

LAWS GOVERNING SOLID MINERALS MINING IN NIGERIA

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Nigeria is endowed with a variety of solid minerals. In 2015, the Nigerian Extractives Industries and Transparency Initiative (NEITI) report stated that there are about 40 kinds of solid minerals of various categories waiting to be exploited².

Below are the relevant laws, policies, regulations and guidelines which regulate mining of solid minerals in Nigeria as well as other sources of law relating to the mining of solid minerals:

A. LAWS, POLICIES, REGULATIONS AND GUIDELINES WHICH REGULATE MINING OF SOLID MINERALS IN NIGERIA

1. Minerals and Mining Act³

The Minerals and Mining Act⁴ (the “MMA”) is the principal legislation that regulates the Nigerian mining sector; it regulates all aspects of the exploration and exploitation of solid minerals in Nigeria. It was enacted to deal with the shortcomings of the Minerals and Mining Act, No. 34 of 1999 Act, such as the broad discretionary powers granted to the Minister for Solid Minerals Development on matters relating to the grant of mineral titles.

The MMA vests the control, regulation and ownership of all mineral resources in the Federal Government of Nigeria (the “FGN”). Some of the key features of the MMA are:

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² Omoh Gabriel, ‘Neglect of Solid Minerals: Why Nigeria Remains Poor’, (Vanguard Nigeria, June 29 2015) <<http://www.vanguardngr.com/2015/06/neglect-of-solid-minerals-why-nigeria-remains-poor/>> accessed March 12, 2016.

³ The Minerals and Mining Act No. 20 of 2007.

⁴ *supra*.

- a. **The eligibility requirements for grant of mineral titles:** it expressly provides for the qualifications of applicants for each of the various mining titles.⁵
- b. **The establishment of the Mining Cadastre Office:** it establishes the Mining Cadastre Office which is saddled with the responsibility for the administration of mineral titles and the maintenance of the cadastral registers;
- c. **The grant of a title on a ‘first come, first served’ basis:** Section 8 provides that where several applications are received at the same time or for priority overlapping areas 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 the others;
- d. **Environmental Considerations:** Section 11(1) provides that the holder of mineral title shall, in exercise of his rights under the mineral title have regard, to the effects of the mining operations on the environment and take such steps as may be necessary to prevent pollution of the environment resulting from the mining operation; and
- e. **Dispute resolution provisions:** it provides that all disputes must first be settled on an amicable basis⁶.

In summary, the MMA is a comprehensive enactment which does well to provide a practical and efficient framework for the exploration and exploitation of minerals in Nigeria.

2. The National Minerals and Metals Policy (2008) ⁷

The National Minerals & Metals Policy 2008 (the “Policy”) is a tool, developed by the MMA, for establishing the new direction of development of the sector by the

⁵ Nigerian Minerals and Mining Act, 2007, ss. 47-52.

⁶ Nigerian Minerals and Mining Act, 2007, s. 141.

⁷ The National Minerals and Metals Policy, 2008.

government. The Policy has led to the restructuring of the Ministry of Mines and Steel Development (the “Ministry”) to enhance performance and regulate the sector adequately by establishing four (4) new technical units namely the Mining Cadastre Office, Mines Inspectorate Department, Artisanal and Small-Scale Mining Department and the Mines Environmental Compliance Department.

The Policy is also designed to take active cognizance of the three tier governance structure in force in Nigeria to be used for administrative convenience. Notably, Section 6.0 of the Policy is anchored on the need to develop a private sector-led mining industry, promote participation and recognizes the private sector as the key to the development of the metal industry with the government restricting its role to that of an administrator-regulator.⁸ It highlights the need to develop a business environment where the private sector will flourish as well as take a leadership role in the development of the sector.

The Policy has the following core objectives:

- a. The Policy thrust as introduced by section 5.0 of the Policy aims to achieve a substantial increase in GDP contribution, employment opportunities and poverty reduction⁹.
- b. Section 5.0 also provides for the implementation of the policy thrust which is aimed at addressing the neglect of the past and respond to new and global developments in the mining sector and consider possible areas of future action. These include: Ensuring compliance with environmental best practices, ensuring an efficient and effective management of the Nations Mineral Resources and promote technological growth in the metals sub-sector, stimulate foreign investment, and encourage a transparent mining titles and permit regime (which is a joint responsibility of the Mining Cadastre Office, Mines Inspectorate Department, and Artisanal and Small-scale Mining department)¹⁰.

⁸ S 6.0 NMMP, 2008.

⁹ S.5.0 NMMP, 2008.

¹⁰ S5.0 NNMP, 2008.

- c. The Policy, through Section 8.1, aims to promote linkage with the National economy through the enforcement of the use of domestic metal products for the development of the nation's infrastructure¹¹.
- d. Furthermore, in boosting the economy, through Section 8.2 of the Policy, the Federal Government hopes to accelerate the export of metals and metal related mineral products so as to substantially improve the non-oil foreign exchange earnings of the country by promoting competitiveness of value added products so as to stimulate domestic and export demand of metal¹².

3. Nigerian Minerals and Mining Regulations 2011

The Nigerian Minerals and Mining Regulations (**the "Regulations"**) was issued by the Ministry. The objective of the Regulations is to establish a more coordinated and accountable solid minerals sector in the country and to stamp out the discretionary grant of mineral titles.

The Regulations set out the rules, procedures and processes for the acquisition of mineral title thereby streamlining the procedures for granting licenses to investors (both local and foreign).

Acquisition for mineral title may be obtained through any of the various mining titles which are granted by the Minister of Solid Minerals Development either through Priority application or Competitive Bidding.

4. Guidelines on Mineral Titles Application 2014

The Guidelines on Mineral Titles Application (**the "Guidelines"**) was issued by Nigeria Mining Cadastre Office (**the "Cadastre Office"**) with its most recent update being in January 2014. The Cadastre Office was established in 2007 with the responsibility of

¹¹ S8.1 NNMP, 2008.

¹² S8.2 NNMP, 2008.

administration and management of mineral titles in Nigeria in accordance with the MMA.¹³It details the different types of mineral titles, the requirements for the application of these titles as well as a detailed outlook on the application procedure and fees.

In line with Section 46 of the MMA and the Regulations, the right to search for or exploit minerals in Nigeria is governed by the following mineral titles as contained in the Guidelines:

a) Reconnaissance Permit¹⁴

The holder of a Reconnaissance Permit is granted the right to carry out reconnaissance on a non-exclusive basis, conduct reconnaissance activities in an environmentally and socially responsible manner. The holder shall however, not engage in drilling, excavation or other subsurface techniques. The permit terminates upon expiration of the term granted unless it is revoked and shall not be granted over any land that is or has become subject to an exploration license, small scale mining lease, mining lease or water use permit. The duration for this permit is for a period of 1 year and may be renewed upon satisfactory application for another 1 year¹⁵.

b) Exploration License¹⁶

The holder of an Exploration License has exclusive right to conduct exploration upon the land within the area of his license. An exploration license is granted in respect of an area not exceeding 200 square kilometers. The duration of this license is for 3 years and it may be renewed for two further periods of 2 years each so that the term and any renewal do not exceed 7 years.

¹³ Section 5 (1) Nigerian Minerals and Mining Act, 2007

¹⁴ Regs 32-34, Nigerian Minerals and Mining Regulations 2011; Guidelines on Mineral Titles Application, Nigeria Mining Cadastre Office, Guideline 2.1.

¹⁵ Guidelines on Mineral Titles Application, Nigeria Mining Cadastre Office, Guideline 2.1.

¹⁶ Regs 35 - 44 Nigerian Minerals and Mining Regulations 2011; Guidelines on Mineral Titles Application, Nigeria Mining Cadastre Office, Guideline 2.2.

c) Small Scale Mining Lease¹⁷

The holder of a Small Scale Mining Lease is granted the right to conduct artisanal operations which do not involve the use of extensive and continued use of explosives, toxic chemicals or agents. The duration of this lease is for a period of 5 years and may be renewed upon application for another term of 5 years.

d) Mining Lease¹⁸

The grant of a Mining Lease to a prospective company is subject to proof of economic reserve of the mineral commodity for which a concession is sought. To obtain this lease, the company makes an application to the Minister of Solid Minerals Development who grants and issues it a Mining Lease for the purposes required within forty-five days of such application¹⁹. The duration of this lease is 25 years, and shall be renewable every twenty-four years; provided that the holder thereof has complied with his minimum work obligation commitments; and all other requirements of the MMA and its Regulations have been met²⁰.

e) Quarry Lease²¹

A quarry lease is granted in respect of a land area not exceeding 5 square kilometers. It confers on its holder the right to carry out quarrying operations on the land within the area of the lease and to remove and dispose of any quarriable mineral specified in the lease. Quarriable minerals are defined under the act as being- asbestos, china clay, fuller's earth, gypsum, marble, limestone, mica, pipe clay, slate, sand, stone, late rite, gravel, etc.²² The duration of this lease is a 5 year period which may be renewed every

¹⁷ Regs 45 - 55 Nigerian Minerals and Mining Regulations 2011; Guidelines on Mineral Titles Application, Nigeria Mining Cadastre Office, Guideline 2.5.

¹⁸ Regs 56 - 66 Nigerian Minerals and Mining Regulations 2011; Guidelines on Mineral Titles Application, Nigeria Mining Cadastre Office, Guideline 2.3.

¹⁹ S65 Minerals and Mining Act 2007.

²⁰ S66 Minerals and Mining Act 2007.

²¹ Regs 67 - 76 Nigerian Minerals and Mining Regulations 2011; Guidelines on Mineral Titles Application, Nigeria Mining Cadastre Office, Guideline 2.4.

²² S75 Minerals and Mining Act 2007

five years provided such application for renewal is made within 3 months before the expiration of the existing license²³.

f) **Water Use Permit²⁴**

This is a right granted to a mining title holder to obtain water for use in mining exploration and exploitation. The permit is granted for the period for which the mining title is granted.

5. **Nigerian Extractive Industries Transparency Initiative (NEITI) Act**

The Nigerian Extractive Industries Transparency Initiative Act (**the “NEITI Act”**) 2007 was enacted to ensure due process and transparency in the payments made by companies operating in the Nigerian extractive industry to the federal government.

A major component of the on-going anti-corruption reform in Nigeria, it is the national version of the Extractive Industries Transparency Initiative (**EITI**), which is a global movement aimed at ensuring that extractive resources aid sustainable development.

The NEITI Act provides for the establishment of the Nigerian Extractive Industry Transparency Initiative (**NEITI**) charged with the responsibility among other things, for the development of a framework for transparency and accountability in the reporting and disclosure by all Extractive Industry companies of revenue due to or paid to the Federal Government.

²³ Guidelines on Mineral Titles Application, Nigeria Mining Cadastre Office, Guideline 2.4.

²⁴ Regs 77 - 86 Nigerian Minerals and Mining Regulations 2011; Guidelines on Mineral Titles Application, Nigeria Mining Cadastre Office, Guideline 2.6.

B. OTHER SOURCES OF LAW RELATING TO THE MINING OF SOLID MINERALS IN NIGERIA

1. 1999 Constitution of the Federal Republic of Nigeria

Mines and Minerals are currently on the Exclusive Legislative List, under the 1999 Constitution of the Federal Republic of Nigeria (as amended) (the “**Constitution**”)²⁵. Therefore, the federal government has exclusive powers and jurisdiction on all matters relating them. Also, all taxes and royalties derived from mining go to the federal pocket rather than the individual States’ from whose territory mining occurred.

Section 43 of the Constitution provides that every citizen has a right to acquire and own property anywhere in Nigeria. However, this is a qualified right as further explained in Section 44 which although prohibits compulsory acquisition of property, states that ownership and control of minerals under or upon any land in Nigeria vests in the Federal Government. Therefore, any land previously owned by a citizen may be revoked in the event that minerals are found upon the land.²⁶

Finally, by section 251 of the Constitution, in civil causes and matters connected to mines and minerals, the Federal High Court shall have and exercise jurisdiction to the exclusion of any other court.

The Constitution does well to provide the jurisdiction for dispute resolution as above stated. However, its shortcoming is in the vesting of exclusive power in the federal government as this discourages the State Governments from devoting their resources in the development of mining activities in their individual states. The resulting effect of this

²⁵ Item 39, Exclusive Legislative List, Part I, Second Schedule to the 1999 Constitution of the Federal Republic of Nigeria (as amended).

²⁶ See also, **Section 28 Land Use Act 1978** which makes it lawful for the Governor to revoke a right of occupancy for overriding public interest.

is the reality that Nigeria does not earn as much revenue as it could from its variety of solid minerals.²⁷

2. Land Use Act²⁸

The Land Use Act²⁹ (the “LUA”) vests all the land comprised in the territory of each state in the Governor of the state with the exception of land that has been vested in Federal government or its agencies.

It regulates access to land for mining by virtue of Section 28 (1) (c) which provides that the Governor of a state can revoke a right of occupancy for an overriding public interest. Therefore, where a mineral deposit is found to be in commercial quantity in an area of land, there is an overriding public interest in that land which shall revoke the certificate of occupancy.

Similarly, Section 22 (2) of the MMA provides that where a mining lease or quarry lease is granted over a land that is subject to an existing statutory or customary right of occupancy, the governor of the state within such rights are granted, shall within 60 days of such grant or declaration revoke such right of occupancy in relation to section 28 of the land use act. The prior titleholder of that land would however be compensated.³⁰

3. The Environmental Impact Assessment Act

The Environmental Impact Assessment Act³¹ (the “EIAA”) makes it mandatory to conduct an Environmental Impact Assessment (EIA) in respect of any proposed project

²⁷ Kunle Olasanmi & Ruth T. Natsa, ‘Investigation: Why Nigeria Earns Low Revenue from Solid Minerals’ (Leadership Nigeria, July 16 2015) <www.leadership.ng/news/447370/investigation-why-nigeria-earns-low-revenue-from-solid-minerals> accessed 10 March 2016.

²⁸ Land Use Act 1978.

²⁹ *supra*.

³⁰ Nigerian Mineral and Mining Act 2007, s. 70 (7).

³¹ Environmental Impact Assessment Act Cap E12 LFN 2004.

or activity. More specifically, the EIAA places a restriction on commencing any public or private project without prior consideration of the likely environmental effects³².

Further to this, projects on the mandatory study list, which includes mining, are expressly prohibited from being carried out without the Nigerian Environmental Protection Agency taking a decision or issuing an order that the project can be carried out with or without conditions.³³

At the debut of such a project, there must be a community development agreement between the lessee and the host community. Subsequently, the lessee must submit an Environmental Impact Assessment as well as an Environment Protection and Rehabilitation Program containing details of environmental regulation to the Mines Environmental Compliance Department (MECD).³⁴

The strength of the EIAA lies in the fact that it provides for the consultation and consideration of public consultation in relation to mining activities as such projects have numerous socio-economic implications. However, there MECD must do better to publish the resulting reports from the investigations made after public consultation. This is suggested in order to prove that the objectives for which the Act was established are achieved.

4. **The Company and Allied Matters 2004**³⁵

The Companies and Allied Matters Act 2004 (“CAMA”) regulates company formation and operation in Nigeria and provides that no foreign company may carry on business in Nigeria unless it incorporates a local subsidiary in the country. The MMA incorporates this by providing that no person shall be qualified for the grant of any mining title unless the person is a body corporate duly incorporated under CAMA.

³² S.2 Environmental Impact Assessment Act 2004.

³³ S.12 Environmental Impact Assessment Act 2004.

³⁴ See S.116, Minerals and Mining Act 2007.

³⁵ The Companies and Allied Matters Act, CAP C20, LFN, 2004

5. Companies Income Tax Act (CITA)³⁶

The following taxes are required to be paid by a mining company: corporate income tax; education tax; personal income tax of its staff; value-added tax; capital gains tax; and withholding tax.

Companies involved in mining activities are assessed to tax under the **Companies Income Tax Act (CITA)**. However, individuals and partnerships engaged in mining activities are liable to tax under the **Personal Income Tax Act (PITA)**.³⁷

CITA provides for the following fiscal and tax incentives:

- a. In determining its total profits, a license holder is entitled to deduct from its assessable profits a Capital Allowance of 95% of Qualifying Capital.
- b. 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.
- c. Infrastructure costs incurred regardless of ownership or replacement. The amount of any loss incurred by a license holder shall be deducted as far as is possible from the assessable profits of the first year of assessment. The loss incurred cannot be made from such amounts of 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.

³⁶ Companies Income Tax Act, CAP 60, LFN, 1990

³⁷ Personal Income Tax Act 2011, CAP P8, LFN, 2004

In addition to the above, there are payments that must still be made by interest holders to the government. The Regulations state that the holders of all titles, apart from reconnaissance permit holders, are required to pay royalties to the state as well as other taxes.

Royalties are calculated *ad valorem* ranging from 3 per cent to 5 per cent depending on the type of mineral. However, Section 33 of the regulations provides that the minister may reduce or waive the royalty if he is satisfied that the mineral being mined or explored is exported solely for experiment or analysis in a reasonable quantity. The only tax payable by a mining company which is less than the royalty is the Education Tax (EDT); it is calculated on a 2 per cent basis.

6. Nigerian Investment Promotion Commission Act³⁸

This Nigerian Investment Promotion Commission Act (**the “NIPC Act”**) was enacted to establish the Nigerian Investment Promotion Commission, to encourage and promote investment in the Nigerian Economy, and for matters connected therewith.³⁹

Section 29 (2) of the MMA provides that the specifications of the NIPC Act shall apply to any foreign investment made in respect of any mineral title granted pursuant to this act. By virtue of this, the provisions of the NIPC Act that apply to foreign investors, shall also apply to same who have made investments in respect of any mineral titles.

The NIPC Act is particularly useful in the area of dispute resolution as regards to solid mineral mining. The MMA provides in section 141 that where a dispute is not settled amicably the provision of the NIPC should be applied.⁴⁰ As a result, all disputes that arise between an investor and any government of the Federation in respects of an enterprise, efforts shall be made through mutual discussions to reach an amicable settlement.⁴¹

³⁸ Nigerian Investment Promotion Commission Act 1995, CAP N117, LFN, 2004

³⁹ S.1, NIPC Act 1995

⁴⁰ S.141, MMA Act 2007

⁴¹ S. 27 (2) (a)-(c) NIPC Act 1995

If the dispute is not amicably settled through mutual discussions, it may be submitted at the option of the aggrieved party to arbitration as follows:-

- a. In the case of a Nigerian investor, in accordance with the rules of procedure for arbitration as specified in the arbitration and conciliation act;
- b. In the case of a foreign investor, within the framework of any bilateral or multilateral agreement on investment protection to which the federal government and the country of which the investor is a national are parties; or
- c. In accordance with any other national or international machinery for the settlement of investment disputes agreed on by parties.

However, where in respect of 'any' dispute, there is disagreement between the investor and the Federal Government as to the method of dispute settlement to be adopted, the International Centre for Settlement of Investment Dispute (**the "ICSID"**) Rules shall apply. This option for international investors has limitations because ICSID arbitration is only possible if the party voluntarily submits to it.

Conclusion

The Nigerian economy is largely dependent on oil and over the years, non-oil minerals have played relatively weak roles in the economy. However, the current global economic downturn, in particular the instability of oil prices in the international market, has compelled the Nigerian government to reduce the risk of over-dependence on oil by paying considerable attention to solid mineral development. Nigerian mining has tremendous potential for economic development.

In improving the role of solid minerals in Nigeria's economy, the Honourable Minister for Solid Minerals Development, Dr. Kayode Fayemi, has deemed it fit to constitute and inaugurate a committee to formulate a road map that identifies the goals, gaps, actions and

time lines that will stimulate the growth of the mining sector. This committee was inaugurated on the 1st of March 2016, comprising of 17 members. Its responsibilities include of 1) Identifying hindrances to the development of the mining industry of Nigeria; 2) Developing case studies of similar developing mining countries in which scenarios such as Nigeria's exist and drawing lessons from other relevant mining jurisdictions; 3) Identifying strategies to overcoming existing hindrances, 4) Prioritising activities and providing a timeframe for all activities including Proposed Action Plans to actualize the strategies; 5) Defining mechanisms for implementation and performance monitoring with clear indicators; 6) Developing contingency scenarios & risks analyses; 7) Developing a communication strategy for consultation and engagement of all stakeholders in the industry, including states, communities and other ministries (e.g. environment and power).

In conclusion, with the existing framework and the innovative inauguration of the Committee by the Honourable Minister, the future of the Nigerian Mining of Solid Minerals Industry has abundant prospects in the foreseeable future.

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