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This Must Be Our Place: Protectionism and Foreign Investment in Kazakhstan's Farmland

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This Must Be Our Place: Protectionism and Foreign Investment in Kazakhstan’s Farmland

*Kristi Lew**

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INTRODUCTION

In July 2020, Kazakhstan's second president Kassym-Jomart Tokayev announced that the country's agricultural land "is not for sale to foreigners."¹ In May 2021, Tokayev signed into law an amendment to the country's Land Code banning the sale of agricultural land to "foreign citizens, stateless persons, foreign legal entities, Kazakhstani legal entities with foreign owners, international organizations, academic centers involved with foreign countries."² Tokayev's actions seem to conflict with Kazakhstan's other policies favoring foreign investors. The country has attempted to attract foreign capital and technology by highlighting Kazakhstan's natural resources, educated work force, and "vast arable lands."³ And investors have heeded the call. In 2019, Kazakhstan succeeded in attracting over \$3 billion in foreign direct investment (FDI) and \$330 billion total FDI since achieving independence in 1991.⁴ FDI plays a central role in the government's strategy to diversify the country's oil-and-gas-dependent economy.⁵ Only one month after its president declared farmland to be "not for sale to foreigners," the country invited foreign business to profit from Kazakhstan's "cheap and plentiful" electricity in mining cryptocurrency at the new Enegix facility.⁶ Tokayev's ban mars this investor-friendly picture.

While potentially deterring foreign investors, the ban has a clear popular

¹ *Prodazha Zemli Inostrantsam: Tokaev Prinial Reshenie [Sale of Land to Foreigners: Tokayev Has Decided]*, FORBES.KZ (July 10, 2020), https://forbes.kz/process/budut_li_peredavatsya_kazahstanskic_zemli_inostrantsam/, ("Zemlia ne budet prodavat'sia inostrantsam." (author's translation in text above)).

² *Tokaev Podpisal Zakon, Zapreshchaiushchii Prodazhu Zelm'i Inostrantsam [Tokayev Signs Law Forbidding Sale of Land to Foreigners]*, https://tengrinews.kz/kazakhstan_news/tokaev-podpisal-zakon-zapreshchayuschiy-prodaju-zemli-437231/ (May 13, 2021) (author's translation in text above); O Vnesenii Izmenenii i Dopol'nenii v Nekotorye Zakonodatel'nye Akty Respubliki Kazakhstan po Voprosam Zemel'nykh Otnoshenii [An Act to Change and Amend Several Laws of the Republic of Kazakhstan Concerning Issues of Land Relations] art. 1(6) (May 13, 2021).

³ E.g., Nursultan Nazarbayev, *Strategy "Kazakhstan 2030"* in *Prosperity, Security and Ever Growing Welfare of All The Kazakhstanis, Message of the President of The Country to The People of Kazakhstan*, https://www.akorda.kz/en/official_documents/strategies_and_programs (highlighting "geographical position on the very crossroads in the Eurasian region," "rich natural resources," "a highly educated population with . . . scientific and creative potential," and "our vast land areas, our arable lands" as advantages in economic growth for the country).

⁴ See *Foreign Direct Investment, Net Inflows - Kazakhstan 1992-2019*, WORLD BANK, <https://data.worldbank.org/indicator/BX.KLT.DINV.CD.WD?end=2019&locations=KZ&start=1992&view=chart> (last visited Mar. 8, 2021); Dilshat Zhussupova, *Kazakhstan Attracts \$330 Billion FDI Since 1991*, ASTANA TIMES (Sept. 11, 2019), <https://astanatimes.com/2019/09/kazakhstan-attracts-330-billion-fdi-since-1991/>.

⁵ Nazarbayev, *supra* note 3 ("Further rehabilitation of the economy depends on a massive influx of investments.").

⁶ Paddy Baker, *Bitcoin Mining Facility with Room for 50,000 Rigs Set to Launch in Kazakhstan*, NASDAQ COINDESK (Aug. 21, 2020 12:24PM), <https://www.nasdaq.com/articles/bitcoin-mining-facility-with-room-for-50000-rigs-set-to-launch-in-kazakhstan-2020-08-21>.

audience within Kazakhstan.⁷ The privatization of agricultural land remains controversial in the post-Soviet country, and extraterritorial influence in the land market only heightens existing tensions.⁸ In 2016, a government commission proposed several reforms to the country's Land Code that would, among other provisions, allow foreign-controlled entities to lease farmland for up to twenty-five years.⁹ This proposed legislation was met with mass protests across the country—unusual levels of popular expression in this undemocratic country¹⁰—to which the government responded by imposing a moratorium on the privatization of farmland until the end of 2021.¹¹ It was this moratorium that Tokayev codified in May 2021.

This article will examine how we can make sense of Kazakhstan's restrictions on FDI in agricultural land, and why this topic is an exception to the country's otherwise FDI-centered development strategy. I hope thereby to explore the domestic and international pressures shaping Kazakhstani¹² law. To this end, the article will also compare Kazakhstan's legal regime with New Zealand's restriction on the purchase of housing by foreign persons in the 2018 Overseas Investment Act. Borrowing from the lexicon of

⁷ See *infra* Part III.C.

⁸ See *infra* Part V.C.

⁹ See Zemel'nyi Kodeks Respubliki Kazakhstan [Land Code] [hereinafter Land Code] art. 24. This article will cite official Russian-language versions of the Civil and Land Codes, which have been enacted as law. Russian has official legal status on par with Kazakh-language laws. Konstitutsiia Respubliki Kazakhstan (1995 rev. 2017) [Konst. RK] [Constitution] art. 7 para. 2 (“Russian language shall be officially used on equal grounds along with the Kazakh language in state institutions.”). To avoid reinventing the wheel for translation, this article will use the unofficial English version of the Civil and Land Codes provided by Adilet, a legal research system hosted by Kazakhstan's Ministry of Justice.

¹⁰ Kazakhstan is rated “not free” by Freedom House, with freedom of assembly subject to “tight restrictions.” These include denial of permits for “sanctioned” protests, the arrest of protesters and those supporting non-sanctioned protests on social media. *Kazakhstan*, <https://freedomhouse.org/country/kazakhstan/freedom-world/2020> (last visited Mar. 8, 2021). The popular protests of January 2022 against fuel prices and continuing demonstrations against the Tokayev regime's deadly crackdown may complicate this picture. See, e.g., “I Don't Know if She's Dead or Alive”: Desperate Kazakh Families Looking for Relatives After Unrest, RADIOFREEEUROPE (Jan. 20, 2022, 12:47 PM), <https://www.rferl.org/a/kazakhstan-deadly-unrest-missing-relatives/31663308.html>.

¹¹ See Land Code art. 24; Aiman Turebekova, *Kazakhstan Extends by Five Years Moratorium on Controversial Land Code Amendments*, ASTANA TIMES (Aug. 23, 2016), <https://astanatimes.com/2016/08/kazakhstan-extends-by-five-years-moratorium-on-controversial-land-code-amendments/#:~:text=Kazakhstan%20Extends%20by%20Five%20Years%20Moratorium%20on%20Controversial%20Land%20Code%20Amendments,-By%20Aiman%20Turebekova&text=ASTANA%20%E2%80%93%20Kazakhstan%20decided%20Aug.,amendments%20to%20its%20land%20law>.

¹² The term “Kazakhstani” denotes places or practices of the country as a whole, and the demonym “Kazakh” refers to the ethnic group after which the country is named. Kazakhstan is a multinational country and multilingual country, so it is useful to draw a distinction between nationality and ethnicity. *People and Society (Kazakhstan)*, CIA WORLD FACTBOOK, <https://www.cia.gov/the-world-factbook/countries/kazakhstan/#people-and-society> (last visited Mar. 8, 2021).

international trade, I will use the term “protectionism” to refer to legal regimes that purport to favor national insiders by restricting the rights of foreign investors. While Kazakhstan and New Zealand are very different countries with different legal systems, it is helpful to compare these two protectionist regimes precisely because of their dissimilarities. The differences highlight what is unique about Kazakhstan’s development, while also pulling out some common threads in protectionist laws and the factors leading to their creation. Like Kazakhstan, New Zealand has adopted protectionist policies uniquely with respect to land, welcoming foreign investment in other sectors such as finance and manufacturing.¹³ New Zealand is also a multinational country with a history of colonialism and is facing growing Chinese influence in its economy.¹⁴

This paper argues that Kazakhstan’s proposed ban on foreign ownership and lease of agricultural land is an uneasy compromise between the investment-friendly central government and popular, anti-Chinese forces within the country, keeping foreign business out without providing a corresponding advantage to domestic agricultural producers. I do not claim that Kazakhstan or any other country should de-regulate agricultural land, nor do I attempt to pass judgment on land protectionism *per se*. If history is any guide, the power to exclude outsiders is too intertwined with national sovereignty for land protectionism to be abandoned anytime soon.¹⁵ While one could criticize land protectionism from an efficiency standpoint, my critique of Kazakhstan’s system ultimately rests on the observation that current land regulations prevent or discourage non-citizens *and* citizens alike from making necessary investments in Kazakhstan’s farmland. In short, this paper attempts to identify and organize justifications for land protectionism in the admittedly “vague, sensational, and largely unsubstantiated”¹⁶ debates about non-citizen property rights in Kazakhstan and criticizes the law primarily where it fails to advance citizen welfare.

¹³ Apart from sizable investments in large companies or telecommunications infrastructure, only investments in land trigger the Overseas Investment Act. The country has established offices around the globe to invite investment in New Zealand and educate investors on opportunities within the country. *See Our International Offices*, N.Z. TRADE & ENTERPRISE, <https://www.nzte.govt.nz/page/contact-our-international-offices> (last visited Mar. 8, 2021). Finance and manufacturing are leading sectors in FDI in New Zealand. *Foreign Direct Investment in New Zealand Continues to Increase*, STATS N.Z. (Sept. 25, 2019, 3:45 PM), <https://www.stats.govt.nz/news/foreign-direct-investment-in-new-zealand-continues-to-increase>.

¹⁴ *See infra* Part IV. *See also* Rob Schmitz, *Australia and New Zealand Are Ground Zero for Chinese Influence*, NPR.ORG (Oct. 2, 2018 3:28 PM), <https://www.npr.org/2018/10/02/627249909/australia-and-new-zealand-are-ground-zero-for-chinese-influence>.

¹⁵ This issue is explored from the perspective of American constitutional law in Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1 (2002).

¹⁶ Grant Wilson, *Reforming Alien Agricultural Landownership Restrictions in Corporate Farming Law States: A Constitutional and Policy View from Iowa*, 17 DRAKE J. AGRIC. L. 709 (2012) (describing alien land laws in farming in the United States).

In this article, I aim to provide context for understanding Kazakhstan's current legal system after over two decades of independent development. After Kazakhstan gained independence in 1991, several excellent pieces surveyed Kazakhstan's new legal system for the English-speaking world. Alongside the letter of the new law, these articles often sought to discern Kazakhstan's until-then-neglected national history and culture.¹⁷ With the benefit of more data (i.e., years of development to document), recent commentators have engaged with Kazakhstan's legal system in action, examining the role its institutions play in social life.¹⁸ I hope to contribute in a modest way to this body of scholarship by incorporating the work of other authors studying land protectionism, typically in the common law context of alien land laws. Many pieces have bemoaned, analyzed, or cautiously applauded FDI in land, but fewer have studied the protectionist legal response to foreign interests in land.¹⁹ I attempt in this paper to apply these insights into land protectionism to modern Kazakhstan.

This paper is divided into six parts. Part I defines the terms of FDI and land protectionism. Part II develops three key policy justifications for land protectionism. Parts III and IV move to surveying the protectionist legal systems in both countries, summarizing the history and core provisions of Kazakhstan's land ban and New Zealand's 2018 Overseas Investment Act. Part V compares the policy goals of the two systems and how each system implements those goals with respect to the type of land covered by the regulation, the regulated interests in land, and the types of buyers to which

¹⁷ E.g., Christopher Osakwe, *Anatomy of the 1994 Civil Codes of Russia and Kazakhstan: A Biopsy of the Economic Constitutions of Two Post-Soviet Republics*, 73 NOTRE DAME L. REV. 1413 (1998) (summarizing the main provisions of the Russian and Kazakhstani civil codes in English); Philip M. Nichols, *The Viability of Transplanted Law: Kazakhstani Reception of A Transplanted Foreign Investment Code*, 18 U. PA. J. INT'L ECON. L. 1235 (1997) (testing the acceptance and integration of the new civil code into Kazakhstani culture).

¹⁸ E.g., Lauren Woodard, *From Prikaz to Procedures: Becoming an International Organization in Post-Soviet Kazakhstan*, 41 POLAR: POL. & LEGAL ANTHROPOLOGY REV. 75 (2018) (exploring one NGO's navigation of bureaucracy to become an "international organization"); Margaret Hanson, *Legalized Rent-Seeking: Eminent Domain in Kazakhstan*, 50 CORNELL INT'L L.J. 15 (2017) (observing the institutional source of insecurity of citizen property rights in Kazakhstan and documenting citizen and official recourse to remedies through formal legal institutions); Roza Nurgozhayeva, *State Ownership in Terms of Transition: Curse or Blessing*, 50 CORNELL INT'L L.J. 47 (2017) (arguing that the state ownership can be efficient in developing economies, testing its hypothesis in the context of Kazakhstan).

¹⁹ Jootaek Lee has compiled an excellent resource on scholarship relating to large-and smaller-scale land acquisitions in *Contemporary Land Grabbing: Research Sources and Bibliography*, 107 LAW LIBR. J. 259 (2015). Alien land laws seem to be a perennial favorite for student notes; in particular, Grant Wilson compiled numerous resources in *Reforming Alien Agricultural Landownership Restrictions in Corporate Farming Law States*, *supra* note 16. This paper owes a particular intellectual debt to Professor Tirres's work in *Property Outliers: Non-Citizens, Property Rights and State Power*, 27 GEO. IMMIGR. L.J. 77 (2012) in my attempt to distinguish and explain the different treatment of non-citizens in property law, albeit in a context outside of the United States.

the regulations extend. I conclude in Part VI that New Zealand's protectionist regime succeeds on its own terms by putting citizen interests first while directing outside investment to address its national housing shortage. Kazakhstan's law, on the other hand, blocks foreign investment and acts as a disincentive for citizens to invest in agriculture.

I. DEFINITIONS

Before exploring protectionism, we must first define both FDI and land protectionism. These terms refer to a range of activity that is widespread but difficult to define.

A. Foreign Direct Investment in Land

FDI has taken many forms according to the variety of incorporated and unincorporated enterprises around the world. The International Monetary Fund defines FDI as an "investment that is made to acquire a lasting interest in an enterprise operating in an economy other than that of the investor, the investor's purpose being to have an effective voice in the management of the enterprise."²⁰ Investors can be either entities or individuals; this paper will default to assuming that an "investor" is an entity unless specified otherwise. In the context of investing in land, a "lasting interest" can be a leasehold, held either directly by the investor or through a domestic company in which the foreign investor owns a controlling stake, or the outright purchase of land in the host country.²¹ Land investment is a particularly visible form of FDI: the investor acquires a physical presence in the foreign country. To receive the value of the investment, i.e., the use of the land, the investor must control access to and development of the land to the exclusion of others. This group of excluded "others" most directly implicates the citizens of the host country, who live and work in proximity to the foreign-controlled land.

Both developed and emerging countries have sought FDI: emerging countries tend to seek the financing, expertise, and technology of developed countries, while developed host countries attract investment by virtue of their stable and flourishing markets.²² Former Soviet countries in particular have sought foreign capital to finance the tremendous structural challenges of modernizing key industries, such as agriculture and the service sector.²³

Positive accounts of FDI see job creation, the global integration of economies, and the introduction of modern technology as its primary

²⁰ Tadeusz Galeza & James Chan, Back to Basics, *What Is Direct Investment?*, 52 FINANCE & DEVELOPMENT 34 (2015).

²¹ FOREIGN DIRECT INVESTMENT (FDI) IN LAND IN DEVELOPING COUNTRIES, DEUTSCHE GESELLSCHAFT FÜR TECHNISCHE ZUSAMMENARBEIT 9 (2009) (surveying types of FDI in land and defining it as "based on a lasting interest in taking control over land use rights. The transaction includes either rights of land-use or land-ownership.").

²² *Id.* at 34.

²³ *Id.*

benefits.²⁴ Foreign investment should, according to this account, create positive spillover effects for the long-term development of the host country: more jobs, training, and expertise raise the standard of living for everyone.²⁵ Competing negative accounts of FDI see foreign capital as threatening the overall development of the host country when it acts only to strip resources from that country, exporting goods and profits back home and hiring only low-skilled labor. FDI in Latin America in the late twentieth century, for example, “fail[ed] to contribute to the overall long-term economic and social development of their hosts,” operating as “enclave-type economic islands” that took advantage of relatively cheap labor to send raw supplies and produce to other parts of the world.²⁶ Foreign entities may also destabilize local markets by out-competing domestic businesses.²⁷

B. Land Protectionism

Land protectionism (or “protectionism” for short) is the policy of creating legal barriers to foreign property rights in land. The history of land protectionism necessarily reflects contemporary norms of what defines an “insider” as opposed to an “alien.” For example, in the common law tradition, “[t]he modern ‘citizen’ did not exist . . . in a monarchy, all those owing allegiance to the king were his subjects.”²⁸ With narrow exceptions, non-subjects were not permitted to own or inherit land due to their perceived allegiance to a foreign sovereign.²⁹ With the emergence of citizenship as the marker of insider status in modern nation-states, land protectionism limits property rights according to citizenship for individuals and entities alike. Foreign entities present some difficulty in definition, since an entity’s formal citizenship through incorporation or organization only captures some ways that non-citizens may be controlling an entity. For example, a majority of non-citizens may sit on the board of a domestic corporation; a corporation’s shares may be owned by a controlling majority of non-citizen shareholders; a foreign corporation may establish a domestic subsidiary. Later sections about the protectionist frameworks in Kazakhstan and New Zealand will address how the statutes define foreign-entity ownership.³⁰

²⁴ Zoltan Adam, *FDI: Good or Bad?*, 3 SEER: J. LAB. & SOC. AFF. E. EUR. 73, 79–80 (2000). See generally David Shea Bettwy, *The Human Rights and Wrongs of Foreign Direct Investment: Addressing the Need for an Analytical Framework*, 11 RICH. J. GLOBAL L. & BUS. 239 (2012) (summarizing positive and negative aspects of FDI and analyzing its impact on human rights in the host countries).

²⁵ Adam, *supra* note 24, at 80–81.

²⁶ *Id.* at 80.

²⁷ *Id.* at 73.

²⁸ Allison B. Tirres, *Ownership Without Citizenship: The Creation of Noncitizen Property Rights*, 19 MICH. J. RACE & L. 1, 10 (2013).

²⁹ *Id.* at 10–11. So-called “denizens,” a formal status conferred by the monarch, were permitted to hold a life estate in land. *Id.* at 12.

³⁰ See *infra* Parts III and IV.

Land protectionism may take several legal forms depending on the particular goal that the restriction is designed to achieve. Some of the more common restrictions include: preventing non-citizens from owning land outright, such as forbidding the sale to or inheritance of land by non-citizens; limiting lease terms to prevent non-citizens from recreating ownership by signing, for example, 100-year leases; or preventing non-citizens from purchasing strategic or otherwise important types of land.³¹ The next section will examine justifications for different forms of land protectionism in more detail.

II. WHY PROTECT LAND?

Non-citizen control of land implicates core national interests. As commentators in this field have observed, “citizenship is ‘land’s investment’ . . . ‘[p]atriotism is the demand of the territorial club for priority.’”³² This is true regardless of how developed the host country’s economy might be. For example, many American states have alien land laws restricting foreign investment in real estate.³³ There are several justifications, often overlapping or mutually reinforcing, that tend to reappear in arguments for land protectionism.³⁴ This paper will focus on the recurring concerns of national security, equity, and national integrity in discussions surrounding land protectionism.

A. National Security

At its core, the national security critique of foreign land ownership relies on an assumption that foreign investors stand for the interests of their own home governments (or other organizations) and should accordingly be

³¹ See *infra* Part II for examples of land-protectionist measures.

³² Wilson, *supra* note 16, at 712 (citing Gene Wunderlich, *Foreign Investment in U.S. Real Estate: Summary, Conclusions, and Recommendations*, in FOREIGN INVESTMENT IN U.S. REAL ESTATE 347 (Gene Wunderlich, USDA ed., 1976); Letter from Oliver W. Holmes to Felix Frankfurter (Mar. 27, 1917), in HOLMES AND FRANKFURTER: THEIR CORRESPONDENCE, 1912-1934, 70 (Robert M. Mennel & Christine L. Compston, eds., 1996)).

³³ See Erin McKinstry, Midwest Center for Investigative Reporting, *Regulation on Foreign Ownership of Agricultural Land: A State-by-State Breakdown*, <https://investigatamidwest.org/2017/06/22/regulation-on-foreign-ownership-of-agricultural-land-a-state-by-state-breakdown/> (last visited Mar. 8, 2021). *E.g.*, “[S]ales of state lands shall only be made to citizens of the United States and to those who shall have declared their intentions to become such.” IDAHO CODE ANN. § 58-313 (West, Westlaw through 2020 Legis. Sess.).

³⁴ This paper identifies three primary justifications but does not pretend to be exhaustive. Other authors have framed policy concerns differently in the context of their specific issues. See, e.g., Anthony B. Schutz, *Corporate-Farming Measures in A Post-Jones World*, 14 DRAKE J. AGRIC. L. 97, 99–102 (2009) (discussing five normative concerns behind restricting the corporate form in state agriculture, including “restricting absentee ownership,” lack of insider “social controls that influence qualifying corporations’ behavior,” and “larger landholdings” that threaten family farmers).

treated as suspect. The English jurist William Blackstone summarized this fear: “If lands had been suffered to fall into their hands who own no allegiance to the crown, the design of introducing our feuds, the defence of the kingdom, would have been defeated.”³⁵ English common law strictures against alien land ownership were based on the notion that land ownership was a privilege deriving from one’s undivided allegiance to a sovereign.³⁶ The forced removal of Japanese farmers from their land on the West Coast after Pearl Harbor offers an extreme modern example of security motivated protectionism.³⁷

The national security concern is most acute in regulating specific types of land. For example, foreign citizens and foreign-controlled entities may be prohibited from purchasing land near a national border or by a city’s water supply.³⁸ At a minimum, most countries monitor the levels of foreign ownership within their territories.³⁹ Agricultural land occupies a special place in the national security analysis as countries compete for arable land to secure their food supply. Responding to a spike in food prices around 2008, food importing countries such as China and Saudi Arabia began to acquire interests in farmland in Africa and South America.⁴⁰ These investors sought not only profit, but also represented their national interest in securing domestic food supply through imports.⁴¹ Agricultural investment can be seen as a zero-sum game whereby—in the most dramatic framing of the issue—a foreign country takes food from the mouths of the host country’s citizens. Of course, this analysis ignores potential benefits to the host country when investors hire citizens in their operations, and moreover assumes that all food produced on the investor’s land is exported to the investor’s home country.

³⁵ WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 328 (4th ed. London, V. & R. Stevens and G.S. Norton 1853).

³⁶ Tirres, *supra* note 28, at 10–11.

³⁷ For a brief legal history of internment, see Aziz Z. Huq, *Article II and Antidiscrimination Norms*, 118 MICH. L. REV. 47, 57 (2019). On anti-immigrant and anti-Japanese prejudice in the West preceding internment, see generally Robert Higgs, *Landless by Law: Japanese Immigrants in California Agriculture to 1941*, 38 J. ECON. HIST. 205 (1978).

³⁸ The Committee on Foreign Investment in the United States takes the targeted approach by identifying and overseeing transactions connected to “critical infrastructure,” including real estate. JAMES K. JACKSON, CONG. RESEARCH SERV., RL33388, THE COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES (CFIUS) (2020).

³⁹ For example, the Agricultural Foreign Investment Disclosure Act of 1978 requires foreign persons holding interests in U.S. agricultural land to submit a report to that effect to the Secretary of Agriculture. Pub. L. 95-460, Oct. 14, 1978, 92 Stat. 1263 (7 U.S.C. 3501 et seq.).

⁴⁰ FOREIGN DIRECT INVESTMENT (FDI) IN LAND IN DEVELOPING COUNTRIES, *supra* note 21, at 12–13.

⁴¹ See Lee, *supra* note 19, at 262 (noting that “states seeking guaranteed food production for their citizens” and transnational corporations have been leading the large-scale acquisition of land abroad).

B. Equity

Foreign land ownership also implicates economic inequality or equity concerns between citizens and non-citizens. Blanket restrictions against investment or certain types of investment, such as within the agricultural or housing sectors, may be motivated by equity concerns since the introduction of foreign capital into a market tends to raise land prices and force local players out. This dynamic operates even between states in the United States. The widespread and often ironic slogan “Go back to California” in Oregon, for example, reflects the wave of demand for real estate from the wealthier state that resulted in higher property values and taxes for Oregonians.⁴² In certain African countries, foreign landowners have literally displaced local people from plots where they had been farming on the basis of informal property rights.⁴³ Foreign investors may not be familiar with or sympathetic to customary practices, relying instead on formal property rights to oust locals interfering with their investment.

Equity concerns are also implicated in the duration of a foreign investor’s property interest. Landownership—as opposed to leasing—typically includes the right to convey the property or to pass it to heirs of one’s choosing, effectively locking citizens out of the foreign-owned property for generations. In the case of corporate-owned property, the indefinite longevity of the corporate owner poses a similar issue.⁴⁴

C. Nationalism

Finally, the emotional dimension of national integrity underlies land protectionism and heightens concerns about national security and equity. Nationalist justifications often dictate the degree of protectionism within a given legal framework. One might see nationalist statements such as “[t]he land of a country should belong to the nation and to its citizens” simply as xenophobia, and prejudice against outsiders certainly plays a role in land protectionism.⁴⁵ There is more, though: land evokes a deep emotional

⁴² E.g., Douglas Perry, “Go Back to California!” *Graffiti on Car, House Stuns New Arrivals, Highlights Old Tensions in Portland*, THE OREGONIAN OREGONLIVE (July 2, 2017), https://www.oregonlive.com/portland/2017/07/go_back_to_california_vandalis.html (“The beast steals our jobs and our self-respect. It keeps us from buying homes. It is The Californian.”).

⁴³ FOREIGN DIRECT INVESTMENT (FDI) IN LAND IN DEVELOPING COUNTRIES, *supra* note 21, at 9. This can be remedied by including the right by the group in question to use/cross the land in question in the purchase/lease.

⁴⁴ One Ohioan expressed this concern: “once a foreign entity buys up however many acres they want, Americans might never be able to secure that land again.” “American Soil” Is Increasingly Foreign Owned, NPR.ORG (May 27, 2019 4:17PM) <https://www.npr.org/2019/05/27/723501793/american-soil-is-increasingly-foreign-owned>.

⁴⁵ See, e.g., H.R. DOC. NO. 89, at 3 (1921). This report argued for the exclusion of Japanese immigrants from property rights in California and other Western states, stating in dramatic terms that a Japanese influx would amount to “semibarbarism.” *Id.* at 4.

response and often stands in the popular imagination for the national unit itself. “The land is not merely a site of beauty, but also a site that ‘addresses’ a people. It not only offers a physical refuge a nation can call its own, but also provides the ground, so to speak, where the nation can both be reminded of itself and become itself.”⁴⁶

Members of a nation tend to view themselves as the stewards of the territory they occupy; slogans against foreign ownership play on the theme that land “belongs” to its citizens, even if they as individuals do not own the land in a formal, legal sense.⁴⁷ Foreign owners who hold land for investment are therefore perceived as lacking a sense of stewardship and are seen as less capable of managing the land. This idea echoes throughout discussions of foreign land rights; one advocate for restricting foreign land rights summarized it as: “The closer you are to the land, the more likely you are to take care of it.”⁴⁸ At its most extreme, foreign ownership without responsible management might amount to a type of “neo-colonialism,” whereby a foreign entity strips the host country’s land with no view to its long-term cultivation.⁴⁹

III. THE LEGAL FRAMEWORK IN KAZAKHSTAN

A. History of Land Ownership

After surveying land protectionism and its common justifications, I will now turn to Kazakhstan and its land-protectionist legal regime, past and present. First, a word about the land itself: Kazakhstan’s territory is made up of arid and semi-arid steppe, desert, and mountains. Without cultivation, steppe land is naturally suited as pasturage for animal herding.⁵⁰ The country’s main crop is wheat, grown primarily in Northern Kazakhstan, with

⁴⁶ Eyal Chowers, *Land-centred Nationalism and the State: A Re-evaluation of Jewish National Revival*, 24 *NATIONS & NATIONALISM* 937, 938 (2018). This article will treat the concept of nationalism broadly and not dive into a deeper study of the specific culturological dimensions of nationalism in Kazakhstan and New Zealand (land-centered or otherwise).

⁴⁷ For example, the Russian nationalist slogan “Rossiya dlya russkikh” [“Russia for Russians”] implies a right to live in the country’s territory based on national identification rather than property ownership. A more inclusive spin on this metaphorical citizen ownership can be found in Woody Guthrie’s *This Land is Your Land*. WOODY GUTHRIE, *THIS LAND IS YOUR LAND* (1956), available at https://www.woodyguthrie.org/Lyrics/This_Land.htm.

⁴⁸ Midwest Center for Investigative Reporting, *As Foreign Investment in U.S. Farmland Grows, Efforts to Ban and Limit the Increase Mount*, *SUCCESSFUL FARMING* (June 6, 2019), <https://www.agriculture.com/farm-management/farm-land/as-foreign-investment-in-us-farmland-grows-efforts-to-ban-and-limit-the>.

⁴⁹ This term is used in the literature discussing FDI in land in developing countries, particularly in Africa. *E.g.*, Beth Robertson & Per Pinstrop-Andersen, *Global Land Acquisition: Neo-colonialism or Development Opportunity?*, 2 *FOOD SEC.* 271 (2010).

⁵⁰ Jessica Barkas, *Testing the Bomb: Disparate Impacts on Indigenous Peoples in the American West, the Marshall Islands, and in Kazakhstan*, 13 *U. BALT. J. ENVTL. L.* 29, 44 (2005).

oilseed (such as flax) and cotton grown in the East and South, respectively.⁵¹ Yields are “highly dependent on weather” due to Kazakhstan’s aridity, undeveloped irrigation technology, and a Soviet legacy of single-crop farming.⁵² Livestock farming accounts for some 40% of agricultural output.⁵³

Contemporary Kazakhstan is a presidential republic in which both the president and parliament may exercise legislative powers.⁵⁴ Kazakhstani citizens today may own land, but the recognition of individual land ownership rights as a phenomenon separate from political power emerged in the country relatively recently (with the exception of a brief period between 1906 and the late 1920s).

Before the incorporation of the Kazakh khanates into the Russian Empire, grazing lands were recognized as the property of feudal lords whose tribal units were in possession of the land.⁵⁵ Paths used by nomadic groups to travel between pasturelands were common property.⁵⁶ After a series of treaties and alliances begun in 1731, the lands of the Kazakh khans came fully under the control of the Russian Empire around 1847.⁵⁷ Kazakh herders were permitted to preserve their customary law to self-regulate within the imperial system.⁵⁸ In 1906, in an effort to prevent the socialist radicalization of its peasant class, Russia recognized the right of all Russian subjects—but not ethnic Kazakhs—to own land.⁵⁹ For good measure, the empire followed

⁵¹ *Kazakhstan Agricultural Overview*, U.S. Dep’t of Agriculture, Commodity Intelligence Report, https://ipad.fas.usda.gov/highlights/2010/01/kaz_19jan2010/ (last visited Mar. 8, 2021).

⁵² *Id.*

⁵³ ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, *MONITORING THE DEVELOPMENT OF AGRICULTURAL CO-OPERATIVES IN KAZAKHSTAN* 15 (2019).

⁵⁴ *Konstitutsiia Respubliki Kazakhstan* (1995 rev. 2017) [Konst. RK] [Constitution] art. 49 para. 1 (vesting legislative power in the parliament); § 3 art. 45 para. 1 (permitting the president to issue binding decrees).

⁵⁵ Bakytzhan Abdraimov et al., *Istoriko-pravovoi Analiz Razvitiia i Stanovleniia Arendy za Zemliu v Respublike Kazakhstana* [Historical and Legal Analysis of The Development and Establishment of Land Rent in the Republic of Kazakhstan], 16 IURIDICHESKIIIE NAUKI [LEGAL STUDIES] 249, 250 (2012). For a brief account of early Kazakh culture, see J. Robert Brown, Jr., *Culture, Chaos and Capitalism: Privatization in Kazakhstan*, 19 U. PA. J. INT’L ECON. L. 909, 911–17 (1998).

⁵⁶ Abdraimov et al., *supra* note 55, at 250.

⁵⁷ *Id.* (citing as authority for the date of 1847 Zh. K. Taimaganbekov, *ISTORIIA KAZAKHSTANA S DREVNEISHIKH VREMĖN DO NASHIKH DNEI* [A HISTORY OF KAZAKHSTAN FROM ANCIENT TIMES UNTIL THE MODERN DAY] (1993)). In 1847 Russia had not yet abolished serfdom, but the law did recognize private property rights for the nobility and the merchant classes. RICHARD PIPES, *RUSSIA UNDER THE OLD REGIME* 133–34 (1974).

⁵⁸ Abdraimov et al., *supra* note 55, at 250. The Kazakhs were not peasants (*krest’iane*) who were bound to land as serfs, and so could observe their own customary laws within the boundaries of grazing lands not otherwise occupied by Russian military settlements, towns, or private estates.

⁵⁹ *Ukaz* [Decree] of Nov. 9, 1906. A photocopy of the document in original Russian is available online at <https://doc.histrf.ru/20/imenny-vysochayshiy-ukaz-o-dopolnenii-nekotorykh-postanovleniy-deystvuyushchego-zakona-kasayushchikh/> (last visited Mar. 8,

these reforms with a mass resettlement of potentially insurrectionary Russian peasants onto arable plots of land in Siberia and the Kazakh steppe.⁶⁰ One can compare this privatization of farmland in Kazakhstan to the enclosure movement in England, whereby customary property rights held in common by diffuse groups (villagers in England, and nomadic tribes in Kazakhstan) were displaced by private owners who cultivated or sold the land for profit.⁶¹ Yet unlike England's centuries of discussing and refining enclosure, widespread privatization of farmland appeared in Kazakhstan suddenly and by the fiat of a colonizing power.

After the 1917 Revolution, all title to land was transferred to the Soviet government, but Soviet citizens continued to exercise formal property rights within the new socialist regime.⁶² Individual farmers retained the right to rent land and largely control its use under the New Economic Policy.⁶³ This compromise lasted until the late 1920s with the forced collectivization of farming. Peasant farmers were initially allowed to continue cultivating their plots as individuals but faced extreme legal and extralegal deterrents, including heavy taxes, punitive farming assignments by the state, and confiscation of crops.⁶⁴ In the culmination of collectivization in 1928, Soviet

2021).

⁶⁰ George L. Yaney, *The Concept of the Stolypin Land Reform*, 23 *SLAVIC REV.* 275, 278 (1964). Yaney argues that while heading off revolution was certainly a priority for tsarist officials, the land reforms should be seen as an attempt at structural change more than ad hoc measure to stave off unrest.

⁶¹ See Charles J. Reid, Jr., *The Seventeenth-Century Revolution in the English Land Law*, 43 *CLEV. ST. L. REV.* 221, 243–61 (1995) (surveying the historical justifications for enclosure of common land, including increased investment in the enclosed land by its owners and resulting increases in agricultural productivity). In contrast to the English enclosure laws, the Russian land reforms (also called the Stolypin land reforms) were experimental, short-lived, and led primarily by the state. See generally Yaney, *supra* note 60.

⁶² See, e.g., Richard C. Schneider, Jr., *Developments in Soviet Property Law*, 13 *FORDHAM INT'L L.J.* 446 (1989) (summarizing the evolution of "socialist property" concerning individual property rights).

⁶³ Daria Verkhoglyad, *Novaia Ekonomicheskaiia Politika (NEP) i Regulirovaniie Prava Sobstvennosti na Zemliu v SSSR v Period eë Provedeniia [The New Economic Policy (NEP) and The Regulation of Property Rights of the Lands in the USSR During the Period of Its Implementation]* 94 *NAUCHNYI ZHURNAL KUBGAU [SCIENTIFIC JOURNAL OF THE KUBAN STATE AGRARIAN UNIVERSITY]* 2 (2013). The Soviet Land Code of 1922 protected agricultural collectives and "guaranteed perpetual use of all land factually being worked to the person at that time operating the land." John N. Hazard, *Soviet Property Law*, 30 *CORNELL L. REV.* 466, 472 (1945). Non-collectivized farmers were governed not by the Land Code but by the civil contracts code in their leases with the government. *Id.*

⁶⁴ LEWIS SIEGELBAUM & ANDREI SOKOLOV, *STALINISM AS A WAY OF LIFE* (2000). The planned economy meant that individual farmers had more independence in theory but had little control of their output or chosen crops. Ethnic Kazakhs suffered the highest casualties as a percentage of their population during the famine resulting from forced collectivization in the 1930s. Some historians estimate that around 40% of Kazakhs died during this period. Elena Volkava, *The Kazakh Famine of 1930-33 and the Politics of History in the Post-Soviet Space*, <https://www.wilsoncenter.org/publication/the-kazakh-famine-1930-33-and-the-politics-history-the-post-soviet-space> (last visited Mar. 8, 2021).

citizens lost the right to lease farmland until the late 1980s under perestroika.⁶⁵ Until the fall of the Soviet Union, then, title to land remained in government hands while agricultural collectives had the right to possess and use farmland as part of their charters.⁶⁶ These rights were closely tied to the specific use planned for the land by the socialist state; “the rights to possess and use land . . . may be revoked by the local council of people’s deputies in the case of . . . ‘use of the plot for purposes other than those designated.’”⁶⁷ This model of “socialist ownership” was distinct from government leases, a practice common in the urban housing sector.⁶⁸

In the 1950s and 1960s, the Soviet government implemented the “virgin lands” program in Kazakhstan, dedicating a large portion of its territory to growing grain.⁶⁹ In an echo of the tsarist-era mass settlements to Kazakhstan, the program also encouraged large numbers of Soviet citizens, particularly Russians, to immigrate to the Kazakhstan Soviet Socialist Republic to farm the land; ethnic Kazakhs became a minority within the Republic.⁷⁰ The policy also dealt the final blow to nomadism in Kazakhstan, since traditional grazing lands were repurposed by the state for wheat production.⁷¹

In 1991 the newly independent Republic of Kazakhstan transferred all territory from Soviet to Kazakhstani state ownership. Independence presented Kazakhstan with a host of novel challenges, including the establishment of a new legal system to replace the socialist Soviet codes. After tremendous and detailed study of code-based and common law systems, the country adopted its modern Civil Code in 1994 and Constitution in 1995.⁷²

B. Agricultural Land in the Civil and Land Codes

Kazakhstan’s Civil Code combines into a single document regulating private law what traditional civil law systems organize as separate civil and

⁶⁵ Andrei A. Baev, *The Privatization of Land in Russia: Reforms and Impediments*, 17 LOY. L.A. INT’L & COMP. L. REV. 1, 13, 17 (1994). Perestroika (“rebuilding”) was the policy of economic liberalization, i.e., the introduction of a limited market regime, under Mikhail Gorbachev that immediately preceded the collapse of the Soviet Union.

⁶⁶ Soviet citizens could own their own homes as structures, although citizens living in communal apartments or municipally owned buildings were unable to become owners. Hazard, *supra* note 63, at 474–77; Schneider, *supra* note 62.

⁶⁷ Schneider, *supra* note 62, at 465.

⁶⁸ Hazard, *supra* note 63, at 476–77.

⁶⁹ Brown, *supra* note 55, at 924–25. “Virgin Lands” is the translation of the *osvoenie tseliny* program initiated by General Secretary Khrushchev and continued under the leadership of Leonid Brezhnev.

⁷⁰ *Id.*

⁷¹ Philip M. Nichols, *The Fit Between Changes to the International Corruption Regime and Indigenous Perceptions of Corruption in Kazakhstan*, 22 U. PA. J. INT’L ECON. L. 863, 906–07 (2001).

⁷² For a summary of the birth of Kazakhstan’s Civil Code, see Osakwe, *supra* note 17.

commercial codes.⁷³ The Civil Code also calls for the adoption of supplementary codes, such as land and securities regulation. Unlike its Soviet predecessor, the Civil Code recognizes individual private property rights in land, which are entitled to the same legal protection as state ownership. It differentiates between ownership of land and ownership of structures built on land, classifying both as “immovable property.”⁷⁴ Individuals are also permitted to lease land, which is termed by the Civil Code to be a contractual right, not a property right.⁷⁵ The Civil Code presumes that unless stated in the contract, leases for real property are of indefinite length.⁷⁶ However, this liberal approach is limited in the case of farmland by the Land Code, which permits citizens and domestic Kazakhstani entities to lease agricultural land for up to forty-nine years.⁷⁷ Perhaps in recognition of the “politically charged” nature of land ownership in the post-Soviet sphere, the original Civil Code provisions concerning land were drafted to become effective only after the adoption of the later-drafted Land Code, which would represent some consensus about land privatization.⁷⁸

If the Civil Code’s general embrace of private land ownership had aroused little dispute, the nitty-gritty of land privatization in the Land Code has provoked more controversy. Adopted in 2003—over ten years after independence—the Land Code has been subject to regular reworkings as the process of land privatization starts and stops. Continuing the Soviet status quo, the government first permitted use rights for farmers on state-owned farmland, then moved to a leasing model in 1995.⁷⁹ The 2003 Land Code recognized private ownership of farmland, but few large agricultural collectives from the Soviet period were restructured into smaller private entities. And among the newly privatized, few shareholders exercised their rights to create independent family farms.⁸⁰ One reason for this low interest in privatization among rural residents was financial: lease rates were low, only 1% of the value of the land, so continuing to lease from the state was often the most affordable option.⁸¹

The Land Code defines seven main types of land, something of a

⁷³ This is modeled in part on the Dutch code system. Osakwe, *supra* note 17, at 1417.

⁷⁴ *Grazhdanskii Kodeks Respubliki Kazakhstan [GK RK] [Civil Code] [hereinafter Civil Code]* art. 117 para. 1.

⁷⁵ *Id.* arts. 540 et seq.

⁷⁶ *Id.* art. 545 para. 2.

⁷⁷ Land Code art. 37 para. 5(1).

⁷⁸ Osakwe, *supra* note 17, at 1482, 1486.

⁷⁹ Martin Petrick & Richard Pomfret, *Agricultural Policies in Kazakhstan*, Discussion Paper No. 155, LEIBNIZ INST. AGRIC. DEV. TRANSITION ECON. 12 (2016).

⁸⁰ Restructuring and the breakup of large agricultural collectives were thought to endanger productivity and food security. *Id.* at 10–12 (“Privatization in principle broke up large farms, but in practice many farms remained essentially unstructured. . . . The sector was characterized by continuing power of former state-farm managers and of local authorities.”).

⁸¹ Hanson, *supra* note 18, at 30–31.

national zoning of territory, each with associated legal regulations.⁸² Agricultural land is subject to a different regulatory regime than residential or industrial land, with the precise allocation of land into any category left to administrative bodies within the central and municipal governments.⁸³ Designation depends on how the land is used: agricultural land encompasses cultivated or arable land as well as the land on which are located the roads, “bodies of water,” and secondary “constructions and installations” that serve the agricultural economy.⁸⁴ Approximately 272 million hectares, or over 70% of Kazakhstan’s territory, is designated as agricultural land suitable for growing crops or pasturing livestock.⁸⁵

In language reminiscent of the Soviet planned economy, the Land Code requires the optimal use of farmland, forbidding farmers from building structures or grazing animals on “valuable arable areas” with the greatest potential for producing crops.⁸⁶ Citizens and domestic entities may purchase or lease agricultural land.⁸⁷ Base rates for leasing state-owned farmland are set low by statute, as noted above, a form of government subsidy for agriculture.⁸⁸ Government is also the primary source of agricultural credit through the state holding company KazAgro, which grants loans to projects and entities according to state-set priority.⁸⁹ Shortly before the proposed land reforms in 2015, only 1.3% of all agricultural land was privately owned.⁹⁰ The remaining 98% of farmland was leased by the government to Kazakhstani farmers or agricultural enterprises.⁹¹ One can contrast this picture with the robust private market in urban real estate, in which some

⁸² Land Code § 1, ch. 1, art. 1.

⁸³ *Id.* arts. 2, 8.

⁸⁴ *Id.* art. 97 1–2.

⁸⁵ *Economy (Kazakhstan)*, CIA WORLD FACTBOOK, https://www.cia.gov/library/publications/the-world-factbook/geos/print_kz.html.

⁸⁶ Land Code art. 97 3. “By this, the valuable arable areas, which include all kinds of irrigated arable areas, plowing land, abandoned field and the lands, occupied by the perennial plantings, may not be used for construction of animal production units, temporary and domestic structures for the seasonal works and distant-pasture cattle tending on the agricultural lands.”

⁸⁷ *Id.* art. 37 para. 5.

⁸⁸ N.S. Almukhamedova et al., *Zemel’naia Diskussii: Khronologiya, Soderzhanie, Itogi [The Land Discussion: Chronology, Content, and Conclusions]*, KAZAKHSTANSKII INSTITUT STRATEGICHESKIKH ISLEDOVANII PRI PREZIDENTE RESPUBLIKI KAZAKHSTAN [KAZAKHSTAN INSTITUTE FOR STRATEGIC RESEARCH FOR THE PRESIDENT OF THE REPUBLIC OF KAZAKHSTAN] 17 (2016).

⁸⁹ See Ayapbergen Taubayev et al., *Institutional Support of Agro-industrial Complex Entities of Quasi-public Sector of Kazakhstan*, 8 J. ADVANCED RES. L. & ECON. 1350, 1352 (2017) (concluding that the “main purpose of the Holding [company] is implementation of state policy on forming and development of competitive and export-oriented agriculture”); Petrick & Pomfret, *supra* note 79, at 21.

⁹⁰ Almukhamedova et al., *supra* note 88, at 14.

⁹¹ *Id.*

96% of housing stock was privately owned.⁹²

As a general principle, the Land Code permits foreign citizens and entities to own land “on an equal basis with citizens and legal entities of the Republic of Kazakhstan unless otherwise provided by this Code or other legislative acts of the Republic of Kazakhstan.”⁹³ The Land and Civil Codes define foreign entities as enterprises incorporated abroad, or domestic entities in which a foreign entity or citizen owns over half of the authorized capital.⁹⁴ Under the terms of the 2016 moratorium—and the 2021 amendment to the Land Code—the Land Code prohibits the purchase of agricultural land by Kazakhstani enterprises, Kazakhstani citizens, or foreign-owned enterprises.⁹⁵ Entities with over fifty percent foreign-contributed capital may not lease agricultural land. In contrast, the Land Code permits the purchase of residential and industrial land by natural persons and entities—regardless of national citizenship.⁹⁶ Foreign-owned entities may also lease oil and gas rights, and benefit from government policies encouraging investment in this sector.⁹⁷

Gauging demand by foreign investors to lease or buy farmland in Kazakhstan is difficult given the low level of privatization and legal bar to such activity. FDI in agricultural production (as opposed to agricultural food processing) represented less than 1% of Kazakhstan’s total FDI shortly before the proposed 2016 reforms.⁹⁸ Immediately before the 2016 moratorium, investors from Russia, Cyprus, and the United Arab Emirates

⁹² UNITED NATIONS ECONOMIC COMMISSION FOR EUROPE, COUNTRY PROFILES ON THE HOUSING SECTOR: REPUBLIC OF KAZAKHSTAN 39 tbl. 2 (2018), https://www.unece.org/fileadmin/DAM/hlm/prgm/cph/countries/kazakhstan/07_CP_Kazakhstan_part1chapter3.ENG.pdf.

⁹³ Land Code art. 6 para. 6.

⁹⁴ Land Code art. 97 para. 3(6)(3).

⁹⁵ Land Code art. 24, as amended by O Vnesenii Izmenenii i Dopol’nenii v Nekotorye Zakonodatel’nye Akty Respubliki Kazakhstan po Voprosam Zemel’nykh Otnoshenii [An Act to Change and Amend Several Laws of the Republic of Kazakhstan Concerning Issues of Land Relations] art. 1(6) (May 13, 2021).

⁹⁶ Land Code art. 23 para. 4 (“Foreigners, stateless persons and foreign legal entities (non-state ones) may own land plots for the purposes specified in paragraph 3 of this article, except for lands intended for agricultural production and afforestation.”).

⁹⁷ See, e.g., O Nedrakh I Nedropol’zovanii [Code on Subsoil and Subsoil Use], arts. 32, 40 (not differentiating between the rights of domestic and foreign entities apart from requiring that foreign applicants for subsoil licenses submit documents in Kazakh or Russian and provide certain disclosures related to the laws of the investor’s home country). For a summary of Kazakhstan’s subsoil regulations for investors, see YERBOLAT YERKEBULANOV ET AL., KAZAKHSTAN MINING LAW AND PRACTICE (Chambers Global Practice, 2020). On incentives to invest, see Kulpash Konyrova, *Kazakhstan to Hold Auction for Subsoil Use Rights in December*, NEWEUROPE (Sept. 29, 2020, 3:39 PM), <https://www.neweurope.eu/article/kazakhstan-to-hold-auction-for-subsoil-use-rights-in-december/>.

⁹⁸ WORLD BANK GROUP MACROECONOMICS & FISCAL MANAGEMENT, KAZAKHSTAN THE ECONOMY HAS BOTTOMED OUT: WHAT IS NEXT? 19 (2017). See *infra* Part III.C on the proposed 2016 reforms.

leased the most farmland, approximately 19,050 total hectares.⁹⁹ Chinese investors were leasing a modest 282 hectares.¹⁰⁰ Note the scale: thousands of hectares, not thousands or millions. Of Kazakhstan's 76.5 million hectares of farmland, then, foreign-controlled entities were leasing some 0.025%. Joint ventures between Kazakhstani and foreign investors leased an additional 45,000 hectares of land.¹⁰¹ The Kazakhstani investors owned a sizable share, around 40%, of such ventures.¹⁰² These figures capture demand when leasing terms were allowed up to ten years. Suggesting the potential for greater interest by investors, in 2009 the Kazakhstani government announced a planned long-term rental project with Chinese partners to grow flax seed in Northern Kazakhstan for export to Europe. This project was not realized for reasons unclear,¹⁰³ possibly due to low investor interest and the poor quality of agricultural infrastructure in Kazakhstan in general.¹⁰⁴ Proposals to privatize farmland in 2016 were intended to address both of these problems.

C. 2016 Proposed Reforms to Privatize Agricultural Land

In late 2015, then-President Nazarbayev created a Land Reform Commission to propose amendments to the Land Code that would improve agricultural productivity. Kazakhstan's agricultural sector was and remains relatively undeveloped. Agriculture comprises a small share of the economy, around 4.5% of the overall national GDP as of 2019.¹⁰⁵ Kazakhstan's economy relies on the oil and gas sector, and growth is closely tied to the rise and fall of international oil prices.¹⁰⁶ Despite Kazakhstan's large swaths of agricultural-zoned land, agriculture is labor-intensive (employing some 18% of the population), heavily subsidized by government, and produces

⁹⁹ *Skol'ko Gektarov Zemli i v Kakikh Regionakh Kazakhstana Arenduiut Inostrantsy* [How Many Hectares and in Which Regions of Kazakh Are Foreigners Leasing Land], TODAY.KZ (Apr. 29, 2016, 3:54 PM), <https://bit.ly/3t0x1Or>.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Kazakhs Protest Alleged Chinese Plan to Rent Farmland*, RADIOFREEEUROPE (Dec. 11, 2009, 8:27 PM), https://www.rferl.org/a/Kazakhs_Protest_Alleged_Chinese_Plan_To_Rent_Farmland/1903278.html#:~:text=Kazakh%20President%20Nursultan%20Nazarbaev%20told,hectares%20of%20Kazakh%20farm%20land.&text=Nazarbaev%20said%20at%20the%20foreign,for%20soybean%20and%20rapeseed%20cultivation (“Kazakh President Nursultan Nazarbaev told a session of the Foreign Investors Council on December 4 that China had asked to lease 1 million hectares of Kazakh farm land. But Chinese Ambassador to Kazakhstan Cheng Guoping said at a press conference on December 9 that he is unaware of any negotiations between the two countries on this issue.”).

¹⁰⁴ See *infra* Part III.C.

¹⁰⁵ *Economy (Kazakhstan)*, CIA WORLD FACTBOOK, <https://www.cia.gov/the-world-factbook/countries/kazakhstan/#economy> (last visited Mar. 8, 2021).

¹⁰⁶ Total industry, including oil, gas, and mining, comprises 34% of Kazakhstan's GDP and around 67% of its total exports. *Id.*

relatively low yields.¹⁰⁷ Many of these problems can be traced to the Soviet period, which favored “agriculture . . . dominated by a small number of crops, which are unsuited to the local environment,” “inefficient nutrient conservation,” and low investment in technology and infrastructure.¹⁰⁸ Substantial investment was needed to overcome these issues, so the government tasked the Land Reform Commission with facilitating investment in agriculture.

The Commission’s proposals centered around the privatization of the country’s largely state-owned farmland, which was expected to result in more efficient land use.¹⁰⁹ Under the terms of the proposed amendments, state-owned land would be sold at auction to domestic and foreign buyers, with foreign investors permitted to purchase land through a Kazakhstan-registered enterprise 50% or more of whose authorized capital was owned by Kazakhstani citizens or domestic companies.¹¹⁰ Foreign citizens and entities with over 50% foreign control were not to be permitted to purchase land. Rather, these investors would be permitted to lease farmland for up to twenty-five years, an extension from the ten-year lease period permitted for foreign entities by the Land Code since 2011.¹¹¹ Domestic leaseholders would have the right of first refusal to purchase the plots that they were already leasing. The amendments would also have removed bureaucratic and legal restrictions imposed on leasing farmland; leaseholders would be able to sell and mortgage their rights.¹¹² The legislative proposals were thus aimed not only at foreign investors, but would also have given new rights to Kazakhstani farmers for whom obtaining capital was a chronic difficulty due to the high-risk nature of farming loans and bank requirements for collateral.¹¹³ Perpetuating the weak development of Kazakhstan’s agriculture, farming loans were treated as high-risk precisely because yields were low and unpredictable—making unavailable the capital that might have improved productivity through better infrastructure and technology.

The amendments were set to come into effect in July 2016. But once approved by government, the proposals were met with unprecedented public disfavor. Activists in the western city of Atyrau set off a wave of mass protests against the reforms around the country, demonstrating with signs

¹⁰⁷ WORLD BANK GROUP, *supra* note 98, at 24.

¹⁰⁸ SANDRA BROKA ET AL., KAZAKHSTAN AGRICULTURAL SECTOR RISK ASSESSMENT 10 (2016).

¹⁰⁹ Almukhamedova et al., *supra* note 88, at 15–16.

¹¹⁰ *Id.* at 18.

¹¹¹ *Id.*; Dena Sholk, *Kazakhstan’s Land Reforms*, DIPLOMAT (June 15, 2016), <https://thediplomat.com/2016/06/kazakhstans-land-reforms/>.

¹¹² Almukhamedova et al., *supra* note 88, at 17–18.

¹¹³ Alma Damerovna Karshalova et al., *Financing of Agribusiness in Kazakhstan (National Specifics and International Practice)*, 38 REVISTA ESPACIOS 23, 24 (2017), <http://www.revistaespacios.com/a17v38n48/a17v38n48p23.pdf>; OECD, IMPROVING ACCESS TO FINANCE IN KAZAKHSTAN’S AGRIBUSINESS SECTOR (2013).

bearing slogans like, “Do not sell land to China!”¹¹⁴ The legislature responded quickly, enacting in August a five-year moratorium on amending the Land Code to halt the planned privatization. It also suspended until December 2021 the right to purchase farmland for either Kazakhstani or foreign enterprises. The legislature and President spoke of the need for further study and refinement of land reform, although official sources explained the protests as stemming from popular ignorance about the amendments more than disapproval of FDI in land.¹¹⁵

Nazarbayev stepped down as president in 2019, leaving his successor Tokayev with the looming prospect of land reform in 2021. In August 2020, Tokayev preemptively announced in a general government assembly that the sale of land to foreigners would not be revived as a proposal once the moratorium expires.¹¹⁶ The announcement was reported by media as a “ban” on the sale of land, but the law was formally amended only in May 2021, as the moratorium approached its expiration date.

In summary, Kazakhstan’s Land Code limits the purchase of agricultural land by domestic and foreign investors alike, permitting only entities with less than 50% foreign control to lease land for up to forty-nine years.

IV. THE LEGAL FRAMEWORK IN NEW ZEALAND

With this understanding of Kazakhstan’s legal framework, we now move to a survey of New Zealand’s protectionist law before comparing the two systems in Part V. New Zealand has restricted the purchase of land by foreign citizens and foreign-controlled entities since the mid-1960s.¹¹⁷ New Zealand is a constitutional monarchy with parliamentary supremacy, allowing the regulation of foreign interests in land to be reworked by act of parliament several times just in the past five years. The current regulatory framework is contained in the Overseas Investment Act, enacted first in 2005 and amended in 2018 and 2020.¹¹⁸

The Act provides for an administrative screening process when a non-

¹¹⁴ Sanat Urnaliev, *Aktivist Prosit ne Prodavat' Zemliu* [Activist Asks Not to Sell Land], RADIO AZATTYQ, <https://rus.azattyk.org/a/isatai-utepov-uralsk-protestrotiv-prodazhi-zemli/27693817.html> (Apr. 24, 2016).

¹¹⁵ E.g., Almukhamedova et al., *supra* note 88, at 21. Nazarbayev also referred to “provocateurs” as responsible for some of the unrest. Catherine Putz, *Land Protests Persist in Kazakhstan*, DIPLOMAT (May 3, 2016), <https://thediplomat.com/2016/05/land-protests-persist-in-kazakhstan/>.

¹¹⁶ *Prodazha Zelmi Inostrantsam: Tokaev Prinial Reshenie* [Sale of Land to Foreigners: Tokayev Has Made A Decision], FORBES.KZ (July 10, 2020), https://forbes.kz/process/budut_li_peredavatsya_kazahstanskije_zemli_inostrantsam/ (“Zemlia ne budet prodavat'sia inostrantsam. K etomu voprosu my bol'she ne vernem'sia.” “Land will not be sold to foreigners. We will not return to this question again.” (author’s translation)).

¹¹⁷ Amokura Kawharu, *The Values at Stake in the Screening of Foreign Investment in Land: A Legislative History in Three Acts*, 21 N.Z. BUS. L.Q. 235, 235 (2015).

¹¹⁸ This paper examines New Zealand’s legal regime as of the end of 2020.

resident or entity with more than 25% foreign ownership or control applies to purchase “sensitive land.”¹¹⁹ Sensitive land includes all residential land, as well as non-urban land acquisitions exceeding five hectares. Land that adjoins sensitive land for purposes of the statute is also protected.¹²⁰ The Act defines “investment” in land subject to regulation as any interest in sensitive land or an estate or interest in land that lasts longer than three years.¹²¹ The Act was further restricted in 2018 to control foreign purchase of housing, classifying all existing housing as sensitive land.¹²²

The 2018 amendments were passed in response to New Zealand’s longstanding housing affordability crisis. In 2017, median house prices in Auckland were nearly ten times the median annual household income.¹²³ Average rents also climbed, although they were limited in many cases by tenants’ ability to pay, since rented property tended to be clustered in low-income urban areas, where Māori citizens disproportionately tend to live.¹²⁴ Housing stock was further made scarce by the country’s preference for low-density homes; this preference was entrenched by local council (municipal planning bodies) decisions blocking inclusive or multi-family rezoning.¹²⁵ Commentators bemoaned the lack of starter homes and middle-priced units that might improve social mobility.¹²⁶

The screening process for acquiring sensitive land requires the potential investor to apply for approval to the Overseas Investment Office (OIO). The application must present information for why the proposed purchase will bring a “benefit to New Zealand,” a multi-factor test under which a potential investor must present data showing a variety of factors depending on the land and investment in question, such as whether the investment will: “create[e]

¹¹⁹ Overseas Investment Act 2005, pt 1 s 7(a)–(c) (N.Z.) (defining “overseas person” as an individual non-citizen or non-resident, and incorporated bodies “incorporated outside New Zealand or . . . a more than 25% subsidiary of a body corporate incorporated outside New Zealand,” or a corporate body where overseas persons own “more than 25% of any class of A’s securities,” “the power to control the composition of more than 25% of A’s governing body,” or “the right to exercise or control the exercise of more than 25% of the voting power at a meeting of A”). Section 7 also provides definitions in (d), (e), and (f) of overseas persons who are unincorporated entities.

¹²⁰ *Id.* sch 1 tbl. 1.

¹²¹ *Id.* s 12.

¹²² *Id.* sch 1 tbl. 1 (area threshold for residential land is zero hectares, i.e., extends to all residential land).

¹²³ Michelle Tustin, *Legal Interventions to Meaningfully Increase Housing Supply in New Zealand Cities with Housing Shortages*, 48 VICTORIA U. OF WELLINGTON L. REV. 133, 134 (2017).

¹²⁴ Bob Hargreaves, *More New Zealanders Are Renting, And Renting for Longer. The Rule Book Needs to Keep Up*, <https://thespinoff.co.nz/society/20-03-2017/more-new-zealanders-are-renting-and-renting-for-longer-the-rule-book-needs-to-keep-up/> (Mar. 20, 2017).

¹²⁵ Tustin, *supra* note 123, at 138–39.

¹²⁶ *Id.* at 137–38 (“Auckland has failed to provide a variety of housing options in their developments. Developers are naturally reluctant to build low end housing on extremely expensive land.”).

new job opportunities in New Zealand,” “introduce[] into New Zealand . . . new technology or business skills,” “introduc[e] into New Zealand . . . additional investment for development purposes.”¹²⁷ To purchase housing, individuals must establish their intent to reside in New Zealand for at least 183 days of the year and to become a resident for tax purposes.¹²⁸ There is good reason to question the effectiveness of this provision in making housing available for Kiwis: prior to the 2018 amendments, individual investors accounted only for some three percent of housing purchases.¹²⁹ However, it is beyond the scope of this paper to evaluate the empirical success of the Act. The majority of pre-2018 foreign investors were Chinese citizens seeking to study or retire in New Zealand. Foreign-buyer transactions were concentrated in Queenstown and Auckland, where “almost 5% of the home transfers were entered into by people without New Zealand citizenship or residency” at their peak before the 2018 amendment.¹³⁰ Since the adoption of the amendments, home transfers to foreign citizens dropped to around 0.5%, or 153 transfers per quarter.¹³¹

In recognition of the housing shortage, the 2018 amendments also attempt to channel FDI to increase the number of residential units available. Foreign developers may receive more favorable legal treatment under the “increased housing” test.¹³² The OIO’s website explains that this test was designed to permit foreign investors to “buy residential land in New Zealand if [the investor] intend[s] to build on it to increase housing supply, but not live in it.”¹³³

The OIO tends to spend about a month processing applications, although requests for additional information from the applicant can further delay approval.¹³⁴ The OIO rarely declines to grant its consent to investments, with just nine total applications declined from 2018–2019 compared to 416 approvals.¹³⁵ However, as the Office itself notes in

¹²⁷ Overseas Investment Act 2005 s 17 (N.Z.).

¹²⁸ Overseas Investment Act 2018 sch 2 pts 2, 3 (N.Z.).

¹²⁹ Tran Bao Cao, *Foreign Investment in New Zealand Residential Property*, 25 COMPARATIVE L.J. PAC. 129, 131 (2019).

¹³⁰ *Id.* at 130–31.

¹³¹ *More Overseas People Selling Than Buying Homes*, STATS NZ TATAURANGA AOTEAROA (Apr. 30, 2020 3:45PM) <https://www.stats.govt.nz/news/more-overseas-people-selling-than-buying-homes>.

¹³² Overseas Investment Act 2018 sch 2 pt 2, s 5 (N.Z.).

¹³³ *Information for Increased Housing*, LAND INFO. N.Z., <https://www.linz.govt.nz/overseas-investment/developing-or-investing-residential-land/information-for-increasing-housing> (last visited Mar. 8, 2021).

¹³⁴ *Assessment Timeframes*, LAND INFO. N.Z., <https://www.linz.govt.nz/overseas-investment/apply-for-consent-purchase-new-zealand-assets/how-oio-assesses-your-application/assessment-timeframes> (last visited Mar. 8, 2021).

¹³⁵ *Decision Summaries - December 2019, Applications Declined*, LAND INFO. N.Z., <https://www.linz.govt.nz/overseas-investment/decision-summaries-statistics/2019-12> (last visited Mar. 8, 2021).

publishing this data, the high cost of fees, professional services needed to craft a successful application, and pre-application checks mean that applicants “do not normally submit applications . . . if they are unlikely to meet the criteria” of the statute.¹³⁶

V. COMPARISON OF LEGAL REGIMES

We can now compare the respective approaches of Kazakhstan and New Zealand to implementing land protectionism. Both countries employ the same essential strategy in implementing their relative protectionist land regimes. The law, in theory, protects land supply for citizens by preventing foreign citizens or investors from entering the market. This suppresses land prices by keeping demand out, particularly demand by capital-rich investors.

This section will analyze the most salient points of comparison and potential justifications for each type of restriction in view of the policy and legislative history discussed above. In particular, I attempt to compare the systems as a whole by analyzing how the legal regimes regulate different types of land, what interests in land they cover, and which buyers of those interests are subject to the regulation. In so doing, this section will identify the underlying policy goal of each system. Overall, New Zealand’s system presents a relatively balanced protectionist program insofar as it recognizes a range of sensitive land where national interests are implicated, while also giving government the ability to screen FDI on a case-by-case basis. New Zealand’s OIO can protect the interests of local players while still allowing the country to receive some of the benefits of FDI where they are most needed. Kazakhstan’s Land Code, on the other hand, shows its origins as a single-issue compromise in its focus solely on agricultural land and blanket ban on its purchase.

A. Type of Land

Kazakhstan imposes a flat ban on the purchase or lease of agricultural land by foreign investors but does not impose a similar restriction on other types of land. Citizens and non-citizens alike in Kazakhstan may buy apartments, license the rights to extract oil and gas, and lease industrial-zoned land. As seen in Part III, this treatment is based not on any calculation of the relative national interests at stake in farmland as opposed to housing. Rather, the protectionist moratorium was enacted as a concession to protests precisely when the government was attempting to make the legal treatment of farmland *consistent* with the more privatized and investor-friendly spheres of mining, housing, and industry. One may contrast this approach with New Zealand’s catalog of sensitive land, which recognizes a range of areas the country has an interest in protecting. Existing housing is an exceptional protected category in that any purchase triggers the application of the “benefit

¹³⁶ *Id.*

to New Zealand” test. But even here New Zealand does not impose a flat ban on foreign purchase of housing, tempering its restriction with the “increased housing” test.

National security interests often underlie land-type-based protectionist measures. New Zealand’s housing discussion featured national security—and openly anti-Chinese sentiments—less virulently than in Kazakhstan, which may be partly attributable to the fact that New Zealand does not share a border with China, making an annexation or invasion by the Chinese state seem unlikely. Moreover, New Zealand’s investors tended to be individuals seeking a connection with the country for personal reasons like work or retirement, unlike larger Chinese business investors receiving state support.¹³⁷ While national security interests are doubtless implicated when foreign entities invest specifically in farmland,¹³⁸ Kazakhstan’s single and blunt exception in banning the sale of agricultural land makes little sense even from the viewpoint of national security. In the popular discourse, foreign and particularly Chinese cultivation of the land was equated to foreign occupation. Kazakhstani activist Isatai Utepov demonstrated in Atyrau with his well-publicized anti-Chinese slogan.¹³⁹ Another protester argued that, “We can’t give land to the Chinese. If they come then they won’t leave!”¹⁴⁰ Yet if occupation of the land posed a threat, then the occupation of industrial or residential land would also logically impair sovereignty in allowing foreign investors to monopolize Kazakhstani resources for extended periods of time. In fact, given Kazakhstan’s reliance on industry as measured by percentage of GDP, investors’ foreign agendas would seem to present

¹³⁷ Under China’s “go global” policy, state-owned enterprises play a dominant role in the country’s outward FDI. The state also provides “guidance and intelligence” to state- and privately owned enterprises engaged in FDI abroad. Ana Teresa Tavares Lehmann & Frederick Lehmann, *Outward Direct Investment by Chinese State-owned Enterprises*, 27 COMPETITIVENESS REV. 231, 235 (2017).

¹³⁸ See *supra* Part II.A.

¹³⁹ “Do not sell land to China!” *Kazakhstan’s Land Reform Protests Explained*, BBC.COM (Apr. 28, 2016), <https://www.bbc.com/news/world-asia-36163103>.

¹⁴⁰ *Id.* It is easy to dismiss national security fears as paranoia, but there is some basis for concern about Chinese investment, particularly for Kazakhstan. Underlying the national-security concern is a concern that foreign investors represent a foreign government. The Chinese national government has been implicated in seemingly innocuous technologies sold by manufacturers, although security concerns like the ones raised by Huawei’s network devices only came to light after Kazakhstan and New Zealand adopted their protectionist policies in 2016 and 2018, respectively. The Chinese government has suppressed ethnic Uyghurs in Western China, some of whom are Kazakhstani nationals and who, as Turkic and majority-Muslim peoples, have a similar language, culture, and shared history with Kazakhs. See Bruce Pannier, *Why Are Central Asian Countries Silent About China’s Uyghurs?*, RADIOFREEEUROPE (Sept. 22, 2020 4:38PM), <https://www.rferl.org/a/why-are-central-asian-countries-silent-about-china-s-uyghurs-/30852452.html>; Reid Standish, “Our Government Doesn’t Want to Spoil Relations with China,” ATLANTIC (Sept. 3, 2019), <https://www.theatlantic.com/international/archive/2019/09/china-xinjiang-uyghur-kazakhstan/597106/>. Kazakhstani might well question the consequences of a Chinese presence within their borders.

more of a threat in industry rather than on undeveloped farmland. But the law permits long-term leasing and construction on industrial land by foreign investors.

One might argue that like New Zealand's channeling of FDI to increased housing construction, Kazakhstan's law is simply directing investment to favored projects in the oil and gas sector. This is true. However, Kazakhstan's moratorium directs capital too far afield, creating no incentive for domestic or foreign investors to improve the low yields or poor infrastructure in agriculture. The moratorium overprotects agriculture while other laws and policies invite foreign investors into strategically significant economic sectors.

B. Leases

Both Kazakhstan and New Zealand protect against long-term leasing as a form of foreign control. Kazakhstan permits only domestic citizens and entities to obtain leases in farmland. New Zealand allows foreign investors leasing property for less than three years to bypass the "benefit to New Zealand test" across the board—i.e., with respect to all types of sensitive land. The length of the lease—as well as the type of land—implicates national interests in New Zealand's scheme. This was the case in Kazakhstan from 2011 until the moratorium, with foreign-controlled entities permitted to lease land for up to ten years.

The Kazakhstani protesters highlighted the equity concern that they saw as inherent in allowing wealthier foreign investors to cultivate land, namely that the land would be effectively alienated from Kazakhstani citizens: "After 25 years, they will stay for 65. After 65 their descendants will take Kazakhstan's citizenship and our descendants will be their slaves."¹⁴¹ While official government accounts of the protests emphasized that the protesters opposed the law because they did not understand its provisions,¹⁴² the comment above is interesting because it correctly notes the extended lease period and objects to it on its own terms. The reason is likely rooted in a distrust of government justified by experience. When Kazakhstan privatized land *en masse* in the 1990s, the population saw that the process favored elites who obtained private property at bargain prices through corruption and fraud, entrenching inequality.¹⁴³ This experience raises grave procedural concerns about fairly implementing further agricultural privatization. Yet blocking privatization altogether, as the moratorium does, forces Kazakhstani citizens to forego the potential benefits of landownership and FDI, such as increased productivity, improved infrastructure, and greater tax revenues.

¹⁴¹ *Kazakhstan's Land Reform Protests Explained*, *supra* note 139.

¹⁴² Sale of farmland to foreign citizens or entities was never part of the proposed amendments. *See supra* Part III.B.

¹⁴³ Philip M. Nichols, *Creating A Market Along the Silk Road: A Comparison of Privatization Techniques in Central Asia*, N.Y.U J. INT'L L. & POL. 299, 312–20 (1997).

Kazakhstan's law also fails from the perspective of advancing citizen equity. Protectionist laws aim to favor insiders at the expense of outsiders. When the law prevents foreign investors from entering a market, it is counterproductive also to restrict citizens' ability to participate in that market. This is how Kazakhstan's current law works: Kazakhstani farmers may not purchase land, or mortgage or sublet their current leases. By delaying the auction process envisioned by the 2016 amendments, Kazakhstani citizens are also deprived of a transparent way of purchasing land that might counteract government corruption.¹⁴⁴ New Zealand's Act affects only the rights of foreign investors with respect to leases, and so does not suffer from the defect of Kazakhstan's moratorium in limiting citizen property rights. The law protects Kiwis from the greater ability of foreign investors to out-compete them for real estate. Once again, then, Kazakhstani law over-protects land without protecting or advancing citizen property interests.

C. Absolute Nature of Protection

Kazakhstan's Land Code is unambiguous in its degree of protectionism: purchasing or leasing farmland is forbidden to foreign investors. New Zealand's scheme offers the government greater flexibility and discretion to select which investors and projects are allowed into the country. The Parliament can also easily amend the Act through parliamentary supremacy, for example classifying all residential land as "sensitive" in 2018 or introducing emergency pandemic-related measures in 2020.¹⁴⁵

Nationalism, and specifically protection for national identity, emerges as the dominant justification for Kazakhstan's ban. The measure was passed as a compromise with popular nationalist forces after the uniquely emotional dimension of farmland ignited a spark in civil society. The 2016 protests were unprecedented for this undemocratic country where public opposition to government carries the threat of arrest. Simple ignorance about the proposed law does not explain fully the scale or intensity of the land protests. The Civil Code tacitly recognized the tremendous and emotional task of privatizing land after seventy years of socialism in delaying the process until enough

¹⁴⁴ The stated goal of the auction system was greater transparency, although this by no means guaranteed it. Abuse of the auction system during privatization throughout the former Soviet Union through fraud, rigging, and simple intimidation is well documented. See Scott P. Boylan, *Organized Crime and Corruption in Russia: Implications for U.S. and International Law*, 19 FORDHAM INT'L L.J. 1999, 2000 n.8 (1996) (noting that due to an alliance between Russian government and mafia, "70% of the privatization auctions were shams where the buyer was selected well in advance."). Organized crime in Kazakhstan has not been thoroughly studied, but there seems to be reason for concern over its influence in privatization. See Bakhyt Moldatjaevich Nurgaliyev et al., *Organized Crime in Kazakhstan: The Past, the Present, Development Tendencies and Social Consequences*, 14 J. APPLIED SCI. 3436 (2014).

¹⁴⁵ See generally Overseas Investment (Urgent Measures) Amendment Act 2020 (N.Z.).

consensus had built around the Land Code. The possibility of foreign influence in this process raised the stakes by threatening Kazakhstan's newfound national and cultural identity.

Kazakhstan is a relatively new nation on the world stage. As discussed above, its territory was first held by tribal units, later becoming a territory of the Russian Empire and then of the Soviet Union.¹⁴⁶ Its modern status as a nation-state was the result more of circumstance than choice. In 1991, Kazakhstan would gladly have remained within the Soviet Union had it not collapsed from under them.¹⁴⁷ The fact that the country is currently a Kazakh nation-state is also a result of Soviet leadership, which despite its own nominal dedication to a nationless society chose to organize its republics along ethnic lines. Modern Kazakhstan is multicultural and multilingual, but increasingly Kazakh in its commitments.¹⁴⁸ The language of law and government is Kazakh; the government has announced its departure from writing Kazakh in Cyrillic script, switching to Roman letters that would make the language look more like Turkish, its linguistic relative.¹⁴⁹ Yet this national hegemony is fragile. Ethnic Kazakhs only came to represent a majority of the population in the late 1990s. Before, the waves of Russian settlers from the Russian Empire and Soviet Union during the Virgin Lands agricultural resettlement outnumbered Kazakhs.¹⁵⁰ A potential influx of Chinese agricultural investors, coming from a country whose population dwarfs that of Kazakhstan, resurrects the possibility that Kazakhs may again become an ethnic and cultural minority. The popular call to stop Chinese investors from buying Kazakhstan may plausibly stand for a move to protect not only the Kazakh economy, but also the new Kazakh national identity.

Nationalism was no less at play in New Zealand's 2018 housing amendments, although national pride, more than national fragility, sounded the dominant note. The introduction of the Overseas Investment Act itself reads as a kind of nationalist slogan, stating that, "The purpose of this Act is to acknowledge that it is a privilege for overseas persons to own or control sensitive New Zealand assets."¹⁵¹ Unlike Kazakhstan's concern with ethnic-group control over land, New Zealand's priority was the rights and privileges of national citizens, who as stakeholders were assumed to be the rightful and

¹⁴⁶ See *supra* Part III.

¹⁴⁷ See LUCA ANCeschi, ANALYSING KAZAKHSTAN'S FOREIGN POLICY: REGIME NEO-EURASIANISM IN THE NAZARBAEV ERA 10–22 (2020) (documenting Kazakhstan's early efforts to remain integrated with Russia and the pre-independence order).

¹⁴⁸ Aziz Burkhanov, *Kazakhstan's National Identity-Building Policy: Soviet Legacy, State Efforts, and Societal Reactions*, 50 CORNELL INT'L L.J. 1, 12 (2017) (noting that "Kazakhs started to be seen as bearing responsibility for the state and for all other ethnic groups" in their role as the titular nation of Kazakhstan).

¹⁴⁹ Andrew Higgins, *Kazakhstan Cheers New Alphabet, Except for All Those Apostrophes*, N.Y. TIMES (Jan. 15, 2018), <https://www.nytimes.com/2018/01/15/world/asia/kazakhstan-alphabet-nursultan-nazarbayev.html>.

¹⁵⁰ Brown, *supra* note 55, at 924–25.

¹⁵¹ Overseas Investment Act 2005, pt. 1 § 3 ("Purpose") (N.Z.).

better owners of the land. Foreign ownership of real estate was characterized as speculation, with non-resident and non-residing (Chinese) owners driving up prices on investment properties and then leaving houses empty. The indigenous Māori people objected on unique grounds to the sale of land; their culture treats land as the soul of their people.¹⁵² Selling land to outsiders for investment or development is diametrically opposed to this belief.

In both countries, then, the law advanced national and nationalist values. In Kazakhstan, this seems to have been the law's sole motivation and effect, while New Zealand attempted to complement protectionism with an option to channel FDI to increasing the country's housing stock.

VI. EVALUATING LAND PROTECTIONISM IN KAZAKHSTAN

The previous section suggests that Kazakhstan's moratorium and subsequent ban were more emotionally motivated than logically planned. I conclude in this section that Kazakhstan's protectionist system fails to advance the purported goal of protectionism—citizen welfare—while depriving itself of any benefit of FDI in farmland. As discussed in the Introduction, defining the “success” of a protectionist system in terms of empirical efficiency such as increased output, higher wages, etc. is beyond the scope of this paper. Rather, I evaluate Kazakhstan's moratorium in view of its underlying goal. Since the moratorium was enacted to stave off local opposition, the ensuing social quiet—lack of protests—might be considered an unqualified success. But on a deeper level, no one, government or oppositionists alike, has achieved their goal through the protectionist moratorium. Government has been frustrated in privatizing land and raising productivity; citizens are unable to become true owners and cultivators of the land. The ban fails to allow the creation of property rights that might incentivize local investment in agriculture. As a result, Kazakhstan's agricultural lands lie as undeveloped as ever.

Property rights are vital to economic efficiency as rights-holders enjoy “information and incentives that stimulate entrepreneurship, capital accumulation, and investment.”¹⁵³ For a country to realize these benefits, property rights must also be secure as legal or political uncertainty can create transaction costs.¹⁵⁴ Kazakhstan's law, in codifying the moratorium without giving citizens additional rights, fails to empower leaseholders from enjoying increased rights under the 2016 legislative proposals, such as the ability to transfer their leases. Making agriculture and property rights more precarious for Kazakhstani citizens, government has the power to take back lands that

¹⁵² Kawharu, *supra* note 117, at 251.

¹⁵³ Claudia R. Williamson, *The Two Sides of de Soto: Property Rights, Land Titling, and Development*, in ANNUAL PROCEEDINGS OF THE WEALTH AND WELL-BEING OF NATIONS, 95, 96–97 (2010).

¹⁵⁴ *Id.* at 97 (aggregating empirical studies establishing a positive correlation between secure property rights and economic growth).

are “underused” through eminent domain. At the same time Tokayev announced in 2020 the “ban” on selling farmland to foreigners, he stressed that the government would be more vigorous in policing land use through eminent domain than before.¹⁵⁵ Tokayev’s policy is a disincentive for citizens and foreign businesses alike to avoid farming in Kazakhstan for fear of the arbitrary and punitive exercise of state power. New Zealand offers a better model in providing an incentive for foreign investment to target its housing shortage. While building more housing units alone might not solve the affordability crisis, New Zealand’s law at a minimum is not acting to block investment where it is most needed.¹⁵⁶

And while New Zealand suffers from housing scarcity, Kazakhstan contains millions of underdeveloped hectares of agricultural land. In the face of such abundance, it is hard to argue that allowing foreign investment, particularly in such a modest form as partial ownership of a local venture, would greatly disadvantage citizens. After all, demand for Kazakhstan’s agricultural land by foreign investors was low in 2016.¹⁵⁷ The ability for foreign investors to lease land in low demand for an even longer period would likely not have changed this situation. The primary beneficiaries of the privatization program, rather, would have been the Kazakhstani farmers then leasing the land, who would have been able to access financing through their increased rights under the proposed law. This capital could have been invested in yield-improving technology. The ban prevents Kazakhstan’s agricultural enterprises from obtaining capital, had they been able to purchase land at all.

In short, Kazakhstan’s 2016 moratorium and subsequent 2021 Land Code amendment are a political concession to concerns about national integrity that did not adequately account for the potential benefits of privatization and foreign investment for Kazakhstan’s citizens. The law blocks FDI in land without providing a corresponding advantage to domestic entities, serving as a stopgap measure to quell popular protests.

CONCLUSION

The privatization of farmland in Kazakhstan and the introduction of FDI to this sector has been stymied by nationalist and anti-Chinese forces, representing everything from a critique of government administration to fears of Chinese influence on the less populous Kazakh nation. Some of these fears

¹⁵⁵ *Tokayev Obeshchal Zakryt’ Vopros Prodazhi Zemel’ Inostrantsam* [Tokayev Has Promised to Close the Question of Selling Land to Foreigners], https://tengrinews.kz/kazakhstan_news/tokaev-obeshchal-zakryit-vopros-prodaji-zemel-inostrantsam-407875/ (July 10, 2020, 1:45 PM).

¹⁵⁶ New Zealand has also begun to experiment with direct subsidies to families for housing, although this program has only had, thus far, very moderate success. Yvette McCullough, *First Phase of \$400M Housing Fund Announced*, <https://www.rnz.co.nz/news/political/421920/first-phase-of-400m-housing-fund-announced> (July 24, 2020, 7:27PM).

¹⁵⁷ See *supra* Part III.

are grounded in real lived experience, and it bears repeating that concern about Chinese influence is not a uniquely Kazakhstani phenomenon. As recent as 2017, Iowa enacted restrictions on foreign acquisition of public farmland in response to a large Chinese project.¹⁵⁸ However, in light of the low development of Kazakhstan's agricultural sector and its need for further privatization and investment, I question whether blanket protectionism for farmland is the right approach. Of course, FDI is not the sole solution to modernizing Kazakhstan's economy, although land privatization might curb endemic problems like government corruption by empowering the private sector.¹⁵⁹

Finally, I should note that Kazakhstan's laws do not bar the way for FDI in the agricultural sector altogether. Secondary markets within agribusiness are open to foreign investment under current law. Food processing, equipment, and food retail do not fall within the terms of the moratorium and foreign interest—and capital—might stimulate improvements in this sector. Investors can likely count on a warmer welcome and more favorable legal regime in agribusiness, particularly given the state investment company's recent promotion of food processing partnerships.¹⁶⁰

Kazakhstan is a beautiful country rich not only in resources like oil and gas but also human capital. In the nineteenth century, the Kazakh poet Abai noted that learning the Russian language would be valuable to the Kazakh people as a way of “opening [their] eyes” to the world.¹⁶¹ My hope is that the law in Kazakhstan can analogously facilitate the opening of the economy to the benefits of FDI from the West and East alike, while allowing the Kazakhstani people to exercise their sovereignty to channel foreign capital where it is most needed. For now, however, the lands of the steppe have defied taming by the state and investors alike.

¹⁵⁸ Bryce T. Shelman, *Realization of the American Dream by Foreign Investors: Alien Agricultural Land Ownership in Iowa*, 42 J. CORP. L. 731 (2017).

¹⁵⁹ See Tiernan Mennen, *The Resource State: Deconstructing the Causality of Poverty, Bad Governance, and Natural Resource Rights*, 23 U.C. DAVIS J. INT'L L. & POL'Y 101, 137–39 (2016) (discussing a possible connection between state ownership of land and the “resource curse” inhibiting the development of the private sector).

¹⁶⁰ Aidana Yergaliyeva, *Turkish Business Circles to Invest \$160 Million into Kazakh Economy*, ASTANA TIMES (Nov. 12, 2020), <https://astanatimes.com/2020/11/turkish-business-circles-to-invest-160-million-into-kazakh-economy/>.

¹⁶¹ ABAI KUNANBAEV, THE BOOK OF WORDS, Word 25 (Leneschmidt Trans.), http://www.leneschmidt-translations.com/book_of_words_abai_kunanbaev_english/t25.htm.