

MINING IN NIGERIA –THE NIGERIAN MINERALS AND MINING ACT, 2007

“For long, West Africa has been a destination of choice for mining executives the world over, with countries like Burkina Faso, Ghana, Ivory Coast and Niger being actively explored and mined. Now, Africa’s most populous nation, Nigeria, fortuitously located in this remarkably prospective region is opening up its mining sector and taking aggressive steps to become an alternate mining destination”¹

The Mining Industry is now a global industry with many countries competing for exploration funds. The fierce international competition suggests that mining companies and their investment funds would only go to those countries where the enabling environment would allow the private sector to flourish without hindrance. It is the realization of this fact that is driving the recent efforts of the Federal Government of Nigeria towards the creation of an orderly and sustainable development of Nigeria’s Minerals Resources. The Nigerian government policy thrust on the mining sector is anchored on the need to develop a private sector led mining industry with Government restricting its role to that of an administrator / regulator.

This article is intended to provide an overview of the legal/legislative framework most likely to be relevant to foreign investors considering investing in Nigeria’s mining sector. Some problem and risk areas would still need to be considered in greater detail within the context of Nigeria’s general investment, fiscal and tax laws. It is a general introductory guide only and not intended to provide legal advice.

The Nigerian Opportunity

Going for Gold!!! But the future holds a lot more. Nigeria today is in a wave of market reforms in many segments of its economy including the privatisation of government owned companies and mining assets. After years of dithering and being weighed down under squandered oil revenues and rising debt levels, the government finally demonstrated the political will to implement market friendly policies. To this end, Nigeria over the past couple of years deregulated fuel prices, began a programme of fiscal and monetary management. More recently, among other reforms, the country has attempted to modernize and strengthen the banking system.

Nigeria is also undergoing political transformation of enormous proportion. For the past nine years, the country has seen uninterrupted civilian rule which is the longest since independence. The April 2007 elections saw the first civilian-to-civilian transfer of power in the history of the country, making its attempts at economic recovery more meaningful.

World Class Minerals

The Geology of Nigeria is comparable to those of other countries where world class deposits have been found. The mineral spread in Nigeria is significant with evidence of

34 different minerals distributed in Nigeria's richly endowed geology. Though not all the mineral occurrences will ultimately have enough reserves to be of viable interest to mining companies, the Nigerian government is leaving no stone unturned in its increasing sustained efforts to delineate and objectively demonstrate the potential and encourage investments in all the different minerals.

New Greenfield mines are not the only option. Nigeria has several previously explored mines that could be re-opened. The gold mining opportunity in Nigeria could be very much like that of Ghana where abandoned mines could be redeveloped. Thus significantly increasing the country's mining potential. Some of the known minerals include: Gold, Coal, Bitumen, Iron-ore, Tantalite / Columbite, Lead / Zinc Sulphides, Barytes, Cassiterite, Gemstones, Talc, Feldspar and marble.

Seven Strategic Minerals

In its September 2008 ministerial press briefing, the Minister in charge of the Ministry of Solid Minerals Development stated that in order to give the reforms in the mining sector a more meaningful approach, the leadership of the Ministry has prioritized the development of Seven Strategic Minerals (7SM), Coal, Bitumen, Limestone, Iron Ore, Barytes, Gold and Lead/Zinc. These seven minerals are world class and have been carefully chosen for development in view of their strategic importance to Nigeria's economy and their availability in quantities that are sufficient to sustain mining operations for years.

One obvious implication of the above is that potential investments in any of these seven may receive accelerated response from the government as such investments would be seen as being in alignment with the government broader goal of enhancing infrastructural development across the six geopolitical zones of the country and their expected contribution to the nation's GDP.

Legislative Framework

The Federal Government of Nigeria is generally creating an enabling environment that will enable business to flourish. The enabling environment with respect to the mining sector includes the development of a new legislative framework. The legislative framework is embedded in the Mineral and Mining Act 2007 ("the Act"). The Act contains specific provisions that will enhance private sector leadership in the development of the mining industry in the country.

Some of the salient provisions contained in the Act are as follows:

- **Ownership and Control of Minerals**

The Act vests entire property in and control of all Mineral Resources in, under, or upon any land in Nigeria, its contiguous continental shelf and all rivers, streams and water courses throughout Nigeria, any area covered by its territorial waters or

constituency and the exclusive economic zone in the Federal Government of Nigeria. This provision essentially mirrors the Constitution of the Federal Republic of Nigeria.

- **Transfer of Property in Mineral Resources**

Section 1(3) of the Act however provides that property in mineral resources shall pass from the Government to the person by whom the mineral resources are lawfully won upon their recovery in accordance with the Act.

- **The Administration of the Act**

Generally, the Act is administered by the Minister for Solid Minerals Development who has the general responsibility for the development of well planned and coherent programme of exploitation of Nigeria's mineral resources. Specifically, however the Act also establishes a Mining Cadastre Office (MCO) which operates as a sole Agency responsible for the administration of mineral titles with exclusive jurisdiction over the whole country. The MCO is responsible for considering applications for mineral titles and permits and also the issuance, suspension and **upon the written approval of the Minister** revocation of any mineral title.

The Act provides that the Minister shall by regulation determine areas wherein an exploration licence and a mining lease shall be granted based on competitive bidding. Pursuant to the Regulations that may be made by the Minister, the MCO shall consider competing bids through an open and transparent method and select the bid which will promote the expeditious and beneficial development of the Mineral Resources of the area.

Where several applications are received on the same area or for overlapping area from two or more persons on the same business day, the application which is first received in the proper form shall be deemed to have priority over others.

The Act gives priority for the use of land for mining over other uses of land and shall be considered for the purposes of access, use and occupation as constituting overriding public interest under the Land Use Act.

- **Mining Incentives**

The Act provides for the following fiscal and tax incentives.

- In determining its total profits, a licence holder is entitled to deduct from its assessable profits a Capital Allowance of 95% of Qualifying Capital Expenditure incurred in the year in which the investment was made on all

- certified exploration, development and processing expenditure including feasibility study and sample assaying cost.
 - Infrastructure costs incurred regardless of ownership or replacement.
- The amount of any loss incurred by a licence holder shall be deducted as far as is possible from the assessable profits of the first year of assessment after that in which the loss was incurred and in so far as it cannot be so made then from such amounts of such assessable profits of the next year of assessment and so on up to a limit of four years after which period any unregistered loss shall become lapse.
- All operators shall be granted the following benefits:
- Exemption from payment of customs and import duties in respect of plant, machinery, equipment and accessories imported specifically and exclusively for mining operations
- Expatriate quota and resident 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.
- The machinery, equipment and accessories to be imported shall be approved by the Mines Inspectorate Division. The plant, machinery, equipment and accessories imported pursuant to this section may be disposed of by the holder of Mineral Title upon full payment of customs and import duties in respect thereof.
- The Central Bank of Nigeria (CBN) may permit a holder of a Mineral Title who earns foreign exchange from sale of his minerals to retain in a foreign exchange domiciliary account a portion of his 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.
- The Act also guarantees free transferability of funds through the CBN in convertible currency of
- payments in respect of loan servicing where a certified foreign loan has been obtained by the holder for his mining operations.

- the remittance of foreign capital in the event of sale or liquidation of the mining operations or any interest therein attributable to foreign investment.
- The Act provides a tax relief period of 3 years for any company granted a Mineral Title under the Act. The tax relief period may be extended for a further period of 2 years by the Minister on the fulfillment of certain conditions.

The tax relief period commences on the date that the licence holder commences operations.

Under the Companies Income Tax Act (CITA) mining companies are only granted a tax relief period of 3 years without an option for an extension. There are ongoing debates over the validity or otherwise of the extension period granted under the Mining Act. This is however beyond the scope of this paper.

- Section 30 of the Act provide for deductibility of environmental cost. It specifically states that:

“A tax deductible reserve for environmental protection, mine rehabilitation, reclamation and mine closure costs shall be established by companies engaged in the exploitation of mineral resources, provided however, that the appropriateness of the reserve is certified by an independent qualified person taking into account the determination made under the provisions of this Act:-

- (a) the reserve is recorded in the audited financial statements of the companies.
 - (b) tax deductibility will be restricted to actual amount incurred for the purpose of the reclamation; and
 - (c) a sum equivalent to the reserve amount is set aside every year and invested in dedicated account or trust fund managed by independent trustees appointed pursuant to the provisions of the Act.
- A **tax deductible** amount established in accordance with the applicable rate set out in the Pension Reform Act shall be imposed on mining companies or enterprises, towards the payment of pensions to each employee.
 - Section 32 provides for Annual Capital Cost Indexation. It states that the unclaimed balance of capital cost shall be increased yearly by 5 percent

for mines that start production within 5 years from the date of enactment of the Mining Act.

- The Act provides that any mineral obtained in the course of exploration or mining operations shall be liable to pay royalty as prescribed in any regulations made under the Act. However, the Minister may also defer the payment of royalty on any minerals for a specific period, on the approval of the Federal Executive Council

- Type of Licences Granted under the Act

The right to search for or exploit Mineral Resources under the Act is obtained through one of the following mineral titles:

- (a) Reconnaissance Permit
- (b) Exploration Licence
- (c) Small Scale Mining Lease
- (d) Mining Lease
- (e) Quarry Lease
- (f) Water Use Permit

In general terms these licences are granted to any of the following class of persons: a citizen of Nigeria, a body corporate duly incorporated under the Companies and Allied Matters Act (CAMA), a mining Cooperative and where applicable a holder of the relevant prior licence. However in the case of a Mining Lease it appears the emphasis is on a body corporate duly incorporated under CAMA

- Reconnaissance Permit

A Reconnaissance Permit confers on the holder the right to obtain access into, enter on or fly over any land within the territory of Nigeria available for mining purposes to search for Mineral Resources on a non-exclusive basis. In addition, it also confers on the holder the right to obtain and remove surface samples in small quantities.

A Reconnaissance Permit is issued for a period of 1 year and is renewable annually provided the conditions under the Act and any regulations made pursuant to the Act are met.

Part of the conditions for the grant of a Reconnaissance Permit includes:

- Non-Exclusivity

- Does not involve drilling, excavation or other sub-surface techniques.
- Holder to compensate users of land for damage to land and property and pay the subscribed fees.
- Reconnaissance activities do not constitute land use right under the Land Use Act.

A Reconnaissance Permit shall not be granted over any land that is or has become subject to Exploratory Licence, Small Scale Mining Lease, Mining Lease or Water Use Permit.

- Exploration Licence

The holder of an Exploration Licence has exclusive right to conduct exploration upon the land within the area of his licence. An exploration licence is granted in respect of an area not exceeding 200 square kilometers. The duration of an exploration licence is for 3 years and it may be renewed for two further periods of 2 years each. The holder of an Exploration Licence shall have exclusive right to be granted one or more Small Scale Mining Lease, Mining Lease or Quarry Lease in respect of any part(s) of the exploration area provided the holder has complied with all the obligations of the exploration licence.

- Mining Lease

A Mining Lease will not be granted in respect of any area within an Exploration Licence Area or Small Scale Mining Lease except to the holder of the Exploration Licence or Small Scale Mining Licence. The duration of a mining lease is twenty-five (25) years and is renewable every twenty-four years subject to the holder complying with his minimum work obligations and commitments. A mining lease confers on the holder [among other rights] the right to obtain access and enter the Mining Lease Area, the exclusive use, occupation and the carrying out of mineral exploration with the Mining Lease Area.

- Quarry Lease

Quarrying under the Act applies in relation to all naturally occurring quarriable minerals, such as asbestos, china clay, fuller's earth, gypsum, marble, limestone, mica, pipe clay, slate, sand, stone, late rite, gravel, etc. which may also be lawfully extracted under Mining Leases. A quarry lease is granted in respect of a land area not exceeding 5 square kilometres and covers a 5 year period unless renewed.

A quarry lease confers on its holder the right to carry out quarrying operation on the land within the area of the lease and to remove and dispose of any quarriable mineral specified in the lease.

- Small Scale Mining

A Small Scale Mining Licence is granted in respect of an area not less than 5 acres and shall not exceed 3 square kilometres. Other conditions applicable to Small Scale Mining Lease shall be as determined by the Small Scale and Artisanal Mining Department of the Ministry of Solid Mineral Development.

- Transfer of Mineral Title.

Mineral title is transferable under the Act subject to the approval of the transfer by the Minister and registration of the transfer with the MCO. Rights arising from a mineral title or permit that are transferable under the Act can be wholly and partially assigned, sub leased, pledged, mortgaged, charged, hypothecated or subject to any security interest.

The approval of the MCO shall not be required for an assignment to an affiliate, where the obligations of the affiliate are guaranteed by the assignor or by a parent company.

- Renewal of Mineral Title.

The Act provides that during the pendency of a title renewal, the current mineral title shall remain in force until the date of the renewal of the mineral title or the refusal of the application.

- Revocation of Mineral Title.

Section 151 of the Act lists certain conditions under which a mineral title may be revoked. Those instances include where the holder:

- is convicted of an offence by a court of competent jurisdiction;
- breaches any provision of the Act or regulations made pursuant to the Act;
- is declared insolvent or bankrupt by court of competent jurisdiction;
- in the case of a Small Scale Mining Lease or Mining Lease, the Holder wholly discontinues operations under the lease for a continuous period of six months etc.

A mineral title becomes revoked upon the written advice of the Minister and after 30 days notice of intention to revoke the mineral title containing in detail the grounds thereof has been given to the holder and during the period fixed the

holder has failed to remedy such breach or remove the grounds for revocation within the required period.

Gbenga Biobaku & Co.

References

1. Online version of a paper presented by Prof. Lesley Obiora (Former Minister in the Ministry of Solid Minerals Development on Mining in Nigeria.
2. The Nigerian 2007 National Minerals and Metals Policy.
3. September 2008 Ministerial Press Briefing by Chief Sarafa Tunji Ishola Honourable Minister of Mines and Steel Development.
4. Nigerian Minerals and Mining Act, 2007.