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Too Much, Too Little: the Dilemma of Ghana's Legal Regime for Investment in the Mining Sector

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Abstract: Ghana, through its constitutional arrangement, practices the public ownership of natural resources. The state grants mining rights to prospective investors in the mining sector. However, the exploitation of natural resources in Ghana has had devastating effects on its mining communities including deprivation and destruction of farmlands, delayed compensation, rising cost of living, inadequate housing, youth unemployment and family disorganisation. Besides, mining communities in Ghana face a number of challenges such as the failure to incorporate in legal provisions wealth creation opportunities for local indigenes as compensation for the deprivation of their land, and conflicts that erupt between mining companies and indigenes due to deprivation of their source of income. Using the doctrinal lecgal research, this article seeks to examine the legal environment regulating investments and investor protection in Ghana's mining sector. The paper postulates that the prevailing legal regime in Ghana's mining sector protects investors but ignores the needs of the local communities. It reveals that the current legal regime in Ghana for development of mining communities is heavily dependant on the royalties paid to the state, which has failed to ensure adequate development in mining communities. The article argues for a paradigm shift and advocates for a balance of protection and treatment for investors and mining communities because the existing legal regime for investment gives too much to investors and very little to mining communities.

Keywords: Mining, Mining Rights, Development, Mining Communities, Foreign Direct Investment, Natural Resources and Deprivation

1. Introduction

Society determines the ownership of natural resources wherever found [15]. Title to natural resources in resource-rich countries may be private or public ownership[1] [40]. The exploitation of natural resources often comes with numerous challenges [22]. The article discusses two such challenges: the failure to incorporate provisions in the law that creates wealth and opportunity for the local indigenes as compensation for the deprivation of their land, and the conflicts that erupt between mining companies and indigenes due to deprivation of their source of income [14, 25, 30, 32, 36]. The involvement of foreign investment in Ghana's mining sector stems from the capital nature of exploiting minerals which is capital intensive [2]. In the face of these challenges and the need to exploit the country's natural resources, this article argues that the existing legislation regulating the exploitation of minerals by mining companies tends to overly protect mining companies and their investment in the resource-rich countries at the expense of the local indigenes.

Article 257(6) of Ghana's Constitution vests all mineral

1 The private system of ownership operates in the United States of America which has been recognised by their courts. Ghana operates the public system of ownership through Article 257 (6) of the 1992 Constitution of Ghana.

2 Due to the capital intensive nature of exploiting minerals, Ghana has signed mining leases with mining companies to exploit the natural resources. 'Galamsey' now abounds in Ghana due to the reduced cost of using same to exploit natural resources. It has a devastating effect on river bodies and forest reserves.

resources in Ghana in the President as a trustee for citizens [3] [1]. Ghana's Constitution makes the state the sole party to enact laws regarding exploitation and granting mining leases to prospective investors in the sector. Ghana's legal regime for exploiting natural resources protects the investor's interest without equal protection for the local indigene. This article thus argues that mining legislation must spread the security and benefits of mining to cover relevant local communities.

The article has six parts. The first part introduces the discussion and set the premise for the legal regime for exploiting natural resources in Ghana. The second part is devoted to ascertaining the considerations made by mining companies regarding their investment destinations. The third part assesses the legal regime by examining legislation dealing with investment in Ghana's mining sector. It also focuses on investor security and the protection of investment in the mining sector. The fourth part highlights the impact of mining on mining communities and advocates balancing the interest of the mining companies and the mining communities in the laws relating to mining. Part five attempts to proffer suggestions to improve the existing imbalance treatment under the relevant laws and part six concludes the discussion.

2. Considerations for Investments in Mining Sectors

This section seeks to assess the general considerations that influence investment in mining communities and ascertain whether the case of investment in Ghana's mining industry is different from what the literature postulates. This assessment will inform the suggestions made by this paper in terms of re-examining mining laws under which developing resource-rich countries like Ghana grants mining rights to mining companies.

2.1. Failure to Provide for Investment in Local Communities

A host of considerations influence investment in mining sectors [4] [50]. Sadly, none of these considerations speaks about investing in the local community. Local legislation in Ghana has failed to make provisions for mining companies to invest in mining communities. The United Nations has adopted the principle of 'Permanent Sovereignty over Natural Resources' (PSNR) to give resource-rich countries the right to control their natural resources [5]. The first resolution states that 'the right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned'[6]. The resolution gives resource-rich countries the right to control their natural resources. The issue that requires urgent consideration is what factors inform resource-rich states when formulating mining legislation to manage natural resources.

The PSNR is a tool to empower and benefit people and not a vehicle for suppressing the interests of the indigenes or serving the political elite's attention [26]. Actions of a resource-rich country regarding the exploitation of natural resources that fail to advance the welfare of its citizens negate the intentions of the PSNR. Ng'ambi argues that the PSNR ensures that resource-rich nations have control over their natural resources in five areas [42]. These areas comprise the right to dispose of natural resources freely, the freedom to explore and exploit natural resources freely; the right to use natural resources for development; the right to regulate foreign investment; and the right to settle disputes based on national law [42]. The paper focuses on the fourth area, which deals with the right of the resource-rich country to regulate foreign investment. The paper postulates that regulating foreign investment empowers the host nation to formulate its investment laws in the mining sector to benefit both the investor and the host developing country.

2.2. Protection for Mining Investment

However, the trend for investment by mining companies in resource-rich countries portrays different considerations for such investments. Mining investors have been attracted to resource-rich countries due to competition between host developing countries to attract investors into the mining sector. [38] The race to attract foreign investors in developing resource-rich countries has led to the proliferation of legal regime that offers protection to mining investors. The incentives provided include international arbitration in foreign jurisdictions, prohibiting expropriation without compensation, and committing to stability regimes [7]. The position resonates with Oman's observation that 'competition among governments to attract corporate investments appears to have heated up in recent years [8] [13, 45]. Favourable geology in countries still requires enacting laws termed as 'attractive mineral investment regime' to attract investment in the mining sector [13].

The paper contends that resource-rich developing countries should focus on two interests: creating an enabling regime

3 1992 Constitution (Ghana), Art. 257 (6) The clause states as follows: *'Every mineral in its natural state in, under or upon any land in Ghana, rivers, streams, water course throughout Ghana, the exclusive economic zone and any area covered by the territorial sea or continental shelf is the property of the Republic of Ghana and shall be vested in the President on behalf of, and in trust for the people of Ghana.'*

4 Paul Mitchell cites ten main reasons reproduced hereunder as the main considerations that informs investment destinations of mining companies in resource-rich countries. The considerations are geological potential for target mineral, profitability of potential operations, security of tenure, permitting ability to repatriate profits, consistency of minerals policies, realistic foreign exchange controls, stability of exploration terms and conditions, ability to pre-determine environmental obligations, ability to pre-determine tax liability, and stability of tax regime.

5 See Resolution 1803 (XVII) passed by the United Nations in 1964.

6 See Resolution One of Resolution 1803 (XVII).

7 Tienhaara (n 13), 372-373.

8 Dundee: Centre for Petroleum and Mineral Law and Policy, 1994, 2 who argues that the trend saw mining companies gaining access to vast portion of land areas in developing resource-rich countries.

for mine investors to flourish and balancing that with the benefit of the resource-rich country through legislation. In this regard, the legal system for investment takes care of the two competing interests instead of just one. For this reason, Campbell and others have referred to African mining codes as 'inward investment' that failed to set a plan for growth in developing resource-rich countries [21].

The commitment of States to protect the investment in mining through bilateral investment treaties has further protected investors in the mining sector with no linkage to the mining communit [9]. The bilateral agreements are usually developed by industrialised countries that favour foreign investors, emphasising international arbitration and expropriation without compensation [10]. The rationale for resorting to international arbitration emanates from fears expressed by foreign investors that the local courts lack the competence to decide investment disputes and that they are unable to resist the political pressure of the state to rule in their favour [20]. Developing resource-rich countries face challenges in international arbitration in the areas of lack of transparency, accountability, openness to third parties, and high fees for lawyers and the panel of arbitrators [11]. With this background, any dispute that arises becomes a drain on the developing resource-rich country already struggling with a low level of development.

Expropriation without compensation is not possible now, but another form of it is known as 'indirect takings' [12] or 'indirect expropriation' seems to abound [13]. Indirect takings have two components, namely 'creeping expropriations' and 'regulatory takings' [14]. The creeping expropriation occurs when the host state gradually takes decisions that infringe on the ownership right of the investor, which devalues the investment [15]. The regulatory takings refer to the host state invoking health, environment, morals, culture, or economic regulations [46]. In addition to these, adverse changes in existing law are among the 'most feared legal risks of mining investors', and protection exists for investors in host developing countries through stabilisation clauses. [16]. Stabilisation clauses limit state powers to pass laws that oppose investors' interests during their investment [47].

The need for resource-rich developing countries to attract foreign investment is high. The preceding discussions reveal that while most of the measures protect the interest of the mining investors, very little is left for the resource-rich country except for the receipt of royalties and corporate tax for the host government. Although investors need protection, new trends such as the environmental impact of mining, taking care of local communities, adhering to human rights and indigenous rights have emerged, which must be addressed in mining legislation and signing mining leases [24]. The inability of resource-rich developing countries to factor these issues into law on mining and mining leases needs redress, and this paper advocates a paradigm shift. Failure to address the one-sided legislation favouring mining investors would result in the exploitation of minerals that cannot create wealth for people deprived of their lands; hence, conflicts would persist in mining communities.

The problem of having one-sided legislation that protects mining investors alone is due to the process of granting exploration and exploitation rights to mining companies. The following section briefly discusses applying for exploration rights and the utilisation of royalties' vis-à-vis the development of mining communities.

2.3. Exploration Rights and the Development of Mining Communities in Ghana

In Ghana, government agencies handle the application for the exploration of mineral rights without the involvement of the local communities where the mining takes place [43]. This means that the rights or licenses granted have nothing to do with the local economy. Mining companies pay royalties and corporate tax to the state, which goes into the Consolidated Fund [16] [1] for disbursement by the government [17] [2]. After distributing these funds, there is eventually nothing left to develop the communities where the mining takes place. Companies undertaking exploration usually promise the local communities that resource exploitation will benefit them, but these promises are not documented to make them enforceable [48]. The result is that Ghanaian mining communities gain minimal benefits from the operations of these mining companies [23, 43].

Ghana's mining benefits are experienced at the macro level but not at the micro level [37]. Meanwhile, the mining communities lose out on development, suffer from cyanide pollution, displacement of farmers, land deprivation, dust pollution, chronic impoverishment, social disruption, decreased access to essential public services, human rights abuses, and loss of land and resources due to relocation [37] The lack of development has resulted in increased community resistance to mining activities [33, 34].

In a bid to reduce the conflict, mining companies have introduced Corporate Social Responsibility (CSR) and Sustainable Development strategies geared towards ameliorating the tension existing in mining communities [19,

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9 Tienhaara (n 13) 376.

10 Tienhaara (n 13) 376-377.

11 Tienhaara (n 13) 378. The author makes reference to UNCTAD, 'Investor-state disputes and policy implications Trade and Development Board: Commission on Investment, Technology and Related Financial Issues, Ninth Session, 2005b, and states that companies spent up to US$ 4 million on lawyers and arbitrators' fees for investor-state disputes with countries expected to spend about US$ 400,000 or more and US$ 1-2 million in legal fees.

12 UNCTAD, 'Taking of property: Issues in International Investment Agreement, UNCTAD/ITE/IIT/15, 2000, Geneva: United Nations, 4. It refers to steps taken by the developing host nation resulting in the foreign investor losing 'management, use or control or a significant depreciation of the value of the assets of the foreign investor'.

13 Tienhaara (n 13) 379.

14 Tienhaara (n 13) 379

15 Tienhaara (n 13) 379

16 1992 Constitution (Ghana), Art. 176 (1) states that the Consolidated Fund receives all revenues due to the state and any other money raised on behalf of the government.

17 (n 31), Art. 267 (6), Office of the Administrator of Stool Lands Act, 1994, (Act 481), s. 7 for the disbursement of the royalties.

33] The introduction of these two interventions has not solved the problem, with others debating CSR's usefulness and its long-term effects [44]. With this conflict, the tension between mining communities and mining companies would continue to exist. The paper thus argues for provisions in mining legislation for investing in mining communities to protect both the interest of the mining communities and the mining companies.

The following section proceeds to examine the relevant laws of Ghana that regulate the exploitation of minerals in Ghana. The section aims to identify whether mining legislation in Ghana benefits mines investors and the mining communities. What explains the omission if there are benefits enjoyed by only one party (investors as against mining communities)? The discussions of the foregoing questions form the basis of this paper.

3. The Legal Regime for Mining Investment in Ghana and Investor Security in Ghana

The legal basis for exploiting natural resources starts with the constitutional provision that vests all natural resources found in Ghana in the President as trustee for Ghanaians [18] [1, 22] is Article 257 of the 1992 Constitution which mandates Ghana to enact the necessary laws to regulate the exploitation of natural resources. Accordingly, past and present governments of Ghana have passed legislation for that purpose [19] [6-9, 11, 12].

As discussed earlier, attracting investors to resource-rich countries requires that the host developing country assures the investor of investment security. In this regard, the legal regime of exploiting minerals must make bold statements about the host nation's preparedness to settle amicably any dispute that arises in the course of the investor's activities in the host country. In addition, the host developing state would not pass any law that will adversely affect the investor's interest. Again, the benefits of a foreign investor can be protected by ascertaining whether the host developing state has signed a bilateral or multilateral agreement in which the investor's nation is a signatory.

Before Ghana gained independence in 1975, the right to engage in mining in Gold Coast (the former name of Ghana) depended upon executing a concession agreement between chiefs and European mining concerns with 'expansive terms' in terms of the Europeans [28]. The concession agreements [20] [3-5, 7] lacked provisions targeted at developing mining communities, which reflects in current mining legislation in Ghana.

The focus of this article is to examine whether the relevant legislation takes care of the two challenges identified in this paper. The paper proceeds to discuss the applicable laws regarding the protection they offer investors vis-à-vis how it caters to the interest of the local indigenes. The scope of the discussion of the legal regime focuses on post-independence to date and the level of security the legal regime offers investors in the mining sector in Ghana. The section further seeks to determine whether mining communities have protection regarding development in their communities.

3.1. The Minerals Act 1962 (Act 126) [21]

Ghana passed the Minerals Act in 1962 after the concession era. Act 126 vested all minerals in the country in trust for and on behalf of all Ghanaians [22] [8] Apart from vesting natural resources in the state, Act 126 further gave the President the right to grant licences for prospecting minerals, dredging rivers, streams or watercourses for gold and other minerals [23] [8]. The beneficiaries of these licenses paid rents and compensation for the use of the land to the state [24]. The President had the right of pre-emption of minerals and the appointment of a statutory company to manage the mine as an agent through an Executive Instrument (E. I.) [25]. This law failed to make provision for using some of the revenue accrued to the state from the rents and commission to invest in the mining communities by way of development. The paper contends that vesting the minerals in the country places a responsibility on the state to use the resources that accrue to the state equitably. The Minerals and Mining Act frowned upon obstructing the President's power of pre-emption, which could lead to the cancellation of the mining right and a fine when found guilty [26]. This and other government actions served as a precursor for the European mining companies to abandon investments in the mines.

Ghana assumed ownership of natural resources found in Ghana after independence in 1958 when the Kwame Nkrumah government set up the Boateng Commission to inquire into the terms and the basis for holding mineral and timber rights [29]. The Commission, after its work, made the following recommendations to the government:

(1) Government takes over mineral rights from the landowning communities on whose behalf grants had hitherto been made by their chiefs and other local leaders;

18 1992 Constitution (Ghana) Art. 257 (6). See also C. Adomako-Kwakye.

19 The laws passed in the mining sector to regulate the exploitation of minerals includes, The Minerals Ordinance 1936 (Cap 155), the Minerals Act 1962 (Act 126), the Minerals and Mining Law 1986 (PNDCL 153) the Minerals and Mining Act 2006 (Act 703) and the Minerals and Mining (Amendment) Act 2015 (Act 900). The Ghana Investment Promotion Centre Act 2013 (Act 865) has provisions that protects the interest of mine investors.

20 The concession agreement was backed by the following laws, Concession Ordinance of 1900 (Cap 14,) Concession Ordinance of 1939 (Cap 136), the Mineral Ordinance 1936 (Cap 155) and the Concession Act 1962 (Act 124)

21 This was a seven page law passed solely to consolidate the power of the state regarding ownership of minerals in Ghana.

22 See the preamble and section 1 of Minerals Act 1962 (Act 126). The preamble states as follows; 'AN ACT to provide for the vesting of the ownership and control of minerals throughout Ghana in the President on behalf of the Republic of Ghana in trust for the People of Ghana, to enable the President to issue prospecting, mining, dredging and water licences …. among others.

23 See Minerals Act 1962 (Act 126), s. 2 (1) (a).

24 (n 46), s. 3 (1) (a).

25 (n 46), s. 5 (1) and (2).

26 (n 46), s. 8.

(2) *Royalties to be paid by mining companies be calculated as a percentage of net profit (rather than be fixed amounts whose value diminished with time);*
(3) *Landowners are entitled to a percentage of mining royalties determined by law;*
(4) *More stringent rules are developed to restrict the area over which a mineral right could be held and its duration;*
(5) *Power be given to a government body to terminate a mineral right held for an undue length of time without adequate activity by the grantee;*
(6) *Government [should] investigate the advisability of acquiring 51% of the shares in mining companies; and*
(7) *Consideration is given to the advisability of establishing a state monopoly to export minerals [[27]].*

The government implemented the recommendations of the Commission and took the following actions. First, the state acquired 51% shares in five mines at Bibiani, Tarkwa, Prestea, Konongo and Dunkwa, belonging to the Europeans who wanted to dispose of their operations [[28]]. Second, the state took a 55% majority stake in Ashanti Goldfields Corporation, Ghana Bauxite Company and Ghana Consolidated Diamonds. Third, Ghana formed the State Mining Corporation to manage these mines but failed to invest in these entities, which led to a deterioration of state mines causing them to become obsolete, uncompetitive and stagnated. Ghana subsequently succumbed to the international trend that de-emphasised state ownership of mining companies to attract private investors.

The deteriorating situation in mining continued until the Mineral and Mining Law in 1986 (PNDCL153), which gave an advantage to private mining companies. The next section discusses PNDCL 153 to determine whether the law addressed the interest of the mining communities (conscious development) and the mine investors regarding the investment regime in the law.

3.2. The Minerals and Mining Law 1986 (PNDCL 153)

Given the wretched state of the mining industry, the government of Ghana in 1983 initiated the Economic Recovery Programme (ERP) and Structural Adjustment Programme (SAP) to address the concerns of private investors and tackle challenges in the mining sector. The government took decisions under the ERP and the SAP to revamp the mining industry in Ghana [25, 30, 31, 41, 48]. The state sought help from bilateral and multilateral agencies, disengaged from mining and offloaded its shares to the private sector [31]. The government stake in state mining companies reduced from 55% to between 19-20% [29]. The reforms resulted in the complete divestiture of state mining companies to the private foreign sector companies with a statutory 10% free equity in these companies for the state [30].

27 Tsikata (n 50), 10.
28 Tsikata (n 50), 10.
29 Akabzaa and Darimani, (n. 33), 19.
30 Akabzaa and Darimani, (n. 33), 19.

This law created an enabling environment for foreign mine investors. The provisions of PNDCL 153 favoured the mine investors to the extent that it immediately brought thirteen mining companies on board to work in Ghana [31]. Part four of the law, titled tax, incentives and benefits, treated mining companies generously. Firstly, the payment of royalty was liberal, as it stated that it should not be more than 12% and less than 3% of the total revenue of the mining company [32] [9]. However, the Secretary responsible for Mines could consult the Finance and Economic Planning Secretary on the advice of the Minerals Commission to defer wholly or part the assessed royalty if such decision is of national interest and in the interest of the production of such minerals [33]. The law, however, failed to define national interest and the interest of the production of the minerals nor give guidelines under which the delay or waiver should occur. Apart from the failure to state an exact rate of royalty payable, the provision could also compromise state officials and benefit mining investors.

Secondly, an investor in the mining sector was entitled to a capital allowance of 75% of capital expenditure incurred in the investment year and 50% in subsequent years [34]. This provision drastically reduced the total amount of tax payable by the mining companies in Ghana. Thirdly, mining companies got an exemption from paying import duties on plants, machinery, equipment and accessories for the commencement of mining operations [35].

Additionally, the authorities could defer wholly or in part the payment of registration and stamp duties for five years if satisfied that the circumstances prevailing at the time of the application for the benefit justify such deferment [36]. Furthermore, holders of mining leases were permitted to retain portions of their foreign exchange in a foreign account to buy spare parts, inputs for mining, debt servicing, payment of dividends and remittances to expatriate staff [37]. The liberalisation of the mining laws as discussed under PNDCL 153 provided a generous concession to multinational companies. The United Nations Conference on Trade and Development (UNCTAD) confirmed this when it revealed that the foreign direct investment that came to Africa's mining sector stood at USD 15 billion in 2004 [25].

The PNDCL 153 protected the interest of mine investors regarding disputes arising between the investors and the government of Ghana. In a conflict between the state and the foreign investor, the parties shall resolve their differences amicably through mutual discussion [38]. If joint talks fail, the parties may submit themselves to arbitration according to the following procedures, the rules provided by the United

31 Akabzaa and Darimani, (n. 33), 20.
32 See Minerals and Mining Law 1986 (PNDCL 153), ss. 22 (1) and (2).
33 (n 58), s. 22 (3).
34 (n 58), s. 26 (a).
35 (n 58), s. 27 (a).
36 (n 58), s. 28.
37 (n 58), s. 29 (1) and (2).
38 PNDCL 153, s. 31 (2).

Nations Commission on International Trade Law, [39] resort to the bilateral or multilateral framework to which Ghana and the nation of the investor are parties [40], or resort to international machinery for the settlement of investment disputes [41]. These provisions demonstrate that mine investors are protected as steps legally exist to ensure amicable settlement of disputes that arise between the parties.

The subsequent amendment of PNDCL 153 introduced restrictions regarding the sale of shares in mining companies to becoming a majority shareholder of a mining company, the process and punishment associated with breaching the procedure set under the amended law [42] [10].

The critical question here is the extent to which the local community benefited from this law since it is evident that it favoured the mining companies. The following section discusses the new mining law introduced in 2006 after operating PNDCL 153 for two decades.

3.3. The Minerals and Mining Act 2006 (Act 703)

The Minerals and Mining Act of 2006 repealed the Minerals and Mining Law passed in 1986. It came with enhanced generous terms for investors in the mining sector. Royalty payable by mining companies and small scale miners was ranged based on total revenue derived from minerals. The royalty payable was not to be more than 6% and less than 3% of the total income of minerals obtained by the mining leaseholde [43] [11]. In 2011, an attempt to increase government revenue resulted in fixing the rate of royalty payable to 5% of the total revenue obtained by the mining company. Subsequently, the amendment of Act 703 provides that royalties payable depends upon "at the rate and in the manner that may be prescribed" by the authorities [44] [12].

Act 703 maintains the benefits accorded mining investors under PNDCL 153 and introduced new benefits. It also permits mining leaseholders to retain a portion of the earned foreign exchange for acquiring machinery and other machinery needed for their operations [45]. Further, holders of mining lease who received foreign exchange can retain 25% [46] to obtain spare parts and machinery for mining, [47] debt servicing and payment of dividends [48], remittances for expatriate staff[49], and transfer of capital in the event of sale or liquidation of investors mining operations [50].

Act 703 further introduced the stability agreement for persons or entities holding mining leases. The stability agreement lasted for 15 years, and during the tenure, the state could not enact any legislation that will adversely affect an investor's interest [[51]]. Such an agreement was, however, subject to ratification by Parliament [[52]]. Another innovation introduced under Act 703 was the benefit of the development agreement [53]. The section stipulates that the state may enter into a development agreement under a mining lease where the investment by the investor exceeds USD 500 million [54].

The development agreement contains provisions exercisable in favour of the investor. It relates to mineral rights and operations to be conducted under the lease,[55] the exercise of discretion by the Minister, [56] stability terms, [57] environmental issues and obligations of the investor to safeguard the environment, [58] and settlement of disputes [59]. A development agreement is subject to parliamentary ratification to make it binding [60].

The law admonishes parties to settle disputes that arise between them through arbitration [61]. Where the conflict is between the government of Ghana and a foreign investor, and the parties fail to resolve the dispute, one party shall give notice to all other parties to submit to arbitration through the procedures provided under the law within thirty days [62]. The framework provided under the law includes resorting to international machinery for resolving investment disputes so agreed by the parties [63]. If the difference remains unresolved, the parties shall submit to arbitration in terms of a bilateral or multilateral agreement on investment protection to which the parties' countries have subscribed [64]. If there is no agreement, the parties shall resort to the United Nations Commission on International Trade Law (UNCTRAL) Rulles [65]. The provisions of the law discussed above demonstrate investor protection in the mining sector.

3.4. The 1992 Constitution of Ghana

The 1992 Constitution of Ghana guarantees protection from deprivation of property [66]. This paper classifies investment in the mining sector as the property of the mining investor. Thus the state can only deprive an investor of their property on the grounds of national interest.[67] If the state compulsorily acquires a person's property, it shall do so under the law [68] and pay fair, reasonable, and just

39 (n 65), s. 31 (3) (a).
40 (n 65), s. 31 (3) (b).
41 (n 65), s. 31 (3) (c).
42 Minerals and Mining (Amendment) Act 1994 (Act 475) ss. 60, 60A, 60B, 60C and 60 D.
43 Minerals and Mining Act 2006 (Act 703) s. 25.
44 Mineral and Mining (Amendment) Act, 2015, (Act 900) s. 1.
45 (n 70), s. 30 (1).
46 (n 70), s. 30 (2).
47 (n 70), s. 30 (2) (a).
48 (n 70), s. 30 (2) (b).
49 (n 70), s. 30 (2) (c).
50 (n 70), s. 30 (2) (d).
51 (n 70), s. 48 (1).
52 (n 70), s. 48 (2).
53 (n 70), s. 49 (1).
54 (n 70), s. 49 (1).
55 (n 70), s. 49 (2) (a).
56 (n 70), s. 49 (2) (b).
57 (n 70), s. 49 (2) (c).
58(n 70), s. 49 (2) (d).
59 (n 70), s. 49 (2) (e).
60(n 70), s. 49 (3).
61 Act 703 s. 27 (1).
62 (n 88), s. 27 (3).
63 (n 88), s. 27 (3) (a).
64 (n 88), s. 27 (3) (b) (i).
65 (n 88), s. 27 (3) (b) (ii).
66 (n 31), Art. 20 (1).
67 (n 31), Art. 20 (1) (a).
68 (n 31), Art. 20 (2).

compensation to the owner of the property [69].

These constitutional provisions further protect the foreign investors from the state taking over their investment without paying a commensurate compensation to the investors in the unlikely event that the state compulsorily acquires their stake. An investor who is dissatisfied with the actions of the state has the right to resort to bilateral and multilateral agreements and the UNCTRAL rules.

3.5. The Ghana Investment Promotion Centre Act 2013 (Act 865)

The Ghana Investment Promotions Centre (GIPC) Act in 2013 encourages and facilitate investment in Ghana. The Act has two objects: to create a friendly atmosphere for investment and development of the Ghanaian economy and to encourage, promote and facilitate investment in Ghana [70] [6]. The Act provides a host of investment guarantees for prospective investors in the Ghanaian economy. These include the prohibition against discrimination, [71] guarantee against expropriation, [72] and the transfer of capital, profits, dividends and personal remittances [73].

Besides, Act 865 provides settlement of disputes that may arise between the Ghanaian government and foreign investors regarding their investments in Ghana. A conflict that arises between an investor and the government of Ghana must be settled through mutual discussion [74]. Where there is no settlement within six months, the aggrieved party can resort to arbitration by choosing one of the procedures allowed under the Act [75].

First, the parties may adopt the rules provided under the United Nations Commission of International Trade Rules [76]. Second, the parties may use the framework of a bilateral or multilateral agreement on investment protection to which the investor's country and Ghana are parties to settle their disputes [77]. Third, the parties may agree and use any other national or international machinery for resolving investment disputes to settle their differences [78]. Act 865 further offers protection to guarantee the investment of foreign companies in the mining industry in Ghana.

3.6. Bilateral Investment Treaties

Bilateral Investment Treaties (BITs) is another medium through which foreign investors seek investment protection. BITs have become the dominant international vehicle for regulating foreign investments [18]. Before introducing BITs, the Hull Rule requires prompt, adequate, and effective compensation to a foreign investor regulated expropriation [18]. BITs seek to address two issues. Developing countries sign BITs to attract more foreign direct investment [27]. In addition, foreign investors are often sceptical about the quality of institutions in developing countries regarding law enforcement; hence BITs assure them of having their disputes with host governments adjudicated outside the domestic jurisdiction [27]. The provision of dispute settlement procedures under BITs offers investors an impartial forum for hearing, and the decisions bind the host state [79].

To attract foreign direct investment and assure the investors' protection of their assets, Ghana has signed several BITs. Ghana currently has BITs with twenty-eight countries, but only nine are presently in force [51]. The operational BITs relates to United Kingdom, Netherlands, China, Switzerland, Denmark, Germany, Malaysia, Serbia and Burkina Faso [80]. Foreign investors in the mining sector are afforded all the benefits earlier discussed. However, there seems to be an omission of the local community's interest in mining legislation and BITs.

4. Critique: Balancing Parties Interest

The discussions of this paper so far show that foreign investment in Ghana's mining sector is protected and secured. The various mining legislation, the 1992 Constitution of Ghana, and the BITs signed with nine countries afford mining investors protection. Literature exists to show that the benefits slant towards foreign investors. The mining communities, despite these investments, have not seen any improvement in their communities and lives. This section recounts some of the adverse effects of mining investments in mining communities and argues for a paradigm shift that balances the interest of mining communities with that of foreign investors in mining in Ghana.

4.1. The Impact of Mining Activities on Local Communities

The SAP in the 1980s brought increased resource extraction in resource-rich countries, including Ghana and impacted economic growth [43]. Despite the growth in the mining sector, mineral exploitation has had adverse effects such as the destruction of farms, delayed compensation, and rising cost of living in the mining communities [81]. The mining companies provide corporate social responsibility to reduce the harmful effects of mining, but the intervention has failed to address mining communities' economic, social, and environmental challenges [82]. The distribution of mining revenues has been unable to address these issues since a more significant portion of resource revenues remains with the central government [83]. This paper thus contends that the expenditure of resource revenue in Ghana reflects very little activity in the mining communities; hence the focus of the

69 (n 31), Art. 20 (2) (a).
70 Ghana Investment Promotion Centre Act, 2013 (Act 865), s. 3.
71 (n 97), s. 30.
72 (n 97), s. 31.
73 (n 97) s. 32.
74 (n 97) s. 33 (1).
75 (n 97) s. 33 (2).
76 (n 97) s. 32 (2) (a).
77 (n 97) s. 32 (2) (b).
78 (n 97) s. 32 (2) (c).
79 Guzman (n 102) 658.
80 (n 111)
81 Garvin et al; (n 133), 572.
82 Garvin et al; (n 133), 571.
83 Garvin et al; (n 133), 572.

article is that mining legislation must devote part of the mining revenues to develop mining communities.

The publicised benefits of expanded mining sector investment as demonstrated by a study conducted at Tarkwa, Ghana, shows that mining brought in foreign exchange, provided substantial government revenue, capital and social infrastructure to the public, employment generation (both direct and indirect), and developed communities in mining areas [84]. Despite these economic benefits, there were several social challenges associated with increased mining activities in mining communities. In some cases, the social fabric of mining communities gets destroyed due to increased investment in mining. The social organisation of every society is guided and directed by certain principles. The concentration of mining operations in Tarkwa impacted adversely on its people's social organisation and cultural values [85]. The influx of persons to work in the mines resulted in inadequate housing, youth unemployment, family disorganisation, school dropout rates, prostitution, and drug abuse [86]. These vices were resorted to by persons who came to seek work but were not successful.

This paper argues that the inability of Ghana to factor the development of mining communities such as Tarkwa in its mining laws have led to the preceding social vices. The lack of adequate jobs and low growth in mining communities has not changed, although mining activities continue in these communities. The flaw in Ghana's investment and mineral policy is its inability to address challenges in mining communities in Ghana. Thus the wake-up call on the government to rethink granting benefits to mine investors to the neglect of the mining communities cannot be overemphasised.

4.2. Effects of Reforms in Ghana's Mining Sector

The expectation is that injecting Foreign Direct Investment (FDI) in the mining sector would contribute to the economic development of Ghana and improve the living conditions of mining communities [87]. This expectation is, however, yet to be realised. The neglect of mining communities has led to community struggles in the face of investment in mining. Conflicts thus abound in mining communities between the indigenes and the mining companies. For example, in Tarkwa and Prestea, 'galamsey' operators clashed with Golden Star Resources Bogoso over a portion of the concession granted to the company, which 'galamsey' operators had taken over because of insufficient alternative jobs for the locals [30]. Indeed large scale surface mining has taken over a large tract of land from farmers, and mining activities do not provide enough jobs for those deprived of their farming activities [88]. The conclusion that mining sector reforms have been successful in Ghana fails to consider the impacts of expanded mining on local communities [89].

Although the reforms in the mining sector have been good, SAPs assist extensive ownership within the primary industry sectors of the developing resource-rich economies to increase production and exportation of raw materials [31]. The London-based charity Mines and Communities has put it succinctly as follows:

Despite the large increase in Foreign Direct Investment (FDI) in extractive activities in Africa, the peoples of the continent are poorer, and the economies of African countries are weaker. The Bank's role in the extractive industries has only succeeded in generating excessive profit for foreign investors with mining codes that ensure minimal taxes for foreign mining companies, increasing the debt burden of African countries and reducing the quality of life for peoples living in resource-rich communities and states.... A substantial amount of foreign exchange earnings derived from the extractive industries are retained abroad, while insignificant amounts are retained in the national economies of Africa.... Mining has remained an enclave activity with little or no linkages to other sectors of the African economies. As a result, any "multiplier" benefits that result from processing or refining accrue outside [90].

This paper agrees with Hilson and Yakovleva's assertion that the macroeconomic gains made within the mining industry under SAP have been tremendous in Ghana. However, mounting evidence indicates that this growth has delivered few benefits to the local mining community [[91]]. The critique demonstrates that although reforms in the mining sector have benefited the industry, the effects on mining communities have not been beneficial. It is trite that conflict apart, social vices and environmental hazards, lack of employment, diseases and human rights abuse continue to confront mining communities.

The enactment of the Mineral Development Fund Act [92] has failed to address these challenges [23]. The appalling conditions prevailing in mining communities in Ghana require a shift from the current situation. Such a change would create opportunities for the local economy in the face

84 Akabzaa & Daramani, (n. 33), 39.

85 Akabzaa & Dramani (n 33), 43.

86 Akabzaa & Dramani (n 33), 43.

87 Owusu-Koranteng (n 60), 468. For example, the UNDP concept of development states that 'the basic objective of human development is to enlarge the range of people's choices to make human development more democratic and participatory.' *These choices should include access to income and employment opportunities, education and health and clean and safe physical environment. Each individual should also have the opportunity to participate fully in community decisions and to enjoy human, economic and political freedoms.*

88 Akabzaa & Dramani (n 33), 45.

89 Hilson and Yakovleva (n 117), 101.

90 Mines and Communities, 2003.

91 Hilson and Yakovleva (n 120), 62. See also Tockman, Jason, Ghana: IMF, Mining and Logging, 2003, who argues that actions taken by large-scale companies operating in Ghana have in fact, devastated local peasant communities. He further states that, 'in many cases, the land used for mining operations in Ghana has been forcibly acquired from peasant farmers under ambiguous regulations. Sometimes this acquisition occurred with no compensation. In some instances, the mines have been responsible for the dislocation and forced resettlement of communities numbering in the hundreds even thousands. Numerous violations of human rights, including shootings and beatings, have also been committed in relation to the mines.

92 Minerals Development Fund Act 2016 (Act 912)

of mining communities being denied their source of livelihood despite ongoing large scale mining. The following section proceeds to make recommendations.

5. Recommendations

Since the government of Ghana assumed ownership of all-natural resources found in Ghana, it has received all the revenue from natural resources [93]. The position created under Ghana's Constitution imposes an obligation on the state to use the resource revenue to benefit all persons. However, the situation in mining communities in Ghana depicts a state of neglect, abject poverty, diseases, environmental hazards, social vices, unemployment, human rights abuse, and loss of farmlands. The country has not been able to manage mining communities under the current legal dispensation where the state receives all resource revenues into the Consolidated Fund. The challenges faced by mining communities, therefore, remains unresolved. The paper offers the following recommendations to help improve the living conditions existing in mining communities.

The paper recommends an amendment of the current Minerals and Mining Act of 2006 (Act 703) in three main areas to give meaning to the provision that natural resources vest in the President for the benefit of the citizens of Ghana. To begin with, a portion of the royalty payable must not go into the Consolidated Fund but instead into a fund created at the Bank of Ghana (BOG) to develop mining communities. The BOG shall issue reports of the payments received. The paper suggests that the amount should be between 35% to 40% of the royalties paid by the mining companies to the state. The BOG must disburse the funds for the benefit of the mining communities since the current situation under the Mineral Development Fund Act 2016 (Act 912) lacks accountability. Upon creating the account, Act 912 must be repealed because it has failed to take care of mining communities due to its shortfalls [94] [49].

The second suggestion calls for re-examining tax exemptions granted to the mining companies regarding importing the machinery and accessory for mining [95]. The paper suggests the adoption of the practice that operates in Burkina Faso. The Burkinabe government has imposed a 6% flat rate of tax on importing raw materials and equipment used in mining [35]. The stability regimes in most mining leases require that the flat tariff rate on imports of machinery would apply to new contracts negotiation. The paper further suggests that 50% of the amount in question should form part of the fund created at the BOG for transforming the mining communities.

Thirdly, the relevant mining legislation requires an immediate amendment to link the mining sector and the local economy. The current state of the mining laws in Ghana has failed to make room for connecting the mining sector to the rest of the economy, which has contributed chiefly to unemployment, especially in the mining communities. Again being mindful of stability regimes, the provision would apply to prospective investors.

The paper further recommends the passage of legislation for development plans in the mining communities. The fund created at the BOG will thus serve as the source of funding for such developmental projects. The planning of the development projects shall include the mining communities' inputs against the imposition of projects by the central government. Parliament shall authorise the release of the funds for projects after approving development plans agreed upon within the mining communities.

The next critical issue relates to the body that will oversee the implementation of these funds to safeguard accountability. The paper suggests creating an authority or a governing body whose membership shall comprise representatives of the local community, representatives of the mining companies, Civil Society Organisations working in the mining communities and the district assemblies. The BOG, which shall be subject to the proposed body, shall publish the amount received from the royalty payments and the flat tax rate in the national dailies and on its official website annually for accountability and transparency. The fund's governing body must also publish projects undertaken with the funds released by the BOG in the national dailies. The Auditor-General must audit the expenditure of the funds released by the BOG. In this manner, the development will not elude mining communities that have endured deplorable conditions despite natural resources in their communities.

In the alternative, the paper suggests corporate-community investment through which mining companies will undertake 'strategic social investment' that contributes to the development of the mining communities [17]. This recommendation stems from the fact that CSR has limitations and has failed to transform the local mining communities. The proposed partnership shall be under the supervision of Parliament using the revenue from the account created at the BOG for the development of mining communities.

93 All mining laws passed from 1958 vest natural resources in the President to hold same in trust for the citizens of Ghana. The same provision appears in the various constitutions of Ghana, the latest being Article 257 (6) of the 1992 Constitution of Ghana.

94 C. Adomako-Kwakye et al., (n 128). The authors examined the MDFA and showed the shortfalls of the Act. The article further demonstrated that the MDFA in its current state cannot help transform the mining communities. See also Païvi Lujala and John Narh. They identified five reasons why the MDFA has failed to address the challenges of mining communities. *First, the Act is silent on how the share that goes to the paramount chiefs and the district assemblies should be utilised leading to misappropriation of the royalties at the local level. Second, the selection of the local management committee members fails to include local people in the mining communities denying the community members how the royalties are shared. Third, the amount transferred to the MDFA is inadequate to help the transformation needed at the mining communities because the Ghana Chamber of Mines has suggested that mining communities would need 30 per cent of royalties paid to the state in order to address the challenges of the mining communities. Fourth, the MDFA has no provision to force the transfer of the royalties. Fifth, the MDFA does not encourage accountability since there is no mechanism to ensure the expenditure of the money.*

95 See the discussion under sections 3.2 and 3.3 supra.

6. Conclusion

This paper has shown the basis of ownership of natural resources before and after Ghana's independence. Upon assuming ownership of natural resources in Ghana, the country has the responsibility to utilise the revenues equitably to benefit all Ghanaian, including the mining communities. The state has failed to equitably cater for the mining communities, culminating in establishing the Mineral Development Fund Act 2016 (Act 912). As discussed briefly, Act 912 has also failed to alleviate the challenges of mining communities due to the reasons elucidated in the section 4 of this paper.

In that regard, it is needful to ascertain other means of transforming mining communities to give meaning to Article 257(6) of the 1992 Constitution, which allows the President to hold all natural resources in trust for the people of Ghana. The article has shed light on the various mining legislation that has provided several security and incentives to investors in the mining sector to the neglect of mining communities. The current legal regime in Ghana for the development of mining communities is heavily dependent on the royalties paid to the state, which has failed to ensure adequate development in mining communities.

Ghana has been unable to attend to the needs of the mining communities despite the enactment of Act 916. For these reasons, this paper has argued for a paradigm shift to address the challenges in the mining communities because the dichotomies of mining whereby at one extreme, it produces wealth and, on the other, threatens the destruction of lands and community life is grossly inequitable.[96]

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