

**EXAMINING THE ROLE OF THE LAND USE ACT IN PROMOTING FOREIGN INVESTMENT IN NIGERIA\***

**Abstract**

*The success of a good investment regime is predicated on efficient institutions, adequate capital and most importantly protection of property rights. Access to secure land rights is therefore a key factor in a sound foreign investment decision. In view of the risks inherent in investments or businesses, the final criteria or determinant for a sound investment climate depends primarily on the political and legal stability of the region or country and the attractiveness of the rights which the law confers. To this end this paper examined the key provisions of the Nigerian Land Use Act of 1978 impacting on the foreign investment potentials of the country particularly in the area of flexibility of acquisition of land, quantum of rights granted and enjoyed our land expropriation of land rights and compensation thereof. It was found that the entitlement to acquire land by a foreign investor in Nigeria is hazy or not clearly defined by the Land Use Act and/or fraught with undue hindrances. It was equally found that much as the legal regime for expropriation of property rights under the 1999 constitution (as amended) appears to be sufficient as far as foreign investment considerations are concerned, and are in conformity with global trends, the legal regime for revocation of rights of occupancy under the Land Use Act seems to be highly oppressive and not foreign investment friendly. This paper therefore recommended that the Land Use Act should be amended to clearly provide for the right of foreigners to acquire and own land in Nigeria, to confer a more secure land rights not only to citizens but also to foreigners alike, to provide guarantees against undue and arbitrary expropriation of land rights and fair and adequate compensation in the event of lawful expropriation.*

**Keywords:** Examination, Land Use Act, Foreign Investment, Nigeria

**1. Introduction**

Since the early 1980s, the changing international economic and political environment has led to a renewed interest in the relative merits of foreign investments as a means through which developing or less developed countries can achieve a reasonable and sustainable rate of economic growth.<sup>1</sup> It is not in doubt that many developing countries have faced increasingly formidable economic difficulties including rising inflations, snowballing debts as well as falling growth rate which have made them inclined to the belief that more resources in form of aid and investments are needed to resume the impetus of economic growth and to eradicate poverty in their respective domains. It cannot be gainsaid that foreign investment has played a leading role in the development of many economies in Africa including Nigeria.<sup>2</sup> This quest for economic gain thus became the principal motive for investment by the developed countries in the economies of developing countries. It is against this backdrop, that many development economists and officials of international economic agencies believe that Foreign Direct Investment (FDI) is a more reliable financial source for developing countries.<sup>3</sup> It must be observed that most investments invariably involve the use of land; and a land regime that does not guarantee protection of land rights will necessarily have negative implications for investment whether local or foreign. The Land Use Act 1978 being the basic law that regulates land use and administration in Nigeria, its provisions necessarily affect the foreign investment potentials in Nigeria. To this end, the essence of this paper is to examine the salient provisions of the Act vis-à-vis the quest for foreign investment in Nigeria.

**2. Objectives of the Land Use Act**

The Land Use Act<sup>4</sup> was promulgated for the purpose of unifying, defining and regulating enjoyment of land rights in Nigeria;<sup>5</sup> thus, all other laws affecting title to land or the transfer of interest in land including those existing

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<sup>1</sup>P Tsai, 'Determinant of Foreign Investment and its Impact on Economic Growth' (1994) *Journal of Economic Development Vol 19 (1)*, p. 137; K Jansen, 'Foreign Direct Investment, Information Technology and Economic Growth In the MENA Region' (1995) *World Development*, 23(2), pp.193-210; M Agosin & R Mayer, 'Foreign Investment in Developing Countries: Does it Crowd in Domestic Investment?' (2000) *UNCTAD Paper*, No.146.

<sup>2</sup>S Antwi *et al*, 'Impact of Foreign Direct Investment on Economic Growth in Empirical Evidence from Ghana' (2013) Vol 3 (1) *International Journal of Academic Research in Accounting, Finance and Managerial Sciences*. Pp18-25 at 18.

<sup>3</sup>IMF, *Private Investment in Developing Countries* (Washington DC: IMF, 1985) cited in P Tsai, *Ibid*, p. 138; V N Balasubramanyam, 'Incentives and Disincentives for Foreign Investment in less Developed Countries' in B Balassa & H Giersch eds, *Economic Incentives*, (UK: Macmillan Publishers Ltd, 1986) cited in P Tsai, *Ibid*.

<sup>4</sup> Cap L5, LFN, 2004.

<sup>5</sup>A Nnamani, 'The Land Use Act, 11 years After' (1989) *GRBL*, 31 S Butter, 'The Nigerian Land Market and the Land Use Act of 1978' <<http://www.focusonland.com/download/525525442d643>> accessed on 16/2/2016; I A Umezulike, 'The Review of the Land Use Act 1978: A needless and Futile Exercise' (1995) *Vol. 2 No. 1 Lawyers Bi-Annual*, 172.

before the promulgation of the Act are subject to the provisions of the Act.<sup>6</sup> It is not in doubt that the Land Use Act was a product of state intervention based on noble aspirations of the people of Nigeria.<sup>7</sup> It also bears witness to the fact that, as at the time it was enacted, the federal government had an unswerving resolve to find a lasting solution to the problems associated with the pre-existing land tenure system. However, it must be mentioned that with the passage of time, the enthusiasm with which the people greeted the promulgation of the Land Use Act dwindled drastically.<sup>8</sup>

The major objectives of the Act were identified as including, *inter alia*, the following:

1. To generate revenue for the state by empowering the government to impose rents, review rents, revise rents and penalties.
2. To eliminate litigation in matters of sale, mortgage, lease or any other form of alienation of land.
3. To facilitate acquisition of land for the federal, state or local government by vesting it in the government of the state.
4. To avoid concentration of land in the hands of only few people by fixing a ceiling on land and introducing the half-hectare rule in urban areas.
5. To curb speculation in land that largely accounted for the astronomical rise in land values, especially in urban areas.
6. To encourage development by laying down terms and conditions for a holder and providing compensation for unexhausted improvement only.
7. To ensure that the rights of all Nigerians in land be asserted and preserved by law.
8. To ensure that the rights of all Nigerians to use and enjoy both land and natural fruits thereof in sufficient quantity be assured, protected and prescribed.<sup>9</sup>

In furtherance of its general principles Section 1 of the Act provides thus: 'Subject to the provisions of the Act, all land comprised in the territory of each state in the federation are vested in the 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 the Act'. It is also important in this respect to recall the preamble to the Act which describes it in the following terms:

An Act to vest all land comprised in the territory of each state (except land vested in the Federal Government or its agencies) solely in the Governor of the state, who would hold such land in trust for the people and would henceforth be responsible for allocation of land in all urban areas to individuals resident in the state and organisations for residential, agricultural, commercial and other purposes while similar power with respect to non urban areas are conferred on local government.

### **3. Nature of Foreign Investment**

Foreign investment has been defined as a transfer of funds or materials from one country (called the capital exporting country) to another (called the host country) in return for a direct or indirect participation in the earnings of that enterprise.<sup>10</sup> It is also said to involve the transfer of tangible assets from one country into another for the purpose of use in that country to generate wealth under the total or partial control of the owner of the assets.<sup>11</sup> Foreign investment is broadly categorized into two main types i.e. Foreign Direct Investment (FDI) and Portfolio Investment (PI). Foreign Direct Investment may be defined as investment that is made to acquire a lasting interest in an enterprise operating in an economy other than that of an investor, the investor's purpose being to have an effective voice in the management of the enterprise.<sup>12</sup> As Graham and Krugman postulate<sup>13</sup>, 'Foreign Direct Investment is formally defined as ownership of assets by foreign residents for purposes of controlling the use of those assets'. In contrast to FDI, Portfolio Investments are merely directed at earning dividends, interest, capital

<sup>6</sup>Land Use Act s. 48. N B Udoekem *et al*, 'Land Ownership in Nigeria: Historical Development, Current Issues and Future Expectations' (2014) *Journal of Environment and Earth Science Vol. 4 No. 21*, 185. <[https://www.google.com/url?q=http://www.unoosa.org/pdf/reports/unispace/viennadecle.pdf&sa=U&ved=0ahUKEwj3\\_fCd3ePLAhXLQBQKHb2NB1EQFggNMAA&sig2=eC\\_FiMHlc7BAXH5YYWS8Yg&usg=AFQjCNEMfvkBK7sZ7IYy-nvw-Upl7f\\_Kog](https://www.google.com/url?q=http://www.unoosa.org/pdf/reports/unispace/viennadecle.pdf&sa=U&ved=0ahUKEwj3_fCd3ePLAhXLQBQKHb2NB1EQFggNMAA&sig2=eC_FiMHlc7BAXH5YYWS8Yg&usg=AFQjCNEMfvkBK7sZ7IYy-nvw-Upl7f_Kog)> accessed on 05/03/2016.

<sup>7</sup>M I Jegede, 'Land Use Act: Six Years After', A Paper delivered at the National Symposium of Nigerian Institute of Estate Surveyors and Valuers in Lagos on 22<sup>nd</sup> November, 1984.

<sup>8</sup>R K Udo, *Land Use Policy and Land Ownership in Nigeria* (Ikot Ekpene: Ebi Akwa Ventures, 1990) p. 1.

<sup>9</sup>J A Omotola, *Essays on the Nigerian Land Use Act 1978* (Lagos: University of Lagos Press, 1980); I A Umezulike, *Issues in Contemporary Nigerian Land Law* (Enugu: Fourth Dimension Publishing Co. Ltd, 1995) p. 58; M G Yakubu, *Land Law in Nigeria* (Lagos: Macmillan Publishers, 1985) pp. 209-213.

<sup>10</sup>*Encyclopaedia of Public International Law* (vol. 8) p. 246 quoted in M Sornarajah "The International Law on Foreign Investment (UK: Cambridge Grotius Publications, 1994) p. 4.

<sup>11</sup>M Sornarajah, *op cit*.

<sup>12</sup>See IMF Balance of Payments Manual (1980) para 408 cited in M Sornarajah *op cit*, p. 4.

<sup>13</sup>E Graham and P Krugman, *Foreign direct investment in the United States* (US: Institute for International Economics, 1991) p. 7 cited in M Sornarajah *Ibid*.

gains etc without participating in management.<sup>14</sup> In this connection section 32 of the Nigerian Investment Promotion Commission Act<sup>15</sup> provides that, ‘Portfolio investment’ means an investment in shares or other securities traded on the Nigerian Stock Exchange’. In Portfolio Investment, there is a divorce between management and control of the company and the share ownership in it.<sup>16</sup> It does not therefore involve the movement of personnel plants and equipment of the investor. It is generally accepted that in portfolio investment, the investor takes upon himself the risk making such an investment. This is because his investment, which does not involve physical facilities, can be pulled out anytime and transferred into other portfolio investments. The absence of the foreign investor’s participation in the management of and control of the investment or the enterprise in which it is made, is therefore one major factor which distinguished portfolio investment from foreign direct investment.

#### **4. Key Aspects of the Land Use Act Impacting on Foreign Investment**

##### **Nationalization of Land in Nigeria**

The general effect of the Act on title to land is to vest abstract title and control over land within the territory of each state upon the Governor of the state whilst preserving the title of the Federal Government and its agencies<sup>17</sup> over limited areas of land belonging to the Federal Government.<sup>18</sup> The absolute forms of ownership that existed before the introduction of the Act became extinguished and became vested in the Governor of the state.<sup>19</sup> In a loose sense the Governor became the ‘land owner’ or ‘landlord’ with power to grant rights of occupancy to citizens. The import of section 1 of the Act with respect to the relationship between the state and an individual land owner is that of landlord and tenant; the individual interest being in the nature of a ‘right of occupancy’ while ownership now resides in the state. The incidents of a right of occupancy are limited, to a great extent, by the Act and thus, it does not amount to ownership as known under land law.<sup>20</sup> With the promulgation of the Act, absolute interests in land by individuals were lost in favour of the state. Therefore, as far as an individual’s right over land is concerned, ownership is designed, under the Act, to take the form of a right of occupancy which is evidenced by a certificate of occupancy, as the sole medium through which the government certifies that an individual ‘owns’ a land.<sup>21</sup> Adefulu and Esionye have also observed that the effect is that radical ownership of land was vested in the Governor and private persons were only entitled to a leasehold interest through a right of occupancy.<sup>22</sup> C. Ilegbune on his part also opined that the combined effect of Sections 1 and 49 of the Act is to repose the ownership of the maximal title to all land in Nigeria in only 3 categories of owners, namely the Federal Government, existing federal government agencies and the state Governors. All pre-existing ownership sources like the community, chieftaincy, families and individuals are completely excluded.<sup>23</sup> It seems therefore undebatable that the effect of Section 1 of the Act is to nationalize all land in Nigeria.<sup>24</sup> This conclusion is inescapable given the fact that the ultimate reversionary interest in all lands within the State is vested in the State as represented by the Governor.<sup>25</sup> Therefore, the logical sovereign with respect to ownership of land is the Nigerian State.<sup>26</sup> A clear understanding of where radical title lies is a critical factor in determining whether or not to invest in a particular country by a foreign investor; especially in the cost and security evaluation of the proposed investment.

##### **Nature of a Right of Occupancy/Certificate of Occupancy**

In fulfilment of the government’s policy of control over land in Nigeria, the Act introduced the certificate of occupancy to evidence or articulate the rights granted by it.<sup>27</sup> The State recognizes no other superior or

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<sup>14</sup> Guobadia, *op cit*.

<sup>15</sup> Cap N47 LFN 2004 (as amended).

<sup>16</sup> Sornarajah, *op cit*, p. 4.

<sup>17</sup> Land Use Act s. 48.

<sup>18</sup> I O Smith ‘Title to Land in the Former Federal Capital Territory of Lagos upon Creation of Lagos State: Matters Arising’ (2004) *Vol. 25 JPPL*, 21.

<sup>19</sup> *Nkwocha v Governor of Anambra State* (1984) 6 SC 362. *Savannah Bank v Ajilo* [1989] 1 NWLR (Pt. 97)p. 305.

<sup>20</sup> *Ogunlora & Ors. v Eiykole & Ors.* [1990] 4 NWLR (pt 632) 653; *Dantoshu v Mohamed* [2003] 6 NWLR (pt 817) 457; *Ibrahim v Mohamad* (2000) 6 NWLR (Pt 817) 615; *Nkwocha v Governor of Anambra State (supra)*.

<sup>21</sup> D C Williams, ‘Measuring the Impact of Land Reform Policy in Nigeria’ (1992), *Journal of African Studies Vol. 30 No. 4*, p. 587-608.

<sup>22</sup> A Adefulu & N Esionye ‘An Overview of Nigeria Land Use Amendment Bill’ <<http://www.mondaq.com/x/81844/agriculture+land+law/An+Overview+of+Nigerias+Land+Use+Amendment+Bill>> accessed on 21<sup>st</sup> February 2016.

<sup>23</sup> C Ilegbune ‘Land Ownership Structure under the Land Use Act 1978’ (2003) *23 JPPL*, 33.

<sup>24</sup> L K Agbosu, ‘The Land Use Act and the State of Nigerian Land Law’ (1988) *Journal of African Law, Vol. 32, No. 1* p5; AL Mabogunje, ‘Land Reform In Nigeria: Progress, Problems & Prospects <<http://siteresources.worldbank.org>> accessed 04/06/2016.

<sup>25</sup> A Otubu, *art cit*; C Uchendu, ‘State Land and Society in Nigeria: a Critical Assessment of the Land Use Decree of 1978’ being a seminar paper presented at the Institute of African Studies, University of Nigeria, Nsukka, Nigeria in 1979.

<sup>26</sup> V C Uchendu, ‘State, Land and Society in Nigeria. A Critical Assessment of the Land Decree’ (1978) *Journal of African Studies Vol. 6*, 62-74. See also R K Udo, Understanding Nigeria’s Land Use Law. Paper delivered at Nigeria Land Rights Forum Speakers and Papers available at <<http://www.course.earthrights.net/node/416> --> accessed 17/04/2012. See also R K Udo, *Land Use policy and Land Ownership in Nigeria* (Aba: Ebieakwa Ventures, 1990).

<sup>27</sup> Land Use Act s. 9.

complementary document for that purpose provided that the title of the bearer is not defective.<sup>28</sup> The issuance of a certificate of occupancy is the prerogative of the Governor. Thus, although local Governments are empowered to grant customary rights of occupancy with respect to land in non-urban areas, no Local Government can validly issue a certificate of occupancy even in respect of a customary right of occupancy granted or deemed granted by it. The implication of this is that a certificate of occupancy purportedly issued by any local government authority is void and the terms and conditions contained therein ineffectual. The Act creates two types of rights of occupancy viz: the statutory right of occupancy and the customary right of occupancy.<sup>29</sup> Statutory Right of Occupancy is usually granted in respect of land in urban areas although it can also be granted by the Governor over a piece of land in a non-urban area. Customary right of occupancy is granted in respect of land in non-urban area by the local government. Sections 34 and 36 of the Act also make provisions for previous owners or occupiers of land before the promulgation of the Act to continue to enjoy their interests over their respective portions of land as deemed grantees of rights of occupancy depending on the location of the land in question. The method of obtaining a right of occupancy over a piece of land under the Act is by an application to the Governor or to the local government either directly or through the Land Use and Allocation Committee in respect of land in an urban area and the Land Allocation Advisory Committee with respect to land in non-urban areas.<sup>30</sup> When a person applies and fulfils the necessary conditions, he is granted a right of occupancy which is evidenced by a certificate of occupancy containing the terms and conditions of the grant including the amount to be paid as well as other covenants and conditions. It cannot be gainsaid that the nature and method of acquisition of a right of occupancy as the ultimate individual land right will be of great interest to a potential foreign investor. This is because an insecure land right will be a great disincentive to invest in any particular country by a foreign investor.

### **The Right of Aliens to Right of Occupancy**

With regard to access to land by foreigners including foreign investors, the question may be asked whether a non-Nigerian is entitled to grant of a right of occupancy in the first place in the same manner as a Nigerian citizen. A cursory reading of Section 1 of the Act creates the impression that only Nigerians can be beneficiaries of grants of rights of occupancy under the Act. This is evident from the use of the expression ‘such land shall be held in trust and administered for the use and common benefit of all Nigerians. However, this conclusion cannot easily be reached in the light of the fact that in the preamble to the Act, it is clearly recognised that the Governor or the local government would be responsible for allocation of land to individuals resident in the state and to organisations for residential, agricultural, commercial and other purposes. There is no indication that such individuals or organisations must be Nigerians or Nigerian companies. In any event, the Land Use Act empowers the Governor or the Local Government, as the case may be, to grant a right of occupancy to ‘any person’.<sup>31</sup> ‘Any person’ as used in those provisions should necessarily include a foreigner or a foreign investor. Despite the above analysis however, the provisions of Section 46 (1) (a) of the Act seems to paint a different picture. It provides thus:

- 46(1) The National Council of States may make regulations for the purpose of carrying this Act into effect and particularly with regard to the following matters:
- (a) the transfer by assignment or otherwise however of any rights of occupancy whether statutory or customary, including the conditions applicable to the transfer of such rights to persons who are not Nigerians

What emerges from the above is that whilst there is no express provision of the Act prohibiting a direct grant of a right of occupancy in favour of a non-Nigerian, the above provision seems to prohibit the transfer by a Nigerian of a right of occupancy to a foreigner except in accordance with regulations made or expected to be made by the National Council of States. It is pertinent to observe that no such regulation has yet been made as at the time of writing this work. It is our opinion that for a country in dire need of foreign investment and given the importance of access and availability of land to any investment enterprise, there should be no justification for any undue restriction to such access to land by investors. It is therefore suggested that paragraph (a) of Section 46(1) of the Act be completely deleted.

### **The Consent to Alienation of Right of Occupancy**

Sections 21 and 22 of the Act make it unlawful for anybody to alienate a right of occupancy without the approval of the Local Government in the case of customary right of occupancy and the prior consent of the Governor in the case of statutory right of occupancy.<sup>32</sup> Whilst the provision of section 21 of the Act requiring the approval of the Local Government to alienation of a customary right of occupancy has been subjected to little or no debate, the

<sup>28</sup> *Ademola v Amao & Ors.* (1982) CGSLR 273, reported in JA Omotola, *Cases and Materials on the Land Use Act* (Lagos: Lagos University Press, 1983).

<sup>29</sup> Ss, 5, 6, 34 and 36 of the Act.

<sup>30</sup> See S. 2(1)-(5) of the Act.

<sup>31</sup> Ss 5, 6, 34 and 36 of the Act.

<sup>32</sup> *Savannah Bank v Ajilo (Supra)*, *Awojubagbe light Ind. Ltd v Chinukwe* [1995] 4 NWLR (Pt. 390) 379; *Union Bank of Nigeria Plc v Ayodare* [2007] 13 NWLR (Pt. 1052) 567.

issue of the correct interpretation of Section 22 of the Act has however been a subject of conflicting academic and judicial postulations. While some persons opine that the consent of the Governor must be obtained before any alienation of an interest in land as failure to obtain same renders such transaction inchoate, others argue that failure to obtain such consent will only operate to render the transaction inchoate pending the time when the parties to the transaction obtain the consent.<sup>33</sup> However, the Supreme Court in *CCCTCS v Ekpo*<sup>34</sup> held in unequivocal terms that lack of prior consent before execution renders such a transaction without consent invalid. Referring to the provisions of the said Section the Supreme Court stated thus:

It is very clear that the said provision is by the tone and tenor mandatory; it makes the obtaining of consent a precondition for the validity of any alienation of a right of occupancy under the Land Use Act 1978. Though there is no time limit to the obtaining of the said consent by the provision, it is very clear that before the alienation can be valid or be said to confer the desired right on the party intended to benefit therefrom the consent of the governor of the state concerned must be first had and obtained. That does not, by any means, make the transaction without the requisite consent inchoate. It makes it invalid until the consent is obtained.<sup>35</sup>

It is pertinent to note that the issue of alienation of land rights being a key factor with regard to access to land, the uncertainty surrounding the correct interpretation of section 22 of the Act is a big disincentive to foreign investment and needs to be quickly laid to rest.

### **Revocation of Right of Occupancy**

The Governor may revoke a right of occupancy by virtue of powers conferred by Section 28 of the Land Use Act for overriding public interest.<sup>36</sup> Section 28(2) defines overriding public interest in the case of a statutory right of occupancy to mean alienation without the requisite consent, requirement of land by the Local, State or Federal Government<sup>37</sup> for public purpose or the requirement of the land for mining purpose or oil pipelines or any purpose connected therewith. In the case of a customary right of occupancy, over-riding public interest is defined in almost the same terms with statutory right of occupancy the only difference being the addition of the requirement of the land for extraction of building materials.<sup>38</sup> Section 51 of the Act defines 'public purposes' to include requirement of the land:

- (a) for exclusive Government use or for general public use;
- (b) for use by anybody corporate directly established by law or by anybody corporate registered under the Companies and Allied Matters Act as respects which the Government owns shares, stocks or debentures;<sup>39</sup>
- (c) for or in connection with sanitary improvements of any kind;
- (d) for obtaining control over land contiguous to any part or over land the value of which will be enhanced by the construction of any railway, road or other public work or convenience about to be undertaken or provided by the Government;
- (e) for obtaining control over land required for or in connection with development of telecommunications or provision of electricity;
- (f) for obtaining control over land required for or in connection with mining purposes;
- (g) for obtaining control over land required for or in connection with planned urban or rural development or settlement;
- (h) for obtaining control over land required for or in connection with economic, industrial or agricultural development;
- (i) for educational and other social services;

In *Osho v Foreign Finance Corporation*<sup>40</sup> the Supreme Court, while interpreting the provisions of Sections 28 and 51 of the Land Use Act, held that a purported revocation of a right of occupancy for any purpose outside those prescribed in the Act cannot amount to revocation for public purpose and is thus unlawful. Where a right of

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<sup>33</sup> *Savannah Bank v Ajilo (Supra)*, *Awojubagbe light Ind. Ltd v Chinukwe (Supra)*.

<sup>34</sup> [2008] 6 NWLR (Pt. 1083) 362.

<sup>35</sup> *Supra*.

<sup>36</sup> *Majiyagbe v Attorney General of Northern Nigeria* (1957) NCLR 158; *Umar Ali & Co. (Nig) Ltd v Commissioner for Land and Survey & Ors* (1983) 4 NCCR 571. *Provost of Lagos State College of Education & Ors v Edun & Ors* [2004] 6 NWLR (Pt. 870) 476; *Ereku v Military Governor of Mid-Western State* (1974) 10 S.C. 59; *Obikoya v Governor of Lagos State* [1987] 1 NWLR (pt. 50) 385.

<sup>37</sup> It is pertinent to note that the Federal or Local Government have no right to revoke a right of occupancy. The power is exclusively reserved for the Governor which he exercises personally or through his delegate - Land Use Act s. 28(6).

<sup>38</sup> Land Use Act s. 28(3). See also Section 51 of the Act for the definition of "public purposes".

<sup>39</sup> By this provision of the Act, it is not an abuse of power for the Governor to revoke a right of occupancy and grant same to a private company if the state, local or Federal Government has shares or economic interest in the company. *L.S.D.P.C. v F.F. Corporations* [1987] 1 NWLR (Pt. 50) 413.

<sup>40</sup> (1991) 4 NWLR (Pt. 184) 157.

occupancy is revoked for overriding public interest and the purpose for which the right is revoked fails; the right will revert to the original holder of the right.<sup>41</sup> It is submitted however, that the category of 'public purposes' as defined under Section 51 of the Act is not exhaustive; given the language of the Act. The word 'includes' as used in the section suggests that the framers of the Act have in contemplation, other public purposes outside the ones specifically mentioned in the Act so long as such other purposes are of like character as the ones specifically mentioned; in consonance with the *ejusdem generis* rule of interpretation. Where the Federal Government issues a notice declaring a land to be required by it for public purposes, the Governor of the State is obliged to revoke any right of occupancy in respect thereof by virtue of Section 28(4) of the Act.<sup>42</sup> The Governor may also revoke a statutory right of occupancy on the ground of breach of any of the implied covenants under Section 10 or terms expressed on the certificate of occupancy or any special contract made under Section 8 or for a refusal to accept and pay for such certificate.<sup>43</sup> Revocation being a method of expropriation on the right of individuals over land by the state is undoubtedly a major source of worry for a potential investor. The state of the law regarding this aspect should therefore be certain to enable a potential investor make an informed decision on whether or not to invest.

### Compensation for Revocation

Compensation denotes some form of restitution which attempts to place a property owner, as near as possible, to the position he would have been had his property not been acquired for public purposes.<sup>44</sup> Section 44 of the Constitution of the Federal Republic of Nigeria,<sup>45</sup> provides the principle of that should regulate compensation for acquired proprietary

44. (1) No moveable property or any interest in an immovable property shall be taken possession of compulsorily and no right over or interest in any such property shall be acquired compulsorily in any part of Nigeria except in the manner and for the purposes prescribed by a law that, among other things -

(a) requires the prompt payment of compensation therefore and

(b) gives to any person claiming such compensation a right of access for the determination of his interest in the property and the amount of compensation to a court of law or tribunal or body having jurisdiction in that part of Nigeria.

The legal regime for compensation for revocation of right of occupancy is contained under Section 29 of the Land Use Act. Under the Act, there is no compensation payable by the state where a right of occupancy is revoked because of the holder's breach of the prohibition of alienation without prior consent or for breach of other terms and conditions of the grant.<sup>46</sup> No compensation is also payable for the value of the land *per se* or for disturbance thereof; compensation is only payable for the 'unexhausted improvement' on the land.<sup>47</sup> The rationale for this provision is that land is owned by the state and so it cannot compensate the individual for the state's property.<sup>48</sup> This position appears not to have taken cognizance of the proprietary right of the original land owners who for long has toiled on the land and traditionally enjoyed the benefits arising therefrom. It also neglects the fact that upon the Land Use Act expropriating the right to absolute ownership vide Section 1 of the Act, no compensation was paid to customary land owners in respect of their land holdings. This is contrary to the provision of Section 44 of the 1999 Constitution of the Federal Republic of Nigeria which guarantees private property right and right to compensation upon compulsory acquisition which should be prompt and adequate. It is submitted, in the light of the foregoing exposition, that the compensation regime under the Land Use Act is grossly inadequate and works manifest hardship on land owners with the tendency to drive away investors. It is also pertinent to highlight that the Land Use Act by virtue of section 33 (1) provides for the option of resettlement by way of provision of reasonable accommodation in lieu of compensation thus;

Where a right of occupancy in respect of any developed land on which a residential building has been erected is revoked under this Act, the Governor or the local government, as the case may be, may in his or its discretion offer in lieu of compensation payable in accordance with

<sup>41</sup>*Lawson & Anor v Ajibulu* [1997] 6 NWLR (Pt. 507) 17, *Olatunji v Military Governor of Oyo State* [1995] 5 NWLR (Pt. 397) 385.

<sup>42</sup>*Attorney General of Lagos State v NEPA* (Unreported Suit No. LD/372/81, judgment delivered on 5/7/82 at High Court of Lagos State.

<sup>43</sup>Land Use Act s. 28(4).

<sup>44</sup>A Otubu 'Compulsory Acquisition Without Compensation and the Land Use Act <<http://ssrn.com/abstract=2420039>> accessed on 08/03/2016

<sup>45</sup> Constitution of the Federal Republic of Nigeria Cap C23 LFN, 2004.

<sup>46</sup> Land Use Act s. 29 (1).

<sup>47</sup>*Upper Benue River Basin Development Authority v Alka & ors* [1998] 2 NWLR (Pt. 357) 329; *Osho v Foreign Finance Corporation (Supra)* at 197.

<sup>48</sup>O G Amokaye 'Convention of Biological Diversity; Access to and Exploitation of Genetic Resources and the Land Tenure System in Nigeria' (1992) *Afr. J. Into & C.L* 86 at 97; J U Oshimiri, 'Award of Compensation to Holders of Undeveloped Plots under the Land Use Act - A case for Reform' (1991) 7 *JUS*, 29; J U Oshimiri, 'Can the Power of Attorney Avoid Consent Provision of the Land Use Act 1978' (1990) 3 (13) *GRBPL* 9 at 13.

the provisions of this Act, resettlement in any other place or area by way of a reasonable alternative accommodation (if appropriate in the circumstances).

## **5. Conclusion**

The optimum investment law is one that does not only take into account the interest of the state but also takes into account the interest of the investors. Thus, the essential need of the investor must always be kept in mind. The prime responsibility must be with the government, whose duty it is to maintain general economic stability, for it is only in this overall context that the intrinsic commercial soundness of the investment will not be jeopardized.<sup>49</sup> Long term investors, especially those investing in developing countries like Nigeria usually also require some assurances that their investment will enjoy reasonable safety and that their investments will not be subject to arbitrary, onerous and frequent changes in the conditions governing same. Investors gain these assurances where its right to property is guaranteed. In this regard, a state can only achieve such an atmosphere if it promises with reasonable credence that arbitrary measures are not to be employed that may have the effect of overreaching the interest of investors. For instance, it must make sure that its legal regime for protection of investments are such that will forestall taking unpredictable measures which may not have been foreseen by the jeopardize or prejudice investors and which have the capacity to unfairly prejudice the investors or their investments. It has been asserted that the success of a good investment regime is predicated on efficient institutions, adequate capital and most importantly protection of property rights.<sup>50</sup> Thus, it is the duty of a state to make sure that its legal regime for protection of investments is such that will forestall unpredictable measures which may scare investors away. Much as the regime for expropriation of property rights under the Constitution is sufficient and seems to be in conformity with international best practices, the legal regime for revocation of right of occupancy under the Land Use Act<sup>51</sup> is grossly inadequate and should be reviewed to bring it in tandem with the current global trends and international best practices on the subject. Compensation should be paid to holders of revoked undeveloped lands, at least to the extent of their investment for securing the land from the state or third parties. This is based on the fact that revocation of right of occupancy under the Act is peremptory and leaves the holder of the right with no remedy once the power of revocation is validly exercised. Provisions should be made for compensating a holder of a right of occupancy revoked by the Governor, whether or not there is an unexhausted improvement on the land. It is also recommended that penal revocation of land rights under the Act should be subject to judicial review to curb executive tyranny and politically motivated revocations.<sup>52</sup> Furthermore, in order to assure the security of private property rights, revocation of rights of occupancy should not be based on such flimsy excuses as failure to pay rent, failure to collect or pay for certificate of occupancy and the like. Such minor infractions should be addressed by imposition of penalties and other less punitive measures than outright revocation.

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<sup>49</sup>M Ndulo, 'Protection and Attraction of Foreign Investment in Zambia' in M A Ajomo & Oluwole Akanle (eds) *Regulation of Trade and Investment in an Era of Structural Adjustment: The African Experience* (Lagos: NIALS, 1995) p. 103.

<sup>50</sup>K Moghalu, 'The Role of Institutions in National Development' being the text of a keynote address presented at the law week of the Nigerian Bar Association, Enugu Branch on 4<sup>th</sup> December, 2017.

<sup>51</sup> Cap L5, LFN, 2004.

<sup>52</sup>It was reported in 2013 that the authorities of the Federal Capital Territory (FCT) had marked for demolition the property housing the secretariat of PDP, a breakaway faction of the then ruling party. See: <<http://www.vanguardngr.com/2013/10/fcta-marks-npdp-secretariat-demolition/>> accessed 22/03/2016.