Nigeria's Land Use Act in Light of the Pan-African Investment Code: Why Reforms are Necessary

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The draft Pan-African Investment Code (PAIC) or (Code) was released in 2015 with the objective of fostering cross-border investment flows in Africa. While the draft code currently serves as "guiding instrument", it remains a valuable blueprint for solving the long-standing investment problems plaguing the region. It is therefore imperative that African countries hasten their efforts to ensure its implementation as a binding treaty document. The decision to develop the Code was welcomed by experts as an opportunity to create a binding legal framework to oversee Africa's industrial and structural transformation. The Code was also expected to balance the lopsided nature of the relationship between investors' rights and host states' obligations. It is also designed to take into account countries' sustainable development objectives as well as to streamline the investor-state dispute-settlement system (ISDS). When it comes into force, this unique African investment code is expected to help overcome the fragmentation of the international investment regime, due to the

multiplicity of investment treaties and the diverse interpretative practice of arbitral tribunals. Land is one of the primary means of production and as such an indispensable economic factor. Thus, an effective land use regime is fundamental to the quest to increase FDI flows into African countries. The success of crucial sectors such as the extractive and manufacturing industries, that are central to the development of African economies, is dependent on effective land use regimes. Countries with weak legal and institutional arrangements that regulate property often struggle to attract investment. For instance, registration of property is a key determinant of the Ease of Doing Business ranking of the World Bank. Nigeria, one of Africa's largest economies, has witnessed a sudden drop in the Ease of Doing Business ranking. The most recent rankings placed Nigeria 146 among 190 economies in the ease of doing business. Furthermore, Nigeria's dwindling fortunes as an investment destination has been compounded by her economic woes in recent times. This has led Ghana to surpass Nigeria as the preferred destination for FDI in the West African sub-region. At the heart of Nigeria's slow socio-economic advancement is the extant land use regime. The Nigerian Land Use Act (LUA) 1978 is the principal legislation that regulates contemporary land tenure in Nigeria. Its enactment was hailed as a revolutionary step to overthrow the inherent contradictions of the colonial and neo-colonial dependent, pseudo-capitalist economic structures that existed in Nigerian law at the time.The major objective of the new land law was among other things, to reduce unequal access to land and land resources, a situation which had foisted unmitigated hardship on the Nigerian populace. It was expected that the act would free up massive and unfettered access to land and land resources for the citizenry. This would in turn stimulate the needed economic growth in an economy that is based on agriculture and mineral resources. However, after four decades of its operation, the LUA has failed to live up to expectation. There are several examples of the LUA that are inconsistent with the goals of encouraging investment contained in the African Union's investment regime, the PAIC.

Examples of LUA Provisions that Discourage Investment in Nigeria Inconsistently with the PAIC

Some provisions of the LUA are particularly problematic when considered in the context of international investment. The most important provision of the LUA is

Section 1 which provides:

“subject to the provisions of this Decree, all land [sic] comprised in the territory of each State in the Federation are hereby vested in the Military Governor of that State and such land shall be held in trust and administered for the use and common benefit of all Nigerians in accordance with the provisions of this Decree.”

Ogundare J. in *Akinloye V. Oyejide* (Unreported Suit No. HCJ/9A/81) argues that the use of the word “vest” implies that ownership of land has been transferred to the Governor with the effect to deprive citizens of ownership rights without compensation. The most obvious import of Section 1 is the abolition of private ownership of land. There is need to amend the wordings of this section to specifically ensure that the Governor is a trustee and not an allodial owner of all land in a state as currently practiced. Section 22 of the LUA makes it unlawful for any holder of a statutory right of occupancy granted by the Governor (under Section 5) to alienate such right or any part thereof by assignment, mortgage, transfer of possession, sub-lease or otherwise howsoever without the consent of the Governor first had and obtained. Furthermore, Section 28(1) empowers the Governor to revoke a right of occupancy for overriding public interest while section 5(2) extinguishes all hitherto existing rights to the use and occupation of land, which is the subject of statutory right of occupancy. In practice, these provisions make the acquisition and long-term use of property in Nigeria extremely problematic. The Governor’s consent need not precede alienation of land, provided it is acquired subsequently. Section 29 of the land use act provides that the holder and the occupier of a revoked right of occupancy shall be entitled to compensation for the value at the date of revocation of their unexhausted improvements.This provision is concomitant with Section 44 of the 1999 Constitution of the Federal Republic of Nigeria which provides that no immovable property or any interest in or any right over an immovable property shall be compulsorily acquired for overriding public purpose without prompt payment of compensation. However, in practice, since the law prescribes no particular formula for determining “adequate” compensation, and also the limitation of compensation to unexhausted improvements, the LUA greatly disenfranchises a land holder in the event that a right of occupancy is revoked. These provisions contravene the new investment regime of the PAIC which provides in Article 12, that ‘adequate compensation shall normally be assessed

in relation to the fair market value of the expropriated investment before the date of expropriation.' It also provides that the assessment shall take into account the current and past use of the property, the history of its acquisition, the extent of previous profit made by the foreign investor through the investment, and the duration of the investment. Overall, the current form of the LUA is for all intents and purposes an impediment to the investment climate in Nigeria. The combined effect of the above provisions only highlights the strictures which the current land use regime is fraught with. In addition, national institutional frameworks are weak and the political will necessary for equitable and just implementation of the Act is lacking. The words of Lord Bingham who observed that "no one would choose to do business [...] involving large sums of money, in a country where parties' rights and obligations were undecided"

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[1] describe the current situation in the Nigerian land market. In an era where the Federal Government of Nigeria is in dire need of investments to diversify the oil-based economy, land use reform is inevitable. In the same vein, the LUA regime is contrary to the spirit of the PAIC. Normatively, the PAIC could serve as an important guide for Nigeria which has established an office for trade negotiation to review Nigeria's Bilateral Investment Treaties (BITs) since independence, and function as the primary institution for trade negotiations.

[2] T. Bingham, *The Rule of Law*(Penguin Books: UK, 2011), at p.38.

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