Mining and Infrastructure Development in Nigeria: Appraisal of the Legal and Policy Framework for Investment and *Sukuk*

Bakari Saleh Arabi

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PRELIMINARIES

Abstract

This research study focuses on the extractive minerals sector as limited current research exists on the Nigeria‟s mining sector, compare to oil and gas which has been extensively researched. Nigeria has distinctive opportunities and challenges in relation to its extractive industries. Over the years, Nigeria has recorded significant fortunes in terms of revenue generated from oil and gas sector. However, failure to manage these resources effectively, diversify the economy and invest in infrastructure to create inclusive growth, has kept the country entangled in development challenges. Furthermore, the recent instability in global oil markets has resulted in considerable drop in Nigeria‟s revenue and thereby compounded the problem, hence, diversification is necessary. While Nigeria‟s mining sector is considered to be a potential alternative source of revenue, poor regulatory and policy frameworks, inadequate infrastructure and lack of investment create a serious setback to the sector. This study seeks to investigate the factors that can improve foreign direct investment and enable the use of innovative financial instruments for financing mining projects in Nigeria. Overall, the study explores key issues underpinning debates on mining and development. It finds that reviving the mining industry in Nigeria requires integrated reform to address issues of investment, industrial infrastructure and effective regulation. Adopting a three-pronged approach of analysis through legal, spatial and economic dimensions, this thesis interrogates how foreign direct investment and Islamic Finance instruments, particularly Sukuk could stimulate Nigeria‟s mining sector.

Declaration

I do hereby declare that this piece of work is my original contribution, has nothing to do with any other‟s work except for academic literature referred to in the thesis, which have been duly referenced in consistence with the universally accepted standard of intellectual honesty.

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List of Acronyms

AAOIFI	Accounting and Auditing Organisation for Islamic Financial Institutions
ADR	Alternative Disputes Resolution
AIM	Alternative Investment Market
BBA	*Bay-Bithaman Ajil*
BMA	Bahrain Monetary Agency
bpd	Barrels Per Day
CAC	Corporate Affairs Commission
CSR	Corporate Social Responsibility
CDA	Community Development Agreements
ECOWAS	Economic Community of West Africa
CLS	Critical Legal studies
DFID	UK Department for International Development
DIFC	Dubai International Financial Centre
GCC	Gulf Co-operation Council
GDP	Gross Domestic Product
HKSAR	Hong Kong Special Administration Region
ICM	Islamic Capital Market
ICSID	International Centre for Settlement of Investment Disputes
ICM	Islamic capital market
IMF	International Monetary Fund
LMB	London Bullion Market
LME	London Metal Exchange
LSDS	Less-Developed Countries
LSE	London Stock Exchange
LIFS	London International Financial Services
MFN	Most Favoured Nation Treatment
MDGs	Millennium Development Goals
MW	Megawatt
MNCS	Multi-National Corporations

NIMASA	Nigeria Maritime Safety Agency
NEITI	Nigeria"s Extractive Industries Transparency Initiative
NPPF	National Planning Policy Framework
NDMC	Nigeria Downstream Management Company
NCC	Nigeria Coal Corporation
NFIU	Nigeria Financial Intelligence Unit
NIIMP	National Integrated Infrastructure Master Plan
OECD	Organisation for Economic Co-operation and Development
OEL	Oil Exploration License
OPEC	Organisation of Petroleum Exporting Countries
OPL	Oil Prospecting License
OML	Oil Mining License
PDM	Public Debt Management
PPP	Public-Private Partnership
PIB	Petroleum Industry Bill
PIB	Petroleum Industry Bill
PHCF	Petroleum Host Communities Fund
PEPS	Politically Exposed Persons
RTF	Road Transport Fund
SPV	Special Purpose Vehicle
SAP	Structural Adjustment Programs
SEC	Securities and Exchange Commission
SCMA	Saudi Arabia Capital Market Authority
SDGS	Sustainable Development Goals
SAC	Shari"ah Advisory Council
UK	United Kingdom
UAE	United Arab Emirates
UTC	Urban Traffic Control
UNDP	United Nations Development Programme
WBCSD	World Business Council for Sustainable Development
UNCTAD	United Nations Commission on Trade and Development

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1. Chapter One: Background to Issues of Mining, Infrastructure and Investment

Introduction

This chapter provides the context behind the role of extractive industries in Nigeria, highlighting the need for an appropriate policy and legal framework for investment in mining and infrastructure development (power and transport). The chapter sets out the rationale for focusing on key elements of this study, namely mining, infrastructure development, investment (both conventional and Islamic) and their interlinkages. The aims and objectives of the research as well as its contribution to the discourse on investment and knowledge are discussed. This chapter pursues fundamental questions underpinning the study, and the methodology used to carry out its investigation. Adopting legal and policy analysis, the chapter interrogates how foreign direct investment (FDI) and Islamic Finance instruments, particularly sukuk (Islamic bonds) could stimulate Nigeria‟s mining sector.

1.1. Mining, Development Legal Framework: the need for a different approach

Extractive industries in Nigeria comprise of two sectors; namely the mining sector and the oil and gas sector. The focus of this study is on the mining; however, it will also be referring to the oil sector in order to draw lessons.

1.1.1. Introducing the Mining Sector in Nigeria

Mining was a strategic sector to Nigeria‟s development prior to independence. Hard minerals such as coal, iron ore and lead/zink together with agriculture were the backbone of the Nigerian economy, and particularly mining was part of drive for development and industrialisation in the early 20th century. Revenue from coal mining and coal energy were used to build and run railway infrastructure efficiently in addition to provision of electric power supply for both factories and household utilities. Iron ore gave birth to the first Steel Plant and Steel Rolling Mills in Nigeria. One of the factors that had led to those significant development was the effective regulation of the sector through the mining legislations of 1900s. The hard-mineral sector continued to be crucial to Nigeria‟s economy until oil was discovered.[1] With the discovery of oil in the 1950s and eventual commencement of crude lifting in the 1970s, solid minerals were neglected as the state shifted its focus to the oil and

[1] Umejesi I., „Coal Sector Revitalization, Community Memory and Land Question in Nigeria: A Paradox of Economic Diversification‟ (2011) African Studies Quarterly, Vol. 12 (3), pp. 1-21, at pg. 9

gas sector due to its greater economic advantage compared to solid minerals. Furthermore, the industry declined swiftly due to the eventual departure of foreign companies due to nationalisation policy of 1970s/80s, and the gradual withdrawal of the Nigerian Mining Corporation (NMC) from active mining as the government focused on oil, virtually leaving it to petty and artisanal miners.[2] Since then, the sector was largely abandoned until 1995, when the need to reform the sector became a reality. Considering the growing uncertainty in oil markets on one side, and the increased potentials of mining in Africa on the other, the Nigerian government resolved to diversify its revenue source by reviving the long-abandoned mining sector. In addition to the instability of its market value, Nigeria‟s oil reserves were predicted to last for only forty more years. Mining is, thus, seen as one of the key sectors with the potential to replace oil and gas.

From 1995 to present, there has been some indication from the government of willingness to reform the sector. New policy and regulatory frameworks have been introduced in order to create an attractive business environment; a ministry dedicated to mining has been established with a minister and six technical directorates as well as a couple of research agencies for effective management and regulation; and extensive geological work has been undertaken to bring into public display the potentials of Nigeria‟s natural resources. Data suggests that, the geological endowment of Nigeria in solid minerals is vast. Unlike oil which is found in only few areas, solid minerals occur in hundreds within each of the country‟s six geopolitical zones.[3]

Nevertheless, despite all this potential, the lack of investors has been a major challenge for mining in Nigeria as the sector has long been dominated by artisanal miners. Major international companies are still hesitant to invest, and the reason has been noted by the 2017 Investment Promotion Brochure of the Nigeria‟s Ministry of Mines as „There is an established market perception that Nigeria is not investor friendly‟.[4] Data has shown that, GDP contribution of mining in Nigeria over the period of 10 years (2007-2017) was the

[2] Alfred, Oluropo Filani, „The prospects of solid minerals industry in Nigeria‟ (2014), journal of Education and Research, Vol. 2, No. 1, PP. 689-696 Mining started to decline in 1970s due partly to the civil war and largely owing to shift in policy in 1972, where state began to take part in mining, Nigeria Mining Corporations (NMC) established to activate and promote state involvement in mining, which also declined later on due to oil prospects.

[3] Nigeria Mining Investment Promotion Brochure 2017, available at: <https://www.slideshare.net/FMMSDNgr/nigerias-mining-and-steel-sector-investment-brochure> (accessed 5th December, 2018) pg. 11

[4] Ibid, pg. 24

lowest of almost all mining countries in Africa. While South Africa, Democratic Republic of Congo and Botswana respectively have 18%, 25%, and 40% as mining contribution to GDP, Nigeria recorded only 0.55%.[5] Hence the choice of mining industry in this study. The table below emphasises this point, showing the different types of minerals found in each of the six zones.

Table 1:1 Different types of minerals found in each of the six geopolitical zones of Nigeria

Zone	Available Mineral Resources
Northeast	Feldspars, flourspar, marble, gypsum, magnesite, tantalite, rock crystal, laterites, topaz, sandstones, mercury, glass sand, zircon, spinel, emerald, graphite, beryil, tourmaline, mica, iron ore, clay minerals, diatomite, coal, garnet, aquamarine, gold dust, zoisite, cassaterite, agates, amethyst chalcopyrite, kaolin, limestone, chalcedony, onyx, barytes, zinc, tin, uranium, quartz, mica, wolframite, columbite, platinum, ruby, Kaolin, trona, gypsum, cassiterite, mica, clay, tantalite, galena, iron ore, gemstone, sphalerite, silica sand, barite, columbite, zinc, lead, muscovite, quartz, tin, glass sand, monazite, feldspar, graphite, wolfram, coal, agate, rutile, tungsten, copper, talc, limenite, zironSilica sand, natural salt, sapphire
Northwest	Clay, laterite, cassiterite, columbite, illmenite galena, phyrochlorite, kaoline, gemstone, silica, tin ore, monazite, wolframite, thorium, granite, hyalite, kaolin, beryl, amethyst, gold , manganese, lateritic, clay, feldspar, black tourmaline, amethyst, quartz, kaolin, mica, gypsum, silimanite, clay, granite, sand, uranium asbestos, tourmalin, chromites, illmenite, diamond, graphite, iron ore, potash, silica sand
Northcentral	Bell clay, kaolin, limestone, granite, glass sand, iron ore, red clay, feldspar, silica sand, quartz, asbestos, marble, talc, gemstone, gold, manganese and tantalite, Monazite, columbite, feldspar, clay, cassiterite, gemstone, kaolin, dolomite, mica, zicron, marble, limonite, barite, quartz, talc, galena
South-south	silica sand, glass sand, clay, Kaolin, lateritic clay, gravel, silica sand, natural gas, petroleum, ball clay, bauxite, granite, river sand, clay, spring water, limestone, glass sand, Salt limestone, coal, maganese, mica, limenite, gold, quartz, glass sand, tourmaline, petroleum, natural gas, kaolin, tin ore, sharp sand, spring water, salt deposit, talc , granite, galena, lead, zinc, tin ore, muscovite, uranium, barite, Clay, glass sand, salt, silica sand, granite, coal, petroleum, natural gas, kaolin, limestone, lignite
Southeast	Laterite clay, crude oil, kaolinitic clay, iron ore, glass sand, petroleum, gypsum, coal, silica sand ceramics, Glass sand, limestone, salt, shale, ball clay, granite, galena, marble laterite, bentonite, phosphate, kaolin, pyrite, feldspar, petroleum, lignite, gypsum, sphalerite, clay, Lead, zinc ore, salt, limestone, ball clay, refractory clay, gypsum, granite
Southwest	Silica sand, bitumen, sharp sand, gravel, petroleum, laterite, Kaolin, feldspar, silica sand, mica, granite, clay, phosphate, gypsum, limestone, quartz, tar sand, Marble, gold, gemstone, diorite, lignite Clay, granite, talc, dolomite, feldspar, quartz, limestone, mica, gold, Clay, feldspar, granite, limonite, iron ore, kaolin, quartz, talc, marble, dolomite, tourmaline, aquamarine, amethyst, gemstones

Source: distilled from the website of the ministry of mines, Nigeria

[5] Nigeria Mining Investment Promotion Brochure 2017, PP. 4-6

1.1.2. Oil and Gas

While the booming mining sector sustained Nigeria in the 19th century, the search for oil begun in earnest in the 20th century. By 1908, various companies had been looking for oil in Nigeria, but were not successful for almost fifty years until 1956, when Shell-BP made a discovery in Oloibiri, Bayelsa state. The first ever crude oil production begun in 1958, yet the volume was only 5100 Barrel Per Day (bpd) not big enough to shift away from mining. Nonetheless, mineral exploration had already started to decline owing to departure of several foreign companies due to civil war (1967-1970). With the emergence of Nigeria from the civil war in 1970, its reliance on hard minerals declined as it coincided with the boom in oil prices and discovery of new oil fields. The combined effect of the increase in global demand for oil and the volume of crude production in Nigeria was a rise in economic fortunes that led the country into neglecting other sectors including mining.[6]

Over time, the fortunes of Nigeria‟s oil sector significantly improved, increasing its reputation in the global petroleum industry. In 1971 Nigeria joined the Organisation of Petroleum Exporting Countries (OPEC) to have a stake in driving policies for the international oil market. Further, to consolidate its state control over natural resources, Nigeria established its national oil company, the Nigerian National Petroleum Corporation (NNPC) in 1977. Nigeria became the largest oil producer in Africa, with a capacity of 2 million bpd which is currently maintained.[7] However, the country has been marred by socio-economic turmoil despite remarkable growth in state revenues due to its failure to achieve expected development of local content as oil extraction still depends on foreign technology. The relationship between investor and host communities has been characterized by entrenched hostilities due to conspicuous absence of regulated Corporate Social Responsibility (CSR). This imbalance was largely attributed to the poor quality of policy and regulatory frameworks. For example, there are 16 different statutes governing the oil and gas sector, but mostly outdated as they were enacted in the 1960s. Given this experience from the oil and gas sector and Nigeria‟s determination to revive mining industry, there is need to reflect on the former to avoid repeating same mistakes in the mining sector.

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[6] A.G. Hopkin, *An Economic History of West Africa* (New York, London: Routledge, 2014), PP. 121-200;

[7] Jedrzey George Frynas, Manuel Paul, „A New Scramble for African Oil? Historical, Political, and Business Perspectives‟ (2007) African Affairs, Vol. 106, Issue 423, PP. 229-251 also available at: <http://nnpcgroup.com/nnpcbusiness/businessinformation/oilgasinnigeria/industryhistory.aspx> accessed 5th December, 2018

Although, oil and gas, and mining are two distinct sectors, regulated by different set of legislation, yet there are some similarities between the two. Both sectors depend largely on foreign capital and technology to function, therefore FDI is critical to each of them and consequently the need for enabling environment is one of the common factors that justify comparison between the two sectors. Furthermore, they are both termed as extractive industries which is a broad umbrella pointing to myriad of issues such as CSR and resource course associated with these sectors. Based on these reasons, lessons from the oil and gas sector might be relevant in the mining sector. However, mining operations have generated considerable controversy. Adverse effect of extractive industries on the society and environment coupled with the nature of minerals as exhaustible resources, raise questions regarding the sustainability of these sectors. Nevertheless, these natural resources generate monumental revenues to states, which could be used to create economic development and prosperity for citizens, provided the sector is effectively regulated and the income is managed carefully. This is the assumption on the basis of which this research proceeds.

1.2. Development outcomes in Nigeria

1.2.1. Infrastructure Development

For any diversification of Nigeria‟s economy to be productive, current deficits in infrastructure need to be addressed. Infrastructure is crucial for a functional and efficient mining sector but is also necessary for the provision of vital services for citizens. Resilient infrastructure serves as a link for development generally, it drives socio-economic prosperity through job creation and enhancement of revenue generation. Acknowledging the need to address this gap, infrastructure development has recently been consistently prioritized by the Nigeria‟s government increasing its budgetary allocations for capital projects progressively from 2016 through to 2018. However, owing to population growth and rapid urbanisation in Nigeria, the demand for infrastructure is also increasing, experts estimated the required expenditure to grow from $23billion from 2014 to $77 billion by 2025.[8] In 2012, Nigeria‟s central bank governor disclosed that, the country would require $10 billion to be spent on

[8] National Integrated Infrastructure Master Plan (NIIMP), 2015; PwC Nigeria, „Infrastructure Development in Nigeria: Better Late than Never‟ (2016), available at: <https://www.lexology.com/library/detail.aspx?g=7814c253-4d29-44ac-a59a-b2aa51e0276d> accessed 15th September, 2019

infrastructure annually for one decade to overcome the challenge, and he noted that government alone cannot provide the funding.[9] Even though, all types of infrastructure in Nigeria are vital and require attention, the deficit in utility infrastructure appears to be more challenging.

Power infrastructure is the most concerning of all sectors because it is critical to the nation‟s economy, and because Nigeria‟s potential to generate its own electricity through coal, gas, hydro, thermal among others. Yet, the country has been unable to generate efficient and stable electricity for residential or industrial consumption. Despite significant improvements that took place in the period 2015-2018, and with a population of about 200 million, Nigeria generates only 5,026.48 MW,[10] while Malaysia generates 20,944MW,[11] which exceeds its total demand of 17000MW,[12] with a population of only 30,270,962 people.[13] The ability to ensure adequate power supply is one of the key reasons that mining has been more efficient and attractive in other African countries.[14] South Africa, for instance, currently generates 51,309MW with a population of just 56.72million.[15] In transport sector the narrative is similar. Road network in Nigeria is 80% unpaved, only 20% of the country is linked,[16] consequently most mines are left out of this coverage as they are predominantly in rural areas and the road coverage largely favours urban areas. The cause of this infrastructure constraint has been attributed to lack of investment, weak institutions and a poor regulatory framework.[17]

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[9] S. L. Sanusi, „The Role of Development Finance Institutions in Infrastructure Development: What Nigeria can Learn from Bndes and the Indian Infrastructure Finance‟ (2012), PP. 1-12, available at: <http://www.proshareng.com/admin/upload/report/gpppstakeholderforum160712.pdf> accessed 12 September,2018

[10] International Atomic Energy Agency (AEA), Report on Federal Republic of Nigeria (2018), available at: <https://www-pub.iaea.org/MTCD/Publications/PDF/cnpp2018/countryprofiles/Nigeria/Nigeria.htm> accessed: 15th September, 2019

[11] MD Hasanuzzaman, Jeyraj Selvaraj, Siew Chein Teo, and Shing Chyi Chua, „Energy Policy and alternative energy in Malaysia: Issues and Challenges for Sustainable Growth-An Update‟ (2018), Renewable and Sustainable Energy Review, Vol. 81, PP. 3021-3031, at Pg. 3022

[12] Ibid

[13] Worldometers, Malaysian Population (2019), available at: <https://www.worldometers.info/world-population/malaysia-population/> accessed 16th September, 2019. The figure given above is for 2015 to correspond to electricity demand and supply data given above, which stands for 2015. Current (2019) population of Malaysia is 31,949,777

[14] Johannes Fedderke and Rob Garlick, infrastructure Development and economic growth in South Africa: A review of the accumulated evidence (2008), Policy Paper Number 12, PP. 1-28, at Pg. 4, available at: <https://econrsa.org/system/files/publications/policy_papers/pp12.pdf> last accessed 10th September, 2019

[15] PwC Nigeria : „Infrastructure Development in Nigeria: Better Late than Never‟ (2016) Pg. 1

[16] Ibid

[17] Ibid, PP. 1-2

Current economic realities in Nigeria indicate that active private sector engagement and innovation are critically needed in order to address infrastructure deficits. The significant drop in government revenue occasioned by shocks in global oil market and the ever-increasing demand for infrastructure, justify the fact that government alone might not be able to conduct investment. By 2030, Nigeria‟s demand for energy is predicted to expand to around 119MW, while the state capacity is estimated to be able to generate only 17500MW, there is over 100MW gap, potentially the private sector could fill this gap.[18] Therefore, on the part of government, there is need to forge stronger collaboration with both local and foreign investors to create public-private partnerships (PPPs) to be able to meet this demand. For investors, this huge gap presents an opportunity for investment with economic returns estimated to be between 5-25% per each dollar invested in infrastructure projects.[19] Nevertheless, to attract the right partnerships, the Nigerian government has a challenging task to create enabling business environment.

Sound legal and policy frameworks are needed to persuade investor to contribute in key sectors. Frameworks must be comprehensive in incorporating national development objectives alongside investors‟ interests. To start with, well-articulated master plans providing all necessary information on what infrastructure is needed and where. The feasibility studies as well as the costs and regulations governing the projects are required to help build prospects for investment, and direct investors in injecting their capital into the sector. Furthermore, policy must provide for innovative financing arrangements, promote local content development, particularly in the form of technology and knowledge transfer, which can be crucial for maintaining existing assets and the future ability of actors to carry out expansion independently if investment dries up or disappears.

1.2.2. Outcome and Social Benefits

The principal objective of mining is to generate revenue for national prosperity. Essentially, revenue collected forms the basis for economic development, which is a precondition for the government‟s ability to provide development in other areas including socio-economic, human and infrastructure development in the country. The essence of mining law and regulations has been to implement a policy of natioal development through resource wealth. Development in

[18] PwC Nigeria, „Infrastructure Development in Nigeria: Better Late than Never‟ (2016), PP. 1-2
[19] Ibid

this context means translating state wealth into opportunities for its citizens and providing good governance to tackle socio-economic problems such as poverty, poor health care and lack of education, growing unemployment and dilapidated infrastructure. Thus, failure of resource-endowed countries like Nigeria to deliver these public goods and services, must raise questions of sustainability in their pursuit of mineral exploitation, a situation referred to as the „resource curse‟. Furthermore, the need to address living conditions and quality of life in mining communities who may live in abject poverty, other mining-associated concerns include unsustainability of extractive industries have attracted attentions globally. International efforts to achieve sustainable development have been embedded in policy-level discussions through the Sustainable Development Goals (SDGs), which through its 17 goals emphasises the need for integrated solutions to cross-cutting underdevelopment complaint.

The SDGs include provision on health (SDG3), clean water (SDG6) and quality education (SDG4), eradicating hunger and poverty (SDGs1&2), ensuring economic growth through employment and equal opportunity (SDGs5,8 &10) as well as infrastructure (SDG9) and preservation of environment (SDGs7,13,14&15). Sustainability in mining means mineral extraction shall not be for profiteering purposes only. Rather, the mining sector must have regard to improving peoples‟ living conditions and protection of the environment (sea, land and air) as well. Additionally, sustainability requires that, future generation must be considered in resource exploitation, and that natural resources must not be exhausted at expense of the people yet unborn. The SDGs have potential implications for mining, because the latter has tendency to degrade the environment, affecting potential land use, water and air pollution and rural livelihoods. It is therefore expedient, if not imperative, for a study on mining to consider developmental concerns.

The inability of Nigeria to address these competing objectives has been attributed to various issues surrounding extractive industries. Lack of effective management;[20] resource curse and over dependence on oil;[21] poor governance represented by systemic corruption and official

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[20] Subai P., Towards a Functional Petroleum Industry in Nigeria: A Critical Analysis of Nigeria‟s Petroleum Industry Reform (2014) Doctoral Thesis submitted to Newcastle Law School, available at <https://ethos.bl.uk/OrderDetails.do?did=1&uin=uk.bl.ethos.654903> accessed 5th December, 2018

[21] Chindo M., Ali I.N. and Abubakar A., „The Nigerian Extractive Economy and Development‟ (2014) Journal of Studies and Research in Human Geography, vol. 8, no. 2, PP. 1843-6587

impunity;[22] presence of powerful NOC and government interference.[23] No doubt, each of these issues has its own challenges, however in Nigeria scholars suggest an integrated/coordinated set of interventions are needed. This thesis sets out to examine the role of law in facilitating not only Foreign Direct Investment (FDI), but also innovative investment vehicles such as *Sukuk* with potential to generate liquidity for mining and enhance development.

Furthermore, the recent and unprecedented rise in the number of resource-rich countries from Africa entering the global mining sector, is yet another challenge to compound the already existing problem of stiff competition for FDI among African states. In addition, Nigeria‟s mining sector is particularly disadvantaged: it is dominated by small scale miners who themselves are short of both liquidity and the technology needed to pursue serious mining. Thus, this thesis explores the question of how innovations in the current investment law and policy frameworks help to respond to new challenges and opportunities? This thesis, is therefore, about generating an integrated reform of Nigeria‟s mining sector investment framework. It therefore includes a socio-economic and political assessment of Nigeria‟s mining sector.

1.3. Investment, Sukuk and Islamic/Ethical Finance

1.3.1. Opportunities for use of Islamic Finance in the Mining sector

Mining requires capital and sophisticated technology, which most developing countries, including Nigeria, do not have, hence such resource-rich countries need foreign multinational corporations (MNCs) to help extract their mineral wealth. Foreign companies can mobilise finance, equipment and expertise into a resource-endowed country through a special arrangement. This is commonly termed foreign direct investment. FDI is paramount to development and prosperity of poor nations, particularly those that depend substantially on natural resources, FDI can create revenue for governments, help bring development to citizens through localised job creation, local content development and a range of other socio-

[22] Mamman A. Lawan, The Paradox of Underdevelopment amidst Oil in Nigeria: A Socio-legal Explanation (2008), Doctoral Thesis submitted to Warwick School of Law, available at <http://Nigeria%20database/Lawan-Warwick.pdf> accessed 8th December, 2018

[23] Inomiesa Oghenemarho, Sustainable Exploration of Oil and Gas in the United Kingdom and Nigeria (2016) Doctoral Thesis submitted to Liverpool John Moores University, available at <https://ethos.bl.uk/OrderDetails.do?did=1&uin=uk.bl.ethos.689382> accessed 8 December, 2018

economic benefits arising from CSR arrangement. Thus, FDI is significant to the mining sector process discussed in this thesis.

However, due to factors including an increase in the number of mineral discoveries across Africa, the presence of MNCs in Nigeria is still below the threshold necessary for robust development of the mining sector. The sector is overcrowded with poorly equipped local enterprises that lack the finance to expand and sustain growth. Although, few foreign corporations do have the technology required for the resource extraction, the need for financial liquidity continues to be a common challenge for both domestic and external mining enterprises in Nigeria. It is usual that, corporate entities raise finance through loans or other credit facilities, and a conventional mode of project financing includes bond issuance. However, the main problem is high interest and possibility of default, which inhibits trust of investors. Therefore, potential alternative is Sukuk, an asset-backed bonds that have potential for greater ethical stewardship. Furthermore, while the use of conventional financing has been widely researched, the use of Islamic financial derivatives, particularly *Sukuk*, in relation to mining has been less-developed.

A key challenge associated with researching Islamic finance is the limited literature. The interaction between Islamic finance and conventional approaches to finance has been evolving. More so, re-enactment of Sukuk from its classical construct into current conceptions of a financing vehicle is considered to be the latest development in the field of Islamic finance. All this would suggest the validity of the general presumption that, bodies of references available in this area might not be enough to present convincing evidence from which researcher on sukuk might draw conclusion. However, the widespread use of *Sukuk* in many other jurisdictions of the world has led to production of significant amounts of academic work on this subject matter. By drawing on examples of best practices from documented experience of Malaysia, the United Arab Emirates (U.A.E.) and the United Kingdom (U.K.), this study pursues fundamental questions on the suitability and applicability of Islamic bonds in the Nigeria‟s mining sector. Nevertheless, use of *Sukuk* in the economic sector dominated by common law (Nigeria‟s mining industry) is likely to require engagement with Nigeria‟s legal system debates over legal pluralism.

1.3.2. Debates over legal pluralism and the role of Islamic legal systems

Legal pluralism refers to „a context in which multiple legal terms co-exist‟.[24] This is to say the co-existence of different legal traditions in a particular area or transaction. It could be either various laws that originated from different sources, or of similar origin but differing level of application. Therefore, relevance of legal pluralism to this study is multidimensional. *Sukuk* are a pragmatic but also pluralistic instrument, grounded in Islamic legal tradition but yet practically regulated by mainstream financial regulations. On the other hand, mining brings together different parties, namely foreign investors, the state and rural communities, and therefore is a complex venture. Stakeholders are grounded in different regulatory traditions, with a divergence of approaches on rights, responsibilities, and processes,‟[25] which can impact on what is observed to be fair. In this thesis multiplicity of law is viewed as strength to the system rather than a weakness, because evidence exists to show that, „the same situation might provide incentives to certain aspects of mining such as dispute resolution.‟[26]

Despite the differences between conventional understanding of *Sukuk* and mining, they are not mutually exclusive. While mineral investment is predominantly governed by western oriented laws that recognises rent payment on money i.e. interest and the fundamentals of Islamic finance involve total rejection of interest, beyond this reconcilable challenge, there are many factors to underpin the compatibility of Sukuk with minerals investment. Although mining is both time-consuming and capital-intensive, potentials of Sukuk can generate long term liquidity corresponding to land values. Thus, there is need to harmonise Sukuk and conventional investment frameworks using legal instruments. Countries like Malaysia have used comprehensive frameworks that allow for broad-based financing including Islamic finance instruments in their national investment regimes. Contrary to critics in Nigeria, who tended to see Islamic finance investment vehicles as a form of religion intervening in social areas of business and law. Literature show that, Sukuk have been used in various countries mainly for its ethical component. The pluralistic nature of Nigeria‟s social and legal system

[24] Brian Z. Tamanaha, „The Rule of Law and Legal Pluralism in Development‟ in B. Z. Tamanaha, Caroline S. and M. Woodcock (eds) Legal Pluralism and Development (Cambridge, Cambridge University Press: 2012) pg.34

[25] Mey Taylor and Nicholas Menzies, „Unearthing Pluralism: Mining, Multilaterals, and State‟ in B. Z. Tamanaha, Caroline S. and M. Woodcock (eds) *Legal Pluralism and Development* (Cambridge: Cambridge University Press; 2012) pg. 229

[26] Taylor and Menzies, „Unearthing Pluralism: Mining, Multilaterals, and State‟ (2012), pg. 229

provides support for innovation, which by origin forms part of norms underlying the commercial practice of Nigerian firms and MNCs.

Often legal order in a society reflects social norms underlying it. Rene and Brierley assert that, „historically there are different legal systems corresponding to different social systems‟. Accordingly, where several social systems co-existed in a given community, it would be difficult to have only one legal order governing the entire affairs of that community without exclusion. The framework within which legal pluralism operates is therefore "legal system". As far back as 1900 five legal systems were famous: Romanistic, Germanic, Anglo-Saxon, Slavic and Islamic,‟[27] which sits alongside customary practices locally instituted. In many countries, two or more sources of law exist side-by-side, this is known as "pluralistic legal systems" evidenced by for example Nigeria‟s legal system contrasting with England‟s "monolithic legal system". Socio-legal studies have found that, in every society there are social systems that underlie the existence of law.[28] Therefore, the more the social orders that exist in an area, the more pluralistic its legal system, hence in order to appreciate legal pluralism, it is crucial to understand the relationship between law and society.

In a social system, law is conducted through "norms". How does norm evolve? Robert B. Seidman explained the process of evolving norms arguing that, „A repetitive pattern of behaviour in society is a by-product of a long standing practice that earned their legitimacy by reason of continuous usage through generations, and that is what Max Weber referred to as "norm".‟[29] People subscribe to norms of a society because they are viewed as socially accepted standards, and this is intuitive to law. To change any conduct in society, one must change norms. Hence, in order to make law for the state, authorities often reiterate the same norms in official language. [30] This then becomes positive law, and this kind of law tends to be more popular in society because it originates from people‟s way of life. This sort of organic law contains "traditional legitimacy"[31] in contrast to the one imported and imposed on society, which is often resisted.

[27] David Rene and Brierley John Elmes Campbell, *Major legal systems in the world today: an introduction to the comparative study of law* (London: Stevens; 1985), Pg. 45
[28] David Rene and Brierley John Elmes Campbell, *Major legal systems in the world today* (1985),PP.22-30
[29] Robert B. Seidman, *The State Law and Development* (London: Croom Helm Ltd; 1978) PP. 16-17
[30] Ibid
[31] Weber Max, *From Max Weber: Essays in Sociology*, (Hoboken: Taylor and Francis; c2013), pg. 168, E-books, available at <https://ebookcentral.proquest.com/lib/uel/detail.action?docID=1111791> accessed on 15th December, 2018

Pre-colonial Nigeria was made up of a typically diverse society. Principles of Islamic faith were deeply rooted into ways of life in what is currently the northern and the western regions. Eventually, this metamorphosed into norms governing the conduct of those communities. In contrast, social behaviour in the East and South was characterised by a set of norms that had emerged from traditional belief and superstitious practices dated back to generations of ancestors. Colonialism transformed these norms and faith based practices and as such the British colonial administration instituted common law and subsequently Nigerian governments have maintained this legacy in spite of multiple and often competing norms guiding conduct of society.[32] Even though legal pluralism could bring challenges in developing countries including Nigeria, it also presents distinctive opportunities.[33] For example, a tendency to accept law introduced by state officials, because the society is structurally diversified, and any formal innovation is therefore likely accepted. This is based on the legal tendency theory which says:

> *(a)The social system which is based on the pluralistic values provides a means of introducing mutually acceptable order to the members of this society with precise formal prescriptions regulating their social behaviour, changeable only as a result of an outbreak of conflicting social forces. (b) The social system based on homogenous values also provides a means of introducing a mutually acceptable order to the members of this society but with few precise formal prescriptions, thus relying upon unified convictions and imposed informal measures of social control.*

However, although the structure of *Sukuk* instrument follows certain ethical principles that are based on Islamic orientation, it is not entirely regulated by Shari"ah. The fact that, *Sukuk* transactions have been floated successfully in jurisdictions where the legal system is not Islamic, proves that *Sukuk* is a pragmatic tool, amenable to all legal systems within specific formal descriptions. It is an applied model rather than a rigid jurisprudential concept.

[32] Oba A.A., „Islamic Law as Customary Law: The Changing Perspective in Nigeria" (2002), International and Comparative Law Quarterly, vol. 51, No. 4, pp. 817-820

[33] Caroline S. and Michael W., „Legal Pluralism and Development Policy", in Brian Z. and T. Caroline (eds) *Legal Pluralism and Development* (Cambridge: Cambridge University Press; 2012), Pg. 34

1.4. Methodology and Research Scope

1.4.1. Aims, Objectives and Research Questions

This research seeks to critically evaluate Nigeria"s existing policy and legal frameworks with respect to investment in Nigeria in relation to mining and development potentials, and to assess the relevant Nigerian legal provisions on the role of stakeholders in the mining industry, to understand the gaps between theoretical and practical contexts of the Mining and Minerals Act, 2007. Furthermore, it attempts to examine the responsiveness of Islamic law with the aim of ascertaining the adaptability of *Sukuk* investment to Nigeria"s mining sector. Through the survey of different types of investment frameworks in various jurisdictions (Malaysia, the UAE and the UK), it seeks to make a comparative study with the aim of considering the feasibility of replicating such approaches in Nigeria to foster the realisation of national goals to revive the mining sector. Based on these aims and objectives, this study seeks to answer the following two questions.

> How flexible and innovative is the current Nigeria"s mineral investment law and policy framework to respond to new challenges and opportunities?
>
> How does the current Nigeria"s legal framework facilitate development through investment and *Sukuk*?

1.4.2. Contribution to academic discourse and originality

The original contributions of this thesis are twofold: it contributes to the existing literature by presenting innovative perspectives on investment strategies in Nigeria"s mining sector for, inter alia, community and infrastructure development by considering a broader range of investment models, including alternate cash flows. It does so by introducing additional „investment *Sukuk*" as a model through which both foreign and local investment could be attracted to the sector and community development achieved. *Sukuk* instrument is, itself, a new investment mechanism that was first launched in 2001 by the Bahrain Monetary Agency (BMA) and since then, there has been a growing literature on *Sukuk*. However, none of them explores the viability and implications of using *Sukuk* to finance mining projects and to deliver developmental projects, such as infrastructure and social development, to resource communities in Nigeria. This research addresses this gap by drawing analogies with countries with similar legal systems to Nigeria where *Sukuk* have recorded remarkable success.

Therefore, the study aims at answering the following critical question: given the origin of Nigerian legal system in English common law, can Sukuk as a product of Islamic financial system be sustained under Nigerian law? Based upon this, the research explores relevance of *Sukuk* in Nigeria leading to eventual inducement of foreign investors, especially from the Gulf Cooperation Council (GCC).

Beyond economic success approaches, the research also contributes to literature on corporate social responsibility (CSR). This study seeks to fill a gap between law in theory and law in practice with the context of CSR in Nigeria. Sections 116 & 117 of the Minerals Act, 2007 provides for community development agreements (CDAs), which is widely acknowledged as the first legislative approach to declare CSR as a mandatory requirement in the mining industry. Although, by these provisions, the government is apparently seeking to create an enabling environment necessary to attract investment and development,[34] this research argues that, the failure of the Act to provide for some crucial matters, such as „community representatives‟, could undermine practical success of the CDAs.

While it is true, as suggested by empirical evidence that, the potentials of CDAs to reduce conflict with mining communities and assure uninterrupted business have proved attractive to many investors,[35] lack of adequate provision on who represents communities is a source of tension. The findings of Eyen Okpanachi, underpins this argument. In that study, the author identified lack of confidence in representation and the way representatives redistributed dividends of resource extraction as one of the key factors responsible for sustained conflict in resource communities.[36]

This, research contributes also to the debate on CDA‟s legal framework by discussing the practical consequences of its shortcomings and proposing a solution. This contribution is significant in terms of its aim to address loopholes in the CDAs regime that are capable of undermining the main objective of the law which is creating a „safe environment‟ for businesses to operate and for all actors to safeguard their rights. The argument of this thesis is therefore, unless there is effective legal mechanism to ensure proper representation

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[34] Eghosa Osa Ekhator and Linimose Anyiwe, „Foreign Direct Investment and Nigerian Law‟ (2016) IJLMA, Vol.58 No.1, Pg. 133

[35] Kendra E. Dupuy, „Requirement of community development in mining laws‟ (2014) The Extractive Industries and Society, Vol. 1, PP. 200-2015

[36] Eyene Okpanachi, „Confronting the Governance Challenges of Developing Nigeria‟s Extractive Industry: Policy and Performance in the Oil and Gas Sector‟ (2011) Review of Policy Research, Vol. 28, no. 1, PP. 25-34

communities in CDA negotiations, then mistrust is inevitable, and the consequence of may be stability of mining activities and investment more generally. This is supported by the U.S. Energy Report of May 2016 on Nigeria, which maintains, actions of sabotage by resource communities in Nigeria have resulted in massive divestment in the extractive resources. Furthermore, this research is interdisciplinary, using law and policy, investment and economics

1.4.3. Legal reasoning, research methods and approach

This research is case study based and adopts a qualitative approach relying mostly on a desk appraisal of legal, policy and investment documents as well as reports on the SDGs and from civil society organisations, periodicals, Islamic law codification and practice to explore the suitability of existing frameworks to achieve development objectives in the context of the mining industry and infrastructure needs in Nigeria. The focus is not merely on the formal legislative or policy framework but also on action plans and their implementation. The choice of methodology has been substantially determined by the nature and scope of the research, which is interdisciplinary in nature drawing on legal and policy assessments, economic and investment analysis as well as sociological contexts. In seeking to examine investment and legal frameworks relating to extractive industries, this study adopts qualitative methods. Qualitative research, as opposed to quantitative, is interpretative, exploratory and critical; it uses a range of data and material and does not provide a single answer to question. Unlike quantitative, qualitative research uses qualitative techniques within qualitative paradigm instead of theory-testing and identification of variables.[37]

Although, this study involves economic and social concepts and reasoning, it is primarily legal in nature, focusing on evaluation of investment law and policy relating to Nigerian mineral sector. In selecting methodology, therefore, the question raised was what sort of paradigm guides a conceptual framework, through an interdisciplinary but predominantly legal approach? Discussion on the relevance of this paradigm to legal research has recently reached appreciation of relationship between law and other disciplines. Although, law is neither a natural nor social science by description, a legal paradigm facilitates identifying

[37] Clarke V. and Braun, V. *Successful Qualitative Research: A Practical Guide for Beginners* (London: Sage; 2013) PP. 20-27

vital concepts in theory building,[38] and provides the way, pattern and system of doing interdisciplinary research.[39] Law is a multidimensional and complex subject and therefore multiple theories are used for analysing different problems. To start with, this study adopts legal pluralism as the lens to recognise the socio-historical and cultural diversity of law in Nigeria. Furthermore, a Critical Legal Studies (CLS) approach has been adopted to interrogate socio-economic underpinnings of the key national investment instruments such as the Nigerian Minerals Act 2007. CLS is a technique of legal analysis that brings out the hidden political nature of law; also throws light on the interpretation nature of legal language.[40]

The difficulty in using this legal approach lies in determining the boundaries and interlinkages between economic and law so as not to overshadow what is generally meant to be a pragmatic and inter-disciplinary study. To overcome this challenge, the research uses institutional theory which provides a deeper understanding of stakeholder and power relationships in participative governance. This will involve adopting a range of empirical research methods grounded in socio-legal approaches which have been successfully used in similar studies to investigate the impact of law, how it works, how the actors in a legal system behave, and more importantly the overall practical benefits of law to society. These methods will be adopted to test the international and domestic legal instruments and policy material that affects investment and development in Nigerian. Other legal approaches such as doctrinal analysis and black letter law are fit and proper for interpretation and policy analysis, yet they are not prioritised in this study due to the socio-economic element of the study. These alternative approaches can be quite exclusive and may fail to allow interdisciplinary research prospect. Hence, CLS and empirical methods are more suitable to this work for these reasons.[41]

Finally, as a case study-based research that undertakes law and policy analysis involving various documents from different sources, identifying a uniform approach of analysis is crucial. Nature and source of data used contribute to the accurate decision as to the most suitable analytical approach. Therefore, data for this study is drawn from a range of resources

[38] Ziegler, P.A. „General Theory of Law as a Paradigm for Legal Research‟ (1988) *MLR*, Vol. 51 Pg. 569
[39] Habermas, J. *Knowledge and Human Interest* (London: Heinman Publishers;1978), PP.20-30
[40] Morris C, and Murphy C.C. *Getting a PhD in Law, (*London: Bloomsbury; 2011), PP. 15-30
[41]Steven Ratener and Anne-Marie Slaughter, „Symposium on Methods in International Law‟ (1999) Am. J. Int‟l L. vol. 93, Pg. 294

such as e-databases in accessing books, journal articles and other relevant materials such as periodicals, policy documents, reports (including development indicators produced by international development agencies and reports on international and Islamic financial market) and legislations as well as newspapers. Accordingly, the content analysis method has been used to analyse information extracted from these sources. The criteria for selecting case studies namely Malaysia, the UAE and the UK, included historical ties, common legal system and level of development. Drawing on the best international practices obtained in those jurisdictions, this study makes a compelling conclusion on what needs to be done in Nigeria to reinvigorate the extractive minerals industry and achieve its national development objectives.

This thesis is structured through 7 chapters. The first chapter is an introduction to the thesis. It introduces issues of mining, infrastructure development and investment in Nigeria. In addition to setting out the context of the study, aims and objectives of the research as well as its contribution to the discourse on investment and knowledge and the methodology used to carry out its investigation are discussed in the chapter. Chapter two provides a historical account of pluralism in the Nigerian legal system and the differentiated position of Islamic finance and Sukuk within Nigeria"s investment frameworks, while chapter three provides conceptual argument on the key themes through a literature review. It explores the relationship between four following dimensions: law, development, investment, and *Sukuk* in order to contextualise their meanings within the conceptual framework of this thesis. But also highlights the current state in the literature and suggests a way forward.

A critical review of legal and policy frameworks for development and investment in mining and infrastructure will be presented in chapter four, which includes interrogation of the duty of states to create prosperity as well as the role of the private sector in promoting development. Furthermore, the chapter looks at other elements critical for attractive investment regime, such as economic freedom and infrastructure. Inadequacies of Nigeria"s regime are discussed in contrast with the trajectory of legal and policy improvements emerging in some African countries like Ghana and South Africa. Chapter five is on Sukuk investment and its potentials for Nigeria"s extractive industries. In effect, the chapter looks at ethical constituents of Sukuk from the perspective of Islamic law and how these legal principles are embedded in the contractual structure of Sukuk. The chapter also investigates the roots of the contemporary arguments on the legality or otherwise of the conventional structuring with the aim to ascertaining what is both ethically and pragmatically suitable for the Nigeria‟s mining sector.

In chapter six, cases of Malaysia, UAE and UK will be explored. Distinctive experience and differentiated practice of each jurisdiction along with their corresponding successes and challenges in the field of Islamic finance, investment and law are studied in this chapter in order to identify suitable model for Nigeria. Chapter seven is a conclusion for the thesis, where reflecting on issues raised in the preceding chapters, the final argument of this study has been made. Creating a proposed comprehensive investment framework for Nigeria‟s mining sector, the prospects and challenges of implementing the proposal of this study has been discussed.

2. Chapter Two: Historical Context of Law, Mineral investment and Sukuk in Nigerian

Introduction

Creating a legal investment framework for the Nigerian context requires an understanding of the historical development of Nigerian investment law and its relation to English common law. It is integral to reflect upon the extent to which Nigerian independence influenced policy changes and how the subsequent nationalization of foreign interest presented an opportunity for a newly independent Nigeria to assert its economic sovereignty. Through the presentation of the historical account of these relationships a critical perspective emerges helping to situate Islamic law within the Nigerian legal system as well as the differentiated position of Islamic finance within these legal perspectives. Thus, the overall aim of this chapter is to assess the compatibility of *Sukuk* investment models against the emergence of conventional financial legal approaches.

2.1. Part A: A brief history of Nigeria with reference to the Mining Sector

2.1.1. Legacies of Colonial Rule in Nigeria

British colonial rule has had systemic impacts on Nigeria: forging its modern nation-state pluralistic legal traditions and framing issues of natural resource extraction. In understanding the development of modern Nigerian investment narratives and associated legal approaches it is essential to understand impact of colonial legal tradition on modern approaches. A major feature of British colonial rule in Nigeria and Empire more generally was the export of legal systems used to transform colonial territories. This is illustrated by the Companies Ordinance 1912, which introduced the first legal instrument ever to regulate investment activities in Nigeria. Enacted by the British colonial administration, it was rooted in the English common law tradition of 'commercial justice' and arbitration, where common empire practice meant business entities that were mainly owned and run by aliens in Lagos were subject to Ordinance.[42] However, it simply confirmed the transformation of British interest in the territory since first establishing the „Oil Rivers Protectorate" in 1884, some 20 years after the

[42] Eghosa and Linimose, „FDI and the Law in Nigeria" (2016), PP. 126-127

annex of Lagos in 1861 which had placed commerce and natural resource extraction at its root.[43]

Organised mining was not started until 1903 when the colonial government established the Mineral Survey of the Northern Protectorate.[44] This Survey together with its counterpart in the Southern Protectorate have yielded result through to 1940 where Nigeria became a major producer of such minerals as tin and coal. Due to industrial and economic significance of coal, the Nigerian Coal Corporation was created in 1950 by the Nigerian Coal Corporation Act of the same year.[45] With amalgamation of the different parts of Nigeria in 1914, a supreme court with nationwide jurisdiction was established through Ordinance to apply doctrines of common law and equity, and the statute of general application which was in force in England on the 1st January, 1900, the obvious implication of which means, applicability of English commercial/company law throughout Nigeria.[46] This and the company ordinance, that had seen series of amendments, continued to represent the legal framework for investment in Nigeria up until 1960.

2.1.2. Independence and Nationalisation and its links with foreign investment practices

1960 was a turning point for economic regulations in the developing nations of the world; Africa, Asia and Latin America. Influenced by a growing tide of decolonisation, emerging states deemed foreign enterprises as rival elements that could, unless controlled, undermine

[43] AOY Raji and TS Abejide, „The British Mining and Oil Regulations in Colonial Nigeria 1914-1960s: An Assessment" (2014) Singaporean Journal of Business Economics and Management Studies, Vol. 2, No. 10, PP. 1-5 available at: < http://www.singaporeanjbem.com/pdfs/SG_VOL_2_(10)/7.pdf>

[44] Generally, pre-independence mining was dominated by foreign enterprises. Royal Niger Company, a British corporation, was the first to start formal mining regulated by institutions in 1905. The first institutional framework for mining was the minerals department, which was established for the southern protectorate in 1903 and for the north in 1904. Owing to amalgamation of the north and south in 1914, the two minerals departments were pulled together into one body, "geological survey of Nigeria and the mines Inspectorate Services". Since then, several legislations followed as mining activities expanded. Mineral ordinance of 1946 emerged to codify all previous guidelines issued by the regulatory institutions. With coal mining assuming prominence in the late 1940s, the coal mines Ordinance 1950 was promulgated.

[45] Oladotun Alokolaro and George Ukwuoma, „Mining Law Review: Mining-Nigeria" (2017), Mining Law Review, Edition 6, available at: < https://thelawreviews.co.uk/edition/the-mining-law-review-edition-6/1149531/mining-nigeria> accessed 20th August, 2018

[46] Eghosa and Linimose, „FDI and the Law in Nigeria" (2016) PP. 126-127; Jadesola L., Oluwatoyin A. and Clement A., „Legal Basis for Research Ethics Governance in Nigeria" (2014), available at: <https://elearning.trree.org/mod/page/view.php?id=142> accessed 4th December, 2017

both their sovereignty and the growth of domestic business.[47] Consequently, a sway of legislations were made to ensure implementation of new policies adopted in order to check the influence of multinational corporations in those jurisdictions. In Nigeria, for example, the Exchange Control Act of 1962, the Immigration Act of 1963, the Company Decree of 1968 and the Nigerian Enterprise Promotion Decree of 1970, came into existence with the principal objective being to stimulate indigenous business while crippling the foreign ones. Section 10(1)(a) of the Exchange Control Act provides that, no one shall transfer any security to anyone outside Nigeria until permission from the minister sought for and obtained. Similarly, section 8(1) of the Immigration Act, prohibited a non-citizen from establishing or taking over a business or even to practicing a profession without clear consent of the minister.[48] Such restrictions accompanied by the widespread nationalisation of alien economic interest were meant to, and did, indeed, operate to discourage foreign investment in Nigeria. This was also true in other countries in the 1970s.

2.1.3. Extractive Industries and the Policy of Nationalisation

Due to the economic and industrial significance of coal mineral, the Nigerian Coal Corporation was established in 1950 as a state company with monopoly over mining, processing and sales of coal and coke products in Nigeria. This can be arguably, considered as a step towards expanding national influence on the resource industry. The fortunes of coal industry continued beyond independence. In the period after 1960 however, the industry declined in production and ultimately came to stop due to eruption of civil war in the country on one hand, and discovery of oil minerals on the other.[49] From 1960, the minerals industry, specifically oil became very critical to Nigerian economy, replacing Marketing Board of 1940s and1950s. Initially, in 1950‟s extraction of oil-mineral in the country was handled by Shell-BP, but by 1960s the potentials of the industry attracted many other foreign companies. Oil revenue became so significant that all development plans were based on it. Given that significance of oil, Nigeria needed to take control of the industry in order to maximise its revenue. The need for Nigerian nationals to acquire the technical know-how of mineral

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[47] Ismail M., The Nigerian enterprises Promotion Decrees (1972 and 1977) and Indigenisation in Nigeria (1985) PP. 57-85, a Ph.D. Thesis submitted to University of Warwick, available at: <http://wrap.warwick.ac.uk/34591/1/WRAP_THESIS_Mohammed_1985.pdf> accessed 15th July, 2017

[48] Amao. O., „Corporate Social Responsibility, Multinationals and the Law in Nigeria: Controlling Multinationals in Home State‟ (2008), Journal of African Law, Vol. 52, No. 1, PP. 90-100

[49] Oladotun and George, „Mining Law Review‟ (2017), available at: < https://thelawreviews.co.uk/edition/the-mining-law-review-edition-6/1149531/mining-nigeria> last accessed 10th September, 2018

exploitation and marketing it was another factor that informed the resolution to get rid of foreign dominance in the sector.[50]

The first policy step taken was the promulgation of Petroleum Decree of 1969, followed by establishment of Nigerian National Oil Company (NNOC) 1971. The Decree required participation of NNOC as a condition for validity of any mining lease. Accordingly, 35% shares of French Oil Company; SAFRAF (ELF) was acquired in the same year. Similarly, all other foreign companies were compelled to relinquish part of their equity ownership to NNOC. Not only that, but Nigeria signed agreement for progressive take over, "the greater the level of the company"s crude oil output the greater the government share in ownership."[51] The fortunes of oil improved greatly; by 1971 the production capacity was four times that of 1966.Hence government ownership by 1974 was 55% as declared by the second national development plan (1970/74). Ever since then, Nigeria held the control of the oil industry. Of the 7 joint venture operated so far, the government had 60% of the equity, except in one where government had 55%, Shell had 30% while Elf and gip had 10% and 5% respectively. At present, no foreign company is granted OPL (Oil Prospecting Licence) directly, all OPL are held by NNPC, prospective companies can only negotiate partnership with the NNPC, and most of the agreements are PSC (Production Sharing Contracts), where the foreign partner bears the entire risk involved.[52] However, some acts of nationalisation were fuelled international political reasons. The takeover by Nigerian government of the entire asset of British Petroleum in the late 1970s was intended to force British government soften its stance on South Africa and Rhodesia. [53]

2.1.4. International Efforts to Control Investment

The formidable effort of new self-governed nations to control their economy began in 1960 when about twenty states, including China and Nigeria, were admitted into the United Nations by resolution 1515.[54] From this period, certain principles of international law relevant to investment were sharply contested by developing countries, including Nigeria.

[50] Ismail, The Nigerian Enterprise Promotion Degree (1985), PP.85-90
51 Ibid
[52] Olajumoke Akinjide-Balogun., „Legal Framework of the Nigerian Petroleum Industry" (2001), available at: <http://www.mondaq.com/Nigeria/x/10726/Legal+Framework+Of+The+Nigerian+Petroleum+Industry> last accessed 20th September, 2017
[53] Ismail, The Nigerian Enterprise Promotion Decree (1985), pp.84-90
[54] UNGA resolution 1515 (XV), 1960

Requirement to accord aliens a treatment of international minimum standard better known as the „principle of state responsibility" was considered to be unfairly weighted in favour of rich nations. Postulations of that principle demand host countries to provide investors a treatment higher than that available to their citizens where the latter falls below the so-called minimum international standard.[55] Having contradicted clearly the determinations of the new sovereign states to promote local investments, the traditional formulation of the principle of state responsibility was very strongly rejected. Instead, the call for upholding permanent sovereignty of states over properties lying within their territory, especially, natural resources, prevailed. To further consolidate their powers to regulate investment affairs, developing countries asserted 4 basic principles, including the following:[56]

> *1-State has the right to control entry, acquisition of property and activities of Transnational Corporations;*
> *2-The right to nationalise foreign property is inherent attribute of sovereignty and subject to no condition other than compensation;*
> *3-State will observe investment agreement voluntarily entered into subject to sovereign power to renegotiate, review or unilaterally modify in light of new developments.; and*
> *4-Whereas some incentives to drive FDI might be put in place, treatments accorded to foreigners shall in no way be better than those given to domestic ones.*

As a result, states" permanent sovereignty over natural resources became a settled principle of international law. And by UN resolution 1803, right of state to expropriate foreign property in the public interest has been well affirmed with the requirement of appropriate compensation been recognized as the only consequential obligation in that circumstance. The right of each nation to control investment has equally been lauded.[57] With these principles of international investment law set in place, states begun to consolidate national development agendas by redirecting the focus of their respective investment policies inwards.

However, owing to factors such as corruption, structural institutional failure and lack of effective governance, legislations aiming to drive internal development failed to achieve the intended goals, local enterprises could not prove ability to sustain the economy. Stimulated by the concrete reality of the need to attract FDI, Nigeria had to embraced liberalisation policy that was, then, being marketed by IMF and World Bank, infamously referred to as

[55] Samuel K. B. Asante, „International Law and Foreign Investment: A Reappraisal" (1988) International and Comparative Law Quarterly, Vol. 37, PP. 590-592
[56]Ibid
[57] UNGA resolution 1803(XVII), 1962

„World Bank Structural Adjustment Policy" (SAP).[58] This period has seen legislative reversal of laws made in 1970. In effect, Nigerian Investment Promotion Act 1988 came to water down the Enterprise Promotion Decree of 1977 by allowing 100% foreign participation with consent of the relevant authority. Ever since then, Nigeria has progressively continued to liberalise its economy, soften investment regime and improve the business climate in order to attract FDI into various sectors, especially natural resources.[59]

2.2. The Nigerian Investment Promotion Commission Act and other legislation

2.2.1. Current investment legislation and frameworks operating in Nigeria

Although, there is, today, several legislations that together form up the regulatory framework for investment in the country, the Nigerian Investment Promotion Act is the lead document on the subject. This Act is meant to regulate, coordinate and promote investment activities in Nigeria. Through an agency called, Nigeria Investment Promotion Commission (NIPC), created by the Act, vital investment data including opportunities in the country and sources of capital are collected, collated and disseminated. Even though, other legislations regulating specific sectors of the economy do exist, NIPC Act is the centrepiece as far as investment in Nigeria is concerned. In fact, major changes to investment regime were reflected in the NIPC Act. For example, section 17 of the Act is the core of liberalism as it permits foreigners to invest and participate in the operation of any company or business in Nigeria subject to no limitation other than S.16 of the Nigerian constitution which termed some areas of business as „major economy" and declared them exclusive for the state for strategic reason, and that, the Act of National Assembly, which is the NIPC Act, shall be the one to determine those no-go areas. Accordingly, section 33 of NIPC Act spelled out the „negative list" as including inter alia, production of arms and ammunition as well as production or dealing in narcotic drugs and psychotropic substances. In effect, the new provision has excluded oil and gas which used to be inclusive.[60]

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[58] Eghosa and Linimose, FDI and the Law in Nigeria (2006), pp. 129-130
[59] Ibid
[60] S. 16 of the 1999 Constitution of the Federal Republic of Nigeria (Subsequently "the 1999 Constitution"); Ss. 17, 18 & 33 of the Nigeria Investment Promotion Commission Act 1998 (now 2004, subsequently "NIPC Act (2004)")

In contrast, section 29 of Minerals and Mining Act incorporated the application of relevant provisions of Investment Promotion Commission Act and that Foreign Exchange (Monitoring and Miscellaneous) Act, Cap F34 LFN 2004 to all investment in minerals under the Act. The point is foreign investors are now allowed to own and run oil field without having to partner with indigenous company, which has never been the case. Prior to that, citizen participation was a condition necessary for foreign investment in Nigeria.[61] Other restrictions that had sought to squeeze FDI in Nigeria, ware limitations imposed by Industrial Development Coordination Decree 1988, Nigerian Enterprise Promotion Decree 1972 and the Exchange Control Act 1962 on outflow of investment profit and use of foreign currency to fund business in Nigeria. All were removed by Foreign Exchange and Monetary Miscellaneous Protection Act, as well as by the NIPC Act. Instead, the Act dismantled all restrictions on repatriation of profit, and allowed the use of foreign currency to finance investment in Nigeria.[62] To ease administration of the Act, a commission, Nigerian Investment Promotion Commission has, by virtue of S.4, been established to carry out the following functions:[63]

> *Be the agency of the federal government to coordinate and monitor all promotion activities pertaining to investment*
> *Initiate and support measures which shall enhance investment climate for both domestic and foreign investors*
> *Collect, collate, analyse and disseminate information about investment opportunities and the sources of investment capital*
> *Register and keep record of all enterprises to which this Act applies*

The foregoing provisions of the NIPC Act means that, the commission shall be a platform that attract investors to and connect with their respective areas of interest. The commission would achieve these objectives by doing two things. First, is to support specific sectors create enabling environment for business. And second, is to research and publish investment opportunities that exist in Nigeria as well as sources of finance for investors.

2.2.2. Other notable legislation and shifting approaches to encourage investment

Although, the backward-and-forward shifts of investment policy were largely made by amending relevant provisions of the legislation, yet, there are few more enactments that are equally critical for investment in Nigeria. Compliance with other complementary instruments

[61] Ismail, The Nigerian Enterprise Promotion Degree (1985), PP.57-79
[62] See S. 21 of the NIPC Act (2004)
[63] Ibid S. 4; Section 16 of the 1999 Constitution

is essential for putting up investment in Nigeria. NIPC Act itself provided that, no enterprise, domestic or foreign, can legally operate in Nigeria except in conformity with the Companies and Allied Matters Act (CAMA) 1999 (now 2004 as amended).[64] One of those fundamental requirements under CAMA is obtaining valid registration of the company or business name, as the case may be. Corporate Affairs Commission (CAC) is the body statutorily empowered to administer CAMA, supervise and enforce compliance of corporate bodies with the provisions of the Act.

Investment and Securities Act (ISA) is another essential legislation meant to govern issuance and transfer of company securities and companies" merger and acquisition among other things. The Act provided for establishment of security and exchange commission to coordinate portfolio investment and the capital market transactions being conducted on the floor of stock exchange. It also provides for Newmarket infrastructure and wide-ranging system of regulations and securities business in Nigeria. S. 21 of the NIPC Act allows foreign investors to acquire to invest in any enterprise in Nigeria by acquiring shares of such companies using whatever convertible currency with one condition. The purchase must be through Nigeria Stock Exchange. In addition to the foregoing, legislation on tax has mandated all businesses within Nigeria to pay their tax to Federal Inland Revenue Service, a body created by a statute of Federal Inland Revenue Service (Establishment) Act 2007. Section 68 of the Act recognises all other relevant investment laws in force, but, where there is conflict between the FIRS Act and any other law or Act in matters relating to tax in Nigeria, the former shall, however, prevail.[65]

Looking at the highlight of Nigerian investment regime given above, one will obviously perceive that, setting up business in that jurisdiction would certainly require putting a lot of bits and pieces together. Perhaps, one may need to visit various institutions at different locations, which entails extra effort that could discourage potential investors. However, that was the case, but not anymore. „To make business much easier than ever before, the NIPC has initiated a one stop investment centre (OSIC)", where in one closing, investors can meet with desk officers of all the important organisations they need to contact for necessary endorsement of their investment. Although, the idea of OSIC has made business climate a bit

[64] S. 19 of the NIPC Act (2004)

[65] S. 68 of the Federal Inland Revenue Services Act 2007 (subsequently "FIRS Act (2007"). This section does not envisage conflict between the Act itself and the Constitution, because the supremacy of the constitution is more general.

more conducive, there exist yet another factor equally discouraging to investors. Where investors have to survey for relevant laws from different documents, it is most likely that they prefer rather a jurisdiction with a single but comprehensive codification of business regulations.

2.3. Part B: The position of Islamic Law within Nigerian Legal System

2.3.1. Questions of legal pluralism and the acceptance of Islamic law

Paralleled to the ebbs and flows of investment regime in Nigeria, was the struggle for national identity and effort to create harmony between competing legal systems. Nigeria has been a homogenous society which is typically pluralistic, not only culturally and religiously but also legally so. Even before superimposition of English common law through colonialism, there was existence of well-established Islamic law system in the north, and customary law in the south.[66] The entrenchment of Islamic legal system in Nigeria has never been difficult to see even during colonial administration. The resolve of British power to avoid direct interference with the already existing Islamic institutions in the north, and its policy to rule indirectly through the traditional political structure was a testimony to the pervasiveness of Islam in Nigeria. However, the influence of that system and relevance of its institutions were gradually and very severely undermined by the subsequent imperial policies which aimed to replace indigenous law with English ordinance. Nevertheless, the spread of British common law in Nigeria had not been able to obliterate Islamic law completely.[67]

By 1954 the colonial administration had no option but to acknowledge legal pluralism, federalism was therefore adopted whereby three regions-north, west and east-emerged with equally three distinct elements of pluralism. The north is dominated by Muslim majority Hausa-Fulani tribe, west is Yoruba tribe who has almost equal number of Muslim and Christian, and East with Igbo majority and prevailing number of traditional religion

[66] Alexandre M. and Neelam V. and Stephen M., „Addressing the Challenges of Legal Pluralism and Improving the Management of Land" (2015), PP. 141-152, available at: < https://elibrary.worldbank.org/doi/10.1596/978-1-4648-0464-9_ch7> last accessed 2th September, 2017

[67] Oba AA, „Islamic Law as Customary Law: The Changing Perspective in Nigeria" (2002), International and Comparative Law Quarterly, Vol. 51, No. 4, PP. 817-820

adherents.[68] Now, with exception of English law that applies nationwide, each region had some distinct law peculiar to their area. That is manifestation of legal pluralism. Legal pluralism is „when the sovereign commands different bodies of laws for different groups of the population varying by ethnicity, religion, nationality and geography."[69] Accordingly, the Nigerian legal system has always preserved the application of English common law and doctrine of equity, Islamic law and customary law. This legal multiplicity corresponded to the prevailing ethnic and religious pluralism in the three regions of the country.[70]

2.3.2. Islamic Law in Nigeria Before, During and After Colonialism

Islamic civilisation, which includes its commercial law, existed in Nigeria long before British came into the country. Literature holds that, colonial masters did not arrive in Lagos until the second half of the 19th century, while by then Islamic legal tradition had spread wide and far into sub-Saharan region of Africa, Nigeria inclusive. Accounting for this, Alan Frishman[71] asserted „The evidence of Arabic writers shows that Islam had crossed the Sahara Desert and was being practiced by rulers and traders in the Sahel by the 13th century", pointing to a time when Islam became so entrenched in the region not the time of its arrival of course. While rulers of these new Islamic entities apply Shari"ah in exercising their judicial and political functions, entrepreneurs conducted business transactions based on Islamic commercial law. Islam as a faith carries with it a civilisation, which covers all aspect of human life, religious, social, political and economic. Although, introduction of Islam has brought a total transformation in these territories in terms of modifying their land tenure systems and judicial settings among others, nothing is more strictly adhered to by Nigeria"s Muslims than proscription of *riba* (usury or interest-bearing loan).[72]

Prohibition of usury is the most famous and fundamental feature distinguishing Islamic finance, and as such, the strong abhorrence for interest indicates the prevalence of ethical financial principles in pre-colonial Nigeria. Furthermore, peoples" insistence to avoid commercial dealings involving interest may be attributed to the nature of the link and circumstances by which Islam was introduced to the country. It is a matter of common

[68] Oba, „Islamic Law as Customary Law" (2002), PP. 817-820
[69] Sally E. M., „Legal Pluralism" (1988), Law and Society Review, Vol. 22, no. 5, Pg. 870
[70] Oba, „Islamic Law as Customary Law" (2002), PP. 817-820
[71] Alan Frishman, „The Impact of Islam on the Urban Structure and Economy of Kano, Nigeria" (1986), Journal Institute of Muslim Minority Affairs, Vol. 7, Issue 2, PP. 464-475, at 464
[72]Ibid, Pg. 464

knowledge that Islam did not come to Nigeria through a warfare, rather it was business interaction between Muslim traders of north Africa and entrepreneurs of an area known as western Sudan, which comprises today‟s Kanem Bornu, that made the latter cherish and admire the high level of fairness, honesty and integrity with which the former were handling transactions. Perhaps, as they subsequently went on to propagate Islam, the locals in Kanem Bornu continued to give emphasis on this fact which constituted attraction to them, hence the overwhelming rejection of riba among the Muslim community in Nigeria.

As regards the first encounter of Nigeria with Islam, this varied significantly depending on which part of Nigeria is under reference. Early back as 9th century, Islam had penetrated some areas in the north, precisely the present day Borno state and from there proceeded after a short while to Hausa land in north west and central, and then subsequently to the south west of the country much later.[73] Some records argued that, Kano and Katsina got acquaintance with the religion from north Africa independent of and around the same time as Kanem Bornu.[74] This source maintained that, Islam entered the cities of north west through a Trans-Saharan trade route linking Hausa land with Tuwat, a famous city in Algeria via Tunisia and Agadez city of Niger. In contrast, the introduction of Islam to Bornu had been from Egypt via a popular but yet another Trans-Saharan trade route across Tripoli cutting through Fezzan.[75] Whatever is the case, Islam had been firmly established in the entire north and Yoruba land in the south, long before European imperialism. Again, the early 19th century revolution, otherwise called Jihad led by Othman bin Fodio came to revive the practice of Islam in these areas by separating the genuine Islamic tradition from filthy adulterations and corrupt practices with which it was diluted over the period of time. This revival process gave birth to the famous Sokoto Caliphate, whose area of authority extended over the three geopolitical zones of the northern region and south western zone in the southern region.

The extent of reform brought about by Dan Fodio movement had seen a widespread application of Islamic law throughout the Caliphate. Describing the entrenchment of Shari‟ah in the Caliphate, the legal and colonial orientalist scholar JND Anderson said, "Outside the Arab Peninsula I know of no place where Islam is more pervasive than northern Nigeria."

[73] Auwalu H. Yadudu, „Colonialism and the Transformation of Islamic Law in the Northern States of Nigeria‟ (1992), Journal of Legal Pluralism and Unofficial Law, Vol. 24, PP. 103-131, at Pg. 110
[74] Lawal Yusuf Malumfashi, „The Spread and Development of Islamic Civilization in Northern Nigeria:Case Study of Katsina State‟ (2016) International Journal of Business, Economic and Law, Vol. 9, Issue 5, PP. 173-179, at PP. 173-174
[75] Ibid

Dan Fodio‟s movement had transformed the region both politically by replacing heather to corrupt leaderships of various emirates of northern Nigerian with his disciples who were righteously devoted to the system, and judicially by ensuring a structured court system manned by highly qualified personnel vast in Islamic legal tradition. There was in place a system of reproducing skilful judges, well-grounded in Qur‟an, hadith and principles of Islamic jurisprudence necessary for understanding of and deriving legal rulings from the primary sources of Shari‟ah. In depth knowledge of these subjects couple with unimpeachable character were the criteria for selecting the judges, and their appointment was made by the *Amirul-Mumineen* (commander of the faithful).[76]

By nature of their training and virtue of their appointment combined, judges were imbued with the primary function of their office, which is, in the words of Yadudu, "removing injustice, restraining aggressors, and ensuring generally the prevalence of justice throughout the realm in accordance with the Shari‟ah".[77] Shari‟ah law was observed in the territory under the caliphal authority without exception. In other words, all aspect of Shari‟ah be it political, economic, family, civil or criminal had been applied according to the relevant sources of Islamic law. For most part, adherence to Islamic legal system and its institutions had remained functional until the forceful domination by British empire in 1904.This was attested to by the colonial administrator, Lugard himself, who acknowledged that the system he found was highly sophisticated and politically organised, with judicial officers that are both respectable and admirably knowledgeable.[78]

However, with the inception of the 20th century which mark the beginning of European imperialism in the region following the fall of Sokoto Caliphate, the influence of Islamic law was to be ousted and eventually replaced by the English common law. Although, this agenda would not be expressed explicitly and the British power would continue to maintain those Islamic legal institutions and its personnel for considerable length of time, but subsequent developments in the region would reveal the main objective underlying the entire process. Colonial administration only wanted to and did indeed take advantage of the existing system to build its empire gradually and systematically. The power to appoint judges was slowly removed from the emir, and the freedom of judicial officers to administer justice in

[76] This title continued to exist till today, although it‟s now known and referred to as "Sarkin Musulmi", which is a near equivalent of "Amirul-Mumineena" in the local language.
[77] Yadudu, „Colonialism and the Transformation of Islamic Law‟ (1992), Pg. 111
[78] Ibid

conformity with Islamic law was carefully dismantled. By virtue of series of proclamations and ordinances (of inter alia 1906, 1914, and 1933), new grades of courts were introduced, emir"s power to make outright appointment of judges was reduced to mere nomination subjected to confirmation and approval of a superior colonial officer in the area. More so, imperial officials, who have no acquaintance whatsoever with Islamic law, were empowered to supervise and, where they deem necessary, to interfere with proceedings of the courts.[79]

The implication of the new supervisory function allocated to British officials in the region was that, power to regulate the judiciary had shifted to the imperial administrator, by dint of which they could exploit the legitimacy of the existing Alkalis to import English legal order surreptitiously. The first such interference was to do with the criminal justice, which came in a form of an order suspending any court sentence that entails „inhumane treatment". Again, what amounts to „inhumane treatment" was to be judged according to British legal tradition as the power to determine whether or not a particular sentence of court was inhumane treatment lies with the colonial officers. Consequently, this had led to serious conflict and even confusion in judicial pronouncement, a person might be tried and pronounced guilty under Islamic law, yet the sentence could not be given in line with the same law. As time went by, several other changes were introduced. The mode of training judges and the content of their learning was transformed substantially with bias for English orientation over the Islamic law. Correlatively, different grades of court emerged, and judges with skills in indigenous law[80] were appointed to lower grades, rendering the latter less prestigious. Following the amalgamation of the southern protectorate and the northern protectorate into single and united Nigeria, English law received into Lagos by virtue of Ordinance No. 3 of 1863 was extended to the north.

Unlike the case of Northern Nigeria, application of English law started the same year Lagos was ceded to British power, and it continued to be applicable in the South for half a century before its eventual extension to the north. It was neither the Ordinance of 1863 nor it extension that actually displaced the native system, because the former applied subject to certain codes. However, the decisive moment, as for Islamic law in the north, came shortly before Nigeria attained the status of self-governing entity. Sections 28 and 38 of the High

[79] Yadudu, „Colonialism and the Transformation of Islamic Law" (1992), PP. 114-123
[80] By colonial interpretation, and so was the case for considerable period after independence, the phrase „indigenous, customary or native law" refers to any form of law other than English law and local legislation, including Islamic law.

Court Law, Northern Region of Nigeria (No. 8 of 1955), for example, respectively sanctioned the wholesale application of English law and its superiority over and above the native law. By virtue of these sections, which remain functional and intact, the High Court shall apply the common law, the doctrine of equity and the statutes of general application which were in force in England on the 1st day of January 1900. Furthermore, native law and custom shall only be observed by the court if they are not repugnant to natural justice, equity and good conscience, nor incompatible either directly or by implication with any law for the time being in force. Ultimately, the combined effect of these provisions of the law virtually rendered Islamic law subservient to the English law. Even though, it can be argued that the total import of the sections has endorsed the co-existence of multiple legal systems. Nevertheless, the terms upon which this pluralism operates are heavily weighted in favour of the English legal system. The implication of this colonial version of pluralism has been aptly observed by Yadudu when he said:[81]

> *But this ostensible co-existence of plural legal systems, particularly of Islamic law and the common law should not deceive us. For it does not permit Islamic law to exist as an all-embracing legal system nor as an independent and autonomous partner of the English common law. It exists as an appendage and a tolerated nuisance in relation to the pre-eminent „rœeived"English law.*

It was clear to the general public that, by allocating this type of relevance to common law just few years before its departure from Nigeria, the imperial power aimed at supplanting Islamic law with British legal system, and to do so subtly through promulgation by the regional parliament. Although, the northern assembly consisted of local Nigerians, people saw them and their actions as a mere colonial stratagem to obtain legitimacy for foreign agenda through the use of domestic elements. This explains the reason behind series of mass protest that followed certain legislative developments in the north around that period. There was element of proof that, local politicians had, at some point, lent themselves to the service of colonial interest against the yearnings of their compatriots, and they did that due to not only political reasons but also economic benefits. Ahmadu Bello,[82] premier of the northern region conceded as follows:

[81]Yadudu, „Colonialism and the Transformation of Islamic Law" (1992), PP. 117-118
[82] Bello, Ahmadu, *My Life* (Cambridge: Cambridge University Press, 1962) Pg. 217 (as quoted, as well, in Yadudu," Colonialism and the Transformation of Islamic Law" (1992), Pg. 116

> *It was borne upon us that these legal and judicial reforms would have to be carried out if the self-governing region was to fulfil its role in the federation of Nigeria and command respect amongst the nations of the world…finally, there are the commercial and industrial interests, mainly financed by capital brought into this country from abroad, which we are doing our best to encourage and foster.*

Clear imports of the above quote indicate that, in addition to political exigency of the time, northern politicians had to accept the superimposition of the western oriented legal system in fulfilment of conditions attached to an external capital to be obtained for the region. Obviously, these political figures ware persuaded into this by Justice Abu Rannat, the chairman for the 6-man committee employed by the colonial office to work out which code will be appropriate for northern Nigeria.[83] After a considerable survey and debate, the committee resolved to propose for the north, a penal code modelled on one of the three famous English criminal codifications. Faced by resistance from the regional elites, who themselves were under intense pressure generated by anti-imperialist campaign overwhelmingly supported throughout the region, the then chief justice of Sudan, Abu Rannat quickly felt the need to use a carrot and stick approach if he were to change perception of the northern elders. Cited his experience of Sudan where foreign laws ware initially loathed and rejected in the worst possible manner, but no sooner than independence was granted, people came to realise the benefits the reform agenda brings to the economy. Accordingly, he advised northerners to endorse the penal code, because “After independence they would need to attract foreign capital, so they must have a legal and judicial system which would give confidence to foreigners.”[84] Not just that, he added, “They would wish to be members of the United Nations Organisation, so they must expect awkward questions and put themselves in a position to give satisfactory answers.”[85] In effect, failure to change the law, at that point in time, could, soon thereafter, expose politicians to embarrassment before international community. Consequently, this approach had not only instilled fear in the politically exposed northerners, it boosted their hope to drive investment capital into the region.

It is noteworthy that, it was not only in northern Nigeria that colonial policy to import and impose a foreign system was resisted. Jamaica had fiercely protested British attempt to adopt St. Lucia code of 1889 for Jamaica and British Honduras; the extension of Queensland

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[83] Anderson J.N.D., „Conflict of Laws in Northern Nigeria: A New Start" (1959) international and comparative law Quarterly, Vol. 8, PP. 450-452
[84] Anderson, „Conflict of Laws" (1959), Pg. 452
[85] Ibid, PP. 452-453

modelled criminal code of Gold Coast to Lagos was not straightforward.[86] Nor did India, Sudan and Pakistan feel too glad to exchange their pre-colonial systems for the infamous Penal Code. This highlights the correlation between social and legal systems, which is critical to legitimacy of law itself as emphasised in legitimacy theory. Any law that originates from practices and behaviour underpinned by prevailing norms in a society, will have a normative value and imbued legitimacy.[87] In contrast, foreign law imposed upon unrelated social order is most likely to be resisted and will require official intervention to be observed and legitimated.

Likewise, in the case of British colonial office in Africa, the legal system sought to and, in some cases, did impose, were more European than African. All criminal codes adopted for ex-British dependencies, including the famous four colonies of West Africa, originated from one of the three main English codifications. Main Queensland code; St. Lucia Code; and Indian Penal Code.[88] The controversial promulgation of 1959 in the northern Nigeria was a reproduction of a British suited criminal justice which was used for India and Sudan in 1837 and 1899 respectively. The idea of introducing the code was conceived in response to public outcry and clamour of northerners for a criminal justice consistent with the tenets of Islamic law.[89] The mass movement against this code in the north was due to serious and alarming discrepancies that exist between the provisions of the code and those of the actual Shari‟ah. People had been longing for pre-colonial justice with which they were more acquainted since before British assumed control over the territories under Sokoto caliphate. Consequently, the overall objective of the colonial code seemed to be total obliteration, or at least, subjugation of the Shari‟ah.[90]

Furthermore, in 1956 justly before British departure from Nigeria, a Muslim Court of Appeal was created. The court was meant to have appellate jurisdiction over appeals from Emir‟s and Alkali‟s courts, and deal with such cases in conformance with the principles and precepts of Shari‟ah. However, the adjudicatory powers of this court were significantly limited, in terms

[86] Morris H.F., „How Nigeria Got its Criminal Code‟ (1970) Journal of African Law, PP. 137-154, at PP.137-145
[87] Adam Podgorecki, „Social Systems and Legal Systems-Criteria for Classification‟ in Adam Podgorecki, Christopher J. Whelan and Dinesh Khosla (eds) *Legal Systems and Social Systems* (Australia: Croom Helm Ltd, 2010), PP. 1-24, at PP. 2-10
[88] Ibid, Pg. 137
[89] Yadudu, „Colonialism and the Transformation of Islamic Law‟ (1992), PP. 117-119 (particularly pg. 117, footnote no. 11 and pg. 119, footnote no. 13)
[90] Ibid

of subject matter, to matters "governed Muslim law" only,[91] which consist of matters to do with marriage, divorce, child custody and inheritance. By implication, the comprehensive application of the principles of Islamic law in the pre-colonial north, broad powers of its judicial institutions covering all private and public domain of human conduct, as well as relevance and influence of its personnel were all reduced to simply a niche in Islamic civil law generally referred to as "family" law. Consequently, this has excluded all other social, economic and commercial aspects of Islamic law and placed them under the jurisdiction of common law-oriented courts. Fortunately, or unfortunately, this position of the Muslim court has successfully been successively kept intact by subsequent constitutions as will be discussed later.

2.3.3. Constitutional Status of Islamic Law

The first federal constitution that recognized Islamic law in Nigeria was the 1979 constitution. It does not only acknowledge its application but also provided for its administration by establishing a *Shari"ah* Court of Appeal. This constitutional landmark was not without controversy. The move to formulate a new grand norm to replace the republican constitution 1963, was accompanied by series of agitations, notably the one staged by Muslims clamouring for recognition of Shari‟ah. Consequent upon that, both Shari‟ah and customary court of Appeals were incorporated in the new constitution. Contrary to what the north had actually yearned for, adjudicatory powers of those courts were critically limited. Operative parts of Section 242(2) (e) of the constitution states that, the court shall here cases where parties to the proceedings chose to be governed by Islamic law at the court of first instance regardless of their faith.[92] The overall implication of this provision was sensitive. Islamic law was made to be a choice of law open to all Nigerians. While, a non-Muslim may wilfully opt to be bound by Shari‟ah, a Muslim has the right to reject its application altogether.

In 1999 Constitution, the provision on the jurisdiction of the Court of Appeal was retained under section 277(2). The words: „Muslim *Shari"ah* or not Muslim‟ was however, removed and replaced with the phrase: "where all parties being Muslim"[93] however. In effect, this has

[91] Anderson, „Conflict of Laws‟ (1959), Pg. 455
[92] S. 242(2)(e) of the Constitution of the Federal Republic of Nigeria, 1979
[93] S. 277(2) of the Constitution of the Federal Republic of Nigeria, 1999

limited the application of Islamic law to Muslims only. It must be noted that, in both constitutions, the adjudicatory powers of *Shari"ah* Court of Appeal are limited to matters of "Personal Law", and they are matters relating to inheritance, marriage and divorce, guardianship of an infant as well as *waqf*.[94]

To sum it up, the sources of law in Nigeria are Nigerian legislation, case law, English common law and equity as well as Islamic and customary law. Islamic law applies to Muslim only. The jurisdiction of the *Shari"ah* Court of Appeal is limited to "Muslim Personal Law" only. All other matters, including investment, are to be heard and determined by the High Court, even where the parties involved are Muslims and the matter relates to Islamic law generally. That was the decision of Court of Appeal in the case of *Usman v. Umaru.*[95]

2.4. Legal Framework for Islamic Finance in Nigeria

The first legal endorsement of Islamic financial transactions in the modern Nigeria dates back to tail end of the 19th century. By virtue of the decree of military government of 1991, specialised banking, which includes non-interest banking were allowed. Pursuant to this, Musharaka transactions begun to appear in some of Nigeria"s bank. However, in 2012 full-fledge Islamic banking was licensed in the country under the Banks and Other Financial Institution Act, 2012. Sections 43 and 63 of the Act allow for operations of interest-free banking system in the country and empowered the Central Bank of Nigeria (CBN) to issue guidelines to the practice of Islamic banks in Nigeria. Accordingly, the CBN Drafted guidelines of 2012 came in being. Furthermore, the law empowered the CBN to inaugurate a committee of experts on Islamic law and finance for proper advice and supervision. Although, there is full legal backing for Islamic finance, this is yet poorly developed, particularly with respect to other products like Takaful (Islamic insurance) and Sukuk.

Nevertheless, the position of law is that, all interest-free versions of transactions, including Sukuk, are lawful. Based on this, Nigeria issued its first Islamic bonds to generate N100 billion for financing road infrastructure in the country. While, sukuk issuance of 2017 was very successful and even over-subscribed, lack of robust legal infrastructure to support widespread application of sukuk remain a going concern in Nigeria.

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[94] S. 11 of Shari"a Court of Appeal Law of Northern Nigeria, 1960

[95] [1971] NNLR, 77

2.4.1. Place of *Sukuk* within the Nigerian Legal System

Sukuk, popularly known as „Islamic bonds", is a product of Islamic financial system, and belongs to the broad branch of Islamic law that deals with commercial transactions, called *„Mu'amalat"*. As already mentioned, the Nigerian legal system allows administration of Islamic law in a limited area of „personal law" only, it does not apply to financial dealings. For financial system in Nigeria is entirely secular. It has also been noted earlier that, investment is largely regulated by NIPC Act (2004). The question now arises as to, how then do *Sukuk* (Islamic bonds) become compatible or applicable in Nigeria? This question is controversially exciting, it is so particularly in the light of the current debate in Nigeria where some groups are determined to challenge the constitutionality of the N100 billion sovereign *Sukuk* recently issued by the government.[96] Before any attempt to provide an answer, in the affirmative or negative, both the *Sukuk* and Nigerian investment policy shall be examined. Policy is defined as the total objectives of the state, including legislations, regulations and procedure.[97] Law plays an important role of achieving the underlined objectives of a particular policy, and the law itself needs institution for effective implementation.

Section 16 of the constitution of federal republic of Nigeria has outlined the policy-objective of the government as far as investment is concerned. The government will harness the resources of the nation to promote national prosperity and dynamic self-reliant economy and social development.[98] In other words, the overall objective of government in managing natural resources and all other sectors of economy is to attain national development. Effective management of these resources would require policy that attracts investors and bring along sophisticated technology and huge revenue. To facilitate realisation of this objective, section 16(3) said, an Act of National Assembly, which is the law, shall be enacted to establish a body to regulate and promote enterprises and investment in all sectors, except what is termed as „negative list", in order to achieve „national development." Accordingly, NIPC was created pursuant to the above provision of the constitution. Arguably, therefore, any investment

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[96] *Sukuk* Bond: Federal Government Finally Speak on Plan to Islamise Nigeria, Daily Post of 25/09/2017 available at: < http://dailypost.ng/2017/09/25/sukuk-bond-federal-government-finally-speaks-plans-islamise-nigeria/>

[97] Walied El-Malik, *Mineral Investment Under the Shari'ah Law* (London: Graham and Trotman; 1993), PP. 35-43

[98] S. 16, the Constitution of the Federal Republic of Nigeria, 1999

initiative that satisfied the foregoing three conditions is compatible with the general context of investment policy as per constitution and NIPC Act.

Sukuk on the other hand, is an investment tool, used for generating funds by government or private companies for financing developmental projects, particularly infrastructure.[99] *Sukuk* are not a religious initiative per se; it is rather an investment alternative to conventional bonds, the success of which has been widely acknowledged.[100] The recent road infrastructure *Sukuk* of N100 billion, issued in Nigeria, has underscored this point. This research will examine, the subsequent chapters, the applicability of *Sukuk* to finance not only infrastructure but also mining projects in Nigeria. In chapters 3 and 4 precisely, phenomenal success of *Sukuk* investment in financing a range of projects in different jurisdictions across the world would be highlighted with aim to ascertaining international best practice which Nigeria could adopt. The purpose here in this chapter is, however, to assess whether within the purview of NIPC Act, Sukuk is relevant and generally compatible.

Sukuk have been defined as "Certificates of equal value representing undivided shares in ownership of tangible assets, usufruct and services or the asset of particular project or special investment activity."[101] Simply put, *Sukuk* are shares in investment. Section 33 of NIPC Act provides thus, "investment" means an expenditure made to acquire an interest in an enterprise operating within and outside the economy of Nigeria." Again, section 22 of the Act allows investors local or foreign to buy shares of any Nigerian enterprise in any convertible currency provided such transaction is concluded through Nigerian stock exchange. From the section arise two points for consideration. Whether *Sukuk* for development projects qualify to be an enterprise within the purview of the Act? And whether it is conducted on the floor of stock exchange. Section 33(interpretation) of the Act states, an "enterprise" means an industry, project, undertaking or business owed by a Nigerian or non-Nigerian or an expansion of that industry, undertaking or business. In this thesis, *Sukuk* for mining industry and Sukuk for infrastructure development would be discussed and some structure proposed.

[99] Nigeria Debt Management Office „Sovereign Sukuk Bond", available at: < https://www.dmo.gov.ng/fgn-bonds/sovereign-sukuk> last accessed 20th October, 2017

[100] Julio C. Colon, „Choice of Law and Islamic Finance" (2011) Texas International Law Journal, Vol. 46, PP. 412-424, PP. 412-415

[101] AAOIFI, „Shari"ah Standard No. (17): Investment Sukuk" (2007), PP. 467-487, at Pg. 468, available at <http://aaoifi.com/shariaa-standards/?lang=en> accessed 9th May, 2019

The key words that are essential to this research from the definition of enterprise by the Act, therefore, are “project” and “industry”, these will be extensively explored in chapter 2, 3 and 4. The second issue from section 22 is the requirement that *Sukuk* be marketed through stock exchange. By nature, *Sukuk* is a portfolio investment like conventional bond and has always been traded through the same medium as bond in line with relevant regulations, it has been traded at the floor of London Exchange for example. And the remarkable Nigerian Sukuk of last September was conducted through Stock Exchange via Debt Management Office. As shall be seen in the subsequent chapter, Sukuk, unlike bond, is not a debt, it is an ownership of the underlying asset, and this so because Islamic law does not allow trading in debt. This raises the question as to whether this character of Islamic bond may result in conflict of laws in states where the legal system is not based on *Shari"ah,* like Nigeria.

2.4.2. Sukuk under State Law

As stated above, legal pluralism presupposes the existence of multiple legal systems side by side unhindered. It however presents a complex legal problem as to having to decide which law to govern a particular transaction at a given time.[102] Ideally, *Sukuk* should be governed exclusively by Islamic law, but the reality is however majority of Sukuk issuance have been governed by English common law. In *Nakheel Sukuk* of Dubai of 2009, for building a city twice the size of Hong Kong Ireland at Dubai Waterfront at total cost of $26 billion (USD), the governing law was English law.[103] This is because as noted by one writer, “activities in the Islamic financial sector are not confined to countries whose legal systems are *Shari"ah* based.”[104] Example is United Kingdom which ranked number 9th in holdings of Sukuk asset in the world.[105] Secondly, there is not much difference between Islamic commercial law (*Mu"amalat*) that governs financial transactions and English law. Accordingly, evidence has shown that, Islamic bonds have been successful in countries with legal systems dominated by English common law.[106]

Furthermore, even where the contractual document provides for choice of law, conflict of law that may arise under such circumstances shall be resolved in favour of the law of the state. In

[102] Sally, „Legal Pluralism" (1988) pg.871
[103] Omar Salah, Dubai Debt Crisis: A Legal Analysis of the *Nakheel Sukuk* (2010), Berkeley Journal of International Law, Vol. 4, PP. 19-30
[104] Julio, Choice of Law and Islamic Finance (2011), pp. 412-415
[105] ibid
[106] Ibid

Shamil Bank of Bahrain E.C. v. Beximco Pharmaceuticals Ltd,[107] a British Court was called upon to examine the validity of the contract under Islamic law. It was a financing contract based on *Murabaha* model whereby the parties executed the contractual document and asset of about $47 million (USD) was acquired. The document contained a choice of law clause that reads: "[s]ubject to the principles of the glorious *shari"ah,* this agreement shall be governed by and construed in accordance with the laws of England". The contention of the defendant Beximco, who defaulted on payment, that the agreement is invalid as it violates *Shari"ah*was rejected by the court. The reason of the Appellate Court was that, the clause for choice of law in the agreement cannot stand in the face of 1980 Rome Convention on the law applicable to contractual obligations, which stipulates that only one law shall govern a contract and that the law so chosen must be law of a state. The governing law can either be that of a state that is not necessarily based on Islam, such as Nigeria, or where combined principles of *Shari"ah* apply side by side as the main legal system.[108] Dispute resolution in *Sukuk* will be looked at in-depth towards the end of this thesis.

2.5. Conclusion on the evolution, role and possible use of sukuk in Nigeria

This chapter has looked at historical account of multiple legal systems that shaped Nigeria"s investment framework. From pre-colonial era up until present, several systems had influenced the business regime. Exposition of their respective evolution as well as interaction with one another as presented in this chapter is critical to clear understanding of their role, the terms of their co-existence within the national legal system, and more importantly their interplay in promoting investment and development today.

The chapter pointed out predominance of customary and Islamic law in governing the affairs of pre-colonial Nigeria. Various tribes in the south had subscribed to social norms that had evolved over long period of time and been accepted as common standard to guide conduct in the society. Therefore, people in the South used to lead their economic, social and public lives in accordance with that standard. In contrast, Islam had since 14th century been widely embraced in the north. Although, the practice of subsequent rulers in the north had significantly compromised the ideals and teachings of Islam, the revival movement of Dan

[107] [2004] ECWA (civ) 19

[108] Andreas J., „Islamic Finance: Issues Surrounding Islamic Law as a Choice of Law Under German Conflict of Laws Principles" (2007) CHI. J. Int"l Law, Vol. 7, PP. 537-543

Fodio in early 19th century did eventually bring the entire region back on course under Sokoto Caliphate. Traditional institution of emirates was functioning in a robust manner, with a highly organised judicial system manned by well-trained judges and headed by the emirs. Under this sophisticated and hierarchical structure of governance, principles of Islamic law continued to apply without let or hindrance. Within this region, all activities including commercial and financial dealings were conducted in accordance with jurisprudential views of Maliki Islamic school of thought.

The chapter also discussed the evolution of English legal system in Nigeria and the influence of its commercial principles on Nigeria‟s investment framework. With declaration of Lagos as a colony in 1862, British economic activities intensified in the area and soon thereafter the company Ordinance of 1863 was introduced to guide commercial transactions in the colony. Gradually and somewhat smoothly, English statutes and legal order was made to apply and replace customary norms not only in Lagos but even the rest of southern protectorate. Similarly, the British acquisition of the north in 1904 saw a significant dismantle of Islamic legal system, more gradually and subtly though. By virtue of amalgamating southern and northern protectorates in 1914, applicability of laws in the former were extended to the latter. Ultimately, in the second half of the century, sphere of operation for Islamic law was reduced to Muslim personal matters only, broadly substituting English common law for Shari‟ah in most areas including commercial.

As conspicuously noted in the chapter, this domineering process of common law, was not without resistance, particularly in the north. While the imperial agenda of transforming the pre-colonial legal system in favour of their own imported one was being implemented very cautiously, contestations accompanied the entire period in the north, and to a much lesser degree to there were protests to retain native law in the south. Consequently, the colonial administration could not fail to observe the need for retaining Islamic and customary systems alongside the superimposed English legal systems, and it did so, albeit asymmetrically. Principles of both Islamic and customary law were made applicable only where they are not inconsistent with the received English law or local legislations. The latter is nothing but repackaged and legitimated version of the English law. For most part, allocation of this subservient status to Islamic law continued to be one of the colonial heritages that survived all pre-independence protests and continued to feature even within the local statutes of post-independence era.

Upon attaining its independence in 1960, Nigeria started a new era. Policy and law, relating to economy, took a different dimension. Like many other countries that had just emerged from colonialism, Nigeria focused on internal development through empowering domestic enterprises. Accordingly, most of policy formulation and legislations of this period were not favourable to foreign investors and many of them had to leave. Failure to provide good governance by the subsequent leadership of developing nations coupled with the global economic crisis of 1970s forced a reversal of those investment policies. Nigeria had to follow specific guidelines by the World Bank, as did many other countries, softened its regime to attract external capital through investment. The use of law and policy instruments to create a friendly business environment has continued to be the trend embraced by states to stimulate both foreign and domestic investors.

Given the rise in factors necessitating development in Africa and beyond, competition for investors has naturally increased and innovation became inevitable. One such innovation happens to be Islamic bonds, otherwise known as Sukuk. Like any other business layout, this instrument requires enabling environment necessary for its functional existence. Even though, it is a product of Islamic finance and governed substantially by a branch of Islamic law, Sukuk does not need an ideal Islamic territory in the calibre of Sokoto caliphate to operate. Rather, it is a form of financial inclusion and a pragmatic investment alternative compatible to various frameworks. This chapter did not look at whether or not Nigeria has in place an appropriate structure for this business instrument. However, having recounted the long existence and application of Islamic law side by side with other systems in the country, the chapter has tended to draw a compelling analogy to establish mutual compatibility of two financial orders within a framework. Hence, this chapter has sought to answer the question as to whether the current legal and policy framework for investment in Nigeria is generally tooled to support *Sukuk* investment.

Analysis made in this chapter has shed light on compatibility of *Sukuk* to Nigerian investment regime, not directly though. The concepts of legal pluralism as well as flexibility of Islamic law have made adaptability and applicability of investment tools such as *Sukuk,* feasible in Nigeria. Accordingly, the country had issued its debut Islamic bonds in September 2017. Moreover, the fact that, this Road Infrastructure *Sukuk* issued by the Federal Government of Nigeria was oversubscribed by both Muslims and non-Muslims indicates potentials of this investment mechanism in Nigeria, on one hand. On the other, this widespread patronage would dislodge any allegations that, institutionalising financial inclusivity in Nigeria is tantamount to an effort to islamise the country wholesale. Overall, this chapter has demonstrated that, given the pluralism of Nigeria‟s legal system and openness of its business framework, Sukuk is not incompatible to the current investment regime. Nevertheless, assessing conduciveness of the existing legal and policy structure to facilitate sustainable and productive Sukuk in Nigeria is beyond the ambit of this chapter. Thus, subsequent chapters will examine nature and needs of specific sectors, namely mining and infrastructure, where demand for investment is particularly high, and further evaluate potentials of the current legal and policy regime to stimulate development in these sectors through investment and *Sukuk.*

The next chapter reviews the critical literature on mining, law and development with specific reference to the differentiated regulatory needs of the mining sector, as well as issues of Corporate Social Responsibility (CSR) and the need for innovative financing strategies to enhance investment prospects and deliver sustainability.

3. Chapter Three: Key Themes and Issues (Literature Review)

3.1. Chapter Overview

The aim in this chapter is to explore the relationship between four following dimensions: law, development, investment, and *Sukuk* in order to contextualise their meanings within the conceptual framework of this thesis. This chapter also discusses the role of state and investors in the management of natural resources of a country. Although, minerals belong to the collective people of a state as their common wealth, the legal ownership of these resources is entrusted in the state authorities to manage it for sole purpose of creating prosperity for the citizen. Owing to the complexity of unearthing these resources, which requires huge capital and technical know-how, it has always been critical for governments in Africa to involve specialised multinational enterprises. However, as these companies are profit-oriented entities, the process of attracting them into a country as well as terms of engagement, with reference to exploration and exploitation of the minerals, is not without challenges. For example, the state would need to fulfil certain requirements, indicating not only the extent of geological prospects it holds, but also what kind of protection is available for potential investors. These challenges are discussed in this chapter.

Further, the chapter highlights the relationship between mining and development. In mining context, both the exploitation of minerals to generate revenue, and the proper redistribution of such revenue is referred to as “development”. Thus, development could be one of successful outcome of mining. The chapter explores relevant literature to argue that, while both the state officials and private investors have responsibility to deliver mining benefits to the citizens, yet, basic development challenges, namely socio-economic issues, have continued to characterized the living condition of the resource-endowed countries of Africa, including Nigeria. Current regional and international efforts aiming, respectively, at including development agenda in the state mining legislation and mapping up mining to SDGs, are assessed in the chapter. Although, generally at the centre of mining issues across developing nations is the failure to pacify the community as a stakeholder, the main challenge in Nigeria specifically has been lack of investors.

Finally, this chapter looks at the multidimensional role of law in relation to myriad of challenges mentioned above. In as much as it is important to adopt legislative provisions necessary to stimulate FDI, it is also critical to consider innovative investment tools such as Sukuk through the instrument of legal pluralism to effectively address lack of investment in the mining sector of Nigeria. Overall, the chapter argues that, beyond responding to the need for investment capital, Sukuk instrument has the potentials of creating proactive role for the community given its character of financial inclusion. Nevertheless, Sukuk requires appropriate legal structure to support its smooth flow in a country like Nigeria. Hence, a comprehensive legal framework for investment is crucial.

3.2. Mining and Law

Mining is defined as "the industrial process of removing a mineral-bearing substance from the place of its natural occurrence in the earth‟s crust".[109] This includes oil and hard minerals. Minerals resources have always been a precious treasure of all societies since pre-modern history and with modern technology and industry development the world became even more dependent on the extractive products than ever before. Due to its critical economic value today, in most countries of the world, ownership, control and management of minerals vest with the state authorities to hold in trust for the benefit of their entire population.[110] The global demand for minerals creates potentials in the resource to generate revenue needed by states to provide prosperity to their citizens on one hand, and return on investment for business entities, on the other. Thus, by virtue of these economic and social opportunities, it brings various stakeholders-state, private investors and communities-and bind them together in a complex relationship through the instrument of law. Law becomes relevant because, for this multi-layer relationship to succeed there is need for not only substantial partnership between the stakeholders, but also a well-defined and smoothly regulated set of duties and obligations for each party. Law is the most available instrument to do that.[111]

At the centre of the debate about mineral wealth is the community or citizens of a state. To create a condition whereby economic prosperity and social as well as political rights can be

[109] P.V. McDade, „Materials on Mineral Law; A Survey of U.K Comparative and International Legal Issues Relating to Hard Minerals‟, Vol. 1 CMPL University of Dundee, pp. A1-01(quoted in Walied E., *Mineral Investment Under the Shari'ah Law* (London: Graham and Trotman; 1993), pg. 17)
[110] Eghosa and Linimose, „Foreign Direct Investment and the Law in Nigeria‟ (2016), PP. 126-127
[111] Wolfgang G. Friedman, „The Role of Law and the Function of the Lawyer in the Developing Countries‟, (1963) Vand. L. Rev., Vol. 17, PP. 181-191

enjoyed by individuals, rule of law is necessary. According to the International Congress of Jurists (1995), "The rule of law should be employed not only to safeguard and advance the civil and political rights of the individual in a free society, but also to establish social, political, educational and cultural conditions under which his legitimate aspirations and dignity may be realised."[112] Equally, states use the policy and regulatory instrument to attract investors and to direct their conduct in a certain desired way to benefit its citizens. Fall or rise in the flow of both foreign direct and portfolio investment is often achieved by governments change to its regulatory framework.[113] Investors are generally attracted to countries with fiscal regime favourable to their investment, tax relief, easy documentation processes and effective dispute resolution mechanisms. States persuade investors through these elements of the mining law (regulatory framework).[114] To sum up, law is the ligament bonding the stakeholders around mineral investment, thus law will continue to feature in discussing the relationship between mining and other concepts below.

However, besides all these opportunities, mining also presents myriad of challenges. Adverse impacts of mining affect social and environmental lives. To reduce the negative effect of resource extraction on human and the ecosystem, stakeholders are world-wide committed to the global agenda for sustainable development.[115]

3.3. Mining and Development

3.3.1. Exploring the relationship between mining and development

Scholars have attempted to explain the relationship between "mining" and "development" in different ways. According to Friedman, [116] the gap between economic fortunes of a given state and the level of social prosperity available to its citizens defines lack of development. To bridge this gap (in other words to bring development) use of law is not only desirable but also necessary as constitutional and statutory amendment is the only way to effective change of social dynamics in a state. This definition of development as failure to translate wealth into

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[112] Congress of Jurists, 1995 (quoted in Seidman, *The State Law and Development* (1978), pg. 17
[113] Congress of Jurists, 1995
23 Thomas W. Waelde, „International Energy Investment", 17 Energy L.J. (1996), PP. 191-215
[115]A.T. Kearney, „Mining Takes on the Sustainability Challenges: Article on Mining and Metal" (2019), PP. 4-10 available at: <https://www.atkearney.com/metals-mining/article?/a/mining-takes-on-the-sustainability-challenge> , accessed 10th January, 2019
[116]Friedman., The Role of Law (1963), PP. 181-191 at Pg.183

basic civic needs, is consistent with the practical realities of many developing countries including Nigeria as described by a World Bank report that, „even with the large economy in Africa such as Nigeria, their challenge has been the failure to translate growth into widespread earning opportunity for its people.[117] However, this refers to the relationship between state and its citizen within the context of human development only. The interface between mining and development goes beyond that.

Friedman[118] argues that, in the context of modern multi-stakeholder interface, the significance of "mining" to "development" process is even more pronounced. He gave the example of a complex investment relationship, where rather than simply two individuals were involved as parties, it is a foreign company with special know-how getting involved to develop an asset (e.g, minerals) belonging to a sovereign authority, while a third party to provide the financial commitment known as „capital", with a community living next to the project and participates actively as a host. Although, this kind of project has been the major source for economic fortunes of many states in the world, it does also potends serious threats to both society and environment. Challenges ranging from disturbing use of land (affecting dwellings, earnings and agrarian lands); contamination of water (affecting human consumption leading to serious health issues); to air pollution and issues to do with mine pits closure.[119]

Considering the serious nature of the negative consequesncies of the mining industry, the international community formed a global synergistic response initiative in the form of the Sustainable Development Goals (SDGs) in 2015, to address a range of development issues. One such issues happen to be the menance of "resource curse". To realise full socio-economic benefit of mining for current and future generation, international community have collectively conceived the SDGs, which all stakeholders, including Nigeria, are committed to achieve by 2030.[120]

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[117] World Bank Development Indicator (2011), available at: https://databank.worldbank.org/data/source/world-development-indicators> accessed 30th April, 2019

[118] Friedman, The Role of Law (1963), PP. 181-191

[119] A.T. Kearney, „Sustainability Challenges" (2019), PP. 4-10, available at: <https://www.atkearney.com/metals-mining/article?/a/mining-takes-on-the-sustainability-challenge> , accessed 10th January, 2019

[120] United Nations Sustainable Development Solution Network, „Mapping Mining to the Sustainable Development Goals: An Atlas" (July, 2016), a white paper submitted to the World Economic Forum, PP. 3-4, available at <http://unsdsn.org/wp-content/uploads/2016/11/Mapping_Mining_SDGs_An_Atlas.pdf > accessed 15th July, 2018

The Sustainable Development Goals (SDG) are comprised of 17 goals aiming at, among other things, addressing the adverse impact of mining on the environment and the community on one hand and realising social benefits and preserving the environment alongside economic development. The goals include among other things, clean water and sanitation, poverty eradication, peace and strong institutions, infrastructure and economic development. Global stakeholders assert that, mining industry has the potentials to deliver on all the goals if properly managed, and warn that, the same industry can prove devastative if abandoned. Therefore, all stakeholders-governments, investors and communities-are bound to adopt SDGs into their practices.[121]

3.3.2. Implimentation of development strategies and agendas

States primarily exist to create good life and prosperity for its people through harnessing and effective management of national resources. Accordingly, upon emergence from colonialism developing states across Africa, Asia and Latin America consolidated their sovereignty over all resources (natural resources in particular) and came up with policies meant to foster national development through empowering domestic enterprises and rejection of foreign domination.[122] These internal efforts were, to some extent, internationally supported. Through the united nations, sovereignty of states over their political and economic affairs were strongly upheld. Also to help national government facilitate development and formulate effective policies multinational organisations like World Bank and IMF were established.

Following the financial crises of 1970s through to 1980s, it became clear that due to factors associated with poor governance, government in developing states have failed to deliver development as many of the state were under huge debt. Thus, neoliberalism was introduced. In effect, the concept of governance was reinterpreted to bring in private sector as partners with states in ensuring development. Consequently, Structural Adjustment Programme (SAP) advocated through the World Bank encouraging states to soften their investment regime and privatize national enterprises in order to allow more participatory power to corporate entities.[123] The thrust of this model is to limit states" role to be a regulator defining the role for investors to

[121] UNSDSN, „Mapping Mining to SDGs: An Atlas" (2016), PP. 3-4
[122] Samuel K. B. Asante, „International Law and Foreign Investment: A Reappraisal" (1988) International and Comparative Law Quarterly, vol. 37, pp. 590-592
[123] Adaeze Okoye, „Exploring the Relationship between Corporate Social Responsibility, Law and Development in an African Context" (2012) International Journal of Law and Management, Vol. 54, no. 5, PP. 364-378

play in development agenda. Thus, regionally AU has directed member states to integrate national development agenda into their respective investment legislations.[124]

Although, mining legislations in Nigeria have incorporated CSR, and the country also participated in various international development initiatives such as SDGs and UNDP among others, but yet development indicators have consistently rated the country as one that suffers severe development challenges. Recent literature blames this situation on poor governance, archaic and inadequate investment regulations. The latter is said to have caused significant divestment from the country"s natural resource sector (Nigeria Extractive Industry Transparency Initiative Report, 2016; US Assessment of Nigerian Energy Sector).

3.3. Mining and Investment

3.3.1. FDI and Investment in the Mining Sector

Due to lack of technical know-how and financial capacity necessary to undertake mineral extraction, developing countries including Nigeria must rely on foreign investors to develop such resources. Generally, investment comes in the form of FDI or portfolio investment. FDI has been defined by UNCTAD as „an investment involving a long-term relationship and reflecting a lasting interest and control by a resident entity in one economy in an enterprise resident in an economy other than that of the foreign direct investor".[125] It is also defined as "Flow of business capital, technological and management know-how from foreign entities into an economy of a state with a view to obtain the target returns over specific period of time."[126] While portfolio investment is a movement of capital to acquire interest (not control) in an already formed and functioning enterprise, the interest could be shares or any other instrument through which company raises capital for its operation.[127] This includes *Sukuk* bonds. These definitions highlight the positive role of FDI in explaining why resource countries compete to attract them. Cave[128] has summarised the benefits of FDI as:

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[124] ECOWAS Harmonization Directives (2008); African Mining Vision (2009)
[125] UNCTAD Definitions, available at: <https://unctad.org/en/Docs/wir2007p4_en.pdf> last accessed 18th October, 2018)
[126] Sornarajah, M. *The International Law on Foreign Investment*, (Cambridge: Cambridge University Press, 2010), Pg. 8
[127] Ibid
[128] Caves, R.E. *Multinational Enterprise and Economic Analysis* (Cambridge: Cambridge University Press, 1996), Pg. 104

The effort made by various countries in attracting FDI are due to the potential positive effects that this would have on economy. FDI would increase productivity, technology transfer, managerial skills, know-how, international production network, reducing unemployment, and access to external market.

Generally, after the Second World War, FDI acquired a prominent position in the global economic landscape, but its gradual control over economic and political affairs of host states has generated criticism. Common criticism includes the tendency to crowd out domestic enterprises, and undue interference with governance regimes thereby undermining socio-economic development. For this reason, governments in developing countries have viewed FDI as a potential threat to their sovereignty.[129] This is a pattern of the situation that prompted nationalisation policy in 1970s, where host states took over foreign businesses. Despite these negative elements, FDI remains crucial to developing countries until there is alternative source of investment.[130] Economists believe that once the potential benefits provided by FDI can be created locally, FDI will no longer be relevant. They maintained that, as domestic enterprise will naturally be better informed about internal business environments, there must be certain prevailing conditions to warrant FDI. Yet foreign firm possess certain advantages that allow them to pursue investment, which includes ability to generate finance from abroad, mobilise technology and take risks in a way that domestic companies are unable to do.[131]

However, the reason for which states attract foreign investor, then on the flip side of the coin one may ask what is it that the investors look for? The answer is business-friendly environment, and this is always gleaned from the legal framework of a state.[132] Law enables smooth and productive transactions between states and resource developers. Through mining regulations, host governments in developing countries seek to achieve national growth both economically and otherwise, with the principal objective of investors being to maximise shareholder benefits from the investment and increasing their capital base. Generally, in deciding where to invest their capital, mining companies primarily look at the investment legal framework of a particular state to assess and ascertain whether the jurisdiction is an attractive one. Thus, to attract investment, sovereign states need to frame their investment

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[129] Vintila Denisia, „Foreign Direct Investment Theories: An Overview of the Main FDI Theories" (2010) European Journal of Interdisciplinary Studies, Vol. 2, no. 2, PP. 104-110

[130] Denisia, „Foreign Direct Investment Theories" (2010) PP. 104-110

[131] Ibid, pp. 104-110

[132] Walied E, *Mineral Investment Under the Shari'ah Law* (1993) PP. 35-43

policy and laws in ways that capture not only their own developmental goals but also the legitimate interests of private enterprises as potential development partners. It is from this concept that the theory „investors are attracted to a system that is predictable and efficient"[133] has emerged.

3.3.2. CSR, Mining and Investment

In a qualitative study assessing the extent to which Nigeria"s legal framework promotes investment, Ekhator and Anyiwe[134] found that, there is downturn of investment flow into Nigeria due to some limitations in the law, which impede the desired level of investment in all sectors including minerals. This limitation has to do with provisions on responsibility of investors to contribute towards community development. The authors conclude that, the „amendment of the extant laws regulating the different sectors is necessary to encourage social and corporate responsibility; and improve and promote the inflow of FDI into the country".[135] Literature also indicates that, existence of clear and effective provisions on how mining benefit be delivered to the citizen provides assurance of safe environment to investors, and failure to make such provisions has led to tensions and ultimately significant divestment from Nigeria"s extractive industries.[136] It is therefore in the interest of all stakeholders that, states make laws defining clearly and seeking to enforce effectively the role of investors in community development. Scholars have however differed in their opinion as to whether hard or soft law is appropriate to be adopted by states in framing the provisions for corporate social responsibility of the investors. Hard law refers to law in a form of command followed by sanction, while soft law entails use of law in its liberal sense as persuading instrument seeking to achieve its goal through incentives rather than threat of punitive measures.

3.3.3. Relationship between CSR, Law and Development

[133] Amanda Perry, „An Ideal Legal System for Attracting Foreign Direct Investment? Some Theory and Reality"(2000), Vol. 15Am. U. Int'l L. Rev. PP. 1627 - 1628
[134] Eghosa and Linimose, „FDI and the Law in Nigeria" (2016), PP. 126-127
[135]Ibid
[136] Kendra, „Community Development in Mining Laws" (2014), PP. 200-2015; U.S. Energy Information Administration Report on Nigeria (2016), available at <https://www.eia.gov/beta/international/analysis.php?iso=NGA> accessed 8th August, 2016

Corporate Social Responsibility (CSR) is a growing part of the discourse on the role of investment firms in the resource extractive industry. The work of Okoye[137] on the relationship between CSR, Law and development in an African context" is particularly relevant. In the article, Okoye reviewed extensive literature on governance and perception of development in African context. Furthermore, the author reiterated the growing perspective on governance which views private sector as partners to state in development agenda. In the light of this perspective, Okoye then assessed various approaches to CSR obtained in different developing countries, especially African. Below are the major arguments of Okoye.

First, she argues that, the traditional view of CSR as a charity and voluntary initiative by investors cannot achieve development. States need to regulate CSR through the instrument of law. However, the role of law is to define and concretise CSR objectives to cover basic development challenges peculiar to African states. Therefore, contrary to the standard view of CSR in developed countries promoting elements such as consumer protection and climate change among other things, the African version need to be more concerned with socio-economic challenges. [138] Also she argues that, states‟ performance on development might have direct impact on CSR, unless states themselves are seen to be leading by example any attempt to regulate the private sector is likely to fail.[139] Okoye‟s last but more important argument is about the appropriate type of law to be used in framing corporate obligations towards development.

Okoye finally suggest that, the major issue with regulating CSR in African lies in the conceptual misperception of "law" and "CSR". While investors view their corporate contribution to development as voluntary, governments‟ authorities in Africa tend to use only hard law rather than adopting holistic approach to the use of law. Okoye argues that, this element of state officials seeking to control investors by way of punitive law was responsible for the failure of a CSR Bill (208) in Nigeria.[140] In essence, the author found that, even though the traditional perception of CSR as mere voluntary investor initiative is increasingly fading out, yet seeking to impose CSR by way of mandatory legislation could be

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[137] Okoye, „CSR, Law and Development‟ (2012), Pg. 368
[138] Okoye, „CSR, Law and Development‟ (2012), PP. 372-373
[139] Ibid, Pg. 374
[140] Ibid, PP. 370-372

counterproductive. She concludes, „consequently, law which is broadly conceived considering hard law and soft law, appears most relevant in this category.‟[141]

3.3.4. A Critique of Okoye‟s Paper

Okoye‟s argument that, the major problem of engagement between state and investors in relation to CSR lies in the dominance of using law in command fashion, is not always the case. African countries, including Nigeria, have incorporated CSR of mining companies into their Mining legislations. It is the same Nigeria‟s parliament passed the mining legislation in 2007 and rejected the said CSR Bill in 2008. In the mining sector, CSR is referred to as Community Development Agreement (CDA). CDA in most mining jurisdictions of African is couched in mandatory language. Section 116(1) of Nigeria‟s Minerals Development Act 2007 declared mandatory for a holder of mining lease to sign CDA before commencing any work. Moreover, sub-section (5) made it further clear that, CDA is binding on the parties. Nevertheless, evidence from empirical study indicates that, use of hard law in CDA has not recorded any damage to state-investor relationship. In the contrary, CDA signifies quality of regulations and security in a country and thereby attracts FDI.[142] Kendra[143] concludes:

> *As both cross-national data and the case of Sierra Leone demonstrate, states are seeking to attract foreign investment into their mining sectors by imposing higher regulatory standards, and they are using community development legal provisions to communicate the security of their investment environment to potential investors. This challenges the conventional wisdom that globalization necessarily leads to regulatory races to the bottom, including in the mining sector.*

Moreover, Okoye‟s paper did not seem to have considered rival explanation contained in other existing literature as to why bills to do with CSR in oil and gas sector such as Petroleum Industry Bill (PIB) and CSR Bill 2018 were unsuccessful. Reports from Nigeria‟s Extractive Industries Transparency Initiative (NEITI) for example cited a different reason. Things including lack of efficiency in governance, transparency problem, and conflicting interest

[141] Ibid, Pg. 373
[142] Kendra, „Community Development in Mining Laws‟ (2014),1, PP. 200–215, at pp. 206-207
[143] Ibid, Pg. 211

among politicians and bureaucrats of regulatory institutions, as well as systemic corruption rather than strict regulations.[144]

3.3.5 Community Development Agreements and their implementation

CDA represents an important milestone of the recent process for reforming the mining sector in Nigeria. Sections 116 and 117 of Nigeria"s Mining Act, 2007, creates robust framework for CDA. Objectives of CDA were consistent with particular needs of Africa"s communities, as they reflect all basic socio-economic and environmental challenges. However, research highlight some important concerns with practicality of the agreement in African nations (Nigeria inclusive). Ekhator and Anyiwe[145] feared that CDA implementation might be unlikely in Nigeria. Because institutional decay and poor governance which defeated CSR in oil sector are still present in the state. The author assert, „Arguably, the weaknesses of the extant MOU/GMoU initiatives in the oil sector will be replicated in the solid minerals/steel sector in Nigeria."[146] Nwapi[147] pointed out two major shortcomings of the CDA to include representation and capacity building.CDA regime did not provide for who should represent the community or how such representation be drawn up. Nwapi highlighted that it is important to specify representative, because there is tendency of people to disagree on this point. Nwapi[148] argues:

> *The only exception is Kenya's Draft CDA Regulations, which prescribe the membership of the CDA monitoring and implementation committee. But this is only a limited exception, because the committee is charged only with implementation of a CDA that has already been concluded and approved. The guidelines do not apply to the negotiation of CDAs. Meaning that dominant groups within a community may hijack the negotiation process. Since CDAs result in benefits to the community, such as employment and educational scholarships, the groups which dominated the*

[144] Nigeria Extractive Industries Transparency Initiative (NEITI) Report (2018), available at: <https://eiti.org/nigeria> accessed 12th September, 2018
[145] Egose and Linimose, „FDI and the Law in Nigeria" (2016) PP. 132-134
[146] Ibid, Pg. 133
[147] Chilenye Nwapi, „Legal and Institutional Frameworks for Community Development Agreements in the Mining Sector in Africa" (2017), The Extractive Industries and Society, Vol. 4 PP. 202–215, at PP. 212-213
[148] Ibid, Pg. 213

negotiation process are also likely to dominate in the enjoyment of the benefits. In addition, the draft regulations do not

Similarly, hesitance of major foreign investors to invest directly in Nigeria"s solid mineral sector despite proven geological potentials has been linked to investors being unsure of the "business-enabling environment". In spite all incentives necessary for investment prosperity put in place by the government, yet the major challenge is that the mining sector is beset by lack of capital; the sector is dominated by local artisanal miners who are skilled but lack technology and capital, while foreign investors are hesitant to step into the country.[149] This situation creates a gap which portfolio investment can set in. Although, this thesis is equally concerned with concretising the provisions on the right of people to socio-economic development, it focuses on examining *Sukuk* portfolio investment as a viable means to generating investment capital for mining from within and outside Nigeria.

Portfolio investment theory asserts that, „as long as there is no risk or barrier in the way of capital movement; the capital will go from countries with low interest rates to countries with high interest rates."[150] However, this definition was rejected by some other economist stating that, no barrier to capital flow in business reality and it can move freely in any direction.[151] High interest rate in the above quote is taken to mean high return on investment, which is the profit yield for purpose of *Sukuk* in this thesis. It is therefore clear from the theory that, what attracts capital for portfolio investment is the return on investment (i.e. high interest rates) across jurisdictions. Thus, it is also safe to theorise that, potentials for high return created as incentives within investment framework, might attract capital through *Sukuk* portfolio.

3.4. Mining Law and Sukuk Investment

2.4.1. Introducing Sukuk and Islamic Financial systems

Sukuk can be loosely translated as "Islamic bonds", but more accurately as "Islamic investment certificate." The word *Sukuk* is a plural of the Arabic word "*Sak",* which is a long-standing parlance within the classic Islamic commercial law, referring to a paper that represents undischarged financial obligation. Historically, first appearance of this term was in

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[149] Nigeria Mining Investment Promotion Brochure, 2017
[150] Denisia, Foreign Direct Investment Theories (2010), p. 105
[151] Ibid

7th century, when the second caliph, Omar said, "I have been presented with a Sak, due for redemption in the "month of Rajab", but which Rajab? Last, present or the following year? Hence, we need to have a calendar system to have our transactions properly dated."[152] There is a widely documented claim that the conventional word "check" is an onomatopoeia of the Arabic word "*Sak"*[153] In nowadays financial world, *Sukuk* are translated as „Islamic bonds", but many researchers object to this loose translation, arguing that *Sukuk* is broader than the word „bonds" and therefore should rather be translated as Islamic „investment certificates"[154] This is consistent with the official definition of *Sukuk* provided by Accounting and Auditing Organisation for Islamic Financial Institutions (AAOIFI), where the word „bond" has completely been avoided. Eventually, the AAOIFI definition, which emerged in the year 2003, seems to be accepted as the most official definition of *Sukuk* so far, it reads as "*Sukuk* are certificates of equal value, which represent an undivided pro-rate ownership of underlying assets…." The major problem with this definition is that, it has failed to make reference to the ethical dimension within which Islamic finance sits. The working definition adopted in this study will be, "Investment instrument structured along ethically oriented Islamic principles".

Sukuk as Islamic bonds continue to gain popularity throughout the relevant literature for obvious reason of similarity between the two. Selim Cakir and Faezeh Raei have maintained that, "*Sukuk* are, in many respects, similar to conventional bonds. They further noted that, *Sukuk* are also considered to serve as security instruments that provide a predictable level of return; they are traded in the secondary market albeit less than conventional bonds; they are assessed and rated by internal rating agencies; and are mostly cleared under Euroclear (listed in Luxemburg)". Nonetheless, they also noted some key differences, "For example" they continued "an Ijara (lease) contract that is often used to structure sovereign *Sukuk*, creates a lessee/lessor relationship which is different from a lender/borrower relationship. Investor protection mechanism for *Sukuk* remain largely untested, taxation could also become an issue to certain investors where the legal basis for taxation of Islamic securities is not legislated in the home country".[155] Additionally, the authors have noted further differences relating to

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152 Multaq Al-khutaba, „The History of Islamic Calendar" (2019) (in file with the researcher)
153 Yahia Abdul-Rahman, *The Art of Islamic Banking and Finance: Tools and Techniques for Community-based Banking* (New Jersey: Wiley & Sons, 2010), PP. 84-128
154 Ali Alshamrani, „*Sukuk* Issuance and its Regulatory Framework in Saudi Arabia" (2014), Journal of Islamic Banking and Finance, Vol. 2, No. 1, PP. 305-333
155 Selim Cakir and Faeeh Raei, „*Sukuk* vs Eurobonds: Is There a Difference in Value-at-Risk" (2007) International Monetary Fund Paper, PP. 1-20

issuance and market behaviour that would be considered later. Yet, the main factor underlying the distinctiveness of *Sukuk* is beyond what has so far been mentioned.

According to Omar Salah[156] *Sukuk* are structurally unique, and this uniqueness is due to something owing to the main origin, "the *Shari'ah* background of *Sukuk* results in concrete requirements, which in turn determine the formation of *Sukuk* structure".[157] Concrete requirements refer to ethical standard set up by the principles of Islamic law governing commercial activities which all financial products, including *Sukuk*, must adhere to. The ethics fundamentally require that, money should be seen as a medium of facilitating a trade but not a tradable commodity in its own right, and therefore no interest shall be paid or received for lending it, and by extension, this rule applies to any instrument representing money e.g. debt (such as bond), hence cannot be traded according to Shari"ah. This second requirement is however contestable as some scholars view the permissibility of trading in debt, which is the reason why Malaysia endorsed trading *Sukuk* structured as debt instrument.[158] This represents a minority opinion though. By operation, the view of majority imposes the essential requirement for tangible asset in structuring *Sukuk* so that ownership thereof can be conferred on the potential investors (*Sukuk*-holders) through issuance of the *Sukuk* certificates to them, making it thereby legitimate commodity that can be lawfully traded in the secondary markets after issuance.[159]

Although, *Sukuk* differs significantly from traditional bonds, it serves similar purpose as the latter in terms of generating finance for the issuing body. Mining, on the other hand, is a capital-intensive project, and as such, companies involved in resource extraction need liquidity to carry out the project. More so, one of the conditions for obtaining the lease is, applicant companies must demonstrate financial capability to undertake the project, in addition to technical know-how. Under corporate finance arrangement, *Sukuk* hold potentials to provide mining corporations with the much-needed funds for the operations. However, when *Sukuk* are used by companies registered and regulated in accordance with common law tradition, then question of legal pluralism arises. At times, when parties to *Sukuk* investment fail to indicate their choice of law clearly, conflict of laws become inevitable.

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156 Salah, 'A Legal Analysis of the *Nakheel Sukuk"*(2010), PP. 19-32

157 Salah, „A Legal Analysis of the *Nakheel Sukuk"*(2010), Pg. 20

158 Zulkhibri Muhamed, „A Synthesis of Theoretical and Empirical Research on Sukuk" (2015), Borsa Instanbul Review 15-4 (2015) 237–248

159 Alshamrani, „*Sukuk* Issuance and its Regulatory Framework in Saudi Arabia" (2014), PP. 305-333

Beyond its legal framework, this study is equally interested in how the *Sukuk* affect the mining outcomes. To assess the outcome, one may need to know what the objectives of mining are. Although, mining is fundamentally to generate revenue for the host state through rents payment, royalty and tax regime, it is also to create profit and return on investment for the benefit of multinationals who have risked their capital and technical knowledge. Above all however the right of the host communities to benefit as stakeholders is one important objective of mining. While, the respective interest of these stakeholders may not run *pari passu* with one another, an ideal framework must be able to provide for, and reconcile between these competing objectives. Contrary to the practice of many less developed jurisdictions including Nigeria, investment regimes envisage that, communities in the host state should drive greater benefit from natural resources compare to any of the two other stakeholders. *Sukuk* is a kind of bond but a participatory bond, its nature allows for multi-stakeholder participation, which entails participation of various parties. Now the question is whom does the minerals belong to?

In Nigeria, the law vests the ownership of all mineral resources in the government of the federation as a trustee to regulate and manage it for the ultimate benefit of the citizens of Nigeria.[160] More so, the right of people to socio-economic development has been sanctioned by regional and international instruments on human right. The African Charter on People and Human Right and United Nations Covenant on Social, Economic and Cultural Right have both declared that, there is obligation on the states to work towards full realisation of those rights.[161] Article 3 of the International Convention on Economic, Social and Cultural Rights (1976) states, „The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.‟; and Article 22(1&2) of African Charter on Human and Peoples Right (1986) provides, „All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the

[160] S.44 of the 1999 Constitution of the Federal Republic of Nigeria; s. 1 of the Nigeria Minerals Act (2007); and s. 1 of the Petroleum Act (1969) of Nigeria, have all vested ownership of mineral resources in the Federal Government of Nigeria. However, the beneficial ownership of those resources is vest in the collective people of Nigeria. Because, the same constitution provides that, the government shall harness the resources of the nation and promote national prosperity and an efficient, a dynamic and self-reliant economy (S. 16(1). Exploitation of natural resources is prohibited for any reason whatsoever except for the benefit of the community (S. 17(2(d).

[161] The International Convention on Economic, Social and Cultural Rights (1976) and African Charter on Human and Peoples Right (1986)

common heritage of mankind. States shall have the duty, individually or collectively, to ensure the exercise of the right to development." This creates not only social responsibility but also the obligation to bring the laws to benefit the people. While many African states have already incorporated this obligation into their national constitutions, yet social and economic rights of citizens remain non-justiciable in Nigeria.[162] For this and other inadequacies, this study would recommend holistic reform of the legal and policy framework for both investment and development in Nigeria, and how would bringing *Sukuk* into the framework facilitate realisation of those rights?

Like all other concepts, the concept of *Sukuk* has also been challenged. Critics assert that *Sukuk* instrument is a religious tool; not professional as there is no sophisticated global standard for regulation and accountability like that of conventional bonds. However, *Sukuk* are not merely a religious instrument, rather it is a pragmatic investment vehicle that has been used by many countries (including secular ones) around the world; it is also ethical, non-exploitative and driven by results; and it can be listed as national or international stock, either private or sovereign. Under corporate finance structure arrangement, the private *Sukuk* have had a track record of potentials in raising much-desired capital for mineral development in many jurisdictions including in the United States. Of course, its governance would involve certain aspect of *Shari"ah* law principles, but yet dominated by national and international financial regulations. These layers of law governing its transaction are more likely to provide checks and balance rather than a loophole. And this formal description is, arguably, the framework.

3.4.2. Legal framework for Sukuk

Numerous studies have indicated the significance of a legal framework to smooth and orderly conduct of any important transaction. For law is essential to existence of ideal state and society. According to Elsie Addo Awadzi, "Sound public debt policies and debt management practices require robust legal underpinnings". Examining the main characteristics of comprehensive legal framework for managing any sovereign bonds, the author asserts that, "a good PDM legal framework will reflect an optimal balance between flexibility (power of

[162] S. 6 of the 1999 Nigerian Constitution made it clear that, provisions of chapter 2 thereof, which contains all socio-economic rights are non-justiciable. Countries like South Africa have got rid of this obstacle (non-justiciability) in order to allow for full commitment and sense of accountability towards development on side of the state.

government to borrow) on one hand and appropriate constraints on the other. A well-designed legal framework helps to promote clarity, transparency and discipline, which ultimately support sustainability objectives". He further stated that, in assessing legal framework of any affairs in a particular jurisdiction, the sovereign document of that state (i.e. constitution) should constitute the first pot of call.

In structuring out demography of government, the constitution allocates fiscal powers and authority to borrow across the respective levels of government, and then confers legislative powers on the parliament to enact subsidiary laws in that regard. Looking at the subsidiary laws of different jurisdictions, the study found that legal framework of several states may differ from one another in material. While some states would treat any contravention of the law in a bond transaction as a serious violation of the framework capable of vitiating the entire contract, other states do not consider it to be more than mere irregularity. Overall, the study concluded that "generally addressing weaknesses in the existing legal framework should be pragmatic and be carefully calibrated to help meet reform objectives". [163] This study has two main limitations. First, it addresses public debt management framework only. In other words, it focuses on sovereign bonds and did say nothing about private bonds. This is significant because investors would require more of legal protection when dealing with private entities particularly in matters relating to bonds for the obvious fact that government has better ability to redress loss in the event of default. Second limitation of this study, which is more relevant here, happens to be the failure to address specific demands of Islamic bonds. This is crucial as *Sukuk* have unique requirements in addition to the general characters they share with the conventional bonds that might not be covered by the PDM framework.

3.4.3. Legal framework for Sukuk issuance in Saudi Arabia

Alshamrani[164] extensively reviewed the regulatory framework that governs *Sukuk* issuance in Saudi Arabia and found that, despite the distinctive nature of *Sukuk* which naturally demands a specific regulatory framework, there is no such provision in the current legislation of the Kingdom. Instead, *Sukuk* have been defined and regulated by the policies meant and structured for the purpose of debt instrument in the Kingdom. There are two bodies of law that regulate Saudi Capital Markets: Capital Market Law (CML) and the Offer of Securities

[163]S. 6 of the Constitution of the Federal Republic of Nigeria Nigerian, 1999
[164]Alshamrani, „*Sukuk* Issuance and its Regulatory Framework in Saudi Arabia" (2014), PP. 305-333

Issuance Regulations, both are administered by a statutory body known as Saudi Capital Market Authority (SCMA) which was established by Royal Decree No. M/30 of 2nd July, 2003, but neither of them made mention of *Sukuk* or any of its derivatives. Lack of legislation to cater for the special character of *Sukuk* investment has had and might continue to have serious implications on *Sukuk* investment in the Kingdom.

The author mentioned three consequences of Saudi framework. Firstly, he noted that, failure to provide for Sukuk in the regulatory framework explains why there was no issuance of *Sukuk* in the Kingdom until 2004; all the issuances made so far (about fifteen in total) were made under and in accordance with the Offer of Securities Issuance Regulations, which defines *Sukuk* as debt instrument, and this definition sharply contradicts the inherent nature of Islamic bonds; and finally, the failure of the current framework to „provide for an efficient mechanism necessary for setting up and maintaining transaction-specific special purpose companies, has created considerable obstacles thereby hindering investors ability to gain access to capital markets". To bring the Saudi framework into conformity with the essentials of *Sukuk* investment consistent with Shari"ah principles, the author suggested that, there must be a *Shari"ah* Advisory Committee with mandate to scrutinize issuance and check for compliance, and the current securities dispute resolution mechanism be amended to accommodate *Sukuk* disputes.[165] The focus of this paper is geographically limited as it investigates only Saudi Arabia whose Islamic finance industry is not yet as sophisticated as those of countries such as Turkey, Malaysia and UAE.

3.4.4. International Approaches to Sukuk

The widespread issuance of *Sukuk* by both sovereign and corporate entities is a testimony for the need of proper regulation to ensure smooth governance of those transactions. Countries from not only south Asia and Middle East but also Europe and Far East have embraced Islamic bonds, and due to its distinctive nature, the need to provide a suitable legal framework for it has since been acknowledged by authorities in those jurisdictions. However, lack of comprehensive domestic and international legal framework has been widely noted and documented.

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[165] Alshamrani, „*Sukuk* Issuance and its Regulatory Framework in Saudi Arabia" (2014), PP. 305-333

Balibek[166] reviewed the framework of five different countries: UK, Indonesia, Luxembourg, Turkey and Hong Kong Special Administration Region (HKSAR) of China and found that each of these countries has developed legal framework which enabled them made successful issuance of *Sukuk*. Except Indonesia and Honk Kong who have an independent legislation, all other states created their legal framework for Sukuk by simply amending their Debt Management Law. To assess comprehensiveness of these frameworks, the author measured them against four factors: issuance; accountability of SPV; assurance of redemption; and provision for reducing operational cost of asset. With regard to issuance almost all of the states involved provided for necessary regulations required for *Sukuk* although not all of them referred to the instrument by name, for example both UK and Luxembourg described it as alternative financing instrument. Again, there is clear statement warning investors of no guarantee to invest the *Sukuk* proceeds in *Shari"ah* compliant business, in case of UK.[167]

Balibek did not however, point out that, this proviso could have serious implication on the legitimacy of such an investment from *Shari"ah* perspective. One of the fundamental principles forming the *shari"ah* background of *Sukuk* is the requirement to be clear of being invested in any commercial activities that contravene the tenets of Shari"ah. „These are investments relating to, inter alia, alcohol, drugs, armaments, military technology, pornography, prostitution, and gambling."[168] The study also noted that, for better accountability there is need to bring the responsibility of collecting and managing the *Sukuk* proceeds under debt management office and not under a separate SPV. Noted also, is the lack of clear provision assuring investors of redemption even in case of complete loss of the asset. The study has acknowledged the effort of framework of each state to remove operational burden on *Sukuk* investment by reducing tax chargeable to several asset transfer. However, provisions for discounted tax exist only in debt management law while other taxation instruments stand intact without any incentives for *Sukuk.*[169] This study has a number of limitations: It focuses on public issuance only nothing on private and corporate *Sukuk*. It also did not consider most popular destinations of *Sukuk* such as Malaysia and United Arab Emirate which are seen as the major global hubs for this instrument, thereby missing discussion about irrelevant aspects of governance like rights of parties in the events of default

[166] Emre Balibek, „Establishing a Legal Framework for Sovereign Sukuk Issuance: A Public Debt Management Perspective" (2017), World Bank MFM Paper No. 18
[167] Balibek, Establishing a Legal Framework for Sovereign Sukuk Issuance (2017)
[168] Salah, „A Legal Analysis of *Nakhee*l Investment" (2010), PP. 20-32
[169] Ibid

and dispute resolution mechanisms that are covered by the more comprehensive and robust legal framework of such countries as the ones just mentioned.

3.5. Dispute Resolution Mechanisms

The existence of dispute resolution mechanism is a significant mark of an effective investment framework, for it signals availability of legal protection for investors and thereby wins their confidence. Accordingly, all investment regimes both conventional and Islamic do contain provisions on dispute settlement. In this study, conventional framework for disputes resolution as well as *shari"ah*-based mechanisms would be considered. Researchers have looked at the significance of legal framework in creating enabling environment for *Sukuk* investment with reference to provisions for dispute resolution in the framework. An empirical research (Umar and Kabir) assessed the far-reaching impact the existence of dispute resolution mechanism might have on the success of Islamic capital market (ICM). The authors reviewed 10 different Sukuk prospectus, conducted direct interview with 10 prominent *Shari"ah* scholars with vast experience in *Sukuk* and examined financial legislations of five leading jurisdictions. These countries are Malaysia, Saudi Arabia, Cayman Island, United Kingdom and United Arab Emirates.

Umar and Kabir observed that, although, the widespread adoption of *Sukuk* as a new method of financing development has been paralleled by tremendous legislative efforts necessary for the Islamic bonds across the countries, lack of proper and comprehensive legal documentation, which incorporates reference to Shari"ah-compliant dispute resolution mechanism, has continued to undermine the modern practice of *Sukuk*. Although the authors acknowledged contractual documentation can hardly be absolute, yet, they argue that, consideration of some concrete legal elements would make significant difference. They wrote:

> *However, the impact of the post-default legal battles and stakeholders' tantrums can be minimized through proper legal documentation that takes into consideration key aspects of shari'a -based procedures of liquidation, debt-restructuring and dispute resolution. Given the fact that different jurisdictions have been coming up with legislations and regulations on issuance of Sukuk, much is left to be desired,*

especially when one considers the scanty references to post-default liquidation and dispute resolution processes that are originally shari'a -based.

Generally, this study found that, overwhelming majority of governing clauses in *Sukuk* prospectuses analysed, have invoked the jurisdiction of English court, by implication, the entire transaction has been subjected to the dictates of the Anglo-American legal system, where judges may not have the expertise to appreciate the contractual underpinnings of *Sukuk* as they are substantially based on permutations native to Islamic legal system. Furthermore, the study maintained that, even in the most advanced jurisdictions, Malaysia and Saudi Arabia, choice of law clauses inserted into the contract tend to place *Sukuk* matters under national courts. To be precise, in the case of Saudi Arabian Electricity Sukuk, particular reference has been made to domestic securities dispute resolution mechanism, while in Malaysia national High Courts who are normally seized with the matter, would refer to and rely on the verdict of *Shari"ah*committee.

The authors proposed that, *shari"ah*-based alternative dispute resolution as against normal court room litigation should be widely embraced in drafting *Sukuk* contracts. The limitation of this finding resides in failure to consider the weakness of arbitration process itself, as submission to arbitration is generally optional and enforcement of any award issued by arbitral panel is not legally binding, parties dissatisfied with such outcome are likely to disrespect it altogether. In effect, as a rule of arbitration, parties can withdraw from proceedings any time before the award is given, and even after handing down the award, there are challenges associated with enforcement. Also, the study has missed to consider that, arbitrators themselves could be compromised by their appointers, as they are mostly appointed by the parties to the matter who have vested interest in it.[170] Other researchers, who explored arbitration in the past and present, have acknowledged these defects.

Colon,[171] extensively reviewed resolution of Islamic commercial cases by courts and by Alternative Disputes Resolution (ADR) forums as well, pointed out the major problems national and international forums for alternative dispute resolution and discussed their practices as relate to Islamic financial transaction globally present in each option.[172]

[170] Oseni, Umar A. and Hassan M. Kabir, „Regulating the Governing Law Clauses in Sukuk Transaction" (2015) Journal of Banking Regulations, 16.3, PP. 220-249
[171] Julio C. Colon, „Choice of Law and Islamic Finance" (2011), PP. 412-424
[172] Ibid

Although, he concurred with the finding of other researchers that, Sharia-based ADR would be the most ideal forum to which matters on Islamic finance be referred right from drafting stage, but reiterated the challenges associated with arbitration as already noted. The author has, nevertheless, suggested that, the none-binding nature of arbitral proceedings can be rectified through a national legislation or multi-lateral investment agreement giving legal force to such arbitral effort. This is however defeated by the right of parties to approach court of law seeking review of arbitral proceedings as it was the case in Sanghi Polyesters Ltd (India) V. the International Investment KCFC (Kuwait). Besides, prevailing practice of Islamic finance industry indicates that, parties opt to be bound by national laws of a particular jurisdiction that has world-wide reputation in finance such as that of United Kingdom.

However, this is not to say that, the parties were shunning the jurisdiction of Islamic law, but they do that in keeping with the main objective of Islamic finance, which is achieving an Islamic transaction within a conventional regulatory framework.[173] Reviewing some notable and significant cases on Islamic finance that were adjudicated before English courts, the same author confirmed this reality and further found that, intention of parties to Islamic financial contracts is to subject their transaction to „a combined system that pairs a national legal system with Islamic principles", the author cited in evidence, the choice of law clauses in the transaction leading to the famous case of *Shamil* Bank of Bahrain EC V. Beximco Pharmaceuticals Ltd and that of Sanghi Polyesters Ltd V. The International Investment KCFC which read respectively, "Subject to the principles of the Glorious *shari"a,* this agreement shall be governed by and construed in accordance with the law of England" and "Disputes arising out of this transaction shall be governed by law of England except to the extent it may conflict with Islamic *shari"ah,* which shall prevail".[174]

The main finding of Colon was that, the phrase „combined law" does not mean choosing two bodies of law to govern a particular contractual obligation concurrently, rather it means disputes under the contract shall be analysed mainly according to the national legal system chosen by the parties, and only in the event of conflict *shari"ah* law will prevail. This finding was pivotal as it goes to rectify the supposed conflict between the clauses referred to in those cases and the provision of Rome Convention on the Law applicable to contractual obligation

[173] Umar Moghul and Arshad Ahmad, „Contractual Forms in Islamic Finance Law" (2003), Fordham International Law Journal, Vol. 27, PP. 150-194
[174] Umar Moghul and Arshad Ahmad, „Contractual Forms in Islamic Finance Law" (2003) PP. 175

of 1980, which stipulates that only one law shall govern a particular contract. In effect, it is based on this seeming conflict that, English court held the choice of law clause in *Shamil"s* case supra as invalid. In practical terms, this study proposes the adoption of „combined law" approach by English courts, and that Western courts are guided by the practice of Shari"ah arbitration forums on Islamic finance disputes. As it is obvious, the study limited itself to pure *shari"a*-based conflict resolution prevailing in countries with Islamic law principles as the main or even the only recognised source of legislation on the one hand, and on the other hand it deals with conflict of law existing between instruments inherently meant to be governed by Islamic law and a legal system that does not consider Shari"ah relevant to it such as European states, thereby neglecting what is in between the two and these are countries with legal system mainly common law but also recognises the influence of Islamic law and regards it as a source of legislation like Nigeria.

It is clear from this dimension that, previous studies have considered the need to create enabling environment for *Sukuk* investment by providing regulations that ensures proper structuring of the instrument in accordance with Islamic legal principles and assuring investment profitability. However, they generally focused on sovereign issuance and substantially neglected private issuance by enterprises. Also, in terms of creation of incentives through tax relief policy, existing literature mentioned removing tax on multiple asset transfer in *Sukuk* transaction, losing sight of many other relevant layers of tax burdens which private issuers may consider essential. Finally, on dispute resolution, which is the corner stone of any investment framework as far as investors" protection is concerned, the current literature is silent on two important accounts. First, Africa as a continent has been conspicuously absent, and secondly, the literature did not mention anything about the main international forum for dispute resolution on investment i.e. International Centre for Settlement of Investment Disputes (ICSID). This study will attempt to fill this gap and discuss these issues within the general context of this thesis, which is examining the legal framework for investment and *Sukuk* in the mineral sector.

3.6. Discussions on Ways Forward/Conclusion

This chapter has discussed main issues to be addressed in this study. It has focused on the need for robust regulations in order for the mining industry to achieve its primary objectives. The chapter highlighted that, the positive impact of resource revenue on the Nigerian communities, which is the core objective of the mining is insignificant. Hence, there is need to enhance socio-economic benefits of the natural wealth for the citizen through improving the regulatory framework to broaden the role of all stakeholders including communities and engage with international development initiatives such as SDGs. However, this is only possible when there is good inflow of investment in the sector, which is not the case in Nigeria at present. This is because investors find other mining destinations more attractive to them than Nigeria. Again, the chapter argued that, to attract investors into the mining industry, enabling instruments must be reformed in such a way to reflect not only the factors that are traditionally used to attract FDI but also innovative investment tools. For example, *Sukuk.*

Literature reviewed in the chapter indicated that, generally the problem with mining in Nigeria is lack of serious investors. Consequently, the sector has been dominated by artisanal and illegal miners, leading to loss of huge revenue by the state. Further, although, normally states were able to attract investment capital by demonstrating high geological endowment in terms of mineral reserves lying underneath their seabed, as well as by providing for certain fiscal incentives in their framework, this alone is now unlikely to produce a sustainable solution in the face of the ever-increasing demand for FDI in Africa as the number of resource countries has kept swelling.

Almost concurrently with the rise of the number of natural resource-wealthy nations is the growth of socio-economic problems within those states, Nigeria inclusive. Literature both academic and national instruments, including constitution and specific mineral legislations referred to in this chapter show that governments have a duty to translate the earnings from mining into opportunities for their people. Yet, practical reality of most countries reveal cases of abject poverty, high proportion of illiteracy, lack of health care infrastructure and even insecurity. Thus, in line with the new perception of governance where development is viewed as a task for both state and investors, scholars proposed that, CSR should be the vehicle through which private enterprises may deliver on development goals. Okoye argues that, state officials in Africa should use legal instrument to formulate development agenda into CSR of mining companies. This proposal is, again, not tenable. The usual question is which version of the law (hard or soft) is to be used by the authorities to concretise the responsibility of business entities. Eventually, there have been instances where attempts to enforce CSR by use of law with sanction were have failed mainly due to sustained objections by multinationals. The multinationals maintained that CSR is voluntary. Yet, evidence exist to show that, multinationals in developing countries have rarely demonstrated sufficient commitment to "voluntary CSR".

Subsequent chapters of this study would seek to address these issues differently. Overall, the study aims propose internal and external reform to the investment framework for Nigeria‟s mining sector. In effect, internal reform consists of critical assessment of the framework against fundamental elements of persuasive business environment, usually appealing to FDI, namely reduced size of government; community development; access to sound money; and investment protection. External reform represents an investment innovation, namely Sukuk. Sukuk is an Islamic financial instrument widely used for generating investment capital. The application of this instrument in Nigeria‟s mining sector is both crucial and controversial. It is crucial because it creates liquidity for foreign behemoth corporations as well as for the rising medium scale domestic miners. The implication of which means that, in this case the industry might function well with or somewhat even without FDI. Moreover, it provides opportunity for communities to become active rather than passive stakeholders, because *Sukuk* by nature is a participatory instrument. This way, it addresses community neglect problem.

Being a product of Islamic finance, its application within Nigeria‟s investment framework would trigger some legal questions. One such question is whether two or more different legal systems can co-exist to govern a transaction. This legal controversy goes to challenge the pluralism of Nigeria‟s legal system. Hence, the historical development of Nigeria‟s legal system and its diversity vis-à-vis the impact of this development on commercial activities will be explored in chapter three to provide historical perspective for this instrument. These perspectives have eventually continued to have impact on the construct of Nigeria‟s investment outlook till present day.

Modern Nigeria‟s mining industry is then critically examined in chapter four to ascertain the extent to which it provides for economic freedom of investors and community rights, legal protection as well as sanctity of contract and access to sound money. These elements are essential for designing attractive investment atmosphere in a state. They provide greater certainty for investors and therefore attract investment. However, given stiff competition for FDI worldwide, countries tend to provide for broader economic freedom with a range of legal systems for investors to subscribe as it pleases them. Accordingly, access to sound money is given expanded interpretation to mean also financial inclusion. Islamic finance is discussed as a source of liquidity for mining companies. Precisely, Islamic bonds; its legal structure; and its applications in relation to investment broadly and mining would be considered is chapter five.

However, given that, no enough precedent in Nigeria, case studies of three other countries will be used for the purpose comparative study. These jurisdictions were selected based on unique qualities they exhibited. Malaysia has a similar historical antecedence to Nigeria with multiplicity of legal systems forming the core of federalism. They both had Islamic law rooted in their culture before British colonialism. However, Malaysia developed faster than Nigeria in many respects, including in Islamic finance and has become a world leader in this area. On the other hand, UAE presents an entirely distinct scenario. It was a predominantly Islamic state but embraced relaxed economic policy free economic zones, which proved successful. The UK is weaker in terms of Islamic bonds, however its legal system (British common law) has become a preferred system for dispute resolution in Islamic finance transactions world-wide. Essentially, these three case studies each presents distinct features, with varying strengths and weakness, however. The model emerged from each study will be analysed and then assessed in relation to its suitability to the Nigerian framework for possible adoption.

The next chapter will examine nature and needs of specific sectors, namely mining and infrastructure, where demand for investment is particularly high, and further evaluate potentials of the current legal and policy regime to stimulate development in these sectors through investment.

4. Chapter Four: Critical Review of the Frameworks for Development through Mining and the need for Infrastructure investment to enable sustainable development in Nigeria

4.1. Chapter Overview (Introduction)

This chapter aims to critically examine the current legal framework for investment and development in Nigeria. From the outset, it investigates the relationship between investment and development. Looks at development in terms of raising the living standard of a people socio-economically as the primary responsibility of states, but also explores the nexus between the ability of state to pursue development and the role of FDI. Given the fact that, only through revenue generation and achieving inclusive economic growth can government undertake any meaningful development. Thus, FDI is critical for development. In addition, the chapter also discusses investors‟ contribution to development of their host state in the context of CSR. The debate as to whether the social responsibility of mining companies be made mandatory or left to remain as an act of charity is explored. Given the peculiar state of underdevelopment in Africa as well as investors‟ need for social license, redefined and entrenched version of CSR would boost investor confidence in the jurisdiction.

Furthermore, the chapter looks at other elements critical for attractive investment regime. A system that provides for enhanced certainty and cater for investor freedom would naturally persuade more investors. Economic freedom is normally assessed based on such factors as access to sound money, well-regulated credit facilities, legal protection for private property and contractual obligation as well as eased documentation process, which are necessary for creation of favourable business environment. However, this chapter will primarily focus on three elements potential investors would use to predict efficiency and assess level of risk that exist in a mining sectors. Their relationship with the state, which is determined by the mining regime; relationship with host community (social license) usually assed from level of development and clarity of law on what mining communities should expect; and finally necessary infrastructure, which includes institutions. It has been theorised that, “investors are attracted to the legal system that is both predictable and efficient.”[175]

[175] Amanda, An Ideal Legal System for Attracting Foreign Direct Investment (2000) pg. 1628

Considering that, infrastructure is particularly crucial, second half of this chapter (part B) is dedicated to discussions on the relationship between infrastructure development and achieving a functional mining industry in Nigeria. The chapter begins by looking at different definitions of infrastructure both broad and specific with aim to arriving at a working definition narrowed down to minerals sector. Further, a discussion on the mutual benefits linking the two sectors with each other is explored. Using Atlas (2016), a global framework developed by UN and partners as well as National Policy on Minerals Metal in Nigeria, potentials of the mining industry to spur infrastructure development is discussed. On the other hand, broad effect of infrastructure on the mining is presented through an intuitive theoretical framework developed by Johannes and Rob (2008). Finally, and based on the foregoing, Nigeria‟s policy and legal framework for infrastructure development is reviewed to evaluate current successes and challenges. Global indicators are used to compare development level in Nigeria with other mining jurisdictions, with aim to highlight extent of gap to fill with emphasis on the amount of funding required, possible sources and overall policy implication of the entire review. Furthermore, the chapter highlights the potential of Islamic bonds to contribute to development of both mining and infrastructure in Nigeria. As an investment vehicle sukuk is globally recognised to be a source of generating capital for long time investment, a characteristic that fits into the nature of both mining and infrastructure investment.

4.2. PART A: The Role of Investment in fostering development

4.2.1. Obligations for development as part of investment

Although, investment is quite a broad concept which encompasses different types within itself and denotes various industries and sectors of a state, the extractive industry is central to investment in a country like Nigeria. Thus, in this chapter, reference to laws governing investment and development within that industry would be made in addition to the leading documents, namely the constitution, investment promotion act and the companies act to demonstrate the impact of the system on development through both FDI and portfolio investment. Precisely, role and the rights of the key stakeholders-government, indigenous people and the investors-are explored. Community Development Agreement (CDA) contained in the mining Act as well as the arguments around the long-awaited Petroleum

Industry Bill (PIB) would be looked at. CDA is another name for Corporate Social Responsibility (CSR) of mining companies. However, in the case of CDA both the obligations as well as the objectives of the CSR have been specified and concretized by law. The provision of Sections 116, 117 and 118, as shown below, specifically demanded that, CDA shall ensure social and infrastructure development within mining communities. This is discussed alongside the historical evolution of CSR which serves as the original basis for the CDA, in order to highlight the growing role of law in bringing together private actors and the government as partners in delivering development.

4.2.2. Role of Government in Providing Predictability and Effectiveness

„Legd systems that fail to provide credible information regarding the status of legal rights and obligations must be reformed in order to create greater certainty for foreign investors."[176]

From the outset, the constitution of Nigeria serves as the fundamental framework for both governance and development, since the constitution is essentially a „contractual document between government and the citizens", and more so, it is the grand norm from which all other laws drive their legitimacy. Section 44 of 1999 constitution of the federal republic of Nigeria vests the ownership of minerals resources in the government of Nigeria, and this has led to section 1 of the Petroleum Act (1969) as well as section 1 of the Mining Act (2007) focusing on resource ownership. Thus, there is no concept of private ownership of minerals in Nigeria, as all minerals are a property of the state, be it solid or oil and regardless of whether they happen to be on private or public land. However, state is a mere trustee, holding legal title to the resources for the sole benefit of the citizens of Nigeria. This trust has been envisaged by the constitution itself, recognising government"s obligation to manage the resources efficiently to create development. Section 16(1) of the constitution stipulates that, „government shall harness the resources of the nation and promote national prosperity and an efficient, a dynamic and self-reliant economy". And even more clearly, the constitution declares „exploitation of natural resources is prohibited for any reason whatsoever except for the benefit of the community"[177].

[176] Amanda, „An Ideal Legal System for Attracting Foreign Direct Investment" (2000), Pg. 1627
[177] S. 17(2(d) the Constitution of the Federal Republic of Nigeria, 1999

The combined effect of the two sections are taken to mean that, government shall manage all national resources in order to create prosperity for the citizens and to promote national development. The key phrases in the foregoing provisions are „national prosperity‟ and „benefit of the community‟. Taken together, these phrases may mean that, government shall use revenue from extractive industries mainly to provide social and public goods. Subsequent provisions of the constitution hinted towards human and socio-economic development. The emphasis of section 17 (3 a-d)[178] is on equality, rule of law, efficiency and independence of judiciary to ensure accessible justice. Furthermore, the section emphasizes creation of earning opportunities for people, provision of adequate and equal healthcare facilities for all as well skills acquisition scheme. S. 18 (1)[179] is on provision of free education for all citizens from primary to university level. Whereas S. 20[180] is on environmental protection. By and large, Nigeria‟s constitution has conferred on the state powers to control resources but has also placed a broad range of duty to create a widespread development. Nonetheless, literature show that, in spite of huge revenue gained mainly from natural resources, government has failed to achieve any meaningful development in the country.

4.2.3. Indications of governance failures in Nigeria‟s approach to development

It should be noted here that, there was international initiatives to promote development in developing countries like Nigeria. In addition to the presupposed effort of the national government under the constitution, there had been a corresponding international effort through United Nations Development Programme (UNDP). This initiative was launched in the year 2000 to implement development agenda declared by international community as development priority in selected countries. The central objective was to „eradicate extreme poverty and hunger, achieve universal primary education, promote gender equality and empower women, reduce child mortality and improve maternal health, combat HIV/AIDS, Malaria and other diseases, ensure environmental sustainability and develop a global partnership for development.‟[181] All necessary facilities for the success of this project had been provided by UN department responsible for partnering with concerned states‟

[178] S. 17(2(d) the Constitution of the Federal Republic of Nigeria, 1999
[179] S. 18 the Constitution of the Federal Republic of Nigeria, 1999
[180] S. 20 the Constitution of the Federal Republic of Nigeria, 1999
[181] United Nations Development Programme (UNDP) : Millennium Development Goals (2000), available at <http://www.undp.org/content/undp/en/home/sdgoverview/mdg_goals.html> accessed 26th September, 2019

authorities to ensure smooth implementation of the programme. Preliminary studies conducted and resources supplied.

However, by the year 2015, when the timeframe for the project had ended, there was no meaningful achievement recorded in Nigeria. Sadly, country MDG report of Nigeria suggests that, the overall result for the period of one and the half decade was an extremely weak or very poor performance across almost all indicators (see table 2, below):

Table 1:4 Selected MDGs Indicators

No. OF INDICATOR	NAME OF INDICATOR	REMARK
Indicator 1.1	Proportion of population below USD 1 per day (%)	weak
Indicator 1.8	National level prevalence of underweight children under five years of age	fair
Indicator 2.1	Net enrolment in primary education (%)	weak
Indicator 2.2	Primary six completion rate	weak
Indicator 2.3	Literacy rate of 15 to 24-year olds	weak
Indicator 3.1a	Ratio of girls to boys in primary education	strong
Indicator 3.1b	Ratio of girls to boys in secondary education	fair
Indicator 3.2	Share of women in wage employment in non-agricultural sector (%)	weak
Indicator 3.3	Proportion of seats held by women in the national parliament (%)	weak
Indicator 4.1	Under-five mortality rate	strong
Indicator 4.2	Infant mortality rate	fair
Indicator 4.3	Proportion of 1-year-old children immunized against measles	weak
Indicator 5.1	Maternal mortality ratio	met
Indicator 5.2	Proportion of births attended by skilled health personnel	weak
Indicator 5.3	Contraceptive prevalence rate	weak
Indicator 5.5	Antenatal care coverage (at least one visit)	weak
Indicator 6.1	HIV prevalence among pregnant young women aged 15 – 24	weak
Indicator 6.2	Young people aged 15–24 years reporting the use of a condom during sexual intercourse with a non-regular sexual partner	weak
Indicator 6.3	Proportion of the population aged 15–24 years with comprehensive correct knowledge of HIV and AIDS	weak
Indicator 6.5	Indicator 6.5 Proportion of the population with advanced HIV infection with access to antiretroviral drugs	weak
Indicator 6.7	Proportion of under-five children sleeping under insecticide-treated bed nets	weak
Indicator 6.9	Incidence of TB per 100,000 population	None
Indicator 7.1	Proportion of land area covered by forest	weak
Indicator 7.9	Proportion of population using an improved drinking water source	weak
Indicator 7.10	Proportion of urban population living in slums	weak
Indicator 8.1	Per capita ODA to Nigeria	Fair
Indicator 8.2	Debt service as a percentage of exports of goods and services	Strong
Indicator 8.14	Telephone lines per 100 people	weak
Indicator 8.15	Cellular phone subscribers per 100 people	Strong

Indicator 8.16	Internet users per 100 people	Fair
Indicator 8.17	Tele-density	Strong
80% weak		

Source: Nigeria 2015 MDG End-Point Report

4.2.4. Analysis of Millennium Development Goal Indicators

Generally, the table above indicates level of performance in key areas of socio-economic development goals. These areas are poverty (lack of earning opportunity); education and literacy; health care for mothers and their children; environmental safety; and gender equality. Several indicators have been used to represent and provide information on each of the goals. Remark on each indicator alongside its name and number has been given in the table. Now, these indicators and the respective remarks provided on them will be used to analyse Nigeria‟s performance on MDGs.

Healthcare: The table shows high rate of infant and children mortality alongside low proportion of children immunized against killer diseases like measles, low or weak proportion of children sleeping under insecticide-treated bed nets, weak antenatal care coverage and low number of births attended by skilled personnel indicates poor performance or even failure to achieve MDGs on healthcare. Quality healthcare for mothers and their children is necessary for combating maternal mortality and ensuring greater chance of survival for them. However, the table shows that prevalence of HIV is not high among pregnant women, even though awareness about it and precautions against it is also weak. This suggest that, the high rate of maternal and infant mortality is unrelated to HIV.

Education and equal opportunity for women: Similarly, in the area of education the table shows overall weak or poor performance. Indicators on literacy among teenagers and young adults are remarked as weak, the rate of primary six completions is also weak. Although, the ratio of girls to boys in both primary and secondary education is fair or strong, enrolment of children into primary education is generally weak. Report from other sources indicate that, Nigeria is one of the countries with alarming number of children out of school. Remarks on gender equality appears to be fair or even strong, but this is not the case when it comes to non-agricultural (salaried) employment and political office. Women representation is yet indicated to be weak. Thus, the outcome of MDGs on equal opportunity for women is weak or poor performance in Nigeria.

Poverty reduction: High rate of poverty is indicated for on the table by weakness of the effort to reduce the number of people living below USD 1 a day. This is also true of issues to do with environmental safety, as only small proportion have access to improved drinking-water source. Overall, the table represents 80% weakness in Nigeria‟s performance on the MDGs, while 20% shows work done. This is below average. The table indicates that, implementation of MDGs in Nigeria has been only 20% success or well-performed, while 80% is poorly performed or even a failure. This assessment of Nigeria‟s performance on MDGs is significant as it may serve as precursor to the way and manner SDGs should be handled in order to avoid repeating similar outcome.

Lack of development has been attributed to several factors. Inadequacy of the laws to enforce accountability and check corruption were among the most cited elements responsible for underdevelopment in most third world countries including Nigeria. Inadequate legal backing to hold the government accountable for its failure to deliver on developmental rights is represented by the constitutional declaration of those rights as non-justiciable. S. 6 (6) of the constitution provides that, the judicial power:

> *shall not except as otherwise provided by this Constitution, extend to any issue or question as to whether any act of omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this Constitution*

By implication, the above provision has removed the duty of state to create economic and social and infrastructure development from judicial powers, hence in effect, government is simply at discretion with regards to the provision of chapter II. Eventually, S. 6(6) has widely been viewed as constitutional impediment to development.[182] Given the persistent failure of states to realise their national development aspirations, consensus has gradually emerged to allocate private sector a role to pursue developmental goals alongside the state. This rise in corporate power has been paralleled with not only the collapse of the Soviet Union, but also the emergence of neoliberalism shifting significant influence onto the private sector to take part in governance. Thus, governance has been reinterpreted to mean the state creating a role for investors to contribute to national development. Yet, as the MDG indicators reveal,

[182] Olaolu S Opadere, „Non-justiciability of the Fundamental Objectives: Paradox and the Bane of Governance in Nigeria‟ (2018), Journal of Law Policy and Globalisation, Vol. 74, PP. 37-46

creating development outcomes can be more complex in practice and may often require multi-scalar, multi-stakeholder governance and buy-in that currently does not exist in Nigeria.

4.2.5. The Sustainable Development Goals and the post-2015 development agenda

SDGs initiative has been the natural successor to the MDGs. Towards the expiration of MDGs timeframe (2000-2015), Rio conference on sustainable development held in 2012 recommended that a committee shall be set up to come up with post-MDGs development plan. Accordingly, by 2014 the UN Open Working Group (OWG) put together a zero draft of SDGs comprising of 17 goals, which was later finalised and adopted by the UNGA in its 68th session. By 2015 September, "193 United Nations (UN) member states adopted "Transforming our world: the 2030 Agenda for Sustainable Development", which includes a set of Sustainable Development Goals (SDGs) for 2015-2030". In addition to the 17 goals, it also consists of 169 targets (desired features) and 330 indicators (requirements). Of the 17, 6 goals are reiteration if not reproduction of the core message of MDGs.[183] Given the underperformance recorded in some countries, SDGs is a continuation of the MDGs in a broader and more expanded framework.[184]

As regards mining, literature shows strong linkages between mineral development and SDGs. Considering strategic place mining industry occupies both in terms of geography and its impacts on environment, economy and society, the industry has naturally conformed to the core components of sustainable development.[185] For most part, the sustainability goals can be grouped in line with these fundamental components, namely preservation of environment, social inclusion and economic development. Accordingly, potentials of mining to contribute to SDGs have been widely acknowledged.

From an environmental perspective, mining activities share the use of some natural resources such as water, land and air with human beings, flora and fauna. Unless, regulated, mining tends to create adverse impact on the lives on land by polluting and oversubscribing to these

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[183] Svatva Janouskova and Bedrick Moldan, „Sustainable Development Goals: A need for relevant indicators" (2016) Ecological indicators, 60, PP. 565-573 at Pg. 566

[184] Svatna and Bedrich, „Sustainable development goals" (2016), Pg. 566

[185] Andre Xavier, Bern Klein and Fatima Regina Ney Matos, „Mining and the sustainable Development Goals: A Systematic Literature Review" (2017), Conference Proceedings of 8th conference on Sustainable Development in the mineral industry, PP. 29-34, at Pg. 29, available at <www.camdemia.ca/publications/press@camdemia> accessed 20th November, 2018

shared resources. Avoidance of this, would contribute to objects of SDG6 and 15, which respectively seek to achieve clean water and sanitation, and life on land. Furthermore, "mining activities are energy and emission intensive presenting opportunities for greater efficiency as well as expanding access to energy". [186] This represents a direct contribution to SDG7: energy access and sustainability, and SDG 13: Climate action.

Core objective of SDGs1(end poverty), 5(gender equality), 10(reduced inequalities) and 16(peace, justice and strong institutions) has a social dimension, which mining can be promoted through mining. Resource industry generates huge income to both the state and mining companies. If equitably redistributed and fairly used, mining revenue will create socio-economic prosperity by enhancing household earning through job creation. In addition, proper regulation of employment into slots provided by government and private investor must ensure equal opportunities for those that are often neglected including women. Entrenching such ideals of social justice in the practice of mining industry, avoidance of any action or inaction capable of undermining trust between investor and host community, will go a long way in creating not only a peaceful society but also social license for investors.[187]

Turning to economic development, fortunes derived from mining has the potentials to create widespread development. While SDG8 is about decent work and economic growth, mining offers opportunity acquire technical skills and expertise for citizens by working with industry companies in addition to earning opportunities. More so, operations of giant companies will naturally create an economic impact on the local businesses providing mining-related services. Further in this regard, mining contributes to SDG (infrastructure innovation and industrialisation) in the sense that, diversification from industry revenue into infrastructure can give rise to new physical development in communication facilities, road and transport system as well as enhanced power generation. Furthermore, "mining provides materials critical for renewable technologies and the opportunities for companies to collaborate across the supply chain to minimise waste, and to reuse and recycle".[188] Generating these raw materials will induce industrial development, and the opportunity to recycle them marks the significant contribution this can make to SDG 12 (responsible consumption and production).

[186] Mapping Mining to SDGs: An Atlas (2016), Pg. 4
[187] Ibid
[188] Ibid

It is immediately obvious from the above that, mining can contribute to SDGs, however it is not inherently so. Proactive steps need to be taken by stakeholders to create a framework necessary to realising potentials of minerals industry to facilitate SDGs in the manner outlined above.[189] Legal and policy framework for mineral investment must incorporate provision aiming at attaining sustainability and development goals through mining in collaboration with the private sector. The role of private sector is critical and hence must be clearly defined and regulated by the state. Regardless of size and nationality, all companies must be made accountable to the realisation of this global agenda for sustainability. Scholars have identified ways by which mining enterprise may deliver sustainability to include, provision of quality training to employees, use of high level and clean technology as well as effective discharge of their social responsibilities.[190]

4.3. Role of the Private Sector in delivering sustainable development

4.3.1. Shifting debates over the role of businesses in development discourse

With the emergence of neoliberalism as a dominant force in contemporary debate over governance, the role of private sector has become more asserted within the global economic landscape. Capitalism as a dominant economic order has brought foreign investors and their interest to be the focal point of investment policy of the states. Parallel to the growth of corporate popularity was a global acknowledgement of the reality that development is not a task to be performed by government alone. As a result, most countries adopted a policy that allows private sector to take lead in investment and contribute directly to community development, while government remains mainly as a regulator whose role has been to create enabling environment for business through policy and law. Enabling environment includes defining the role of private sector within development framework.[191] In most jurisdictions, especially Africa, this is contained in mining legislations.

In mining discourse, development refers to ways in which mining benefits may be delivered to mining communities in order to achieve both national development and a stable investment climate. This will include not only maximising earning opportunities through creation of wealth to reduce poverty, but also the trickle down of benefits from extraction of the

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189 Andre, Bern and Fatima, „A Systematic Literature Review" (2017), PP. 30-33
190 Ibid, Pg. 31
191 Okoye, „Corporate Social Responsibility, Law and Development in African Context" (2012), Pg. 369

resources through to investment in community projects in agriculture, healthcare and education services as well as physical infrastructure. Return of resource revenue to the local communities in this way became necessary for both the state and investors to avoid distributional conflict, otherwise known as „resource curse". Although, the need for investors to do good to the host community has been a point of consensus, but there is argument as to whether this should be an obligation or a mere goodwill gesture. Nevertheless, it has remained largely at investors" discretion with attendant consequence. In some places, Nigeria and Sierra Leone for example, failure to fulfil this responsibility had made exploration for mining companies difficult or impossible without state-sanctioned military protection due to violent resistance from the society.[192] As a result, businesses started to prioritize their social responsibility through the concept of corporate social responsibility (CSR).

4.3.2. Evolution of Corporate Social Responsibility and linkages with development processes

In response to the growing social anger, CSR was conceptualised and further strengthened through international organisations such as the World Bank and World Business Council for Sustainable Development (WBCSD). This concept is defined as the continuing commitment by business enterprises to behave ethically and contribute to its own economic development and that of local society.[193] Over the years, business entities have been seen to operationalise their CSR strategy through, among other things, corporate philanthropy, waste management and good working practice, yet it has been criticized as insufficient to deliver developmental objectives. In the Niger-Delta region of Nigeria, for example, despite sustained philanthropic efforts made by multinationals in the recent years, yet social resistance persists in some communities.[194] CSR being voluntary initiatives of a company, as defined by UK department for international development (DFID), that voluntariness might be the reason why it has not been effective. Some scholars have identified lack of legal framework as the main limitation of CSR. Government has a responsibility to concretize the objectives of CSR especially in developing worlds through the instrument of law to drive development.[195] The need for private investors to contribute to the collective development agenda alongside states has been

[192] Bruce Harvey, „Social development will not deliver social licence to operate for extractive sector" (2014) The Extractive Industries and Society, Vol. 1, PP. 7-11
[193] Andrew W. and Yvonne D., „Managerial and stakeholder perception of an Africa-based multinational mining company"s corporate social responsibility" (2014), The Extractive Industries and Society, Vol.1, PP. 225-236
[194] Idemudia U., „Corporate-community engagement strategies in the Niger Delta: some critical reflections" (2014) The Extractive Industries and the Society, Vol. 1 PP. 154-162
[195] Okoye, „Corporate Social Responsibility, Law and Development in African Context" (2012), Pg. 369

an international initiative, which was subsequently domesticated through regional and national bodies.

4.3.3. CSR in International Law

As far back as 1972, the international community did acknowledge the fact that, unless managed carefully, resource development can cause more harm than benefit to human being and the environment. Hence, Stockholm Convention was held in June 1972 for urgent response to environmental deterioration. Overall, the conference formulated 26 guiding principles necessary for preserving and enhancing human environment with aim to inspiring stakeholders to, without prejudice to the sovereign right of member states to pursue development of their natural resources, to act responsibly and accordingly. Although, the permanent and unconditional sovereignty of states over their natural resources has, at least since the emergence of most states from colonial rule, been settled under the law of nations,[196] Stockholm Declarations has been seen as a legal limitation to that right.[197] This is because failure to protect environment may be so consequential that even the most fundamental of human rights, right to life is threatened.[198] The idea of CSR became more consolidated twenty years later within the concept of sustainable development at 1992 UN Conference held in Rio.

Fundamentally, Rio Declaration conceptualized the concept of sustainable development and more importantly stressed on the three pillars of that concept-economic development, social development and environment protection. Given the situation of social unrest that characterized majority of resource-wealthy countries of the world where resource communities resented both their governments and business entities for failure to deliver socio-economic development, the international community put human development as topmost element of sustainable development. The first principle of Rio Declaration states: "Human beings are at the centre of concern for sustainable development. They are entitled to healthy and productive life in harmony with nature."[199] Accordingly, all stakeholders, public and private were mandated to work together to actualize the declaration and particularly so to

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[196] Asante, International Law and Foreign Direct Investment (1988), PP. 593-595

[197] Schwartz, Priscilla, „Sustainable Development and Mining in Sierra Leone" (2005), PP. 40-50, PhD Thesis accessed via Ethos Online Thesis of British Library, available at: <http://ethos.bl.uk/OrderDetails.do?did=11&uin=uk.bl.ethos.420594> accessed 20th September, 2017

[198] UN Proclamation at 1972 Stockholm Conference, available at: <http://un-document.net/unchedec.htm>

[199] Principle 1 of Rio Declaration on Environment and Development (UN Conference of June, 1992), available at: < www.un.org/documents/ga/conf151/aconf15126-1annex1.htm> accessed 21st September, 2017

achieve social development through poverty eradication.[200] Again in the year 2002, World Summit on Sustainable Development, held in Johannesburg, South-Africa, made responsibility of resource developers towards their host community clearer. "In pursuit of their legitimate business, private sector has a duty to contribute to the evolution of equitable sustainable society."[201] By virtue of principles 18, 19, 20 and 23 enunciated by the summit, regional groupings and national governments were urged to fight anything that undermines social development and more generally expedite implementation of UN Declarations on sustainable development.[202] And this is achieved by internalising them through domestic legislations.

Following these important declarations, several international, regional and national initiatives have evolved targeting development in mining-affected communities, including but not limited to, Extractive Industry Transparency Initiatives (EITI:200). All set out to mitigate the destructive social and environmental impact of mining on local communities." Accordingly, the 2008 ECOWAS (Economic Community of West African States) Harmonization Directives and 2009 African Mining Vision stipulate that, all ECOWAS and AU member states should better connect minerals exploitation to the fulfilment of national socio-economic development goals and should include community development requirements into their harmonized mining laws.

4.4. Incorporating Corporate Social Responsibility into Nigeria"s investment framework

4.4.1. Corporate Social Responsibility and Mining

Nigeria"s legal framework for mining is fragmented, not centralised. Although, both oil and solid minerals fall under the rubric of "extractive industry", yet, the two exist and function each separately in Nigeria. More so, in contrast to many other jurisdictions, these industries are regulated by distinct legislation and functions independent of the other. Eventually, each sector has a different approach to CSR.

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200 Ibid, Principles 4,10 &27

201 Principle 27: World Summit on Sustainable Development (Johannesburg August, 2002) available at: <www.un.org/events/wssd/summaries/envdevj1.htm> accessed 21st September, 2019

202 Ibid Principles 18, 19, 20 & 23

Nigeria reviewed its legislation in line with the global concern for mining communities noted above. Adoption of standard regulatory tools has become imperative to address growing social insecurity triggered by uneven distribution of resource benefit across mineral rich nations. The approach aimed at making a solid framework that ensures provision of significant social and economic advantage in favour of those who bear the greater cost of mining. As a result, states with mining sectors, were therefore called upon to incorporate community development covenants into their mining regimes. Many states across the world, including Nigeria, responded accordingly quickly. Between 1986 and 2012, 32 countries, with China and Ghana being the earliest while Kyrgyzstan and Sudan the latest; had made a provision for community development in their respective mining laws.[203] This postulation, which is consistent with the concept of CSR, is popularly known as Community Development Agreement (CDA).

CDA refers to provision of social goods and services to mining communities. It is a comprehensive term, which includes all that which is necessary to improve living standards of the concerned communities, raise their living standard socio-economically, transform them intellectually, and generally includes physical infrastructure needed for functional society, such as schools, roads networks, healthcare delivery centres, scholarship awards, boreholes as well as agricultural and business assistance.[204] This regulation mandates multinationals to enter into a legally binding agreements with local communities as condition precedent to any operation on minefields. The distinction between this new approach and the older measures is that, while the latter meant to address damages caused to the community by demanding mining companies to clean up after usage, and compensate individual for disturbing their titles to land under the general principle of "polluter pays", the new approach, in addition, seeks to ensure that, communities affected have not only benefited from the revenue generated by raising their socio-economic condition, but also permanently transform them through establishing a development trust fund that would survive the duration of mining concessions granted to foreign investors.[205]

The provision for a trust fund that would outlive the duration of resource extraction is in line with the UN Declaration directing stakeholders in the mineral sector to take proactive

[203] Kendra, „Community Development in Mining Laws‟ (2014), PP. 200-2015
[204] Ibid, Pg. 200
[205] Ibid, PP. 200-2015

measures so as to guard against dangers associated with future exhaustion of non-renewable natural resources.[206] In effect, this provision envisages that, the resource that belongs to all mankind might be exhausted by oversubscription of the present generation, in which case nothing of it would be left for generation yet unborn and therefore it is a duty upon the world to employ means and method capable of providing a lasting substitute. The Nigerian Minerals and Mining Act 2007, for example, made a comprehensive provision for establishment of a development fund to be run and managed by a Board known as Solid Minerals Development Board, a body registered, with perpetual existence and legal capacity to sue and be sued.[207] The intendment of this provision might be that, proper and effective management of the trust fund via reinvestment in developmental project, can provide substitute to, and reduce dependence of present and next generation on the exhaustible mineral resources. The objectives of the Fund include, inter alia, investing in developing human and technical capacity as well as infrastructure, and ways of raising funds include loan, donations and bonds.[208]

4.4.2. Corporate Social Responsibility in the Oil and Gas Sector in Nigeria

In contrast to mandatory CDA in the mining sector, the role of private investor with reference to host community within oil and gas framework has not been well-developed. Petroleum industry has been the major foreign exchange earner and the back-borne of Nigerian economy from 1956 and ever since, and the level of hazard faced and being faced by the people living within and around exploration activities has reached an internationally alarming threshold,[209] yet corporate social responsibility remains voluntary as charity work.[210] Evidence from existing literature shows that, oil-producing communities of Niger Delta, in Nigeria, suffer devastating impact from the activities of resource developers, those activities include seismic, exploration, production, storage, and transportation by ocean-going vessels and pipelines, as well as refining or processing. Crude from production sites are usually transported through pipelines to storage deports-terminals near the loading points for onward

[206]Principle 5 of UN Conference on Human Environment (Stockholm June, 1972) available at: <http://www.un-documents.net/unchedec.htm> accessed 22nd November, 2017
[207]Ss. 34-42, Nigeria"s Minerals and Mining Act, 2007
[208] Ibid
[209] Environmental Assessment of Ogoni Land: UNEP Report (2011) available at: <https://wedocs.unep.org/bitstream/handle/20.500.11822/25282/ogoniland_chapter1_UNEP_OEA.pdf?sequence=1&isAllowed=y> accessed 25th November, 2017
[210] Gabriel Eweje, „Multinational Oil Companies" CSR Initiatives in Nigeria: The Scepticism of Stakeholders in Host Communities" (2007), Managerial Law, Vol. 49, no. 5/6, PP. 218 - 235

loading unto ocean-going vessels, the pipelines runs up to hundreds of miles crisscrossing farmlands, creeks, maze and coastal area where several communities live. Spillage from oil fields into water, refinery effluent, pipeline leakage, spills during storage and loading have caused massive pollution in the community. For example, an incidental rupture of a pipeline in Jesse community in 1988 and its eventual explosion had caused the loss of more than 1000 human lives.[211]

The common practice of CSR that prevail within those communities is in form of voluntary agreement. This agreement is called „memorandum of understanding" (MoU), entered into by the community and oil enterprises, it has failed to yield any meaningful development over the years. In fact, empirical data indicate that, oil producing areas suffer from abject poverty, unemployment, presence of health-threatening factors emanating from oil spills and gas flaring which affected drinking water as well as lack of infrastructure.[212] This lack of socio-economic and infrastructure development prompted sustained agitations from affected communities which eventually culminated into crisis that has rendered the entire region hostile to investment.[213] These agitators have breaded various groups who have engaged in several acts of high crime profile: illicit oil bunkering, kidnapping of foreign oil workers, vandalising oil installations all as part of general campaign to destroy the capacity of the Nigerian government to explore, exploit and export resources.[214]

This hostility can undermine investors" confidence to invest in Nigeria, as safety constitute a key factor to all investors (FDI and portfolio) when it comes to risk assessment. Eventually, the prevailing social unrest targeting foreign investors and oil infrastructure in the Niger Delta region of Nigeria said to have accounted for a significant shrink in crude production capacity of the country in the recent time.[215] Literature asserts that, although the possible cause of this menace popularly known as "resource curse" may include the fact that

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[211] Olubunmi A. *The Impact of Oil Pollution on the Environment of the Oil Producing Communities of Nigeria: A Critical Analysis of the Statutory and Regulatory Provisions in Nigeria* (Milton Keynes: Lightning Source Ltd, 2014) PP.2-8

[212] Alo Samson A., „Nigeria"s Development and the Minority Problems: A Retrospective View on the Niger Delta Region" (2015), PP. 1-16, at PP. 10-12, available at <https://www.researchgate.net/publication/280088740_NIGERIA%27S_DEVELOPMENT_AND_THE_MINORITY_PROBLEMSA_RETROSPECTIVE_VIEW_ON_THE_NIGER_DELTA_REGION> accessed 25th November, 2017; Olubunmi, *The Impact of Oil Pollution on the Environment* (2014), PP. 2-8

[213] Gabriel, „The Scepticism of Stakeholders in Host Communities" (2007), PP. 218-220

[214] Olubunmi, „*The Impact of Oil Pollution on the Environment"* (2014), PP. 2-4

[215] U.S. Energy Information Administration Report on Nigeria(2016), PP. 2-15, available at: <*https://www.eia.gov/beta/international/analysis.cfm?iso=NGA*> accessed 15th August, 2017

stakeholders‟ contribution and compensation to the community isn‟t adequate and the existence of some corrupt elements within the ranks of the indigenous people themselves who divert public funds to their private purse, but the principal factor is the failure of successive governments to effectively address the challenges associated with governance and to concretise the objectives of CSR by way of clear regulations.[216] In other words, there is inadequacy of law and inefficiency in governance.

4.4.3. Assessing effectiveness of Community Development Agreements within Nigeria

Community Development Agreement has widely been celebrated as one of the major achievements of the recent legislation on mining in Nigeria. The Act made CDA a mandatory requirement of law which a mining company must fulfil before it can be permitted to embark on any exploration work, that aspect of hard law approach to enforce CSR is unprecedented, and it is the celebre cause for applauding the new regime in Nigeria.[217] Section 116(1) of the Act provides:

> *Subject to the provision of this section, the Holder of a Mining Lease, Small Scale Mining Lease or Quarry Lease shall prior to the commencement of any development activity within the lease area, conclude with the host community, where the operations are to be conducted an agreement referred to as a Community Development Agreement or other such agreement that will ensure the transfer of social and economic benefits to the community.*

Furthermore, subsection (2) elaborated on what the agreement shall address. Depending on the needs of communities, the agreement shall address contribution to development of infrastructure necessary for education, health-care and community services like road, water and power. It shall also provide for ways to improve local content and capacity building by means of educational scholarship, technical training, employment opportunities and assistance needed to stimulate small scale domestic enterprises.[218] For this elaborate provision, CDA has been widely applauded, with some scholars describing it as „a formal agreement designed to impose obligations on each participating entity and affect the distribution of costs and the allocation of benefits from a project with the goal of reducing conflict surrounding mineral extraction.‟[219] Similarly, sections 116-118 of Petroleum Industry

[216] Okoye, „Corporate Social Responsibility, Law and Development in an African Context‟ (2012), PP. 365-370
[217] Eghosa and Linimose, „Foreign Direct Investment and the Law in Nigeria‟ (2016), Pg. 133
[218] S.116(3) (a-e) of the Nigeria‟s Minerals Act (2007)
[219] Kendra, „Community Development in Mining Laws‟ (2014), Pg. 203

Bill(PIB) provided for the establishment of Petroleum Host Communities Fund (PHCF) for developing social infrastructure the communities affected by the activities of oil companies. It further prescribes payment of 10% of profit companies made from the resources extracted from the area. The strength of CDA is however enshrined in section 117 of the Act, which considers the community as partners in development activities. It provides:

> *The Community Development Agreement shall specify appropriate consultative and monitoring framework between the mineral title holder and the host community and the means by which the community may participate in the planning, implementation, management and monitoring of activities carried out under the agreement.*

To assess the effectiveness of this provision, two things must be considered: adequacy and practicability. Although, the foregoing provisions on CDA seem to be very comprehensive in terms of investors‟ role in development, there is hardly enough evidence to show its practical implementation in Nigeria. By implication, this lack of practical examples may undermine any attempt to describe this substantive provision as effective. It has been concluded that „as important as what rules say…is what they mean in practice. A pristine statute on investment that is unknown, administered and unenforced is ineffective.‟[220] While absence of clear record of implementation considered being due to the slow inflow of investors into the sector as well as time factor being a new legislation which only came to existence in 2007, some commentators rejected this claim and blamed lack of investment on the law.

Adoption of this approach (mandatory CDA) was principally meant to deliver significant mining benefit to the community through the instrument of law. However, there is scepticism that, the adoption of high standard regulations could discourage investors. This scepticism explains why community development law is not yet mandatory in many mining jurisdictions. In Ghana, Australia and some parts of Canada, this important convention remains a voluntary initiative.[221] In other words, it is at the goodwill of multinationals to implement it. This argument is important as it aims to show the effect of mining regime of a country, such as Nigeria, with a mandatory CDA.

[220] Amanda, „An Ideal Legal System for Attracting Foreign Direct Investment‟ (2000), Pg. 1629
[221] Ibid, Pg. 1629

While liberals may argue that, a conventional wisdom that countries should soften domestic legislations, adopting liberal social and labour policies and relaxing tax regime to attract FDI, CDA would appear to remove incentives and could thereby operate to drive potential investors away from states that adopted them.[222] This argument finds some corroboration in the words of Rusal, the largest world‟s aluminium company operating in Guinea for Bauxite extraction, when the country incorporated CDA into its mining laws, the company remarked: "Any investor with good sense would look for investment opportunities outside of Guinea."[223]

However, in contrast to outright neo-liberalism of the 1980s and 1990s which failed to achieve development, national governments and international organisations now favoured a new legal approach as a path to realisation of national development goals.[224] This is because, apart from its potentials to promote community interest, CDA offers vital incentives to investors, informing them of safety of the mining environment and thereby mitigating political risk of operation. "Higher regulatory standard can be viewed as a benefit by foreign investors since community development requirements clarify responsibilities towards, and thus, reduce the potentials of conflict with mining affected communities."[225]

Nevertheless, implementation of the code might depend largely on how serious the will of the regulators, regardless of its binding force. If government being the custodian of the resource on behalf of the community is determined to pursue community benefits, investors have no option but to follow. A study conducted by the World Bank shows that, gold mining in Ghana has produced significant improvement to the community. The positive spill over includes employment opportunity and reduced inequality. Ten percent of men and about nine percent of women living near the mine have been employed by the investor. This is perhaps due to government‟s policies indicating that community is important. One such policy, is the requirement that, investor must get clearance from communal authority in charge of land before any application for license to pursue mining is granted.[226]

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[222] Kendra, „Community Development in Mining Laws‟ (2014), PP. 200-203
[223] Kendra, „Community Development in Mining Laws‟ (2014), Pg. 203
[224]Ibid, PP. 200-203
35 Ibid
[226] Chuhampole Punan, Dabalen L. Andrew and Land Bryan Christopher, „Mining in Africa: Are Local Communities Better off‟ (2017), World Bank Publication, available at: <https://openknowledge.worldbank.org/bitstream/handle/10986/26110/9781464808197.pdf?sequence=6> accessed 20th September, 2019

Another factor essential to measuring effectiveness is adequacy of the law. Clear and unambiguous rules with respect to rights and obligations of the parties, creates greater certainty for investors.[227] Again, even where these agreements are legally binding like in Guinea, Sierra Leon and Mali, beneficiaries of the scheme seem caught struggling to surmount certain technicalities that have become hard hurdles in the process of realising the actual benefit enshrined in the law. Issues to do with capacity of rural communities to negotiate technical documents (agreements) with highly experienced company personnel; representation of the community; land tenure; and enforceability of CDA are generally raised as the short comings of this model across Africa.[228] Equally important but omitted is who amongst the community should oversee money meant for CDA? The Act is silent on this vital point. The presumption would be to consider dealing with the community through their traditional rulers and tribal chiefs. This approach might be considered objectionable by the community. Research indicates that, in the Niger-Delta oil producing region, traditional institutions have failed to account for what they have been handed by the oil companies.[229] Thus, some scepticism is required when arguing that CDA alone can solve development challenges or make corporate actors take charge of the negative consequences of their actions. Instead, it might form part of a wider set of tools that can enable ethical investment practice. Yet, even before reaching this point, a critical challenge is having the infrastructure to enable investment and therefore development.

4.5. PART B: Infrastructure Development

4.5.1. Conceptualising infrastructure?

The term infrastructure generally refers to all that a society needs to function well, which includes roads, houses, schools and health-care facilities as well as economic, political and social structure. Olufemi described it as „the set of interconnected structural elements that provide framework supporting an entire structure of development".[230] Fulmer defined it in

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227 Amanda, „An Ideal Legal System for Attracting Foreign Direct Investment" (2000), Pg. 1629

228 Chilenye Nwapi, „Legal and Institutional Framework for Community Development Agreement in the Mining Sector in Africa" (2017) , The Extractive Industries and Society, Vol. 4, PP. 211-213

229 Eyene, „Confronting the Governance Challenges of Developing Nigeria"s Extractive Industries" (2011), PP. 27-5o

230 Olufemi Adedamola Oyedele, „The Challenges of Infrastructure Development in Democratic Governance" (2012), Pg. 2, a Conference Paper available at : <https://www.researchgate.net/publication/228098249> accessed 7th September, 2019

narrow and technical sense as „the physical component of interrelated system providing commodities and services essential to enable, sustain or enhance societal living condition".[231] While this definition comprises things that are necessary for the well-being of human community such as clean water supply, electricity, hospitals, learning centres, shopping malls, transportation and communication system, it might not contemplate that the state in which they live possess particular kind of weapon, for example, a nuclear arsenal.

Definitions of infrastructure can be even narrower and more restricted when referenced to a sector or profession. Military infrastructure, for instance, refers to "building and permanent installations necessary for the support, redeployment and operations of military forces." [232] Likewise, in mining discourse, infrastructure refers to those structural elements that enable, sustain and enhance the efficiency and functionality of the resource industry. Although, what is required to improve productivity of a mining sector may differ from one jurisdiction to another, key infrastructure essential to mining seems to be common worldwide. To name the most critical, but also lacking in African states, including Nigeria, stable power supply and well-connected transportation system. Nigeria"s mining industry is less competitive due to high cost of operation caused mainly by lack of energy infrastructure, and difficulty in accessing international market exacerbated by weak transport infrastructure. It is also noted that infrastructure need not be physical, it can also be institutional support that aids businesses and communities in implementation agreements and resolving conflicts that could possibly arise. Therefore, it is also about legal tools that can enable investment.

4.5.2. Linkages between infrastructure development and mining industry

Relationship between infrastructure development and mining is symbiotic one. Generally, literature show that, mining industry has direct and indirect potential impact on infrastructure. A report compiled by UNDP in collaboration with several other research and development partners underscored this point. Famously known as Atlas (2016), was a scholarly effort mapping up mining to SDGs. With reference to SDG 7 (infrastructure, innovation and industrialisation, the report remarked, "mining can help drive economic development and diversification through direct and indirect economic benefits and by spurring the construction

[231] Fulmer, Jeffrey, „What in the world is infrastructure?" (2009), PEI Infrastructure Investor, PP. 30–32.
3 Department of Defence Dictionary, 2005.

of new infrastructure for transport, communication, water and energy."[233] These categories of infrastructure represent basic framework critical for well-being of every economy.[234] Thus, the National Policy on Minerals Metal in Nigeria noted the potentials of a functional mining industry as such that creates impacts on all other sectors of the economy in the country.

Mining contributes to the economy not only by enhancing national revenue base, it also generates a widespread earning opportunity for household through massive job creation.[235] "In addition, solid minerals will provide local raw materials for industries and bring vital infrastructure and wealth to rural areas."[236] As most of the mines in Nigeria are in the rural areas, it is obvious that majority of the host communities need basic infrastructure such as clean water, power, and road network connecting them to the main cities. In the past, the industry played critical role in spurring energy and railway infrastructure through production of coal minerals. Furthermore, most of roads, education and health-care infrastructure construction of 20th century were financed through export-earnings generated by the industry.[237]

With regards to impact of infrastructure on mining, discussion here would be in the context of five channels formulated by Johannes and Rob (2008).[238] Exploring the relationship between infrastructure and growth the authors identified five specific channels through which infrastructure can enhance growth. It can be a factor of production; a complement to other factors of production; a stimulus to factor accumulation; a stimulus to aggregate demand; and a tool for industrial policy. Although, the scope of their analysis relates to the broad subject of economic growth, it is possible that discourse on productivity of mining industry be situated within that context, more so, the analysis has focused on industry and production. Having said that, it is significant to highlight at least some aspects of the analytical framework within which they discussed this relationship and the theory upon which it is based.

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233 Mapping Mining to SDGs : Atlas (2016), Pg. 4

234 Development Bank of southern Africa (1998), "infrastructure: A Foundation for Development", Development Report 1998. Pretoria: DBSA. Cited in Johannes Fedderke and Rob Garlick, „Infrastructure Development and economic growth in South Africa: A review of the accumulated evidence" (2008), Policy Paper Number 12, pg. 2

235 National Policy on Minerals metal in Nigeria, Business Legislation and Resources in Nigeria (March 24, 2016), Pg. 1, available at:< http://www.foramfera.com/national-policy-on-minerals-metal-in-nigeria2/>

236 Ibid, accessed 26th May, 2018

237 Business Legislation and Resources in Nigeria (March 24, 2016), PP. 1-2

238 Johannes Fedderke and Rob Garlick, „Infrastructure Development and economic growth in South Africa: A review of the accumulated evidence" (2008), Policy Paper Number 12, PP. 1-28, available at: <https://econrsa.org/system/files/publications/policy_papers/pp12.pdf> accessed on 10th September, 2019

Growth theory postulates that, "aggregate economic output is a function of a collection of production inputs",[239] production input is same as factors of production. Thus, simply means, factors of production involved and used as input determine the overall outcome, which is growth. Furthermore, there are no specific and uniform factors of production applicable to all sectors, rather they are determined by circumstances of each sector. However, such factors as technology, human capital, physical capital, level of labour force, government policy and viable institutions are frequently regarded by majority.[240]

Some infrastructures are directly involved in the production process. As a result, they are regarded as an actual input and accordingly termed as factors of production. In a mining perspective, this might include heavy-duty machines needed for mineral extraction or electricity, which is crucial for efficient mining activities. It has been theorised that, "an increase in the stock of infrastructure would increase the output of the economy as a whole".[241] Thus, stable power supply makes mining more efficient, less costly and hence functions to improve overall productivity of the sector in terms of greater revenue generation and widespread benefits to stakeholders. "The role of power generation infrastructure provides a concrete example of this channel. It is a necessary input into many production processes for both goods and services and so unreliable power supplies render this process either more expensive or entirely impossible."[242] Lack of this infrastructure explains the current state malfunction of many sectors of economy in Nigeria. As it is the case with infrastructure generally, significance of electric power is not exclusive for mining industry, several other industries such as textile, crude oil refineries and steel factory have shut down partly due to absence of this critical infrastructure in the country.

In yet some other cases, an infrastructure may not be itself a direct factor, it generates impact by complementing other factors of production. Popular example again is that of transport infrastructure. Even though, transport is not considered as a factor directly involved in the actual process of mineral extraction on site, it creates impact to the overall performance of the resource development process with respect to cost. Because availability of adequate transport

[239] Johannes Fedderke and Rob Garlick, „Infrastructure Development and economic growth in South Africa: A review of the accumulated evidence" (2008), Pg. 3
[240] Ibid
[241] Ibid, Pg. 4
[242] Ibid

infrastructure facilitates movements of goods and services, while "inadequate infrastructure creates a number of costs for firms who may have to develop contingency plan against infrastructure failure or even build infrastructure themselves."[243] Consequently, where there is inadequate road-network to link minefields with main outlets to international market, as it is the case in Nigeria, investors would inevitably incur huge cost to mobilise physical capital to the mining site and to transport extracted minerals to points of exportation.

Closely related to the above, is impact of infrastructure on mining through factor accumulation. Electricity and road, for example, may function to produce some other factors of high significance to the resource industry. Besides their direct contribution to the mining, energy and transport infrastructure bolster the function of social infrastructure in the form of school facilities to produce human resources with necessary expertise needed to direct both managerial and technical affairs of the industry for greater productivity.[244] Finally, infrastructure can be used as a policy tool to incite growth. To ensure smooth relocation of a rural settlement existing on an area later designated for mining, offer of an alternative space with superb infrastructure may be used to induce the process. Again, to persuade private investment into new mining areas, state policy might be directed towards creating some incentives in terms of infrastructure development. Construction of transport infrastructure liking those localities to major strategic national and international business hubs,[245] for example.

The foregoing provided an overview of how mining and infrastructure impact on each other. The World Economic Forum once noted the broad impact of infrastructure on development by saying, "Much of the debate on ways to spur growth, reduce poverty, and achieve other sustainable development goals (SDGs) is centred on the need to promote large increase in infrastructure investment."[246] While economic infrastructure-energy, transport, water system and sanitation facilities-effect industry productive capacity directly, social infrastructure-education and health-care structures-do create an indirect impact on the sector performance. Likewise, a functional resource industry is a crucial driver for creation and sustaining both types of infrastructure through its capacity as economic booster and diversification driver.

[243]Fedderke and Garlick, infrastructure Development and economic growth in South Africa (2008), Pg. 4
[244] Ibid, Pg. 5
[245]Ibid, PP. 5-6
[246]World Economic Forum 2017, quoted in Chukwuemeka Valentine Okolo, Richardson Kojo Edeme and Chinanuefe Emmanuel, „Economic Analysis of Capital Expenditure and Infrastructural Development in Nigeria" (2018), Journal of Infrastructure Development, Vol. 10, PP. 52-62, at pg. 52

Overall, these two sectors are not mutually exclusive, rather they are indeed critical to each other‟s efficiency and productivity. Thus, unless adequate infrastructure is available, it is most unlikely that mining industry becomes attractive to investment.

4.6. Comments on the state of infrastructure in Nigeria

4.6.1. Current state of infrastructure

Infrastructure deficits have been identified as one of the key areas undermining Nigeria‟s growth and development. Literature to date has shown that, although countries can attain growth without having adequate infrastructure, lack of functional infrastructure would constrain such nations from translating growth into development. An example was given of how countries with developed infrastructure were able to receive technology transfer through dealing with US enterprises while underdeveloped countries dealing with the same investors could not due to weak infrastructure.[247] Similarly, using Nigeria as a focal state, Scholars have extensively reviewed existing literature on FDI, economic growth and development to establish that, although FDI leads to significant raise of income, the link between growth and economic development can be challenged by absence of requisite infrastructure.[248] Further, the literature holds that, growth, which, is explained as increase in per capita output and boost in labour force and consumption is a common outcome of FDI, however, "the benefit of FDI is strongly contingent on the existence of appropriate infrastructure in the recipient country".[249]

The ultimate benefit of FDI lies in its potential to enable economic development and to aid investment that might otherwise be hampered in the absence of necessary infrastructure. Economic development therefore relates to ability of a state to translate national earning into widespread opportunities with positive impact on general social system through diversification and other direct and indirect economic benefits, including institutional expansion to generate employment and eradicate poverty.[250] However, despite the rise in

[247] Xu B., „Multinational enterprises, technology diffusion and host country productivity growth‟ (2000), Journal of development economics, Vol. 62 (2), PP. 477-493
[248] Edun Adetunji Olufemi, Akinde Jubril Olatunbosun, Olaleye Samuel Olasode and Idowu Gbolahan Adeniran, „Ifrastructural development and its Effect on Economic Growth: The Nigerian Perspective‟ (2013) European Scientific Journal, Vol. 9, no. 31, PP. 431-452
[249] Edun, Akinde, Olaleye and Idowu, „Infrastructural development‟ (2013), Pg. 438
[250] Ibid, Pg. 449

national revenue generated over the years, Nigeria's infrastructure still remains very poor as a result of lack of investment. This has deprived Nigeria"s attainment of development targets and the same reason has been used to explain the country's failure to realise the strategic Millennium Development Goals in 2015.[251] The World Bank had made it clear then that states need to upgrade their infrastructure in order to meet the goal to reduce poverty, boost growth and even to realise their Millennium Development Goals.[252] This continues to be a challenge when focusing on the Sustainable Development Goals.

There is huge gap in key infrastructure that would have high impact on the economy in Nigeria. Although, there has been improvement in telecommunication sector and computer literacy, the state of other economic infrastructure such as road and electricity among other things are deplorable.[253] With a land mass of 9, 110,000 square kilometre of land and a population of about 200 million people, only 193, 200 kilometres has been covered by the road network,[254] and currently over 80 per cent is begging for repair.[255] This is because the infrastructures are very old as much of were built in the 1970 s.[256] As regards electricity, "55.6 per cent of the total population do not have access to electricity."[257] Translated into actual number, that means over 100 million people do not enjoy electricity at all, while the rest, who are less, enjoy poor supply. In terms of these key economic infrastructure, data indicates that Nigeria is far below some comparable countries even within the African region. Schematic comparison between Nigeria and South Africa is shown in the table below:

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[251] Edun, Akinde, Olaleye and Idowu, „Infrastructural development" (2013), PP. 448-450
[252] World Bank (2007), The World Bank Annual Report, 2007
[253] Olufemi, „The Challenges of Infrastructure Development" (2012), Pg. 7
[254] Ibid, Pg. 8
[255] Chukwuemeka Valentine Okolo, Richardson Kojo Edeme and Chinanuefe Emmanuel, „Economic Analysis of Capital Expenditure and Infrastructural Development in Nigeria" (2018), Journal of Infrastructure Development, Vol. 10, PP. 52-62, at pg. 54
[256] Edun, Akinde, Olaleye and Idowu, „Infrastructural development" (2013), Pg. 432
[257] Chukwuemeka, Richardson and Chinanuefe, „Economic Analysis of Capital Expenditure" (2018), Pg. 54

Table 2:4 Infrastructure Stock in Nigeria

Core Infrastructure	**Nigeria**	**South Africa**
Road km per 100 sq2	21%	30%
Energy consumption per capita (KWh)	136	4803
Mining, sanitation and access to water	31	79
Security number of police per 100,000	205	317
ICT, use of phone	68%	140%

Source: Carthena Advisory: Presentation of NIIMP

The above table suggests that the aggregate infrastructure stock in Nigeria is simply inadequate. In addition to the data above, empirical literature further indicates the level of core infrastructure in Nigeria is 45-50, which is below the benchmark of 70. International statistic of core infrastructure show countries of similar potentials has either hit or been above the benchmark. South Africa, for example, has been rated 87, while Indonesia has been 70.[258] Overall infrastructure regional ranking in terms of quality published in 2015 in the World Bank Global Report placed Nigeria as number eight in West Africa sub-region.[259] Deficits in power infrastructure are the most concerning because Nigeria has the natural resources needed to generate electric power- coal, gas, hydro, thermal among others; yet it has been unable to generate efficient and stable electricity enough for residential let alone industrial consumption. With a population of over 200 million, Nigeria generates less than 4000MW, while Malaysia generates 19,023MW for a population of only 32 million. In fact, reliable power supply is one of the key reasons that mining has been more efficient and attractive in other African countries. South Africa, for instance, currently generates 51,309MW with a population of just 56.72million. In transportation sector the narrative is similar: Nigeria"s road network is 80% unpaved, only 20% of the country is linked, consequently most of the mines are left out of this coverage as they are predominantly in the rural areas. The cause of

[258] Wole Ogundare, 'Presentation of the Nigerian National Integrated Infrastructure Master Plan, African Investments Investor Session' (2018), Pg. 13, available at: <https://www.africaninvestments.co/wp-content/uploads/sites/82/2018/11/Wole-Ogundare-NIIMP-Presentation-Wole-Ogundare.pdf> accessed: 13th September, 2019)

[259] Chukwuemeka, Richardson and Chinanuefe, „Economic Analysis of Capital Expenditure" (2018), Pg. 53

this infrastructure constrain has been attributed to lack of investment, weak institutions and poor regulatory framework.[260]

4.6.2. Infrastructure Challenges in Nigeria

Several scholars have identified various challenges that retard infrastructure development in Nigeria. Low and inconsistent public spending on capital projects has been highlighted as the principal factor underlying inadequacy of infrastructure in Nigeria. In a research co-authored by three Nigerian scholars, capital expenditure record spanning over 40 years has been analysed. The authors observed that, "capital expenditure, construction expenditure and non-oil revenue have the potency of accentuating infrastructure development in the long-run, but such is being hampered by external debt."[261] Essentially, this observation led to the conclusion that, increase public spending on infrastructure and non-oil revenue generating sectors is crucial for closing the gap in infrastructure.[262]

Other scholars have attributed the poor state of infrastructure largely to the policy framework. Main factors for neglecting infrastructure, according to this group, have been poor implementation of the national plan and instability in oil revenue which necessitated policy change. Accordingly, they emphasise the need to strengthen regulatory institutions and the necessity of improving infrastructure to drive FDI into non-oil vital economy sectors.[263] Some development scholars had argued that, the fundamental challenge of developing countries with respect to development was to do with the innovativeness and literacy of the individuals in charge. They maintained that, developed nations were able to excel because of "individuals with high level of achievement motivation",[264] whereas leaders in less developed countries (LDCs) were "authoritarian personalities who lacked self-confidence, exhibited a high level of anxiety when faced with new situations and who were content to preserve the status quo."[265] Thus, to promote infrastructure and other development people must change psychologically and states must strive to improve level of literacy and general awareness.

[260] PWC Nigeria, „Infrastructure development in Nigeria: Better late than never" (2016), PP. 1-2
[261] Chukwuemeka, Richardson and Chinanuefe, „Economic Analysis of Capital Expenditure" (2018), Pg. 60
[262] Ibid
[263] Edun, Akinde, Olaleye and Idowu, „Infrastructural development" (2013), Pg. 432
[264] McClelland David Clarence, *The Achieving Society* (New Jersy: Van Nostrand, 1968), Pg. 20, cited in Olufemi, The Challenges of Infrastructure Development (2012), Pg. 6
[265] Hagen, E.F., „On the Theory of Social Change" (1983) IIPA Journal, Pg. 16 cited in Olufemi, The Challenges of Infrastructure Development (2012), Pg. 6

Olufemi[266] offered a comprehensive analysis of challenges facing Nigeria"s infrastructure sector. To capture myriad of issues associated with the sector, he adopted various models of analysis including PESTLES. In other words, the problem with infrastructure development in Nigeria involves different perspectives: Political, economic, social, technology, legal, environment and security. In conclusion, the author summarised all the challenges in two points. First, "the demand surpasses the supply and finance that will stimulate rapid provision is not there."[267] This can be aligned with inadequate public spending on infrastructure noted by other scholars as well.[268] In addition, however, this author has pointed out an important issue to do with finance. The fact that, the state has been financially unable to allocate resources necessary to provide adequate infrastructure and that private investment is critical to development of the sector is widely documented. The existing literature have however missed the discussion on the way to diversify the source of financing infrastructure using innovative approaches including from different legal traditions, such as Sukuk.

As discussed subsequently, although Sukuk has been tested successfully in Nigeria, proper structure to support its wider application has not been developed.[269] Creating linkages between Sukuk and the legal framework of other economic sectors including infrastructure is yet to be done. This leads us naturally into the second issue adumbrated by Olufemi that, "government do not set the priority right".[270] This is critical as capital projects require planning, which includes consideration of factors to do with design, finance, technology and management. In the next section, these two issues, namely, finance and planning (priority setting) will be used to review the policy and regulatory framework for infrastructure development in Nigeria.

4.6.3. Review of policy and regulatory frameworks for infrastructure development in Nigeria

National Integrated Infrastructure Master Plan (NIIMP), is the principal policy document governing infrastructure development in Nigeria. Planning is crucial to infrastructure

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266 Olufemi, „The Challenges of Infrastructure Development" (2012), PP. 1-15

267 Ibid, Pg. 10

268 Chukwuemeka, Richardson and Chinanuefe, „Economic Analysis of Capital Expenditure" (2018), PP. 52-61; Edun, Akinde, Olaleye and Idowu, Infrastructural development (2013), PP. 431-452, at Pg. 450 authors concluded by recommending research into PPP and noted infrastructure deficit in Nigeria is at such a stage that government alone cannot provide adequately.

269 See chapter six of this thesis

270 Olufemi, „The Challenges of Infrastructure Development" (2012), Pg. 10

development. It is mainly about deciding what project to undertake, why is it important, where is it most suitable to locate it, when and within what timeframe should be delivered as well as how to finance the project, ensure quality and to provide proper management till completion. Feasibility studies is necessary to determine not only viability but also that it serves development purpose and objectives. Accordingly, the master plan is to serve as a robust and comprehensive framework for infrastructure development, with fundamental objective to ensure that, right projects are prioritised for the right time, and enabling environment is created for private investors to participate. Further, the NIIMP is expected to achieve economic growth by efficiently allocating resources to projects with greater positive externalities.[271]

This section will interrogate NIIMP"s completeness with regards to priority setting and private financing framework. For industrial and overall economic development purpose, energy power generation, transport, and IT and communication are regarded as key priority sectors of infrastructure. As far as mining is concerned, these three sectors are necessary for efficient operation and widespread impact of the industry. It must be reiterated that, currently the productivity of the solid resource sector has been challenged by lack of reliable electricity, good road network, adequate air and sea port facilities to link up the rural mines in the country with international market.[272] Improving human capital with minimum international threshold level of technology literacy is significant, because the ability of Nigeria to build its local content and absorb the transfer of technology to run its resource industry depends on it squarely.[273] These and these infrastructures are costly and gap to close is wide, Nigeria will need $2.9 trillion from now till nearly the end of NIIMP"s timeframe (2014-2043).[274] One way to achieve this is to collaborate with private investors, promote innovative and pragmatic approaches to financing infrastructure development, to enable efforts through partnership with private actors.

To cover all necessary grounds in the assessment of the framework, it is important that other relevant regulatory instruments are considered along with the NIIMP. Key institutional regulatory framework directly linked to specific infrastructure or economic sector referred to in this section would be relevant. In terms of electricity generation, it is inevitable to discuss

[271] Wole, „Presentation on NIIMP" (2018), Pg. 3
[272] Nigeria Mining Investment Promotion Brochure (2017), PP. 5-24
[273] Edun, Akinde, Olaleye and Idowu, „Infrastructural development" (2013), Pg. 438
[274] Wole, Presentation on NIIMP (2018), Pg. 16

certain provisions of National Energy Regulation Commission (NERC) Act. Likewise, legislations governing transport and mining. Furthermore, connections between infrastructure development and aspects of investment including finance and company regulations, such legal instruments as NIPC Act, CAMA, CBN Act, Debt Management Office (DMO) Act as well as PPP framework are of significance to the entire discourse of this section.

Mining and infrastructure have always been at the centre of Nigeria‟s development policy. Transformation Agenda (2011-2015) had these two sectors in addition to inclusive growth and job creation as priority. Likewise, the Nigeria‟s Vision 20: 2020. The key objective of the VN20:20 has been to drive development of adequate infrastructure necessary to reinvigorate all sectors critical to the nation‟s economy, including mining. Even though, the vision was formulated in 2010, four years earlier than IIMP (2014-2043), and to last for just ten years, there has been significant overlap in terms of their object and timeframe, signalling an effective synergistic approach to infrastructure development. Moreover, during NIIMP formation period technical inputs from mining, energy, transport and legal sectors were solicited for and eventually incorporated in the master plan. Thus, these sectors are not only prioritized, they are expected to work in synergy with the National Planning Commission as they all have a stake in the main purpose of the NIIMP, namely to address infrastructure challenges in Nigeria.

4.6.4. The Energy Sector

The main aim of power sector has been to achieve adequate supply of electricity for both social and industrial consumption to all parts of Nigeria. National Electric Power Authority (NEPA) was incepted in 1972 to regulate the entire sector. Given the continuous failure to meet the energy demand of the growing population over the decades, NEPA was scrapped in 2005. Instead, the Electric Sector Reform Act (EPSRA) 2005 created Power Holding Company of Nigeria (PHCN) to which all NEPA‟s employees as well as assets and liabilities were transferred. It must be emphasised that, the principal reason behind dissolution of NEPA, was to eliminate state monopoly in the sector and to persuade private investment. Accordingly, EPSRA created eighteen new companies and three regulatory bodies to ensure enhanced generation and distribution of power in the country.[275] NERC emerged as main regulator, along with the other two agencies, namely Nigerian Electricity management Company (NEMCO) and Nigerian Bulk Electricity Training Plc (NBET), were established to manage various activities of the sector which involves persuading private investment and collaboration with international bodies.

From a planning perspective, regulatory agencies must work to facilitate NNMP aspirations in the sector. The master plan has set goal targets to be achieved in three time bound stages. Phase one, which is to last till 2020 aims to boost generation capacity to 40000MW to expand electricity access to 75% of the population, compare to current coverage of 30-35%. This rapid upgrade has been planned to generate from combined renewable and non-renewable sources of power generation in line with Nigeria"s policy to gradually migrate onto renewable energy.[276] By 2030, the second slot of the plan is to ensure distribution has reached 90% of the population and industrial supply significantly improved to drive strong and comprehensive growth. Overall, Nigeria aspires for complete close of any gap in power infrastructure before the year 2043 and to export energy to other African countries. This might not be too ambitious considering the abundant reserve of fossil fuel (oil, gas and coal), which has continued to be the dominant source of electric power generation in the country. However, increasing desire of the country to transform onto clean and green sources consistent with the global trend of sustainability and healthy environment, could delay realisation of those policy objectives. Although, Nigeria can also boast of huge resource of renewable energy sources such as biomass, solar and wind among other things, two challenges are real. "Lack of technological expertise and skilled labour for the implementation and running of the wind farms, thermal stations and energy facilities".[277] Training and expanded literacy programme on renewable energy is crucial to building human capital, though it might take time.

NERC has, so far, taken various initiatives to expedite NIIMP objectives. These efforts involve generating motivations for the private actors to invest in power-related projects but also accessing support from international financial institutions. A facility has been obtained

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[275] 18 companies newly established under ESR Act constitute of 11 Distribution companies (Dis Cos), 6 Generating Companies (Gen Cos) and Transmission Company of Nigeria (TCN).

[276] Global Legal Insight, „Report on Nigeria"s Energy Sector" (2019), PP. 1-2, available at: <https://www.globallegalinsights.com/practice-areas/energy-laws-and-regulations/nigeria> accessed 14th September, 2019

[277] I Global Legal Insight, „Report on Nigeria"s Energy Sector"(2019), PP. 1-2

by the commission to finance the construction of ten thousand solar-grid stations with aim to supply social, educational and health-care facilities. The project is meant to contribute towards 2030 target to ensure 30% of total national generation comes from renewable energy as enshrine in the National Renewable Energy Action Plan (NREAP). This is an inter-ministerial effort and in collaboration with several state agencies adopted (2015-2030) to improve power efficiency through renewable energy. Furthermore, to stimulate participation of non-state entities in green energy approach, NREAP launched a package of incentives to private providers of clean energy, which involves tax relief, access to financial facilities and guarantee to purchase their supply at a good price determined by the commission.[278] However, bureaucratic bias in favour of fossil fuel suppliers has delayed implementation of this persuasive policy.[279]

Nonetheless, another window has been created in 2018 named Meter Asset Provider. Consistent with the name, this scheme allowed investors supply meters to energy consumers in the country, which was never the case before, as only e-meter could only be purchased from designated state agency. The most productive of all incentives was perhaps the N701 billion payment assurance guarantee, which guarantees instant payment for suppliers once they delivered power stocks to distributors. This arrangement has yielded remarkable boost in the sector output by improving production volume up to 7000 (MW). However, this policy has been widely criticised for being unsustainable and does not fall within the intent of the sector reform Act.[280]

In addition, there are two other initiatives that have, as well, recorded popularity in the sector. In order to tackle inadequate skills, which has the tendency to undermine Nigeria‟s policy on renewable energy, partnership with an oversee team of experts has been successfully concluded. This approach, which involves training Nigerians on technical skills, has led to construction of a facility that produce 20MW of clean energy thereby saving the country from 20,744 tons of carbon emission. Further, Eligible Customer Regulation 2017 was also

[278] Nigeria‟s National Renewable Energy Action Plan (NREAP) (2015-2030), available at: <https://www.se4all-africa.org/fileadmin/uploads/se4all/Documents/Country_PANER/Nigeria_National_Renewable_Energy_Action_Plans_.pdf> accessed 14th September, 2019

[279] Global Legal Insight, Report on Nigeria‟s Energy Sector (2019), PP. 1-2

[280] THIS DAY News, As 701b Power Supply Fund Draws Down (THIS DAY News, 19 Febuary,2019), available at: <https://www.thisdaylive.com/index.php/2019/02/19/as-n701bn-power-supply-fund-draws-down/> accessed 16th September, 2019

launched to enhance energy supply to industries by allowing them to purchase directly from generating companies rather than distributors.[281]

Despite all above, the regulatory and policy approach of the sector is not without controversy. Certain policy steps taken by some public sectors in the country conflict with and capable of eroding the overall efforts of energy regulating agencies, causing a sabotage to NIIMP, and signalling serious lack of a streamline regulatory instrument to coordinate actions of all stakeholders within the system. Recently in 2018, authorities of Nigeria‟s Custom and Excise announced imposition of 5-10% import duty on any solar component brought into the country. This kind of charges will increase the cost of importation and by extension the market price with ultimate effect being high cost of electricity for Nigerian consumers. This policy create disincentive to renewable energy suppliers. Similarly, resolution of Nigeria‟s mining sector to grant coal mining concession for power generating companies would promote power generation from coal which could have adverse impact on environment. In aggregate, this contradicts not only the grand policy to reduce generating power from unconventional sources, but also threatens the entire framework of infrastructure development in Nigeria. Finally, on this note, the policy formulation and implementation process of power regulatory agencies themselves needs to be reviewed. Public back lash generated by NERC resolve to raise energy tariff, which ended up in judicial pronouncement being made against the commission,[282] highlights a gap in the policy cycle with respect to legitimacy of ideas underlying that policy.[283]

4.6.5. The Transport Sector

This sector is composed of four sub-sectors. Aviation which is regulated by t through Federal Airports Authority of Nigeria (FAAN), a parastatal under the ministry of aviation; and the other three, maritime, railway and road network come under the ministry of transport. However, each of these three is regulated by a separate body. Maritime is managed by Nigeria Maritime Safety Authority (NIMASA) and Nigeria Port Authority (NPA), railways are under Nigeria Railways Corporation (NRC), and roads are managed by Federal Roads

[281]Global Legal Insight, Report on Nigeria‟s Energy Sector (2019), PP. 1-2
[282] Nigerian Electricity Regulation Commission v. Barr. Toluwani Yemi Adebiyi LPELR-429032 (CA) 2017
[283] Policy cycle involves five stages: formulation, legitimation, implementation, evaluation and policy change. In representative democracy, some important policy decision with far-reaching effect on people requires public opinion sampling to test its legitimacy before taking to implementation stage.

Management Authority (FERMA). Although, road network is the major concerned with regard to transport infrastructure urgently needed to facilitate development in Nigeria, other sub-sectors are important. Thus, NIIMP provided for a broad plan to expand the entire sector in order to meet the main objective of creating strong and inclusive growth by reviving economic industries through FDI and enhanced. infrastructure. The master plan provided for a three splits of target goals to be achieved over the period 2018-2043.[284]

By 2018, the plan is to ensure that all economic centres in the country are connected, national highways rehabilitated, and Urban Traffic Control (UTC) system is not only developed but also effective maintenance facilities are put in place to ensure long term sustainability. At this stage four airport terminal would be constructed, and sea ports performance would be enhanced. Furthermore, roads linking economically strategic areas would be dualized by 2023 to expand business volume and facilitating movement of goods and services across the country and beyond. Besides, the split target of 2023 would include rehabilitating about 70% of the roads in Nigeria. Ultimately, 100% of roads network will be made good by the end of 2043.[285]

Given the need to stimulate private investment in the transport sector, various incentives have evolved. Companies Income (Expansion of Profit) Order 2012 created Infrastructure Tax Relief (ITR), which allows companies that invested in the sector to claim back 30% of the total cost of their projects through a deduction from computation of their respective Companies Income Tax.

Following the expiration of this scheme in 2017 as it was to last for only five years, another scheme was developed. The new package was named Road Transport Fund (RTF) 2017 and was later upgraded into Road Infrastructure Development and Refurbishment Scheme in 2019. This scheme created a window that entitles investors to recover 100% cost of investment plus an uplift through tax credit mechanism. Furthermore, to encourage infrastructure development in rural areas a special incentive was generated. Investors that mobilise their capital into provision of vital infrastructure such as road, electricity and communication facilities will enjoy a motivational reward under section 34 of Companies

[284] Nigeria‟s National Integrated Infrastructure Master Plan (NIIMP), PP. 35-50
[285] Ibid, PP. 35-50

Income Tax Act (CITA).[286] However, some of these incentives have specific conditions. For example, the Road Infrastructure Development and Refurbishment Scheme in 2019 is not available to any company that pays petroleum income tax, and for any investor to benefit from the scheme, the project they undertake must satisfy eligibility requirement. Eligible projects are as designated by the president of the Federal Republic of Nigeria.[287]

However, as noted earlier, infrastructure does not only refer to physical areas of investment and management but can also include legal and policy frameworks through which decisions are made and investments are governed.

4.7. Inadequacy in law and inefficiency in governance in Nigeria

The inadequacies of law in Nigeria has been well documented. In the Nigerian petroleum sector, it is a glaring fact that reveals itself through the main legislation. The principal legislation governing oil and gas sector is the Petroleum Act (1969). S.1 of the Act vested ownership of resources in the government of the Federation as did S. 44(3) of the 1999 constitution; S. 2 empowered minister of petroleum resources to grant and revoke license which includes OEL (Oil Exploration License), OPL (Oil Prospecting License), and OML (Oil Mining Lease); and direct management of the oil and gas asset vested in the Nigeria National Petroleum Corporation (NNPC). Another core legislation is the Petroleum (Drilling and Production) Regulations (1969). As regards criminal acts of sabotage to oil industry by the community which tended to grossly undermine national economy, the Petroleum Production and Distribution Anti-Sabotage Act (1975) was enacted.

To tackle any such activities detrimental to investment the Act classified such acts as crimes of high magnitudes and prescribed highest possible punishment of up to 21-year imprisonment or even death sentence for wilful saboteurs.[288] Although some other subsidiary investment laws were reviewed, but not these core legislations. It has been theorised that, archaic and outdated legal framework which does not reflect modern reality is inadequate.[289] However, in the case of Nigeria, these key legislations have not been updated for decades.

[286] Andersen Tax, „Tax and Road Infrastructure Development in Nigeria: the Nexus" (February, 2019), available at: <https://drive.google.com/file/d/18i4G3Vz9cTg0xZ78314CyNk4jEm6FsjJ/view> accessed 16th September, 2019
[287] Ibid
[288] Olubunmi, „The Impact of Oil Pollution on the Environment" (2014), Pg. 16
[289] Amanda, „An Ideal Legal System for Attracting Foreign Direct Investment" (2000), Pg. 1629,

The adverse effect of this inadequacy has been aptly observed by the Nigerian Extractive Industries Transparency Initiatives that:

> *Nigeria"s oil and gas sector has continued to deteriorate largely due to the fact that the laws that govern the petroleum industry are either not sufficient for effective regulation of the sector, or too outdated to be relevant in today's global energy environment. For instance, the Petroleum Act (1969) was enacted when the country"s economy revolved less around oil and when the global oil market was less competitive than todays. Yet, the country has failed to enact laws to adapt to the changing realities in the sector locally and internationally.*[290]

The issue of the current framework is not just one of age, but beyond that, it allocates excessive discretion to the officials, contains imprecise rules and confusion between stakeholders" roles. Naturally, these factors generated second degree elements of inefficiency and uncertainty like corruption, lack of transparency and accountability.[291] As stated from the outset of this study, any framework that fails to make clear and unambiguous rules must be amended so as to provide greater certainty for investors. For certainty is fundamental to any prudent investment decision. In fact, „rational investor prizes regulatory certainty above practically all else: clear, unambiguous rules, predictable policymaking and efficient regulation."[292] And the best way to achieve certainty, according to the dominant theory of investment, is by making the law clear and accessible, limiting state discretion and reducing corruption.[293]

These factors combined, necessitated a reform within the Nigerian petroleum sector and consequently the controversial Petroleum Industry Bill (PIB) was drafted in 2003 but yet has not been passed into law due largely to issues to do with governance and disagreement among stakeholders over some contentious provisions of the Bill. „These disagreements have cantered mostly around the regulatory framework, including power of the minister, ownership and control of the resources, host community benefits, environmental concerns, appropriate fiscal regime etc."[294] The PIB has been stagnant for 16 years, and has cost the

[290] Nigeria Extractive Industries Transparency Initiative (NEITI), „The Urgency of a New Petroleum Sector Law" (2016), Policy Brief, Issue 02/October, PP. 1-10, at Pg. 3, available at <file:///C:/Users/Al%20Muawid%20L3/AppData/Local/Packages/Microsoft.MicrosoftEdge_8wekyb3d8bbwe/TempState/Downloads/NEITI-PB2-280916%20(3).pdf> accessed 15th May, 2019
[291] Nigeria Extractive Industries Transparency Initiative (NEITI), Policy Brief Issue 2 (2016), PP.1-10, at Pg. 3,
[292] Ibid, Pg. 3
[293] Amanda, „An Ideal Legal System for Attracting Foreign Direct Investment" (2000), Pg. 1629
[294] Nigeria Extractive Industries Transparency Initiative (NEITI), Policy Brief, Issue 2 (2016), Pg. 2

country an estimated amount of $120 billion which is lost to investment withheld or diverted to other jurisdictions. Among the reasons advanced for this prolonged delay is are corruption and governance deficiencies. NEITI audit report of 2013 has revealed that, a cumulative amount of $10.4bn and N378.7bn was lost or unremitted. And from 1960 (just two years after production started) to 1999 the total amount of $400 billion is reported to have been stolen by the ruling class from the oil revenue.[295]

Reference to corruption and lack of transparency would naturally highlight yet another issue that calls for urgent regulation within the legal framework. Ownership disclosure or revealing the actual actors behind the corporate veil is essential to the economy of developing countries like Nigeria. Because corporate names are often used anonymously „to deny countries of valuable revenues…; then, the shroud of secrecy around them is used not only to mask possible corrupt relationships with government officials but also to obscure probable links to money laundering, drug trafficking and terrorism financing‟[296]

Report from international development organisations including OECD concludes that, not less than a trillion USD is lost annually by developing nations to the undisclosed corporate entities, and $2 for every $1 that comes in as development funds or as external investment capital.[297] Thus, use of anonymous company presents serious threat to both the national economy and thereby hinders development. Real life situations have shown instances where politically exposed persons (PEPs) would hide behind the corporate veil and appropriate to themselves resources that may otherwise be used to provide development to the citizens and thereby leaving the citizens in abject poverty. One famous example is the controversial case of Malabu Oil Company, where a Nigerian minister of petroleum awarded the oil license to Malabu, a company wherein he owned significant interest which was cloaked under some fictitious names contained in the company papers. While the danger of dodgy companies can affect any country in the world but shown by panama revelations „the biggest victims of these practices are developing countries, or generally countries with relatively weak institutions of accountability and tax authorities.‟[298]

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[295] Eyene, „Confronting the Governance Challenges of Developing Nigeria‟s Extractive Industries‟ (201), Pg.28
[296] Nigeria Extractive Industries Transparency Initiative (NEITI), „The Need to Know Who Owns What in Nigeria‟s Extractive Sector‟ (2016), Policy Brief, Issue 1/May, PP. 1-8, at Pg. 1 available at <https://eiti.org/sites/default/files/documents/policy_dialogue_on_beneficial_ownership_final.pdf> accessed 15th May, 2019
[297] Ibid
[298] Nigeria Extractive Industries Transparency Initiative (NEITI), Policy Brief, Issue 2 (2016), Pg. 3

To provide an international framework, in 2016 the Extractive Industries Transparency Initiatives has set up a new standard of practice to all member states. S. 2.5 of the standard required participating countries to keep a register where details of all companies with investment in the industry shall be fully recorded including of course the actual identities of those who own them. The difficult question is given the current position of the investment framework can this initiative be implemented in Nigeria? Although, the ownership disclosure entails practical benefits as it might protect government‟s revenue and promote domestic enterprises‟ potentials of partnering with multinationals, there is no internal framework to provide necessary legal backings to the initiative. Rather the provisions of corporate law in Nigeria, appear to sharply contradict this standard. The combine effect of Sections 37 and 38 is to give a corporate entity all transactional capacity and powers available to natural person which tends to resist any attempt to unveil it except within limited circumstances of which EITI standard is not one. Thus, this initiative will remain to be uneasy to implement unless the internal framework is reviewed. Some commentators viewed the establishment of Nigeria‟s financial intelligence Unit (NFIU) and the enactment of Money Laundering Prevention Act as a move in that direction. In effect the Act has mandated banks to and Designated Non-Financial Institutions (DNFIs) to dig out details of beneficial owners of companies. However, lack of professional intelligence background on part of bankers would hinder the success of this scheme.[299]

Freedom of information Act is yet another avenue for checking anonymity of companies. The Act gives people the right to demand for information from any organisation. The only shortcoming of this law is that it covers only public sector. And public domain holds only formally disclosed data and no more. The fact that those legislations are not very clear on the issue they cannot take place of unambiguous policy and law. No doubt achieving transparency can reduce corruption, lower the risk of financial misconduct, and thereby create incentives for all stakeholders, the government, investors and host communities.

On the flip side of the coin is the argument that, even where state uses the instrument of law to define the role of the private sector in development, language to be used should or should not be of command. Critics have cautioned against any use of law in traditional sense

[299] Nigeria Extractive Industries Transparency Initiative (NEITI), Policy Brief, Issue 2 (2016), PP. 1-8

"command followed by sanction",[300] as that is likely to be counterproductive. They cited two examples of Nigerian experience. A bill to institutionalise CSR in 2008 had been frustrated and eventually defeated by protectionist investors due to a provision mandating companies operating in the country to pay certain percentage of their annual profit towards community development.[301] Again, similar reason was adduced for the long delay of the still awaited Petroleum Industry Bill (PIB).[302] Moreover, the regulatory uncertainties surrounding the outcome of PIB, has been identified as the sole reason for massive divestment by International Oil Companies in the deep water projects of Nigeria‟s Oil and Gas Industry.[303]

Many of such companies have now refused to undertake exploration at the new off-shore blogs despite of the deadline they had earlier signed. Furthermore, the same PIB alongside the prevailing social unrest targeting foreign investors and oil infrastructure in the Niger Delta region of Nigeria said to account for the recent shrink in crude production capacity of the country. Due to vulnerability of working in the on-shore and shallow waters, foreign oil companies felt compelled to transfer their equity to local companies[304].

On the other side of the spectrum are positivists, who are of the opinion that only mandatory legal rules would drive meaningful development through CSR. Even in the case of Nigerian Niger Delta, the scholars expressed confidence that legislation enforcing CSR can solve the long-standing crisis in the oil communities. One writer stated:[305]

> *If the PIB is passed into law in Nigeria and the provisions on the Petroleum Host Communities Fund is retained in the legislation, it could have a significant effect on the percentage of oil spills caused by sabotage of oil facilities by disgruntled host communities, provided proper mechanisms and guideline are put in place to ensure that the funds are judiciously managed.*

A study suggests that, mandatory payment for CSR will cost resource companies far less than what they spend on security to protect their investment from social unrest. Samuel Diminas found that, Shell Petroleum Development Company (SPDC), spends on security in Nigeria an amount far more than it spends for same purpose in in Americas, Europe and Russia

[300] Okoye, „Corporate Social Responsibility, Law and Development in an African Context‟ (2012), PP. 365-370
[301] Ibid
[302] Olubunmi, „*The Impact of Oil Pollution on the Environment" (*2014), PP. 18-20
[303] U.S. Energy Information, „Report on Nigeria‟ (May 2016) PP. 2-15
[304] Ibid, PP. 2-15
[305] Olubunmi, „*The Impact of Oil Pollution* on Environment‟ (2014), Pg. 21

combined.[306] Also, a model of community/business relationship in which the host community is treated as partners, holds phenomenal incentives for all stakeholders, has been equally proved by Indorama Eleme Petrochemicals Ltd. This arrangement has seen Indorama paid four billion annually to the community and financed a project of Greenfield Urea Fertilizer Plant for $1.2 billion in the same community, all in exchange for smooth and uninterrupted operation, for which the company won a global award.[307] Therefore, improving legal systems and governance mechanisms is vital to improving the confidence of investors in Nigeria‟s mining sector and the security and stability of their investment over time.

From efficiency perspective, Ghana seems to have been ahead of Nigeria. It was Nigeria‟s move to reform the oil and gas industry through PIB that inspired Ghana to embark on a similar project, but the latter has successfully completed the process, while Nigeria is still on. Another aspect of efficiency that makes Ghana a competitive mining destination is the speedy process of documentation. It takes five days to register a company and obtain immigration permit, and within one month mining licensed is processed. This institutional efficiency wins investor confidence. In South Africa, again effective institutions that are vital for mining renders business relatively easier. Financial institutions are well-developed in addition to modern infrastructure. Although, mining in South Africa is facing some challenges due to technical issues with energy sector of the country, their infrastructure stock is far ahead of Nigeria as presented and discussed above in this chapter.

Turning to predictability in the mining regime, still South Africa and Ghana appear to be more predictable. The life span of mining lease in both countries is 30 years and renewable for until the end of the economic life of the mine.[308] In contrast, the longest license granted under the Nigeria‟s Minerals and Mining Act, 2007 is 25 years, renewable for another 25 years upon stringent conditions. The longer a regime, the more the stability it gives to an investor, as mining is a time consuming project. Accordingly, potential investors looking at the mining laws will be able to establish certainty and investment predictability from the

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[306] Samuel Diminas, „An Analysis of the Nigerian Petroleum Industry Bill‟ (2013), PP. 5-8 available at: <http://www.wespaq.com/wp-content/uploads/2013/05/An-Analysis-of-the-Nigerian-Petroleum-Industry-Bill-2012WESPA V1FINAL.pdf> accessed 20th August 2019

[307] Ibid

[308] Deloitte Report, „State of Mining in Africa‟ (2017), available at: <https://www2.deloitte.com/content/dam/Deloitte/za/Documents/energy-resources/za_state_of_mining_africa_09022015.pdf> accessed 20th September, 2018; Also The minerals and Petroleum Development Act, 2013 (South Africa), Minerals and Mining Act, 2006 (Ghana) and Minerals and mining Act, 2007 (Nigeria).

length of the mining lease. Thus, Nigeria needs to review its regime to improve predictability and compensate for the lack of adequate infrastructure that is limiting the efficiency of the mining sector.

4.8. Conclusions on policy and legal frameworks for development through mining and infrastructure investment

This chapter has discussed the strength and the weakness of the investment framework for Nigeria"s extractive industries. Lack of up-to-date law has made petroleum industry in adequate and less productive. Imprecision in the rules, ambiguity and availability of large discretion to the bureaucrats has given birth to some more serious issues of governance such as widespread corruption, lack of transparency and accountability. The endemic effect of these factors is holding the new Petroleum Industry Bill (PIB) to ransom. The bill which is meant to address all inadequacy of the framework and bring it into speed with the modern realities of investment and development has been stagnating for more than one and half a decade in its draft form, mainly because stakeholders disagreed to agree on certain provisions. Unless PIB is successfully passed into law, the sector would continue to underperform, the state loses revenue and development pace continue to be even slower. NEITI has described the paradox of operating within outdated framework as:

> *Relying on rules and methods that were crafted for the market as it was four decades ago is not only a wrong choice, it is a very costly one. Inevitably, the cost of failure of policy and regulation to adapt as the industry evolved has left a yawning gap between endowment and performance. Nigeria currently holds the largest gas reserve in Africa and the 9th largest reserve in the world. Yet it occupies only the 24th position among the world"s producers. This contradiction is one of many illustrations of the paradox of a sector abundant in natural endowments but beset with avoidable, man-made problems. Nigeria is the 12th largest producer of crude but has the lowest contribution of oil to GDP among OPEC countries. The commodity accounts for 93% of export earnings, 85% of government revenues but only 9% of GDP. This is on account of the absence of adequate "productive activities in the economy" related to oil.*

Failure to update laws governing the oil and gas sector has not only stagnated development but also created uncertainty for investors. Petroleum Act of 1960s must not be expected to reflect current priorities as the draftsmen could only have envisaged the realities of their time. This explains the yawning gap between the volume of crude produced and oil contribution to

GDP. While contribution to GDP is less than 10%, production is so huge that it accounts for 85-90% of the total export, due to lack of industries and manufacturers. This neglect by the state to provide for industrial development means also lack of job and earning opportunity for the citizens, which manifest itself in widespread socio-economic problems. Consequently, this was the main drive for community up rise against the state in some oil producing areas, rendering those areas less-attractive to potential investors.

Further, there has been no concrete regulations with reference to investor duty towards community. The practice in the oil communities has so far been based on memorandum of understanding, which is entirely voluntary, and thus not always accessible. All efforts to concretise CSR of oil companies by a binding legislation had always ended in deadlock between stakeholders. In contrast, Community Development Agreement (CDA) represents a mandatory legislation demanding investors to contribute in socio-economic development of affected mining communities. Although, this model has been widely lauded as concrete definition of rights and duties creating sufficient incentives to all stakeholders,[309] yet, is not without controversy. Scholars have expressed mixed-feeling about real and potential success of using legal instrument to enforce CSR as it is the case with CDA, there is not enough evidence of practical experience within Nigeria to enable one draw conclusion either way. The possible reason for this situation in Nigeria is lack of serious investors in the mining sector.

This chapter has also discussed linkages between infrastructure development and mining and investment. Infrastructure is crucial driver to growth in all economic sectors of the Nigeria, but it is particularly critical to mining industry. Nigeria needs to improve energy infrastructure as adequate electric power availability improves efficiency of industrial operations by reducing cost and thereby enhances production and profitability. The current 4000 (MW) generation capacity of the country has not even been enough for social consumption as majority of the population lack access to electricity. Same can be said in the context of road infrastructure. As heighted in the chapter, 80% of Nigeria"s land mass is unpaved, which generated adverse impact on the productivity of the mining and other vital economic sector. Given the significance of access to international market and facilitated movement of goods and services to resource industries, it is critical that Nigeria upgrades its

[309] Amanda, „Attractive Legal System" (2000), PP. 201-204

transportation system by expanding rad and railways coverage, and sea and airports performance.

Further, this chapter has looked at Nigeria‟s framework for infrastructure development. There has been a set of policy initiatives all aiming at infrastructure enhancement. Nigeria Vision 20:2020 (2010-2020); The federal government Transformation Agenda (2011-2015); and National Integrated Infrastructure Master Plan (NIIMP) (2014-2043). The master plan has set out an expanded plan and targets with aim to closing all gaps that exist in the country‟s infrastructure by 2043. In addition, a synergistic approach involving key economic sectors, namely power, transport and mining among others, has been developed. However, the chapter has revealed some challenges capable of undermining this collective effort to address infrastructure deficit in Nigeria. Mainly to do with governance and finance. From governance perspective, there is lack of single regulatory and policy framework to coordinate all policy actions that could have impact on infrastructure development. As a result, conflicting policies emerged from different sectors to hamper the overall objective of NIIMP. The need for private sector mobilisation to invest in infrastructure has been also discussed. Considering the gap is too wide and government alone cannot provide the funding, the framework acknowledges private participation. The NIIMP contains legal enablers providing a framework for Public Private Participation (PPP). However, this area is poorly developed. There is need to boost investor confidence through addressing the risk factor involve in giving the government too much rights in a contractual agreement. More so, there is need to incorporate other innovative investment schemes which have been globally recognised for infrastructure development such as Islamic bonds (Sukuk). Next chapter will provide greater detail and discuss Sukuk framework.

Finally, and most importantly, to attract meaningful investment these frameworks need to incorporate the concept of economic freedom. This concept is about according private actors with unrestricted opportunity to conduct business, it creates compelling incentives to entrepreneurs. Essential components of this freedom include limiting the role of states into regulating the deals to ensure smooth transactions as well as creating certainty through a proper legal infrastructure to resort to in case of any default. Security of private property is crucial to investors, especially in Africa. In a situation where government is bestowed with so much powers to deal with the fate of the other party to contract, as it is the case with PPP, it is capable of eroding investors‟ confidence in the contract. Therefore, clear legal provisions guaranteeing protection of private rights to property against any arbitrary use of state power, is necessary to induce private investment in both mining and infrastructure. Others are access to sound money, freedom to trade internationally and regulation of credit, labour and business. Availability of a well-regulated credit market is particularly significant as it provides liquidity support to both foreign and local investors. Thus, this chapter highlighted potentials of inclusive financing vehicles of Islamic finance to stimulate development of Nigeria‟s mining and infrastructure. The capital market with regards to Islamic bonds is poorly developed. Hence, the following chapters will elaborate discussion on Sukuk.

5. Chapter Five: Developing a framework for the use of *Sukuk* in theory and practice

Introduction

This chapter discusses the potential use of *Sukuk* (Islamic bonds) in extractive industries in Nigeria, as well as suitable types of Sukuk structures and factors that may facilitate or affect its smooth application. In effect, the chapter looks at ethical constituents of *Sukuk* from the perspective of Islamic law and how these legal principles are embedded in the contractual structure of *Sukuk*. Essentially the chapter seeks to investigate the roots of the contemporary arguments on the legality or otherwise of the conventional structuring. For this reason, various types of Islamic commercial contracts underlying *Sukuk* transactions are discussed in the chapter with the overall aim to ascertaining what is both ethically and pragmatically suitable for the Nigeria‟s mining sector. Ultimately, this chapter will propose a framework and contractual forms for the use of Sukuk in the Nigeria‟s mineral industries.

5.1 Exploring the growing role of Sukuk in Islamic Finance

5.1.1. The potential and expansion of *Sukuk*

Sukuk has been and is being increasingly adopted as means of financing development by both governments and high-profile private entities. Its global reach and territorial coverage is not only remarkable but also unprecedented. From USD 1,172 million in 2001 total global issuance grew to USD 472.683 billion in 2013. Although, it is a classic term well documented and practiced by Muslim jurist in the past, *Sukuk* had its modern re-birth in Jeddah, Saudi Arabia 1988, when the Islamic Jurisprudence Council endorsed it as an acceptable investment vehicle from Islamic legal perspective.[310] Ever since then, offerings started to go far and wide from East Asia, Malaysia and Indonesia, up to Singapore and China and into Middle East through to Pakistan and North Africa down to Europe and finally penetrated United States before landing in East and West Africa recently. In most of these countries, legal and policy changes have been adopted in order to provide a framework for uptake and smooth operation.

Given the recent issuance within Africa, in Nigeria, Kenya and South Africa among others, this chapter seeks to examine the policy changes that have been or need to be made in order

[310] Ayman H. Abdel-Khaleq and Christopher F. Richardson, „New Horizons for Islamic Securities: Emerging Trends in *Sukuk* Offerings‟ (2006-2007), Chicago Journal of International Law, Vol. 7, PP.409-425

to provide enabling environment for *Sukuk* investment. Especially, in the wake of new policy in some countries, like Nigeria, where government has resolved to direct sovereign investment authority to generate funds for mine development through securities.[311] In particular, this chapter aims to explore the compatibility of *Sukuk* to and its viability for financing projects in mining sector within the existing policy and legal framework. First, the chapter will look at characteristics of *Sukuk*, and then *Sukuk* issuance, and thereafter legal framework for *Sukuk* in selected jurisdictions, and finally *Sukuk* for industry and infrastructure development followed by a conclusion. Ultimately, the contribution of this chapter together with others, would attempt to answer the second question of this research. How does state policy affect *Sukuk* investment in the context of minerals development?

5.1.2. Character and structure of *Sukuk*

Sukuk (Islamic bonds) is defined as investment certificate representing claim of ownership of a tangible asset.[312] This definition underscore fundamental difference between *Sukuk* and conventional bonds, the terms „ownership‟ of tangible asset‟ highlight two structural underpinnings of this instrument, namely asset-backing and conferment of ownership thereof upon *Sukuk* holders. By implication, investors in *Sukuk* deals are basically considered partners in ownership of the asset as opposed to mere „creditors‟ in the case of conventional bonds. Also by virtue of being beneficial owners of the underlying asset therefore, whatever payments the *Sukuk* holders may receive are a profit accruing from their own asset not an interest. This distinction is crucial in order to bring the *Sukuk* transaction into conformity with the ethical principles of *Shari"ah* law which is the core element of governance as far as Islamic finance is concerned. Fundamentally, while Islamic law views commodity as a tradable instrument which can be exchanged and rented out for a profit, it does not consider money as a commodity, but only a medium of transaction.[313]

Accordingly, payment of rent on money used (interest on loan) as well as trading in instrument representing a loan is out rightly proscribed. Other important objectionable

[311]New Policy to shape Nigerian Mining Sector in 2017, Nigeria‟s Mining News (16 January, 2017) available at:< http://www.miningne.ws/2017/01/16/key-policies-to-shape-nigerian-mining-sector-in-2017/# >
[312] Excerpt from the official definition given by Accounting and Auditing Organisation for Islamic Institutions (AAOFII), which defined *Sukuk* as "certificate of equal value representing undivided shares in the ownership of tangible assets, usufructs and services or (in the ownership of) the asset of particular projects or special investment activity."
[313] Yahia, *The Art of Islamic Banking and Finance* (Wiley Finance: New York; 2010), PP. 84-128

elements that *Shari"ah* seeks to eliminate from financial dealings are uncertainty and anything that is detrimental to public safety. In effect, these requirements operationally impose the condition that a valid *Sukuk* structure must be based on or backed by an asset, and the ownership thereof vested upon the holders.[314] As already noted, the term *Sukuk* existed within the commercial dealings of the past Muslim generations, although the term as well as the context (investment) has remained the same, but the concept and the structure has changed due pragmatic reasons. While medieval Muslim traders knew and used *Sak* (singular of *Sukuk*) as a mere paper-evidence of financial obligation with no intrinsic value whatsoever, today it has graduated into an investment vehicle with sophisticated techniques. It is an amalgamation of sub-structure of traditional bond and a format of classic Islamic contract, with the latter substantially forming the basis of the structure and on top of that lies the layer of conventional approach. This modern structuring technique becomes necessary, in order that Islamic financial products achieve their business goal without losing their ethical characteristics.[315] To guard against spoliation of any such character, *Sukuk* format is always based upon one of the basic Islamic commercial contracts: *mudaraba, musharaka*, *murabaha, salam, istithna, ijara* or *wakala.* These terms indicate varying types of transactions ranging respectively from partnership, sale, lease to agency contract.

Accordingly, *Sukuk* could be *Murabaha Sukuk, Salam Sukuk, Istithna Sukuk*, *Mudaraba Sukuk, Musharaka Sukuk, Ijara Sukuk or Wakala Sukuk.* And whatever form *Sukuk* might take, presence of a tangible asset is essential for valid structuring of the contract, however *Sukuk* can be asset backed or asset based, and the difference between the two types is legally significant. This is because in the event of default, while asset-backed *Sukuk* holders can have direct recourse to the asset underlying the contract, such right will not be available to investors in asset-based *Sukuk.*[316] Another important implication has to do with the market value of the instrument, because international rating agencies tend to rank asset-backed instrument higher due to the level of investor protection involved. The most serious draw-back for asset-based *Sukuk* would, however, appear to be the controversial nature of its structure in the eyes of *shari"ah*scholars, most scholars deem it impermissible to be traded in the secondary market, the reason being that it contains element of debt, as holders do not

[314] Salah, A Legal Analysis of *Nakhee*l Investment (2010), pp. 20-32
[315] Umar and Arshad, „Contractual Forms in Islamic Finance Law" (2003), PP. 150-194
[316] M Siraj Sait, Shari"ah Compliant *Sukuk*: OJK In-House Training on *Sukuk* (2015), (document available with researcher on file).

have right of ownership in the asset.[317] Also in practice, factors such as type of asset available to issuer, interest of investors and regulatory framework of a jurisdiction do dictate choice of a particular structure.[318]

Table 1:5 Different types of Islamic contract underlying Sukuk

Underlying Contract	**Classic Name**	**Description**
Sale Agreement	*Murabaha*	(Mark-up Sale) The proceeds of the *sukuk* are used to purchase commodities or other assets from a supplier. They are then on-sold at a deferred price, which includes a mark-up on the purchase price. The instalments from the on-sale are then used to pay the periodic distribution amount due to investors under the *sukuk*
	Salam	The proceeds are used as spot payment for future delivery of a commodity, which is then sold to pay back the *sukuk* holders. The commodity must be a standardized one, and its quality, quantity, place, date, and time of delivery must be well defined in advance.
	Istithna	The proceeds from issuance are passed on to a contractor for future delivery of a manufactured or constructed asset, which is then to be on-sold after delivery to pay back the investors. This is often combined with a forward-lease agreement for the asset, and the fees received from this advance rental are used for periodic payments.
Partnership Agreement	*Mudaraba*	Proceeds of the *sukuk* issuance are used by the issuer as capital to finance a business in partnership with an entrepreneur, who contributes his labour and expertise. Profit generated from the business is distributed in pre-defined proportions between the business entrepreneur and the issuer, who then uses them for periodic payments to the *sukuk* holders
	Musharaka	Proceeds are utilized to finance a business, but on a joint-venture basis, where both parties contribute capital to the business. Periodic payments and payment at maturity are generated in a manner similar to those in a *Mudaraba* structure.
Lease Agreement	*Ijara*	*Sukuk* is issued to finance the purchase of certain assets which are leased out to a lessee, whose rent payments are used for the periodic payments to the investors (*sukuk* holders). At maturity, the assets are repurchased by an obligor, and the proceeds of this sale are transferred to the investors
Agency Agreement	*Wakala*	An appointed agent (the *wakeel*) uses the *sukuk* proceeds to invest in a pool of permissible investments or assets. Periodic payments to investors are made from the profits derived from the investment.

Source: Emre Balibek 2017

[317] Muhamed Zulkhibri, „A Synthesis of Theoretical and Empirical Research on *Sukuk*"(2015) Borsa Istanbul Review, 15-4, PP. 237-248; available at: < http://www.elsavier.com/journalsborsa-istanbul-Review/2214-8450> accessed 15 March, 2019

[318] Sait, Shari"ah Complaint Sukuk (2015 supra)

5.2. *Sukuk* Issuance

5.2.1. Factors behind and impact of *sukuk* issuance

As noted earlier, *Sukuk* issuance has become a world-wide phenomenon whereby governments and enterprises take to offering Islamic securities in order to diversify their source of funding. In the past few decades, this instrument has recorded remarkable growth and become so famous within the global financial landscape. *Sukuk* attracted a broad range of investors from different faith groups around the world, and the number of issuers has been progressively increasing. One of the probable reasons for this rise, as documented by many researchers, is the ethical characteristics of *Sukuk* which do not allow uncertainty or exploitation in trade. The empirically tested potentials of this instrument to provide diversification and thereby reduce risk in investment portfolio is yet another factor to explain the tremendous boost in the Islamic capital market.[319] The first issuance of *Sukuk* ever was in 1983 in Malaysia, and since then many countries and corporations followed suite.[320] While Malaysia and Gulf countries remain the leading hubs for *Sukuk* in the world, and other countries like UK in the Europe and Singapore in the Far East have since become active players, African states are however just beginning to emerge. Inside Africa, countries like Nigeria, South Africa, Sudan, Senegal and Gambia have made offerings, while others like Morocco are preparing to catch up soon.[321]

The table 5 (below) shows the wide coverage of Sukuk in terms of geographical location and diverse nature of the issuing countries. Malaysia has the highest number of issues (1388 times) and monetary value (351,494) USD millions. Malaysia has been chosen to be one of the case studies in this research because of being the leading hub for issuance of Islamic finance products, but also for its legal history as well as regulatory infrastructure. Gambia has the second highest number of issuance (401), almost twice higher than Bahrain, one of the world leading jurisdictions in Sukuk and houses five important international bodies: AAOIFI, IIFM, CIBAFI, IIRA and LMC. However, the monetary value of the latter ($12,545 m) is about 65 times bigger than that of Gambia.

319 Selim Cakir and Faeeh Raei, „Sukuk vs Eurobonds: Is There A Difference in Value-at-Risk" (2007) IMF Paper, PP. 1-20

320 Zulkhibri Muhamed, „A Synthesis of Theoretical and Empirical Research on *Sukuk*" (2015) Borsa Istanbul Review 15-4 (2015) 237–248

321 Malaysia International Islamic Finance Centre (8/6/2018), available at: <http://www.mifc.com/index.php?ch=ch_contents_capital_markets&pg=pg_cm_global&ac=26432> accessed 11th June, 2018

Table 2:5 A highlight of Sukuk Issuance from different Jurisdictions

Country	**Number of Issuance**	**Amount in $m**
Bahrain	226	12, 545
Gambia	401	194
Malaysia	1388	351,494
Pakistan	17	7,669
Brunei	113	6093
Turkey	7	6900
Hong Kong	1	1000
Luxemburg	1	272
Indonesia	65	21890
South Africa	1	500
Senegal	1	200
United Kingdom	1	340
Qatar	17	19655
Nigeria	1	71
Germany	1	123
Singapore	5	193
UAE	11	6855
Yemen	2	250
Sudan	26	2868
Total	2263	370326

Source: IIFM 2016

Factors affecting Sukuk impact includes the number of issuances, value, context and legal system of a jurisdiction, have informed the selection of candidate cases for the study. For example, U.K. with only „one issuance‟ of $340m is preferred to Pakistan and Turkey with 17 and 7 issuances representing a value of $7,669m and $6,900m respectively. This position of U.K. was due to its legal system which is widely viewed as the leading jurisdiction for dispute resolution. Similarly, U.A.E. is selected because of its conservative approach to *Sukuk* distinct to Malaysia and other European and African nations, even though Indonesia has more attractive volume of issuance (65) and the amount of $21,890m.

As highlighted in the table above, few African countries are emerging. In any jurisdiction-Africa, Asia or Europe-elements essential for the growth of *Sukuk* investment include amending their laws and capital market regulations to facilitate Sukuk issuance. As discussed in the subsequent paragraphs, a sound legal framework is necessary for hitch-free Sukuk investment.

5.2.2. Legal Framework for *Sukuk* Issuance

Legal framework refers to law that guides the procedure of issuing, trading, redemption *Sukuk* bonds and resolution of disputes arising therefrom. Generally, bond investment is a complex transaction which involves governments, huge enterprises and investors; hence it requires careful management regulated by the policy of the state of issuance.[322] International financial regulations may as well apply where bonds are listed as international stocks. With *Sukuk* however, the need to comply with *Shari"ah* law constitute a third layer of regulatory framework, which is necessary to cater for certain distinctive requirements of *Sukuk* as an Islamic investment vehicle. The regulatory demands of *Sukuk* are more complex compare to those of traditional bonds.[323] In any case, "sound public debt policies and debt management practices require robust legal underpinnings".[324]

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[322] Elsie Addo Awadzi, „Designing Legal Framework for Public Debt Management‟ (2015), PP. 2-56, IMF Working Paper, available at: <file:///F:/Literature%20on%20Sukuk%20&%20Contract%20law/Legal%20Frameworks%20for%20Sukuk%20Issuance%20(1).pdf> accessed 20th June, 2019

[323] Ali Alshamrani, „*Sukuk* Issuance and its Regulatory Framework in Saudi Arabia‟ (2014) Journal of Islamic Banking and Finance, Vol. 2, No. 1, PP. 305-333

[324] Awadzi, „Designing Legal Framework for Public Debt Management‟ (2015), PP. 2-55

In some jurisdictions, distinct legislations are made for *Sukuk*, while some others would accommodate it within a framework of traditional bonds, without compromising its ethical characters. The first *Sukuk* issuance in Hong Kong (HKSAR) was made under an already existing program for conventional securities, preserving the requirement of conformity of the structure with Islamic legal principles.[325] To achieve this conformity, generally, a legal framework needs to address certain elements critical for *Sukuk* investment. Given the fact that, asset is critical to the structure of this instrument, and ownership of asset as well as transfer of such ownership is likely to have some legal implications, legislations need to be clear on that. Among other things, the framework should address issues such as what constitutes the legal authority of an originator to employ a designated asset to back the *Sukuk* issuance, tax implication as well as what criteria an asset need to satisfy in order to qualify to be a subject-matter of the transaction, because the asset must not contravene the fundamentals of Islamic commercial law as noted above. Also, a provision for a setting up suitable SPV for *Sukuk* deals, with proven ability to structure effective *Sukuk* deals, through the application of sound understanding of *Shari"ah* and in-depth familiarity with traditional financial concepts. This part of the framework shall, in addition to, stating out the power of SPV to issue certificates conferring ownership of the underlying asset onto holders, outline quality and qualifications of who can be an SPV. Another important aspect of the framework is a provision for investors‟ protection in the event of default or insolvency and bankruptcy.[326] The insolvency and bankruptcy element which guarantees investors‟ protection, combine with tax incentives are critical aspects of any investment framework seeking to attract, stimulate and enhance investment climate. "The framework for *Sukuk* issuance should be a consistent part of the overall public financial management legal framework."[327] To accommodate those concepts, many countries across the world have adopted necessary changes to their regulatory framework.

In United Kingdom, when government envisioned *Sukuk* issuance did not simply rely on the existing Finance Act of 2008 only, but rather facilitated the issuance with a new regulation, Government Alternative Finance Regulations (GAFR) of 2014. The two have served as legal

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[325] Emre Balibek, „Establishing a Legal Framework for Sovereign *Sukuk* Issuance: A Public Debt Management Perspective‟ (2017), PP. 2-3, world Bank IMFM Paper No. 18, available at: <file:///F:/Literature%20on%20Sukuk%20&%20Contract%20law/framework%20for%20sukuk%20issuance.pdf> accessed on 23th April, 2019

[326] Emre Balibek, „Establishing a Legal Framework for Sovereign *Sukuk* Issuance (2017), PP. 2-3

[327] Ibid

framework for effective *Sukuk* issuance of 2014 in London.[328] In the same year, authorities in Luxembourg made a specific law known as „*Sukuk* Law" wherein government was unequivocally authorised to set up a Special Purpose Vehicle (SPV) and transfer to it a landed property designated as an asset for *Sukuk* to be structured according to the distinctive requirements of Islamic bond. In contrast, Turkey did not make separate law for *Sukuk*, all it did was amended its existing Public Finance and Debt Management Law to accommodate Islamic bonds and thereby provided legal basis for the debut Turkish *Sukuk* to hit both domestic and international market in 2012.[329] The objective of surveying a set of contrasting approaches here is to make a point that, it is not necessary for *Sukuk* framework to be in a distinct codification, it is sufficient to amend an existing law, as did Turkey and HKSAR China. What can be of serious implication however, is failure to make any legal basis to accommodate fundamental and distinctive requirement of Islamic instrument, which might consequently result in the instrument being not only unethical but altogether objectionable in *Shari"ah.* For example, in Saudi Arabia, Caravan maiden *Sukuk* issuance of 2014, generated a heated debate among Scholars in the Kingdom as to whether the issuance procedure was done in compliance with the principles of Islamic law because the regulations with regards to capital market in the country is did not make any specific provision for *Sukuk.*[330]

The case of Saudi Arabia is particularly interesting, while the Royal Decree has declared Qur"an and Hadith as the constitution of the land and basic law of governance, legal framework for managing securities does appear to support *Sukuk* issuance in accordance with the principles of *Shari"ah.* Saudi Capital Market Law (CML) of 2003, created Capital Market Authority (CMA) whose resolutions constitute policies and guidelines to govern the conduct of financial market in the country. Accordingly, the CMA made two sets of regulations to form the legal framework for all issuance including *Sukuk*: Offer of Security Issuance Regulations and Listing Rules of 2004. Yet, there was no reference to *Sukuk* whatsoever in the entire framework, the definition of conventional bonds as "debt instrument" extends to Islamic bonds, and by implication, the bonds so issued are not tradable in the eyes of *Shari"ah* and therefore may not attract ethical investors.[331] In essence, this is an example of a case where relevant authorities need to make policies that are necessary to ensure smooth

[328] Oseni and Hassan, „Regulating the Governing Law Clauses in *Sukuk* Transaction" (2015), PP. 220-249
[329] Hazine Mustesarligi, „Turkish Treasury" (2012), "Press Release" 2012/143, Sept. 18, Ankara, available at: <www.hazine.gov.tr> accessed 12th August, 2019
[330] Alshamrani, „*Sukuk* Issuance and its Regulatory Framework in Saudi Arabia" (2014), PP. 305-333
[331] Abdullah Al Sheikh and Joseph Tanega, „*Sukuk* Structure and its Regulatory Environment in the Kingdom of Saudi Arabi"a" (2011), Law and Financial Market Review, No.5 (3), Pg. 194

issuance, trading and ultimate redemption of the investment.[332] To achieve that in case of Saudi Kingdom, not only proper definition is required but also, among other things, a provision for purpose-made SPV competent to structure Islamic bonds in consonance with the law as it obtains in other countries such as UAE and Bahrain.

In contrast, UAE which is probably the most active as well as the most regulated hub for *Sukuk* investment within the GCC countries, made provisions for Islamic securities. There are two distinct jurisdictions within the UAE, and each is regulated by a separate set of financial regulations. Dubai International Financial Centre (DIFC) which is one of the leading centre for commercial activities world-wide, represents a financial hub governed purely by English common law, and is regulated by Dubai Financial Services Authority (DFSA).[333] For the rest of the Emirate, Emirates Securities and Commodities Authority (ESCA) serve as the governing body to regulate all commodities and securities including *Sukuk* transactions. This authority is empowered by the regime that created it to make laws and policies necessary for the smooth conduct of commercial activities involving securities and commodities throughout the Emirate with exception of DIFC. Accordingly, ESCA in Abu-Dhabi, for example, has developed a comprehensive regulatory framework for the issuance of Sukuk prospectus as well as for *shari"ah*-compliant resolution of disputes arising out of such transactions. But where a transaction is between an entity registered for business within DIFC and a person or corporation from the other jurisdiction, the laws of the former will take precedence to regulate the relationship according to English law applicable in the English courts already established in Dubai or Arbitral Forum created under and by the DFSA.[334] Recently, in the wake of Dana *Sukuk* controversy, the Securities and Commodities Authority (SCA) of UEA has made a resolution to make new regulations which shall provide for a comprehensive unified mechanism for settlement of disputes to do with Islamic bonds.[335] With that it is hoped that a tribunal or a sophisticated forum similar to that of Malaysia may emerge in the Emirate.

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[332] Alshamrani, „*Sukuk Issuance and its* Regulatory Framework in Saudi Arabia" (2014), PP. 305-333
[333] Oseni and Hassan, „Regulating the Governing Law Clauses in *Sukuk* Transaction" (2015), PP. 220-249; Salah, „A Legal Analysis of *Nakheel Sukuk"* (2010), PP. 20-32
[334] Oseni and Hassan, „Regulating the Governing Law Clauses in *Sukuk* Transaction" (2015), PP. 220-249
[335] Malaysia International Islamic Finance Centre (MIFC) News (June 8, 2018) available at: <http://www.mifc.com/index.php?ch=ch_contents_capital_markets&pg=pg_cm_global&ac=26427> accessed 11th July, 2018. Dana *Sukuk is* an infamous case where the issuer defaulted on payment on the grounds that the arrangement was based on invalid law as it violates certain *shari"ah* principles. This case highlights the significance of dispute resolution mechanism to Sukuk transactions.

Malaysia has so far held itself out as the global centre for *Shari"ah*-compliant investment in terms of the volume of Islamic financial activities as well legal framework to regulate those activities. As far as *Sukuk* is concerned, creation of SPV, issuance, structuring and management of periodical payments thereof, are all regulated by law in accordance with *Shari"ah*. The 2011 amendment of Capital Market and Services Act (CMSA) has incorporated and addressed the needs of Islamic bonds. Although, it is the sole Act governing the entire spectrum of stock market in Malaysia including conventional bonds, CMSA contains specific provisions dedicated for Islamic Capital Market (ICM). By operation of the Act, Securities and Exchange Commission, the body statutorily charged with the administration of the CMSA, has formulated comprehensive guidelines known as "*Sukuk* guidelines of (2011)". [336] In addition, Independent *Shari"ah* Advisory Committee was set-up and made to exist as part of the Exchange Commission in order to ensure compliance of all *Sukuk* dealings with the principles of Islamic law. Another distinctive hallmark that has made Malaysia a unique jurisdiction within the global landscape of *Sukuk* investment is the existence of a robust framework for dispute resolution. [337] Elaborate discussion on dispute resolution will come under chapter five.

On the other end of the spectrum, few African countries have followed in the footsteps of the foregoing nations to issue *Sukuk*, notably, Nigeria, South Africa, Kenya, and Morocco. In September 2017 Nigeria issued a road network infrastructure *Sukuk* of 100 billion naira. This offer which was first such issuance of its kind has revealed peoples" appetite to this instrument. Although, that offer has primarily expanded investor-base of the federal government and provided liquidity for realisation of (2017-2020) plan to achieve competitive economy through infrastructure development, it has also provided economic inclusion and investment avenue to large number of the citizens who are ethical investors.[338] Given the oversubscription of that *Sukuk,* government is even more determined now to pursue development of other sectors, like mining, through securities investment.[339] But the question is what is the policy change introduced so far to provide enabling environment for this investment to flourish. While, this investment is still at nascent stage *and* the process of

[336] Oseni and Hassan, „Regulating the Governing Law Clauses in *Sukuk* Transaction" (2015), PP. 220-249
[337] Elaborate discussion on Malaysia"s framework is given in chapter six.
[338] Patience Oniha, „The Case for Nigerian *Sukuk" (This Day News of February 17, 2018)* available at: <*https://www.thisdaylive.com/index.php/2017/09/18/the-case-for-nigerian-sukuk/*> accessed 10th July,2018
[339]Nigeria"s Mining News, New Policy to shape Nigerian Mining Sector (16 January, 2017) available at: <http://www.miningne.ws/2017/01/16/key-policies-to-shape-nigerian-mining-sector-in-2017/#> accessed 10th February,2018

growth and changes will normally happen slowly, there are five incentives worthy of mention.

Given the significance of tax issue in *Sukuk* transaction, because it involves multiple transfer of asset which means exorbitant tax to pay, tax-exemption was granted.[340] However, it is not clear whether this is going to be backed by an Act of parliament or shall remain as regulatory guidelines made by the Securities and Exchange Commission. In South Africa, where *Sukuk* offer begun much earlier, legislation has come to concretize tax incentives for Islamic bonds since 2016 (four years after first issuance), and as a result, private enterprises felt persuaded to emulate the government and make corporate issuance.[341] Second, the Central Bank of Nigeria conferred liquid asset status on the *Sukuk* certificates, thereby making it capable of being used as very reliable collateral and of being listed as well as traded on the floor of the Nigerian Stock Exchange. The appointment of two highly reputable companies to serve as SPV in the deal has also boosted investors" confidence. Lastly and most importantly, Debt Management Office would henceforth play a dual role in the capital market, while one has to do with traditional bonds and the other is to help in facilitating *Sukuk* arrangements for not only the government of the federation but also other tiers and agencies.[342] What is remain to be seen is whether Nigeria is going to be driven and inspired by countries like Kenya who is pursuing rigorous legislative amendments to provide leading environment for Islamic finance in Africa,[343] or is going to follow a slow trend.

5.3.Sukuk for infrastructure and industrial development

The use of *Sukuk* as investment vehicle for financing infrastructure development has become a focal point of the global Islamic financial industry. The growing need for capital in the mining sector as well as infrastructure globally and particularly in Africa, would prove the potential relevance of *Sukuk* beyond doubt. By the year 2030, according to OECD (Organisation for Economic Co-operation and Development), the world would need about $71 trillion investment in order to finance basic infrastructure only, which includes water,

[340] Patience Oniha, „The Case for Nigerian *Sukuk"* *(This Day News of February 17, 2018)* Pg. 1
[341] South Africa Proposes Extending Sukuk to Corporate Issuers *(Reuters News of July 28, 2015)* available at: <*www.reuters.com/article/safrica-sukuk/south-africa-proposes-extending-sukuk-to-corporate-issuers-idUSL5N10804Y20150728*> accessed 10th July2018
[342] Patience Oniha, „The Case for Nigerian *Sukuk"* *(This Day News of February 17, 2018)* Pg. 1
[343] UPDATE 2-Kenya Review Finance Laws ahead of Debut *Sukuk* (Reuters News of February 17, 2016), available at: <https://www.reuters.com/article/kenya-sukuk/update-2-kenya-reviews-islamic-finance-laws-ahead-of-debut-sukuk-idUSL8N15W103> accessed 10th June, 2018

electricity, rail and road network as well as telecoms.[344] The interdependence of mining industry and infrastructure development is well-documented. [345] Also, using revenue that accrued from mineral development to provide infrastructure for the well-being of the citizens and social welfare as a constitutional responsibility of a representative government is a common knowledge. However, using infrastructure development in a country to woo foreign investors into injecting their capital in the mining industry of the state, has received relatively less attention. One of the key factors often raised by mineral developers as basis of their decision not to invest in a particular jurisdiction has to do with poor state of infrastructure in the state.

In Nigeria, for example, lack of good roads linking the minefield with major international outlets (sea and air ports) and poor electricity were frequently pointed out as major impediments to foreign investors.[346] The reason for such decision is very simple: minerals investment is capital intensive by nature and characterized with huge risk, if in addition to that, investors will have to find a way of addressing such issues like lack of power supply and dilapidated road network, then it will be an act of imprudence in business to invest in that state, because the amount of capital required and the risk involved are most likely compounded. It is therefore an emerging trend in development that states would build infrastructure to create favourable environment for mining (less-costly) in order to persuade potential investors. S. 4 (1) (F) of the Nigerian Mining Act, 2007 provides that, government should "create an enabling environment for the private investors both foreign and domestic by providing adequate infrastructure for mining activities." A question arises here as to whether *Sukuk* could serve as a liquid vehicle to deliver the much-needed infrastructure in the mining industry making it thereby both attractive and competitive.

This new trend that advocates basic infrastructure, such as road and electricity, be provided by states as necessary ingredients of attractive business atmosphere, might seem to disagree with the approach emphasised by majority of the conventional legislations on community

344 Malaysia International Islamic Finance Centre (MIFC) News (18 October, 2013) available at: <www.mifc.com> accessed 25th November, 2018
345 Kendra, „Community Development in Mining Laws" (2014), PP. 201-203
346 Kayode Fayemi, „Nigeria‟s Solid Minerals Sector: Alternative Investment Opportunity" (19 May, 2016) Chatham House Lecture by Nigeria‟s minister for solid minerals development, available at: http://www.chathamhouse.org/sites/default/files/events/2016-05-19-Nigeria-solid-minerals-appg-transcript.pdf> accessed 10th July, 2018

development across mining jurisdictions in Africa.[347] Eventually, regulations in resource-wealthy countries tend to saddle investors rather than governments with the task of developing infrastructure within communities that dwell next to and directly affected by their activities. This concept is encapsulated in the famous provision for community development agreement of the respective mining Acts of various countries.[348] While it is beyond the scope of this chapter to accommodate full expositions of community development as social responsibility of resource companies (as this is a topic of another chapter), the purpose here is to run a cursory look at some points so as to highlight the relevance of *Sukuk* for mining industry and development. The point remains that, while presence of basic infrastructure makes an industry of a state more appealing to investors, it is also possible to achieve infrastructure development through responsible investment, thus, government and investors are partners in progress in within context of development.[349] Whichever way one sees it, the underlying need for liquidity in both cases presents opportunity for *Sukuk* to enhance its relevance as a significant source of financing development in the industry.

Generally, minerals are developed by government or private Mining Corporations. The primary source of finance in either case is the developer"s own funds if they have sufficient liquidity to execute such projects, which has not always been the case. Most often, funds for purpose of such development are raised from international lending institutions such as investment banks or through issuance of securities to investors so as to pool adequate financial resources necessary for the projects concerned.[350] Due to high cost of borrowing and some ethical issues associated with this conventional approach, governments and enterprises have seemed to welcome any alternative technique that could offer them opportunity to diversify their funding stream.[351] The emergence of Islamic bonds was therefore viewed as a laudable development within the international investment landscape.[352] Accordingly, the global capital market has, in the recent time, witnessed a widespread issuance of both sovereign and corporate *Sukuk* for various development projects, including in energy and natural resources. However, researchers have found that, given the inherent nature of Islamic bonds and centrality of asset to its structure, use of any asset regulated by a different legal

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[347]; Niger-China Relations, Global Security publications (2000), available at: <www.globalsecurity.org/military/world/africa/ne-forrel-prc.htm> accessed 22nd December, 2018
[348] Ss. 116 & 117 of Nigerian Mining and Minerals Act, 2007
[349]Okoye, „Corporate Social Responsibility, Law and Development in an African" (2012), PP. 365-370
[350] Walied, *Mineral Investment under the Shari"a Law* (1993)
[351] Cakir and Raei, „Sukuk versus Eurobonds" (2007), PP. 1-20
[352] Ayman and Christopher, „Emerging Trends in *Sukuk* Offerings" (2006-2007), PP.409-425

system may be prone to legal challenges that would require careful consideration.[353] More so, considering the intricacy associated with policies governing investment in mining industries across Africa, any *Sukuk* structuring is likely to involve a complex set of interactions between different legal concepts. In the context of minerals investment, the concept of "underlying asset" which is also central to *Sukuk* may provide an interesting nexus and a ground for compatibility between Islamic bonds and the industry, because this type of asset (land) will represent an ideal object for *Sukuk* transaction from *Shari'ah* perspective.

Nonetheless, careful consideration of some practical issues may raise some policy and legal concerns. At the intersect, is the issue of ownership, while all property in the "ownership" of the asset (land containing mineral resources) is constitutionally vested in the sovereign government to hold in trust for the benefit of the citizens,[354] *Sukuk* arrangement fundamentally requires the issuer to transfer ownership of the underlying asset onto investors via investment certificate. This presupposes issuance of sovereign *Sukuk* only, where government as the custodian of title over the entire estate in the asset becomes the originator of the *Sukuk* and passes the ownership to a designated SPV under specific contract(long time mining lease), who will in turn raise the needed funds through issuance of *Sukuk* certificates conferring ownership (equitable and beneficial) of the said asset to investors under a separate arrangement(long time lease contract), and then pay the entire proceeds back to the originator (government in this case) for sole purpose of developing the asset (minerals) on yet another different terms of contract (short term lease-back).[355]

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[353] Ayman and Christopher, „Emerging Trends in *Sukuk* Offerings‟ (2006-2007), PP.409-425
[354] S. 1(1) of the Nigerian Mining Act (2007); similar provision (almost identical) exist in mining legislations of South Africa, Kenya, Sierre Leone, Angola, Sudan and Ghana
[355] See figure No. 2 for a supposed structure sovereign *Sukuk* in Nigeria‟s mining industry

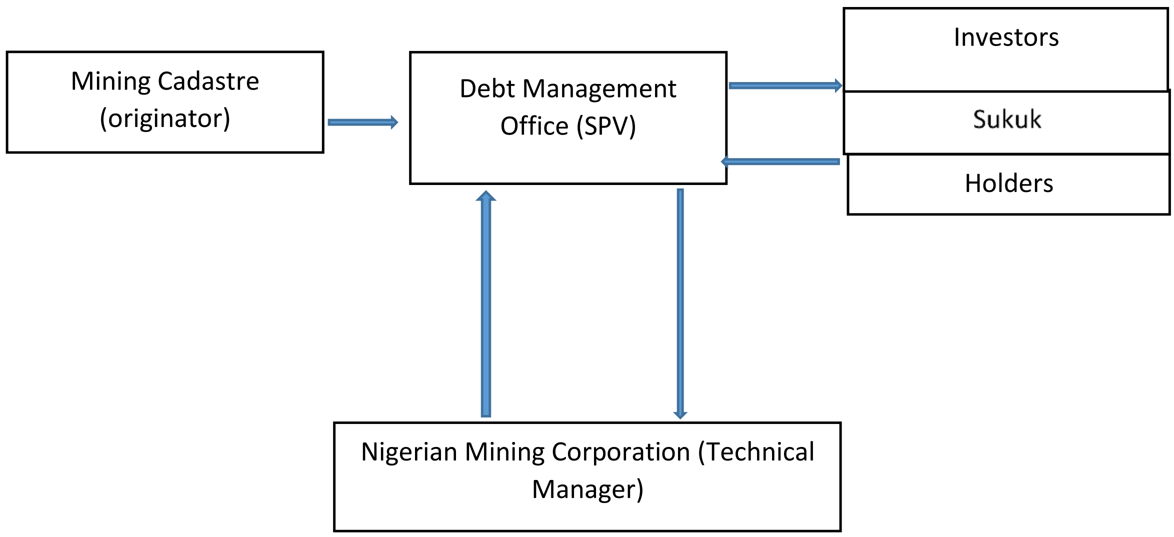

Figure 1:5 Sovereign *Sukuk* Structure

This arrangement is structured as sovereign issuance with government agencies and sovereign investment authorities involved as stakeholders, which suggest government raising funds to pursue minerals development by itself. However, with most African states, including Nigeria, having adopted the international policy aiming at allowing private entities to take lead in mineral development and reducing the role of state to that of regulator only, the above structure may appear to contradict the prevailing policy.[356] Furthermore, the combine effect of section 3(2) of South African Minerals and Petroleum Act, 2002[357] and section 245 of Nigerian Investment Securities Act 2007[358] can have serious legal implication on this structure. The Mineral Act, while authorises the government to transfer ownership in the minefield and oil-blocks to potential developers, it stated specific conditions to be fulfil by a beneficiary of that transfer. The beneficiary must have financial capability and technical know-how to undertake mineral development.

[356] This policy has been promoted by mining legislation, s. 4(1 [d-f]) of the Nigerian Act, for example, provide that, the minister for soli minerals shall:
(d) establish the procedure for monitoring developments in the solid minerals sector and encourage the private sector investment in mineral resources development; (e) ensure that in the exploitation of the mineral resources, an equitable balance is maintained between foreign an indigenous interest; and (f) create an enabling environment for the private investors, both foreign and domestic by providing adequate infrastructure for mining activities, and identify areas where Government intervention is desirable. in achieving policy goals and proper perspective in mineral resources development;
[357] Identical provision can be found in Nigeria, Ghana and all other Mining jurisdictions in Africa, Canada and Australia
[358] In fact, this is universal description of SPV within the purview of financial regulations and law on capital market globally

SPVs in the view of financial regulatory instruments are companies registered as trustee, banks or insurance companies, with expertise in financial dealings who act as a trustee for bond holders.[359] It could be a subsidiary of the originator but should not have fiduciary relationship with or share liability of the originator in the event of insolvency. By implication, the legislation does not envisage SPV as a suitable candidate for mining lease as they are mere trustees with financial expertise and not mining corporations. In contrast, the amended Trustee Act, 2000 of the United Kingdom recognises the fact that a trustee could have special knowledge or skill of a business or profession beyond and above the objective baseline duty of care which every trustee must exercise. Such a trustee is to be held to a higher standard than a fairly trustee.[360] Arguably, in this case an independent enterprise with requisite technical experience in the field of mining can serve as a special purpose entity (SPE) to raise, through *Sukuk*, the amount of capital governments needs to develop its natural resources. Having said all that, given the recent resolution of authorities in Nigerian to develop mining sector by raising $600 million through sovereign bonds,[361] it is not unlikely for the government to adopt a policy change in this direction. Unless there is policy reverse concerning privatising management of mining activities, governments" role would largely remain as regulator to oversee and regulate activities of private companies.

Besides sovereign issuance, private Mining Corporations can equally take advantage of *Sukuk* to finance projects in the industry. Literatures indicate that, while there has been substantial sovereign issuance by various governments globally, corporate *Sukuk* constitute the majority so far. Islamic bonds successfully issued by energy and natural resource companies from GCC to East Asia up to Singapore and down to US prove that, this instrument has the capacity to feed the great appetite for capital in the mining industry. The East Cameron Gas company *Sukuk* of 2006 was structured from an asset (oil well) created and regulated by American law, represents a phenomenal transaction in the history of *Sukuk* and provide a precedent to other jurisdictions.[362] The hallmark of that sophisticated structure lies in the fact that, ownership of minerals granted pursuant to laws of non-Islamic jurisdiction fits into definition of "real asset ownership" legally transferable under *Shari"ah.* A question now

[359] S.245 Nigerian Securities and Exchange Commission Act, 2007
[360] Part 1, sections 1-2 & 2-2 of UK Trustee Act, 2000; Panesar Sukhninder, The Trustee Act, 2000 (2001), Coventry University Law Journal, PP. 28-29
[361] New Policy to shape Nigerian Mining Sector: Nigeria"s Mining News (16 January, 2017)
[362] Ayman and Christopher, „Emerging Trends in *Sukuk* Offerings" (2006-2007), PP.409-425

arises as to whether the mining rights created and conveyed under the mining laws of African countries constitute real and transferable estate.

Although, there might be some difference in mining legislations across different jurisdictions, the relevant legislative provisions in the case of Nigeria, Ghana, Kenya, Sierra Leone and South Africa are substantially identical. Relevant provisions of law in these jurisdictions empowered respective authorities to convey and pass onto the holder of "Mining Right" property in the minerals lying underneath a designated area by virtue of a lease specified in the Act. In Nigeria, for example, section 1(3) the Act stated, "The property in mineral resources shall pass from the government to the person by whom the mineral resources are lawfully won, upon their recovery in accordance with this Act."[363] Without prejudice to the owners of the surface land, the grant confers right of ownership in and over the resources extracted therefrom. Elaborating on the
legal nature of this right, Section 5 of South African Act declares that, the mining right creates "exclusive right to carry out exploration, store, remove, process, transport and/or market the mineral products resulting from mining operations."

In effect, the nature of "ownership" that states confer upon holders of mining lease is for all purpose and intendment represents real "estate in the minerals" capable of true sale akin to the "property of oil well" in the Gulf of Mexico. In which case, private enterprises can lawfully employ their minefields and use them as pool of asset from which *Sukuk* can be structured. This right is not however straightforward across all states with mining sectors in Africa. In Ghana and Kenya no transfer or assignment or even change of holding and control within the company is valid unless written consent of the government is sought and obtained. Figure below demonstrates Sukuk structure based on above analysis.

[363] S. 20 of Zambian Mines and Minerals Development Act,2015; S. 33 Mines and Minerals Act, 2009 of Sierra Leone; S. 4 of Kenyan Mining Act; S.5 Minerals and Mining Act, 2006 of Ghana; and S. 5 of South African Minerals and Petroleum Resources Development Act, 2002.

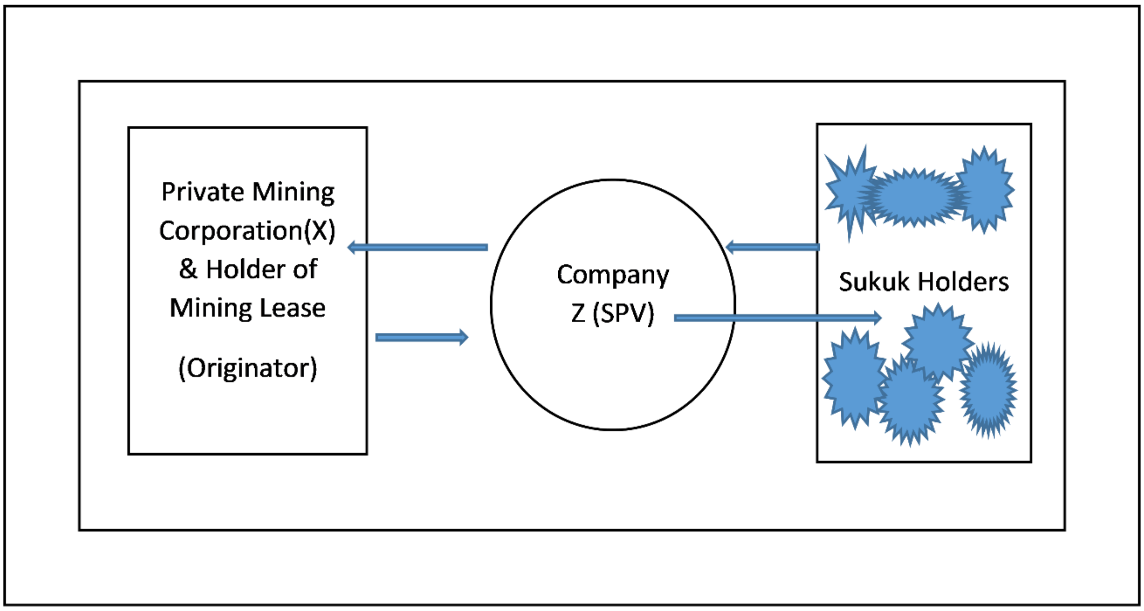

Figure 2:5 A proposed corporate *Sukuk* structure for the mining sector

5.4.Sukuk for the Oil and Gas sector

Unlike solid minerals, the policy in petroleum industry favours involvement of government, and therefore direct issuance of *Sukuk* by government might be smoother compare to hard minerals. As far as governing law and policy are concerned, in most countries, oil and gas or liquid minerals is a separate entity from solid minerals, although both come under Extractive Industries Initiative Act. In Nigerian context for example, while Minerals Act, 2007 applies to solid minerals industry, petroleum industry is mainly regulated by the Nigerian Petroleum Act, 1969.[364] And as noted in chapter one of this thesis, it is the Nigerian National Petroleum Corporation (NNPC) that spearheads development of oil and gas mainly in partnership with multinational enterprises.[365] Generally, presence and character of asset in mineral industry, facilitates *Sukuk* arrangement. While natural resource extraction is a physical investment and capital intensive, *Sukuk* on the other hand is an investment arrangement structured on tangible asset for generating much needed liquidity.[366] As noted above, the element of "asset" comfortably binds *Sukuk* with the energy sector. Also, the tendency of Islamic bonds to have

[364] In some jurisdictions where both hard and oil minerals are regulated by a single codification, like South Africa (i.e. Minerals and Petroleum Resources Development Act, 2002), the Act is divided inside into two separate parts each governing one industry.
[365] S. 6 of the Nigerian National Petroleum Corporation Act, 1990 has provided for that.
[366] Ayman and Christopher, „Emerging Trends in *Sukuk* Offerings‟ (2006-2007), PP.422-423

longer maturity compare to traditional one would make this compatibility even more solid, because mineral investment is naturally time-consuming.

Furthermore, going by all energy *Sukuk* that have been issued in so far, the nature of the transaction suggest that issuer cannot pass physical asset(land) but the product thereof,[367] and this fits well into nature of mining rights which emphasise that only the state can have legal ownership. Section 16 of the 1999 Constitution of the federal Republic of Nigeria, for example vested the ownership of all oil minerals in the government of the federation to hold in trust for the citizens of Nigeria. As already stated, NNPC, a state-owned company, together with several its subsidiaries are responsible for oil and gas development for and on behalf of the government. With all this in mind, the ideal structure for *Sukuk* in the oil mineral sector is given as below:

Figure 5.5: *Musharaka Sukuk* (Joint Venture Agreement (JVA)

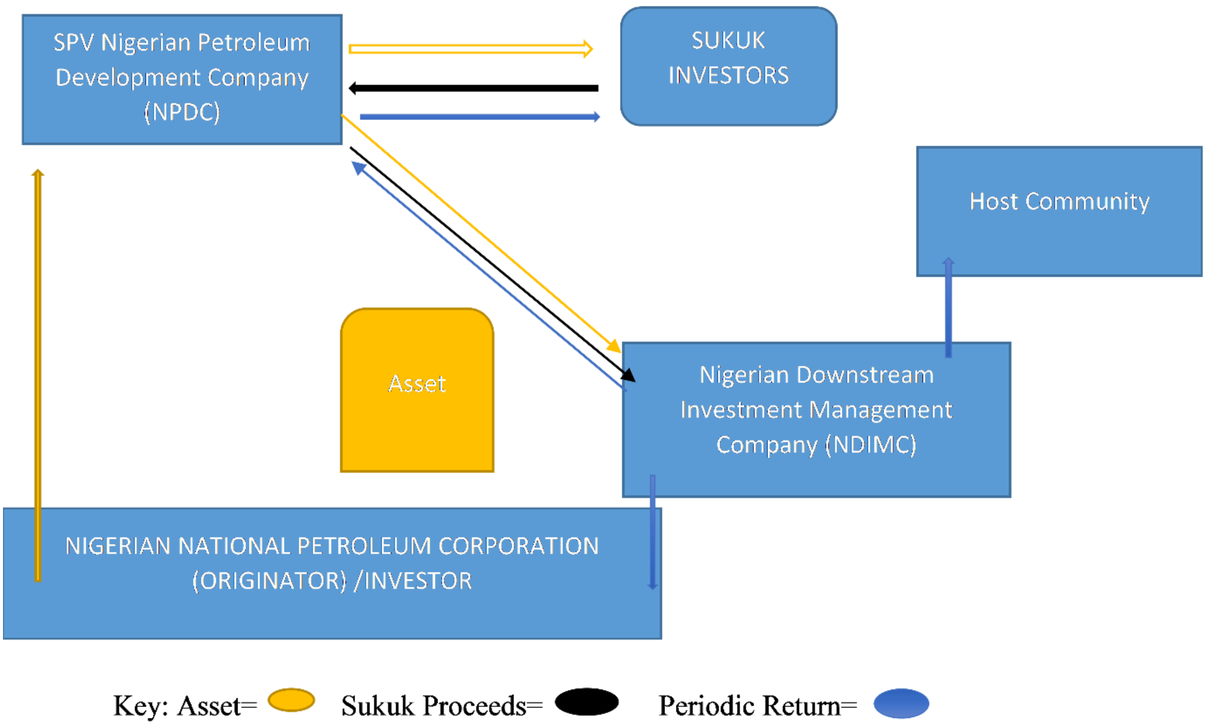

Figure 3:5 Proposed sovereign sukuk based on Musharaka (JVA)

Above figure represent a proposed *sukuk* structure based on *Musharaka* (Joint Venture) contract, where the NNPC as originator, relinquishes certain percentage of the entire estate in

[367]Deloitte, „Corporate S*ukuk*: Building the Ecosystem to finance Sustainable Infrastructure" (2016), Deloitte Islamic Finance Insight Services, PP. 21-23, available at: <file:///F:/Literature%20on%20Sukuk%20&%20Contract%20law1/Sukuk%20and%20Sustainable%20Development.pdf> accessed on 22nd June, 2019

the asset (oilfield) from which the *Sukuk* is structured, and investors contribute funds required to develop the resource by purchasing beneficial ownership over the estate of minerals already relinquished by the NNPC and which is also represented by the *Sukuk* certificates to be issued by independent body, SPV, Nigeria Petroleum Development Company (NPDC), which is a subsidiary of NNPC with independent juristic personality. The SPV manages the business for and on behalf of the investors pursuant to an agency agreement called "*Wakala*" which also contained profit sharing arrangement, based on which periodic returns are distributed to *Sukuk* holders. Proceeds of *Sukuk* are paid to Nigerian Downstream Investment Management Company (NDMC) yet another subsidiary of the originator who is responsible for development of the asset and management of a Joint Venture Agreement (JVA) to which all of SPV, originator and host community are parties.

Under the JVA, returns are distributed periodically to the respective stakeholders in accordance with the sharing formula enshrined in the JVA otherwise referred to as *"Musharaka*". The *Sukuk* certificate shall have endorsed on it a guarantee of redemption upon maturity for market value by the originator on behalf of the government of federation.[368] This arrangement would not be as smooth in hard minerals given the current policy governing the sector.

In Nigeria, the 2009 National Policy on Minerals and Metals which operationalize the Mineral and Mining Act, 2007 has introduced a change to investment policy in the sector. Essentially, it aimed at reducing state involvement to merely regulatory function and allowing private hands to take lead in mining operation.[369] Although this policy could have some implications on *Sukuk* issuance, the government can play an effective role through its administrative and regulatory powers, by creating enabling environment for private companies both domestic and foreign to develop the abundant mineral resources lying underneath its land.

[368] This is a novel structure with two underlying contracts, namely Musharaka and *Wakala* fused together in compliance with the tenets of *Shari"a*.

[369] This is one of the characteristics of modern mining laws as it was long noted by Thomas Walde in his conference paper, „Permanent Sovereignty over Natural Resources" delivered in a conference held by Natural Resources Forum, University of Aberdeen (October, 1983) PP. 241-242; Endalew Lijalem anew, Application of the Right to Permanent Sovereignty over natural resources for indigenous people: Assessment of current legal development (2017) Arctic Review of Law and Politics, pp. 222–245

As already noted, the mining legislations provide that, the minister of mines and steel shall have powers to administer the provisions of the Act to achieve development of the sector, and that Mining Cadastre Office shall have power to grant permit and license to applicants. The Cadastre Office may grant to successful applicants a lease for a term ranging from 5years for quarry lease to 25 years for mining lease. Leaseholders in each case would have beneficial ownership of the land covered by the lease, which legally entitles them to pass equitable ownership to others while the legal ownership is retained by the government of the Federal Republic of Nigeria, to whom the asset would revolve back after the expiration of the head lease. Now, during the pendency of the mineral concession, a resource company beneficiary of the concession can validly raise funds from other investment partners through *Sukuk* for purpose of efficient and speedy development of the mineral resources, in which case, the original lessee becomes the originator of the *Sukuk*.

As preceded, one important characteristic of energy *Sukuk* as per legislation of many jurisdictions in the world (including Nigeria), is that Energy Company cannot transfer any physical part of the land; however, there ownership of the underlying asset (minerals) is absolute, as ownership in law is characterized by the right to *usus-fructus-abuses* (right to use, explore and dispose), and it all exist to the holders of mining right. Thus, any issuance of *Sukuk* can validly confer upon *Sukuk* holder the ownership of the usufruct (i.e. the product of the asset) of the land, extracting and selling of the minerals in this case.

One of the ideal structures for such arrangements is *"Wakala*" or *Ijara* model, which means product management contract. In Turkey Energy *Sukuk* of 2015, where a *Sukuk* certificate of TRY 100 million was issued, the originator, Zorlu Energy could only transfer to the investor, Turkey Participation Bank, mere energy (electricity) production and sale rather than any physical asset. Moreover, due to technical know-how of the business, the former acted as an agent for the latter under *"Wakala*" (management agency) contract.[370] With the foregoing in mind, the ideal structure for Nigeria"s extractive industry is either *Sukuk Manfa"a-Ijarah or Wakala*. The figure below is a proposed corporate *Sukuk* structured on *Ijara* model:

[370]Deloitte, „Corporate S*ukuk*: Building the Ecosystem to finance Sustainable Infrastructure"(2016), Deloitte Islamic Finance Insight Services, PP. 21-23

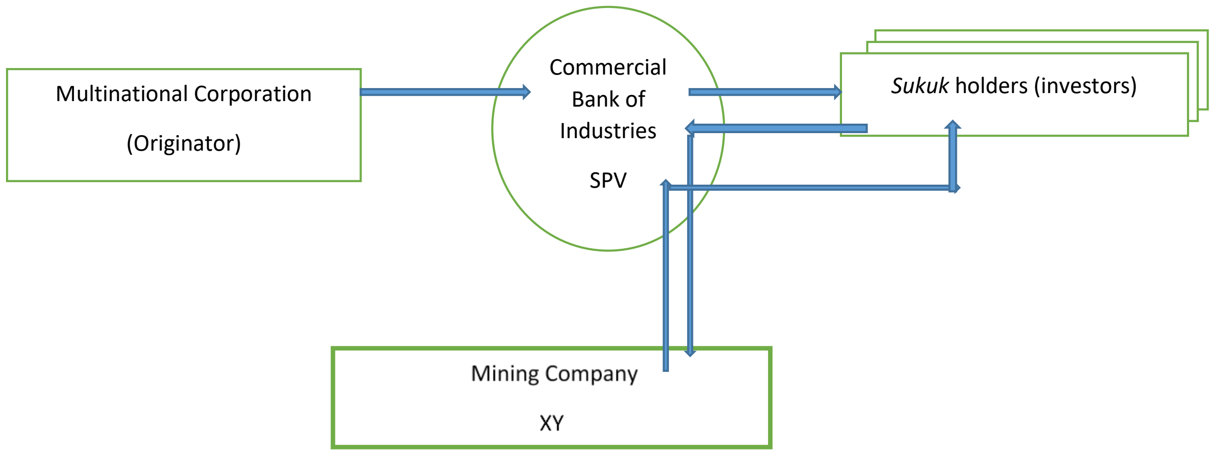

Figure 4:5 Proposed Corporate *Sukuk* in the Solid Mineral sector

Above *sukuk* is structured on *Ijara* model (leasehold). Multinational Corporation, a private enterprise and a holder of mining right over a mineral fields in Africa, is the originator, based on a lease agreement (lease no. 1) which is normally long (say 20 years) passes the beneficial ownership of the designated resource area to the SPV, which is the issuer of the *Sukuk*, the issuer then issues out certificates of equal value each representing undivided beneficial ownership in the investment asset (mineral resources) to investors in exchange for indexed price which put together equivalent to total amount required for developing the resource land concerned. The SPV will collect and collate the proceeds of the *Sukuk* issuance in a pool of investment fund designed for that purpose and then transfer them to the multinational corporation in accordance with terms of a lease (*Ijara*) contract already concluded between the two, and the asset is now in the custody of the SPV holding it in trust for the *Sukuk* holders.

By way of a lease-back arrangement (shorter than the lease no.1 say 5 years), the SPV will now release the asset to the originator company, the latter being independent legal entity with technical expertise in resource development, shall use the funds to undertake operations on the field; extract and sale minerals so extracted, and pay rent on the lease to the SPV, who will then distribute to the respective investors (*Sukuk* holders) according to periodic profit percentage stated in the *Sukuk* contract and endorsed on the certificate thereof. Upon expiration of lease no. 2 which is also referred to as "maturity of the *Sukuk*", the originator shall, according to guarantee agreement furnished by the issuing authority at the issuance, terminate the main contract (lease no. 1) and redeem the asset by paying the original price paid by the *sukuk* holders. Under normal circumstances, the originator executes a guarantee agreement assuring the SPV of redeeming the *Sukuk* upon maturity. Consequent upon this, the issuer signs a guarantee to pay back in favour of the *Sukuk* holders. The guarantee serves as investor protection in addition to right of recourse to the underlying asset in the event of insolvency. Below is the hierarchical structure of how the guarantee looks like.

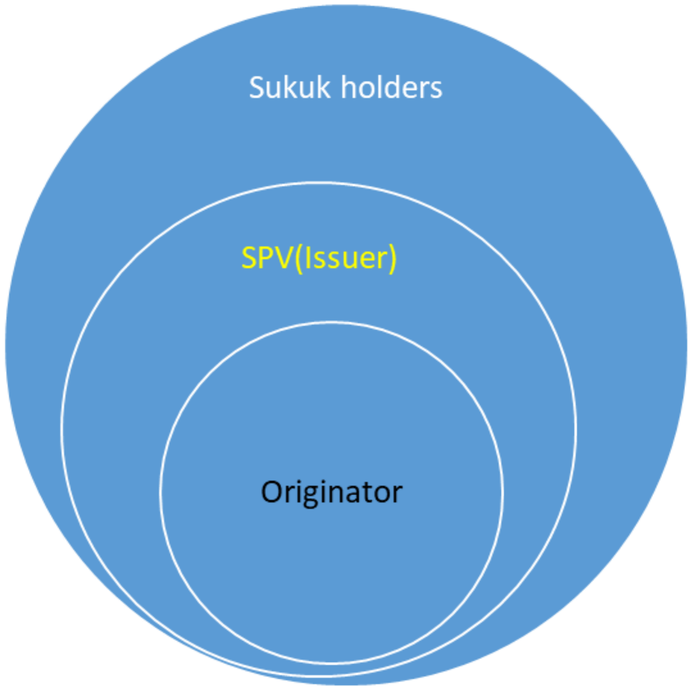

Figure 5:5 Proposed guarantees structure for sukuk in the mining sector

5.5. Conclusions on the potential structure of sukuk for the mining sector in Nigeria

This chapter has explored the ethical principles that underpin *Sukuk* investment alongside the potentials of Islamic bonds for mining and development. The chapter highlighted that, apart from being alternative source of finance for funding infrastructure and natural resource development, Sukuk creates opportunities for inclusion as it is a multi-stakeholder instrument. However, the use of this instrument in a country characterised with legal diversity like Nigeria, requires a comprehensive regulatory framework. The framework must combine between Shariʿah governance (ethical considerations) and conventional financial and investment requirements. Although, the chapter has shown that, such a framework can be standing alone or a part of an existing one, yet it is important to that, legislative effort is made to ensure the ethical principles of *Sukuk* are preserved.

Fundamental ethics of Islamic finance necessary to consider in the framework have been highlighted in this chapter. Prohibition on riba dictates that Sukuk transaction must be based on the principles of loss and profit sharing and devoid of interest. Hence, the investment arrangement must consider *Sukuk* holders as co-owners of the subject-matter(asset) and not merely lenders. Thus, the framework must stipulate requirement of an asset. Furthermore, as regards extractive industry, no company shall be qualified to issue Sukuk until and unless they have reached a threshold of certainty as to availability of the source in commercial quantity. Therefore, corporations holding reconnaissance permit might not be eligible for Sukuk due to uncertainty associated with the asset they hold, regardless of results of the seismic analysis, as it is not always a conclusive proof. In addition, there must be provisions for Shari‟ah committee and technical SPV in the framework.

The frameworks developed as part of this chapter reflect the reality that innovations in ethical and Islamic finance are challenging assumptions about how *Sukuk* should operate. A key emphasis of the model is creating an asset-backed structure through which investors are effectively co-owners of capital assets utilised in the production of profits. In the case of the mining sector this is the mine itself, which gives investors recourse through of land titles, and thereby through which land rights which can be exchanged in the event of default on agreements by the investment company. In contrast to the asset-based investments, where investors have no access to ownership of physical assets and therefore little security in the event of a default by the investment company. As a result, this can undermine investment and even create greater risk.

Alongside ethical principles of *Sukuk*, an ideal framework must reflect certain elements essential for conventional business environment. This include tax relief, ease of documentation and dispute resolution mechanism. Some legal and practical issues that could hinder smooth issuance of *Sukuk* discussed ware limitation of trustees; requirement to obtain written consent before valid transfer of any title; and lack of judicial infrastructure. Even though, Nigeria has recorded one issuance, yet, the legal infrastructure is not fully developed as to support smooth subsequent issuances of higher volume, particularly in the corporate sector like mining. Graphical example of corporate *Sukuk* structure for extractive companies, which will require robust legal frameworks have been discussed in this chapter. In the next chapter, some three more developed jurisdictions would be studied to provide example of best international practices that Nigeria can follow.

6. Chapter Six: Case Studies on sukuk issuance, policy and regulation from Malaysia, the United Arab Emirates and the United Kingdom

Introduction

This chapter looks at the legal approaches adopted by Malaysia, that of the UAE and that of the UK to facilitate Sukuk investment. These three distinct countries have achieved considerable progress in their practices, albeit with varying legal history and trajectories. This chapter would discuss each of the approaches and the legal system underlying it, with the overall aim to evaluating which could be the most suitable for Nigeria to adopt. While Malaysia is a pluralistic country with a long standing connection with both Islamic and English law, UAE is an Arab country with a legal system historically dominated by traditional Islamic law, which came to embrace secular commercial law in the wake of the modern economic exigencies. In contrast, UK provides an example of secular state based on pure common law jurisdiction that creates a space for Islamic financial practices for inclusion. Beyond finance, UK model of mining law provides some lessons for Nigeria.

6.1. Malaysian as Pluralistic Islamic Sukuk model

The objective of this chapter is to explore Malaysia‟s investment approach from legal point of view; specifically; its approach to *Sukuk* investment, what legal instruments and government bodies regulate ethical bonds and the conduct of the financial market as well as impact of all this on development. Given the strong presence of pluralism in its legal system couple with Malaysia‟s classic value as the leading hub for Islamic finance globally, an inspiring model has to emerge therefrom.

6.1.1. *Regulatory Framework*

In Malaysia, *Sukuk* transactions are mainly regulated by three statutory bodies. Securities Commission (SC) is the patriarch of all financial instruments including both *Sukuk* and traditional bonds, the body is charged with overall supervision of *Sukuk* transaction to ensure compliance with *Shari"ah* standard as well as Malaysian laws and other international regulations. Accordingly, it produces guidelines to provide necessary description and prescription of what the Islamic bonds needs to abide by. The Guidelines on the Offering of Asset-backed Securities, 2004 was issued in this regard. Bursa Malaysia provides national and international platform for marketing the products, it is one of the most vibrant capital markets for Islamic securities world-wide.[371] Yet, strong objection has been raised in reference to certain transactions floated on this platform for being incongruous with Islamic legal principles. The subject matter of this controversy includes trading *murabaha* receivables on the secondary market, which is illegal by many scholars from outside Malaysia.[372] The last but not the least of the governing bodies is the Labuan Offshore Financial Services Authority (LOFSA). Capital Market Service Act (CMSA), 2007 is the principal statute governing the conduct of all financial stock operations in Malaysia. This approach suggests active official participation in the regulation of *Sukuk* affairs in Malaysia, where authorities provide formal safeguard to not only state laws but also ethical principles governing *Sukuk*-bonds, so much so that any significant infraction is checked by the *Shari"ah* Advisory Council (SAC), a unit under the SC.[373]

In addition to the domestic regulatory framework, there is a set of international financial regulations that also apply to *Sukuk* transaction in Malaysia. Although, some of these regulatory standards were adopted voluntarily to consolidate the locally provided ethical standard, yet others are mandatory international standard proceeded from the World Bank. These regulations include, inter alia, the International Islamic Financial Market (IIFM) Standards (the World Bank). Objectives and principles of the International Organisation of Securities Commission (IOSC) as well as the guidelines of the International Financial Services Board (IFSB) were incorporated into national guidelines for effective governance and smooth conduct of financial market generally. With regards to Islamic bonds specifically however, the *Shari"ah* standards for *Sukuk* issued by Accounting and Auditing Organisation of Islamic Financial Institutions (AAOIFI) has been substantially used in shaping the domestic guidelines. This smooth convergence of laws to govern a subject-matter of the same transaction has been attributed to pluralistic nature of Malaysian approach.

371 Asma Hakimah A and Ruzian Markom, „Sukuk Murabaha Under Malaysian Plural Legal System" (2018), Earth and Environmental Science 175 PP. 1-6

372 ND Miller, J Challoner, A. Atta, „UK Welcomes the Sukuk-How the UK Finance Bill should Stimulate Islamic Finance in London, Much to the Delight of the City"s Banks" (2007) International Financial Law Review, Vol. 26 PP. 24-25

373 Zulkifli Hasan, „Regulatory Framework of Shari"ah Governance System in Malaysia, GCC Countries and the UK" (3-2 March-2010), Kyota Bulletin of Islamic Area Studies, PP.82-115 at PP. 103-104

6.1.2. Pluralism and the Position of Islamic Law within the Malaysian Legal System

According to documented literature, presence of Islamic law in the South East Asian peninsula, which includes Malaysia, dated back to late 12th century, a period characterized by active commercial relationship between Muslim Arab traders and the people living on the coastal cities of the area. By 13th century, Islam was firmly established (in the area to become Malaysia) with Malay Sultans presiding over administration of justice substantially in accordance with the *Shari"ah* From then on, local norms and *Shari"ah* continued to be the only source of law for over three hundred years that followed. By the arrival of European merchants in 15th -16th century and consequent prevalence of British influence however, common law was made to govern major affairs of the state, the case is not different even with regards to some parts of present Malaysia where the colonial power had ruled indirectly through the Sultanates as they were allowed to establish Islamic courts with jurisdictions limited to Muslim personal matters only.[374]

Although, the English law penetrated significant part of the colony, it did relatively recognize the relevance of other legal system, in a restricted sphere though. Even though it is true that, the British Enactment of 1918 aimed at systematic displacement and relegation of the Islamic and Malaysian Customary law, nonetheless it is equally plausible to argue that, that arrangement is itself an obvious mark of legal pluralism. The colonial legislation famously known a "Court Enactment of 1918" created six grades of courts: The Supreme Court, Magistrate 1st class and 2nd class, *Qadi* Court and Assistant *Qadi* Court, and *Penghulu* (village Islamic head) Court. This pluralist feature continued to characterize the state of Malay, and of course all issues arising out of matters that constituted British interest such as commercial disputes had always fallen within the jurisdiction of common law throughout the colonial era.[375]

Although, by 1963 the entire area of Malay under colonial subjugation and present-day Singapore had become fully self-governed and together formed the state of Malaysia,[376] the

[374] Farid S. Shuaib, „The Islamic Legal System in Malaysia" (2012), Pacific Rim Law & Policy Journal, Vol. 21, No.1, PP. 86-113
[375] Ibid
[376] By 1957 only eleven out of thirteen states of today"s Malaysia had gained independence. Sabah and Sarawak as well as to become Singapore were not released from European domination until 1963. Singapore broke out Later on in 1965. The remaining units of Malay formed the present-day Malaysia with thirteen distinct states

legal system remained the same pretty much as before in terms of pluralism. No doubt that, upon independence a new federated state had emerged. Essentially, the structure comprised of thirteen states and federal territories. Even though, the common law oriented federal courts in the central territories have nation-wide jurisdiction, the constitution accorded each state with the legislative freedom to make divergent substantive laws and to establish courts for administration of justice as they deem suitable for their respective areas.

Furthermore, the appellate powers of the federal courts over the decisions of states‟ courts, which was originally created by the British imperialist in order to provide judicial checks against any possible interpretation of Islamic and Malay customary law that might run contrary to English concept of justice, was retained intact. In effect, efforts made by the state assemblies to broaden the application of Islamic law within their respective borders, had been severely hampered by the powers of the federal courts to interfere judicially. However, the law reform of 1988 has dismantled the appellate powers of the federal courts over *shari"ah* courts of the states, and thereby accorded some sort of judicial autonomy to the states,[377] a situation akin to what obtains in the United States of America.[378]

It is expedient to note here that, even though various states may make laws-including Islamic and Malay Customary law (*adat*)- distinct from one another for good governance of their respective domains, that must be exercised in keeping with the powers of state to make law as determined and allocated within the purview of the legislative list provided under the constitution. For example, legislation on matters of national interest meant to have nationwide uniform application, such as investment, banking and finance, lies with only the federal government as this fall under "exclusive legislative list". Flowing organically from this position is that, as noted herein above, federal laws are dominated by English common law and statutes, in fact, Malaysia‟s federal law is often described as "secular law", and therefore law governing financial transactions are eventually "secular".

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and three federal territories, namely: Kuala Lumpur, Putrajaya and Labuan. Later on, this became the capital city with twelve territories (not states) directly administered by the federal government.

[377] Farid S. Shuaib, „The Islamic Legal System in Malaysia‟ (2012), PP. 86-113

[378] In the USA, the federalism arrangement allowed some states to have their own constitution, supreme court and resource control. Thus, arguably, they are autonomous economic, judicial and political entities within America.

6.1.3. Legal Framework for Islamic Finance

Given the growth of Islamic finance industry globally and the critical role of Malaysia as a country, Islamic finance has come to be seen as a "national interest" and hence the national government felt the need to regulate it. Accordingly, Federal Courts begun to interpret and administer statutes that pertain to, and any disputes arising from financial as well as investment transaction in the spirit of Islamic law. It is possible to argue that, this has further consolidated the presence of legal pluralism in financial law at federal level. At any rate, this pluralism offers opportunity in the system for „exploring a myriad of ways that overlap legal systems to interact with each other, and at time creates opening for contestation, resistance and creative adoption. This is the creativity for the regulator in a country to create a positive interaction between the legal systems to facilitate the transaction process."[379]

Among other possible factors, the presence of advanced regulatory infrastructure has made Malaysia to be the most vibrant global hub for Islamic securities. Seven out of the fourteen *Sukuk* standards and structures approved by AAOIFI, have been repeatedly structured, issued and traded in Malaysia with a ground-breaking success. Those that have not been tested yet in Malaysia include *salam* and *istithna* among others. Reasons advanced for shunning this kind of Sukuk were to do with their structure which render them impermissible to be traded in the secondary market and therefore business-wise counterproductive to engage in issuing them. This is again the same reason for which *murabaha Sukuk* has become controversial. Although, Malaysian scholars used to promote its legality based on *maslaha* (public interest), which is to facilitate the growth of Malaysian capital market that position seems to have been vacated, as evidence shows that, presence of *murabaha*-base receivables on Malaysian Bursa, has been on drastic decline.[380]

The basis upon which Malaysia allowed the practice of trading the so-called unorthodox *Sukuk* is rooted in their scholarly argument that has run contrary to the opinion and viewpoint of other Islamic jurists from the mainstream *Sukuk* jurisdictions like *GCC*. The pros and cons of this debate has already been discussed in chapter four. What needs to be highlighted here is however that, the decline in issuance and trading of instruments structured on debt-bearing

[379] Asma Hakimah A and Ruzian Markom, „Sukuk Murabaha Under Malaysian Plural Legal System" (2018), Earth and Environmental Science 175, at Pg. 3
[380] Zulkifli Hassan, „Regulatory Framework of Shariah Governance System in Malaysia, GCC countries (March, 2010), Kyoto Bulletin of Islamic Area Studies, PP.82-115 at PP. 103-104

contracts in Malaysia, is not to be taken to mean a sudden compromise of legal opinion by Malay jurists; but rather it is a juristic concession arising out of general consensus of the key global *Sukuk* players under the auspices of the Islamic International Financial Market(IIFM). The fundamental objective of IIFM has been to bridge the existing gap between various markets by providing a platform to trade instruments acceptable to all members.[381]

The emergence of these two international institutions is an unequivocal acknowledgment of the need to globalise the activities of Islamic finance industry, provide an international umbrella with legal mandate to issue guidelines and set up standards for all markets, thereby bringing the practice of *Sukuk* structuring, issuing and trading into global uniformity. One could glean this from the principal objectives of the bodies. The governor of Negara once summed up IFSB"s objective as „To set prudential standard for Islamic Financial Institutions, and to bring harmonization of these standards across countries to ensure the soundness, stability, integrity and confidence in the Islamic financial institutions"[382].

Given the fact that, controversy within the industry is mostly generated by failure to comply with the principles of *Shari"ah* that are supposed to govern the ethical nature of its transactions, the question here is whether IIFM and world bank"s IFSB would be concerned with issues to do with compliance in this regard. This question is important because if the duo is not concerned with issue of ethical governance, which is the main point of divergence between markets, how then it is possible or the agenda of converging the global *Sukuk* transactions within the remit of one single market to succeed. The paradox of this is that, in this case, it will be very much unlikely for those agencies to achieve their fundamental objectives, the very essence of their creation i.e. to bridge the gap between markets by remove controversies.

In addition, if the answer to the question turns out to be otherwise affirmative, then the functions of these institutions could give rise to a similar controversial scenario if not worst. Because the sovereign powers of states to regulate financial activities through their respective central banks will be eventually, tempered with by international agencies. The implication of this scenario on the future of the industry could be enormous, as perhaps participating states

[381] Asiamoney, Interview with Abdul Rais Abdul Majid, the CEO of IIFM (August, 2002), Pg. 5. As of this date, the CEO confirmed that, only five countries: Malaysia, Brunei, Indonesia, Bahrain and Sudan were members. Alongside these states, some institutions including Islamic Development Bank, Kuwait Finance House, Islamic Bank of Abu Dhabi among others have subscribed to the IIFM.

[382] Anonymous, How Malaysia Approaches Islamic Finance, Asiamoney: London, Vol. 13, Issue 7 (Aug 2002), Pg. 4

may not see it as a precursor to a conflict of law situation only but might also operate to discourage active jurisdictions from subscribing to the membership of those institutions. This potential danger has been the reason behind the decision of other multinational organisations with even more robust mandate not to engage in making conflating regulations with member states. For example, WTO has declined to regulate environmental issues associated with trade due to fear of backlash that could result from it, especially when states get to perceive that their sovereignty is somehow threatened. Obviously, answer to this question is either way paradoxical, even though it is more problematic in the second scenario.

Accordingly, both IIFM and IFSB have made it clear that, issues pertaining to compliance either concerning conventional regulations or ethical governance do not form part of IIFM and IFSB mandate, international bodies recognised those issues as a matter that falls within the regulatory powers of individual state. Nevertheless, beyond the theoretical and practical challenges characterizing the task of international standard setters, this position ultimately indicates how crucial it is for the states to provide for effective regulatory framework in order to achieve compliance, a necessary ingredient for harmony and growth, both at local and global levels.

Furthermore, situating both IIFM and IFSB in Malaysia would buttress the point made earlier that, the robust regulatory infrastructure created by the state has rendered this jurisdiction so attractive to the modern Islamic capital market, so much, so that it is possible to argue that, Malaysia is the de facto global headquarters. Having said that, it is worthwhile to look at the structural composition of Malaysian legal framework for Islamic investment instruments.

6.1.4. Regulatory bodies

The strength of Malaysian regulatory structure lies in the presence of multi-layer *team of Shari"ah* experts in order to ensure thorough compliance with ethical requirements of *Sukuk*. A department of Shari"ah committee has been created within both the Central Bank, Negara, and the Securities Commission. The practical implication of this is that, any sovereign *sukuk* structured by the Debt Management Office must be scrutinized by the Shari"ah committee unit of the central bank to ensure compliance and then be investigated once again by the panel of jurists at the commission. In case of corporate issuance, the Shari"ah committee within SPV shall oversee the structure before it goes to Securities Commission for yet another legal search before listing. Whether structured as sovereign or corporate, Islamic securities would have to be checked at least twice by Shariʽah committee.[383] This multi-scaler legal check-up create investor confidence in the system. In addition, there is specific legislation or guidelines directed to each of the strategic regulators to administer. Below diagram shows each body with the relevant legislation(s) and guidelines.

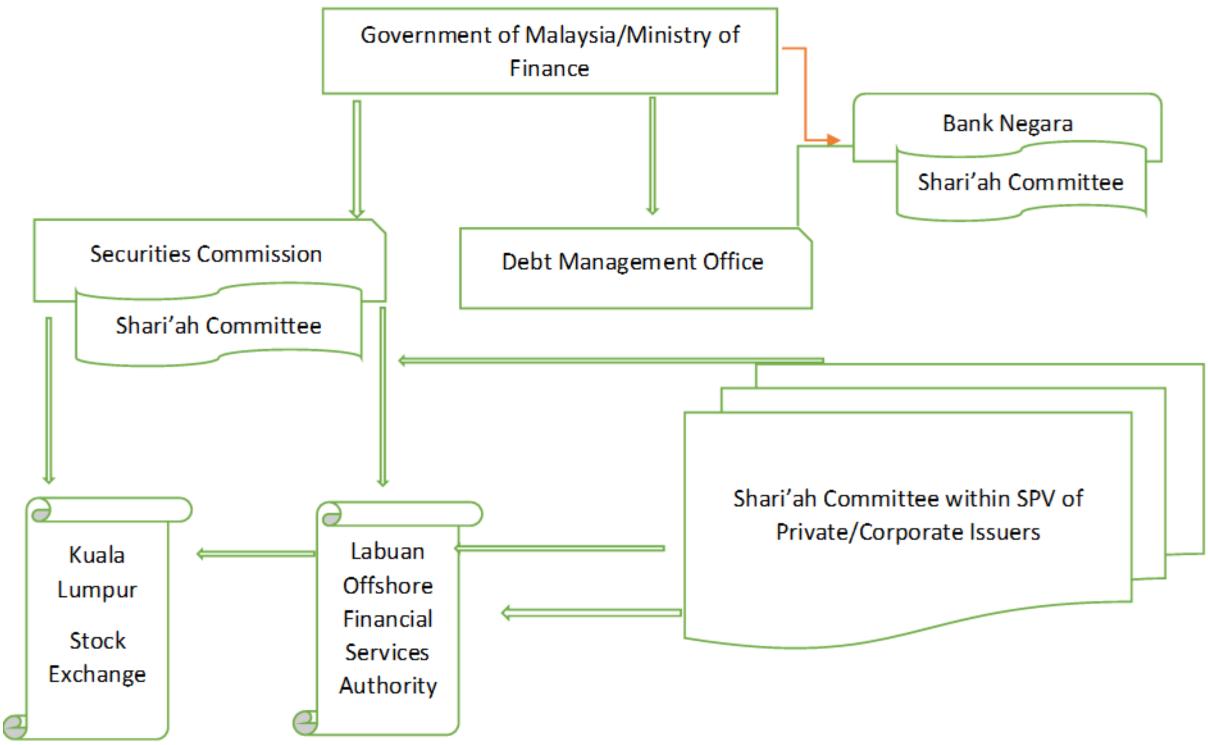

Figure 1:6 Institutional regulation of Islamic finance in Malaysia

As far back as 1958, legislations in Malaysia have laid foundation for regulating financial and commercial transactions based on Islamic principles. Section 16B (1) of the Central Bank Act 1958 provides:

> *The Bank may establish a Syariah Advisory Council, which shall be the authority for the ascertainment of Islamic law for the purposes of Islamic banking business, takaful business, Islamic financial business, Islamic development financial business, or any*

[383] This remarkable arrangement of building the legal mechanism within the financial system of the state hardly obtained elsewhere throughout the countries of the world where Islamic commercial practices exist. In fact, one of the warnings issued by the famous Bahrain based standard setter, AAIOFI, was that, Shariʽah Supervisory Boards should expand their oversight function to cover not only the stage of structuring and issuance but also the way funds are invested must be Shariʽah compliant. For more on this point, see Faisal Hijazi, Global Sukuk Issuance: 2008 Slowdown Mainly Due to Credit Crisis, But Some Impact from Shariʽah Compliance Issues (2009) Special Report of International Structured Finance (21st January, 2009).

other business, which is based on Syariah principles and is supervised and regulated by the Bank.

Under subsections 4-7 of the same section of the Act, functions of the Shari"ah Advisory Council have been spelled out to include ascertaining the position of Islamic law pertaining to any matter referred to it by the central bank itself or any other financial body in the country. Additionally, in cases to do with commercial transaction, courts of law may seek expert opinion from the council and deciding such disputes the court is bound to take into consideration any written opinion of the council. The Central Bank Act 1958 has therefore been the first legislation to govern Islamic financial activities in Malaysia. From the general wordings of s. 16B one can confidently gather that, Shari"ah oriented financial bodies such as *takaful* and banking have been in existence, to some extent, since 1958. The Act was however amended in 2009 to expand and accord more weight and authority to the functions of the Shari"ah Advisory Council.

By section 58 of the Act (as amended), ruling of the council shall prevail any ruling or opinion on Islamic tractions made by other bodies within or outside the country. In 1983 however, full fledge Islamic banking was introduced by the Islamic Banking Act of 1983. Although, the Act has established the Islamic Bank of Malaysia and subsequently many other similar banks, there was no separate Shari"ah Advisory Council created. Rather, section 13A of the Act directed all Islamic financial institutions and other conventional bodies with kind of Islamic window to resort to the main Advisory council already established under section 16B of the Central Bank Act. Furthermore, any advice rendered by the council is binding on any such institution that sought for it.

Besides setting up full-blown Islamic financial authority in Malaysia, the main distinction of the Islamic Banking Act 1983 is bringing the key legislations of the country into recognising Islamic financial institution as distinct legal entities. Instances of this are found in amendment to section 59 of the Banking Act 1973 and section 4 of the Companies Act 1965. Yet, as far as Sukuk is concerned, the first comprehensive enactment in Malaysia was the Capital Market and Services Act 2007 (Act 671). Division 6 of the Act was dedicated to Islamic securities. Section 316 (1) states to whom the division applies. It states, „This Division applies to a person who proposes to make available, offer for subscription or purchase, or issue an invitation to subscribe for or purchase, Islamic securities.‟ Thus, it regulates both private and sovereign issuance.

Under section 377, the Act empowered Malaysian Security Commission to make guidelines for the conduct of Sukuk transaction, and accordingly, a comprehensive guideline containing rights and duties of all parties to Islamic bond has been issued out in 2007. Although, there is Shari‟ah Advisory Council established under the central bank, the Capital Market Act has created another well-composed Shari‟ah Advisory Council, with authority to regulate the conduct of business on the platform of Bursa Malaysia. In order to appreciate how comprehensive is the function of this council, section 316B is provided hereunder:

> The *Shariah* Advisory Council shall have the following functions:
>
> *(a)* to ascertain the application of *Shariah* principles on any matter pertaining to Islamic capital market business or transaction and issue a ruling upon reference made to it in accordance with this Division;
>
> *(b)* to advise the Commission on any *Shariah* issue relating to Islamic capital market business or transaction;
>
> *(c)* to provide advice to any person on any *Shariah* issue relating to Islamic capital market business or transaction; and
>
> *(d)* such other functions as may be prescribed by the Minister.

6.1.5. Dispute Resolution Mechanism

The main objective of a legal framework is to promote investment by creating certainty for investor through minimising room for defaults. Default, which is violation of any contractual obligation by either party, mainly failure of the Sukuk issuer to meet their payment obligations, has the tendency of undermining market‟s confidence on Sukuk investment in the jurisdiction where it occurs frequently.[384] Hence, to boost investor confidence and attract more investment countries must devise comprehensive legal regime that creates greater certainty for both issuer and investor by upholding sanctity of contractual commitments in

[384] Hafiz Ab Majid, Shahida Shahimi and Mohd Hafizuddin Syah Bangaan Abdullah, „Sukuk Defaults and its Implication: A Case Study of Malaysian Capital Market‟(2011), a conference paper presented at the 8th International Conference on Islamic Economics and Finance hosted by the Centre for Islamic Economics and Finance, Qatar Faculty of Islamic Studies, Qatar Foundation (paper in file with the author) Pg. 1

Islamic commercial transactions.[385] This kind of legal infrastructure generates confidence as it provides for well-defined rights and duties of the parties with clarity aiming to reduce legal issues that could potentially degenerate into court cases.

Furthermore, to produce greater protection for the investor a framework must contain clear provisions covering the parties in default cases. "Certainty with regard to the post-default process in Sukuk transaction is necessary because the risk for a default exist in all types of transactions. Even the most prudently structured products can fail due to circumstances outside investors" control." [386] For example, in Malaysia (one of the most developed and sophisticated jurisdictions), data from empirical study indicates that, between the period of 1997-2009 there was at least one case of default in almost every single year.[387] Similarly, there were defaults elsewhere. What is important however is to understand the factors underlying failure in those commercial transactions? In addition, even more important from investors" perspective, what forums are there to provide remedy in such a circumstance? The default in Sukuk transactions across the Islamic finance industry highlights the need for a robust legal framework that addresses both questions.

In Malaysia, the mainstream courts, which decide conventional financial disputes, determine cases arising from Islamic commercial transactions. The problem with this approach is that, both the judges and the rules governing the proceedings are of English legal orientation, while maters on Islamic finance require some acquaintance with Islamic commercial law as essential elements of Islamic finance products originate from the ethical principles of Shari"ah. The result of this incompatibility challenge would be a failure to have coherent judicial outcome, parties might obtain varying judgements even where their cases bear similar facts. Situation as such raises alarm of uncertainty and weakness in investors" protection mechanism of a state. For example, in the case Arab Malaysian Merchants Bank Berhad v Silver Concept, the claimant brought a case of default to fulfil payment obligation arising out of contract of purchase with deferred payment, otherwise known as *Bay Bithaman Ajil* (BBA) before a high court in Malaysia, asking for an order of foreclosure. Upholding validity of the said contract, the court granted the relief sought. However, in Bank Islam

[385] Tunn Arifin bin Zakaria, „A Judicial Perspective on Islamic Finance Litigation in Malaysia" (2013), 21 IIUMLJ 143, Pg. 150
[386] Hafiz Ab Majid, Shahida Shahimi and Mohd Hafizuddin Syah Bangaan Abdullah, „Sukuk Defaults and its Implications" (2011), Pg. 6-10
[387] Ibid

Malaysia v Lim Kok, yet another case of breach of BBA contract asking for same relief before a different high court in Malaysia, the court rejected the claim on the grounds that, the contract (BBA) itself was structurally invalid under Islamic law and therefore unenforceable.[388] Inconsistent outcome of judicial proceedings makes up negative perceptions of the framework and has the tendency to undermine investors‟ confidence.

To address the issue of conflicting judicial pronouncements on matters relating to Islamic finance, Malaysia made some reforms to its existing framework. IFSA 2013 provided for a central authority with powers to make final verdicts on Legality or otherwise of any aspect of Islamic finance. Section 16B of the Act declares that, opinion of Shari‟ah Advisory Council (SAC) of the Central Bank of Malaysia on Islamic finance is not only a final say but has a legal force binding upon all institutions including courts of law. By implication, no judicial authority has the power to contradict a verdict of SAC with reference to permissibility or proscription of a product or structure of any transaction to do with Islamic finance in Malaysia. In effect, court decision such as that of Bank Islam Malaysia v Lim Kok H and Others would be a nullity if the court were to make them after the reform of 2013. Scholars celebrated IFSA widely for the broad and remarkable change it has brought into Malaysia‟s finance industry: it has unified Malaysia‟s position on substantive principles of Shari‟ah governing the industry thereby saving the country from albeit fragmented juristic views.

However, IFSA does not solve all the problems as it only relates to substantive Islamic financial law and not rules of procedure. SAC would make guidelines on what is valid in terms of form and substance of commercial transaction such as *murabaha*, *BBA* and the like, but it does not provide for technical issues such as rules of court. There is growing concern that, relieves granted by common law courts in Malaysia are not compatible with Islamic finance.[389] Relieves such as order of foreclosure, rebate and award of interest on judgement debt all originated from European law and therefore not suitable for Islamic finance. Yet, the courts have always rejected this contention and held that grant of those relieves were justified by the circumstances of the cases, that particulars of those cases have satisfied all grounds

[388] Tunn Arifin , „Islamic Finance Litigation in Malaysia‟ (2013), PP. 162-163
[389] This contention was raised repeatedly in cases like Bank Islam Malaysia v Adnan Omar and Bank Kerjasma Rakyat Malaysia Berhad v Emcee Corporation

warranting the grant of those relieves under section 256 of National Land Code (NLC) of Malaysia as well as O. 83 of the High Court Rules 1980.[390]

It emerges from the position of the court that, to tackle the friction between the judicial approach and the Islamic financial products in Malaysia, there is need for reform beyond section 16 B of IFSA 2013. A reform that aims to create a dispute resolution mechanism compatible with Islamic finance in both substantive and adjectival law. There are two ways to achieve his objective in Malaysia. Having already created a national legal instrument for unification of opinion on substantive Islamic principles recognized by conventional courts, the country could simply make some amendment to the rules of court where necessary to bring it into conformity with Islamic finance. The alternative is to create a separate forum dedicated for resolution of Islamic finance dispute.

However, literature indicates that, Malaysia seems to have tilted towards the first option. Efforts evolve to harmonise civil rules of court and Islamic law. The first such effort being the amendment of O. 2 R. 12(a) 2012, which allows for award of "*ta"awidh*" in matters related to Islamic finance instead of "interest" awarded in conventional finance on judgement debt to compensate for loss that might have been incurred by the judgement creditor due to passage of time.[391] Despite absence of ideal judicial infrastructure dedicated to Islamic finance wholesale, Malaysian system remains to be one of the most developed and enviable in the global Islamic financial landscape for two reasons. The conflict and fast-evolving relationship between its conventional court system and Islamic finance industry is one, and remarkable characteristics of the framework aiming at forestalling minor issues before they geminate into commercial chaos.

Rating of bond issuer has been a credible tool used internationally as a precautionary measure that helps to perceive a potential default in the timeline of a deal before it becomes a reality. Strong framework for Sukuk must contain a requirement for rating to provide enough information for investors with view to protecting them against a creeping default. Regulations

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390 Tunn Arifin , „Islamic Finance Litigation in Malaysia" (2013), PP. 160-170
391 Ibid, Pg. 175

in Malaysia always requires rating of all debt securities including Sukuk issues by approved rating agencies.[392]

In addition, the bunch of coherent substantive principles of Islamic law substantially presented in forms of guidelines and legislations with nation-wide application would strengthen the knowledge base of the public and promote credibility of the system. The fact that, "issuers have to abide by similar standards, guidelines and laws that govern both Sukuk and conventional bonds increases investor confidence."[393] Although there were cases of default in Malaysia"s Islamic capital market, that does not affect it considerably at local level. Because fatwa has been centralised to SAC, there is strict supervision to minimise events of non-compliance and importantly presence of centralised juristic opinion on Islamic finance ensures consistency and predictability in the domestic market.[394] In contrast, the issue of Shari"ah non-compliance has been identified as one of the principal factors underpinning default in *Sukuk* market of other leading jurisdictions of the GGC countries as may be seen in the next case study.

6.2. United Arab Emirate (UAE): Traditionalist Islamic Sukuk Model

UAE[395] is a member of Gulf Corporation Council (GCC), a bloc regarded as the engine room and birth place of Islamic finance. GCC is consist of leading countries like Bahrain where strategic international regulators such as AAOIFI are based, and Saudi Arabia, the acknowledged mother of Islamic finance. However, UAE occupies an equally important position in Islamic finance industry, the capital market in particular. Sukuk represent 16.7% of the total Islamic financial assets in the emirate as compare to 11.4% in Saudi Arabia.[396] Dubai financial centre provides international platform for Sukuk transaction in the region. Reports of International Islamic Financial Market (IIFM) indicates that, UAE accounts for

[392] Hafiz Ab Majid, Shahida Shahimi and Mohd Hafizuddin Syah Bangaan Abdullah, Sukuk Defaults and its Implications" (2011), Pg.2
[393] Hafiz Ab Majid, Shahida Shahimi and Mohd Hafizuddin Syah Bangaan Abdullah, Sukuk Defaults and its Implications" (2011), Pg. 18
[394] Ibid, pg. 17
[395] United Arab Emirates (UAE) is a union of seven member states known as "emirates" under a federal constitution. These emirates are: Umm Al-Quwain, Ras Al-Khaima, Sharjah, Dubai, Ajman, Al-Fujaira and Abu Dhabi. The formation of UAE in 1970 as a federation governed by a single constitution means a substantially uniform legal system would apply throughout the emirates, albeit with somewhat different administrative regulations at local levels.
[396] Islamic Financial Services Board (IFSB), 2016

8.09% of the total international issuance.[397] Thus, UAE is the leading hub for Islamic bonds within the GCC.

The formation of UAE was largely driven by economic reason. Although, since pre-modern history of Arabia, there had always been common factors to do with familial connection, culture and religion that kept their social fabric together, that has given way in the face of political tensions. The structure of leadership was purely based upon tribal arrangement rather than a defined system. "Initially the UAE represented a tribal hierarchy with the political structure subject to the authority of ruling sheikhs." Each emirate was (and still is) headed by a chief, and consequently strife and hostility, typical of rural area, characterized the relationship among the emirates till nineteenth century. However, following the discovery of oil minerals and gas resources all over the emirates in 1960s, the need for the Trucial states to form a united and formidable federation with progressive investment policy became critical. Accordingly, a conglomerate of seven emirates gave birth to a federal state under UAE Constitution of 1971. Further, given the experience of financial crisis of 1970s and the growing uncertainty in the global oil market, Dubai lunched an investment policy in 1980 with the central objective being to reduce dependence on the natural resources.[398]

Of all the seven emirates that constitute UAE, Dubai appears to be the commercial centre, even though Abu Dhabi is the de facto capital city of the federation. Indeed, recent ambitious investment approaches of Dubai have achieved for the city a position above its regional and even global competitors. The 2019 ranking of global financial cities of the world had the Arabian emirate as number 12 out of 102 selected countries, putting above Paris and many more cities in the developed nations. Profile wise, Dubai and Abu Dhabi have been rated as global, while Boston, Geneva and Melbourne as well as Kuala Lumpur were grouped as international. As for other regional competitors like Tel Aviv, Bahrain, Kuwait and Riyadh, they were simply graded local.[399]

Moreover, the international business arena of Dubai presents a distinctive regulatory framework seen as a model of attractive market in the modern time. Because, the existence of

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[397]International Islamic Financial Market (IIFM), 2016

[398] Michael Strong and Robert Himber, „The Legal Autonomy of the Dubai International Financial Centre: A Scalable Strategy for Global Free Market Reforms" (2009) iea Economic Affairs, PP. 36-37

[399] 2019 Global Financial Centres Index, available at: <http://en.wikipedia.org/wiki/global_financial_centres_index> accessed 15th April, 2019

Dubai global investment hub inside the emirates couple with the smooth functioning of its judicial structures within the overall UAE system is an innovative structure indicative of successful co-existence of multiple legal systems within a nation state.

6.2.1.UAE Legal System and Dualism in Dubai

Owing to geographical proximity of UAE to Saudi Arabia (immediate neighbour of UAE to the west), the early spread of Islam to cities within and around the Arab peninsula did not spare the areas that came to be known later as emirates of Southern Coast of Gulf, which was then part of Sultanate of Oman. Article 6 of UAE Constitution reiterated this by saying, "The Union shall be part of the Great Arab Nation, to which it is bound by the ties of religion, language, history and common destiny." [400] The great Arab Nation here refers to GCC countries. Hence, it is no surprise that Islamic law forms the foundation of UAE legal system. The 1971 Federal Constitution of the emirates provided for its legal system, although theoretically the constitution presupposes uniformity of judicial practice in all the emirates, local legislations and regulations of individual emirates practically differ from one another.[401] Nevertheless, recognition of Islam as state religion and Islamic Shari‟a as the source of law is rooted in both the federal constitution and judicial practice of the Arab emirates. Article 7 of the UAE Constitution provides: "Islam shall be the official religion of the Union. The Islamic Shari‟ah shall be a principal source of legislation in the Union." While, there may be other sources of law in the emirates, Islamic law shall have substantial influence in shaping the legal system. The phrase "a principal source of legislation" hinted to the supremacy of Shari‟ah, but, at the same time, did also uphold the authority of other sources albeit implicitly.

The use of indefinite article in the phrase „a principal source of legislation‟, rendered the provision of Article 7 of the constitution somewhat controversial. The main controversy generated by this hazy framing has been whether, under the UAE legal system as provided by the constitution, legislations based upon Shari‟ah were meant to have equal legal status with those emanating from other sources of law such as custom and foreign legal principles. The

[400] The UAE Federal Constitution of 1971, available at: <https://www.constituteproject.org/constitution/United_Arab_Emirates_2004.pdf> accessed 22th April, 2019
[401] Buti S. Buti Al-Muhairi, „The Position of Shari‟a within the UAE Constitution and the Federal Supreme Court‟s Application of the Constitutional Clause Concerning Shari‟a‟ (1996), Arab Law Quarterly, Vol. 11, No. 3, PP. 229-232

implication of this question is to ascertain whether legal pluralism is envisaged by the constitution. This is debatable. Consequently, this provision of the Constitution has divided legal scholars in their opinions into two groups. More so, even judicial approaches to the issue of supremacy of Shari"ah varied across different levels of courts within the emirates.[402] One such example was Junatta Bank case, in which the plaintiff bank brought an action to a local court in Abu Dhabi asking for repayment of a loan plus interest. The bank pleaded for the payment of interest based on articles 61 and 62 of Abu Dhabi Local Law No. 3/1970. Yet, the local court rejected the plea for interest on the grounds that, it contradicts the tenets of the shari"ah, which is the main source of law as enshrined under article 7 of the constitution. On appeal to the Federal Court of Appeal Abu Dhabi branch, the appeal was dismissed upholding the decision of the lower court. This decision was referred to the Supreme Court for interpretation.[403]

Legal system in the UAE mandated the Supreme Court in exercise of its jurisdiction to review decisions of lower courts to comply with Article 75 of the Federal Law No. 10/1973. Article 75 provides that, the supreme court shall apply

> *The provisions of Islamic Shari"a, Federal Laws, and other laws in force in the member emirates of the federation conforming to the Islamic Shari"a. Likewise, it shall apply those rules of custom and those principles of natural and comparative law which do not conflict with the principles of the Shari"a*[404]

The above provision has been interpreted to mean that, the apex court should check that judgements passed by the courts below do not conflict with the principles of Shari"ah. This is because, by mentioning Shari"a first in order before the other sources and conditioning them upon agreement with its principles, Article 75 has envisaged the primacy of Shari"a over any other source of law in the UEA. Another important feature of the legal system in the emirates is that, although courts are not so much bound by previous decisions of superior courts in contrast to the principle of case law and the doctrine of stare decisis widely applied in common law jurisdictions, the supreme court of the UAE has exclusive jurisdiction to resolve any question on constitutional interpretation and powers of cassation to review decisions of the lower court. Hence, based on these grounds, the case of Junatta Bank among others were referred to the Federal Supreme Court for interpretation. The outcome was a resolution of the

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[402] Al-Muhairi, „The Position of Shari"a within the UAE Constitution" (1996), PP. 230-240

[403] Ibid

[404] Federal Law of the UAE No. 10/1973, available at: <https://uaelaws.wordpress.com/2010/07/15/uae-federal-law-no-10-concerning-the-supreme-federal-court/> accessed 22nd April, 2019

all legal controversies surrounding Article 7 of the UAE Constitution and other related legislative provision. [405] In effect the Supreme Court aptly formulated 3 principles as follows:

(1) That promulgation of laws is the duty of the legislature and at Article 150 of the Constitution directed the federal legislature to issue laws to replace legislation which existed before the federation, and to regulate matters in detail in accordance with the Constitution's purposes and orders;44 that Article 7 of the Constitution is a direction from the Constitution to the federal legislature to issue laws and regulations and to have the Islamic Shari'a as a main source of such legislation. The speed and the form of such federal legislation especially regarding Islamic Shari"a rules, is a matter of policy which is not for the judiciary to decide.
(2) That the laws, regulations, orders and other measures in force at i.e. time when the Constitution commenced its operation are saved from application of Article 15145 because of the protection extended to them by Article 148 It was obvious from Article 148 and the following articles, that the framers of the Constitution have differentiated between two categories of legislation. Under the first category comes legislation in force at the time of coming into force of the Constitution. This category is granted extension of authority and continuation of application by Article 148. The second category encompasses all legislation issued subsequent to the coming into force of the Constitution. This category is regulated by Articles 149 and 150. The hierarchy of this second category is established by Article 151. This second category is subject to review by the Supreme Court to ensure observation of the order established by Article 151. Accordingly, all measures of legislations preceding the coming into force of the Constitution remain in force and acquire authority from the provisions of the Constitution so far as they are not amended or abolished expressly.

There is no excuse for any authority in the country to refrain from observing legislation preceding the operation of the Constitution, as they stand, under the cover that some of these laws do not conform with the provisions of the Constitution. The reason for the continuation of the operation of such legislation is that the Constitution expressly ordered their observation and saved them from application of Article 151. Indeed, any abandonment of the application of these measures would amount to abandonment of constitutional orders prohibited by Article 145. Because of the foregoing, Articles 61 and 62 of the Civil Procedure Code of Abu

[405] Al-Muhairi, „The Position of Shari"a within the UAE Constitution" (1996), PP. 230-240

Dhabi are parts of a law which came into force before commencement of the operation of the Constitution, therefore, these two Articles are constitutional according to Article 148 of the Constitution. Nothing in Article 8 of Law No. 6/1978 or 75 of Law No. 10/ 1973 - which provide for the application of Shari‟ah - affects or removes the constitutional authority extended to the two Articles of the Abu Dhabi Law by the Constitution.

(3) That the purpose of the language used in Article 62 of the Abu Dhabi Civil Procedure Code is to establish the maximum allowable rates of interest. Nothing in this or Article 61 authorises the judges to refrain from enforcing the interest rate agreed by the parties or abandon the payment of interest in their judgment. The purpose of establishing maximum rates of interest is the protection of debtors from exploitation. Therefore, exceeded in their agreements the prescribed limits, it becomes the duty of the judges to decrease the rate of interest to conform to the maximum limit prescribed by the Code.[406]

Above decision of the highest judicial body in the emirates has established certain fundamental principles of the UAE legal system. That, the Constitution is supreme, and it is above any law and any authority in the state. This is akin to the notion of the supremacy of the Constitution in many modern democratic states, which, many observers viewed as conflicting with the tenets of Shari‟a.[407] Besides, the interesting part of these principles is that, it upholds the provisions of Articles 61 and 62 of Abu Dhabi local legislations, which allow payment of interest on debts. This is interesting because it goes to underpin a unique feature in UAE legal system. In commercial transactions, UAE compromises a lot of Shari‟ah principles in favour of economic freedom, invoking the Islamic principle „necessity dictates exception" as a legal justification. However, this is not without critics. Critics would question the appropriateness of applying such a restricted principle of Islamic law to suspend explicit proscription of interest (riba) merely due to present day commercial exigencies. The basis for UAE compromise on *riba* is the need to attract diverse range of investors to create national wealth and prosperity.[408] Furthermore, the position of the Supreme Court regarding interest has been eventually consolidated by subsequent legislations.

[406]Al-Muhairi, „The Position of Shari‟a within the UAE Constitution" (1996), PP. 235-237. These 3 paragraphs are a decision of the UAE Supreme Court originally given in Arabic language, rendered into English by A-Owais, from whom Al-Muhairi quoted.
[407] Ibid, PP. 235-240
[408] Zulkifli Hasan, „Regulatory Framework of Shari‟ah Governance System in Malaysia, GCC Countries and the UK" (2010), Kyoto Bulletin of Islamic Area Studies, 3-2, PP. 82-115 at Pg. 91

Federal Law of 1987 removed commercial activities from the class of civil matters to which interest was not applicable. Moreover, in 1992 by virtue of the Federal Law No. 11 all restrictions on the payment of interest were abolished. Now, pursuant to Law No. 18 of 1993, charging interest on commercial loan has become a right of the lender enforceable at law. This position could have serious implications on practice of Islamic finance and Sukuk in the UEA. Because, payment or receive of interest otherwise known as *riba* infringes the core of ethical principles governing Islamic commercial activities.[409] This practice originated from conventional finance whose governance framework is rooted in common law, which has continued to have incredible influences on the legal system of countries that were once under British rule.

Historically, the Trucial state, which later became UAE was never colonised by any foreign entity. Nevertheless, there was a long-standing treaty relationship between the central command of British colonial administration in Bombay and the Arab rulers of the emirates. In 1802, the British and the Arab rulers in charge of commercial routes leading to India via the red sea had entered into a truce to guarantee the safety of British interest on transit.[410] Although, the object of the treaty was not to, and did not actually interfere with the internal politics of the emirates,[411] it is possible to argue that, certain English legal principles enshrined in the peace document might have passively found their way into the mainstream custom of the area which continued to remain till today. Yet, another reason to suggest this possibility somewhat more strongly is the continued presence of Indian merchants with English orientation on the coastal city of Dubai since eighteenth century, and usual consequence of commercial interactions among diverse groups would include dilution of norms and culture. Additionally, the influence of common law on the UAE legal system has grown more conspicuously in the aftermath of oil discovery in the emirates in the 1960, British and America have ever since then, become the main business partners of the UAE.[412]

Further, the foregoing might have somehow had influence on the UAE Federal Constitution of 1971. Because looking at the general sprit of the constitution, one can presume that, the

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409 Hasan, „Regulatory Framework of Shari‟ah Governance" (2010), PP.90-92

410 Rosemarie Said Zahlan, *The Origins of the United Arab Emirates: A Political and Social History of the Trucial States* (New York: Routledge; 2016), PP. xi-xvii

411 Kenneth Christie, „Globalisation, Religion and State Formation in the United Arab Emirates and Pakistan" (2010), Totalitarian Movements and Political Religions, Vol. 11, No. 2, PP. 203-212

412 Michael Strong and Robert Humber, „The Legal Autonomy of the Dubai International Financial Centre: A Scalable Strategy for Global Free Market Reforms" (2009), IEA Economic Affairs, PP. 35-37

union intends that, in addition to Islamic law, other legal traditions would form part of its overall regulatory framework as may be dictated by economic reality of the modern world. The preamble to the constitution states that, the rulers of the seven emirates and their people are:

> *Desiring also to lay the foundations of Union Law in the coming years on a sound basis, corresponding with the realities and the capacities of the Emirates at the present time, enabling the Union, so far as possible, freely to achieve its goals, sustaining the identity of its members where this is not inconsistent with those goals and preparing the people of the Union at the same time for a noble and free constitutional life, progressing by steps towards a comprehensive, representative, democratic regime in an Islamic and Arab society free from fear and anxiety*[413]

Present time reality of the emirates appears to include the need to pursue ambitious projects designed by the emirates aiming at building economy, infrastructure and prosperity for the citizen. Thus, to realise these national development goals, the sovereign bloc might need to open up for the using various legal concepts necessary for wealth creation. Keeping with this goal therefore, in addition to custom and economic union ensuring free movement of people good and services across the borders of seven member emirates, such concepts of World Trade Organisation as the Most Favoured Nation (MFN) treatment as well as other key liberal investment policies of the modern time were adopted. The objective is to make attractive and competitive not only the oil mineral sector, which has been the main source of revenue for the emirates, but also to transform the country into a global hub for investment in multidimensional sense.

One such dimension was to make Dubai, the second city of UAE, a financial centre capable of competing with top capital markets in the world, namely New York, London and Singapore. Consequently, Dubai International Financial Centre (DIFC) was created to provide a platform for international capital transactions. The international character of this facility is epitomized in two things. First, DIFC is an economic free zone. It is a business-friendly environment, with less restriction and broad opportunity, aimed at giving economic freedom to its members. Economic freedom is the foundation of wealth creation. Second, the legal infrastructure of the centre is substantially based on the English common law. This is, partially, because of the global reputation of English judicial system, and the fact that, most of the world"s leading capital markets are located in countries with a legal system based on

[413] The preamble to the UAE Federal Constitution of 1971

the common law.[414] Although, in terms of conventional finance, Dubai is yet seen as a rising market, its fortunes and potentials with regards to Islamic finance is even higher and more promising, as it is unanimously considered to be one of the two leading jurisdictions of Islamic bonds in the world.[415]

6.2.2. Law and the Practice of Sukuk in the Emirates

As regards legal framework for Islamic finance in the UAE, the principal instrument to derive authority from is the constitution. Declaring Shari‟ah as a source of law, the constitution has provided for a legal foundation that Islamic commercial activities in the emirates be regulated in accordance with the tenets of Shari‟ah. Accordingly, article 714 of the Federal Law No. 5 of 1985 prohibited all kind of riba (interest), even though this prohibition has since been restricted by both judicial and legislative authorities that followed this period. However, this restriction did not hinder the authority already granted to Islamic institutions and investment entities that choose to operate in accordance with the Islamic financial principles throughout the emirates. Nevertheless, Law No. 6 of the same 1985 has required that, such entities must maintain a document containing the detail nature of their business.[416]

In the wake of economic transformation of the UEA represented in creation of several investment free zones, there has been enhanced legal regulatory framework for Islamic financial practices in the emirates. The most famous economic free zones are Jebel Ali and Dubai International Financial Centre (DIFC). These zones are legally autonomous, their regulatory and judicial system being separate from the UAE mainstream legal system. Financial transactions concluded within the parameters of DIFC are subject to and governed by DIFC legal system, which is predominantly composed of commercial principles based on British legal orientation, whereas anything outside the zone constitute a subject matter for pure UAE legal permutations.[417] Nonetheless, regulations to ensure Shari‟ah compliance for Islamic investment outlets are available in both jurisdictions, to different extent though.

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[414] Strong and Humber, „The Legal Autonomy of the Dubai International Financial Centre‟ (2009), PP. 36-37
[415] Erhan Akkas, „An Overview of Islamic Economics and Finance in the GCC Countries‟ (2017), IKAM Country Report, No. 3, PP. 25-26
[416] Hasan, „Regulatory Framework of Shari‟ah Governance‟ (2010), PP. 92-93
[417] Ibid, Pg. 92

Higher *Shari"ah* Authority (HAS) is the body centrally charged with the supervision of all Islamic financial institutions in the UAE. This body is a highly authoritative and draws its membership from the ministries of justice and Islamic Affairs to ensure competence in both common law and *Shari"ah* Besides, there is an independent Shari"ah Committee consist of erudite Muslim jurists who volunteered to complement the efforts of the state committee. In addition, to provide checks on for day-to-day transactions the law requires every institution to have internal Supervisory committee of no less than 3 members assessed for competency and approved for appointment by the HAS. Details of the committee members including terms of reference and remuneration must be stated out in the memorandum and articles of association of the company. [418]

Likewise, financial institutions with ethical orientation run under the auspices of DIFC are governed by two enactments: DIFC Law No. 13 of 2004 and DIFC Services Authority (DFSA) Rulebook on Islamic Financial Business Module. Further, it is mandatory for all DIFC registered institution to adopt AAOIFI standards in both structuring, issuance and marketing Islamic financial products. This requirement of law is effective in creating both consistence and compliance in the Sukuk market. Similarly, DFSA regulations requires each financial institution to constitute 3 member Shari"ah board, and publish their functions, duty, allowances as well as their terms of engagement and disengagement. This requirement is meant to inject transparency into the system. In addition, to ensure accountability the law mandated that, record of supervisory activities of the board shall be kept for the period of 6 consecutive years to allow for effective auditing.[419] The robust investment regulation along with several other business incentives made DIFC and, with it, the UAE to be one of the outstanding hubs for investment in the world. It is particularly so in respect to *Sukuk* as shown in the table below.

[418] Hasan, „Regulatory Framework of Shari"ah Governance" (2010), PP. 92-93
[419] Ibid

Table 1:6 A highlight of Sukuk issuance in the UAE

GCC Countries	Number of Issues	Amount in USD M	% of Total Value
Bahrain	392	27,720	2.83%
Jordan	3	272	0.03%
Kuwait	18	3,658	0.37%
Oman	7	3,523	0.36%
Qatar	30	25,851	2.64%
Saudi Arabia	122	95,215	9.72%
UAE	110	71,895	7.34%
Yemen	2	253	0.03%
Total	684	228, 387	23.3%

Source: IIFM 2017 Report

The table above represents total Sukuk transaction for six years (2001-2007) across the states of GCC and Middle East. It highlights how vibrant UAE capital market has been as it has recorded 110 issuances over this period, valued at USD 71,895 Million. This amount represents 7.34% of the global issuance within the period under consideration. In terms of volume, regionally UAE is second to only Saudi Arabia, whose total transaction represents 9.72% of the world. Yet, the Kingdom of Saudi Arabia has been able to record higher volume than UAE in 2017 due to its recent huge sovereign issuance of USD 9 billion this year. Otherwise, the emirates had always been ahead. Even in the present report, corporate issuance in the emirates has beaten all records in the region. This success has been linked to innovative investment framework of UAE in form of DIFC.

6.2.3. Economic Freedom in the UAE and the Success of DIFC

DIFC is a form of economic free zone, where entrepreneurs would operate with minimal restrictions. Scholars have theorised that, "economic freedom is the foundation of wealth creation".[420] According to the same theory, there is link between economic freedom and prosperity. Countries that allow more freedom to private investors are more attractive to business and thus wealthier.[421] Economic freedom is assessed upon five indicators. These indicators include sound investment regulatory framework, reduced state involvement, access to sound money and freedom to transact internationally as well as security of property rights. Fraser 2018 index declared United Arab Emirates and Bahrain as the most economically-free states in the Arab world.[422]

The approach adopted in the UAE provides broad opportunity to investors and removes restrictions on business. Corporate entities registered under DIFC are allowed to have 100% foreign ownership, while emirates" investment regime stipulates that no company shall be licensed for operation within the country unless 51% of its shareholding are Emiratis. In addition, income and profit taxes are completely waived, profit can be held in sound and stable currency and can be repatriated or moved in and out to any part of the world without restriction except for internationally recognised due process of dealing with finances such as that of Anti-Laundering laws.[423] Furthermore, the centre created greater certainty for investors through provision of robust legal protection for their contractual obligations. Excessive regulations and too many bureaucratic obstacles have been identified as symbol of oppressive restriction on investment,[424] hence DIFC maintained simple but effective regulatory structure. The centre is governed by three bodies only: DIFC Financial Authority, Services Authority and Judicial Authority. Owing to universal acceptance of English common law by investors, DIFC Courts are manned by British judges well-experienced in English commercial law. Creation of DIFC made Dubai and UAE attractive to investors worldwide.

Literature shows that, in two years DIFC attracted 750 companies who put together brought in investment capital of about USD 18 billion into infrastructure alone. One study estimated the amount of FDI flow into UAE in 4 years equates that of entire sub-Saharan countries of Africa put together. Moreover, the emirate"s GDP per capita was once rated by the US as the

[420] Strong and Humber, „The Legal Autonomy of the Dubai International Financial Centre" (2009), Pg. 40
[421] Ibid 37-40
[422]Fraser 2018 Report: Economic Freedom of the Arab World, available at: <https://www.fraserinstitute.org/sites/default/files/human-freedom-index-2018.pdf> accessed 23rd April, 2019
[422] Hasan, „Regulatory Framework of Shari"ah Governance" (2010), PP. 92-93
[423] Strong and Humber, „The Legal Autonomy of the Dubai International Financial Centre" (2009), Pg. 39
[424]Ibid, PP. 35-37

fifth highest in the world.[425] This success is attributable to the economic freedom provided through investment free zones such as DIFC, because studies have shown that, there is link between economic freedom and rise in GDP of a country.[426] Furthermore, there is argument that, the hallmark of UAE economic transformation and financial success was the British legal structure transplanted in the DIFC. Because literature show that, countries with British common law as major legal system tend to outperform others, because the common law framework has, over the time, earned great reputation among investors globally.[427] Thus, existence of credible dispute resolution mechanism in a state is important element to demonstrate investment protection in the event of defaults. The cases of Nakheel Sukuk and Dana Sukuk among many others indeed highlighted the fact that disputes resolution mechanism is crucial.

6.2.4 Dispute Resolution Mechanism in UAE

Generally, in the Arab states of GCC of which UEA is a member, matters to do with commercial disputes fall within adjudicatory powers of regular courts. Alternative methods of settling investment cases such as arbitration and mediations were not popular. As a result, Arab countries were reluctant to submit to arbitration, and they only abide by that route where it becomes part of a transaction involving a foreign entity.[428] However, this notion of inclining towards national judicial system is a recent development, a natural consequence of codifications of law in the modern Arab nation state. Otherwise arbitration and mediation are well rooted in the Islamic tradition. Further, due to oil discovery in the Middle East, which brought Western multinational companies into investment relationship with the Arab world, business trend of those transnationals including contracts with arbitration clause was reintroduced to Arab countries. Hence, unlike many other Arab states, Saudi Arabia and UAE recognise the validity of arbitral clause and, more so, they even accept strict concept of irrevocability of appointment of arbitrators, which is central to independence of the arbitrators and thus the fairness of the process.[429] This is a credible concession given the tendency of those countries to have full control of the system including power to hire and fire arbitrators at will. That said, one restriction is still in force in both countries. Although both

[425] Strong and Humber, The Legal Autonomy of the Dubai International Financial Centre (2009), pp. 37-39
[426] Ibid, pg. 37

[428] Samir Saleh, „The Settlement of Disputes in the Arab World Arbitration and other Methods-Trends in Legislation and Case Law‟ (1986) Arab Law Quarterly, PP. 198-204, at PP. 198-200
[429] Samir Saleh, „The Settlement of Disputes in the Arab World‟ (1986) PP. 200-203

Saudi Arabia and UAE do acknowledge the concept of international arbitration, yet their attitude towards implementing arbitral awards is not straightforward. Arbitral award is not binding until same has been endorsed by their domestic courts.[430] With regards to UAE however, the current trajectories of the shift towards economic freedom has introduced some changes.

Given the new trend of transformation, three layers of disputes resolution mechanisms appeared to have evolved in the present UAE, namely national, international and arbitration mechanism. Regular courts in all the emirates retained their jurisdiction over commercial disputes. By virtue of section 235 of the UAE Civil Procedure Law, these courts are conferred with a wide jurisdiction concerning commercial disputes. As they apply national laws to resolve disputes arising from investments, they represent national or domestic dispute resolution mechanism, hence are famous and popular among the locals. However, legal controversy ensues in matters arising from investment deals that tend to be international by nature like Sukuk, where parties might prefer their disputes resolved by a foreign judicial system. This is controversial because judicial practice within the emirates indicates that, UAE mainstream courts would assume jurisdiction over almost all matters regardless of any stipulations in the contractual document invoking the jurisdiction of a foreign court, except for arbitration.[431] Consequently, where such cases are heard by external courts, judgements obtained therefrom are not recognised in the emirates and therefore unenforceable.

In this regard, UAE legal system seems to reject the notion of any foreign judicial body should have adjudicatory powers over transactions entered into within its territory, except for subject matters not specifically covered by section 235 cited above. The section has given out a lengthy list of subject matters over which the domestic courts shall have jurisdiction, one writer commented on the practical implication of the list saying: "The above list certainly enumerates almost every case that could come to mind, and thus, indeed limits the scope for executing a foreign judgement in the UAE."[432] Because, foreign judgements need to obtain approval by local courts before they can be validly executed in the emirates. In fact, this was the basis for another judicial approach in the UAE, which, perhaps, is even more controversial. For purpose of enforcement, the legal system empowers local courts to reassess

[430] Samir Saleh, „The Settlement of Disputes in the Arab World‟ (1986) PP. 200-203
[431] Hasan Arab, „Execution of Foreign Judgement in the UAE‟ (2002) Arab Law Quarterly, PP. 208-2012, at PP. 208-210
[432] Ibid, Pg. 209

foreign judgement to ascertain not only that the subject matter of the case has satisfied local criteria for execution but also that the proceedings before the court abroad was judiciously fair and credible.[433] This is tantamount to empowering the UAE judicial authority to exercise appellate jurisdiction over other courts on the face of earth.

Observers have maintained that, no effective remedy to this legal anomaly except the creation of internationally accepted umpire within the emirates, Samir writes: "The Arab states themselves must pave the way for the adoption of international arbitration on their territories. In order to do this, they should show legal maturity and recognize that international arbitration enjoys some measure of autonomy" [434] And that is, exactly, what the DIFC appears to stand for. The innovative economic structure of the DIFC provides for two dispute resolution mechanisms. Arbitration centre and a common law court. All transactions concluded within DIFC are subject to the arbitration facility of the centre.[435] Pursuant to the law that established the zone, natural or legal entities registered with the centre, whether local or foreign would have the right to subscribe to the legal jurisdiction of the DIFC.

Although, given the use of English as the language of proceedings and adoption of British legal tradition as well, the judicial infrastructure of the DIFC is supposed to be international, yet the centre does not appear seen to have attained international threshold due to certain challenges. One of these challenges is that, the panel of legal experts in the centre does not demonstrate diverse nature of an international mechanism, as only UAE personnel and British judges have dominated it.[436] In addition, there is need to incorporate international standards set out in internationally reputable instruments such as International Centre for Settlement of Investment Disputes (ICSID).

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[433] Hasan Arab, „Execution of Foreign Judgement in the UAE‟ (2002), PP. 208-211; Salah, „A Legal Analysis of the Nakheel Sukuk‟ (2010), PP. 30-31

[434] Arab, „Execution of Foreign Judgement in the UAE‟ (2002), Pg. 203

[435] Hasan, „Regulatory Framework of Shari‟ah Governance‟ (2012), PP.91-92; Strong and Robert, „The Legal Autonomy of the DIFC‟ (2009), PP. 36-38

[436] Tareq Na‟el Al-Tawil, Parabhakar Gantasal and Hasan Younies, „The Benefits and Disadvantages of the Law on the Expansion of the Jurisdiction of the DIFC Court‟ (2018), International Journal of Law and Management, Vol. 60, Issue: 2, PP. 221-232

6.3. The U.K. Approach: A Secularist Islamic Sukuk Model

As far as financial market and minerals investment are concerned, U.K. is one of the leading jurisdictions of the world. There is accumulation of multidimensional factors that made Britain so critical in this regard. Historical and contemporary as well as internal and external factors. United Kingdom is the colonial mother of most of the common law-oriented systems in the world including Nigeria. Moreover, its financial market was famous even before the colonial era. As far back as 1801, London transformed the so-called subscription room and Capel Court into a regulated "Stock Exchange" in the country, and since then continued to grow gradually into a robust and sustained financial city. The subscription room and Capel Court later metamorphosed into the present London Stock Exchange (LSE). As regards mining, UK provides an international trading platform for industrial metals, London Metal Exchange (LME). This successful non-precious metal market originated from the 1570s Royal Exchange. Besides, it is in the city of London that, the world"s biggest marketing house for gold and silver is situated. The estimated amount of daily transaction at London Bullion Market (LBM) is about 18 million ounces of gold and 108 million of silver. These three key institutions with the Bank of England on top constitute London International Financial Services (LIFS), one of the most prominent financial markets of the world.

However, beyond London the afore-mentioned factors, the current prominent position of the UK in the global financial landscape has been attributed to the reputation of its powerful regulations internally, and the effect of certain external elements. These foreign factors include the fact that, every key international investment and financial body in the world has an office carrying out business in the city. In addition, the confidence reposed by different nationals of the world in the English judicial system, as there has been an established tendency of investors (including *Sukuk* investors) of differing legal background to endorse English courts as the chosen forum for determination of any dispute arising out of their transactions.

As will be highlighted in this chapter, contrary to many other states, U.K. approach to natural resources and development accords private titles to land a unique legal protection. Individual ownership of the land surface is extended to include deep subsoil strata and the wealth lying underneath, with exception of only few minerals. The chapter seeks to also examine the symbiotic impact of mining and development on each other, and finally investigates how the

U.K. investment framework broadened up its legal mechanisms to facilitate development through alternative investment vehicles of *Sukuk*. On the other hand, Malaysia and UAE represent the most advanced jurisdictions of the world as relates to Islamic finance products including *Sukuk and* do provide differing approaches through which tremendous successes have been recorded.

6.3.1 Mining and Law in the UK

In contrast to many other resource-rich jurisdictions, there is no single regulatory regime applicable to all minerals in the United Kingdom; rather different laws govern different kind of minerals. For this purpose, minerals are classified into five categories: Coal, gold and silver, oil and gas, and all other minerals. Generally, ownership of minerals in the UK is based predominantly on the common law concept which recognises private ownership based on the postulation of the ancient Roman law. In effect the Roman law attributes to the surface owner all that which exist underneath the land down to the centre of the earth. Thus, minerals found on the private land belong to the owner of the land and freedom to exploit such minerals lies with the same person. Thus, the owner has undisputable right to extract the minerals or grant another person (natural or judicial) such a right through a contract for absolute sale or lease. Nonetheless, compliance with certain regulatory framework is necessary. The role of government in this circumstance would be limited to registration of titles and regulating the conduct of the exploration activities in order to ensure safe and sustainable mining.[437] This general rule is not however applicable to the first four out of the five categories mentioned earlier.

Coal minerals are regulated by the Coal Industry Act, which is a statute administered by the Coal Authority, an executive unit under the Department for Business, Energy and Industrial Strategy. By virtue of this statute, ownership of coal vests with the Authority, and it is consequently responsible for grant of license of mining operations in the U.K and to administer claims for any damage caused by mining subsidence. With regards to gold and silver mines, their ownership has since nineteenth century been vested in the Crown by common law doctrine, and hence they constitute "Mines Royal", the permission of Crown

[437] Unlike England, Wales and Scotland, the Minerals Development Act, 1969 in Northern Ireland vested almost all minerals, including those other than gold and silver, coal and oil and gas, in the Department of Economy ("DE"), which regulates the industry and grant license to commercial mining companies

estate is essential for lawful extraction of these precious minerals from any part of the U.K. The permits are obtained from the Wardell Armstrong, the Crown Estate Mineral Agent. Yet, even under this category, access permission from the owner of the surface is indispensable.

Pursuant to the Petroleum Act, 1998 and the Continental Shelf Act, 1964 oil and gas in the U.K. (both onshore and in territorial waters and the U.K. continental shelf) also vest with the Crown. Recently (in 2015), Oil and Gas Authority ("OGA") was created as an agency to regulate oil and gas operations in the country. Shortly thereafter (in 2016) same "OGA" was formed into a state company limited with shares with the secretary for the Department for Business, Energy and Industrial Strategy as the sole shareholder. This company has become the body responsible for all onshore and offshore oil and gas operation in the UK, including licensing, exploration and production, and oil and gas infrastructure.[438] By implication, the company has the power to issue and grant exclusive right to bore for and extract oil and gas throughout the country. However, the right so granted does not obviate the requirement to seek for and obtain right of access from the landowner, nor does it account for approval by Mineral Planning Authority either. These two requirements seem to have same legal weight as the main license sanctioning the mining operation itself, and they arguably represent the most distinctive character of the British mining regime. To this extent, the right of the owner of the surface of land at common law is no difference from the ancient French concept of accessory theory, which holds that subsoil belongs to the surface owner.[439] While France has since 1789 dropped any traces of the concept from its system, this is not the case in the U.K.

Eventually, the sanctity of this concept has been retained at English common law with obvious passion. Even where the minerals are those that totally vest with the state, any license granted to exploit such resources does not carry permission to use the under-surface area of the natural occurrence of the minerals. In this case, ownership of the minerals viewed separate from the ownership of the subsoil strata that contains the minerals. The surface owner has the right to bring action in trespass against a licensed miner for tempering with the sub-surface because of mining activities necessary to extract minerals therefrom, even though it might not interfere, in anyway, with the owners‟ apparent enjoyment of the surface. This is

[438] ICLG Report 2016, available at: <https://iclg.com/compare/mining-law#practicearea=mining-law&&jurisdictions=south-africa@@united> accessed 26th April, 2019
[439] Nicholas J. Champbell, JR., „Principles of Mineral Ownership in the Civil Law and Common Law Systems‟ (1956) A.B.A. Sec. Int‟l & Comp. L. Proc. 31, PP. 37-43

the point made by the supreme court of England in Bocardo S.A. v Star Energy UK Onshore Ltd as would be considered later in detail.

6.3.2. Role of Local Planning Authority (CLG)

Who regulates the mining industry? Local Planning Authority plays a key role in mines regulation in the UK. Both at regional and project specific level. Marine Management Organisation ("MMO"), a subsidiary of the Department for Environment, Food and Rural Affairs ("DEFRA") along with an independent environmental regulator specific for the region concerned provide environmental regulations while Health and Safety Executive ("HSE") is charged with enforcement of health and safety standard throughout UK except in Northern Ireland where similar body operates. With effect from 6th April 2015, the by operation of the Mines Regulations, 2014 has replaced all other laws relating to health and safety.

A question arises as to who is eligible for mining right in the UK and whether title can be used as a security to raise finance? It is noteworthy that in UK there is no any restriction as to who is eligible to obtain and hold a mineral right, whether the right drives from the Crown or private owner, and whether the applicant is human or legal entity, indigenous or foreign is altogether immaterial. Whosoever appears to have satisfied the necessary requirement for a specific mineral being applied for as well as general conditions requiring planning, environmental, health and safety as well as access right in case of private land, can obtain the license. However, the only limitation is the one relating to age, a minor cannot acquire interest in land.

A question which then follows is whether a holder of mining rights is allowed to transfer it to a third party by way of outright sale or lease or mortgage or otherwise secure it to raise finances? Although, mining or exploration rights are unconditionally bondable in some mining jurisdictions like South Africa, any transfer of such rights may trigger some regulatory conditions in the UK depending on the type of the mineral and the nature of the right being held though. While the owner of freehold interest may transfer his title including of course the right to exploit minerals contained smoothly, right held through a state grant would have to follow a general formal procedure for transferring the license to a new holder. In fact, this is a statutory requirement in the UK. But so far as the transfer is temporary by reason of mortgage or bond, it is generally permissible depending again on the terms of each grant. Where the rights conferred by the instrument comprise an interest capable of being mortgaged and bondable as well, then it is transferable without recourse to any statute, and otherwise it is not. Yet, in any case the law requires that any change to the details of holders of mining rights, including change of name or address, to be reported to HSE within a period of no more than 28 days from the date of effecting the change. This range of regulatory restrictions might have some implications on the use of *Sukuk* bonds to raise funds by mining companies. This point would be considered later.

6.3.3. Land Acquisition by the State

Given the sanctity of private ownership under the UK regime as noted above, one may be curious to know if the state has got any power under the law to expropriate land for mining purpose, especially where the holder refuses to grant the right of access. The answer is yes, but within a limited context of development meant to serve a collective public interest, and subject to stringent conditions aimed at protecting the private title against arbitrary use of state powers. The inclination to safeguard titles to land is evident not only in limiting the purpose of acquisition but also in many other regulatory schemes. The Mines (Working Facilities Support) Act of 1966, for example, has provided for compulsory acquisition of land for mining purpose in England and Wales, but does not seem to include freehold interest in land, it rather envisages mere right over land. And even in the appropriate cases, the Act laid down a rather lengthy and complex procedure that it is only the central government can bring the action for the acquisition. Thus, any mining company involved would have to make application to the appropriate government department requesting it to trigger the proceedings. And in any event courts in UK are reluctant to grant the order unless it is well established that the grant is “expedient in the national interest” The only circumstance where land can be acquired without recourse to court is perhaps in the case of local planning authority.

Local Authority is also empowered to acquire land compulsorily where such acquisition is to facilitate real development and is likely to promote economic, social and environmental wellbeing of the area. Yet, the authority has a duty to satisfy itself that the land in question may not be obtained by any means other than expropriation. In any case, land owners whose lands were taken for development reason (mining is also considered as development) must be adequately compensated. Right to such a compensation has since 1952 been accorded a status of human right throughout European Union (EU) by virtue of Article 1 of the First Protocol to the European Convention on Human Rights. The Article provides that, "No one shall be deprived of his possession except in the public interest and subject to the conditions provided for by law and by the general principles of the international law." Basically, this is referring to the standard of compensation originally espoused under *Lex Mercatoria,* which came to form part of customary international law relating to "alien treatment".

The postulation of this principle requires that, compensation must be adequate, prompt and effective.[440] This provision of ECHR has been operationalise in the UK, by statute and been emphasised through judicial authorities. In Howard v UK (1985)[441] it was held that, assessment of compensation in expropriation cases shall include, in addition to the market value of the property, a disturbance allowance and home loss payment. The code must be adequate and in compliance with Article 8 and Article 1 of the First Protocol to the ECHR. Furthermore, in contrast to what obtains in some African states, land owner in the UK can challenge the quantum of the compensation if he feels that his interest acquisitioned by the compulsory purchase order has not been adequately compensated. A special tribunal exist for assessment of such compensation. Not only that, private landowners are even empowered by statute law to question the validity of the very decision to take over their property where they believe that the powers were used in error.

According to section 23 (1) of the Land Acquisition Act 1981, if any person aggrieved by a compulsory acquisition order desires to question its validity on the grounds that, the authorisation of the order is not empowered by the Act or any other enactment, may make an application to the High Court. The section further provides that:

And if the court is satisfied that:

a. The authorisation granted by the order is not empowered under the Act of 1981 Act or (inter alia) the 1991 Act or any enactment, or
b. The interest of the applicant is substantially prejudiced by any relevant requirement of law not having been complied with

The court may quash the order either generally or in so far as it affects any property of the applicant.

[440] Asante, „International Law and Foreign Investment" (1988), PP. 590-592
[441] App. No.10825/84, Decision dated October 18, 1985; (1987) 52 D.R. 198

This position of law was judicially tested in the case of Pasco v. First Secretary of State (2006).[442] Pursuant to the section 23(1) cited above, the claimant brought the action challenging the validity of the Urban Regeneration (Edge Lane West, Liverpool) compulsory purchase order 2005. In fact, the order was challenged on three grounds: that the property did not fit the conditions described by the statute; that the code of compensation was inadequate; and that, there was no equality of arms provided by government at the inquiry session. The order in question was made by a legitimate body, the Urban Regeneration Agency, which was established under section 158 of the Leasehold Reform, Housing and Urban Regeneration Reform Act of 1993 (formerly Urban Development Act, 1993), and purportedly acting within the powers conferred by s. 159 of the same Act. Yet, the challenge succeeded substantially, and the order was eventually quashed. This is a confirmation that, UK approach to development has community at heart and does not discount community rights in favour of economic development. This also is the case with mineral investment, where mining does not automatically take precedence over private ownership of land even though it could be for national interest.

6.3.4.UK Approach to community development within the context of investment

At the centre of the debate on mining and development is land issue. Generally, land represents a valuable resource of significance to all stakeholders-government, investors and locals-throughout human history. The multidimensional benefits of land-social, economic and cultural-explains why it has always been held so strategic by both the private and public institutions. It is not a surprise therefore that, issues relating to land tenure and holder"s right occupy key position in all investment as well as development framework of modern states. More so, in mineral investment, clarity of legislation on the rights of, and resolution of conflicting titles to land constitute a cardinal element of good business environment, which provides assurance of security for both indigenes and investors, and ultimately increases the flow of capital into the relevant jurisdiction.[443] Thus, states might differ in the way they utilise this aspect in order to, not only, attract investment but also to foster development.

In contrast to many other jurisdictions of the world, a person with legal ownership to land in the UK owns the surface and the strata beneath the land deep down to 300 meters below the

[442] WLUK 378 [QBD (Admin.)]; EWHC 2356
[443] Thomas W. Waelde, „International Energy Investment"(1996), 17 Energy L.J. 191, PP. 191-215 at 191-201

see level and any minerals that were to be found therein as long as it has not been alienated by way of conveyance at common law, or statute (sections 43-48 Infrastructure Act 2015).[444] Effectually, if any land that is originally owned by the community or any member thereof has subsequently become a subject of minerals development, the owner is entitle to a share of the proceeds of the resources so extracted from underneath his land even though the exploration activities might not have interfered with the owner‟s use and enjoyment of the surface land.

In Bocardo S.A. v Star Energy UK Onshore Ltd, the supreme court held that, „The owner of the subsurface was entitled to say that his land was being interfered with when it was bored into by someone else. His right to object was inherent in his right of ownership of the land, and it was irrelevant that he was not making any use of it.‟[445] In this case, the defendant, Star Energy UK Onshore Ltd (Star Energy), who, by virtue of the holder of a petroleum production licence (the Licence) issued in 1980 under the Petroleum Act 1934 , was authorised to search, bore for and get petroleum in an oilfield called "Palmers Wood Oilfield", had constructed some oil wells that passed under the substrata of, penetrated into and terminated beneath a land known as "Oxted Estate", which belonged to Bocardo and located immediately next to the drilling site of the defendant. Upon an action for trespass brought by the land owner (Bocardo), the court found that, the landowner, „was entitled to damages assessed at 9 per cent of the income received by Star Energy which appeared to be £6,902,000 between July 22, 2000 and December 31, 2007‟ not only the past but also entitle „to damages assessed at 9 per cent of all future income from that date until the oil and gas extraction was exhausted.‟[446] This case has made abundantly clear the current approach in the UK which recognises the legitimate interest of landowner to subsoil and the valuable asset lying underneath such as oil or hard minerals, and more importantly their right to be contacted for negotiation before tempering with the land and to damages in tort of trespass when extraction is undertaken before way-leave is sought for from the owner and obtained.

Similarly, where investment relates to development of physical infrastructure such as housing units, malls and roads, due consideration has been allocated to the right of UK citizens and

[444] UK Infrastructure Act 2015, Part 6, Sections 43-48, available at: <file:///G:/Europe%20database/UK%20Infrastructure%20Act%202015.pdf> accessed 6th December, 2018

[445] Bocardo SA v Star Energy UK Onshore Ltd (Also Star Energy UK Onshore Ltd v Bocardo SA) [2010] UKSC 35; [2011] 1 A.C. 380; [2010] 3 W.L.R. 654; [2010] 3 All E.R. 975; [2010] 7 WLUK 813; [2010] B.L.R. 13; [2010] 3 E.G.L.R. 145; [2010] R.V.R. 339; [2010] 31 E.G. 63 (C.S.); [2010] N.P.C. 88; Times, July 29, 2010;

[446] Bocardo SA v Star Energy UK Onshore Ltd (2010)

especially communities living near-by the concerned amenities. In addition to provisions for matters of public interest and safety like consumer protection, environmental concern, green investment and climate change, among other things that are meant to tackle broad range of issues to do which overall corporate social responsibility of all businesses; certain basic community needs are tailored and incorporated into specific legislations. Typical example of this is section 106 of the Town and Country Planning Act 1990.[447] Under the legislation, a local authority can enter into agreement with a developer to mitigate the effects of any development. Thus, for instance, a developer might be required to provide some affordable housing in a block of flats, or provide the public with leisure facilities, such as a park or a library. However, these legislative arrangements popularly nicknamed as "106 agreements" have been criticised and are not without controversy - they can get rather complicated. There is also the question of whether developers should be able to negotiate any contribution that they make to the local economy. This necessarily benefits the developers with the most resources and it may not be in the interests of the local community. Similarly, cash-starved local authorities may end up agreeing to unwise developments to get the planning money etc.

There is also the Community Infrastructure Levy (CIL). This is a much more recent innovation and effectively, it operates as a tax on new developments that are larger than 100 metres squared - there are some exemptions for social housing and so on. Usually, the CIL is collected by local authorities and is for infrastructure development in the local area (i.e. roads, public spaces among others).[448]

Mining and development

U.K. has been one of the leading mining jurisdictions of the world renowned for both production and processing minerals. The country is endowed with 12 kinds of construction minerals that are critical for infrastructure development of any nation, including rocks and varying stones (aggregate), cement and Magnesian limestone suitable for industrial dolomite. Furthermore, it produces industrial minerals such as silica sand, ball clay and kaolin, fluorspar, salt, peat, barites and potash. Basically, this industry is critical to socio-economic and industrial growth of the U.K., because most if not all of manufacture companies depend

[447] UK Town and Country Planning Act, 1990 available at: <https://www.local.gov.uk/pas/pastopics/infrastructure/s106obligatiooverview> accessed 4th December, 2018
[448] Available at: <https://www.gov.uk/guidance/community-infrastructure-levy> accessed 4th December, 2018

on the mining sector for their vital raw materials, without which they may not function. Accordingly, being industrially developed country, the smooth operation of industries down the supply chain creates jobs and earning opportunities for the populace and maximises revenue base for the state. Recent reports indicate that, extraction alone generates a turnover of £15 billion, and £ billion in Gross Value Added (GVA) tax per annum. This figure dramatically goes up to £235 billion when product manufactured and direct markets are added. Jobwise, the upstream industry standing alone has a workforce of 34,000 people, while by extension it supports 4.3 million jobs through its supply chain.[449]

However, the prospects of mining industry in the U.K. are not without hitches. Recent studies have shown that, production has been on decline over the few years. In 2013, there was domestic production of 25 million tonnes of industrial minerals, yet the country had to import minerals raw materials to feed its industrial demands, with £62 million worth importation representing the trade deficit of just one year. The imported minerals included metallic ores (not included precious metal), import of which alone has consumed £2 million due to shrink in local production. Quantitative literature which compared 10 years of mineral production in the U.K. suggested that, capacity has increasingly been on decrease since 2003. The highest being in 2003 when, for example, about 12m tonnes of limestone was produced, down to 2009 when it had the worst of its downswings with only 6m tonnes production. Although it has gradually gone up again through the following years, but not higher than 11m tonnes recorded in the year 2013. Similarly, production of metal that comprises tin, lead and iron ores has moved retrogressively down to almost naught in 2013 from 2.5 million tonnes recorded in 1997. This decline in production is widespread and does not spare any category be it industrial or construction minerals, not even the most famous and common mineral in the U.K. i.e. the coal.

Back in 1950s, despite the substantial reliance of the country upon coal minerals, the domestic consumption needed only 70% of the entire production (about 90 million tonnes), while the remaining 30% was exported. However, at present U.K. annually imports 33 million tonnes (this figure represents 2013 data) to be used mainly by electricity generators. The amount of coal imported in the year 2013 tripled the actual domestic production of the

[449] CBI Report (2016) on UK Mineral Extraction Industry, available at: < http://www.cbi.org.uk/news/minerals-critical-to-the-uk-economy/cbi-report-the-uk-mineral-extraction-industry/> accessed 15th January, 2019

same year, which 13 million tonnes.[450] This dramatic switch from being a net exporter of coal to a net importer of the same product, explains the extent of the challenge in the U.K. mining industry. One major reason for the swift decline of coal industry in the UK is the solid determination of the country to reduce its coal production and consequently consumption in response to genuine calls from both local and international quarters to uphold the global sustainability agenda.[451]

6.3.5. Sustainability

Other perspectives of this challenge are, inter alia, to do with environmental hazards associated with mining, both during and after operations. „Mining activities typically cause impacts on land, water, the climate and the flora, fauna and people that depend on these resources.[452] In particular, land has been significantly affected, because mining by nature requires access to land, which may be used for dwelling, agriculture and other social and economic objectives. Thus, all stakeholders (states, community, investors, civil society organisations and international development agencies) focus on reducing the negative impact of mining on the environment. This effort is collectively pursued through the global agenda to achieve sustainable development goals by 2030, which states, including UK, have internalised. For example, the National Planning Policy Framework (NPPF) 2018 for England is focused on how to achieve sustainable development.[453] The central point of sustainability being that, while seeking to actualise economic interest out of resources, stakeholders must not lose sight of the potential dangers that might cause to both society and environment. Thus, sustainability dictates the need to down-size production of minerals that are used in a manner ecologically harmful. Example of such practices is coal-fired power generation, producing carbon emissions, which causes air pollution.[454]

[450] CBI Report (2016) on UK Mineral Extraction Industry (supra)
[451] The Coal Authority (TCA) has noted in its most recent annual report (2018) that, in its effort to become a global lead in sustainable practice, it has adopted a "swiftly declining industry" approach
[452] Mapping Mining to the Sustainable Development Goals: An Atlas, a white paper submitted to the World Economic Forum, Pg. 4
[453] S. 7 of the 2018 National Development Policy Framework for England states, „The purpose of the planning system is to contribute to the achievement of sustainable development.‟
[454] A.T. Kearney, „Mining Takes on the Sustainability Challenges‟(2016) , PP. 4-10 available at: <https://www.atkearney.com/metals-mining/article?/a/mining-takes-on-the-sustainability-challenge> accessed 10th January, 2019

Coal mine is also associated with water pollution ultimately affecting human consumption and farming in general. „Acid mine water is a mines biggest contingent liability. For mine with a positive water balance, water rich in sulphates and heavy metals will run for decades and potentially centuries after a mine closes."[455] This long-time impact is evident in the U.K. where the urgent need for development triggered by rapid urbanization informed the planning decision to construct housing infrastructure on colliery. While this approach might be lauded as one that brought about not only the apparent safe closure of the mines but also replaced them with a housing infrastructure development, yet the potential outcome could defeat the immediate success. Out of seven million properties built on coalfields in the country, The Coal Authority (TCA) said, "1.5 million of those properties are sitting on shallow workings – the most susceptible to risk."[456] The potential dangers to the residents of such areas is said to range from possible escape of poisonous gas from cracks underneath the buildings due to improper closure of the old mine and mixture of mine water with water bodies meant for domestic consumption.

More sustainable alternative might be the one adopted by Germany, where dirty collieries were turned into green areas. Solar power stations made to replace dirty coal mines leading to the provision of clean energy infrastructure as well as socio-economic benefits through job creation.[457] These practical and sustainable benefits are probably the basis for determination by the government of Germany to make 80% of its electricity generation from renewable energy sources (solar, windmill, hydropower and biomass) by 2050, which accounts for less than 20% at the moment. Importantly, *Sukuk* is one of the innovative investment vehicles being used in Germany to achieve this sustainable development. In 2015 a corporate Sukuk issued by ABC group generated USD 100 million, which was successfully invested in renewable energy.[458] Below is description of that transaction:

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[455] A.T. Kearney, „Mining Takes on the Sustainability Challenges" (2016) , PP. 6 and 7

[456] The Coal Authority Tailored Review Report (2017), published by the Department for Business, Energy & Industrial Strategy, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/670785/coal-authority-tailored-review.pdf (accessed 12/1/19)

[457] Mining Takes on the Sustainability Challenges, A.T. Kearney(Article on Mining and Metal), pg. 4 available at: https://www.atkearney.com/metals-mining/article?/a/mining-takes-on-the-sustainability-challenge (accessed 10/1/19)

[458] Corporate Sukuk in Europe: Alternative Financing for Investment Projects, Deloite Research Paper, pg. 25 available at: https://www2.deloitte.com/ly/en/pages/financial-services/articles/corporate-sukuk-in-europe.html (accessed 10/1/19)

Table 2:6 Renewable energy *Sukuk* in the Germany based on istisna contract

Transaction Type	Corporate Sukuk Bonds
Issue Price	USD 100 Million
Sukuk Tenure	3 Years
Coupon Period/Rate	6 Monthly
Underlying Asset	Windmill
Governing Law	German Law

Source: Deloitte

Sukuk (Islamic bond) investment vehicle has been in practice now for over a decade in the UK. Records show that, more than three dozen of *Sukuk* bond transactions have so far been listed on the UK Alternative Investment Market (AIM), a platform provided by the London Stock Exchange (LSE) for innovative investment products like *Sukuk*. Although, the remarkable reputation of LSE as one of the World"s largest hubs for financial services plus the relatively cheap cost of listing did and continue to attract stocks (including Islamic bonds) to LSE from outside of the UK, Sukuk was adopted domestically for internal development benefits. The initial trigger for sovereign issuance was the need for innovative modes to fund the ever –growing demand for infrastructure in the UK.

It became obvious that, potentially banks would be financially unable to provide enough funding for infrastructure development, hence government intervention was essential. Accordingly, sovereign Sukuk was considered by HM Treasury and UK Debt Management Office in 2007. Before this date, no Sukuk transaction could be conducted in the UK because of multiple tax regimes that might defeat its financial essence. With broad reform of Finance Act, 2007, removing double taxation on Islamic financial products, bringing Sukuk within the ambit of alternative financial product, the scene was set for Islamic bonds to take off in the country.[459] Eventually, the comprehensive amendment of the Finance Act has generally provided legal framework for Islamic securities in Britain,[460] while the sovereign issuance that followed have served as catalyst for private companies to join the go, and since then

[459] Miller, Challoner, Atta, „UK Welcomes the Sukuk" (2007), PP. 24-25
[460] Oseni, Umar A. and Hassan M. Kabir, „Regulating the Governing Law Clauses in *Sukuk* Transaction" (2015) Journal of Banking Regulations, 16.3, PP. 220-249

Sukuk has been employed for differing investment and development purposes. One such corporate issuance was that of 2014 by ABC group, to finance, develop, build and maintain complex infrastructure including transportation, power, and utility system for social and commercial structures in the country. Arguably, both issuers and investors generated motivation from the government plan to finance 69% of UK infrastructure through the private sector.[461] Below is the description of the transaction:

Table 3:6 Sukuk issuance in the UK

Transaction Type	Corporate Sukuk Bonds
Issue Price	USD 100 Million
Sukuk Tenure	Till Project Completion
Coupon Period/Rate	6 Monthly
Governing Law	English or French Law

Source: Deloitte

Question may now arise as to whether mining companies can employ *Sukuk* for financing their mines project? The answer is yes, because *Sukuk* is a flexible financial instrument similar to (not same as) conventional bonds, it serves substantially whatever purpose the latter stands for and even more, the only difference between the two being the ethical characteristics. As noted earlier, the ethical requirements require that, Sukuk must be asset backed, and the nature of the asset must not be such that contravenes Islamic legal principles. Once these conditions are satisfied, Islamic bonds can be effectively used in different dimensions, including corporate finance for mineral projects in England. In U.S. about USD300 million was raised in corporate *Sukuk* bonds, using an oil well as the asset to back the transaction.[462] Thus, given the fact that, the investment climate in the UK is more favourable to Islamic commercial dealings than that of Americas, theoretically one can safely conclude that, *Sukuk* may be used more effectively in the Britain to generate corporate finance for mining projects.

[461] Deloitte, „Corporate Sukuk in Europe: Alternative Financing for Investment Projects", Deloitte Research Paper, Pg. 28 available at: https://www2.deloitte.com/ly/en/pages/financial-services/articles/corporate-sukuk-in-europe.html accessed 10th January, 2019

[462] Ayman and Christopher, „New Horizons for Islamic Securities" (2006-2007), PP.409-425

Even though, the existence of Islamic financial services in Britain can, arguably, be traced back to the brief presence of Albarakah Bank in 1980s, there can be little doubt that, the formal and proper operations never existed any time before 2004, when Islamic bank of Britain was licenced to function in the UK as financial institution ethically oriented along Islamic principles. Yet, the UK approach to *shari"ah*governance differs markedly from those of countries like Malaysia.

6.3.6. UK Approach to Islamic Financial Products

It has been near consensus among the scholars within the academic community that, the expanded reform of financial regimes in 2003 through to 2007 has produced necessary legal framework required for Islamic financial products and services to operate. Finance Act (2000) saw amends in 2003 which removed double taxations on, and extended tax relief to shari"ah-compliant financing of real estate, thereby investors from GCC and Asian countries were attracted into UK property market through Islamic banks and other banks with Islamic financial windows. In 2005, the Act was further amended to remove stamp duty and land tax in order to provide smooth grounds for *murabaha* and *mudarabah* products to flourish, similar tax treatment was extended to diminishing partnership and agency contract (*wakala*) by virtue of Finance Act (2005), and subsequent amends came to accommodate Sukuk within the financial landscape of UK.[463]

6.3.7. Legal framework for Sukuk

Legal framework for Sukuk investment emerged in 2008 pursuant to with the UK"s policy on Islamic finance. The key policy on Islamic finance reiterates government commitment to ensure inclusive financial platform that offers all British citizens with opportunity to participate regardless of their faith. Further, with respect to Sukuk in particular, UK has been determined to maintain and possibly improve the status of London as one of leading financial hubs globally, in addition to diversifying its investor base by offering products of interest to investors from GCC countries. Accordingly, the first UK Sterling Sukuk of 2014 attracted a wide range of investors across the world. An instrument intended to generate £200 million,

[463] Oseni, Umar and Hassan M. Kabir, „Regulating the Governing Law Clauses in *Sukuk* Transaction" (2015) PP. 220-249 at PP. 9-10

received an order totalling £2.3 billion,[464] oversubscribed twenty times of its value. Nevertheless, the main policy objective behind this sovereign issuance as well as setting up a legal framework for Sukuk, has been to encourage corporate issuance as noted by Osborne the chancellor of exchequer, when he said: "We have seen very strong demand for the Sukuk, resulting in a price that delivers good value for money for the taxpayer. I hope that the success of this government issuance will encourage further private sector issuances of Sukuk in the UK."[465]

The legal instrument the cement above policy is the amendment to section 151 of the Finance Bill. The section empowered HM Treasury to make provision for raising money through alternative finance arrangement. Alternative finance arrangement has been interpreted to mean any arrangement which in the opinion of the treasury will yield same result as other similar interest-bearing instruments but structured to function devoid of interest. These legislative and administrative efforts made UK to be not only the first sovereign Sukuk issuer outside the traditional Islamic finance enclave but earned it a status of leading destination for Islamic finance in the West.

However, UK model has been criticised for lack of institutional regulation. Unlike Malaysia and the UAE, there are no institutional mechanisms to ensure that Islamic financial practices are conducted according to the spirit of *shari"ah.* The reason for this is clear. UK is a secular country with one legal system, which provides for compliance with conventional financial regulations only. Observance of Islamic commercial injunctions are left to the parties involved. Accordingly, Islamic banks in the country have each set up and maintained "*Shari"ah* Board", at least to reassure customers. Furthermore, although the law does indeed encourage institutions to set up advisory body for guidance and supervision, but again any directives emanating from such a body must be considered to be only recommendatory, not mandatory.[466] While, the wisdom behind adoption of this approach in the UK might be clear, but the practical implication might not be all immediately clear.

[464] HM Treasury: Government issues first bond (2014), available at: <https://www.gov.uk/government/news/government-issues-first-islamic-bond> accessed 20th February, 2019
[465] Ibid
[466] Hasan, „Regulatory Framework of Shari"ah Governance System in Malaysia, GCC Countries and the UK", 3-2 (March-2010), PP.82-115 at PP. 103-104

6.4. Conclusions: Learning from Malaysia, the United Arab Emirates and the United Kingdom

This chapter has looked at three case studies, namely Malaysia, the UAE and the UK. Legal system that prevails in each of these countries has been highlighted. Sukuk and other Islamic financial practices of each jurisdiction as well as regulations and institutions are discussed with view to identifying which one could the most appropriate model for Nigeria to adopt. Although, all the three have some nearly common legal systems with respect to strong influence of English common law in all, they vary significantly from one another with regard to their approaches to Islamic financial transactions and sukuk, for which looking at them separately is important.

Malaysia was an English colony, and Islamic law was prominent prior to colonialism, and currently they practice plural legal system. Presence of customary law in the country indicates that, this pluralism is due not only to Islam and British imperialism, but Malay society is inherently diverse in nature being multi-ethnic and multi-cultural. In this regard, Malaysia bears striking similarities to Nigeria, based on which a general assumption can be made that, any legal and economic innovations that succeed in the former is likely to suite the latter. More so, given the socio-economic diversity of their society, they share same tendency to accept any legal practice introduced to them within specific prescription as espoused by socio-legal theory.

From Islamic finance perspective, Malaysia is well-advanced, with a vibrant Islamic capital market and considered to one of the leading hubs globally. However, it‟s approach to Sukuk is highly pragmatic in nature as it tends to favour innovation over jurisprudential rigidity and allows for various types of sukuk instruments to be structured and marketed on its national and internal financial platforms. Nevertheless, this flexibility is not without controversy. Shari‟ah experts, particularly from other Jurisdictions including GCC countries, have expressed concern, that Malaysian version of Sukuk is exposed to a legal risk as it violates an important ethical requirement. Although, it is not an outright trade off with the Shari‟ah component of Islamic bond, the Malaysian interpretation and therefore application of Islamic injunction with respect to sukuk starkly differ from the dominant perception in the Middle East. Thus, the economic effect of this model for a country willing to attract investors from oversee can be enormous. Investors from gulf countries might not consider products based on Malaysian prescription as ethical or otherwise attractive.

Turning to the second case study, UAE is a prominent GCC member with vibrant Islamic capital market considered to be one of the global hubs of Sukuk. UAE has a legal system dominantly based on Islamic law in contrast to Nigeria. Yet, the strong presence of economic freedom which allow investors to choose which system of law to govern their transactions, has made UAE very popular destination for investment. Furthermore, it has recently established more free economic zones from which Nigeria might desire to learn. The prospect of Dubai International Financial Centre has changed the landscape of UAE in terms of investment. The strength of DIFC lies in three things, namely, regulations, freedom ad dispute resolution mechanism. By virtue of the law that sets up the centre, DIFC has a distinct regulation compare to the mainstream law as it operates as a common law zone. More so, investors registered with the centre will have choice to make as to what law to govern their transaction. Finally, there is arbitration centre in addition to investment courts all functioning in accordance with British common law. However, about Sukuk structure and market, in contrast to Malaysia UAE favours classic interpretation of Islamic law.

From historical point of view, UK is a mother to Nigeria, and still commonwealth is keeping them together. These two key factors are likely to make Nigeria naturally emulate UK. More so, the case study of UK present additional vital data to do with coal mining and sustainability approach that might be of interest for Nigeria to adopt. However, the practice of Islamic finance in UK has not been well developed in terms of regulatory framework and institutions. Yet, it presents a viable model for a secular state with interest to deliver inclusiveness. Besides, there is a point to take in terms of policy objective underpinning UK issuance. Government should provide for effective regulatory frameworks to allow for greater participation. It is obvious that each of the three jurisdictions studied has something for Nigeria to adopt in order to build a vibrant market for Sukuk investment.

7 Chapter Seven: Towards a Framework for Investment and Sukuk

Nigeria has endeavoured to shift its focus onto solid minerals to reduce its dependence on oil and gas and to diversify its economy through a series of reforms aimed at repositioning the industry to make it attractive to investors. This thesis critiques the current investment framework to examine the extent of its effectiveness in stimulating investment and business climate to embrace innovative investment tools to improve growth as well as development.

In evaluating economic effectiveness, the study deployed three generally acknowledged components of an attractive investment regime, namely "efficiency", "predictability" and "flexibility, to assess the strength and depth of Nigeria"s mining industry performance or attractiveness. The assessment of these elements indicates that Nigeria"s framework is weak compare to other mining jurisdictions, like South Africa and Ghana. Thus, there is a need to reconsider what innovative tools and far reaching reforms are needed to maximise the potential Nigerian mining industry and foster infrastructure development through sustainable measures.

The shortcomings in the Nigerian strategy associated with conventional methods has failed to stimulate investors or respond to the bottlenecks, prompting Nigeria to rethink how it"s mining sector could incorporate new approaches to investment such as Sukuk or Islamic bonds. Flexibility in the investment framework has been conditioned through the mechanisms of legal pluralism, financial inclusion and economic freedom. The study found that the pluralistic nature of Nigeria"s system, highlighted in chapter 3, the flexibility of its overall investment policy and law chapter 4 as well the dynamism of Islamic finance on the other hand from chapter 5, rendered Sukuk investment worthy of consideration within the investment framework for mining. However, chapter 2 reinforced that legal and administrative infrastructure required for Sukuk instrument is less developed in Nigeria compared to other countries like Malaysia, UAE and the UK where Sukuk has been successfully deployed. Each of these experiences, examined as comparative case studies in chapter 6, offered lessons and comparative perspectives to point to innovative approaches and sustainable approaches that could contribute to Nigerian investment diversification toward a more robust and competitive mining industry. While there is traditionalist, pluralist and secularist mechanisms for absorbing Sukuk in investment strategies, Nigeria is a unique case with its distinctive socio-political history that allows it to develop its own bespoke model of

Sukuk and conventional hybrid investment model that meets its economic, ethical and regulatory demands.

More broadly, the thesis argues, through chapter 4, that the objectives of mining law should be based on community participation, corporate social responsibility and improved governance through constitutional guarantees of individual rights to access equitable benefits of sustainable development through mining and infrastructure development. This thesis recognises the imperative of economic growth but not as an end in itself. It argues that rather than a sterile legal framework or a selective investment pitch, Nigeria can render its mining industry as a stepping stone to socio-economic development rather than merely profit which exacerbates the poverty gap or the North South divide in Nigeria. In adopting the three-pronged lens – spatial, legal and economic analysis – the thesis queries the holistic model of development in Nigeria that cannot avoid seeking systemic reforms while pursing incremental or specific changes.

This study is among the first academic attempts to incorporate Islamic financial instrument into investment framework of Nigeria‟s extractive industry to supplement conventional approaches. This chapter outlines the findings, reflections and conclusion of this thesis through five sections. The first section highlights and discusses issues raised by the thesis in connection with the main research questions. The second proposes workable investment models for Nigeria‟s mining sector. The third section explores and posits an appropriate framework for Sukuk investment in Nigeria. Section four discusses the challenges associated with practical implementation of the outcome of this research and the limitations of the thesis, while section five concludes the chapter and makes recommendation for further research.

7.1. Introduction: Framing the Study

This study identified key issues and contexts related to the investment framework of the mining sector in Nigeria. Rather than legal frameworks or economic packages, the starting point is how to engage with key stakeholders towards achieving viable exploration of the mineral resources for equitable and sustainable development. Rather than top-down economic policy or bilateral deals with select corporate mining agents, understanding the dynamics and purposes of mining as public interest requires placing good governance at the centre of the narrative. Therefore, adequacy of law is accompanied by the outcomes of laws for all stakeholders. Citizenry and communities who are normally intended to be the central beneficiary of the revenue generated from the wealth of the country, need to be included in the process. In practice, communities are not only deprived of the primary benefits of mining frustrating equitable socio-economic development but also result in social unrest, injustice and insecurity. This deprivation common to both solid and oil minerals communities in Nigeria needs to be addressed in reorienting policy objectives and implementation methods as well as monitoring and evaluation criteria.

For example, the oil-rich Niger Delta (South-South) communities have, for decades, encountered armed hostility between government forces and militant members of the communities rebelling against the historical injustices by both multinational oil companies and the state. In the gold mines of the North-West axis (Zamfara and other states) internal and external illegal resource-extractors took advantage of a weak regulatory framework and to by-pass rules and local authorities. Armed bandits allegedly hired by the rentier elites have taken over the region, unleashing a range of crimes-namely kidnapping, theft, killing, rape among other things-on the innocent communities so as to create instability to pre-occupy both the government and mining communities, thereby providing safe atmosphere for illegal miners. The fundamental observation is that mining industry should be brought under the rule of law and human rights, not subject to political expediency or opportunism or at the mercy of the mining mafia. However, the thesis recognises that the legal and policy framework cannot be constructed merely to stop abuse but that it should also stimulate innovation, growth and development in line with national priorities and international development standards and goals such as the SDGs and the New Urban Agenda.

Mining is the responsibility of both the government and the private actor to improve the living conditions of the community, in other words, to provide development. This thesis has shown that, this objective has largely been unfulfilled owing to both inefficient strategies and insufficient protection from waste and abuse. In spite of the Nigerian constitution that clearly states the role of the state authorities to harness the resources on behalf of the citizens to upgrade socio-economic condition of Nigeria"s populace, successive governments have failed to create that prosperity and equitable development in Nigeria despite the opportunity through the mining industry. Although, a number of local and international factors have contributed to this unfortunate situation, this study focuses on one fundamental factor for underperformance of government in Nigeria. This is due to basic socio-economic rights of the citizens being unenforceable at law thereby undermining any potential effort by Nigerians to hold their leadership accountable to the task of creating equitable and sustainable development. This executive impunity and collapse of rule of law, has been reflected in poor infrastructure as road and electricity, which are critical for mining industry. Similarly, widespread lack of human development is represented in high rate of illiteracy, unemployment and poverty, which is a recipe for a rise in crime and insecurity as well as a narrow skills and talent pool. The lack of consistent good governance thus, consequence dissuade potential investors through a lack of business supportive environment.

Failure of extractive companies to make any significant contribution to the society means that the mining industry is alienated from community led support and engagement. Not just government, corporate social responsibility (CSR) in business and development contexts demand that private sector reinvests a proportion of their profit in socio-economic development projects aimed at enhancing the living condition of the host community. CSR initiative should ordinarily contribute to poverty eradication, improving literacy and good health through job creation, schools‟ construction and provision of health care facilities. However, this study has shown that, in spite of decades of profitable mining in Nigeria, there has been no real change to the socio-economic status of the communities. While there could be many possible factors to account for this imbalance, this study has focused on the lack of concrete legal framework for the CSR, as it has always remained an act of charity exercised by the resource companies at will. Further, these companies have maintained strong opposition to any move seeking to enforce CSR by way of legislation. Thus, it has been difficult to obtain adequate legal backing for mandatory CSR in Nigeria, at least in the oil sector. In contrast, Community Development Agreements (CDA) has since become a mandatory provision in the mining legislations of many African states including Nigeria. These provisions are potentially transformative but remain largely untested due to lack of serious investors in the sector. The Nigerian law and policy framework for mining and infrastructure development thus is opaque and resistant to bottom up participative ethos. To improve transparency and participative governance, it would need to have as its pillars constitutional guarantees or human rights, corporate social responsibility or accountability and CDA or recognise communities as stakeholders and ultimate beneficiaries of mining within national growth.

The decline of interest in the hard-mineral sector of the country on the part of serious foreign investors is a cause for concern. Unlike in the 1960s when Nigeria was the major mining jurisdiction, currently investors would prefer to invest in other destinations within Africa even though they are perhaps holding less mineral reserve than Nigeria. This is indicative of the fact that, the business environment in Nigeria is not persuasive compared to other competitors. States generate attractive investment climate through their regulatory framework by providing for key entry points for entrepreneurs to assess and leverage productivity in a mining jurisdiction. This study has highlighted that, the investment framework of the largest African economy did not only fall short of stability expectations for potential investors by ensuring peaceful mining communities, but also lacked other key features of a comprehensive legal regime. These elements consist of reliable and predictable fiscal regime in terms of royalties, taxes and charges on investments. Furthermore, investors need to be satisfied about robust legal protection more than anything else. Legal protection of private property against oppressive restrictions or arbitrary use of state apparatus are major essentials of economic freedom, as is access to finance. Ultimately, the mining industry has to not only be attractive but attract investment funds.

Capital and liquidity are critical to all investment, and particularly so to mineral investment that is capital intensive. Multinational corporations are dissuaded from country where investors‟ access to funds is limited. The five elements that constitute economic freedom in a jurisdiction determine the response of investors. Protection of private property, unrestricted access to international market, regulated capital market and significant freedom to raise, use and move capital internationally without unnecessary restrictions, are determinant of investor confidence. Existence of functional and well-developed capital market encourages both large and small enterprises through reliable sources for investment funds. Thus, this study focused on expanding the revenue streams and opportunities, using the vehicle of Islamic finance capital market for mining sector, in addition to the already existing conventional stock exchange in Nigeria.

The study found that Sukuk or Islamic bonds is particularly relevant for financing mining projects in Nigeria for several reasons. Sukuk is structurally a multi-stakeholder mechanism/structure for investment; it therefore has the potential to bring together the company, government and the mining community as partners in the resource management. This is likely to address the issue of community participation in the natural wealth development as well as management. Another distinctive characteristic of this instrument has been the tendency to persuade investors at both local and global scale owing to its ethical characters, thereby creating opportunity for financial inclusion of a significant portion of Muslim and non-Muslim population of ethical investors in Nigeria.

However, for Sukuk to operate properly in Nigeria, there must be a robust regulatory framework supporting its application. Being an investment instrument formulated along Islamic oriented legal principles, it requires appropriate legal framework in addition to the overall framework that regulates traditional capital market in Nigeria. In view of the foregoing issues, it is the thesis of this study that, creating an investment framework for Nigeria"s mining sector is crucial for stimulating FDI into the country. In addition, a regulatory framework for Sukuk investment that reflects all necessary requirements of Islamic bonds is equally critical to provide source of investment funds for both the large and small corporations in the field of mining.

7.2. A Framework for Investment in the Mining Sector

The Nigerian framework for mineral investment is contained in the constitution and four distinct but connected legislation, namely, Nigerian Investment Promotion Commission Act (NIPC Act) 1995; Mining Act 2007; Company and Allied Matters Act 1990 and Investment and Securities Act 2007. Even though, other legislation regulating specific sectors of the economy do exist, NIPC Act is the centrepiece for investment in Nigeria. While the Mining Act is specific to legal regimes pertaining to extraction of solid resources, the Investment Promotion Act is the embodiment of all necessary incentives available to enterprises willing to invest in Nigeria. In particular, it mandates the Investment Promotion Commission to collate and disseminate information on potentials of the country as well as on the sources of investment capital and any such data likely to attract investors. Companies Act regulates the authority of enterprises be it foreign or local to conduct business. Investment to do with companies" securities and bonds is regulated by ISA.

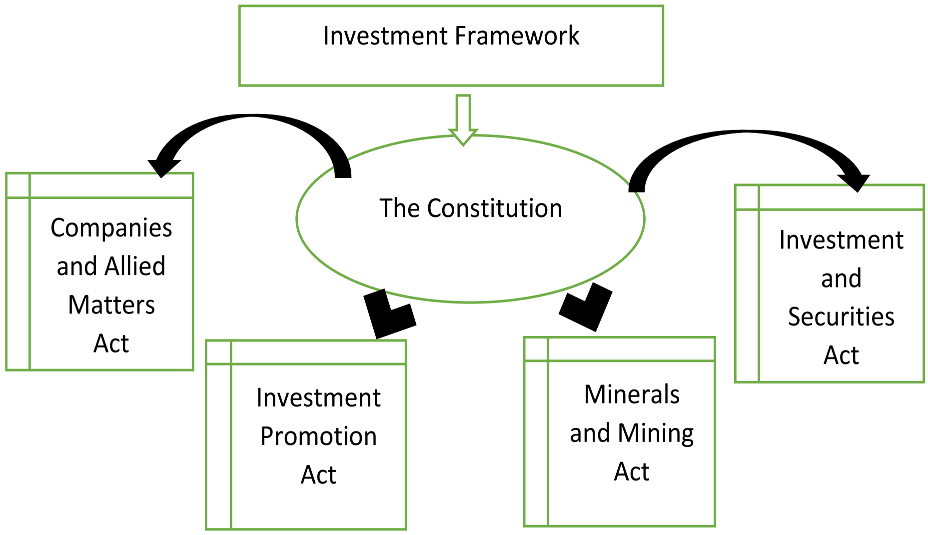

Figure no. 1:7 Proposed Ideal investment framework for Nigeria

An ideal investment framework for Nigeria‟s mining sector shall incorporate four elements identified and defined in this study as the essential components of attractive framework. These elements are economic freedom of investors; sustainable development; legal protection for the investment through the existence robust dispute resolution mechanism; and reliable as well as pragmatic source of finance.

To achieve sustainable development, Nigeria needs to amend its 1999 constitution. The provision of chapter two shall be either reframed or expunged altogether from the constitution. In case it is to be reframed, the wording shall, not only uphold those economic and social rights as simply justiciable but shall also bring it into conformity with African Charter on Human and People‟s Rights, ratified by Nigeria. This would recognise socio-economic development as fundamental human rights of the citizens, as do countries like South Africa in the region. The positive impact of this constitutional amendment on the governance and development as well as the mining sector could be significant. Existence of a legal window within the constitution allowing citizens to challenge the performance of the political class, alongside a functional judicial system would mean active pursuit of the rule of law. This would eventually serve as a watchdog to provide checks on the officialdom against uneven redistribution of resource revenue, because government is held accountable to its citizens. In essence, this situation creates pressure for government to use the wealth of the country as belonging to the people in executing socio-economic projects and national development.

Naturally, development attracts investors and hence promotes economy. Where a country improves its essential infrastructure, namely, road, electricity, clean water, schools and hospitals, would be able to breed healthy, peaceful and productive society. Local availability of skilled manpower and necessary infrastructure would reduce the cost of production and, of course, increase profitability of business, which eventually attracts investors. On the other side, increasing presence of enterprises and business entities, translates into creation of more jobs and earning opportunities for the community. Thus, there is symbiotic relationship between development and investment, a likely outcome of the proposed constitutional amendment.

Dispute resolution mechanism or functional judicial system is key to investment. Comprehensive provision for dispute settlement within the investment regime of a state constitutes a cornerstone of ideal framework. Investors are attracted to a stable jurisdiction that provides greater certainty and protection for their capital. Specifically, four components must exist in order to produce a credible dispute resolution mechanism necessary to enhance the confidence of potential investors. One is adequacy. Substantial law on investment must be clear and up-to-date in terms of rights and obligations of all parties as well as remedies obtainable in case of breach of any such rights and obligations. Currently, there is a yawning gap between investment policy and the law in Nigeria, legislation did not fully reflect some area areas of investment which the policy has already envisaged. One such area relevant to this thesis is Sukuk investment. The extent of inadequacy would be discussed under economic freedom and framework for Sukuk.

Another key feature of a credible and predictable dispute resolution mechanism is existence of a well-equipped judicial infrastructure. Although, physical existence of purpose-built court rooms within access are an important element of this infrastructure, qualified personnel possessing relevant legal expertise and ensuring decent remuneration for all staffs bottom-to-top is more essential. Lack of adequate compensation for non-judges‟ member staffs and poor pay for lower courts‟ judges has generated incentives for corruption in Nigeria‟s judiciary. Gradually this scourge of corruption has permeated the entire judicial system and infected even the well-paid judges of the higher courts of records. Politicians driven by self-interest would use already compromised registry staff to reach out to benchers with juicy offers or threat of removal from office, a kind of which only a saint can resist. Ultimately, the result of this ill-equipped judicial infrastructure was inconsistency in rulings and out right subversion of justice, in some occasion. This is conclusive feature of unpredictable system. Thus, rather than mining laws, it is the legal system itself that needs reform.

Third component of an ideal investment dispute resolution framework is independence. Generally, judicial independence entails lack of or being free from interference with the course of justice, however, for Nigeria‟s purpose, independence of judiciary shall require a next level definition. Thus, the system must be free from any avenue for interference with the way and manner courts of law discharge its constitutional duties. Again, this definition would mean, no external party, not even the executive could take undue advantage of its legitimate powers towards tempting judicial staffs by use of favour or fear. This arrangement would appear to suggest a watertight separation of power, which is impracticable in the representative democracy, given the requirement of check and balance between the three arms of government. Nevertheless, what sought to be achieved here is not absolute independence but rather near-absolute. Constitutional power of executive to temporarily suspend or permanently remove a judicial officer should be reviewed, stringent conditions including a requirement for endorsement by both national and state assemblies be incorporated. Also, fiscal allocation of judiciary should be a fixed percentage of the revenue akin to that of states, which is to be determined by the National Revenue and Fiscal Allocation and Formula Derivation Commission. Finally, on this note, to guard against any abuse of such a system severe punishment must be provide against any attempt to compromise official duty by a judicial officer or external party or by both.

Last of the four components of a comprehensive dispute resolution mechanism is availability of alternatives to litigation. Investors would usually prefer to get investment disputes resolved by means other than normal court room proceedings, due to several reasons. Some of the reasons include publicity, delay, future reference and the most common is technicalities involved. Nonetheless, proper judicial system with the characters mentioned above represents a trademark of friendly business environment, even though investors would prefer other settlement process like arbitration. Essentially, investment framework should be inclusive one, incorporating national and international as well as ethical ways of settling investment differences. By and large, recognition of other alternative dispute resolution mechanism is a feature of attractive investment framework.

In Nigeria, both the Mining Act and Investment and Securities Act provided for alternative resolution, but also missed to reflect mechanism relevant to Sukuk investment. Although, Islamic judicial principles have an established presence within the Nigerian legal system,[467] dispute resolution mechanism based on this legal system is missing from the investment framework. Hence, a mechanism like that of either Malaysia or UAE has been proposed as would be discussed hereunder. Both countries have been studied quite extensively in this thesis, yet due to their distinctive nature, historical backgrounds as well as varying benefits and challenges for investment, one can hardly conclude which is more suitable for Nigeria. Hence both sides have been argued.

7.3. Framework for Sukuk Investment in Nigeria

It has been established in this thesis that, Sukuk investment has potential to facilitate development of the mining sector in Nigeria. Given the capacity of this instrument to spur infrastructure development and to provide liquidity for investment, it can thus create enabling environment for mining investors. Countries like Indonesia, Malaysia and GCC have made remarkable development through Sukuk.

Smooth application of Sukuk instrument in Nigeria would require adoption of framework like those of the leading jurisdictions. Even though, issuance of Sukuk is not new to Nigeria"s investment hub, legal and administrative structures needed for large scale and sustainable use of it is less developed compare to countries like Malaysia, UAE and even UK. Chapter six shows that, in each of these destinations there have been essential facilities in place, that make the use of Sukuk both practical and productive for the government and the private investors. Fundamentally, two elements are critical to functional Sukuk market. One is the governance aspect relating to the ethical nature of the Islamic bonds and second is economic freedom necessary to support investors.

Chapter five argued that, Sukuk or Islamic bond is substantially dissimilar to conventional bonds, although there are certain features that are common to both. The main point of departure is that Sukuk being a financing instrument formulated along Islamic legal principles, is not allowed to operate as a debt instrument, rather it must be an undivided

[467] Chapter 3 of this thesis is partially dedicated for this aspect

beneficial ownership of the investment asset. Thus, there is a host of legal principles set to ensure compliance with this ethical inhibition in strict sense. A comprehensive framework must reflect these legal principles and develop sophisticated protection mechanism against breach of any of them.

In Malaysia, the approach taken to address the ethical character of Sukuk was twofold: legislative and institutional. Widespread legislative reforms were made to provide legal basis for the existence of Islamic commercial principles in the national investment framework. In this regard, key legislations to do with Finance-Central Bank Act, Securities Commission Act as well as Capital Market Services Act have been accordingly amended. Secondly, institutions empowered by the reform to regulate Sukuk, mainly Bank Negara and Securities Commission developed institutional unit with Islamic bond in focus and produced comprehensive guidelines to ensure ethical governance and compliance. In addition, international financial regulations and standards have been incorporated into Malaysia‟s national framework to consolidate locally provided ethical standard. Therefore, Malaysian approach is distinct for being pluralistic as it is evident from convergence of laws to govern a subject matter, and it is also state-regulated.

Nigeria should seek to create robust framework on Malaysia‟s model to transform its Sukuk market into international investment hub. In order to achieve this transformation, extensive law reform aiming at creating a consolidated national Sukuk investment structure is critical. This would mean amending Nigeria‟s key investment legislations, including but not limited to Investment Securities Act, Central Bank Act, Investment Promotion Commission Act, Mining Act and Companies and Allied Matters Act. To brace up the strength of this framework, key financial market and investment regulatory institutions such as Securities and Exchange Commission along with Central Bank should come up with some comprehensive national guidelines for Sukuk reflecting the national framework as well as important international regulations meant for safeguarding ethical and international financial standards. This should include International Islamic Financial Market (IIFM) standards (World Bank); Accounting and Auditing of Islamic Organisations and Financial Institution (AAIOFI) standards on Sukuk; and International Organisation of Securities Commission (IOSC) objectives and principles. A comprehensive and pluralistic framework as such is required to ensure effective governance and persuade smooth conduct of Sukuk investment both local and global levels. This proposed sophisticated framework should assume regulatory institutional structure given below.

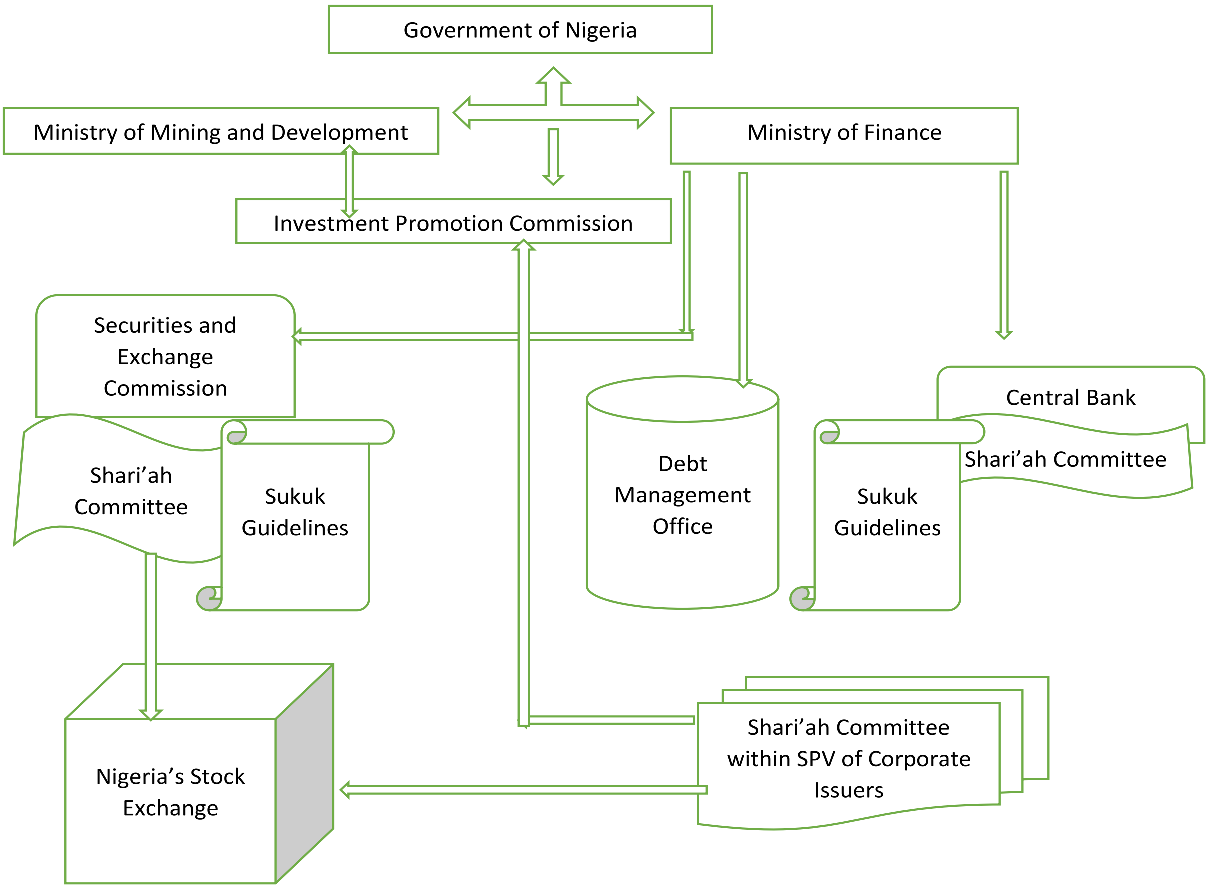

Figure no. 2:7 Proposed comprehensive frameworks for Sukuk

Above structure demonstrate triple checks mechanism imbedded in the framework to provide safeguard against any potential risk of Shari῾ah governance which is the most essential character of Sukuk instrument. Presence of committee of legal experts in three institutions would provide great certainty for investors as to strict compliance with the ethical principles underlying Islamic bonds at all crucial stages of transaction. Any Sukuk transaction whether proceeding from a private entity or state must be exposed to these three checking points, namely Special Purpose Vehicle (SPV), Central Bank at structuring and packaging level, and finally Securities and Exchange Commission at marketing stage. This is crucial because ethical feature is the primary element of Sukuk that attract investors. Triple checks apply to both sovereign and private issuances, particularly important in case of corporate issuance because as level of risk in the private is higher. Where a holder of mining lease is taking on partners through Sukuk investment such a deal would need to be registered with original grantor of the lease as well as investment promotion commission for transparency and greater security for investors. Certain incentives might be attached to this requirement in order to encourage compliance.

To facilitate use of Sukuk in the Nigeria"s extractive industries, recognition of Sukuk as a source for investment capital must be reflected in the principal legislations related to mining. Primary function of NIPC is to promote investment in the country. This objective is achieved by, inter alia, disseminating information about investment opportunities, which includes minerals potentials, and availability of various ways of raising investment capital in Nigeria. National investment database developed for this purpose and put out to investors world-wide through the NIPC Portal should reflect Sukuk categorically. Further, the investment promotion handout should contain a highlight on the viability of Sukuk market in the country as there are over one hundred million potential subscribers for such an ethical investment domestically.[468] Similarly, the Mining Act shall recognise the right of the appropriate mining lease holder to create a sublease by dint of Sukuk certificates over the subject matter covered by the main grant. Inserting this provision into the Act is crucial because while the current position of law restricts reassignment of the mining lease, issuance of Islamic bonds legally operates to create beneficial co-ownership over the asset (i.e. the minefield).

Sukuk should be specifically included in update of laws and policies. Given the difference between Sukuk and traditional bond is a fundamental one,[469] the former must not be simply assumed to have always been subsumed automatically in the latter, except where the expression so admits. Clear example would the rights of mining companies, like any other corporate entity to raise capital for their projects through issuance of bonds or debentures, which do not need to be backed by physical assets of the company but backed solely by the full faith and credit of the issuer. This right does not extend to include Sukuk as they are

[468] This point is proven by over-subscription of the debut road infrastructure Sukuk issued in Nigeria in the year 2017

[469] Argument about material particulars distinguishing Sukuk from traditional bonds has been presented in chapter 2. Presence of debt element in the latter, which is completely absent in the former underscores the main parting point between the two.

meant for borrowing money through creation of floating charges on the asset of the company but not allocation of partnership over the beneficial ownership of the asset in question.

To facilitate widespread upgrade of infrastructure through Sukuk investment, Nigeria needs to create a link between national infrastructure development plan and Sukuk, prioritizing areas essential to mineral sector. National Integrated Infrastructure Master Plan 2030 should be amended to redefine its priority. For the period, the focus should be on power and transport linking the hot mining spots in Nigeria to major international egresses, namely sea ports and cargo airports in the country to facilitate onward exportation of minerals. In addition to state efforts, the framework should be encouraging private investment through provision of monumental incentives for infrastructure Sukuk. Incentives in this regard can take a form of guarantee of indemnity by the state, which will create certainty and credibility for such corporate Sukuk similar to those of sovereign issuance, and thereby winning the confidence of both local and foreign investors. Given the examples of countries like Indonesia, if properly and carefully implemented in Nigeria, infrastructure Sukuk has the potentials to bring about speedy transformation of the country‟s creaky power and crumbling transport infrastructure, and, thus, would ultimately revive investment into the mining sector.

7.4. Resolution of Sukuk Disputes

Chapter four and six highlighted significance of dispute resolution mechanism, It constitutes one of the key factor‟s investors use to determine strength and weakness of a framework. Generally, investors would feel unsafe where they are not well-protected against defaults that could arise out of their transactions. In contrast, existence of effective system to address investment grievances creates greater certainty for Sukuk investors. And as such, the framework for Sukuk in Nigeria has to incorporate a structure for disputes resolution that would be suitable for Islamic bonds. Although, cases studied in chapter six of this thesis reveal several judicial approaches to Sukuk disputes, yet two models have appeared to provide informative guides to emerging jurisdictions like Nigeria.

Nigeria might confer jurisdiction to entertain Sukuk disputes on the regular Courts. Nevertheless, such regular courts must be superior courts of record, and applying Islamic legal principles to determine issues of Islamic finance, as it is the case in Malaysia. However, this model would face two challenges in Nigeria. States‟ High Courts are not competent to entertain Sukuk disputes, because currently, Nigeria"s constitution has vested exclusive jurisdiction in the Federal High Court over all matters to do with companies and Allied Matters, including bonds related disputes. Secondly, lack of legal expertise in the field. While High Court judges in Malaysia might be learned in both Shari"ah and common law, Federal High Courts are predominantly manned by those that are trained and only qualify in common law.

Alternatively, Nigeria might establish a special court within economic free zone of the country. The court shall function as an umbrella housing a syndicate of various judicial options respectively suitable for varying investment disputes. Although, the main legal order of the court is based on British commercial legal principles, yet it draws on members with expertise in all other legal system including Shari"ah. In addition, the court offers arbitration facility as the first option for all members. No other judicial step can be taken unless and until arbitration has failed. However, the court will only have jurisdiction with respect to matters involving members registered with the zone. This is UAE model. To create more certainty for Sukuk investors, Corporate Affairs Commission shall require all intending corporate Sukuk issuers to register with the zone. Setting up a regime of this nature in Nigeria would also have its own challenges. Fundamentally, this arrangement presupposes existence of entrepreneurial capitalism.

Entrepreneurial capitalism or economic freedom is another aspect of a persuasive investment framework. Generally, indicators of economic freedom are legal protection of private right and property, removal of unnecessary restrictions to business, creation of functional capital market and access to sound money. Co-existence of these factors makes a jurisdiction an economic free zone and boost its popularity among investors. This is the main approach adopted by UAE and has been discussed elaborately in chapter six.

This thesis would prefer UAE model for Nigeria"s framework. Given the international character of the judicial infrastructure of investment zone, it is likely that this will attract not only local but also foreign investor into the country. Chapter six has shown the fortunes of UAE following their setting up of free investment zones. In a span of just two years, DIFC attracted 750 companies who put together brought in investment capital of about USD 18 billion into infrastructure alone. The amount of FDI flow into UAE equates that of entire sub-Saharan countries of Africa put together. Additionally, the presence of multi-dimensional legal approach in the court would create confidence that the settlement process shall duly consider the ethical perspective of Sukuk investment. Furthermore, the offer to resolve disputes through arbitration is a push towards amicable resolution which is a wholesome option for investors. Considering business relationship between parties to arbitration is more likely to remain cordial compare to aftermath of legal battles which is usually adversarial in nature, the former underscores investors" preference.

7.5. Challenges and Limitations of this Research

Like any other research work, reform proposal presented in this thesis are not without challenges and limitations. The thesis has put forward an argument of what are the key issues undermining investment in the Nigeria"s mining sector and how they can be tackled through adapting to innovative investment tools by making policy and law reforms necessary for repositioning the industry. However, there are challenges and limitations that could hamper the smooth process of achieving those objectives. These challenges basically relate to issues of governance and implementation; security and bureaucracy; as well as the extent to which this will impact development. These issues are discussed under separate headings below:

7.5.1. Political and Government (Legislative Agenda and Implementation)

Core submissions of this thesis involve proposals for policy and law reform intended to serve as guide for government officials and policy makers. On socio-economic front, this study has argued that, unless chapter two of the constitution is restated to hold the government in Nigeria judicially accountable to its citizens as regards economic equity and judicious management of mining revenue to drive growth and development, then prosperity will continue to be a mirage in the country. Because, the current position of the constitution which is in favour of non-justiciability of socio-economic rights, creates incentives for executive impunity and therefore feeds corruption and poor governance. Hence, the proposal for the amendment of the constitution became relevant. Similarly, the main proposition of this study for creation of comprehensive Sukuk framework suggested several policy formulations and reform of various legislations, including but not limited to the Mining Act, Investment and Securities Act, and NIPC Act. Beyond this reform, periodic guidelines for Sukuk investment are to be issued by key regulating institutions using the expertise of their respective SACs to ensure implementation of government"s policy and legislations. These tasks are usually faced with certain challenges.

To begin with, the act of making laws itself is an uneasy task in developing countries including Nigeria. Getting a bill through legislative process has always been a challenging task for the political class to perform in Nigeria due to issues of poor governance, which often see executive and legislature at loggerhead with each other. As a result, the country is still operating upon laws that are conspicuously out-dated. Typical example in this regard, is petroleum industry whose governing laws dates back to almost six decades, the industry is begging for an update, but to no avail. The bill (PIB) intended to reform the oil and gas sector has been lying in frustration on the floor of national assembly for over twenty years now. Persistent deadlock on who should get what, has been the main reason behind this unnecessary delay. Failure to pass the bill seeking to concretize and institutionalise CSR of multinationals in 2008, was yet another instance demonstrating the extent to which political hitches could defeat the essence of any reform involving legislative agenda in Nigeria.

Further, even where recommendations are reflected through legislation, they oftentimes remain as reform on papers. Proposals and recommendations of many researches works, conferences and even governmental bodies (ad-hoc committees etc.) had resulted into state policies and regulations, yet practical implementation has become an issue. The problem is multidimensional: official impunity (rule of law); self-centred attitude; and compromising standard. It would appear that, all issues of poor governance in Africa are related to corruption. Thus, the fundamental issue for good governance in Nigeria is corruption. The menace of corruption has led to fall in standard and quality of service in every sector of both public and private arenas. This explains the reason as to why development, be it infrastructure, socio-economic, human or otherwise, have all been stagnated despite monumental economic fortunes driven mainly through oil and gas sector of the country.

This element of poor governance has been so systemic in Nigeria that; it is championed by almost all institutions and thus, has the tendency to undermine any effort to promote development agenda. While legislative and judicial institutions are characterized by undue delay in making laws and disposition of matters respectively, the executive and its agencies have been notorious for compromising standard; failure to implement law and policy to the letter and spirit; and promotion of personal objectives at the expense of national interest. In consequence, it is plausible argue that, even if Nigeria succeeds in transforming its mining sector into functional one through implementing reform agenda advanced in this study, this achievement would only increase the revenue base of the federal government but might not necessarily mean translation of economic growth into opportunities that could benefit the citizens due to corruption. Nonetheless, the proposed amends to chapter two of the constitution is targeted at strengthening rule of law and accountability to ensure even redistribution of resource revenue and quell corruption.

Furthermore, to root out corruption in the system, this thesis would suggest establishment of ethics and standard board in Nigeria. Like in the UK, standard board shall set ethical standard for every prospective legislative, judicial and executive officer in the country. Failing to satisfy the standard before, during or after tenure in office must be consequential, sanctioned to carry high-handed punitive measures. By implication, this would mean that, the board shall have powers to suspend and dismiss summarily from office such officers that breach the law by engaging in conducts falling below the ethical standard. That would also mean placing the board ahead of all three arms of government even though it generates its legitimacy from the constitution.

7.5.2 Security and Bureaucracy

This research did not delve much into the areas of security and bureaucracy, yet they have significant impact on shaping business environment. Investors would consider security to lives and properties, as one of the key issues forming the basis for risk assessment. Accordingly, existence of any elements posing real or perceived danger to potential investors would have the tendency of discouraging them from undertaking business in that jurisdiction. Thus, prevalence of factors such as Boko Haram insurgency, herdsmen and farmer crisis as well as kidnapping in northern Nigeria where most of the mining sites are located, would have substantial impact on the flow of mineral investment into the country. Although this aspect has not been looked at in depth, significance of cordial relationship between resource extracting companies and host community, which provides social license for mining projects has been discussed under CDA in chapter four.

Insurgency and prevalence of organised crime undermine investor confidence. In spite the fact that, serious mining activities involving foreign entities has not been present in Nigeria in large scale sufficient enough to assess the real impact of these elements on the prospects of mining, assumptions could be drawn from the oil sector. Militants" reaction to resource extraction in the oil-rich Niger-Delta region of Nigeria has caused significant reduction in production capacity of the country for a number of years, forcing investors into divestment on one hand, and the government to adopt new policies on the other. Thus, given the significance of security to investment success and profitability, unless the prevailing state of insecurity is addressed, boko haram insurgency, kidnapping and communal crisis will continue to threaten the thrive of mineral investment in Nigeria regardless of sound investment framework.

Another important perspective to security as far as mining is concerned is the security of tenure. Inasmuch as geological potentials are crucial to investors in the mineral sector so also the existence of a sound land policy in the jurisdiction. Unsettled titles to land constitute a recipe for conflict between investors and original title holders. Given the fact majority of what the government has designated as strategic sites for mining in Nigeria occur in rural areas on one hand, and the dependence of rural economy on agriculture, sound land policy is critical to successful mining. Taking over agrarian lands for mining could lead to rural people losing shelter, land for farming and grazing. Beyond economic attachment, significance of land to rural society has acquired social and political sentiment. This study has made reference to nature of rights available to mining leaseholders in Nigeria and their implications to titleholders. In contrast, rights of private landowner to minerals under their land as obtain in the United Kingdom have been discussed. However, this thesis did not elaborate on Nigeria"s land policy in general, or various types of tenure system in the country.[470]

Bureaucracy has also been a factor dissuading investors from conservative jurisdictions. Excessive administrative procedure constitutes obstacles to economic freedom and hinders flow of investment. States have been proactive in removing unnecessary requirements for lengthy documentations in order to ease business. By implication, where a country requires investors to go through various government officials to obtain several approvals before undertaking a business, that approach creates disincentives for potential investors. In contrast, investors are attracted to jurisdictions where the use of modern technology has been adopted and all documentation is done by click of a computer button. This approach is bound to gain more popularity because it saves time and cost for investors, and therefore more efficient. The more efficient the approach is, the lesser the cost of investment. Relaxing complexity

[470] Chapters 4 & 6

associated with documentation is an essential indicator of the level of economic freedom available in a given state. Chapter six highlighted the concept of economic freedom including the impact of bureaucracy on investment. Yet, there was neither extensive analysis of its indicators nor specific assessment of past and present impact on Nigeria.

Connected to the issue of bureaucracy is frequent change of law and regulations without proper notice or due consultations. Bureaucratic vicissitude is typical feature of African countries including Nigeria and owing mainly to political instability and self-aggrandisement of those happen to be in power at a particular period. Successive governments almost always come up with new policies to water down any achievement holding credit to the predecessor. At time policy change might be influenced by desire to pacify a group for their political loyalty to the head of government. Given the multi-ethnic and multi-faith feature of Nigeria, this kind of switch in policy might be fuelled by mere sentiment. All these shifts in policy which are likely to result in sudden and significant change of investment regulations with tendency to affect business interest of enterprises in the country are often introduced without enough or any notice. This practice exposes the entrepreneur to the risk of unpredictable circumstances, which undermines investor confidence in that jurisdiction. Although this thesis has pointed out the negative impact of unnecessary bureaucracy on investment,[471] it did not into quantitative analysis of this impact in Nigeria.

Productive mining does depend not only on sound framework for investment and Sukuk, but also stability of those policies and consistency in their application. Thus, unless a sort of protection against political and bureaucratic vicissitude is provided for policies made in the interest of the nation, important innovation such as framework for Sukuk could be potentially liable to suffer serious sabotage simply on the account of religious or political sentiment. To guard against such inconsistency, an inbuilt protection mechanism within the framework would be necessary. A provision shall be inserted into any such legislation stipulating conditions and procedure of introducing any amendment or reform to it. That should include public consultation and securing two third majority of both the state and national assemblies. This would ensure checks against arbitrary use of power by the political class to scrap progressive policies and important institutions against public interest.

[471] Chapter four and six

7.4.3 Impact on Development

Overall essence of mining is development. State harness resources in order to drive development and prosperity for its people, revenue generated from mineral investment meant primarily for raising the living condition of the citizens. Beyond the present time, resource management also means devising ways to sustaining the prosperity for future generation. This is the main objective underpinning all mining and investment policies. Accordingly, creating a framework for Sukuk and investment in the mining sector must have an impact on development.

This thesis would have impact on Nigeria‟s economy. Reforming the investment framework means transforming the mining sector into functional one, attractive to investors world-wide. In crude terms, the increase of investment in solid minerals literally means an increase in the national revenue. Although, unlike oil minerals where state is actively involved in exploration activities through national oil company (NNPC), only private enterprises undertake extraction in the hard resources industry. Nevertheless, revenue from mineral investment accrues to state coffers in terms of royalty and a number of tax categories. And by implication, this would reduce the strain put on oil and gas industry by overdependence of Nigeria‟s economy on petroleum. Chapter one noted significant improvement recorded by some destinations in African on mining contribution to GDP. Currently, contribution of mining sector to GDP in Nigeria is comparatively insignificant; yet, the proposal of this study would ultimately have impact on the economy including the GDP.

As well as impact on infrastructure development, Infrastructure is one of the two key nexuses between Sukuk investment and mining industry as identified in this study. While mining success depends heavily on stable power and good transport network, Sukuk serves as innovative means of creating those facilities. Thus, the argument of this thesis creating comprehensive framework for Sukuk investment provides incentives for developing electricity and road infrastructure, which are crucial for mining. For any approach to mining to be effective it must consider connecting rural parts of Nigeria, where mining activities take place, to the air and sea ports. These rural areas are currently disconnected. Further, to reduce the cost of technical and industrial expenses, stable electric power supply is critical. Hence, the proposal holistic reform of the Nigeria‟s mining sector incorporates a proposal for significant infrastructure upgrade.

Closely related to infrastructure development is industrial development. Since 1990s many industries have shut down operation in Nigeria due to high cost of production resulting from power shortage, which consequently resulted in monumental loss of jobs. The impact of this research on infrastructure development has the potential of reversing the negative effect emanated from shortage of power. Infrastructure Sukuk has been used widely and successfully to provide capital for investment in power generation across the world. In addition, revival of mining industry would provide raw material for many factories and industries in Nigeria; Aluminium zinc, ceramic, cement, among others. Availability of these raw materials couple with stable power supply would create incentives for setting up factories and industries across Nigeria.

All the above would generate socio-economic impact on the society. Sukuk investment seeks to persuade investment in the mining sector. Mining generates revenue, which primarily inflates economic fortunes of the state, in other words economic growth. Economic growth is normally giving state financial capacity to create socio-economic prosperity. This include establishment of schools and learning centres, healthcare facilities and job opportunities. All these factors put together increases socio-economic fortunes of individual members in the society. Combined effect of this is that such a society would be both peaceful and productive. Because standard healthcare and quality education are likely to produce wholesome and skilful individuals capable of adding value to industries and organisations, that employ them. Thus, they are attractive to employers, and the employment provides decent compensation for their talent. In effect, this symbiotic relationship creates mutual benefits and thereby drives growth and eliminates poverty. In contrast, high rate illiteracy and widespread unemployment are catalyst for social unrest and conflict. Cases of Boko Haram and Niger Delta militants recruiting from the teaming unemployed Nigerian youth afford good example.

In addition, both infrastructures Sukuk and mineral extraction provide incentives for factories and industries to come live; this would inevitably promote job creation. A host number of companies that forced by lack of necessary infrastructure to close down, are likely to start business again in the event power supply becomes stable. And by implication, this would further reduce unemployment rate. Furthermore, the potentials of the mining industry to provide raw materials needed for industrial development create incentives for both government and the private sector to take initiatives in creating industries in the country. In addition to cheap raw material, availability of electricity makes it even more efficient to run industries in the country. Again, this would offer more recruitment opportunities.

However, impact of this study on development is not without challenges. Revenue generation and economic fortunes do not translate into socio-economic prosperity automatically. Rather, good governance is a key to transforming financial fortunes into good living, social prosperity and earning opportunity for people. Thus, unless there is in place a system to check and ensure transparency and accountability in resource management, the impact of this study on development might be unlikely. This is the current situation with oil and gas industry: despite the monumental revenue the sector generates, socio-economic indicators of Nigeria have persistently been recording far below expectation. Therefore, amending chapter two of the constitution is expedient to enable the citizens hold state authorities accountable for their failure to drive development. This is, however, highly challenging as the procedure for amending the constitution is cumbersome one, demanding two third majority supports from all state houses of assemblies as well as the national assembly. Given that, the amendment is meant to check their excesses, the political class is unlikely to endorse this reform. Except there is pressure created through a push from electorate within respective constituencies of the legislatures and international bodies from outside.

7.5 Further Research

The scope of this thesis is limited to the use of Sukuk to revive investment in the Nigeria‟s mining sector. Although it touches on issues of governance, socio-economic development and sustainability being matters incidental to mining, the focus has been the use of policy and regulatory framework to create enabling environment for innovative investment practices within the mining industry of Nigeria, with overall objective geared towards diversifying the revenue base of the country. Thus, effective and even redistribution of revenue generated from that investment to create prosperity is not covered in this study. Also, given the fact that mining in sector in Nigeria is a private sector-driven industry, more attention has been given to corporate Sukuk as compare to sovereign Sukuk. Hence, further specific research might be carried out on these areas.

7.6 Conclusion

This thesis has argued that, Sukuk investment has the potential to revive Nigeria‟s mining industry in two ways, namely project-financing and infrastructure financing. Infrastructure Sukuk has served as catalyst for upgrading power and transport infrastructure in countries like Indonesia, Malaysia, UK and some GCC countries. Power and road network are the key issues undermining efficiency of mining in Nigeria. While this element of inefficiency puts the cost of investment in the country high and thereby dissuading multinationals from injecting their capital on one hand, and on the other, lack of liquidity has rendered local miners less productive in the sector. The thesis demonstrated how Sukuk instruments could address both situations. However, smooth application of this instrument in Nigeria could be hindered by lack of comprehensive investment framework, which is both inclusive and suitable.

Further, the thesis argued that, to stimulate this innovative investment tool, Nigeria needs to create enabling business environment for Islamic bonds within its overall investment framework. Creation of such a framework would require a paradigm shift in policy and law as obtains in the leading jurisdictions namely, Malaysia, Dubai and UK. These countries have pursued significant amendments to their investment regimes in order to reflect basic requirements of Sukuk, and consequently attained remarkable success. Accordingly, Nigeria has to incorporate similar reform as proposed in this thesis to allow productive operation of this instrument in the mining sector of the country. To reinvigorate the solid mineral industry in Nigeria, this thesis proposed an integrated reform, encompassing key essential components of a functional mining industry, namely, investment, infrastructure as well as law and policy. Adopting three-pronged approach (legal, economic and spatial), the study highlighted interlinkages between these areas and key statutory provisions that need to be addressed.

This reform is necessary to create alternative source of revenue for Nigeria as the oil and gas industry has been in gradual but progressive decline. Solid minerals sector has been identified as one of the country‟s potential to replace oil and gas in the event of the latter winds up completely. Thus, there is need to transform the sector into a functional and productive one, and to achieve this objective it is crucial creation of efficient mining business environment. Efficient mining industry depends on not only sound regulatory framework but also reliable power and transport infrastructure. In addition, practical, inclusive and accessible capital market is critical to building local content as it creates avenue for empowering domestic enterprises and artisanal mining. Nigeria needs to factor these three elements-sound regulations; infrastructure development; and access to investment capital-into the on-going reform of the mineral sector. The proposals put forward by this thesis contribute to this holistic reform.

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