

**NIGERIA'S SOLID MINERALS AS A SOURCE OF ECONOMIC
DEVELOPMENT – TAPPING A LATENT RESOURCE?**

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Appropriate management of solid minerals should translate or some say return Nigeria from just a minerals country to a mining country. Any industry that can generate high economic yield, income, technology and massive employment at the same time -even at the risk of price fluctuation and exhaustibility - is source of economic development.

I must disclose my bias immediately, as a lawyer a less than dispassionate appraisal has led me to the conclusion that the law is all important.

Is the Solid Minerals Sector a source of economic development? Is it a latent source? Why? What can be done about the sector?

We shall cover Solid minerals as a source of Economic Development in four broad sections:

- I. Solid Minerals Legal Regime
- II. Challenges in the sector
- III. Reforms and Road map development for the sector
- IV. Opportunities & Expectations - the value chain

At the end we shall see that Solid Minerals sector optimal performance is an imperative source for Nigeria's economic development.

Introduction

The vastness of Nigeria's minerals resources cannot and should not be over emphasised. We began to explore and exploit her natural mineral resources in 1902 and in its prime, the solid minerals sector was one of the largest producers of tin and coal, as well as a producer of a considerable 1.4 tons of gold annually.

The history is now well known due to ill-effected policy changes and lack of proper attention, the sector saw a steady decline and today, mining and solid minerals only account for about 0.3% of the gross domestic product of Nigeria.

The Nigerian oil and gas sector has played a central role in the Nigerian economy. The revenue realized from the Nigerian petroleum industry has been the country's fiscal mainstay and remains a major revenue source. The reality of the recent downward trend of oil prices and its impact on the revenue and foreign reserves of the country however means that it has never been more vital for Nigeria to protect herself by diversifying her revenue streams.

Nigeria is enriched with over forty (40) types of minerals including marble, gypsum, lithium, silver, granite, gold, gemstones, bentonite, iron ore and talc. The mining and solid mineral sector of the extractive industry in Nigeria has always been a viable greenfield and is now getting the attention it deserves, having been earmarked as a key source of economic development and diversification of the revenue streams of the country.

It is however incontrovertible that the sector is under-performing and plagued with issues ranging from inadequate infrastructure to illegal artesian mining and community challenges. These issues stifle potential by deterring potential investors whose resources are essential to the revitalisation of the sector.

I. Solid Minerals Legal Regime

Relevant Policy /Statutes

- a. Minerals and Mining Act No. 20 of 2007 (the MMA): The Act is the principal legislation that regulates the Nigerian mining sector. The Act vests the control, regulation and ownership of all mineral resources in the Federal Government of Nigeria (FGN).

- b. The National Minerals and Metals Policy¹
- c. Nigerian Minerals and Mining Regulations 2011 (the ‘Regulations’)²: The Federal Ministry of Mines and Steel Development (the ‘Ministry’) recently issued new mining regulations titled the Nigerian Minerals and Mining Regulations 2011 (the ‘Regulations’) which is intended 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 were issued for the purpose of setting out the rules, procedures and processes for the acquisition of mineral titles, and to give effect to the Minerals and Mining Act No. 20 of 2007 (the MMA)
- d. Company and Allied Matters Act (“CAMA”) Cap 20, Laws of the Federation of Nigeria (LFN) (2004) (“CAMA”): This is the law that regulates company formation and operation in Nigeria, no foreign company may carry on business in Nigeria unless it incorporates a local subsidiary in the country. The MMA also states that no person shall be qualified for the grant of any mining title unless the person is a body corporate duly incorporated under CAMA.
- e. Various Tax Legislation

Public Authorities

a. The Minister

The administration of the mining industry is vested in the Minister of Mines and Steel Development. The functions of the Minister include amongst other things, ensuring the orderly and sustainable development of Nigeria's mineral resources, creating an enabling environment for private investors, both foreign and domestic by providing adequate infrastructure for mining activities e.t.c. The Minister is also empowered within his ministry to establish the following departments:

¹. After the Nigerian Minerals and Mining Act was enacted in 2007, by the National Assembly, it was followed with the launching of the National Minerals and Metals Policy by the Ministry of Mines and Steel Development (MMSD), in January 2008.

². The Ministry of Mines and Steel Development announced the commencement of the Regulations on 24th May 2011, when he delivered a presentation of Nigeria's Minerals and Mining Regulations to investors, stakeholders and members of the public in Abuja. The May 2011 event marked the completion of Nigerian Mining programme geared towards the provision of the required regulatory framework for mining in Nigeria. The Minister stated that the Regulations were aimed at meeting the yearnings and aspirations of all stakeholders, prospective indigenous and foreign investors since their inputs were taken into consideration in the formulation of the document.

- a. Mines Inspectorate Department;
- b. Mines Environment and Compliance; and
- c. Such other departments as he deems fit³

b. Cadastre Office

The Act creates the Mining Cadastre Office. Its headquarters is located in Abuja, with a number of Zonal Offices for administrative convenience.⁴ It is a body corporate with perpetual succession and a common seal and is saddled with the responsibility of the administration of Mineral titles and the maintenance of the cadastral registers.⁵ These registers include a register of Reconnaissance Permits; Exploration Licenses; Mining Leases; Small-Scale Mining Leases; Water Use Permits; and Quarry Leases.⁶ The Cadastre office considers applications for mineral titles and permits, issue, suspend and upon the written approval of the Minister revoke mineral titles.⁷ It is also required to grant property rights on the basis of priority where there are competing applications for the same exclusive area.⁸

Minerals

Minerals mean any substance whether in solid, liquid, or gaseous form occurring in or on the earth, formed by or subjected to geological processes including occurrences or deposits of rocks, coal, coal bed gases, bituminous shales, tar sands, any substances that may be extracted from coal, shale or tar sands, mineral water, and mineral components in tailings, and with waste piles but with the exclusion of Petroleum and waters without mineral content.⁹

a. Mineral Operations

The operation and works carried out in the course of mineral exploration, inclusive of the search for and exploration of minerals, beneficiation, processing and contract mining all qualify as mineral operations.¹⁰ Legislation deals with

³ Section 16- 18 MMA 2007

⁴ Section 6 MMA 2007

⁵ Section 5(2) MMA 2007

⁶ Section 7 MMA 2007

⁷ Section 5(5) MMA 2007 See also Section 10 and 11 for grounds of revocation.

⁸ Section 8 MMA 2007

⁹ Section 164 MMA 2007

¹⁰ Ibid.

matters incidental to the exploration of minerals such as the proprietary titles for exploration¹¹ and their respective durations,¹² qualifications for obtaining such titles,¹³ rights and obligations of title holders,¹⁴ limits to such rights¹⁵ persons disqualified from having exploration titles,¹⁶ discovery of radioactive materials in mining areas¹⁷ as well as discovery of minerals not specified in licenses¹⁸ and the duty of non-disclosure of confidential information by officers or former officers with respect to exploration.¹⁹

Excluded however from exploration purposes are certain lands including lands set apart for military purposes except with the approval of the President, lands within 50 metres of oil pipeline license areas issued under the Oil Pipeline Act and lands over which mineral titles which are still subsisting had previously been granted by the Cadastre office etc.

b. *The Minerals and Mining Regime*²⁰

Under this, the property titles available include Mineral Titles and Licenses. Part V of chapter 1 of MMA prohibits any person from prospecting for minerals except with a Prospecting or Exclusive Prospecting License granted by the Minister.²¹

II. Challenges and Sector Risks

For the Solid Minerals extractive sector to have any role to play as a source of economic development it must meet and mitigate its known challenges and risk factors. We need to dimension a few of these challenges:

- I) Low domestic and foreign investment appetite leading to minimal project funding
- II) Gap in sector infrastructure support:
 - Access roads

¹¹ Section 46 MMA 2007

¹² Sections 57, 62, 66 MMA 2007

¹³Section 47- 52 MMA 2007

¹⁴Section 60, 61, 66, 68, 70, 74, 78 MMA 2007

¹⁵ Section 69 MMA 2007

¹⁶Section 53 MMA 2007

¹⁷Section 44 of the MMA 2007 makes radioactive materials under the operation of the Nuclear Safety and Radioactive Act Cap N19 LFN 2004

¹⁸ Section 64 of MMA 2007.

¹⁹ Section 45 of MMA 2007.

²⁰. See Section 46 of MMA 2007.

²¹. Section 26(1) of MMA.

- Rail from site to use and or export

III) Risk – Legal/Policy Uncertainty

IV) Illegal mining & community action

We should examine some of them in detail:

Risk

The foremost of these issues are the risks presented by the sector’s legal and regulatory framework. This framework is the foundation upon which a sustainable, attractive and globally competitive private sector-led industry must be based and must therefore be solid to give the mining sector its best chance.

Previous reforms in the mining sector led to the enactment of Minerals and Mining Act of 2007 (“the Act”). These reforms have helped to address certain problems faced by stakeholders in the sector such as security of mineral rights achieved by the re-characterisation of the Mining Cadastre Office (“MCO”) as an autonomous body separate from the Ministry, and the transferability of mineral titles validly granted under the Act, which have positively affected the sourcing of funding for mining projects, as mining titles can be used as security for such sourcing.

- *Policy uncertainty*

Political risks faced by the sector include slow reform implementation, policy failures and policy U-turns which are sometimes a feature of political turnover. Others stem from the overlapping jurisdictions of the several authorities involved at several levels of government in the licensing process for mining in Nigeria

- *Legal Title Conflict & Uncertainty*

On the legal front, the key risks arise from uncertainty of legal ownership of mining rights between the Federal and State Governments. This dichotomy is created by apparent duality from the Constitution and legislation affecting the activities of the sector. For example:

The Land use Act.

At S. 315 (5) of the Constitution the Land Use Act assumes a curiously problematic status

(5) Nothing in this Constitution shall invalidate the following enactments, that is to say - ...

(a)

(B)

(C)

(d) the Land Use Act,

and the provisions of those enactments shall continue to apply and have full effect in accordance with their tenor and to the like extent as any other provisions forming part of this Constitution and shall not be altered or repealed except in accordance with the provisions of section 9 (2) of this Constitution.

As we all know the Land Use Act vests title to all land within a state in the Governor of that state, thus giving the Governor control of the so called 'surface' rights over land. The Minerals and Mining Act however exclusively vests title in the minerals below these lands and control over the grant of property rights in those minerals in the Federal Government. Problems will therefore arise where a license to mine below surface is given to a person other than the holder of a statutory right of occupancy over the land.

The legislative list in the constitution also adds to the problem.

Item 39 in Part I of the Second Schedule of the Constitution which places mines and minerals on the exclusive legislative list and the fact that “lands” still remains a residual matter within the legislative purview of the sub-national states is a conflict which creates another legal risk.

This tension has kept the law courts busy for decades. In hydrocarbon extraction the oil and pipeline community claims quickly progressed to strikes, lock outs and then to community agitation finally to where we are now - all out insurgency.

A milder version already exists in mining communities. Along with actual state government non-cooperation, the sector has been deprived of any meaningful investment because of this title and community risk. In all likelihood the cycle of community action will increase much more rapidly in the Mining sector if for no other reason than the fact that the foot print of mining operations is significantly larger than hydrocarbon operations. It can and must be avoided to unlock the economic development the sector holds. This can best be achieved by mitigation of risk factors within the sector.

III. Reforms & Road map

Before we consider the mitigating strategies to unlock the sector we must identify the work of the Road Map for the Growth and Development of Nigerian Mining Industry Committee (“the Committee”) of the Federal Ministry of Solid Minerals Development:

The Committee has developed an 89 page policy paper to 'transform the minerals mining and metals sector' in Nigeria²². The Roadmap identifies several major challenges to the growth of the sector which include insufficient geosciences data, inadequate mineral production data and information, inadequate infrastructure, lack of major industry participants, limited engagement and leverage of industry stakeholders, poorly organized institutions lacking in technical talent, lingering opacity, lack of regulatory enforcement, security issues and poor investor perception. Also highlighted as major challenges to the sector were the issues of lack of clarity in governing laws and conflicts between different levels of government in terms of rights to issue mining licenses and allocation of revenue from the sector.

The report aims to serve as a framework for the revitalization of the sector and sets out a strategy which is to be carried out so in three (3) broad phases. The first phase aims to stabilize the sector and rebuild market confidence. In the second phase, steps would be taken for Nigeria to be established as a competitive African mining and minerals processing center and finally, in the third phase, the country’s mining sector would aim to compete in the global market for refined metals and minerals in addition to select ore exports²³.

The Roadmap sets out a focused approach to tackling the challenges and identifies priority minerals, target markets/customers and potential participants. The minerals identified as priority minerals are those for which data already exists, which have proven commercial viability and include iron ore, coal, bitumen, limestone, lead/zinc, gold and barite²⁴. The strategy will initially focus on serving companies and end users in the local market, as Nigeria herself is a major consumer of solid minerals, and will eventually seek to expand the target market to include export markets.

It is envisaged by the Committee that the revitalization of the sector to achieve a world class mining industry which can serve as a source of the economic development and revenue diversification can be achieved by the following:

²² See foreword of Roadmap for the Growth and Development of the Nigeria Mining Industry 2016 delivered by the Minister at page 7

²³ See Roadmap for the Growth and Development of the Nigeria Mining Industry 2016 at page 35

²⁴ See Roadmap for the Growth and Development of the Nigeria Mining Industry 2016 at page 37

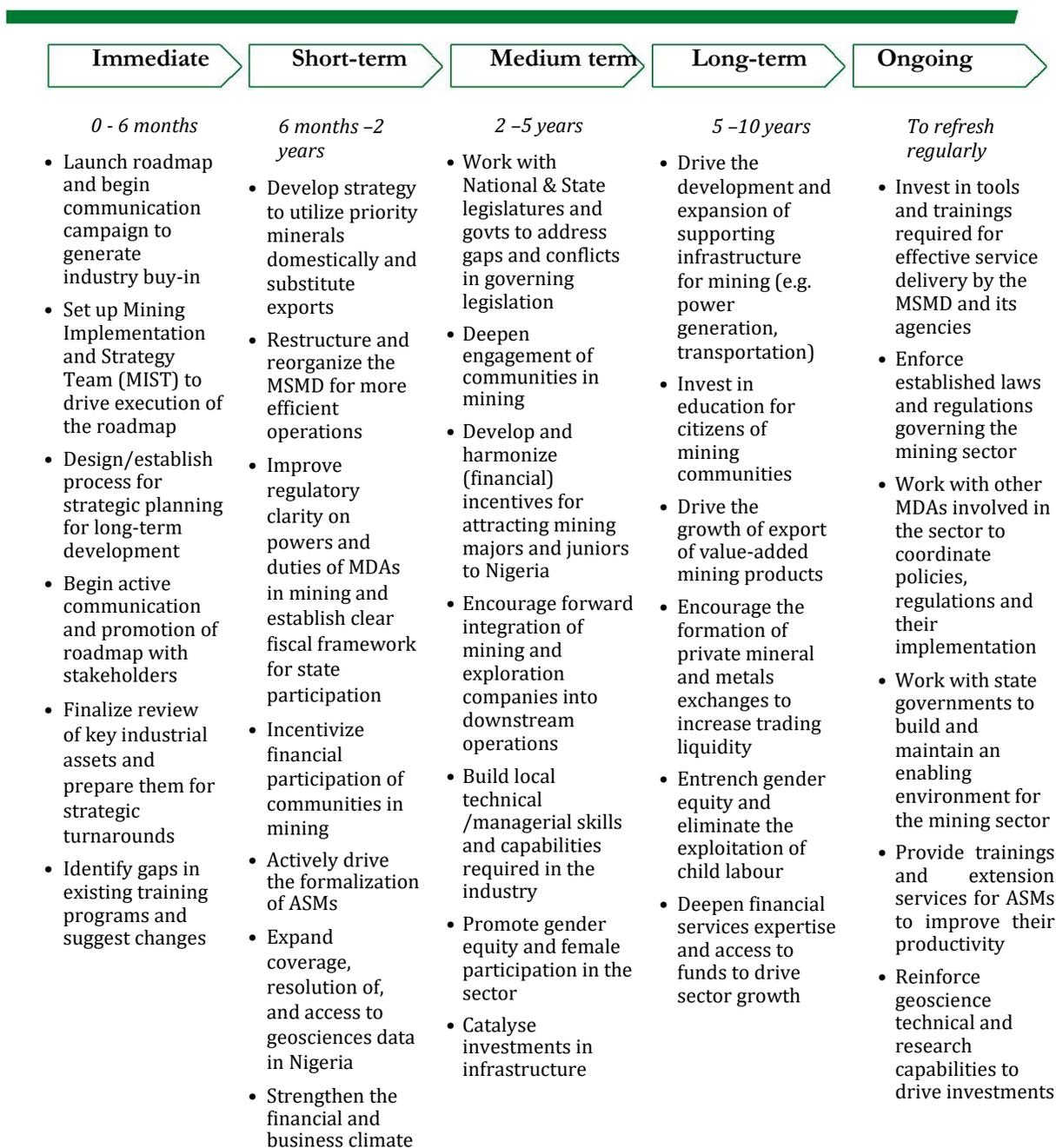
- Proactive communication of the strategic plan established in the Roadmap to stakeholders including other branches of government, community activists, potential investors etc;
- Creation of an investor friendly regulatory environment;
- Coordinated infrastructure investments;
- Establishment of community partnerships;
- Provision of investment funding;
- Institutional reform
- Improved geoscientific databases
- Use of mining as a developmental catalyst

The Roadmap also specifies “preliminary timescales”²⁵ within which the above initiatives contemplated by the Committee would be implemented. The implementation strategy is divided into immediate goals to be achieved within 0 – 6 months of the launch of the Roadmap, short-term goals to be achieved within 6 months to 2 years, medium-term goals to be achieved within 2 – 5 years, long-term goals to be achieved within 5 to 10 years and finally ongoing goals which will be implemented regularly throughout the strategy.

²⁵ See Roadmap for the Growth and Development of the Nigeria Mining Industry 2016 at page 45

A summary of action items and their prescribed timelines is below:

Timeline of key action items for executing the roadmap²⁶



²⁶ Roadmap for the Growth and Development of the Nigeria Mining Industry 2016

The Hon Minister Dr. Kayode Fayemi and the Minister of State Hon Bawa Bwari are to be commended for their vision in establishing the Roadmap Committee. In taking this step, the Ministry has shown a laudable awareness of the needs of the sector and its readiness to do what is necessary for its de-risking. It is however respectfully submitted that there is a need to include a more aggressive approach to making the sector “open for business” and able to generate revenue in the immediate goals, while the more comprehensive overhaul is in the works.

Mitigation:

i) Community Action

One of the main risk factors discussed above is central control.

The central control of the country’s minerals by the Federal Government in itself is also, respectfully, a hindrance to the success of the sector as a source of economic development for the country. It should by now be incontrovertible that the size, authority and powers of the Federal Central Government of Nigeria are in need of substantial reallocation.

Centralism in policy making creates social inequities and economic injustice which in turn ensure that local communities set up mental and attitudinal barriers to central control, as in the Niger Delta with the oil and gas sector, and many mining communities. We must reduce centralism in resources.

There are some measures we can take that will have a catalytic and mitigating effect that will go a long way in unlocking the resource:

ii) State participating Joint Venture catalyst

The Ministry for Solid Minerals Development (“the Ministry”) has an essential role to play in this effort. The Ministry could act as a catalyst for the short term. The incorporation of a company at the Corporate Affairs Commission (“New MineCo”) which would be wholly owned by the Ministry of Finance Incorporated and which could hold a selected number, say six (6) strategic titles for each of the geo-political zones of the country would be the first step. The minerals could be the same as identified in the Roadmap.

New MineCo would subsequently enter into partnerships with domestic or foreign private sector investors (“InvestCo”) to form joint venture vehicles (“JointCo”) for the exploration and exploitation of the mineral resources of the country, for an initial “catalyst period” of perhaps five (5) years.

The private sector investors which would partner with NewMineCo can be identified through select invitation or open competitive bidding where the titles would be offered for sale to investors who have financial and technical capacity to fully realize the potential of their allocated titles. The process under the competitive bidding would include advertisement, preferred investor selection, due diligence, and finally the offer of mineral titles to selected investors. Joint Venture Agreements or Investment Agreements would set out terms such as the duration of the catalyst period, the purpose, structure, funding, corporate governance and dividend policy of the joint venture, right of first refusal for the private sector partner following divestment of shares by the Government etc.

Having a Federal Government and State Governments joint venture partner in minority participating interest would significantly reassure the InvestCos on matters of political and legal risk thus creating a stability which is much needed for the attraction of investors to the Nigerian mining sector.

Finally, after the catalyst period, the shares of New MineCo in JointCo would be entirely divested to InvestCo, allowing the Government to exit the partnership with a right of first refusal offered to InvestCo.

This intervention is naturally without prejudice to preparatory work of the Ministry in the sector, data gathering and indeed competitive bidding for other titles, but this serves to energise the sector and prove “mining in the economy” as a viable greenfield resource for Nigeria.

The collaboration between the State and Federal Governments would be regulated by Memoranda of Agreement²⁷ which would set out the parameters of their relationship including the description, purpose and goals of the collaboration, the respective rights and obligations of the parties, the fiscal regime and revenue sharing modalities, the policies to be implemented to achieve the purpose of the proposed project, ownership of title, shareholding structure in NewMineCo etc.

The most effective requirement of the MOA would be its ability to survive different administrations in order to create continuity and offer comfort and security to potential investors. This is in line with the objectives of the Committee in recommending the establishment of the Mining Implementation and Strategy Team (“MIST”). MIST could also act as

²⁷ However see s. 19 of the Act which establishes a State Mineral Resources and Environmental Management Committee made up of state and federal officers that meet every three months with the minister and advises of pollution and other non vesting matters.

the supervisory body in charge of this mitigation strategy, in line with its proposed mission to “ensure that all key parties remain focused on implementing [the Roadmap] irrespective of shifts in leadership within the Ministry and the broader government”²⁸.

iii) 'G2B' Government to Business Catalyst

Mineral assets should be identified on a “need” basis for 'government to business' development. That is, a selective-targeted or custom titles approach in which project mandates are given directly to private sector participants on a need and capacity basis. This will leap frog portfolio companies, commission agents and speculators. For instance Government will directly negotiate bitumen titles with major road construction businesses, coal with generating companies, limestone with cement businesses, barite titles with oil drilling businesses and so forth.

We should note that s.9 of the Act directs the minister to determine which leases and licenses will be granted on a 'competitive bidding' basis and s.9(2) directs the Cadastre office to conduct 'open and transparent' bidding method which 'promote the expeditious and beneficial development of the mineral resources' of Nigeria.

This provision at close consideration will permit the approach without the need for review.

iv) 'G2G' Government to Government Catalyst

Without prejudice to private sector participation, Federal government can give selected mineral titles to host states. These host States have a unique interest and will take positive steps to develop mining projects. Where minerals straddle the territory of more than one state, creating a unique interest in a combination of states, these states can come together and collaborate in the private sector exploitation.

Again this will cut out portfolio investors, middlemen and speculators.

IV. Opportunities & Expectations:

The seven priority or strategy minerals strategy will continue:

- i) Coal - principally Anambra Kogi Benue and Enugu with estimated 1134 million tonnes
- ii) Bitumen - Ondo, Lagos with over 16 Billion barrels and tars sands of 42 billion barrels

²⁸ See Roadmap for the Growth and Development of the Nigeria Mining Industry 2016 at page 61

- iii) Limestone - south west and middle belt over 31 million tonnes in the south west alone
- iv) Iron Ore down the East from North to South approximately 900 million tonnes
- v) Barites - 21, 123, 913 metric tonnes with proven reserves in Benue and Nassarawa
- vi) Lead Zinc - North East and South west
- vii) Gold - Where Nigeria has the potential to be a leading producer



Source: Mining in Nigeria – Ministry of Solid Mineral Development

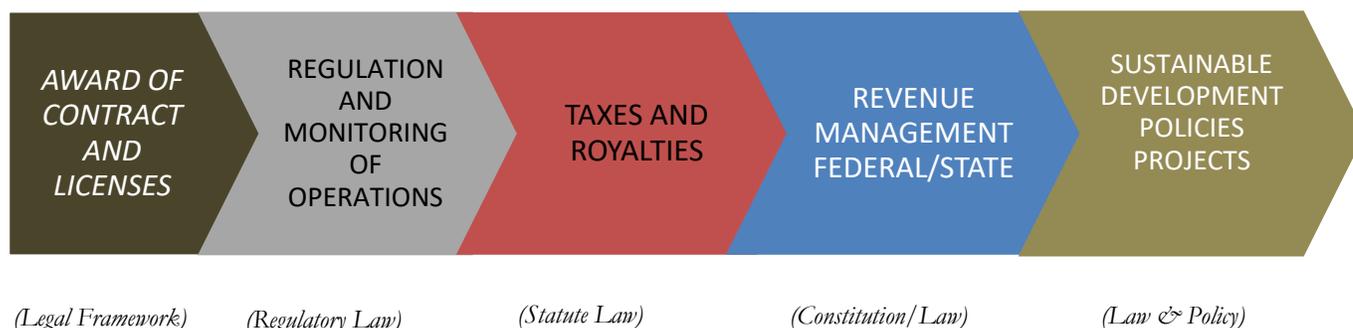
Fiscal opportunities for Nigeria:

Royalty:

Under the existing regime, applicable royalty is 3% to 5% calculated ad valorem on revenue and every company engaged in mining activities is required to pay them to the government.

Corporate Income Tax:	CIT liability is generally at the rate of 30% of companies' income however new companies engaging in the business of mining solid minerals are exempt for the first three (3) years and a special rate of 20% is applied to mining companies that make less than N1,000,000.00 (One Million Naira) in their first 5 (five) years of operation. The latter provisions can serve as incentives for investors.
Export Taxes:	Naturally export duties vary from mineral to mineral. These duties could significantly add to the revenue of the country where the sector is properly regulated and its export operations are carried out in accordance with procedures provided for in the regulatory framework.
Value Added:	The applicable VAT rate on goods and services supplied within Nigeria is 5%.
Capital Gains Tax:	CGT is chargeable at the rate of 10% on the total amount of chargeable gains of a person or company, derived from the disposal of assets, after making deductions allowed under the Act. CGT is also chargeable on assets disposed of outside Nigeria, but only on any amounts of such gains which are brought into Nigeria.
Personal Income Tax:	PIT is applicable to salaries and other earnings. It is charges at varying rates depending on the value of chargeable income.
Withholding Tax:	WHT can be applied to dividend, rent and other transactions.
Tertiary Education Tax:	Chargeable annually at the rate of 2% (two percent) on the assessable profit of every company registered in Nigeria.

VALUE CHAIN FOR MINING SECTOR²⁹



The best course to achieving what is envisaged by the Roadmap and the recommendations made in this address is the adoption of a value chain approach to the optimization of the sector's opportunities. The importance of a value chain is the addition of value at every step of a process and the achievement of the total value built up throughout that process. Without ensuring that each link in the value chain for the exploitation of Nigeria's mineral resources is firmly backed up by an apposite, applied and enforced legal and regulatory framework any efforts towards unlocking the potential of the Nigerian mining sector will inevitably fail.

Awards of titles must be fit for purpose and we must avoid blind mimicking of the systems of other jurisdictions on the grounds of foreign best practice. There must be competition but not attrition. There must be community participation and sensitivity not central control. Taxes and Royalties should include state participation in royalties. Revenue management again should take into account all stakeholders. Sustainability should embrace a circular economy where possible capture the benefits of the sector and avoid the mistakes of the hydrocarbon era.

V. Conclusion

I will conclude by stating that Nigeria's solid minerals are indeed a latent resource, ready to be tapped. This resource must however be tapped properly and within a solid and clear legal and regulatory framework. The existing framework does not address all key investor risk considerations including:

²⁹ Adapted from World Bank – Africa Region working paper March 2009

- i. Rights to use land and legislative competence on land and matters affecting land - this could be addressed by bringing the Federal and State operators together to agree on fiscal benefits thereby self-limiting authority on agreed lines.
- ii. Government involvement during a catalyst period will foster investor confidence.

As an emerging industry, the Nigerian mining sector has all of the opportunities and growth potential of any other. Mining currently only contributes about 0.36% to the Nigerian GDP. It is carried out on a very small scale and currently employs approximately 450,000 people directly and 2,000,000 people indirectly. This situation is abysmally low compared to other African countries including Botswana where the mining sector contributes about 40 % (forty percent) to the country's GDP and South Africa where it contributes about 18% (eighteen percent).

- iii. There is a need to combine the efforts of the Roadmap Committee and mitigation strategies with catalyst projects to immediately stimulate the market. Measures such as State JVs, G2B and G2G are strongly recommended. With adequate funding and proper attention it is estimated that the sector could generate employment opportunities for over 5 million people in the short term and contribute 3% - 6% in the medium term³⁰ and as much as \$27 billion (Twenty-Seven Billion Dollars) to the Nigerian GDP by 2025³¹.
- iv. A value chain approach is strongly recommended, if conceived properly it is clear that Law and Legal resources are essential to optimal performance of the sector.
- v. Nigeria will progress from being a mere 'minerals' country to a mining country.

³⁰ National integrated Infrastructure a Master Plan 2013

³¹ See Roadmap for the Growth and Development of the Nigeria Mining Industry 2016 at page 61