



## ENERGY & INFRASTRUCTURE GROUP

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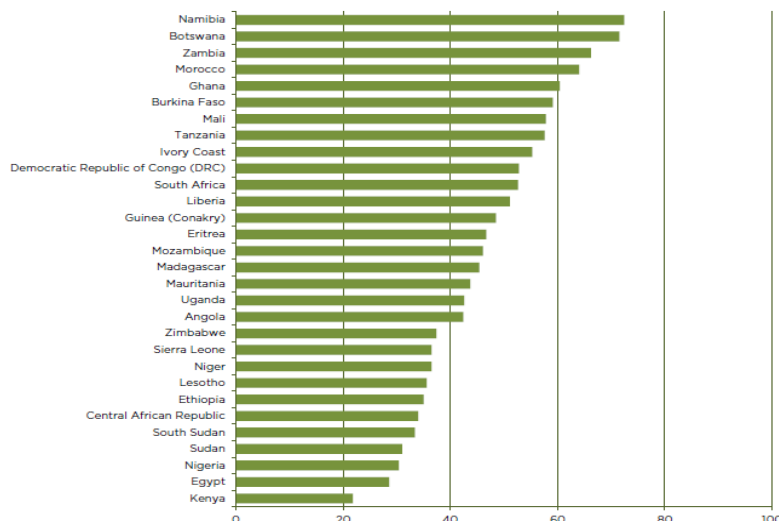
### THE LEGAL AND REGULATORY FRAMEWORK FOR MINING IN NIGERIA: A CATALYST FOR INVESTMENT

There is no gain saying that Nigeria is richly endowed with various mineral deposits. As at the last count, the Ministry of Mines and Steel Development ("Ministry") has identified about 44 different mineral occurrences across the country notable amongst which are Coal, Iron, Lead and Zinc ores, Gold and Columbite.

Despite these vast mineral deposits, the mining sector remains unharnessed and presently contributes less than 1% to the nation's GDP. This of course has not always been the case, in the 1950's and 60's mining contributed significantly to the growth and development of Nigeria. This contribution was unfortunately truncated by the indigenization policies of the 1970's which led to decades of stagnation and neglect of the sector with virtually all Transnational Mining Companies (TMC's) operating in the country withdrawing both their technical and financial resources.

The Fraser institute of Canada in its survey of leading mining companies on the mining investment attractiveness for African countries ranks Nigeria third from the bottom (see Figure 1 below). Additionally, the World Bank in its forecast for mining investments for the years 2000 – 2020 does not forecast any major mining investment coming to Nigeria. This is despite the fact that mining projects are not as capital intensive as oil & gas projects.

Figure 1: Investment Attractiveness Index for Africa<sup>1</sup>



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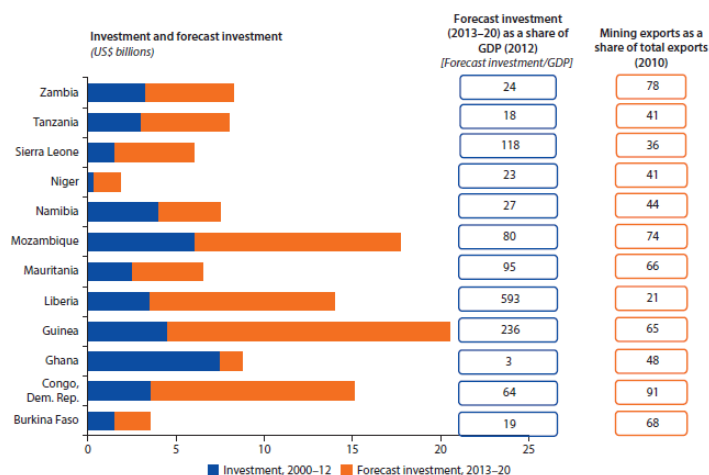
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<sup>1</sup> Source: Fraser Institute Annual Survey of Mining Companies, 2014

Figure 2: Mining Investment, Current and Forecast, 2000 - 2020<sup>2</sup>



Source: Based on World Bank 2012.

Note: The investment figures are averages across a range. For Mozambique, forecast investment excludes natural gas.

Typically, the capital required for mining projects vary dependent on various factors such as the type of minerals sought to be mined, the precise location of the proposed mine, terrain of the mine site, foreign exchange rate, labour, fuel supply and equipment. As an example, the costs for the development of the Kalana open pit gold mine located in Mali with an output of 1.46m ounces of gold over a mine life of 14 years is estimated to be USD\$187m in comparison to the much larger and controversial Republic of Guinea's Simandou iron ore project with an output of 100mt per annum over 40 years, the development of which is estimated to cost over USD\$18bn. These figures when juxtaposed with the USD\$33B spent on the development of Bonga, Nigeria's biggest oil find offshore Nigeria buttresses the fact that mining is not as capital intensive as oil production .

Having identified the level of investment typically required for mining projects, a pre-requisite for any mining investor is a clear and unambiguous legal and regulatory framework. Major considerations for any investor under this head are licensing and permit requirements; conversion of exploration rights to mining rights; duration of mining licences; ownership of mined minerals; access to mining sites and trespass; and taxes and royalties. Given the myriad of legal and regulatory issues of concern to an investor seeking to embark on a mining project, it is important to provide an insight into the legal and regulatory framework of the Nigerian mining sector so as to see how same can serve as a catalyst to attracting foreign direct investment to the solid minerals sector.

#### LEGAL AND REGULATORY FRAMEWORK OF THE NIGERIAN MINING SECTOR

The principal legislation governing the mining sector is the Minerals and Mining Act of 2007 ably supported by the Minerals and Mining regulations of 2011. Prior to the passage of the Act, the sector was largely neglected and unregulated. The various public mining institutions had overlapping jurisdictions making application for mining titles cumbersome and unnecessarily expensive. The weakness of these mining institutions meant a dearth of accurate geological data and statistics in identifying mining prospects and the lack of any fiscal incentives was a turn off for any foreign investor.

The Act and the regulations have since introduced a better regulated sector and provided an attractive investment climate for foreign investors seeking to invest in the mining sector. We now have a transparent licensing regime with titles issued on a first come first serve basis and with the introduction of a Mining Cadastre Office we have up to date data and information on the available mining titles.

In terms of regulatory responsibilities, our mining laws and regulations create various offices and prescribe their roles and responsibilities. These are as follows:

<sup>2</sup> Source: The Power of the Mine - A Transformative Opportunity for Sub-Saharan Africa, 2015.

*"The conservation of our natural resources and their proper use constitutes the fundamental problem which underlies almost every other problem of our national life" - Theodore Roosevelt*

### **1. The Ministry of Solid Minerals:**

The Minister of Mine and Steel Development is vested with the overall administration of the mining industry. He oversees the sustainable development of minerals resources through the creation of an enabling environment for private investors.

### **2. The Mining Cadastre Office (MCO)**

The MCO was established for the purposes of administering mineral titles and maintaining cadastral registers. Other functions of the MCO include but are not limited to: considering applications for mineral titles and permits; issuing, suspending and revoking mineral titles; receiving and disposing of applications for renewal, extension of areas of, transfer and relinquishment of mineral titles; maintaining a chronological record of all applications in respect of mineral titles; and maintaining a priority book and general registry book.

### **3. Mines Inspectorate Department (MID)**

The MID has the sole duty of supervising all reconnaissance, exploration and mining operations for the purposes of ensuring that they comply with the provisions of the Act. Other functions of the MID include: supervising and enforcing compliance by mining title holders with all mining regulations relating to health and safety, conducting investigations and inspections necessary to ensure that all conditions relating to grant of mineral titles as well as the requirements of the Act are complied with, and review programs for controlling mining operations for recommendation to the Minister.

### **4. Mines Environmental Compliance Department (MECD)**

The MECD has various responsibilities which include monitoring and enforcing compliance with all environmental requirements imposed by the Act and the Regulations, periodical audit of all environmental requirements provided by the Act, the Regulations and any other law for the purposes of making recommendations on same to the Minister, and review of all plans, studies and reports on the mining environment prepared by holders of mineral titles.

### **5. Artisanal and Small-Scale Mining Department (ASSMD)**

The ASSMD has the responsibility of assisting, and supporting small scale and artisanal mining operations in the country. Other functions of the ASSMD include provision of extension services to small-scale and artisanal mining title holders, and assisting artisanal and small-scale miners to access the Solid Mineral Development Fund established by the Act.

As a precursor to discussing the various mining rights and titles which may be available to a private investor, it is important to note that though ownership of minerals in, under and or upon any land in the Federal Republic of Nigeria vests in the Federal Government, title in the mineral resources passes to the person who lawfully wins and recovers same in accordance with the provisions of the Act. Thus a foreign investor may, in accordance with the Act, acquire mining rights through an application to the MCO. These rights are usually granted on a priority basis but exploration licences and mining leases may also be granted through a competitive bidding process for brownfield mining assets. A mining title can be granted to an applicant who is an individual, a company or a mining co-operative.

The following are the different mining titles that a private party may acquire for the exploration and exploitation of mineral resources in Nigeria:

#### **(a) Reconnaissance Permit:**

This permit allows, on a non-exclusive basis, reconnaissance activities on all land within Nigeria that is available for mining operations. The permit is issued and valid for a period of 1 (One) year and may be renewed upon satisfactory application for renewal of same. This permit does not cover land which is already the subject of a mining exploration licence, small scale mining lease, mining lease quarry lease, or water use permit.

**(b) Exploration Licence:**

The Exploration licence permits the holder to exclusively conduct exploration activities on a land area not exceeding 200 square kilometers and which is not subject to an existing exploration licence, mining lease or small scale mining lease. The licence is granted for a 3 (Three) year term and is renewable for two consecutive periods of 2 (Two) years each subject to the title holder having fulfilled his minimum work obligation commitment and other relevant requirements of the Act. The holder of an Exploration Licence has the exclusive right to apply for and be granted, subject to the provisions of the Act, one or more Small Scale Mining Lease, Mining Lease, or Quarry Lease in respect of any part of the Exploration Licence area.

**(c) Mining Lease:**

The mining lease confers on the holder, amongst other rights, the exclusive occupation and use of the licence area for the purposes of exploring and exploiting mineral resources. The duration of a mining lease is usually for the term applied for by the applicant but not exceeding 25 (Twenty-Five) years in the first instance and may be renewed for another 25 (Twenty-Five) year period subject to satisfactory compliance with the minimum work obligations and any commitments which may be specified by the MMSD.

Mining lease is granted over an area of land not exceeding 50 square kilometers and the lease holder is not permitted to commence work in the area until after it has submitted to the MECD all environmental impact assessment studies and mitigation plans required under applicable environmental laws and has procured MECD's approval for same, concluded a Community Development Agreement approved by the MECD with relevant communities, and has paid all necessary compensation as required by the Act. A holder of a mining lease has the right to export and sell minerals won subject to other requirements for such export and sale.

**(d) Small Scale Mining Lease:**

The small scale mining lease allows the holder of the lease to conduct artisanal mining operations which does not include the extensive and continued use of explosives, toxic chemicals or agents on an area of land not less than 5 acres but not exceeding 3 square kilometers. The holder of a small scale mining lease is not allowed to employ more than 50 workers in a typical work day and not allowed to have underground workings more than 7 meters below surface nor galleries extending more than 10 meters from a shaft. Small scale mining lease is granted for a period of 5 (Five) years and may be renewed for further terms of 5 (Five) years and there is no limitation to the number of renewal.

**(e) Quarry Lease:**

A quarry lease is granted for the quarrying of all quarriable minerals such as asbestos, china clay, gypsum, marble, limestone, sand, stone and gravel as may be specified in the lease. The quarry lease is granted in respect of an area not exceeding 5 square kilometers for a period of 5 (Five) years which may be renewed for further terms each of 5 (Five) years and there is no limitation to the number of renewal.

**(f) Water Use Permit:**

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 relevant mining title is granted.

The Act introduces a number of elements in relation to Mineral titles and these include consolidation and conversion. All mineral titles, save for the reconnaissance permit can be consolidated. All such titles sought to be consolidated must be the same in nature and the areas they cover should be contiguous to each other. Additionally, the Act provides that mineral titles such as a Small Scale Mining Lease and/or Quarry Lease can each be converted to Mining Lease where the holder of such title is so qualified

under the Act and the Regulations to hold a Mining Lease. Under the Act, Mineral titles are also transferable subject to the approval of the Minister and the subsequent registration of such transfers with the MCO and rights arising from a mineral title or permit can be wholly or partially assigned, sub-leased, pledged, mortgaged, hypothecated or subject to any security interest.

The Act also provides that Mineral titles can be revoked in instances where the holder is convicted of an offence by a court of competent jurisdiction, breaches any provisions of the act or regulations made pursuant thereto, is declared insolvent or bankrupt by a court of competent jurisdiction, in the case of a small scale mining lease holder or mining lease holder, they discontinue operations for a continuous period of 6 months. A mineral title stands revoked upon the written advice of the Minister and after 30 days notice of intention to revoke the title has been served on the holder and said holder has failed or neglected to remedy such breach or remove the grounds for revocation.

### ***FISCAL INCENTIVES OF THE NIGERIAN MINING SECTOR***

Of paramount importance to any mining investor are the fiscal regime and tax incentives of the host country. Under Nigerian mining laws, a mining project is entitled to enjoy various tax advantages, incentives and benefits as follows:

- In determining total profits, a licence holder is entitled to deduct from his assessable profits Capital allowance of 95% of qualifying expenditure incurred in the year in which the investment was made on all certified exploration, development and processing expenditure including feasibility studies; sample assaying costs; and infrastructure costs;
- 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 and thereafter in the year 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 (4) years after which the period any unregistered loss shall lapse;
- Exemption from customs and import duties on approved plants and machinery, equipment and accessories imported specifically and exclusively for mining operations;
- Tax holiday for the first 3 years of operation which period may be extended for another 2 years. The Tax relief begins to accrue on the commencement of operations. This is at odds with CITA which only grants tax holiday of 3 years without any option of extension;
- Expatriate Quota and resident permit in respect of expatriate quota personnel;
- Personal remittance quota to expatriate personnel for the transfer of foreign currency out of Nigeria;
- Free transferability of dividends or profits;; payments in respect of servicing a certified foreign loan; and foreign capital in the event of sale or liquidation of mining operations in any convertible currency;
- The Central Bank of Nigeria(CBN) may permit a title holder who earns foreign exchange from the sale of its 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 mining operations which would otherwise not be readily available without use of such earnings;
- Grant of investment allowance of 10% on qualifying plant and machinery;
- Tax deductible for environmental cost;
- Tax deductible for pension funds for employees of mining companies;

- Annual Capital Cost Indexation-unclaimed balance of capital cost shall be increased yearly by 5% for mines that start production within 5 years from the date of enactment of the Act;
- Deferment of royalty payments on any minerals for a specific period on the approval of the Federal Executive Council; and
- The investor may also be entitled to claim an additional rural investment allowance on its infrastructure cost. This is however dependent on the location of the company and the type of infrastructure provided.

Figure 3: Fiscal incentives in Nigeria compared to other African jurisdictions.

|                 | Capital Allowance | Exemption from import duties | Tax relief/holiday | Retain & use earned FX | Personal remittance quota | Free transferability of FX | Deferred Royalty payment | Carryover of losses | Expatriate quota |
|-----------------|-------------------|------------------------------|--------------------|------------------------|---------------------------|----------------------------|--------------------------|---------------------|------------------|
| <b>Nigeria</b>  | ✓                 | ✓                            | ✓                  | ✓                      | ✓                         | ✓                          | ✓                        | ✓                   | ✓                |
| <b>Ghana</b>    | ✓                 | ✓                            | x                  | ✓                      | ✓                         | ✓                          | x                        | x                   | ✓                |
| <b>Tanzania</b> | ✓                 | ✓                            | x                  |                        | x                         |                            | ✓                        | ✓                   |                  |

From the above and in comparison to other African mining jurisdictions, the fiscal regime for mining investment in Nigeria is amongst the most favorable globally.

The legal and regulatory regime of the solid mineral sector also seeks to protect investment made in the sector and this is achieved through a number of statutory instruments to wit: the Nigerian Investment Promotion Commission Act, which guarantees an investor the unconditional transfer through an authorized dealer in freely convertible currency, its profits or dividends accruing from the investments; payments to service foreign loans; and proceeds from the sale or liquidation of the investment enterprise; it also provides that disputes between an authorized mining investor and any Federal State or Local Government in Nigeria may be settled by negotiation or arbitration in accordance with (i) a procedure specified in the Arbitration and Conciliation Act, (ii) the framework of any bilateral or multilateral agreement on investment protection entered into by the Federal Government of Nigeria and the investor's home country, or (iii) any other contractually agreed dispute settlement machinery.

Furthermore, Nigeria is also a signatory to a number of bilateral investment treaties aimed at protecting Foreign Direct Investments in all sectors of the Nigerian economy.

#### **FACTORS IMPEDING DEVELOPMENT OF THE MINING SECTOR**

Given that the Nigerian legal and regulatory framework meets all the major considerations of a mining investor, it is difficult to understand why the survey conducted by the Fraser Institute ranks Nigeria so low and the World Bank's forecast for mining investment in Nigeria between the years 2000 and 2020 is nil. This may not be unconnected with the following:

- Security:** Majority of the naturally occurring minerals are located in the schist belt which covers an extensive part of Northern Nigeria where the present insurgency is being experienced. Security is one of the main risks to any mining investment as it has a bearing on the overall cost of the project. As the government improves the security situation in these parts of the country, mining juniors and TMC's may begin to refocus their attention to Nigeria.
- Funding:** There is a challenge of funding mining projects. Mining projects have long lead times and as such require long term capital which simply is lacking in Nigeria presently. Perhaps with the introduction of the single treasury account and limitation of focus on short term funds, banks may be forced to start providing longer term funding to sectors such as the mining sector.
- Infrastructure:** The lack of adequate infrastructure is also a challenge to any mining investor. The mineral deposits in Nigeria are too distant to the ports for the export market and there is presently very little domestic use for the minerals presently being produced. The railway system is archaic and in need of a complete overhaul to be able to serve the sector. In the absence of a

functional railway system, Nigeria won't see any major mining investment in the immediate future. It is crucial to begin to look at various models of how the needed transportation infrastructure for mining activities can be provided. One model could be the use of Public Private Partnership to deliver multi-client/multiuser mining related rail infrastructure in Nigeria. The pension funds are also a veritable way of funding the infrastructure investment for the sector.

- (d) **Illegal Mining:** Illegal mining contributes to about 60% of the mining activities in Nigeria. This is perhaps the biggest challenge to the mining sector (currently statistics made available by the MMSD allege that over \$1b has been lost as a result of illegal mining in Nigeria over the last two years). However, the loss of revenue is not the only byproduct of illegal mining as same also results in the degradation of the environment and loss of human life mainly from lead poisoning.
- (e) **Political and Economic Risk:** Nigeria has witnessed 16 years of uninterrupted democratic rule and more recently the transition of power from a ruling party to an opposition party. This clearly signifies political stability to any foreign investor seeking to invest in the solid mineral sector. The ongoing devaluation of the Naira poses its own hindrance to investment but there are ways of addressing currency risks in mining projects and this includes currency hedging.

### **RECOMMENDATIONS FOR THE SECTOR**

There are a number of recommendations and these include:

1. The urgent need to improve on the funding of the public mining institutions so as to ensure effective monitoring and regulation of mining activities;
2. The spate of illegal mining must vastly reduce so as to ensure order and prevent environmental degradation and loss of life;
3. The Federal Government must as a matter of urgency address the security situation in the northern region of Nigeria which is ore rich;
4. Enforcement of the "use it or lose it principle" with respect to licences which are not utilised within a specific timeframe;
5. Improved mining related transport infrastructure through Public Private Partnerships;
6. Identify a specific set of minerals to promote through roadshows showcasing the potential of mining these minerals in Nigeria; and
7. Privatisation through competitive bidding of existing Federal Government mining properties as a means of kick starting the sector.

In conclusion, Nigeria being the largest economy in Africa, with a population of 170 million inhabitants to provide skilled and unskilled labour and a transparent legal and regulatory framework offering some of the best fiscal incentives in the global mining industry, offers attractive mining investment opportunities to the discerning investor.

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