

SUMMARY: TRANSPARENCY INTERNATIONAL & ORS V REPUBLIC OF GHANA (‘THE AGYAPA CASE’)

By: Nick Opoku and Elikem Gadzekpo

On July 13, 2022, the Community Court of Justice of the Economic Community of West African States (ECOWAS Court) shall deliver its judgment in a suit challenging the propriety of the Agyapa Deal initiated by the Government of Ghana (GoG). On December 20, 2020, Transparency International (TI), Ghana Integrity Initiative (GII), and Ghana Anti-Corruption Coalition (GACC) filed an application at the ECOWAS Court for the enforcement of fundamental human rights under Article 33 of the Rules of the ECOWAS Court, Article 21(1) of the African Charter on Human and Peoples Rights, Article 2(1) and (2), 3(1), 16(1) and 17(3) of the Revised African Convention on the Conservation of Nature and Natural Resources.

The plaintiffs argue that the enactment of the Minerals Income Investment Fund (MIIF) Act and the proposed execution of a Relationship Agreement between GoG, MIIF, and Agyapa Royalties Limited amounts to an interference with the rights of the people of Ghana to permanent sovereignty over natural resources as it would lead to a loss of about 75.6% of gold royalties in perpetuity. The plaintiffs also contend that the deal would substantially deprive future generations of Ghanaians of their biggest asset, worth billions of dollars, in exchange for a potential \$500 million equity share in a foreign SPV established in a known tax haven. In support of their case, they cite a number of lack of transparency issues and value for money concerns highlighted by Civil Society Organisations (CSOs) in Ghana and the Corruption Risk Assessment report by Ghana’s Office of the Special Prosecutor (OSP), including the involvement of politically exposed persons in the transaction. The OSP in its report described the deal as “a surrender of Ghana’s sovereignty over its gold revenue for one billion United States Dollars without a thorough consultation with critical stakeholders and a meticulous examination by the people’s representatives...”

Key among the reliefs sought by the plaintiffs are (i) a declaration that the deal initiated by and entered into by GoG constitutes an interference with the rights of the people of Ghana under the African Charter on Human and Peoples Rights and the Revised African Convention on the Conservation of Nature and Natural Resources; and (ii) an order restraining GoG and its officials from implementing the Agyapa deal and terminating the already existing contracts.

Attorney-General’s response

On April 28, 2021, the Office of the Attorney-General (AG) submitted its response to the suit. First, the AG questions the capacity of the first plaintiff to bring the present suit before the ECOWAS Court. The AG argues that Transparency International (TI) is not constituted under the laws of any member State of ECOWAS and therefore lacks capacity to institute the present suit. Also, the AG contends that TI is not a victim of the human rights violation complained of. Accordingly, the AG wants the Court to expunge the name of TI from the present suit.

Second, the AG contends that the Agyapa transaction does not interfere with the people's right to permanent sovereignty, as argued by the plaintiffs. According to the AG, GoG, headed by the President, is a trustee of natural resources and is constitutionally clothed with authority to ensure that natural resources are optimally used for the benefit of the people of Ghana; which is in line with the objects of the MIIF. The AG also argues the Agyapa deal is designed as a means by which only a fraction of mineral royalties due the State from the allocated mining companies would be efficiently invested to ensure that the people of Ghana obtain benefits. Further, the AG contends that 49% of the shares in Agyapa to be floated on the London Stock Exchange will be available to every interested person, including Ghanaians, to purchase.

In response to the plaintiff's argument about the involvement of politically exposed persons in the transaction, the AG contends that there is no law in Ghana preventing relatives of public officers in Ghana from holding office in corporate entities in the country. Further, the AG argues that the plaintiffs failed to supply any evidence to back the allegation that the supposed politically exposed persons intend to misappropriate the mineral resources of the Republic of Ghana. The AG concludes that the present suit does not raise any cause of action against GoG and wants the suit dismissed.

Summary of the Agyapa Deal and chronology of events

In 2018, Ghana's Parliament passed the Minerals Income Investment Fund Act 2018 (Act 978), establishing the Minerals Income Investment Fund (MIIF). The Fund is to 'manage the equity interests of the Republic [of Ghana] in mining companies and to receive mineral royalties and other related income due the Republic from mining operations. In carrying out its mandate, the Fund is empowered to create and hold equity interests in a Special Purpose Vehicle (SPV)—a legal entity (usually a company) that is created to serve one function such as facilitating a financial arrangement or creating a financial instrument—in any jurisdiction in order to achieve its objectives.

Pursuant to the MIIF Act (as amended), and the constitutional obligation on government to seek Parliamentary approval for all international business transactions, the Finance Minister, on August 14, 2020, laid before Parliament for approval the 'Project Kingdom Investment Arrangements' comprising:

- (i) The Minerals Royalties Investment Agreement between the Government of Ghana (represented by the Ministry of Finance), the Minerals Income Investment Fund, Agyapa Royalties Limited, and ARG Royalties Ghana Limited in relation to Gold Royalties Monetisation Transaction
- (ii) Amended and Restated Minerals Royalties Investment Agreement between the Government of Ghana (represented by the Ministry of Finance), the Minerals Income Investment Fund, Agyapa Royalties Limited, and ARG Royalties Ghana Limited in relation to Gold Royalties Monetisation Transaction
- (iii) Relationship Agreement between the Government of Ghana (represented by the Ministry of Finance), the Minerals Income Investment Fund, and Agyapa Royalties Limited in relation to Gold Royalties Monetisation Transaction

- (iv) Assignment Agreement between the Minerals Income Investment Fund and Agyapa Royalties Limited for the assignment of the right of the Fund to Agyapa to receive the royalty value due from ARG under the Investment Agreement for the acquisition of the Allocated Minerals Royalties from the Fund in consideration for shares to be issued by Agyapa to the Fund at an agreed price of US\$1.0 Billion

The overall objective of these agreements is to provide immediate revenue for the government of Ghana against future cash flows from mineral royalties, through the Special Purpose Vehicle (Agyapa Royalties Ltd).

Under the agreement, the MIIF Fund is to incorporate Agyapa Royalties Limited (formerly Asaase Royalties Company Ltd.) under the laws of the Bailiwick of Jersey. The Fund is the sole shareholder of Agyapa Royalties Ltd, which will also be registered in Ghana as an external company. Agyapa Royalties Ltd. would incorporate ARG Royalties Ghana Ltd. as its wholly-owned subsidiary in Ghana.

The Fund would provide the government an upfront amount of USD 500 million, 'assign its right to receive royalty payments from certain gold mining companies, and undertake an initial public offer of up to 49% of its shares in Agyapa Royalties Ltd. and listing the same on the London Stock Exchange (LSE) and the Ghana Stock Exchange (GSE) for about USD 500 million. The agreement would cover 16 mines in Ghana (including 4 under development).

The agreements were referred to the Finance Committee on the same day (August 14, 2020) for consideration and report.

According to rules of parliamentary procedure, a report can only be debated 48 hours after it has been presented to the Chamber. This is to allow parliamentarians enough time to study and scrutinize same. The Finance Committee submitted its report to the Chamber the following day (August 15, 2020). At this sitting, a procedural motion was moved to set aside the '48-hour rule' to allow Parliament to debate the report and approve same.

Minority's concerns

In addition to concerns raised on the floor of Parliament about the haste with which these agreements were being processed, the Minority argued that the setup of an SPV (Agyapa Royalties Ltd) in Jersey—a known tax haven, not having a public register of company owners—would make it difficult for parliament to gain any transparency into the process and or over the management of the SPV, the IPO and the beneficial owners of Agyapa Royalties. The minority also argued that mortgaging future revenues from gold royalties in exchange for cash now is a bad idea, especially as according to their analysis '*Ghana stands to lose billions of United States Dollars in revenue as a consequence of this transaction*'.

Despite the minority's opposition, the majority had their way. On August 14, 2020, the minority walked out in protest as the agreements were approved by the majority in Parliament.

Government's response

Responding to concerns by the minority, Finance Minister, Ken Ofori Atta at a press conference on August 27, 2018, said *"This deal is not hasty, it is not rushed and not shrouded in any secrecy because we have been working at it since 2018. We are confident that Agyapa is going to be the largest company in Africa in the mineral royalty space and it is in the best interest of this country."*

Responding to concerns about beneficial owners of Agyapa and the choice of Jersey (a tax haven) for the SPV, the Finance Minister said *"the issue of disclosure of beneficial ownership of the Agyapa Royalties transaction was a non-starter because the government was the owner of the company...as it is now, Agyapa Royalties is 100 percent owned by the MIIF, which is also 100 percent owned by the government. It is after listing it on the stock markets, both in Ghana and London, that shares will be floated, and even that, the government will keep at least 51 percent of the shares."*

Civil Society concerns

The choice of Jersey (a tax haven)

IMANI Africa, an Accra-based think tank disagrees with the government's justification for incorporating Agyapa Royalties Ltd. in Jersey. According to IMANI's Bright Simons, tax efficiency is not the only reason people list in tax havens. He argues *"tax efficiency is just one benefit. The other benefit is secrecy...reduced public scrutiny of certain types of transactions. The other benefit for which people list in tax havens is the ability to make share transfers that are less tax exposed..."*

Highlighting some of the problems with Agyapa in a statement dated September 26, 2020, IMANI argued that *"While returns to the SPV itself need not be taxed, investors who profit from buying shares in the SPV during the book-building period need to be KNOWN and TAXED. Even if we must go the IPO route, many jurisdictions with far better transparency standards exist, some of which have double taxation treaties with Ghana. The same tax-efficient outcome could have been reached by using a BEPS strategy in one of these other places. By incorporating in Jersey, where the laws permit notoriously impenetrable trusts, it has become all too easy for the underwriters to under-price the vehicle (and by implication, Ghana's gold royalties), allot the shares to investors hiding behind trusts, and when the stock debuts, join these crony investors to pocket hundreds of millions of dollars without any of us being any wiser since such trusts would usually be 'trusts of trusts', and effectively impossible to unveil."*

Regardless of the government's protestations, they have no tool to stop the underwriters from doing this."

Undervaluation and duration of the agreement

Fui Tsikata (a lawyer with over four decades of experience in mineral and energy law) and Kofi Ansah (the founding Chief Executive of the Ghana Minerals Commission) raise significant concerns about valuation and the duration of the agreement and urge the government to suspend the implementation of the transaction for broad stakeholder consultation. The two argue that government could lose substantial future income by rushing the deal because the Government of Ghana could *'get more than USD400 million [at an average gold price of US\$1800 an ounce] in 2021 if it kept its right to receive all the royalties from the eleven producing mines.'*

They believe there's a gross undervaluation of the gold under the agreement:

*"What is the proper value of the royalty rights of Government which the transaction seeks to assign to the Agyapa company? This is not merely a technical question. To demonstrate this, let us use a hypothetical example. If the proper value of the rights being assigned is US\$3 billion but we accept the US\$1 billion figure stipulated in the agreements, a person who pays US\$500 million for half of the shares in the company can promptly sell those shares for US\$800 million to a person willing to purchase at that price, knowing the real underlying value. If that happened, US\$300 million which should be in Government coffers would have gone to private parties. It is irrelevant that the Government still retains its fifty per cent interest: it would have ceded US\$300 million to private parties for no good reason. **So, the consequences of the initial undervaluation can have a huge impact on our revenue situation."***

The two experts also question the duration of the agreement: *'The right to royalties is being assigned to Agyapa in respect of at least fifteen mines or prospective mines, including all the existing, established mines, **effectively for an indefinite future. The agreements say that Agyapa's rights continue not only for the duration of any leases granted to the mining companies but also for as long as their leases are renewed.** The maximum duration of a mining lease is thirty years. The grant of a right to those royalties for that duration is in itself a substantial right. A right to royalties not only for the original term but also for every extended period upon renewal of a mining lease is even more substantial. **In these circumstances, it is hard to see the basis on which these rights have been valued at US1 billion as the agreements clearly state.'***

The Attorney-General in a letter addressed to the Finance Minister, dated July 22, 2020, raised similar concerns. Ms. Gloria Akuffo said *"The agreements run in perpetuity and therefore have no fixed term. They are expected to run until the expiration of the last Mining lease in Ghana. The agreements also appear to be cast in stone with no option to evaluate*

*their effectiveness and or satisfactory performance so as to renew or terminate same should the need arise. **This makes the agreement unconscionable.***” She further noted “*monetising royalties and investing such income has been ring-fenced for ListCo [Agyapa Royalties] and RoyaltyCo [ARG Royalties Ghana Ltd] such that the Republic is precluded from exercising any right over the 75.6% percentage shares as referred to in the Agreement. However, we also note that the value of gold is not stable on the international market and is likely to drop against the projection of high value which may have negative consequences on the royalties received. It is suggested that this agreement should be for a fixed term for the avoidance of doubt and sanctity of contract.*”

Interestingly, these concerns were omitted in another letter by the Attorney-General (which appears to be her final legal opinion on the agreement) addressed to the Finance Minister dated August 12, 2020, titled ‘RE: Revised versions of Project Kingdom Investment Arrangement Draft Agreements Incorporating the Hon. AG’s Recommendation’.

Nepotism and Conflict of Interest

The selection of Kofi Osafo-Mafo (son of Senior Minister, Yaw Osafo-Mafo) as a director of Agyapa Royalties Ltd. has also raised eyebrows. Deputy Finance Minister, Charles Adu Boahen says he was selected following a ‘*competitive process... we had a company by the name Kornferry ...a global headhunting firm that went through a very rigorous process over several months identifying professionals in the mining sector and who were shortlisted, [and] interviewed.*’ But there is no evidence of any public announcement for the role in Agyapa.

Responding to questions about Kofi Osafo-Mafo’s appointment, Information Minister, Kojo Opong-Nkrumah, justified the latter’s appointment on the basis that he is qualified: “*Kofi Osafo-Mafo is qualified as any other qualified Ghanaian to be working with Agyapa Royalties. ‘Show me the scheme because Osafo-Mafo’s son who over the years has been very experienced in mineral royalties [...] but why must he be barred because he is Osafo-Mafo’s son?’*”

The involvement of Gabby Asare Otchere Darko’s (the President’s cousin) Accra-based law firm as transaction advisors and the amount allegedly paid the transaction advisors have also raised eyebrows. The transaction advisors are White & Case LLP, Accra-based Bentsi-Enchill, Letsa & Ankomah, and Africa Legal Associates of which Gabby Asare Otchere Darko is a founder and senior partner. The Finance Minister justifies the involvement of Gabby’s firm thus ‘*Africa Legal Associates (Gabby’s firm) is linked to the law firm representing Bank of America; the main advisor. Bank of America is the main advisor and they have their own law firm. Usually, these international law firms have an affiliate in Ghana and that’s where Gabby’s firm came in.*’

The minority in Parliament questioned the cost of the transaction. Minority Spokesperson on Finance, Ato Forson, told a media briefing ‘*we need to know the cost of the transaction. They [the*

Finance Ministry] failed to give us. Only for the [Finance] minister to tell us that so far, they have spent about \$2 million...This \$2 million, we want to know who they paid it to. We are aware that Africa Legal Associates is one of the lawyers who is part of this agreement. We want to know how much money they have paid to this company and for what purpose.'

The involvement of Databank, an Accra-based investment bank—of which the Finance Minister is the founder—as a transaction advisor has also raised questions about conflict of interest. But Ken Ofori Atta justifies Databank’s involvement thus *“Databank has extensive experience in investment banking. The fact that I am Finance Minister does not mean Databank should not work. We can’t collapse businesses because of politics.”*

Corruption Risk Assessment by Office of the Special Prosecutor

Sometime in November 2020, the OSP published a highly critical 67-page assessment of the deal. The OSP identified a risk of corruption and conflicts of interest in the Agyapa plan, in the structuring of the company and the selection of transaction advisors and corporate directors, as well as multiple breaches of the law.



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