



A Selection of Licence and Contract Instruments for Capturing Mineral Revenue

by
Fui S. Tsikata
Reindorf Chambers
Accra, Ghana

AU/EU/UNECA Workshop on Mining Taxation
Addis Ababa, 9 – 10 December 2011



A trajectory of Ghanaian legislative provisions on royalty: flexibility v predictability

- Empowering the minister to determine royalty in his discretion (on the advice of the Minerals Commission) (1986, Minerals & Mining Law, s. 22)
- Regulations setting out formula for determining applicable rate of royalty (1987, Legislative Instrument (LI) 1349) (based on profitability of mineral operation)
- Legislation prescribing single fixed royalty rate (2010, Minerals & Mining Amendment Act)
- Proposal to set royalty rate for each type of mineral periodically by reference to stipulated mineral prices
- Impact of clauses stabilising regime
 - subsequent legislation does not affect protected taxpayer for its duration
 - discrimination complaints by non-protected taxpayers



Regulating mineral marketing agreements: shadowing arms-length arrangements

- Minerals with published prices
 - premiums and discounts
 - refining charges in sale and refining agreements
 - resolving buyer/seller disputes over product quality
- Minerals without published prices
 - proxy prices
 - industry information about contractual arrangements
- Government instruments for determining/approving applicable prices and related terms
 - transfer pricing provisions in tax legislation
 - approval provisions in powers to grant licence to mine or export; exchange control powers
 - provisions in mineral development agreements



Renegotiation clauses: stability and change

- Review at specified intervals
- Review at request of a party
- Issues subject to objective determination and with potential for third-party resolution
- Changed circumstances, general review for fairness clauses



Expanding rules of standing in (some) common law jurisdictions: confidentiality v transparency

- Small businesses group objecting to tax arrangements with print workers
- ICI objecting to arrangements by tax authorities involving competitors



Annex 1: Ghana Royalty Provisions from Principal Legislation

- **Minerals and Mining Law 1986, section 22**

- (1) The holder of a mining lease shall pay to the Republic royalty in respect of minerals obtained by the holder from mining operations.
- (2) The Minister shall, on the advice of the Minerals Commission, determine the rate of royalty payable under subsection (1) by the holder of a mining lease.
- (3) The rate of royalty payable under subsection (2) shall not be more than twelve per cent or less than three per cent of the total revenue of minerals obtained by the holder from the mining operations.



Annex 1 (contd.)

- **Minerals and Mining Act 2006 (Act 703) , section 25**

A holder of a mining lease, restricted mining lease or small scale mining licence shall pay royalty that may be prescribed in respect of minerals obtained from its mining operations to the Republic, except that the rate of royalty shall not be more than 6% or less than 3% of the total revenue of minerals obtained by the holder.

- **Minerals and Mining (Amendment) Act 2010 (Act 794)**

A holder of a mining lease, restricted mining lease or small scale mining licence shall pay royalty that may be prescribed in respect of minerals obtained from its mining operations to the Republic at the rate of 5% of the total revenue earned from minerals obtained by the holder.



Annex 2: Mineral (Royalties) Regulations, 1987 (L.I. 1349)

- **Regulation 2—Variation of Rate of Royalty.**

- (1) The rate of royalty payable under these Regulations shall be based on the profitability of the mining operations.
- (2) Such profitability shall be determined by the application of the operating ratio, being the ratio as expressed in terms of percentage which the operating margin bears to the value of the minerals won from the mining operations during the yearly period.
- (3) For the purpose of determining the operating margin of any mining operation, the operational cost shall be deducted from the total value of minerals won from such mining operations.



Annex 2 (contd.)

- "*operational cost*" in relation to any period means—
 - (a) the current expenditure wholly and exclusively incurred by the holder of the mining lease during that period for the purpose of mining, transporting, processing or sale of minerals won; provided that such current expenditure shall not include—
 - (i) any royalty under these Regulations;
 - (ii) any income tax or other tax on profit whether imposed in Ghana or elsewhere;
 - (iii) any payment under any agreement between the Republic and any person on the value of, or receipts from, minerals won;
 - (iv) in the case of a company, any expenditure incurred in respect of the management and control of the company which in the opinion of the Commissioner are not directly related to the operations of mining, transporting, processing or sale of the minerals won;
 - (b) Capital allowances for the period deductible under the provisions of section 26 of the Minerals and Mining Law, 1986...



Annex 2 (contd.)

SCHEDULE

Operating Ratio	Rate of Royalty
(i) where the operating ratio is 30% or less:	3%
(ii) where the operating ratio is more than 30% but less than 70%:	3% plus 0.225 of every 1% by which the operating ratio exceeds 30%
(iii) where the operating ratio is 70% or more:	12%



Annex 3: Periodic renegotiation clause

“The parties shall cooperate with each other in carrying out the purposes of this agreement and shall meet together during the last quarter of [...] and at intervals of 5 years thereafter, with a view to considering in good faith whether this agreement is continuing to operate fairly to each of them and with a view further to discussing in good faith any problems arising from the practical operation of this agreement. If at any such meeting, it is agreed that this agreement is not so continuing to operate fairly to each of the parties, or the parties agree that there exist problems arising from the practical operation of this agreement then they shall confer together in good faith...and...they shall use their best endeavours to agree on such changes to this agreement as may be requisite... Any changes...agreed by the parties...will in the case of the first such review take effect on [...] and in the case of any subsequent review on the fifth anniversary of the date on which changes last took effect pursuant to this article.”



Annex 4: Review at the request of a party

“Where a party considers that a significant change in the circumstances prevailing at the time the agreement was entered into has occurred affecting the economic balance of the agreement, the party adversely affected thereby shall notify the other party in writing of the claimed change with a statement of how the claimed change has affected such economic balance or has otherwise affected relations between the parties. The other party shall indicate in writing its reaction to such notification within a period of [...] months after receipt of such notification. If such significant changes are established by the parties to have occurred, the parties shall meet to engage in negotiations and shall effect such changes in, or rectification of, these provisions as they may agree are necessary to restore the relative economic position of the parties.”



Annex 5: Review of issues subject to objective determination

“The parties when they meet...will review the tolling charge then chargeable...with a view to agreeing on the adjustments (if any) which need to be made to that charge in order to ensure that the proportion of the value of aluminium produced not covered by the tolling charge includes an amount representing the value of alumina purchased on long-term (5 years) contracts and alumina freight and amounts representing services provided by the...shareholders valued on an arms-length basis, and as if a third party were selling...[the company’s] entire production in the form of ingot on the market used for the tolling charge price reference. The services aforesaid shall comprise delivery of finished aluminium, selling services, the provision of working capital for alumina and metal inventories and credit terms if applicable and management and technical assistance provided...”



Annex 6: Provision for expert determination

“...In the event that the parties are unable to reach agreement on the adjustments (if any) to be made...in the tolling charge ..., the matter or matters in issue between them shall be referred to an independent expert for his opinion. The opinion of the expert aforesaid on the matter or matters so referred to him shall be accepted by the parties as conclusive and binding, and ...the tolling charge...shall if the opinion so requires be adjusted accordingly. The expert will be chosen by agreement between the parties. In the event of failure to agree by the parties within 30 days of a proposal in writing from either party suggesting an expert, either party may request in writing the Secretary-General of the International Centre for the Settlement of Investment Disputes to appoint the expert... The choice of the Secretary-General shall be conclusive and binding upon the parties. ”



Annex 7: Rules of standing in tax litigation

“The rules as to ‘standing’ for the purpose of applying for prerogative orders, like most of English public law, are not to be found in any statute. They were made by judges, by judges they can be changed; and so they have been over the years to meet the need to preserve the integrity of the rule of law despite changes in the social structure, methods of government and the extent to which the activities of private citizens are controlled by governmental authorities, that have been taking place continuously, sometimes slowly, sometimes swiftly, since the rules were originally propounded.”

(Lord Diplock in *Commissioners of Inland Revenue v National Federation of Self-Employed & Small Businesses Ltd.*, UK House of Lords [1981])



Annex 7 (contd.)

“Although ICI seeks to compel the Crown to deal with the tax affairs of the oil companies in a specified manner, it does not do so as a taxpayer. It does not say that an unlawful acceptance will result in an increase in its own bill for tax. As the only United Kingdom producer of ethylene which does not use ethane as a feedstock, it says that it will result in a reduction of its profits and, moreover, in its profits alone...More important still is the universal acknowledgement that the reduction in profits will or may be very substantial. Accordingly, ICI has a most unusual and substantial financial interest. The fact that it is not, like a ratepayer’s, an interest in a common fund is unimportant.”

(Lord Justice Nourse in Regina v Attorney General, ex parte Imperial Chemical Industries Plc, 1986 Court of Appeal, England and Wales)