Non-Citizens and Land Tenure in Kenya:

Land Acquisition for Investment in a New Constitutional Era

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Abstract

The acquisition of land by foreigners in developing countries has emerged as a key mechanism for foreign direct investment (FDI). FDI is defined by the Organization for Economic Cooperation and Development (OECD) as the category of international investment that reflects the objective of a resident entity in one economy to obtain a lasting interest in an enterprise resident in another economy. With land as a significant basic factor of production, the entry of FDI in most countries often requires a non-citizen investor to engage with public authorities and private citizens on the acquisition of rights over land for investment purposes. Foreign acquisition of land in developing countries, such as Kenya, has been there, since colonial times. In the context of this research, the term land acquisition is applied to include actual purchases or leases of land by foreign or non-citizen entities, for purposes of investments. This is an important issue for Kenya, due to new constitutional rules that create restrictions on landholding by non-citizens (legal or natural), as part of ongoing land reforms. It is important to explore this element in the context of land requirements for investment purposes because the demand for such land is increasing. In any event, the constitution needs to protect local communities where any public land is set aside for local or foreign investment purposes. This research focuses on foreign or non-citizen investments. It aims to propose a policy or legislative process that will only permit investments that are beneficial to the economy and the people of Kenya.

Executive summary

The role of Foreign Direct Investments in a developing country's economy cannot be gainsaid. Neither can constitutional rules that seek to control and regulate the category of land, and nature of land rights that foreign investors can access. This is the twin scenario that the laws, economy, and people of Kenya, must address in order to guarantee an economically sustainable future for the country, and uphold the rule of law. Article 65 of the 2010 Constitution placed fetters and restrictions that limit the entitlement of non-citizens (legal or natural persons) to hold land in freehold, or leases exceeding 99 years. In the first instance, the constitution sought to convert any such pre-existing foreign-held land into leases not exceeding 99 years. In the second instance, the constitution anticipated that any land held by non-citizens in the future would have to adhere to the constitutional criteria.

The latter concern is important because the constitution, in addition to the restrictions, provides criteria for determination of the citizenship status of corporate bodies. Under these criteria, a body corporate that is not wholly controlled by citizens, is a non-citizen, and therefore subject to the restrictions. With the demand for land for foreign direct investment increasing over the years, particularly for agriculture, mining, and other industrial purposes, it is imperative for the law and policy to explore how to ensure that the availability of such land is aligned to the constitution, statutory law and other national interests. Section 12 of the *Land Act, 2012,* requires the National Land Commissions (NLC), as the overall custodian of public land, to set aside land for investment purposes, and to secure the economic interests of the local communities. This research addresses the concerns that the NLC should bear in mind when seeking to implement section 12, in the context of the constitution, and makes the following key recommendations:

1. In setting aside land for investment purposes, the NLC should be guided by the development and sustainability priorities of the national, and county governments
2. The NLC should ensure that any process that requires compulsory acquisition of private or community land fulfills the test of a public purpose or public interest

3. The law on community land, upon enactment, should provide guidelines for protection of the interests of members of a community (particularly group representatives) when reaching investment agreements with any foreign or local investor
4. There should be, in accordance with article 10 of the constitution, a procedure for effective and constructive public participation in the determination of the particular public land to be set aside for investment by the NLC. This will ensure full participation by the Kenyan public, especially the local community whose interest must be secured in any such investment
5. The NLC must integrate requirements of sustainability, including application of broad policy instruments such as Environmental Impact (EIA) and Strategic Environmental Assessment (SEA) before permitting investments on public land. Similarly, the NLC should ensure that local livelihoods and the ecosystem are protected, by ensuring that rules on allocation of water rights are equitable, and that foreign investments in land include legal commitments on local transfer of technology and building capacity
6. The NLC should consider harmonizing its role over allocation of land for foreign investments, with the functions of the Kenya Investments Authority (KenInvest) which undertakes a holistic assessment on the suitability of any foreign investment to Kenya. This would require KenInvest to function as an agent of the NLC, and assess the land requirements of any foreign investor based on the criteria developed by the NLC.
7. The rules for determination of the citizenship of corporate bodies under Kenyan law should be harmonized. This will enable, for instance, the KenInvest to apply the criteria of absence of foreign ownership (absolute domestic control), as a basis to determine that a corporation is a non-citizen, and therefore subject to constitutional restrictions on land ownership. Under current rules, the *Investment Promotion Act* classifies a foreign investor to include companies incorporated outside Kenya, which is at odds with the constitutional classification.

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List of abbreviations

FDI	Foreign Direct Investment
OECD	Organization for Economic Cooperation
PDS	Private Sector Development Strategy
GDP	Gross Domestic Product
WFP	World Food Programme
FAO	Food and Agriculture Organization
NLC	National Land Commission
ICSID	Convention of the International Centre for Settlement of International Disputes
EAC	East African Community
SWFs	Soveriegn Wealth Funds
QIA	Qatar Investment Authority
GLA	Governmenr Lands Act
LAPSSET	Lamu Port Southern Sudan Ethiopia Transportation Corridor
MTF	Medium Term Framework
SEA	Strategic Environment Assesment
EIA	Environment Impact Assesment
Ken Invest	Kenya Investment Authority

1 Introduction to the study

The acquisition of land by foreigners in developing countries has emerged as a key mechanism for Foreign Direct Investment (FDI). FDI is defined by the Organization for Economic Cooperation and Development (OECD) as the category of international investment that reflects the objective of a resident entity in one economy to obtain a lasting interest in an enterprise resident in another economy.[1] With land as a significant basic factor of production, the entry of FDI in most countries often requires a non-citizen investor to engage with public authorities and private citizens on the acquisition of rights over land for investment purposes. Foreign acquisition of land in developing countries, such as Kenya, has been there for many years, since colonial times. In the context of this research, the term land acquisition is applied to include actual purchases or leases of land by foreign or non-citizen entities, for purposes of investments. For ease of reference, the terms non-citizen and foreign, are applied interchangeably.

1.1 Statement of the problem

Foreign direct investment typically contributes to, among others, the role of the private sector in development of any country's economy. In Kenya, the private sector is reported to contribute over 80% of the GDP, a substantial percentage of total employment, and the bulk of export earnings.[2] The major growth sectors are trade, restaurants and hotels; agriculture, manufacturing, finance, insurance, real estate and business support services; and transport, communications and storage.[3] While acknowledging that most large firms in the private sector are subsidiaries of foreign multinational companies, the first (2006-2010) Private Sector Development Strategy

1 See, http://stats.oecd.org/glossary/detail.asp?ID=1028

2 Kenya Private Sector Alliance (KEPSA), 2005 *Private Sector Development in Kenya*, KEPSA, Nairobi, p. 2

3 Ibid

for Kenya[4] strongly argued for strengthening the role of private sector because "while pursuing their corporate interests, businesses will respond to incentives created through the PSDs, not only to meet their profit goals, but also to help Kenya reduce poverty and enjoy a higher economic growth rate."[5] This importance of the private sector, including foreign investors, is heightened by their contribution to key sectors that rely on land, such as industries and tourism, among others. Notably, the draft National Policy on Industrialization acknowledges that the availability of adequate and accessible industrial land is a crucial factor in the location of industries but decries the fact that the cost of industrial land is quite high owing to speculation and lack of direct government intervention in the provision of industrial land.[6]

This challenge on availability of land for investments has a bearing on the efficacy of securing critical foreign investments for the country, particularly to fulfil core *Vision 2030* objectives. *Vision 2030*, the principal development master-plan for Kenya until the year 2030, acknowledges the critical impact of land administration and management to its socio-economic and political objectives.[7] The 2008-2012 medium-term strategy for *Vision 2030* reveals that huge disparities exist with regard to ownership of land in the country, particularly in high potential regions where a few individuals own large tracts of land (most of which is idle), while a large number are squatters without any land, mainly due to a slow and inefficient process of land adjudication and registration, that covers only one-third of the country.[8] This is important because some key objectives of *Vision 2030* involve construction of flagship projects, such as resort cities and technology towns (Konza City),[9] all which involve acquisition of public or private land, potentially by foreign investors.

Mining and mineral extraction, including petroleum, is another emerging economic sector in Kenya. Although about 90% of Kenya is geologically mapped and mineral occurrence documented, the mining industry is not significantly developed.[10] In

4 Kenya, 2006, *Private Sector Development Strategy 2006-2010,* Ministry of Trade, Nairobi, p. xi
5 Ibid, p. ix
6 Kenya, 2010, *National Industrialization Policy (Final Draft),* Ministry of Industrialization, Nairobi, p. 34.
7 Kenya, 2007, *Kenya, Vision 2030 (Popular Version),* Republic of Kenya, Nairobi, p. 9
8 Kenya, 2008, *First Medium-Term Plan – Vision 2030,* Ministry of State for Economic Planning and *Vision 2030*, Nairobi, pp. 34-35
9 See for instance the proposal, in the medium-term period, to construct three resort cities (two at the coast, and one in Isiolo) in *Kenya, Vision 2030 (Popular Version),* p. 10
10 Robert Kibugi, "Mineral Resources and the Mining Industry in Kenya" in Charles Okidi; Patricia

this context, the 2011 Draft Mining Policy proposes to encourage local and foreign private sector participation in the mining sector, including the facilitation of land access.[11] However, in recent months, the government has announced the discovery of petroleum in Turkana County to the north of Kenya by a foreign investor, Tullow Oil of the United Kingdom.[12] Media reports further say that large scale coal mining is about to commence in the Mui Basin of Kitui County, led by a foreign investor from China.[13]

The agriculture sector, which contributes 51% to the national GDP annually, also contributes 65% of Kenya's exports,[14] 55% of these exports arising from the main industrial crops such as tea, coffee, sugar cane, cotton, sunflower, pyrethrum, barley, tobacco, sisal, coconut and bixa.[15] According to the 2012 Draft National Irrigation Policy, Kenya has an irrigation potential of 539,000 ha of which only 129,000 ha of irrigation have been developed, and there is a potential to increase irrigation to 1.3 million ha.[16] This is important, in context of this study, for two reasons: First, the bulk of agricultural produce in Kenya is produced through irrigation;[17] second, the draft policy reiterates that the role of the private sector is crucial in irrigation development and management in order to hasten sustainable growth of irrigation sector.[18] Indeed, the *Draft Irrigation Bill* proposes to require the Cabinet Secretary to "provide and enhance incentives to private commercial farms … to utilize high technology and produce high-value crops for the export market, especially flowers and vegetables."[19] This policy direction in terms of agriculture

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Kameri-Mbote & Migai Akech (eds) 2008, *Environmental Governance in Kenya: Implementing the Framework Law,* East African Educational Publishers, Nairobi, p. 357

11 Kenya, 2010, *National Minerals and Mining Policy (Final Draft),* Ministry of Environment and Mineral Resources, Nairobi, pp. 10-11

12 See Press Statement of 26 March 2012, by State House Nairobi: "Kenya Discovers Oil, President Kibaki Announces," which quoted the President as stating that the breakthrough in Oil exploration was made by Tullow Oil, a company which has been prospecting for oil in block 10 BB in Turkana County. http://www.statehousekenya.go.ke/news/march2012/2012260301.htm

13 One Newspaper, The Standard, reported that "Two bids that were submitted by Fenxi for block C and block D were the most financially and technically compliant." See, The Standard "Government picks Chinese firm Fenxi for coal mining" 12 December 2011. http://www.standardmedia.co.ke/archives/InsidePage.php?id=2000048237&cid=14&j=&m=&d=

14 Kenya, 2010, *Agriculture Sector Development Strategy,* Ministry of Agriculture, Nairobi, p. xi

15 Ibid, p. 13

16 Kenya , 2012, *Draft National Irrigation Policy,* Ministry of Water and Irrigation, Nairobi, p. 4

17 Ibid

18 Ibid, p. 21

19 Draft Irrigation Bill, 2012, see section 18(3) – "Management of National Irrigation Schemes."

and irrigation, and the role of the private sector is important to this study because foreign acquisition of land for agriculture investments has, in recent years, increased significantly in developing countries, including Kenya. Indeed, in the African continent, it is estimated that between 15 and 20 million hectares of farmland has changed hands since 2006.[20]

In the West African state of Mali, foreign direct investments in land have dramatically increased since 2007, covering an average 130,105 ha of land by 2009.[21] The main reasons are the search for alternatives for fossil fuel, through biofuels, and the global food crisis in 2008. Foreign governments and private companies have intensified investments in agricultural land in poor countries for the production of oil-producing crops as well as for the production of food.[22] In July 2009, the government of Ethiopia reportedly marked out 1.6 million ha of land, extendable to 2.7 million, for investors willing to develop commercial farms.[23] In Kenya, already the government (through the County Council of Siaya) has granted a concessional lease to Dominion Farms, an American company, over 20,000 acres for 25 years, over the valued and expansive Yala Swamp.[24] In 2009, it was widely reported in the media that Kenya would lease out about 100,000 acres of land in the Tana River Delta (another wetland) to the Gulf State of Qatar for agriculture at a time when the country was facing serious food shortage[25] In contrast, a lot of the African countries that openly welcome foreign land acquisitions for agriculture are so acutely food-insecure that they depend on aid from the World Food Program (WFP).[26] Ethiopia, for example, is reported to receive $116 million in WFP food aid—not much more than the $100 million Saudi Arabia is paying Addis Ababa to grow grains on Ethiopian farms for Saudi consumption.[27]

20 Lorenzo Cotula and Sonja Vermeulen "Deal or no deal: the outlook for agricultural land investment in Africa" International Affairs 85: 6 (2009) 1233–1247, p 1234

21 Aly Diallo, Dr. Godihald Mushinzimana *Foreign Direct Investment (FDI) in Land in Mali* Work of Division 45 - Agriculture, fisheries and food, GTZ, 2009, p. 6

22 Ibid

23 Lorenzo Cotula and Sonja Vermeulen "Deal or no deal: the outlook for agricultural land investment in Africa" p 1234

24 See explanation by Friends of Yala Swamp: http://www.friendsofyala.or.ke/index.php?option=com_content&view=article&id=6&Itemid=2

25 "Kenya, Qatar land deal questioned" Capital Business (Nairobi)19 May 2009

26 Michael Kugelman, "Introduction" in Michael Kugelman and Susan L. Levenstein (eds) 2009 LAND GRAB? The Race for the World's Farmland Woodrow Wilson International Center for Scholars, Washington, D.C. p. 10

27 Ibid

The search for economic opportunities for development in Sub-Saharan African countries such as Kenya, and the evolving dynamics of foreign direct investments heighten the need to evaluate the law and policy framework on availability, and acquisition of land by non-citizen or foreign individual, and corporate investors. Against a background of a mainly rural-farming population, and insecure land tenure rights, examining the current frameworks, and proposing changes on how foreign investors can acquire land for various activities is urgent. In Kenya, this urgency is heightened by article 65 of the 2010 Constitution which prohibits non-citizens from owning freehold land, and limits the maximum period for land leases held by non-citizens to 99 years. Article 65(4) requires the enactment of a legislative framework to regulate non-citizen acquisition of land for various purposes in Kenya. It is the aim of this study to identify the key legal and policy challenges and opportunities that such a framework should pay attention to, in order to ensure that acquisition of land for investments by non-citizens contributes to the national development priorities of Kenya, including the goal of sustainable development.

Scholars Meinzen-Dick and Markelova analyse the often polarized debate on foreign land acquisitions for investments. Although their analysis is focused on agricultural land deals only, the concept provides a normative basis for analysis in a broader context. They argue that there are potentially two schools of thought about foreign acquisitions over agricultural land.[28] One school of thought regards “beneficial investment” whereby investors are viewed as bringing needed investment, possibly improved technology or farming knowledge, thereby generating employment and increasing food production. Another school of thought refers to “neo-colonial land grab” whereby foreign investors are viewed as expropriating local land with little local input, and growing crops that are exported directly, even when local people do not have enough to eat.[29] Meinzen-Dick and Markelova further argue that because these foreign land acquisitions are ongoing, at a very fast, rate, it is necessary for host countries to focus on what they can do to seize the opportunities and mitigate

28 Ruth Meinzen-Dick & Helen Markelova Necessary Nuance: Toward a Code of Conduct in Foreign Land Deals in in Michael Kugelman and Susan L. Levenstein (eds) 2009 LAND GRAB? The Race for the World’s Farmland Woodrow Wilson International Center for Scholars, Washington, D.C. p. 69

29 Ibid, p 75

the risks associated with the deals. It is this latter approach that this research has adopted in seeking to explore policy options for Kenya, that could facilitate framing of a law to regulate non-citizen land acquisition for investments.

The foregoing analysis therefore provides an important window to review the law and policy framework governing foreign direct investments, as well as land law. This review is necessary to enable developing countries such as Kenya, which already have to contend with historical non-citizen ownership of large tracts of freehold or long-term (up to 999 years) leases for various commercial purposes, to make decisions on the direction of law and policy, going forward. This research contends that a proactive approach, which seeks to put in place a sound policy framework, and implement constitutional imperatives, will equip Kenya to take advantage of the global economic dynamics that are accelerating the foreign land acquisitions for investments, in a diversity of sectors including agriculture, petroleum, minerals, industrial uses, and services.

1.2 Objectives of the research

The principal research objective is to inquire into the legal or policy dimensions that, in light of the 2010 Constitution, would underpin a legal framework on acquisition of land by non-citizens. The research is guided by the following specific objectives –

(i) To review the current policy and legislative criteria for non-citizen acquisition of land for investments in Kenya, and

(ii) To explore the legislative and policy options arising from the provisions of the 2010 Constitutions that can ensure allocation of land for investments by non-citizens is undertaken in the interest of the sustainable development of Kenya.

1.3 Research methodology

This research is designed and undertaken as a qualitative survey that was informed by extensive desk review of literature, laws, policies and other secondary information from Kenya and other comparable jurisdictions. The legal research has undertaken extensive section-level literature review of primary and secondary literature including the constitution of Kenya 2010; various statutes and regulations; and legal and other

scholarly literature. This conceptual legal research involved field research based on open-ended interview guides with public officials from state agencies working on investments, particularly by non-citizen entities. The interview findings have been applied qualitatively, as appropriate, to either prove or disprove the applicability or suitability of legal or policy provisions.

2 Reviewing the nature and function of land tenure in land acquisitions

In this section, the research examines the primary role of land tenure in the discourse on rights of non-citizens to acquire land for investments in Kenya. It is on the basis of land tenure that a decision could be reached on whether a certain category of land is available for non-citizen acquisition, as well as the breadth of rights that a non-citizen holder could exercise. Indeed, under the Constitution of Kenya, restrictions have been imposed on the rights of non-citizens to hold freehold tenure, or leasesholds exceeding 99 years in length.

2.1 Nature and function of land tenure

Land tenure is important because it normally defines methods by which individuals or groups acquire, hold, transfer or transmit property rights in land. It has to do with how rights to land and other natural resources are assigned within societies, and just as it determines *who* holds *what* interests in *what* land.[30] According to the Food and Agriculture Organization of the United Nations (FAO),[31] the breadth of tenure rights in land may comprise three elements, mainly (a) use rights (to use the land for grazing, growing subsistence crops, gathering minor forestry products); (b) control rights (to make decisions how the land should be used including deciding what crops should be planted, and to benefit financially from the sale of crops);

30 Patricia Kameri-Mbote, "The Land has its Owners! Gender Issues in Land Tenure under Customary Law" (Paper presented at the UNDP-International Land Coalition Workshop: *Land Rights for African Development: From Knowledge to Action* Nairobi, October 31 – November 3, 2005) at 6. See also, Kameri-Mbote, "Land Tenure and Sustainable Environmental Management," *supra* note 23 at 262.

31 Food and Agriculture Organization (FAO), 2002, *Land Tenure and Rural Development* (FAO Land Tenure Studies 3: Rome, pp. 9-10

and (c) transfer rights (right to sell or mortgage the land, to convey the land to others through intra-community reallocations, to transmit the land to heirs through inheritance, and to reallocate use and control rights). This content of tenure rights highlights their utility in the context of decision making on how the land should be utilized, and the breadth of rights allocated to a landholder therefore defining how much authority they possess over the land. This is an important aspect in proposing to govern or regulate the rights of non-citizen corporations over land ownership and use, including the permitted activities, the power of disposition; and the reversionary right of the state upon expiry of the tenure period.

2.1.1 Categories of land under Kenyan law

In addition to the breadth of rights deriving out of tenure entitlement, highlighted above, the category of land plays an important role in categorizing land, and determining entitlements to hold or own such land, as well as the scope of dealings in such land. In the Kenyan legal system, the 2010 Constitution recognizes three basic forms of land tenure in Kenya: public land; private land and community land.[32]

The scope of public land is defined in article 62 in a very broad sense. It includes unalienated government land; any land held by a state organ or public agency, such as government forests, national parks, rivers, lakes, wetlands, and water resources, among others. It also includes all roads, minerals and mineral resources; the territorial sea, exclusive economic zone and sea bed; the continental shelf; and any land not classified as private or community land by the constitution. It further includes land that is vested in and held by a county government in trust for the people resident in the county. While it is vested by the constitution either in the national governments, or county governments, public land is to be managed on their behalf by the National Land Commission. This Commission, established under article 67 of the Constitution, is therefore an instrumental legal entity in providing leadership and policy direction on acquisition of land for investments by non-citizens, in accordance with the constitution and statute laws governing land management in Kenya.

The scope of community land is defined in article 63 of the Constitution to consist of land lawfully registered in the name of group representatives under the provisions

32 Article 61

of any law; land lawfully transferred to a specific community by any process of law; any other land declared to be community land by an Act of Parliament. It will also include land that is lawfully held, managed or used by specific communities as community forests, grazing areas or shrines; ancestral lands and lands traditionally occupied by hunter-gatherer communities; or lawfully held as trust land by the county governments, but not including any public land held in trust by the county. The constitution provides that community land shall vest in and be held by communities identified on the basis of ethnicity, culture or similar community of interest. In addition, any unregistered community land shall be held in trust by county governments on behalf of the communities for which it is held. Further, community land shall not be disposed of or otherwise used except in terms of legislation specifying the nature and extent of the rights of members of each community individually and collectively. Parliament is expected to enact legislation to provide for further guidelines, an approach which is endorsed by section 37 of the *Land Act, 2012.*

Private land is defined, by article 64, as land held by any person under freehold or leasehold tenure. Under the former constitution, private land was regulated through the now *Registration of Titles Act*[33], which granted freehold tenure, and leases; the *Registered Lands Act,*[34] which granted absolute proprietorship and leases; and the *Land Titles Act,*[35] which specifically governed land in the coastal area. These three legislations have been replaced by the *Land Registration Act, 2012,* which together with Part V-VI of the *Land Act, 2012* extensively provide for the registration, administration and management of private land, either as freehold or leases. Private land is instrumental in this context, because part of the constitutional restrictions addresses non-citizenship ownership of freehold land. The type of tenure, according to the 2009 *Sessional Paper on National Land Policy,* "… connotes the largest quantity of land rights which the State can grant to an individual," which while conferring unlimited rights of use, abuse and disposition, is subject to the regulatory powers of the State.[36]

33 Cap 281 Laws of Kenya
34 Cap 300, Laws of Kenya
35 Cap 282 Laws of Kenya
36 Kenya (2009) *Sessional Paper No. 3 on National Land Policy* (Government Printer, Nairobi) Para 76

The *Land Act* also makes extensive provision for the management of public land, particularly the role of the National Land Commission, especially in context of setting aside land for investment purposes. The legislation also provides a procedure for granting leases over public land, and, rules on compulsory acquisition of private or community land, which converts the land in question into public land, which could be granted by the NLC for investments purposes, including to foreign investors.

3 The legal concepts on citizenship for corporations in acquisition of land for investment

In addition to an exposition on concepts and law on land tenure, an inquiry, such as this, into acquisition of land for investments by non-citizens must examine the legal notion of citizenship for natural and legal persons (people and corporate bodies). In this section, the research examines how the provisions of Kenyan law define and treat non-citizens, as opposed to citizens. The study further examines the nature of land tenure in Kenya, and argues that land tenure is critical as it defines the nature of rights that any person can hold over land. These tenure rights confer the ability on any right holder to manage and utilize the land. This will help answer the key question on the breadth of land tenure rights that a citizen or non-citizen investor can acquire and utilize in Kenya today.

3.1 Who is a foreigner/non-citizen under Kenyan law?

The Constitution of Kenya does not offer an explicit legal definition of a citizen, non-citizen or foreigner. The Constitution, instead, sets out the rights, benefits, privileges and duties of a citizen.[37] The 2011 *Citizenship and Immigration Act* sets out the normative content of these rights and privileges, for instance, including the right to own land and other property in any part of the country; and entitlement to any document of registration given to citizens, including a "certificate of registration."[38] This immigration law defines a foreign national to mean "any person who is not a

37 Article 12(1)
38 Citizenship and Immigration Act, 2011, section 22

citizen of Kenya."[39] These statutes however appear to concern the status of natural persons, and not corporations, which are the principal players in foreign direct investments. Thus, while the nationality of a natural person, even with respect to investments will be determined on the basis of immigration law, the question of citizenship concerning corporations, and the specific national criteria adopted to determine whether a company or other corporation is a foreign national involves concepts and laws regarding corporate bodies and investments. Nonetheless, the immigration status or citizenship of natural persons remains relevant, particularly in context of the doctrine of foreign control, whereby the nationality of a body corporate could be determined on the basis of the citizenship of the natural persons that hold decision making control over such body corporate.

3.2 Exploring the conceptual test for the citizenship of body corporates

In many legal systems, the country of incorporation is the main test for the citizenship status of a corporation; yet in many civil law systems, nationality is determined by the location of the corporation's central administration. In some instances, it is the nationality of the senior managers or the shareholders who control the operation, or the country where most of the business is done, that determines corporate nationality.[40] The position at international law, as exemplified by the 1965 Convention of the International Centre for Settlement of International Disputes, is instructive. In article 25(2) (b), *the Convention of the International Centre for Settlement of International Disputes* (ICSID)[41] deals with the question of the nationality of a juridical or legal person, such as corporations. This article provides that –

> any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.

39 Section 2

40 Geoffrey G. Jones, October 2006 The Rise of Corporate Nationality Harvard Business Review http://hbr.org/2006/10/the-rise-of-corporate-nationality/ar/1

41 Convention on the Settlement of Investment Disputes between States and Nationals of other States, 1965

The first part of this article relates only to the question of "nationality", which according to ICSID in the 2008 arbitral decision, *TSA Spectrum de Argentina S.A. v Argentine Republic,*[42] applies a formal (textual) legal approach to nationality, based on two basic criteria: (a) place of incorporation, or (b) the seat (*siège social*) of the corporation.[43] On the other hand, according to the *TSA Spectrum de Argentina S.A. v Argentine Republic* arbitral decision, second part of article 25(2) addresses the question of "foreign control," which could be addressed through a bilateral treaty between two countries, such that a juridical person with the nationality of one country, could be treated as a national of the other country, for purpose of control. In giving some normative content to this foreign control, the arbitral tribunal determined that a company operating in Argentina could not be treated as a Dutch national because it was under the effective control of an Argentinean, and did not have Dutch citizens on its board of directors. In this sense, the ICSID Convention, and the arbitral award, consider both *formal nationality* (place of incorporation; and headquarters), as well as *effective domestic control*, as the basic legal criteria to determine the citizenship or nationality of a legal person, such as a body corporate.

The latter approach is whereby control of a company is deployed as a legislative basis to determine entitlement of a corporation to acquire any, or certain categories of land, is, for instance, evident in the *Foreigner Land Acquisition Act* of South Korea. This is a country whose legal system could provide useful comparison to this research because according to the OECD, it has an aggressive FDI inducement policy, and significant success,[44] akin to Kenyan legal reforms to attract FDI.[45] This 2008 law permits foreign legal persons (such as companies) to purchase any land outside of restricted areas, so long as notification is given to a designated (local) government authority after the purchase. The law sets out criteria to determine who a foreign legal person (company) is, including: a company whose majority of

42 ICSID Case No. ARB/05/5 (Date of Dispatch to the Parties: December 19, 2008) online: http://italaw.com/documents/TSAAwardEng.pdf

43 Ibid, Para 144, p. 41

44 Choong Yong Ahn, 2008 *New Direction of Korea's Foreign Direct Investment Policy in the Multi-Track FTA Era: Inducement and Aftercare Services,* OECD, Global Forum on International Investments, p. 7 http://www.oecd.org/dataoecd/24/37/40400795.pdf

45 This is evidenced through enactment of the *Investment Promotion Act* in 2004, which led to creation of the Kenya Investment Authority (KenInvest), as the one-stop shop to facilitate licensing procedures for foreign investors. An earlier effort was through the creation of Export Processing Zones, with special fiscal and tax rebates to enable them manufacture goods for export.

employees are foreign citizens; a company whose majority of executives or directors are foreigners; and a company with a majority share capital or voting rights held by foreigners or a foreign company.[46] The Korean law applies the concept of "foreign control," the anti-thesis to the absence of *domestic control,* as the principal basis on which to determine the nationality of a company.

3.3 Lessons for Kenya

The 1965 ICSID Convention provides useful conceptual and international law grounding that could be applied as a parameter to assess the legal basis for determination of citizenship status of body corporate under Kenyan law. The ICSID approach draws a distinction between *formal nationality* and the concept of *foreign control;* but the suitability of either has to be determined on the basis of the law, as well as national, economic, strategic and other interests of Kenya. It is notable that article 65 of the Constitution, examined in detail in section 5.3 applies *foreign control* to restrict the rights of a body corporate from owning freehold land, or a leasehold interest exceeding 99 years. This approach, by the supreme law of Kenya, suggests the suitability of *foreign control* of a corporation as the primary criteria to determine entitlement to hold certain categories of land.

4 The East African approaches: comparative assessment and lessons for Kenya

In this section, the research reviews laws, policies and other literature on the status of foreign land acquisitions for investments, in order to bring out the key issues of concern or best practices, if any. The comparative review focuses on the basic legal and policy framework for foreign land acquisitions in Tanzania and Uganda due to the commonalities in the legal systems, social and economic circumstances that they share with Kenya, and partnership in the regional East African Community (EAC) economic bloc.

46 Korea, *Foreigner Land Acquisition Act,* Amended by Act No. 9186, Dec. 26, 2008, section 2

4.1 Legal position under East African Community (EAC) agreements

It is important to note that within the EAC, there has been no harmony on the treatment of land rights. This is because there has been disagreement on the legal status and rights of the citizens of the five countries to own land in each partner state, and in accordance with the East African Common Market Protocol, the "… access to and use of land and premises shall be governed by the national policies and laws of the Partner States."[47] This means that there is no treaty obligation for any partner state to provide national treatment to companies and individuals from other partner states, for land acquisition. This implies that, in the absence of a bilateral agreement between Kenya and any of the partner states, Kenyan citizens (natural and legal) shall be treated as foreign investors, and be subjected to appropriate restrictions on land ownership.

4.2 The position under Uganda investments and land laws

The entitlement of foreign corporations to acquire land in Uganda is governed by provisions of the constitution, land, and investments laws.

The Constitution of Uganda sets the basic framework on land law. It clearly states that non-citizens may only acquire leases in land, in accordance with the laws enacted by Parliament.[48] It is notable that the constitutional provision requires those laws to define a non-citizen for purposes of land acquisition. The Uganda *Land Act* was enacted to give effect to the land law provisions of the constitution, and among other aspects, sets down the criteria for landholding by non-citizens. This land law, in similarity to the 2010 Constitution of Kenya, specifies that a non-citizen can only hold a leasehold interest in land, that should not exceed 99 years. Further, the law prohibits non-citizens from holding *mailo*[49] or freehold land.[50] However, this does not prevent the government from exercising the constitutional powers of

47 Protocol on the Establishment of the East African Community Common Market, 2009, article 15

48 Article 237(2)(d)

49 *Mailo* land tenure, is defines in section to mean the holding of registered land in perpetuity and having roots in the allotment of land pursuant to the 1900 Uganda Agreement. It is important to note that Under a 1900 Agreement with the British, the *Kabaka*, his family and the chiefs were allocated freehold estates known as *mailo* (derived from the word mile) covering about half of the total area of Buganda, while the rest of the land was made Crown Land. See, Elliot Green, 2006, *Ethnicity and the Politics of Land Tenure in Central Uganda*, Development Studies Institute, London School of Economics Working Paper Series No. 05-58, London, p. 6.

50 See section 41 (2)-(4

compulsory acquisition,[51] in order to acquire land in the public interest, as specified by 237(2) of the Constitution. Such acquisition could convert *mailo* or freehold land into public land, and open the same up for acquisition by foreign investors. This is, however, contingent on the legal meaning of "public interest," which although applied extensively by the Constitution, is not defined, leaving future legislative or judicial decisions to determine the normative content.

For purposes of land acquisition, the Uganda land law sets out definitive criteria to determine the citizenship status of natural and legal persons. With respect to legal persons, a corporate body is deemed to be a non-citizen when the controlling interest lies with non-citizens.[52] A "controlling interest" arises where in case of companies with shares, the majority shares are held by non-citizens; and in case of companies without shares, the decisions are made by a majority who are not citizens of Uganda.[53] Other companies that will lawfully be deemed as non-citizen for purposes of land ownership include: a company in which shares are held in trust for non-citizens; and a company incorporated in Uganda with articles of association that do not restrict transfer of shares to non-citizens.[54]

The provisions of the *Uganda Investment Code*[55] are important to regulation of non-citizen land holding because this is the primary law that defines a "foreign investor." Section 9 adopts the concept of foreign control, similar to the land legislation, providing that a company is a foreign investor where "… more than 50 percent of the shares are held by a person who is not a citizen of Uganda."[56] However, the definition of "foreign control" under the land legislation provides more latitude to include more legal entities in the non-citizen category, and limit their rights to own or hold freehold land. It is necessary to reconcile these definitions, especially because the Uganda Investment Authority, established under the code, is the front-line one stop shop, where foreign investors must commence the licensing process. It is notable that the investments code attempts to regulate non-citizen acquisition of land by prohibiting any foreign investor from acquiring leases for crop or animal production.[57]

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51 Article 26
52 Section 41(7)
53 Section 41(8)
54 Section 41(8)
55 Uganda Investment Code, 1991 (as amended)
56 Ibid, section 9(1)(b).
57 Section 10(2)

However, neither the land law nor the investments law set out criteria for identification of appropriate land for foreign investments. The procedure and requirements for application of an investment license deal with generic concerns on the name and details of foreign investor, and particulars of employees. The only specific technical requirements regard (a) the nature of the proposed business activity and the proposed location (b) the proposed capital structure, amount of investments and the projected growth over the next five years; (c) the incentives for which the applicant expects to qualify. The procedure and criteria for appraisal of applications for investment licences sets out the basic criteria to include how the investment aims to (a) generate new earnings or savings of foreign exchange; (b) utilize local materials; (c) create employment opportunities in Uganda; (d) introduce advanced technology; or (e) contribute to local or regional balanced socio-economic development.

Notably, there is no explicit requirement for the Investments Authority to consider, review or evaluate the land requirements of the foreign investor, before making a decision on whether to issue an investment licence. It is therefore difficult to perceive how the authority will exercise its power to prevent non-citizens from acquiring land for crop or animal production (agriculture). In this context, the question of what and how much land a foreign investor requires will likely arise, in context of the investments law, after the licence has been issued, at which point the code requires the Chief Executive Officer of the Investments Authority to "liaise with Government Ministries and departments, local authorities and other bodies in order to assist an investment licence holder in complying with any formalities or requirements for obtaining any permissions, authorizations, licences, land and other things required for the purpose of the business enterprise." This vague provision is a cause for concern as it removes clarity and transparency from the procedure and assessment basis on land acquisition by foreign investors, particularly bearing in mind that most of the priority areas for foreign investments set out in the Second Schedule,[58] require vast amounts of land.

58 These include 1. Crop processing; 2. Processing of forest products; 3. Fish processing; 4. Steel industry; 5. Chemical industries; 6. Textile and leather industry; 7. Oil milling industry 8. Paper production; 9. Mining industry 10. Glass and plastic products industry 11. Ceramics industry 12. Manufacturing of tools, implements, equipment and machinery 13. Manufacture of industrial spare parts 14. Construction and building industry 15. Meat processing 16. Tourism industry 17. Real estate development industry 18. Manufacture of building materials industry 19. Packaging industry 20. Transport industry 21. Energy conservation industry 22. Pharmaceutical industry 23. Banking 24. High-technology industry 25. Telecommunication services

This potential opaqueness and lack of transparency, resulted, in 2007, in a government attempt to degazette 7,100 hectares of the Mabira Forest Reserve for sugarcane production by the Sugar Corporation of Uganda. However, this was stopped after local NGOs and activists, organized in a coalition, pressed the government to not pursue the degazettment, amid court petitions, and street demonstrations.[59] This implies that among others, there is absence of effective public participation, which can be a major problem when compulsory of *mailo* or private land is a preferred option for extraction of minerals, which could be construed as a public interest. It is notable that these challenges arise, in spite of a fairly robust legal framework. There is need for the *Investments Code* to reconcile the legal basis to determine that a corporation is a non-citizen, with the approach taken by the *Land Act,* because the latter legislation is implementing the provisions of article 237 of the Constitution. In addition, it is important to determine what amounts to a "public interest" particularly where likelihood for the compulsory acquisition of *mailo* land arises, and the potential transfer to a private foreign investor, which would undo the protections anticipated by the *Land Act*. Although the land law determines the criteria through which non-citizen corporate bodies could acquire land in Uganda, the investments law as the primary legal tool for admitting foreign investors into the country appears suitable for assessing the land requirements of foreign investors.

4.3 The law and policy on foreign land acquisition in Tanzania

The restrictions on breadth of land ownership rights for non-citizens in Tanzania, was first set out by the 1997 *National Land Policy.* The policy, clearly directed that non-citizens would not be granted land unless it was required for investment purposes, under the *Investment Promotion Act.* Further, the policy sought to block non-citizens and foreign companies from acquiring customary land.[60] These policy statements were then enacted into law through 1999 *Land Act,* which reiterates the letter of the land policy, stating that "for avoidance of doubt, a non-citizen shall not be allocated or granted land unless it is for investment purposes under the Tanzania

59 World Resources Institution (WRI), 2010, *Land for Private Investors and Economic Development* – Uganda, WRI, p. 3 online: http://www.wri.org/property-rights-africa/wriTest_Uganda//documents/Lesson2_Brief.pdf

60 United Republic of Tanzania, 1997, *National Land Policy,* Ministry of Lands and Human Settlements Development, Dar-es-Salaam, p. 11

Investment Act, 1997."[61] It is notable that unlike the legislation in Uganda, the Tanzanian land law is explicit on the procedures, and places the investments laws at the epicentre of regulating foreign land acquisitions, which are, in any event, restricted to investments only. The *Land Act* requires an *a priori* identification of land for investment purposes, which is then to be gazetted and allocated to the Tanzania Investment Centre.[62] The Centre would then process applications for land by foreign investors, and grant derivative rights of occupancy, which include leases and sub-leases.[63] This necessarily means that there would be no direct dealings between foreign investors, and private individuals with regard to acquisition of land for investment purposes.

The land law further sets out a clear basis for determining the citizenship status of a legal person, for purposes of land ownership. It applies the concept of "foreign control" and provides that "any body corporate of whose majority shareholders or owners are non-citizens shall be deemed to be non citizen or foreign company."[64] This criteria, while definitive in applying "foreign control" as the only basis, is divergent with the more restrictive criteria applied by the *Tanzania Investment Act* under which a company is deemed a foreign investor if (a) it is incorporated outside Tanzania, and (b) more than fifty percent of the shares are held by non-citizens.[65]

While it is clear that the Investment Centre is empowered by law to grant derivative rights of land occupancy to foreign investors, the principal law is silent on the procedure to be followed. Nonetheless, the Centre is empowered to consult with other government agencies and identify investment sites, estates of land for purposes of investors; and to provide, develop, construct, alter, adapt, maintain and administer investment sites, estates or land.[66] However, other than the generic and investment specific (economic and financial) information required upon application for an investment licence, the *Investment Act* is silent on assessment of the specific land requirements of a foreign investor, including concerns on sustainability.

61 *Land Act, 1998, s*ection 20(1)
62 Section 20(2)
63 Ibid
64 Section 20(4)
65 Section 2
66 Section 6

4.4 Lessons for Kenya

The legal and policy provisions evaluated above bear certain lessons for application to Kenya, in the search for a functional and effective mechanism to regulate non-citizen acquisition of land for investments. First, it is important for legislation and policy to reflect the overall letter and spirit espoused by the overall land policy or constitution, as appropriate, which represent the primary direction on land policy. Secondly, so long as the law on foreign investments regulates licensing of non-citizen corporations seeking to invest in a country, it is critical to reconcile that law with the primary law on land, to ensure there are no substantive or procedural loopholes. This implies a need to harmonize the scope or definition of "foreign control," as well as the procedure. The legal position in Tanzania, whereby land is appropriated to the Investment Centre in advance, is instructive, as it presumes standardized treatment for all non-citizen corporations seeking investment land.

5 Determination of citizenship status of corporate bodies under Kenyan law

In the Kenyan legal system, the foreign citizenship status of a body corporate, as a legal person, can be determined through the provisions of a variety of laws, as evaluated below -

5.1 The Investments Promotion, and Companies Legislation

In terms of general investments law the *Investment Promotion Act*[67] is designed to provide a "one-stop shop" through which foreign investors are guided in application for necessary licences and permits, and assessed for suitability to invest in Kenya. In determining the "foreign status" of an investor, this law only applies the notion of *foreign control* with regard to partnerships, which are deemed as foreign if the controlling interest is owned by person(s) who are not citizens of Kenya.[68] However, the law employs the concept of *formal nationality* whereby companies are deemed as non-citizen (or foreign investor) based on their place of incorporation, such that

67 Cap 485B
68 Section 2

a company is a foreign investor is it was incorporated under the laws of a foreign country.[69]

This is the view taken by the *Companies Act*,[70] which in reference to foreign companies, refers to "... companies incorporated outside Kenya which … establish a place of business within Kenya."[71] The companies' legislation thus equally applies the place of incorporation as the primary criterion to determine the "foreign" status of a company, but also requires such entity to establish a local place of business. In terms of the eligibility of a foreign company to hold land in Kenya, it is notable that under section 367(2), all foreign companies that have complied with registration provisions shall "... have the same power to hold land in Kenya" as if they were incorporated under Kenyan law. This legislative approach is at odds with the explicit provisions set out in article 65 of the 2010 Constitution, which applies *absolute domestic control* (the absence of foreign control) as the sole basis for entitlement to own freehold land, and restriction to only hold leaseholds of upto 99 years.

5.2 Divergence arising from right of Non-Citizen corporations to acquire agricultural land under the Land Control Act

The legislative divergence is further manifested through provisions of the *Land Control Act*[72]which requires all dispositions of agricultural land to be approved by the relevant land control board.[73] Under this law, the land control boards are empowered to deny or refuse any application for disposition of agricultural land to persons who are non-citizens; or to private companies or cooperative societies whose members are not all citizens of Kenya.[74] The latter provision would imply that any company entitled to own land pursuant to the *Companies Act*, would be excluded from holding agricultural land, for having any percentage of non-citizen shareholders, by operation of the *Land Control Act.* However, section 24 empowers the President of Kenya, in his discretion, to order the exemption of any disposition of agricultural

69 Ibid
70 Cap 486 Laws of Kenya
71 Ibid, section 365(1)
72 Cap 302, Laws of Kenya
73 Section 3
74 Section 9

land, from the proceedings and approval under the land control legislation. It is notable that this provision, while giving extensive powers to the President, does not require that the exercise of these powers be accompanied by written reasons, therefore leaving it open to extensive abuse. In any case, since the restrictions are on "private companies," with some non-citizen shareholding, it is conceivable that public company of a similar nature would not be subject to these restrictions.

In addition, this provision of the *Land Control Act* is in contravention of the Constitution because while article 65 bars non-citizens from holding freehold land, there is no constitutional bar on non-citizen acquisition of agricultural land on leasehold terms, as provided for in the land control legislation.

5.3 Position under the provisions of the 2010 Constitution - absolute domestic control

As highlighted above, the provisions of the investments and companies law are problematic, when read together with article 65 of the Constitution, which limits the landholding rights of non-citizens, including body corporate such as companies, to leaseholds not exceeding 99 years. This means, in terms of the constitution, that a corporation or company that is not a citizen, as per the constitutional parameters, is not eligible to hold freehold land or leases exceeding 99 years.

The constitutional approach to corporate citizenship in 65(3) adopts a conceptual requirement of "absolute domestic control." This is clear because a body corporate will be regarded as a citizen only if that "… body corporate is wholly owned by one or more citizens." When construed in the negative sense, this provision means that where a company is not wholly owned by Kenyan citizens, it cannot own freehold land, and any leasehold interest in land would be limited to a maximum of 99 years, and subject to any conditions imposed by enabling legislation. This point to the necessity to harmonize the definition of a foreign company or a foreign investor, respectively in the companies' and investments laws of Kenya, to uphold the notion of control as determined by the constitution, with respect to entitlement of legal persons to acquire land for investments.

5.4 Key Lessons on the legislative and constitutional criteria to determine corporate citizenship for purposes of land acquisition

The constitution applies a concept of absolute control by Kenyan citizens, as the only permitted criteria that qualifies a corporation to hold freehold land, and leases for a maximum of 99 years. From the foregoing analysis, it has emerged that the concepts of "control" and "State of incorporation/headquarters" have been applied together or separately in various jurisdictions. "Control" has been applied by the constitution, as explained above, with regard to ownership of (freehold or leasehold) land by non-citizen corporations. However, with respect to legislation in Kenya, both the *Investment Promotion Act* and *Companies Act* apply "State or Country of incorporation" as the basis to establish corporate nationality for companies, with the element of control applies on with respect to partnerships. The *Companies Bill, 2010,* proposes to amend the *Companies Act,* in defining a foreign company simply as "… a company incorporated outside Kenya,"[75] entrenches place of incorporation as basic criteria. Therefore, the main laws that regulate the role of legal persons in business (such as companies) determine the foreign citizenship status based on the State or Country of incorporation.

In addition, the emergence of Sovereign Wealth Funds (SWFs), as legal vehicles through which foreign governments undertake foreign investments is notable. These sovereign wealth funds have specifically private sector functions and status on global markets, while sometimes undertaking investments that go beyond fiduciary duty to pursuit of national security concerns, such as the Qatar Investment Authority (QIA), which pursues joint ventures with foreign host governments using a co-ownership, risk-sharing model.[76] The King Abdullah Initiative for Saudi agricultural investment abroad, is another SWF, whose prime concern includes preserving water resources by investing in agricultural production overseas.[77] It is necessary for Kenyan investments law to determine whether these entities will be treated as having "foreign citizenship," and be subjected to the same treatment as foreign companies. Section 12(5) of the *Land Act, 2012* empowers the National Land Commission to "… allocate land to foreign governments on a reciprocal basis in accordance with the Vienna

75 Ibid, section 598(1)

76 Lorenzo Cotula and Sonja Vermeulen "Deal or no deal: the outlook for agricultural land investment in Africa" p. 1238.

77 Carin Smaller and Howard Mann *A Thirst for Distant Lands Foreign investment in agricultural land and water* 2009 International Institute for Sustainable Development (IISD) p 5

Convention on Diplomatic Relations." While the SWFs could take advantage of this provide and incorporate as entities owned by a foreign government, that would put them firmly within the meaning of article 65(3)(a) as non-citizens for not being wholly owned by citizens of Kenya.

It will be necessary to develop policy guidelines and legislation to determine the various lengths, uses, and other conditions for grants of lease holds land to non-citizen investors, for lengths not exceeding 99 years. This is necessary to determine how to ensure equitable land allocation, ensure economic soundness of investments, adhere to environmental, sustainability and climate change laws, and respect the rights of local communities. This has been anticipated by section 12(3) and (4) of the *Land Act, 2012,* which are further examined in section 7 of this research.

6 Evolution of land tenure legislation in governance of non-citizen land acquisitions

In this section, the research examines the role and evolution of land tenure law in Kenya in governance of non-citizen acquisition of land. The analysis examines the now-repealed *Government Lands Act,* which until its replacement by the *Land Act, 2012,* was the primary law on allocation of public land for any use, including investments by non-citizens. The analysis briefly highlights the role of the 2009 land policy in guiding a policy shift that was adopted by the 2010 Constitution. In this context, the research seeks to answer the legal question on the fate of non-citizen held freeholds, and leases exceeding 99 years, on the 27 August 2010, which is the *effective date* when the constitutional restrictions on non-citizen land holdings came into force in Kenya.

6.1 The historical role of the Government Lands Act (GLA)

Until the enactment of the *Land Act 2012,* the principal legislation governing the acquisition of public land for private uses, including investments, has been the now repealed *Government Lands Act* (GLA).[78] Although it is no longer in force, reviewing

78 Cap 280, Laws of Kenya

the GLA is important to explain the underlying problems surrounding disposal and acquisitions of public land. The GLA gave special powers over public land, to the President, and those powers have been misused extensively, with disregard to the public interest. In context of land acquisition for investments, because neither the *Companies Act* nor the GLA creates any restrictions with regard to ownership of land by foreign investors, they enjoyed the same rights as Kenyan companies and individuals. Section 3 empowered the President to "make grants or dispositions of any estates, interests or rights in or over unalienated Government land" to individuals or corporations. Unalienated government land, in terms of the GLA, was land which is not, for the time being, leased to any other person, or in respect of which the Commissioner has not issued any letter of allotment.[79] The powers of the President under section 3 were delegated to the Commissioner for Lands, in terms specified in the same section. According to the *Ndung'u Commission report*[80] although section 7 of the GLA permitted the Commissioner for lands to act on behalf of the President, only the President had the power to make grants or dispositions over any unalienated government land.[81] This, according to the report, implies that the President would have had to notify the Commissioner for Lands in writing that he (President) intended to make a grant of unalienated government land to whoever has been selected as grantee.[82]

It is notable that the GLA was silent on the procedure or criteria for selection of "grantees" of public land, which in law implied that determining the recipients' of grants over unalienated public lands, was a matter of discretion. The *Ndung'u Commission report* notes that, in this context, public land had been allocated in total disregard of the public interest, and in circumstances that fly in the face of the law, and in any case, "'land was no longer allocated for development purposes but as political reward and for speculation purposes."[83] The absence of criteria on which allocation of public land is based, for investment and other purposes, and the subsequent abuse of official discretion, suggests a need to review that discretion, or set up a regulatory framework. These restrictions are generally reflected by the establishment of the

79 Section 2

80 Kenya, 2004, *Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land,* Government Printer, Nairobi

81 Ibid, p. 8

82 Ibid

83 Ibid

National Land Commission (NLC), as an independent constitutional commission to hold and manage public land. The powers and functions of the NLC are further defined by the *National Land Commission Act, 2012* and the *Land Act, 2012* examined later in section 7 of this research.

6.2 Position under the Sessional Paper on National Land Policy

The official policy on land is contained in *Sessional Paper No. 3 of 2009 on National Land Policy.* [84] Upon adoption in 2009, this land policy sought to set the pace for restrictions in non-citizen landholding in Kenya. This, ostensibly, was to ensure that the grant of land rights to non-citizens does not unduly deny citizens access to land. In this context, the policy committed the government to prohibit non-citizens from holding freehold interests in land; to restrict non-citizens and foreign companies to acquire leasehold interests only, subject to public policy considerations such as security; and to ensure that the leasehold term for land leased to non-citizens is strictly based on the intended use and does not, in any event, exceed 99 years.[85] The letter and spirit of these 2009 policy statements was given effect by provisions of the new constitution promulgated a year later in August 2010.

6.3 The position under the 2010 Constitution

The constitutional provisions regarding land ownership by foreigners address both existing land rights, and future acquisitions. They also set the basis for a legislative framework to govern acquisition of land for investments and other purposes by foreigners within the stipulated parameters. The constitutional provisions, as examined in section 5.6, are clear on the restrictions on leasehold and freehold land ownership by non-citizens.

While the focus of this research regards acquisition of land by non-citizens for investments, in the days ahead, it is nonetheless important to evaluate the constitutional import on freehold, and leaseholds exceeding 99 years, that were held by non-citizens when the constitution entered into force.

84 Kenya, *Sessional Paper No. 3 of 2009 on National Land Policy,* para 93

85 Ibid

6.3.1 "Effective date" - The status of non-citizen land interests in freehold land, and leases exceeding 99 years after 27 August 2010

It is article 65 of the Constitution, highlighted previously, that creates restrictions on the eligibility of non-citizen natural and legal persons to hold freehold land, and limits leasehold interests to 99 years. Section 8 of the Sixth Schedule to the Constitution provides substantive support on the transitional effect of article 65, particularly with regard to those non-citizen interests in land that were subsisting prior to the 27 August 2010, the "effective date" when the constitution was promulgated into law. Section 8, *in extenso,* reads -

> 8. (1) On the effective date, any freehold interest in land in Kenya held by a person who is not a citizen shall revert to the Republic of Kenya to be held on behalf of the people of Kenya, and the State shall grant to the person a ninety-nine year lease at a peppercorn rent.
>
> (2) On the effective date, any other interest in land in Kenya greater than a ninety-nine year lease held by a person who is not a citizen shall be converted to a ninety-nine year lease. (emphasis added)

The gist of this section is in providing that, on the date when the Constitution came into force, all non-citizen held leases, exceeding 99 years, shall revert to the state, and the state shall grant the person a 99 year lease. In a similar tone, all freeholds that were held by non-citizens are, on the effective date, converted into leaseholds. It is important to note that the operative word, in this context, is "shall." The legal meaning and application of the word "shall", read together with the rules of interpretation applicable to this constitution, will assist to answer the question whether the conversion was automatic, or whether there is need for some legislative or policy procedure.

According the Black's legal dictionary, when used in legislative instruments, the word "shall" is generally imperative or mandatory; but it may be construed as merely permissive or directory.[86] The former meaning, which implies an imperative or mandatory application of the word "shall" is likely the applicable meaning, when the contextual approach to land reforms by the constitution is considered. Indeed, the Constitution provides its own rules of interpretation, providing that it should

86 See, http://thelawdictionary.org/shall/

be interpreted in a manner that "promotes its purposes, values and principles."[87] Further, it is article 259 which stipulates that each provision of the Constitution must be construed according to the doctrine of interpretation that the law is always speaking. Comparatively, several commonwealth countries, apply the same doctrine of interpretation, and could offer normative strength. In Canada, which applies the same doctrine in statutory interpretation, the *Interpretation Act* provides that any matter or thing expressed in the present tense shall be "applied to the circumstances as they arise, so that effect may be given to the enactment according to its true spirit, intent and meaning."[88] A similar approach is taken by the 1999 *Interpretation Act* of New Zealand, which provides that enactments should be read to apply to circumstances as they arise.[89]

In this context, it is necessary for both article 65, and section 8 of the Sixth Schedule to be read, to apply to the current circumstances of the land reform agenda envisaged by Chapter 5 of the Constitution. This will ensure that the constitution is construed according to its true spirit, intent and meaning, in order to promote its purposes. It can therefore be argued, that by operation of section 8 of the Sixth Schedule, all non-citizen freehold and leaseholds exceeding 99 years, were converted accordingly and automatically, and any subsequent proceedings of changing documentation, or altering the register must be limited to a mechanical, administrative process.

7 Towards a framework: key policy and legal considerations to guide non-citizen land acquisitions for investments

Article 65 of the Constitution anticipates a legislative framework to regulate the holding and ownership of leasehold land by non-citizens, for various purposes, including investments. Such a framework would be developed in context of the legislative inconsistencies highlighted in the foregoing sections, and the emerging need for land for various investments in African countries like Kenya, as demonstrated in the statement of the problem. It is therefore necessary to set out the basic legal

87 Article 259
88 Interpretation Act (R.S.C., 1985, c. I-21), section 10
89 http://www.legislation.govt.nz/act/public/1999/0085/latest/DLM31459.html, section 6.

and policy considerations that the legal framework should incorporate as minimum considerations. In this section, the research examines these policy considerations, suggesting the need for a test against which a non-citizen corporation seeking land for investments should be measured, in order to determine the scope and breadth of leasehold interests, up to the upper limit of 99 years. Seemingly, there could be legislative rules on lands that are excluded from the entitlement of non-citizens to acquire interests. First, this section highlights the modes of land acquisitions that could be employed, in order to make land available to any investor, including non-citizens. Secondly, we explore the considerations that should be factored in to ensure a harmonized approach and the overall benefit to Kenya. Third, the section suggests that it is the national investments law, which is empowered by Parliament to gauge suitability of foreign investments to Kenya that could play a constructive role of assessing the overall land requirements of foreign investors, as an agent of the National Land Commission.

7.1 Mechanisms for land acquisitions

There are several possible mechanisms through which a non-citizen corporation could acquire land for investments, on the leasehold terms:

7.1.1 Direct contractual agreements with private or community landholders

Persons who hold land under private tenure are entitled to deal with that land, including granting leases under voluntary lease agreements to other people, for an agreed amount of money as consideration. According to Part VI of the *Land Act,* these leases or sub-leases could be periodic, short-term, future leases, or could be an agreement for a fixed term.[90] In context of investment land by a non-citizen corporation, such a foreign entity would not be entitled to enter into lease or sub-lease agreements over any private land on freehold tenure, as this is prohibited by the constitution. The law governing administration of community land tenure has not yet been enacted by the Parliament, as required by the constitution,[91] and it will be imperative for that law to regulate the nature of dispositions, such as leases, that can be undertaken with respect to community land, in order to protect the collective

90 See, Part VI of *Land Act, 2012*

91 According to the Fifth Schedule, the law on community land should be enacted within five years from the date the constitution came into force

interest, while at the same time enhancing participation of communities in beneficial investment activities.

7.1.2 Compulsory acquisition of land for public benefit and in the public interest

Compulsory acquisition of private or community land by the State is one mechanism that can be applied, where such land may be required for investments. However, in accordance with article 40 of the constitution, such land can only be acquired compulsorily, for a public purpose, or in the public interest. This is because the Constitution offers protection for private property, including land, which can only be expropriated under the rules on compulsory acquisition, and upon prompt payment of full or just compensation.[92] This mechanism, in context of Kenya, will become particularly instrumental, in the acquisition of land for purposes of petroleum mining, and extraction of newly discovered minerals such as coal.

It is important to determine the legal true meaning and intent of the tests of "public purpose" and "public interest." This is because these tests are novel to the Kenyan legal system since section 75 of the repealed constitution applied the test of "public benefit." Indeed, in that context, Kenyan courts engaged in a long discourse on the meaning of a "public benefit" informed by a history of illegal acquisition of private property on the pretext of its public uses, but really using political patronage to later allocate the land to private individuals. Various judicial directions were given in several decisions but two of them are most relevant to this research. In *Niaz Mohamed v. Commissioner for Lands and others,*[93] the High Court determined that compulsory acquisition of private property must only be for the public purposes specified in the Constitution. Concurring with this view, another decision in *Commissioner for Lands and another v. Coastal Aquaculture*[94] put an additional condition that any notices issued for compulsory acquisition of property must be clear that the taking is for a public body, and for a public benefit authorized by the Constitution." The contrast with the new constitutional order arises because of the shift from "public benefit" to application of "public purpose" and "public interest."

The *Land Act, 2012*, provides an inclusive definition of "public purpose" to

92 Article 40(3)
93 [1996] eKLR
94 Mombasa H.C. Misc. Civil Application No. 55 of 1994 (unreported)

include transportation; public buildings; public utilities; public parks; security and defence installations or settlement of squatters, the poor, landless or internally displaced persons.[95] This definition thus raises a suggestion that the government can compulsorily acquire private land, and then transfer the same to a private investor, local or foreign. This can be supported by arguments that while the eventual output, for instance a road or railway line, would benefit the public, the government may not have the economic or technical capacity to undertake the work, hence engaging private investors. The incidence of Vision 2030 flagship infrastructure projects such as the Lamu Port Southern Sudan Ethiopia Transportation Corridor (LAPSSET), heightens this possibility. According to Vision 2030 Medium Term Framework (MTF) 2008-2012,[96] the project involves the development of a new transport corridor from the new port at Lamu through Garissa, Isiolo, Mararal, Lodwar, and Lokichoggio to branch at Isiolo to Ethiopia and Southern Sudan. This will comprise of a new road network, a railway line, oil refinery at Lamu, oil pipeline, Lamu Airport and free port at Lamu (Manda Bay) in addition to resort cities at the coast and in Isiolo. It will form the backbone for opening up Northern Kenya and integrating it into the national economy.[97] The government intends to compulsorily acquire private and community land within proximity of the LAPSSET corridor, which will be vested in the National Land Commission as public land, and the Commission, working with relevant government departments, would oversee allocation to private investors.[98]

In the context of mineral resources under the *Mining Act,* the government is empowered to acquire land on which minerals have been found, and proceed to grant a lease to an investor.[99] However, minerals are vested in the government, and therefore a balance will quite often be sought between private property rights, and the public interest.[100]

In terms of the *Land Act, 2012,* the procedure for compulsory acquisition is initiated by the national government or county government, to the National Land Commission (NLC). The NLC may reject the application, especially if the land is not required

95 Section 2.
96 Kenya (2008) *Vision 2030 Medium Term Framework 2008-2012,* Ministry of Economic Planning and *Vision 2030*
97 Ibid, p. 20
98 Interview with *Vision 2030* Secretariat official, 19 May 2012
99 Section 7(3)
100 Robert Kibugi, 2008, "Mineral Resources and the Mining Industry in Kenya" p 360

for a public purpose or in the public interest. If the acquisition is approved and proceeds to conclusion, fair compensation must be paid, and there is a right to refer any disputes to the Environment and Land Court. It is notable that once private or community land has been acquired compulsorily, it becomes public land, vested in either the national or county government(s), and managed on their behalf by the NLC, in accordance with the law.

Compulsory acquisition of land for public purposes or in the public purpose is an important constitutional tool that should be applied in the interest of a country's priorities. These priorities include the property, socio-economic and cultural rights of those people whose land will be acquired; the goals of the country to attain sustainable economic development; protection of critical ecosystems, among others. It is such factors that the NLC should consider as a basis to utilize its powers under section 107(3) of the *Land Act* to reject an application to commence compulsory acquisition where the public purpose or public interest is not apparent in a request for compulsory acquisition.

7.1.3 Periodic grants over public lands

The issuance of periodic grants over public lands is undertaken by the National Land Commission (NLC), in exercise of its function to manage public land on behalf of the national and county governments. The constitution and functions of the NLC are governed by provisions of the *National Land Commission Act,* which came into force on 2 May 2012. The specific allocation of public land for various purposes is governed by section 12 of the *Land Act* which sets out the various mechanisms through which the NLC can allocate public lands: public auction; public tenders; public drawing of lots; public request for proposals; and public exchanges of equal value. These mechanisms of allocation involve the grant of various categories of rights over public land. Since there is no legislative restriction, it is possible that the NLC could entertain applications for allocation of land from non-citizen corporations, and that NLC would consider such application under guidance from article 65 of the Constitution.

The NLC is further empowered to issue short-term and periodic grants (licences

and leases) of public land, on behalf of the national or county government.[101] This includes, for instance, the power of the NLC to grant a licence for use of unalienated public land for a period not exceeding five years.

It is notable that the *Land Act* specifically exempts certain public lands from any consideration for allocation by the NLC, including: public land subject to erosion or floods; public lands within forests, wildlife reserves or wetlands; public lands along watersheds, river and lake catchments or territorial sea; public land reserved for security, education and other strategic functions; and natural or historical features of national value.[102] In context of the foregoing restrictions over the listed lands, these periodic grants of public land provide an important legal tool through which non-citizen corporations can acquire leasehold interests in land for investments.

7.2 Subsidiary legislation by the National Land Commission to administer land set for investments

Section 12 of the *Land Act* empowers that National Land Commission to set aside land for investment purposes. It is notable that this section anticipates the possibility of non-citizens seeking such investment land, and provides that the NLC should perform this function, "subject to article 65 of the constitution …" Section 12(3) requires that in setting aside the land for investment purposes, the NLC "shall ensure that the investments in the land benefit the local communities and their economies." This provision is instrumental for two reasons: First, it clearly subjects this specific function of the NLC to the restrictions on non-citizens imposed by article 65 of the Constitution; and secondly, it represents an attempt to fulfil the constitutional requirement in article 66(b) that "Parliament shall enact legislation ensuring that investments in property benefit local communities and their economies." However, this amounts to merely restating constitutional provisions, and the *Land Act* misses an opportunity to provide normative content that would aid the implementation of both article 65 and 66(b) of the constitution. It is nonetheless notable that section 12(11) requires the NLC to make regulations to assist implementation of the important provision. Such regulations should incorporate key considerations that the NLC should factor in, when making decisions on setting aside of land for investment purposes,

101 Section 23
102 Section 12(2)

specifically for non-citizen entities, and including mechanisms to secure the socio-economic benefits of local communities:

(a) National and County Economic Priorities – The NLC ought to evaluate the economic priorities of the national government, and relevant county governments, based on consultations with the relevant level of government, and consultation of economic policies. This will ensure that the proposed investments plans for specified public land are compatible with the national interests of Kenya, and also will bring economic benefit to local communities

(b) Public participation and consultation to secure local economic benefit – Although the power of the NLC relative to setting aside investments land relates to the category of public land, it is nonetheless required that such investments should result in benefits to the local public and economy. Therefore, in accordance with article 10 of the Constitution, the NLC should make such plans public, and engage in a constructive and open process of public consultation in order to secure consensus, and local ownership of such investment proposals. Article 10 of the Constitution, which is binding on state agencies such as the NLC when they are making public policy decisions, requires incorporation of certain national values such as public participation.

    The land law does not provide further detail or guidance on how this should be undertaken. The regulations should provide a procedure for effective consultation with members of the public, including those in the local community that would normally not be reached through conventional means of communication.

    The NLC could utilize the mechanism for assessment of foreign investments, under the *Investment Promotion Act,* in order to make local benefit a condition precedent for allocation of any investment land to non-citizen corporations. This would secure the position of local benefit as a primary consideration in assessment of suitability of any foreign investment proposal that requires land.

(c) Considerations of sustainability - The principle of sustainable development is significant, because it is buttressed by other provisions in the constitution, including the basic principles of national land policy to hold and utilize land sustainably,[103] and the obligation of the state to ensure sustainability in the

103 Article 60

utilization of natural resources.[104] Sustainable development requires integration of social, economic and environmental consideration in making laws, policies and decisions over use of land and natural resources. It is an important principle that could ensure that investments touching on land and natural resources benefit present generations, and sustain a healthy ecological system for future generations.

The regulations made by the NLC, under section 12(11) of the *Land Act* should therefore include sustainability as a key parameter in making decisions to set aside specific public lands for local or foreign investments. An in depth analysis of the specific sustainability considerations is beyond the scope of this research. However, by illustration, the sustainability considerations include application of primary tools such as Environmental Impact Assessment (EIA) or Strategic Environmental Assessment (SEA) depending on the scale of the investment.

On a micro-level, regulations should require assessment and monitoring of sustainability concerns relating to equity of water rights allocation, in order to protect local communities and the ecosystem; and agreements on transfer of technology and local capacity building, especially in context of natural resource based investments such as agriculture. The latter, similar to the:

(d) Legal undertakings – In order to secure compliance with the rules seeking to integrate sustainability or local benefit, the regulations should empower the NLC to conclude legal undertakings with individual foreign investors, on a case-by-case basis, under which the investors commit to implement specific conditions included in their grant of leases over public land. A breach of these legal undertakings should result in sanctions or termination of the lease. These tailor-made legal agreements will assure dynamism, and ensure that each investment is designed to fulfil specific national and local need, depending on content and context.

(e) The role of investments law- In terms of the *Investment Promotion Act,* the Kenya Investment Authority (KenInvest) is established as a one-stop shop, where foreign investors will only be granted an investment licence, upon fulfilment of other requirements. This investment law could be utilized as a harmonized mechanism for processing applications and allocation of public lands for investments by non-citizen corporations because of its existing statutory mandate, a best practice that is adopted in comparative East African

104 Article 69(1)

jurisdictions, such as Tanzania. The role of the investment legislation, in context of the constitutional powers of the NLC, can only be in congruence with the legislative functions of the NLC, to the extent that the investments authority should only act under authority delegated from the NLC, through regulations.

After the NLC has reserve land for investment purposes, presumably in accordance to the national or county development priorities, such land should be planned, surveyed, and serviced, and guidelines for its development are prepared.[105] This is an important provision that ensures that spatial and physical planning requirements precede any allocation of land, and ensure that investments on land are guided by the priorities of Kenya, including sustainability.

The investment authority would exercise delegated authority from the NLC, and would be responsible for vetting the land requirements for foreign investors. This would primarily be based on categories of investments for which land has been set aside by the NLC, as well as the development guidelines set out for the land, after physical planning and surveying. The investment authority would then integrate land requirements as part of the statutory criteria that section 4 of the *Investment Promotion Act* has established for assessment of a foreign investment proposal. These criteria examine the net benefit to Kenya including: the minimum financial investment; creation of employment; acquisition of new skills or technology; contribution to tax revenues or other government revenues; transfer of technology; an increase in foreign exchange , either through exports or import substitution; utilization of domestic raw materials, supplies and services; adoption of value addition in the processing of local, natural and agricultural resources; and utilization, promotion, development and implementation of information and communication technology.[106]

The above considerations should form the basis for the NLC determining the suitability of any investment proposal to acquire use of any public land. Collectively, the criteria provide an objective basis to determine the length of a lease to be granted to a foreign investor, from 0-99 years.

105 Section 12(8)
106 *Investment Promotion Act,* section 4

7.3 Harmonization of citizenship rules for foreign corporations

It is necessary for the law to harmonize the rules to determine the citizenship of corporate bodies, in order to ensure respect for the constitutional provisions. In this context, the proposal that the NLC should utilize the mechanisms under the *Investment Promotion Act* to ensure that the vetting of foreign investment proposals includes their land requirements, the basis of citizenship should be synchronized. This requires altering the *Investment Promotion Act* and the *Companies Act* in order to apply the constitutional criteria of *absolute domestic control,* as opposed to *formal nationality.*

8 Conclusion

The importance of FDI to any economy cannot be over-emphasized; but neither can be the significance of equitable and sustainable management of land, that is guided by the rule of law. In Kenya, land has been an emotive political subject, and the history of illegal allocations of public land has triggered reform in the land management system, which was launched by the 2010 Constitution. This basic law also created restrictions on the entitlement of non-citizens, natural or juridical persons, to own freehold land, or to hold any land leases exceeding 99 years. The eventual legislation on land, the *Land Act, 2012,* while attempting to legislate on setting aside of land for investment purposes, does not sufficiently address the concern with foreign investments. This research has endeavoured to examine the basis of the law in determining the citizenship status of corporations, since it is a primary basis adopted by the Constitution. Informed by analysis of international law, and comparative East African laws, the research proposes harmonization of the citizenship rules applied by the constitution, with those applied by legislation on investments and companies.

The role of the National Land Commission stands out, due to the functions defined by the constitution, and the *Land Act.* It is imperative for the NLC to address the specific concerns that should be considered when making decisions to set aside specific land for investment purposes, including assessment of national or county

economic priorities; public participation, especially by local communities; concerns on sustainability obligations, among other factors. The NLC could harmonize its functions, for purposes of non-citizen investors, with the role played by KenInvest, and synchronize assessment of the suitability of investment proposals with that of land requirements.

The research has further examined the law in context of freeholds and leaseholds exceeding 99 years that were held by non-citizens on the effective date. Based on review of the legal import of the word "shall," a conclusion has been drawn that these provisions requiring conversion of these interests into 99 year leases were imperative, and occurred automatically on 27 August 2012. In this context, it is now incumbent on the National Land Commission to issue administrative guidelines for the appropriate exchange of title documents, and alteration of the relevant land register to reflect the constitutionally mandated changes.

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