



MEMORANDUM

December 29, 2006

TO: Nigerian National Stakeholders Working

FROM: Cynthia L. Quarterman
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Under the direction of Goldwyn International Strategies, LLC

RE: Review of Draft Bill before the Federal Republic of Nigeria House of Representatives for An Act to Repeal the Minerals and Mining Act, No. 34 of 1999 and Re-Enact the Minerals and Mining Act for the Purposes of Regulating All Aspects of the Exploration and Exploitation of Solid Minerals in Nigeria and for Connected Purposes, 2006 (H.G. 87)

EXECUTIVE SUMMARY

The present bill to re-enact the Minerals Mining Act is a comprehensive piece of legislation to address mining operations in Nigeria. Indeed, in some ways it may be too comprehensive addressing matters that might best be dealt with in regulations (for example, periods by which certain actions must be acted upon by the Minister and the extent of tax breaks). In other instances, it is less than comprehensive where it should be (for example, leaving to the Minister's discretion the appropriate royalty rate). All the matters that are important to cover in mining legislation appear to be touched upon in this piece of legislation however, not all of them are as well defined as they could be. Nevertheless, having some reference to all the matters that are important should be sufficient to permit the Minister to promulgate regulations to flesh out these matters. Some items that are mentioned in the legislation, but have minimal treatment, include the royalty rate calculation, collection and verification process; the mineral leasing process; the financial requirements upon operators; the

appeals process; and mine safety and health standards. The first four of these items are important to ensuring transparency in mining operations. Attached as an Appendix to this memo is a section-by-section analysis of the latest version of the bill we had available. It raises questions with respect to its specific provisions that we believe should be addressed before the legislation is passed. A broader review of the bill's strengths and weaknesses follow.

I. Minerals, Prospecting, Mining and Quarrying

A. Ownership and Control of Minerals

Part I of the Bill sets forth the relationship between the federal government, the mineral title holder and other users. This Part is fairly straight forward, but could be strengthened by either defining more of the terms used to limit future debate or setting up a process to resolve any controversies about whether a particular property is subject to the Act's jurisdiction. One substantive question that is raised by this provision and the definitional section of the Act, is whether it is intended to cover petroleum products such as oil and gas removed from coal, shale and tar sands. As currently drafted, it appears to include those petroleum products within its scope. However, for consistency's sake, it would be advisable to have either exclusive or overlapping oversight of such products with the agency responsible for overseeing exploration and exploitation of other petroleum products. Another point that could be clarified in the Act is what rights over the mineral estate are being transferred to mineral lessees under the Act.

B. Administration of the Act

Part II of the Bill sets forth the function of the Minister, establishes a Mining Cadastre and sub-departments for Inspection and Environmental Compliance, and establishes State

Mineral Resources and Environmental Management Committees. It further delegates power to the Minister for issuing regulations and establishes mining as a priority on lands identified in Part I.

While it is the duty of the Minister to exploit mineral resources taking into account economic development, ecological and environmental factors, nothing in the Act further delineates the standards to be upheld with respect to those factors. Setting standards for the elements of each factor could require several other pieces of legislation. It is unclear whether it is the Minister's duty to flesh out those factors in regulations or to enforce existing laws with respect to those factors. Similarly, mine worker health and safety, which is also listed as within the Minister's functions, could evoke its own set of laws as it does in many locales. It should be recognized that the broad list of functions given to the Minister will require vast regulation, resources and enforcement authority to fulfill them properly. Efforts should also be made to divide functions within the Mining Cadastre to guard against potential corruption. For example, the same group should not be responsible for both taking custody of forfeited minerals and disposing of them because that could lead to misappropriation of goods. In addition, given the breadth of the authority granted, there should be independent oversight of the Ministry's and Mining Cadastre's performance to guard against mismanagement and corruption. The Act does not currently contemplate such oversight.

As currently drafted mining applications are to be granted on a first come, first serve basis. No doubt this mechanism is being used to encourage mining applications. However, there are several potential problems with such a system: it may encourage fraud in processing applications; it completely eliminates other factors (such as financial wherewithal, mining skill or likely economic return) from being considered in the application process; it tends to favor

those with more resources who will find it easier to apply; it encourages land hoarding and brokering by middlemen; and it does not contemplate a future time when mining may be more competitive. The Act also permits the Minister to determine areas where competitive bidding could be used. A more flexible approach would provide the Minister with an array of options, included among them first come, first serve and competitive leasing. The description of the competitive leasing process set forth in the Act should be expanded to ensure that it is transparent. Some of the provisions adopted to address oil and gas leasing in other legislation should be replicated here. In addition, while expedition of development may be the overriding concern now, it should not be the exclusive concern long-term. A fair economic return on the Nation's resources should also be a consideration. The Act mentions beneficial development, but the factors being considered do not include a fair return or economic benefit to the Nation.

The provision for State Committees on Mineral Resources and Environmental Management is a strength of this legislation. Disputes associated with land uses are the single largest threat to actual mining development. Mandating such a Committee in each State makes this legislation more advanced than many. However, details of how the Committees will operate, who will participate, what role/authority it has, who it reports to, etc. should be seriously considered and set forth either in the legislation or the implementing regulations to avoid future controversy about its mandate.

C. Mining Incentives

Part III of the Bill establishes the financial terms of the mining activities, which makes it the single most important part of the legislation from the perspective of ensuring transparency.

The draft Bill permits tax deductions from assessable profits of qualifying capital expenditures and losses. These tax allowances are undoubtedly intended to encourage mining operations. As currently drafted, however, they are an open-ended incentive with the potential to offset any economic benefit from mining operations. Deductions of the nature proposed here are very difficult to police and audit. It is not clear whose job it will be to ferret out whether the deductions taken are legitimate or overstated. Whether it is the Mining Ministry or taxing authorities who does the policing, it will require a great deal of manpower and technical expertise to ensure these provisions are not being abused. It is far too simple to show costs and losses exceeding profits. Setting up such an incentive in the legislation itself also makes it much more difficult to change it later, if deemed necessary. A simpler alternative would be to establish a minimum royalty and give the Minister flexibility in providing a royalty holiday. A minimum royalty rate by commodity is something that should be established in legislation so that the Minister has some guidelines on the legislature's expectations. There also needs to be a whole mechanism established in legislation or regulations about how royalties are to be calculated, collected, disbursed, audited and enforced.

This Part's establishment of the Solid Minerals Development Fund is another strong selling point for this legislation in order to develop capacity in the mining sector. Some consideration should also be given to using this fund to finance research to survey mineral resources to estimate the value of the reserves of Nigeria's mineral estate.

D. Minerals Exploration

This Part of the Bill sets forth the qualifications for obtaining permits and licences to perform mining operations. These provisions are fairly straight forward. They raise some

mundane concerns about what happens when a licensee commits an offence under the Act; whether the Act sets forth adequate time for the Cadastre to approve applications; whether the rights granted to licensees are overly broad; and what appeal or mediation process is utilized during disputes. In each instance, it would be best to provide flexibility in the Act so as not to constrain the Ministry and Cadastre too much. One substantive item that should be addressed in this Part or elsewhere is an assurance that a permit or licence holder has sufficient financial wherewithal through bonding, insurance or another security vehicle to accept financial responsibility for its mining operations.

E. Mining

This Part of the Bill addresses similar issues and raises similar concerns as Part IV and the comments above apply equally to this Part.

F. Quarrying

See Discussion of Part D.

G. Roads

This Part of the Bill addresses roads, trams and railways associated with mining areas. The effect and rationale of some of these provisions are less than clear and should be reviewed with an eye toward making them clearer and reasonable to both mining and non-mining users.

H. Inquiry Into Accidents

This Part of the Bill addresses accidents that occur on mining property. This Part could be expanded to include more comprehensive provisions dealing with mine safety and health matters that is otherwise missing from this Act. It should also clarify which agency will be responsible for overseeing these functions and keeping records and statistics relating to mine injuries and fatalities. The topics such an expanded section should address are the following:

inspections and investigations; recordkeeping requirements; violations and orders; enforcement and appeals of orders; signage and postings requirements; penalties for violations; worker qualifications and training requirements; equipment testing and examinations; ventilation requirements; blasting and explosives; fire protection requirements; workers' claims and compensation funds; and mining research and studies.

II. Small Scale Mining

This Chapter deals with small scale mining. The primary question it raises is whose responsibility it is to oversee those mines that fall below its lower limits. Mining on less than five acre plots have just as much potential to cause environmental and other damage as larger ones. Such a demarcation may also encourage operators to create several smaller than small scale mining operations to avoid oversight.

III. Possession and Purchase of Minerals

This Chapter addresses possession and purchase of minerals by unauthorized persons. However, it does not indicate what penalty there is for the possession or purchase of such minerals. To have any deterrent value, the Act should clarify what happens in those instances.

IV. Environmental Considerations and Rights of Host Communities

This Chapter seeks to distinguish between the rights of the mineral holder and the surface owner, the required rents and payments, and clarifies what types environmental damage is subject to correction and compensation. In addition, this Chapter establishes a Land Use Allocation Committee, Community Development Agreement and Environmental Protection and Rehabilitation Program and Fund. All of these are innovative and important provisions.

As to the provisions relating to rental payments, the current draft leaves a great deal of flexibility with respect to the amount of rents that are to be paid rather than establishing an

across-the-board minimum rental amount to be updated by the Minister. The advantage of a universal minimum rental scheme is that it is much simpler to implement, it is much less likely to lead to corruption and it is less controversial because it does not require a process to both establish and appeal the rental amount as the current draft would necessitate. A State Land Use and Allocation Committee is referred to in the Act as responsible for resolving rental and other land usage disputes, but it is not clear who would participate on such a Committee, who that Committee would report to and what its role and authority would be. In order to be effective, the operations of such a Committee should be further developed in the Act or regulations.

Similarly, the Act calls for creation of a Community Development Agreement to involve the host community in the proposed mining operations. This is a wonderful innovation to help ensure transparency and involvement at a local level. However, the discussion of the Agreement requires further development either in the Act or regulations to clarify who the parties to the Agreement are, how representation is determined, what the scope of the Agreement is, and how and who will enforce the Agreement, if at all.

This Chapter also seeks to flesh out to some extent the environmental requirements on mineral holders. It sets forth requirements for an Environment Impact Assessment and an Environmental Protection and Rehabilitation Program and Fund. Those provisions are extremely important in making sure that the land is returned as close as feasible to its native state after mining has concluded and that the costs of that rehabilitation are not borne by the general public. The Act's discussion of what the Fund is intended to cover and how it will operate should be clarified. It is not clear whether an operator must from the inception of mining set aside enough money in the Fund to pay for reclamation for all expected activities or whether the payments are to be made over time, and, if the latter, what will happen if there is insufficient money to pay for

reclamation if an operator stops work before fully funding the Fund. It is also not clear whether the Fund is intended to cover all the costs during actual reclamation activities or merely act as a security in case reclamation does not occur. It is also not clear whether the Fund may be used to pay for costs associated with abandoned mine lands and whether the Ministry will be permitted to use money from that Fund to undertake reclamation activities on its own initiative.

The Act also prohibits certain kinds of pollution and environmental degradation. However, it is not clear what the remedy is when such pollution or degradation occurs or how the amount of compensation to remedy the situation will be determined or enforced. For example, it is unclear whether the Fund be available to offset these costs.

V. Offences and Penalties

The final Chapter addresses the consequences of many of the offences set forth in the Act, including fines and criminal penalties. On balance, these provisions appear to be comprehensive although it is not always clear whether all offences are covered equitably by these provisions. Another provision that would be useful is one requiring financial disclosures by employees of the Ministry and Cadastre and establishing penalties associated with failure to follow the provisions of the Act by those individuals.

CONCLUSION

In sum, the current Nigerian Mining Bill is a very strong beginning whose transparency should be improved upon during the legislative process to reflect the changes recommended above, especially those relating to the financial tax and royalty terms and leasing process.

