



## RESEARCH ARTICLE

### CRITICAL ASSESMENT OF THE FISCAL INCENTIVES PROVIDED IN THE MINERAL AND MINING ACT OF 2007

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#### ABSTRACT

The mining sector has been identified as a priority sector to the nation's diversification drive. The sector, no doubt, holds great potentials for substantial increase in national income and export. The mining sector has critical backward and forward linkages with other sectors: modern industrial activities revolve around minerals and metals. In recognition of the potentials of the mineral sector, the Nigerian government officially declared the year 2007 as Minerals and Mines Year (MAMY). It further enacted the Nigerian Mineral and Mining Act 2007 and operationalized the Act in 2009 through the National Minerals and Metals Policy. However, the performance of the Nigerian mining sector has been far below the performance projections: in 2016, it was reported that the mining sector contributed only 0.13% of GDP and 0.16% of non-oil export. Since the operation and performance of the mining sector is largely contingent on the legal, institutional and regulatory framework, this study examined the NMMA with a view to evaluating its provisions. This study critically assesses the fiscal incentives provided in the Mineral and Mining Act 2007 with the aim of determining how well the incentives have stimulated the growth and development of the sector and the economy at large. The findings indicate that the greatest problem facing the Nigerian mining sector is poor enforcement of the Mining Act. The study also reveals that the Act inadvertently reinforces the operation of illegal miners through its stringent licensing conditions. The implication of this is gross revenue loss to the government and non-compliance with EIA requirement. The study therefore recommends that the Act be reviewed to accommodate the NEITI principles which would enhance transparency in the mining sector. It is also recommended that the Act be reviewed to allow for grant of license to cooperative societies as a mitigant to illegal mining operation. Given that foreign direct investment to the mining sector is relatively low despite the attractive fiscal incentives provided in the Act, it is also recommended that the nation takes pragmatic step to minimize rising economic, political and security risks, boost infrastructural development and stop illegal mining.

#### INTRODUCTION

Solid mineral mining is the world's second oldest industry after agriculture<sup>1</sup>. Mining is a global industry, contributing to both national and global economic growth for over 100 years. There is overwhelming evidence that mining activities contributes significantly to the economic development of nations through wealth creation and contribution to gross domestic products (GDP). Few examples of countries considered in terms of the contribution of mining to their GDP include Canada, Ghana, Botswana, DRC, South Africa and Nigeria. For instance, in Canada, mining is one of the most important economic sectors and a major job creator. For example, in Canada, about 375,000 people work in the mining and processing industries. Mining contributed \$36 billion to the country's GDP and 29% of the value of exports in 2015. It also earned \$84 billion in taxes and royalties to the government<sup>2</sup>.

Similarly, in South Africa, minerals value chain is a key source of revenue. The South Africa mining sector absorbs over five hundred thousand direct workers and another additional five hundred indirect jobs. It also contributes 8.6% to GDP<sup>3</sup>. In Nigeria, solid mineral constitute production input in most sectors. In other words, solid mineral has critical value chain that crystalizes its importance for economic development. Key sectors of the economy such as oil, construction, agriculture, steel, manufacturing and cement need one form of solid mineral or another<sup>4</sup>. There is no doubt that Nigeria is endowed with vast reserves of solid minerals. Almost all corners of Nigeria is blessed with solid mineral assets. Presently there are deposits of tin, limestone, coal, columbite, iron, pottery clays, gild, lead, zinc, oil gas Marbles etc. in various parts of the country.

<sup>3</sup><http://www.brandsouthafrica.com>; accessed on 19 March, 2019

<sup>4</sup>Report of the Vision 2020 National Technical Working Group on Minerals and Metals Development, July 2009, Abuja, Pg. 42

<sup>1</sup>Amponsah-Tawaih, K. & Dartey-Baah, K., p.62.

<sup>2</sup><http://mining.ca>. Accessed on 19 March, 2019

However, mineral mining in Nigeria has been underutilized. For example, the contribution of the sector to the GDP was 0.22% in 2001 and 0.28% in 2006. The total production of solid mineral for the year 2016 was 41,874,611.02 tons, valued at N34.09 billion as declared by the government. However, the total production (and market value) in 2015 and 2014 were 38,674,273.67 tons (N25.6 billion) and 36,208,370.16 tons (N20.6 billion). This placed its contribution to GDP at 0.15%, 0.14% and 0.13% for 2014, 2015 and 2016 respectively<sup>5</sup>. In an attempt to increase ensure improved performance of the mining sector, the Nigerian government enacted several laws and regulatory frameworks. One of such legal frameworks in the mining sector is Nigerian Minerals and Mining Act 2007 (NMMA). Nigerian Minerals and Mining Act 2007 (NMMA) amongst other things provides for several fiscal incentives aimed at promoting mining activities in Nigeria. Most developing countries use fiscal incentives to attract investors to their priority sectors. The fiscal incentives provided by the NMMA include capital allowances, deductible loss, custom and import duties exemptions, Expatriate quota and resident permit, preferential treatment on foreign exchange permit, various tax reliefs and Annual Capital Cost Indexation. Despite the various fiscal incentives provided by the NMMA, it appears that investment in the mining sector is below the expected threshold. The underperformance of the mining sector has necessitated a re-examination of the fiscal incentives provided in the NMMA 2007. It is against this backdrop that this study examines the fiscal incentives provided in the NMMA 2007 with a view to understanding the structure, adequacy and encumbrances of the fiscal incentives.

This paper employs doctrinal research procedure. Under the doctrinal method, both primary and secondary source documents were examined. The main primary source of documents analysed, include the Constitution of the Federal Republic of Nigeria and Nigerian Minerals and Mining Act, 2007. The secondary source of documents used for the research under the doctrinal method, include published and unpublished works of scholars in this relevant area. These are for example books, journals, articles, seminar papers, dissertation/thesis, newspapers and magazines. The rest of the paper is organised as follows. Section 2 examines the enactment of the Nigerian Minerals and Mining Act of 2007. It also traces the development and regulation of mineral and mining activities in Nigeria from historical perspective. In section 3, the various fiscal incentives in Nigerian Minerals and Mining Act of 2007 were critically analyzed. It also highlights the fiscal incentive regimes in other climes, especially African countries within the context of comparative analysis. Section 4 focuses on the implication of mining activities for the environment. It examines the legal and regulatory provisions for environmental provisions as enshrined in the Nigerian Minerals and Mining Act of 2007. Finally, section 5 presents the conclusion and recommendations of the study

## Historical Development of Minerals and Mining Regulations in Nigeria

**Mineral and Mining Regulatory Framework Prior to the Enactment of Nigerian Minerals and Mining Act of 2007:** Historically, the mining of minerals resources in Nigeria is dated far back beyond the amalgamation of Nigeria in 1914

when Nigeria became one nation. For instance, the extraction of tin dates as far back as 500 BC, where the Nok culture of the Benue/Northern Zaria areas of Nigeria were understood to have knowledge of iron smelting. Also, the famous exploit of the Benin Bronze casting in Ile-Ife was around 1400 AD, under the rule of Oba Ogunta, the Sixth king of Benin. Later, early European explorers located and informally mined tin, galena, gold, and other minerals that could be traded internationally. However, records show that organised modern exploration activities in Nigeria only commenced sometime between 1903 and 1904, when the Secretary of State for Colonies conducted mineral surveys of the Southern and Northern Protectorates respectively. The principal mineral deposits discovered by the survey teams included lignite at Asaba, widespread lead and zinc ore deposits, tin and columbite; limestone and lead-zinc ores at Abakaliki district. Other examples are coal at Enugu, brine springs at Arufu and Awe, Galena in Jos plateau, iron ore deposits in Niger and Kwara districts and marble deposits in Jakura.

Although mining started in Nigeria long before the era of colonization, formal regulation of mining activities was initiated by the British colonial authority. Organised mining activities handled mainly by British owned multinational companies alongside some small scaled local miners were regulated by certain ordinances like the 1906 and 1907 mining rights, instituted by the British Colonial authorities. The 1906 and 1907 ordinances contained legal guidelines under which mining companies could operate in a concession. While the 1906 ordinances regulated directly the mining of carbon, earth, metallic, and other precious minerals, the 1907 ordinance mandated mining and oil companies to obtain concessionary rights to commence geological and geophysical investigations in the area so specified.<sup>6</sup> Both ordinances were criticized for favouring the foreign operators (such as Bitumen Oil Corporation) at the expense of local operators. It failed to accommodate any incentive or special privilege for local operators.<sup>7</sup> For example, given that the 1907 mineral ordinance empowered the governor to grant licenses to the prospective oil multinational companies registered in Britain and in the British colony, John Bergheim's Bitumen Oil Corporation was granted exclusive right over oil mineral exploration in the South-Western Nigeria. The Ordinances were amended from time to time to accommodate totally the British interest and control. For example, Fredrick Lugard, the Governor-General of Nigeria, in 1914 passed a legislation to secure easy administration over mining and oil rights, replacing the 1907 Mineral Ordinance and making it a wholly British concern:

*No lease or license shall be granted except to a British subject or to a British company registered in Great Britain or in a British colony and having its principal place of business within her majesty's dominion, the chairman and managing director (if any) and the majority of the directors of which are British subjects. (NAI, 29/1914) <sup>8</sup>.*

According to Okonmah, the Mineral Oil Ordinance of 1914, "vested the Right to search for, win and work mineral oils exclusively in British subjects or companies controlled by them" and thus disenfranchised Nigerians. In same vein, the 1916 Mineral Ordinance as enacted re-affirmed the control and

<sup>6</sup>National Archives Ibadan, NAI, 0094/19).

<sup>7</sup>Colonial Office CO, CO502/40/28382.1.NAI, CSO/1907/C80).

<sup>8</sup>section 6 (1) of the 1914 Ordinance

<sup>5</sup>Mines Inspectorate Department (2016)

ownership by the British Crown over Mining and oil rights found in the Nigerian environment. The Ordinance<sup>9</sup> in section 3(1) clearly states:

*The entire property in and control of the minerals, and mineral oils, in under or upon any land in Nigeria, and of all Rivers, streams and water courses, throughout Nigeria, is and shall be vested in the Crown, save in so far as such rights may in any case have been limited by the express grant made before the commencement of this ordinance* (NAE, CSO, 422/1916)

The ordinance provisions of the ordinance implied that the British mining company had the sole right to start exploration and extract any resources found on land and that the landowners had no right to challenge the occupier of the leased land while the agreement last; Accordingly the aforementioned Mining and Oil Ordinances only paved way for two British mining companies namely; the Niger Company and later the Champion (Nigeria) Tin Field Company, to dominate the extractive industry for three decades. In 1946, the Nigeria Mineral Act 1946 was enacted. It became the first Act that formally regulated mining in Nigeria apart from the ordinances and regulated solid mineral mining separately from the petroleum resources. The Petroleum Act of 1969, which reaffirmed the ownership of mineral resources in the federal government of Nigeria was also enacted to handle petroleum related issues. The Mining Act has undergone several amendments. It was repealed by the Minerals and Mining Act of 1990, which in turn was repealed by section 161(1) of the Minerals and Mining Act, 2007.

**Minerals and Mining Act, 2007:** The Nigerian Minerals and Mining Act 2007 came into being on March 16, 2007. It repealed the Minerals and Mining Act, No. 34 of 1990 and now regulates the exploration and exploitation of solid Mineral in Nigeria while addressing most of the setback in the said repealed Act 1990 and advancing the private sector investment opportunities in the Nigeria mineral and mining sector. The discourse in this subsection details the (a) institutional framework and Administration of the Act (b) Legal framework and Mineral Titles (c) Area Ownership, Control of Minerals and Qualified Applicants (d) Commencement of Development on Mining Lease (e) Environmental Considerations and Rights of Host Communities (f) Offences and Penalties.

**Institutional Framework and Administration of the Act:** The Minerals and Mining Act puts the Government in a frontal role in mineral development through the Federal Ministry of Solid Minerals Development that was established in 1995 to facilitate the development of the mining sector in accordance with the policy of the government<sup>10</sup>. It was also a reaffirmation of the provision of the 1999 Constitution of Nigeria<sup>11</sup>. This was unlike the dictates of the 1999 Act<sup>12</sup>, under which the authority to manage the sector including responsibilities for policy formulation and the grant of mining titles is vested in the Minister for Solid Minerals Development. The also Act provides for the establishment of the Mining Cadastre Office (MCO) that shall be responsible for the administration of mineral titles, For efficient development of the minerals and mining sector and for the proper administration of the Act, the

Act established some other departments in the Ministry of Mines and Steel Development (MMSD). These include the Mines Inspectorate Department (MID) and the Mines Environmental Compliance Department (MECD). It equally empowered the minister to delegate to any department or officer of the Ministry the exercise or performance of any function conferred on him under the Act with the exception of his function to make regulations upon notification of such action in the Gazette.

**Legal Framework and Mineral Titles:** Permits and approval from the following agencies are prerequisite for entering the minerals and mining sector as miners:

- Department of Geological Survey for detailed exploration data.
- Prospecting and mining rights from the Federal Ministry of solid Minerals Development.
- Mines Directorate for operational permits.
- Ministry of finance for tax exemption certificates (where applicable).
- Ministry of Industries for business permits.
- Ministry of Internal Affairs for expatriate quotas in respect of expatriate employees.
- Ministry of Environment for reviews of Environmental Impact Assessment plans.
- National Office for Technology Acquisition and Promotion (NOTAP) in instances of technology transfer from abroad.
- Surface rights access permits from the State Government or the Local Government.
- Negotiations with the community/family/individual for peaceful access to the land before mining can take place.

Consequently, engaging in any mining activities without the requisite mineral title or authority is an offence under the Act. The right to search for or exploit mineral resources can be obtained through one of the following mineral titles as listed in Section 48 of the NMMA, 2007: Reconnaissance Permit, Exploration License, Small-Scale Mining Lease, Mining Lease, Quarrying Lease, Water Use Permit.

**Ownership, Control of Minerals and Qualified Applicants:** The Act vests control of all properties and minerals in Nigeria in the State and prohibits all forms of unauthorized exploration or exploitation of minerals. The Act stipulates that all lands in which minerals have been found in commercial quantities shall from the commencement of the Act be acquired by the Federal Government in accordance with the Land Use Act of 1976. The Act further stipulate that any person who was the holder of a right or lease or license under the Repealed Act (1990) shall be deemed to have become, on the appointed date, the holder of an interim right, lease or license under the new Act. More so, the Act stipulates that the use of land for mining operations shall have a priority over other uses of land and be considered for the purposes of access, use and occupation of land for mining operations as constituting an overriding public interest within the meaning of the Land Use Act. The Act also provides that qualified applicant for a Reconnaissance Permit, an Exploration Lease, a Small Scale Mining Lease and a Quarry Lease shall be

<sup>9</sup>NAI, CSO, 1290/1916). Section 3(1) 1916 Mineral Ordinance.

<sup>10</sup>S.44.

<sup>11</sup>GbiteAdeniji, "the Legal and Regulatory Framework for Mining in Nigeria", p.4

<sup>12</sup>S.2 of the Act.

- A citizen of Nigeria with legal capacity and who has not been convicted of a criminal offence;
- A body corporate duly incorporated under the Companies and Allied Matters Act; or
- A Mining Co-operative.

#### **Fiscal Incentives under the Minerals and Mining Act, 2007**

There are copious monetary and fiscal incentives embedded in the Minerals and Mining Act, 2007. Incentives are generally financial and non-financial means of stimulants used by organizations or nations to attract both investors and investments into a given sector or an economy. The Act did introduce juicy incentives to attract investment into the Nigeria minerals and mining sectors. According to the former Minister of Mines, Prof. Leslye Obiora<sup>13</sup>, the incentives embedded in the Act are attractive enough to encourage the development of the mining sector in Nigeria and in line with international best practice, is in pursuit of both local and foreign investment as to attain her policy objectives within the best global standards at little or no trade restriction.

**Specific Fiscal Incentives Provided in the Act:** Specifically, Mining incentives as being discussed are contained under part 3 of the Nigerian Minerals and Mining Act, 2007, which together with the provisions of the Foreign Exchange Act, 2012 and the Nigerian Investment Promotion Commission Act, 2013 are aimed at ensuring that the minerals and mining sector develop fast especially in the context of local content and foreign investment attraction. The fiscal incentives provided in the Act are briefly discussed below:

**Provision of Tax Relief Period:** S.28 (1) of the Act details the provision of Tax relief for licensed operator in the minerals and mining sector. The Act provides that the tax relief period of a company granted mineral title shall commence on the date of operation and subject to the provisions of this Act or any other relevant financial enactment, the relief shall continue for three years and may be extended by the Minister for one further period of two years as contained in Section.28 (2).Section 28(3) requires the minister to ensure that the company to be granted tax relief has a satisfactory rate of expansion, standard of efficiency personnel development protocol.

**Allowable Deduction Provided for Under the Act:** Section 24 of the Act provides for Capital Allowances. Under subsection (1), any licensed holder is eligible under the Act to be allowed and entitled, in determining its total profits, to deduct from its assessable profits a capital allowance of ninety-five percent of Qualifying Capital Expenditure incurred in the year in which the investment is incurred. In some respects, this incentive is similar to what is contained in the Petroleum Profit Tax Act<sup>14</sup>, as it allows the following as qualifying capital expenditure.

- all certified exploration, development and processing expenditure, including feasibility study and sample assaying costs; and
- all infrastructure costs incurred regardless of ownership and replacement.

Under subsection (2), the amount of any loss incurred by any person eligible under the Act shall be deducted as far as it 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 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 unrelieved loss shall become lapse. Although, licensed operators are entitled to deduct the applicable capital allowance for the qualifying assets to the tune of 95% yet capital allowances are not to continue ad infinitum. It has a limitation period of four years.

**Permission to Retain and Use Foreign Exchange:** As stipulated under Section. 26 of the Act, where the holder of a mineral title earn foreign exchange from the sale of his minerals, he may be permitted by the Central Bank of Nigeria to retain in a foreign exchange domiciliary account a portion of his 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 earning. This incentive saves the operation of the incidence of fluctuating exchange rate and increased availability of foreign exchange. Section 27 of the Act also provides for free transferability of funds through the Central Bank in convertible currency for;

- Payments in respect of loan servicing where a certified foreign loan has been obtained by the holder for his mining operations; and
- The remittance of foreign capital in the event of sale or liquidation of the mining operations or any interest therein attributable to foreign investment.

**Provision for Exemption from Custom Duty:** The Act allow licensed operator exemption from payment of customs and import duties in respect of plant, machinery, equipment and accessories imported specifically and exclusively for mining operations. This incentive is allowable subject to the plant, machinery, equipment and accessories imported by the operator(s) specifically and exclusively for mining operations and must be approved by the Mines Inspectorate Department in accordance with Section 25(2) of the Act. This incentive is a core relief for investors in the mining sector given the high cost of import duty on machineries

#### **Other Incentives and Benefits**

**The Act, grants operators in the mining industry the following other benefits**

- Expatriate quota and resident permit in respect of the approved expatriate personnel,
- Personal remittance quota for expatriate personnel, free from any tax imposed by any enactment for the transfer of external currency out of Nigeria.
- Deducting of environmental costs as provided by Section 30 of the Act.
- Section. 31 provides that a tax-deductible amount established in accordance with the applicable rate set out in the Pensions Reform Act shall be imposed on mining companies or enterprises, towards the payment of pensions to each employee.
- Administrative incentives contained in the Act which includes the supportive role played by the Mining Cadastre Office (MCO).

<sup>13</sup>“Mining in Nigeria”, available at <http://nipc.gov.ng/mining.html>, visited on April 2009.

<sup>14</sup>Sections 9 (3), (4), (5) and 10, which provide for various processes of arriving at the chargeable profit and the actual deductions allowable.

**The Adequacy or Otherwise of the Fiscal Incentives Under NMMA, 2007:** In the light of what is obtainable in other African countries, the incentives under the Nigerian Minerals and Mining Act, 2007 could be said to be adequate and attractive. However, there are other measures that need to be taken seriously such as reduction in government bureaucratic procedures which affect the operation of the private operator within and outside the sector, The issues of political instability, policy inconsistency, un-enabling environment, local community hostility in the country are some other impediments. Some scholars hold that mining incentives in Africa are too generous<sup>15</sup>. They believe that foreign governments especially Canada has been instrumental in the manipulation of mining laws in Africa. They pointed that there is a tripartite conspiracy by Canada, World Bank and International Monetary Fund (IMF) in framing the various mining policies and determining the fiscal regimes in their favour for which Nigeria is also a victim either directly or indirectly. They maintained that that conspiracy was aimed at reducing the obligation of the mining companies to the host country in spite of the ever increasing environmental degradation, destruction of community livelihoods, abuse of human rights etc that come with the operation from the developed nations in Africa. As laudable as the above assertion may sound, it cannot be totally acceptable because, Canada is not the major player in the mining sector in Africa. China investment in the mining industry in Africa is the highest and their presence is most felt than any other country. Alokolaro and Akande (2015)<sup>16</sup> argued, when compared with other African mining jurisdictions, the fiscal regime for mining investment in Nigeria is amongst the most favourable globally (see Table 5.1).

From Table 4.1, one may infer that fiscal regime may not be the reason for low investment in the Nigerian mining sector. According to Fraser institute of Canada<sup>17</sup>, Nigeria is ranked third least country by investment into mining sector. It has been suggested that the failure of the mining sector to attract significant foreign direct investment is as a result of economic and political risks, escalating security risks, dearth of infrastructure and illegal mining<sup>18</sup>.

**Mining, the Environment and Economy:** There is no doubt that solid minerals such as gold, iron ore, tin ore, lead, bauxite, etc can contribute significantly to economic development of any nation, of which Nigeria is no exception<sup>19,20</sup>. The mineral base is considered as a veritable alternative for diversification<sup>21</sup> and industrialization<sup>22</sup>. However, the mining activities generate considerable disruption to the physical, biological and socio-

cultural environment. It is therefore imperative to assess the general environment and development context that may be affected by present and future mining operations. In this respect, legislation and government institutions play critical roles by supplying the basic framework for the implementation of environmental and mining policies through environmental planning and management. Their roles are critical to mining activities, which, no doubt, have inherent environmental implications.

**Environmental Impact of Mining Activities:** Mining activities are associated with substantial environmental hazards. According to Thomas Walde<sup>23</sup>, environmental hazards associated with mining activities tend to increase both in geographical scope and intensity as the phases of mining (exploration, extraction, metallurgical processing) advance. Thomas Walde<sup>24</sup> identified the following phases of mining activities and the associated environmental effects:

- The exploration phase in mining (geophysical, geochemical surveys, mapping, drilling) produces mostly only minor and quite localized effects (clearing of trees for drilling sites, camps, access roads, sinking of pits, holes, shafts) and can be handled by relatively simple rules ensuring that no lasting danger or damage remains.
- The extraction phase will usually involve a more massive, but mostly localized impact affecting in a sometimes, destructive way the natural environment (landscape, fauna and vegetation). For instance, local mining releases considerable amounts of methane, considered a major agent of the greenhouse effect<sup>25</sup>.
- The main environmental change generated by the mining industry is likely to be generated at the metallurgical stage, mainly smelting and refining. The industrial processes create considerable air pollution (carbon monoxide, oxides of nitrogen and sulphur).

The environmental impact<sup>26</sup> of mining also includes formation of sinkholes, loss of biodiversity, erosion in the environment, and contamination of soil, groundwater, and surface water by chemicals from mining processes. In addition to creating environmental damage, the contamination resulting from leakage of chemicals also affects the health of the local population. Water pollution engendered by mining activities can cause unnaturally high concentrations of some chemicals, such as arsenic, sulfuric acid, and mercury over a significant area of surface or subsurface<sup>27</sup>. The dumping of the runoff in surface waters or in a lot of forests is the worst option here. Runoff of rock debris -although non-toxic- also devastates the surrounding vegetation. Also, the establishment of a mine is a major habitat modification, and adverse effects can be observed long after the end of the mine activity. Destruction or drastic modification of the original site and anthropogenic substances release can have major impact on biodiversity in the area.

<sup>15</sup>A. Darimani, "Impacts of Activities of Canadian Mining Companies in Africa", p.7, available at <http://www.miningwatch.ca/updir/africa-case-study.pdf>, visited on May 5, 2009.

<sup>16</sup>Alokolaro and Akande (2015). The Legal And Regulatory Framework For Mining In Nigeria: A

Catalyst For Investment p.6

<sup>17</sup> Fraser Institute Annual Survey of Mining Companies, 2014

<sup>18</sup>Alokolaro and Akande (2015)

<sup>19</sup>Traore PA (1997) Strategies for development of small/medium scale mines in Africa. Small/Medium Scale Mining. Oxford/IBH Publications, UK, 17-24.

<sup>20</sup> Alison-Madueke, D. (2009). Opportunities in Nigeria's Minerals Sector. Ministry of Mines and Steel Development, Abuja, Nigeria, 22nd April 2009.

<sup>21</sup>Olumide, S. A., Akongwale, S., &Udefuna, .P.N (2013). Economic diversification in Nigeria: Any role for solid mineral development? Mediterranean Journal of Social Sciences, 4(6),691-703

<sup>22</sup>Egbon, P.C. (2017). Nigeria's industrialization drive: What went wrong and what we need to do. An invited paper presented at the Nigerian Economic Society's conference on the Imperatives for Industrialization in Nigeria, held at Nicon Luxury Hotel, Abuja, 26th – 28th September, 2017

<sup>23</sup>Walde T, Environmental Policies Towards Mining in Developing Countries, Journal of Energy and Natural Resources Law, Vol. 10 No. 4, 1992 p. 327

<sup>24</sup> Ibid

<sup>25</sup> Ibid, P. 329.

<sup>26</sup>Tarras-Wahlberga, N.H.; Flachier, A.; Lanec, S.N.; Sangforsd, O. (2001). "Environmental impacts and metal exposure of aquatic ecosystems in rivers contaminated by small scale gold mining: the Puyango River basin, southern Ecuador". The Science of the Total Environment. 278: 239–261. doi:10.1016/S0048-9697(01)00655-6.

<sup>27</sup>"January 2009" ngm.nationalgeographic.com.

Although, destruction of the habitat is the main component of biodiversity losses, direct poisoning caused by mine-extracted material, and indirect poisoning through food and water, can also affect animals, vegetation and microorganisms<sup>28</sup>. To minimize the environmental impact of mining activities, the international community adopted the Mining and Environment Guidelines at the international round-table on Mining and the Environment at Berlin in 1991. As a follow-up, Nigeria also enacted the Minerals and Mining Act, No. 34 of 1999 which was later repealed by the Minerals and Mining Act No. 20 of 2007.

**Environmental Legislation of the NMMA, 2007:** Before we proceed to examine the provisions for environmental protection under the Nigerian Minerals and Mining Act (NMMA), 2007 let us look at the relevant provisions under the 1999 Constitution. The Constitution<sup>29</sup> provides that "the State shall protect and improve the environment and safeguard the water, air and land, forest and wild life of Nigeria". Even though the above section falls under the Fundamental Objectives and Directive Principles of State Policy and as such, it is not justiciable, however, it is a bold statement. It shows that the Constitution has taken cognizance of the fact that the environment is an integral part of the people and should be handled with utmost care that it deserves.

The environmental legislation enshrined in the NMMA, 2007 include:

**Prevention of pollution of environment:** Section 111<sup>30</sup> provide that a holder of mineral title shall, 'take such steps as may be necessary to prevent pollution of the environment resulting from the mining operation'. Section.123 specifically prohibited miners from polluting 'any water or watercourse in the area within the Mining Lease or beyond that area'. Section 124<sup>31</sup> further provides that 'every person who uses water in connection with mining operation...shall...make such provisions as shall ensure that the water so used does not contain injurious substances in quantities likely to prove detrimental to animal or vegetable life when the water leaves the mining area in which it has been so used. Interestingly, section 125<sup>32</sup> provides that a 'licensee or lessee shall pay compensation to the owner or occupier...who suffers damages as a result of pollution of any source of water, used for domestic and other purposes, as a consequence of the exploration or operations in any work connected with the property, for any such damage not otherwise made good'. In other words, the NMMA provides that miners should take all steps necessary to ensure that they do not endanger the environment through any form of pollution in course of carrying on the mining activities. However, unlike environmental legislation<sup>33</sup> in India and Indonesia, the NMMA, 2007 does not provide for punishment for offenders in this respect.

**Environmental Obligations:** Section 118<sup>34</sup> of the Act imposes environmental obligation on every holder of a mineral title.

It stipulates that every mineral licensee or lessee shall as far as it is reasonably practicable (i) 'minimise, manage and mitigate any environmental impact resulting from mining activities' and (ii) 'rehabilitate and reclaim, where applicable, the land disturbed, excavated, explored, mined or covered with tailings arising from mining operations to its natural or predetermined state' or to such state that is in accordance with established best practices.

**Environmental Impact Assessment:** Section 119<sup>35</sup> provides that every mineral licensee or lessee shall conduct environmental impact assessment (EIA) prior to the commencement of mining operations. The EIA must be approved by the federal ministry of environment and submitted to the Mines Environmental Compliance Department

**Environmental Protection and Rehabilitation Program:** In Section. 119 (c)(ii) and Section 120<sup>36</sup>, the NMMA 2007 also provides that every holder of mining title shall submit an Environmental Protection and Rehabilitation Program (EPRP) to the Mines Environmental Compliance Department. The EPRP shall provide for specific rehabilitation and reclamation actions, inspections, annual reports; a reasonable estimate of the cost of rehabilitation; a timetable for the orderly and efficient rehabilitation and reclamation of the Mineral Title Area to a safe and environmentally sound condition suitable for future economic development or recreational use.

**Establishment of the Environmental Protection and Rehabilitation Fund:** Section 121<sup>37</sup> provides that the Minister establishes an Environmental Protection and Rehabilitation Fund (EPRF) for the purpose of guaranteeing the environmental obligations of holders of mineral titles. The EPRF is to be managed by an independent fund managers in accordance with the provisions of the Trustees Investments Act, Cap. T22 Laws of the Federation of Nigeria, 2004. Holders of mineral titles are mandated by the Act to begin to contribute to the EPRF not later than one year from the approval of the EPRP. The amount to be contributed is the amount approved in the EPRP. The EPRF ensures that the EPRP is implemented: the amount contributed in the EPRF is to be used exclusively for implementing the EPRP.

**Sanction for non-compliance with Environmental Legislation:** Although the NMMA 2007 does not directly provide for sanction for non-compliance with environmental legislation enshrined in the Act, there are other relevant legislations that provides for such sanction. For example, in Section.245 of the Criminal Code, it is provided that any person who corrupts or fouls the water of any spring, stream, well, tank, reservoir or place, so as to render it less fit for the purpose for which it is ordinarily used, shall be guilty of an offence and liable on conviction to imprisonment for a term not exceeding six months. Also Section 247 provides that any person who vitiates the atmosphere in any place so as to make it noxious to the health of persons is guilty of an offence punishable with six months' imprisonment. Invariably, if any holder of mining right violates the environmental legislation guiding mining operation, he can be liable to punishment under the Criminal Code.

<sup>28</sup>Jung, MyungChae; Thornton, Iain (1996). "Heavy metals contamination of soils and plants in the vicinity of a lead-zinc mine, Korea". *Applied Geochemistry*. 11: 53–59. doi:10.1016/0883-2927(95)00075-5

<sup>29</sup>S.20

<sup>30</sup>Nigerian Mineral and Mining Act N. 20 2007 Chapter 4, page A517

<sup>31</sup>ibid

<sup>32</sup>ibid

<sup>33</sup>UNCTAD (1994).Environmental Legislation for mining and metal industries in Asia. UNCTAD/COM/40

<sup>34</sup>Nigerian Mineral and Mining Act N. 20 2007 Chapter 4, page A519

<sup>35</sup>ibid

<sup>36</sup>ibid

<sup>37</sup>ibid

**Environmental Regulatory Frameworks** The NMMA 2007 provides that the minister establishes regulatory frameworks that should guide and supervise mining and exploration activities. As regards, environmental regulatory framework, the Act provides the creation of the following departments. Mines Environmental Compliance Department: Section 18<sup>38</sup> authorizes the Minister to create Mines Environmental Compliance Department. The functions of the Mines Environmental Compliance Department include:

- Review of all plans, studies and reports required to be prepared by holders of mineral title in respect of their environmental obligations;
- Monitoring and enforcing compliance by holders of mineral title with all environmental requirements and obligations
- Periodically audit the environmental requirements and obligations of mining activities in the country.

As shown above, the Act authorizes the Mines Environmental Compliance Department to ensure that licensees and lessees of mineral title comply with the environmental legislations of the Act, both before and during mining operations. This implies that strict compliance or blatant complacency by the holders of mining title is contingent on the operation of the Mines Environmental Compliance Department. Establishment of State Mineral Resources and Environmental Management Committee: In order to ensure compliance with environmental legislation, the Act in Section 19<sup>39</sup> provides for the establishment of Mineral Resources and Environmental Management Committee in each state of the federation. The committee shall be comprised of a representative of the Mines Environmental Compliance Department in the Ministry who shall be the chairman of the Committee; a representative of the Ministry responsible for Land matters or Mineral related matters in the State; the Mines Officer responsible for the State; a representative of the Ministry of Agriculture or Forestry in the State; a representative of the Surveyor-General of the State; a representative of the Local Government Council when matters affecting the said Local Government Area are being considered by the Committee; a representative of the State Environmental Department or Agency; and a representative of the Federal Ministry of Environment in the State.

**The committee is saddled with the following responsibilities relating to environmental management:**

- Discuss, consider and advise the Minister on the matters affecting pollution and degradation of any land on which any mineral is being extracted;
- Advise the Departments established in accordance with the provisions of this Act for the supervision of mineral exploitation and the implementation of social and environmental protection measures;
- Advise the Local Government Areas and communities on the implementation of programs for environmental protection and sustainable management of mineral resources;

**Conclusion and Recommendation**

The mining sector is considered as one of the priority sectors for economic diversification in Nigeria. This is because

Nigeria is richly endowed with over 44 different solid minerals. However, the contribution of solid mineral to economic development in Nigeria has been adjudged to be quite low. Given that the legal framework is a key success factor in mining operation, this study was an attempt to critically assess the fiscal incentives provided in the Nigerian Mining and Mineral Act of 2007. From the findings of the study, the following conclusions are made. First, the exclusivity of mining operation and control to the federal government makes the state government docile and non-committal to the management of mining operations. Secondly, although the Act makes provision for the compensation of the host communities through educational scholarships, infrastructural developments and employment opportunities, the legal loophole in that provision could lead to hijacking of the compensation mandate. One of such loopholes is absence of clear provision on how and with whom the community development agreement is to be negotiated and agreed upon. Thirdly, although the Act makes provision for environmental protection through its provision on environmental impact analysis (EIA) and criminalization of environmental pollution, the predominance of illegal mining activities implies that such impact assessment may not be done for many of these sites. This could explain the exacerbating environmental degeneration that is recorded in most mineral-endowed states in Nigeria. Finally, the NMMA has clear implementable provisions for fiscal incentives. In fact, the fiscal incentives provided in the Act are adjudged one of the most favourable in the world. This scenario may suggest that high political risk and escalating insecurity may be contributory to the poor performance of the sector. In addition, dearth of basic infrastructure and social capitals may also pose substantial disincentive to investors.

Having concluded the review of the NMMA 2007, we make the following recommendations. While the NMMA 2007 makes provision for transparency in granting of mining licenses, neither the Act nor the National Minerals and Metals Policy deals with issues of principles of transparency and accountability in the revenue collection and utilization from the extraction and sell of minerals in the country. It is therefore recommended that the Act be reformed to mainstream the NEITI principles that govern the petroleum industry. One of the greatest problems of the mining sector is illegal mining. This could largely result from the inability of small-scale miners to obtain the mining license. It is therefore recommended that Section 50 of the Mining Act should include mining cooperatives as qualified for mining lease. In this way, the small-scale miners can pool their resources to obtain mining lease.

- In order to avoid hijacking of the community agreement by some powerful vested interest in the communities, a clause should be added to Section 116 of the Act to specify how the community agreement is to be reached and with whom it is to be signed.
- There are other ancillary incentives which Nigeria must as a matter of necessity continuously provide for investors if the mining sector must be maximally harnessed thereby making Nigeria an irresistible destination for investors. These include basic infrastructure - roads, power, stable political climate, avoidance of crisis that may threaten investment such as religious crisis.

<sup>38</sup>Ibid

<sup>39</sup>Ibid

These factors in addition to the fiscal incentives are required to ensure the long term prosperity for the mining industries and the Nigeria economy.

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