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Mining Research

Briefing 3 : Stakeholder Engagement and Grievance Mechanisms for Mineral Resources in Ghana

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1. Introduction

Ensuring effective stakeholder engagement and establishing robust grievance mechanisms are crucial elements within any framework governing mineral resource allocation. This imperative becomes even more pronounced considering the escalating demand for mineral resources and the potential environmental repercussions tied to their exploration. Striking a balance among the diverse interests of stakeholders, ranging from mining communities and corporations to environmental activists and governmental bodies, is essential.

The complexity arising from these varied interests necessitates the provision of and access to channels for resolving the disputes and grievances that inevitably emerge. This briefing is dedicated to examining stakeholder engagement, with a specific focus on the establishment of district committees and small-scale mining committees, as well as the implementation of public hearing procedures and environmental assessments.

Furthermore, the briefing delves into the resolution of conflicts and disputes, emphasizing a preference for Alternative Dispute Resolution (ADR) mechanisms over traditional litigation. The paper also scrutinizes the issue of compensation in instances where a mineral right encroaches upon an individual's land rights, addressing the entitlements owed to affected individuals.

Conclusively, the briefing highlights existing gaps in dispute resolution rules, providing a comprehensive overview of the landscape surrounding stakeholder engagement, grievance resolution, and compensation within the context of mineral resource allocation.

2. Stakeholder engagement in mining activities

a. Parliamentary Ratification

One avenue for stakeholder engagement in management of mineral resources is Parliamentary ratification of mining licences. Parliaments are elected representatives who act on behalf of their constituents. By participating in the ratification process, they bring the perspectives, needs, and concerns of the public to the legislative arena. The process of parliamentary ratification requires public debates, committee hearings, and sometimes public consultations before a decision is made. This transparency allows stakeholders, including civil society, businesses, and the general public, to understand the implications of legislation, contribute their views, and monitor the process. It enhances the legitimacy of the ratified agreements by ensuring they have been subjected to scrutiny and have considered various stakeholder perspectives. This ensures that decisions are not only reflective of the wider society’s interests but also hold the government accountable to its citizens, thereby engaging the ultimate stakeholders in governance.

The regime for natural resources emphasizes the need for Ghanaians as a collective to have a hand in the allocation of mineral rights. Accordingly, the Constitution requires that the mining leases are ratified by Parliament before they become effective. Failure to ratify a mining lease renders the lease void with no rights arising therefrom, unless Parliament has previously resolved that such mining leases will be exempted from the requirement of ratification.

b. Public hearings

Another way of engaging stakeholders is through public hearings. Opportunity for public hearings often occur during the application for an environmental permit, after the mining lease/ license has been issued. Once an individual acquires a mineral right, they are required to obtain the necessary permits from the Forestry Commission and EPA, where applicable, before commencing mining operations. This requirement is to safeguard the environment, preserve our natural resources, and protect public health.[1] The law prescribes the need for a public hearing where the notice of a proposed undertaking of mining activities is met with adverse reaction from the public, there is resettlement of communities or there is risk of significant environmental impact, in the opinion of the EPA.[2]

The hearing must be conducted by a panel of between three to five persons, with at least one-third of the panel residing in the affected geographical area. The panel is chaired by a person appointed by the EPA. It hears all submissions presented before it and submits written recommendations to the EPA within fifteen days of commencing the hearings.[3] EPA is required to consider these recommendations in deciding whether to grant the Environmental permit or not as it reviews the EIA submitted by the prospective holder of the mineral right. EPA may grant or refuse the application, or require the applicant will to amend the EIA and submit a revised version at a later date.[4] The EPA is mandated by law to publish, in the gazette, the mass media, or in other forms determined by the EPA, notice of every environmental permit . Similarly, if a mineral right holder has been operating and intends to cease operations, they must inform the appropriate authorities at least thirty days before discontinuing activities.[5] Failing to comply with this duty may result in an initial penalty of up to five thousand dollars and a further penalty of five hundred dollars for each day the violation persists.[6]

c. Small-Scale Mining Committees and District Offices

The Minerals Commission is given the mandate to create an office in a mining area to be referred to as the District Office of the Commission and headed by a District Officer. The District Office's responsibilities include maintaining a register of small-scale miners, monitoring their operations, providing training facilities to optimize their operations, and regularly reporting on their operations to the Minerals Commission.[7] Further, provision is made for the establishment of small-scale mining committees in mining areas. These committees consist of a District Chief Executive as chairperson, a District Officer, and four other members nominated by the District Assembly, Traditional Council, the Inspectorate Division of the Commission, and an officer from the Environmental Protection Agency (EPA). The Committee oversees effectively monitoring, promoting and developing mining operations in an area designated for small scale mining.[8]

[1] Minerals and Mining Act 2006 (Act 703), Section 18(1)
[2] Environmental Assessment Regulations 1999 (L.I. 1652), Regulation 17
[3] Ibid
[4] Environmental Assessment Regulations 1999 (L.I. 1652), Regulation 18
[5] Minerals and Mining (General) Regulation 2012 (LI 2173), Regulation 9
[6] Minerals and Mining Act 2006 (Act 703), Section 106
[7] Minerals and Mining Act 2006 (Act 703), Section 90
[8] Minerals and Mining Act 2006 (Act 703), Section 92

3. Grievance Mechanisms

a. Dispute Resolution in Mining Operations

Dispute resolution covers the methods or mechanisms that exist to settle disagreements and resolve grievances that may arise in the course of dealings between the several stakeholders involved in the mining industry. Resolution of conflicts includes both settlements out of court, known as alternative dispute resolution mechanisms, and in-court settlements.

In the mining industry, disputes may range from contractual issues related to mining rights to disputes between the government (and regulatory institutions) and mining right holders, grievances borne by the host communities and other impacted and interested persons, as well as in the exercise of mining rights by mining right holders.

The current legal regime in the mining industry promotes recourse to alternative dispute resolution mechanism among parties. The law states that all agreements concerning the grant of mineral rights should provide for alternative dispute resolution mechanisms (ADR) where disagreements arise.[9] These mechanisms include:

- **Negotiation**: This process involves the parties discussing possible outcomes directly with each other. To reach an agreement, parties may make proposals and demands, advance arguments, and continue discussions until a favourable position is reached. This process is beneficial because aside from flexibility, it also affords confidentiality as discussions remain between the concerned parties. This process is generally considered as being highly-cost effective and accessible due to its flexible procedures and low fees involved.
- **Mediation**[10]: This is a non-binding process, where the parties involve an impartial third-party in their negotiations, to help them reach a resolution. Mediation is advantageous in resolving disputes relating to mineral rights because it allows direct communication between parties, and also allows them to reach mutually beneficial compromises.
- **Arbitration**[11]: This involves the parties voluntarily agreeing to submit their dispute before an impartial person to have the person make a final and binding determination of their dispute. This method affords confidentiality and also saves time as compared to litigation. The difference between Arbitration and Mediation is that while the decision of an arbitrator is binding on the parties, mediation is non-binding.

These mechanisms, however, do not apply where the conflict arising out of the agreement for the mineral right relates to the non-payment of ground rent, royalties or other required payments associated with their mineral right. In such circumstances, the state may sue in its own courts, treating the sums owed as civil debts[12].

Generally, whenever there is a dispute between a mineral right holder and the state, that dispute is to be resolved amicably using ADR mechanisms.[13] Where the parties fail to resolve their dispute with negotiation or mediation within thirty days, the law permits either party to submit the dispute to be settled by arbitration.

[9] Minerals and Mining Act (Act 703), Section 27(4)
[10] Alternative Dispute Resolution Act,2010, Section 63
[11] Alternative Dispute Resolution Act, 2010, Section 2
[12] Minerals and Mining Act (Act 703), Section 26
[13] Minerals and Mining Act (Act 703), Section 27 (1)

While this is optional and parties are not required to submit the dispute to arbitration in such an instance, submitting their dispute for arbitration gives the parties more control over the outcome of the decision and can lead to decisions that are not disadvantageous to either party.

However, it is noteworthy that after a mineral right holder formally informs the Minister of their intention to have their dispute settled by arbitration, they are allowed to enjoy all the rights that were originally allowed under the grant, for a period of thirty days pending the determination of the dispute.[14] Where the party would not want to refer the dispute to arbitration or any ADR mechanism, then the benefit of the extension of their mineral right would not apply, since that benefit is only extended to parties who decide to resolve their disputes through alternative dispute resolution mechanisms.[15]

b. Disputes Arising Between Non-Citizens and the State

Where there is a dispute between a foreigner and the state and the parties are unable to resolve it within thirty days, they may agree to submit their dispute to arbitration. In doing this, all parties must agree with the decision to go to arbitration and it must be done in a manner that follows the internationally established standards for resolving such disputes. If after applying these mechanisms, the dispute remains unresolved, then they are to be guided by existing international agreements on investment protection, which have been ratified by both parties. Where there is no such agreement that has been ratified by both parties, then the arbitration is to be guided by the procedural rules for arbitration set forth by the United Nations Commission on International Trade Law.[16]

c. Recourse to the Courts

The 1992 Constitution of Ghana vest judicial power in the judiciary and for that matter the law courts. Thus, the courts remain the final arbiters to all disputes that may arise in all matters.

Where a mineral right is exercised, and a person perceives that exercising that mineral right is likely to interfere with the enjoyment of their fundamental human rights, they are allowed to apply to the High Court to seek redress. Such redress may include the court restraining the mineral right holder from exercising their rights under the grant or compensating the aggrieved persons for the injuries suffered. It is also possible for aggrieved persons to sue government institutions which have refused to perform their duties in relation to some mining operations. Upon such a suit, the court may grant a mandamus, an order compelling the institution to perform the duty that has not been performed.

Outside of human right considerations, the High Court retains a general jurisdiction to hear all suits, whether civil or criminal. Thus, in any situation where it is unclear which court an aggrieved stakeholder may approach, the High Court may have jurisdiction to hear the matter. It is worth noting that the ADR mechanism tend to be faster than court proceedings. Public courts often face backlogs and delays, whereas ADR can provide quicker resolutions, which is crucial for timely dispute settlement. Additionally, ADR focuses on collaboration and finding amicable solutions, which can help preserve business and personal relationships. Litigation, on the other hand, can be adversarial and may damage relationships irreparably.

[14] Minerals and Mining Act (Act 703), Section 27 (5)
[15] Minerals and Mining Act (Act 703), Section 27 (1)&(5)
[16] Minerals and Mining Act (Act 703), Section 27 (3)

d. Grievances Concerning a Landowner's Right to Compensation

Where a mineral right is granted over land belonging to another person, then the owner of the land is entitled to be compensated for the use of their land. In determining the amount that should be paid, the concerned parties must enter into negotiations and where they fail to reach an agreement on the sum to be paid as compensation, then either party may notify the Minister of the dispute to help determine the amount to be paid.[17]

Where a landowner or lawful occupier of land has received compensation for the use of their land but is dissatisfied with the terms of compensation offered by the mineral right holder or the Minister, he may seek redress at the High Court. Similarly, if a mineral right holder is dissatisfied with the compensation determined by the Minister, they have the option to request a review of the Minister's decision through the High Court.[18]

4. Challenges and Gaps

a. Public hearings are insufficient mechanisms as they cannot halt or otherwise prevent mineral exploitation

The Minerals and Mining Act 2006 makes no provisions for public hearing requirements in the grant of mineral rights to parties. The public hearings is only a requirement at the Environmental Impact Assessment stage where there are adverse public reactions to the proposed undertaking, the proposed undertaking would involve the relocation or resettlement of the community or if the EPA considers that the proposed undertaking would have far reaching consequences on the environment.[19] Therefore in the absence of these conditions, there is no legal requirement for public hearings under the EIA process. Public hearings provide an opportunity for stakeholders to be consulted on proposed mining explorations and gather input from the community on its likely effect.

Secondly, the legal requirement for public consultation does not set out the relevant considerations EPA has to make, including the weight to place on information or concerns from these consultations in the decision making. Legal prescription of these could offer a pathway into administrative challenge of decisions or judicial review of these decisions.

It is suggested that public hearings are made a compulsory stage in the allocation of mineral right process and that the views given at such public hearings are held relevant in whether a party is granted a mineral right or not.

b. Absence of ADR in addressing disputes concerning the environment.

The ADR Act which provides a framework for resolving disputes expressly excludes the environment as a subject matter of ADR processes.[20] The ADR Act also fails to define the scope of the concept of environment, consequently the extent of this prohibition is debatable. For example, it is not clear of the prohibition includes disputes related to land, health, income being adversely affected by destruction of the environment by mining activities.

[17] Minerals and Mining (Compensation and Resettlement) Regulations, 2012 (L.I. 2175), Regulation 2(6)
[18] Minerals and Mining Act (Act 703), Section 75
[19] Regulation 17(1) of Environmental Assessment Regulations, 1999
[20] Alternative Dispute Resolution Act, 2010 (Act 798), Section 1

ADR mechanisms provide a faster way for parties to address disputes without having to go through the traditional court process. It would also give the opportunities to third parties, not in contract with the government or mining corporations, to raise matters against such persons where it seems that their interests are being violated for equitable settlement between the parties. However, this would not apply currently since issues of the environment are expressly excluded from the scope of ADR. Parties would have to resort to court process to have their matters resolved and in cases of third parties with interest, they would have to prove that the matter involves the violation of a class right to get redress before the courts. For example, A Rocha Ghana together with several communities fringing the Atewa forest are presently in court to enforce their collective right to a safe environment against the Government of Ghana to prevent mining activities in the Atewa Forest.

c. Minerals Commission needs a fiat to prosecute offences

Illegal mining remains one of the biggest hinderances to sustainable utilisation of mineral resources. Fronting is prevalent in the sector and it presents a significant challenge to the regulator. Fronting is the practice where operators act to deceive or behave in a particular manner to conceal the fact that a company is not a citizen[21]. Artisanal mining, where simple tools and equipment are to be used, has been reserved for Ghanaian citizens and companies wholly owned by Ghanaians. However, some foreign nationals collude with some citizens who “front” for the mining licence. This leads to weaker accountability and the use of heavy and destructive chemicals in quantities not contemplated in EIAs done prior to the mining activities.

Currently, all these offences are prosecuted by the Ghana Police Service or the Attorney-General. The challenge this presents is that these institutions often lack the technical knowledge required to cogently prosecute these offences. The high standard of proof required in criminal offences and the technical knowledge required to successfully prosecute mining related offences, often discourage the police or Attorney-General’s from prosecuting these offences. To solve the underlying problem of lack of technical knowledge, we recommend that the Minerals Commission be given a fiat to prosecute mineral offences, akin to the fiat that is given to the Forestry Commission and other state agencies.

[21] To ‘front’ as provided for in Regulation 20 of LI 2431 means to deceive or behave in a particular manner to conceal the fact that a company is not a citizen.

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