

HOW COMPETITIVE IS GHANA'S NEW MINING LAW IN ATTRACTING FOREIGN DIRECT INVESTMENT?

ANNOTATED BIBLIOGRAPHY

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My research project focuses on the competitiveness of Ghana's new mining law in attracting foreign direct investment. My objective is to demonstrate that a clear, transparent, predictable and effective legal framework to govern the activities of the mining industry is indispensable in the relative competitiveness of a country in attracting foreign direct investment. Ghana adopted a new mining law on 31 March 2006 with the objective attracting high levels of foreign direct investment to commensurate with her status as the most attractive destination for mining investment in Africa.

My thesis will focus on a comparative study of Ghana's new mining law with the Latin American Mining law Model. The model refers to the key features of the legal and regulatory framework for the exploration and exploitation of minerals in many Latin American countries representing a blend of concepts and procedures distilled from the actual laws of such countries as Chile, Peru, Bolivia and Mexico. The model was adjudged and recommended by the World Bank as a criterion for good laws in attracting foreign direct investment for which mineral-rich countries should emulate or seek to achieve in reforming their legal framework.

The following Annotated Bibliography deals with some of the literature for my thesis project. I must point out the bibliography is still a work in progress and therefore not comprehensive at this stage.

LEGISLATION

Chilean Mining Code, Law No. 18,248, Official Gazette 14 October 1983.

Organic Constitutional Law of Mining Concessions, No. 18,097, Official Gazette 21 January, 1982.

Peruvian Law for the Promotion of Investment in the Mining sector, Legislative Decree No. 708, Official Gazette 14 November, 1991.

Single Revised text of the General Mining Law of Peru, Supreme Decree No. 014-92-EM, Official Gazette 4 June 1992.

Minerals and Mining Act, Law No.703 (Act 703) of 22 March 2006, Official Gazette 31 March, 2006.

Minerals and Mining Law, Provincial National Defence Council Law No. 153, 4 July 1986 of Ghana, Official Gazette 18 July 1986.

Secondary Sources

Books

Elizabeth Bastida, Thomas Walde, and Janeth Warden-Fernandez (eds.), *International Comparative Mineral Law and Policy: Trends and Prospects*(The Hague: Kluwer Law International, 2004).

This book, a mining compendium is a compilation of more than sixty papers. The book reflects a range of approaches and experiences in mineral-rich countries on mineral law and policy. The book is divided into three chapters but it is the articles in chapter one that is relevant to my research work. The various authors discuss the past and current trends in legal regimes applicable to the exploration and exploitation of mineral from both international and comparative perspectives. It was clear from the articles in this chapter that there is a growing consensus that foreign direct investment in mining activities is attracted by a competitive legal and investment framework.

Dani Le Barberis, *Negotiating Mineral Agreements: Past, Current and Future Trends* (London: Kluwer law International, 1999).

This book basically explores the various forms of a mining agreement can take. The author analyses the evolution of mining agreements in four mineral-endowed countries. These were Australia, Indonesia, Papua New Guinea and Chile. The author also discusses the need for most governments particularly the developing ones eager to attract foreign direct investment to balance their mining policies with the investors' need for stability of the investment terms and parameters, a key criterion most foreign investors will consider before deciding to invest in a foreign mining project. The author concludes with an explanation on how to write a mining agreement that will stand the test of time.

Koh Naito and Felix Remy, *Mining Sector Reform and investment: Results of a Global Survey* (London: Mining Journal Books, 2001).

This book was prepared by the officials and consultants of the World Bank and reviews the bank's experiences in legal and fiscal reforms in mining globally. The authors discuss the results of a global survey on mining reform and its relationship to exploration worldwide. The objective of the survey which covered thirty five countries was to develop a comprehensive and objective methodology for evaluating the impact of mining sector reforms. The authors conclude that long term success in attracting private investment in mineral exploration depends on how a mineral-rich country adapts its legal, fiscal and institutional framework to the challenges of competitive global markets for capital and mineral products.

Koh Naito, Felix Remy and John P. Williams, *Review of Fiscal Frameworks for Exploration and Mining* (London: Mining Journal Books Ltd., 2001).

This book has been prepared by World Bank Officials and Consultants and reviews the bank's experiences in legal and fiscal reform in mining globally. The book primarily discusses the result of a survey of the legal and regulatory framework, fiscal regime and environmental requirements in selected mineral-rich countries. Chapter three which focuses on global

trends in Legal frameworks and Chapter four which discusses the key building blocks of mining law reforms are particularly useful to my thesis project. The objective of the survey and as outlined in the book is to determine the best practice in mining law among the developing countries.

Otto James and Cordes John, *The Regulation of Mineral Enterprises: A Global Perspective on Economics, Law and Policy* (Westminster, Colorado: Rocky Mountain Mineral Law Foundation, 2002)

This book explores a broad range of issues that affect the mining industry globally. It covers topics such as mining policy, mineral taxation and environment and sustainable development. The discussion of the increasing importance of a mining code as a central source of regulation in chapter three is what makes the book relevant to my thesis project. The author in this chapter focuses on the trends in national mining regulation system in developed, developing and transitional economies. Of particular relevance is the framework of questions that should often be considered in analyzing a mining law from exploration and development to mining and mine closure.

Articles and Journals

Elizabeth Bastida, “A Review of the Concept of Security of Tenure: Issues and Challenges”, 2001, *Journal of Energy and Natural Resources Law*, Volume 19, Number 1.

This article discusses security of tenure as a key criterion that any Investor will consider before deciding to invest in a foreign mining project. The author reviews the various interpretations that have been given the concept over the years. The author contends that the implementation of the concept by some Latin American countries contributed immensely in helping to attract foreign direct investment to their mining sector. The author further argues that the increasing concerns for stricter environmental regulation, sustainable development and the social impacts of mining pose serious challenges to the concept. The article therefore calls for the need to balance these challenges with the concept in order not to undermine the competitiveness of the mining industry in the countries faced with these challenges.

Elizabeth Bastida et al., “Mining Investment and Policy Development: Argentina, Chile and Peru”, *CEPMLP Internet Journal*, Volume 16, Article 10.

This article provides an overview of the law and policy developments that have taken place in the mining industry of Chile, Peru and Argentina within the last two decades. Like the article by John Williams, the authors also discuss the Latin American Mining Law Model and highlighted the historical reasons behind the model. Unlike John Williams, the article concludes by analyzing the challenges that these countries are likely to face in the changing context of mineral sector governance within the concept of sustainable development.

John P. Williams, “The Latin American Mining law Model”, in Elizabeth Bastida, Thomas Walde and Janeth Warden-Fernandez (eds.), *International and Comparative Mineral Law and Policy: Trends and Propects* (The Hague: Kluwer law International, 2005) 741-757.

The author of the article describes the so-called “Latin American Mining Law Model” Which he defines as the distillation of the key features of the legal and regulatory framework for minerals exploration and mining in such countries as Chile, Peru, Mexico, Bolivia among others. The author delves into some major features of the model and admits that although the model has not been enthusiastically embraced worldwide, it inspired changes that made the mining laws of many mineral-rich countries more responsive to the needs of the mining industry globally.

Robert Pritchard, “Safeguards for Foreign Investment in Mining”, in Elizabeth Bastida, Thomas Walde and Janeth Warden-Fernandez (eds.), *International and Comparative Mineral Law and Policy: Trends and Prospects* (The Hague: Kluwer law International, 2005) 73-97.

This article contends that private investment in mining especially by multinationals depends on a competitive legal and investment framework of the host country. Pritchard is of the view that the most adverse fears of foreign investors is the change of the legal regime in favour of the host country especially after the investor has initially been encouraged by the host state to commit its capital. The author therefore discusses the key legal safeguards which multinationals in particular generally look for before investing their funds in a mining activity in any country. These include legal and fiscal guarantees as well as international arbitration mechanisms to enforce the performance of these guarantees.

Thomas Walde, “Investment Policies and Investment promotion in Mining Industries” (1991) 6 ICSID/Foreign Investment Law Journal, 1 (Spring) 94-113

This journal discusses stability of contract terms as key criterion to be considered by investors before a decision is made as to whether to invest in a mining project in any country. The author emphasized this is very essential for most long term investments in mining in order for the investor as well as his sponsors to be assured that the expected benefits of the investment will be realized. The author further argues that the stability of the investment terms and conditions covers not just the proprietary rights and title but extends to taxation, import and export regulations and foreign exchange regulations among others.

Reports

The Challenge of Mineral Wealth: Using Resource Endowments to foster Sustainable Development (London: International Council on Mining and Metals, April 2006).

This is a detailed report of a research project sponsored by the World Bank Group, International Council on Mining and Metals and UNCTAD. The report is a case study of socio-economic impact of mining in four countries comprising Chile, Peru, Ghana and Tanzania. The report develops a toolkit focusing on governance processes to assess local, regional and national socio-economic impacts of mining in these four countries with the ultimate aim of applying to a broader set of mineral-rich countries. Although the report covered a broad range of social, economic, political and historical issues, it is relevant in helping to understand the reasons behind the legal reforms in Latin America particularly in Chile, Peru and Ghana which are also the countries to be covered in my thesis project.

The World Bank Industry and Mining Division- Industry and Energy Department, World Bank Technical Paper No. 345: A Mining Strategy for Latin America and the Caribbean (Washington D.C.: The World Bank, 1996).

This is a detailed report based on studies undertaken by the World Bank in six Latin American countries as well as the World Bank's experience elsewhere in the world. The studies specifically covered Argentina, Bolivia, Chile, Ecuador, Peru and Mexico. The report essentially highlights the major features of the legal framework for the exploration and exploitation of mineral which succeeded in transforming the region's mining industry in order to provide useful guides for governments in other mineral-rich countries in other parts of the world.

The World Bank Industry and Mining Division-Industry and Energy Department, *Strategies to attract new investment for Africa mining* (Washington D.C.: The World Bank, June 1994).

This report examines the strategies that African countries should adopt in if they are desirous in developing their mineral resources. It explores a wide range of measures that African countries must put in place to enable them compete favourably for global mining capital. The report particularly highlights the need for a comprehensive mining law which grants mineral rights according to well-defined criteria rather than governmental discretion among other factors. What is essentially useful about this report to my thesis project is that it discusses the lessons from country experience of Ghana and even Chile although the focus was on Africa.

**Fraser Institute, *Annual Survey of Mining Companies, 2005/2006*,
Online: < <http://www.fraserinstitute.ca/admin/books/files/mining20052006.pdf>> (last visited on 21/10/2007).**

The Fraser Institute is a Canadian-based independent research and educational organization. The institute's researches cover a wide range of issues globally. Its annual survey of mining companies which commenced in 1997 evaluates how policies of mineral-rich countries influence decisions by companies or businesses across the world to invest in mining projects in the countries surveyed. The survey primary provides a comparative analysis of the existing political legal, institutional, contractual and regulatory frameworks of the various countries surveyed by relying on responses from exploration and mining companies working in the countries identified in the survey.

Vilhena, F.C., *Main Issues for Formulating Mining Policies Towards Attracting Foreign Investment*, in *The Mining Industry: Old Threats and New Challenges*, CEPMLP, University of Dundee Annual Mining Seminar, 10-14 June 2002.

One major issue that any legal framework for mining should address is how to resolve conflicts between mining and other land uses. These conflicts may cover such issues as when exploration and mining activities will prevail over other uses of the land and the rights of way and to easements over third parties' land. Vilhena makes it clear that if a country is to attract and sustain investment in the mining sector, then its mining law must define the rights of landowners and other occupiers, ensure that investors in the mining industry recognize these rights in negotiating land access and creates an effective and practical mechanism to enforce such provisions in the law. This paper is particularly useful in the area of land access and compensation which is one of the key features that

will form the basis of my comparison of Ghana's new mining law to the Latin American Mining law Model.