

**A REVIEW OF THE ANGLOGOLD ASHANTI’S DEVELOPMENT AND TAX CONCESSION AGREEMENTS SIGNED WITH THE GOVERNMENT OF GHANA**

**BY**

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## INTRODUCTION

As a critical stakeholder in the mining industry, the Ghana Mineworkers Union wishes to add its voice to the ongoing review of the Development and Tax Agreements between AngloGold Ashanti (Ghana) Limited (AGAG) and the Government of Ghana, as part of the redevelopment efforts of AGAG. The review brings into sharp focus issues that have the potential to adversely affect government, employers, workers and the overall citizenry who are without a doubt, the ultimate custodians and beneficiaries of the Development and Tax Concession Agreements.

For the purpose of this review, issues have been raised according to their respective clauses contained in the agreements. These issues have further been categorized based on the nature and the possible timelines (short and mid- term considerations) needed for consultation and possible implementation. The review also makes recommendations on various matters as a basis for policy reforms and a guide in negotiating future agreements.

## SHORT TERM CONSIDERATIONS

This section highlights among other minor omissions and modifications of some clauses in both Agreements. Issues considered under this section include; Definitions & Interpretation, Stabilization, Training, Use of Ghanaian goods and services, Assignment and Succession, Employment and Training, Profound Changes in Circumstances and Royalty.

### 1.0 Definitions & Interpretation

The Union proposes that “**permanent employee**” should be clearly defined under clause 1.1 (definitions and interpretations).

**Rationale:** It is the considered view of the Union that the lack of a clear definition of “**permanent employee**” leaves a major gap for possible exploitation. A precise definition of “permanent employee” will therefore prevent the generic interpretation of the term and also help eliminate possible implementation and compliance gaps.

### 1.1 Stabilization clause 4 (pg 7)

Reference is made to **pg7** of the stabilization clause in the Development Agreement (DA) and the Union consequently proposes the inclusion of the following clauses.

*(a) During the initial stability period (10years) from the Effective Date, AngloGold shall not and shall cause not to implement any retrenchment programme in Ghana (it's being understood that individual dismissals made from time to time do not constitute a retrenchment programme)*

*(b) The terms of this DA and Tax Concession Agreement (TCA) shall apply exclusively to AngloGold Ashanti, Obuasi and shall not apply to any of its subsidiaries, contractors or subcontractors within Ghana or its concession.*

**Rationale:** Employment remains a key indicator of the economic performance of every nation and indeed has become one of the major preoccupations of every Government. Whilst

Government may be concerned about creating and maintaining decent jobs, employers on the other hand may want to resort to 'needless' redundancies in order to benefit from numerical flexibility as a basis for maximizing its returns. This phenomenon therefore makes it important to leverage on the DA and the TCA, in the case of AGAG, in order to guarantee decent employment and pensions, particularly during the stability period.

Subsequently, the proposed provision in (b) will ensure a strict ring fencing of the fiscal incentives provided for in the redevelopment of AngloGold Ashanti without any other entity taking undue advantage of the arrangement.

### 1.2 Stabilization Con't; clause 4 pg7

Reference is made to paragraph 1 p7 of the stabilization clause and we propose the insertion of the clause below

- a) *AngloGold shall ensure that all its prospective contractors and subcontractors enter into employment relationship with their workers reflective of the contract tenure between AGA and these contractors and subcontractors.*

**Rationale:** Considering the current reported life-of-mine of AGAG of 22 years, it is important that workers not only have security of tenure, but that the rights of these workers are also respected at all times. To this end, the Union's proposal seeks to ensure job security, guaranteed pensions, and income security for these workers and their households under any such arrangement. The employment relationship is therefore expected to encompass the following key pillars of the ILO decent work agenda.

- (i) Respect for International labour standards and fundamental principles and rights at work
- (ii) Employment creation
- (iii) Social protection and
- (iv) Social dialogue and tripartism

### 1.3 Training; clause 9.2 (pg12)

The Union proposes that details in respect of; type of skills, number of skills, financial commitment and specific timelines over the stability period are properly outlined in the Development Agreement to ensure the full realization of Regulation 1 of the General Regulation.

**Rationale:** It is very refreshing to see training highlighted in **pg12** of the Development agreement, especially the intent of reinforcing Regulation 1 of the General Mining Regulations which requires the Minerals Commission to work with mining companies to identify staff positions that can be filled by Ghanaians, local candidates who can be trained to replace foreign staff, a training program, and timing for local staff to replace foreign staff.

Considering that AGA's redevelopment plan will see the introduction and use of mechanized/sophisticated mining methods and technology, which is likely to affect local employment as a result of the seeming unavailability of these skills immediately within the Ghanaian labour market, it is important to as part of the Development Agreement, demand

AGAG to demonstrate how local content requirements in Regulation 1 of the General Regulation will be realized.

#### 1.4 Use of Ghanaian Goods and Services; clause 8.3 (pg 11)

In order to ensure strict adherence to regulation 2 of General Mining Regulations, the Union propose that the Development agreement clearly specify the following:

- a) A detailed list of items that cannot be procured locally to be submitted to the Minerals Commission
- b) A plan of action to realize the provision in (a) as part of efforts to ensure full beneficiation of the mining value chain.

**Rationale:** It is striking to note that the net effect list of import duties waived by the terms of the agreements is not only colossal; it also has the potential to stifle Ghanaian businesses. Hence, on the principle of competitive cost advantage, this initiative will render the cost of import substitution products expensive relative to the subsidized imports. This in essence will render the intent of the local content provision counterproductive.<sup>1</sup> A painstaking collation of goods and services readily available in the Ghanaian market is not only a step towards the realization of clause 8.3; it is a substantial step towards the actualization of the downstream potential of the mining value chain.

#### 1.5 Assignment and Succession; clause 22.1 (pg26)

Drawing on the existing stability agreement between AGA and the Government of Ghana signed in 2004, page 8, captioned “*No Third Party Beneficiaries*”, the Union proposes the clause below to replace clause 22.1 of the Development Agreement.

***(a) This Agreement shall be binding upon and inure solely to the benefit of each party hereto, and nothing in this Agreement, express or implied, is intended to or shall confer upon any other person any right, benefit or remedy of any nature whatsoever under or by reason of this Agreement.***

**Rationale:** It is the Union’s considered view that with clause 22.1 in its current form as contained in the Development Agreement, Government stands the risk of losing tax revenue through third party tax evasion<sup>2</sup> and transfer pricing arrangements, if potential loopholes are not properly identified and tightened. It is therefore important to strictly ring-fence these fiscal incentives granted AGA to ensure that it is used for its true purpose and that is, the re-development of AGA. It is however worth noting that a mere replacement of clause 22.1 with the proposed clause above will not automatically guarantee the absence of revenue leakages but will undoubtedly be a substantial step if deployed alongside other stringent mechanisms including a robust monitoring/tracking system.

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<sup>1</sup> The import duty waivers as part of the tax concession total US\$177million. This is indirectly a disincentive to import substitution industrialization. *The net effect of the provision in 8.3 Use of Ghanaian goods* is that theoretically the DA will embrace intent of the provision however in practice it would never be achieved.

<sup>2</sup> Here, third party contractors get procurement of mine fleets and other equipment through the bearers of the development agreement which means these contractors will avoid standardized internationally charges on their imports

### 1.6 Employment and Training; clause 9 (pg11)

Reference is made to the last paragraph of **(pg11)** on employment and training. The Union, propose the revision of clause 9.1 last paragraph to read as follows.

- a) *AGAG shall, subject to the foregoing, also has the right at all times to choose its employees freely and without restriction. AGA, Government **and trade unions (where applicable)** shall from time to time as permitted by Law, determine how to accomplish the objectives set forth above in this Clause 9.1.*

**Rationale:** The Union proposes this amendment against the backdrop of ensuring that matters bordering on the future of work, the nature and form of employment and the ramifications thereof, are viewed from a tripartite (consultations between; Government, Employers and Organized Labour) perspective. This will among other reasons, guarantee not only policy coherence between mining and labour, it also ensures compliance with all relevant labour legislation.

### 1.7 Profound Changes in Circumstances; Clause 14.1 (pg 17 last paragraph)

The Union proposes the amendment of clause 14.1 (last paragraph- last three lines) to read as follows:

- a) *For purposes of this Agreement, Profound changes in Circumstances shall mean such changes in the economic conditions of the gold mining industry worldwide or in Ghana, or such changes in the economic, political or social circumstances existing in Ghana or elsewhere in the world at large **Or changes in the ownership of AngloGold Ashanti** as to result in such a material and fundamental alteration of the conditions, assumptions and basis relied upon by the Parties at the Effective Date (or the time after any subsequent review pursuant to this Clause 14.1 that the overall balance of equities and benefits reasonably anticipated by them will no longer be achievable as a practical matter.*

**Rationale:** The Union's proposed amendment to clause 14.1 is drawn from the fact that "profound changes in circumstances" do not only happen globally or nationally, it also happens at the enterprise level. Worth noting also, is the fact that whiles, this Development Agreement seeks to serve the interest of the Parties to it, it does appear that clause 14.1 only seeks to secure the interest of AGAG at all material times at the expense of Government. It may therefore be fair to explore a modification of the Development Agreement in the interest of Government if profound changes were to occur in the ownership of AGAG.

Interestingly, what clause 14.1 does not appear to cover is, ***in a situation where these profound changes turnout to be very positive for AGAG***, what Government may also benefit from any such relatively more favourable outcomes. Drawing on best practices elsewhere, the concept of "windfall tax" becomes eminent in such favourable situations.

### 1.8 Modification; clause 21.2 (pg26)

The Union proposes the amendment of clause 21.2 (paragraph 3) to read as follows:

- a) *This agreement may only be modified or amended **in accordance with clause 14.1** by the mutual written agreement of the Parties and such modification or amendment*

would require ratification by Parliament, in which case any such modification or amendment shall not become effective until ratified by parliament.

**Rationale:** As specified under the provisions on “profound changes in circumstances”, there are considerably stringent bases for modification of the agreement subject to the ratification by parliament. In order to tighten loopholes that may be exploited as a result of the generic interpretation of clause 21.2, it is important to tie clause 21.2 to clause 14.1 as the only bases upon which modifications may be proposed.

### 1.9 Fiscal Concessions (pg 2, clause 3.1)

The Union proposes AGAG complies strictly with prevailing tax rates as the bases for the Stability Agreement.

**Rationale:** It is the Union’s considered view that the framework or the parent law, within which the TCA is developed, is the Mining and Mineral Act 2006, (*Act 703*) and its relevant regulations.

From the foregoing and drawing on sections 48 and 49 of the Mining and Mineral Act 2006, (*Act 703*), the power of the Minister to enter into a stability or development agreement is limited to the fiscal regime at the time of entering into such agreements. This means that the prevailing fiscal regime that existed at the time of the stability agreement, and in this case AGAG, can only be the floor and not a ceiling as put forward in the TCA. It is therefore unclear what powers the Minister has under the law to reduce for example, corporate Income tax from 35% to 32.5%.

### 2.0 Other Information; clause 12.2 (pg16, paragraph 2)

The Union proposes that contrary to the provision on “other information” contained in the development agreement, ***there should be a full disclosure without any restrictions to ensure transparency of all transactions provided in clause 12.2.***

**Rationale:** Article 257 section (6) of the 1992 Constitution of the Republic of Ghana as well as Section 1 of the Mining and Minerals Act 2006 (*Act 703*) stipulates:

***“Every mineral in its natural state in, under or upon land in Ghana, rivers, streams, water-courses throughout the country, the exclusive economic zone and an area covered by the territorial sea or continental shelf is the property of the Republic and is vested in the President in trust for the people of Ghana”***

From this provision, it is abundantly clear that the mineral resources of Ghana are vested in the president in trust for its citizens. It is therefore important to ensure strict accountability of how these mineral resources are exploited and utilized in a very transparent manner at all times.

From the foregoing, it is not only important that the Government would make all relevant information relating to these Agreements (including provisions contained in clause 12.2) as

transparent as possible, it should also take necessary measures or steps to ensure their accessibility without any restriction whatsoever.

Indeed, there is no gainsaying that most of the information that clause 12.2 purports as confidential is available to the public by virtue of binding international standard requirements, particularly on stock markets that these multinational businesses including AGAG are listed.

In view of the above, it is therefore imperative for the citizens to have a full disclosure of information (including those set out in clause 12.2).

### MID-TERM CONSIDERATION

This section further highlights some key policy drivers which could also be considered extensively in the review of the Mining and Mineral Act 2006 (Act 703) and its relevant regulations. In addition, the uniqueness of these clauses, would further provide a sustainable path to ensuring sustainable mineral resource depletion, longevity of employment, as well as sustained revenue generation from the mining sector.

In doing so, two key policy variables namely; production modifier and windfall tax had been listed for the consideration of the Joint Committee (Select Committee of Mines & Energy and Finance) of Parliament of the AGAG and future agreements.

#### 2.1 Production Modifier; new insertion

This provision indicates that, on the principle of Sliding scale, any **excessive increase** in production of AGAG should result in a corresponding decrease in the net fiscal concession granted under the stability period.

#### Find below an illustration

Increase in production relative to the previous year	Corresponding reduction in the net fiscal concession
Up to 5%	3%
6-10%	5%
11-15%	6.5%
16-20%	7.5%
21 above	10%

**Rationale:** The concept of a **Production Modifier** is established within the context of sustainable development which is expected to ensure that development meets the needs of the present without compromising the ability of future generations to meet their own needs. It is therefore imperative to ensure that the rate of use of our minerals resources do not exceed our capacity to find new sources of mineral deposits. The introduction of a Production Modifier seeks to secure the country's natural resource in terms of mineral deposits from unguarded depletion, taking into account the fiscal giveaways embedded in the Development and Tax Concession agreements.

This modifier which is expected to be a control on production will likely secure Life of Mine and guarantee long term employment. This would among other things ensure that AGAG do not only benefit from these giveaways through accelerated mining of the mineral deposits based on

favourable prevailing economic conditions, but that other stakeholders particularly Government and workers can also benefit by partly taking back portions of these fiscal concessions and ensuring longevity of employment respectively.

## 2.2 Wind fall tax; new insertion

The Union proposes the introduction of a windfall tax as follows.

- a) AGAG shall be required to pay windfall tax when ***realized gold price exceeds planned gold price by 20%***.

**Rationale:** The intent of the introduction of a windfall tax it to ensure among other the redistribution of super-normal profits in a situation of unforeseen or unexpectedly large profit, especially one regarded to be excessive or unfairly obtained. Indeed, the need for this proposal is reinforced by the provisions contained in clause 14.1 of the DA which seeks not only to deny government its fair share in circumstances which turn out to be very positive, it grants every protection to AGAG when circumstances turn out to be negative and threaten the AGAG business. The carrot and stick principle therefore becomes imperative in the application of clause 14.1.

## Community Trust

The Union proposes the institutionalization of a ***tripartite plus committee*** (including catchment communities, employers, government, trade unions where applicable, NGOs and other relevant stakeholders) to manage the Community Trust Fund.

**Rationale:** Social license has become a key requirement and foundation not only for businesses to operate but also to thrive. To ensure the continuous maintenance of the AGAG social license, it is important to institutionalize a tripartite plus committee with its management and governance structures in order to engender stakeholder participation and involvement in the development efforts of communities around the AGAG catchment area.

## Recommendations

- ✓ Joint Committee (select committees on Mines and Energy and Finance) should conduct a bi-annual audit as a monitoring mechanism to ensure that AGAG is complying with the provisions of both the Development and Tax Concession Agreements.
- ✓ A change in the current approach (top-bottom) to a bottom-top approach where wider stakeholder consultation is conducted to feed into the negotiations of such Agreements.
- ✓ Review the General Mining Regulation to among other things reflect both short and mid-term considerations captured in report.