# JOINT VENTURE AGREEMENTS AS A TOOL FOR REVITALIZING NIGERIA'S SOLID MINERALS SUB SECTOR

**Terhemen Andzenge**

**JULY, 2006**

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**A THESIS SUBMITTED TO THE POST – GRADUATE SCHOOL, AHMADU BELLO UNIVERSITY, ZARIA IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE AWARD OF THE DEGREE OF MASTERS OF LAW (LL. M)**

**DEPARTMENT OF COMMERCIAL LAW**
**FACULTY OF LAW**
**AHMADU BELLO UNIVERSITY, ZARIA**

## DECLARATION

I hereby declare that this thesis has been written by me and that it is published elsewhere by anybody or any institution for a higher degree.

All quotations and references are duly indicated with specific acknowledgments.

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## CERTIFICATION

This thesis entitled " JOINT VENTURE AGREEMENTS AS A TOOL FOR REVITALIZING NIGERIA'S SOLID MINERALS SUB SECTOR " BY ANDZENGE, TERHEMEN Esq. meets the regulations governing the degree of Master of Laws of Ahmadu Bello University Zaria and is approved for its contribution to academic knowledge and literary presentation.

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# DEDICATION

THIS THESIS IS DEDICATED TO THE SINGULAR GLORY, HONOUR AND PRAISE OF THE CREATOR OF THE UNIVERSE – THE ALMIGHTY GOD.

# ACKNOWLEDGEMENTS

I ascribe all honor and attribute all praise to the Almighty God for enabling, equipping and sustaining me to see this work through. Mindful however that He employs and utilizes His creatures to achieve His purposes, I wish to underline those He used and who made themselves available to enable me attain the objectives of this work.

I acknowledge the help, guidance and direction I received to in the course of this work from the deep well of knowledge and experience of my supervisors Dr Y. Aboki and Dr A.A. Akume without whose patience I would still be burning the "midnight oil".

I thank members of my family for lending a helping shoulder for me to lean in my times of despair and discouragement: Princess, the one who has always been "there" whenever she was needed and for always perceiving when to give me the space to move the work forward. The child of my strength, Sever for the invaluable computer tips and Ashe-Shaana for the intermittent, irritating yet enjoyable disruptions during the unaccountable number of times I have been on the computer. The readiness of my cousin Zach Gundu, P.hD to make his resources available to me went a whole long way in readying this work. The foresight of Steve Andzenge in encouraging me to pursue this path provided the needed impetus.

I recall with unending appreciation the nuisance my friend; Dan Ogun, P.hD constituted himself into in my life with his continuous questions: "how far have you gone with the work". He provided the much needed support including "bed and breakfast" with the "Area mummy". Much credit goes to Pat Emesiani who ungrudgingly endured my several deadlines to get the work completed in time.

Peter Akper deserves special mention for allowing me unhesitatingly to tap into his rich resource of materials without which this work would still be on the drawing table. Mr. H. I Ali of the Commercial Law Dept require mention here for his encouragement that has borne an imprint on this work.

Finally, I cannot finish without acknowledging the bullying interventions of Barrister Sekwonumwaza, in the course of this work which, instead of putting me off provided a soothing effect to spur me on. Thank you for refusing to let go.

To the numerous “OTHERS” who have aided me on my way but whom I am unable to individually mention here, I can only commend you to the One who sees in secret to reward you publicly.

Notwithstanding the above, a caveat is needful here: all the shortcomings this work labors under are entirely attributable to me alone.

# ABSTRACT


## 1. Statement

The contribution of solid minerals to the Gross Domestic Product (GDP) and Foreign Exchange earnings of the country has been on the decline since the discovery of the Oil Minerals (Crude Oil) and its commercial exploitation in the late 1950s. The unwholesome reliance on the mineral has not only led to the progressive neglect of other sectors of the economy such as Agriculture, Mining, Manufacturing etc. but has also led to structural imbalances in the economy, with the effect becoming manifest in the 1990s.

To address this problem the Government has decided to explore other viable alternatives that have hitherto been neglected in order to diversify the revenue base of the country.

The solid minerals sub sector is a viable alternative in this regard and there are indications that if properly harnessed, the sector has the potential of contributing substantially to the revenue earnings of the country in the 21st century.

However, given the long period of neglect it has suffered, concerted efforts must be made to revitalize it and properly position if for the role expected of it as a major source of revenue earning. One of the ways of achieving this objective is through the use of Joint Venture Agreements.

A Joint Venture Agreement is essentially a relationship between two or more persons to conduct a common business for their mutual benefit with the underlying understanding that shall share in the profits and losses and each shall have a stake in its management. Solid minerals development encompassing the stages of prospecting exploration and exploitation is heavily capital intensive with long gestation periods and the pooling of financial resources from several partners, both local and international, under a Joint Venture arrangement is the most effective and less burdening way of developing the sub sector.

# TABLE OF CONTENTS



## CHAPTER ONE

## 1.0 GENERAL INTRODUCTION

## CHAPTER TWO

## 2.0 LEGAL FRAMEWORK FOR SOLID MINERALS DEVELOPMENT IN NIGERIA.



## CHAPTER THREE

## 5.0 FORMS OF MINERALS DEVELOPMENT AGREEMENTS

## CHAPTER FOUR

## 4.0 CONTENTS OF JOINT VENTURE AGREEMENTS IN MINERALS DEVELOPMENT

## CHAPTER FIVE

## 5.0MAKING NIGERIA'S SOLID MINERALS SUB SECTOR COMPETITIVE: INTERNATIONAL TRENDS AND LOCALCHALLENGES FACING THE SOLID MINERALS SUB SECTOR

## CHAPTER SIX

## TABLE OF STATUTES

## TABLE OF ABBREVIATIONS

1. BIO - Bank for Commerce and Industry
2. CAMA - Companies and Allied Matters Act
3. CAP - Chapter
4. COW - Contract of Work
5. EFCC- Economic and Financial Crimes Commission
6. FDI - Foreign Direct Investment
7. FOS - Federal Office of Statistics
8. GDFI - Gross Domestic Product Fixed Investment
9. GDP - Gross Domestic Product
10. GSN - Geological Survey of Nigeria
11. IB. ID - Ibidem
12. ICPC - Independent Corrupt Practices and other Offences Commission
13. LAAC - Land Allocation Adjustment Committee
14. LAC - Latin American and Caribbean Region
15. LFN - Laws of the Federation of Nigeria
16. LOC.CIT - Loco Citato
17. MA - Mineral Agreements
18. MIGA - Multilateral Investment Guarantee Agency
19. ML - Mineral Law
20. MNCS - Multi National Companies
21. MSMD - Ministry of Solid Minerals Development
22. NERFUND- National Economic and Reconstruction Fund
23. NCC - Nigeria Coal Corporation

**24. NEXIM- Nigeria Import Export Bank**

**25. NIDB - Nigeria Industrial Development Bank**

**26. NIEO - New International Economic Order**

**27. NIPC - Nigerian Investment Promotion Council**

**28. NMC - Nigerian Mining Corporation**

**29. OP.CIT - Opera Citato**

**30. PMRS - Private Minerals Rights System**

**31. PSNR - Permanent Sovereignty Over Natural Resources**

**32. R'OOO- Rand**

**33. SMRS - State Minerals Rights System**

**34. TNCs - Trans-National Corporations**

**35. UN - United Nations Organization**

**36. USA - United States of America**

## LIST OF TABLES

## TABLE OF APPENDICES

# CHAPTER ONE

# GENERAL INTRODUCTION

## 1.0 ORIGIN OF THE PROBLEM

The economy of Nigeria has for more than four decades now been dominated by earnings derived from petroleum resources. Historically, however, this has not always been the case. Up till 1960 and prior to the discovery of petroleum resources, solid minerals in the form of coal and tin ranked among the highest revenue earners for the country, second only to agriculture. Solid minerals then contributed significantly to the Gross Domestic Product of the nation.

By 1962 agriculture and other non-oil sub sector earnings contributed 78.2% of the total nation's revenue. Apart from agriculture, these earnings were derived from coal, gold, tin, columbite, tantalite, wolframite, lead and zinc coupled with the substantial employment opportunities for the citizenry. During the same period, the contribution of oil to the nation's revenue base was a meager 13.3%.[1]

This picture changed dramatically and by 1977 the revenue from agriculture and non-oil earnings dropped to a mere 1.1% while those from oil rose from 13.3% to 98.9% [2].

In spite of the positive contributions of petroleum resources to the GDP and foreign exchange earnings of the nation, the total reliance on it has thrown up structural distortions in the economic base of the nation. This has been exacerbated by constant fluctuations in the international market pricing regimes of petroleum resources. Planning and development based on these price projections has therefore been haphazard leading to retarded economic growth.

The intensity of these distortions on the economy coupled with the toll they were exacting on the nation provided a wake up call for Government. By the 1990s Government began to take a second look at another erstwhile major revenue earner of the nation - solid minerals. This led to the creation of a new ministry, the Ministry of Solid Minerals Development to serve as a vehicle to reposition solid minerals as a veritable alternative to petroleum resources. In addition, a new enabling law was enacted, the Minerals and Mining Act of 1999. This law consolidated and harmonized the concepts in the

myriad of laws that hitherto regulated the solid minerals sector. These included:

(i) Minerals Act.[3]

(ii) The Diamond Trading Act. [4]

(iii) Nigerian Mining Corporation Act. [5]

(iv) The Tin (Miscellaneous Provisions) Act. [6]

(v) The Nigerian Coal Corporation Act. [7]

(vi) The Quarries Act and, Regulations. [8]

(vii) The Gold Trading Act. [9]

Key to the realizing the goal of revitalizing solid minerals exploitation in the country is the need to attract foreign investment into the industry. The present weak economic base and capital paucity in the country coupled with dearth of skilled mining manpower have made it almost impossible for Government to meaningfully exploit the nation's vast solid minerals endowments without foreign investment.

The thesis of this study therefore, is to conduct a historical overview of the development of solid minerals and its exploitation,

both at local and international levels and in the process bring to bear on it the different mineral contract regimes in force with a close consideration of Joint Venture Agreements as a crucial tool for the attainment of Government objectives in the solid minerals sub sector.

## 1.1 OBJECTIVES AND AIMS OF THE RESEARCH

The major aims and objectives of this study are as follows:

i) To examine the historical development of solid minerals exploitation in Nigeria identifying its high points and trace the reasons for the steady decline of the sector giving place to petroleum resources.

ii) Conduct a review of the different mineral contract regimes in force globally and in Nigeria and how they have aided in the development of the sector.

iii) To examine the effectiveness or otherwise of clauses in Joint Venture Agreements, as a vehicle for revitalizing the solid minerals sub sector towards the economic development of the country.

iv) To consider ways and means of improving on the preparation, drafting and implementation or management of solid minerals

development agreements in Nigeria within the context of global economic development.

v) To consider the challenges facing the solid minerals sector, including but not limited to institutional reforms and legal framework.

vi) To proffer suitable strategic options for re-invigorating the solid minerals industry in Nigeria.

## 1.2 SCOPE OF RESEARCH

The main thrust of this thesis is to trace the historical development of solid minerals industry and the kinds of mineral agreements that have hitherto governed and still govern the relationships with specific emphasis on the Joint Venture Agreement, highlighting it as a veritable tool for revitalizing the slow paced sector.

## 1.3 METHODOLOGY OF RESEARCH

Owing to the unique nature of this research and its novelty in contemporary legal arena, a hybrid approach of both doctrinal and non-doctrinal methods of research has been adopted.

Firstly, the study utilizes primary data such as laws, gazettes, collection of legal documents within and outside Government departments. In addition data obtained from informal interviews with some experts has been incorporated.

Secondary data in form of literature on the subject and relevant books and publications have been employed.

As the development of the sub sector is at its infancy, not much local data or publications is available and recourse has had to be made in certain cases to publications in petroleum resources development as the two sub sectors, apart from being mining sectors have the same stages of processing and exploitation.

## 1.4 LITERATURE REVIEW

A myriad of literature sources have been relied upon in this research. Majorly however, three publications and two unpublished works have borne a larger imprint on this work. They include:-

a) **The Oil and Gas Industry, Exploration and Production Contracts** by Yinka Omorogbe, Malthouse Press Ltd, 1997.

b) **Petroleum Development Contracts with Multinational Oil Firms: The Nigerian Experience** by Maxwell Gidado, El-Liform Services, 1999.

c) **Mining Exploration Agreements** by W.B. Gordon Walker, Special Volume 28, The Canadian Institute of Mining and Metallurgy, 1984.

d) **The Law and Policy Relating to Solid Minerals Development in Nigeria** by Peter Terkaa Akper: Thesis for Master of Philosophy, Obafemi Awolowo University, Ile-Ife, March 2002.

e) **International Contracts for Mineral Development in Nigeria: An Appraisal** by Muhibat Jadesinmi Oladoja Mohammed; December, 1998, LL.M Long Essay, Obafemi Awolowo University, Ile-Ife.

### 1.4.1 **The Oil and Gas Industry, Exploration and Production Contracts, By Yinka Omorogbe.**

This work is essentially aimed at "reducing or eliminating possible areas of conflict that could arise within a long-term contractual relationship for the exploration, production and development of Crude Oil…" The essential thrust of this work is therefore aimed at contractual relationships in the petroleum industry.

However, it has been found very useful on the premise that mining be it in petroleum resources or solid minerals share a common umbilical cord. Unique areas such as the unpredictability of exploration activities and the need to provide regimes that would ameliorate loses in cases on unsuccessful exploratory activity are common to both petroleum and solid minerals resources.

The book therefore has been of invaluable help in seeking to arrive at an "ideal" mineral agreement that serves the interests of all parties to a mineral agreement.

### 1.4.2 **Petroleum Development Contracts with Multinational Oil Firms, The Nigerian Experience by Maxwell Gidado**

The focus of this work is essentially the same as the Omoregbe's above. The critique contained therein applies here mutandis mutandis. It may be needful to add here that the work has treated the different mineral development agreements in petroleum resources in a detailed form and further introduced an important chapter on transfer of technology to Nigeria; an area that is also critical to the survival and development of solid minerals in Nigeria.

### 1.4.3 **Mining Exploration Agreements by W.B. Gordon Walker.**

This work, written by a field geologist brings out the Canadian perspective of exploration contracts in mining. The work is restricted to the first stage of a mining programme i.e. exploration and does not provide help in the other critical stages of mineral exploitation.

### 1.4.4 **The Law and Policy Relating to Solid Minerals Development in Nigeria by Peter Terkaa Akper.**

This is an unpublished Masters of Philosophy research work. It provides a broad overview of solid minerals development, beginning with a historical perspective to the policy framework, legal regime, and institutional framework. The work has also sought to highlight the challenges facing the Nigerian solid minerals sub sector and proffered solutions and recommendations.

This work is voluminously large. It provides a broad, non specific overview of the solid minerals. For the core purposes of this thesis therefore, the work provides little help. However, the chapters that dwell on the historical development, legal framework and challenges facing the solid minerals sector have been most instructive.

Being a work that is essentially on the law and policy relating to solid minerals, it does not in any way consider or treat specific mineral development agreements.

1.4.5 **International Contracts for Mineral Development in Nigeria: An Appraisal by Muhibat Jadesinmi Oladoja Mohammed**

This is another research work. It is an unpublished Masters of Laws work. It seeks to review and research on minerals development contracts generally. This entails an equal consideration of mineral development contracts both in the petroleum resources and the solid minerals sector.

However, apart from an attempt at defining the concept of solid minerals and its origin and evolution in chapter one, all the other chapters dwell mainly on petroleum resources sub sector to the detriment of the solid minerals sub sector. Apart from an occasional perch here and there, the body of the study is essentially a thesis on international petroleum resources contracts. The detailed consideration of clauses in the study in minerals contracts lacks any reference whatsoever to solid minerals.

However, this thesis has been of immense help as:-

i) Mineral Contracts in petroleum resources have similarities to solid minerals as all are in respect of mining.

ii) Certain specific clauses in mineral contracts are uniform in all international mining regimes be they for petroleum resources or solid minerals and their treatment in one publication would aid in the consideration of the other.

## 1.5 SIGNIFICANCE OF THE WORK

This work, in addition to and in contradistinction with the above works seeks to provide the platform for a clear appreciation of the developmental history of solid minerals in Nigeria, its potentials, the legal regime that governs it and the different contractual relationship that are in operation. A case is thereafter made for the suitability of Joint Venture Agreements as a veritable tool for repositioning the solid minerals sub sector as a revenue earner for the nation. While the works reviewed above essentially dwell on the development of the oil sector and the legal regimes in operations therein and legal framework governing development of solid minerals in Nigeria, the

present work, while covering the above grounds, goes further to suggest and build a platform for Joint Venture Agreements as a suitable vehicle for transforming the solid minerals sub sector from its present doldrums.

## 1.6 LIMITATION OF THE RESEARCH

This work labors from limitations from several directions.

Firstly, solid minerals development is a virgin area. It lacks a delineated history. It is an emerging sector. Thus decided cases are non-existent while on-going "live" Agreements are rare.

Secondly, the Minerals and Mining Act of 1999 on which the solid minerals development hinges is relatively new and untested. Assessing its impact is therefore been deemed premature.

Thirdly, literature available is scarce, and in most areas completely non-existent. This has been a hugely limiting factor and, where available they do not deal strictly with the different contractual relationships in a detailed form.

Fourthly, most of the reforms intended to be carried out under the Solid Minerals National Development Policy are yet to commence.

This has starved the sub sector of the vibrancy that would aid in its development.

## 1.7 ORGANISATIONAL LAYOUT

The study's main thrust is on Joint Venture Agreements as a tool for revitalizing solid minerals. Apart from the foundational areas of the work where the historical development of the sub sector is presented, there is also an attempt at defining and classifying minerals and the nature of minerals rights available.

The study is divided into six chapters.

Chapter One, introductory in nature highlights the nature of the problem to be tackled by the work, the objectives of the work, its reach and scope, the methodology employed, the literature materials referred to, the limitations the work labors under and the general organizational layout.

Chapter Two attempts to define and categorize minerals according to their use. It also presents a historical and theoretical perspective of solid minerals development globally as well as in Nigeria. The chapter in addition delineates the development of the solid minerals mining

from antiquity to its present position in Nigeria. In addition it provides basic concepts that are central to mining:-Ownership and control of minerals and the different mineral rights systems prevalent in the global mining world and in Nigeria particularly. It also touches on the raging controversy of resource control by states that are endowed with minerals that have had the singular fortune of being given priority by the Government.

Chapter Three is essentially a presentation and critical appraisal of the different shades of minerals development agreements that have been and still are in practice in developing countries with the analysis focusing on the Nigerian situation. In addition, the mineral development contract regime in developed mining countries is also presented.

Chapter Four brings to the fore the nature of a Joint Venture Agreement and its contents and a clause by clause analysis conducted in the light of international industry trends and their relevance and adaptability to the Nigerian situation.

Chapter Five identifies and discusses the challenges facing the solid minerals sub sector in a bid to make it more investor friendly and conducive to foreign investors.

Chapter Six contains the conclusions and the recommendations distilled from the work.

## END NOTES TO CHAPTER ONE

1. Omene, G.E. Solid Minerals - Oil and Gas: Key to the Nigerian Economy. A lecture presented at the conference organized by Metallurgical and Mining Division of the Nigerian Society of Engineers held at Abuja on the 26th September 2002.
2. Ibid
3. Cap 226, LFN, 1990
4. Cap 162, LFN, 1990
5. Cap 317, LFN, 1990
6. Cap 429, LFN, 1990
7. Cap 229, LFN, 1990
8. Cap 385, LFN, 1990
9. Cap 102, LFN, 1990

# CHAPTER TWO

# LEGAL FRAMEWORK AND DEVELOPMENT OF SOLID MINERALS IN NIGERIA

## 2.0 INTRODUCTORY OVERVIEW

Prior to independence in 1960 and a decade afterwards a thriving mining industry existed in Nigeria with solid minerals accounting for a second place after agriculture in the export earnings and revenue profile of the colonial government and the newly independent nation. Nigeria was a major world producer and exporter of tin ore. Mining began in 1908 with the pioneering work of the Nigerian Bitumen company. Simultaneously with this was the commencement of tin mining in the Plateau which peaked to an all time high of 17000 tons per annum in 1945 from a humble beginning yield of about 18 tons per annum. Coal also occupied a strategic place as a main source of power running the rail system and providing the energy needs of the colonial government. Solid minerals were the second highest employer of labour after agriculture. The development of the sub sector was essentially private sector driven.

However, after independence the importance of solid minerals and its strategic relevance to the nation's economic fabric began to lessen with the discovery of petroleum resources. In addition, the civil war that the country went through between 1967 – 1970 contributed in no small way in halting the development of the sub sector as it was predominately private sector driven by foreign companies and individuals who had to leave Nigeria on the out break of the war.

Furthermore, the depression in the price of the major minerals Nigeria was producing, principally tin, following the end of the Second World War made mining less attractive and uneconomical.

In addition, the coming into effect of the indigenization era of the 1970s had a negative effect of uprooting foreign concerns and individuals who had been engaged in mining to allow local entrepreneurs to enter the sub sector. This led to massive flight of investment and manpower thus further depressing the sector.

To cap it all, discovery of alternative (but necessarily cheaper) sources of energy to replace coal such as natural gas, solar energy, and fossil fuels helped in no small way to diminish the importance of solid minerals.

However, by the turn of the 1990s due to a combination of several factors including the realisation by Government that the total reliance on petroleum resources earnings as the main stay of the economy was creating distortions in the nation's growth, concerted efforts began to be evolved for a diversification of the revenue base of the nation towards the development of solid minerals.

Government began to take steps to reposition the sub sector. These included the creation of separate ministry charged with the sole responsibility for the development of the sector i.e. the Ministry of Solid Minerals Development in 1995, the publication of a National Solid Minerals Policy in 1999, the revision and enactment of modern Minerals and Mining Law in 1999 and the institution of an incentive regime to attract investors.

The main thrust of this study therefore is to conduct a historical review of mining on a global, continental and national levels, identify the nature of rights accruing to titles in solid minerals exploration and exploitation, trace the origin, nature and contents of early mining agreements and having in mind the prevailing regime of state ownership of mineral rights, conduct an informed discourse on the different contractual relationships in solid minerals development, their implication and most importantly dwell on the Joint Venture Agreement and its role as a veritable tool for revitalizing and repositioning the nation's solid minerals to a pedestal that will allow it to be once again a leading revenue earner for the nation.

## 2.1 DEFINITION OF MINERALS

Solid minerals are naturally occurring or naturally formed inorganic substances.[10] To be categorized as a mineral, a substance must have an inorganic, or non-living origin and a composition that can be expressed by a chemical formula. In this regard, its elements may be metallic or non-metallic.[11]

Their distribution is irregular and uneven as a result of the fact that their occurrence is determined by fortuitous factors of geological and

evolutionary processes on the planet.

Solid minerals come in several categories broadly categorized as the ferrous group, the non-ferrous metallic group and the non-metallic group. According to the National Policy on Solid Minerals, 1988, solid minerals "encompass a wide range of endowments going from iron ore to coal to sand and gravel, some of which are found on the surface while others can only be won from the earth through underground mining"

## 2.2 CLASSIFICATION OF MINERALS

Mineral experts worldwide have through study identified over 1500 different mineral species. However for broad classification, minerals are categorized into 11 major groups according to their constituents. These major groups are: -

a) Native Elements
b) Sulfides
c) Sulfates
d) Nitrates and lodates

e) Tingatates and Molydate

f) Carbonates

g) Sulfosalts

h) Oxide and Hydroxides

i) Halides and Borates

j) Phosphates Venadate and Arsenates

k) Silicates

However, the classification of minerals according to their uses may make such classification more amendable to understanding. This is the classification adopted by the Ministry of Solid Minerals Development through the Department of Geological Surveys[12] : -

a) Minerals Fuels: Bitumen, Thorium, Uranium, etc.

b) Metallic Minerals: Iron, Nickel, Tin, Lead, Zinc, Clay, Manganese, Aluminum, etc.

c) Structural Engineering Minerals: Marble, Feldspar, Fluorspar, Gypsum, Gravel, Clay etc.

d) Industrial Minerals: Sodium Carbonate, Sodium Chloride, Sulphate, Graphite, Limestone, Quartz,

Sand, Diatomite, Asbestos, Monazite, etc.

e) Gemstones: Emerald, Diamond, Ruby, Garnet, Amethyst, Topaz, etc.

This classification using the mineral's usage as a yardstick has been further underlined by the National Policy on Solid Minerals, 1988 which goes a step further to divide minerals in relation to their importance to the nation[13].

In that regard therefore, all mineral occurrences in the country have been classified under 3 headings:-

a) National Interest Minerals

b) Security Interest Minerals

c) Industrial Interest Minerals

## A. NATIONAL INTEREST MINERALS

National Interest Minerals are those minerals which, by their nature, are strategic to a nation's economic and political well-being. They are usually not only used for economic purposes but also for ensuring the stability of the nation state too.

A typical example of a mineral being considered one of "National Interest" is coal. At the onset of its exploitation, the Colonial Government and the

newly independent Government in the early sixties employed coal as the sole source of power that moved the railways system, powered the cement factories and generated electricity at the Oji River.[14] Its use was of prime national importance to the nation as it moved the wheels of the two dominant areas of the economy then, to wit, transportation and power. It was therefore apposite to consider the mineral to be of national interest and categorized as such.

## B. SECURITY INTEREST MINERALS

As the name implies, these are minerals which by their constituents are amendable to be employed for weaponry or for offensive purposes and can have national security implications. Uranium is one of such minerals which when refined and enriched can be a veritable by – product for making bombs, so also are fissionable minerals that contain explosive elements. This classification is important as it would be inadvisable to allow an unchecked private exploitation of "Security Interest" Minerals, which could get into the hands of persons or groups that would apply same to subvert national / international stability through force and/or threaten international tranquility.

## C. INDUSTRIAL INTEREST MINERALS

Industrial Interest Minerals are those minerals which by their constituent parts are amendable to be transformed into economic uses. As opposed to Security Interest Minerals which are essentially offensive in nature when applied or utilized, Industrial Interest Minerals are those which, if left unexploited are useless, but when exploited and channeled properly, can transform the economic fortunes of a nation. Such minerals can rightly be considered paramount for oiling the wheel of economic development of a nation. Iron ore for example is employed in the making of steel, without which no nation can be technologically independent. Furthermore in Nigeria, with oil as the mainstay of the economy, minerals such as barites and bentonite which are used for drilling mud by oil companies assume added significance. These minerals can therefore be properly considered to be of immense industrial interest to the nation.

## 2.3 HISTORICAL DEVELOPMENT OF SOLID MINERALS INDUSTRY

### 2.3.1 GLOBAL PERSPECTIVE

Mining in one form or another predates prehistoric times in the world. The people of the Stone Age were recorded to have excavated from the ground, flint, specie of the mineral quartz, which they converted to weapons and tools[15]. The Bronze Age came into being with the discovery that alloying copper and tin produced a stronger and more durable metal referred to as "alloy".

The Iron Age which began about 1000BC, due to the enormous progress that was made in steel processing during the past century, became known as the "Age of Steel".[16]

As societies grew and became more cosmopolitan and sophisticated, the demand for and search of solid minerals grew. This period saw the crossing of the Mediterranean Sea by the Phoenics to work on the copper mines in Spain while their ships set sail to the British Isles for the trade in tin. The coal mines of Great Britain and her production of iron and steel provided the basis for the "Industrial Revolution"[17] in 1750.

In the United States of America, coal mines were opened in Richmond, Virginia about the 1740s. Closely following that was the discovery of gold in California in 1888. The increase in the tempo of activities in the solid minerals sector led to the establishment of a Bureau of Mines in 1910 as a response to labor union demands. This Bureau was specifically charged with the responsibility of promoting the preservation and development of minerals and fuel resources.

As for the African continent, the quest for knowledge and exploration for geographical purposes led different European peoples to lead expeditions to different parts of Africa. Though the search of minerals was not the original aim of the explorers, on their discovery, an increased quest for raw materials to feed the new assembly lines of industries back in their home countries became heightened. Having discovered huge and untapped mineral deposits all over the areas they had “discovered”, a stage reached when the European explorers and traders could not be satisfied with mere conventional trading and expeditions in Africa.

They brought tremendous pressure to bear on their home governments to set up colonies in Africa with a view to exploiting those mineral resources.

Thus by the end of the Second World War countries on the continent of Africa were still laboring under the yoke of colonialism. Since they were colonies, they were for all intents and purposes considered an integral part of the colonizing nation. The development of these nation's economies including solid minerals was therefore tied to the apron strings of the colonizing nations.

It became clear to any discerning person that the motives of these nations were essentially economic: to have access to and take over vast and virgin natural resources of the colonies to meet the raw material needs of their home factories. So much so that by the end of the 19th Century most of the developing world had been carved out and shared amongst the imperialist powers.[18]In fact Lenin argues that as the dearth of raw materials was felt more and more among the imperial powers, the desperation and intensity of the competition to discover and win other sources of raw materials increased around the world. By the middle of the 18th Century therefore, Africa and other developing areas of the world were partitioned by the Western Powers like United Kingdom, France, Belgium, Italy etc. From thereon raged an unchecked, reckless and systematic exploitation of Africa's mineral resources.

The political machinery of colonialism was employed to obtain substantial production rights for the MNCs and TNCs of America and Europe. The result of this was that Africa's resources were considerably depleted, the profits accruing from the depletions were expatriated to foreign countries while the continent that was in dire need of such money for development purposes continued to wallow in abject poverty and misery. Even though these mining activities were crudely and unprofessionally carried out, today, the continent of Africa is still known to harbor a large expanse of mineral deposits that account for seventy (70%) percent of the world's diamonds, Fifty – Five (55%) percent of its gold and at least Twenty Five (15%) percent of its Chromites, apart from being a major producer of copper, tin, iron ore, and oil.

Despite the wide array of minerals, the mining sub sector in Africa is predominantly foreign, though there continues to be concerted efforts by governments to involve indigenes more in it.

## 2.4 HISTORICAL EVOLUTION OF SOLID MINERALS EXPLOITATION IN NIGERIA

Mining can properly be said to be the oldest occupation in Nigeria after agriculture. From the famed "golden lands of Wangara"[19] where gold mining thrived in the Hausa enclaves in the 19th Century to the skilled metallurgy of the Benin Kingdom[20] dating back to the 15th Century up to the massive exploitation of coal as a live wire moving the wheels of the colonial government, solid minerals occupied a pride of place in the economic fabric of the nation.

Some forms of mining activities took place before the advent of colonialism. Several indigenous communities were known to mine for domestic use minerals such as: salt, soda, potash or galena. This pedestrian exploitation of the vast potentials of the mineral endowment of the country received a fresh injection vide the policy of the colonial administration to maximally exploit raw materials for their home market and industries and in turn create local demand for foreign made goods. As has been aptly stated by Professor Bade Onimode:

> From colonial times African countries ….. have been programmed and encouraged to specialize in the production of raw materials for export to the factories of the North. This was to enable Africans to earn the foreign exchange for

> the import of capital goods (machinery and equipment),drugs and other essential materials for meeting local needs…….. It made and still makes African countries produce what they do not consume and to consume what they do not produce.[21]

However, the evolution of solid minerals exploration and exploitation in Nigeria was not streamlined to make it amendable to a precise appreciation. Three periods are however discernable:

### 2.4.1 PRE AND POST COLONIAL ERA

Apart from the primitive mining of minerals for purely domestic needs in local communities, formal and organized mining activities were rare. Following the sighting of tin metals in a local iron market in 1879, the Colonial Government dispatched an expedition to trace its source. The expedition led to the rocks of the Jos Plateau. This discovery led to a massive influx of foreign mining concerns and individuals to the area, where large – scale mining commenced at fever pitch levels in 1903.

Several foreign companies and individuals such as Amalgamated Tin Mines (Nig Ltd), Gold and Base Metal Mines Ltd, Kaduna Prospectors, Ex-lands Ltd, Bisichi Tin Company Ltd, Jantar (Nig) Ltd, and individuals such as N.L. Swift, FHA Townsend and H.R. Wilson, dominated the northern

mining fields encompassing areas such as Plateau, Bauchi, Kano and Kaduna[22] Niger and Kogi states[23]

These mining activities involved the exploitation of minerals such as tin, tantalite, columbite and gold. From the mining of a few tones of tin at the beginning, it reached a peak of 17,000 tones per annum in 1945 at the height of the Second World War.

In Eastern Nigeria, as a result of the discovery of coal in 1916, massive exploitation ensued pioneered by the Colonial Government. From the point of view of the Colonial Government the most important mineral was coal as it was required for electricity generation and for the rail system. The production of this strategic mineral was made a Colonial Government monopoly. Mining of coal continued massively until 1958 when the locomotives running the rail system were dieselized[24]. Even at that, coal continued to play a vital role in providing fuel for the generation of power supply to major cities until hydropower and gas fired generating stations took over progressively beginning in 1968. From an annual production of 12,000 tones in 1916, production peaked up to one million tones in 1959.

This underlined the strategic importance of the mineral both for the local economy then and for export purposes.

A German corporation, Nigerian Bitumen Corporation commenced exploration work in and around Ijebu Ode and Okitipupa for Bitumen deposits also called tar sand between 1908 and 1914 but these activities had to be discontinued due to the outbreak of the 1st World War in 1914.[25]

An attempt at encouraging organized mining was undertaken by the Colonial Government when in 1903 and 1904 respectively it inaugurated a Minerals Survey of the Southern and Northern Nigeria which was sanctioned by the Secretary of State for the Colonies for an initial period of three years.[26]Unfortunately due to the outbreak of the 1st World War, these Minerals surveys were disbanded in 1909 and 1913 respectively for the Northern and Southern Nigeria. The geological works however resumed in 1919 under the leadership of Dr. J. D. Falconer, whose work continued until 1939 when on the outbreak of World War II, the Surveys were abruptly curtailed, and were not to resume until the end World War II. Again the activities of the Geological Surveys Department were adversely affected by the Civil War between 1967 – 1970 until when it again resumed.

The importance of a Geological Survey to mining cannot be downplayed. Its primary function is the production of a geological map of its territory. In the course of mapping, many mineral deposits may be discovered and the geological maps are indispensable guides to geologists and prospectors searching for particular minerals. Furthermore, even after discovery stage, geological maps are an indispensable guide to mining engineers in the actual exploitation.

A lack of financial wherewithal by Nigerians coupled with a low level of indigenous technical know-how, however militated against the ability of local entrepreneurs to participate actively in mining activities on a large scale hence the dominance by foreign companies and individuals.[27]

Pertaining to government regulations, there was no coordinated or regulated framework for the mining activities of the foreign corporations and individuals. Initial attempts to regulate the sub sector can be traced to the Royal Niger Company who, on discovery that some areas in Nigeria harbored mineral wealth (mainly tin and bauxite) formulated and

promulgated regulations which had the effect of granting them monopoly rights over the mining of these minerals in Northern Nigeria.[28]

The arbitrary and monopolistic regime of the Royal Niger Company took firm roots until 1900 when the British Government revoked the charter of the Royal Niger Company and went ahead to enact legislation to regulate the industry, the first being in 1902 reserving all mineral rights on and in the land to the Crown[29]. This Ordinance was amended in 1916 and further amended in 1927.

Essentially, the Mineral Ordinance served the sole purpose of reserving all mining privileges to foreign investors, albeit British Corporations or its allies. The sub sector later saw the promulgation of the Minerals Ordinance in 1946 and the Coal Ordinance in 1950.

### 2.4.2 INDIGENIZATION ERA

The solid minerals mining landscape remained largely unchanged even after independence in 1960 and for the next decade mining was still firmly in the hands of foreign companies and individuals. The major reasons for this continued dominance were the capital intensiveness of the sector and its long

gestation period[30]. The heavy financial investments needed encouraged players in the sub sector to concentrate their energies on the mining of minerals that possessed export potentials and relegated those meant for local consumption and industries. Prior to 1971, British companies completely dominated the mining landscape with up to 120 of them operating at the height of tin mining.[31]However, this dominance was to be seriously jolted with the coming into force of the indigenization policies of the Government in 1972. The sum effect of these policies was that it became mandatory for Nigerians to part own shares in strategic areas of the economy including mining.[32]

The coming into effect of the indigenization policies served the purpose of ensuring the involvement of Nigerians in critical areas of the economy. For the solid minerals sub sector however, the policies ushered in an ironic situation whereby Government had to compulsorily become involved in it despite its prevailing policy of non – participation. It has been submitted[33] that was largely due to two major reasons: -

Firstly, the outbreak of the civil war came with it the vagaries and dislocations of warfare. The period of 1967 – 1970 saw an abrupt departure

of foreign companies and individuals who were engaged in mining around the country especially in Eastern Nigeria. The conflict generated by the war did not endear a conducive mining atmosphere. Rampaging troops took over mining camps arbitrarily and commandeered earth moving equipment at will.

Secondly, the natural resistance to change in mankind also had its toll. The "nationalistic" implementation of the indigenization policies was not received kindly by most foreign corporations and individuals who perceived it as a form of "creeping nationalism".[34] These foreign companies and individuals saw in the indigenization efforts an attempt to allow the Nigerians reap where they did not sow. They argued that the new entrants, courtesy of the indigenization policies lacked both the financial wherewithal and the technical expertise to contribute anything of value to the hitherto existing mining activities, and should not be allowed to "own a piece of the pie" just like that.

This policy resulted in the massive departure of the foreign investors who were not willing or able to dilute their interests to accommodate Nigerian investors. This led to massive withdrawal of foreign investment from Nigeria and presented government with a dilemma. By the 1970s therefore

the policy of Government began to change. Government decided to become involved in the sub sector directly again.

The main thrust of this policy shift was amplified in a report of the Committee on National Policy on Solid Minerals in 1971 as follows:-

> In brief the objective of Government's Mining Policy would be to secure the development, conservation and utilization of the mineral resources of Nigeria in the best possible manner as to bring about economic benefit for the largest possible period, and there is no reason to suppose that the private investor is the best instrument with which to achieve this[35]

To allow government become more involved in the sub sector and also act as catalyst for its development several measures were adopted. Among these were:

1. The establishment of the Nigerian Mining Corporation[36] in 1972 with the mandate to explore and prospect for minerals of various kinds occurring in the country excepting oil and coal on behalf of the Federal Government.
2. The dormant role of the Geological Survey Department and the Mines Division of the then Ministry of Mines and Power was reversed and it was transformed into a full

fledged agency of Government to be known and called Geological Agency of Nigeria to carry out detailed geological exploration and beneficiation studies.

3. To allow investors to enter into the sub sector with minimal bottlenecks, government decentralized the issuance of prospecting licenses from the Mines Department of the Ministry to the respective State Mines Offices.
4. The provisions of incentives by way of concessions were offered to ginger extensive exploration activities around the country.
5. The establishment by government of a National Institute of Mining and Geology to admit graduates from the School of Mines to further train and equip them in mining methods and engineering.

Ironically, even with applauded indigenization policy and the increased government involvement in the sector, investment in the sector continued to decline. This steady decline has been attributed, in the reasoned position of Akper[37] to several factors including: -

a) The discovery of petroleum resources in the late 1950s and its large-scale exploitation from the 1960s onwards served notice on the solid minerals sub sector that its erstwhile dominant role was under a real threat.

b) Not only the solid minerals sub sector suffered so also did agriculture, the prime moving force of the nation's economy with its famed groundnut pyramids and the cocoa plantations. They took a heavy blow from the discovery of oil never to recover as of yet.

c) The fall in the international world price for the major minerals such as tin and columbite, as a natural fallout of the end of the Second World War made the production of these ores less attractive. The low economic returns on tin gradually led miners to abandon solid minerals mining.

d) The discovery of alternative avenues for power such as solar energy, fossil fuels, natural gas etc. for industrial purposes also adversely affected the importance of minerals such coal that had hitherto occupied a pride of place in the country.

### 2.4.3 THE REALIZATION ERA OF 1990s

The fluctuation and slump in international oil prices of the 1980s and its continued adverse impact on the economic well being of the country coupled with the over dependence on oil revenue with its adverse fallouts forced government to begin to dwell seriously on the need to diversify the revenue base of the nation. With the diverse, rich and abundant mineral endowments of the country, it was not surprising that by the turn of the 1990s, government had begun to pay attention to this sub sector as a potential revenue earner.

A comparative analysis and review of some sub Saharan African country's economies and the contribution of solid minerals to it began to provide a platform for government to re-think the neglect of the sub sector. Table 1 hereunder painted a very helpful picture in that direction.

## TABLE 1

## CONTRIBUTION OF SOLID MINERALS TO THE ECONOMIES OF SELECTED SUB-SAHARAN AFRICAN COUNTRIES 1987

| COUNTRY | MINING EXPORT AS % OF TOTAL EXPORT | MINING VALUE ADDED AS % OF GDP |
|---|---|---|
| Botswana | 90 | 40 |
| Zaire | 73 | 24 |
| Zambia | 93 | 15 |
| Zimbabwe | 43 | 8 |
| Guinea | 92 | 14 |
| Niger | 80 | 2 |
| Liberia | 58 | 3 |
| Ghana | 19 | 2 |
| Gabon | 9 | 3 |
| Mauritania | 31 | 12 |
| Sierra-Leone | 74 | 13 |
| Togo | 29 | 7 |
| Senegal | 9 | 2 |
| Burkina Faso | 20 | 3 |
| Nigeria | 0.4 | 0.3 |

*Source:* World bank/CBN Annual Report as Exhibited in the Vision 2010 Report on Solid Minerals Sub-sector, 1997.

In addition some professional bodies begun to impress on Government the dormant potentials of the sub sector which far outstrips that of petroleum resources. In a presentation to the Federal Government Committee on Accelerated and Sustainable Development of Solid Mineral Potentials submitted by the Nigerian Society of Mining Engineers[38] the attention of government was drawn to the fact that when you develop one mineral, for example oil, you are developing only that particular part of the country where the mineral is situated. However if you pay attention to solid minerals you will be developing the whole nation as solid minerals occur in every state of the Federation.

Furthermore the performance index of the solid minerals sub sector in South Africa as shown in Tables 2, 3 and 4 provided sobering thoughts on the immense untapped potentials in the solid minerals in Nigeria:

**TABLE 2**

**CONTRIBUTION OF MINING AND QUARRYING TO GROSS DOMESTIC PRODUCT AND GROSS DOMESTIC FIXED INVESTMENT OF SOUTH AFRICA, 1988 – 1997 (current prices).**

| | **CONTRIBUTION TO GDP*** | | **CONTRIBUTION TO GDFI** | |
|---|---|---|---|---|
| **Year** | **R . Million** | **%** | **R Million** | **%** |
| 1988 | 21 382 | 11,8 | 5717 | 14,4 |
| 1989 | 22 828 | 10,6 | 6814 | 13,7 |
| 1990 | 24 0940 | 9,7 | 7176 | 13,3 |
| 1991 | 25 471 | 9,2 | 7354 | 13,3 |
| 1992 | 26 502 | 8,6 | 6448 | 11,4 |
| 1993 | 30 505 | 8,8 | 5013 | 8,5 |
| 1994 | 33 172 | 8,6 | 6426 | 9,3 |
| 1995 | 33 742 | 7,8 | 7558 | 9,2 |
| 1996 | 39 122 | 8,1 | 8072 | 8,7 |
| 1997 | 41 210 | 7,8 | 9209 | 8,9 |

Source: South Africa Reserve Bank, 1998, pp S101 & S109

**TABLE 3**

**MINING INDUSTRY: CONTRIBUTION TO STATE REVENUE IN SOUTH AFRICA, 1988 – 1997**

| STATE REVENUE FROM MINING YEAR Ended 31 Mar. | Mining Taxation R'000 | State share of Profits and Diamond Export Duties R'000 | Total Revenue R'000 | AS Percentage of Total State Revenue % | AID[o] R,000 |
|---|---|---|---|---|---|
| 1988 | 2 837 710 | 729 983 | 3 567 693 | 9,5 | 26 535 |
| 1989 | 2 552 071 | 647 156 | 3 199 227 | 6,7 | 29 757 |
| 1990 | 2 273 695 | 546 604 | 2 820 209 | 4,4 | 49 894 |
| 1991 | 2 201 059 | 438 128 | 2 639 187 | 3,8 | 55 267 |
| 1992 | 1 236 158 | 346 425 | 1 582 583 | 2,1 | 48 443 |
| 1993 | 884 497 | 217 355 | 1 101 852 | 1,4 | 41 818 |
| 1994 | 1 011 192 | 326 152 | 1 337 344 | 1,4 | 24 215 |
| 1995 | 1 509 901 | 259 521 | 1 769 422 | 1,6 | 27 670 |
| 1996 | 1 608 455 | 217 078 | 1 843 660 | 1,7 | 24 740 |
| 1997 | 1 849 253 | 146 427 | 2 013 476 | 1,4 | 36 404 |

*Source:* Republic of South Africa, Department of Finance, Inland Revenue, 1998. *Directorate:* Mining Economics, 1998

**TABLE 4**

**CONTRIBUTION OF MINERALS TO SOUTH AFRICA'S EXPORTS, 1988 – 1997**

| | NOMINAL VALUE OF MINERAL EXPORTS | MINERAL EXPORTS AS PERCENTAGE OF TOTAL EXPORTS | |
|---|---|---|---|
| YEAR | | | |
| | R'000 | All minerals | Gold |
| | | % | % |
| 1988 | 29 913 283 | 57,7 | 38,0 |
| 1989 | 32 822 808 | 57,1 | 33,8 |
| 1990 | 33 018 924 | 54,2 | 31,2 |
| 1991 | 34 228 999 | 53,2 | 30,0 |
| 1992 | 33 061 745 | 49,1 | 29,0 |
| 1993 | 40 347 743 | 51,1 | 29,5 |
| 1994 | 42 817 338 | 48,0 | 28,0 |
| 1995 | 44 145 295 | 42,1 | 22,4 |
| 1996 | 50 539 613 | 39,6 | 20,5 |
| 1997 | 51 731 384 | 37,3 | 17,8 |

*Source:* South Africa Reserve Bank, 1998, pg. S.79 Minerals Bureau

**Table 5**

**GEOGRAPHICAL DISPERSION/OCCURRENCES OF SOLID MINERALS IN NIGERIA, STATE BY STATE.**

| Mineral Commodity | Location/ Locality |
|---|---|
| 1. Iron Ore | Utakpe, Chakaochoko, Ajabonoko, Obajara, Ebija, and Ohudu in Kogi State, Muro in Plateau State, Ajase in Osun State, Birnin Kebbi, Dakingari in Kebbi State and Gusaka in Sokoto State, Nsudelidi, Nkalagu Idri, Nkalagu Obukpa in Enugu State, Ayaba, Birnin Gwari in Kaduna State, Akumu in Ondo State, Ndun Bar, Ndum Yaji in Taraba State, Marara Hill in Zamfara State. |
| 2. Limestone | Arochukwu, Ozuitem in Abia State, Yandev, Igomale, Ukpa, Ugba, Aliade(Asango) in Benue State, Mfanosing, Agoi Iban, Ikot Ana in cross River State, Odomoke in Ebonyi State, Ashaka, Kalshinga, Kanawa, Ayaba, Lasani in Gombe State, Shagamu, Ewekoro in Ogun State, Kalambaina in Sokoto State, Gabai, Gulai, Mutwe in Yobe State. |

| | |
|---|---|
| 3. Phosphate | Bende, Ozuabaru in Abia State, Yojiric, Ososun, Oja Odan, Edogo in Ogun State, Karsawa, Danje in Sokoto State. |
| 4. Bentonite | Bende in Abia State, Guyuk, Nguare in Adamawa State, Damboa, Sakwa, Munguno, Maiduguri, Kwkawa in Borno State, Ogwashi Uku in Delta State, Ukpella in Edo State. |
| 5. Kaolin | Uturu/Umiahia in Abia State, Ikot Ikwere in Akwa Ibom State, Ozubulu in Anambra State, Darazo in Bauchi State, Kwadoma in Benue State, Dobrin Kolvri in Borno State, Isanekiti in Ekiti State, Nkpologun in Enugu State, Bojude, Dukku, Gombe Abba, Dargov in Gombe State, Awomama, Umuma in Imo State, Gezawa, gwarzo, Fogolawa in Kano State, Ruma, Kankara in Katsina State, Sada Fokku, Kaoje, Kanba, Giro in Kebbi State, Agbaja, Akutukpa in Kogi State, Konwesso in Niger State, Abeokuta, Aiyetoro, Ijebu Ode, Ireko in Ogun State, Ifon in Ondo State, Iregun in Osun State, Major Porter, Nahuta, Werran in Plateau State, Buan in Rivers State, Dakingari in Sokoto State, Kwali in the F.C.T. |

| | |
|---|---|
| 6. Clay | Mubi in Adamawa State, Biseri in Bayelsa State, Ozanagogo in Delta State, Awkunanaw, Enugu in Enugu State, Mararaba Rido in Kaduna State, Pinaye in Kebbi State, Lokoja in Kogi State, Egboro, Oke, Oro in Kwara State, Onibode in Ogun State, Lanu, Shogbon in Ondo State, Shere Hills, Naraguta Plateau State, Lantewa, Kalawa in Yobe State, Ozubulu, Ihialat<br>Nwewi in Anambra State, Kankara in Katsina State, Nsu in Imo State, Biu and Maiduguri in Borno State. |
| 7. Lignite | Uturu/ Umiahia in Abia State, Nnewi in Anambra State, Ogwashi Uku in Delta State, Gombe in Gombe State, Orlu, Ihira in Imo State, Ute in Ondo State, |
| 8. Silica Sand | Azunmiri, Aba in Abia State, Iwuo Uken in Akwa Ibom State, Utu Eten Epo in Cross River State, Ughelli in Delta State, Auchi in Edo State, Nkpologu in Enugu State, Gumel, Kazaure, Doko in Jigawa State, Burim Burum in Kano State, Badagry, Lagos in Lagos State, Igbokoda in Ondo State, Port Harcourt in Rivers State. |

| | |
|---|---|
| 9. Galena | Eshiagu in Abia State, Omeri Ameka in Ebonyi State, Keana in Nasarawa State, Wase in Plateau State, Akwara, Arsa in Taraba State, Baba Tsavni in F.C.T. |
| 10. Granite | Lopka in Abia State |
| 11. Cassuterite | Shebshi hills, Jere hills in Adamawa State, Kogo/ Rishi Hill, Tongolo Complex, Yeli hills, Dagga Allah hills, Kwandankaya hills, Shana hill in Bauchi State, Ijero in Ekiti State, Fagau, Birninkudu, in Jgawa State, Jena'a, Barke, Ningishi hills, Dustin Wai in Kaduna State, Ririwai, Liruei in Kano State, Bakori in Katsina State, Egbe in Kogi State, Dutse Nkura in Nasarawa State, Iregun in Osun State, Gana Ropp, Rayfield, Rukuba, Gurum, Garawuri, Kisa, Jarawa hill, Amo hill, Kigom hills in Plateau State, Tunga in F.C.T. |
| 12. Feldspar | Gombi in Adamawa State, Gwoza in Borno State, Ukpella/ Ukpilla in Edo State, Billiri in Gombe State, Karau Karau in Kaduna State, Lokoja, Osara, Okene in Kogi State, Oshogbo in Osun State, Barkin Kasuwa in Yobe State. |

| | |
|---|---|
| 13. Gypsum | Guyuk in Adamawa State, Umogidi, Adoka, Edumaja Anoda, Lessel in Benue State, Gubio in Borno State, Afuze, in Edo State, Adani Igga Emene in Enugu State, Najada, Ayaba, Pindiga in Gombe State, Marirona, Taloka, Wirro in Sokoto State, Danagun, Fika/ Fina in Yobe State. |
| 14. Uranium | Gumchi in Adamawa State, Adimidoni in Cross River State, Muka in Taraba State. |
| 15. Magnesite | Sakatsimta in Adamawa State. |
| 16. Columbite | Ningi hills in Bauchi State, Udegi in Nasarawa State Bukuru in Plateau State, Dutse in Zamfara State. |
| 17. Ilmenite/Rutile | Tilder Fulani in Bauchi State, Odomoke in Ebonyi State, Narka Sands in Anambra State, Radeggi in Kaduna State. |
| 18. Wolframite | Birra, Pakira in Bauchi State, Ririwai in Kano State, Keffi in Nasarawa State, Sarkin Pawa in Niger State. |
| 19. Topaz | Tafawa Balewa in Bauchi State. |
| 20. Salt/Brine | Oku Labe, Moi Igbo Lake in Benue State, Ogoja in Cross River State, Bunza in kebbi State, Awe in Nasarawa State, Uburu Lake, Enyigba, Abakiliki in Ebonyi State. |

| | |
|---|---|
| 21. Coal | Owukpa in Benue State State, Afikpo in Ebonyi State, Okpora, Enugu, Ezimo, Amossiodo, Inyi, Ogogu in Enugu State, Panadintai, Pindiga and Doka in Gombe State, Okigwe in Imo State, Okaba, Ogroyoga, Dekira in Kogi State, Lafia and Obi in Nasarawa State. |
| 22. Baytes | Lessel, Gboko, Ikyobo in Benue State, Osina and Gabu in Cross River State, Odomoke in Ebonyi State, Keana Awe and Azara in Nasarawa State, Ibi, Wukari and Dumgel in Taraba State. |

| | |
|---|---|
| 23. Gold | Ikpoba River in Edo State, Maigisheri, Kariga River, Yelwa, Old Birnin Gwori, Tsibiri in Kaduna State, Rimi in Kano State Bakori and Dakin Rugu in Katsina State, Laka, Shashi, Malendo, Bin Yaisi in Kebbi State, Koro, Okolom, Dogan Daji, Oke-Oloke, Isanlu Esa in Kogi State, Kaiana and Weru River in Kwara State, Galadima Kogo, Gwaderi, Beri, Chanchga, Kuta, Kazai, Mdaka, Kaduna River, Wushishi, Momoji and Malendao River in Niger State, Iperindo and Itagunmodi in Osun State, Udele and Madada in Sokoto State, Gummi, Gulbin, Doraga, Bukkuyum, Bindin, Ka River, Mainchi, Maradum, Maru, Takore, Tugan Kawo, Zurmi and Zamfari River in Zamfara State, Izom Baban in F.C.T. |
| 24. Tar Sand (Bitumen) | Eghar in Edo State, Ijebu Ode in Ogun State, Foriku and Ode Aiye in Ondo State. |
| 25. Mica | Ijero in Ekiti State |
| 26. Quartz | Ijero in Ekiti State, Arufu, Muka in Taraba State. |

| | |
|---|---|
| 27. Gemstones (Beryl, Amethyst Emerald, Aquarnarine, Tourmaline Sophire, Ruby | Billin, Tal and Kaltungo in Gombe State, Kakaryi, Zaria in Kaduna State, Saya Saya in Kano State, Tudunwada, Keffi, Rafin Gabas hills, Nasarawa Eggon(Gala Hill in Nasarawa State, Kontogora in Niger State, Olode and Komu in Oyo State, Baissa, Takum in Taraba State. |
| 28. Lead/Zinc | Abakiliki, Ameka, Ameri, Enyigba, Ekwete lave, Eka Inyere, Uburu in Ebonyi State, Ishagu in Abia State, Awe and Arufu in Nasarawa State, Tunga and Zurak in Adamawa State/Taraba/Plateau State, Gwana in Bauchi State, Ayaba and Kakala in Gombe State and Ririwai in Kano State. |
| 29. Marl | Anyo Gumel, Hadeija, Mallam Maduri in Jigawa State |
| 30. Talc | Fadan Kaje, Zonkwa in Kaduna State, Okolom in Kogi State, Kumurin, Kgara and Abuchi in Niger State, Iregun in Ogun State. |

| | |
|---|---|
| 31. Tantalite | Sherui in Kastina State, Egbe in Kogi State, Pategi, Ndanaku and Lema in Kwara State, Udegi, Kube and Ungwan Kwano in Nasarawa State, Shaki in Oyo State, Mgami and Maradun in Zamfara State, Takwa-Shara in F.C.T. |
| 32. Marble | Osara forest, Itobe, Jakira, Mopa and Abo in Kogi State, Igbeti and Ikoyi in Oyo State, Amper in Plateau State, Moriki in Zamfara State, Burum in F.C.T. |
| 33. Asbestos | Sheri in Katsina State, Chafe in Zamfara State State. |
| 34. Dolomite | Osara in Kogi State, Burum in F.C.T. |
| 35. Tomaline | Keffi in Nasarawa State, Kontagora in Niger State, Komu in Oyo State. |
| 35. Wolframite | Keffi in Nasarawa State, Sarkin Pawa in Niger State. |

**Source:** Presidential Committee on Solid Mineral Development: Report on a Seven-Year (2003-2009) Strategic Action Plan for Solid Minerals Development, November 2002.

Table 5 above details the huge potential of solid minerals endowments in Nigeria and their dispersions. In addition, it is submitted that a sustainable investment in the solid minerals sector has the real potential of impacting positively on the nation in several ways including:

a) *Contribution to the Gross Domestic Product ( GDP)*

Our domestic production capacity would be enhanced considerably by an investment in the sub sector.

b) *Employment Generation*

Considering the wide dispersion and equitable distribution of mineral endowments in virtually every nook and corner of the country, the immediate positive fallout of its exploitation would be the abundant generation of employment opportunities. At the height of mining activities in Nigeria the labor market was positively impacted as can be seen from Table 6 appearing hereunder. The corresponding spiral unemployment that ensued on its relapse as can be gleaned from Table 7. Between 1970 and 1980, there was an almost total national halt in solid minerals exploitation due to the depression in the market price of minerals worldwide. Even when the prices picked up in the

1980s, due to limited mining activities, employment activities were meager as can be seen as from Table 7.

## Table 6

### Employment Figures in Solid Mineral Mining: 1958-1970

| Year | Tin and Associated Metals | Lead Zinc, etc | Gold | Coal | Limestone | Marble | Total |
|---|---|---|---|---|---|---|---|
| 1958 | 33,496 | 143 | 272 | 8295 | | | 42,206 |
| 1959 | 29,290 | 168 | 266 | 6410 | | | 36,134 |
| 1960 | 36,634 | 91 | 91 | 3878 | | | 40,794 |
| 1961 | 40,149 | 52 | 68 | 3948 | 205 | | 44,522 |
| 1962 | 43,767 | 25 | 80 | 3876 | 251 | | 48,099 |
| 1963 | 45,362 | 32 | 100 | 3796 | 257 | | 49,547 |
| 1964 | 44,627 | 66 | 71 | 3970 | 303 | 233 | 49,037 |
| 1965 | 53,454 | 305 | 44 | 4282 | 310 | 76 | 58,471 |
| 1966 | 54,454 | 483 | 29 | 4323 | 295 | 70 | 59,654 |
| 1967 | 57,673 | 345 | 43 | na | 295 | na | 52,356 |
| 1968 | 50,101 | 9 | 66 | na | na | na | 50,176 |
| 1969 | 49,126 | 6 | 64 | na | na | na | 49,196 |
| 1970 | 51,795 | 6 | 31 | 414 | na | na | 52,246 |
| Average | 44,918 | 133 | 117 | 4,320 | 274 | 126 | 48,649 |

**Note**: na = not available
*Source*: Kogbe, C. A. and A. U. Obialo, 1974: 401: Digest of Statistics, Vol. 21, p.8

**Table 7**

**Persons Employed in Solid Mineral Mining. 1988 – 1993**

| Year | Tin and associated metals | Lead and zinc etc. | Coal | Total |
|---|---|---|---|---|
| 1988 | 3849 | 52 | 1576 | 5477 |
| 1989 | 4411 | 30 | 1661 | 6102 |
| 1990 | n.a | n.a | 1445 | n.a |
| 1991 | n.a | n.a | 1339 | n.a |
| 1992 | 3849 | 52 | 1069 | 4970 |
| 1993 | 4411 | 30 | n.a | 4441 |
| Average | 4130 | 41 | 1,418 | 5,248 |

n.a = not available

*Source*: FOS, 1996: 213; 1995: 199

c) *Poverty Alleviation*

Small artisanal miners will greatly benefit from the reactivation of the sub sector.

d) *Reduce Rural – Urban Migration*

Since these minerals are scattered in every nook and corner of the nation, their exploitation would empower the inhabitants of the area in question and reduce the lure of moving to urban areas to pursue job opportunities, especially among the unemployed youth.

e) *Reduce Crime*

Most of the incidents of crime especially armed robbery are directly attributable to youths who are unable to be meaningfully engaged in productive activities due to the depression in the economy. The opening of this sub sector will provide a window of opportunity to redress this.

## 2.5 LIBERALIZATION OF THE INVESTMENT CLIMATE

The quest for investment in the solid mineral sub sector has been long and tortuous. From the era of the pre and post independence where mineral rights and its exploitation were firmly in the hands of the Crown to the indigenization era of 1970s when government sought to restrict ownership of business ventures to encourage local entrepreneurs up to the current liberalization era whereby government is again throwing the door open to all and sundry to own wholly or partly any economic activity they choose. The nation has indeed gone full circle.

The bringing into being of the Nigerian Investment Promotion Act of 1995 signaled the total abandonment of the indigenization ship in Nigeria.

## 2.6 OWNERSHIP AND CONTROL OF MINERALS

To allow for informed discourse on the ownership of minerals and the exercise of control thereon, it will be needful to look into the historical background of ownership and control of natural resources worldwide. This can be appreciated by examining the era of Old International Economic Order and the evolution of the New International Economic Order on the subject.

### 2.6.1 THE ERA OF OLD INTERNATIONAL ECONOMIC ORDER

The uneven occurrences and endowments of mineral resources in the world had and still does stimulate intense competition among nation states to obtain access to these resources, because of their centrality to the survival and development of the world economy.[39] The fact that a majority of these minerals are located in developing countries has produced immense opportunities for the states and people who own them and the quest for their exploitation by developed countries that need them most[40].

This is an era usually referred to as the Old International Economic Order. During the colonial period, the point of entry into mining was for TNCs and MNCs to obtain propriety rights over mineral occurrences through the

instrumentality of concession agreements.

The TNCs and MNCs in turn made equity investments in the host country to exploit the minerals found therein. These concession agreements, as can be seen in chapter three herein, had the unique feature of completely excluding the participation of the host country in the exploration, exploitation and marketing of the minerals. The era of the Old International Economic Order existed and had been operated to the detriment of the host countries/developing countries in various ways:

a) These mining concessions completely excluded the participation of the host nation as the TNCs and MNCs assumed total control of the exploitation and marketing of the minerals and the host nation or its people had no say as to what purpose the proceeds were applied.

b) The coverage of these mining concessions was usually for vast pieces of land granted to the TNCs and MNCs. The limitless scope of coverage made the beneficiaries complete owners of the land and its resources. The Concession Agreement between Liberia and Gewerkshagt Company tagged "Liberia Gewerkshagt Exploitation

Agreement of 1958 is a good example[41]. The operative clause reads thus:

> The Government.....grants to the concessionaire... the exclusive right and privilege to .....exploit deposit of all kinds of ores.....

No restriction of any kind was placed on the concessionaire's acquired right as regards the kind of ore as she was free to exploit any and all ores thereon and therein.

c) The tenure of these concessionary agreements was another area in which the host countries were swindled of their resources. A few examples will help to illustrate this: -

i) A long term of 99 years was granted to the Sierra Leon Selection Trust[42.]

ii) The Ashanti Goldfields Corporation in Ghana was granted a term of 99 years[43.]

ii) In Nigeria concessions given or acquired by the TNCs and MNCs were limitless and in some cases pure monopolies. A case in point is the Royal Niger Company, who in order to appropriate mineral resources to the exclusion of all others took upon itself and formulated regulations which had the effect of

granting the company total monopoly of mining rights in Northern Nigeria[44].

d) Despite the long tenure and the almost absolute ownership over and in the resources of these host nations, the consideration in monetary terms was in most cases almost nil. A few examples will bring this to the fore:

i) In a mining agreement[45] dated August 27, 1945 between the Liberian Government and the Liberian Mining Company Ltd, a foreign mining concern, the Liberian Government was entitled to five cents for every ton of iron shipped out of the country!

ii) In yet another illustration[46], in an agreement between Iraq and the Khanagin Oil Company (again a foreign entity) in 1926, a meager sum of four shillings was remitted to the Iraqi government for every ton of net crude oil produced.

e) The nature of the concession agreements entered into by the TNCs and MNCs and the host nations were such that they contained the so called 'stabilization clauses' which had the effect of ensuring that the terms and conditions of the agreements could not be altered. This was a direct affront to the concept of sovereignty of states over their resources as the host states were rendered impotent even where

they found the terms and conditions of the concession agreements to be against their interests simply because of these clauses.

f) The TNCs and MNCs invoked the legal regime that upholds the sanctity of contract as encapsulated in the principle of "Pacta sunt Servanda" against the host states whenever there were attempts to review or repudiate these long and arbitrary concession agreements. The essential thrust of the principle of "Pacta sunt Servanda" is one that once an agreement has been validly made it must be kept.

g) These concession agreements, it has been argued by Mohammed[47] were also used as instruments of divide and rule by the TNCs and MNCs. This was especially highlighted in the British West Africa colonial area where the TNCs and MNCs colluded with traditional chiefs who were ironically supposedly representatives of the people to deny their people of any benefit from these mining activities in consideration for paltry personal benefits.

The above reasons coupled with the nationalistic wave that was sweeping the world led developing nations to begin to have a critical and sober evaluation of the Old International Economic Order and its crippling implication on their developing economies. These

developing nations came to the realization even though their nations were being endowed with rich natural resources that were being sought after to propel and keep the economies of the developed nations going, they failed to impact positively in the economic development of their nations and did in fact leave them worse off.

It was this reality more than anything else that gave birth to the evolution of another economic order to replace the old one.

### 2.6.2 THE ERA OF PERMENANT SOVEREIGNITY OF STATES OVER ITS NATURAL RESOURCES

After the end of the Second World War many African, Asian, Latin American and Oceanic countries which form the Third World, commenced a long journey of asserting their economic independence. Nationalization was its zenith and economic independence was equated with a nation's sovereignty. The fight-to-gain political and economic freedom from the Colonialists and the quest for self - determination, which included the claim to "Permanent Sovereignty over natural resources and wealth" commenced. Apart from ventilating their nationalistic interests, these developing nations realized the emerging and compelling need to utilize their natural resources

to lay a firm foundation for sustainable economic development. This firstly took the form of nations switching from the hitherto existing regime of the payment of paltry royalties by TNCs and MNC's to the host nations to the imposition of direct income tax with the aim of gaining more revenue from their national resources.

This shift in the position of developing countries has been articulated by David N. Smith and Louis T. Wells, Jr. as hereunder appearing: -

> In oil, hard minerals, timbre plantation, the shift from royalty to income tax payment has taken place in two ways: first existing agreements have been amended, either to substitute income taxation for royalty payments or to supplement royalties with levies on income, second, new agreements negotiated in the 1950s and later have incorporated income tax or profit sharing principles as the primary source of government revenue [48]

Commendable as this shift from royalties to taxation may appear to be in enhancing the revenue base of developing nations, it continued to be the only real change in the otherwise exploitative concession agreements.

TNCs and MNCs continued to resist any further renegotiation of existing concessionary agreements by tying their posture to the argument that the principle enshrined in the legal doctrine of "Pacta Sunt Servanda" must be respected.

The belief by developed nations that foreign investment would promote economic and social development in the host states was countered by the prevailing fear that foreign investment in itself would not yield the economic results needed and could in fact diminish the host states control over their natural resources.

The theater for this emerging thinking was the United Nations whose membership had been swollen by developing nations on the attainment of independence. The developing nations with their overwhelming numbers commenced the agitation for their economic liberation by recommending a Universal Declaration of the Sovereignty of States over their Natural Resources.

The United Nations in answer to this agitation adopted several resolutions to reach an understanding favorable to all parties. These resolutions explicitly declared permanent sovereignty of states over their natural resources. These relevant United Nations Resolutions included:

a) General Assembly Resolution 523(VI), 1952 "Integrated Economic Development of Commercial Agreements”

b) General Assembly Resolution 626 (VII), 1952 "Right to Explore Freely Natural Wealth and Resources”

c) General Assembly Resolution 1314 (XIII) 1958 "Recommendations concerning International Respect for the Rights of Peoples and Nations to Self— Determination”.

d) General Assembly Resolution 1803 (XVII), 1962, Declaration on Permanent Sovereignty over Natural Resources. See Appendix

Resolution No. 1803 of 1962 was however by far the most far-reaching and comprehensive piece of legislation that codified the international community’s full understanding of the concept of states sovereignty over its natural resources.

The Resolution recognizes the states permanent sovereignty over their resources as a "basic component element of the right of self determination”.

The first clause of the Resolution reads as follows:-

> The right of the peoples and nation to permanent sovereignty over their natural wealth and resources must be exercise in the interest of their national development and of the well - being of the people of the state concerned.

The second clause reads:-

> The exploration, development and disposition of such resources as well as the import of the foreign capital required for the purpose, should be in conformity with the rules and conditions which the people and nation freely consider to be necessary or desirable with regards the authorization, restriction or prohibition of such activities.

The third clause provides, inter alia, that in case the authorization is granted to a foreign company, the capital imported and the earnings on same shall be governed by the terms of the contract, the national legislation in force and by International Law.

This Resolution also marked a watershed in establishing firmly the doctrine of Permanent Sovereignty over Natural Resources as it: -

i) Set down this right as a principle of International law

ii) Established a common ground for the interest of the majority of the member states (developed and developing countries) to be addressed.

iii) While on one hand it established the inalienable right to Permanent Sovereignty over Natural Resources and the naturally flowing rights to "nationalize" or "expropriate" on the grounds of "public utility, security or national interest" it also lays down the legal obligation for the payment of

"appropriate compensation" according to Internal Law and in the event of conflict, made provision for settlement through arbitration or international adjudication.

iv) General Assembly Resolution 2696 (XXV) and Resolution 3016 (XXVIII) extended the Permanent Sovereignty over Natural Resources to these resources off shore and on the continental shelf.

### 2.6.3 THE NEW INTERNATIONAL ECONOMIC ORDER (NIEO)

In addition to the above resolutions, General Assembly of the United Nations ushered in a new world economic order (NIEO) through the instrumentality of two General Assembly Resolutions:

These resolutions were: -

- General Assembly Resolution 3202 (S - VI) “Declaration on the Establishment of a New International Economic Order.
- General Assembly Resolution 3281 (XXIX) Charter of Economic Rights and Duties of States (CERDS).

These two resolutions were adopted in 1974 and they enlarged the scope of Resolution No. 1803 of 1962 on the Permanent Sovereignty over Natural Resources to include "all its wealth, natural resources and economic activities" [49].

Resolutions No. 3201 and 3281 (S.V) in effect put in place a new International Economic Order. Specific provisions attesting to the permanent sovereignty of states over its resources, states that:

> In order to safeguard these resources, each state is entitled to exercise effective control over them and their exploitation with means suitable to its own situation, including the right to nationalization or transfer of ownership to its nationals, this right being an expression of the full permanent sovereignty of the state. No state may be subjected to economic, political or any type of coercion to prevent the free and full exercise of this inalienable rights.

Furthermore, the Programme of action affirmed its resolve to:

> Put an end to all forms of foreign occupation, racial discrimination, apartheid, colonial, neocolonial and alien domination and exploitation through the exercise of permanent sovereignty over natural resources.

As laudable and radical as these resolutions on the Permanent Sovereignty over Natural Resources by nations states are, different results on its implementation have emerged.

One of the results is the illusion that because of Permanent Sovereignty over Natural Resources, developing countries would directly and
independently manage their resources without the requisite technical know how and financial wherewithal. The nationalistic rush to set up costly infrastructure without necessary technical back up led to bureaucratic dislocations and frustrations. Consequently the expected benefits to their inward - oriented, states engineered self-efforts failed to contribute meaningfully to the development of national economies.

Thus, Janet Warden - Fernandez argues with obvious justification that this nationalistic approach merely offered a platform for the enrichment of the elite ruling class in the developing countries as the state enterprises set up offered themselves as ready patronage for plundering their nation's wealth.

Even though it has been submitted[50] that the developed countries that participated in negotiations leading to the Resolutions that established the NIEO saw as unrealistic the hope of economic emancipation through the Permanent Sovereignty over Natural Resources alone, they did little to oppose the agitation for political reasons. At the material time of these

negotiations, the world economic system was sharply divided between two contending forces, to wit capitalism and communism. The developing countries' resources that the colonialists and capitalists were benefiting from through the implementation of the concession agreements nursed fears that if they did not give in, developing countries would move towards the communist allure and thus deny them access to these minerals.

It appears unfortunately; that the euphoria that greeted the arrival of the Permanent Sovereignty over Natural Resources was short lived. Significant drop in commodity prices in the 1980s, sovereignty borrowings, and inefficient running of enterprises set up on the advent of the NIEO, and stifling debt burdens led to stagnation of the economies of the developing countries**.** Thus the adoption of the noble precepts of NIEO proved an inadequate antidote for the expected economic development of developing countries.

## 2.7 MINERAL RIGHTS SYSTEMS

With the institution of the Permanent Sovereignty over Natural Resources doctrine, an internal debate ensued as to the best possible avenue of exploitation the natural resources of states for the overall benefit of its people. Competing interests between public and private ownership of mineral resources emerged. While on the other hand it has been argued that complete private ownership and exploitation of natural resources is the most efficient method of developing the sub sector, others have posited that since these resources are in the public domain, public ownership and exploitation is the best way of guaranteeing the overall benefit of the larger community.

Thus these two contenting forms of ownership of mineral resources have come to dominate the exploitation of natural resources and have been in practice in one form or another in varying degrees in different countries all in a bid to arrive at the best possible method of harnessing natural resources for the maximum benefit of its peoples.

### 2.7.1 STATE MINERAL RIGHTS SYSTEM

A State Mineral Rights system is one in which the ownership and control of mineral resources is vested in the State to hold in trust for and on behalf of the citizenry. The system is founded on the fundamental basis that all minerals belong to the State. In asserting its full and complete ownership, the State in turn grants leases, licenses and other rights to private persons and companies for the exploitation of the minerals subject to certain terms and conditions including the tenure of the grant.

The State Mineral Rights system has been the system that has taken root in Nigeria as captured in the National Policy of Solid Minerals, 1988.

The vesting of ownership of minerals in the State to hold, control and manage for and on behalf of the people is firmly established both in our Fundamental Law, the Constitution and the Minerals and Mining Act, 1999.

a) i. Section 4 (2) of the Constitution of the Federal Republic Nigeria, 1999, provides that:

> The National Assembly shall have the power to make laws for the peace, order and good government of the Federation or any part thereof with respect to any matter in the Exclusive Legislative list set out in Part 1 of the Second Schedule to this Constitution.

Exclusive Legislative List, Part 1, item 39 refers to "Mines and Minerals, including oil fields, oil mining, geological surveys and natural gas".

ii) Section 44 (3) provides that:

> Notwithstanding the foregoing provisions of this section, the entire property in and control in and control of all minerals, mineral oils and natural gas in, under and upon any land in Nigeria, or in under upon the territorial waters and the Exclusive Economic Zone of Nigeria shall vest in the Government of the Federation and shall be managed in such manner as may be prescribed by the National Assembly

b) i. The above fundamental basis of the ownership of minerals has been adopted by the Minerals and Minerals Act, 1999. Section 1(1), which reads:

> The entire property in and control of all minerals, in, under and upon any land in Nigeria, its contiguous continental shelf and of all rivers, streams and watercourses throughout Nigeria, any area covered by territorial waters or constituency, the Exclusive Economic Zone is and shall be vested in the Government of the Federation for and on behalf of the people of Nigeria.

To further reinforce the absolute ownership and control of the minerals and lands on which the minerals are found Section 1(2) provides that:-

> All lands in which minerals have been found in commercial quantities shall, from the commencement of this Act, be acquired by the Government of the Federation in accordance with the provisions of the Land Use Act and the Minister may, from time to time, with the approval, the Federal Executive Council, designate such lands as security lands.

Most common law countries have tended to adopt this policy of state ownership of mineral rights, which has inherent in it, the following advantages: -

a) Ensures equitable distribution of mineral resources. Since the possession of a right to exploit a particular mineral allows one access to and over an area to the exclusion of all others, subject to the terms of the grant, it is needful for the state to regulate these grants to ensure that it is fairly and equitably granted, not only to a few rich, but to a cross section of the citizenry.

b) Ensures certainty and stability in the approval procedure and process. Since the State owns and controls minerals it sets terms and conditions for the grant of rights to exploit the minerals. This promotes certainty in investment and gingers the confidence of investors; to echo the words of Georgious Agricola:

> The Miner should not start mining operations in a district which is oppressed by a tyrant, but should carefully consider if the overlord there be friendly or inimical [51]

c) Ensures uniformity in policies since mineral occurrences in nation states are usually scattered far and wide and unevenly distributed hence the need to evolve standardized forms of dealing with grant of rights wherever they occur in an orderly and uniform way and from one mineral to another.

d) Ensures controlled exploration and exploitation of mineral resources. This advantage seeks to ensure orderliness in exploration/exploitation programmes. It seeks to put in place safe, efficient and cost effective mining methods and also ensures that degradation of the environment is prevented by putting into place reclamation policies.

### 2.7.2 PRIVATE MINERALS RIGHTS SYSTEM

As the name suggests, it is a system that allows for the private ownership of mineral rights as opposed to State ownership. This system treats mineral resources as chattels or real property amendable to be owned fully and to the exclusion of all others. This system of mineral ownership is the one in force

in South Africa and the United States of America. It has the following advantages: -

i) Holders of licenses and leases can, since they are held exclusively, be able to freely mortgage and alienate same to raise capital for mining purposes due to their secure and determined tenure.

ii) These rights, being private, are easily transferable and not subject to revocation as in the manner of rights granted under the State Mineral Rights System.

iii) The relative ease with which a holder of prospecting right can convert it into mining a right merely by private agreement.

iv) It attempts to promote free enterprise against state controlled and regulated regimes.

In conclusion, it is observed that despite the advantages of the two systems, almost all nations of the world, excepting South Africa and USA practice the state mineral rights system. The National Policy on Solid Minerals, 1988 clearly favors state mineral rights system though it has been submitted[52] that

real challenge is that “of being able to optimize the advantages from both systems”.

## 2.8 RESOURCE CONTROL AGITATIONS VIZ-AVIS STATE MINERAL RIGHTS SYSTEM

A presentation of the mineral rights system prevalent in the country would be incomplete without a mention of the currently raging debate on resource control by states where minerals are located.

Though it is submitted that this debate is purely political cum constitutional and should be resolved as such, the agitation by states that have within its borders oil mineral resources to have control over them as against the present position where the Government of the Federation exercises ownership and control over all it has now spilled over to non-oil possessing states. This argument by the non-oil possessing states is founded on twin pillars:-

a) When the economy of the nation was completely dependent on agriculture, the revenue that was used to develop the country came from agricultural producing parts of the country and it

would be unfair to now say that oil be appropriated for the sole benefit of the oil possessing states, when the same did not apply when agriculture was the mainstay of the economy.

b) That the complete reliance on oil exports by the Government has had the direct effect of relegating other viable areas of the economic life of the nation. Government has channeled all resources to develop the oil mineral to the detriment of all minerals. It will therefore be wrong, it is argued to now allow ownership and control to reside in the states where the mineral occurs when the resources used to develop the oil mineral came from other parts of the country too. This position was strongly articulated by 16 granite rich states[53] who met in Akure, Ondo state and resolved that the Federal Government should urgently adopt measures aimed at the development and exploitation of granite as another viable source of earning to the nation.

This raging debate pitches oil possessing states against non-oil possessing states. It may be needful to recall that in 1954, during the discussion as regional self – government, the North as it then was, placed as a condition for agreement, that each region must control its resources and contribute towards the maintenance of common services by the Central Government. That the Northern states are now among the states against the resource control debate is therefore quite ironic.

A way out has been suggested [54] by commending the United States of America model for adoption by the country. In the USA ownership of land and minerals is on the concurrent legislative list of both the Central and State Governments. The Central Government owns 405.1 million acres or 21.3 percent of the entire land mass of the country. Mineral resources found on central government lands are the exclusive property of the Federal Government of U.S. The Federal Government surrenders certain portions of the proceeds of minerals mined from its lands to the states where these lands are located. Whatever mineral resources are found in lands outside the Central government such belongs to the respectively states. Despite the above arrangement, disputes arose over resources ownership and sharing of offshore oil deposits. The Supreme Court ruled that the national government had a paramount interest in the offshore oil deposits. The current position of

the law is that the States that border the relevant areas have vested in them title to submerged lands and resources within their boundaries, while the Federal Government has ownership of submerged lands of the continental shelf beyond State boundaries.[55]

Considering the watertight provisions of Nigeria's constitution placing ownership and control of minerals squarely in the hands of the Federal Government, the only way out would be through a constitutional amendment to allow our system to be modeled after that of USA.

It has been submitted[56] that an alternative to the concurrent ownership of land and minerals by both the federal and state governments as is the case in USA, another model be adopted. The model is one in which the State is given, not of the right of ownership but of authority and responsibility while the right of ownership is resides with the Federal Government. In this arrangement, state governments would be empowered to grant prospecting and mining licenses and permits to investors on behalf of the Federal Government. State governments will also be allowed to attract investors, collect mining rents and royalties and, in return for the authority granted them; pay a specified percentage of the proceeds to the Federal Government. In this way, the issue of resource control in respect of mineral resources will

be resolved to the satisfaction of both the federal and state governments. State's ownership and control of mineral resources within their territories would also encourage increased exploitation of minerals. Increased investment in the mineral sub sector would no doubt expand economic activities in the states and help reduce the financial difficulties of states that are blessed with abundant mineral deposits. For the states that are not so blessed, a special grant from the Federation Account should be given to them.

As elucidating and thought provoking as the above contributions are, it is respectfully submitted that they labour under a drawback which has the potential of developing into pythonic dimensions that would wreck the ship of state.

Firstly, oil minerals accounts for over 98% of all the earnings of the Federal Government, which the states survive on. In a scenario where the ownership and control of these minerals is transferred to the few states on whose lands the oil minerals are located, these few federating units would become richer and stronger than the center. They could actually hold the center and other "less endowed" federating units to ransom and thoughts of secession would

not be far. It also means the Federal Government would have to use its own share of revenue to fend for its self and also distribute it among non-oil possessing states.

Secondly, transferring control and ownership to the states would place the history of the nation on its head. When the economy of Nigeria had agriculture as its mainstay, the export proceeds from groundnuts and cocoa were used to develop the nation evenly including bustling cities such as Lagos and it would now be unfair not to share oil revenue evenly the same way the revenue from agriculture was.

Thirdly, the model being recommended for adoption i.e. the American model developed from a people that have imbibed the culture of tolerance and maturity. Nigeria however still suffers from spasms of intolerance, misplaced ethnic jingoism etc which would not permit the adoption of the American model of resource control.

## 2.9 CONCLUSION

The opening of this thesis has sought to lay a foundation that will make an appreciation of this journey comprehensible. A definition of solid minerals has been followed by the broad classification of minerals into their constituent parts and uses. Secondly, a historical trip on the origin, development and present position of the solid minerals sector has been made from the global angle to the African angle while finally resting on the Nigerian situation. Thirdly, we have brought out the potentials of the sector and the benefits accruable in this development.

Fourthly, we have been able to trace the historical and theoretical development of solid minerals in the world, in Africa and microscopically in Nigeria. Fifthly, a review of the era of the old International Economic Order and the era of the new International Economic Order which founded the doctrine of Permanent Sovereignty over Natural Resources has been undertaken as it relates to solid minerals.

Sixthly, the chapter has also drawn a picture of the State and Private Minerals Systems prevalent in the world and the preponderance or preference of nation states to adopt the State Mineral Rights System as

opposed to the Private Right System while seeking to tap the benefits of both.

Finally we have been able to briefly dwell on the contemporary raging debate on Resource Control.

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# CHAPTER THREE

## 3.0 FORMS OF MINERAL DEVELOPMENT AGREEMENTS

## 3.1 EARLY MINERAL AGREEMENTS

The Creator has endowed nation states with mineral reserves in a radically uneven distribution. More than half of mineral occurrences are located in developing countries; and as if by deliberate arrangement, no one nation state is self-sustaining in relation to mineral endowments.

This has therefore foisted on humanity an interdependent regime; from nation states seeking to have access to mineral resources they need but have not been endowed with to nation states that have been endowed with the mineral in question. Thus the internationality of the usage of natural resources has made its ownership, control and exploitation a matter of international interest.

To have access to these mineral resources, different arrangements, relationships and understandings have been evolved over time between nation states and private entities to allow for their exploitation.

These arrangements, albeit agreements, due to the peculiar evolution of the mineral resources development have differed in nature from one to another, being different in one period from the next.

A global appreciation of mineral resources exploitation shows that for the long period that they became known to man, their ownership and control has been in the hands of different authorities depending on the period and location of the mineral. Largely, apart from United States of America and South Africa [57] natural resources have always been under the exclusive control of sovereign entities who hold same in trust for its peoples.

For most of the 18th and early 19th centuries, with the loud sounding drumbeats of colonialism on the ascent mineral resources were under

the control of colonial powers who determined the mode of its exploitation and who the exploiters were. With the advent of independence, the ownership of these mineral endowments fell in the hands of the newly independent governments. Even at independence, these newly independent states had to surmount immense problems[58] that also took the older mineral producing countries long to overcome, to wit:

> Developing the necessary capital, technology, access to markets and management skills, identifying and attracting the appropriate foreign firms to provide these services, developing skills in negotiating contracts with foreign firms, developing administrative skills to monitor the contracts and gaining an understanding of the international minerals industry with a view to phasing out foreign assistance.

In both the pre and post colonial eras, a common restraining feature in the development of mineral resources was the capital intensiveness of its exploitation and the high technological know-how required.

In due appreciation of the "risks" attending its exploitation, nation states, multinational corporations, companies and individuals have

over the decades carefully woven legal frameworks geared towards protecting their huge investments. Those legal protections took several and varied forms all pigeon holed as mineral agreements.

It is desirable that a tabulation of the various legal relationships that have evolved in the past in the exploitation of mineral resources be made to appreciate their strengths and weakness. This will allow for a clear presentation of a persuasive case in aid of this thesis, the Joint Venture Agreement.

These agreements evolved and have been enforced and/or are still in force around the world in different shapes and forms and can be summarized into the following nomenclature:-

a) Concession Agreements.

b) Equity Participation Agreements.

c) Production Sharing Agreements.

d) Service Contract and Technical Assistance Agreements.

e) Contractual Joint Venture Agreements.

f) Joint Venture Agreements.

## 3.1 CONCESSION AGREEMENTS

Concession Agreements have been captioned "first generation agreements"[59] in mineral development legal framework. They are the earliest forms of mineral agreements that governed exploitation of natural resources around the world.

The word "concession" has been elusively hard to define legally and its meaning varies from one jurisdiction to another and from one country to another.

Attempts have been made at defining "concession" in the traditional sense: - According to Lipton[60] it is a

> grant of a property right in minerals, usually for a long period, 99 years was by no means unusual. The investor has an almost complete property right in the minerals in the ground, that is to say all the interest but the bare legal title.

To another scholar, Fisher[61] "concession" is defined as

> … a synllagmatic act by which a state transfers the exercise of the rights or functions proper to itself to an enterprise or a consortium which, in turn, participated in the performance of public functions and thus gains a privileged position vis-à-vis other private subjects within the jurisdiction of the state concerned.

Under French Law,[62] "concessions" are considered and regarded as Administrative contracts while under the Common Law concession agreements may take the form of a grant, a license or even sometimes, all three[63].

It can be summarized from the above definitions that a concession agreement is an instrument which sets to delineate the rights and privileges of a grantor and beneficiary to a concession to explore, exploit and market minerals within an area covered by the concession with the concessionaire coming up with the necessary capital and technical know-how.

The main features of concession agreements were:-

a) The agreements usually covered a large area sometimes covering a whole territory. [64]

b) Exclusivity was another common feature of concession agreements. Rights were granted exclusively over mineral deposits in the area in question. The full ambit of these grants can be appreciated by looking at a concession grant issued by the Sultan of Oman which stated that:

> In consideration of the payments described in Article 7 the Sultan hereby grants to the company for the remainder of the period of this Agreement the exclusive right to explore, search for, drill for, produce, win, refine, transport, sell, export, and otherwise deal with or dispose of the substances and to do all things necessary for all or any of the above purposes within the Lease Area. [65]

c) The duration usually ranged from 30 to 99 years. During the currency of the agreement the concessionaire possessed unhindered access and rights to deal with the mineral as he

deemed fit to the exclusion of all others. [66] Examples of these agreements abound:-

i) The Concession to Standard Oil Company of California by Iraq in 1925 covered the whole of Iraq (excluding the province of Basra) for duration of 75 years.

ii) The Concession granted to Anglo-Persian Oil Company multinational concern in Qatar in 1935 extended to the whole country for a duration of 77 years.

iii) The Ashanti Gold Fields Corporation, a TNC was recipient of a grant for 90 years in Ghana.

iv) The concession received by the Royal Niger Company was limitless in scope covering the whole of the then Northern Nigeria.

d) The royalty regime was abysmally poor. Financial benefits accruable to the host country under concession

agreements were grossly poor; when compared with the immense value of the minerals being exploited.

In some cases, the concessionaire paid a nominal rent of about £150 for a whole concession in addition to a bottle or two of RUM!. [67]

d) Concession agreements were known for their simplicity in language. The grant made to the concessionaire was usually an exclusive right to exploit the mineral resource with minimum administrative and supervisory requirements.

Considering the foundational nature of concession agreements to the minerals resources development and its spill over influence on all the other succeeding agreements further consideration of its merits and drawbacks will impact positively on our future considerations of the other mineral agreements.

Concession agreements by their ancient nature were bereft of complexity, verbosity and long winding and counter provisions. They were simple and straight forward agreements usually contained

on a page or two. The grants were to a concessionaire for exclusive rights to exploit the minerals resources usually made by traditional rulers or colonial administrators[68].

Secondly, these agreements provided for minimal administrative and/or supervisory roles by the host nation. It left the concessionaire alone to determine "how the minerals would be mined, at what rate, the extent to which they would be processed in the host country if at all, where they would be sold, on what terms, conditions or at what prices". [69]

On a somber appreciation of the merits of concession agreements it can immediately be seen that its characteristics were dearly inequitable and lopsided in favour of the concessionaire, no wonder that they were unable to survive the de-colonization wave dutifully attended to by the New International Economic Order.

These agreements for all intents and purposes wrestled from the host nations the control of their mineral deposits thus leaving the mineral

resources to the easy plunder of the concessionaires. A picture of concession agreements and their impact on the host nations was ably drawn by El-Kosheri:

> It is not the legal system per se which made for the terms of the early concession, but the then prevailing general circumstances. In those days, concessions were granted by sovereign with sometimes little authority, often under the foreign political dominance. Also, the countries concerned were backward, sometimes nomadic, and in no case possessed a legal framework liable to govern such things as petroleum operations. Therefore in order to fill that void concessions were not only tilted in favor multination oil corporations but also written in such a way that constituted self-sufficient charters for those areas of the world where they existed no infrastructure of any kind, nor any government control or capabilities of any sort. Hence it is hardly surprising that the word "concession" became mentally associated with "underdevelopment" and "political dominance this explains from a psychological stand point the hostility shown towards this type of agreement [70].

### 3.2.1 THE MODERN CONCESSION AGREEMENT

The above limiting features of old concession agreements led newly independent states to retain its fundamental concept of granting exclusive rights but went ahead to revolutionalize its clauses to make it amenable to modern day commercial transactions. [71]

In the solid minerals legal framework therefore, modern concession agreements come in two ways:

a) Prospecting Licenses

b) Mining Titles

### 3.2.2 PROSPECTING STAGE

At this infant stage of prospecting, the Mineral and Mining Act, 1990 recognizes the following rights which accrue to a concessionaire:-

i) Prospecting Right.

ii) Exclusive Prospecting License.

iii) Special Exclusive Prospecting License.

i) **Prospecting Right**

A Prospecting Right can rightly be termed the first instrument an investor interested in mining is given. It grants that grantee the right to enter into or upon a specified area and investigate minerals occurrences thereon and therein.

S. 26(1) of the Act represents the first kind of concession rights available to an intending investor to prospect for minerals. It empowers the Minister of Solid Minerals Development on an application on a prescribed form to issue a Prospecting Right[72]. This grant is further subject to the powers of the Minister to make endorsements on the right restricting its use to a specified area over specified minerals and generally to impose any conditions as he may consider necessary. The Act specifically makes unlawful any prospecting without a prospecting right[73].

The duration of a prospecting right is for an initial period of one year[74] and comes with it rights to "enter upon and prospect on any land… specified in the … right. The holder is also obliged under the Act[75] to restore the ground to "its original state at the completion of prospecting operations".

ii) **Exclusive Prospecting License**

This license is usually granted to holders of a prospecting right who have commenced prospecting and have beaconed the area covered by the right.[76] The right is specifically restricted to a specified area not exceeding 20 square kilometres[77]. The Act also requires an applicant to fulfill the conditions spelt out in S. 10[78].

This right, been one flowing from the initial prospecting right, is for a period of two years, with provisions for several subsequent renewals depending on the location of the mineral in the crest[79].

An Exclusive Prospecting License also grants to the owner the right to enter within the area covered by the license and "do all other things necessary and incidental to prospecting" [80]

iii) **Special Exclusive Prospecting License**

Under S.40 of the Act the Minister is empowered at his own discretion to grant a Special Exclusive Prospecting License in respect of an area exceeding 20 square kilometers. This grant is purely discretional and has in practice only been issued to the organ of Government charged with the responsibility of prospecting, exploring and mining minerals i.e the N.M.C . An example is the grant of a Special Exclusive Prospecting License No. 401 covering a large are of land stretching from Isanlu in Kogi State to Kwara State[81]

### 3.1.3 MINING TITLES

After the preliminary stages of exploring and prospecting, the stage of mining proper arrives and a holder of a prospecting title has the under mentioned rights available to him. Though in some mining regimes[82] provision is made whereby holders of prospecting licenses automatically transit and become holders of mining leases, such provisions are non-existent under the Act and a fresh application has to be made for a separate title to be granted.

The following mining rights are therefore available under the Act.

a) Mining Lease

b) Special Mining Lease

c) Temporary Mining Lease

a) **Mining Lease**

This is essentially the instrument that legitimizes mining operations in Nigeria. A Mining Lease specifies the mineral(s) which the Leasee is entitled to mine within the Lease, although the Minister may add

or vary the minerals endorsed on the Lease. [83] Under the Act, the duration of a Mining Lease is 21 years subject to renewal upon satisfactory compliance with the terms of the grant. [84]

b) **Special Mining Lease**

As the name implies this title is granted where the Minister is satisfied that by reason of the difficulties and cost attending the mining operations, it is necessary that a Special Mining Lease be granted[85]. On its grant the Minister is empowered to fix the form of and the area to be comprised in such a lease, the rent and royalty to be paid and the labour and other conditions to be contained in the Lease. [86]

This essential difference between a Mining Lease and a Special Mining Lease is the nature and terrain of the area and the circumstances that work for or against its exploitation. Usually a Special Mining Lease is desirous where the terrain is large and very different to exploit thus requiring special concessions and incentives to allow for its utilization.

c) **Temporary Mining Lease**

The law has envisaged situations where an application for a Mining Lease is made and may be pending as a result of delays occasioned in its processing and thus it may be necessary and expedient to issue in those circumstances, a temporary Mining Lease.[87] This power vested in the Minister is discretionary upon terms and conditions to be imposed as he deems fit.

From the above it can be seen that modern day concessionary agreements have advanced to the commendable level of giving the host country a greater say in the mineral development activities by fixing shorter tenures unlike before, with smaller areas of coverage.

Despite the improvements occasioned by the modern concession agreements, two American writers, David N. Smith and Louis Well Jnr have continued to argue that the old traditional concession agreements offer better advantages to developing countries:

> There is much to be said for the traditional form of concession. The agreements are often less complicated and may therefore be easier to administer than some of the newer forms of agreements. The income tax provisions, if well conceived and well drafted, can be relatively straight forward. A country with a weak income tax administration or without a sophisticated governmental body to police an agreement might well prefer a traditional agreement which raises minimal administrative problems to one which is so complex that the governmental machinery simply can not cope with its administration[88]

## 3.3 EQUITY PARTICIPATION AGREEMENT

This module mineral development agreement was a direct fallout of the United Nations Resolution No. 1803 of 1962 which espoused the doctrine of the "Permanent Sovereignty over Natural Resources".[89] It had as its bedrock the modern clamor for state participation in the development of its natural resources, with the format becoming popular and well entrenched in the 1960s and 1970s.

These agreements are usually concluded and entered into between the host country or its national enterprise acting on behalf of the state and the foreign or private mining concern. For the host country, it is a

kind of partnership relationship in which the host nation or its national enterprise acts on behalf of the host nation with a foreign concern or multinational entity.

A celebrated example of an Equity Participation Agreement is the scenario that presented itself in Chile early last century. [90] Chile was during the 1st and 2nd world wars the leading world producer of Copper a veritable mineral in the development of electric energy. Copper, of all the common metals, has the highest conductivity – the quality of receiving and transmitting heat and electricity. Copper therefore stood out as a leading metal in the electricity industry – both in creation and transmission of power and in a wide range of its appliances. Until the 1960s copper production in Chile was carried out primarily by two United States based companies, Kennecott and Anaconda. Even though production peaked to about 500 tons in 1959 with the attendant revenue accruing to Chile there was a sustained clamor for a more direct participatory role for Chileans in the Copper industry.

In 1964, a policy of “Chilean Copper in Chilean Hands” was introduced thus ushering in major Equity Participatory Agreements between the multinational mining concern Kennecott Copper Company operating under the name of its subsidiary company and the newly incorporated Chilean National Corporation “Codelco”. In it the latter acquired 51% shareholding in Branden Copper Company, a wholly owned subsidiary of Kennocott Copper Company[91] while in the Operating Agreement, the legal framework between the partners, rules of procedure of the joint undertaking and proprietary rights were spelt out.

The major advantage and thrust of an Equity Participation Agreement lies in its ambition to attract greater revenue for the host government unlike the case in old and modern Concession Agreements. One manifestly obvious drawback of this agreement is the risk factor. While in concession agreements, the multinational company takes all the risks, in an Equity Participation Agreement,

the host nation assumes some of the risk by virtue of its shareholding and where the venture becomes speculative and yields nothing, the host nation loses too.

Even though in Equity Participation Agreement the host states partly owns the company, managerial control in the day to day operations of the mining venture and the policies that will affect its expected return on investment as well as access to the mineral products remain in the hands of the foreign partner.

## 3.4 PRODUCTION SHARING AGREEMENT

William and Meyers defines the term "Production Sharing Contract" as:

> A contract for the development of mineral resources under which the contractors' costs are recoverable each year out of the production but there is a maximum amount of the production which can be applied to this cost recovery in any one year…[92]

Production Sharing Agreement derives its origin from Indonesia in the early 1960s when they were successfully applied in the

agricultural sector. Under this form of agreement, the foreign mining company acts as contractor and risk bearing investor while the ownership and control of the business enterprise rests with the host country.

Features of Production Sharing Agreement include:-

i) Ownership of title to the mineral rests in the host country or state enterprise as the contractor acquires title only up to the point of export.

ii) Profits accruing from the business are shared on pro-rank basis between the parties.

iii) Where a commercial discovery is made, the contractor recoups his investment and cost of production from the proceeds after the deduction of royalties and tax.

iv) The risks attending the venture are shouldered by the contractor as its success depends on the continuous availability of the mineral in commercial quantities.

Some of the advantages of Production Sharing Agreement include:

a) It frees the host country from contributing to the direct cost of the operations.

b) The host country is able to exert control and exercise supervisory roles in the venture while the day to day operations are handled by the contractor.

c) Since the share of the raw ore is paid to the parties in proportion to their shareholding rather than the cost, the adherence to tax obligations is easy.

d) Since the host country in majority of the cases lacks the financial wherewithal to sustain the mining programme, scarce resources are instead channeled to other more critical areas of national development.

In contradistinction to these advantages it is pertinent that:

a) If the operating expenses are not monitored closely the contractor can rip off the host country by excessively padding expenses which in turn dilutes the revenue of the venture.

b) The Contractor can slow down development activities especially when the discovery at a point is able to meet its profit needs and covers the cost of exploration, thus leaving them with no real incentive to work harder.

c) Since expenses are reimbursable the contractor could become wasteful since he knows he will always recover his expenses before anything else.

## 3.5 SERVICE CONTRACT

These types of contracts are sub-divided into two: risk contracts and pure service contracts.

### 3.5.1 Risk Contracts

Risk contracts are arrangements whereby the contractor comes up with the total capital requirement for the venture to cover both exploration and production costs. If a discovery is not made the contract automatically ceases, with no further obligation to any of the partners.

In the event of a commercial discovery however, the contractor offsets the production costs from the sale of the mineral product and is also entitled to payment in cash or in the ore itself.

### 3.5.2 PURE SERVICE CONTRACTS

On the other hand pure service contracts is as simple as it is stated a pure contract of service. All the risks are borne by the host state and the contractor merely performs his stipulated assignments in the operations for which services he is paid a flat service fee.

Inherent in this kind of agreement is the advantage of minimizing cheating, exploitation and back hand dealings by the contractor though this comes with it the disadvantage uniquely peculiar to the developing nations that do not have funds to pay huge service fees and desire real foreign finance investment in their fields.

## 3.6 TECHNICAL ASSISTANCE AGREEMENT

These kinds of agreements are the newest on the block with their main feature being the restriction of the foreign investor to a specified area of interest solely for monetary considerations with no further strings attached to it. Even though this kind of agreement is akin to a pure service contract, the distinguishing feature is that the company in question is engaged to provide technical services alone and acquires no proprietary interest or benefit in the industry, with his remuneration being the agreed fees and no more.

It is for this reason that Technical Assistance Agreement has been considered to represent the "most departure from a traditional concession" by which "the relegation of a trans-national corporation from the status of owner to that of a contractor is perfected". [93]

## 3.6 THE NIGERIAN EXPERIENCE OF AGREEMENTS IN THE SOLID MINERALS SECTOR.

Though solid minerals has a long chequered history and has been closely associated with the economic development of the entity called Nigeria from the times of tin, columbite to coal exploitation, the discovery of the oil mineral served as a fatally destabilizing factor for its development.

From the era where the state (colonial government) wholly controlled the exploitation of coal[94] to the private sector driven exploitation of tin and columbite deposits in the Jos Plateau, the sector saw the emergence of uniquely peculiar legal arrangements for its exploitation. Unlike oil minerals which have, due to the over-concentration of the energies and resources of government, developed more rapidly, solid minerals has continued to totter and crawl.

In its short and stunted period of development, the solid minerals sub sector has seen three dominant vehicles of investment; to wit, the State Investment, the Private/State Investment and the Pure Private Sector Investment.

### 3.7.1 STATE INVESTMENT

The colonial government pioneered, funded and invested in the solid minerals sub sector by wholly funding the coal sector. From the point of view of the colonial government the most important mineral was coal

> which was required for electricity generation and especially for the railway system which in turn played a central role in the economy and in turn administration. The production of this strategic mineral at Enugu as from 1916 was made a government monopoly. Coal provided the fuel for the railways until 1958 when the locomotives were dieselized. It also provided fuel for the electricity generating undertakings for power supply to our major towns until hydropower and gas fired generating stations took over progressively from 1968.[95]

Thus the first organized investment in solid minerals exploitation was by government.

### 3.7.2 PRIVATE SECTOR INVESTMENT

Apart from coal, the exploitation of tin and columbite in the Jos Plateau was the largest solid minerals exploitation record in Nigeria. Due to the strategic need for tin for supporting the world war efforts of Great Britain, the colonial government, moved to provide a conducive atmosphere in form of laws, regulations and social infrastructure for British companies to enter into the mining of Tin and Columbite. [96]

Several British and private companies[97] massively invested into mines development to exploit tin and columbite deposits. The form these investments took was essentially concession agreement based. They were granted concessions by the colonial government in return for the payment of meager royalties.

These foreign companies did not involve any Nigerian or Nigerian company in the ventures.

### 3.7.3 PRIVATE /STATE INVESTMENT

With the advent of the indigenization era, government made a concerted move to be involved in the development of the Solid Minerals sector with the establishment of the NMC in 1972 with the mandate of:

> exploring, prospecting for, working, mining or otherwise acquiring, processing and disposing of minerals of various kinds in Nigeria other than petroleum and coal [98]

In a bid to fulfill its mandate, the Corporation entered into several Joint Ventures with local and foreign private entities towards the exploitation of varied solid minerals around the country. In addition, the Corporation set up several subsidiary companies as pacesetters to exploit different solid minerals around the country.

A list of the Joint Venture Agreements entered into by the Corporation is as in Table 8 while Table 9 represents the wholly

owned subsidiary companies set up by NMC to establish pilot mining activities for specific mineral.

## Table 8.

## Joint Venture Agreements with Nigerian Mining Corporation

| S/NO | NAME OF COMPANY | SHAREHOLDING | ACTIVITIES | 1995 PERFORMANCE |
|---|---|---|---|---|
| 1 | Oil Chem. Ltd | NMC – 40%<br>Oil Chem 60% | Production of Barytes | Made profit and paid dividends |
| 2 | Nigeria Freedom Mining Co. Ltd | NMC – 40%<br>Nig. Freedom 60% | Production of Marble | == |
| 3 | Arewa Ceramic Ltd | NMC – 18%<br>Bauchi State Government – 40%<br>Bored Engr. 11%<br>Unifirnance(UK) 20% other 11% | Manufacture of Ceramics, sanitary ware and fittings | Steady increased production since 1993, Good investment. |
| 4 | Katsina Kaolin Ceramic Prod. Ltd. | NMC – 15%<br>Kaduna Investment Co. Ltd. – 65%<br>Unifirnances 20% | Mining and processing Kaolin | Production not encouraging |

| | | | | |
|---|---|---|---|---|
| 5 | Nimco Concrete Roofing Tiles | NMC – 43%<br>Others – 57% | Production of roofing tiles | Company under receivership by NIDB |
| 6 | Jakura Marble Industry Ltd | NMC – 35%, Kinco 35%, NNDC 10%, NIDB 10%, Ajaokuta Steel 75%, NPMI 25% | Mining, Crushing, Polishing and milling of marble | Poor performance due to lack of working capital and old machines. |
| 7 | Consolidated Tin Mines Ltd. Terrazzo | NMC 56%<br>Others 44% | Production and Trading of an cassitarite | Mine remained flooded. Operation remained in the cassitarite trade. |
| 8 | Makeri Smelting Co. Ltd. | NMC 39% Others 61% | Smelting of Tin Ore and production of lead, solar and alloys | Operational but made losses due to heavy bank loans. |
| 9 | Minesfield Engineering Ltd | Consolidated Tin Mines Ltd, 100% | Provides engineering services | Make profitable operation |

| | | | | |
|---|---|---|---|---|
| 10 | Cross River Limestones Ltd. | NMC 18%<br>Others 82% | Production and sales of limestone products | Low production due to management problem. |
| 11 | Nigeria Marble Co. Igbeti | NMC – 20%<br>Others – 80% | Production and sale of limestone products | == |
| 12 | Nigeria Electricity Supply Corporation | NMC 9%<br>Others 81% | Generation and sale of electricity | Paid dividends. |
| 13 | Kampe Valley Mining Co. | NMC 40%<br>Others 60% | Mining of tantalite deposits | Mining programme on-going |
| 14 | Nigerian-American Mining Co. | NMC 40%<br>Others 60% | Mining of Lead and Zinc deposits | Venture dormant |
| 15 | Tropical Mines Ltd. | NMC 20%<br>Others 80% | Mining of Gold deposits | Venture dormant |
| 16 | Laka Gold Mining Co. | NMC 15%<br>Others 85% | Mining of Gold deposits | Venture dormant |

| | | | | |
|---|---|---|---|---|
| 17 | Magnesite Mining Co. Ltd. | NMC 20%<br>Others 80% | Mining of magnesite deposits | Venture dormant |
| 18 | Magnum Mining Co. Ltd. | NMC 20%<br>Others 80% | Mining of Lead and Zinc deposits | Venture on-going |
| 19 | Afrcorp Ltd. | NMC 20%<br>Others 80% | Mining of Gold deposits | Venture dorrmant |
| 19 | RBG Resources Ltd. | NMc 15%<br>Others 85% | Mining of Tin and Columbite deposits | Venture dormant |
| 20 | North-South Extractive Resources Ltd. | NMC 20%<br>Others 80% | Mining of Gold deposits | Venture on-going |
| 21 | Prime Ace Metals | NMC 20%<br>Others 80% | Mining of tantalite deposits | Venture dormant |

*Source*: Status Report on Subsisting Joint Venture Agreements the Corporation is involved in, August 2005.

## Table 9

## Subsidiary Companies of Nigerian Mining Corporation

| S/NO | NAME OF COMPANY | ACTIVITIES | 1995 PERFORMANCE |
|---|---|---|---|
| 1 | Nigerian Kaolin Limited | Mining and processing of Kaolin | Increased production due to further injection of funds in 1995 |
| 2 | Nigeria Barytes Mining & Processing Company Ltd. | Mining and processing of Barytes | Change in management and injection of funds showed increased production. |
| 3 | Nigeria Tin and Allied Minerals Products Limited | Mining and processing of tin and associated minerals | Injection of funds yielded a remarkable increase in production from 6 tonnes in 1994 to 38 tonnes in 1995. 20 tonnes were exported. |
| 4 | Nimco Quarry Products Ltd. | Produce crushed stones for the construction industries | Only one quarry is operational due to poor sales. |
| 5 | Nimco Feldspar/Quartz Project | Processing Feldspar and Quartz | About 100% increase in turnover over 1994 performance. Further funds injected in the company. |
| 6 | Nimco Gold Min. Co. Ltd. | Mining and processing Gold | Poor performance management is being investigated |
| 7 | Nimco Terrazzo Co. Ltd | Production of both pre-cast and instu Terrazzo tiles. | Intermittent production throughout the year. Production was only the request from customers. |

| | | | |
|---|---|---|---|
| 8 | Nigeria Brick Works | Production of clay bricks | Low capacity utilization of plants that need urgent replacement. All the plant require fresh inject of funds for refurbishment/replacement. |
| | a) Naraguta Brickworks | " | Plateau State government owns 14% while NMC has 84%, 10% capacity utilization. |
| | b) Ibadan Brickworks | " " | Only 5% capacity utilization achieved, wholly by NMC |
| | c) Kaduna Brickworks | Production of clay brick | Owned by NMC, 20% capacity utilization achieved. Could be encouraged to perform better. |
| | d) Enugu Brickwork | " " | Wholly owned by NMC, only 6% capacity utilization due to the deterioration condition of operational plants. |
| | e) Ikorodu Brickworks | " " | Owned by the Corporation, has highest production level of 27% plant utilization, could be encouraged |
| | f) Kano Brickworks | " " | Wholly owned by NMC. It is distressed at the moment. |

*Source*: Status Report on Subsidiary Companies of the Corporation, August 2005

Sadly, none of the Joint Venture Agreements have lived up to its mandate neither are any of the subsidiary companies as at today doing well. Though it is not the brief of this paper to delve into the reasons for this dismal state of performance in an otherwise virgin and very viable industry, a brief mention of these reasons may provide a situational understanding as we proceed with this work.

Majorly, both the Joint Venture Companies and the subsidiary companies failed because of several inter-twined reasons including:

i) Undue interference from government and supervising ministry
ii) Lack of funding for the sector.
iii) The culture of corruption which affected managerial competence of representatives of government on these ventures.

Notwithstanding all the above shortcomings it is the thesis of this paper that Joint Venture Agreement offers the best avenue of repositioning and arresting the dwindling fortunes of the solid minerals sector.

## 3.8 CONCLUSION

This chapter has conducted a review of the different minerals development agreement in operations worldwide, the nature of titles available to prospective investors.

This background information will be invaluable in our impending consideration of the Joint Venture Agreement as a veritable for the development of the solid minerals sector.

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95. Ibid

96. Ibid

97. British companies involved in mining in the Jos Plateau and other parts of Northern Nigeria included Amalgamated Tin Mines Ltd, Gold and Base Metals Ltd, Kaduna Prospectors, Ex-lands Ltd, Bisichi Tin Company Ltd, Jantar (Nig) Ltd.

98. S. 4(a) of the NMC Act No. 39 of 1972

# CHAPTER FOUR

# JOINT VENTURE AGREEMENTS

## 4.1 CHOICE OF AGREEMENT

A choice of the "most suitable" agreement for the development of solid minerals in Nigeria would be a misnomer on the onset. Each of the contractual relationships discussed in chapter three possess individual strengths and weaknesses. They are products of particular and peculiar emerging circumstances and prevailing conditions in the environments they took root. Thus while concession agreements were most popular and in practice at the advent of and early stages of the development of the industry due to underdevelopment and colonialism, the injustices inherent in them attracted developing countries to "newer contractual forms that are more acceptable to and are considered "psychologically more acceptable than the concession"[99]. While accepting the fact that concession agreements are less technical and complex of all the other forms of agreements, "which makes it easier to administer

particularly for a state that is not too knowledgeable"[100] it is on the other hand considered the most rigid and the least amendable to indigenous technological development as all the aspects of exploration, mining and development are undertaken by the foreign multi-national companies.

A comprehensive critique[101] of the various forms of agreements shows that while the Production Sharing Agreement allows the company an agreed percentage of the minerals products on completion of each mining programme, the Risk, Pure Service and Technical Assistance Agreements all give the multinational company no share in the proceeds save their agreed professional fees.

The Production Sharing Agreement for all intents and purposes provides the host state with a win-win scenario. Of all the forms, it is the most inherently flexible, as it can be used both to maximize income while at the same time serving as an effective

vehicle for indigenous technological development due to the active participation of the host nation in its operations.

However from the angle of asserting ownership and control by the host nation of its natural resources, the Service and Technical Assistance Contracts give the greatest benefit to the host State. These benefits are however largely emotive and psychological because these forms by their nature require careful monitoring and supervision that most developing countries lack the trained manpower or resources to undertake effectively.

As has been rightly submitted by Yinka Omorogbe[102] appropriate and right clauses will make any form of agreement workable and beneficial to the parties while wrong clauses will kill. The type or form of agreement in most cases does not matter as much as the contractual terms and the commitment and efficiency of the parties. Most of the terms considered

suitable and are wont to protect the parties interests can always be worked into any form of agreement. Essentially therefore, the actual clauses in an agreement are what determine its classification:

> Technically, the grant of a concession does not derogate from this legal position because concession agreements rarely designate the concessionaire as owner of a resource up its extraction. What a concession does confer on the trans-national corporation is the exclusive right to exploitation and marketing. When such right is reinforced by exclusive control and management of the enterprise, then the concessionaire for all practical purpose displays the incidents of ownership even at the point of extraction.
>
> Thus, if the service contract continues to vest exclusive management and control in the trans-national corporation, an essential ingredient of that traditional concession regime will persist, notwithstanding the fact that under the contract the state is deemed to be owner of the natural resource at the point of extraction or that the trans-national corporation is remunerated in kind.
>
> …the transfer of control from trans-national corporation to host governments is assured not so much by recourse to sophisticated contractual forms and institutional arrangements as by effective supervision of

> the operations. When the supervisory authority lacks the requisite, technical, financial and managerial skills, such supervision tends to be ineffectual and government control becomes illusory. [103]

Rather is it submitted that what should be the determining factor(s) in deciding which of the forms of agreement to adopt should be the goals, objectives and targets of the agreement and by necessary extension what the venture seeks to attain.

Some of these include:-

a) Negotiating and settling for a form of agreement that aims at curbing and bringing to the barest minimum possible areas of friction in the future operations of the venture. The insertion of particular clauses in the chosen form of agreement should be strategically done with the future in mind. This strategic exercise ought to consider all the various aspects of the venture including the exploration, exploitation and development of the minerals.

b) The objective of the venture and that of the parties should be given due and overriding concern alongside their aims, objectives and aspirations.

c) Settling for a form of agreement that meets the yearnings of the public ownership of the mineral and the need to be involved in the decision-making process of the venture especially on important matters.

d) Adopting a form of contract that allows for the acquisition of requisite technology, managerial and technical skills for the host nation.

e) Identifying with and finding a place for the ultimate goal of the company to make profits for the host nation. The clauses should be structured such as to allow the company has a return on investment and a recouping of its investments in the Venture, while at the same time allowing the host nation to economically benefit from the mineral endowment.

This has been aptly put by an industry watcher[104]

> Our primary goal as a private sector company is to create wealth for our shareholders… How do we try to create wealth for the company? We do this by investing in projects which yield more than the cost of raising funds…

f) Perceiving and having in mind agreements as developmental tools. The form to be adopted must have the economic development of the host nation in mind, with the "role of the mineral agreement as a major building-block in shaping national and regional economic-development"[105] made paramount. This perception of mineral agreements being molded to make them amendable to the social-economic needs and national developmental aspirations of host nations and not merely for developing and exploiting the mineral per-se has been ably stated by David N. Smith:

> And if one looks at the history of natural resources development in Asia, Africa and Latin America over the past twenty years – or so even just the past ten years – it often appears that the foreign investors are permitted to develop the resource not because

> it makes sense in terms of economic, social and political development but for the same reason that men and women climb Mt. Everest - because it is there [106]

## 4.2. JOINT VENTURE AGREEMENTS: DEFINITION

Attempts at defining a Joint Venture Agreement have been made severally:

a) A **Joint Venture** is a relationship created when two or more persons combine in a joint enterprise for their mutual benefit with the understanding that they are to share in the profits or losses and each is to have a voice in its management [107]

b) "A **Joint Venture** is a voluntary association of two or more persons to carry out a common business enterprise for profit. It is formed by an express or implied contract which may be inferred from the conduct of the parties and the surrounding facts and circumstances [108]

As is common in the dilemma of scientifically constructing an acceptable definition of legal terms, joint ventures also labour from this difficulty.

An examination of the main features of a Joint Venture Agreement would allow for a deeper understanding of what it is and does encompass.

### 4.2.1 FEATURES OF A JOINT VENTURE AGREEMENT IN MINING AGREEMENTS.

a) They are formed for a single, specific business transaction.

b) The Venturers to a Joint Venture Agreement stand in a fiduciary relationship with one another and are generally liable for the debts and torts of the other Joint Venturer acting within the scope of the Joint Venture[109].

c) Inherent in a Joint Venture is the Joint Venturer's right to participate in the profits of the Venture and the obligation to share in the losses.

d) In the absence of an express contrary agreement, the courts will presume that profit and losses will be shared equally.

e) Each Venturer has the right to participate equally in the management of the Joint Venture unless the Venturers

delegate management responsibility to certain of the Joint Venturers.

f) No Joint Venturer may assign his interest in the Venture without the consent of the others, in the absence of an express contrary agreement.

g) The death of Joint Venturer, either natural or legal, vests his interest in the venture property to the surviving Joint Venturer(s) who retains the exclusive right to manage and posses venture property, at least, in the case where there is no express agreement for the purpose of winding up the business of the Joint Venture[110]

h) The life of the Joint Venture is fixed by agreement. In the absence of express or implied agreement, the duration of a Joint Venture will be until such a time as its purpose is accomplished or becomes commercially impracticable.

i) It may be dissolved at any time by notice from any Joint Venturers except where the agreement provides otherwise.

j) No Joint Venturer may be expelled or forced to retire unless the agreement so allows.

k) It is fundamental in the concept of a Joint Venture that each party shall take in kind and separately dispose of its share of the mineral products, in the absence of an express contrary agreement.

## 4.3 FUNDAMENTAL PREMISES

Despite the myriad of forms of agreements available in mineral development, Joint Venture Agreements have emerged as the form that nearly represents the aims and aspirations of the developing countries in their quest to develop the sector to realize its full potentials. The premises on which this conclusion is founded are:

a) Of all the forms of agreements considered, the one that incorporates most, the yearnings and aspirations of developing countries to exploit and manage its natural

resources in accordance with their national interest for the economic development of its people as captured by the principle of "State Sovereignty over Natural Resources" is the Joint Venture Agreement.

Even though this principle enunciated by the United Nations vide Resolution No. 1803(XVII) of 1962 (see Appendix 'A'); alongside similar resolutions like 3201(S-VI) of 1 May 1974 containing a declaration on the establishment of New International Economic Order NIEO and Resolution No. 3281(XXIX) of 12th December 1974 adopting the Charter of Economic Rights and Duties of States served as an emancipating platform for developing countries eager to assert ownership and control over their natural resources, jurists and writers from developed countries have maintained that these resolutions, being United Nations General assembly Resolutions have no binding effect.

This was also the position taken by the courts of the United States of America in the cases of *Texaco Petroleum Development Company and California Asiatic Company V. Libya*[111] *and American Independent Oil Company Vs the Government of Kuwait*[104].

However international law writers such as Sornarajah[113] have argued that:

> It is well accepted among public International Lawyers that the principles of self-determination is now part of public International Law. The recognition of the economic counterpart of that principle, the principle of permanent sovereignty over natural resources has gone through the same process of creation and developed in the climate of decolonization. The latter principle must be accorded the same status in International Law as the principle of self determination.

It has been submitted[114], and quite rightly in this writer's point of view that these successive General Assembly resolutions through State practice and having been embodied in municipal

legislation and constitutions, the principle[115] is now part of international law.

**b)** A Joint Venture Agreement allows for the sharing of risks among the Joint Venturers rather than one Venturer carrying all the risk. This feature is especially expedient for developing nations such as Nigeria which does not have the financial wherewithal to meet all the exploration and exploitation costs of mining activities. Thus a Joint Venture form of agreement allows for the weaker party to have its burden lessened through the spreading of the risk to other Joint Venturers.

**c)** One of the major stumbling blocks to the development of solid minerals in developing countries is the lack of technological and managerial skills and expertise. The Joint Venture Agreement allows one party, the Foreign Venturer to be an Operator and to deploy his technical know-how and managerial skills towards the running of the Venture while the

other Venturers, through representation at the managerial levels are able to acquire skills and knowledge needed for the development of the industry.

**d)** One of the strengths of a Joint Venture arrangement is the promotion of the concept of pooling together of resources towards a common goal, that of pursuing the Joint Venture activity. Since Joint Ventures have a limited time with a limited scope in view, the coming together and pooling of resources promotes the adage of strength in unity. This allows each of the Venturers to maintain his identity but still be able to merge into a streamlined structure and thereby partner for the attainment of the goals of the Venture.

**e)** The negotiation and implementation of a Joint Venture arrangement is quicker, easier, cheaper, flexible and more efficient. Since a Joint Venture relationship seeks to define dearly and explicitly the duties, obligations and rights of each of the Venturers, it proactively eliminates impending frictions

and allows each Venturer to concentrate on its own share of the obligations to attain the common goal of the Venture.

## 4.4. CONTENTS OF JOINT VENTURE AGREEMENT'S IN THE DEVELOPMENT OF SOLID MINERALS.

Unlike the oil sector where exploration and exploitation of the oil minerals is fully regulated by government and government does have a stake in every venture, liberalization of the solid minerals sub sector through the enactment of the Minerals and Mining Act of 1999 and the Nigerian Investment Promotion Act, 1995 has opened the gate to all comers.

The above regime allows private miners, both local and foreign, incorporated companies or individuals to enter into the sector. In addition, Government too has allocated a major role to itself as a miner through its national enterprises, the NMC and NCC which by virtue of their enabling laws[116], have the right of entering into mining.

Even though all Joint Venture Agreements have as their common objective the realization of adequate profits to justify the investments of the owners, these intentions must be clearly articulated in the Agreement. Other equally important clauses and provisions must be made for in the Agreements. Even though the primary focus of Joint Venturers on the part of the company is the "making of money" other equally important provisions shall be discussed here. The clauses cover all the different stages of a typical mining activity, to wit, exploration, exploitation and development of the mineral. On the part of the host nation or national enterprise considerations beyond profit drive the Venture such as the rapid development of the economy through foreign investment and job creation.

### 4.4.1 CLARIFYING ISSUES

In the regime currently in force for the development of solid minerals in Nigeria[117] any person or organization can apply for a prospecting or mining title to explore and/or mine solid minerals in the country; subject to the fulfillment of the conditions for its grant.

However, the reality on ground needs to be discussed to put matters in perspective.

As part of the entrenched doctrine of Permanent Sovereignty over Natural Resources, the Government of Nigeria moved to take charge and control of the productive sectors of the economy with the institution of the Indigenization Policies in 1972. These policies saw the divestment of several foreign mining companies in the country and a void was created. In a direct move to tackle this void, (as nature abhors a void) Government set up the NMC to be a vehicle in pioneering exploration and mining activities towards harnessing, developing and maintaining the tempo of mining activities that had hitherto existed in the country. The NMC took the mandate seriously and between 1972 and 1985, engaged in massive and comprehensive exploration activities in virtually every state of the country. This move necessitated their acquiring

prospecting and mining titles in virtually every state of the Federation. As pointed out by Akper[118]

> It is pertinent to state that the Nigerian Mining Corporation's mandate to undertake full exploration for minerals, and to take over the search for minerals from where the Department of Geological Survey had stopped is very important to the development of the sub-sector and perhaps accounts for the relative successes that have been recorded overtime

As of today therefore, over seventy percent of the identifiable mineral occurrences in the country have had geological, exploratory studies and surveys conducted on them by the NMC. This therefore means that titles to most of the confirmed and investigated cases of minerals occurrences in the country are held by the NMC. The remainder is held by individuals and private companies.

### 4.4.2 JOINT VENTURE CLAUSES

The foregoing part of the thesis identifies the critical clauses that must co-exist in a typical Joint Venture Agreement to make

room for an effectual exploration and exploitation production and development of solid minerals. These specified clauses are not exhaustive and it is to be expected that each of the Joint Venturers will endeavour to bring in clauses that in their opinion best protects their interests and aid in the attainment of their objectives in entering into the Joint Venture Agreement.

#### 4.4.2.1 EXPLORATION CLAUSE

This clause requires the technical partner, or Operator to carry further and additional geological, and topographical/seismic studies to ascertain the minerals, its location and ascertain the reserves. This would determine the commercial viability of the Venture. This clause is crucial as exploration is essentially risk based and it is in most cases only the foreign Venturers that posses the financial wherewithal to fund a meaningful exploration programme credible enough to be relied upon and far reaching enough to determine commercial reserves.

Because of the stunted development of the solid minerals sub sector, majority, if not all the Joint Venture Agreements that are known by the writer after extensive studies to be in operation are the ones entered into by the NMC on behalf of the government with other partners.

In each of these Joint Venture Agreements[119] NMC had previously carried out preliminary exploratory works and topographic surveys and has ascertained some reserves which required further and additional investigation before exploitation proper commences. This led the Corporation to enter into Joint Venture Agreements with partners for the further development and exploitation of the reserves.

Work programmes will need to be spelt out taking into consideration whether or not some prior exploration works have been carried out. Where they have been prior investigations, the extent, depth and nature of the additional works will need to be spelt out. This is crucial on the onset considering the fact that exploration programmes are capital intensive and sometimes open ended and could depress the

investment mood of an otherwise willing investor in the event of a non-discovery after heavy investment.

In addition exploration activities are time bound and could be more costly, time consuming and less reliable at particular weather regimes of the year. This too needs to be contemplated and incorporated in exploration clause.

#### 4.4.2.2. TENURE OF VENTURE

It is needful that every Joint Venture Agreement provides for its tenure. Since the venture in the first place is for a specified purpose it cannot be left ad infinitum. The duration may be divided between the preliminary stages which covers the exploratory period–geological, topographic seismic studies etc while the second stage will be the exploitation stage. This way both partners are able to gauge the attainment of their various obligations within the time frames specified.

This lack of a specific duration of the venture, it is submitted has been the undoing of most of the Joint Venture Agreements entered into between the NMC and third parties.

For example, the Joint Venture Agreement between NMC and Tropical Mines Ltd as reflected in Table 7 for the exploration/exploitation of gold deposits in Osun State had no time frame instituted in the Joint Venture Agreement for any of the activities. It is not surprising therefore that no meaningful exploratory mining activity has taken place since 1994 when the agreement was entered into and did take effect, as the parties were not under any obligation to accomplish particular tasks within any specified time frame.

#### 4.4.2.3 TERMINATION

Whatever has a beginning must of necessity have an end. So it is with Agreements. All Joint Venture Agreements should make provision for the conditions under which termination can

occur, at the instance of either party. Yinka Omorogbe[120] had this in mind when she posited that:

> …sometimes one finds that a contract contains no termination clause at all, and this could lead to serious problems if events occur that lead one party to seek for termination. Clauses of this nature are better if drafted specifically, clearly delimiting circumstances which will give either party grounds for termination. Bearing in mind that the levels of investment and desires and aspirations of the parties offer mean that there is the mutual wish for a fulfilling relationship; termination provisions should not be too easy. They should reflect the desire for a long time relationship by giving time for breaches to be remedied by the defaulting party and for procedures for peaceful settlement, such a negotiation or even arbitration to be entered into before seeking for termination

It has now become apparent that a very promising Joint Venture Agreement for the meeting of all dolomite needs of Ajaokuta Steel Complex by the Nigerian Mining Corporation and the Freedom Group, through quarrying activities in Edo failed due to the lack of an escape valve i.e. termination clause[121]It has now become clear to all the Parties to the Joint

Venture Agreement that though they are ill-suited to collaborate in carrying out the common objectives of the Venture, none is willing to seek an end to the Joint Venture Agreement due largely to the as a result of an enabling clause in the Joint Venture Agreement allowing for its termination by either of the Parties.

### 4.4.2.4 OBLIGATIONS AND DUTIES OF THE PARTIES

Since it is a "Joint" venture, it goes without saying that each of the Venturers has rights, duties and responsibilities towards the attainment of the objectives of the Venture.

In a typical solid minerals Joint Venture relationship, three parties are usually but not always necessarily parties, to wit;- The foreign company that is usually the Technical Partner or Operator, the Nigerian company either the State Mining Company or a private entity and thirdly the local and/or state government on whose land the natural resources is situated.

1) **OBLIGATIONS OF THE STATE MINING COMPANY OR A LOCAL COMPANY**

a) Ensures the good and continuous good standing of the titles on which the mining programme is predicated upon by liaising with the Mines Department of the Ministry of Solid Minerals Development.

b) Pursuing and processing all or any approvals and permits required or needed for the Venture.

c) Monitoring the performance of the duties of the Operator through the instrumentality of the Board of Directors and Management Committee.

d) Providing all and any of the needed or required local logical support including the clearance and movement to site of machinery and dealing with all or any challenges confronting the Venture at Federal government levels.

e) Puts up all the financial resources needed for the running of the project in proportion to its shareholding.

2) **THE FOREIGN COMPANY/OPERATOR**

a) Acts as the Operator of the Venture in charge of all exploratory programmes, mining activities and marketing of products.

b) Provide the managerial and technical human resources needed for the venture.

c) Puts up all the financial resources needed for the Venture in proportion to its shareholding.

d) Undertakes the operations of the Venture vide the employment of sound business principles of professionalism, competence, account-ability, transparency and profitability.

e) Ensures the transfer of technological know-how and the indigenization of the technical staff through training.

f) Payment of royalty and taxes to government.

The duties of the Operator relating to the transfer of technology and the employment/training of nationals require some additional mention here.

## i. Transfer of Technology

The draft International Code of Conduct on the Transfer of Technology defines technology to mean:

> …systematic knowledge for the manufacture of a product, the application of a process or the rendering of a service, whether that knowledge be reflected in an utility model, or a new plan variety, or in technical information or skills or in the services and assistance provided by experts for the design, installation, operations or maintenance of an individual plant or for the management of an industrial or commercial enterprise or its activities.

According to Yinka Omorogbe therefore[122]

> A transfer can be said to have taken place where a technology developed and essentially applied by one organization is utilized for

production purposes and effectively applied by another organization.

A transfer of technology can therefore be considered to have taken place only where the people at the latter organization are sufficiently empowered, via the knowledge of the technology of the initial organization and are able to utilize same alone without guidance from people from the initial organization.

**ii) Employment and Training of Nationals**

It is to be expected that as the Operator carries out his obligations under the Joint Venture Agreement, nationals will be employed, trained and sufficiently empowered technically to carry out the mining activities in the absence of the expatriate workers.

Some agreements apart from having provisions requiring companies to use local citizens or trained nationals go a step further to specify a percentage of nationals to be engaged. As

meaningful as this could be it is argued by Omorogbe[123] that without specifying the levels at which these employment must be made, the aim of the provision may be defeated. A clause with the following provisions has been suggested. [124] The foreign company is obligated to:

> Make use of Nigerian nationals to the maximum extent in all aspects of its operations. Only in cases where specified technical personnel are required and not available from among Nigerians, may the contractor with prior agreement hire non Nigerians provided always that the employment of non Nigerians shall be subject to the condition that the contractor undertakes to train Nigerians in corresponding specializations to replace such non Nigerians in the shortest possible time

It is however needful to stress that emphasis on the employment and training of nationals should be all embracing to cover all areas of the venture including:-

i) Managerial expertise for organizing minerals exploration as a whole.

ii) Technological expertise for taking decisions at critical stages of exploration and development.

iii) Knowledge of the minefield and equipment market dynamics for effective procurement policy.

iv) Minefield skills generally.

3) **LOCAL/STATE GOVERNMENT**

The increasing demands and disruptive activities of host communities towards mining concerns as a result of environmental degradation of their lands as articulated in chapter two herein under resource control comes into focus. For any mining concern to make meaningful progress it has to align with and work alongside the local and state governments where the mineral is located. It is therefore very critical for them to be a part of any venture within their communities to rein in their restive subjects.

In addition, they:

a) Ensure and maintain a harmonious working relationship between the host communities and the Operator through

the promotion of responsible community relations projects.

b) Curb illegal mining activities at the already opened mines.

4.4.2.5 **ENVIROMENTAL CLAUSE**

The history of solid minerals mining presents a sorry case of devastating and raping of the environment by MNCs and TNCs especially in Enugu and the Jos Plateau. There exists in these locations, among others, mines sites littered with mine dumps, ponds, pits and scraps of mining and processing equipment, which have not only left the environment unfit for other uses but also have claimed the lives of several human beings and livestock. With the benefit of hindsight therefore, environmental clauses should have been structured to prevent a reoccurrence of the described scenario above.

It is the contention of an expert in mineral law[125] that:

> A company in its operations tends to comply with the national standard of the state in

> which it is operating... A company will invariably be more careless and use cheaper and less environmental–friendly technology in a country which is not environmentally conscious, while in another country it will abide by stringent guidelines and use up-to-date expensive and environmentally sound technology.

The following Peruvian[126] clauses provides an example of a clause couched in general terms, which also imposes an obligation to comply with national legislation of the host state:-

a) In fulfillment of this contract, the CONTRACTOR shall not contaminate the soil, air or water so as to harm human life or health, animal or plant life and, in general, the ecology, in accordance with the pertinent legal provisions. The CONTRACTOR alone is responsible for utilizing the most adequate technical measures aimed at preventing pollution of the environment. Whenever pollution of the environment cannot be prevented, the CONTRACTOR shall be responsible for eliminating the said pollution.

   It is expressly agreed and understood that the CONTRACTOR shall have the right to dispose of untreated produced water, discharging it into open dumps.

   The CONTRACTOR alone shall be responsible for complying with the legal regulations in effect and those which may be issued for the protection of the environment.

The clause should in addition emphasize the need for land reclamation, restoration, rehabilitation of mine sites to as near possible as its original state.

### 4.4.2.6 STABILIZATION CLAUSE

Considering the capital intensiveness of mining activities and its attendant long gestation period, foreign investors in the industry seek to negotiate this term in Joint Venture Agreements to protect their investments and insulate them from economic and political dislocations of the host country. Stabilization clauses take three forms[119], viz;

a) It may insulate the foreign company's rights from interference by subsequent legislation of the host country.

b) It may expressly stipulate that the Agreement will prevail over future legislation or regulation of the host country if such legislations or regulations is inconsistent with the contractual provisions, and

c) It may stipulate that the host country's municipal law that is in force at the time of the contract shall remain the binding law with respect to the rights and obligations of the parties, notwithstanding any subsequent change of the host country law.

The foundation on which the principle of stabilization clauses sits is on the legal doctrine "Pacta Sunt Servanda" which enjoins the sanctity of contracts. However it has been submitted that this principle however is of doubtful legal efficacy[128] as it seeks to take precedence over the doctrine of the Permanent Sovereignty over Natural Resources. This is because the principle will offend the Permanent Sovereignty over Natural Resources if states are not allowed to make and alter their laws and regulations over their natural resources simply because of the principle of sanctity of contract.

As has been observed by Atsegbua[129]

> Whereas the foreign investors prefer a legal regime that upholds the sanctity of contract as

encapsulated in the principle of Pacta Sunt Servanda, host countries prefer a regime whereby the contacts they execute with foreign investors are subject to the principle of permanent sovereignty over natural resources and the charter of economic rights and duties of states which they claim empowers them to exercise unhindered rights and liberties over their natural resources and could therefore revoke, breach or modify any contract with any foreign investor at will

#### 4.4.2.7 RENEGOTIATION CLAUSE

The volatile nature of the minerals industry makes it imperative to make clear provisions for the renegotiation of Joint Venture Agreements. This ensures stability and flexibility at the same time. As minerals consumption is international in nature fluctuations in prices are a natural occurrence and where this occurs, parties should be assured that a mutually beneficial renegotiation would be undertaken so that they will not be unduly disadvantaged by its initial terms.

The importance and need for renegotiation clause in minerals Agreement was highlighted by the Group of Eminent Persons appointed by the Secretary-General of the United Nations[130]:

> While a clear understanding on several issues at the time of entry is vital, it is to be recognized that conditions change and what may seem to have been adequate and fair at the time of entry may prove to be unsatisfactory to either party over time. A large number of agreements made in the past lack comprehensiveness and contain no provision for renegotiation. Developing countries have of course, the power, through legislation, to modify the terms of the Agreements. But sometimes such actions if carried out unilaterally entail disproportionately high costs in terms of future flow of investments. A willingness on both sides to renegotiate agreements which have been in force for more than, say, ten years could help to avoid recourse to extreme measures.
>
> The group recommends that in the initial agreement with multinational corporations host countries should consider making provisions for the review, at the behest of either side after suitable intervals, of various clauses of the agreement.

The insertion of renegotiation clauses in minerals agreements has been a thoroughly thorny issue that has generated intense

friction between nations and foreign investors. Multinational corporation have fervently argued that:-

a) Re-negotiation of agreements betrays the legal doctrine of the sanctity of contracts better known as “Pacta Sunt Servanda”. The position is maintained on the basis that agreements are products of bargaining entered into by the free will of the parties guided by the free will theory of contracts and should not after their execution be changed.

b) Courts should be careful not to render a contract void as it is against public policy to readjust the bargain willingly struck by the parties to an agreement. It is also in the interest of the social order that men of full age and competent understanding be allowed the liberty of entering contracts and such contracts[131] “when entered into freely and voluntarily shall be held sacred and enforced by courts of justice”

The above postulation, though flowery, has been punctured by Usman A.K. [132] who has submitted that:

i) Courts of law have in opposition to the position of multinational corporations applied the objective theory of contract which has enabled them to actively intervene to rectify contractual provisions on grounds of equity. It follows from this that there is no immutable doctrine of contract and developing countries are perfectly entitled to come under the cloak of fairness and equity to review contracts which are inimical to their interests.

ii) Secondly, major legal system has never swallowed hook, line and sinker the principle of sanctity of contracts. The French legal principle of "imprevision" is a good faith principle which provides for the review of contracts in appropriate cases. According to this principle, agreements between a State and a Foreign company can be altered and renegotiated "upon the occurrence of

subsequent events not foreseen by the parties which has rendered the obligations of one party so onerous that it may be assumed that if he had it in contemplation he would not have made the contract – at least on the terms he made".

iii) Thirdly, most if not all these agreements are entered into without the parties possessing equal bargaining strength. Illiteracy, lack of technical knowledge of an underdeveloped nation cannot be considered an equal bargaining power with that of the superior negotiating knowledge and more formidable positions which the multinational companies bring to the negotiating table.

For instance, in the negotiations between Ghana and Reynolds of America in the early 1960s Nkrumah was so anxious to conclude the deal that while urging officials to negotiate the best terms firmly directed them to come to some terms at all cost!! .[133]

iv) Fourthly, an investment agreement that relates to the natural resources endowment of a nation, its exploitation and marketing cannot be termed a “private contract” bound by the ordinary rules of contract. It is rather a major instrument of public policy, a highlighted aspect of developmental strategy hardly distinguishable from a nation’s development plan. The subject matter of these agreements provide the platform for a joint public enterprise between government and the Foreign partner engaged in the development, for the overall state benefit of a vital strategic public revenue.

The transactions therefore belong to the domain of public rather than private law. They cannot therefore be insulated from the pressures which are brought to bear on public institutions such as political changes, economic conditions and the overall expectations of the generality of the public.

It can therefore be summarized that renegotiation of agreements has been acknowledged to be an integral feature of foreign investment and clauses providing for it ought to be inserted in Joint Venture Agreements.

#### 4.4.2.8 FORCE MAJEURE

The future belongs to God; and only Him knows. It is therefore imperative for parties to make provision in mineral agreements for what would happen in the event of the occurring of unforeseen events and how to handle situations when one of them may be in breach as a result of an act totally outside his control. In the event of such occurrence, the party ought to and should be absolved of liability. It is safer and wiser for parties to clearly define the events that will be considered as "force majeure" and also any other happening which the affected party could not reasonably prevent or control. Conversely too, it is better for parties to agree on what

will not be categorized as “force majeure” and to include same in the agreement.

An example of a typical “force majuere” clause is found in a 1968 Indonesian agreement where it is defined as :-

> …any order, regulation or direction of the government of the Republic of Indonesia or of the United States of America, whether promulgated in the form of a law or otherwise, or any act of God or the public enemy, perils of navigation, fire, flood, hostilities, war (declared or undeclared), blockage, labour disturbances, strikes, riots insurrections, civil/commotion, restrictions, epidemics, storms, earthquake, accidents or any other causes beyond the control of Permina or Contractors, or any of them, whether similar to the cases here in above specified or not.

### 4.2.9 GOVERNING LAW

Joint Venture relationships involving not one but two or more parties are open to disputes and misunderstandings which would eventually be referred to arbitration or courts of law. The choice of the law that would regulate the affairs of the Joint Venture thus becomes very important.

It should be, and has always been the law of the host community where the mining activities are being undertaken that is made the governing law. This provides an obvious advantage for it means that where differences or disagreements occur that need to be resolved, the rules of settlement will be familiar to the local partners rather than them being subject to an international foreign body whose rules and regulations are alien to the Nigerian Legal system, and inimical to the economic interests of the country. This is fallout of the Permanent Sovereignty over Natural Resources doctrine before the advent of independence, the laws of the foreign colonizing power were made to rule over all agreements.

It is instructive that the United Nations Charter of Economic Rights and Duties of States "CERDS" birthed by General Assembly Resolution 3281(XXIX) of 1974 gives credence to the inclusion of this clause as it states:-

> Each State has the right to regulate and exercise authority over foreign investment

> within its national jurisdiction in accordance with its law and regulations and in conformity with the national objectives and priorities[134].

### 4.4.2.10 DISPUTE RESOLUTION CLAUSES

In regular international business transaction between private companies or between States and private corporations a provision is usually made for international arbitration. Even though all parties to an agreement accede to a dispute resolution clause that is where the agreement ends. There has been an unending battle as to whether it should be the host country's arbitration authorities that should be in charge or international bodies. While the host nation naturally prefers local arbitration, foreign companies always prefer international arbitration citing their assumed neutrality.

It has been submitted by Yinka Omorogbe[135] that historically the resolution of these two contending positions has been in favour of the stronger partner's position. Thus prior to decolonization and the proclamation of the doctrine of

permanent sovereignty over natural resources, it was quite normal for mineral development agreements to provide for international arbitration.

However with the combined effect of the Permanent Sovereignty over Natural Resources resolutions and developing nations resolve to take charge of and control their natural resources, it has been the strong position by many international investment lawyers that governments have no right to enter into agreements that allow for foreign arbitration. Sornarajah[136] writes that:

> A central concept of the principle of Permanent Sovereignty over Natural Resources is the rule that national laws should have primacy over the exploitation of natural resources and that any disputes relating to such resources should be settled by the national courts applying the national laws. The evolution of that principle means that there is no scope at all for an 'international contract law' under which such disputes could be decided by foreign arbitral tribunals applying 'general principles of law.

> In fact, it must now be seriously doubted whether a state has the capacity to enter into a contract with a foreign corporation relating to the exploitation of its natural resources and agree to submit disputes arising from the contract for settlement by a foreign tribunal. In the theory underlying the principle, sovereignty over natural resources resides in the people and the state merely acts as agents for the people… Thus, the acceptance of the principle creates a constitutional limitation on the State in international law to deal with its natural resources except in accordance with the interest of its people. This would mean that a state cannot validly agree not to change the terms of an agreement on the exploitation of natural resources or to submit disputes to a foreign arbitral tribunal.

As a result of deep seated and long running feelings towards colonization and the subjugation that it occasioned, it is submitted that a regime that allows for a local resolution of disputes is preferable to an international one even though the International Bank for Reconstruction and Development vide the Convention on the Settlement of Investment Disputes between States and Nationals of other states makes provision for adjudication of disputes by the International Centre for

Settlement of Investments Disputes if the parties in dispute consent in writing to it to be bound by it.

#### 4.4.2.11 CLAUSES WHICH PROVIDE FOR DECISION-MAKING AND CONTROL

Even though under a Joint Venture Agreement the Venture is run by an Operator who is responsible for the day-to-day management of the Venture, it is extremely important that the other Venturers have a say in the broader decision making issues and exercise some measure of control on the operations of the Venture.

As a guidance to moderate between the two extremes that usually contend in this matter control of the operations the Joint Venture, it has been submitted[137] that ideally such clauses should be balanced so as to avoid two extremes: on the one extreme - that the clauses be so liberally be drafted that even critical decisions may be taken by the companies without the

approval of the other Venturers, and on the other extreme – that the other Venturers involvement in the decision making might be so much that day-to-day decision will be bogged down by bureaucratic delays.

In practice solid minerals Joint Ventures have provisions for monitoring the operations and activities of the Operator on three levels.

On level one there is a management committee which includes representatives of the other Venturers, apart from the Operator. Even though the Operator provides all the key operational staff, the other Venturers are at liberty to provide some managerial staff. These staff can apart from working as staff of the Joint Venture also represent the interests of the other Venturers.

On level two, is the policy making body of the Joint Venture – the Board of Directors. Usually, representation on the Board of Directors is proportional to the shareholding, however to allow

for having a say in the running of the venture, the Chairman of the Board of Directors is usually provided by another Venturer apart form the Operator.

The third level of control and monitoring of the operations of the Joint Venture is the provision in the agreement for the rendering of periodic reports indicating the operational state of the venture and giving sufficient information that would enable the Venturers to be kept abreast with the happenings in the venture and to ascertain progress thereon or lack of it.

## CONCLUSION

It has been attempted in this chapter to define what a Joint Venture Agreement is, and to provide a roadmap of its features for ease of identification. An elaborate critique of the contents and clauses that co-exist in a typical Joint Venture Agreement is made.

With this, a full picture has been provided on what regime is obtained with the prevalence of Joint Venture Agreements.

## END NOTES TO CHAPTER FOUR

99. Op. Cit.

100. Ibid

101. Ibid

102. Ibid

103. Op. Cit. .

105. Nicandros C. S. "An Oil Company Evaluation of Worldwide Exploration Opportunities" 12th Energy Policy Seminar, Sanderslolen Norway, Feb. 1985.

106. Op. Cit.

107. Ibid

108. Chrishom Vs. Gilmer 81 F, 2nd 120 at pg. 124

109. Fern M.D. "Warren's Forms of Agreements Vol 7-3

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111. Ibid

112. (1979) 53 L.L. R 389

113. (1082) 21 L.L.M 976

114. "The Myth of International Contract Law, (1982) 16 J.W.T.L 187 at 208

115. Op. Cit

116. The Principle of Permanent Sovereignty Over Natural Resources has been embedded in constitutions of several countries including Nigeria : Section 44 (3) of the 1999 Constitution.

117. NMC Act Cap 317 LFN 1990 and NCC Ordinance No 29 of 1950 and NCC (Amendment) Act of 1998

118. Minerals and Mining Act, 1999

119. Op. Cit

120. Table 7. .

121. Op. Cit.

122. The Joint Venture Agreement was entered into on 27th May 1988 with no termination clause whatsoever.

123. Op. Cit

124. Ibid

125. Ibid

126. Ibid

127. Peter, W. Arbitration and Re-negotiation of International Investment Agreements, Martins Nijhogg Publishers, Dordrecht, Netherlands, 1986

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130. Ibid, M

131. Op. Cit

132. Usman, A. K., International Economic Law Lecture, 2002, Zaria at page 2.

133. Ibid.

134. Article 2 of CERDS, 1974

135. Op. Cit

136. Op. Cit

137. Op. Cit

# CHAPTER FIVE

## 6.0 CHALLENGES FACING THE SOLID MINERALS SECTOR

## 5.1 INTRODUCTION

The preceding four chapters have painted a picture of the historical development of solid minerals exploitation in Nigeria, the different modes of ownership, the nature and kinds of early and modern mining agreements, the mineral endowments in Nigeria and their dispersal map, zeroing in on a detailed consideration of Joint Venture Agreement as a suitable vehicle for the effectual exploitation of the nation's solid minerals endowments.

It is clear from the foregoing that there are enormous economic and technological benefits derivable from the full and effective exploitation of our solid mineral endowments which far outstrips that of oil. This thesis has thrown up certain critical challenges that the solid minerals sector faces that need to be identified and considered for any meaningful benefit to accrue to the nation.

No matter the strengths and merits of Joint Venture Agreements as a tool for revitalising the solid minerals sector, it will remain just that -

a tool, unexploited and lying fallow unless and until these challenges are faced and surmounted.

This chapter therefore, intends to highlight those challenges facing the sector, carefully seeking to underline how they negatively impact on it, thereby creating a natural platform to proffer means and ways of overcoming them. These challenges which have been gleaned from a close study of the history of the development of the solid minerals can be discussed under the following subheads:

- Geological map
- Legislative and Regulatory Framework
- Political Factors
- Infrastructural Development
- Funding
- Fiscal Regime
- Community Relations
- Skilled Manpower

### 5.2.1 Geological Map

As has been borne out earlier in this study[138] the importance of a reliable database that points to proven reserves of mineral endowment in a particular geographical location cannot be over emphasised. What attract mining investors to countries are rich and proven mineral endowments. Globally, solid minerals investments are influenced by the nature, quality and richness of a nation's mineral endowment. Even though the investment climate plays a part in influencing solid minerals investors, the primary consideration is whether or not a nation's geological situation is convertible into a viable commercial proposition.[139]

Mining activities have therefore, over the decades tended to be concentrated in countries that have been known to be mineral producers such as Australia, Canada and the United States of America and to some extent developing economies such as Botswana, Chile, Brazil, Peru, Argentina and Papua New Guinea[140] which in addition offer an attractive investment climate. It is taken as settled, the inference that since these nations have over the years established themselves as mineral producers, they have moved from the

pedestrian stage of ascertaining the existence, quality and quantity of the mineral endowments to its actual exploitation.

A reliable geological map of Nigeria does not at the moment exist. The initial attempts at providing a geological map of Nigeria that contains not just the geological but also the structural, fractural and tectonic details that fully encompass a minerals map suffered a lethal blow with the outbreak of the civil war was in 1966[141]and was not to recover until recently. Nigeria is among the many countries that posses a rich geological terrain, yet have had same unexplored due to the absence of a geological databank that would attract international investors.

A recent World Bank Study[142] carried out a survey of about 80 international mining companies to determine what influences their investment decisions in developing countries. The study revealed that the primary criteria influencing mining activities is the presence of mineral potential and infrastructure while two-thirds of all those surveyed were willing to be among the first foreign companies to explore or develop projects if there are good prospects i.e. a reliable geological data showing a rich geological endowment.

It is instructive to note that this same survey[143] revealed that 72 percent of the companies interviewed were of the opinion that information is less available on countries in Africa than the ones in Asia-Pacific region or Latin America. Among the critical information that are the sparse and in most cases totally unavailable relate to basic geological data. The critical need for a reliable mineral databank for Nigeria has now been realised by the Government and measures have been taken, which if seen through would provide the database needed to attract international investors. These include:

a. The completion of the Airborne Geophysical Survey pilot study awarded to Messers Furgo Airborne Survey (PTY) Limited to carry out a survey over Ogun state. With its successful completion, the second phase, which is to cover the rest of the country, would, on completion give a clear picture of the mineral endowments to international investors. [144]

b. The persuasive case made to Government by the Presidential Committee on Solid Minerals Development in its November 2002 Report for the digitalisation of existing maps in addition to ensuring that the Geological Survey of Nigeria Agency is empowered both by law(as opposed to an Agency of

Government as is now) and funding to "gather, publish and disseminate geo-scientific, technical and economic data".[145]

Unless and until this challenge of readying a verifiable and reliable database of the country's rich mineral endowments is overcome, this gift of mineral endowments from the Creator will continue to lie buried underneath us- unknown and untapped to the economic ruin and underdevelopment of the country.

### 5.2.2 Legal Framework

To show a serious commitment to exploiting its vast mineral endowments, a nation must provide a conducive and workable legal framework that would make its private sector friendly. This can be done by eliminating known barriers to investment in the sector by introducing new fiscal and technical incentives, mitigating adverse social and environmental impacts, removing identified restrictive practises and most importantly, ensuring the conditions that are attractive for new investments for mining and minerals development.[146]As has been submitted by Akper, P.T. [147] a good

mineral endowment and satisfactory political environment must be complemented by an appropriate legislative and regulatory framework in order to attract investors. Foreign investors have always considered reforms in the regulatory regime of a country as a sufficient magnet that would pull them to invest there.

To attract foreign investors into the mining sector, countries of Latin America and Caribbean Region (LAC) including Bolivia, Ecuador, Mexico, Argentina and Peru had over the immediate past modernised their regulatory regimes. These reforms no doubt accounted for Latin America being placed as the leading region in terms of exploration investments on a global basis for two consecutive years (1994 – 1995). In the same vein, a survey conducted in Australia in 1997 demonstrated that three Latin American countries occupied three of the five positions in terms of attraction for exploration investments. They were ranked in the following order: Chile, United States, Argentina, Canada, Peru and Australia.[148]

Several criteria are employed to assess the adequacy or otherwise of a particular legal framework for attracting mining investment. We shall bring out a few to underline the point being made: -

a. Methods of Granting Rights To Mining Titles

As we have seen earlier[149], ownership of minerals globally is vested in the state with few exceptions such as United States of America and few other countries. Nigeria is no exception.[150]Mining titles are therefore acquired and/or granted to both local and foreign investors by the relevant Government agencies[151].

Three methods of granting mining titles have evolved and have been acknowledged internationally in this respect. They are: -

i. By applying the state mining and national regulations alongside the prevailing land-use and planning laws. Developed countries such as USA, Canada, Australia, Germany and France favour this approach.

ii) By granting mining rights within the framework of the mineral agreement between the parties which usually contains more specific regulations cum clauses and sometimes supersedes the principles and rules of the National Mineral law. A prevailing example is Indonesia where foreign investment in the mineral sector is regulated mainly (though not exclusively) through the Contract of Work (COW).

ii) By a hybrid system which combines the two preceding methods. This is the most widely used approach since in it both the Mining law (and National regulation) and the Mineral Agreements are used simultaneously. This method is in use in Chile where a Mining Lease is granted under the general Mining Code, but the investment itself is generally channelled through a foreign investment contract. [152]

In Australia and Papua New Guinea, small-scale projects are negotiated through the general legal system but large-scale projects employ ad hoc mining agreements. [153]

b. Mining Code

This is the essential tool any host government employs to regulate mineral development and its provisions provide the basis for assessing the suitability of the investment climate. It also serves as planning machinery for Government instrumentality, clarifies jurisdiction of Government departments and serves to the outside world as a clear, easily useable and comprehensive instrument detailing Government policy and regulations in the sector. [154] Foreign investments in the mining sector are largely dependent upon the suitability of the mining legislation in force. Countries tending to foster mining development within their territory must have a modern mining legislation in place. [155]

From the foregoing therefore, a mining code ideally, should be comprehensive and detailed and should include as much as is practicable, pertinent rules relating to tax, environment, health and safety, import and export regulations, foreign exchange and custom duty issues consistent with the special nature and need of the mining industry. [156]

A modern mining code therefore requires clarity, predictability, and minimisation of subjectiveness in decision-making in order to satisfy the yearnings of foreign investors in a bid to avoid unnecessary bureaucratic bottlenecks, which invariably lead to corruption and increase the cost of doing business.

Universally the rules that are applicable to the mining industry demand that every mining code should be "systematic, orderly, comprehensible (providing rules and exceptions), realistic, non-discriminatory, non-discretionary, unambiguous and methodical"[157] All the different phases of a typical mining venture should be contained therein, to wit:

i. Prospecting

ii. Exploration

iii. Exploitation

iv. Treatment

v. Sale of mineral products[158]

In Nigeria especially, it is necessary, if not needful to evolve a mining code that distances the state from the business of mining and restricts Government interference from Governmental agencies to safeguarding a few but essential public concerns such as environment, proper use of national resources and land tax etc.

In addition, a mining code must provide well-defined entitlements with transparent criteria that rely on standards that can be adjudicated upon by impartial experts[159]

There is a raging international competition between countries to attract investors for the much needed large capital inflow and technological transfer. Thus the attractiveness of a nation's mineral endowment lie to a large degree on the capacity of the regulatory regimes to be transparent and minimise, if not eliminate completely, corruption and the cost of doing business.

Chile is usually cited as a developing country that has set an outstanding example by providing a detailed and comprehensive Mining Code which provides a reliable system for granting secure and good transferable mining rights. Among others the Mining Code does

this through procedures based on straightforward technical criteria that are insulated from bureaucratic decision making[160]. It stipulates three types of mineral or related activities that include prospecting, exploitation and production.

c. Security of Tenure

The rationale behind the clamour for a secure tenure for mining titles is the need to secure guarantees to investors that the title would provide a "sufficiently adequate duration to cover for the period necessary to allow for amortisation of investment. Correspondingly, it ensures to the investor the ability to renew the title and adequate protection from harmful practises like expropriation.[161]

It is important to emphasis here that security of tenure, as has been argued by Akper P.T[162] involves a delicate balance of interests between all parties concerned, the state and the investor. This is because on the one hand there is the commercial perspective that exploration risk should only be assumed if there is a reasonably safe expectation of obtaining subsequent mining titles, and on the other hand there is the legitimate concern by the state of safeguarding public interests. Thus, it is argued that a mining law which merely

emphasises security of tenure without also imposing obligations on the title-holders will tie up promising acreage and thereby effectively stifle mineral development.

Although there is no universally accepted model provision securing tenures in mining ventures, it is generally agreed that an ideal Mining Code should give a first priority of a mining lease to a exploratory concessionaire in the event of the discovery of minerals. This is the position in established mining regimes in Indonesia, Namibia and Australia among others.[163]

A contrast can be seen from the Iranian Mining code, which provides for a right of priority to the holder of the exploration certificate to apply for an exploitation license in the event of a discovery. However, this directly contradicts the obligation prescribed for the Ministry of Mines and Metals to grant priority to the families of martyrs, war veterans, co-operatives and joint –stock companies of local qualified individuals in the issuance of exploitation licenses. Thus, Walde[164]states that in the Islamic Republic of Iran, because of the

conflict of interest stated above, there is no guarantee of mining tenure.

d. Transferability of Mining Rights

The right to transfer a valid title is inherent in its validity. The ability to transfer mineral rights enhances their liquidity, facilitates financing through the availability of a mining title as a loan security and stimulates an active mineral property market. This is why prospective investors in the mining industry usually carefully look out for the right of the titleholder to freely transfer both the Exploration and Exploitation Licenses to other third parties eligible to hold them.

In addition, the transferability of a mining title diminishes the investor's risk and also contributes to a more efficient use of mineral resources as well as increasing revenue potential for Governments.[165]

Thus a mining concession, whether for exploration or exploitation should be a real and immovable right distinct and independent from the surface, which may be the object of hypothesis, mortgages and other real rights and generally of any other contract or agreement. This aspect entails by its nature the right of the concession holder to

freely dispose of the concession, to mortgage his concession or encumber it with other charges, without state or administrative authorization[166].

It is therefore important that countries wishing to attract foreign investors must fashion their Mining Codes in such a way as to make mining rights granted easily transferable upon fulfilment of certain conditions. Both Mining Codes of Latin American countries and those of Bolivia and Peru impute on a mining title the character of real and immovable rights transferable, transmissible and liable to mortgage.

Under the Nigerian Mining Code, i.e. Minerals and Mining Act 1999, the right to transfer a mining title is made subject to the discretion of the Minister[167]. This discretionary power enhances the real potential for corruption while an unencumbered right clearly minimises if not outrightly eliminates it[168].

e. Land Laws

Access to land has become a major challenge in mining ventures in countries with a dense population or extensive agricultural production. Because land laws regulate access to land, sometimes this is overlooked if the focus is merely on the Mining Code. The foreign

investor needs transparent procedures in the event of landholder demands for compensations as this may play a major role in deciding whether to invest in a particular country or not. As is obtainable in Australia and the Islamic Republic of Iran where the Mining Codes and land laws guarantee unrestricted access to land for mineral exploitation, Nigeria also enjoys that privilege. Though this right has been found in practise to be a theoretical one with the heightened advent of the "Resource Control" agitation[169]. There is yet a need to harmonise the Minerals and Mining Act, 1999 with the Land Use Act, 1978 within the present day realities of Resource Control agitation and its disruptive effects.

It has thus, been submitted[170] that in lands granted or leased by the state, the concession holder should have the right to acquire from the surface owner, by agreement or following expropriation with compensation the following rights:

i. any property permitting access to or necessary for the performance of exploration work or mining operations

ii. a right –of-way to construct, use and maintain roads, cableways, railways, pipelines, electric transmission lines required for mining activities and

iii. Land intended for tailing containment areas.

All the above rights due to the concession holder should have attached to them an obligation to indemnify the surface owner for all or any damages caused by exploration and exploitation activities[171].

In conclusion, it is worth noting that the World Bank, appreciating the need for the evolvement of an efficient, fair, transparent and effective Legal and Regulatory framework for the Solid Minerals sector has in collaboration with the Ministry of Solid Minerals Development under the auspices of the Sustainable Management of Mineral Resources Project (SMMRP) commenced a series of dialogues and consultations towards the institution of a Mining Code that would make it more internationally investor friendly[172].

f. Dispute Settlement

From the position of international investors, it is important that the host country institute clear pre-determined and well-defined norms in the event of dispute to ensure a fair and impartial resolution. Four mechanisms are universally acknowledged in dispute resolution involving foreign parties, to wit settlement by local courts, settlement by international courts, local arbitration and international arbitration. The most commonly employed method in international mineral agreements is the international arbitration. Some developing countries have opted to subscribe to the International Centre for Settlement of Investment Dispute (ICSID) and the Multilateral Investment Guarantee Agency (MIGA), both of which are affiliates of the World Bank.

For many investors, provision of access to international arbitration is an essential precondition for foreign investment, as its absence does not inspire the necessary confidence to deploy a large capital outlay. Though host nations usually have in their law books provision for dispute resolution and arbitral proceedings, international investors always prefer mining disputes to be submitted to an international dispute resolution[173] bodies totally independent of the host country.

### 5.2.3 Political Factors

Among the critical challenges that impact on the development of the mineral sector, the political aspects appear to overreach and impact severely than all the others. Instability in the body polity and its twin, policy inconsistency are considered here:

a. Political Instability

This relates to unfavourable changes in the political structure of a country, which have the tendency of disrupting the security situation in the country thus hindering the continuance of projects or the carrying on of mining programmes initially planned. It is generally agreed that a stable continuous regime, free of turmoil and dramatic change is an important consideration for foreign investors[174]. The Times of London in its June 15th 2000 issue aptly captured it thus:-

> However demanding Nigeria's economic crisis may be, its most profound disease is a political one

As have been pointed out[175], mining activities are capital intensive projects with long gestation periods and naturally investors are akin to avoid countries with a history of political instability and rather attracted to ones with a record of relative political stability. This it is submitted[176] is the reason why international mining companies prefer making investments in developed countries with political stability such as Australia, Canada, USA. Conversely and strangely too, countries of the former Soviet Union with good geological prospects are still unable to attract investors because of the volatile nature of their political direction.

b. Policy Inconsistency

There is no gainsaying the fact that policy direction in Nigeria has seen a lot of somersaults over the decades. International investors in mineral development usually insist on having guarantees that despite a change in leadership within the nation state or the country they intend to invest in, their rights related to prospecting, exploration and exploitation will be respected and secured.

The chequered political history of Nigeria characterised by military interventions and botched democratic attempts since independence has no doubt had a devastatingly retarding influence on international mineral investments[177]. Between 1960 to date Nigeria has witnessed seven coup d'etats i.e. forceful take-over of Government by the military. Each change has entailed the replacement of one Government, its policies and agenda for the new with the country essentially starting all over again each time. With each change in government, new policies are thrown up in the name of a restructuring to "correct" the wrongs of the past. The whole country has thus been turned into a huge laboratory of sorts to endure different and varied theoretical policy thrusts never tried anywhere in the world.

What Nigeria must learn from the experiences of other jurisdictions is that consistency in mineral policy enhances a country's competitiveness in attracting foreign investment, especially as mining projects involve large sums of money and long gestation period and international mining companies focus interest on countries with a history of stability in their mineral policy[178].

### 5.2.4 Infrastructural Development

Mineral occurrences are mostly found in rural and/or inaccessible areas usually without basic infrastructure critical to mining activities such as roads, rails, electricity, telecommunication, schools and health centres. The absence of the infrastructural base and services possess severe limitations to the development of mineral resources. Some of the challenges include:

a. Power

Mining is essentially power driven and this explains why for the successful mining of coal by the British that predated independence, special attention had to be given to coal to power the Oji River Power station. It also explains why tin mining thrived in the Plateau as the British Mining Companies pooled resources and set up a hydroelectric power company called Nigerian Electricity Company of Nigeria (NESCO) to provide power for the minefields. Public power supply is epileptic even in towns and urban centers not to talk of the rural areas.

The National Electric Power Authority (NEPA) with its monopolistic stronghold provides the nation with abysmal power ratios. In 1999 power generation for the whole nation stood at about 1,600 megawatts. After five years, it has only been improved upon to fluctuative levels of between 3,330 to 3,400 megawatts daily despite huge investments therein[179].

b. Seaports

Though Nigeria has two deep seaports in Lagos and Port Harcourt and five smaller ones in Calabar, Warri, Onne, Sapele and Koko, its utilization value in mining are minimal.

c. River Transportation

The nation's two main rivers for inland transport are Niger and Benue. As a result of their shallow depth they are navigable only seasonally and the need to dredge them to become navigable all year though acknowledged has not been attended to. The current depth of both rivers allows ships of only a low tonnage to sail therein[180].

d. Railways

Though there currently exist 3505kms of rail, which runs North-South, [181] the archaic and outdated railing and rail tracks

(these were built by the colonial government's pre independence) does not make it amenable for modern transportation haulage.

e. Road

The 150,000 kilometres of road network in the country links mostly only urban and small towns and does not impact on rural areas where mineral endowments occur. Most of the areas where mineral endowments occur are earth roads that are seasonal and cannot take heavy traffic[182].

### 5.2.5 Funding

As has been concluded[183] mineral development is heavily capital intensive and with underdeveloped economies such as Nigeria, the financial backbone to support the sector is almost non-existent.

Though from pre-and post independence up to the 1970s there was in place a policy of non-state involvement in mining investment as it was private sector driven, this changed from the 1970s with the active participation of the state mining ventures until date. The reasons for

this policy shift have been adumbrated elsewhere[184]. It is sufficient however to state here that with the departure of the major international mining companies due to the outbreak of the civil war and the indigenization policies, Government had to step in to fill the void. However with the new policy directives, Government has once again, through the Nigerian Investment Promotion Council (NIPC), changed course to make mining investment once again private sector driven. It is an open question as to whether with the present level of economic underdevelopment; capital exists to fund meaningful mining ventures locally.

The recommendation[185] for the establishment of a Solid Minerals Development Fund deserves a close and favourable consideration as avenue for empowering local entrepreneurs to enter into mineral exploitation. In that vein a case has been made[186] for the setting up of Solid Minerals Development Bank. However it is submitted that with the existence of several financial institutions set up primarily to provide seed capital to local entrepreneurs such as NIDB, NEXIM, NERFUND and BOI, funding can be sourced directly there[187].

### 5.2.6 Fiscal Regime

a. Incentives

The Nigerian solid minerals sector operates in a international market where intense competition exists for resources and expertise to carry out mineral exploration and exploitation. Countries tend to compete to attract foreign capital by providing favourable investment climate for mining companies to do business. The provision of economic incentives by host nations in the solid minerals sector are a determinant of investment decisions as they have effect on:

i) The ability of a country to attract foreign investment, and

ii) The price competitiveness of the mined ores[188].

The current fiscal framework of 3-5 years tax holiday, deferred royalty payments, capitalization of expenditure on surveys and exploration, provision by state of critical infrastructure such as roads and electricity 100% ownership, tax deductible and capital allowances though comparable to those of other mining countries in Africa needs to be adjusted to bring it in line with best practices internationally.

For example, Chile, Mexico and Peru do not have royalties on production taxes on mineral output; Nigeria on the other hand has a royalty of 3 percent on industrial minerals and 5 percent on base metals and precious stones[189]. Considering that Nigeria is operating in an international competitive market, a review of the above regime is desirable.

b. Taxation

Taxation of mineral production is a complex and controversial issue as a result of its unique features which include the risk and uncertainty associated with the geological conditions, the fixed single purpose nature of the investment, large minimum economic scale of production requiring large capital investment, the exhaustible and non- renewable nature of our resources and the significant environmental impact on the mining activity.[190] There is therefore hardly any parallel in other sectors. It has therefore been submitted[191] that a distinct fiscal regime be evolved for mineral development.

This argument is predicated on the premise that in developing countries taxes are often perceived as unpredictable. The experience

of many international investors in some developing countries has been that despite what is promised at the beginning of the mining venture new levies and taxes invariably keep emerging from other tiers of Government such as local or state authorities. Such prospects, it is argued, dampens investment. [192]

The challenge here will be to set a limited number of taxes including a clearly defined method of computation, thus, excluding all other taxes, levies etc.

c. Royalty

Internationally there are four methods of assessing royalties. These are:

i. Ad-valorem

A percentage from sales of mined ores. This makes the royalties to be a steady avenue for the host country. In addition, royalties under this method are easy to determine as Government authorities responsible for the calculation could refer to the bills of sale and invoices that are readily available for auditing purposes. However

this method is sensitive to the fluctuation in the valuation of the minerals internationally.

ii. Specific

This method fixes the prices specifically and cushions the host Government from a downward turn in the value of the mineral. Conversely therefore, the host Government does not benefit from any rise in prices.

iii. Proportional Profit

It is usually a fixed proportion of the profits. This method understandably is the most acceptable from the point of view of the investor.

Iv. "Hybrid" which combines both ad-valorem and profit systems[193]

Nigeria needs to wade its way through these methods and settle for one that most closely secures its interests. Such agreed method must be one that does not leave too much room for discretionary exercise of power by Government officials to discourage under the table dealings that ginger corruption

d. Import and Export Duties

Mining equipment is specialized and sophisticated and in most cases has to be sourced abroad. A relief by way of duty waivers on their importation is very important to an investor especially at the start-up period and within the early periods of the venture.

e. Foreign Exchange

The Government should grant options to the investor to take out foreign exchange either in cash or in production to cover his capital and profits. A feature of most multilateral investment agreements is extensive guarantees for the repatriation of foreign exchange by way of Central Bank repatriation guarantees and offshore accounts held for export proceedings and debt service.

An example will bring this in focus. In the Islamic Republic of Iran, under the Law for the Attraction and Protection of Foreign Investment, the investor has a guarantee for repatriation from loan of the capital and any other amount earned there-from such as dividends, interests and accrued profits. Also secured is the right of the investor to transfer the net profit overseas annually[194].

Factors that influence foreign investment in the mining sector across the world especially the fiscal regime for six countries are summarised in Table 10 below to demonstrate at a glance how these countries are measured up to the demands of international mining companies:

## TABLE 10
## SUMMARY OF RELEVANT LEGAL AND TAX CRITERIA

| CRITERIA | CHANA | INDONESIA | CHILE | NAMIBIA | W. AUSTRALIA | IRAN |
|---|---|---|---|---|---|---|
| **Foreign Investment** | No Restrictions since 1986 | Joint Venture or Contract (COW) | No Restrictions | Joint Venture with State | No Restrictions | Joint Venture with Iranian companies |
| **Methods of Granted Mining Rights** | Reconnaissance (Prospecting) License. Prospecting (Exploration) License and Mining License | Contract of Work (COW) | Mining Concessions Plus Investment Agreements | Mineral Licenses Plus Mineral Agreements | Prospecting License, Exploration, License, and Mining Lease. Special Agreements for Large Scale Operations | Prospecting/Exploration License, Exploration License. |
| **States of Minerals Activities** | Reconnaissance (Prospecting), Prospecting (Exploration), and Mining | General survey, Exploration, Exploitation, Processing and Refining Transportation and Sales | Prospecting Exploration and Production | Reconnaissance prospecting and Mining | Prospecting, Exploration and Mining | Prospecting/Exploration and Exploitation. |
| **Security of Tenure after Exploration Phase** | Non Subject to the discretion of the Secretary for Lands and Nations | Yes | Yes | Yes | Yes | No Priority to Families of War Veterans, Cooperative and Joint-Stock companies |
| **Granter of Mining Titles** | Secretary for Lands and Natural Resources | Minister of Mines and Energy gives on Authority to: Director General of Mines of Provincial Government | Civil court | Minister of Mine and Energy | Minister of Mines | Minister of Mines and Metals |
| **Settlement of disputes** | Yes | Yes | Yes | Signed in 1998 | Yes | No |
| **contracting Party of** | Yes | Yes | Yes | Yes | Yes | No |
| **1) ICSID** | | | | | | |
| **2) MIGA** | | | | | | |
| **3) NY** | | | | | | |
| **Convention Signed Bilateral Investment Treaties (BITs)** | Eight | Twenty-Four | Twenty-Nine | Three | Twelve | Three |
| **Corporate Income Tax** | 45% | Progressive 15% - 35% | 32.5% or Stabilization for up to 20 Years Paying 49.5% | Progressive Base on Profit 25% - 55% | 36% | Progressive 20% - 45% Plus 3% Surtax (Municipal Tax) |
| **Royalty** | 3% - 12% | 1% - 3% | None | 5% - 1% | 1.25% - 7.5% | 6% - 10% |
| **Additional Profit Tax (APT)** | Yes | None | Yes | None | None | Unknown |
| **With Holding Tax** | Yes | Yes | Yes | Yes | Yes | Yes |
| **Import Duties** | Exemption for Capital Goods Imported for commencement of the Mining Project. | Yes | Yes | Unknown | Yes | Machinery for Development of Mining Activity is exempted from Taxes and Duties |
| **Loss Carry Forward** | Yes | Yes | Yes | Yes | Yes | |

**Source: Thomas Walde, Modern Mining Law, Mining 2000**

### 5.2.7 Community Relations

By far the most contemporary challenge facing the mining industry is the rising clamour for resource control[186] hidden in cloaks such as marginalization, compensation etc. Some years ago, environmental issues were not a major consideration in the industry however with the Niger-Delta debacle all that is now history.

The success of a mining venture largely depends on the cordial relationship that the mining company has with the host communities. As a result of increased awareness and education, communities are now concerned about the environment and resource conservation. It makes business sense for mining companies planning mining ventures to understand these concerns and seek to respond to them as an integral part of the 'core' mining venture.

A comprehensive check-list of the relationship that should be put in place by the mining company on the on-set through the instrumentality of the local chiefs, opinion leaders, religious leaders etc has been suggested by the Presidential Committee on Solid Minerals Development Report on a Seven Year (2003 – 2009) Strategic Action Plan for the Solid Minerals Development in March 2002. It:

a. Shows how the project will contribute to ecologically sustainable development by its contribution to the social and economic life of the community, by protecting and rehabilitating the environment in the most effective way possible.

b. Demonstrate the benefits to the community, emphasising aspects such as job creation and the opportunity for improvement in skills, particularly for young people and minority of disadvantaged groups.

c. Regularly liaise with politicians at the Federal, State and Local Government levels and also maintain contacts with officials from the host community and community leaders. The company should always be open and helpful and its senior officials should always be available to respond to inquiries.

d. Watches for changing needs among special interest groups and work to accommodate them as much as possible.

e. Appoint a community liaison officer who will maintain contacts and build up trust with the community.

f. Carry out an extensive inventory of the environment such as farmlands, economic trees, areas of cultural heritage, etc. before the venture commences

### 5.2.7 Skilled Manpower

The concerted mining activities that predated independence and afterwards were carried out using two layers of manpower. On one layer were the skilled/trained manpower and the locals who were essentially labourers on the other. Considering the highly technical nature of mining, a concerted regime should be put in place to allow the country raise a technically competent crop of mining manpower. The noble objectives that informed the establishment of a National Institute of Mining and Geology and the School of Mines should be nurtured and the institutions adequately funded to train skilled manpower in mining and geosciences to address the current lack of skilled manpower in the mining industry.

## 5.3 CONCLUSION

These challenges though daunting are surmountable. Countries that attracted and continue to attract substantial investment in the mining industry are those that over time invested time, energy, resources and have not been lacking in the will to see through far reaching reforms that seek to make the mining climate investor friendly.

## END NOTES TO CHAPTER FIVE

138. Chapter One.
139. Op. cit
140. Op. Cit
141. Chapter 1.
142. Strategy for African Mining, The World Bank, Washington D.C, World Bank Technical Paper Number 181, African Department Series.
143. Ibid.
144. 2004 Ministerial Press Briefing of the Ministry of Solid Minerals Development, Sept, 9, 2004
145. Presidential Committee on Solid Minerals Development Report on a Seven-Year (2003 – 2009) Strategic Action Plan for Solid Minerals Development, November, 2002
146. Ibid
147. Ibid
148. Op. Cit
149. Chapter Two deals with different Minerals Rights and the process their acquisition.
150. Section 1 of the Minerals and Mining Act, 1999

151. The Minister under the Minerals and Mining Act 1999 is responsible for the grant of Mining Rights, Licenses and Leases in Nigeria

152. In this respect, the investment contract does not serve to establish the legal title but rather serves to provide the investor with state – issued foreign investment guarantees.

153. Op.Cit

154. Ibid. See also Marian Kene Omalu and Armando Zamora "Key Issues in Mining Policy: A brief comparative survey on the reform of mining law". In Journal of Energy and Natural Reserves Law, Vol. 17

155. Langlois P., Mining Legislation and Foreign Investment, Conference e Montrel, May 16, 2000 pg 1.

156. Op.Cit

157. Op.Cit

158. Ibid

159. Ibid

160. The 1970s style of mining laws influenced by the Concept of Permanent Sovereignty over Natural Resources strongly motivated by domestic bureaucratic and political interests, emphasized restriction of private investment and large discretionary powers by national "vetting" agencies negotiating with foreign investors and on the philosophy enshrined in the static and rationalistic approach, is now recognized to have failed in its aspirations. That large vetting, restricting and discretionary bargaining powers are now known to have presented a large scope of corruption which is viewed as a major disincentive to investors. However, this position cannot be accepted wholly in a country like Nigeria. The National Office of Technology (NOTAP) which is one of the vetting agencies established by Government

performs very useful functions in ensuring that Nigeria is not unduly taken advantage of by the foreign investors. In a country where over 60% of the population is illiterate it is our position that agencies such as NOTAP are necessary to safe guard local entrepreneurs in their dealings with foreign investors and safeguard national interest.

161. Op Cit

162. Op.Cit

163. Ibid

164. Op.Cit.

165. Ibid

166. Ibid

167. Section 13, Minerals and Mining Act, 1999

168. Op.Cit

169. The issue of Resource Control has been tackled in Chapter 2 herein.

170. Op.Cit

171. Ibid

172. National Mining Policy Dialogue Conference and Exhibition, July 12-14, 2004, Abuja Conference Centre, Abuja.

173. Op.Cit

174. Ritchie, D. "Exploration and Mining in the Asian Pacific Region-The Industry Perspective" – Proceedings of the Conference on Rationalization and Industrialization of Mining Codes and Legislation 16-18March,1992 Bangkok, Thailand. It is pertinent to note however that this does not necessarily mean the favoring of a particular political party retaining power over another. But rather, the seeking by the investor of a host country which provides a setting where successive governments of perhaps different political persuasion have a record of encouraging the development of the

country's minerals sector: In Nigeria, choices of government have largely been between military and civil government as political parties are generally devoid of ideological flavor. Recently the international community has tended to show preference for investing in countries that embrace western style democratic government that recognize human rights, liberalization of the economy and non-discriminating policies as between national and foreigners in the economic spheres of the country.

175. Chapter One herein

176. Op. Cit.

177. Op. Cit

178. Op. Cit.

179. Thisday Newspaper of September 12, 2004 page 14.

180. Op. Cit

181. Ibid

182. Ibid

183. Chapter One herein

184. Chapter One herein

185. Op. Cit

186. Op. Cit

187. Ibid

188. Ibid

189. Ibid

190. Ibid

191. Ibid

192. Earlier considered in chapter 2 herein

193. Op. Cit

194. Ibid

CHAPTER SIX

# 6.0 RECOMMENDATIONS AND CONCLUSION

## 6.1 RECOMMENDATIONS

The recommendations relating to this work has been divided into two main sub-heads for the purpose of emphasis. They are recommendations in respect of the option of Joint Venture Agreement as a viable option for reordering and revitalising the solid minerals sector and recommendations relating to a desirable investment climate.

### 6.1.1 JOINT VENTURE AGREEMENT AS A TOOL FOR REVITALIZING NIGERIA'S SOLID MINERALS SECTOR

Solid minerals agreements in Nigeria have had a chequered history, in the process passing through several stages. In substance, they have improved from what obtained two or three was decades ago departing from:-

> Long contract periods, inadequate working provisions, excessive tax incentives and low royalty and tax rates, discretion left to the foreign operating company in most subject areas, arbitrary accounting methods and pricing policies, absence of environment protection provisions, absence of provisions calling forward and backward linkages, inadequate training and employment provisions…[195]

Government income from mineral ventures has radically appreciated with shorter tenures, the movement away from unit of production royalties and other modest

royalties to an income tax or profit sharing arrangement has maximized profit and economic benefit to developing nations. [196]

From the days when foreign companies “would agree to ‘consider’ the employment of local nationals” where feasible or would agree to use mining procedures "generally used in the industry” [197]host nations now, through the instrumentality of Joint Venture and other agreements determine the number of nationals to be hired while also approving and certifying before hand the best mining methods that suit the host country.

As has been earlier submitted[198], Joint Venture Agreements are not an end in themselves. They are only vehicles to take a nation to the promise land of economic development in the minerals sector. As David N. Smith has argued[199]

> There must be serious effort now in integrating mineral development into national development planning and in making the mineral contract itself a more effective vehicle for economic and social development. We shall have to begin conceptualizing mineral contracts – to think about them as development programs rather than contracts, to bring underlying development issues to the surface and to alter the adversary relationship between company and Government. In addition, developing countries must take more seriously issues relating to diversification of the economy, the role of state mining companies, the role of corporations and the role of minerals in the development process.

That Nigeria has been endowed with so many minerals potential[200] yet continues to wallow in abject underdevelopment has been reiterated over and over again. The International Labour Organization wrote of Nigeria[201]that

> Probably more people are living in poverty than before the oil boom… The wages of those in regular employment buy no more in relation to the cost of living than they did in the mid 1960s, with a continuing heavy incidence of diseases of poverty… semi-stagnation in the rural economy causes heavy migration to the towns and cities… water supplies have lagged even more severely behind population growth.

Although Joint Venture Agreements contemplate and cover virtually cover every aspect of the mining programme and venture, special attention must be given to implementing its provision as the problem most times is not with the agreement itself but in being faithful in implementing the "letter and spirit" of the agreement.

Another area that needs special mention is the disproportionate reliance on oil and gas, thus making our economy "mono-dependent." [202] Despite our vast mineral endowments, it is sad that our mineral policy thrust have over the period been determined by the importance the international world market attaches to a particular mineral with the end result being the concentration on that mineral while the ones "not reigning" [203] are neglected until their time comes, if it ever does.

Rather than allow international markets to determine what mineral to concentrate on, Nigeria should strategically commence the exploitation of minerals that support its present weak economic base. Most of the nation's industries operate well below capacity, as they are unable to meet the high cost of imported raw materials. There is a serious inadequacy in the local supply of vital minerals to sectors such as petroleum, iron & steel, agriculture, construction and manufacturing; not because the minerals are not available but because of constraints which include:-

- lack of proven deposits
- lack of adequate capacities in mining and processing
- lack of infrastructural facilities
- unfavourable fiscal regime
- uncompetitive legal and regulatory framework.

The nation can do well to concentrate on mining minerals to meet local industry needs firstly as import substitution strategy, secondly to conserve foreign exchange and thirdly to provide jobs secured through mining activities. For example, Nigeria's current annual demand for cement is nine million tonnes but the country's cement factories only produce two million tonnes. The shortfall of seven million tonnes is made up by importation. [204] By simply getting into exploration activities, the nation can prove reserves of

limestone scattered over several states[205], limestone being the major raw material needed for cement production.

### 6.1.2 INVESTMENT CLIMATE

Without an attractive, suitable, stable investment climate devoid of political and policy instability, foreign investment cannot thrive. Nations without stability cannot move forward, not to talk of attracting foreign direct investment from outside.

Some recommendations will be proffered to highlight the critical areas needed to be addressed to make the climate conducive for international investors in the Solid Mineral Sector.

a. The responsibilities entrusted to the Minister under the Minerals and Mining Act of 1999 are very extensive. The nature of the office is political. Under a political dispensation, there is no guarantee that a person with the requisite technical know-how would be appointed a Minister. It may therefore be needful to remove the awesome powers conferred on the Minister and vest same in an autonomous commission to be known as “Solid Minerals Development Commission” manned by

technocrats knowledgeable in the industry and placed under the broad directives of the Minister.

b. Furthermore, in the absence of such a Commission, a compelling case exists to take a hard look at the enormous wide discretionary powers vested on the Minister under the Act. This may serve as disincentive while also providing as an avenue for under the table dealings. There is a need to limit the powers of the Minister by prescribing objective standards within which the Minister must act.

c. There is a need to reinforce the security of tenure provided under the Act. The present position of the law does not offer much security to investors who may have spent large sum of money on exploration. Indeed as the law presently stands, such investors stand the risk of not being granted leases or licenses to exploit minerals where proven reserves have been made in an exploration activity.

d. One of the major problems investors have is the inordinate delay encountered when processing necessary pre-investment approvals. This has led to frustration and dissatisfaction among investors. A dire need exists to strengthen and streamline the process to ensure prompt

attention. Although the process leading to the grant of access to land has been considerably shortened by the establishment of the Land Use Allocation Committee, the bureaucracy at the State and Federal Ministries is still a source of worry. There is a need to ensure that officers work within given time frames, to ensure that approvals are given in good time.

e. There is the critical need to formalize the hitherto haphazard, dangerous and environmentally devastating activities of "illegal miners". These so called "illegal miners" referred to internationally as small-scale/artisanal miners have had their informal mining operations formalized into economically viable and environmentally friendly ventures in developed mining countries. Their programmes are then extensively used as vehicles for poverty eradication, massive employment in rural areas. In addition, the minefields are made conducive for investment with the mined products contributing appreciably to the solid mineral exports of the nation. Other benefits that accrue on the recognition and formalization of the activities of these miners are:

- provision of revenue due to Government

- provision of sustainable self employment in the rural areas with its attendant spiral positive effects
- minimizing environmental degrading
- minimizing social and health problems such as child labour and the spread of HIV-AIDS
- Ensuring safety in the minefields through the adoption of safe mining methods.

As a first step, these artisanal miners should be organised into co-operatives and buying centres established to forestall “sharks” that operate cartels that rob the miners of their yields. In addition extension services should be undertaken in order to enhance and sustain operations.

## 6.2 CONCLUSION

This work has seen us attempt a diagnostic overview of the history and development of solid mineral exploitation in Nigeria. We have attempted to survey the legal regime of the sector, the various mineral agreements that have been in operation since mining activities commenced and their strengths and weaknesses. We have observed that it is the desire to diversify the revenue base of the country that necessitated the reactivation of the mining industry that has suffered from prolonged stagnation and neglect.

While it is generally believed that the solid minerals sector has the potential of contributing greatly to the revenue earnings of the country, to be to able realise this potential, huge financial investment must be made in exploration and exploitation of the vast mineral endowments of the country.

It appears from prevailing government policy that the development of the mining industry in Nigeria will be largely exogenous through the efforts of foreign investors. This has informed Government policy to the effect that development of the sector will be "private sector driven". Although this policy direction will be consistent with current international trends and the dictates of

Briton Woods Financial Institutions, its wholesale adoption by Nigeria may not be completely suitable in view of her peculiar problems.

The dearth of venture capital or low capital formation among local entrepreneurs has clearly militated against the ability to engage in large-scale mining projects required to yield the revenue expected of the industry. Hence the present emphasis on foreign capital and its attraction. To succeed in the quest to attract foreign capital the investment regime must be reformed to provide a conducive environment for the reception of Foreign Direct Investment.

Although the examination of the investment regime reveals that commendable efforts have been made to reform the legal as well as the investment regime, the general investment climate is still very much unpredictable and to a large extent remains unfriendly. Since the legal regime is only one of the factors which constitute the overall investment climate which investors take into account when making investment decisions, there is a need to address problems that affect the general investment climate such as the micro economic policies of the Government, prevalent policy inconsistency, insecurity of life and property, poor infrastructure etc which at the moment constitute a major disincentive to the investors.

Another important issue relating to the survival of the mining industry is the fact that over 70% of the operations in the industry are carried out at informal levels the group loosely referred to as “illegal miners”. Informal or artisanal mining, which is prevalent in the country, is sadly unrecognized and unregulated with adverse consequences on growth and development of the industry. Since sufficient efforts have not been made to recognise and regulate informal mining, the country has not been able to tap from the wealth of experience of these group of miners recognised the world over as excellent prospectors. Furthermore the potential of artisanal mining as a source for skilled low level manpower critical to the development of the mining industry has not been fully tapped.

Geological mapping to appropriate scale (about 1:25,000) is yet to be completed in the country. This has left interested investors with scanty information regarding the extent of deposits in the country and their commercial viability. The key to attracting investment in the sector therefore is the updating of geological information available on the minerals in the country to international standards.

It is important to note that major multi national mining companies which Nigeria hopes to attract may not necessarily be interested in investing in the country despite significant reforms that have taken place in the investment regime. This is because experience has shown that the major companies are shirking rather than expanding their operations. Major mining companies now prefer to concentrate their activities in those countries or regions traditionally known to be conducive for mining operations except where there is a significant new discovery of very rich deposits in other countries. The experience of some Latin American countries like Brazil, Colombia and Venezuela are instructive in this regard.

Since Nigeria is no where to be found on the mineral map of the world, there is the need to concentrate on the promotion of development of small-scale panacea for the overall development of the solid mineral subsection. This is our Thesis, as the accomplishment of this objective does not really depend on the attraction of major mining companies or comparatively huge capital outlay.

Two issues are however central to success in this strategy namely: the recognition and promotion of small scale and artisanal mining and its effective regulation. The uncomplimentary tag given to this group as “illegal miners”

should therefore be removed to create an enabling environment for institutional support for this group of miners that are enthusiastic to explore and exploit the vast mineral endowments of the country, whether with or without the assistance of foreign investors.

Besides, the time has come for Nigerians to exhibit some measure of confidence in the Nigerian economy by investing in it. It is only when they began to do this that the foreign investors will be encouraged or attracted to invest in the country. It is thus our humble view that a small-scale /artisanal miner offers the best opportunities for such investment.

The Nigerian economy has been adversely affected by the relative political instability in the last two decades. Constant devaluation of the Naira since 1983 has left the country worse off than it was before. Interest rates and exchange rates have continued to fluctuate on a weekly basis making realistic planning difficult if not impossible to attain. The implications of this state of affairs in an economy, which is import dependent, such as Nigeria are grave.

The net effect of all these factors has been the gradual depletion of long term lending facilities needed for investment purposes especially in sectors with long gestation period such as solid minerals. The challenge of Government is

to ensure macro-economic stability and consistency in policy needed to attract investors to the economy.

Corruption is widely believed to contribute significantly to cost of doing business especially in developing countries. Since investors are attracted to economies where the cost of doing business is less, Nigeria must take active steps towards combating the epidemic of corruption in the country. Although the regime of Chief Olusegun Obasanjo has made the war against corruption a cardinal programme there is wide spread feeling which is being translated into reality that not much is being achieved in terms of concrete reality. Arguments abound that “it is still business as usual” in Government ministries, agencies and parastatals because of the cosmetic approach of the Government to the problem of corruption. This is in spite of the setting up of the ICPC and the EFCC..

The challenge for the Government is to create an enabling environment that adequately remunerates its citizens and provides the necessary social and economic conditions that would insulate her citizens from corrupt practices. Success in this regard will no doubt boost the nation’s quest to attract foreign investment.

Personal security and security of investments have posed serious concerns to investors (local and foreign) in Nigeria. Hardship occasioned by poor management of the economy has created a lot of unemployed youths that are daily finding it difficult to engage in legitimate means of livelihood. Over the years, the nation has witnessed increased incidences of armed robberies, assassinations, religious and ethnic crises occasioning large scale destruction of property and human lives. The tail end of the military rule 1995 – 1999 also witnessed the formation of various ethnic militias with adverse consequences on the security situation of the country.

The Nigerian Judiciary has failed to inspire confidence from foreign investors on account of the long delays in the administration of Justice. Investors complain that cases take rather too long to decide, thereby rendering the system unsuitable for the resolution of commercial disputes. There is therefore a need to strengthen the Judiciary in order to ensure speedy disposal of cases. The use of Alternative Dispute resolution (ADR) mechanisms as viable alternative to the adjudicatory system would help in decongesting the courts and speed up the trial procedure.

## END NOTES TO CHAPTER SIX

195. Op.Cit.

196. Ibid

197. Op.Cit

198. Chapter Four

199. Op.Cit

200. Table 4

201. ILO Special Report on Economic Situation in Nigeria (ILO: 1981) quoted in Blunt Peter 1983, Organization Theory and Behaviour, London and New York, Longman Group Limited

202. Op.Cit

203. Ibid

204. Ibid

205. Table 4

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# APPENDIX 'A'

## United Nations General Assembly Resolution on Permanent Sovereignty over Natural Resources (1962)

*The General Assembly,*

*Recalling* its resolutions 523 (VI) of 12 January 1952 and 626 (VII) of 21 December 1958, by which it established the Commission on Permanent Sovereignty over Natural Resources and instructed it to conduct a full survey of the status of permanent sovereignty over natural wealth and resources as a basis constituent of the right to self-determination, with recommendations where necessary, for its strengthening, and decided further that, in the conduct of the full survey of the status of the permanent sovereignty of peoples and nations over their natural wealth and resources, due regard should be paid to the rights and duties of States under international law and to the importance of encouraging international co-operation in the economic development of developing countries,

*Bearing in mind* its resolution 1515 (XV) of 15 December 1960, in which it recommended that the sovereign right of every State to dispose of its wealth and its natural resources should be respected,

*Considering* that any measure in this respect in this must be based on the recognition of the inalienable right of all States freely to dispose of their natural wealth and resources in accordance with their national interests, and on respect for the economic independence of States,

*Considering* that nothing in paragraph 4 below in any way prejudices the position of any Member State on any aspect of the question of the rights and obligations of successor States and Governments in respect of property acquired before the accession to complete sovereignty of countries formerly under colonial rule.,

*Noting* that the subject of succession of States and Governments is being examined as a matter of priority by the International Law Commission,

*Considering* that is desirable to promote international co-operation for the economic development of developing countries, and that economic development of developing countries, and that economic and financial agreements between the developed and the developing countries must be based on the principles of equality and of the right of peoples and nations to self-determination,

*Considering* that the provision of economic and technical assistance, loans and increased foreign investment must not be subject to conditions which conflict with the interests of the recipient State,

*Considering* the benefits to be derived from exchanges of technical and scientific information likely to promote the development and use of such resources and wealth, and the important part which the United Nations and other international organizations are called upon to play in that connexion,

*Attaching* particular importance to the question of promoting the economic development of developing countries and securing their economic independence,

*Noting* that the creation and strengthening of the inalienable sovereignty of States over their natural wealth and resources reinforces their economic independence,
*Desiring* that there should be further consideration by the United Nations of the subject of permanent sovereignty over natural resources in the spirit of international co-operation in the field of economic development, particularly that of the developing countries,

I

*Declares that:*

1. The right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned.

2. The exploration, development and disposition of such resources, as well as the import of the foreign capital required for these purposes, should be in conformity with the rules and conditions which the peoples and nations freely consider to be necessary or desirable with regard to the authorization, restriction or prohibition of such activities.

3. In cases where authorization is granted, the capital imported and the earnings on that capital shall be governed by the terms thereof, by the national legislation in force, and by international law. The profits derived must be shared in the proportions freely agreed upon, in each case, between the investors and the recipient State, due care being taken to ensure that there is no impairment, for any reason, of that State's sovereignty over its natural wealth and resources.

4. Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognised as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law. In any case where the question of compensation gives rise to a controversy, the national jurisdiction of the State taking such measures shall be exhausted. However, upon agreement by sovereign States and other parties concerned, settlement of the dispute should be made through arbitration or international adjudication.

5. The free and beneficial exercise of the sovereignty of peoples and nations over their natural resources must be furthered by the mutual respect of States based on their sovereign equity.

6. International co-operation for the economic development of developing countries, whether in the form of public or private capital investments, exchange of goods and services, technical assistance or exchange of scientific information, shall be such as to further their independent national development and shall be based upon respect for their sovereignty over their natural wealth and resources.

7. Violation of the rights of peoples and nations to sovereignty over their natural wealth and resources is contrary to the spirit and principles of the Charter of the United Nations and hinders the development of international co-operation and the maintenance of peace.

8. Foreign investment agreements freely entered into by or between sovereign State shall be observed in good faith; Stats and international organisations shall strictly and conscientiously respect the sovereignty of peoples and nations over their natural wealth and resources in accordance with the Charter and the principles set forth in the present resolution.

II

*Welcomes* the decision of the International Law Commission to speed up its work on the codification of the topic of responsibility of States for the consideration of the General Assembly;

**III**

*Requests* the Secretary-General to continue the study of the various aspects of permanent sovereignty over natural resources, taking into account the desire of Member States to ensure the protection of their sovereign rights while encouraging international co-operation in the field of economic development, and to report to the Economic and Social Council and to the General Assembly, if possible at its eighteenth session. “

1194th plenary meeting

14 December, 1962.