



THE ROLE OF KENYA'S NATIONAL INVESTMENT AUTHORITY IN IDENTIFYING AND ALLOCATING LAND FOR PRIVATE INVESTMENT



AFRICA BIODIVERSITY COLLABORATIVE GROUP

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EXECUTIVE SUMMARY

This study sought to determine the legal basis and the role of Kenya government's Investment Authority in identifying and allocating land for private investment, especially for large-scale land allocations for food and biofuel crop production. The study has been conducted largely by review of relevant literature, interviews with responsible investment Authority officials and representatives of non-government organizations and case studies, over a period of three months.

This study finds that in Kenya, the Investment Promotion Act, number 6 of year 2004 is the law that established Kenya Investment Authority, also known as KenInvest, as a national agency responsible for promotion and facilitation of private investment. However, Act No. 6 of 2004, the constituting statute, does not contain express provisions authorizing the Authority to acquire or allocate land for private investment. Unlike its predecessor, the Investment Promotion Center (IPC), the Authority has, in relation to property for private investment, only power to "facilitate and manage investment sites, estates or land, together with associated facilities on the sites, estates and land." There is no explicit provision in the law stating that the Authority itself shall acquire investment land, estates or sites.

This study further finds that without authority or power to itself acquire land for investment, the Authority does not own or hold any land or land bank for investment. In fact, there is no land bank for investment in Kenya, at all. The last chunk of land for investment that was held by the now defunct IPC was disposed of by 1999, long before the Authority came into being in the year 2004. It was determined that rather than identify and allocate land for investment, the Authority's functions regarding land for investment has been relegated to maintenance of data of some private land owners who voluntarily submitted information to the Authority about availability of land for investment and, in a few cases, assisting investors to connect with real estate agents and private land owners. The Authority no longer assists investors to connect with the Ministry of Lands to identify land for investment because there has been a moratorium on dealings with government lands, which has yet to be lifted.

In the circumstances, private investors, including foreign investors, have managed to acquire land for investment through a variety of ways, including: direct connection/contact with land owners, connection with politicians

leading to politically-connected land allocations for investment and direct connection with regional development authorities. In one case, a foreign investor has, through direct connection with a regional development authority, acquired over 209,000 hectares of land for biofuel crop production. Private investors seeking land in Kenya have had varied experiences, ranging from successful cultivation of biofuel crops to inability to utilize land allocated for investment due to land rates and unauthorized occupation of land by squatters. Also, while many have been able to acquire land for investment, a number have been, perhaps unexpectedly, subjected to EIA processes and outcomes that they do not seem to have deemed favourable to their investments. There are also investors who have successfully gone through EIA processes and outcomes with satisfaction.

It has been determined that land holding by foreign entities is limited by the Constitution to leases only, for a period not exceeding 99 years, but this study finds that many leases are in the range of 50 - 55 years.

The study also determined that the Investment Authority does not itself identify ecosystem services that potential large-scale agricultural projects would depend on, which services a project would likely impact and which services would be more important to local livelihood. The Investment Authority does not engage in environmental considerations at all. It has neither capacity nor legal mandate to do so. Its officials confirmed that it does refer all investor matters requiring environmental considerations to NEMA.

With regard to investment promotion functions, the Investment Authority's capacity has been determined to be weak, requiring improvement in several ways, along with necessary amendments to Act No. 6 of 2004. In Kenya, only few people know about the existence of the Investment Authority. This study makes a number of recommendations for the improvement of the Authority's performance.

Perhaps it is more interesting to note this study's finding that in Kenya, although the Investment Authority is designated the responsibility to promote and facilitate private investment, there are a number of other government agencies with similar statutory powers to promote private investment, including through allocation of land for investment and in the case of these other agencies, the respective laws are more explicit on their land allocation powers. These include: Kenya Wildlife Service, regional development Authorities such as Ewaso Nyiro South Development Authority, the Minister for Agriculture, acting in collaboration with the Central Agricultural Board and the Export Promotion Zones (EPZ) Authority, among others. The EPZ Authority does, in fact hold/own sites and facilities for investment.

The prevailing situation concerning powers to allocate land for investment and the absence of an investment land bank in Kenya is likely to change, now that a

new Land Act has been effected, with express provisions empowering the National Land Commission (currently in the process of formation) to set aside land for investment and also allocate land for investment. Laws empowering other government agencies to allocate land for investment are likely to be amended to consolidate powers over investment land in the Land Commission as intended and provided for by the latest land law and the national Constitution.

Regarding social and environmental concerns, it was determined that although the Agriculture Act and the Physical Planning Act have provisions requiring environmental factors to be taken into consideration in the process of allocation and utilization of land, the provisions are hardly enforced. It is provisions of the Environmental Management and Co-ordination Act (EMCA of 1999) that have been applied, especially provisions requiring environmental impact assessment (EIA) and audit, to incorporate both environment and social considerations in investment activities. In some cases, the application of EIA and audit requirements have been successfully implemented, for example, to limit the scale of biofuel crop cultivation to prevent negative consequences. This study also presents a number of other projects than crop cultivation in which EIA has been applied, to elaborate the potential of the EIA process as a powerful tool to prevent or reduce negative social and environmental externalities of investment activities.

Of all the non-government organizations interviewed, only one, Green Africa Foundation, has engaged with the Investment Authority, especially in holding joint investment promotion activities abroad. The NGO's experience with the Authority is described herein. The study finds that there are a number of NGOs dealing with land-related issues but they do not engage with the Investment Authority.

Efforts were also made to determine the experience of communities regarding land allocations. This study finds that communities have had varied experiences. While some welcomed investors and cooperated with them in the process of land acquisition in the hope of benefiting from investment activities, others vehemently opposed investor land acquisition and in at least one case, community members are continuing to suffer the consequences of an investor's large-scale crop cultivation and related activities.

Generally, it is, in every case, expected that private investment will confer some benefits, not only to the country, but specifically to local communities, especially in terms of poverty alleviation. However, this study finds that community members have, in a few cases, gained employment especially as casual labourers in some of the investment projects. The scope of this study did not allow a determination of whether or not such employment generates sufficient earnings that could alleviate poverty. It also determined that in some cases, negative consequences of investment activities outweigh any benefits

that could be realized. However, the new Land Act now equires the National Land Commission (currently in the process of formation) to ensure that investment/development activities confer benefits to local communities.

It is noted that a national biofuel strategy and policy have been drafted but not yet passed. These are expected to bring more order in land allocations for biofuel crop production. It was also indicated that some agencies in Kenya may have been engaged in mapping of areas in Kenya where biofuel crops may be grown, but details could not be obtained before the end of this study.

Introduction

This study sought to determine the legal basis and the role of Kenya government's Investment Authority in identifying and allocating land for private investment, especially for large-scale land allocations for food and biofuel crop production. The study has been conducted largely by review of relevant literature, interviews with responsible investment Authority officials and representatives of non-government organizations and case studies, over a period of three months.

In order to maintain what is believed to have been pertinent matters for determination, this report is presented in a format that answers questions in the order in which they were presented for research. The presentation is organized into sections, A to E. Each section has numbered questions, each followed by corresponding answers. If necessary and upon direction or request, the presentation may be re-organized as deemed necessary.

A.

1. What does the investment law provide regarding identification and allocation of land for private investment purposes?

The Investment Promotion Act, No. 6 of 2004, which declares in its Preamble that it is the law intended to facilitate and promote investment, has no express provisions on identification and allocation of land for private investment. The Only reference to land in the Investment Promotion Act which could be linked to acquisition of land for investment is section 15 which states the functions of the Authority. At 15(d), the law states that one of the functions of the Authority is to "*facilitate and manage investment sites, estates or land together with associated facilities on the sites, estates and land.*" It was explained during interviews with the Authority's personnel that what it has done, so far, is facilitate investor acquisition of land for investment by providing them with a list of privately held lands available for investment that has been prepared by the Authority based on land owner submission of information and, to a limited extent, by putting investors in touch with: the Ministry of Lands, estate agents and local authorities. It was explained that the Authority itself does not engage in negotiations for land on behalf of investors. It was further explained that its facilitation with regard to acquisition of government land has diminished in light of a government moratorium on acquisition of government land.

Section 15(d) of the Investment Promotion Act states that the Investment Authority shall manage investment sites, estate or land. However, it does not authorize the Authority to acquire land for the purpose of establishing investment sites or estates. It was clarified that in practice, the Authority has never held or owned any investment sites, estates or land. Its predecessor, the Investment Promotion Center, did own some land for investment which had

been allocated to it by central government. However, by the year 1999, the IPC had alienated all of the land, some of it through the phenomenon of land grabbing in which powerful politicians and their cronies were allocated much of the land. It was stated that only a few investors, about four, were allocated investment land by the IPC, as it then was. Moreover, it was stated, land that the IPC had control over had been set aside in major towns in Kenya, including Eldoret, Thika and Nairobi, mainly for establishment of industries. The IPC had no land in the countryside for cultivation of crops. Currently, property of the kind the IPC owned for investment exist only in the form of buildings and spaces in what is known as Export Promotion Zone (EPZ) in Arthi River in Kenya. EPZ facilities are owned and leased by EPZ Authority, a separate agency from the national Investment Authority. One may understand EPZ Authority's role as focusing on promotion of exports and that of the national Investment Authority as focused on promotion and facilitation of investments in Kenya, generally, but obviously, the functions of the two converge at the point where promotion of investments, generally, encompass promotion of exports and export-oriented production processes. It would appear that functions of the two could overlap, more so because there is nothing in the relevant statutes limiting the nature of investment activities that each of the bodies may engage in.

The preamble to the Act is instructive on the role of Kenya's Investment Authority. It specifies that it is an Act of Parliament to promote and facilitate investment by "*...assisting investors in obtaining the licences necessary to invest and by providing other assistance and incentives...*" The Authority's role in facilitating investment and assisting investors was clarified to include services at two levels, that is, before investment and after investment.

Pre-investment services include the Authority's: issuance of an investment certificate, which is the mainstay of its investment related activities, assistance in obtaining any necessary licences and permits, assistance in obtaining incentives or exemptions under the Income Tax Act, the Customs and Excise Act, the Value Added Tax Act and other legislation that applies, providing prospective investors with information on the business climate, operating rules and investment opportunities including sources of capital and liaison with other government agencies for issuance of additional licences and approvals not directly handled by the Authority.

Post investment services, also known as after care services, have been stated to involve "continuous liaison with other stakeholders who interface with investors in their day-to-day operations with an ultimate aim of improving the investment environment." (Kenya Investment Authority Prospectus, at p. 2). During interviews, it was clarified that as part of its after care services, the Authority's staff visit investors to ensure that existing investments "are comfortable" and to obtain investor feed back on the investment climate including any bottlenecks and policy issues. In the process, the Authority

informs investors of any new government incentives and policy changes. The stated objective of after care services is to retain existing investors.

2. What authorities does the law provide the government investment authority (and other agencies, such as the Ministry of Lands, of Agriculture, e.t.c) to acquire, hold and allocate land for private investments?

In response to the question, this section begins by presenting the position regarding acquisition and allocation of land for private investment that has changed and then proceeds to analyze powers/authority currently granted by specified laws to various government agencies to acquire and allocate land for investment. In the process, powers/authorities that are likely to change when the National Land Commission begins to implement provisions of the new Land Act are stated.

The Current Law and Related Authorities for Acquisition and Allocation of Land for Private Investment

Until the Land Act of 2012 was passed, the rights, powers and procedures for allocation of land for all purposes depended on the type of land under consideration - government land, private land or community land. There was no specific provision in law for acquisition of land for investment purposes, except those that existed in the Investment Promotion Center Act which was repealed in the year 2004. Before the Land Act of May 2012, the President, personally, but mostly through the Commissioner of Lands, allocated or granted land out of government land for a variety of purposes, including private investment purposes through the now defunct Investment Promotion Center. The procedure for acquisition of land was set out in the Government Land Act, now repealed.

Government land, as defined by the now repealed Government Land Act, did not include land belonging to local authorities, which were largely acquired and disposed of under the Local Government Act (Cap. 265, especially section 144). The Local Government Act, still in force, authorizes local authorities to sell, lease or issue licences over its land, even for private purposes (section 144) but now, the provisions of the Local Government Act, along with the statutory authorities granted over disposal of local authority land, conflict with provisions of the Constitution, especially Article 62(1)(b) and (m) and sections 2 and 12 of the Land Act of 2012 which include local authority land in the definition of public/government land and state that only the National Land Commission has power to allocate public land, including local authority land, for all purposes, including private investment purposes.

Land formerly categorized as trust land, now community land, were held by the respective local authorities (county councils) in trust for the communities and

could be disposed of (sold, leased or distributed to individual community members upon which it became private land) in accordance with powers granted by the former national constitution and the Trust Land Act.

There was also private land- a category comprising much of the land in Kenya, owned by private individuals and other bodies (companies, et cetra), over which the private owners had powers, under the Registered Land Act (now repealed), the India Transfer of Property Act (also repealed) and other laws (a number of them now repealed) to sell or lease, through private arrangements, for any purpose, including investment purposes.

Further, the Investment Promotion Center Act, now repealed, had specific provisions for acquisition and allocation of land for investment. Sections 3 of the Act empowered the Investment Promotion Center, a body corporate, to hold land. Further, section 4 of the Act, reproduced below, granted the Center wide powers to acquire land for purposes of investment, and to lease, sell, grant rights over or otherwise dispose for purposes of investment.

On the basis of the wide legal powers on the IPC to acquire and dispose of land for investment, land was granted it by central government of an amount that was not ascertained but in major Towns in Kenya, with powers to allocate the same to investors. By the year 1999, all of the land had either been allocated to a few investors or irregularly acquired, mainly by government officials and their cohorts.

The above position has, in some significant ways, been changed by the provisions of the new Land Act which was passed in May 2012. Some of the procedural aspects of dealings in land are also likely to be changed by the new Land Registration Act of 2012 and rules and regulations that the National Land Commission, currently in the process of establishment, is likely to make, as empowered by law.

The following discussion is organized according to the various categories of land and related authorities granted by law to agencies and private personalities to allocate or dispose of land for private investment.

(a). Authority to dispose of or allocate land forming part of public land for private investment purposes

Under the new national Constitution (Article 62 already elaborated above) and the Land Act of 2012 (sections 2), land that was formerly government land is now officially classified as public land, which includes land belonging to local authorities. Currently, local authorities comprise municipalities, townships and counties, but the arrangement is expected to change as the country transitions to a system of counties (47 in number) as the acceptable form of local government.

The only government agency with legal authority to allocate land out of public land for private investment purposes is the National Land Commission (section 12 of the Land Act), which is yet to be established. Obviously, the President and the Commissioner of Lands no longer have power or authority in law to allocate public land for investment.

Section 12 of the Land Act of 2012 explicitly confers on the Commission power to allocate land for investment purposes. However, there are conditions to be met before and after the Commission sets aside land for investment purposes, namely:

- (i) section 65 of the Constitution, which limits acquisition of land by non-Kenyans to leases only, for a term not exceeding 99 years;
- (ii) section 12(2) of the Land Act which excludes certain types of land from allocation for investment purposes (land along water sheds, wildlife reserves, land prone to erosion, land already reserved for public purposes such as education and land comprising natural, historical and cultural features);
- (iii) section 12(4) which requires the Commission to first ensure that the proposed investments in the land benefits local communities and their economies;
- (iv) section 12(7) which requires that before land is allocated for investment, it must first be planned, surveyed and serviced and guidelines for its development prepared in accordance with section 16 of the Act; and
- (v) section 12(8) which enjoins the Commission to ensure that public land allocated for investment purposes is not sold, disposed off, sub-leased, or sub-divided unless it is developed for the purpose for which it was allocated.

The above provisions of law affect the authority that KWS and regional development authorities have been exercising to allocate land within protected wildlife areas for private investment. Article 62(1)(b) of the Constitution includes land held, used or occupied by state organs under the classification of public land. This means that now, only the National Land Commission has power to allocate land that the KWS would have had the liberty to allocate for tourism purposes. Moreover, the Land Act, section 12(2)(b) excludes land in “wildlife reserves” from allocation for investment purposes. This means that only land in protected wildlife areas that have already been allocated for investment purposes and those that were already in the process of allocation when the Land Act of May 2012 came into force shall proceed, as saved in the transitional and saving provisions of the Land Act (section 162). The relevant provision states that:

“Unless the contrary is specifically provided in this Act, any right, interest, title, power, or obligation acquired, accrued, established, coming into force or exercisable before the commencement of this Act shall continue to be governed by the law applicable to it immediately prior to the commencement of this Act.”

The above provision of law applies to all other transactions affecting public land that were already underway when the Land Act came into force in May 2012. However, except for transactions involving land held by government agencies such as KWS and land held by local authorities (municipalities, counties and townships), such transactions are expected to have been few, if at all, because the government placed a moratorium over transactions involving government land two years ago, which moratorium has not yet been lifted. It is expected to be lifted when the National Land Commission is in place.

(b). *Authority to dispose of or allocate land forming part of Trust land/ Community Land for private investment purposes*

Article 63 of the Constitution classifies trust land as community land. Before the new Constitution came into force, such land could be allocated for investment purposes largely through exercise of alienation and disposal powers by county councils. Although county councils held the land in trust for local communities, community members were, in most cases, not consulted on matters of allocation of land. In a few cases, for example in the case involving Bedford Biofuel Limited, they were, to a limited extent, consulted. However, both the Constitution and the Land Act has changed allocation powers and procedures.

First, Article 63(4) requires a specific law, than the Trust Land Act, on disposition and use of trust land to be enacted before such land can be disposed of, by sale, lease or allocation to individual community members. It states:

“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.”

The constitutional requirement for specific new law to govern trust lands is affirmed by section 37 of the new Land Act which states that:

“Community land shall be managed in accordance with the law relating to community land enacted pursuant to Article 63 of the Constitution.”

Until the anticipated law is enacted and comes into force, any transactions involving trust land, including those by way of allocation for private investment

are illegal. In effect, the law places a moratorium on dealings in community land until a specific new law governing that category of land is passed. The legal position is understandable, given the fact that transactions involving trust lands, now community land, were largely governed by the former national constitution which has been repealed by the new one which was passed through a national referendum in the year 2010.

(c). Authority to dispose of or allocate land forming part of private land for private investment purposes

Private land consists of land held by any person under any freehold tenure, land privately held by any person under leasehold tenure and land declared to be private land by an act of Parliament (Article 64 of the Constitution). This category of land was largely governed by the Registered Land Act (now repealed) and the Land Titles Act also repealed), among others, as the substantive laws and the India Transfer of Property Act and Registration of Titles Act (also repealed), among others as the procedural laws governing sales, transfers and registration of titles. Currently, sections 38 - 106 of the Land Act of 2012 makes elaborate provisions regarding acquisition of land falling within this category. Basically, land may be acquired for investment purposes by sale (only to Kenyans), lease (to Kenyans and non-Kenyans), gift (to Kenyans only) and other legally acceptable forms of disposition. Clearly, for non-Kenyan investors, leases arrived at by contract with private land owners - individuals, companies, et cetra, are the only option. Needless to state, Article 65 on land holding by non-citizens applies - leases must not be for a term exceeding 99 years.

This study found that currently, the safest and quickest way to acquire land for investment purposes is to seek and find land in this category. During interviews, officials of the Investment Authority stated that the Authority has data on private land available for investment. The data was compiled on the basis of land owner submission to the authority of their interest in having their land leased for investment purposes. The Investment Authority itself has no power to allocate privately owned or held land to investors; it may only avail data and connect interested investors with land owners. Thereupon, investors and land owners engage in discussions and negotiations which may lead to the formation of contracts for land leases. Alternatively, investors may approach land estate agents - which are very many in Kenya, to assist them in identifying suitable land for investment, depending on the kind of investment that they prefer.

(d). Does Kenya's Investment Authority have power to allocate land for investment purposes?

On the basis of the preceding elaboration of laws governing the various categories of land in Kenya and related alienation authorities, it can be

understood that Kenya's Investment Authority does not have power or authority to allocate land for investment purposes.

The predecessor to the Authority, known as the Investment Promotion Center, was allocated land by central government (by the former President and Commissioner of Lands) for investment purposes, under section 3 of the Investment Promotion Centre Act (Cap 485, now repealed) which, granted the IPC power to hold land and section 4(a) thereof which empowered the Center,

“ to purchase, take on lease, hire or otherwise acquire, and to sell, exchange, surrender, lease, mortgage, charge, convert, turn to account, dispose of and deal with, any movable or immovable property and rights of all kinds;

and section 4(b) of the Act, which further empowered it:

“to sell, exchange, mortgage (with or without power of sale), assign, lease, sublet, improve, manage, develop, dispose of, turn to account, grant rights and privileges in respect of and generally otherwise deal with the whole or any part of any business, estates, property rights or undertakings of the Centre, upon any terms, either together or in portions, and as a going concern or otherwise, for such consideration, whether cash, shares, stocks, obligations or securities as the Board may think fit...”

The above provisions were not incorporated in Act No. 6 of 2004 establishing the current national Investment Authority for reasons which may be associated with the wanton manner in which much of the land advanced to the former IPC for investment purposes was squandered.

Interviews with the Investment Authority's officials revealed that land had been set aside for investment purposes in major towns in Kenya, including Nairobi, Kisumu, Thika and Eldoret and that land so set aside was placed under the authority of the Investment Promotion Center to decide whether or not and how to allocate it to investors, especially those that were seeking to invest in the industrial production sector. However, only a few investors were allocated land. Much of the land was grabbed by politicians such that by 1999, long before the Investment Promotion Act establishing the existing investment authority came into force, there was no more of the land formerly set aside for investment. It may have been the corruption involving the land allocated for investment that informed the drafters of the new law not to place powers on the current Investment Authority over investment land and also NOT to authorize central government to allocate any land to it for investment purposes.

The Investment Promotion Act does not expressly authorize the Authority to acquire and hold land. In fact, it has no explicit provision authorizing the Investment Authority to acquire or receive land for investment. The most relevant provisions regarding the Authority's power to acquire and hold land is section 15(2)(d) which sets out its functions. It provides that it shall:

“facilitate and manage investment sites, estates or land together with associated facilities on the sites, estates and land.”

Clearly, the Authority is bestowed with power to “manage” investment land, sites or estates without specification in law of how it would acquire investment land, even though there is no express provision in the law prohibiting it from acquiring and holding land for investment.

Provisions of the new Land Act of 2012 clarify that it has never been the intention of Parliament to confer on the Investment Authority power to allocate land for investment. As explained in details in other sections of this report, section 12 of the Land Act places authority on the National Land Commission to set aside land for investment purposes and also to allocate the land for investment, upon fulfillment of a number of conditions that have already been explained.

In summary, Kenya's national Investment Authority, also known as KenInvest, does not own or hold any land that it may allocate to investors; it does not have power to acquire land and reserve it for investment because that power has been placed with the National Land Commission and it does not have power to allocate land to investors because that power too has been placed with the National Land Commission.

(e). Authority granted the Export Promotion Zones Authority to allocate land-based facilities for export promotion activities

Besides the national Investment Authority, there is another government Authority, known as the EPZ Authority with powers to promote, especially private foreign and local investment in Kenya in the manufacturing, commercial and services sectors for export.

The Export Promotion Zones Act, Cap. 517 of the laws of Kenya confers upon the Export Promotion Zones Authority (EPZ Authority) separate powers from those of the national Investment Authority to establish export promotion zones - areas designated as such in Arthi River (15 miles from Nairobi), Malindi, Mombasa, Eldoret, Ruiru and in any other part of the country. Under sections 9 (c) and 15 of the EPZ Act, the EPZ Authority has power to map areas to be designated as export promotion zones. For over 15 years, an EPZ has been existing in Arthi River on the outskirts of Nairobi, but the law authorizes the

EPZ Authority to identify, map and designate any other area within the country as an EPZ.

Areas designated as EPZs are for “manufacturing activities, commercial activities or service activities” (section 17 of the EPZ Act). EPZ facilities comprise building structures and spaces where one may build a manufacturing or some other facility for one or more of the permitted activities. The EPZ Authority which, as already pointed out, functions separately from the national Investment Authority, has the legal mandate to not only participate, in collaboration with the Minister for Trade in establishing EPZs, but also to: promote and market EPZs among investors (section 9(k) of the EPZ Act), develop all aspects of EPZs with particular emphasis on creation of incentives for export-oriented production in areas designated as EPZs (section 9(a) of the Act), allocate spaces (land) within EPA for establishment of manufacturing, commercial or service facilities for export and receive and process applications and licences for EPZ facilities (section 9(e) of the Act).

Section 21 of the EPZ Act sets out qualifications that investors must meet in order to conduct export-related activities within the EPZ. It states that:

“An export processing zone developer or operator shall -

(a) be a company incorporated in Kenya for the sole purpose of developing and operating an export processing zone;

(b) have the necessary capital and expertise required for developing the export processing zone; and

(c) except for an export processing zone operator appointed under section 22, own or lease land for a minimum period of thirty years within the export processing zone.”

Those who qualify as EPZ developers or operators receive an export processing zone operator's licence from the Authority.

EPZ facilities in Kenya have and continue to accommodate vibrant export-oriented activities by investors from Europe, Asia, America and several other countries. Many textile products sold in the U.S.A., including high quality jeans, are manufactured in Kenya's EPZs. There is no provision in the EPZ Act that expressly prohibits setting aside areas/land for cultivation of cash crops for export. Moreover, section 22(1) (b) empowers one who qualifies as an EPZ developer or operator to, among other things, lease, sub-lease or sell land or buildings to licensed export processing zone enterprises, and charge rent or fees for other services that may be provided, in convertible foreign currency.” However, this study did not find any area that has been designated an EPZ for crop cultivation for export.

(f). *Authority granted the Director of KWS to allocate sites within protected wildlife areas for construction of hotels.*

Section 9(2)(iii) of the Wildlife (Management and Conservation) Act of 1976 expressly authorizes the Director of KWS to, within national parks, let sites for the erection of hotels, or other accommodation for visitors to the Park. In that regard, the Director has authority to give directions as to the manner in which permitted facilities shall be managed to ensure that areas reserved or set aside within protected areas as breeding grounds for animals or as nurseries for vegetation are not adversely affected.

KWS has exercised the power conferred on its Director as aforesaid to lease land within protected wildlife areas (national parks) for investment purposes. An advertisement appearing in The Traveller/Msafiri Magazine of May - June 2012 (page 30) states that KWS has already leased to private investors land in nine sites within national parks and reserves for establishment of high-end accommodation facilities (in Ndere Island, Kisumu Impala Sanctuary, Aberdare, Travo East, Hells Gate and Meru National Park). KWS is offering additional investment sites in Tsavo West, Mt. Kenya, Amboseli, Lake Nakuru and Maasai Mara, among others.

Will KWS retain its land allocation authority in light of the new Land Act? The answer is, not likely. Section 2 of the Land Act and Article 62 (g) of the Constitution define public land to include national parks, government animal sanctuaries and specially protected areas. Power to set aside and allocate such land for investment purposes has been conferred on the National Land Commission (section 12 (3), (4) and (8)). Once the Commission is in place, it is expected to develop regulations prescribing the criteria for allocation of public land for investment purposes as authorized by section 12(12) of the Land Act.

(g) *Authority granted ministries to allocate land and facilities for investment*

Kenya's Ministry of Information and Communication provides a good example of a government ministry that has power, parallel to those of the national Investment Authority, to undertake investment activities, especially in the information and communications technology as well as promote local and foreign investment in information and communication technology, as part of the fulfillment of Kenya's Vision 2030, a blue print for Kenya's attainment of industrial country status by the year 2030.

The Ministry has set aside 5000 acres of land in Machakos, about 45 miles from the City of Nairobi, for the establishment of Konza Technology City, an ICT city that is expected to attain the status of Silicon Valley in the U.S.A. The 500 acres of Konza City land has been declared by the Ministry to be a Special Economic Zone (SEZ) for establishment of business centers, hotels, schools,

universities, hospitals and residential premises capable of hosting local and multinational companies. Konza can be closely compared to Cairo's Smart Village or Mauritius' Ebene Cyber City, but it is expected to be bigger in scale. The Ministry has already allocated some one billion shillings for its development, though the total cost thereof is expected to reach trillions of shillings. There have been indications that the International Finance Corporation (IFC) is spearheading the Konza City development process as the project adviser, in collaboration with numerous consultants and that the IFC has been looking for a master developer for the project, a search that has delayed ground breaking. A public site development authority, the Konza Technopolis Development Authority (KTDA) is in the process of being established to oversee the planning, infrastructure development and land allocation within the site, parallel to the existence of the national Investment Authority.

While preparatory activities for the establishment of Konza City are going on, the Ministry is currently seeking investors in a cluster of technology businesses, financial services firms and other enterprises centered on the state-of-the-art business and science and it is expected that investors shall be allocated land for their investment activities. The development finds basis in Kenya's Vision 2030, which has similar status of as a national development policy. This study did not find any collaboration between the Ministry of Information and Communication that is promoting local and foreign investment in Konza City and Kenya's national Investment Authority.

(h). Regional Development Authorities' Power to allocate land for investment

For a long time, Kenya has maintained regional development authorities in the former eight provinces and complemented their functions, in many cases, by district development committees. Examples of regional development authorities are: Ewaso Ngiro South River Basin Development Authority, established by the Ewaso Ngiro South River Basin Development Authority Act, Cap. 447 which also specifies functions of the Authority, Ewaso Ngiro North River Basin Development Authority, established by Ewaso Ngiro South River Basin Development Authority Act, Tana and Arthi River Development Authority, Lake Basin Development Authority and Kerio Valley Development Authority. Each one of the development authorities is established by a statute and all constituting statutes are subject to the State Corporations Act that applies to all state corporations (it is some sort of grandfather statute).

The various constituting statutes empower each of the regional development authorities to undertake a variety of development activities, including investment functions that are, in many ways, similar to those of the national Investment Authority. The case of Ewaso Ngiro South River Basin Development Authority and the enabling Ewaso Ngiro South River Basin Development Authority Act provide a good example.

Ewaso Ngiro South River Basin Development Authority Act, Cap. 447, establishes the Ewaso Ngiro South River Basin Development Authority to plan for the development of the Area and initiate development project activities identified from such planning in the Area “through the Government generally” (section 8(a)). Within the permissive provisions of law, any project activity could be identified, including cultivation of biofuel crops, so long as identification of a development activity is preceded by the preparation of a development plan, mandated by section 8(b) which empowers the Authority “to develop an up-to-date long-range development plan for the Area.”

Regarding investments, without limiting the Authority’s powers and functions to local investment, section 8(c) of the Act is specific. It authorizes it to:

“initiate such studies, and carry out such surveys, of the Area as may be considered necessary by the Government or the Authority, and to assess alternative demands within the Area on the natural resources thereof, and to initiate, operate or implement such projects as may be necessary to exploit those natural resources including agriculture (both irrigated and rainfed), forestry, or wildlife and tourism industries, electric power generation, mining, and fishing, and to recommend economic priorities.”

Ancillary powers of the Authority are indicative of a sense of environment and natural resource management awareness. While the Authority undertakes development activities in their areas of operation, the law requires them to:

(i) co-coordinate their various studies of schemes within their areas of operation such that human, water, animal, land and other resources are utilized to the best advantage (section 8(d));

(ii) monitor the design and execution of planned projects and monitor and evaluate the performance of projects within its area of operation (sections 8(d) and (e)), which implies both social and environmental impact assessment of development activities;

(iii) co-ordinate the present abstraction and use of natural resources especially water, within the Area and to set up an affective monitoring of abstraction and usage (section 8(f));

(iv) ensure that landowners in the Area undertake all the measures specified by the Authority to protect the water and soils of the Area (section 8(h));

(v) to identify, collect, collate and correlate all such data related to the use of the water and other resources and also economic and related activities within the Area as may be necessary for the efficient forward planning of the Area (section 8(i));

(vi) maintain a liaison between the Government, the private sector and other interested agencies in the matter of the development of the Area with a view to limiting the duplication of effort and to ensuring , the best use of the available technical resources (section 8(j));

(vii) to examine the hydrological and ecological effects of the development programmes and evaluate how they affect the economic activities of the persons dependent on the river environment (section 8(k)); and

(viii) to consider all aspects of the development of the Area and its effects on the river's inflow and outflow (section 8(l)).

Development Authority's Power to Acquire and Allocate Land

All regional development Authorities have been endowed with legal powers to acquire, own and allocate land for development purposes. For example, section 21(1) of the Ewaso Ngiro South River Basin Development Authority Act specifies that where land is required by the Authority for its purposes, it may

“if the land is not public land, acquire the land through negotiation and agreement with the registered owner thereof, provided that, notwithstanding the provisions of section 6 of the Land Control Act, the ensuing transaction shall not require the consent of a land control board if the land to be acquired is agricultural land; or

if the land is public land, or if the Authority is unable to acquire through negotiation and agreement in accordance with paragraph (a), notify the Minister responsible for public lands that the land specified in the notice is required for the purpose of the Authority” (section 21(1), (a) and (b)).

Of course, upon notification, in the case of public land, the responsible minister would liaise with the Ministry of lands to grant it to the development authority. In the case of private land, the process of compulsory acquisition could ensue.

Regarding allocation of the Authority's land for investment/development purposes, section 15 of the Act states that land, as do their other assets, shall be disposed of in accordance with the provisions of section 13 of the State Corporations Act, the grandfather statute noted earlier. Section 13 of the State Corporations Act states that assets of regional development authorities shall be disposed of by way of sale or otherwise with the approval of the Minister and the Treasury where such disposal has not been taken into account in the estimates of the authority's budget. Where the minister responsible for matter of finance has, in collaboration with a particular regional development authority, made rules for disposal of land and other assets, such rules shall be followed (section 13(2) of the State Corporations Act).

It is explained later in this report that Bedford Biofuels Limited, which this study found to have acquired the largest tract of land in Kenya for biofuel crop production, managed to acquire the land through a regional development authority, namely, Tana Delta District Development Committee. Therefore, until the National Land Commission reorganizes the system of acquisition and allocation of land for investment as empowered by the new Land Act (section 12, et cetera), the role of regional development authorities in identifying and allocating land for private investment should not be underestimated.

(i). *Authority granted the minister for agriculture and the Central Agricultural Board by the Agriculture Act to acquire and allocate land for investment*

Section 184 of the Agriculture Act empowers the Central Agricultural Board (CAB) to set rules binding land owners for preservation, utilization and development of agricultural land. If land owners contravene those rules, the minister responsible for matters of agriculture may terminate an owner's interest in the land and let it to a tenant approved by the CAB. Ownership interest may be terminated by voluntary purchase or by compulsory acquisition. The law makes it clear that land so "taken over" may be leased to any tenant approved by the CAB, without any limitation of approved tenants to Kenyans. It means that foreign investors may also be considered for leases of land acquired as a result of owner's failure to comply with CAB's regulations. Time and resources did not allow a thorough search for instances in which the power has been exercised, but it does exist in the law. Provision for the powers described also illustrate that the Agriculture Act does have relevant provisions for environmental safeguards.

In addition, section 186 of the Agriculture Act empowers the minister for agriculture, upon request by the CAB, to acquire privately owned land and add it to adjoining land (which may be in the use of a local or foreign investor) in order for the land to be properly farmed. The power may be exercised where: the CAB is satisfied that an owner of land is not using or managing it for agricultural purposes or, is not residing thereon; the CAB is satisfied that having regard to ecological characteristics of the land or the principles of good land management or good husbandry, the land is not reasonably capable of being profitably farmed unless merged with adjoining land; or that it is in the interest of proper development of the land that it be added to adjoining land in order to be properly farmed. Land may be acquired by voluntary agreement or, in the absence of such agreement, by compulsory acquisition. There is nothing in the law to stop the Minister or the CAB from allocating land so acquired to an adjoining owner or occupier of land that happens to be a local or foreign investor. It is noted that the law establishes an administrative appeal structure for persons affected by the exercise of powers of acquisition and allocation under sections 186 and 186. Appeals lie to the Agricultural Appeals Tribunal.

Further, section 186A of the Agriculture Act empowers the minister for agriculture, in consultation with the CAB, to acquire land, voluntarily or by compulsory acquisition, for the cultivation of particular crops (names of crops not specified), where:

- (i) the land within the area is determined or considered to be particularly suitable for the production of a particular crop (section 186A(1)(a)); and
- (ii) in the interest of development, land in the area should be used, as far as possible, in a manner that promotes public benefit by cultivating a particular crop. (section 186A(1)(b)).

Powers expressed in the foregoing provisions of section 186 of the Agriculture Act are the ones that could be more suitable for acquisition of land for cultivation of biofuel crops, especially now that there are indications that mapping of areas suitable for cultivation of jatropha has been conducted in the country. However, the Agriculture Act has been under review for more than five years and there are indications that a draft amended agriculture act may have already been forwarded to Cabinet for approval. It is not clear whether or not the foregoing provisions have been preserved as currently stated. Moreover, it is the National Land Commission that will now have power to acquire land on behalf of the government. It is expected that should the foregoing provisions of the Agriculture Act be preserved, some effort will be made to harmonize powers of the CAB with those of the Commission. Also, as soon as next year's national elections are held, there will be no government ministers. Instead, there will be cabinet secretaries. It is not clear yet whether the secretaries will assume powers currently conferred on ministers over acquisition and allocation of land as explained.

3. What authorities does the investment authority have to extinguish rights to land identified for investment?

The Investment Authority does not have power to directly extinguish rights to land identified for investment. Under Kenya's laws, a foreign investor may only acquire a lease of land, for a term of years (A person who is not a citizen may hold land on the basis of leasehold tenure only, and any such lease, however granted, shall not exceed ninety-nine years - Article 65(1) of the Constitution). All land leases are protected, most importantly, by the Constitution, whose Article 40 prohibits state expropriation of property and arbitrary deprivation or limitation of any interest in property (including leasehold interests), unless land is acquired illegally. In any case, the Authority does not own land that it could allocate for investment and therefore has no power to revoke allocations which can only be effected by other government agencies. However, where it revokes an investment certificate as empowered by section 10 of Act No. 6 of 2004, one ceases to be considered an investor and his/its lease of land for investment purposes may be questioned and possibly, revoked.

4. What criteria or procedures are used to determine which companies or investments are eligible to receive land allocations?

On the basis of information already presented in this work, it is sufficiently clear that Kenya's Investment Authority does not allocate land for investment, most importantly because in the first place, it does not have/own land that could be the subject of allocation. Therefore, eligibility to acquire land for investment is herein considered in light of the legal requirements on investors, here, foreign investors and the Authority's role in facilitating investor's efforts to acquire land for investment.

The applicable law sets the criteria for determining who may be considered as a foreign investor in Kenya and thus qualify to acquire land for investment. First, one has to qualify or be considered as a foreign investor. To meet that qualification, the amount of money one wishes to invest in Kenya must be "*at least five hundred thousand United States of America dollars or the equivalent in any currency.*" (section 4(1)(b) of the Investment Promotion Act). Those who meet that requirement are required, as a next step, to register their companies in Kenya. In registration documents, applicants are required to indicate that they wish to invest so much money in Kenya.

Once a company meets the registration requirement, it may apply to the Authority for an investment certificate, confirming in the application that the proposed investment and related activities are lawful and beneficial to Kenya (section 4(1)(d) of the Investment Promotion Act). The Authority has a legally set criteria in section 4(2)(a) to (i) for determining whether an investment would be beneficial to Kenya. It would find in favour of an applicant if it determines that the proposed investment would lead to: creation of employment for Kenyans, acquisition of new skills or technology for Kenyans, contribution of tax or other revenue for government, transfer of technology to Kenya, increase in foreign exchange 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.

If the Authority finds the foregoing factors in favour of an applicant, it issues it with an investment certificate which serves, among other things, to licence an investor, in simple terms, permit an investor to invest in Kenya, in this case, to begin the process of investing in Kenya, which, for those wishing to engage in cultivation of biofuel crops, would involve commencement of the process of acquiring land. Section 6(3) of the Investment Promotion Act specifies that, "*A foreign investor shall not invest in Kenya unless that foreign investor has been issued with an investment certificate.*" Therefore, only those who have been issued with an investment certificate may request the Authority to facilitate their search for land or proceed on their own to engage directly with land owners.

5. Does the investment law call for the establishment of a landbank for private investment?

In its specification of the Investment Authority's functions, the Investment Promotion Act, section 15(2)(d) states that it shall, in promoting and facilitating investments, "*facilitate and manage investment sites, estates or land together with associated facilities on the sites, estates and land*" but it does not expressly confer on the Authority power to establish a land bank. The law does not specify the process of acquiring estates, land or sites that the Investment Authority is empowered to facilitate and manage. During interview with a representative of the Authority, it was stated that the Authority does not have a landbank for investments; neither has it ever maintained one. It was further stated that the Investment Promotion Center, the predecessor to the Authority, did own some land allocated to it by central government to allocate to investors. However, there was no criteria for allocation of land and investments that qualified for land allocation were not determined in a straight forward way. In the end, by 1999, long before the Authority came into being, all of the land that the IPC had acquired from central government had been disposed of, mostly through illegal land allocations to politicians and their cronies. It was stated that only few investors, about three or four, obtained land from the IPC for establishment of industries. It was further stated that none of the land allocated by the IPC was for cultivation of crops.

The Authority's officials stated that what the Authority currently maintains is a list or databank of private land available for investments whose compilation is based on land owner submission to the Authority of information about availability of their land.

6. If the answer to 5 is yes, which authority has management responsibility for the land bank?

The answer provided above, based on interviews with officials of the Investment Promotion Authority, clarify that the Authority has no land bank for private or public investment. Therefore, it has no structure for management of that kind of land and no such land exists in Kenya.

7. What are the procedures for acquiring and allocating land bank properties?

Currently, there is no land bank for investment purposes in Kenya. The Investment Promotion Center, the predecessor to the current Investment Authority, did have some land in what might have been considered as a land bank for investment. However, a smaller portion of the land, which was set aside in various towns in Kenya, was allocated to a few investors. It was stated during interviews that most of the land was grabbed, mainly by politicians and their cronies. It was further stated that by the year 1999, long before the

current Investment authority was established, the IPC did not have any more land investment in its “bank”. Perhaps it may be useful to mention that what exists in Kenya with some semblance of an investment property bank are the buildings and open spaces within the Export Promotion Zone (EPZ) that may be available for lease by investors. However, the Investment Authority does not own or control EPZ properties. EPZ properties are owned and managed by the EPZ Authority for purposes of promotion of export-oriented investment activities as explained in more details later in this work. There are, also, Konza City land, discussed in more details later in this work, but it does not seem to qualify as a land bank.

It is explained in other parts of this report that section 12 of the new Land Act, among other sections of the law, empower the national Land Commission, currently in the process of establishment, to set aside land for investment. On that basis, it is expected that at some point in time, Kenya might have a land bank for investment.

8. Does the law limit allocation of land to foreign entities?

Neither the Investment Promotion Act, nor any other law limits land, in terms of quantity, that may be allocated to a foreign investor. The example of Bedford Biofuels which acquired over 200,000 hectares of land in Kenya clearly shows that there is no limit on the quantity of land that a foreign investor may acquire in Kenya. What exists in the Constitution is a limit on the kind of interest a foreign investor may acquire in land (only leasehold) and the term of years over which a leasehold may be held by a foreign investor (not more than 99 years). However, the new Land Act of May 2012 introduces the idea of limitation of the amount of land that one might own in Kenya. It was anticipated that the law would actually place a limit. However, the law requires studies to inform a determination of a minimum and maximum acreage of land that one may own/lease in Kenya.

9. If the answer to 8 is yes, how is limitation effected?

The Constitution places a limit on the duration of land leases by non-Kenyans including leases for investment purposes. The time period is, not more than 99 years. A survey of leases so far obtained by foreign investors indicates general compliance with the limit (many are for 50-55 years).

B.

1. Is the national investment law effectively implemented and enforced, especially the provisions regarding the national investment authority and large-scale land acquisitions?

This study finds that the Investment Promotion Act has not been and is NOT being effectively implemented and enforced, especially regarding large-scale land acquisition. The law, in section 15(1) and (2) confers on the Authority the

power to promote and facilitate investments in Kenya by, among other things, “*facilitating and managing investment sites, estates or land together with associated facilities on the sites, estates and land.*” First, it is noted that the law retains the idea that some land should be available for investment purposes, at the instance of the government and that the Authority should be in charge of that land. However, the law falls short of empowering the Authority to acquire land from private or public sources for investment, while the law gives it power to manage investment land. How would the authority exercise management powers over investment land that it does not own and does not exist?

The foregoing provisions also empower the authority to facilitate investment land, sites or estate. Facilitation could be by way of facilitating establishment of a land bank for investment or investment estates. However, there is no clear provision conferring land acquisition or ownership powers on the Authority. Recently, the government, by law, clarified that it was not its intention to confer on the Authority any power to own or control investment land. Section 12(3) of the recently passed Land Act of May 2012 confers power to allocate land for investment in the National Land Commission. It states that: “*Subject to Article 65 of the Constitution, the Commission shall set aside land for investment purposes.*” These provisions render provisions of section 15 (2)(d) of the Investment Promotion Act less effective and more difficult to enforce, especially with regard to allocation, management and control of land for investment purposes. While there is no express provision of the Investment Promotion Act conferring power to allocate investment land on the Authority, provisions of the new Land Act expressly confer power on the Commission to do so.

This study also finds that although section 15(2)(d) of the Investment Promotion Act states that one of the Authority’s functions shall be to manage investment sites, estates or land, the Investment Authority has no capacity to enforce provisions of law to check or control impacts of large land acquisitions and related activities on the environment. As stated elsewhere in this study, that is a function of NEMA. The Investment Authority does not undertake any activity that might be considered as control of investment activities. Admittedly, the Authority does not have competent personnel or experts to determine whether or not investments in biofuel crop production are exerting negative consequences on communities and the environment.

In law, it has power to place conditions on investment certificates that might ensure environment and social safeguards, with additional powers to revoke a certificate if conditions are breached (section 10(1)(c)) but there is no known case in which it exercised the powers to ensure social or environmental safeguards. This weak position is confirmed by findings of serious negative consequences resulting from some of the large land acquisitions and related activities, including Dominion Farms that some community members

complained about, without any kind of intervention by the investment Authority. The Authority has power to facilitate investment. It has extended its role in this regard beyond the issuance of investment certificates, but only to provide “aftercare services” or post-investment services to investors. During interviews, it was stated that the services are intended “to ensure that existing investments are comfortable.” It was also stated that the services involve visiting investors to get their feed back including bottle-necks faced and policy issues arising as well as inform investors of any new government incentives and policies, the objective being to retain existing investments to enable investors to expand and re-invest. Where policy issues arise in the course of such interactions, the Authority makes policy recommendations to the government.

This study further finds that the Investment Promotion Act lacks adequate provisions that would provide basis for control of large-scale land acquisitions and related activities. It has no provisions prohibiting or authorizing revocation of large scale land acquisitions, for example, where acquisition and/or use is detrimental to the environment and welfare of communities. Also, the Act has no provisions allowing concerned people who are not investment certificate applicants, such as environmental groups to challenge denial or issuance of an investment certificate. The authority’s decisions regarding investment certificates may be reviewed, but only upon application by one who applied for a certificate (section 11 of the Investment Promotion Act).

What worsens the Authority’s position regarding large land acquisitions and related activities is the fact that most foreign investors acquire large tracts of land without the Authority’s involvement in allocation. The Authority is not even aware of some of the large land acquisitions.

During interviews, it was stated that another provision of the Investment Promotion Act that has not been implemented is section 26 which provides for the establishment of a National Investment Council. The Council was to comprise representatives of a number of key government ministries in relation to investment and large land acquisitions including ministries of land, trade and industry, planning, local authorities and environment, natural; resources and wildlife (section 26(b)). It was to be chaired by none other than the President (section 26(a)). Had a Council been established as stated in law, investment matters within the Authority’s mandate would have received attention at the highest level of government. It is noted that one of the functions of the Council was to promote cooperation between the public and private sectors in the formulation and implementation of government policies relating to the economy and investment (section 27(1)(b)). In carrying out its functions, the Council was required by law to consult with both private and public stakeholders to factor in their views and suggestions on investment and economic development. No doubt, a council would have presented an appropriate platform to raise views on matters concerning investment, its impacts on environment and communities and appropriate ways and means to

prevent actual and potential harm. Unfortunately, it has never been established, despite several reminders to the government by the Investment Authority. Failure to establish an investment council was cited as one of the causes of the Authorities limitations in directing and controlling investments, including its lack of investment land.

2. Are decisions and actions of the government’s investment authority consistent with the law?

Yes, decisions and actions of the Investment Authority are, largely, consistent with the applicable law. It is noted that the law does not empower the investment authority to control or supervise investment activities to prevent negative environment and social externalities.

3. What regulations and rules have been established by the investment authority regarding identification, acquisition, holding and allocation of land for private investment?

Kenya’s investment Authority has NOT established rules for acquisition, holding and allocation of land for private investment. It was stated during interviews that even during the existence of the IPC when the predecessor held some land for investment allocated by central government, there were no allocation rules, which is one of the factors that exposed land set aside for investment to land grabbing. Currently, an investor who wishes to seek the Authority’s assistance in identifying private land for development makes such a request, verbally or in writing before or after obtaining an investment certificate and it is up to the Authority to decide how it goes about identifying land, on a case-by-case basis. It could do so by direct consultation with land owners, including the government (but currently there is a moratorium on transactions involving government land). It could also identify land from a list of available land that it has compiled, based on requests by private land owners that their land be listed by the Authority as available for investment.

4. Does the authority have the resources, political support and capacity needed to meet its roles and responsibilities?

The Authority’s officials confirmed that they do have capacity to carry out their statutory responsibilities, but “there is room for improvement, especially in staff training.” In simple terms, the Authority does not have adequate capacity to sufficiently carry out its mandate. It was also stated that currently, the Authority enjoys political support of the executive arm of government and Parliament which has maintained the statute establishing it and not repealed it (as they did with the Anticorruption and Economic Crimes Act). It also enjoys political support, to the extent that Parliamentarians have consistently approved its yearly government funding. Currently, the Authority functions under the Ministry of Finance, which places it within the Ministry’s obligations

to provide funding. However, a national economic and social council which ought to have been established as part of the Authority under section 26 of the Act has not yet been established. If the Council, chaired by the President, had been established as provided for by law, it was stated, the Authority would have enjoyed stronger political support, especially in terms of coordination of the roles of the various government agencies with investment-related functions.

5. What has been the experience of private investors seeking land?

Since the days of the Investment Promotion Center, the Authority's predecessor, investors have had varied experiences, especially in relation to land allocation and acquisition. It was stated that all of the few successful investors during IPC existence were allocated land in towns - Nairobi, Thika, Eldoret. However, only a few of them were able to utilize their land. Others either were unable to pay accumulated land rates and so would not effect transfer of leases to themselves or lost land to grabbers and squatters. In Kenya, if land in an urban area is left vacant, it becomes susceptible to unauthorized occupation by squatters who become very difficult to eject. In time, land originally designated for development could degenerate into a slum.

6. What has been the experience of NGOs interested in engaging with the authority?

During this study, a number of NGOs were surveyed, based on work experience on land on land and related activities including: Kenya Land Alliance, Kenya Land conservation Trust, Action Aid and Green Africa Foundation. Of the organizations interviewed, only one, namely, Green Africa Foundation, has engaged with the Investment Authority in some work, focusing on what is known as Green Investment Initiative.

Noting that African countries, including Kenya, continue to seek and utilize natural resource in their quest to increase material wealth, the Foundation is collaborating with the Investment Authority in undertaking a series of activities intended to promote investments that balance economic benefits with conservation of the natural environment on the basis of the principle of sustainable development. The kind of investments envisaged, i.e, considered to be green investments, are those that: could mitigate climate change and global warming without impeding national economic growth and development; seek to promote community participation in economic activities that integrate environment conservation components, promote sustainable utilization and conservation of forests, those that utilize and promote utilization of low or non carbon emitting sources of energy such as hydroelectricity, increase access to arable non-forested land, are based on high potential low carbon sectors such as fruits and vegetables, aquaculture, honey cultivation and harvesting, promote alternative and renewable energy, promote farming that facilitate

African entrepreneurs and seek to improve social services including health care and education.

In order to mobilize local and external support for green investment initiatives, the Foundation has partnered with Kenya's Investment Authority to organize colloquia and other forum in Kenya and abroad with the intention to educate actual and would-be stakeholders on the initiative, garner their support for it and secure their participation in a number of green investment activities. The Foundation has not and does not engage in allocation of land for investment.

Having partnered with the Authority, the Foundation seems to hold the view that the Authority's capacity to engage in environmental considerations, for example, to consider likely ecological impacts of investment activities is limited. In any case, the authority has no power or legal mandate to audit or assess environmental impacts of investments that it certifies. The responsibility to conduct both EIA and environmental audit of activities with potential significant impacts on the environment lies with NEMA. However, this study found that the Authority would be receptive of training and other support that might increase the capacity of its personnel to better carry out its legal mandate.

C.

1. **Do any social or environmental safeguards exist in law and are they applied in practice to large-scale agriculture projects?**

There are a number of legal sources of environment and social safeguard requirements on agricultural activities in general. These are: (1) requirements set out in the Agriculture Act, which is currently being reviewed, (2) requirements set out in the Physical Planning Act; and (3) those set out in EMCA and the related EIA and Audit Regulations within the context of EIA and audit requirements.

The Physical Planning Act

The Physical Planning Act, section 36, requires an EIA to be conducted and an EIA report submitted to a local authority where a local authority is of the opinion that proposals for industrial location, dumping sites, sewerage treatment, quarries or any other development activity will have injurious impact on the environment. This provision predates EMCA provisions on EIA. However, although the EIA process required would, of necessity, include social considerations, this study did not find any case in which an EIA was adequately conducted under the Physical planning Act. It is necessary to mention that since the coming into force of EMCA and its EIA requirements, no effort has been made to harmonize those provisions with EIA provisions in the Physical Planning Act. This means that local authorities that are, in almost every case, the first to be presented with development approval requests, have always had

power to consider both social and environmental factors in deciding whether or not to approve developments but they hardly exercise that power.

The Agriculture Act, Cap. 318

The Agriculture Act makes provisions for both social and environmental safeguards requiring, for example: cultivation of particular kinds of crops (section 184(1)(d) to ensure food sufficiency and income), farming in accordance with good husbandry (section 184 (1)(b)), cultivation of crops considered to be commercially beneficial, section 190); farmers to plant essential crops (section 100 - 109, to ensure food security), that government guarantees minimum returns from farming (section 111), issuance of land preservation rules for soil conservation and for protection of soil from erosion (section 48, an environmental safeguard) and issuance of land preservation orders obligating land owners and occupiers to undertake land preservation measures to preserve soil and biodiversity therein). Although the sections of the Agriculture Act stated above prescribe penalties for non-compliance with the requirements, they are hardly enforced, which means that social and environment safeguard provisions of the law have remained ineffective.

The Environmental Management and Co-ordination Act (EMCA)

EMCA and related EIA and Audit Regulations (Legal Notice No. 101 Of 2003) are not specific or limited to agricultural projects; they apply to all projects listed in the Second Schedule to EMCA, which specifies a number of agricultural projects, among others, that must be subjected to the EIA process, namely:

- (a) large-scale agriculture (no specification of acreage),
- (b) use of pesticides,
- (c) introduction of new crops and animals,
- (d) use of fertilizer and
- (e) irrigation.

In addition, in its general provisions, the Second Schedule to EMCA lists the following activities as requiring EIA:

- (a) activities out of character with the surrounding; and
- (b) major changes in land use.

The second category of activities requiring EIA and audit include, for example, introduction of farming activities in pastoral or largely mining areas, introduction of large scale irrigation in areas where farming is predominantly small scale and introduction of farming activities in areas occupied by nomadic communities.

EIA and Audit requirements encompass both social and environmental safeguards. Both kinds of safeguards are embodied in the requirements. EMCA itself sets out the broad legal framework for EIA and audit of projects, here, agricultural projects, of the nature described above. It specifies, in section 58, that regardless of any approval or licence that a proponent of a scheduled

project may have obtained, project proponents and their financiers are obligated to undertake, ahead of project commencement, the development of a project report providing prescribed information to NEMA about their project, which NEMA uses to decide whether to reject a project, approve a project as presented or with adjustments, or require a project proponent to proceed to undertake a full EIA study. Section 58(7) of EMCA states that both EIA and audits shall be conducted in accordance with *EIA and Audit Regulations* (Legal Notice No. 101 of 2003). Although definitions of both EIA and Audit specify determination of likely impact of activities on the environment only, EIA Regulations have requirements that are intended to serve as social and environmental safeguards and in practice, the two processes have been implemented to serve both purposes at either project report stage (in case a project is approved on the basis of a project report alone) or full study report (where after NEMA reviews a project report, it orders that a full EIA study be conducted).

Relevant provisions for social and environmental safeguards at the project report stage appear in Regulation 7 of the EIA Regulations which obligate project proponents to state, in their project reports, the following, including social and economic factors:

- (a) the nature of the project;
- (b) the location of the project including the physical area that may be affected by the project's activities;
- (c) activities that shall be undertaken during and after the project;
- (d) the design of the project;
- (e) the materials to be used, products and by-products, including wastes to be generated by the project and the method of their disposal;
- (f) the potential environmental impacts of the project and the mitigation measures to be taken during and after implementation of the project;
- (g) an action plan for the prevention and management of possible accidents during the project cycle;
- (h) a plan to ensure the health and safety of workers and neighbouring communities;
- (i) the economic and socio-cultural impacts to the local community and the nation in general;
- (j) the project budget; and
- (k) any other information that the authority/NEMA may require.

Clearly, matters in (h) and (j) above are socio-economic. The rest of the matters are environmental, except prevention and mitigation plans, but it can be understood that the stated environmental matters embody a human

environment component. The applicable laws and regulations require that even where NEMA is minded to approve a project on the basis of a project report alone, a project proponent must engage in public consultation with the community that stands to be affected socially, economically and/or environmentally by a project. Many social and environmental factors are usually raised during public consultation, which NEMA factors in deciding whether to approve a project on the basis of a project report alone, whether to approve a project as presented or modify it, for example by scaling it down or reject it entirely.

If NEMA finds, upon reviewing a project report together with stakeholder views received, that a project is likely to cause significant environmental impacts, it directs a project proponent to conduct a full EIA study (EMCA, section 58(2)). In that event, Regulation 18 prescribes additional set of social, economic and environmental factors to be considered, including:

- (a) a concise description of the national environmental and regulatory framework, baseline information and “*any other information*” relevant to the project;
- (b) the technology, procedures and processes to be used in the implementation of the project;
- (c) a description of the potentially affected environment and a statement of how it might be affected;
- (d) the environmental effects of the project including the social and cultural effects and the direct, indirect, cumulative, irreversible, short-term and long-term effects anticipated (here, social and cultural factors are regarded as part of environmental factors to be considered);
- (e) an environmental management plan proposing the measures for eliminating, minimizing or mitigating adverse impacts on the environment, including the cost, time-frame and responsibility to implement the measures;
- (f) provision of an action plan for the prevention and management of foreseeable accidents and hazardous activities in the course of carrying out activities or major industrial and other development projects;
- (g) measures to prevent health hazards and to ensure security in the working environment for the employees and for the management of emergencies;
- (h) an identification of gaps in knowledge and uncertainties which were encountered in compiling information; and
- (i) an economic and social analysis of the project.

In addition to the factors stated above, stakeholders, Lead Agencies and other government agencies are permitted by law to present to NEMA views and

concerns about a project, including social and environmental concerns. The case of Bedford Biodiesel Limited shows that NEMA does, in practice, apply the law to prevent negative environmental, social and economic impacts that might result from large-scale agricultural activity. In the case of Bedford, NEMA limited the amount of land to be cultivated with jatropha (at least in the first phase of the project) to 10,000 hectares, out of more than 200,000 hectares of land that was acquired for the purpose, in order to prevent unacceptably high levels of negative social and environmental consequences that might result from the large scale agricultural activity.

In summary, EIA is applied at one or two levels in ensuring social and environmental safeguards, namely: (i) at the project report stage where a development is approved on the basis of a project report alone and (ii) through full EIA study where, after reviewing a project report, NEMA finds that a development is likely to have significant impacts on the environment and therefore warrants a full EIA study. At both levels, NEMA considers potential negative impacts of a development on the environment in advance of commencement of a development activity and as necessary, requires a strengthening of environmental monitoring plans and mitigation measures, places conditions on development approval and licence to mitigate likely environmental harm and/or scales down a development to meet the same ends. Where an activity is on going, meaning, it is already being implemented, environmental audit applies as a tool to safeguard health and the environment.

Environmental audits are provided for by sections 68 and 69 of EMCA as well as EIA and Audit Regulations of 2003. All development projects that were already going on by the time EMCA came into effect on 14th January 2000 were required to undergo environmental audits within a year of commencement of the law. In addition, NEMA ordinarily approves new development projects on condition that they be audited within the first twelve months of completion.

A survey of a number of projects that NEMA has, so far, subjected to EIA processes and outcomes indicates that EIA has the potential to serve as a powerful tool to ensure social and environmental safeguards. In this regard, the case of the proposed jatropha cultivation in Dakatcha Woodlands also provides a good example.

Dakatcha Woodlands Case

Dakatcha woodlands are located at the coast of Kenya, near Malindi Town, a popular tourist destination. The woodlands have rich biodiversity including a number of endangered species of flora and fauna. Local communities, including the Watha and Giriama of Kenya live adjacent to the woodlands (forest) where they survive mainly by small-scale farming for sustenance and for sale in local markets to meet their livelihood demands. However, in the year 2009, Nuove Initiative Industrial SRI, an Italian biofuels company, purchased 50,000 hectares of land in the woodlands for the cultivation of jatropha to produce biodiesel for

export to Europe. The land is communally owned and at the time of purchase was in the hands of Malindi Municipal Council as the people's trustee.

The proposed jatropha project threatened to cause the destruction of the biodiversity-rich forest, introduce negative impacts of monoculture, extinguish endangered species of flora and fauna in the forest and socially disrupt the lives and livelihoods of communities in the area, including robbing them of farmlands and homes in order to generate biofuel for use far away in Europe. NEMA weighed all the likely negative social and environmental outcomes against production of biofuel for European markets to arrive at a decision to deny the investor an EIA licence. Both social and environmental considerations informed the Authority's decision to reject the project. Eventually, NEMA suspended the project in consideration of likely negative environmental impacts.

2. What factors may contribute to any discrepancy?

Factors that may contribute to discrepancy between law and practice in ensuring social and environmental safeguards through EIA and audit requirements include: limited competence of EIA experts who must, by law, be the ones to write EIA project reports, lead developers through full EIA study processes and eventually write full EIA study reports. The existing requirements to be met by parties seeking to practice as EIA and audit experts are too permissive, allowing persons who do not fully qualify to register and practice as EIA and audit experts. This challenge is compounded by lack of competence on the part of NEMA itself. NEMA is the body that registers EIA and audit experts but its staff is largely untrained on the subject; neither does it have strong mechanisms to supervise development activities and enforce EIA requirements.

Matters are made worse by dishonesty, especially of EIA experts. Many of EIA project reports and full EIA study reports that have been brought before the Environment Tribunal through appeals against NEMA's decisions on EIA processes and outcomes indicate blatant dishonesty of EIA and audit experts desperate to please their clients, the developers, at the expense of negative social and environmental outcome of development projects. Further, based on personal participation in enforcement of EIA and audit regulations for the last ten years, I have no doubt that Kenya should now improve EIA by implementing strategic environmental impact assessment that would subject government policies and programs also to existing and additional environment and social standards and requirements to better improve livelihoods and well as ensure sustainable development. An amended EMCA might soon contain SEIA requirements.

NEMA's capacity also requires strengthening in a number of areas, including: training of personnel in EIA and audit, increasing its police force and training it on enforcement with focus on EIA, audits, inspection and other relevant subjects and establishing a sufficient number of compliance and enforcement officers, serving in that capacity alone and NOT doubling up as EIA report

reviewers. In addition, collaboration between NEMA and Lead Agencies ought to be strengthened to ensure harmony in the process of development approval and licensing and to avoid the kind of contradictions that have been witnessed between NEMA's approval requirements and outcomes and Lead Agency (for example, local authority) review and approval or licence of development activities.

- 3. Does the government investment authority identify ecosystem services that potential large-scale agriculture projects will depend on, which services a project will likely impact and which services are more important to local livelihoods before land is allocated to investors?**

The Investment Authority does not at all engage in identification of ecosystem services that potential large-scale agricultural projects will depend on, or which services a project would impact. All considerations of likely environmental impacts of development projects are left or referred to the National Environment Management Authority (NEMA). Where the Investment Authority is presented with an application involving land use which raises environmental issues, the Investment Promotion Act authorizes it to refer the matter to NEMA. In that regard, section 7(2) of the Investment Promotion Act states that:

“If an application raises an issue described in subparagraph (1), the authority shall refer the issue to the appropriate person or body and shall inform the applicant of that referral.”

Issues described in paragraph 7(1)(a) are: environmental, health and security.

NEMA conducts relevant analysis largely through EIA and audits in determining whether or not to licence a project and thereby, authorize its implementation. The Physical Planning Act (which predates EMCA) has EIA provisions, to be conducted by the Physical Planning Departments of local authorities but the authorities hardly conduct EIA. There is no known EIA that they ever conducted since the Physical Planning Act came into force. Also, since EMCA came into force, the conduct of EIA processes and implementation of outcomes was understood to be within the mandate of NEMA (alone), as provided for by EMCA (sections 58-64).

- 4. Are the social and environmental impacts of land acquisitions for private investment monitored for compliance? Which institutions monitor compliance? Are sanctions applied to companies that do not comply?**

There is no legal requirement for monitoring of social and environmental impacts of land acquisitions for private investments in isolation; neither has

such monitoring been undertaken in practice, in isolation; that is, outside of the process of environmental audit. It is also clarified that there is no mechanism in law, policy or in practice for monitoring social and environmental impacts of large land acquisitions *per se*, without a related land use. Environmental audit is provided for by sections 68 and 69 of EMCA, which ought to be read together with the provisions of Regulation 31 of the Environmental Impact Assessment and Audit Regulations (Legal Notice No. 101 of 2003). The Regulations make detailed provisions to implement the provisions of EMCA on audits.

A reading of both EMCA and the Regulations indicates that environmental audits (like EIA) are focused on (considering this study's focus), use of land and not an occurrence that might appear in the form of land allocation alone, even though monitoring and evaluation of impacts of such occurrence should be considered to be important. The difference between EIA and environmental audit (EA) is that while the former focuses on projects whose implementation has yet to commence (and whether or not to approve them, in the first place, is yet to be determined), the latter focuses on on-going projects that commenced prior to the coming into force of the EIA and Audit Regulations and projects implemented after undertaking an EIA (whether approved by way of project report or full EIA study report). In the latter category, NEMA usually requires developers, including those undertaking large-scale farming activities that fall within the Second Schedule to EMCA, to undertake environmental audit of the actual and potential impacts of their land use activities within one year of project commencement (Regulation 31(4) of the EIA and Audit Regulations). If the life of a project is shorter than one year, an audit may be required within a shorter period of time. An initial audit report provides baseline information upon which subsequent audits are conducted.

In the conduct of an environmental audit, both social and environmental factors are considered. Regulation 31(7) of the EIA and Audit Regulations specify matters to be considered in conducting an environmental audit to include, "but not limited to": existing internal control mechanisms to identify and mitigate activities with negative environmental impacts, existing internal control mechanisms to ensure the health and safety of workers and existing environmental awareness and sensitization measures, among matters to be considered, specified in 31(7)(a) to (e). Therefore, it would be lawful to consider, for example, lost community pasture land or reduced farmlands raising the threat of food security in the course of auditing the social impacts of allocation of land for large-scale cultivation of jatropha, or some other biofuel crop. Already, Bedford biofuels Limited, a company that has acquired land for jatropha cultivation, has been mandated in its development approval and EIA licence by NEMA to conduct an environmental audit of its farming activities within a year of commencement. In that regard, NEMA's approval condition Number 1.8 conveyed to the investor by letter dated 6th May 2011 states:

“The proponent shall submit an environmental audit report in the first year of occupation/operation commissioning to confirm the efficacy and adequacy of the Environmental Management Plan.”

The same audit condition appears in the investor’s EIA Licence No.0008324 as licence condition number 1.8. NEMA placed an audit condition on the investor after limiting its initial cultivation to only 10,000 of the over 200,000 hectares that it had acquired for cultivation.

D.

1. What have been the social and environmental outcomes of land allocations made by the government investment authority?

The Investment Authority has not been engaged in allocating land for foreign or local investment. It has only gone to the extent of facilitating foreign investors’ acquisition of land for investment, for example, by availing them a list of land owners and corresponding contacts from which to choose suitable land and then contact land owners or have Keninvest initiate contact, upon which investors undertake follow up initiatives and conclusion of lease agreements, where successful. However, its predecessor, the Investment Promotion Center, did actually allocate land to a few investors and it may be fitting to consider what the social and environmental outcomes were.

First, it was stated during interviews that all of the land that the IPC allocated to foreign investors were within urban areas (Nairobi, Thika and Eldoret) and allocation, in all cases, was for the establishment of industries. Secondly, it was stated during interviews that only few of the beneficiaries of the land leases utilized the land. Most of them did not, for a variety of reasons, including inability to pay accumulated land rates (for whatever reason, rates accrued). The scenario does not accommodate the presence of community land users or occupiers in a rural setting with actual or potential loss of farm land and/or settlement. However, the presence of unoccupied land in urban areas resulted, in at least two of the cases, in an all too common occurrence in Kenya, namely: illegal settlement on vacant land by squatters, who became too difficult to remove, making it impossible for two investors to utilize the land for the intended purpose. It was stated that in at least one case, land that was allocated for investment is still occupied by squatters (in what is now a slum in an urban area), even though the foreign investor holds a lease to it.

There has been no official assessment of the actual or potential environmental impacts of the slum and the presence of the people dwelling therein but one can imagine that it could have serious environment and human health implications. Also, this study did not find any actual audit of an agricultural activity that was preceded by an EIA. It is noted that the scope of this study would not allow that line of investigation.

2. Have the land allocations resulted in positive development outcomes?

Large land allocations were expected by both government and communities that accepted them to contribute to employment creation and poverty alleviation. It is the general perception of stakeholders interviewed for this study that to a limited extent, these two expectations have been met, especially in so far as a limited number of local labourers have been employed by investors and earn some income. However, it was not possible, within the scope of this study, to determine the exact numbers of people who have been employed in each farming activity, how much they earn and whether their earnings have meaningful contributions to their livelihoods. Also, this study found that community members, including those employed by investors, have, in a number of cases, suffered adverse impacts of large farming activities, such as frequent flooding. Dominion Farms is a case in point. That makes it necessary to ask, could it be that employment and a few other gains of large land allocations and related investments have been overridden or eroded by high externalities of such activities? How about loss of pasture, settlement and farmlands and related food insecurity and climate change that whose impacts may be felt over time? A detailed study that quantifies some of the factors and matters should be conducted to determine the question with certainty.

3. Have land allocations resulted in poverty reduction and improved environmental management? If not, why not?

It has already been explained that Kenya's investment Authority does NOT allocate land for investment. Therefore, the question whether or not land allocations have resulted in poverty reduction can only be answered with reference to investment land that investors have acquired from other sources, than the Authority, sometimes with the Authority's assistance but mostly without its involvement. Generally, it is expected that once investors acquire land, they engage it in activities (including cultivation of bio fuel crops) that would require local labour. On this basis, the general perception is that land acquisition for investment purposes holds the potential for employment creation. This study found that in almost every case, local people have been hired as manual labourers on large farms. However, determining their numbers and wages to be able to quantify the benefits of such employment in monetary terms is beyond the scope of this work. Also, determining whether wages earned from farm work has meaningfully alleviated poverty of rural communities would have required interviewing a selected number of community labourers, which was also beyond the scope of this work.

In the case of Bedford Biofuels that acquired more than 200,000 hectares of land, the investor paid money to the companies that took over land from community ranches which would have been expected to benefit community members in some way. However, there is no clarity on who exactly received the money and how the proceeds were shared.

The case of Dominion Farms points to a mix of development results, with indications that negative social and environmental consequences of private investment activities may outstrip any benefits that such activities may accrue. Community members claim to have been moved without consultation out of land that they had, hitherto, depended upon for water, pasture, farming, settlement and cultural activities. Although EMCA was in force when the investor acquired the land, an EIA seems to have been conducted without full compliance with the law.

Dominion Farms acquired 17,000 hectares of land at the mouth of River Yala, where it emptied water into Lake Kanyaboli, as it then was. To perpetrate their activities, the foreign investor diverted the River away from Lake Kanyaboli, literally killing it and obliterating it from the record of lakes in Kenya. Also, Dominion Farms leveled Got Agulu, a mountain in the area, which local communities depended upon for, among other things, cultural activities. The list of past and continuing environmental and social devastation of the foreign investor's farming activities seems endless. It is reported that once the proprietors of the business have enough water for irrigating their rice fields, they release excess water to flow downstream without any kind of social or environmental checks, causing periodic flooding downstream, with huge social costs on community members that have to periodically flee their home due to man-made flooding. It is stated that in addition, they suffer losses of crops, livestock and other property, not to mention malaria and other diseases that such frequent flooding occasion. What kind of large-scale farming benefits could adequately compensate or outweigh, favourably, such social and ecological devastation?

The question whether or not large land acquisitions have resulted in improved environmental management could be answered also on the basis of the effectiveness of enforcement of EIA licence conditions, including the usual requirement that environmental audits of activities be conducted within a specified period of time from commencement of investment activities. However, the usual ghosts that perennially haunt NEMA in implementing EMCA and its own EIA and audit Regulations have continued to bedevil its functions. For example, Dominion Farms, in the view of those interviewed for this study, unfortunately, enjoys political support which has, so far, cushioned it even against NEMA's audit requirement that would have resulted in some measure of improvements that could alleviate negative impacts of the investment.

4. What have been the outcomes of the people or communities that claimed land prior to allocation to investors?

Large-scale land acquisitions for production of biofuel crops and for other investment purposes have produced varied outcomes in areas where communities claimed land prior to allocation. In a few cases, for example in the case of Bedford Biofuel Company Limited that acquired the largest chunk of

land in Kenya for biofuel crop production, communities, apparently, accepted the project and agreed to having companies formed for the purpose of transferring land to the foreign investor. Communities are still expectant of not only gains from monetary consideration paid for leases of the land, but also in terms of community projects that the investor agreed to undertake in the area, including construction of health care facilities. While it is too early to judge whether the investor will actually confer benefits to community members as promised, one wonders what the companies that received money from the investor for the land did with the money. There is no indication that the companies did or will utilize the money for community benefits, neither is there any evidence that community members have a say on what has been or will be done with the money.

The flip side of Bedford's acquisition of over 200,000 hectares of land in one area which may be felt over time as the area experiences population increase and related loss of land for settlement, cultivation of food crops and pasture. It is expected that there would also be loss of biodiversity and valuable habitats as the investor incrementally introduces *jatropha* monoculture in the area.

This study found that in some cases, communities have suffered serious ecological and social impacts as a result of investor acquisition of large tracts of land in their areas. For example, in the case of Dominion Farms, interviewees stated that communities in the area did not only suffer loss of pasture land, they also: lost various species of flora and fauna, lost Got Agulu, a mountain that was used for cultural purposes, continue to suffer frequent flooding when Dominion Farms release water from their dams after utilizing enough for irrigation and have lost Lake Kanyaboli as a result of Dominion's diversion of River Yala which used to feed the lake. Such detriments could surpass any benefit that investment activities may accrue, such as employment of local people.

There are also cases, for example, of Tiomin Company that acquired land for extraction of tiomin near Kenya's coast in which community members are still embroiled with the investor in a tussle over compensation for land acquired for the investment, with no guarantee for resettlement. However, in cases where individual land owners entered into partnerships with foreign investors, as is the case of Jorge Alesanco Rodrigues, land owners stands to benefit financially from revenues generated from their joint tourist facility, even though NEMA may not be satisfied with its operations.

Due to the limited scope of this study, it was not possible to gather information about all cases of large-scale land acquisitions for biofuel crop cultivation that would allow detailed analysis of the exact outcome of each case. However, the study determined that investor/landowner partnerships and acquisition of land for investment directly from owners tend to be free from or have less ecological and social intrigues.

E.

- 1. Identify new laws and practices designed to better ensure that land allocations for private investments meet national policy objectives of poverty reduction and sustainable natural resource management and also advance the interests and needs of land holders.**

There is no single law in Kenya that seeks to ensure that land-based investments attain poverty reduction objectives and /or sustainable natural resource management and needs and objectives of land holders. The desired ends, namely: poverty reduction, natural resource management and promotion of landholder interests are scattered in a number of laws and policies. For example, the objective of ensuring that private investments alleviate poverty appears in section 4(2) of the Investment Promotion Act which states that a prospective investor shall be granted an investment certificate if the Authority determines that the proposed investment shall be beneficial to Kenyans. One of the ways of determining whether or not an investment would be beneficial to Kenyans is its potential to contribute to: creation of employment for Kenyans, generation of tax or other government revenues, acquisition of new skills or technology by Kenyans, utilization of domestic raw materials, supplies and reserves and transfer of technology to Kenyans (section 4(2)(a), (b), (c) and (f)). The other existing legal mechanisms for determining whether investments meet sustainable natural resource management objectives are the EIA and the related environmental audit requirements.

EIA and audit mechanisms have been applied to a limited extent but they hold the key to harmonization of the various investment-related interests - poverty reduction, sustainable natural resource management and needs and interests of land holders. The EIA process, provided for by both EMCA and the EIA and Audit Regulations (Legal Notice No. 101 of 2003) allows detailed consideration of potential positive and negative impacts of a proposed development on the environment local livelihoods and, in almost every case, casts focus of both developers and government agencies on sustainable natural resource management and use during implementation, operation and decommissioning stages of projects. During EIA processes, all stakeholders are permitted by law and in practice to raise their views on all kinds of matters related to a particular development, including whether or not a project would alleviate or promote community poverty. If the EAI process could, in every case, be strengthened, especially during operational phases with environmental audits, we would, in Kenya, be closer to harmonizing the various development objectives with the actual development processes and outcomes. Unfortunately, the government body that is charged with the responsibility of facilitating and promoting investments has no legal mandate to engage in environmental considerations of the investments that it certifies and licences and there is very little coordination between the investment Authority, NEMA, the environment and natural resource watchdog of the country, the office in

charge of Kenya Vision 2030 which is the latest blue print for sustainable development and poverty eradication and the government's ministry in charge of planning and national development. It remains to be determined whether the new Land Act will provide additional basis for improvement of the situation.

Recently, the government passed the Land Act of May 2012 which incorporates guiding principles and values of land management and administration including those related to poverty eradication and sustainable natural resource use, such as the principles of: equitable access to land, security of land rights, sustainable and productive management of land, participation, accountability, democratic decision making within communities, the public and the Government, transparent and cost-effective administration of land and protection and conservation of ecologically-sensitive areas (section 4(2)(a)-(m)). The principles bind the National Land Commission and other state organs and all persons whenever they enact, apply or interpret the provisions of the Act. The relevant provisions to which the principles apply include section 12(3) of the new Land Act which empowers the National Land Commission to set aside land for investment purposes.

In its application of the guiding principles and values of land management and administration, the Commission is now bound to ensure, for example, that land set aside for investment is utilized sustainably and productively and in a manner that benefits local communities and their economies (section 12(4) of the new Land Act). The Commission is also obligated by law to ensure that the responsibility to set aside land for investment is harmonized with the requirement of protection and conservation of ecologically-sensitive areas such that the areas are not allocated for investment purposes, which has already happened, for example, in the case of ecologically-sensitive land acquired by Dominion Farms for large-scale cultivation of rice. Instead, the Land Act requires the Commission to conserve ecologically-sensitive public land and in that connection, to take appropriate action to maintain public land that has endangered or endemic species of flora and fauna, critical habitats or protected areas. It is also required by law to identify ecologically sensitive areas that are within public lands and demarcate or take any other justified action on those areas to prevent environmental degradation and climate change (the and Act, section 11(1) and (2)).

The Land Act of 2012 is a new law that has yet to be tested. However, it is observed that the law makes provisions whose effective implementation would move the country forward to wards ensuring that land allocations for private investments meet national policy objectives of poverty reduction and sustainable natural resource management and also advance the interests and needs of land holders with minimal and tolerable negative consequences.

2. Identify the most urgent and appropriate reforms to improve the administration of land for private investment.

A new Land Act has been enacted which clarifies whose responsibility and power it is to set aside land for investment purposes. It is the National Land Commission. The Land Act also addresses the issue of balancing investment for development with the need for sound management of the environment and natural resources. Further, it seeks to ensure that local communities benefit from land-based investments and in that regard, obligates the Land Commission, in setting aside land for investment, to ensure that local communities benefit from investments. These requirements are in conformity with provisions of the Constitution which require, among other things, equitable sharing of land (Article 60). However, a number of reforms in the lands sector need to be undertaken to remove obstacles that still hinder reliance on land for investment purposes. Some of the areas requiring reforms are explained below.

First and foremost, the problem of landlessness in Kenya ought to be practically resolved as a matter of urgency, even to be able to determine whether there would be any land left for investment. Many people in Kenya, especially at the coast, are landless and have been so disadvantaged for decades. The newly introduced problem of internally-displaced persons compounds the problem. At the coast, the problem of landlessness is threatening to create the first breakaway republic in the country now Kenya. War could break out any time at the coast, over landlessness and underdevelopment of much of the area occupied by local communities there. A government that has a national constitution heavily laden with rights of citizens cannot honestly claim to have land for investment when landlessness of its people is threatening its very existence. Paradoxically, this study found that the largest chunk of land acquired by foreign investors for purposes of cultivation of biofuel crops is near the coast. Something appears to be wrong with priorities of both central and local government, especially at the coast, where the situation is already volatile. Are local communities at the coast also compromising their land-related rights? This study could not find evidence of active and informed participation of coastal communities in investor acquisitions of land. Hopefully, there will be a National Land Commission in place very soon and it shall be guided by the new Land Act in identifying and addressing the land rights of Kenyans, including landless people at the coast.

Secondly, there is an urgent need for coordination of all land-based investment activities at government agency level, coupled with official capacity building as necessary. Many investment-related functions are currently being conducted and related powers exercised by a number of government agencies in isolation. Officers of the Investment Authority stated during interviews that the problem of lack of coordination resulted from failure to establish a National Investment Council as provided for by section 26 of the Investment Promotion Act. The Council was to be established in the office of the President and to comprise

members of key government agencies including officers of the Ministries of land, agriculture, finance, trade and industry, local authorities, planning, environment and natural resources, and tourism and information. However, the much awaited Council has never been established and to date, all the relevant agencies continue to carry out one or more of investment related functions in isolation. In a number of cases, the situation has given rise to conflicts. This study suggests amendment of all the laws conferring investment powers on various government agencies to harmonize those powers as well as reorganize agency functions in light of the Constitution and new laws, such as the Land Act.

Regarding allocation of investment land, this study found that there are a number of government agencies with express statutory powers to allocate land for investment, but NOT the Investment Authority. These include: local authorities which often collude with private entities to transfer local authority land to private owners, Kenya Wildlife Service that to date, is proceeding on its own to advertise land available for investment within protected areas to interested investors and the Ministry of Trade, in charge of EPZ facilities. Until recently when the government declared a moratorium over allocation of government land, the list included the Commissioner of Lands who had sole powers to allocate public land, a power that was, over the years, grossly abused. Section 12(3) of the new Land Act clarifies that the National Land Commission will now have power to allocate any portion of what is considered as public land for investment. What happens to land related transactions that are underway, for example, between KWS or a regional development agency and an investor? The law is not clear on how the transition should be handed and the much anticipated Commission has not yet been formed. Who knows who will comprise the Land Commission? Hopefully, politics will not determine who shall become members of the Commission as has happened with many constitutional bodies in Kenya in the recent past.

Another matter requiring urgent address concerns on going large scale farming activities that have been generating serious negative consequences on human health, community livelihoods and the environment without any proper check. Investment activities causing frequent flooding, forcing community members to abandon their homes and farms, causing pollution of various environmental media and those resulting in biodiversity loss, among other negative consequences, ought to be audited and remedied.

Equally important is the need to take full inventory of all existing and proposed land acquisitions for the cultivation of biofuel crops. A number of biofuel crop cultivation activities are going on in the country- some large-scale, others small-scale, without any official documentation of on going and proposed activities. As the country moves towards development of a biofuel policy and strategy, there is need to take stock of existing investments in the sector. Proper documentation of on going cultivation activities should provide basis for

assessing actual and likely negative environmental impacts as well as any threats that large-scale land acquisitions for biofuel crop cultivation poses to the country's food security and vulnerability to climate change impacts, among other negative consequences. Without a careful assessment of actual and potential impacts of local and foreign investments in biofuel crop cultivation, it may not be possible to determine, with accuracy, whether or not such investment could alleviate poverty, help improve living conditions of local people in any way or generate tax revenues for government.

The National Investment Commission whose existence is provided for by section 26 of Act No. 6 of 2004 ought to be established as a matter of priority, to provide a forum for collaboration and information exchange on matters related to investment. In the absence of a Commission, the Investment Authority continues to function in isolation from key government agencies and that kind of situation cannot facilitate investment.

Through interviews with staff of the Investment Authority, it was established that it is necessary to train the staff on all relevant matters - finance, EIA and environmental audits, public relations, information sharing and exchange, trade and investment, land and related laws, among others. In the absence of training in all relevant areas, performance of staff of the Authority, including its Board, will continue to be less effective.

It has been stated elsewhere in this report that the Investment Authority has made a lot of effort to promote Kenya abroad as an investment destination without matching their efforts with activities to encourage local investors to invest in Kenya. There are many Kenyans who have the money to invest, if only they could be facilitated in some way, even by providing information on available investment opportunities. When negative travel advisories, et cetra keep foreign investors away, only local investors could drive the country's economy forward. In this regard, there is an urgent need for the Investment Authority to publicize its existence locally. Many Kenyans and other people in Kenya do not know that there exists such a thing as KenInvest or a national investment authority. (In a Master of Laws class taking international trade law, only two out of thirteen students knew about Kenya's national Investment Authority. Of the two, only one knew whether the offices of the Authority are located).

This study determined that some of the existing farming activities are continually causing both negative health and social impacts. Such activities ought to be subjected to environmental audits as a matter of urgency. In some of the cases, interviewees pleaded with researchers to visit the farms, observe the negative impacts and take urgent action as necessary. It may be necessary to invite the Public Complaints Committee on Environment and NEMA to act quickly.

Further, it is necessary to publicize findings of this study in the hope that the effort would generate, among other things, interest in more detailed research that would lead, for example, to the development of an inventory of all land acquisitions for cultivation of biofuel crops in Kenya. Such a study is necessary and should include detailed investigation of alleged mapping of areas in Kenya for biofuel crop cultivation.

Last, but certainly not the least point, the National Land Commission ought, in collaboration with the Investment Authority, to draft procedures or guidelines for acquisition of land for investment purposes to sufficiently inform both local and foreign investors of existing acquisition options and required legal procedures for each kind of land (public, private or community).

3. What is needed to ensure effective implementation of the Investment Act and law enforcement?

In order to effectively enforce the investment law in Kenya in a manner that ensures that investments do not give rise to negative social and environmental consequences, a number of improvements need to be made on the law itself and on the capacity of the Investment Authority's staff.

First, the law needs to be amended to harmonize it with both aspirations expressed in Vision 2030 - the blue print for Kenya's development agenda, principles of land holding and management, including sustainable development, equitable benefit-sharing and non-discrimination expressed in the new Constitution and provisions of the new Land Act. There are also, in the constitution, requirements of accountability of government agencies and officials, as well as networking and collaboration among government agencies that are not reflected in Act No. 6 of 2004 and yet investment cuts across a number of sectors. In its current state, the Investment Act does not allow for adequate collaboration and consultation among key government agencies with functions relevant to investment.

Related to the above point is the need to operationalize section 26 of Act No. 6 of 2004 which establishes a National Investment Council. The Council has never been established and that appears to be one of the major causes of a disconnect between the functions of the Investment Authority and a number of key government agencies, including NEMA and the Ministry of Tourism and the Ministry of Lands.

Further, there is need to specify, in Act No.6 of 2004, the qualifications required for officers to function in the Authority. It is necessary to ensure that the Authority's personnel have capacity in all relevant fields, including: trade and industry, environment and natural resource management, environmental impact assessment, public relations, immigration and naturalization and taxation and social work, among other relevant fields.

Also, there is need to harmonize the Investment Authority's powers to manage investment sites, land and property with the National Land Commission's power to set aside land for investment and allocate it for that purpose. In this regard, section 15(2)(d) of the Investment Act needs more detailed, now in light of section 12 of the new Land Act of 2012 which places on the Land Commission (yet to be established) power to set aside and allocate public land for investment. There is need for detailed provisions on how the Investment Authority may engage with the Commission to ensure that investors acquire investment land that they may require. In addition, the Investment Authority's engagement with private land owners and estate agents ought to be guided by legal provisions, accompanied by provisions for investor remedies in case of loss or harm.

Equally lacking in Act No. 6 of 2004 are provisions on collaboration between the Authority and NEMA for purposes of ensuring that investment certificates and related licences are issued upon adequate conditions to ensure that investment activities do not result in unacceptably high levels of environmental externalities. It is also necessary to establish rules and procedures for ensuring harmony between the investment functions of the Authority and NEMA's environment-related functions. Currently, the Authority's issuance of certificates and licences is not closely linked to NEMA's environmental oversight functions. The situation has, in some cases, resulted in conflicts with NEMA insisting on EIA while the Investment Authority presses for liberty of investors who have acquired investment certificates from EIA encumbrances. It may be necessary to suspend issuance of investment certificates until, for land based activities, an EIA process for a proposed investment is concluded.

Needless to state, the Authority needs to publicize its existence as well as the existence of the parent statute locally. This study found that the Investment Authority has extensively engaged in activities intended to attract foreign investors to Kenya without equally promoting its existence and any existing investment opportunities locally. Efforts should be made to encourage both local and foreign investors to invest in Kenya and both weak environmental safeguards and cheap labour must never be used as strong points to attract investment in Kenya.

There is need to harmonize, in law and in practice, the investment powers of the Authority with similar powers of the other government agencies and ministries. It has been explained in the preceding sections of this work that there is not one, but a number of government agencies with investment powers and authorities, including power to allocate land, such as: KWS, EPZ Authority and the Ministry of Information and Communication. Approach to the same community of local and foreign investors by the many government agencies duplicate national investment efforts and create confusion and a sense of

competition among government agencies that could undermine overall national investment and development efforts and goals.

4. What does the investment law provide regarding identification and allocation of land for private investment purposes?

In Kenya, the Investment Promotion Act, Number 6 of 2004 (hereinafter, Act No. 6 of 2004), which took effect on 3rd January 2005, is the one specifically intended to facilitate and promote investment (see its Preamble). However, there are other laws with provisions relevant to investment which have been considered in this study, in terms of their relevance to the subject matter and to specific investment-related questions for this research. Act No. 6 of 2004 repealed the Investment Promotion Center Act, Chapter 485 which established the Investment Promotion Centre, the predecessor to the current Kenya Investment Authority.

The preamble to Act No. 6 of 2004 specifies the primary objective of the law, namely:

“... to promote and facilitate investment by assisting investors in obtaining the licences necessary to invest and by providing other assistance and incentives and for related purposes.”

Act Number 6 of 2004 does not have explicit provisions for identification and allocation of land for private investment purposes. However, it has provisions which the Investment Authority could rely on to ensure/achieve identification and allocation of land for investment, in which case, the Investment Authority would be facilitating investor identification and acquisition of land, but not directly allocating it. The relevant provisions are:

(a) sec 15(1), which specifies the Authority’s legal obligation to “promote and facilitate investment in Kenya.” Asked whether the Authority directly engages in identification and allocation of land for investment, an officer of the Authority stated that it does not, because the Authority does not own land that it could allocate to investors. Instead, where an investment needs to acquire and own, lease or occupation of land, the Authority exercises its powers to promote and facilitate development by acting (informally) to place investors in contact with land owners. In that position, the Authority has power to act, upon an investor’s request, on its own or in liaison with the Commissioner of Lands (for government land, where such land is available), local authorities (for local authority land), estate agents and individual and corporate land owners (for privately owned land) to search for and identify available land to allow investors to negotiate with land owners for land leases.

It was explained during interviews with the Authority’s officials that although section 15(2)(d) of Act number 6 of 2004 states that in promoting and

facilitating development, the Authority shall, among other things, “facilitate and manage investment sites, estates or land, together with associated facilities on the sites, estates and land,” the Authority does not own land for investment; neither does it have power to compulsorily acquire land for private investment. It was further stated that the Authority’s predecessor, the IPC did have some land allocated to it for investment by the government (central government), but all of the land was either allocated to investors or privatized - allocated/transferred to private individual owners who were not investors in terms of the law. Efforts were made to trace any investor who may have been allocated land by the defunct IPC for purposes of this study was fruitless.

The Authority’s mandate in section 15 explained above, along with other specifications of the Authority’s roles under the investment law, have been clarified in a Service Charter affirming that the Authority has incidental powers to assist investors, albeit through informal interactions with land owners, to acquire land for investment. The relevant provisions of the Service Charter state that the Authority shall: assist in obtaining incentives or exemptions under the Income Tax Act, the Customs and Excise Act, the Value Added Tax Act or other legislation; provide information to investors on the business climate, operating rules, investment opportunities and sources of capital and liaise with other government agencies for the issuance of additional licenses and approvals not directly handled by the Authority.

(b). sec 15(2)(a)(iv) of the Act specifies the Authority’s mandate to provide investors with information, including information on investment opportunities or sources of capital. This provision may be understood to require and empower the Authority to gather and maintain information on land that is available for the benefit of investors. The provisions also imply that investors are entitled to receive information from the Authority on availability of land for investment.

(c). sec 15(2)(i) of the Act states that in promoting and facilitating investments in Kenya, the Authority shall issue investment certificates which permit one to invest in Kenya and to acquire land for investment, including investment in agriculture. Section 6(3) of the Investment Act specifies that a foreign investor shall not invest in Kenya unless that foreign investor has been issued with an investment certificate.

In summary, the Investment Promotion Act, especially section 15(2)(d), envisages investor acquisition of land for investment, but it has no provision stating how that land shall be acquired or allocated. Therefore, of necessity, one has to look to the provisions of land laws on acquisition/allocation of land, specifically, the new Land Act, supported by provisions of the Constitution, especially, Articles 60 and 65.

(5) What has been the experience of private investors seeking land?

The following paragraphs indicate that most of the investors seeking land in Kenya have been able to find land for their investment purposes, but not

through the same process, channel or procedures, especially in terms of identification and acquisition/allocation of suitable land. While some, especially in recent years, have had to subject their land-based activities to EIA processes and outcomes, others have not been subjected to either EIA or environmental audits, exposing a number of environmental media to actual and potential negative environmental impacts resulting from land-based activities.

This study found that there is and has been no uniform official system or method of investor acquisition of land for investment purposes. This is, perhaps, due to lack of a specific law that sets the procedure for investor acquisition of investment land. The study found that investors have had varied experiences with land acquisition/allocation, depending on their practical approaches as follows:

(i) Direct investor engagement with land owners for identification and allocation of land - ***the case of Adrian Enrique Pintos and his Wasafiri Camp limited.***

In this case, the Investment Authority was not involved in identification and allocation of land to Mr. Pintos, who later incorporated an investment company known as Wasafiri Camp Limited; neither was the Investment Authority involved in putting the investor in touch with the land owner.

From letters written by land owners to a number of government agencies, it emerges that land owners themselves sought and found an investor to lease their land for the establishment of a tented tourist camp.

Seven members of a community living close to the boundary of Maasai Mara Game Reserve decided to combine their seven pieces of land (Mara/Koiyaki/Dagurugurueti/ 280, 281, 294, 295, 296, 319 and 2601) to form a ranch to be leased to an investor for development as a way to alleviate their poverty because the presence of wildlife on their land made it impossible for them to farm, even though land in the area was considered agricultural. They then sought a foreign investor who could lease their land for establishment of a tourist facility and found Mr. Pintos, a private investor from Spain. A lease agreement was signed between the land owners and Mr. Pintos granting him use rights for a period of years, specifically to construct 24 tented camps, a dining hall, kitchen and other related facilities. After the lease was signed, the foreign investor formed a limited liability company (in which the investor held 99% of the shares), known as Wasafiri Camp Limited to undertake the development. Thereafter, meaning, after the land identification and allocation deal between the foreign investor and the land owners was concluded, the investor applied to the Investment Authority for an investment certificate.

Section 6(3) of Act number 6 of 2004 makes it illegal for a foreign investor to invest in Kenya without an investment certificate. An investment certificate serves as a mechanism: for authorization of investment projects, to control investment activities and to ensure legal validity of the presence of foreign

investors in the country, especially for immigration purposes. The investment certificate in many ways, legitimized investors' investment activities in the country and thus authorized, in this case, Mr. Pintos and his company to apply for a number of development permits, including Narok Council's approval of construction of 24 tented camps and related facilities, which the investor obtained.

However, the investor's project failed to meet substantive and procedural aspects of environmental impact assessment (EIA) requirements established by the Environmental Management and Co-ordination Act (EMCA, 1999), prompting Narok Council to cancel approval and stakeholders to lodge an appeal in the National Environment Tribunal against NEMA's approval and licence of the development. In the end, the Tribunal, in consideration of ecological functions of the land on which the tented camps were proposed to be established, especially it being both a cheetah breeding ground and habitat, revoked NEMA's approval and the development and cancelled the EIA licence that it had issued to the developer in NET/07/2007 - *Narok County Council & Kenya Tourism Federation v. The Director General, National Environment Management Authority (NEMA) & Wasafiri Camp Limited*. (It is emerging that the investor has been trying to get around that).

(ii) Direct investor engagement with land owners for identification and allocation of land without the Investment Authority's involvement in the investment project - *the case of Jorge Alesanco Rodriguez Del Castillo*.

In his search for land to establish a cheetah rehabilitation sanctuary, specifically, a satellite cheetah orphanage and rehabilitation centre, the foreign investor, Mr. Ridrigues, Spanish, was not assisted by the investment Authority in identification and allocation of suitable land. He searched for land himself. In this regard, he states that:

"I explained everything about the project since the very beginning to anybody that I encountered along the way, from the searching of the land to the starting of the project..." (His letter to the directors and members of Maasai Mara North Conservancy dated 7th February 2010).

Mr. Ridrigues' search yielded fruit; he identified suitable land, title number CIS MARA/KOIYAKI/DAGURUGURUETI/79 measuring 61.39 hectares (an area formerly known as Koiyaki Conservation Area, Koiyiaki Group Ranch and Lamek Group Ranch) and thereupon, he signed a lease agreement with the owner, one, Nkingis Kisembi, and registered a lease in his name on 24th June 2008. It is stated in the lease that it was for a term of fifty years, from 1st April 2008 to 31st March 2058. (The form of the lease was approved by the Chief Land Registrar under section 108 of the Registered Land Act and the Land Registrar issued Mr. Ridrigues with an official Certificate of Lease on 24th June 2008).

Environmental considerations Alesanco's Project

To establish a cheetah orphanage and rehabilitation sanctuary, Mr. Ridrigues had to apply to NEMA for approval and environmental impact assessment (EIA)

licence. Part of that process required the conduct of a full EIA study to determine the social and ecological suitability of the project in a wildlife area adjacent to Maasai Mara Game Reserve. NEMA issued the investor with an EIA Licence Number 0002326 for, “the establishment of a cheetah orphanage and rehabilitation Center in collaboration with KWS, dated 10th November 2008.

Although it appears that the Director of KWS agreed with the project initially, KWS itself was opposed to it. The adjacent Maasai Mara North Conservancy was also opposed to it for a number of ecological reasons (including the potential impact of the project on Maasai Mara ecosystem, for example using game meat to feed cheetahs in the orphanage, darting and transporting injured wildlife without KWS’s expert involvement and sale of cheetah and other wildlife to foreign zoos) on wildlife in the Mara ecosystem. Also, Ridrigues’s failure to disclose his full intentions attracted serious challenges to the project; he did not, at the time of applying for NEMA’s approval and licence of the project, disclose that he intended also “...to construct a tourism tented camp...” because, “Eventually I had to maintain myself and the project with some benefits of the tourism due myself that I am the only investor in this project...”

The latter aspect of the project was not disclosed to allow NEMA and stakeholders to consider its potential negative impacts, or the potential cumulative negative impact of the whole project on Maasai Mara ecosystem. As a result, Maasai Mara North Conservancy Limited appealed against NEMA’s approval and licence of the project in the Tribunal in NET/37/2009 - *Maasai Mara North Conservancy Limited v. Director General, NEMA, Jorge Alesanco Rodriguez Del Castillo, Kenya Cheetah Foundation & Director, Kenya Wildlife Service*.

(iii). Identification and allocation of land through regional development authorities - ***the case of Bedford Biofuels Tana Delta 1 Limited.***

There have been eight regional development authorities in Kenya, based on the former provinces. At some point in time, regional development authorities, such as Tana River Development Authority and a number of regional development committees had (and a few may still have) land that could be devoted to development activities, as authorized by the various laws establishing and empowering the authorities to undertake a number of development activities. This study found that some investors have been able to acquire land through such regional development authorities. In this regard, the case of Bedford Biofuels Limited provides a good example.

In its search for land to cultivate *Jatropha carcus*, Bedford Biofuels Tana Delta 1 Limited (an affiliate of Bedford Biofuels Inc. of Canada) did not approach the Investment Authority and the Authority confirmed that Bedford approached it “only for other things, but not search for or allocation of land.”

Bedford was interested in establishing and managing a series of *Jatropha* plantations to harvest the seeds for biodiesel production, as well as “carry out

other agricultural pursuits.” In pursuance of its objective, it approached various relevant arms of government including the Tana Delta District Development Committee, as well as local communities in Garsen Location of Tana Delta District to address the possibility of carrying out the project.

It identified suitable land to be in Garsen in Tana Delta District, approximately 100 kilometres from Malindi and 300 kilometres south of Garissa in an area comprising six community ranches, namely: Ida-sa-Godana Randing Cooperative Society Limited (L.R. No.13597, measuring 51, 700 hectares); Giritu Ranching Company Limited (L.R. No. 13598, measuring 97,154 hectares); Haganda Private Ranching Company Limited (L.R. No.13599, measuring 12,141 hectares); Kibusu Ranching Company Limited (No. PDP/TRD/138/01/01, measuring 27, 400 hectares); Kitangale Ranching Company Limited (L.R. No. 28304, measuring 19,634 hectares) and Kon-Dertu Ranching Company Limited (L.R. No. 17601/1, measuring 11, 592 hectares). Bedford Biofuels leased a total of 219, 621 hectares of land in Tana Delta area at the coast of Kenya. (All the parcels of land were originally granted by central government to community members to establish ranches, in other words, they were, originally, land grants from central government).

After identifying suitable land, Bedford Biofuels commenced negotiations for leases of the lands with various ranches and eventually signed and registered the last lease in the year 2010. Each of the leases is for a period of 45 years. In a memorandum to NEMA, community members expressed their approval of the leases, stating that:

“...as a result (of negotiations), we have, on our own volition, signed an agreement with Bedford Biofuels (Tana Delta One) Ltd. to lease out our lands for purposes of Bedford Biofuels (Tana Delta One) Limited establishing *Jatropha* plantations.”

The memorandum was signed by approximately 199 community members.

After leasing the lands, Bedford applied to Tana River County Council for development permission under section 31(1) of the Physical Planning Act and its application was granted.

Environment and Social Considerations of the Project

Section 7 (1) and (2) of the Investment Promotion Act, No. 6 of 2004 states that where an application for an investment certificate raises an environmental issue (among other listed issues), the issue shall be referred to the appropriate government agency. The Investment Authority itself does not engage in environmental or social considerations of a project, beyond the social consideration of the potential of employment creation or lack of it. Accordingly, Bedford Biofuel had to apply to NEMA for approval and licence of their proposed cultivation of *Jatropha carcus*. To such applications, both EMCA, sections 58 - 67 and the Environmental Impact Assessment (EIA) and Audit Regulations (Legal Notice No. 101 of 2003) apply.

A full EIA study was conducted for Bedford's project during which both social factors, especially the potential of the project to alleviate poverty of the communities in the area, as well as likely negative environmental impacts were considered. Two of the negative impacts that were considered in the EIA process were: (1) the likely creation of jatropha carcus monoculture, which might have negative impacts on biodiversity in the area and on biological components of the soil and (2) impacts of large-sale farming on flora and fauna in an area that has considerable wildlife on it. As a result of such considerations, NEMA limited the acreage to be planted with jatropha on the first phase of the project to only 10,000 hectares, out of the 219, 621 hectares of land that Bedford had acquired in Tana Delta area.

(iv) Investor acquisition of land through direct engagement with politicians: The Case of Dominion Farms Limited

Foreign investors who incorporated Dominion Farms did not seek the Investment Authority's facilitation of, or assistance with, their acquisition of 17,000 hectares of land at the mouth of River Yala, where it emptied water into Lake Kanyaboli. It is not clear how they came into contact with Kenyan politicians but it emerges that they came to Kenya, riding on the wings of some named politicians, having made initial contacts elsewhere. It also emerges that the two politicians had, on their own or with the investors' request, identified land, which turned out to be ecologically-sensitive, in Siaya County, in Western Kenya in the year 2004.

With political support, the investors went through the process of EIA, but diverted River Yala from Lake Kanyaboli into their man-made dams to secure water for rice irrigation during the dry season, without official challenge, though local communities complained. Now, River Yala is not feeding Lake Kanyaboli and the Lake is dying- almost completely dead. To make it easy for the investors to irrigate while also acquiring construction materials cheaply, they also leveled Got Agulu - a mountain in the area that served a number of community purposes including those that are cultural in nature. It would appear that because of political affiliation, the investors have never been challenged for killing Lake Kanyaboli or leveling Got Agulu; neither have they ever been put to task over frequent flooding of adjacent human settlements, farms and pasture lands that occur when they have had enough water for irrigation and dispose of the rest by opening their man-made dams. One might also ask, what became of the rare snakes, plants and other biodiversity in the area that is now a huge rice field?

It was stated during interviews that Dominion Farms only engaged with the Investment Authority to seek the Authority's issuance with an investment certificate and approval of its expatriate employees. The investors' farming activities in Western Kenya appear to be long over due for environmental audit.

(vi) *Investor Acquisition of Land Through Green Africa Foundation- The case of Biwako Biolaboratory Limited*

This study found one non-government organization that in some ways, promotes cultivation of biofuel crops. The Foundation has, in a number of cases, assisted investors seeking to cultivate biofuel crops in Kenya to get in touch with land owners at the coasts. There were also unconfirmed indications that the Foundation may also have assisted *Kenya Bixa Limited* to acquire 200 acres of land at the coast for cultivation of jatropha.

(vii) *Identification of Investment Land Through the Investment Authority - No case disclosed*

Officials of the Investment Authority stated that the Authority has and could facilitate investor identification of investment land. It was stated that the Authority has prepared and maintains data on available land, based on information received from land owners seeking to lease their land to investors or partner with them. The Authority also consults with private estate agents to identify available land. If an investor informs the Authority that it is seeking land, the Authority will require it to specify the kind of land it requires and upon specification, the Authority either avails information from its data or contacts estate agents to identify the required land. In the past, before a moratorium was placed on government land, the Authority could also contact the Commissioner of Lands to inform it of any available land but this avenue is no longer available. Once land is identified, the investor is informed and commences negotiations, with or without the Authority's assistance in negotiations, to acquire the land. However, the Authority declined to provide names of investors whom it has assisted to acquire land.

Conclusion

It has been determined, as presented in the foregoing paragraphs that Kenya does have a national agency with statutory mandate to promote and facilitate investment. However, the Authority has no power to allocate land for investment and holds no investment land that it could allocate. Moreover, although the Authority approves investor applications to invest in Kenya and issues certificates for that purpose, its capacity to control investment activities, especially as relates to environment and social outcomes, is limited. It has no competence to engage in environment or social considerations and must refer all environment concerns to NEMA with a high potential for conflict between NEMA's environment-related functions and the Authority's investment promotion functions. It has been determined that EIA and audit regulations do exist that could, if stringently enforced, help to balance investment activities with sustainable development concerns.

What weakens the Investment Authority's position is, among other factors, the existence of a number of other government agencies, such as the EPZ Authority, with similar investment promotion functions, but with added investment property holding advantages. Kenya needs to harmonize the roles of

its various investment agencies. Currently, there is no arrangement or requirement in law or in practice for all of the investment promotion agencies to collaborate or even provide each other with updates of their activities.

Although the study finds that private investment has generated varied outcomes for local communities, a more detailed inquiry is necessary, not only to identify the exact nature and extent of negative social and environmental externalities on communities, but also to quantify investment gains to inform government decisions on future investment promotion and facilitation activities. Also, urgent action is necessary to remedy situations of investment projects that were found to have been generating negative serious consequences.

Now that a new Land Act has been passed that substantially varies the functions of government investment agencies, especially as regards land holding and allocation for investment purposes, all of the laws establishing investment agencies ought to be reviewed in light of the new law and the Constitution.