

# CSO PROPOSALS ON THE

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## Amendment of the Investment Code Act, 2019



## Introduction

In 2019, the Government of Uganda amended the Investment Code Act (the “Act”) to replace the previous Code which was enacted in 1991 and was long overdue for amendment given the changes in approach to attracting investment and the glaring weaknesses in the old Code. The core objective of the new code is to strengthen the Uganda Investment Authority (the “Authority”), establish it as a one-stop investment centre, and also provide for the financing and auditing of the Authority. The Code also aligns the provisions on protection from expropriation with the Constitution, providing for prior payment of compensation. The Code also expressly provides for the removal of the now titled Director General (previously the Executive Director), an area that saw some contention under the old Code.

During the amendment of the Investment Code Act (2019), there was limited consideration of inserting substantive and effective human rights clauses hence leaving the code unbalanced in terms of balancing the rights of the citizens, state, Investors, communities and the environment. To this end, multinational corporations have taken advantage of the gaps within the investment code to practice human and environmental rights violations within the host communities.

It is therefore of crucial importance that the Government rethinks re-amending the current Investment Code Act 2019 to enable Foreign Direct Investment to deliver on its promises, provide certain safeguards to the affected parties, especially to the vulnerable and marginalized groups and also strike a balance between business and human Rights. In the same light, the outbreak of covid-19 presents us with an opportunity to accelerate economic growth and development thus building back better from the negative effects the pandemic had on the economy. It is against this background that we call for the amendment of the Investment Code Act of 2019. We are concerned about some of the provisions in the Investment Code and the gaps therein and we, therefore, wish to make the following observations and recommendations;

<sup>1</sup> The inclusion of requirement that investors conduct real and substantial business operations in the home state is intended to deny protection to so-called “mailbox companies” which have a minimal commercial presence in the home country for example Multilevel marketing initiatives like D9, Telex Free, etc. This definition would address the out flow of resources as a result of “Treaty shopping” due to the Double Taxation Treaties (DTT) that Uganda has signed with countries with low tax jurisdictions like Mauritius. In other words the definition of an investor/ business enterprise should go hand-in-hand with what the investor does./..



Issue	Observation	Proposed reform	Justification
Section 1: Interpretation of the "Business Enterprise" "Business enterprise" includes a manufacturing enterprise, a tourist enterprise, a commercial or agricultural venture and a service enterprise;"	<p>"Business enterprise"</p> <p>The current interpretation of the Business enterprise in the act includes a manufacturing enterprise, a tourist enterprise, a commercial or agricultural venture and a service enterprise. However, there is no substantial definition of a business enterprise</p> <p>Mining and extractives should also be included on the list of business enterprises.</p> <p>In addition, the definition of what constitutes a business enterprise should also emphasize that a</p>	The act should clearly define the business enterprise and also include mining or extractive on the list of business enterprises which is real and substantial .	<p>Uganda is a country that is endowed with minerals such as Gold, oil, and marble among other minerals. Therefore, Mining and extractives should also be included on the list of business enterprises.</p> <p>In addition, the definition of what constitutes a business enterprise should also emphasize that a business enterprise should be real and substantial.</p>
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Section 3 (2) The objects of the Authority are to: a.Promote, attract, advocate, facilitate, register, monitor and evaluate the development of all forms of investment and business activities in Uganda; b.Promote and encourage investment in new technologies, skills upgrading, automation, training, research and product development; c.Establish and manage a one-stop centre; d.Publish and avail periodical reports on the state of investment in the country;	<p>(1)We observe that the authority has powers of attracting and facilitating investments in the country, however, the institution lacks powers of regulating investments</p> <p>(2)Absence of a "regulation" object</p>	Government should give more powers to the authority to regulate all investments in Uganda, and advise the Government on investment policy and related matters.	<p>Including the term "regulating" provides for the operationalization of Clause 18.</p> <p>This would address issues of corporate closure regulation that deal with issues of environmental, social and governance issues.</p> <p>This function ensures that safeguards for responsible investment such as environmental audits, compliance with human rights commitments and labour safeguards are taken into account.</p>



e. Assess for matters of incentives and utilization of local resources and services by the investments; and f. Do any other act conducive or incidental to the foregoing;			
Section 4 (3) (a) The Board shall consist of the following— (a) five persons appointed by the Minister from the private sector with sound knowledge and practical experience in business or investment matters; one of whom shall be the chairperson;	We welcome the idea of having the private sector on the board of UIA. However, the section should also clearly establish a clear framework to be used in selecting the private sector members to the board.  The section should also clearly define what consist of the private sector Gender lens perspective statement is not included	Five persons appointed by the Minister from the private sector in consultation with the private sector bodies who must have sound knowledge and practical experience in business or investment matters; one of whom shall be the chairperson;  The board should also be strict on the number of women sitting on it.  The private sector should be well defined and categorized.	The private sector actors consist of a wide range i.e. trade and commerce, manufacturing, and small-scale production, all of whom must enjoy full and substantial representation. Much as the current board has women, men dominate the board and they occupy the high positions  Much as the current board has women, men dominate the board and they occupy the high positions.
	4(3) to include the ministry of gender, labour and social development; and the Ministry of Local Government .	(f) the Permanent Secretary of the Ministry of Gender, Labour and Social Development  (g) the Permanent Secretary of the Ministry of Local Government.	Investment comes with various social impacts on communities. This ministry in charge of gender, labour and social development should therefore be included.  Similarly, given that several investments are established within communities and often require clearance from the local government before they are established.  They also play a critical role in the granting of land concessions and can be vital players in the monitoring, evaluation and regulation of investments.
Section 5 (2) Removal of a member of the board.	5(2) What constitutes "Just Cause"?	There is a need to include a provision on the parameters that constitute "When a member is incapacitated involving physical or mental illness	The law should provide full clarity on concepts such as "Just cause".
Section 10 (2) The Authority shall have the power to monitor the processing of investment approvals that are by law the mandate of other government agencies.	Whereas the act grants numerous powers to monitor the processing of investment approvals as by the law, this clause doesn't establish enforcement mechanisms in instances where investors have failed to meet their obligations. The need to introduce 10(1)(e) i.e.: in accordance with the constitution and Land Act of Uganda.	We propose that an enforcement department and clause should be established and added under this section.  10(1)(e) to acquire, develop and manage serviced land for investment in accordance with the Constitution and Land Act of Uganda.	Sister Authorities such as NEMA and URA have enforcement departments that hold investors and businesses accountable for failure to meet their required obligations.  This provision should not be an open clause as it will perpetuate land grabbing.  Land identified for investments must be acquired transparently and publicly in agreement with rights holders.



			<p>There are no rules or regulations governing the UIA's identification or acquisition of agricultural land for private investment. Neither does the Act itself specify any rules or regulations governing the allocation of agricultural lands held by the UIA for private investment.</p> <p>Land acquisition and transfer whether public or private is governed by legal frameworks and therefore the implementation of this provision must be subject to national laws.</p>
	<p>10(6) To introduce an additional function and powers of the Authority and investment-related ministries i.e. "participation in the Bilateral Investment Treaty (BIT) Negotiations".</p>	<p>10(6) The authority and investment-related Ministries shall participate in the negotiations of Bilateral Investment Treaties and provide oversight in the implementation and monitoring of the Bilateral Investment Treaties (BIT) to which Uganda and the East African Community (EAC) are party.</p>	<p>As the authority in charge of investment promotion in Uganda, the UIA and Investment related ministries have an important role to play in the negotiation of Bilateral Investment Treaties.</p> <p>This will help to ensure coherence between the Investment Code and the Bilateral Investment Treaties Uganda signs.</p>
<p>11. (2) The government ministries, departments and agencies referred to under subsection (1) include;</p> <p>a.the Uganda Registration Services Bureau;</p> <p>b.the Uganda Revenue Authority;</p> <p>c. the National Environment Management Authority;</p> <p>d.the Uganda National Bureau of Standards;</p> <p>e.the Directorate of Citizenship and Immigration;</p> <p>f.the Directorate of Lands Registration; the Kampala Capital City Authority and local governments;</p> <p>g.the Kampala Capital City Authority and local governments;</p> <p>h.the National Identification and Registration Authority;</p> <p>i.the Uganda Free Zones Authority;</p> <p>j.the National Social Security Fund; and</p> <p>k. any other ministry, department or agency specified by the Minister by Notice in the Gazette.</p>	<p>11(2) Some relevant directorates need to be included on the list eg</p> <p>National Forestry Authority</p>	<p>11(2) Include the following:</p> <p>(I) National Forestry Authority (NFA)</p> <p>(II) Uganda Wild Life Authority</p> <p>Ministry of Gender National Resources</p>	<p>Natural Resources like forests are being cleared to establish investments like industries.</p>



<p>(12) Qualification for incentives. An investor who, in addition to the qualifications for incentives set out in any other law, meets the following qualifications for incentives and commences operations after the commencement of this Act, qualifies for incentives—</p> <p>7. Incentives for investors</p>	<p>This section should be revised and be aligned with the Public Finance Management Act, 2015 which gives procedures for granting of incentives.</p>	<p>Clause 10 should be revised to provide that:</p> <p>For avoidance of doubt any tax exemptions or other incentives or benefits to be granted to investors shall be prescribed by parliament in consultations with the board.</p>	<p>Including parliament in the processing of prescribing and granting of incentives will make the process more consultative and inclusive.</p>
<p>12 (f) directly employs a minimum of sixty percent of citizens;</p>	<p>We welcome this proposal of directly employing a minimum of 60% of citizens however, this section is 'gender blind'.</p>	<p>We propose that at least 25% out of the 60% should be specifically for women.</p>	<p>Women are the most marginalized citizens.</p>
<p>Section 15(1) The Minister shall by statutory instrument, state the minimum investment capital proposed for a domestic and a foreign investor to qualify for registration and issuance of an investment license by the Authority under this Act.</p> <p>8 Minimum investment capital requirements for investment registration</p>	<p>The minimum value proposed for a domestic investor should be increased</p>	<p>15(1) The minimum investment capital requirement should be increased to one hundred thousand United States Dollars or the equivalent in Uganda shillings.</p>	<p>This is in order to harmonize the minimum investment capital requirement with the other EAC partner states.</p>
<p>16. Investment registration.</p>	<p>16 (3) Include a criteria for approval of Investment Plans</p>	<p>16(3) The Authority shall develop regulations for the vetting and approval of investment plans in accordance with national laws and national development plans in force at the time of application before the granting of an investment certificate.</p>	<p>This will ensure that all investment projects are contributing towards to realization of the country's development.</p>
<p>19. (2) The Minister may, by statutory instrument and with the approval of the Cabinet, specify an investment activity that may not be available for participation by foreign investors.</p>	<p>19(2) Lack of clarity on the activities and sectors to be used to encourage domestic enterprise development. this provision should be deleted and replaced.</p>	<p>It should be replaced with "A foreign investor shall not invest or participate in the activities as specified in schedule 4"</p>	<p>This will help to provide clarity on the sectors that are to be ring fenced for domestic enterprise development.</p>



<p>21 (2) An application for an investment certificate shall be in a form prescribed by the Authority and shall include—</p> <p>a.the full name and address of the applicant;</p> <p>b.the shareholders and nationality of the business enterprise;</p> <p>c. the nature of the business, its capital structure, businessplan and the amount to be invested; and</p> <p>d. such other information, documents or particulars as may be specified in the application form.</p>	<p>There should be a clause requiring corporate disclosure i.e. provisions requiring Human Rights/ Social Impact Assessments (HRIAs)</p>	<p>17 (e) Human Rights/ Social Impact Assessment report</p> <p>Include issues of assess to remedy.</p>	<p>There is need to make the requirement for these assessments legally binding</p> <p>There is need to know how the investments will take into account governance, and human rights.</p>
<p>23. Revocation of an Investment License.</p>	<p>Introduce (1)(e) i.e. "has violated citizens' human rights and is not operating in compliance with environmental laws and regulations" should form grounds for revocation of investment certificates.</p>	<p>A new provision should be included in the issues to be considered in revoking a license:</p> <p>23(1)(e) has violated human rights.</p> <p>23(1)(f) is not operating in compliance with the environmental laws and regulations.</p>	<p>Social and environmental considerations are important safeguards that need to be adhered to.</p> <p>The cost to the environment must be considered when expropriation is being done.</p> <p>An important aspect of the power of the state is that, the taking of private property extends to cover all forms of wrongful conduct short of total dispossession. In effect the police power gives the government control over the full range of common law wrongs, willful or accidental damage to the environment and private nuisance such as noise.</p> <p>However, just as the state cannot prima facie take private property rights from one, it also cannot take from the environment. In effect a private development that is considered a public nuisance or environmentally costly is considered a wrong against many individuals. As such state regulation vindicates individual rights for which private enforcement is costly.</p>



<p>Settlement of disputes Section 25(1) Where a dispute arises between an investor and the Authority or the Government in respect of a registered business enterprise, all efforts shall be made to settle the dispute through negotiations for an amicable settlement in accordance with the Arbitration and Conciliation Act.</p> <p>Section 25 (2) (b): In accordance with the rules of procedure for arbitration of the International Centre for the Settlement of Investment Disputes;</p>	<p>this provision should be reviewed to emphasize the need to exhaust local remedies.</p> <p>We call upon the government to abandon this provision</p>	<p>All efforts shall be made to settle the dispute through the exhaustion of local remedies, notice, consultation and negotiation for an amicable settlement using non-binding, third party mediation and other mechanisms; and in accordance with the Arbitration and Conciliation Act.</p>	<p>The Bill should not provide for Investor– State Dispute Settlement. Therefore, in case of a dispute, settlements should be made between the investors’ government and the Government of Uganda.</p> <p>International Centre for Settlement of Investment Disputes (ICSID) has continuously been contested globally as unfair and highly risky for developing states like Uganda. Other options for dispute settlement ought to be explored.</p>
<p>Section 12: Qualification of incentives: An investor who, in addition to the qualifications for incentives set out in any other law, meets the following qualifications for incentives and commences operations after the commencement of this Act, qualifies for incentives—</p> <p>a. Meets the minimum investment capital for the investment as required in the relevant Acts of Parliament;</p> <p>b. Engages in any of the priority areas specified in Schedule 2 to this Act;</p> <p>c. Exports a minimum of eighty percent of the goods produced;</p> <p>d. Provides for substitution of thirty percent of the value of imported products;</p> <p>e. Seventy percent of the raw materials used are sourced locally;</p> <p>f. Directly employs a minimum of sixty percent of citizens; or</p> <p>g. Introduces advanced technology or upgrading of indigenous technology</p>	<p>The act provides for the qualifications of incentives by investors, however, there is need to be more specific on what is required.</p>	<p>“Appraisal of investments for tax incentives”</p> <p>(a) the foreign investment should have been in operation for a period of at least five years while the domestic investor should have been in operation for a period of at least three years;</p> <p>(b) the foreign investment should be at least a medium or a large enterprise, employing nationals especially women in at least 50% of senior level and 70% middle level management;</p> <p>(c) should have a high level of tax compliance.</p>	<p>An investment should be audited to ensure that it fully qualifies for an incentive.</p>



16. Prohibited transactions	There is no clause that addresses issues of investors who acquire land for investment from Government and instead sale it.	Prohibited transactions: (1) It shall be unlawful for an investor to transfer, sale, and lease or sublease the land that was given to him or her or his or her company, through any government agency for the purposes of investment.	There should be a provision of protecting Government land which is held in trust for the people. This will bar speculators and dubious investors.
		(2) Any transaction carried out in violation of subsection (1) shall entitle government to immediately reclaim its land without any compensation to the investor.e entitled to recover the monies given to such investor as a result of the unlawful. (3) In case the investor becomes insolvent, or wishes to transfer ownership of his or her investment to another party or other parties, the consent of Uganda Investment Authority should be sought first once the transaction involves government land, the absence of which the transaction shall be unlawful. (4) In case of violation of provisions, (1) to (3) of this clause, and incase the investor has already received money in violation of the above, Government shall be entitled to recover the monies given to such investor as a result of the unlawful sale of its land through all available legal means.	
15. Performance requirements measures	We observe that there is absence of a provision that clearly stipulates what constitutes the obligations of an investor.	1. The Authority shall in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment, impose or enforce any requirement or enforce any commitment or undertaking: (a) Employment requirements: Achieve a specific level of gainful employment of ationals in at least 50% senior level and 70% middle management; (b) Skills transfer requirements: Engage the workforce (local) in training programs or build the capacities of suppliers of goods and services. (c) Transfer of technology to the host country: The investor shall be required to bring in to the country a certain level of a predetermined type of appropriate and sustainable technology in order to upgrade the country's current technology standard. (d) Maintain specified environmental and social standards: Ensure that the investor is	



		conscious and therefore provides means to avert possible adverse impacts of the investment on people's human rights, environmental and social conditions in the communities where the investment is located.	
		<p>(e)Export performance requirements: investors may be required to export a certain level of locally produced goods and to limit a certain volume or quantity of sales of goods or services to the national market in order to enhance the country's trade exports.</p> <p>(g)Location requirements: A requirement that certain investments should only be established within specific areas and not in others.</p>	
Introduce a new section (42) specifically on land-based investment.	Currently, the code lacks a clause on land-based investment. As a result, many land disputes such as forceful acquisition of land involving investors have been registered in the areas such as Kiryandongo, Kalangala, Karamoja ect.	A clear clause on land-based investment should be developed in accordance with the land act.	<p>This will help the government to come up with guidelines that corporations seeking to invest in land-based investment on the best practices related to the due diligence and structuring of land-based investments.</p> <p>This will reduce on the risks and also vestors on responsible investing hence having a win-win situation for both the private sector, local communities and the government.</p>
SCHEDULE 4	Introduce Schedule 4 into the Investment Code Act to provide clarity on the activities that are ring-fenced for domestic investors only. It's important to ring-fence certain sectors to provide security for domestic investors. They should only engage in processing and value addition rather than the exportation of raw materials.	<p>Activities where a foreign investor is not eligible to invest</p> <ol style="list-style-type: none"> <li>1.Wholesale and retail commerce</li> <li>2.Personal Service Sector</li> <li>3.Public Relations business</li> <li>4.Car hire services and operation of taxis/ public transport services</li> <li>5.Bakeries, confectionaries and food processing for the Ugandan market only</li> <li>6.Postal services</li> <li>7.Crop production</li> <li>8.Processing of forest products</li> <li>9.Fish production</li> <li>10.Paper production</li> <li>11.Packaging industry</li> </ol>	<p>In 2020, Ethiopia, the second-most populous nation in Africa with one of the fastest-growing economies, signal its intention to make some economic sectors off-limits to non-Ethiopians. In its yet-to-be-published investment regulation, the government has included a list of more than 30 economic areas that are either reserved for domestic investors or may only be conducted jointly with the government or in partnership with domestic investors. Some of these areas concern day-to-day business and consumer goods and services, such as brickmaking, baking, sports betting and security services, while others, such as financial services, could be described as economically strategic.</p> <p>Additionally, Malaysia remains generally FDI-friendly but certain sectors have been, and still are, subject to foreign ownership restrictions, including: financial services; capital markets activities carried out by investment banks; insurance and Islamic insurance; petroleum; communications and multimedia; wholesale and distributive trade (in relation to hypermarkets and food and restaurant businesses); education; among others. Ring fencing the proposed sectors will promoted local industrialization.</p>



			This is especially given that the revised law now defines domestic investors as investors who are citizens of the EAC partner states.
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### General Comment

1. In view of the growing number of land based investments, there is need to have an independent section on land based investment which incorporates best land practice measures proposed and adopted at the regional, continental and international levels. In these documents are the minimum requirements for FDI recipient countries. These include;

- African Union Guiding Principles on Large Scale Land Based Investments (2013)
- The CFS (Committee on world food system) Voluntary Guidelines on the Responsible Governance of tenure over Land, Fisheries and Forests (2012)
- The CFS Principles for Responsible Investments in Agriculture and Food Systems (2014)
- Global Guide to Responsible Investment Regulation (2016)
- UN Principles on Business and Human Rights (2011)
- The EAC model Investment treaty (2015)
- NAP on business and human rights (2021)

2. Other proposals to consider in the Investment Code Act of 2019:

I. Investment audits – these are necessary and there should be clause made in this regard to ensure that the commitments made at the point of application are followed through the life of an investment.

II. Benefit sharing - Contractual obligations and Contractual provisions regarding benefit sharing should be publicly disclosed.

This could be included as a new section. Benefit sharing should be an integral part of investment contracts and must be designed in a manner that they are incremental and not one off. It further should include different modalities for land acquisition rather than sale. Furthermore benefit sharing includes compensation for land use change. Compensation for Land Use change should be premised on shareholder arrangements on development rights. This means that compensation would not be based on the market value of the land at the time as that value would sky rocket in the years following the land use change. It is critical that reforms in compensation consider providing the lands owner with a development share or a benefit share resulting from the land use change

III. Transparency – There should be a clause requiring Contracts, to be made public, easily accessible. Also clauses relating enforcement mechanisms are absent.

- The overall lack of transparency that currently surrounds land acquisition for investments in Uganda complicates credible analysis of investment outcomes and increases opportunities for fraud and corruption.
- By making these data public, the government and investors can manage expectations about investments, and citizens can hold both investors and government authorities accountable to their responsibilities.

<sup>2</sup> See for instance, Articles 13–16 Indigenous and Tribal Peoples Convention of International Labor Organization (ILO) Convention No. 169; Articles 25–9 UN Declaration on the Rights of Indigenous Peoples (UNDRIP).



## REFERENCES

- Government of India, Model Text for the Indian Bilateral Investment Treaty
- Investment Code Act of Uganda, 2019
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- SEATINI Uganda, 2015, Assessment Study of the Draft EAC Framework and Investment Model Treaty: Key Provisions and Proposals for Pro-Development Investment Policies and Agreement





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