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Analysis of legal framework for international real estate in Nigeria

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Abstract
Real Estate in Nigeria has huge investment potential and remains a virile solution to Nigeria's quest for economic development. One of the veritable tools for accelerating development in Nigeria's real estate is to attract foreign direct investment (FDI). However due to unclear legal framework, institutional complexity and variation in market conduct, many foreign investors have doubts about the prudence of investing in Nigeria. This paper examines the extant laws and government regulations governing international real estate investment in Nigeria with particular reference to investor protection and administrative burdens and regulatory limitations.

Keywords: Legal framework, Foreign direct investment, International real estate investment Investor protection

1. Introduction
Over the past few years, there has been a growing focus on Nigeria as international investors increasingly see the opportunities in resource rich, consumer driven economy of the most populous nation in Africa with about 163.1 million population. Even though real estate sector in Nigeria could be described as moribund because of its contribution of a paltry 1.79 percent to the nations GDP and the strangulating 18 million housing deficits, it remains a potent solution to Nigeria's economic and employment conundrum.
Domestic investment in real estate has proven insufficient to boost the development of the sector because of the mismatch between capital requirement and savings capacity. This is evidenced in the Global Competitiveness Index 2012-2013 which identified access to financing (22.7%) as the most problematic factor for doing business in Nigeria. Therefore one of the most plausible ways of accelerating development in Nigeria's real estate sector is by attracting foreign direct investment (FDI). Foreign Direct Investment (FDI) has been defined by International Monetary Fund (IMF) as "the investments made by a resident entity in one economy (direct investor) with the objective of obtaining a lasting interest in an entity resident in an economy other than that of the investor (direct investment enterprise). The lasting interest implies the existence of a long term relationship between the direct investor and the enterprise and a significant degree of influence on the management of the enterprise "(IMF, 2001). FD1 is distinguished from other forms of international movements of capital namely portfolio investment which refer to short term capital flows linked to the sale or purchase of financial instruments.
Various authors have identified a number of parameters which foreign investors take into consideration before investing. In a survey in UK and Asia, high returns and the potential for capital appreciation were ranked one and two as the main reasons to hold foreign property (Lim, 2000). Three main reasons for investing in emerging markets like Nigeria have been adduced as follows:

1. Strong economic performance in the economy i.e. growth potential,
2. The very high returns such economy generates,
3. Additional diversification benefits that may accrue.

Nigeria could be said to be on the positive side of the above listed indicators as the following trends power Nigeria's appeal to foreign investors: growing urbanization, demography, technological development, natural resources, emerging political stability and financial deepening amongst others.
Furthermore, Gbadeba (2012), claimed that Nigeria has one of the fastest growing economies in the world with great prospects for investors. Indeed, there are a number of savvy foreign investors who have been investing in real estate in Nigeria for a long time and reaping abundantly as evidenced in the recent sale by a South African company Actis of their interest in Palms Retail Mall in Lagos, Nigeria. A visit to major cities in Nigeria like Lagos, Port Harcourt, Abuja, Kano reveals that real estate is flourishing as those cities transform the skylines with new retail malls, hotels and office complexes. The rapid urbanization that is taking place has even led to the creation of mini cities such as Victoria Garden City, (VGC), Eko Atlantic city in Lagos among others.
According to Solnik (1974) despite all this, most institutional investors still display a reluctance to go overseas in general and into emerging markets in particular. One explanation for such reticence is the possibility that investors impute "extra risks" to foreign investments, French and Poterba (1991). Chin, Dent and Roberts (2006) [3] and Lim, McGreal and Webb (2006) [25] find via surveys that particular aspects of the legal framework and legal regulation are very sensitive for real estate investors' market perception. They relate this finding to the immobility of real estate property and to the complexity of real estate transactions. La Porta *et al.* 1997 and 1998) [21] confirm that the legal environment strongly determines the size and extent of a country's capital market and local companies ability to receive outside financing. Therefore putting in place sound legal structures and the protection of property right will enhance the attractiveness of Nigeria to

international real estate investment. In this paper we review literature on investor protection, legal framework and government regulations to emphasize the importance of these factors in attracting foreign investment. An examination of the extant laws and regulations together with administrative burdens associated with foreign investments will be conducted

Institutional Framework

Institutional complexity and the variation in market conduct have been identified as the greatest barrier to international investment in real estate. Consequently Guerts and Jaffe (1996) [17] suggest that this "institutional risk" should be a prime area of concern when contemplating investing in foreign markets especially into emerging markets where cultural and legal differences will be even more pronounced. It follows that unless a foreign investor is fully aware of the institutional structures, both formal and informal, between countries and even for segments within a country such investors are likely to be at a major disadvantage compared with local market players when they wish to enter the market. Indeed Gordon (1999) [16] suggests that the increase in market transparency in a country's real estate market is the price that must be paid for a country to be considered for admission into today's global investment market.

Thus, if investors can become more informed of the institutional structures and business practices of oversea markets they are more likely to invest in those markets i.e. "familiarity breeds investments" Stratman (1999) [31].

Investor Protection And Legal Framework

Sound legal structures and the protection of property right influence the attractiveness of countries for any kind of investment activity, Chin, Dent and Roberts (2006) [3] and Lim, McGreal and Webb (2006) [25] find via surveys that particular aspects of the legal framework and legal regulation are very sensitive for real estate investors' market perceptions.

They relate this finding to the immobility of real estate property and to the complexity of real estate transactions.

La Porta *et al* (1997 and 1988) [21] confirms that the legal environment strongly determines the size and extent of a country's capital market and local companies ability to receive outside financing. They emphasize the difference between law on books and the quality of law enforcement.

La Porta *et al* (1997) [21] argue that, of the world's four legal systems (English, French, German and Scandinavian), the English common law system is the most suitable for enhancing capital market development, while the French system is the least attractive. Glaser *et al* (2001) and Djankor *et al* (2003 and 2005) suggest that parties in common-law countries have greater ease in enforcing their rights arising from commercial contracts. Even so, Knack and Keefer (1995) [20], Mauro (1995) [28], and Svensson (1998) [32] demonstrate that property rights significantly affect investments and economic growth.

Administrative burdens and regulatory limitations

Solnik (1999) [30] argues that investors trying to invest in foreign countries are exposed to constraints on management and corporate activity and regulatory limitations, consisting of the restriction of capital flows and ownership controls based on particular government policies. D'Arcy and Keogh (1998) [19] claim that each country's real estate market is conditioned, amongst other things, by landlord and tenant law, planning law and urban policy. There-fore the burden of doing real estate business and taxation are considered to directly affect the operational efficiencies of any transaction. Webb (1984) [33], Worzala (1994) [26] and Adair *et al* (1999) [1] note that this significantly affects foreign investors at three times: when investing, operating or exiting a market.

McGreal, Parsa and Keivani (2001) [1] argue that regulatory limitations, exchange controls and the repatriation of capital restrain international capital flows and hence, are a major source of concern for investors. Host governments have been observed to impose penalties on overseas investors when market conditions deteriorated, creating adverse effects on investment returns.

Existing Legal Framework

As noted earlier, sound legal structures and the protection of property rights influence the attractiveness of countries for any kind of investment activity. It follows therefore that the quality of extant laws and government regulations governing real estate investments together with implementation and enforcement machinery impact international real estate investment.

As argued by La Porta *et al* (1997) [21] of the four world legal systems (English, French, German and Scandinavian), the English common law system is the most suitable for enhancing capital market development. Nigeria being a former colony of Britain, practices common law system. However the common law principles are applied in areas where there is no local legislation or judicial authority that governs the area or particular transaction.

In Nigeria there are three levels of government namely Federal, State and Local Government. Similarly the 1999 constitution of the Federal Republic of Nigeria provides for Exclusive, Concurrent and Residual Legislations. The Federal Government has exclusive power to make laws respecting items in the exclusive legislative list like power, railways, companies etc while both Federal and State Governments make laws respecting items in the concurrent legislative list. State Governments have powers to make laws with respect to items on the residual list similarly the local governments have powers to enact local government Bye-Laws and edicts relating to street naming, refuse disposal, registration of births, marriages etc.

As expected in an emerging economy like Nigeria there are often complex, multiple and overlapping jurisdictions/enactments of federal, state and local governments in various aspects of real estate investment. A case in point is the enactment of the Nigerian Urban and Regional Planning Decree of 1992 which empowers the Federal Government to set up a parallel commission for Urban Development of land at the local government/state level notwithstanding that there are already existing development control department at those levels. However, the Supreme Court in the celebrated case of AG Lagos State V AG Federation & 35 others. (2003) FWLR 916-1118, restored the right of state governments to Urban Planning and Development Control in their respective states. However, it is often procedures/laws at the local and state government levels that constitute the biggest barriers to foreign investors. Foreign companies routinely cite examples of state and local officials together with youth associations of the various communities imposing myriad of

arbitrary taxes, permit requirements, development levies in an attempt to raise revenue from firms carrying out real estate development in their jurisdictions.

Prima facie, Nigerian laws are of good quality. It is their enforcement through the legal and judicial system or their implementation through the administrative system that is inadequate. It is therefore necessary that prospective foreign investors should carry out analysis of the statutes, regulations and mechanisms governing state and local power in relation to federal power before deciding on whether to invest in Nigeria and in which state to invest.

In this study, extant legal framework will be analysed in relation to Foreign Direct Investment as opposed to foreign portfolio investment. This is because Foreign Direct Investment disseminates advanced technological and managerial practices through the host country and thereby exhibits greater positive externalities compared with foreign portfolio investment which may not involve positive transfers, just being a change in ownership. Available data suggest that Foreign Direct Investment flows tend to be more stable compared to foreign portfolio investment (Lipsey, 1999). This is because of the liquidity of foreign portfolio investment and the short term horizon associated with such investments.

Fortunately Nigerian Government has appreciated the need to attract foreign direct investment as evidenced in the shift from the era when foreign investors were considerably restricted under the Nigerian Enterprises Promotion Act (the so called indigenization regime) to the current era when foreign investors can invest in literally any part of the Nigerian economy and own its venture 100%, following the introduction of the Nigeria Investment Promotion Commission Decree No 15 of 1995 or Act Cap III LFN 2004. This remains the position of the law notwithstanding the provision of Acquisition of Lands by Aliens Law Cap 2, Laws of Lagos State 1971 to the effect that transfer of lands to aliens must meet with the approval of the Governor, while disallowing aliens from holding freehold interest or a right of absolute ownership of land. Apart from the fact that the Decree supersedes state law being a federal legislation, section 21 of the Land Use Act renders the restriction impotent as Nigerian property holders can also no longer own property absolutely and cannot transfer property without the consent of the Governor. Nevertheless, since property development is very capital intensive, everything ought to be done to encourage foreign investors who have access to funds to invest in our real estate sector.

We shall now analyse the extant laws and government regulations that impact international real estate investment decisions in Nigeria. They are as follows:

Registration of Company

Foreign companies operating in Nigeria must register with the Corporate Affairs Commission (CAC) in accordance with the Companies and Allied Matters Act (CAMA, 1990), and with the Nigerian Investment Promotion Commission (NIPC). The CAMA recognizes three general forms of business. Companies limited by shares; companies limited by guarantee, and unlimited companies.

A private company must have at least two directors and public companies must have a minimum of seven directors and seven shareholders. If the public company is listed on the Nigerian stock exchange, it must have at least 50 shareholders. A foreign company can only purchase shares in a local company if it is incorporated as a Joint Venture. CAMA provides that only accredited individuals, including local lawyers, accountants and chartered secretaries can register a company in Nigeria and most foreign enterprises hire a lawyer to complete this process.

When registering, a foreign firm must submit

a. Memorandum of Association/Company Charter
b. Articles of Association/Company Bye-Laws
c. Statement of authorized share capital
d. Background information on the top company officers
e. (e) Proof that 25% of the company's authorized share capital has been deposited in a Nigerian Bank.

After completing the company incorporation process which takes average of one to three months foreign firms must apply to the Nigeria Investment and Promotion Commission (NIPC) for a business permit which allow the foreign company to begin operations. Registering with NIPC, which is compulsory for foreign firms in Nigeria, also allows a foreign firm to be considered for "pioneer status" incentives. According to the NIPC's Investors Guide to Nigeria, an investor must submit;

1. Completed NIPC application form
2. Receipt for the purchase of the form
3. Certificate of Incorporation
4. Tax Clearance Certificate
5. Memorandum of Association
6. Articles of Association
7. Receipt of Payment of Stamp Duties on the Authorized Share Capital
8. Joint Venture Agreement (if company is not 100% foreign owned)
9. Feasibility Study and Project Implementation Report
10. Deeds and/or Subletting Agreement
11. 11. Training Programme for the Local Personnel, including a Promotion Schedule for Nigerian Employees
12. Name, Address and Nationality of Directors
13. 13. Job Titles and Academic and Professional Experience Required for Expatriates.
14. Brochure Related to the Foreign Shareholder.

Security of Property Rights

Securing tenure is a major barrier to attracting foreign real estate investment in Nigeria. Under the Land Use Act 1978 which is the supreme law governing land administration in Nigeria, the vast majority of Nigerian land transfers fall under state jurisdiction. The power to approve land transfers is vested in state governors for urban land (although other approvals are also required). A customary land allocation system works in parallel to the state system in many areas to the effect that any investor often ends up having to negotiate with two or three occupiers/owners.

The limited land on the private market is available perhaps four to five times the price of state land, but the acquisition of land with secure tenure invariably still requires the state governors' approval. Investors report that indentifying available land is problematic because of poor record keeping, variation in proceedings from state to state and a backlog of unresolved title disputes. The problem of accessing accurate information is exacerbated by the lack of computerization in some individual state land registries and absence of national digital data bank of survey and title

records.
Similarly, the Land Use Act abolished absolute ownership of land replaced it with mere right of occupancy. By virtue of Supreme Court decision in Ogunleye V Oni (1990) 2 NWLR PT 135, the Certificate of Occupancy issued in favour of the person holding right of occupancy does not confer title, does not create a right, but is merely evidence of title and presumes that one exists. This has serious implications for commercial transactions especially loan transaction with real estate as collateral as the original certificate of occupancy which the banker perfects may turnout to be worthless.
Similarly the rash of revocation/withdrawal of certificate of occupancy by government may also negatively affect financial institutions who may have used the revoked certificate of occupancy as collateral.
Furthermore, Sections 21 and 22 of the Land Use Act makes it a requirement that land transfers and land mortgages require consent of the Governor otherwise the transaction is void as held in Savannah Bank V Ajilo (1989). NWLR PT. 97. Apart from the fact that there is no justification for requirement of consent for mortgage transaction as it does not contemplate alienation in any way, the process of obtaining the consent is cumbersome, time consuming and increases transaction costs of land transactions.
In the same vein, section 28 of the Land Use Act empowers the governor to revoke private property for overriding public interest and pay compensation as provided in section 29 of the Act. There are instances of rash revocations of allocations by state governors based on political differences and malice to the effect that there is uncertainty as to the ownership of some parcels of land in Nigeria with grave commercial consequences to investors. There is also controversy as to the adequacy of compensation payable and who to be compensated – the holder of land or occupier of land

Development Control
Notwithstanding the provisions of the Nigerian Urban and Regional Planning Decree 1992, state and local authorities govern construction procedures in Nigeria and procedures apparently vary considerably across jurisdictions. Typically projects must be approved at the planning stage by the relevant planning authority.

Documents for Building Plan approval includes
- Architectural Drawings
- Structural Engineering Drawings
- Survey Plan of the Land
- Tax Payment Certificates
- Receipt of Payment of Ground Rent.
- E.I.A Report.

The approval process can take 4 – 6 months if no complication arises.

The Quality of Legal Enforcement
This examines the judicial independence, integrity of the legal system and rule of law in Nigeria. The commercial legal framework as it relates to ability to enforce property rights, contracts and have an accessible and impartial venue for dispute resolution are key elements of the enabling environment for international real estate investment in the country. The courts have been ineffective as the primary venue for enforcement of right and dispute resolution. A general concern relates to the legacy of rules, regulations and legal practices from years of military rule as follows;
- There are conflicting, confusing and obsolete regulations in our statutes as seen in the requirement for Governor's consent as provided in section 21 of Land Use Act.
- Poor track record in the enforcement of contracts between private companies as well as between firms and government attributable to slow, inefficient and corruptible courts. The government is still a problem in Nigeria as seen in the case of Maevis Ltd V Federal Airport Authority of Nigeria and host of other cases.
- Foreign investors lack confidence in our court/judicial officers and have shown tendency towards seeking redress in arbitration or ADR instead of going to regular courts where they may not get justice.

Taxation
The basic corporate profits tax rate in Nigeria is 30%. However many types of business are eligible for tax incentives. Nigeria's tax code includes a capital gains tax of 10% and withholding tax of 10% on dividends and rent. Capital gains tax is assessed on the disposal of financial and material assets including property and foreign currency. An education tax of 2% is levied on company profits and several business transactions are subject to the payment of stamp duties which may vary in amount and formula for calculation. Taxes are assessed on annual basis and a company must file taxes within 6 months of the end of the previous financial year. Foreign firms pay taxes based on income generated in Nigeria. Tax certificates are issued to companies that have paid their taxes in full.
With respect to personal taxes, foreigners are considered residents for tax purposes if they live in Nigeria 183 days over a 12 month period.

Foreign Exchange Controls
Foreign Exchange (Monitoring and Miscellaneous Provisions) Act Cap F34 LFN 2004 provides for foreign investment in convertible currencies imported freely into Nigeria through authorized dealers and guarantees;
1. Unconditional transferability, repatriation of both capital and earnings and
2. Against unlawful expropriation.

The foreign exchange market has been substantially liberalized in recent years. Businesses no longer need to seek special approval to trade currencies. Foreign exchange can now be purchased and sold freely from private dealers authorized by Central Bank of Nigeria, (CBN), such as banks, hotels, Bureau the change etc.
Applications to acquire foreign exchange must be submitted to the CBN via selected intermediary banks. Application form must state the total amount of foreign exchange requested, applicant's name, name of the local bank, a central bank "intervention sales number" and the date of the transaction request. Once the application is approved, the investor will be issued with certificate of capital importation. The CBN is committed to releasing the foreign exchange within three working days, although some executives suggest it can take up to three weeks.
Thus 100% repatriation of profits is guaranteed subject to

provision of certificate of capital importation, NIPC registration, National Office of Technology approvals (where applicable) and payment of applicable tax.

Employment

This typically includes investor entry, obtaining expatriate work and residence permits.

Visa – with the exception of ECOWAS Nationals, all visitors to Nigeria must obtain a valid visa before entry. In practice requiring a visa is fraught with bureaucratic delay.

Employment Permits: Immigration Act Cap 1I LFN 2004 requires aliens desirous of setting up business in Nigeria to obtain Business permit, expatriate quota and residence permit for their nationals wishing to reside or work in Nigeria.

Expatriate Quota and Residence Permit are valid for 2 years and renewable while a" permanent until Renewed" permit is granted only to a company's Managing Director and only for firms that are majority foreign owned enterprises with authorized capital of N5m (US $50,000) or above. The number of expatriate workers allowed to work in Nigeria is related to the company's paid in capital. An investment of N10m (US $100,000) will currently earn a firm one expatriate employee. Both NIPC and the Ministry of Internal Affairs claim the right to issue expatriate quotas. The NIPC has taken this task as part of its efforts to establish a "One Stop Shop".

Local labour – Nigeria has extensive labour legislation dispute resolution, minimum wage, compulsory benefits rules and termination guidelines are of particular interest to foreign investors.

Registration with securities and exchange commission (sec)

Investment and securities Act (ISA) cap 1 24 LFN 2004 requires SEC to keep and maintain separate registers for foreign direct investments and portfolio investments. This presupposes that a foreign company in addition to registering with CAC, NIPC must also register with SEC.

Ease of registering property

This examines the steps, time and cost involved in registering property assuming that any prudent foreign investor will desire to purchase a property that is already registered and free of title dispute. The world Bank/International Finance Corporation (IFC) (2006) indicated that when it comes to property registration and transfer, Nigeria has the highest cost of 27.1% of the property value when compared to other developed and developing countries of the world.

The report indicated that in Nigeria there are 21 procedures to be followed and the entire process of transfer also last up to 274 days. It is believed that some land owners would choose to continue to operate in the informal market rather than wade through the web of bureaucratic procedures associated with title processing. This has the effect of limiting the number of registered lands in Nigeria and by extension the supply of land available to foreign investors.

Corruption

Finally, the defining feature of the Nigerian business environment is the pervasive legacy of widespread corruption and the breakdown of the normal institutions of civil society which act to ensure a supportive business environment, corruption in the enforcement of regulations, administration of taxes etc. The major impacts of official corruption include increase in costs associated with paying bribes to conduct business, the uncertainty associated with uneven application of laws governing business and citing of projects based on sentimental considerations

Conclusion

This study identifies several legal, regulatory and administrative factors to be considered in greater detail in future work in international real estate investment in Nigeria. We reviewed the existing literature with particular reference to investor protection, legal framework and regulatory limitations and noted the dearth of literature and data on international real estate investment in Nigeria. We examined the existing legal framework and analysed the extant laws and government regulations impacting international real estate investment decisions in Nigeria.

We are of the opinion that the impact of widespread corruption and notoriously poor governance under succession of both military and civilian regimes has created deep seated anomalies in the business environment and undermined the effectiveness of traditional policy instruments. The legal and judicial systems have been severely run down and do not in their current form offer a reliable basis for dispute resolution, protection of property rights and enforcement of contracts.

We noted the fact that Nigeria's real estate transparency rating is opaque and this contributes to the inability of the country to attract foreign real estate investors as rising transparency is associated with increased investment. Therefore, reformation of key property laws to improve the robustness of regulatory and legal frameworks, increased reliability of market data, adoption of international best practice and transparency standards will predispose Nigeria to international real estate investments.

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