partners in matters of national interest. Eventually, the Court allowed the land owners and the company two months within which to negotiate compensation, failing which the issue would have to be determined by the Court.

In *Kenya Power & Lightning Co. v. Omar Abubakar Ali* (Mombasa High Court Civil Suit No. 538 of 2011), Kenya Power, the country's electricity utility company, affirmed the restrictive nature of its power installations by expressly acknowledging that its installations, especially high voltage electricity lines are dangerous and pose dangers to structures constructed within wayleave traces. For that reason, the power company objected to the Defendant's construction of temporary and permanent structures near and below its power lines and sought the court's order for their eviction. The express admission rules out any doubt that where certain categories of power lines are constructed or laid, land uses are restricted by both height and distance, to avoid dangers, including the danger of electrocution.

(2) In *Limo v. Commissioner of Lands*, High Court (Eldoret) Civil Appeal No. 6 of 1987,¹¹⁹ the High Court had a chance to state how the value of compensation for loss of land use or loss of land value should be determined in cases where the value presented by a government valuer or witness is disputed by a land owner. |Valuation of the land in question was conducted by the Commissioner of Lands, for the purpose of compensating the owner, taking into consideration the different characteristics of the 42 hectare parcel of land. The value determined the value of arable portions of the land to be Kenya shillings 20,000 per hectare; steep portions with rocky outcrop to be Kshs. 6000 per hectare, rock-outcrop and flat land at 8,000 and rock and steep land at Kshs. 4,000. On the basis of the determination, taking into account, also, the developments that the land owner had undertaken on the land, the government offered the land owner a total of Kshs. 854,170. The affected land owner disputed this figure and claimed instead a total of Kshs 2,318,976, eventually presenting the matter to court for valuation. In its judgment, the Court stated the cardinal principle that guides courts in cases presented to them for determination of loss of land value, namely: that the appellant has the onus to prove that the government valuer was wrong in his valuation and that the onus is not a heavy one. The court also stated that in assessing compensation, courts were to be guided by Principles set out in the Schedule to the Land Acquisition Act (now repealed),

which included principles that: market value, in relation to land, means the value of the land at the date of publication of the land in the gazette of intention to acquire it; and that in assessing market value the effect of any express or implied condition of title or law which restricts the use to which the land concerned may be put shall be taken into account. Section 160(1) of the Land Act confers on the Land Commission the power, not only to manage the Land Compensation Fund, but also to develop rules to govern the manner of assessing value of an interest in land.

The Court further stated that other matters that a court should also take into consideration in assessing compensation is nearness of the land in question to a main town and nearness to an access road. In addition, a court would consider whether a land owner is likely to derive benefits from the restrictive activity that would, in the absence of the activity, not be available.

Considering all the aforementioned factors, the Court arrived at the conclusion that that the government valuation was reasonable and dismissed the case.

(3) In *Kanini Farm Ltd v. Commissioner of Lands*,¹²⁰ the court considered, among other things, factors to be considered when assessing property value for purposes of compensation, including the question whether speculative value of property could be taken into account. The appellant challenged an award of compensation on the ground that the government valued the property as agricultural land when there had been a change of user to residential. He also challenged government's payment of compensation with regard to the same land to persons whom he considered as trespassers to the land. The court held, among other things, that the value of land had to be determined in accordance with section 9(3) of the now repealed Land Compensation Act, which establishes the Schedule with compensation assessment Principles stated in the foregoing paragraphs. The court further stated that market value provides the basis for assessing compensation and that it is the price which a willing seller might be expected to obtain from a willing purchaser, who may be a speculator, but a reasonable one. Further, the court stated that since a change of user had been obtained from agricultural to residential before the matters giving rise to the need for compensation, it was fair and just that the property be treated as residential in assessing compensation.

(6) In *Christopher Kanai Kamau v Attorney General & 3 Others*, (High Court Civil Suit No. 925 of 2012), the High Court applied provisions of both national and international law against use restrictions that offend private property ownership as a human right and arrive at the conclusion that the land owner must be compensated in accordance with the Constitution.

The case, which was brought under *Article 22(1) (4), 23(1) (3), & 40 of the Constitution* (among other provisions of law) which assert the right to property, the Petitioner, being the registered owner of all that property known as LR No. 209/12056, arose as a result of restriction of the land owner's use of his land by an order of the Chief of the (Kyuna) Location, which directed a large group of young men to descend upon his land

forcefully, whereupon the young men, as directed, felled trees and cleared vegetation therein without the consent or authority of the land owner, making it impossible for the land owner to utilize the land. The land owner claimed that the young men, who were, allegedly from the government's *Kazi Kwa Vijana Initiative* (meaning *employment for the youth initiative*), deprived him of the use and enjoyment of his land and thus they deprived him of his constitutional right to own, use and/or enjoy the said property, which is protected by the national Constitution and exposed him to immense injustice and suffering, without any challenge to his title to the land. The Court ruled that the land owner's absolute right to own property established by section 24 of the Land Registration Act (now repealed) is protected by Article 40(2)(a) of the Constitution (2010) which provides that:

“Parliament shall not enact a law that permits the State or any person -(a) to arbitrarily deprive a person of property of any description or of any interest in or right over any property of any description.”

The Court also made reference to Article 14 of the African Charter on Human and People's Rights provides that:

“The Right to property shall be guaranteed. It shall only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.”

On the basis of both the national and international laws that apply to protect property ownership and use rights, the Court allowed the land owner's claim for compensation and injunction to proceed to full hearing.

It is noted that the Court's reference to international laws that protect property ownership and use rights and support claims for compensation for use restrictions are based on Article 2(6) of Kenya's Constitution which allows applicability, in Kenya, of all international agreements to which Kenya is a party, as part of the country's laws.

7. In *Phyllis N. Mbaluto v. Kenya Power and Lighting Company Limited* (H.CCC No. 122 of 1999), the land owner claimed, among other things, compensation for loss of use of her land, parcel number Mumbuni/Kasinga/2715, resulting from the power company's entry upon her land, without her consent sent or knowledge, and without paying her any compensation, and construction thereon, of an electricity pole and power supply cables, thereby making it difficult for her to develop the land as she intended. The Court clarified that loss of use, in this case resulting from land use restriction, ought to be proved as special damages. It means that a party claiming compensation for such loss would have to show, for example, how much she could have generated from undertaking an activity or activities on her land. Income generated from past activities on the same land could serve to prove the extent of loss of use.

The Practice and Procedures for Compensation: The Example of Kenya Power

Some of the cases presented in the foregoing paragraphs involved Kenya Power, the country's electricity utility company. However, this study found that Kenya power has established a formal in-house structures for assessment and payment of compensation such that only contentious matters go to court.

The company's responsible officials first explained the restrictive nature of its activities. It was stated that where the company has laid or constructed a power line: certain activities are not permitted at all, certain activities may be permitted only within certain distances of the trace area and there are height restrictions for some activities and structures. It was elaborated that generally, settlements are not permitted below or near power lines. It was further elaborated that the company restricts land use such that depending on the category or class of power line or other installation, trees may be permitted but only of a certain height, below or near power lined. In some cases, of all land uses, only grazing may be permitted below or near a power line. Where high voltage lines of 220 kilovolts are constructed, the company requires a distance of twenty metres on either side of the line as trace area, for which wayleave must be obtained from land owners because they would not use part of their land falling in the trace area at all. Therefore, land owners must be paid for resultant use restrictions and for that purpose, whenever the company is designing a power line route, it has to make efforts to find all potentially affected land owners for purposes of explaining to them to company objectives and negotiating compensation.

For purposes of negotiation of compensation, including assessment of compensation amounts, the company has set up a Property Department, comprised of valuers, among others, and a structure for working with Kenya Institute of Arbitrators to assist it in cases requiring compensation arbitration with land owners. The following are some of the guidelines that the company has developed to guide its assessment of compensation: where power installations take up over 50 per cent of one's land, full compensation is paid; crops are paid for based on Ministry of agriculture rates; where domestic lines overfly land, it pays 10 per cent of the value of land; for construction of pylons, compensation is paid as if the company were purchasing the land; and where high voltage lines are constructed, with the potential for physical harms as well as loss of land use, a higher amount may be paid.

The grant of easement and other compensable items are based, in the first instance on agreement between the parties. For the company, valuers in the Property Department carry out valuations, in the process of which they may seek input from the government's valuers and professional valuers. Land owners are also, in the process of negotiation, permitted to hire their own valuers to make presentations on their behalf on property value and their determination of payable compensation. It was stated that both the company and land owners and their respective valuers base property values on prevailing market rates. Where the company comes to agreement with land owners on compensation, a formal agreement is signed, which forms the basis of registration of a wayleave against title to the affected land. It was emphasized that the company always seeks to make payment to land owners **before** imposing use restrictions in order to ensure that a proposed route or site is clear before work starts. In cases where buildings

are the property affected, the company pays 20 percent of agreed value, then demolishes the buildings before paying the remaining 80 per cent. In many cases, land owners have also presented property of sentimental value and even graves and in such cases, the company has no choice but to value and compensate for the items. It was further stated that on the basis of agreements reached between the company and land owners, it compensated over 1000 land owners to secure space for construction of the line between Kiambere (Kiambere Dam) and Nairobi City. For Sondu- Kisumu line, over 300 land owners were compensated, as agreed. Although KETRACO is now the government agency in charge of establishment and maintenance of power lines, it works mainly through Kenya Power that has had a long experience in determination and payment of compensation for land use restrictions, having been placed with the mandate for many years, until recently.

Where parties fail to agree on compensation, the matter is first arbitrated, with the aid of Kenya Institute of Arbitrators, before it is presented to court, if at all. There are also cases where land owners prefer to take their compensation matters directly to court.

SECTION III

Analysis of Policy, Law and Practice of Compensation for Land Use Restrictions in Uganda

The Land Acquisition Act

Uganda's Land Acquisition Act, Chapter 226, is one of the substantive laws governing government actions with likely impacts on private land use activities. Its objective is to make provision for the compulsory acquisition of land for public purposes and for matters that are incidental to and connected with such acquisition.¹²¹ It appears from the provisions of the law that certain activities that government may carry out on privately owned land in connection with compulsory acquisition may have impacts, in the nature of restriction, on private land use, even where compulsory acquisition is not eventually effected. For such use restrictions and related impacts, the law provides for compensation and such compensation is regarded in this study as compensation for private land use restrictions. The relevant provision of the Land Acquisition Act is section 2(2).

Compensation for damage occasioned by government entry into private land

Section 2(1) authorizes the government Minister in charge of matters concerning land to enter into the land, personally or through an appointee, for the purpose of ascertaining suitability of the for a proposed public purpose. If, upon such entry and ascertainment activities, including survey of the land and excavation to draw samples, damage occurs to the land and/or anything thereon, the government shall pay compensation to any person who suffers damage (section 2(2)). According to the relevant provisions of law, compensation is payable after damage has occurred. The amount of compensation to be paid is not specified, neither is the method of determining payable compensation. However, any dispute arise concerning the amount

of compensation to be paid, such dispute shall be referred by the Attorney General to the High Court for decision.

Compensation for temporary government occupation of land

Section 10 of the Land acquisition Act authorizes the government, through its agencies, to enter into, occupy and use private land, including farm land, for public purposes, for a period of up to, but not exceeding three years from the date of commencement of occupation. In the process of occupation and/or utilization of land, the government may also take from it any material as it deems necessary. The law proceeds to state that the owner of such land and any other person claiming interest thereon shall be compensated by the government for: occupation and use of the land, any material taken from the land and any damage to crops on the land, if any. The amount of compensation to be paid is to be agreed between the land owner and person having interest on the land on one hand and the government officer or agency responsible for the temporary occupation or use. After the government issues notice of the intended occupation or use of land, payment may be made in lump sum, periodically, or by monthly installments, as may be agreed in writing (section 10(2)). Any dispute as to the compensation payable shall be referred by the Attorney General to the court for decision.¹²² Section 10 (5) clarifies that the government shall take possession of or occupy land on conclusion of an agreement for the payment of compensation and upon payment of the compensation.

Compensation for damage resulting from government temporary occupation or use of private land

The kind of compensation provided for is in addition to compensation for use and occupation and damage to crops already stated. Section 11 provides that when the temporary occupation of any land under section 10 comes to an end, the Government shall pay compensation to any person having an interest in the land *for any damage done to the land during the occupation, other than damage for which compensation has already been paid or agreed to be paid under that section*. Where land that has been temporarily occupied or used by government becomes permanently unfit to be used for the purpose for which it was used immediately before the occupation, the government may proceed to acquire the land permanently for public purposes, *if all the persons having an interest in the land so require*. This means that where, as a result of government occupation and use of private land, the land becomes damaged and therefore, unfit for the use to which it was already put or intended before the occupation, the owner of land may require the government to acquire it permanently, at a cost and if so required, the government will be obligated to purchase the land for public purposes (section 11).

Compensation for severance of land that is excessive or harmful

Section 12 of the Land Acquisition act makes provisions for situations where, in order to carry out a public purpose, the government seeks to acquire land which it has to

sever from another. In other words, there are instances where the government may need to acquire only a portion and not the whole of a parcel of land or only one parcel of two or more adjoining/joint parcels. Where the government, after ascertaining the suitability of land, decides to sever a parcel from another or others or decides to excise a portion of land from the whole and such excision or severance occasions harm to the land owner or land owners, for example by rendering the remaining portion of land uneconomical, the owner of the affected land or any person having an interest thereon shall be compensated. Alternatively, the government may acquire the whole land, including the affected portion, “...*notwithstanding the fact that only the land first sought to be acquired is needed for a public purpose.*” (section 12(2)). In case a dispute arises concerning the amount of compensation to be paid, such disputes may be referred by the Attorney General to the High Court of Uganda.

The National Environmental Act, Cap 153 of 1995:

Compensation for environmental easements

The law has a number of provisions authorizing government restriction of private land use through the development and enforcement of a number of mechanisms including: environmental impact assessment (section 19 & 20), air quality and other environmental standards (section 25-30), limits on the use of lakes and rivers(section 34), management of river banks and lake shores (section 35), restriction on the use of wetlands (section 26, 36 & 37), and land use planning (section 48) protection of hilltops, hillsides and mountainous areas (section 39 & 40), conservation of biological resources in-situ and ex-situ (section 41 & 42), and environmental easements (section 72). However, of all the statutory mechanisms, the law provides for compensation only in the case of environmental easements.

Under section 73 of the Act, a person or a group of persons may make an application to the court for the grant of an environmental easement and, in accordance with section 72, a court may impose an environmental easement o private land, which then becomes the burdened land, for a variety of ecological purposes including: preservation of flora and fauna; preservation of the quality and flow of water in a dam, lake, river or aquifer; preservation of any outstanding geological, physiographical, ecological, archeological or historical features of the burdened land; preservation of a view; preservation on open space; preservation of access paths; preservation of natural contours and features of the burdened land; prevention or restriction of the scope of any activity on the burdened land which has as its object the mining and working of minerals or aggregates; prevention or restriction of the scope of any agricultural activity on the burdened land; and creation and maintenance of works on burdened land so as to limit or prevent harm to the environment (section 72(a- j)).

Private land whose use is restricted by one or more of the foregoing activities becomes the burdened land whose owner, occupier or user suffers imposition of one or more obligations in respect of the use of land including compliance with an environmental restoration order under section 74, for the purpose of meeting any of the specified goals. Section 72(5) makes provision for compensation, not only to an owner of private

land burdened with an easement but also to any person having an interest or right over such land, including customary rights and interests. The law states that to such person shall be paid, “...by the applicant for the environmental easement, such compensation as may be determined in accordance with section 76.”

Section 76(1) provides for compensation of the land owners and/or other persons with interest or rights over the land, by the applicant for an easement or the government, where an easement is of national significance (section 76(4)), for the “...lost value of the use of the land.” Section 76(2) permits affected persons to specify the compensation sought. However, the National Environment Authority has the obligation to determine compensation due, if affected persons’ payment proposals are not acceptable, in which case, the authority shall make a determination, taking into account the provisions of the Constitution and any other laws relating to compulsory acquisition of land. Any person who is not satisfied with the Authority’s determination of compensation may appeal to court (section 76(6)).

Uganda Wildlife Act, Chapter 200 of 1996:

compensation for revocation of wildlife use rights

The Wildlife Act of Uganda seeks to assure sustainable management of wildlife by, among other things: protection of gazetted wildlife reserves, protection of rare, endangered and endemic species of wild plants and animals, ecologically acceptable control of problem animals, enhancement of economic and social benefits from wildlife management by establishing wildlife use rights and the promoting of tourism, environmental impact assessment of projects that might have negative impacts on wildlife and their habitat, establishment of wildlife conservation areas and sanctuaries (section 18), establishment of Uganda Wildlife authority as the government agency with responsibility for protection of wildlife, control of import, export and re-export of wildlife species and specimens, implementation of international treaties, conventions, agreements or other arrangement to which Uganda is a party, and by assuring public participation in wildlife management.

The law makes various provisions for the accomplishment of the set objectives, including the grant of wildlife use rights to private individuals, organizations and companies. In section 2, the Wildlife Act defines a wildlife use right as a right granted to a person, community or organization to make some extractive utilization of wildlife in accordance with the law. An analysis of the law, especially section 29, discloses that a wildlife use right is a private property right which entitles a right holder to: hunt wildlife (class A use right), farm in protected wildlife areas (class B wildlife use right), carry out wildlife ranching (class c use right), and trade in wildlife and wildlife products (class D wildlife use right). It is only with respect to such a right that the law authorizes compensation to a right holder in case the government revokes the use right for reasons other than that the right holder has not complied with the terms of the grant or the conditions subject to which the grant of a wildlife use right was made. Compensation

shall be for losses directly attributable to the revocation. In addition, a person whose wildlife use right has been revoked shall be entitled to remission of the yearly fee paid. Refusal to award compensation is appealable to the Wildlife appeals Tribunal, in accordance with section 86 of the Act.

The Water Act, Chapter 152 of the Laws of Uganda

In addition to compensation for compulsory acquisition of land for water supply, management and related services, Uganda's water Act provides for compensation for private land use restrictions occasioned by a number of government actions in relation to water and connected services as explained below.

(i) Compensation for easements

Section 2 of the Water Act defines an easement, in relation to water and related works, as a right to enter land owned or occupied by another person for all or any of the following purposes: construction of works on or in that land; storage of water on or in that land; and/or carrying water, drainage or waste under, through or over that land. For any of the foregoing purposes, section 36(1) of the Act authorizes a holder of a water permit, including public agencies, who wishes to bring water to, or drain water from their land over or underneath land owned or occupied by another person to apply to the director of water resources for the creation of an easement over that land if he or she has been unable to obtain an easement by agreement with the owner or occupier of that land. An easement may authorize the construction of works necessary to carry water or waste across another's land; or the construction of fences, bridges, crossings or other works on that land. Therefore, there is no doubt that an easement, whether obtained by a private or public body, would restrict use of land over which it is sought to be applied.

Under section 36(2) of the Act, an easement may also be created for the purpose of transportation of wastes. In such a case, the holder of a waste discharge permit who wishes to drain wastes from his land over land owned or occupied by another person may apply to the director for the creation of an easement over that land if he has been unable to obtain an easement by agreement with the owner or occupier of that land. In the case of a successful applicant, it is the director of water development who creates an easement, on his behalf, on or over privately owned or occupied land.

For private land use restrictions imposed by water service-related easements, the law provides for compensation of the land owner, occupier and/or any person claiming interest in or right over affected land (section 36(6)(c)). The amount of compensation to be paid ought to be prescribed in the easement, which means that compensation payment shall be made after an easement is created. Any person aggrieved by the director of water development's decision concerning compensation payment may appeal to the High Court (section 36(7)). Any compensation which remains unpaid for an unreasonable period, may be obtained as a civil debt (section 36(10)).

(ii) Compensation for government restriction of water use and related private land use rights

Sections 22, 26 , 33 and 91 of Uganda’s Water Act provide for compensation for loss and/or damage arising from the exercise of power by the Minister, the director of water development and other government agencies responsible for water resources in the course of carrying out their functions related to water resources, under the law. The law sets out various functions and activities of government agencies in relation to water resources that may restrict private use of land and related resources, including water and for which compensation shall be paid, in the event of loss or damage. The functions include:

- (i) declaration of any area (including private lands) to be a water supply area or a sewerage area under section 45,
- (ii) variation of a water abstraction or supply permit (section 26), suspension of a water permit halting water abstraction and use (section 22),
- (iii) imposition or variation of water permit conditions (section 22(3)) and entry into private land to investigate water resources including construction of works (section 14),¹²³
- (iv) construction and operation of water works for the supply of water within or outside the area for which the authority is appointed as authorized by section 53,
- (v) entry by the authority upon any land to dig, trench and break up the soil, and use or remove any material dug from the land to set water levels or determine water permit conditions as authorized by section 76;
- (vi) diversion, extraction and impounding water from any watercourse or borehole or alter the course of any watercourse as authorized by section 76(c);
- (vii) blast with explosives or otherwise break up any rock, clay, stone, soil or other geological formation or artificial structure in any manner and remove or use all or any material obtained (section 76(d));
- (viii) restrict or prohibit the application of a water permit, waste discharge permit or other permit or licence issued under the Act (section 8(1) (c)(ii);
- (ix) issuance of restrictive orders by the director of water development under section 44 (1) to land owners, occupiers and other users to do or not to do any thing or to take such measures or construct or remove works that may, in the opinion of the director, be necessary or desirable for the investigation, use, control, protection, management or administration of water; and
- (x) entry by the director into the land to undertake what would have been done in compliance with the order and to remove such works as are necessary to ensure complete compliance with his directives where a land owner fails to comply with the director’s orders .

Any one or more of the foregoing activities would have the effect of restricting private land use and/or causing damage to land and existing property thereon. Section 33(1) and (2), 22, 26 and 91 specify that a land owner, user or other person with an interest

in land and related water resources shall be compensated for damage to land suffered. Damage to land that may result, as recognized by the law, include: deprivation of possession of the surface land; damage to the surface of land and any improvements, trees or crops; damage to stock; and all consequential damage (section 33(2)(a)- (d)). All consequential damage is understood to include lost or reduced land value as well as lost revenue from land-based activities of private users.

Proper construction of section 33(3) and 91 leads to the conclusion that compensation is payable after the fact, that it, after loss and/or damage has occurred. In particular, section 91 (4) states that compensation shall not be paid unless a written claim for compensation has been lodged with the responsible authority within six months of either the claimant learning of the act giving rise to the claim setting out: (a) the claimant's name and address; (b) a description of the land in respect of which the claim is made; (c) the claimant's interest in the land; (d) the nature and extent of the interest of any other person in the land; (e) the damage caused to the land; (f) the particulars of any other damage; and (g) the total amount of the claim.

The law specifies that compensation may be paid in various forms: (a) in the form of money; (b) provision of an alternative supply of water; (c) exchange of land for another piece of public land if the land lost was under the Land Reform Decree, 1975; the provision of compensation water to land on terms the authority may determine (section 96(6)(c), the remission of rates, charges or fees payable to the authority (section 96(6)(d); or (d) any other type of compensation which the Minister may consider appropriate (section 33(3)(a)-(d) and 91(6)). Section 91(1) emphasizes that where damage has occurred, all parties interested in the land for all damage sustained by them in consequence of the exercise of those powers, subject to this Act. Further, section 91 clarifies that damage to land for which compensation shall be paid means loss suffered as a result of: (a) deprivation of the possession of the surface of any land; (b) damage to the surface of land and to any improvements, crops or trees on the land; (c) damage to stock; and (d) all consequential damage.

Any person aggrieved by the decision of an authority may, within thirty days from receiving the notice of the decision, appeal to the Minister- section 91(7).

The Mining Act, Chapter 148 (2003) of the Laws of Uganda: Compensation for private land use activities restricted by mining and related activities

Uganda's Mining Act. Chapter 148 of 2003 is the law that governs minerals and mineral-related activities in the country, including mineral prospecting and trade. The law, in section 82 and 83, provide for compensation "for disturbance of private land owner's rights. Upon proper construction of the provisions of the law, it has been determined that the relevant sections, in effect, provide for compensation for restriction of a private land owners' activities by the state's grant to others of mineral-related rights, including the right to mine. The point is elaborated as follows:

The Mining Act of Uganda was enacted in response to Article 244 of Uganda's Constitution which obligates the country's Parliament to enact laws regulating the exploitation of minerals and related matters including the sharing of royalties arising from mineral exploitation. The Constitution emphasizes, in Article 244(2), that the interests of individual land owners, among others, shall be taken into account in mineral exploitation and related activities. This provision appears to form the basis of provision, in the Mining Act, of compensation, in cases where mining and related activities restrict or interfere with land owners' private land use activities. First, it is necessary to understand why mining and related activities amount to government restriction of private land use.

Mining and related activities with potential to interfere with or restrict land use, such as mineral prospecting, are authorized by state which, by law, owns all minerals in Uganda, including minerals occurring on private land. The relevant provisions of law state that:

“Subject to any right granted to any person under this Act, the entire property in and control of all minerals in, on or under, any land or waters in Uganda are and shall be vested in the Government, notwithstanding any right of ownership of or by any person in relation to any land in, on or under which any such minerals are found.”¹²⁴

The State of Uganda, as the owner of all minerals, has the authority to authorize mining and related activities through the grant of a licence, which confers mineral rights on individuals and companies (section 4 of the Mining Act). Through a licence, which confers a mineral right, the state does not only grant one a right or rights to carry out specified activities in relation to minerals, such as mineral prospecting and mining; the state also, in relation to privately owned land, provide licence holders, in the license with, *“a description of the area over which it is granted.”* (section 7(2)(c)). Mining and mineral prospecting areas shall often be privately owned lands because the law restricts mining on government owned lands such as national forests and protected wildlife areas (section 21(1)(b)) Therefore, where an individual or company is granted a mineral prospecting or mining licence, with the right to do all of what it takes to carry out their activities on privately owned land including: entry upon land to which a mineral right relates, erecting the necessary equipment, plant, machinery and buildings for the purpose of mining, transporting, dressing, treating, smelting and refining the minerals or mineral products recovered during mining operations and doing all related acts (section 49), in the absence of provisions requiring government to first acquire mineral rich areas and then allocate rights, private land owners' use of their land is likely to be restricted by government-authorized mining activities.¹²⁵ Mining and related activities are also likely to damage privately owned land and property thereon. Therefore, the Mining Act provides for private land owner compensation.

Section 82 of the Mining Act which provides for land owner compensation specifies, *“Compensation for disturbance of rights.”* An analysis of the provisions for private land owners' or users' and occupiers' rights that might be interfered with indicates that compensation is required for disturbances with land use activities including

disturbances that restrict or limit such use because the law specifies compensation for, “...any disturbance...” of the right of the owner or occupier of the land (section 82(1)). Any disturbance includes loss of any use of land to which it was devoted before mining or related operations, limited use of land and loss of land value. In addition, the law requires land owner, occupier and user’s compensation “for any damage done to the surface of the land by the holder’s operations... of any crops, trees, buildings or works so damaged...” (section 82(1)).

Compensation, whether it is for loss of land value and land use or for damage to land and/or property thereon, shall be paid by the holder of a mineral right, after the fact, meaning, after harm has occurred because section 82(1) states that payment shall be made “on demand.” Compensation shall be fair and reasonable and based on the market value of the land. In this regard, the relevant provisions of the law state that:

“in assessing compensation payable under this section, account shall be taken of any improvement effected by the holder of the mineral right or by his or her predecessor in title the benefit of which has or will accrue to the owner or lawful occupier of the land.” Section 82(1)(i))

The law further states that:

“the basis upon which compensation shall be payable for damage to the surface of any land shall be the extent to which the market value of the land upon which the damage occurred has been reduced by reason of the damage.” (section 82(1)(ii)).

The law further states, in section 83, that instead of monetary compensation, a private land owner, occupier, or user may be compensated by way of share of royalties under section 98 of the Act.¹²⁶

Uganda Land Act, Chapter 227 of 1998

Article 242 of Uganda’s Constitution Authorizes the country’s Parliament to make laws to regulate the use of land. The Constitution itself contains no provisions for compensation for land use controls that exceed acceptable limits. Pursuant to the constitutional provisions, a number of laws regulating land use have been passed, including the Physical Planning Act and the Land Act of 1998. The Land Act and subsequent amendments thereto (Land (Amendment) Act) of 2001, Land (Amendment) Act of 2004 and Land (Amendment) Act of 2010), constitute the substantive law governing land ownership, use and disposal. The Land Act contains provisions for land use control (sections 42 - 45) and land management (sections 46-73) which, in various ways, restrict private land use. The Act, section 45 thereof, makes reference to other laws which supplement its provisions for land use restrictions, including the Town and Country Planning Act. This section presents restrictive provisions of the Act which include authorization of compensation thereof. In a separate section, relevant provisions of the Town and Country Planning Act are examined.

(i) Compensation for private land use restrictions imposed by official entry and encampment on private land

Besides the right of way and water rights that may be officially established on private land without compensation (sections 70 and 71 of the Land Act), the Act authorizes entry into and encampment on privately owned land by government officials for the purpose of carrying out their duties, including construction of water works and survey. The provisions of the law do not include entry and occupation of private land for military purposes (section 72(5)). Upon entry onto private land, government officials are authorized, where necessary, to select any part of the land to establish their encampment or settlement (section 72(2)). The broad authorization of entry and occupation of private land, accompanied by provisions making private land owner refusal of entry and occupation or obstruction of entry, occupation and government works a punishable offence leave no doubt that such entry and occupation would restrict and disrupt existing as well as planned land use activities including farming. For loss and damage that results, the law provides for private land owner compensation, in addition to payment of fees or charges for the days of official occupation.

With regard to compensation, section 72(3) provides that the Government shall pay, promptly:

- (a) a reasonable fee to the owner or occupier of the land for every day that the land is encamped upon;
- (b) for any produce or other things taken from the land with the permission of the owner or occupier;
- (c) for all damage caused to the land itself;
- (d) for any moveable property on the land or anything wrongly taken away from the land by the actions of any person encamped upon the land; and
- (e).

Apparently, compensation shall be paid after the fact, meaning, after loss of value of Land, loss of property on the land and loss of use of land has occurred. Land owners and occupiers aggrieved by issues concerning compensation payment, including government failure to pay compensation to appeal to the respective District Land Tribunal (section 72(3)(b)), at which point, the law provides mechanisms for determining the amount of compensation payable, including consideration of market values and statutory rates of compensation set out in section 59 (1) of the law , in the case of compensation for both private land use restrictions and for compulsorily acquired land.

In determining the amount of compensation payable, a District Land Tribunal shall take into account the following: (a) in the case of a customary owner, the value of land shall be the open market value of the unimproved land; (b) the value of the buildings on the land, which shall be taken at open market value for urban areas and depreciated replacement cost for the rural

areas; (c) the value of standing crops on the land, excluding annual crops which could be harvested during the period of notice given to the tenant. (section 77(1)(a) - (e)). In addition to compensation assessed as stated, there shall be paid as a disturbance allowance, 15 percent or, if less than six months' notice to give up vacant possession is given, 30 percent of any sum assessed under section 77(1)

(ii) Compensation for land use restrictions imposed by construction of public works

A separate category of government of government activities whose execution has the potential to restrict private land use is known collectively as “public works.” Public works are defined in section 1 of the Act to mean:

“the construction of railways, roads, canals or airfields; the placing of telegraph lines and electric lines, and the erection of supports for those lines; the laying of sewer and water pipes; the construction of drains; the prospecting, exploration, mining and extraction of petroleum resources; the construction of dams and hydropower plants; the establishment of hydrogeological,¹²⁷ meteorological and water quality stations; the construction of water and sewerage treatment plants, storage reservoirs and pumping stations; and any other works, construction of public buildings and other public institutions, declared by statutory instrument to be public works, the construction of buildings for public use, such as hospitals and universities, for the purposes of section 73; and any other works ancillary or incidental to the foregoing.”

Apparently, in Uganda, any one or more of such works may be executed on private land without compulsorily acquiring the land, such that the affected private land owner bears the burden of provision of related public services. In the course of carrying out public works, government agencies may also obtain, from private land, stones, murram or similar materials.

To avoid unfairly overburdening private land owners with losses generated by public works, section 73(3) requires compensation to be paid,

“...promptly, to any person having an interest in the land for any damage caused to crops or buildings and for the land and materials taken or used for the works.”

Statutorily authorized compensation is for a number of items, namely: the land itself, which, although not expressly stated, includes compensation for damage to land and loss of land value; damage to property attached to or on the land including crops and buildings; and materials taken from the land for the public works. There is no stipulated mechanism for determining the amount of compensation payable but the law allows land owners to negotiate with public agencies on matters of compensation (section 73(1)). Such negotiations often involve or include reference to market values and valuation by qualified valuers. In the event of disagreement, aggrieved parties may refer compensation disputes to the Land disputes Tribunal (section 73(4)).

The Electricity Act, Chapter 145 of 1999:

Compensation for private land use restrictions imposed by power installations-

The Electricity Act is Uganda's substantive law that governs generation, transmission, distribution, sale and use of electricity. It also makes provisions for rural electrification of Uganda. For the specified purposes, the law establishes the Electricity Regulatory Authority (to replace Uganda Electricity Board) to take charge of licensing and control of activities in the electricity sector and related matters. The law contains detailed provisions for a variety of government activities aimed at meeting specified goals and objectives, many having the potential to restrict private use of land especially because the activities have, of necessity, to be undertaken on land, including land in rural areas, which largely belong to private individuals, families and communities. Notable is a category of activities known as power or electricity installations. "Installation" means the whole of any plant or equipment under one ownership or, where a management is prescribed, the person in charge of the management, designed for the supply or use or both, as the case may be, of electrical energy.¹²⁸

Installations include: excavation of holes for power posts and erection of power posts therein on designated routes, laying of power cables and lines underneath or over land, establishment of transformer stations in designated areas on designated routes, establishment of electricity power sub-stations, establishment of hydro-electricity dams, thermal and geothermal power stations, and all other works related to generation, transmission, distribution, and marketing of electricity. Related to these are a variety of maintenance activities aimed at maintaining: generation establishment, and power transmission and distribution lines, among other installations. For example, section 67(2) of the law authorizes any person licensed to maintain electric supply lines in, over or upon any land. For that purpose it is lawful, upon written authorization by the authority, for the licensee or his or her representative, at all times, on reasonable notice, to enter upon any land and put up any posts which may be required for the support of any electric supply lines and to cut down any tree or branch which is likely to injure, impede or interfere with any electric supply line. It is also lawful for a licensed person to perform any other activity necessary for the purpose of establishing, constructing, repairing, improving, examining, altering or removing an electric supply line. In the process of undertaking power installations, licensed entities acquire rights of use over private lands to carry out their activities (section 67(2)).

The law authorizes all of the foregoing activities to be undertaken on land compulsorily acquired for the purposes, where necessary (section 71) and mostly on privately owned land, including communally owned land, with actual and potential restriction (limitation, disruption, elimination, destruction, abandonment) of private land use activities, such as: farming, ranching, grazing, building construction works and livestock raising, among others. Installation of electricity power lines on privately owned land is a common activity attendant the supply of electricity in urban and rural areas in Uganda, as it is in Kenya and other parts of Africa. In many cases, power lines are laid over long distances, traversing tracts of land belonging to private and in some cases, public entities also. In the process, private land use activities are restricted by relevant provisions intended to protect the installations, such as appears in sections 81 to 91

and regulations made under the law, which prohibit, among other things: tampering in any way, with power installations, settlement below power lines, especially high voltage lines and electricity posts, cultivation of crops of certain heights below power lines, construction of buildings below power lines and grazing below or near high voltage power lines, among others. The restrictive provisions have actually and potentially curtailed land owner utilization of their land, in a situation where the law authorizes compulsory acquisition of land for power installations only in limited circumstances.

In order to avoid overburdening private land owners with power generation, transmission and supply responsibilities, the law provides for compensation to be paid to private owners and occupiers of land. There shall be paid to affected private persons

“...prompt payment of fair and adequate compensation to all interested persons for any damage or loss sustained by reason of the exercise of the powers under this section. (section 67(3)).”

The powers referred to are those enabling electricity power installations as explained in preceding paragraphs. In accordance with section 70 of the law, compensation shall, in the first place be negotiated between private land owners and occupiers and a person licensed to carry out any of the power installation-related activities. Interviews with responsible officials disclosed that during negotiations, affected land owners and occupiers are permitted to hire their own valuers to assess affected land and other property and to submit their valuations to be considered by utility company valuers and property managers. In default of agreement, a claim for compensation shall be determined by the Land Disputes Tribunal which may be having concurrent jurisdiction with the Electricity Disputes Tribunal (established under section 93 of the Act) over some of the matters. Appeals from the tribunals lie to the High Court.

Uganda Railways Corporation Act, Chapter 331

In addition to compensation that is provided for by section 32 of the Railways Corporation Act for land compulsorily acquired for purposes of establishing a railway network in Uganda, the law provides for compensation of private land owners for losses, including loss of use of land, suffered as a result of use restrictions imposed to meet objectives of the law in the following instances:

(i) Compensation for land use restrictions imposed on land owners during construction of railways lines and related works

Section 39 of the act provides that if, during construction of a railway line, construction works restrict, interfere with or disrupt private land use activities and settlements in areas adjoining the railway line or the area through which the railway line is constructed, owners of affected land may be compensated by the Railways Corporation. The law states that the amount of compensation shall be agreed between the corporation and affected land owners. Compensation shall be made “*for the purpose*

of making good any interruptions caused by the construction of the new railway to the use of the lands through which the railway is constructed.” In effect, loss of use of land is what is compensated. In addition, where bridges, crossings, watercourse and other works relied upon by land owners and other residents are affected, compensation shall be made therefore, as alternative to their restoration.

(ii) Compensation for restrictions and losses occasioned by the exercise of the Railway Authority’s power of entry into private lands

Sections 35 (2) ad 48 (1) and (2) authorize Railway Corporations’ officers to enter into private lands and execute a variety of functions related to the provision of railway services, including: prevention of accidents, in which case, officers are permitted to enter into private lands and for the purpose of preserving the safe operation of any of its transport services or repairing any damage caused by an accident cut down or remove any tree or other obstruction, alter the position of any pipe for the supply of gas, oil, water or compressed air or the position of any electric, telephone or telegraphic pole and wire or the position of any drain and do such other things as it deems necessary. In addition, railways authorities are authorized to construct, operate and maintain railway, marine and road services both in and outside Uganda for the carriage of passengers and goods (section 3), carry passengers, and goods not only by rail, but also road and waterways; provide transit and terminal stations and port facilities for the purpose of provision of railways services and to provide and use upon railways, roads and inland waterways for the carriage of passengers and goods and for the stowage protection or salvage of life and property the following: (i) self-propelled and push service equipment; (ii) road motor vehicles and trailers; and (iii) lake vessels and other associated crafts (section 4).

No doubt, in the course of executing its statutory mandate as summarized in the foregoing paragraph, the Railway authority’s activities would restrict ongoing ad planned private land use activities to the disadvantage of private lad owners and occupiers. Therefore, the law, in sections 32, 35 and 48, provide for compensation to be made to private land owners and occupiers for any damage caused. Section 48(2) states that where any person is entitled to compensation,

“...the compensation shall be determined by a judge of the High Court in accordance with the laws in force and with rules of court of the High Court made for that purpose; and the rules of the court of the High Court may provide for assessors sitting with the judge.”

In practice, courts assess compensation where harm has already been suffered. The burden of proving the nature of loss, such as loss of use or loss of value of land lies on the land owner or occupier making a claim therefore (section 50).

Uganda Petroleum Production and Development Act, No. 3 of 2013

In accordance with article 244 of the Constitution, the entire property in, and the control of, petroleum in its natural condition in, on or under any land or waters in

Uganda is vested in the Government, on behalf of the Republic of Uganda (section 4 of the Petroleum Act). The government, as the holder of rights in petroleum and related activities, confers rights to individuals and entities to engage in petroleum reconnaissance, production and related activities, upon the grant of an enabling licence. (section 5 of the law prohibits in petroleum production and related activities without a government licence). A licence to conduct any one or more of the petroleum development-related activities specifies, among other things, an area over which the activity shall be conducted (sections 48, and 52-56) and such area may fall on privately owned land. If it does, the law mandates the land owner to be the one to adjust or restrict his activities in order not to interfere with reconnaissance or petroleum production activities. Once a licence to conduct a petroleum-related activity is granted and because petroleum, whether it occurs on private land, vests in the state, a land owner has the statutory obligation to restrict, limit or adjust his activities in order not to interfere with licenced petroleum activities. In that regard, section 136 which confers licensees rights to land surface activities states that:

“A land owner in an exploration or development area shall retain the right to graze stock upon or to cultivate the surface of the land insofar as the grazing or cultivation does not interfere with petroleum activities or safety zones in the area.” (section 136(1)).

The law further clarifies the effect of private land use restriction as follows:

“In the case of a development area, the land owner within the area shall not erect any building or structure on the land without the written consent of the licensee or, if the consent is unreasonably withheld, the written consent of the Minister in consultation with the Authority.” (section 136(2)).

(i) Private land owner compensation for loss of use of land, loss of land value and damaged

Having obligated private land owners to adjust their private land use activities to accommodate petroleum production activities on their land and having specifically restricted them from undertaking specified activities on their land at the pain of penalty for non-compliance with the statutory requirement,¹²⁹ it matters not that the law cautions licensees to carry out their activities reasonably so as to affect as little as possible the interests of any land owner of the land on which the rights are exercised. (section 136(3)). Many private land owners would view the provisions to have a confirmatory value in their favour, by recognizing that licensed petroleum activities do, in fact, negatively affect and restrict their private land use activities. Therefore, the law provides for private land owner compensation for what is termed as “disturbance of rights” (section 139). On compensation, the law states that:

“A licensee shall, on demand being made by a land owner, pay the land owner fair and reasonable compensation for any disturbance of his or her rights and for any damage done to the surface of the land due to petroleum activities, and shall, at the demand of the owner of any crops, trees, buildings or works

damaged during the course of the activities, pay compensation for the damage” (section 139(1)).

The law does not specify the rights that may be disturbed but ordinarily, they include rights of land owner to use of land, land value, occupation and development of the land. For losses related to these, a holder of a petroleum license granted by the government is required to pay compensation. In addition, a license holder is obligated to compensate, not only the land owner, but also any other person utilizing the land, for any damage to crops and other property that might result from the licensee’s petroleum-related activities. Where a land owner’s use of land or occupancy thereof is terminated by petroleum related activities, a licence holder shall pay rent which shall be deemed to be adequate compensation for deprivation of the use of the land (section 136(a)). Market value of land is taken into consideration in determining payable compensation. In this regard, the law stated that

“the basis upon which compensation shall be payable for damage to the surface of any land shall be the extent to which the market value of the land for which purpose it shall be deemed saleable upon which the damage occurred has been reduced by reason of the damage, but without taking into account any enhanced value due to the presence of petroleum.” (section 136(c)).

Where a licensee fails to pay compensation as required, or if the land owner of any land is dissatisfied with any compensation offered, the dispute shall be determined by the Chief Government Valuer (section 136(2)). Apparently, compensation payments under the law are made *ex post facto* because section 136(2) states that claims for compensation shall be made within four years *from the date when the claim accrued*. A claim shall not, in law, accrue unless harm has already occurred.

(ii) Compensation of holders of occupancy rights over leased land

Another category of persons to whom compensation shall be paid by licence holders are those who hold lawful occupancy rights over private land that is subject of a lease by petroleum licence holders. Where a holder of a petroleum license, whether for reconnaissance, production or for some other activity, wishes to lease privately owned land for related activities, the law leans in his/its favour, against the property interest of land owner and any others dependent on his land. The position is specified in section 138(1) of the law which states as follows:

“Subject to section 135 and to any law relating to acquisition of land, a holder of a petroleum production licence may, if he or she requires the exclusive use of the whole or any part of a block in a development area, obtain a lease of the land or other rights to use it upon such terms as to the rent to be paid for the land, the duration and extent or area of the land to which the lease or other right of the lease shall relate as may be agreed upon between the holder of a licence and the land owner.”

In case parties fail to agree, the matter shall be referred to the Chief Government Valuer for determination and if he determines in favour of a license holder, not only shall the land owner be paid rent; any person holding a lawful occupancy right over the affected land shall also be compensated for the termination of his lawful occupancy in accordance with the law. (section 138(1)). In determining payable rent to land owner and compensation to occupancy rights holder, the Chief Government Valuer shall be assisted by an expert who shall determine the matter in relation to values applicable at the time of determination of the matter in the area to which the development licence relates for land of a similar nature to the land concerned but without taking into account any enhanced value due to the presence of petroleum (section 138(1)(b) & (c)).

The Practice of Compensation for Land Use Restrictions in Uganda

Case law in Uganda indicates that judicial systems in that country do recognize and respect statutory compensation provisions. The cases presented in this section also indicate that the basis of compensation is fair market value and that in many cases, compensation is paid after imposition of use restriction and not before.

(1) *Annette Zimbiha v. The Attorney General*, High Court (Mbarara) Civil Suit No. 0109 of 2011- The case involved a claim by an administrator of the land in question for compensation for use and loss of land value resulting from government restrictions imposed on the land by the establishment, by the government, of a refugee camp on the land, without having acquired it compulsorily first. Brief facts are that between 1964 and 2011, the government of Uganda established Orukinga Settlement Camp on the suit land, without the owner's permission and without having paid compensation. After the land owner's death, the administrator of his estate filed the case, claiming, among other things, compensation, at market value of the land, vacant possession and damages. Two issues which the court established for determination were: (i) whether compensation should be paid to the administratrix and other beneficiaries of the estate; and (ii) the amount of compensation.

After considering the first question in light of the evidence tendered, the court determined that the government was liable to pay compensation to the administrator and the other beneficiaries. Regarding assessment of the amount of compensation, the court ordered the parties to submit valuation reports in support of their claims. However, only the claimant submitted her valuation report which was admitted in evidence. The defendant failed to do so, despite the several adjournments to allow it to submit a valuation report. The claimant was also allowed to call, as witness, a land valuer, who testified to the basis of his valuation of the land in question, which he placed at 3 billion Uganda shillings for loss of use and land value for a period of 46 years. The valuer also added disturbance allowance at 30% of the value of the land, amounting to Uganda shillings 2,190,000,000= (*Two billion one*), making a total of Uganda shillings 9,490,000,000 (Nine billion four hundred ninety million) claimed in compensation, based on ground rent which the land in question would fetch at prevailing market rates.

The court held that occupation and utilization of the land in question without prior compensation contravened provisions of Article 26 of the Constitution of Uganda and made it unlawful; for which the defendant was, liable in *mesne* profits. Therefore, based on the valuation report and testimony of the claimant's valuer, the occupation and use of the suit land for forty- eight years placed the total proven value of compensation at Uganda shillings 4,486,956,522, which the Court awarded as *mesne* profits to the plaintiff. The court further stated that in assessing compensation in a matter of the nature at issue, it also had to consider the economic inconvenience that the claimant had suffered for a period of 48 years during which the government occupied the land in question without compensation. In that regard, the Court also allowed the claim for interest on the decretal amount.

The Court stated it would award interest and that a just and reasonable rate would be one that would keep the awarded amount cushioned against the ever rising inflation and drastic depreciation of the Uganda currency. It further stated that the plaintiff ought to be entitled to such a rate of interest which should not neglect the current economic value of money, and at the same time, insulate the amount awarded against the vagaries due to inflation and depreciation of the currency. It stated that with that in mind, it deemed the interest rate of 23% per annum to be just and reasonable and, accordingly, awarded Shs.350, 000,000= (Three hundred fifty million) in interest, which would be applied from the date of judgment till payment of compensation in full.

(2) The case of *Sheema Cooperative Ranching Society & 31 Others v. The Attorney General*, High Court (Kampala) Civil Suit No. 103 of 2010), concerns Compensation for land use restrictions imposed in the process of implementing government regulations. Issues for consideration by the court were, whether compensation offered by Government, based on its own Valuation Report was adequate, whether valuation separately conducted by the land owner's valuer could be considered in deciding the amount of compensation and whether the market value to be considered in assessing compensation is the value at the time other land owners were paid in the year 2005 or the prevailing value at the time the claimants presented their case to court in 2009.

The plaintiffs were the registered proprietors of the various pieces of leasehold land comprised in the Ankole-Masaka Ranching Scheme where they carried out business of cattle, beef and dairy farming. By a General Presidential Notice No. 182 of 1990, the Defendant established the Ranch Restructuring Board whose mandate among other were to forcefully confiscate, acquire and take over the land belonging to the Plaintiffs and redistribute it to other people unknown and unrelated to the Plaintiffs.

pursuant to the above mandate, the Defendant through the Board personnel did forcefully enter on to the Plaintiffs' respective ranches and parceled out various acreages of land and redistributed it to various people who were still occupying the land by the time the case was heard. Upon the landowners' claim for compensation for the forceful entry and use of their land at the government's directive, the government commissioned a valuation of all the affected pieces of land and compiled a report to form the basis for compensation of the Plaintiffs. In spite of the fact that the Defendant government had commissioned and obtained the Valuation Report in August 2005, it

kept the Report a secret and hidden from the Plaintiffs and no payments were effected despite repeated complaints. The Plaintiffs then contacted the Ministry of Lands, Housing and Urban Development for the fate of their compensation and the Permanent Secretary in a letter to the Plaintiffs intimated that payments would be effected in the Ministry's fiscal year 2009/2010. However, the government only clandestinely and inadequately compensated a few of the affected land owners, without disclosing the basis of its calculation of compensation, which it later stated to have been based on the Valuation Report commissioned by the government.

Upon perusal of the Report that formed the basis of compensation, the land owners discovered that it recommended very low amounts and did not include, among other things, "disturbance allowance." Consequently, the land owners engaged their own valuer who revalued the land and produced a Valuation Report reflecting the actual value of the land, loss and what should constitute their compensation. Although the government contended that the compensation it proposed was fair and adequate, having been assessed by an independent valuer commissioned by it.

The Court held that the government's assessment was conducted in the year 2005 while compensation payment commenced in the year 2009 and therefore, it was not in accordance with the country's Constitution which requires compensation to be fair, adequate and paid promptly. The court further held that the government's valuation of 2005 was "outdated and insufficient and inadequate since it was not based on the open market value and disturbance allowances were never considered." Moreover, the Court observed, the valuation which the government conducted in 2005 did not reflect the market value of 2010. Therefore, the compensation which the government offered the land owners in the year 2009 and 2010 did not reflect the market value of the land, and hence it was neither fair, adequate nor prompt. However, the Court could not rely on valuation conducted by the claimants' valuer because it was determined that the valuer was not registered. Therefore, the Court ordered for fresh revaluation of the Plaintiffs ranches be conducted by an independent valuer chosen by the Court (Registrar) whose work shall be confirmed by the Chief Government Valuer. The court directed that in conducting valuation, the market value to be taken into consideration should be that of 2010.

(3) In *Buran Chandmary vs The Collector under the Indian Land Acquisition Act*,¹³⁰ it was clarified that the market value of land is the basis on which compensation must be assessed and that the market value of land as the basis on which compensation must be based is the price at which a willing vendor might be expected to obtain from a willing purchaser. A willing purchaser is one who although may be a speculator is not a wild or unreasonable speculator.

(4) A number of cases decided by courts in Uganda indicate that in the country, courts are, in practice, willing to award compensation for land use restrictions imposed by national utility company activities. For example, in *Mathias Lwanga Kaganda v. Uganda Electricity Board*, High Court (Jinja) Civil Suit No. 124 of 2004, private use of the land in question was restricted by the company's construction, through it, of a 132 kilovault

power line and the land owner claimed that his land had been rendered “redundant” by the power line and claimed compensation for loss of use of the land. He also claimed compensation for crops and fish pond that he had on the land at the time of the encroachment. The Court recognized that section 55 (1) of the Electricity act authorized compensation for the loss and the company’s liability therefor. However, the case was filed out of time and was dismissed due to that technicality.

SECTION IV:

Analysis of Policy, Law and Practice of Compensation for Land Use Restrictions in Zambia

Introduction

Zambia is an interesting case to consider for various reasons ranging from the existence of controversial customary land ownership system (among other tenure) to huge impacts of large scale land acquisitions, to statutory introduction of market-based land reforms. Zambia is a Common Law country whose judicial system is based on English Common Law and customary law. The country’s land tenure system comprises private tenure (in the form of long-term leaseholds from the government), customary tenure (which comprises much of the land but is, intentionally, diminishing) and state lands.

In the country, open market value considerations in assessment of compensation for land use restrictions is based on market-based approaches to land reforms that have been going on in the country since the 1990s. From the early 1990s, land market reforms have been undertaken in the country as a move away from socialist land policies, largely in fulfillment of donor conditionalities set, especially by the World Bank and the IMF. The reforms culminated in the enactment of the Land Act of 1995 which, among other things,¹³¹ strengthens lease holders land rights and ostensibly recognizes and protects customary land rights, though it is designed to permanently diminish the amount of land held under communal tenure and to open up more land for investment.¹³² The legislation also aims to improve the security of land tenure and to promote development through investment. Proponents of land market reforms argue that formal titling and an unregulated market for land increases the efficiency of land distribution, increases security of tenure and boosts agrarian productivity. The country’s laws surveyed indicate that the market-based reform approach is reflected in various tenets of government regulation of land use, including the assessment of compensation for land use restrictions. However, the Act has generated a lot of debate concerning its viability in the improvement of land ownership and use situation in the country, as well as conflicts and inequalities arising from its implementation.¹³³ The following section explains that many of the compensation laws expressly require consideration of market value in assessment of compensation in cases of both compulsory acquisition and private land use restrictions.

The Constitution of Zambia

The Constitution of Zambia, which is the country’s *grund norm*, or basic law, guarantees every person in Zambia (not every Zambian), protection from deprivation of property

without compensation (Zambia Constitution, Chapter 1, Article 11(d)). In terms that appear to include regulatory taking and resonate well with a segment of the Fifth Amendment to the U.S. Constitution which supports regulatory takings claims. Article 16 (1) of the Constitution of Zambia Act states that

“...property of **any description** shall not be compulsorily taken possession of, and interest in or right over property of any description shall not be compulsorily acquired, unless by or under the authority of an Act of Parliament which provides for payment of adequate compensation for the property or interest or right to be taken possession of or acquired.” [Emphasis added]

Although the foregoing provisions do not expressly include instances of use restrictions, they may be implied within the meaning of “property of any description” and in “interest in or right over property of any description” that the law specifies, such that where private land use is restricted by law or regulation, an owner or other user may claim that it has been taken, taken possession of or acquired by the state. In such instances, it may be argued that one has been deprived of property and therefore, the requirement of compensation (Article 11(d)) applies and in the absence of agreement on compensation, the amount of compensation shall be determined by a court of competent jurisdiction (Article 13(3)). However, in a few specified instances of use restrictions, which must be imposed by statute to be lawful, the Constitution excludes compensation for use rights. The specified instances may be broadly categorized into two, namely: (i) use restrictions for which the Constitution specifically states that there shall be no compensation and (ii) those falling under the permitted derogation from constitutional protection of rights, including property rights.

In the first place, the Constitution specifies certain government actions that have the potential to restrict private land use but for which there shall be no compensation. The specified actions include *work for the purpose of the conservation of natural resources of any description*; (Article 16(2)(i) and agricultural development or improvement which the owner or occupier of the land has been required to undertake, but the land owner has, without reasonable and lawful excuse refused or failed, to carry out (Article 16(2)(ii)).¹³⁴ It is, perhaps, due to the Constitutional prohibition of compensation for use restrictions for environmental conservation that neither the Environmental Protection and Pollution Control Act nor the Agriculture Act do not contain provisions for compensation for use restrictions.

In the case of permitted derogation from constitutional protection of property rights, the Constitution itself does not define what amounts to deprivation of property but states that the guaranteed protection of the right to property, as other constitutional rights, may be derogated or limited, in certain circumstances, to the extent necessary to protect the fundamental rights and freedoms of others and to safeguard public interest, in the following terms:

“...the provisions of this Part shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in this Part, being limitations designed to ensure that

the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.”¹³⁵

It is noted that although the Constitutional provisions only imply taking of private property by way of statutory restrictions, it sets forth the idea of sanctity of title to property and legitimizes the principle of compensation. Both aspects, as the Constitution envisages, are incorporated by specific reference, in relation to use restrictions, in a number of Zambia’s laws, including the Land Acquisition Act as elaborated in the following section analyzing provisions of Zambia’s laws that permit compensation for various kinds of use restrictions.

Zambia’s Statutory Provisions for Compensation for Private Land Use Restrictions

Zambia’s Land Act¹³⁶ contains provisions authorizing restriction of private land use for public purposes. For example, it authorizes the imposition of easements in section 50, public rights of way in section 86 and mineral rights over privately held land in section 91. Further, the law requires, in section 48, among others, that such land use restrictions be noted in the register of land, against title. However, the Land act itself contains no provisions for compensation restriction of the uses it specifies and other restrictions that other laws of the country permit. The other land-related laws with provisions for restriction of private land use, accompanied by provisions for compensation that are presented in this section include the Land Acquisition Act and various laws governing various activities related to provision of public services and development, including the country’s Electricity Act. Although all of the country’s laws have been analyzed, only those with provisions for compensation for public purpose and developmental activities with restrictive effects on private land use are presented in this section. Where necessary, compensation for compulsory acquisition of land is included to explain some of the principles, procedures and other legal tenets that govern compensation in general, including permissibility of market value considerations.

Compensation under the Land Acquisition Act, Chapter 189

It is an Act of Parliament that governs compulsory acquisition of land and other property¹³⁷ and related matters.¹³⁸ It also governs compensation for private land use restrictions(Preamble to the Act). It defines land to include any interest in or right over land, with the exception of mortgages and other charge (section 2).

(ii) Land Use Restrictions- Compensation for restrictions and damage imposed by official entry upon land and works thereon

Closely related to compulsory acquisition is assessment of evaluation of the suitability of land proposed for compulsory acquisition, for which compensation is required for what, in effect, amounts to land use restriction. The law provides that prior to certification of suitability of land or other property for proposed public purposes, the responsible minister shall have power to personally or by his agents, do a number of things in relation to the land which would, effectively restrict or limit a private use thereof with the potential to also cause damage or harm to the land itself and property thereon. These include: entry upon the land in question or any land in the vicinity thereof, conducting survey and taking levels of the land;

digging or boring under the sub-soil, and clearing, setting out and marking the boundaries of the land proposed to be acquired and the intended line of the work (if any) proposed to be done thereon. Any person who obstructs a government officer from undertaking any of the pre-acquisition activities, even on account of restricting or interfering with his private land use, commits an offence and is liable to fine, imprisonment or both.¹³⁹

At the end of the preliminary activities, land may or may not be determined to be suitable for the proposed purposes. However, for any harm or loss occasioned by any of the foregoing restrictive pre-acquisition activities, “...the Government shall pay for **all** damage done by the persons so entering.” (Emphasis added).¹⁴⁰ It is not explicitly stated but all damage includes loss of use, loss of land value and damage inflicted on physical property on or attached to the land. It appears that the amount of compensation payable ought, in the first place, to be agreed between the government or the responsible government agency and a land owner. Section 21 of the Act establishes a Compensation Advisory Board to advise and assist the Minister in the assessment of any compensation payable under this Act. In case of failure to agree on the amount, either the Minister or the person claiming payment may refer such dispute to a court having jurisdiction (section 4(2)). The relevant provisions imply that compensation shall be paid after damage has occurred. Further, there is no statutory indication of the method of determining the amount of compensation but because parties are allowed to negotiate *ad agree*, in the first place, it would be permissible to take market values into consideration.

Compensation under the Electricity Act, Chapter 433

Zambia’s Electricity Act is the substantive law that regulates the generation, transmission, distribution and supply of electricity in the country. For these purposes, the law authorizes licensing of operators, to undertake any one or more of electricity generation, transmission, distribution and supply on and over both private and public land. Among other electricity power installations that would impact land directly or overhead are: establishment of hydroelectricity power generation stations, laying of electricity cables underground, installation of long distance electricity power lines of various categories and significance over land, installation of power transformers, and construction of power stations and sub-stations.

In order to carry out the foregoing electricity generation activities, the law permits both compulsory acquisition of private and public land and the exercise of a variety of rights over privately owned land, without necessarily acquiring the land.¹⁴¹

(ii) Compensation for land use restrictions imposed by public utility Wayleave

The Electricity Act authorizes operators of electricity-related undertakings, to obtain wayleave from private land owners, to do a number of things, in statutory terms suggesting that they must have their way over private lands. Section 15(4) and (5) states that where a private land owner’s consent to wayleave is denied or withheld, for example, because the proposed utility use would restrict or interfere with the owner’s

use, the responsible minister shall give authority to an operator to utilize the land, regardless of the objection. This sets the basis for private land use restriction with and without a private land owner's consent. Where permission is obtained, either directly from a land owner or through the minister, an operator exercises authority to, among other things and depending on its licensed activities: erect a transmission line over or under privately owned land, place overhead lines above or over land, lay underground cables and do all other things that relate to their electricity generation-related activities.¹⁴²

Operators of electricity undertakings may also lay down or place any transmission line into, through, or against any building, or in any land above which a building is erected, with the consent of the owner and lawful occupier thereof and where consent is denied, the responsible minister exercises authority to allow an operator to utilize the property, regardless of lack of consent. Once power supply lines, cables and others are laid or placed on, through or above land, they become legally protected. In this regard, section 18 of the Electricity Act states that no person shall erect any building or structure in such a position or manner as to be likely to interfere with the supply of electricity through any transmission line. Any person who fails to comply with the section commits a punishable offence. Moreover, activities of operators are not one-off; they are recurrent, especially maintenance and repair of electricity installations as well as removal of any obstacles that might interfere with the lines.

In all cases where private land use is restricted for electricity generation, transmission, distribution and supply purposes, including cases where land owners are compelled by the responsible minister to give way for operators, the law requires compensation. Compensation shall, with any necessary modifications, be decided in accordance with subsection 14(4) of the Act, which states that:

“Adequate compensation shall, from moneys appropriated for the purpose by Parliament, be paid to any person who suffers loss or damage through the exercise of the powers conferred by this section in accordance with the provisions of the Lands Acquisition Act.”

Provisions of the Land acquisition Act regarding compensation have been presented. They include the requirement that the market value of land be considered and that the grant of compensation be guided by a number of principles, including the principle that the value of property shall be the amount which the property might be expected to realize if sold in the open market by a willing seller at the time of taking up the land or commencing its utilization for public purposes, here, electricity-related activities.¹⁴³ In addition, in accordance with section 20 of the Electricity Act, private land owners and others who suffer damage, including damage to their property, as a result of operator utilization of their land or land neighbouring theirs, shall be compensated in terms already discussed in the foregoing paragraphs. Section 14(4) and other provisions of the Electricity Act indicate that compensation shall be paid after land owners and others with related rights have suffered loss and other damage imposed by use restrictions.

Mines and Minerals Act, Chapter 213: Compensation for use restrictions amounting to “disturbance of rights”

The Mining and Minerals Act, Chapter 213, is Zambia’s law for the control of mining, minerals and related matters, including mineral prospecting. The law does not contain explicit provisions for compensation for compulsorily acquired land; neither does it specifically refer to such land acquisition for mining purposes but the Land Acquisition Act authorizes compulsory acquisition for public purposes, which may be extended to mining, prospecting and related activities, in certain circumstances. However, the law has explicit provisions for land owner compensation in cases where government, through the issuance of licences and permits for mining, mineral prospecting and related activities, impose private land use restrictions on land owners and others holding private use rights over land. The law recognizes that where government, by its authorization of mining and related activities, restrict private land use, the restrictions amount to “disturbance of rights”, specifically, land use rights and for such disturbance, compensation shall be paid. The point is elaborated in the proceeding paragraphs.

In accordance with the Mines and Minerals Act, the government of Zambia authorizes individuals and corporate bodies to engage in mineral-related activities through the grant of a licence or permit to undertake a specific activity. Under section 4, among other provisions of the law, mining licences may be issued while under sections 13 & 29, among other provisions of the law, mineral prospecting permits may be issued. Additional licences and permits may be issued for engagement in extraction of gemstones. In the law, the grant of the licences and permits confer on investors legally recognized and indefeasible “mineral rights” in the minerals sector, to be exercised over defined areas of land. Section 41(1)(h) and other provisions of law require that licences and permits include full description of the land where an authorized activity is to be carried out. Land over which mining or some other mineral-related activity may be authorized may, in the law, be either private or public.

Where mining or a related activity is to take place on privately owned land, government regulates intervenes to regulate private land use in one of two scenarios. In the first scenario, access to land for mining and related purposes may be granted by agreement between a land owner and an investor but government still intervenes to restrict private land use in favour of mining and related activities. The law, in section 56, allows parties- the land owner and an interested miner, mineral prospector or some other investor, to enter into agreement for the use of land, including an agreement for compensation to be paid to the land owner. This means that a land owner’s use of land may be restricted by agreement, which may also specify, as permitted section 58 of the Act, the extent to which a land owner’s use of his land has been restricted. For example, parties may agree that a land owner will continue to utilize the land but only for grazing stock, or farming. Compensation, and terms thereof, including the amount, may also be agreed by the parties and there is no legal prohibition on consideration of market values. In the absence of agreement for compensation, the matter could be referred to arbitration. However, once an investor is granted access right to privately owned land and an investor is issued by the government with a mineral prospecting,

mining or other mineral-related licence, the activity becomes protected by law which restricts a private land owner's use of the land.

The law, specifically states, in section 58, that a land owner shall retain the right to graze upon or to cultivate the surface of the land over which an investor holds a mineral-related licence only in so far as such grazing or cultivation does not interfere with the proper working in the area of mining, prospecting or other operation to be carried out under a mining licence or permit. Moreover, the law prohibits land owners and other users from erecting any building or structure on the land without the consent of the licence holder. Further, section 102 prohibits any person, including an owner of land whose use of the land has been restricted, from obstructing or hindering the holder of a mining right from doing any act which that holder is authorized by a mining licence or prospecting permit to do in accordance with the Act. Any kind of obstruction of a miner or mineral prospector is an offence, punishable by fine, imprisonment or both.

In the second scenario, which applies where an enterprise seeks to undertake mining or a related activity on private land but a land owner declines to enter into an access agreement with him/it, the government's director of mining overrides the objection and grants use rights over privately owned land under section 56, 58, 60 and 61.¹⁴⁴ In the circumstances, the affected land or apportion thereof, would be indicated in a mining, or prospecting licence as the area over which an enterprise has obtained mining or prospecting rights, and thereupon, the protective provisions of section 58 as stated above apply and thereby, restrict a land owner's use of land, not by agreement, but by what appears to be compulsion.

Whether access to land for mining purposes is obtained by agreement of parties or through the director's compulsive intervention, provisions of the law, especially section 61, obligate the Director and the responsible government minister to ensure that a land owner is compensated for what the law terms as "disturbance of rights." Such rights are, especially, rights of a land owner's use of land which are restricted by mining or related activities.¹⁴⁵

The nature of compensation required where a private land owner's use rights are restricted by mining or related activities is "fair and reasonable." (section 61). There is an indication that the value of land would be taken into consideration in deciding the amount of compensation because the law states that where the value of land is enhanced by mining and related activities, the value that shall be considered for compensation purposes is the one prevailing before mining activities (section 61). In addition to compensation for disturbance of a land owner's user rights, there shall be paid to a land owner or an authorized user of the land, compensation for any damage caused by mining and related activities. (section 61 & 62). In the event that disputes arise concerning compensation, section 56 (2)(iv) authorizes the government Director of minerals and mining to have the disputes arbitrated in accordance with section 60 and 61 of the Act.

The Water Act, Chapter 198:

- (i) Compensation for restriction of water rights as property**

Sections 7, 8 and 9 grant any person in Zambia the right of access to water in a public water course, meaning water in a natural water course, including streams and rivers, for primary purposes, meaning, for their own use. Riparian land owners may make similar applications under section 10 of the Act. Once permission is granted for water use, it becomes a water use right.

For primary use of water, which is, basically, use for domestic purposes, including watering of livestock, any person, not being a riparian owner of land, may apply to the Secretary of the Water Board for permission to impound and store or divert water from a public stream for their own use. Whereas water rights granted may restrict land use rights, especially of riparian owners, there is no provision for compensation. However, where one applies to utilize water for secondary (irrigation and pisciculture) and tertiary (industrial, industrial and generation of power) purposes under sections 11 and 12 of the Act, the water right acquired for the purposes becomes property whose private use restriction must be compensated. Where one applies to Zambia's Water Board for authorization, for example, to construct irrigation works of public importance or to construct water storage facilities to prevent wastage of surface water or excessive abstraction of underground water, the special rights to water granted become property rights such that if another person is granted similar water rights over the same stream, lake or area, thereby restricting the rights of the former, the former shall be compensated, "...for existing secondary or tertiary water rights which may be prejudiced thereby." (section 11 (2)). Compensation shall be paid, not by the Water Board, but by subsequent holders of property in water, the Board having authority to enforce payment. The law states, in section 11(3) that, "The amount of such compensation, if not settled by mutual agreement, shall be submitted to arbitration." This means that in the first place, parties shall be given a chance to negotiate compensation, without any restriction on reference to the value of water or irrigation sand other activities to which the property owner devoted it. Compensation is arbitrated only if negotiations fail.

(i) Compensation for land use restrictions resulting from official entry and works on private land

Section 47 (1) and (2) of the Water Act authorize the government Minister responsible for water, the Water Officer and the Chief Inspector of Mines, among others, to enter upon any land, along with any number of men, animals, vehicles, appliances and instruments, to carry out any of their functions under the law, including: inspection of any works on the course of any stream, establishing and maintaining hydrographic stations on any private land and to carry out investigations. Section 47(2) requires officers so authorized to enter into private land to cause, "as little damage as possible" upon entry." However, the same provisions of law proceed to state that, "compensation shall be paid by the Minister for all damage so caused, the amount thereof, if not mutually agreed upon, being determined by arbitration." Damage that shall be compensated is not limited by law to any damage that may be caused to property on land. Therefore, compensation is understood to be payable for all kinds of damage, including loss of land value and loss of use, especially because section 47(4) prohibits land owners from preventing or resisting official entry upon their land, at the pain of

criminal penalty. Where the law allows negotiation of compensation, it opens up the process to include consideration of market value of property affected and/or the economic or subsistence activities that were being undertaken thereon, prior to official entry.

Petroleum (Exploration and Production) Act - Chapter 440

The Act, which is the basic law governing petroleum related activities, including prospecting and extraction contains provisions for compensation for two categories of private use restrictions. The first set of restrictions for which compensation is payable regards right of access to private land for petroleum activities through the grant of right of way, easement and other right of access. The second set of restrictions relate to post-access activities of petroleum operators and the limitations on land use and damage that they may impose on private land use. The two categories of compensation are explained below.

(i) Compensation for use restrictions imposed by grant of access to private land for petroleum-related activities

The Petroleum Act is the law that governs all exploratory and production activities involving petroleum in Zambia. In section 17 of the law, the government of Zambia reserves to itself the right to carry out petroleum operations either on its own or by means of contracts with any qualified person. No body else, other than the state, is permitted to carry out petroleum activities, unless such a person has entered into a contract with the state in accordance with the Petroleum Act and all petroleum products underground belong to the state (section 3(1)).

The relevant section 3(1), which sets the basis for restriction of private land ownership and use provides that:

“The entire property in and control over all petroleum and accompanying substances, in whatever physical state, located on or under the territory of the Republic is vested exclusively in the President on behalf of the State.”¹⁴⁶

Section 3(3) which further affirms state ownership of petroleum products and rights to related activities, including activities which may be conducted on privately owned land states that the provisions reserving ownership and rights over petroleum shall have effect, notwithstanding any rights which any other person may possess in or over the soil on or under which petroleum is discovered. Therefore, by contract, the state may grant any person title to and access to petroleum products anywhere in the country (section 3(2)). This means that the state is authorized, directly and through its licensed operators to own and access petroleum in, among other places, privately owned land. Therefore, there is no doubt that petroleum-related activities, including: exploration, development, extraction, production, field separation, transportation, storage, sale and disposal, which would be conducted ostensibly in the interest of the public, have the potential to restrict private land use. Within the areas over which they have surface rights to carry out one or more of the activities, the state and its licensees are

authorized by section 35(1) to, among other things: construct temporary or permanent houses, buildings, engines, machinery, plant and other works, and acquire in the prescribed manner such rights of way, easements and other rights of access as may be necessary for the proper execution of petroleum operations; and to take and use water for domestic use and for the purposes of petroleum operations in accordance with the provisions of the Water Act. In addition, the state and its licensees may also: subject to the provisions of the Roads and Road Traffic Act and the Aviation Act, construct, maintain and operate all such airfields, roads, bridges, communication systems and conveniences as may be necessary; subject to the provisions of the Water Act, lay water pipes and make water courses and ponds, dams and reservoirs, lay drains and sewers and construct and maintain sewage disposal plants; subject to the prior approval of the Minister-construct, reconstruct, alter and operate pipelines, pumping stations and other necessary facilities incidental thereto; and operate and maintain at any place within the country such other facilities and works as may be necessary for carrying out petroleum operations. (section 35(1))

Although section 35(2) specifies that the foregoing activities, among others, shall be conducted and the rights conferred by law to carry them out shall be exercised reasonably so as not to affect adversely the interests of any owner or occupier of the land on which any of the rights is exercised to any greater extent than is necessitated by the reasonable and proper conduct of the operations concerned, the activities, where conducted on privately owned land, are likely to disrupt private land user activities, reduce land value, reduce the value of benefits derived from land by land owners and damage property affixed to land. Therefore, the law requires state agencies and contract licensees seeking to carry out any of the activities to negotiate terms of access, including compensation with land owners for rights of way, easement or other right of access (section 35(4) and (7)). Negotiations, presumably, entail consideration of market values.

(ii) Compensation for land use restrictions amounting to disturbance of land rights-loss of land value, damage to property, et cetera

In addition to compensation for right of way, easement and other access, the law authorizes land owner compensation for restriction of land use in any way that amounts to what the statute terms as disturbance of land ownership rights. The relevant provisions state that:

“...the contractor shall, on demand being made by any person having a lawful interest in land upon or under which petroleum operations are being carried out, pay to such person fair and reasonable compensation for any disturbance of his surface rights, and for damage done to the surface of the land, or to any livestock, crops, trees, buildings or works as a result of petroleum operations. The amount of compensation payable shall be determined by agreement between the parties or, if the parties are unable to reach agreement or the agreed compensation is not paid, either party may refer the matter to the

Minister who shall deal with the same as if the matter had arisen under the provisions of the Mines and Minerals Act, Cap. 213.”¹⁴⁷

Under the Mines and Minerals Act already considered in this report, compensation shall be fair and just and its computation is based on the market value of affected property (section 61 of the Mining Act).

The permissive provisions of the law allow compensation payment for virtually all kinds of harm, including economic harm that a land owner may suffer as a result of petroleum exploration and production activities carried out at the instance of the state. The provisions imply that compensation payment is made after the fact and not before. Related provisions, especially section 35(4)(b), also imply that a land owner may ask the state to acquire the land all together because:

“Where there is no agreement between such person and the contractor concerning the grant of a right-of-way, easement or such other right of access, the contractor may apply, through the Minister, to the President to have the said area compulsorily acquired under the provisions of the Lands Acquisition Act.”

Where the state compulsorily acquires land for petroleum prospecting and production purposes on behalf of a licensed contractor, the contractor will be the responsible for payment of compensation (section 35(4)(b)).

The Zambia Railways (Deviations) Act

Compensation for land use restrictions resulting from railway line and termini deviations

Zambia’s Railways Deviations Act is the law that authorizes railway companies that construct, equip, complete and maintain railway lines in the country to make deviations in the line of railways. The law recognizes that a deviation in a railway line may involve an alteration of its terminals (section 3 (1) of the Act). It also recognizes that deviation of a railway line may require works on land that neither belongs to a railway company, nor to the government. Therefore, the law authorizes a railway company that seeks to alter the course of its railway line or a railway terminal to acquire land, including privately owned land, in whole or in part, for necessary works. In order to acquire the whole of a portion of privately held land, a railway company is obligated by law to apply for land acquisition or use to the responsible Minister to give consent for the proposed deviation and related utilization of land (section 3(3)). The law does not indicate the factors that the responsible minister should consider prior to the grant of consent to deviate and utilize specified lands but authorizes him to give such consent, whereupon, the railway company acquires the right to carry out all works related to railway line deviation on specified lands while the fact of approval of deviation and affected lands is notified to the Registrar of Lands and Deeds who is required by law to register the deviation against title of affected land in the prescribed manner (section 3(5)).

Section 5(1) of the Act authorizes compensation to be paid to land owners and occupiers for railway works carried out pursuant to deviation authorization, where the whole land is utilized, in which case, compensation is paid for compulsory acquisition (if necessary) and for the portion of land used for deviation works. The law, in section 5(1) obligates parties- the railway company representative and an affected private land owner to first attempt negotiation for compensation and it is only where negotiations fail that a compensation dispute should be forwarded to the Minister for Lands and the Minister shall direct parties to proceed to arbitration 5(2) sets a number of rules to guide an arbitrator in determining the amount of compensation payable. The rules, in section 5((2)(a)-(e) include market value considerations. In this regard, section 5(2)(b) obligate arbitrators to consider the value of land (or the value of the affected portion), “shall be *that amount which the land if sold in the open market by a willing seller might be expected to realise.*”

In addition to payment of compensation for utilization of a portion of land, the law authorizes payment of, “an allowance” to be made, “...*for any disturbance of the enjoyment of the whole of the land from which any portion has been taken, having regard to the purpose for which the land was being used at the date of the taking thereof by the railway company.*” (Section 5(2)(d))

Disturbance of enjoyment of land use rights in the foregoing paragraph translates, in practical terms, to use restrictions imposed on the remainder of land by utilization of a portion thereof because the law states that the use to which the affected land was devoted at the time of official authorization of deviation shall be considered in making compensation. In accordance with sub-section (c), additional allowance shall be paid for any improvement on the land that is not included in the value of land at the point of compensation assessment.

The Zambia-Tanzania Pipeline Act, Chapter 455

The Act was specifically designed to authorize the grant of rights over land, both private and public, to a company known as the TAZAMA Pipelines Limited, to enable the construction of an oil pipeline from Zambia to Tanzania. It was envisaged that construction of the pipeline and related works would restrict private land uses on designated routes. Therefore, the law authorizes compensation for use restrictions of two kinds: The first relates to entry upon private land, among other lands, to carry out preparatory works for the laying of the pipeline. The second relate to acquisition of wayleave for the laying of pipeline on private land. Both use restrictions attracting compensation are explained below.

(i) Compensation for use restrictions imposed by pipeline construction preparatory works

Section 4. (1) of the law empowers the Company and its agents may enter upon **any private land**, and other lands, lying in the intended route of the pipeline, to: carry out surveys, examinations or other necessary arrangements, fixing the site of the pipeline,

and set out and ascertain such parts of the land as are necessary and proper for the pipeline. Such activities would, likely, disrupt, limit or otherwise affect private land use activities. Therefore, the law, in section 4(3), obligates the company, to pay compensation to land owners and other occupiers, *as soon as may be after any entry made*. The required compensation is for all damage done to the land and property affixed thereon.

(ii) Compensation for use restrictions resulting from the grant of pipeline wayleave
Section 6 (1) authorizes the President, and not the land owner, if he is satisfied that it is necessary to do so in order to enable the Company to carry out its objects, to issue a statutory order, authorizing the pipeline company to obtain wayleave over privately owned land to lay any pipeline above or below ground, into, out of or across any private land. There is no provision for land owner participation in the President's decision making to acquire wayleave. Where wayleave has been acquired through such compulsive orders of the President, the pipeline company and its agents shall be entitled to reasonable access to such land for the purpose of carrying on its operation on such land or of maintaining, affected land, not only to lay the pipeline, but also to remove, repair or replacing the line, which implies long-term utilization of private land for potentially disruptive public purposes. Any person who interferes, in any way, with a pipeline that has been laid over his land or related works commits an offence as stated by section 12 of the law and is liable to criminal penalties. For the resulting use restrictions, there shall be paid to land owners and any other person with an interest in or right over affected land, adequate compensation from moneys appropriated by Parliament for the purpose (section 8(1)). Section 9(1)(b) of the same law implies that compensation shall be paid after wayleave has been obtained over private land. Any person who is not satisfied with the amount of compensation paid may apply to the High Court to determine the issue and for that purpose, the Registrar of the Court is authorized to make rules for assessment of compensation and the manner in which compensation may be paid and recovered (sections 9, 10 & 11). Where necessary, for example where land owners resist applications for wayleave, their land may be compulsorily acquired for the construction and maintenance of the railway, upon payment of compensation (section 9(1)(c)).

The Tanzania-Zambia Railway Act, Chapter 454- Compensation for use restrictions imposed by official entry and utilization of private land for railway purposes

(i) The Tanzania-Zambia Railway Act is Zambia's law that authorizes the construction, maintenance and operation of a railway line between the two counties through the joint Tanzania-Zambia Railway Authority. Section 60 - 64 of the Act specify railway construction works, maintenance works, works for prevention and remedy of railway accidents and related works to be carried out on, over and under privately owned lands, among other lands. For example, employees of the Authority are permitted by law to enter upon private lands, including lands that are contiguous to the railway line, for survey of the whole land or a portion thereof, excavation and to: excavate and take away and use any earth, stone, gravel or similar materials out of such land; cut, take away and use any timber on any such land; lay, construct, erect and maintain thereon

any poles, posts, standards, cables wires, cords, pipes, tubes or other things required for, or in connection with, the operation and maintenance by the Authority of telegraphic or telephonic means of railway communication (section 60(1)). Further, section 64(1) authorizes the Authority's employees to enter upon any land and alter the position of any pipe for the supply of gas, oil, water or compressed air, or the position of any electric, telephone or telegraphic wire or the position of any drain. Also, during construction works, section 66 and 67 permit the Railway Authority to establish on any land, accommodation works and such culverts, drains or other works, as, in the opinion of the Authority, are necessary to convey water freely, or as nearly as practicable, from or to adjoining lands as existed before the construction of the railway.

The foregoing works necessitate acquisition of land, including privately owned land, which may be accomplished through compulsory acquisition and payment of compensation thereof, as specified by law (section 61(1) and (2)). The numerous works also have the potential to restrict private land use, more so because the activities are authorized and supported by statutory provisions which criminalize any interference with railway works (section 70) and prohibit construction of houses and other structures close to the railway line (section 62(1)). Therefore, sections 61(2), 64(3) authorizes the payment of adequate compensation, where **any damage** is caused by reason of the exercise of the powers conferred by law to carry out any of the activities. Compensation shall be paid by the Authority in such manner as the government may direct (section 61(2)).

(ii) Compensation for use restrictions imposed by works to establish and maintain branches of the railway line

In a number of laws authorizing construction of specific branches of the railway line, similar provisions authorizing both activities that restrict private land use and compensation therefore have been made. The laws include:

(a) The Nkana-nchanga Branch Railway Act, Chapter 457, whose sections 4-6 authorize entry upon private lands and holding the land using it for: surveying the same and of probing and boring it in order to ascertain the nature of the soil or set out the line of railway between two or more points; alignment of the railway line and construction of sidings, stations, approaches; and any other railway works. Section 7 of the law requires compensation for the entry, for any land taken in the process and for injury or damage to actual improvements on land;

(b) The Mashona Railway Company Limited Act, Chapter 459 with similar provisions authorizing use restrictions through official entry and works in sections 4-6 and private land owner and occupier compensation in section 7, except that compensation is to be paid by the British South Africa Company;

(c) The Mufulira-Mokambo Railway Act, Chapter 461, with similar provisions for use restrictions in sections 4-6 and compensation in section 7, except that compensation shall be paid by the Mashonaland Railway Company Limited or its assignees;

(d) The Roan Antelope Branch Railway Act, Chapter 460, with similar provisions in sections 4-6 and 7 (compensation) and compensation to be paid by the Mashonaland Railway Company Limited or its nominees; and

(e) Rhodesia Railways Act, Chapter 458, with similar provisions in sections 4-6 (use restrictive activities) and 7 (compensation), except that compensation is to be paid by Rhodesia Railways Limited or its nominees;

All of the laws with provisions for compensation also make provisions for notice to land owners and other occupiers, prior to official entry and works on the lands or acquisition thereof. It is noted that the Rhodesia Railways Act of 1949 makes no provisions for compensation.

Government practice regarding compensation for property loses from private land use restrictions in Zambia

The practice, as exemplified by courts at all levels (Magistrate's courts, the High Court and the Supreme Court), the Land Disputes Tribunal and administrative agencies, indicate that in Zambia, compensation issues are determined by a number of government agencies and that in most cases, assessment of compensation is based on market value, as guided by the country's policies, laws and procedures. Cases analyzed indicate that a number of issues concerning compensation have been presented to courts and other dispute resolution agencies, including claims concerning: the proper person to receive compensation, the amount of compensation payable and the basis of compensation assessment.

In *May Vijaygiri, Dr. Mohammed Anwar Essa v. Commissioner of Lands* (Supreme Court Judgment No. 3 of 2001), two key issues were presented before court, namely: the proper person to receive compensation and the amount of compensation payable, as between market value and government's arbitrary figures. The subject matter of the case was a parcel of land, No. 8492, in Lusaka, the Capital City, which the complainant had purchased from another, under contract terms which restricted development to constructions of not less than twenty thousand Kwacha. While the former owner met the condition, the complainant could not and the property was repossessed and re-allocated to another owner, without compensating the complainant. Instead, the Land Tribunal which heard the case at the first instance seemed inclined to compensate the subsequent allottee.

It its ruling, on appeal, the Supreme Court first stated that in compliance with the provisions of the Country's Constitution which do not permit deprivation of property belonging to anyone without compensation, the rightful person to be compensated was the complainant. Secondly, it addressed the contentious issue concerning the amount of compensation that was payable, as between the market value of K35 million claimed by the appellant through a witness (valuer) and the "derisory" sum of K3 million suggested by the government's witness Mr. Sangulube who conceded he did not take

into account the market value of the developments. Having considered the market value of the property, the Court ruled that:

“...the appellant was very clearly entitled to compensation in the sum of K35 million payable by the Government. This is the sum which more approximates the real value of the property and which meets the justice of this case. Accordingly, the appeal is allowed and judgment is entered for the appellant in the sum of K35 million as compensation for the property...”

In Zambia, open market value consideration in assessment of compensation for land use restrictions is based on market-based approaches to land reforms that have been going on at the instigation of the World Bank and IMF, since the 1990s.¹⁴⁸ As part of market approaches to land management and use, a number of Zambia’s laws incorporate market value consideration in compensation assessment. For example, section 12(b) of the Land Acquisition Act, Chapter 189 which provides guidance on compensation assessment states that:

“The value of property shall, subject as hereinafter provided, be the amount which the property might be expected to realise if sold in the open market by a willing seller...Provided that there shall be taken into account and deducted... any money granted by the Government for the development of the property or any other investment or donations made by the Government...”

In addition to compensation, the law provides for payment of “allowances” for damage occasioned to land and property thereon, to any person who was, at the time, dependent on it. (section 12(b)(f). The preceding section explains that many of Zambia’s compensation laws expressly require consideration of market value in assessment of compensation in cases of both compulsory acquisition and private land use restrictions. The requirement is similar to that attaining in the United States, though its effective implementation may be tempered by local circumstances prevailing in the country.

CONCLUSION AND RECOMMENDATIONS

CONCLUSION

Analysis of the policies, laws and practices of compensation for land use restrictions in the three selected African countries has been conducted in comparison to the existing situation in the United States, where takings jurisprudence has developed and matured, over many years. This study finds that in the United States, there is constitutional (at federal and state level), statutory and case law that support the principle that where government regulation goes too far or takes the nature of divestiture of property title, affected property owner shall be compensated, justly. The reason is that government must not burden individual property owners with public service responsibilities that the public, as a whole, should bear. Additional reasons include the need to garner and retain public support for environment conservation and other land-based government

programs. For the reasons, among others, where claims have been made in courts and other dispute resolution bodies, the government in the United States, at federal, state and local levels, compensate land and other property owners for: physical occupation of land in a widely construed sense, prohibition of use of rights of way, diminution of water rights, easements, denial of development approval, and for many other land use restrictions. However, the U.S. legal system, especially regulatory takings jurisprudence, does not support compensation for every kind of alleged taking. There are clearly developed determinants or tests of whether or not a taking has occurred, for purposes of compensation. Further, courts, including the Supreme Court of the United States, have stated, categorically, that when compensation is due, assessment must be based on the market value of property. Cases indicate that in every case in which compensation was found to be due, efforts were made to pay it promptly, even though only some of the laws require payment before governmental adverse action.

The general conclusion on assessment of the situation in the United States is that it has enough best practice in terms of regulatory takings policy, law and actual practice that could help strengthen land tenure security, environmental conservation efforts and sustainable development in a country. The question is, how about Africa? Do the same or similar policies, laws and practices exist so that one would expect that the recognized benefits could be derived therefrom?

After analyzing policies and many laws of the selected three African countries, this study finds that in the countries, there exists a comparable situation, as regards government imposition of land use restrictions and the provision for compensation therefore. The general policy, as reflected in national constitutions of all three countries is, first and foremost, that every national of the countries is guaranteed the right to own property and property must not be taken away without just, due or reasonable compensation. However, that position will not bar government from imposing land use restrictions for a variety of public purposes, except that whenever such restrictions are imposed, statutory compensation shall be paid.

Unlike the United States where only few statutes expressly provide for compensation such that affected property owners largely base their claims on the Fifth Amendment of the federal Constitution and related laws, in the African countries, where compensation should be paid for land use restrictions, relevant statutes expressly state so. The result is that the various laws of the countries, including land laws and environmental laws, for purposes of compensation, invariably, recognize as property or property rights, similar items recognized in the U.S, including: water rights, mining rights and land. Moreover, where use restriction is imposed for purposes of creating access, for example, a right of way or easement, compensation shall be paid to affected land owners. In many cases, compensation has been paid for use restrictions, based on market values, in all three countries. However, the situation in the African countries is not as clear-cut as it appears to be in the United States. There are a number of policy and legislative hurdles that ought to be overcome in order to realize full public benefits of property use restrictions without generating negative externalities. Herein below are a few suggestions on what might improve the situation:

RECOMMENDATIONS

All of the three African countries studied do have compensation frameworks in their laws, policies and practices. However, the structures are weak and require strengthening through training, measures for security of tenure and adequate financing. In Kenya, the newly established Land and Environment Court that would be hearing cases of compensation is inadequately resourced, especially in terms of staff. It has only few judges that cannot serve the whole country, in an era of devolution which requires cascading of national government operatives to forty seven counties. It requires training of more judges on land and environment laws, expansion of judicial structures to counties and adequate resource materials, including basic text books on land law and law reports.

There also exists in Kenya, a National Land Commission, which has core responsibilities, especially in relation to determination of some of the issues concerning use restrictions, such as handling of applications for way leaves, rights of way, et cetera. The Commission ought to be strengthened in terms of personnel capacity. There is also need, especially on the part of senior politicians in the country, to stop engaging in roles reserved by statute to the Commission to allow it to adequately fulfill its mandate, including those related to compensation payments.

In Uganda, security of land tenure guaranteed by the national constitution ought to be harmonized with governmental power to acquire land or restrict its use for public purposes, especially in view of statutory authorization of private land acquisition and use restriction for development purposes, which seems to legitimize acquisition of land and restriction of land use by government on behalf of investors, local and foreign. A similar situation prevails in Zambia. To what extent could government in the two countries restrict private land use in the interest of investors, and what kinds of investors would qualify? A related question is, who takes responsibility for compensation payment where government authorizes a private investor to restrict use? What if a private investor, after restricting use and occasioning losses and damage, abandons work and returns to home country, without or before paying requisite compensation? This kind of situation makes it necessary to require compensation ahead of use restrictions, which, in practice, is hardly the case in all of the three African countries and in the U.S.

It is also necessary to harmonize roles related to compensation payment for use restrictions to remove duplicity of agency roles. In all three countries, each agency appears to have its own structure for handling compensation issues. In Kenya, for example, we have Kenya National Highways Authority responsible for restrictions for construction of roads, the Water Appeals Tribunal with mandate including hearing of matters of compensation in cases of easements for water installations and Kenya Power and related agencies to handle compensation cases involving power installations. These are just a few of the government agencies that would, in the first instance, handle matters of compensation for land use restrictions before matters proceed to court, if at all. The situation is worse in Zambia where, depending on the sector, compensation for use restrictions could be handled by district officers, mining agencies, government ministers, Land Tribunal, and the Water Tribunal, just to mention a few. In all of the

countries, courts of law add another layer to the duplicity of agencies with power to determine compensation issues. Harmonization of roles could eliminate role duplicity, expense and confusion, especially in Zambia where traditional chiefs also play certain roles on (customary) land matters.

In all three countries, the capacity of lawyers ought to be enhanced to appreciate the nature of takings claims to clarify and extend the applicability of takings jurisprudence to the African countries. Although statutory compensation exists for various use restrictions and the majority of judges seem to hold the opinion that compensation shall be paid, this study came across a few cases in which lower courts held that since use restriction is imposed for public purposes, affected land owners should not be paid compensation. This necessitates education in the African countries to clearly integrate takings law in existing laws for compensation for use restrictions, especially by extending compensation arguments beyond eminent domain powers to the exercise of police powers that have the character of deprivation of private property title, without actually divesting an owner of title.

Equally lacking in all three African countries is land use policies and laws. Without land use policies and laws to guide land use planning, zoning regulations that are often varied through change of user approvals on a case-by-case basis, without much publicity, will continue to inconvenience land owners and foster uncertainty, which makes land use restrictions more objectionable.

Needless to state, each of the three governments ought to eliminate official corruption to allow governmental structures, including structures for land-related dispute resolution to function properly. Further, in Zambia, there is need to streamline land tenure systems and actualize land management and administration structures that were envisaged in the Land Act of 1995. Without streamlining structures to create clarity on matters of land ownership and use, many Zambians will continue to live under insecurity of tenure, run the risk of acquisition of large tracts of their land by foreigners, foreign enterprises and undeserving affluent Zambians and lose the entire estate in customary land, without having benefited deserving community members.

END NOTES

¹ See, *Narok County Council & Kenya Tourism Federation v. NEMA & Others* in which the affected land owner made sentiments to the effect that he could make wildlife conservation impossible if he was restrained from under taking the intended development on his land. In the appeal filed in the Environment Tribunal, the Tribunal, stopped a land owner and a partner investor from constructing a tourist lodge and camp in a cheetah breeding ground in an area slightly outside Maasai Mara Game Reserve in an effort to preserve the cheetah breeding ground. In that case, an owner of land slightly outside Maasai Mara Game Reserve who had leased land to a foreign investor, asserted his absolute land ownership rights and raised the issue of compensation of a regulatory takings nature. During hearing of an appeal filed to stop both the land owner and the investor from constructing tourist facilities on the land to protect cheetah breeding grounds, the land owner argued that he could not utilize for subsistence and commercial farming because of the presence of wildlife in the area and asserted that he had constitutional right to use his property to earn a living and that stopping him from utilizing his land for the only commercially viable purpose was equivalent to taking his land away from him. He asserted that if the government stopped him from utilizing the land, it would have to pay him compensation for prohibiting him from making use of the land. The landowner and his witnesses stated that if they were

stopped from using the land without compensation, they would make it impossible for wildlife to exist on the land.¹ The Tribunal ordered that a full EIA study be conducted for the project, and in the meantime stopped the development.¹ For the first time, the Tribunal was presented with a takings claim of this of a takings nature.

² See, Marc A. Smith, United States Department of Justice, Fifth Amendment Takings: The Basics, The 11th Annual Conference on Litigating Regulatory Takings and Other Legal Challenges To Land Use and Environmental Regulation (November 6-7, 2008), at 2.

³ Section 1 of the Fourteenth Amendment states, in part, that:

“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

⁴ The Federal Civil Rights Act of 1866, 42, USC, §§ 1983 (Supp. 198).

⁵ The Tucker Act, Ch. 359, 24 Stat. 505, 28 U.S.C. § 1491. The Act does not create substantive rights but confers jurisdiction on the U.S. Court of Federal Claims and other specified federal courts to hear compensation claims against the United States.

⁶ In Florida, for example, Title VIII- Ch. 95-181 (1995) is applicable.

⁷ Article 26(1) of the Constitution, titled “Protection from deprivation of property”, guarantees the right to own property. Article 26(2) proceeds to state that:

“No person shall be compulsorily deprived of property or any interest in or right over property of any description except where the following conditions are satisfied-

(a) the taking of possession or acquisition is necessary for public use or in the interest of defence, public safety, public order, public morality or public health; and

(b) the compulsory taking of possession or acquisition of property is made under a law which makes provision for-

(i) prompt payment of fair and adequate compensation, prior to the taking of possession or acquisition of property; and

(ii) right of access to a court of law by any person who has an interest or right over the property.”

⁸ *Phillips v. Washington Legal Foundation* (524, U.S. 156, 164(1998).

⁹ *Conti v. United States*, 291, F.3d 1334, 1334 (Fed. Cir.2002).

¹⁰ See, *United States v. Welch*, 217, U.S. 333(1920).

¹¹ See, *Forest Properties, Inc. v. United States*, 39 Fed. Cl. 56, 70 (1977)

¹² See, *MHC of Washington v. State*, 13 P.3d 183 (Wash.2000).

¹³ See, *United States v. Gerlach Live Stock Co.*, 339 U.S.725(1950)(riparian rights); *Walker v. United States*, 69 Fed. Cl. 222(2000)(appropriation rights); *Hensley v. City of Columbus*, 433 F.3d 494 (6th Cir.2006) (ground water rights). Also, see, generally, *Hansen v. United States*, 65 Fed. Cl. 76, 123-24(2005).

¹⁴ See, *Pennsylvania Coal Company v. Mahon*, 260 U.S. 393 (1922).

¹⁵ *Kunkes v. United States*, 78 F.3d 1549 (Fed. Cir.1999).

¹⁶ *McCarran Int’l Airport v. Sisolak*, 137 P.3d 1110(Nev.2006).

¹⁷ *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 345 (1883).

¹⁸ *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998).

¹⁹ *Bowen v. POSSE*, 477 U.S. 41, 55(1986).

²⁰ *Concrete Pipe & Products Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 642 (1993).

²¹ *Boyle V. United States*, 200 F.3d 1369 (fed.Cir.2000)

²² *Ruckelshaus v. Monsanto*, 467 U.S.. 986, 1003-04 (1984).

²³ *Ileto v. Glock, Inc.*, 421 F.Supp.2d 1274 (C.D. Cal.2006).

²⁴ *Mountain States Legal Found v. Hodel*, 799 F.2d 1423 (10th Cir. 1986).

²⁵ 28 U.S.C. §§ 1358, 1403.

²⁶ See, *Kelo v. City of New London*, 545 U.S.. 469 (2005).

²⁷ See, *Kirby Forest Indus.*, 467 U.S. at 10.

²⁸ *Amstrong v. United States*, 364 U.S. 40, 49(1960).

²⁹ Marc A. Smith, Fifth Amendment Takings: The Basics, The 11th annual Conference on Litigating Regulatory Takings and Other Legal Challenges To Land Use and Environmental Regulation (2008) at 2 and 3.

³⁰ *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922)

³¹ *Loretto v. Teleprompter Manhattan CATV Corp.*

³² *PA Coal v. Mahon*, 43 Sup Ct. 412.

³³ *United States v. Causby*, 328 U.S. 256 (1946).

³⁴ *United States v. Causby*, 328 U.S. 256 (1946).

³⁵ *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987),

³⁶ *United States v. Welch* - 217 U.S. 333 (1910).

³⁷ It is noted that the value of an easement cannot be ascertained without reference to the dominant estate to which it is attached.

³⁸ *Dolan v. City of Tigard*- 512 U.S. 374 (1994).

³⁹ *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

⁴⁰ *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

⁴¹ S.C. Code Ann. § 48-39-10 et seq. (1989 Cum. Supp.).

⁴² *Lucas v. South Carolina Coastal Council*, 304 S.C. 376 (S.C. 1991).

⁴³ In *Lucas v. S.C. Coastal Council*, 309 S.C. 424 (S.C. 1992).

⁴⁴ After paying Lucas \$850,000 in compensation for the two lots, South Carolina proceeded to sell the lots to private parties for development. Large homes have been established on both lots.

⁴⁵ So stated the Court in , among other many cases, *Armstrong v. United States*, 364 U.S. 40, 49(1960).

⁴⁶ See, *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005).

⁴⁷ *United States v. Causby*, 328 U.S. 256 (1946).

⁴⁸ The Court so announced in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415(1922).

⁴⁹ *Lukas v. South Caroline Coastal Council*, 505 U.S. 1003, 1015, 102991992).

⁵⁰ *Lukas v. South Caroline Coastal Council*, 505 U.S. 1003, 1015, 102991992).

⁵¹ See, for example, *Maritrans, Inc. United States*, 342 F.3d 1344, 1351 (Fed. Cir.2003).

⁵² *Palazzolo*, 533 U.S., at 631.

⁵³ *Penn Central Transportation Co. v. City of New York*, 438, U.S. 104(1978).

In 1965, New York City passed the New York City Landmarks Law to prevent the continued loss of culturally significant structures such as the Pennsylvania Station, demolished in 1963. The objective of the law was to protect structures that are significant to the city while they retain their ability to be properly used. It was to be enforced by the New York City Landmarks Preservation Commission.

In 1968, Penn Central Railroad (a merger of New York Central Railroad with Pennsylvania Railroad) took over management of Grand Central Terminal in New York and in order to save the terminal from further revenue losses due to a decline in public use of the railroad system, it sought to upgrade the uses of the Grand Central Terminal in order to increase revenue and save the company from financial constraints. For that purpose, in mid 1968, Penn Central Railroad developed a design and a design option h to built atop the existing Grand Central Terminal building 55 or 53-story tall office building, allowing Grand Central to maintain its façade or, if the option was permitted, one side of the Station would be demolished in order to create a unified facade for a new 53-story office building. Both designs were submitted to the New York City Landmarks Preservation Commission after the structures met city zoning laws but the Commission, after reviewing the designs, rejected them on grounds that implementation of any of the two designs would adversely affect the feature created by the present structure and its

surroundings, especially the dramatic view of the Terminal from Park Avenue South. A subsequent application by Penn Central Railroad for a Certificate of Appropriateness for both proposals was also rejected. The basis of the Commission's rejection was that the proposed improvement of the Terminal, considered to be a landmark, would reduce or damage its aesthetic value. However, the Landmarks Preservation Commission did offer Penn Central the Transfer of Development Rights (TDRs) which would allow them to sell the air space above Grand Central Terminal to other Developers for their own use. Penn Central felt this was not enough to be considered just compensation for the loss of their land use and filed suit against the city, arguing that under the New York Historical Preservation Law, it was entitled to a reasonable return on the value of its property, whereas in the existing condition, Grand Central Terminal could not break even and because (a) Penn Central was a regulated railroad, and (b) it was in bankruptcy, it could not cease the deficit-causing operations, thus suffering a taking of its property, for which it was entitled to compensation. The trial court agreed.

On appeal, the New York Appellate Division reversed, holding that Penn Central did not use proper accounting methods to demonstrate that it was suffering an ongoing deficit. Upon further appeal, the New York Court of Appeals affirmed the decision of the Appellate Division. Penn Central sought review of the decision by the U.S. Supreme Court.⁵³ In the Supreme Court, Penn Central changed theories, arguing that it was receiving a reasonable return on its property, but arguing instead that the regulation took its air rights above Grand Central Terminal which had been designed to accommodate a 20-story building on top of it. The Supreme Court disagreed, and held that under a new taking test it formulated in this opinion, the economic impact on Penn Central was not severe enough to constitute a taking because Penn Central could continue with its present use whose return, it conceded, was not unreasonable, so the regulation did not interfere with its reasonable investment-backed expectations. The court therefore found that the city's restrictions on the Grand Central Terminal did not amount to a taking.

⁵⁴ [Penn Central](#)...., 438 U.S. at 124.

⁵⁵ See, for example, *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 33 F.supp.2d. 1226, 1243 (Nev., 1999).

⁵⁶ See, for example, *Florida Rock Indus., Inc. v. United States*, 791 F.2d 893 (Fed.Cir.1986).

⁵⁷ See, Robert Meltz, *Substantive Takings Law: A primer* (2008) at 19.

⁵⁸ See, for example, *City National Bank of Miami v. United States*, 33 Fed.Cl. 759 (1995).

⁵⁹ *Ruckelshaus v. Monsanto*, 467 U.S. 986(1984).

⁶⁰ See, *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 479(1987).

⁶¹ See, *Monsanto v. State*, 898 A.2d. 1018 (N.J. 2006).

⁶² See, for example, *State v. Cincinnati*, 886 N.E.2d. 839(Ohio, 2008).

⁶³ So stated the court in, *United States v. Dow*, 357 U.S. 17, 20 (1958) and in *Norman v. United States*, 38 Fed.Cl. 417, 423-24 (1999).

⁶⁴ See, *Kirby Forest Indus. V. United States*, 467 U.S. 1, 3-5 (1984).

⁶⁵ See, Robert Meltz, *Substantive Takings Law: A primer* (2008) at 19.

⁶⁶ *Sessional Paper No. 3 of 2009 on National Land Policy* (2009) at 1.

⁶⁷ *Sessional Paper No. 3 of 2009 on National Land Policy* (2009) at 2.

⁶⁸ The Land Policy legitimizes both private land use restrictions and compulsory acquisition of land and interests thereof, not just for the traditional public purposes (public health care services, schools, et cetra), but also for: investment purposes in accordance with national development objectives; purposes of mining and related activities, in which case, the government shall compulsorily acquire all land on which mineral resources have been discovered before allocating such land to interested investors in order to facilitate fast access to the land and to prevent the exploitation of local communities, environmental degradation and ensure restoration of land after exploitation; strategic public ventures such as development of sea ports; and for regulation of land use (*Sessional Paper No. 3 of 2009 on National Land*

Policy (2009) at 21 & 22).⁶⁸ Loss resulting from compulsory acquisition for the specified purposes is of land itself, together with all interests appurtenant thereto.

Regarding compensation for compulsorily acquired private land, the Policy recognizes that it is the power of the state to extinguish or acquire any title or other interest in land for a public purpose, *subject to prompt payment of compensation* (*Sessional Paper No. 3 of 2009 on National Land Policy (2009)*, paragraph 45, at page 11,). “Any” title or other interest in land means that the government may acquire privately held as well as communally owned land, including land held in trust for communities, for public purposes. The policy does not specify whether compensation shall be paid before or after acquisition of land but it does state that payment thereof must be *prompt*, meaning, immediately or quickly. Ideally, payment ought to be made prior to acquisition of land or any interest thereof, considering that whoever loses land or interest thereof, especially if it is land for settlement or in actual use by the owner, may need alternative land before they lose that which they are dependent upon. [Therefore, although the Policy does not clarify whether compensation payment shall be before or after the fact of compulsory acquisition, prompt, is construed here to mean, quickly or immediately before acquisition by government.

The Policy does recognize loopholes that exist in the procedures for compulsory acquisition, including those relating to irregularities in compensation payment, which expose the process to abuse, occasioning losses and hardship to land owners. To close the gaps, it proposes review of the law on compulsory acquisition in order to: establish procedures which prevent abuses of the process, harmonize institutional framework for compulsory acquisition to avoid mandate overlaps, establish administrative mechanisms for exercise of the power of compulsory acquisition through one national agency, namely, the National Land Commission, and confer pre-emptive rights on the original owners or their successor in title where the public purpose or interest justifying the compulsory acquisition fails or ceases (*Sessional Paper No. 3 of 2009 on National Land Policy (2009)*, at 11 & 12.). The policy objectives and measures, including detailed procedures for compulsory land acquisition are to be effected through a “Land Act” whose enactment it demands *Sessional Paper No. 3 of 2009 on National Land Policy (2009)*, at 13.

⁶⁹ *Sessional Paper No. 3 of 2009 on National Land Policy (2009)*, at 13.

⁷⁰ *Sessional Paper No. 3 of 2009 on National Land Policy (2009)*, at 13, paragraph 30(g).

⁷¹ *Sessional Paper No. 3 of 2009 on National Land Policy (2009)*, at 13, paragraphs 42 & 43.

⁷² *Sessional Paper No. 3 of 2009 on National Land Policy (2009)*, at 11 & 12.

⁷³ *Sessional Paper No. 3 of 2009 on National Land Policy (2009)*, at 11, 12 & 56.

⁷⁴ *Sessional Paper No. 3 of 2009 on National Land Policy (2009)*, at 13, paragraphs 100(b) & (c).

⁷⁵ *Sessional Paper No. 3 of 2009 on National Land Policy (2009)*, at 23, paragraphs 100(d).

⁷⁶ *Sessional Paper No. 3 of 1975, Statement on Future Wildlife Management Policy in Kenya*, at 1, paragraph 1.

⁷⁷ *Sessional Paper No. 3 of 1975, Statement on Future Wildlife Management Policy in Kenya*, at 9-13.

⁷⁸ *Sessional Paper No. 3 of 1975, Statement on Future Wildlife Management Policy in Kenya*, at 13, paragraph 61.

⁷⁹ *Sessional Paper No. 3 of 1975, Statement on Future Wildlife Management Policy in Kenya*, at 13, paragraph 60-62.

⁸⁰ *Sessional Paper No. 3 of 1975, Statement on Future Wildlife Management Policy in Kenya*, at 13, paragraph 61.

⁸¹ *Sessional Paper No. 3 of 1975, Statement on Future Wildlife Management Policy in Kenya*, at 17, paragraph 82.

⁸² *Sessional Paper No. 3 of 1975, Statement on Future Wildlife Management Policy in Kenya*, at 17, paragraph 82.

⁸³ See, for example, *Sessional Paper No. 3 of 1975, Statement on Future Wildlife Management Policy in Kenya*, at 18, paragraph 81.

⁸⁴ *Sessional Paper No. 3 of 1975, Statement on Future Wildlife Management Policy in Kenya*, at 13, paragraph 61.

⁸⁵ *Sessional Paper No. 3 of 1975, Statement on Future Wildlife Management Policy in Kenya*, at 13, paragraph 60.

⁸⁶ *Sessional Paper No. 3 of 1975*, Statement on Future Wildlife Management Policy in Kenya, at 17, paragraph 84.

⁸⁷ *Sessional Paper No. 3 of 1975*, Statement on Future Wildlife Management Policy in Kenya, at 17, paragraph 84.

⁸⁸ *Sessional Paper No. 3 of 1975*, Statement on Future Wildlife Management Policy in Kenya, at 17, paragraph 84. See, also, Article 63(2), (3) & (4) of the Constitution.

⁸⁹ See, [Report of the Induction Workshop of the Parliamentary Committee on Environment and Natural Resources, August, 2013 at page....?](#)

⁹⁰ *Sessional Paper No. 3 of 1975*, Statement on Future Wildlife Management Policy in Kenya, at 15, paragraph 69.

⁹¹ *Sessional Paper No. 3 of 1975*, Statement on Future Wildlife Management Policy in Kenya, at 8, paragraph 37.

⁹² Kenya, National Constitution, article 69(1)(a).

⁹³ See, Report of the Induction Workshop of the Parliamentary Committee on Environment and Natural Resources, August, 2013 at page 10.

⁹⁴ See, Preamble to the Land Act.

⁹⁵ The Land Act makes provisions for compulsory acquisition, now, in a devolved system of government. In the present governance structure, both national and county governments are permitted to compulsorily acquire land, but the power has to be exercised on their behalf by the National Land Commission (NLC), upon written request. In the case of compulsory acquisition, there are three kinds of payable compensation:

- (i) Compensation for damage caused during inspection of land proposed for compulsory acquisition

Unlike in the past, the law mandates inspection of land proposed for compulsory acquisition at the direction of the NLC, to determine suitability for the intended purpose (section 108). For that purpose, the NLC is empowered to appoint any person to enter land for purposes of inspection and if entry causes “any damage” to the land or property thereon, the NLC shall, “*As soon as practicable after entry has been made...promptly pay in full, just compensation for any damage resulting from the entry.*” (section 109) The law does not specify the exact nature of damage that might be caused by entry into land to determine its suitability for proposed purposes but considering the nature of land use activities, damage and/or losses may result from stoppage or interruption of business occasioning financial losses and physical damage to land and related property such as plants and machinery attached thereto. For such kinds of damage and related losses, payment of compensation shall be made before the process of compulsory acquisition proceeds further.

- (ii) Compensation for loss of land or other property and related interests through compulsory acquisition

If, upon inspection, land or other property is determined to be suitable for the intended public purpose, the procedures prescribed in sections 111 to 118 of the Land Act shall be gone through, leading to compulsory acquisition of the land. The procedure includes: NLC’s receipt of submissions on value of land and payable compensation by, among others, the land owner and any others claiming interest on the land, holding of hearing on submissions, making decisions upon hearing and making an award of compensation. Section 111 requires detailed rules on assessment of compensation to be developed which should include procedures for land valuation but before the required rules are developed, matters concerning land value for the purpose of determining appropriate compensation, based on open market values, may be presented at the hearing which sections 111 and 112 require the NLC to hold. Under section 113(2)(a)(2), an award for compensation made subsequent to a hearing shall be conclusive evidence of the value of land to be compulsorily acquired, unless validly contested, which is why matters concerning land valuation out to be presented by a land owner or his valuer, at the hearing.

The law, in sections 114(2), 115, 116, 117 and 118 clarifies that compensation for compulsorily acquired land shall be paid “*...prior to taking possession of the land.*” In the case of compulsory acquisition,

compensation is paid for loss of the land. In accordance with section 117 of the Land Act, land may be granted by the government in lieu of monetary compensation.

(iii) Additional compensation and interest

Further, sections 117 -119 provide for payment of interest and additional compensation, in appropriate cases, for example where land value or size is later found to have been bigger or higher than initially determined.

It is noted that under section 28 of the Registration of Titles Act, No. 3 of 2012, the government's power to compulsorily acquire land is listed among interests that override title to land but the law itself has no additional provisions for compensation. Further, it is noted that the Registration of Titles Act, in section 76, provides for a special kind of restrictions to dealing with private land to prohibit or restrict dealings with land in order to prevent fraud, improper dealing with land or to meet any other sufficient objective, but without provisions for compensation.

⁹⁶ Easements do not include any right to take and carry away anything from the servient land; and any right to the exclusive possession of any land. See, section 138(2)(a) & (b) of the Land Act.

⁹⁷ The Land Act, No. 6 of 2012, section 138(3).

⁹⁸ The "dominant land" is the land for the benefit of which an entry order is issued by Court. See section 139(1).

⁹⁹ The "servient land" is the land over which an entry order is issued. An entry order is recognized by law as burdening the servient land. See section 139 (1) of the Land Act.

¹⁰⁰ See, The Land Act, No. 6 of 2012, section 140(1).

¹⁰¹ In essence, under section 140(6), an access order is a form of easement.

¹⁰² The Land Act, No. 6 of 2012, section 148 (1).

¹⁰³ The Land Act, No. 6 of 2012, section 148 (3).

¹⁰⁴ The Land Act, No. 6 of 2012, section 148 (4).

¹⁰⁵ Where the owner of land is a public body, compensation relating to a wayleave or communal right of way shall not be paid unless there is a demonstrable interference of the use of the land by that public body (section 148(2)).

¹⁰⁶ The Land Act, No. 6 of 2012, section 148 (5). The NLC is obligated to make any further necessary regulations prescribing the criteria to be applied in the payment of compensation for public rights of way and to give effect to this section (section 148(6)).

¹⁰⁷ The Land Act, No. 6 of 2012, section 152 (4).

¹⁰⁸ The Land Act, No. 6 of 2012, section 152 (4).

¹⁰⁹ The National Land Act, No. 6 of 2012, section 155(1)(e).

¹¹⁰ The Land Act, No. 6 of 2012, section 153 (3).

¹¹¹ *Sessional Paper No. 3 of 2009 on National Land Policy (2009)*, at 20, paragraph 88.

¹¹² *Sessional Paper No. 3 of 2009 on National Land Policy (2009)*, at 20, paragraph 87.

¹¹³ Chapter Five of the Constitution includes Article 66(1) aforementioned.

¹¹⁴ The CONSTITUTION, art. 40(3)(2010)(Kenya)

¹¹⁵ The Agriculture, Fisheries and Food Authority Act is an Act of Parliament that consolidates the laws on the regulation and promotion of agriculture generally, provides for the establishment of the Agriculture, Fisheries and Food Authority, and makes provision for the respective roles of the national and county governments in agriculture (excluding livestock) and related matters in furtherance of the relevant provisions of the Fourth Schedule to the national Constitution

¹¹⁶ Section 21 of the law authorizes the Cabinet Secretary to develop land development guidelines in consultation with the NLC and the Agriculture, Fisheries and Food Authority (hereinafter, the authority) to be applied in respect of any category of agricultural land and to affect the owners or the occupiers of the land by requiring their adoption of such system of management or farming practice or other system in relation to land in question, including the execution of such work and the placing of such things in, on or over the land, from time to time, as may be necessary for the proper development of land for agricultural and fishing purposes. The guidelines are to be enforced by the respective county governments, taking into account the circumstances of the respective areas under their jurisdiction.

117 Sections 24- 28 of the act empower county governments to enter private land and eradicate invasive or noxious weed, but without provisions for compensation for loss or damage that such exercise might exert on private use of land, on land or property attached or placed thereon.

¹¹⁸ The requirement of wayleave is also supported by the Trespass Act (Cap. 294), whose section 3(1) states that:

“Any person who, without treasonable excuse, enters or remains upon, or erects any structures on or cultivates or tills, or grazes stock or permits to be on private land without the consent of the occupier thereof shall be guilty of an offence.”

¹¹⁹ All of the Kenyan cases cited in this report are available at the Kenya Law Reports web site at: <http://www.elkr.co.ke>

¹²⁰ *Kanini Farm Ltd v. Commissioner of Lands*, KLR (E & L), Vol. 1 (1984).

¹²¹ Section 5 provides that compensation for land compulsorily acquired as permitted by section 2 of the law shall be made to all persons having an interest in the acquired land, before the government takes over the land. In this regard, section 7 clarifies that an assessment officer shall take possession of a compulsorily acquired land, “*as soon as he or she has made his or her award under section 6.*” Affected land owners and others having any interest in the land are permitted by law to make presentations on the amounts of compensation payable (section 5(2)). In case there is no agreement on the amount of compensation, it shall be assessed by an assessment officer (section 5(2)). Once an amount for compensation is determined, an assessment officer publishes a notice of the award (section 6). The law, in section 19, permits payment of compensation by way of grant of another land or alternative land. A claim for compensation for compulsorily acquired land may also be settled, “...in any other way.” (section 19).

¹²² The High Court may order compensation payable under subsection (2) to be paid into court on such conditions as it thinks appropriate if it is satisfied on the application of the Attorney General that the appointed officer cannot trace the person to whom the compensation is due or is for other good cause unable to make payment of the compensation.

¹²³Section 14 of Uganda’s Water Act authorizes the director of water development, an authorized person or a public authority to enter and remain on private land for a variety of purposes related to water resources including: taking measurements; construct and operation of works as may be necessary for the investigation, use, control, protection, management or administration of water; construct works; installation of equipment and gauging, recording and monitoring stations; investigation or monitoring boreholes and ancillary works on any land; make surveys; taking measurements or samples; and make alterations of any of the foregoing matters. Moreover, under

¹²⁴ Uganda Mining Act, section 3.

¹²⁵ Section 80 (1) of the Mining Act appears to grant superior mineral rights over private land owners’ right to utilize their land. It states that

“The owner or lawful occupier of any land within an area which is the subject of a mineral right shall retain the right to graze stock upon or to cultivate the surface of such land, so far as the grazing or cultivation does not interfere with the proper working in such area for prospecting, exploration or mining purposes; and in so far as the grazing or cultivation does not constitute a danger or hazard to livestock or crops.”

The law, it appears, obligates private land owners to restrict their use of land so as to allow mineral rights holders to carry out their activities. Section 80(2)(b) makes it clear that it is the private land owners’ obligation to ensure that their private land use activities do not interfere with or affect the activities of miners, mineral prospectors and holders of other mineral rights.

¹²⁶ It is noted that those granted rights of use of public land shall not be paid compensation at all for losses or damage suffered as a result of mining and related activities, in the duration of the land grant. (section 82(1)(iii))

¹²⁷ Reference to hydrogeological works were removed by the Land Amendment act of 2004.

¹²⁸ Uganda Electricity Act, Chapter 145 of 1999, section 3.

¹²⁹ A person who obstructs, molests, hinders or prevents a licensee from undertaking any activity which the licensee is authorized to do by the Act or by his or her licence, commits an offence, known as obstruction of licensee, and is liable on conviction to a fine not exceeding one thousand currency points or imprisonment not exceeding five years or both (section 161 of the Act).

¹³⁰ *Buran Chandmary vs The Collector under the Indian Land Acquisition Act (1894)*, 1957, EACA at 125.

¹³¹ The Lands Act, Chapter 185 of 1995, is Zambia's substantive law governing acquisition, ownership and disposal of land. It vests in the President, all land in Zambia, to hold for the people of Zambia, but provides for land alienation by the President to any Zambian (section 3 of the Land Act) and to a category of non-Zambians specified in section 3(3), including permanent residents of Zambia, investors, companies incorporated in Zambia and non-Zambians who have obtained the President's personal permission to own land in the country. Therefore, in Zambia, there is a substantial proportion of land privately owned, in addition to customary land and land in the public domain.

¹³² For more on land ownership and management in Zambia, see, Taylor Brown, *The IDL group, Contestation, confusion and corruption: Market-based land reform in Zambia*, at 2.

¹³³ Taylor Brown, *The IDL group, Contestation, confusion and corruption: Market-based land reform in Zambia*, at 1.

¹³⁴ Other Use Restrictions for which there shall be no compensation are specified in Article 16(2)(a)-(z) and include instances of property seizure due to bankruptcy and failure to comply with tax payment requirements.

¹³⁵ The Constitution of Zambia, Article 11(d).

¹³⁶ The Lands Act is Zambia's substantive law governing acquisition, ownership and disposal of land. It vests in the President, all land in Zambia, to hold for the people of Zambia, but provides for land alienation by the President to any Zambian¹³⁶ and to a category of non-Zambians specified in section 3(3), including permanent residents of Zambia, investors, companies incorporated in Zambia and non-Zambians who have obtained the President's personal permission to own land in the country. Therefore, in Zambia, there is a substantial proportion of land privately owned, in addition to customary land and land in the public domain.

¹³⁷ Property includes land and any interest in or right over property, but does not include a pledge or other charge (section 2).

¹³⁸ Regarding compensation for compulsory acquisition of land, it is worth noting the following: The law makes provisions for compulsory acquisition of land in terms that are closely linked to compensation for private land use restrictions. It authorizes compulsory acquisition whenever it appears to the President that it may be desirable or expedient in the interest of the public to acquire any land or other property for public purposes (section 4(1) and 5(1)). Compulsory acquisition of land and other property must be conducted following procedure prescribed in sections 5- 11 of the law, including public notice, time for raising objections and inspection of land or other property proposed for compensation. In the end, compensation is paid by the government to the land owners and others holding proprietary interests thereon, in monetary form, in such amounts as may be agreed between the government and affected land owners (section 11). The law specifies that in the case of compulsory acquisition, "... *possession may be taken only after payment of the amount regarded by the Minister as just compensation.*"¹³⁸

In case of disagreement on the amount of compensation, the matter shall be referred to the responsible government minister and further, to court for determination (section 11). Both the Land Acquisition Act, section 12 and the Constitution specify principles that shall guide courts and the minister in assessing compensation. They include the principles that:

(a) the value of property shall be the amount which the property might be expected

to realize if sold in the open market by a willing seller at the time of publication of a notice to the land owner to yield up possession; Provided that there shall be taken into account and deducted-

(i) any returns and assessments of capital value for taxation made or acquiesced in by the claimant, (ii) any money granted by the Government for the development of the property or any other investment or donations made by the Government, or deemed to have been made or granted; or any investment or donation, whether in the form of money, services, equipment or any other contribution, made by a company or any other body, unless any contributor indicates in writing that the contribution was specifically made for the use and benefit of the registered owner (such grants, donations or investments, made as aforesaid shall have such value calculated on a pro rata basis of the property as assessed at the time of publication of the notice to yield up possession under section seven of the Act (Zambia Land Acquisition Act, Chapter 189, section 12(b)(ii));¹³⁸

(b) the special suitability or adaptability of the property for any purpose shall not be taken into account if that purpose is one to which it could be applied only in pursuance of statutory powers, or for which there is no market apart from the special needs of a particular purchaser or the requirements of the Government or a local authority;

(c) no allowance shall be made on account of any improvements effected or works constructed after the publication of the notice to yield up possession;

(d) where part only of the land held by any person is acquired, there shall be taken into account any probable enhancement of the value of the residue of the land by reason of the proximity of any improvements or works made or constructed (or to be made or constructed) on the part compulsorily acquired; and

(e) allowance shall be made for the damage, if any, sustained by the person having an estate or interest in the land by reason of the severance of such land from any other land belonging to the

The law provides for alternative form of compensation payment in the form of alternative land, in lieu of or in addition to any compensation payable. Further, it is noted that the law permits affected land owners to request the government to purchase all of their affected land, especially where it is determined that the government requires, for public purposes, only a portion of private land but the remainder thereof would be less than half of an acre (Zambia Land Acquisition Act, Chapter 189, section 8(1)).

¹³⁹ Zambia Land Acquisition Act, Chapter 189, section 8(1), section 28(1).

¹⁴⁰ Zambia Land Acquisition Act, Chapter 189, section 8(1), section 4(2).

¹⁴¹ In the case of compulsory acquisition for electricity generation and related purposes, the power to compulsorily acquire private or public land for electricity utility purposes, the power must be exercised by the President, on behalf of an operator, through issuance of an order for compulsory acquisition of as much land as necessary for a particular electricity-related use (section 14(1)). Before making an order for compulsory acquisition of land, the President must be satisfied that: (a) an operator requiring land has taken all reasonable steps to acquire the land intended to be used on reasonable terms by agreement with the owner of the land but has been unable to do so; and (b) the acquisition of such land is necessary for the purposes of the undertaking carried on by the operator concerned (section 14(2)). If so satisfied, the President shall apply provisions of the Land Acquisition Act to compulsorily acquire land, subject to payment of adequate compensation to the land owner, from moneys appropriated for the purpose by Parliament (section 14(4)). In such cases, compensation is for loss of land (section 14(4)). Besides the land owner, other persons holding rights over compulsorily acquired land shall also be compensated (section 14(4)).

¹⁴² Where any rights over land have been acquired by the operator of an undertaking, whether by agreement or by compulsion through the minister, then, notwithstanding the fact that those rights may

not have been registered against the title to the land to which they relate in accordance with the written law relating to registration of title, those rights shall be binding on the owner of such land and on the successor in title or representative in interest (section 14(7) of the Electricity act).

¹⁴³ See section 12 of the Land Acquisition Act which provides general guidelines on compensation assessment and embraces a market-based approach.

¹⁴⁴ Section 56(1)(c) - If land over which a mining or prospecting license has been issued belongs to a local community, consent of the chief and other tribal elders is required

¹⁴⁵ It appears that without compulsorily acquiring the land, the director coerces a land owner to allow mining and prospecting activities, only to limit use rights of a land owner, but not without compensation.

¹⁴⁶ However, as already noted, a person, including legal persons, may contract with the government to engaged in petroleum activities, including: exploration, development, extraction, production, field separation, transportation, storage, sale and disposal.(section3(2)).

¹⁴⁷ The Mines and Minerals Act, Cap. 213, (section 35(7)).

¹⁴⁸ Taylor Brown, The IDL group, Contestation, confusion and corruption: Market-based land reform in Zambia, at 1.