



MINING AND ENERGY NEWSLETTER

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“A number of developed countries around the world generate about 50% of their electricity from coal power plants. Although, the initial cost outlay may be high, in the long run such plants are cheaper to run. Coal is also a viable option considering that Nigeria has component states endowed with coal and the cost of coal being only 1/5(one fifth) of other fuels,” - Barrister Ayodele Oni.

The innovations in Information Communication Technology has made it easier to enter into contracts across borders thereby:

- **Increasing the nations foreign revenue**

EDITOR'S NOTE

In this quarter's newsletter we take a look at Mining and Energy law, highlighting the current developments in the sector with special emphasis on Nigeria.

Nigeria is wrought with the problem of inadequate energy supply. It is said that we have the widest gap globally between the demand and supply of electricity and this has adversely affected the nation's economic productivity and development.

To tackle this challenge Nigeria privatized the power sector in order to ensure an efficient distribution, generation and transmission network. Therefore in 2005 the Nigerian Electrical Power Authority (NEPA) became The Power Holding Company of Nigeria (PHCN) Plc and in the same year the Nigerian Electricity Regulatory Commission (NERC) was created to regulate the sector. This was followed by the incorporation of 18 Companies comprised of 6 generation companies (GenCos), 11 distribution companies (DisCos) and one transmission company (TCN) which the Federal Government retained control of.

It has been noted however that for Nigeria to achieve its goal of 40000MW by 2020, it will need alternative sources of energy, as opposed to being solely dependent on gas and hydro plants. In like manner, the execution of subsisting agreements between the Federal Government, the GenCos and the DisCos, is very vital to the entire Nigerian Energy sector.

In resolving the downstream gas challenge, there needs to be an overhaul of the regulations governing that subsector of the Nigerian Energy sector. Furthermore, these regulations, policies or laws must be couched in such a way as to encourage private sector participation. This will in turn lead to the necessary competition required to further develop the sector.

Presently, there is poor response to the need for investment, production, distribution and marketing of local gas to meet demand of domestic market. Gas flaring continues despite its detriment to the environment and loss of potential revenue for the nation. It is ironic that with such large gas deposits, Nigeria continues to import Liquefied Petroleum Gas (LPG) for its domestic market. The current wholesale transmission of natural gas from high pressured pipeline locally is carried out by The Nigerian Gas Company (NGC), NLNG and the NNPC/SPDC/Total joint venture, each with its own transmission pipelines that are designated to their individual purposes.

While the transport of gas through low-pressured pipelines to the end-users (power plants and industrial users) in Nigeria is carried out by Shell Nigeria Gas (SNG) and Gas link Nigeria Limited (Gas link), all deliver to Lagos and Niger Delta alone. It goes without saying that it is only when an effective legal framework is established that the productive development will begin. Therefore Nigerians are waiting with great expectation for the passing of the Petroleum Industry Bill, after all "the law" has always been a viable agent of social change.

Do have a pleasant read.

- Improving the nations international image
- Ensuring seamless technology transfer.

REVIVING THE MINING SECTOR

Nigeria owns a vast array of solid mineral reserves from its 2.7 billion metric tonnes of iron ore to its 3 billion tonnes of coal to its 2.2 trillion tonnes of barite, (a mineral used for drilling), tin, gold, uranium and copper all found in commercial deposits at 450 sites scattered across the country.

One of the ways adopted in reviving the mining sector was the enactment of the Nigerian Minerals and Mining Act (the Act) in 2007 which revitalize the Nigerian mining industry.

Further revival can be achieved when the Nigerian government strives to meet the challenge of ensuring strict health and environmental regulations to protect miners and the wider public, due to the health implications of mining.

In addition, strengthening institutions, transparency and accountability will encourage foreign investors, who should however have robust corporate social responsibility initiatives to address the needs of their host communities.

Another challenge to be faced headlong is the illegal mining activities in some of the regions of the nation, with the associated risks. The enactment of the Mining Act however ensures that foreign investors with the necessary permits and licences are guaranteed unfettered operation of their legitimate business in the country.

An equally major challenge to the development of this sector is the slow infrastructural developmental imbalance within Nigeria, particularly, inadequate electricity supply and lack of good access roads to sites of mineral deposits.

However, the privatization and reform of the power sector which started in 2005 is a stimulus for private investors. As progress in capacity continues in the area of Generation, Transmission and Distribution, the current challenges being experienced will be overcome. Meanwhile, any mining investor can meet its energy requirements by engaging independent power producers for generation and supply of energy to the mines.

Furthermore, access roads will ultimately improve with ongoing investments by the Federal and State Governments in road infrastructure. The ongoing rehabilitation of the Rail lines will also facilitate product evacuation across the country for export.

As part of the mission to revive the sector, the Ministry of Mines and Steel Development (MMSD) formerly called the Ministry of Solid Minerals Development, has identified seven minerals, namely: Coal, Bitumen, Limestone, Iron Ore, Barites, Gold and Lead/Zinc for priority development.

Solid minerals are distributed throughout the Federation; however, some parts of the country are notably more active in mineral extraction than others due to their geological nature, legal restrictions, and the rate of demand from local industries. For instance, the current Mining Act prohibits dual licencing or overlapping of both petroleum and solid mineral licences. In the Niger Delta (which is an oil producing region), mining licences are limited to small-scale mining and quarrying for construction and industrial materials for the construction works in the oil industries and related activities.

The Computerized Mining Cadastre System is the substance of the Minerals and Mining Act of 2007. This system has the responsibility to administer mineral titles and maintain a cadastre register on behalf of the Federal Government, with the primary aim being to gain investors' confidence and provides information on the state of mining activities to the

investors and the public at large.

The Nigerian Mining Cadastre System records data such as, geographical location, ownership, type of mineral rights and validity period, compliance with environmental obligations and social agreements, and also payment of required fees. It basically seeks to document all the stages/transactions that occur during the existence of the mine, which include application, grant, payment of fees, possible change in ownership, and finally, release or revocation of the title. In other words it is an official register / file containing amongst other things the areal extent and the value of mineral rights in a certain location, it also forms as a basis for legal, administrative and fiscal analysis, in the management of mineral resource.

Its digital nature makes it easier for mineral title data to be analyzed. In fact most of the Exploration companies are making use of the data made available by the government as opposed to getting it themselves. This geologic data forms a basis for potential investment

The search for, and subsequent exploitation of mineral resources (prospecting , exploration and extraction)in Nigeria according to the provisions of the Mining Act is through an exploration licence, mining lease, quarry licence or small-scale mining lease depending on the scale of operation, type of mineral mined and the geology of the deposit. The Mining Act prohibits dual licensing or the overlapping of both petroleum and solid mineral licences. Exploration for new minerals or of existing reserves may be carried out by the mining company itself or in partnership with an exploration company, also known as the 'Juniors'.

The Nigerian Exploration License is valid for 3 years (renewable) and given to an applicant that shows evidence of the availability of funds, a certificate of incorporation, and willingness to conduct the exploration in a socially and environmentally responsible way as experience has shown that the proper engagement with and interest in the concerns of the local communities at the early stage of exploration, decreases the risks that arise with opposition/conflict.

The Nigerian Mining licence transfers ownership of a mineral from the Federal Government to the holder of the mining licence. A mining lease can be obtained via two methods:

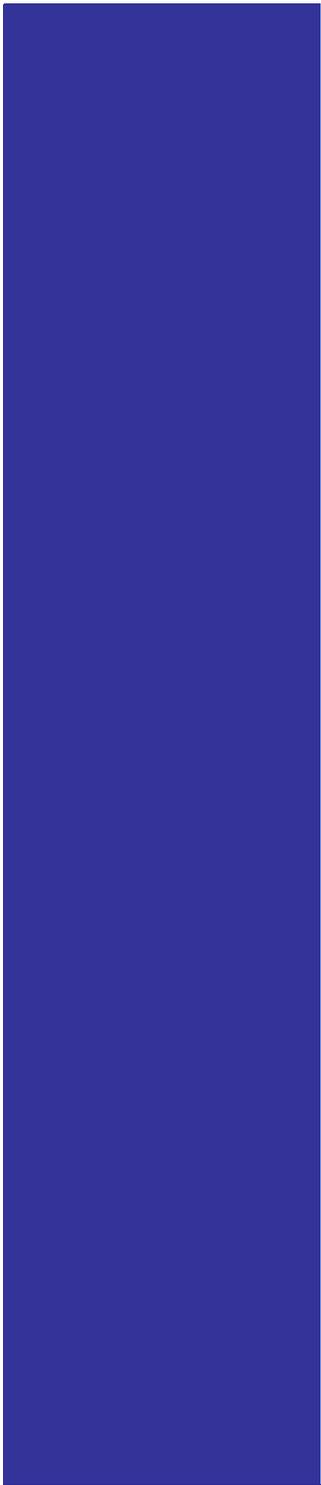
- (1) By complete or part acquisition of an existing mining property(Brownfield)
- (2) By obtaining the appropriate licence at each time, from prospecting (Greenfields), to exploration and then the mining lease.

The first method is not common. It however became a go to option with the privatization of government-owned mining properties, for instance, the Nigerian Mining Corporation (NMC).

It goes without saying that for a revamp of the Nigerian Mining Sector, the Energy Sector must stabilize, by amongst other things graduating from the use of long transmission and distribution wires into rural areas that have no power, to an integrated use / exploitation of various technology options to provide energy solutions to all, such as solar home systems, grid, modern thermal carriers (like liquefied natural gas, bio-ethanol, etc.). Signs of progress have been noticed more in the devices market, since devices such as solar lamps are relatively cheap in the long run when compared with the cost of the use of Kerosene lamps, and there are high quality products in circulation.

Furthermore, there is a need to bridge the capacity gap in the financial, technical and legal skills required for proper execution of energy and mining projects.

Finally the public sector needs to provide unwavering commitment to advance the Mining Sector by creating a stable political environment, that would ensure efficient decision making and drastic reduction in the government's red tapes and bottlenecks.





“IF Nigerian’s had their rights fully protected under explicit consumer protection laws, they would seek to have them enforced more regularly than is the current situation” - Barrister B.V Enwesi, LLB, BL, LLM (E-commerce Law)



The Nigerian Content Act 2010; is there true compliance?

The Nigerian content development and monitoring board ensures capacity building to support increased investment in the oil industry, its mission statement is “opening the Nigerian oil and gas for the Nigerian people”. Basically its responsibilities is to increase participation in the oil and gas industry in order to build local capacity.

It therefore requires that promotion of Nigerian content development be a major concern in all projects and operations in the oil industry stating that Nigerian independent operators shall have the right to be considered first in the award of oil blocks, lifting licenses and in all projects for which contracts are to be awarded and also as regards employment of staff, staff training and procurement of goods and services.

One of the provisions of the Nigerian Content Act is that the Nigerian subsidiary of a multinational parent oil company, must own at least 50 percent of the equipment and the Nigerian Stakeholders have first right of refusal to purchase.

The Act states specifically in section 3 (which contains the overall policy objective) that

- a. Nigerian independent operators shall be given first consideration in the award of oil blocks, oil field licenses, oil lifting licenses and all projects for which contract is to be awarded in the Nigerian oil and gas industry subject to the fulfilment of such conditions as may be specified by the Minister.
- b. There shall be exclusive consideration to Nigerian Indigenous service companies which demonstrate ownership of equipment, Nigerian personnel and capacity to execute such work to bid on land and swamp operating areas of the Nigerian oil and gas industry for contracts and services contained in the schedule to this Act.
- c. Compliance with the provisions of this Act and promotion of Nigerian content development shall be a major criterion for award of licenses, permits and any other interest in bidding for oil exploration, production, transportation and development or any other operations in Nigerian oil and gas industry.

It is important to note that the above provision places a responsibility on the Nigerian Independent Operator to ensure that it has **demonstrable capacity**, in terms of its ability to execute the project, its ownership of requisite equipment and its employment of skilled personnel.

In answering the question as to whether there has been compliance with the Act, the following facts are instructive.

- The Act provides that the **Nigerian Local Content Board** should publish a Nigerian Content Indicator which will act as the criteria used to determine and rate the extent to which a company is complying with the Act. The Board may go ahead to offer concessions to companies having high local content.

- The Act in section 7 provides that the companies/ operators should also have a Nigerian Content Plan which they submit to the Board.
- Section 11 of the Act states that the "minimum Nigerian content in any project to be executed in the Nigerian Oil and Gas industry shall be consistent with the level set out in the Schedule", sub section 3 in particular states that the minimum Nigerian content requirements in the schedule must be complied with by all operators, alliance partners and contractors. This means they should all use Nigerian human resources to the extent specified. However, note that sub section 4 states inter alia that in a case where there is inadequate capacity on the part of Nigerian human resource, then alternative may be sought.
- Section 15 of the Act states that Operators must maintain a bidding process that gives full and fair opportunity to Nigerian companies to supply goods and services in the industry.
- Section 28 of the Act states that "Nigerians shall be given first consideration for employment and training in any project executed by any operator or project promoter".
- Section 31 of the Act sets out strict measures on the employment of expatriates, with each expatriate position being limited to 5% for each project and attainable only after obtaining approval of the Board. This creates more work for Nigerians.
- Section 34 of the Act provides that a "Labour Clause" be inserted in "projects or contracts" mandating the use of a minimum percentage of Nigerian workers as may be stipulated by the Board. Basically all companies operating in the Nigerian oil and gas industry must employ a minimum number of Nigerians in their junior, intermediate and professional cadres. This is an important provision because the labour in most oil and gas companies is constituted by the professional cadre i.e. Geologist, Petroleum Engineers etcetera, it therefore guarantees them consistent revenue.
- In like vein in Section 41 of the Act the Minister may make regulations setting targets to ensure full utilization and industrialization of indigenous companies in the following areas: Exploration, Seismic data processing, Engineering design, Reservoir studies, Manufacturing and fabrication of equipment; and Other facilities as well as the provisions of other support services for the Nigerian Oil and gas industry. Section 41(2) specifically states that International or multinational companies working through their Nigerian subsidiaries shall demonstrate that a minimum of 50% of the equipment deployed for execution of work are owned by Nigerian subsidiaries.
- While Section 44 states that the operators must submit to the Board yearly, a plan showing its initiatives, which are aimed at ensuring the effective transfer of technologies from the operator and alliance

partners to Nigerian individuals and companies.

- Section 49 provides that all investors in the oil and gas industry must insure all their insurable risks related to the oil and gas business, with an insurance broker registered in Nigeria. Section 50 provides that the National Insurance Commission may give a written consent allowing companies to insure their risks outside Nigeria, once it has ascertained that the Nigerian local capacity to insure has been fully exhausted.
- Section 51 is instructive in that it guarantees the use of Nigerian Legal Practitioners, located in Nigeria by investors/operators in every oil and gas transaction, business and contract in Nigeria.
- Section 52 provides that any operator or investor that needs financial services can only engage the services of Nigerian financial institutions except in situations to the satisfaction of the Board it is impracticable to do so.
- Finally Section 53 provides that operators or investors engaged in the Nigerian oil and gas business must carry out all welding activities in Nigeria.

Have the above been applied? For example if a company registered in Nigeria is one hundred percent owned by a multinational company, it would be easy to transfer revenue and assets abroad without consideration.

The above overview shows the laudable intent of the Act. However, it would seem that a practical analysis of the situation in the Nigerian oil and Gas industry will show that it has been difficult to achieve the goals it set forth.

The GOS Newsletter has been prepared for clients and professional colleagues as a general guide to the subject matter, it is not meant to substitute specialist legal advice about your specific circumstances.

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E-mail: b.sodipo@gosodipo.com

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G.O SODIPO & CO
Tel: 08023198641

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