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TEMPLARS ThoughtLab:

Mineral Rights Acquisition in Ghana: Local vs. Foreign Company Perspectives

Introduction

Ghana was ranked in 2021 as the 6th largest producer of gold in the world and the largest producer in Africa from 2018 to 2021¹. The country's mining sector was also rated as the fourth largest contributor to Ghana's gross domestic product in 2020² and is known to attract more than half of all foreign direct investment, generates more than One-third of all export revenues and is the largest tax-paying sector of the economy³. The mining industry, which used to be state-owned has over the years seen significant privatization. Notable among these private sectors players are Newmont Goldcorp from the United States of America, AngloGold Ashanti, which is the result of a merger between Ghanaian-based Ashanti Goldfields Corporation and South-African-based AngloGold. The involvement of the private sector in this very important industry in the Ghanaian economy makes the discussion on the acquisition of mineral rights very apt, when efforts are being made to restore the Ghanaian economy following the grant from the International Monetary Fund.

Types of mineral rights in Ghana

Under Ghanaian law, minerals in their natural state are vested in the President on behalf of the people of Ghana⁴. Consequently, irrespective of the interest/title which a person may hold in land, that person cannot engage in mining operations in Ghana without a mineral right granted by the Minister of Lands and Natural Resources⁵. The types of mineral rights which may be acquired include reconnaissance licence, prospecting licence, and a mining lease.

¹ November 2022 Mining Sector Report of the Ghana Investment Promotion Centre

² supra

³ International Trade Administration's article on: Ghana-Country Commercial Guide dated July 22, 2022

⁴ Article 257(6) of the 1992 Constitution

⁵ Section 9(1) Minerals and Mining Act 2006, (ACT 703)

A mining lease has the highest duration of 30 years or less and may be renewed for an additional term of not more than 30 years. A Prospecting licence on the other hand lasts for an initial period of not more than three (3) years, whilst a reconnaissance licence is granted for an initial period of not more than twelve (12) months. Reconnaissance and Prospecting licence may both be renewed for a term not less than the initial grant.

Reconnaissance licence holders are authorized to engage in regional exploration activities. This involves gathering initial data to assess the mineral potential of a broader area. They also have the permission to erect temporary buildings within their area of operations. However, their focus is primarily on conducting a preliminary assessment rather than detailed exploration.

In contrast, prospecting licence holders have broader privileges. They are permitted to search for minerals within the specific area designated by their licence. Their objective is to determine the extent of mineral deposits and evaluate their economic value. They, too, have the authority to erect temporary buildings to support their exploration activities.

Mining lease holders on the other hand have the right to mine for specific minerals and erect equipment, plant and buildings in furtherance of their mining activities. It is also worth mentioning that the Government of Ghana retains a 10% free carried interest in mining operations in the country at no cost to the government⁶. Each of the mineral rights may also be restricted in respect of industrial minerals such as granites, limestone, salt among others.

Qualification and Procedure for acquiring mineral rights in Ghana

In Ghana, it is only a body incorporated under Companies Act or the Incorporated Private Partnership Act which qualifies to apply for a mineral right⁷. The officers of the company such as the directors and secretary must also have Tax Identification Numbers (TIN) without which the incorporation cannot be completed. A TIN can be obtained from Ghana Revenue Authority (GRA). A company with foreign shareholding is also required to register with the Ghana Investment Promotion Centre (GIPC) after incorporation at the Office of the Registrar of Companies (ORC) and before the commencement of operations. To register with the GIPC, the company must submit a letter from the Bank of Ghana confirming that the company has satisfied the minimum Foreign Equity requirements. Where the company is a Joint Venture with Ghanaian partner who owns not less than 10% of the shares in the company, the minimum capital requirement to be satisfied is US\$ 200, 000.00. For wholly foreign-owned companies, the requisite capital requirement is US\$500,000.00⁸.

An applicant for a mineral right, shall after the incorporation of the company and registering with the GIPC proceed to apply to the Minerals Commission for the mineral right. The application for the mineral right is to be supported with documents such as the certificate of incorporation and the certified copies of the constitution of the company. The application must further indicate the number of blocks being applied for as well as the specific mineral over which the mineral right is sought.

⁶ Section 43, Act 703

⁷ Section 10, Act 703

⁸ Section 28, GIPC Act 2013 (Act 865)

The applicant must also demonstrate among other things that it has the financial and technical resources to engage in mineral operations and has also satisfied the environmental impact assessment requirements for the grant of a mineral right. To promote local content and local participation in the mining sector, applicants for mineral rights are now required to submit proposals on the recruitment of expatriates as well as the employment and training of Ghanaians⁹. The applicant must further indicate the number of Ghanaians to be placed in management positions bearing in mind the need for gender inclusion.

In all, it takes about 240 days to be granted a mineral right after submitting relevant documents to the Minerals Commission. The process in simple terms can be summarised as follows;

- The review of application by Minerals Commission,
- Submission of recommendation to the sector minister,
- Grant of mineral right by the minister
- Issuance of notification of grant to the applicant
- Payment of the applicable fees by the applicant.
- Parliamentary Ratification where the mineral right would involve the exploitation of a mineral

Transfer of Mineral Rights

Apart from a direct application to the Minerals Commission, a mineral right can also be acquired through a transfer or assignment from an existing mineral right holder to a new entity. The transfer of mineral rights would however be invalid unless the prior written approval of the minister has been sought¹⁰. Upon receipt of the minister's approval, the current licence holder and the prospective transferee must enter into a transfer agreement. The Transfer agreement would outline the conditions, obligations and restrictions attached to the mineral right. The Transfer document must also address the issue of royalties, taxes as well as community development commitments. The reason for these conditions is to ensure that the prospective transferee continues with the performance of obligations of the current mineral rights holder after the transfer or assignment.

Contract for the grant of mineral right or concession

Where a transaction or contract seeks to grant a mineral right or concession for the exploitation of minerals in Ghana, such contracts or transactions would require parliamentary ratification to be valid. Consequently, any transaction involving the transfer of a mining lease must undergo parliamentary ratification. This requirement is in place because mining lease holders have the authority to exploit minerals within their designated area. Given the significance of such activities and their potential impact, the involvement of the parliament ensures transparency and accountability in the transfer process. The requirement for parliamentary ratification is a constitutional mandate for which failure to comply with same, renders the mineral right so acquired, void and of no effect¹¹.

Another instance where the transfer of mineral rights requires the authorisation of a state agency to be valid is in respect of the change of control in a company holding a mining lease. This occurs where there is a transfer of ownership or control of a company that

⁹ Minerals and Mining (Local Content and Local Participation) Regulations, 2020 (L. I. 2431)

¹⁰ Section 14, Act 703

¹¹ In the matter of the Minerals and Mining Act, 2006 (Act 703) & Ors v Minister for Lands and Natural Resources Ex parte Exton Cubic Group & Attorney General Suit No. GJ/1424/17 dated 8th of February 2018.

holds the mining lease. The change could be the result of a sale of shares, a merger, an acquisition, or any other means that results in significant alteration of the company's ownership or management structure. The change of control in such instance can only be valid when the approval of the minister has first been sought¹². The prior ministerial approval enables the Minister through the Minerals Commission to ensure that the change of control is in line with the applicable laws and regulations as well as the contractual obligations of a holder of a mining lease.

Obligations and Reporting requirements after the Acquisition of mineral rights ¹³

Upon the acquisition of a mineral right, the holder is obliged to commence operations within a specified period and maintain standard record keeping and reporting requirements. A Reconnaissance Licence holder for instance, must commence operations within one (1) month of the grant of the licence and also report the discovery of new minerals to the Minerals Commission within thirty (30) days of discovery. The periods for the commencement of operations by Prospecting Licence and Mining Lease Holders are three (3) months and twelve (12) months respectively.

There are plethora of record keeping and reporting requirements which mineral rights holders must comply with. For Prospecting and Reconnaissance Licence Holders, geological and financial reports must be submitted to the Minerals Commission every quarter and the terms and conditions of their Environmental Permits must be complied with. The record keeping and reporting requirements imposed on mining lease holders under Ghanaian law are more stringent. They include the submission to the Minerals Commission monthly and half yearly reports on mining operations. The monthly report is to be submitted fifteen (15) days to the end of each month whilst the half-yearly report is to be submitted not later than thirty (30) days after the half year. Within thirty (30) days after the end of a financial year, a report which summarises the results of the mining operations that have been undertaken in the title area during the financial year must also be submitted to the Minerals Commission. The financial report may in addition contain a description of the operations proposed for the following year as well as an estimate of the production and revenue to be obtained from the operations. Furthermore, within 180 days after the end of each financial year, a copy of a mining lease holder's annual financial report comprising of its balance sheet, profit and loss account notes pertaining to records, is to be also tendered to the Minerals Commission.

The failure to submit these reports or the making of fraudulent declarations in the report constitutes an offence punishable by the payment of a fine of the cedi equivalent of Five Thousand United States Dollars (US\$5,000.00). For each day the offence continues, there is a further penalty of the cedi equivalent of Five Hundred United States Dollars (US\$500). Where a body corporate or partnership fails to comply with these requirements or makes fraudulent declarations in these reports, each director or officer of the body corporate or partner in the partnership would be deemed to have also committed the offence.

Conclusion

¹² Section 52, Act 703

¹³ Regulations 7, 8 & 9 of the Minerals and Mining Regulations (General Provisions) 2012 (L.I. 2173)

The mining sector serves as one of the major contributors to Ghana's economic growth. The mining industry which used to be state-owned has now witnessed involvement of both foreign and local private investors. The processes and conditions for the acquisition of mineral rights allow the government and the state agencies to maintain reasonable level of control of the sector whilst allowing private partners the flexibility of investing in the industry. For instance, although the transfer of mineral right to a foreign company is permissible under Ghanaian law, the transfer would be invalid without the approval of the sector minister. Similarly, the acquisition of a mining lease is void and of no effect unless a prior parliamentary ratification is obtained. The mineral rights once acquired must be utilised in accordance with the terms and conditions of the grant. These include the submission of accurate and periodic reports to the Minerals Commission.