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REVIEW OF THE DRAFT LAW RELATING TO EXPROPRIATION IN THE PUBLIC INTEREST

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Executive Summary

Rwanda's Draft Law Relating to Expropriation in Public Interest (Draft Law) attempts to balance the government's exercise of authority to acquire land for public projects with the protection of private property interests. The Draft Law adapts the current 2007 Expropriation Law to the new hierarchy of land governance bodies introduced by the 2013 Land Law. In addition, the Draft Law strengthens procedures for notifying landowners of planned land acquisitions and decisions. The Draft Law also proposes removing the public's right to challenge government action based on environmental grounds under the expropriation law, relying instead solely on remedies potentially available under the 2005 Environmental Law.

Based on established principles of legislative drafting and with reference to international best practices and the expropriation laws of other African jurisdictions, the review recommends several revisions:

1. Clear identification of the types of property rights that are entitled to notice of expropriation, valuation of property rights and other interests, and payment of compensation;
2. A statement regarding partial takings;
3. The obligation of the government or its designee to hold community meetings, consider external input, and prepare analyses of the anticipated impact of the planned expropriation, including the documentation of environmental impact, identification of landowners affected, and assessment of suitability of the project—all of which are required parts of an application for expropriation but lack separate substantive and descriptive statements of the obligations within the law;
4. Requirement of a social impact assessment and the right to seek review of an expropriation decision on that basis;
5. Establishment of an analytical framework for the government's determination on an application for expropriation;
6. Reinstatement of a right to review based on the contents of an environmental impact statement (EIS) or the lack of an EIS (with reference to the 2005 Environmental Law, as appropriate); and
7. An opportunity for restitution of land if the public purpose for which land was used is no longer relevant or if the purpose for which the land was expropriated is never realized.

These suggestions are designed to build on the steps taken in the Draft Law to strengthen the systems for notice and decision-making regarding the expropriation process. In addition, the suggestions are an effort to help establish and maintain the desired balance between the legitimate and necessary exercise of government power in the public interest and the rights of private property owners and local communities impacted by that exercise of power. As important, the recommended revisions clarify and broaden the public's right to receive notice of governmental action and to seek review of those actions through formal channels. The institutionalized procedures for seeking review of government action can help increase the accessibility of governmental institutions and reinforce the value of using formal, democratic systems to challenge government action.

1.0 INTRODUCTION

The five-year Rwanda LAND Project seeks to strengthen the resilience of Rwandan citizens, communities, and institutions and their ability to adapt to land-related economic, environmental, and social change. The project has two main components:

- I. Increased capacity of local Rwandan institutions to generate high-quality evidence-based research on land related issues and GOR laws and policies; and
- II. Increased understanding of land laws, policies, regulations, and legal judgments on land-related issues by GOR officials, local civil society organizations, research institutes, and citizens.

1.1 Land Legislation Review and Drafting

During the second year of operations, the project's GOR counterpart prioritized reviewing key pieces of land legislation. During a meeting between the project and RNRA, the parties agreed to divide the activity into two tasks: 1) reviewing land-related draft laws and regulations to address their legal soundness and implications; and 2) drafting new regulations provided for in the 2013 Land Law. The first task includes review of the following drafts:

- Law on expropriation;
- Law organizing land surveying and demarcation profession and modalities of its practice; and
- Ministerial order determining modalities and procedures for land registration and cancellation of land registration.

This report is the review of the draft law on expropriation. In conducting the work, the authors consulted:

- Law No. 18/2007 of 19/04/2007 Relating to Expropriation in Public Interest (2007 Expropriation Law), the Draft Law Relating to Expropriation in Public Interest (Draft Law), and the Explanatory Note for the Draft Law Relating to Expropriation in Public Interest (Explanatory Note);
- Rwandan legal framework for land and related subjects, including the Organic Law No. 4/2005 08/04/2005 concerning the Modalities for Protection, Conservation and Promotion of Environment in Rwanda (2005 Environmental Law);
- Comparable law of other African countries, including Kenya, Tanzania, Ghana, and Uganda;
- Comparable law of other non-African civil code and common law countries;¹ and

¹ Specific request was made to refer to French, Australian, and Belgium law governing expropriation. As noted in the text, French law does not recognize a right of compensation for land expropriation, except in exceptional cases. Federal law in Australia is similar, although some states, such as New South Wales, allow for just compensation for compulsory acquisition of land. See Rachelle Alterman. 2010. Takings International: A Comparative Perspective on Land Use Regulations and Compensation Rights. New York: American Bar Association, and J. F. Garner, ed. 1975. Compensation for Compulsory Purchase: A Comparative Study. United Kingdom Comparative Law Series, Vol. 2. London: British Institute of

- Secondary sources on issues in expropriation law and procedure.

The report is organized as follows: Section II provides a brief overview of principles of legislative drafting and review. Section III gives an overview of the Draft Law, and Section IV discusses the Draft Law by section and article. Section V lists some options for additional provisions not currently in the Draft Law. Section VI includes a table summarizing the proposed revisions to the Draft law and concludes.

1.2 Objectives and Principles Governing Review

The overall goal of the review is to determine if, as drafted, the proposed legislation effectively and efficiently accomplishes its legislative purpose. To that end, the review considers the:

- Substantive content of the legislation in relation to its objectives;
- Conformity of the legislation with Rwanda’s legal framework and other informing sources and institutions;
- Possible primary and secondary effects of the legislation;
- Alternatives and options for additions to the legislation; and
- Clarity of the terminology, language, and syntax used.

In conducting the review, the authors considered examples of law and experience from other East African countries and, to the extent useful, law and experience from other non-African jurisdictions.

The Draft Law was drafted in Kinyarwanda (Art. 39), while the analysis and suggestions regarding terminology, language, and syntax relate to the English version of the Draft Law, with some reference to the French version. The authors recognize that in many cases, ambiguity and issues with syntax in the English version may not exist in the Kinyarwanda and French versions. Likewise, the recommendations for revisions to the English version may have more limited application to the other versions.

2.0 OVERVIEW OF DRAFT LAW

As with the 2007 Expropriation Law, the Draft Law derives its authority from the Constitution. Article 29 of the Constitution provides that the right to property may not be interfered with except for public use, subject to the payment of “fair and prior compensation.” According to the Explanatory Note, the Draft Law was prepared to harmonize the processes for expropriation with the 2013 Land Law and close loopholes identified in the 2007 Expropriation Law.

The Draft Law follows the sound structure established in the 2007 Expropriation Law, addressing the basis for expropriation of land, the decision-making bodies, procedures for applying for expropriation, and the processes for notification of affected land owners at various stages of the process. The Draft law includes provisions relating to decision making, valuation of the property, payment of compensation, and rights of review. The Draft Law

International and Comparative Law. Accordingly, in many areas these laws are not comparable in their governing policy and purpose to the Rwandan law and not used as examples.

improved on the 2007 Expropriation Law by eliminating some opportunities for conflicts of interest in decision-making, improving transparency of government processes with new notice requirements, and increasing efficiency for project developers and landowners with deadlines for action.

The Draft Law contains many of the protections for holders of private property rights considered to be good international practice.² The conceptual framework of the Draft Law places it squarely within the group of expropriation laws that attempt to balance the government's exercise of power in the public interest and the protection of private property rights. However, as with the 2007 Expropriation Law, the Draft Law lacks some substantive provisions in the areas of defining the application of the law and the basis for governmental decision-making.

In addition, the Draft Law removed some bases for public challenge of expropriation. Those gaps and weaknesses potentially impact the ability to achieve an appropriate balance between the legitimate exercise of government power and the protection of private property rights.

Some of the areas where the Draft Law can be further strengthened include providing:

- Clear identification of the types of property rights that are entitled to notice of expropriation, valuation of property rights and other interests, and payment of compensation;
- A statement whether the rights of landowners (and secondary interest holders, if applicable) extend to partial takings;
- The obligation of the government or its designee to hold community meetings, consider external input, and prepare analyses of the anticipated impact of the planned expropriation, including the documentation of environmental impact, identification of landowners affected, and assessment of suitability of the project—all of which are required parts of an application for expropriation but lack separate substantive and descriptive statements of the obligations within the law;
- Requirement of a social impact assessment and the right to seek review of an expropriation decision on that basis;
- Reinstatement of a right to review based on the contents of an environmental impact statement (EIS) or the lack of an EIS (with reference to the 2005 Environmental Law, as appropriate);
- Establishment of an analytical framework for the government's determination on an application for expropriation; and
- An opportunity for restitution of land if the public purpose for which land was used is no longer relevant or if the purpose for which the land was expropriated is never realized.

² FAO. 2008. Compulsory acquisition of land and compensation, in Land Reform 2008/1. Rome: FAO, 7-16.

3.0 REVIEW OF DRAFT LAW

The review below is organized by article. As warranted by the content of each article, the discussion includes the likely legal effect of the provisions, references to the Rwandan legal framework, and laws of other countries and regional policy statements.

3.1 Draft Law, Introductory Section

This section of the Draft Law references a number of Constitutional provisions, the 2013 Land Law, the 2005 Environmental Law, and the 2007 Expropriation Law. The referenced instruments serve different purposes. The referenced articles of the Constitution provide authority for the Draft Law and the legislative process for enacting and promulgating law. The 2013 Land Law provides the overarching legislative framework for land, and the 2007 Expropriation Law orients the Draft Law to that existing law.

The references to Art. 11 (Nondiscrimination) in the Constitution and the 2005 Environmental Law have a different purpose. Article 11 appears to be referenced as a reminder that the Draft Law is subject to and must be implemented consistent with principals of nondiscrimination. Likewise, the 2005 Environmental Law appears to be referenced as a reminder that activities subject to the Draft Law may also be subject to obligations contained in the Environmental Law, such as the preparation of an environmental impact statement (EIS) for projects.

As an alternative, these kinds of obligations can also be included within the body of the Draft Law. Specific references in the body of the law have two potential positive impacts; including the obligations within the Draft Law: 1) draws attention to important principles of Rwandan policy and law and creates a basis for emphasis of those priorities in creating procedures for land expropriation; and 2) establishes a basis within the Draft Law for enforcement of the legal obligations.

For example, a particular group might allege that a decision to expropriate their agricultural land for urban expansion was based on their religion. Absent a statement of nondiscrimination in the Draft Law it is unclear whether the group would be able to pursue administrative review by the various governmental bodies responsible for the expropriation process or would they be required to bring a constitutional claim in court? If their recourse is the latter, would the court action automatically stay the expropriation process? Or would the group be required to bring a separate action in an administrative or judicial forum to suspend the government's action until the constitutional claim is resolved? The absence of express statements in the Draft Law can create barriers to challenges the government action and delay the process of resolving claims.

3.2 Draft Law, Chapter One: “General Provisions”

Art 1: Purpose of this Law.

This article retains the language of the 2007 Expropriation Law, which states that the purpose of the Draft Law is to set out the procedures relating to expropriation of property. Instruments that provide for procedures alone are most often classified as regulations; laws generally provide substantive rights and obligations (consistent with the authorizing legislation), and can also set out procedures, if desired.³ In this case, the Draft Law does more than simply set out procedures; the Draft Law: 1) identifies the decision-making institutions and the scope of their authority within the context of a land expropriation; and 2) establishes the specific rights of owners of land identified for expropriation, and possibly other interest holders. An example of language that would encompass the actual and appropriate content of the Draft Law is:

This Law identifies rights, obligations, and procedures relating to the expropriation of property.

Expression of legislative intent. This initial article also provides drafters with an opportunity to state the legislative intent of the Draft Law. For example, in its initial article, the 2005 Environmental Law sets out a list of policy objectives guiding the law, including environmental preservation and protection of social welfare. So long as such a statement of purpose is drawn from the authorizing and informing legislation (e.g., Constitution, Land Law), it can provide a useful basis for governmental bodies and other project designers and implementers construing the law. A purpose statement can also help ensure that any judicial construction of the Draft Law is consistent with parliamentary intent, and, if regulations are created, that they are drafted with recognition of the legislative purposes.

Broadly crafted statements of purpose are generally better than very specific statements. Broad statements are less likely to constrain the government’s exercise of its power to expropriate land to a limited and narrowly defined set of activities.⁴ An example of a broadly-conceived purpose statement for the Draft Law is:

The objective of this Law is to:

- *Recognize the inviolability of private property and the value of private property rights and tenure security;*
- *Support the Government of Rwanda’s obligation to advance activities in the public interest that enhance social and economic development and protect the environment;*
- *Require any exercise of Government power to acquire private property in the public interest to be legitimate, fair, and efficient;*
- *Provide property owners and other interest holders who lose property rights as a result of expropriation with fair and prior compensation; and*
- *Allow property owners and other interest holders who will be or are deprived of property rights under this Law to challenge the exercise of the power of expropriation*

³ Whether a law also includes procedures is often driven by the length and complexity of the procedures and the nature (and number) of implementing bodies.

⁴ FAO, 2008 at 8-9.

on all legitimate grounds and receive appropriate remedies for expropriations in violation of this Law.

Art. 2: Definitions

General principles of legislative drafting instruct that the definitions section include any terms used in the law that are not in common usage or that carry specific meaning within the law.⁵ In some areas of the Draft Law, there is some confusion between provisions directed at the authority and process for land expropriation and those directed at the authority and process for the activity or project that requires an expropriation. In addition, some confusion is created by apparent reliance on French terminology, which in English translation misstates the nature of an expropriation. Some of the confusion can be erased by revision of existing definitions. The content is set out below and redlined with proposed revisions, followed by explanations:

1. **Activity or area in the public interest: actions, projects, and sites that serve public purposes.**

This suggested addition, and the revision to the definition below, separate the act of expropriation from the basis for the expropriation, which is usually some kind of infrastructure project that is deemed to serve a public purpose. A particular project might be developed by a government agency, NGO, or private entity. However, the determination of whether or not the project--or some aspect of the project--is in the public interest and thus a basis for the compulsory acquisition of land is made by the governmental body with the decision-making authority. The list of activities and areas deemed to be in the public interest and thus potentially supporting expropriation are retained in Article 5.

2. **Act of Expropriation in the public interest: an act Compulsory acquisition of private land by the Government, public institution, nongovernmental organization, legally accepted associations operating in the country or of an individual with the objective to serve a public purpose., with an aim of public interest.**

This suggested revision clarifies that expropriation is always a government action.

2. **Fair compensation: an indemnity given to a property owner that is equivalent to the market value of the expropriated land and improvements to the land, and includes compensation for other losses to property owners' livelihoods caused by the expropriation and for disturbance caused by relocation. activities performed thereon given to the expropriated person and calculated in consideration of market prices plus compensation for disturbance due relocation.**

The Draft Law adopts the term, "fair compensation." The 2007 Expropriation Law used the term "just compensation" which is the phrase most commonly used in the majority of

⁵ See G. Bowman. 2005. *The Art of Legislative Drafting*. London: Office of Parliamentary Counsel; Tobias Dorsey. 2006. *Legislative Drafter's Deskbook: A Practical Guide*. Washington D.C.: The Capitol.net, Inc.

expropriation laws reviewed and the secondary sources. However, the term, “fair compensation,” is used in the English versions of Rwanda’s Constitution and the 2013 Land Law—the legal bases for the Draft Law. Thus, despite the more common usage of “just compensation,” the Draft Law should use the same terminology as its authorizing and informing legislation.⁶

Like the 2007 Expropriation Law, the Draft Law uses the term “activities” on land subject to expropriation to include improvements such as buildings, standing crops and perennials such as trees, and livelihood interests. The Draft Law added compensation for disturbance due to relocation, which is consistent with the compensation schemes in many other expropriation laws, including Ghana, Uganda, Kenya, and several European countries.⁷

The authors suggest that the Draft Law break out the categories of potential compensation because the term “activities” is ambiguous and ambiguity can lead to denial of compensation or inadequate compensation.⁸ These categories are also referred to in Article 27, which identifies the categories of property and interest subject to compensation.

3. **Expropriation:** a governmental acquisition of private rights in land for public purpose. ~~Taking people of private property due to public interest.~~

This revision clarifies the term. Note that as a technical matter, the term, expropriation (and equivalent terms such as “compulsory acquisition” and “taking”), does not include the requirement of payment of just or fair compensation as part of the definition.⁹

4. **Competent authority:** ~~one or more organ(s) which have~~ a governmental body that has authority under this Law provided for by the law to initiate, evaluate, approve of, or conduct an expropriation in the public interest.

The proposed revisions to this provision reference all the roles that governmental bodies play with regard to an expropriation, as set out in this Draft Law.

5. **Person requesting for expropriation:** ~~a State organ, nongovernmental organizations, legal associations operating in the country or an individual who intends to carry out the act of expropriation and who is obligated to apply to the expropriator.~~

⁶ Drafters can monitor claims arising under the Draft Law to see whether the terminology creates any issues. In English, the term, “just,” tends to be considered a more formal word than “fair.” Some definitions distinguish between the two words by suggesting that “just” refers to an external standard of justice or legality while “fair” may be more likely to refer to a more personal standard of impartiality. Black’s Law Dictionary. 1979. 5d. St. Paul: West Publishing Co. In addition, use of the more common term, “just,” may assist in reference to comparable laws from other jurisdictions and avoid arguments that Rwanda intended a different standard by the selection of the word, “fair.” However, as noted in the body of the report, the priority should be maintaining consistency of terminology between the authorizing legislation and the Draft Law.

⁷ See W.O. Larbi. 2009. Compulsory land acquisitions and compensation in Ghana, in FAO, 2009, no. 1; Kenya Land Act, 2012, Art. 113; and Uganda Land Act, 1998, Art. 77; see generally Alterman, R. Takings International: A Comparative Perspective on Land Use Regulations and Compensation Rights. New York: American Bar Association; FAO.2008. Land Reform, 2008/1. Rome: FAO.

⁸ Sections of Nigerian law governing compulsory acquisitions of land are ambiguous and inconsistent; resulting in the denial of adequate compensation for expropriation of land, especially land with oil and gas reserves. I.I. Kakulu, 2008. The assessment of compensation in compulsory acquisition of oil- and gas-bearing lands in the Niger Delta, in FAO. Land reform, Land Settlement and Cooperatives. Rome: FAO, 57-65.

⁹ FAO, 2008, at 7; Black’s Law Dictionary. 1979. 5d. St. Paul: West Publishing Co.

This provision is recommended for deletion because a special term is not necessary to identify the entities that can apply for land expropriation.

6. ~~**Expropriator:** a government organ with responsibilities and powers conferred by law to carry out expropriation in public interest;~~

This term is used in the French expropriation law¹⁰ but is not commonly used in other expropriation laws and, indeed, is used only a couple of times in the Draft Law. The term is inherently ambiguous because a number of different governmental bodies have responsibility for different stages of an expropriation of land. In addition, the term is potentially equivalent to the term, “competent authority,” depending on the context. The authors recommend that the term be deleted and the Draft Law identifies the relevant governmental body taking expropriation action as necessary. If the drafters would like to use a term to refer to the governing body that acquires the land, the term, “acquiring authority,” which is used in the Kenyan Land Act, may be more easily understood than expropriator because it carries specific reference to the authority’s role with regard to the land.¹¹

7. ~~**Person to be expropriated:** any person or a legally accepted association operating in the country who is to have his or her private property transferred due to public interest as well as legally accepted local administrative entities and institutions.~~

This provision is recommended for deletion because it may cause unnecessary confusion. Expropriation is a term used to describe compulsory acquisition of land, rather than individuals or entities. Most expropriation laws simply refer to the landowner and, in some cases, holders of secondary interests. The revisions suggest using the term, “landowner,” and reference other adversely affected interest holders, as appropriate. Draft Law may wish to refer to those other individuals who are not landowners but are adversely affected by the expropriation as “other interest holders.”¹² Proposed definitions are:

Landowners: Persons and entities who are registered owners of land.

Other interest holders: Persons who are not land owners but who have other land-based rights under formal or customary law such as tenants and easement holders, holders of informal rights such as spouses in de facto unions and unregistered owners, and owners of improvements and activities dependent on the land.

Art. 3: Competent authority with powers to expropriate people due to public interest

¹⁰ L'expropriation pour Cause d'Utilite Publique en France.

¹¹ Government of Kenya. 2012. The Land Act, 2012, No. 6 of 2012, Part VIII.

¹² Another option is to use the term “property owners” to refer to those who own either, the land, improvements or other property interests on the land, or both. Using this term would likely result in extending the government’s obligations of notice to include those with ownership interests in property related to the land but not the land itself. For that reason, this review suggests using the terms “landowners” and “other interest holders.”

This article describes the exclusivity of the government's power of expropriation and the limitations on the government's power. The article also prohibits landowners and others from opposing land expropriation. The authors recommend that the heading be revised to reflect the content of the article and the article reference the authorized avenues through which landowners and the public can challenge government action.

International best practice in expropriation legislation expressly includes the public's right to seek review of the government's planned exercise of its power of eminent domain. Establishment of effective procedures for challenging the government's planned expropriation serves dual objectives, by providing: 1) an important check of the exercise of government power against private property; and 2) a legitimate avenue for the public to channel its engagement in the process (versus other potentially disruptive types of action, such as protests).¹³ As such, development of a meaningful right of review and inclusion of the right within legislation helps protect against arbitrary and unconstitutional takings, thereby potentially enhancing tenure security and social stability.

The authors also recommend deleting the additional content: 1) regarding the landowners' obligations not to hinder activity in the public interest because this topic is covered more generally in the 2013 Land Law (art. 42); and 2) referencing a landowner's entitlement to compensation as that topic is best located in Chapter IV of this Draft Law. The suggestions are redlined below:

Art. 3: ~~Expropriation authority~~ ~~Competent authority with powers to expropriate~~ ~~people due to public interest~~

Only ~~the~~ Government ~~has the authority to acquire private land by expropriation.~~ ~~shall carry out expropriation.~~ ~~The Government must exercise its power~~

~~Expropriation as provided for in this law shall be carried out only~~ ~~In the public interest and~~ ~~with provide~~ ~~prior and fair compensation~~ ~~to owners of expropriated land, and other interest holders, as deemed appropriate.~~

No person shall hinder the ~~implementation of the program of~~ ~~exercise of Government expropriation authority for~~ ~~expropriation~~ ~~or any implementation of an expropriation plan or activity in the public interest, except through the avenues provided in this Law and other laws and legal instruments and institutions providing for review of Government decision and action.~~ ~~on pretext of self centered justifications.~~

~~No land owner shall oppose any underground or surface activity carried out on his or her land with an aim of public interest. In case it causes any loss to him or her, he or she shall receive fair compensation for it.~~

Identification of those entitled to fair compensation. For clarity, the Draft Law can add a new article here that identifies those persons that are entitled to fair compensation for

¹³ FAO, 2008, at 15-16.

expropriation. The following is suggested language, which distinguishes between the rights of landowners and the rights of other interest holders:

Article : Entitlement to fair compensation.

Landowners are entitled to fair compensation in the event of an expropriation of their land.

Other interest holders may be entitled to fair compensation in the event of an expropriation of land, in accordance with the provisions of this Law and any implementing regulations and procedures.

Persons and entities without any formal or customary legal property interest adversely impacted by an expropriation shall not have a right to fair compensation for an expropriation.

In the event that the Government would like to extend the Draft Law to cover partial takings (see section V), the rights of landowners and other interest holders in the event of a partial taking can also be set out in this article or a follow-on article dedicated to partial takings.

Art. 4: Funds for property valuation and fair compensation

This article requires project implementers to budget and provide funds for the process of valuing expropriated property and the payment of fair compensation. The only revisions recommended are to: 1) clarify that the project is not carrying out the expropriation; and 2) reword for clarity:

Every project, ~~at any level, that involves the expropriation of land in the public interest, as authorized and executed by the Government, must budget for and provide which intends to carry out acts of expropriation in public interest, shall provide adequate funds for the valuation of property for the establishment of the elements and rate of fair compensation assets of the person to be expropriated and payment of for fair~~ fair compensation ~~on its budget.~~

3.3 Draft Law, Chapter Two: “Acts in Public Interest”

In this Chapter, the phrase, “acts of public interest,” may not be the most precise choice of words to describe the kind of infrastructure projects and interests in natural resources that most often require expropriation of land (and are listed in Article 5). As an alternative, the items on the list (e.g., airports, biodiversity areas) in Article 5 might be described as “Activities and Areas in the Public Interest.” The headings would be revised as follows:

CHAPTER TWO: ACTIVITIES AND AREAS IN THE OF PUBLIC INTEREST

Art. 5: List of ~~act~~activities and areas in the ~~of~~ public interest

The list of activities and areas deemed to be in the public interest can be introduced with a statement that helps readers place the activities and areas of public interest within the overall conceptual framework.

For purposes of this Law, the following activities and areas are deemed to be in the public interest:

For clarity and to place the reference to minerals and natural resources within the same context as the other entries (and especially No. 12, which refers to areas of biodiversity and other natural resources), No. 22 can be revised as follows:

No. 22: Areas with valuable minerals and other natural resources in the public domain.

Art. 6: Acts of private interest

This article distinguishes between activities and areas of public interest, and those of private interest. As drafted, the article is confusing because it uses terms related to expropriation to describe private actors and activities. The revisions do not include the current statement that private actors can negotiate with landowners for the purchase of their land for a project because that right (and the obligations of private actors and rights of landowners that should apply to the exercise of that right) is not within the scope of the Draft Law. The following is a proposed revised version:

Art. 6: ~~Activities~~ of private interest

Activities designed and implemented by private actors to further private interests are not activities in the public interest and are not subject to this Law.

Private actors may be engaged in designing and implementing activities in the public interest. To the extent that private actors are engaged in designing implementing activities in the public interest that are subject to this Law, the private actors are also subject to this Law. ~~In any case, individual activities meant for private interests, particularly, shall not be referred to as activities aimed at public interest.~~

~~If necessary, the owner of the activities shall negotiate with the person to be expropriated and shall give him or her fair compensation in accordance with relevant laws and in consultation with competent authorities.~~

~~If it is clear that such individual activities are of public interest and the nation at large, they shall be considered as being in public interest, but the owners of the activities shall be liable for payment of charges for valuation of assets and of fair compensation of the person to be expropriated.~~

3.4 Draft Law, Chapter Three: “Competent Authorities, Procedures and Rights of Expropriated Persons and Expropriators for Public Interest”

This Chapter identifies the governmental bodies responsible for the expropriation process and the rights and obligations of landowners and other interest holders. Based on the discussion regarding the defined terms in Article 2, the authors recommend the chapter heading be revised to:

CHAPTER III: COMPETENT AUTHORITIES AND, PROCEDURES AND RIGHTS OF THEFOR EXPROPRIATIONED PERSONS AND THE EXPROPRIATORS FOR IN THE PUBLIC INTEREST

Turning to the substance of the chapter, Section One includes a new structure for authority over land expropriation. The section references committees and other governmental bodies at national, district, and City of Kigali levels that replace the role of the land commissions and are responsible for the: 1) initiation of an application for expropriation; 2) supervision of the process of expropriation; 3) evaluation of the expropriation process; and 4) approval of the expropriation. The Draft Law added the requirement of approval of the expropriation by a separate governmental body (District Council, Kigali City Council, or relevant Ministry), which strengthens the transparency of and governmental accountability for the overall process.

The changes made in the Draft Law lack some clarity in the description of the committees. It is unclear from the draft if the committees responsible for supervising the expropriation (Art. 7) are also the committees that evaluate the process (Art. 9) and whether these committees are separate from the Executive Committees and Ministry responsible for initiating the expropriation (Art. 8). It would be helpful for each separate set of committees to have a name so they can be distinguished from each other. In addition, the Draft Law should identify how the referenced committees relate to the Land Committees and District Land Bureaus described in Articles 32 and 33 of the 2013 Land Law.

Section Two, Articles 11 – 18, are dedicated to setting out the procedures for expropriation. Suggestions for revisions to this section are set out below.

Art. 11: Request for expropriation in public interest

For consistency, the heading for this article should use the term “application,” which is used in the body of the article and elsewhere in the Draft Law. The word “application” is more appropriate than “request” because an application implies a formal process.

This article contains a list of the information and documentation required to accompany the application for expropriation. The purpose of the submission is to provide the decision-makers with the relevant facts regarding the desired expropriation, the project context, the anticipated impacts of the expropriation and project, the affected populations, and other information necessary to make an informed decision.

Several of the items enumerated as part of the application are crucial to the determination of whether the expropriation is appropriate, but they lack a separate requirement in the law for their production and details regarding their contents. For example, “minutes indicating that

the concerned population was sensitized about the importance of the project” must be attached to the application.

However, the Draft Law does not contain a provision requiring that sensitization, identifying which body should conduct the sensitization, how the “concerned population” should be identified, or agenda items for the sensitization (such as an explanation of the population’s rights and obligations with relation to the process of land expropriation and the project) beyond a statement of the importance of the project. Similarly, there is no statement identifying who prepares the “explanatory note detailing that such requested land or place suits the project,” the definition of suitability, or how the judgment of suitability should be made.

In the environmental arena, the article states that the application should include a “document indicating that the project does not degrade the environment.” While the authors understand, that this reference likely refers to the requirement for an EIS for every project, as set forth in the 2005 Environmental Law, there is no indication in the article of the connection between a “document indicating that the project does not degrade the environment” and the EIS required by the 2005 Environmental Law.

The reference to the 2005 Environmental Law is important: a proper EIS contains a number of provisions in addition to a statement of anticipated environmental impact, including other project options and mitigating measures. That information will be important for the decision-makers to have in evaluating the appropriateness of the expropriation of land and the project overall.

The last item references a list of “beneficiaries of activities” on the land to be expropriated. This group is not defined and it is unknown whether the list includes landowners, individuals who hold secondary rights to the land (such as tenants or easement holders), or other individuals who benefit from the land under informal arrangements or practice (e.g., family members of rights holders, community members that use the land for livelihood purposes, such as fodder, etc.).

At a minimum, a list of all landowners (including spouses) who will have their land expropriated should accompany the application. There should, in addition, be a requirement for identification of any other interest holders and the nature of their interests. With that information, the government can decide who in addition to the landowners (if anyone) is entitled to fair compensation.

Social impact assessment. The information required for the application for expropriation does not include any information regarding the anticipated social impact of the expropriation and the project. A comprehensive social impact assessment is commonly required for large public projects that impact a substantial population.¹⁴ Even in smaller projects, some type of social assessment can provide decision-makers with valuable information about the anticipated impact on affected communities. That information can help guide the agendas for public consultations and ensure that efforts to engage the public are reasonably

¹⁴ Michael Cernea and Hari Mather, eds. 2008. *Can Compensation Prevent Impoverishment? Reforming Resettlement through Investments and Benefit-Sharing*. New York: Oxford University Press.

calculated to reach all members of the affected communities, including women, individuals who migrate for labor or are otherwise absent, and marginalized groups. The information can also help decision-makers judge whether the public purpose served is proportional to the private property rights lost through the expropriation, whether less invasive options are available or should be explored, and the elements of “fair compensation” that should be valued.

Art 12: Analysis of the basis of the project proposal for expropriation in public interest

This article might be combined with Article 15 so that the information regarding the analysis of the application for expropriation and the basis for the decision are together. Article 15 states that if the relevant committee finds that the project has a “sound basis,” it will submit it to the District Council, City Council, or Ministry for approval, depending on the location of the land expropriation. Neither Article 12 nor Article 15 state how the committee should evaluate the application materials, what standards the committee should use, or how they should determine if there is a “sound basis” for the expropriation.

Article 12 also requires the relevant committee to conduct a consultative meeting with the population living in the area where the land is located. There is no statement of the purpose of that meeting, the agenda for that meeting, what information the committee should gather during the meeting, whether the same people should attend the consultation meeting as who attended the sensitization meeting, how many committee members must attend, and how the committee members should evaluate the information gathered. Some of this information may be best placed in regulations or procedures governing the actions of the committees and other governing bodies, but the basic outline of the requirement (i.e., the purpose of the meeting and how the information gathered will be used by the decision-making body) should be included in the article.

Analytical Framework- As noted above, some of the necessary elements of the governmental analysis may be properly subjects for regulations or procedures. However, the Draft Law should include an analytical framework for determining the suitability of the expropriation. For those countries with laws that articulate standards, a process that considers the necessity of the project and its suitability under the principle of proportionality is common: the degree of loss of individual property rights must be proportional to the public interest asserted.¹⁵

Stated otherwise, a fair balance should be attempted between the general interests of the public served and the protection of private property rights.¹⁶ Thus, if a project will require expropriation of the land owned and invested in by a large number of people and it will bring minimal benefit to the public, it may not meet the standard of proportionality.

¹⁵ Gregory Alexander. 2006. *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence*. Chicago: University of Chicago Press; Alterman, 2010.

¹⁶ In Germany, for example, expropriation must be deemed to be necessary and the least intrusive means possible to accomplish the public goal and advance public interest. Alexander, 2006.

Art. 13: Exclusion of some members of the committee in charge of supervision of project of expropriation in public interest

This article and the following are important to avoid conflicts of interest. They more logically fit in Section One of this Chapter, which describes the committees and their responsibilities.

Art 14: Replacement of the committee in charge of supervision of project of expropriation in public interest

See discussion of Article 13.

Art. 15: Decision on the basis of a project of expropriation in public interest

See discussion under Article 12 and consider combining the two articles.

Art. 16: Approval of expropriation in public interest

This article refers to the responsibility of the District Council, Kigali City Council, or relevant Ministry to approve the application for expropriation. There is no information as to the standard that these governmental bodies should use to approve or reject an application, or the process they should use, including whether they can seek information in addition to that provided by the committee supervising the expropriation. As noted in the discussion of Article 12, the analytical framework and standard of review should be included in the law rather than reserved for regulations or separate procedures.

Art. 17: Publication of the decision on a project of expropriation in public interest

This article requires publication of the decision by radio and other media and posting of the list of land rights holders affected. The article states that other types of media can be used. Because property rights are impacted, the authors recommend that the governmental authority provide each property owner with written notice of the expropriation. That requirement is consistent with the requirement in the 2013 Land Law that property owners receive individual written notice of land confiscations (Art. 60).

The requirement is also contained in Kenya's law governing expropriation.¹⁷ The governmental authority can use the land registration record for addresses; if an owner is absentee, notice can be sent to the registered agent in addition to the registered owner, if different.

The individual notices should include the time limit for requesting review of the decision and information about the review process, which will make the process more accessible for women, marginalized individuals, and other landowners who for various reasons are less likely to be familiar with legal processes.

¹⁷ Government of Kenya, Land Law, 2012, at Art. 131.

Art. 18: The value of activities developed on land after the publication of the decision of expropriation in public interest

This article, which excludes any new improvements on the land made after notice of expropriation from calculation of fair compensation, prevents windfalls to landowners and is consistent with other expropriation laws and international good practice.¹⁸ The landowner is not prohibited from investing in his or her property in the interim period—just from making investments for which the government is obligated to provide compensation. The article may be best positioned in the chapter on valuation, after Article 26 or 27.

Section Three of the Draft Law, Articles 19-22, focus on the right for review. Landowners whose land is subject to expropriation can request review of three types of decisions under the Draft Law: 1) a decision in favor of expropriation; 2) the valuation of property and other interests for an award of compensation; and 3) the list of landowners who will have their property acquired. The governmental body conducting the expropriation can also seek review of a denial of an application for expropriation. In order to be consistent with the suggested revisions to the terminology discussed in the section of definitions, the heading of the section can be revised as follows:

Section Three: Rights of ~~review~~the expropriated persons and the expropriator

Art. 19: Request for review of the decision on expropriation in public interest

This article should state: 1) who has standing to request review of the expropriation decision (e.g., landowners only, secondary interest holders); 2) the form in which the request must be submitted (e.g., written request to the decision-making body); and 3) when the request for review must be submitted.

The article limits the basis for requesting review to: 1) whether the project serves a public interest; and 2) whether the land suits the project. The Draft Law does not define “suitability,” which limits the ability for any challenges on the second basis. The article also omits two important bases for challenge: environmental impact and impact on local communities.

A right to review does not dictate a particular result; the process does help encourage consideration of all desirable principles governing development and attention to all relevant facts. Environmental impact was included as a basis for review in the 2007 Expropriation Law. As discussed in the section of the report relating to the Preamble, the removal of the right of review based on the adequacy of the environmental assessment limits the public’s ability to raise legitimate challenges to the exercise of governmental power of expropriation.

Without the basis for review, the public is not only prohibited from challenging the EIS, but it is prohibited from asserting that the governance body failed to consider the contents of the EIS in reaching its decision. Without the basis for review, therefore, there is no check on the government’s exercise of power with regard to decisions impacting the environment. Such a

¹⁸ FAO, 2008.

result is contrary to the emphasis placed on environmental protection and sustainable use of natural resources in Rwanda law and the African Union Framework and Guidelines on Land Policy in Africa.

Similarly, the article does not permit review of the expropriation decision on social impact grounds. As discussed in the comments to Article 11, consideration of the anticipated impact of the expropriation on local communities is a critical part of the decision-making process and Government's determination of proportionality. Local communities, NGOs, and other interested parties must have the ability to ensure that the Government conducts appropriate social assessments and their findings meaningfully inform the decisions regarding an expropriation.

Requiring social assessments and granting the ability to challenge an expropriation action on that basis serves two objectives: to help ensure that the interests of local communities are considered in designing and siting development projects; and to help prevent the public from resorting to unconstructive and disruptive methods of challenging government action. Denying the opportunity for review of an expropriation decision based on the impact on local communities is contrary to the principle in the Framework and Guidelines on Land Policy in Africa to balance pro-poor priorities with market-driven development.

Art. 20: Request for review of the annulation of expropriation in public interest

This article allows an entity applying for expropriation to seek review from the governmental body that considered and denied the application. It would seem more meaningful for the review to be conducted by a separate and higher authority, as in the case of review sought by landowners. As with Article 19, the bases for review are similarly limited and the article does not state the form of the request for review.

Art. 21: Request for review of the list of people to be expropriated in public interest

This article is a new addition and a good step toward meeting standards of due process and accountability. The article could be strengthened by identifying what information an individual requesting a review of the list should provide and how the decision-making body will decide who will be on the final list.

The heading of this article should be revised with the more accurate terminology, such as:

Art. 21: Request for review of list of landowners and other interest holders.

Art. 22: Approval of the final list of those to be expropriated

This article is a new addition and another good step toward increasing accountability and transparency in governmental actions. The article could be strengthened with a requirement that the government send individual notifications to those whose land will be expropriated with the timing of the expropriation, the right to fair compensation, the valuation process, rules regarding interim improvements, and other rules and processes. Such individual notifications are consistent with methods of notification impacting land rights in the 2013 Land Law (Art. 60).

While this article follows chronologically from the expiration of the period for review as noted in Article 21, logically, the article is perhaps best situated between Articles 16 and 17 (final decision on expropriation and publication of the decision and list of affected landowners). The final list, like the approval of the expropriation, is still subject to review under Articles 19-21, and may be modified or reversed depending on the results of the review.

The title of this article should be revised with the more accurate terminology, such as:

Art. 22: Approval of final list of landowners and other interest holders.

3.5 Draft Law, Chapter Four: “Valuation of Land and Property Thereon and Award of Fair Compensation”

Chapter Four of the Draft Law addresses the valuation of land identified for expropriation and any other property interests related to the land. Section One: Valuation of land and property thereon, includes Articles 23 – 34.

Art. 23: Appointment of property valuers to carry out valuation of land and activities developed on land

This article, which requires use of professional valuers of real property, is an important change from the 2007 Expropriation Law, which did not identify what entity or persons could conduct the valuation. According to the Explanatory Notes, in practice, the governmental body requesting the expropriation conducted the valuations, which is an inherent conflict of interest.

The article can be further strengthened by requiring the certified real property valuers to use professionally accepted methods of valuation, which is international good practice.¹⁹ The article can also refer to Article 28 for the criteria the valuers must use in determining fair compensation.

Art. 24: Communication of the date of valuation of land and activities developed on land

This article states that the governmental body will communicate the date that the valuation will be conducted to landowners without identifying the method of notification. The requirement can be strengthened by requiring some form of notice that is reasonably calculated to reach all landowners. As noted above, the best method of communication, and the one referenced in the 2013 Land Law, is written notice prepared for each affected landowner.

For absentee owners, written notice should be sent to the owner’s registered address and to any identified local agent. In addition, as noted in Article 17 of this Law, notice can also be given by radio. If there are regions where there is a high likelihood these methods will not

¹⁹ FAO, 2008. Compulsory acquisition of land and compensation; Garner, 1975. Compensation for Compulsory Purchases: A Comparative Study. London: British Institute of International and Comparative Law.

reach all landowners and other interest holders, local government can work with local community leaders to ensure notice is received.

The statement requiring the valuation to take place within 45 days of the date of publication of the expropriation decision should be placed in Article 25, which addresses the process of valuation.

Art 25: Modalities for valuation of land and activities developed on land

This article should include the 45-day deadline currently in Article 24. In the second paragraph, absence of a landowner should be judged at the time of the valuation, not at time that notice of valuation was given.

Art. 26: Proof of ownership of land and activities developed on land for those to be expropriated

The heading for this article should be revised in accordance with the discussion relating to Article 2 and the definition of fair compensation. The following is a suggested revision:

Art. 26: Proof of ownership of ~~property~~land and activities developed on land for those to be expropriated

The title of the article is simplified to refer to owners of property, which includes land, improvements, and land-based businesses.

This article requires property owners and other interest holders produce their marriage certificates evidencing a marriage according to civil law. If drafters would like to extend protections and the possibility of compensation to those living in de facto unions recognized by customary law but without marriage certificates,²⁰ it can require identification of the members of the de facto union by declaration or other document.

The final line stating that squatters are not entitled to compensation should be addressed as part of the definition of interest holders at the beginning of the Draft Law (see Art. 2 and the proposed new article to follow Art. 3). The statement that no compensation is given for improvements made after the notice of expropriation is addressed in Article 18 (and recommended to move to Article 27) and should be deleted from this article.

Art. 27: Valued properties for fair compensation

As noted in the discussion of fair compensation in Article 2, the second category of property for valuation is broadly worded and ambiguous: “activities that were carried out on the land, including different crops, forests, any buildings or other activity aimed at efficient use of land or its productivity.” The authors recommend that the description of the types of property and activities valued for a determination of compensation be described with more particularity. A proposed revision is set out below:

²⁰ See Madina Ndingiza et al. 2013. Rwanda: Assessment of the Legal Framework Governing Gender and Property Rights in Rwanda. Kigali, Rwanda: USAID-Rwanda LAND Project.

Article 27: Valued properties for fair compensation

The properties to be valued for a determination of fair compensation for due to expropriation in the public interest are:

1. land;
2. improvements on the land, including buildings and other permanent infrastructure;
3. standing crops, perennials such as trees, forests; and
4. land-related activities that were carried out on the land including different crops, forests, any buildings or any other activity aimed at efficient use of land or its productivity.

In addition, an amount shall be paid compensation to landowning households for disturbance due to relocation required by the expropriation.²¹

Art 28: Criteria used to determine fair compensation

The criteria considered by valuers for compensating landowners for their property and activities (market rates, and the size, nature, and location of property and activities) are common to expropriation laws. Compensation includes valuation of any land-based businesses.²²

In assigning a set rate for compensating disturbance (five percent of the total value of the property), the Draft Law avoids the difficulty of calculating the impact of dislocation on a case by case basis. The rate provides reasonable consideration for relatively small projects and expropriations, where landowners and other interest holders may be able to relocate within the general area, thus experiencing relatively minor disruption to existing business and social relationships and requiring less onerous moving arrangements and resettlement time in the new location. Use of the percentage of the total value of the property recognizes that those with larger parcels and businesses will likely experience greater difficulty finding comparable land and re-establishing businesses to prior levels of activity.

In some cases, however, the estimate may not adequately address the disruption to livelihoods, as is the case where communities are moved to allow for large public works

²¹ This system of compensation is relatively common, and used in Ghana (W.O. Larbi. 2009. Compulsory land acquisitions and compensation in Ghana, in FAO, 2009, no. 1), Kenya (Kenya Land Act, 2012), Uganda (Uganda Land Act, 1998, Art. 77), and New South Wales, Australia (Land Acquisition (Just Terms Compensation) Act 1991).

²² This is a common method of valuation and included in Kenya's system of land valuation and Ghana's. Other countries using the system are included in Garner, 1975 and FAO, 2008. South Africa has a more comprehensive formula, which includes: consideration of the current use of the land; the history of acquisition and use of the land; the fair market value; the extent of state investment and subsidy in the acquisition and beneficial public improvement; and any possible loss of value resulting from a partial or material taking. Republic of South Africa. 2013. Draft Expropriation Bill (March 2013), Art. 6. http://www.jutalaw.co.za/media/filestore/2013/03/Draft_Expropriation_Bill.pdf

projects. In large projects where a substantial amount of land is required, communities may need to move quite a distance, and they may need to establish new business and social relationships, and travel further to jobs, schools, and to visit family members. In such cases, the basic provision for compensating disturbance might be supplemented with a statement addressing circumstances requiring significant relocation of a population for development of certain public projects, such as dams. In such cases, the law could require additional scrutiny by the decision-makers and consideration of alternative and additional types of compensation, such as benefit-sharing and rental agreements with the operators of the public utilities.²³

Art 29: Duration of the exercise of valuation of land and activities developed on land

Art 30: Submission of the valuation report

These two new articles provide important procedural requirements to strengthen the efficiency and transparency of the process of valuation.

Art 31: Approval and publication of the valuation report prepared by valuers

This new article also adds an important step to the valuation process. The process can be further strengthened by requiring the responsible governmental body to advise every affected landowner in writing of the valuation decision and provide instructions for how to accept the valuation and how to raise an objection to the valuation and the respective timeframes.

Art 32: Signing for fair compensation

This is a new article and an important requirement for a transparent and accountable procedure. The process could be strengthened by requiring the authority to give the landowner a copy of the signed document.

Art 33: Disagreeing with value given to land and activities developed on land

As with the article setting out the right to seek review of an expropriation decision, this article provides for an important right to challenge. As the article is drafted, the landowner disagreeing with a valuation decision must engage his own certified real property valuer to conduct an evaluation. The article does not state which party is responsible for the cost of the second valuation. If the landowner is responsible for the cost, it is unlikely that those with limited financial resources and less education and sophistication will dispute a valuation.

In order to make the right to seek review accessible for people who are poor and marginalized, the government should include information on how to obtain a second valuation in the valuation notifications provided and provide a second valuation at no cost to the landowner. In order to avoid the time and expense of automatic requests for second

²³ The text, *Can Compensation Prevent Impoverishment? Reforming Resettlement through Investments and Benefit-Sharing*, eds. Michael Cernea and Hari Mathur. New York: Oxford University Press, collects experience with different types of compensation schemes.

valuations, the government can tell landowners who wish to dispute the valuation that their compensation may be delayed for an additional period of time, such as 30-60 days after payment is due. The government should be required to deposit the funds for disputed valuations in a District account (as described in Article 37) until the final decision is made.

The heading for the article can be simplified as follows:

Art 33: Right to challenge valuation

Art 34: Analysis of the alterative valuation

This article is new and provides a procedure for handling alternate valuations. It is often difficult to adopt a fair and efficient procedure for selecting between two valuations. In this case, the same decision-maker reviews the original valuation and the alternate valuation and selects one. If the landowner is not satisfied, the remedy is a court action. This procedure for review does not create much opportunity for an unbiased second consideration of the evaluation, yet opens the door to corruption because the same decision-maker conducts the review. The remedy of a court action is unlikely to be pursued by anyone except wealthy and sophisticated landowners, limiting the accessibility of the process.

For those reasons, commentators suggest that when there are two valuations conducted by legitimate valuers, the government adopt the valuation that favors the landowner.²⁴ As an alternative, the procedure might include the engagement of an independent third valuer to review the competing valuations and make a decision—a process that is often used in alternative dispute resolution systems when the arbitrators selected by the parties reach different decisions. A third option is to use a panel of local traditional authorities who are trained in the standards for land expropriation to resolve a dispute through mediation or another form of alternative dispute resolution with social legitimacy (see also Article 37 below).

Section Two of the chapter focuses on compensation and includes Articles 35 – 37.

Art 35: Payment of fair compensation

This section allows the governmental body responsible for the expropriation and the affected landowners to agree to an “in kind” substitution for a monetary payment of fair compensation. The provision for the “in kind” alternative based on the agreement of the parties and the provision of fair compensation prior to the land expropriation and any resettlement are all commonly accepted elements of expropriation laws.

The statement regarding time for payment of fair compensation should be moved to the next article, which addresses that topic.

²⁴ FAO, 2008.

Art. 36: Time for payment to the person to be expropriated

The heading for this article should be revised to omit the reference to expropriation of persons. The following can be used:

Art. 36: Timing of payment of fair compensation

The third statement in this article relates to relocation and should be placed in a new article entitled, “Land transfer, land possession, and relocation.” The new article should state:

- When the transfer of landownership from the private landowner to the government takes place (especially in relation to when the payment of fair compensation or provision for alternate property is made)²⁵;
- What rights the landowner has after the expropriation decision is finalized and before the landowner receives fair compensation and the land is transferred ; and
- Any applicable time limits.

In the last category (applicable time limits), the current statement in Article 36 can be revised as follows for increased clarity:

A landowner must turn over his or her possession of the expropriated land within Subsequent to receiving fair compensation, the expropriated person has a period that does not exceed ninety (90) days of receipt of fair compensation to relocate.

Art. 37: Mode of payment for fair compensation

This article provides protections for landowners receiving monetary compensation that are in addition to those contained in the 2007 Expropriation Law.

In cases where landowners dispute the valuation of their land, improvements, and activities, the article requires the government to deposit of the amount of compensation for fair compensation in the account of the District authority until the dispute is resolved. If co-owners, spouses, or other persons who share the expropriated land do not agree on how the funds received for the expropriation should be shared among themselves, the government shall deposit the contested funds into the District account.

The Draft Law currently states that in some disputes the amounts deposited with the District shall be retained pending a court decision. In other cases, those with confirmed interests in the funds can withdraw sums with written permission from others who have interests in the funds. This section can be simplified to: 1) improve the rights of women and marginalized

²⁵ Under Kenya’s law, for example, the expropriated land vests in the government upon taking possession and payment of just compensation in full to the landowner. Government of Kenya, Land Act, 2012, at Art. 120. At the other extreme, in New South Wales, Australia, the landowner’s rights to land transfer to the Crown when the notice of acquisition is approved by the governor and published; at that point, the landowner’s interest converts to a claim against the Crown for compensation. Victor Mangioni. 2008. The epistemology of value in the assessment of just compensation, in FAO, 2008, 47-55.

landowners who may not be in a position to bring an action in court; and 2) limit the District government's responsibility for verifying the legitimacy of an individual's claim to funds on an ongoing basis and otherwise acting as a banker. The law could require a District-level governing body to attempt to resolve disputes through mediation or other alternative dispute resolution techniques.

The law should allow for the disputing parties to seek review of the District-level decision by a higher administrative body, if possible, before they must assert their rights in a formal court. Once the dispute has been resolved and rights to review and appeal exhausted, the District authority can distribute the funds.

The heading for this article should be revised to reflect the scope of the article. The following is an example:

Article 37: Payment of fair compensation, District-level account, and alternative dispute resolution

3.6 Draft Law, Chapter Five: "Miscellaneous, Transitional, and Final Provisions"

Art. 38: Rights of person whose land was confiscated due to degradation or inexploitation

This article, which was also part of the 2007 Expropriation Law, addresses the circumstance where land confiscated by the government under the 2013 Land Law because of degradation or underutilization. In the 2007 Expropriation Law, the disqualification of landowner for an award of compensation for the expropriation of land was mandatory; in the Draft Law, there is an implication of disqualification.

Neither the 2007 Expropriation Law nor the Draft Law referenced the rights of a landowner in the event that the land was requisitioned at the time of the expropriation. This revised version below suggests a presumption that an owner of requisitioned land has a right to fair compensation because the owner has a right to resume possession. The revisions retain the Draft Law's suggestion of a presumption that owners of confiscated land are not entitled to payment of fair compensation if the land is expropriated:

There shall be a presumption that a landowner whose land has been requisitioned under Article 52 of Law No 43/2013 of 16/6/13 Governing Land in Rwanda shall be entitled to fair compensation for the land in the event that the requisitioned land is expropriated in the public interest. There shall be a presumption that a landowner whose land has been ~~Land-confiscated~~ due to degradation or inexploitation as provided for in items 1°, 2° ~~and° and~~ 4° of the article 58 of the law No 43/2013 of 16/6/2013 governing land in Rwanda shall not be entitled to imply that the person whose land was confiscated has lost all rights to fair compensation for the land in the event that the confiscated land is ~~given during-expropriated~~ in the public interest.

The presumption against qualification for compensation reflects the permanence of confiscation of the land yet allows for the possibility of a landowner asserting continuing

rights to the land under some circumstances, such as an abuse of government authority under Article 58 of the Land Law.

The revised article can have a revised heading:

Art. 38: *Rights in event of land requisition and confiscation*

Art. 39: Drafting, consideration and adoption of this Law

Art. 40: Repealing provision

Art. 41: Commencement

These final three articles are appropriate and well-drafted.

4.0 ADDITIONAL CONTENT

As noted in Section III and at various places in the review of the Draft Law in Section IV, drafters may wish to consider the following additions to the Draft Law:

4.1 Partial takings

A partial taking occurs when government action taken in the public interest burdens a landowner's interest in his or her land, but does not cause a complete dispossession. Some countries, such as France and Greece, grant landowners little or no right to compensation for partial takings. Other countries, such as Kenya, Germany, Sweden, and the Netherlands, provide for compensation for some loss of value experienced by landowners in some circumstances.

In Kenya, for example, the government compensates a landowner for damages done to the land, improvements, and activities such as crops, and a sum for lost profits traceable to the partial taking.²⁶ A specific statement whether the rights of landowners for compensation apply in the event of a partial taking and any compensation available will clarify whether Rwanda recognizes a right and attendant remedies.

4.2 Restitution

International good practice supports a requirement that, in the event that the government's plan requiring the land expropriation fails to materialize or is limited in duration, the landowner at the time of the expropriation shall have a preemptive right to purchase the land.²⁷ For example, in Ghana, if the government does not proceed with a project as planned, it must give the landowner at the time of the expropriation a right of first refusal to purchase the land.

²⁶ Government of Kenya, Land Act, 2012, Art. 126(b).

²⁷ FAO, 2008.

The purchase price is either the compensation paid to the landowner by the government, or based on the value of the land at the time of repurchase.²⁸ This type of provision helps protect against arbitrary action by government—or the perception of arbitrary action—by limiting the government’s ability to acquire land for uncertain projects or to benefit from related land speculation. Such provisions may increase tenure security and a sense of the legitimacy of government action in the minds of the public.

5.0 SUMMARY TABLE AND CONCLUSION

5.1 Summary Table of Recommended Revisions

The following table provides a summary of the primary suggestions for revisions to the Draft Law.

| Article | Topic | Suggested revision |
|----------|---|--|
| Preamble | Informing legislation | Include references to the constitutional requirement of nondiscrimination and obligations regarding environmental protection in the 2005 Environmental Law in the body of the Draft Law |
| 1 | Purpose statement | Add more accurate statement of purpose |
| 2 | Definitions | Substantial changes in definitions suggested to meet standards of clarity and relevance |
| 3 | Expropriation authority | Revise to reflect balance between governmental power and private property rights and right of review of governmental decision-making |
| New | Entitlement to fair compensation | Add clear statement of who has rights to compensation |
| 4 | Funds for valuation and fair compensation | Revise for clarity |
| 5 | List of activities and areas in the public interest | Revise for clarity and accuracy |
| 6 | Private activities | Revise for clarity and eliminate irrelevant content |
| 7-10 | Government authorities | Clarify the composition of the various government bodies operating at the various levels and the connection between those bodies and the commissions and Land Board identified in the 2013 Land Law. |
| 11 | Request for expropriation | Substantial changes in content suggested, including substantive provisions requiring the government to conduct various assessments. |

²⁸ Government of Ghana. 1992. Constitution of the Republic of Ghana. Art. 20(6). South Africa’s Draft Expropriation Bill (March 2013), has a similar provision, although the Government has discretion whether to offer the land to the former landowner before seeking other buyers. Government of South Africa. 2013. Draft Expropriation Bill, Art. 4(12) (c).

| Article | Topic | Suggested revision |
|----------------|---|---|
| 12 | Analysis of application for expropriation | Substantial changes in content suggested, including development of an analytical framework to guide decision-making |
| 13-14 | Exclusion and replacement of members | These are the conflict of interest section, which can be moved to Section One. |
| 15 | Decision on basis of project | This article can be combined with Art. 12 and has the same issues as discussed with Art. 12. |
| 16 | Approval of expropriation | As with At. 12, there should be an analytical framework provided to guide decision-making. |
| 17, 22, 24, 31 | Publication of decision on expropriation | Add requirement of individual written notice to landowners and, as indicated, notice to authorized agents of absentee owners. |
| 18 | Value of activities developed after notice of expropriation | Clarifies that landowners may continue to invest in land but cannot seek reimbursement from the government for investments. |
| 19 | Request for review of expropriation decision | Substantial changes in content suggested to broaden the bases on which a person can request review and provide more details on the process. |
| 20 | Request for review of denial of application | Suggests providing right of review before a higher authority than the official denying the application. |
| 21 | Request for review of list of landowners affected | Suggest addition of basis on which a person can seek review of the list. |
| 23 | Appointment of valuers | Add requirement that valuers use professionally accepted methods of valuation. |
| 25 | Modalities of valuation | Include deadlines from Arty. 24 and revise time absence judged. |
| 26 | Proof of ownership of land, improvements, and other land-related activities | Recommend that the article address all owners of property affected by the expropriation, and consider permitting evidence of de facto unions. |
| 27 | Value properties for fair compensation | Clarifies the categories of property that will be valued for purposes of determining fair compensation |
| 28 | Criteria used to determine fair compensation | Additional section recommended for more significant disturbances to local communities. |
| 32 | Signing for receipt of compensation | Add requirement that signatory receives a copy. |
| 33 | Disagreeing with value given | Revisions of procedures for handling request for second valuation; change in heading |
| 34 | Analysis of alternative valuation | As with Art. 33, revised procedures for handling second valuation request. |
| 36 | Time for payment | Revision to heading |
| New | Land transfer, land possession, and relocation | New article proposed to address the land transfer |

| Article | Topic | Suggested revision |
|---------|--|--|
| 37 | Mode of payment of fair compensation | Revisions to address issues of disputed payments, use of District-level alternative dispute resolution process |
| 38 | Right of person whose land confiscated | Revisions to distinguish between confiscation and requisitioned land and rights of the landowner. |

In addition to the suggestions above, the review also noted that the Draft Law will be strengthened by inclusion of provisions relating to partial takings and any right of restitution.

5.2 Conclusion

The Draft Law took several meaningful steps toward increasing the accountability of the government in expropriation processes. The revisions suggested in this review build and expand on those efforts. The review identifies a number of areas in the Draft Law that might be strengthened by some additional procedural protections and clarification of language. Primarily, however, the review focuses on creating broader legislative basis for establishing a balance between the government's legitimate need to exercise its authority to expropriate land in the public interest and the rights of private property owners.

Maintaining that balance between public need and private rights will be essential to Rwanda's ability to manage development effectively and in the interests of all its citizens in the decades ahead. A well-drafted expropriation law can help support the government's need to construct infrastructure and invest in development serving public purposes while protecting property rights and environmental interests. Perhaps as important, the institutionalized procedures for seeking review of government action can help increase the accessibility of governmental institutions and reinforce the value of using formal, democratic systems to challenge government action.