

COMPARATIVE ANALYSIS ON OWNERSHIP OF IMMOVABLE PROPERTY BY FOREIGNERS AND ITS IMPLICATION ON FDI: THE CASE OF ETHIOPIA AND KENYA'S LAND POLICY

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Abstract

Land is a highly prized property in most African states, and it is governed by a complex set of rules and ceremonies. Many African countries have diverse property ownership arrangements for their lands. The modalities of ownership arrangements range from freehold to customary or state ownership. It is witnessed that many African countries, except for a few have one common salient feature regarding land ownership; that is, land is technically under the ownership of the states. However, foreigners' ownership of land is banned in many African states, with the rationale that the restriction is in place to defend sovereignty and national resources. This commentary delves into the substantive content of the land policies of Ethiopia and Kenya, particularly on the ownership of land by foreigners. Under this backdrop, it examines the implication of awarding ownership of land to foreigners on investment. Moreover, it provides legal options available for dealing with foreign ownership of land in Ethiopia through comparatively evaluating and reviewing the Kenyan land policies and relevant laws. Being awarded to foreigners, land ownership has the potential to benefit Ethiopia's economic development. However, it is required to restrict the adverse effects that it entails. On the contrary, Ethiopian land ownership policy is rigid and strict. This has substantially affected the economic gains from foreign investors and the positive output they could generate in employment opportunities and technology transfer. As to this end, Ethiopian law makers might reconsider amending the land policy including the FDRE constitution by revisiting the stumbles in the legal regimes, with the aim to retain foreign investors. Thus, this paper recommends the state to inculcate intermediate restriction on ownership of land and Kenyan land policies as springboard for reference.

Keywords: Foreigners, Land ownership, Land Policy, FDI, Ethiopia, Kenya

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1. Introduction

Persons who consider themselves to be foreigners are subject to the rules and restrictions imposed on them by the Ethiopian state concerned if they wish to acquire immovable property in the territory of their sovereignty and where foreigners can acquire immovable property in the country of the immovable property.¹ African states are not exceptions to this pragmatic reality regarding the ownership of land by foreigners.

It is a fact that land is a fundamental resource of a nation state. Without land, without territory, there can be no nation state.² Housing, agriculture, natural resource, and national security concerns are all based upon land use and management. Moreover, land is the source of all material wealth; it provides the needs to sustain on. In many developing countries, land has been considered as an important economic and social asset in which the status and prestige of people is determined.³ Because of such high importance, as compared to other properties, the legal protection accorded to land is always strict in nature.

Given the importance of land, many countries around the world have enacted a range of laws governing who can own and use land, as well as supporting their justification by developing an autonomous and comprehensive land policy. The ownership of land by foreigners also sparks contentious policy debates between nations.

As modern states emerged, those who were not citizens were classified as foreigners or aliens who, by their very status as such, were deemed not to be

¹ Ayhan Dolunay and Fevzi Kasap, 'Foreigners Acquisition of Immovable property in the Framework of Legal Basis, sociological Risks and Suggestions' (2021) 2 Revista Gênero e Interdisciplinaridade <<https://www.periodicojs.com.br/index.php/gei/article/view/147>> accessed 9 May 2022.

² Robert Jennings and Arthur watts, 'Oppenheim's International Law' (9th edn vol.1 OUP 2008)

³ ibid

appropriate recipients of full rights of land ownership and use.⁴ Over time, in an ever more interdependent world, many attitudes towards "foreigners" have changed, as a process assisted by global communication increases in foreign investment and the international trade grows of. In many areas, states have mutually accepted the rights of foreign investors and each other's citizens to receive the same treatment as their own citizens, and this trend is likely to continue. However as regards to land, many states still put restrictions about its ownership and use by foreigners.

Since 1995, it has become increasingly clear that the issue of foreign ownership of land remains high on the agenda of many nations around the world.⁵ Indeed, as the pace of economic integration and globalization accelerates, it is expected that many existing regulatory approaches will be re-examined. New techniques that are designed to strike a better balance between a country's perceived interests in regulating foreign investment in land, and the modern imperatives of an international economy will be sought. Under this background, the Sub-Saharan countries, Ethiopia and Kenya have separate laws and interest about foreigner's land ownership.

The Federal Democratic Republic of Ethiopia (FDRE) Constitution has established a non-flexible land policy.⁶ It affirms that, the right of ownership of rural and urban land as well as all natural resources is exclusively vested in the state and the

⁴ Sandra Passinhas, 'Dimensions of property under European law' (PhD thesis, European university institute 2010)

⁵ *ibid*

⁶ Temesgen Solomon Wabelo, 'Legal and Institutional Frameworks Regulating Rural Land Governance in Ethiopia: Towards a Comparative Analysis on the Best Practices of Other African Countries' (2020) vol.11. No.1. Beijing Law Review 64

peoples of Ethiopia.⁷ Land is a common property of the Nations, Nationalities and Peoples of Ethiopia and shall not be subject to sale or to other means of exchange (Article 40 (3) of FDRE Constitution, 1995. In addition, it has implemented a land policy that is based on state ownership of land (where only usufruct rights are given to land holders). Many agricultural economists and international donor agencies have propagated some form of privatized land ownership.

Conversely, the 2010 Kenyan constitution and subsidiary laws allow foreigners to own property in Kenya in their name. The Constitution (2010), the Lands Act (6/2012) and the Land Registration Act (3/2012), subject to certain limitations, grant the right to any person, either individually or in association with others, to acquire and own land in Kenya.⁸ In other words, foreigners may own land through owning shares in a public company that owns agricultural land, or a foreign investor may apply for an exemption from the President and if they lack the access, then an investor may obtain ownership or other rights through ownership of a public company.

There are two competing interests and policy consideration behind ownership of land by foreigners.⁹ First, constitutional prohibition of land ownership by foreigners might adversely affect investment and subsequent benefits. second, complete elimination of all restrictions on foreign ownership would result in a loss of control by the nation over its own territory.

The objective of this article is to provide the legal options available for dealing with the sensitive issue of foreign investors ownership of land in Ethiopia through comparatively evaluating the Kenya land policy. Kenya was chosen because of its similarities to Ethiopian geographic position, economic stand, and overall cultural issues. It is unusual to see repeated comparisons between these two countries in

⁷ FDRE Constitution (1995) Art.40

⁸ 'Foreigners and Property Ownership in Kenya' (International Society of Primerus Law Firms (2012) <https://www.primerus.com> accessed 25 December 2021.

⁹ Wabelo (n 6)

numerous news outlets though these two countries may be competitors in terms of attracting FDI. Foreign ownership of real estate is currently a hot topic in Kenya. On October 29, 2021, a Kenyan court found out that a law barring foreigner from purchasing land is unconstitutional. In fact, it is noted that Kenya was under the umbrella of British colony, unlike Ethiopia. Putting the differences at the side, it is important to compare the two governments' land policies through the lenses land ownership by natural or legal persons.

Therefore, in order to explore and appraise the implication of awarding ownership of land to foreigners on investment particularly, in case of Ethiopia; the article inculcates three sections. Section one discusses the international law perspectives on land ownership by foreigners and lists policy considerations. Section two enumerates, the Kenyan and Ethiopian land policy regarding ownership of lands by foreigners. Section three appraises, the implication of land ownership by foreigners on investment in case of Ethiopia, and it suggests key notes on reforming the Ethiopian land policy, by pinpointing potential approach that helps to increase the gains from FDI without compromising national interest.

2. International Law and Land Law

International law recognizes territory as portion of the earth's surface and its resources, including land, internal waters and other resources located above and below the surface as a constitutive element of statehood.¹⁰ Given the importance of land in social, economic and political relations, it is perhaps not surprising that land has featured prominently throughout the historical development of international law from its early localized manifestations to juristic efforts to legitimize land

¹⁰ R.Y. Jennings, *The Acquisition of Territory in International Law* (Manchester University press 1963), 9-10

acquisition during successive waves of European colonization in the America, Africa, Asia and Oceania.¹¹ Land claims and international law continue to intersect in a wide range of situations.

In fact, land law is the unregulated corpus of international law. The range of approaches to regulate foreign land ownership around the world is very striking.¹² Actually this should not be surprising given that the issue is largely unregulated by the international law that leaves the states to legislate in accordance with their own policies and requirements.

Similarly, customary international law places no restriction on the right of states to restrict or regulate foreign ownership of land within their territories. States have sovereignty over their natural resources including land.¹³ Equally states are entitled to prevent the entry of foreigners or allow entry only on terms including restrictions on the ownership and use of land regulating its use.¹⁴ International law is primarily concerned with the issue of the expropriation of land already lawfully owned by foreigners. While expropriation itself is not unlawful under international law, the manner in which it takes place is subject to rules of international law.¹⁵ Although the right of a foreigner to decide whether or not to purchase land in a particular state is influenced by that state's attitude to the issue of expropriation, this cannot in itself be considered to constitute a legal restriction. Thus, there are no global multilateral treaties on the issue of foreign land ownership or use.

The instrument which comes closest to regulations in this area is the Organization for Economic Cooperation and Development (OECD) Code of Liberalization of Capital Movements which imposes a general obligation on each signatory states to

¹¹ Matthew Craven, 'Colonialism and Domination'(2012) Oxford handbook of the history of international law OUP 862

¹² Ayhan Dolunay and Fevzi Kasap (n 1), 4

¹³Thaddeus Chukwuka Eze, 'RE- APPRAISING THE RIGHT OF FOREIGN NATIONALS UNDER THE NIGERIAN LAND USE ACT' (2020) Vol.11. 3

¹⁴ Ayhan Dolunay and Fevzi Kasap (n 1)

¹⁵ ibid

liberalize their policies towards transactions and money transfers necessary for direct investment. The OECD instrument on capital movement undertaking incorporated liberalization measures adopted by contracting countries. The instrument indicated its position on capital movement liberalization that: Members will gradually remove capital flow restrictions between themselves, as required by Article 2, to the extent necessary for effective cooperation.¹⁶ As a result, governments that restricted the ownership of land to the government merely needed to make it easier for foreigners to participate. As the document states, there are some exceptions to this responsibility. State parties may suspend their commitments under the guise of maintaining public order or protecting public health, morals, and safety safeguarding their essential security interests; or fulfilling their international peace and security obligations.¹⁷ Moreover, if any liberalization measures taken or maintained in accordance with Article 2(a) resulted a significant consequence the contracting parties can derogate their obligation.¹⁸

Other related instruments are the draft United Nations Conduct of Transnational Corporations Code, and the draft Multilateral Agreement on Investment, currently being negotiated through the OECD. The former is designed to regulate the conduct of multinational corporations, and the latter to minimize trade barriers to foreign investment.¹⁹

Similar potential restrictions in international law on state's right to regulate or restrict foreign ownership of land are bilateral Friendship, Commerce and

¹⁶ 'Code-Capital-Movements' <<https://www.oecd.org/investment/investment-policy/Code-capital-movements-EN.pdf>> accessed 9 May 2022.

¹⁷ *ibid.* Art.3.

¹⁸ *ibid.* Art.6(2).

¹⁹ M. Sornorajah, 'The International Law on Foreign Investment' (1994) 187.

Navigation Treaties or their modern cousins, Bilateral Investment Treaties. However, few treaties provide foreign nationals the right to own property in the host country. While most treaties say that each state "must" accept investments from the other, such commitments are commonly modified by a phrase that states that the investments must be accepted "in line with the host state's legislation." As a result, laws prohibiting foreign ownership of land would continue to apply. In fact, according to the 1976 review of the thirty-six similar treaties signed by the United States, just three guaranteed foreigners the same treatment as citizens in terms of land acquisition in general, and six in terms of land acquisition through inheritance. The vast majority of people allowed time for the disposal of their items.

For example, under the BIT negotiated between the United States and Rwanda, U.S. direct investment overseas and foreign investment in the United States should be treated equally. The parties also agree to international law criteria for expropriation and compensation, free financial transactions, and mechanisms for resolving investment disputes, including international arbitration.²⁰

In another BIT signed between the US and Senegal, the US government expressed its concerns as follows: Foreign investors must be treated in accordance with international law, with no less favorable treatment than domestic investors and no less favorable treatment than foreign investors from third countries, whichever is the most favorable treatment ("national" and "most-favored-nation" treatment), subject to certain exceptions.²¹

As the latter's name suggests, such treaties are more concerned with investment regulation in general, and the grant of national treatment whereby foreign investors are accorded the same treatment as national investors, or "most favored nation"

²⁰ 'Bilateral Investment Treaties' <<https://www.trade.gov/bilateral-investment-treaties>> accessed 10 May 2022..

²¹ *ibid*

status in particular whereby all foreign investors, regardless of nationality, are treated equally.

Most investment treaties allow states to regulate foreign investors' acquisition of land rights. However, depending on how they are written, "pre-establishment" investment treaties may force states to remove restrictions on the purchase of land rights that discriminate against foreign investors. This could encourage the commercialization of land relations in areas where land has significant social, cultural, and spiritual significance. Investment treaties may potentially expose governments to liability for actions taken as a result of insufficient administrative or judicial capability.

In many African countries, land ownership is vested in the state, though private use or occupancy rights based on statute or customary law are recognized in one form or another as existing over land that is technically owned by the state.²²

2.1. Policy Considerations in the ownership of Lands by Foreigners

A number of possible policy reasons exist for restricting and regulating ownership and use of land by foreigners and for adopting different techniques. An understanding of the various policy rationales will better inform our consideration of the techniques for controlling foreigners land ownership. The potential policy consideration on ownership of land by foreigners are listed below.

2.1.1. Protect National Security.

Land is a social institution that confers authority not merely over goods, but also over people. Possession of land as a property implies control over others. It has

²²See for Example Eritrea, Land Proclamation, 1994; Tanzania, Land Act, 199 -

served as a tool for those who hold it to exert control over the lives and labor of others who do not. Foreigners land ownership restrictions in border areas, as well as limitations in areas around military bases in nation state borders appear to have been implemented as part of nations' military security strategies. This category might theoretically cover actions to safeguard food security and prevent economic dominance.

In a similar vein, land is the source of many protracted violent clashes in African nation states. Allowing foreigners to acquire land also entails forsaking the country's sole source of revenue and allowing foreign investors to act as the final arbiters of national security. Because of this, states seek to grant property ownership to governments only, presumably for national security reasons.

2.1.2. Prevent General Economic Domination by Foreigners.

Preventing foreigners from owning land would limit foreigners' dominance. When the local economy is poor and the host state's economy is constrained, allowing foreigners to own land through investment would create a monopoly for those with vast sums of money, knowledge, and experience. Besides, domestic investors would be readily absorbed shortly. Similarly, it will also make the domestic economy reliant on a small number of large foreign investors. To this end, states determine to prevent ownership of land by foreigners to oust the dominance of the economy.

2.1.3. Prevent or Restrict Foreign-Based Speculation on Land.

Allowing foreigners to own land would create an inclusion of the foreign investors' interest in the policy that would affect and applies to all property. This would make the host states policymakers consider a foreigner interest leaving aside the interests of their own people, as long as foreign ownership of land is allowed. To this end,

sates opt to restrict ownership of land by foreigners in order to avoid such foreign-based speculation.

2.1.4. Preserve the Social Fabric of the Nation

Land is a crucial property in establishing nation's identity, integrity, unity, and culture. However, when foreigners are allowed to own land, the culture and social fabric of the host state may be ruined and influenced. Foreigners may not come into a host state with mere capital, but also with their identity and culture, and this could have an impact on the host countries' cultures. Hence, prohibiting foreigners from owning land would protect the nation's social fabric and cultures from being ruined by the new and unlearned culture of the foreign investors. In addition to that, the investment activities engaged by the foreigners may produce products that are culturally and religiously condemned. This may eventually cascade in to the cultures and traditions of the native people.

2.2. The Perceived Benefits of Allowing Foreigners to Own Land in the Host State

The fundamental policy goal of total deregulation of foreign land ownership is to create a favorable climate for foreign investment. These policies may be implemented voluntarily or in reaction to external demands to liberalize the foreign investment system. They may strive to stimulate land investment directly, but land ownership is often a byproduct of industrial or agricultural investment. In this situation, it may be critical for a foreign investor to own the land on which their investment is located, not only to gain the benefits of ownership, but also to use the land. Some of the perceived advantages of total deregulation of foreigner land ownership are listed below:

2.2.1. Increases the Transfer of Technological Know-how

Foreigners may not enter in to the host countries solely on the basis of their capital, but also, with new technology and expertise. A foreign investor may introduce new technologies, the latest technological tools, modern and scientific production processes that promote economic development of the host state. The introduction of these newer and improved technologies leads to increased firm distribution in the local economy, resulting in increased industry efficiency and effectiveness. Furthermore, if foreigners are allowed to own land, an ideal atmosphere will be created for host countries to transfer technological knowledge and information related to the products and services they provide.

2.2.2. Boost the Domestic Economy of the Host State.

At it is mentioned elsewhere in this article, and is a natural resource that plays an important role in country's economic development. Land investment might result in knowledge transfer and a deeper integration of the local economy into value chains. Foreign investment may provide additional revenue which will be expected to stimulate the host state economic growth. Increased commodity export output generates foreign currency and raises taxes, allowing national governments to invest in programs that benefit the people. On the same vein, it will improve living conditions and promote long-term growth through increased income opportunities, which can be directly linked to the employment choice within the investment project or indirectly through a rise in other business options. On the same note, the ownership of land by the foreigners would stimulate the manufacturing and service sectors, resulting in job creation and reduction in the country's unemployment rate. Then, the increased employment leads to increased wages and more purchasing power for the populace, strengthening the country's overall economy.

2.2.3. Provides Foreign Investors with Ownership Security

Allowing ownership of land by the foreigners could also have a considerable impact on security. When complete ownership is granted, the owner becomes more devoted in the company's growth. For example, a cultivator with full land ownership rights puts forth more effort, and output rises as a result. However, the prohibition on the other hand, may lead to insecurity stems from fear of eviction. An investor who makes sure that his/her property is not withdrawn by the host states, under the pretext of the land is not owned by the foreigners, would create security. This indeed builds confidence on foreigners. Many international bilateral investment treaties inculcate the duty on the host states to respect due process of laws on compensations and expropriation. Thus, allowing foreigners to own land would create unreserved security on the foreigner's security against dispossession.

Having seen, the status of international law on the ownership of lands by foreigners and the policy considerations, the upcoming parts of this article enumerates the land policies of Ethiopia and Kenya on ownership of lands by foreigners.

3. Kenya and Ethiopian Land Policies on Ownership of Land by Foreigners

Ownership and use rights in relation to land in some legal systems including most common law systems are based on a distinction between real property and personal property²³. In other legal systems, particularly civil law systems, rights in respect of land are based on distinctions firstly, between immovable things (land and buildings) and movables and secondly, between real rights enforceable against the world and personal rights which are only enforceable against specific parties. In some legal systems, land ownership rights are described as permanent use rights

²³ Jennings and watts (n 2)

although for practical purposes the effect of such a right often appears to be much the same as ownership.²⁴ However, there are many variations among countries, even between the same legal systems.

3.1. Kenya Land Policies and Laws on Ownership of Land by Foreigners

The 2010 Kenyan constitution, the 2012 no. 6 of 2012 land act, and the 2014 land control act of Kenya are the pertinent sources of land law in Kenya. The 2010 Constitution of Kenya under article 65 provides that non-citizen may only own land on a leasehold basis for a term not exceeding 99 years.²⁵ A non-citizen who owned freehold land or leasehold land before the 2010 constitution for a term exceeding 99 years then the Constitution provides that their interest in the land will be reduced to a 99-year leasehold interest.²⁶ Nonetheless, a non-citizen can apply for an extension or renewal of the lease at the expiry of the 99-year term.

The Land Control Act of Kenya restricts the ownership by non-citizens of agricultural land or land within land control areas.²⁷ This land, in general terms, is land that is situated outside a municipality, a township, or a market or land that the Minister of Land designates as being controlled and subject to the protections in the act. The Act in section 9 as read with section 6 provides that any dealing in agricultural land or controlled land the purported effect of which is to sell, transfer, lease, charge, partition or exchange land with a non-citizen is void for all intents and purposes.²⁸ A non-citizen for the purpose of the Act is one who is not a citizen either by birth or registration, and for a private company or co-operative society, it is the one whose shareholders or members are not all citizens. A non-citizen may however be exempted from the provisions of this Act by the President of Kenya.

²⁴ *ibid*

²⁵ Kenyan Constitution.(2010) Art.65

²⁶ *ibid*

²⁷ The Land Control Act of Kenya(2012) sec.6

²⁸ *ibid*

The ramifications of the restrictions placed by the Land Control Act are more far reaching than those in the Constitution. Unless, a foreign investor is exempted by the President of the Republic of Kenya, he or she is confined to owning land within or within the vicinity of Kenya. A practice has however developed to try exploit a certain loophole in the Land Control Act to enable the sale, transfer, lease, charge, partition or exchange of agricultural land to non-citizens.

A close reading of the Act reveals that it does not restrict dealings in shares in public companies which own agricultural land. A foreign investor may therefore own agricultural land indirectly through owning shares in a public company that owns agricultural land.

As has been mentioned above, at the expiry of the leasehold terms, non-citizens may apply for renewal or extension of their leases. So far as agricultural land is concerned, a foreign investor may apply for an exemption from the President and if they lack the access, then an investor may obtain ownership or other rights through ownership of a public company.

3.2. Ethiopian Land and Investment Laws on Ownership of Lands by Foreigners

The 1960 Civil Code of Ethiopia on Article 390 clearly state that foreigners may not own immovable property situated in Ethiopia except in accordance with an Imperial Order.²⁹ Such a stance has not been changed when the Imperial Era investment Proclamation No 242/1966 came out. On the same manner, the Dergue

²⁹ Civil Code of the Empire of Ethiopia, Proclamation No.165/1960. Negarit Gazeta. year 19, No.2 Art..390

regime's investment Proclamation No 17/1990 did not change the situation, neither does the Transitional Government Proclamation No 15/1992.³⁰

At present in Ethiopia, land is exclusively owned by the state.³¹ When it proclaimed the ownership of land by the state in 1995, the Constitution also prohibited the sale or exchange of land.³² Thus, the Constitution entitles people, both citizens and non-citizens of Ethiopia, only usufructuary rights. Under the Constitution and the Rural Land Administration Proclamation, peasants,³³ and pastoralists are entitled to access private as well as communal land for free.³⁴ After gaining access, peasants and pastoralists can exercise use rights over their land for an unlimited period of time. Investment Proclamation No 37/1996 incorporated no specific law regarding ownership of immovable by foreigners as well.

The first investment proclamation to introduce the shift was Proclamation No 280/2002. Under Article 38 of this Proclamation, it states that notwithstanding the provisions of Article 390-393 of the Civil Code, a foreign national taken for domestic investor or a foreign investor is granted the right to own a dwelling house and other immovable property requisite for his investment.³⁵ This right of ownership of an immovable covers those investors who have invested prior to the issuance of the proclamation. Then similar provisions allowing foreign investors ownership right of immovable has been included in Investment Proclamation No 769/2012 and the latest Investment Proclamation No 1180/2020 and its Regulation No 474/2020.

³⁰ Wabelo (n 6)

³¹ Klaus Deininger et al., 'Tenure security and land related investment: Evidence from Ethiopia' (2003).Policy research working paper 2991. 9

³² *ibid*

³³ 'Rural Land Administration and Land Use Proc. No. 456/2005, Federal Negarit Gazeta, Art. 2(7).

³⁴ Klaus Deininger (n 31)

³⁵ Investment Regulation No 474/2020 Ethiopian investment regulation No.474/2020. Negarit Gazeta. Art.17.

A foreign national or foreign enterprise will be treated as a domestic investor by making application as per the relevant law or international treaty ratified by Ethiopia and, upon being issued with a permit, will have the right to own immovable property necessary for his investment. Immovable property as used in this provision does not include land. The reason land is excluded is because of the FDRE Constitution. Under Article 40, Sub-Article 3 of the Constitution, the ownership rights of land in Ethiopia are assigned to the Nations, Nationalities, and Peoples of Ethiopia.

A foreign investor or a foreign national treated as domestic investor who owns large investment may be allowed to own one dwelling house.³⁶ Article 17 of the Investment Regulation No 474/2020 state that a foreign investor or foreign national considered as a domestic investor may own a dwelling house if he has invested a minimum of USD10 million.³⁷ Comparing the latest proclamation with the earlier investment proclamations show strict conditions that are set in this latest investment proclamation for ownership of dwelling house. For instance, the previous investment proclamations namely Investment Proclamation No 769/2012 and 280/2002 provide those foreign investors or a foreign national treated as a domestic investor the right to own a dwelling house and other immovable property requisite for his/her investment. There was no capital requirement for owning dwelling house.

³⁶ *ibid*

³⁷ *ibid*

4. The Implication of Ethiopian Land and Investment Laws on Ownership of Land by Foreigners on Attracting Foreign Direct Investment

It is true that, in their attempt to attract Foreign Direct Investment (FDI), most African countries have liberalized trade and attempted to create enabling environment in recent decades. Ethiopia, like many African countries, took some steps towards liberalizing trade and the macroeconomic regime as well as, introducing some measures aimed at improving the FDI regulatory framework. The justification for loosening the regulatory framework stems from the will to increase revenue and domestic production.

The contribution of FDI to economic development and therefore poverty reduction comes through its role as a conduit for transferring advanced technology and organizational forms to the host country, and triggering technological and other spillovers to domestically owned enterprises. Most indeed, it helps, in assisting human capital formation domestically and trade integration globally.³⁸ However, the maximum attainment of gains from FDI is affected by unsuitable policy frameworks.

The Federal Government of Ethiopia is duty bound to ensure that all Ethiopians are given equal opportunity to improve their economic conditions and to promote equitable distribution of wealth among them and the Constitution grants the House of Peoples' Representatives the power to legislate law on the utilization of land and other natural resources. Granting the power to enact law on how to use natural resources, at least by implication, means granting power to regulate investment.

Ethiopian land policy on ownership of land by foreigners is strict and rigid, and it has no room for ownership of land by Ethiopian citizens, let alone foreigners.

³⁸ 'OECD', Foreign Direct Investment for Development: Maximizing Benefits, Minimizing Costs (2002) https://www.oecd-ilibrary.org/finance-and-investment/foreign-direct-investment-for-development_9789264199286-en accessed 10 May 2022.

Ethiopia is among the few African countries where foreigners or even citizens do not own land.

The land is often leased out by the government for a specified period of time to the foreigner. Ethiopian land and investment policies have provided certain benefits to the lessee foreigners that fall short of according full ownership, which is not free from dispossession. From the touchstones of implication, this land policy has potentially affected the economic gain of Ethiopia from foreign direct investment without reservation, and it has been a factor for making many foreign investors to leave, in to, other neighboring countries where their land policies are accommodated and extends maximum security. Kenya is the epitome of this fact and the beneficiary of Ethiopian land law drawbacks. As to this end, Ethiopian law makers should re-consider the possible way out on how to retain foreign investors by revisiting stumbles in the 1995 FDRE constitution particularly regarding ownership of lands.

Foreign investors should be given the opportunity to own land in Ethiopia on which their investment is located, not only to enjoy the benefits of ownership, but also to use the land as security to raise capital for receiving credit from financial institutions. In return such advantages to foreigners will benefit the country's entire economy.

In addition, it makes available capital to Ethiopia from capital sending country. The capital, then, is used to promote the development of the economy of the country. Furthermore, increased FDI boosts the manufacturing as well as the services sector. This in turn creates jobs, and helps to reduce unemployment among the educated youth as well as skilled and unskilled labor in the country. Then, the increased employment translates to increased incomes, and equips the population with

enhanced buying power. This again boosts the economy of the country. Therefore, limiting the ownership of lands by foreigners is a one strand of obstacle to investment which Ethiopia is beholding badly.

In Kenya, foreigners can own land indirectly as it is stipulated in the above paragraphs. Currently, this had contributed much to the sustained economic growth, social development, and political stability gains over the past decade. However, Kenya's key development challenges still include poverty, inequality, climate change, continued weak private sector investment and the vulnerability of the economy to internal and external shocks.³⁹ Including the land liberalization and other factors, over 2015-2019, Kenya's economic growth averaged 5.7%, making it one of the fastest growing economies in Sub-Saharan Africa.⁴⁰ The performance of the economy has been boosted by a stable macroeconomic environment, positive investor confidence and a resilient services sector. On the top of that, Kenya has the potential to be one of Africa's success stories, given its dynamic private sector, skilled workforce, improved infrastructure, new constitution, and its pivotal role in East Africa.

4.1. Ethiopian Land Policy Reforming Regarding Ownership by Foreigners

Since 2018, Ethiopian government has taken a firm stand towards improving the country's economic performance by amending laws that had affected the investment in the country. The measures include but not limited to measures of privatizing state-owned companies, a hotbed of inefficiency, while reallocating people, goods, and money to the manufacturing industry, where further growth potential is expected. On top of that, a gradual process of private-sector led liberalization has begun in some sectors, including in logistics and

³⁹ 'Kenya Economic Update: Unbundling the Slack in Private Sector Investment – Transforming Agriculture Sector Productivity and Linkages to Poverty Reduction' <https://openknowledge.worldbank.org/handle/10986/31515> accessed 26 December 2021

⁴⁰ *ibid*

telecommunications, marking an important shift away from the largely state-led development pursued in recent decades.⁴¹

As stipulated in the above paragraphs, giving foreign investors land ownership provides maximal protection against arbitrary eviction and opens investment doors with a bundle of ensuing technological know-how to the domestic economy. Further, it will open the market for the domestic investors suffering from the shortage of routes, variety in production. As a result, the aggregate result would be boosting and increasing the economy of the host state economic gains. However, such an economic reform regarding land in Ethiopia, needs to be undertaken with maximum protection. Since land is so important to Ethiopians' socioeconomic well-being, land ownership is more than just a policy issue.

Therefore, reforming land policy from the very beginning is mandatory, and that should commence from amending the 1995 FDRE constitution. Nonetheless that is unattainable, within short period of time given the internal unregulated politics and the rigidity of the constitution itself for amendment. However, when the time comes to amend the constitutions, it is plausible to consider the upcoming proposal regarding foreigner's land ownership.

As detailed above, land ownership issue is a very sensitive case that requires maximum attention. Though, awarding land ownership for foreigners has a potential benefit for the economic development of Ethiopia, it is again reasonable to protect the adverse effects it will come up with. Thus, this article proposes an intermediate restriction on ownership of land by foreigners. In addition, it should be noted that the objective of the ownership has to be solely for investment

⁴¹ 'Six Things to Know about Ethiopia's New Program' <<https://www.imf.org/en/News/Articlesngs>> accessed 26 December 2021.

purpose. In other words, when the object of the investment is changed, the ownership needs to be ousted early. Otherwise, it would lead to foreign economic domination and lose control of the amount of direct foreign investment. The Australian Foreign Takeovers Act of 1975, which prohibits foreigners from purchasing urban land, serves as an example.⁴² Therefore, it is recommended that the government should employ the intermediate restrictions approach for land reform in Ethiopia.

Intermediate restriction approach should take the policy frameworks of Ethiopian land law, regarding ownership of land by foreigners. Intermediate restriction allows foreign land ownership, in that foreign land use is permitted, but subject to regulation and various restrictions. The restriction serves to avoid the federal government imposing an inappropriate lease period for a political aim, which is open to rent seeking. Similarly, by bypassing government consent, it will provide farmers with an ultimate decision making on their land. Foreign nationals can also lease land from the government and farmers under the current land ownership regime. The leased property must be used for its intended purpose. The federal government, with the approval of the regional states, has the ability to decide on the fate of the land. Unless, the security of the lessor, is secured in terms of decision making on his/her land, it would amount to migration of the farming population, as poor farmers are forced to sell their plots to unscrupulous urban speculators, particularly during periods of hardship.⁴³

For large-scale modern farms, there is an abundant idle arable land in the low lands, both for rain fed and irrigation farming. Most of the farmers, on the other hand, live in the highlands where there is scarcity of land but large amount of accumulated human power due to high population density. Allowing the farmer to

⁴² Sornorajah, (n 19)

⁴³ 'MOIPAD (Ministry of Information, Press and Audiovisual Department) (2001). Federal Democratic Republic of Ethiopia, Rural Development Policies, Strategies and Instruments (Amharic). Addis Ababa 21.

sell land here, would lead either to displacing the farmers or converting them to tenants. Therefore, the intermediate restriction approach helps to consider the real background. The foreign national leased the land can use the lease right as collateral for credits from Banks.

In general, given the benefits of investment on Ethiopia's socioeconomic development and in stimulating the local community, the Ethiopian government should allow foreign investors to own land subject to strict conditions.

Concluding Remark

Land is fundamental to people's social, political, and economic life on the planet. It provides the means of agriculture, natural resources, and other land-based activities essential to livelihoods through providing food security, income, and employment. Given the value of land, nation-states have adopted wide arrays of land laws and policies to ensure that it is used properly. Furthermore, states use a variety of policy considerations to determine who can own land in order to maximize land utilization and other factors. Some states either give the government sole control of land or allow private ownership. Nonetheless, international law regulates land in a passive manner. State ownership of land is thought to impede investment, which could jeopardize output, food security, and economic progress. On the other side, it is believed that foreigners land ownership will lead to mass land sales by poor rural people, who will then migrate to metropolitan areas, exacerbating the urban issue and worsening poverty.

Ethiopia's prevailing sociopolitical realities has led to a policy of granting Ethiopian government and people customary land ownership. In contrast to

Ethiopian land policy, Kenyan land policy permits private individuals and foreigners to own land through public companies.

It has been justified that allowing foreigners to own land would boost the economy, create more revenue, and speed up the transfer of technology and knowledge. As a result, it is proposed that foreigners shall be allowed to own land. When the time comes to rewrite the FDRE constitution, Ethiopia should change its land policy on ownership by applying intermediate restriction approaches, taking into account the benefits of foreign land ownership.