

CONTRACTUAL ARRANGEMENTS AND LEGAL ASPECTS OF INVESTING IN NIGERIA'S SOLID MINERALS SECTOR: BEING A PAPER PRESENTED AT THE 5TH INTERNATIONAL MINING INVESTMENT CONFERENCE AND EXHIBITION ON NIGERIA, (IMICON 2016) AT TRANSCORP HILTON HOTEL ABUJA ON 31ST AUGUST, 2016.

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INTRODUCTION:

Nigeria depended on agricultural products and solid Minerals as the sources of revenue generation before the discovery of crude oil in 1956. The southern region could boast of cocoa, rubber, palm oil etc as the sources of revenue while the north depended on groundnut and cotton essentially as sources of revenue. These agricultural products that were in abundance were combined with solid minerals like coal, iron ore, bitumen, limestone, gold etc that are spread across the country as sources of revenue.

Notwithstanding the economic value that the solid minerals are to add to the economy of Nigeria, the sector has been abandoned, neglected by the Federal and State Governments due to the discovery of crude oil which now serves as source of revenue to both the Federal and State Governments. It contributes at least 85% of the accruable revenue to the Federation.

However, as a result of decrease in revenue from crude oil due to global fall in the sales of crude oil and price in the international market, the Nigeria government is now shifting attention to agriculture and solid minerals as means of generating revenue. In fact the Federal Government recently reduced mining license time frame to 40 days.

This paper will examine' the contractual arrangement and legal aspects of investing in Nigeria solid minerals sector - that is the law regulating solid minerals in, Nigeria.

SOLID MINERALS LEGAL FRAMEWORK

It is important to understand what solid minerals means in the context of our legal and or extant laws in Nigeria.

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Minerals include any substance whether in solid, liquid or gaseous form occurring in or in the earth formed by or subjected to geological processes, including occurrences or deposits of rocks, coal, coal bed, gases, bituminous, shales, tarsands, any substance that may be extracted from coal, shale or tarsands, minerals water and mineral components in tailings and with waste piles but with the exclusion of petroleum and water without minerals content.

From the finding of **Nigerian Extractive Industries and Transparency Initiative (NEITI)** there are about 40 different kinds of solid minerals and precious metals in Nigeria. But in the year 2008, the Ministry of Mines and Steel Development identified seven strategic minerals relevant to Nigeria Economy, taking into consideration the quantities available for commercial purposes. These Minerals are coal, bitumen, limestone, iron-ore, gold, barytes and lead, zinc.² Mining is on the exclusive legislative list of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) and therefore only the National Assembly can legislate on Solid Minerals.³

By section 44 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) and section 1 of the Minerals and Mining Act, 2007 the entire ownership and control of all minerals, Minerals resources, oil and natural gas in, under or upon any land in Nigeria or in, under and upon any territorial waters and exclusive economic zone of Nigeria is vested on the Federal Government.

Therefore, it is the Federal Government that is in control of mining of Solid Minerals in Nigeria. The Federal Government permits license and leases for reconnaissance, prospecting and extraction of solid minerals to organizations and persons interested.⁴

Therefore, mining is regulated by the **Minerals and Mining Act, No 20 of 2007, Nigeria Minerals and Mining regulations 2011, Company and Allied Matters Act, Cap 20 LFN, 2004 (CAMA), Environmental Impact Act, Cap E12, LFN, 2004** (which makes it mandatory to conduct an environmental impact assessment in respect of any property or activity that is likely to significantly affect the environment).

National Environmental (Mining and processing of coal, ores and industrial minerals) Regulations (SI No. 31 of 2009),

2. KPMG-Cutting Through Complexity- Nigerian Mining Sector- Overview P.4

3. Professor Wahab O. Egbewole "The Legal Framework of Solid Minerals Mining in Nigeria Issues And Challenges" P.I 4. Section 10 of the Minerals and Mining Act, 2007

4. Section 10 of the Minerals and Mining Act, 2007

The Explosives Act and Explosives Regulation (Cap E18 LFN 2004 and Land Use Act, 1978) (which gives the Minister responsible for explosives the power to make regulations in respect of the importation, storage, transport, use, ownership and possession of explosives).

Section 1 (1) of the Minerals and Mining Act, 2007 as stated before provides that the entire property in and control of all Minerals, in, under or upon any land in Nigeria, its contiguous continental shelf and of all rivers, streams and water courses throughout Nigeria and area covered by its territorial waters or contiguous, the exclusive economic zone, is and shall be vested in the Government of the Federation for and on behalf of the people of Nigeria. **Section 1 (2)** of the same Act provides that all lands in which Minerals have been found in commercial quantities shall from the commencement of the Act be acquired by the Government of the Federation in accordance with the provisions of the Land Use Act — **See S.28 of the Land Use Act, 1978.**

It is the Minister of Mines and Steels that regulates and oversees the laws that govern the exploration and exploitation of Solid Minerals in Nigeria.⁵

THE RIGHTS TO SEARCH OR EXPLOIT SOLID MINERALS IN NIGERIA.

By **Section 6 of the Minerals and Mining Act, 2007** only persons with licenses or leases granted by the Minister shall prospect or conduct Mining operations.

Also only a body corporate duly incorporated under the **Companies and Allied Matters Act (CAMA)** is qualified for the grant of any Mining title under the Act, **See Section 5 of the Minerals and Mining Act.** Therefore; the holders of a Mining title shall not without the prior consent of the Minister:-

- a) Transfer the equity shares of the company to any other company or persons or
- b) Enter into agreement, arrangement or understanding with any other company or person if the transfer, agreement or understanding will give the person or company control of the mining title and
- c) Where a Mining title had been granted to or held by any unincorporated body or person prior to the coming into force of this Act, that unincorporated body or

5. Section 2 of the Minerals and Mining Act, 2007

person shall, within the period of six months from the coming into force of the Act comply with the provision of sub-**section (1) of Section 5**.⁶

Any individual or organization interested in exploration, exploitation, extraction or sale of Minerals in Nigeria must obtain appropriate license from the **Mining Cadastre Office (MCO)**; where MCO is equally vested with the power to collect a fee for processing applications for mineral titles and an annual service fee, they are also responsible for the administration of Minerals title and the maintenance of the cadastral register.⁷

The **Minerals and Mining Act of 2007** that was passed into law repealed the **Minerals and Mining Act, No. 34 of 1999**. Notwithstanding the promulgation of the 2007 Act, the status of holders of Minerals title granted under the repealed Act are deemed to have become on the appointed date, the holder of an interim right, lease or license. During the interim period, the holders of an interim right, lease or license is authorized to carry on the operations which he was authorized to carry on immediately before the appointment date under the right, lease or license of which he was the holder and shall enjoy the same rights and be subject to the same liabilities as if the repealed Act were still in force.

MINERAL TITLES

The right to engage in mining or exploitation of mineral resources is obtained through the grant of reconnaissance permit, exploration license, a small scale mining lease, and mining lease.⁸ To engage in any of these activities without the requisite mineral title or authority is an offence under the Act.⁹

a) A Reconnaissance Permit:

This license is granted for a period of **one year** renewable annually upon compliance with relevant provisions of the Act.¹⁰ It permits its holders to search for Mineral resources and obtain and remove surface samples in small quantities over any land which is not already subject to an exploration lease, small scale mining lease, mining lease or water use permit.

b) An Exploration License:

This license is granted for the duration of **three years** renewable for further two periods (twice) of two years each provided that the holder has complied with his minimum work obligation commitments and other relevant provisions of the Act.¹¹ It is granted over land area not exceeding 200 square kilometers which is not already subject to an existing exploration license, mining lease, small scale mining lease or quarry lease and provides an

6. Section 5 (2)(a) and (b)(3) of Minerals and Mining Act, 2007

7. Sections 5-10 of Minerals and Mining Act, 2007

8. Sections 46-50 and 131 and 133 of Minerals and Mining Act, 2007

9. Sections 131-133 of Minerals and Mining Act, 2007

10. Sections 47, 57 and 58 of Minerals and Mining Act, 2007

11. Sections 48,59 and 60 of Minerals and Mining Act, 2007

exclusive right to its holders to conduct exploration activities upon the land within the area of this license, including but not limited to the right to explore for all Mineral resources and to carry out the operations and work necessary for the achievement of this objective, to take specimens and samples within specified limits for the purpose of analysis and conducting bulk sampling and trial processing for determining mining potentials. The holder of an exploration license has the exclusive right to apply for, and to be granted subject to the Act; one or more small scale mining lease, Mining leases or quarry leases in respect of any part(s) of the exploration area, upon due compliance with its exploration obligations under the Act. See **Section 61 of Minerals and Mining Act, 2007**. The holder of an exploration license who sells any Mineral resources as provided for in the Act shall be subject to the payment of royalty as if the Minerals resources sold were obtained under a Mining lease.

c) **A Small Scale Mining Lease:**

A Small Scale Mining Lease covers, an area not exceeding **3 square kilometres** and requires its holders to carry out effective rehabilitation of the mined out areas to the satisfaction of the **Mines Environmental Compliance Department (MECD)** and pay prescribed fees. The Government through the Ministry, shall provide certain extension services to duly registered and performing mining co-operatives of small scale artisanal miners to include amongst other services, prospecting and exploration services to determine the geological setting, structure, nature of occurrence, quantity and quality of minerals being mined, provision of environmental impact assessment report and detailed guidelines on waste and tailing disposal and holding regular workshops to update miners knowledge on legal, marketing, business skills and infrastructural support.

d) **A Mining Lease:**

This is an exclusive permit granted in respect of an area not exceeding **fifty (50) square kilometres** which is not within an Exploration License Area or a Small Scale Mining Area except to the holder of the Exploration License or Small Scale Mining Lease covering such area. It is granted for a period of twenty five (25) years, renewable every twenty four (24) years, provided the holder has complied with his minimum work obligation commitments and all

other obligations and requirements of the Act.¹² The Lease confers upon the holder the right to among other things, use, occupy and carry out Mineral Exploitation within the Mining Lease Area, and market, sell, export or otherwise dispose of the mineral products resulting from the Mining Operations. Subject to the provisions of the Act and any other enactment, the exclusivity of the Mining Lease does not derogate from the right of the lawful occupier of a licensed area to retain the right to graze livestock upon or to cultivate the surface of the land in so far as the grazing or cultivation does not interfere with the Mining Operations in such Area.

Pre-Conditions for Commencement of Development on Mining Lease Area:

Firstly, the holder of a mining lease shall not commence any development work or extraction of Mineral Resources on the Mining Lease Area until after:-

- (a) The submission and approval by the Mines Environmental Compliance Department of all Environmental Impact Assessment Studies and mitigation plans required under applicable environmental laws and regulations.
- (b) The submission and approval by the Mines Inspectorate Department of the details of the work which the applicant is prepared to undertake or a programme for carrying out any minimum work obligations imposed by the Mines Inspectorate Department.
- (c) The conclusion of a Community Development Agreement approved by the Mines Environmental Compliance Department; and
- (d) The holder has duly notified, compensated or offered compensation to all users of land within the Mining Lease Areas as provided for under the Act or in the event of a dispute after the matter has been resolved by Arbitration. See Section 71(1)(a)(b)(c)and(d) of the Minerals and Mining Act, 2007.

Secondly, the holder of a mining lease, except a mining lease for mineral water exploitation, is required to have resolved the matters specified in subsection **(1) (a) and (b) (See Section 71(2)of Minerals and Mining Act, 2007)** above within three (3) years from the issue of the Mining lease, failing which the Mining Lease may be temporarily suspended without affecting the rental payments that shall

12. Section 50 of Minerals and Mining Act, 2007

continue and without prejudice to the transfer right of the title Holder under the provisions of the Act. Thirdly, holder of a Mining Lease for Mineral Water Exploitation is required to have complied with the conditions specified in subsections **(1)(a) and (b) of Section 71(1) Minerals and Mining Act, 2007** within two years from the issue of the Mining Lease for Mineral Water, failing which the mining Lease may be suspended.

Technical Expertise Qualification Requirement: By virtue of this requirement, a Mining Lease is only granted by the Minister to companies that have employed a person with adequate professional qualification and experience in mining. The Minister being further satisfied that such expert shall be retained by the company during the currency of the lease. The subsistence of a mining lease upon grant and the carrying out of mining operations is predicated on the retention of a qualified and experienced mining professional in the company's employ, who shall supervise personally the mining operations being undertaken by the company during the period of the lease.

Rights of Lessee to remove fixtures: The lessee of a mining lease who has paid all rents, royalties and other payments due to be made by it under the Act or under the terms of its lease, is permitted within three (3) months, in the case of alluvial lease, and six (6) months in the case of lode lease, after the expiration or other determination of his lease, to remove all or any of the plants, building or other property of the lessee.¹³ Provided that such property shall become the property of the Federal Government and may be dealt with and disposed of in lieu of the rent, royalty or other payments, as the case may be where on the expiration or determination of the lease, a lessee is in default in the payment of any rent, royalty or other payments or a lessee has failed to remove its property within the term specified above or within such further period, if any, as the Mines Inspectorate may allow the plant, building and property of the lessee on the land.

QUALIFIED CANDIDATE OR APPLICANTS

A qualified applicant for a Reconnaissance Permit, an Exploration Lease, a Small Scale Mining Lease and a Quarry Lease shall be:-

- a. A citizen of Nigeria with legal capacity and who has not been convicted of a criminal offence or

13. Section 74 of Minerals and Mining Act, 2007

- b. A body corporate duly incorporated under the Companies and Allied Matters Act; or
- c. A Mining cooperative

Provided that:

- i. For an Exploration Lease Applicant, such applicant could also be the holder of a Reconnaissance Permit granted in respect of the area subject to the application, who has fulfilled all the conditions attached to the Reconnaissance Permit.
- ii. For a Small Scale Mining Lease -such applicant could be the holder of an Exploration Lease granted in respect of the area subject to the application, who has fulfilled all the conditions _ attached to the Exploration.
- iii. For a Quarry Lease Applicant, such applicant could also be a person extracting construction materials for the construction of roads, railway lines, dams and other engineering works or structures of public interest.

For a Mining Lease, a qualified applicant must be a body corporate duly incorporated under the Companies and Allied Matters Act or other legal entity that-

- i. Has demonstrated under conditions stated in the regulations that a commercial quantity of mineral resources exist, in the area in respect of which the application is made and
- ii. Has fulfilled all the conditions attached to the Exploration License in respect of the area subject to the application.

REVOCATION OF TITLE

In order to ensure that prospectors comply with exploration and exploitation law and title granted to them, law is put in place to revoke the rights granted to prospectors in breach of the rights granted or other fault. One of the things that can result into revocation of the minerals title is where holders fail to pay the prescribed fees. But before the revocation, a 30 day defaults notice is given to the defaulter and failure to pay within that period will result to revocation of mineral title.

INCENTIVES TO HOLDERS OF TITLE

In order to encourage investment in the Mining sector of the economy and to attract investors, all operators in the mining industry are exempted from payment of customs and import duties in respect of plant, machinery, equipment and accessories imported specifically and exclusively for mining operations subject to their inspection and approval by the Mines Inspectorate Director; expatriate quota and residence permit in respect of the approved expatriate personnel; and personal remittance quota for expatriate personnel, free from any tax imposed by any enactment for the transfer of external currency out of Nigeria. Also a holder of a mineral title may be permitted by the Central Bank of Nigeria to enjoy free transferability of funds and retain in a foreign exchange domiciliary account a portion of its foreign exchange earnings for use in acquiring spare parts and other inputs required for the mining operations which would otherwise not be readily available without the use of such earnings. Any company granted mineral title under the Act shall also enjoy a three year tax relief period commencing on the date of operation, which may be extended by the Minister for one further period of two years under certain circumstances. Companies or enterprise that engage in the exploitation of mineral resources shall establish a tax deductible reserve for environmental protection, mine rehabilitation, reclamation and mine closure costs. However, the appropriateness of the reserve must be certified by an independent qualified person taking into account the determination made under the provisions of the Act.

ENVIRONMENTAL CONSIDERATIONS AND RIGHTS OF

HOST COMMUNITIES

Chapter 4 of the **Minerals and Mining Act, 2007** provides for the winning of materials [such as salt, soda, potash or galena] by host communities in relation to areas covered by mining leases; prohibition of mineral exploration in certain areas; reservation of rights of owner or occupier; payment of surface rents; assessment of various compensations and payment of same; restoration of mines land; reclamation; Community Development Agreements; Environmental obligations to include preparation and submission of environmental impact assessment statements and participation in the environmental protection and rehabilitation program. The Minister shall establish an Environmental Protection and Rehabilitation Fund for the purpose of guaranteeing the environmental obligations

of holders of Mineral titles as provided under the Act. The Trustees appointed by the Minister shall operate the fund in accordance with the provisions of the Trustees Investment Act or amendments thereof.

Section 98 of Minerals and Mining Act, 2007 prohibits pollution of water course, alterations in water supply and provides that everyone who uses water connection with mining operation shall ensure that the water in use does not contain injurious substances in quantities likely to prove detrimental to animal or vegetable life. Also, no person shall, in the course of Exploration or mining, carry out operations, in or under any area held to be sacred or permit injury or destruction of any tree or other thing which is the object of veneration.

OFFENCES AND PENALTIES

Chapter 5 of Minerals and Mining Act, 2007 provides for penalties for offences including illegal mining, false and misleading statements in applications for mineral title, false and misleading declaration of important information, smuggling of minerals, use of false or fraudulent scales, misrepresentation and unlawful interference or obstruction. Regarding dispute resolution, any dispute arising between the holder of a mineral title and the Government in respect of the interpretation and application of the Act, its regulations and the terms and conditions of mineral titles shall be resolved, in the first instance, on an amicable basis. Where the dispute is in the nature of a bona fide investment dispute, and such dispute is not amicably settled as stated above, it shall be resolved in accordance with the provisions of the Nigerian Investment Promotions Act.

Any other dispute not settled within these parameters and any offence under the Act and regulations shall be resolved and tried in the Federal High Court.

The major impediment to development of minerals sector in Nigeria is the dispute resolution mechanism as provided herein. In our view, the congestion in courts and the general delay in our court system may affect the operation of this provision.

Notwithstanding the fact that the major regulatory framework for the mining industry in Nigeria is the Solid Mineral Mining Acts, there are other relevant Policy Statutes though stated before but are reproduced hereunder for clarity and emphasis which include:-

1. The National Minerals and Metals Policy

2. Nigerian Minerals and Mining Regulations 2011 (the Regulations)

3. Companies and Allied Matter Act Cap 20 2004.

This legislation regulates company formation and operation in Nigeria, no foreign company may carry on business in Nigeria unless it incorporates a local subsidiary in the country. This is also emphasized by the MMA which also states that no person shall be qualified for the grant of any mining title unless the person is a body corporate duly incorporated under CAMA.

4. Companies Income Tax Act (CITA)

5. Nigeria Investment Promotion Commission Act

6. The National Environmental Standards and Regulations Enforcement Agency (Est.) Act 2007 ("NESREA Act") - which gives the Agency powers to prescribe effluent limitations and prohibits the discharge of hazardous substances, unless such discharge is permitted under any Nigerian law.

7 The Environmental Impact Assessment Act, 1992:- makes it mandatory to conduct an environmental impact assessment in respect of any proposed project or activity that is likely to significantly affect the environment.

8. The Nuclear Safety and Radiation Protection Act, 1995:- establishes the Nigerian Nuclear Regulatory Authority which has amongst its other functions responsibility for regulating the exploration, mining and milling of radioactive ores and other ores associated with the presence of radioactive substances.

9. The Explosives Act, 1967:- gives the Minister responsible for explosives) the power to make regulations in respect of the importation, storage, transport, use, ownership and possession of explosives. No such regulations have been made.

10. The Land Use Act, 1978 - designates the use of land for mining purposes as an 'overriding public interesting' in respect of which the Governor of a state may revoke a right of occupancy.

All these legislations and Solid Minerals Act create the enabling environment for investment in the exploitation, exploration and prospecting in solid minerals mining in Nigeria.

It should be noted that the power exercised under the Act are subject to judicial review under administrative law. The Act provides for arbitration as an additional forum for dispute settlement between the Federal Government and title holders.

SUGGESTIONS/ WAY FORWARD

1. There is the need to review the existing statutes that deal with solid minerals in Nigeria to bring them in line with international best practices.
2. The 1999 Constitution of the Federal Republic of Nigeria (as amended) should be amended and solid minerals and other extractive natural resources should be removed from the exclusive legislative list and put under the concurrent legislative list.
3. Government should provide more incentives and encouragement to investors in the solid mineral mining sector. For example, liberalized single digit unit interest for loans, more tax incentives and better infrastructure to mining areas.
4. All incentives for corruption like undue bureaucracy in granting licenses and permits must be addressed.
5. The government must open the sector to international consortium of experienced world class miners that will be encouraged to transfer technology to Nigerian companies.

CONCLUSION

The Minerals and Mining Act, 2007 provides a useful framework for the exploration and exploitation of Minerals in Nigeria.

Generally, through environmental consideration and rights provided for the host communities, it becomes easier for companies and individuals title holders to carryout Mining processes in various community without much problem as it used to be, thereby enhancing productivity and increasing source of revenue for the country as a whole.

If these laws are properly implemented by the authorities and persons the production, exploration, exploitation and sales of Solid Minerals would be enhanced in Nigeria.

POST SCRIPTS

As I was concluding this presentation I stumbled on some online Nigerian Newspapers publication of **30th August, 2016**,¹⁴ of the discovery of a valuable solid Mineral in likely commercial quantities, high grade nickel in a part of the country.

Nickel by the way is the major raw material for the production of stainless steel. It is an expensive metal.

If this report is true, then Nigeria is on the threshold of a major turning point in becoming a serious player in the world map of mining. Though it is our hope that the Government will follow through on this discovery and pay proper attention to its exploitation.

14.^a See Thisday Newspaper online of 30th August, 2016

14.^b Vanguard Newspaper on line of 30th August, 2016

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