MEMORANDUM ON THE DEVELOPMENT AND TAX CONCESSION AGREEMENTS BETWEEN THE GOVERNMENT OF GHANA AND ANGLOGOLD ASHANTI (GHANA) LTD

TO

THE JOINT COMMITTEE ON MINES AND ENERGY AND FINANCE OF PARLIAMENT

Introduction

1. The Ghana National Coalition for Mining (NCOM) is grateful for the opportunity to present a memorandum to the Joint Committee on Mines and Energy and Finance on the two agreements due for Parliamentary consideration and possible approval, i.e. ***1. The Republic of Ghana and Anglogold Ashanti (Ghana) Limited Tax Concession Agreement for the Obuasi Mine Redevelopment,*** (hereinafter referred to as the TCA) and ***2. The Republic of Ghana and Anglogold Ashanti (Ghana) Limited Development Agreement,*** hereinafter referred to as the DA).

The NCOM is a grouping of community-based organisations in mining areas, NGOs and individuals working for policies and practices which ensure that the exploitation of Ghana's mineral resources contributes to integrated national development and transformation whilst respecting human rights, community livelihoods and environmental sustainability.

The Constitutional, Developmental, Policy and Historical Foundations of NCOM's comments

2. The NCOM's evaluation of the TCA and the DA is informed by a number of principles and factors. The most important of these are a) the of provisions of the 1992 Constitution; b) the terms of the national Minerals and Mining Policy (2014), as well as the 2011 ECOWAS Mineral Development Policy (EMDP) and the agenda of the 2009 Africa's Mining Vision of the African Union; c) the stance of the current government on the role mineral resources should play in Ghana's development and transformation; and d) the grim symbolism of Obuasi town and its environs as a testament to the history of value extraction by foreign investors without local development benefit.

a. Minerals are owned by the Republic in trust for the people of Ghana, in whom the sovereignty of the Republic resides. This means that the exploitation of these resources must advance Ghana's sustainable national development and the welfare of its citizens (the living as well as future generations). This is especially important for a non-renewable resource like gold, the production of which involves substantial negative environmental externalities.
b. The policy implications of the Constitutional provisions have been elaborated in Ghana's Minerals and Mining Policy (2014). The terms of the Minerals and Mining Policy are informed by the ECOWAS Mineral Development Policy (EMDP) and the agenda of the Africa Mining Vision of the AU, as elaborated in the AMV Action Plan (2011) and other documents. These three national, regional and continental policy frameworks on minerals and development are united by the aspiration that Africa's mineral resources

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should power the continent's structural transformation in multiple ways – driving inter-sectoral linkages, job-creation and skills-development, industrialisation and technological upgrading, etc., rather than simply be a source of revenue. This position is founded on a critique of the mutually destructive race among African countries, since the 1980s, to attract foreign direct investment into their mining sectors. The evidence shows that whilst African countries succeeded in attracting investment and earning some mineral revenues, the overall development benefits have been more doubtful. *This is due to excessive fiscal and other incentives given to foreign investors and the inadequate attention to making development outcomes clear and measurable targets in the relationships that were established with foreign large-scale mining firms*.

c. President Akufo-Addo's "Ghana Beyond Aid" agenda has clearly articulated the importance of optimising the transformational and sustainable development benefits that Ghana gets from its mineral resources. This is not simply in terms of increasing mining revenues to the national treasury, but in terms of wider economic and social benefits – increased retention of value in the country, increased local economic asset ownership, industrialisation and procurement of goods and services from inside the country rather than imports. The Minister of Lands and Natural Resources recently publicly expressed his exasperation with the limited development contribution of large scale mining firms, including AGAG.

d. The Obuasi mine has been described by one writer as the 'richest square mile on earth'. It has long been considered perhaps the single richest gold mine in the world on account of the extremely high grade of its ores. Yet the shabby, underdeveloped state of Obuasi and its environs is one of the sharpest testaments to a long unhappy history of how large scale mines focused on, and were allowed to continue, extracting and exporting value from production enclaves with very weak links to the surrounding area as well as the national economy. The proposed re-opening of the Obuasi mine, therefore, offers a not-to-be-missed opportunity for a new beginning and practice in terms of how a rich large-scale gold mine can contribute to local development.

General Comments on the DA and TCA

What is the legal basis of the Development Agreement and the Tax Concession Agreement?

3. Clause 2.1 of the Development Agreement (DA) makes clear that the legal basis of the DA is Sections 48 and 49 of the Minerals and Mining Act, Act 703. Though the Minister may grant the holder of a mining lease exemption from the payment of customs import duty in respect of plant, machinery, equipment and accessories imported specifically and exclusively for the mineral operations" under Section 29. (a) of Act 703, this power was not exercised in this case, nor was it relied on in the DA. Curiously the Tax Concession Agreement (TCA) only mentions the DA as part of the "Background" of the TCA, making no reference to Act 703. However Section 3.1 of the TCA states that the fiscal concessions it seeks to give AGAG are being granted "…Pursuant to the powers of Parliament to waive or vary a tax imposed...". While Parliament has powers in relation to tax matters under various provisions of the Constitution, the provisions relevant here are under Article 174. Clause 4.14 of the memorandum on the TCA from the Minister of Finance to Parliament speaks of the TCA and DA being submitted to Parliament for approval under Article 174 (2) of the 1992 Constitution. Article 174 provides as follows:

"(1) No taxation shall be imposed otherwise than by or under the authority of an Act of Parliament.

(2) Where an Act, enacted in accordance with clause (1) of this article, confers power on any person or authority to waive or vary a tax imposed by that Act, the exercise of the power of waiver or variation, in favour of any person or authority, shall be subject to the prior approval of Parliament by resolution.

(3) Parliament may by resolution, supported by the votes of not less than two-thirds of all members of Parliament, exempt the exercise of any power.

It is clear from the above provisions that Parliament cannot on its own motion vary or waive taxes in reliance on Article 174. It can do so ***only through passing a law or approving the exercise of a statutory power by a person or body authorised to vary or waive taxes*****.** The memorandum requesting Parliament to approve the TCA is from the Minister of Finance. However the TCA does not indicate under which law and by whom the fiscal concessions are being granted. ***The invocation of the 'powers of Parliament to waive or vary taxes' as legal justification for the fiscal concessions in section 3.1 of the TCA is, thus, of doubtful validity because Parliament's role under Article 174 (2) is to approve the waiver or variation of a tax by a person or authority with statutory power to do so*****.**

4. The legal basis for granting fiscal concessions to a holder of a mining lease are Sections 48 and 49 of the Minerals and Mining Act, 2006 (Act 703). These two sections of Act 703 provide as follows:

Section 48

*(1) The Minister **may** as a part of a mining lease enter into a stability agreement with the holder of the mining lease, to ensure that the holder of the mining lease will not, for a period not exceeding fifteen years from the date of the agreement,*

(a) be adversely affected by a new enactment, order instrument or other action made under a new enactment or changes to an enactment, order, instrument that existed at the time of the stability agreement, or other action taken under these that have the effect or purport to have the effect of imposing obligations upon the holder or applicant of the mining lease, and

(b) be adversely affected by subsequent changes to

(i) the level of and payment of customs or other duties relating to the entry of materials, goods, equipment and any other inputs necessary to the mining operations or project,

(ii) the level of and payment of royalties, taxes, fees and other fiscal imposts, and

(iii) laws relating to exchange control, transfer of capital and dividend remittance.

(2) A stability agreement entered into under subsection (1) shall be subject to ratification by Parliament.

Section 49

*(1) The Minister on the advice of the Commission **may enter** into a development agreement under a mining lease with a person where the proposed investment by the person will exceed US$ five hundred million.*

(2) A development agreement may contain provisions,

(a) relating to the mineral right or operations to be conducted under the mining lease,

(b) relating to the circumstance or manner in which the Minister will exercise a discretion conferred by or under this Act,

*(c) **on stability terms as provided under section 48**,*

(d) relating to environmental issues and obligations of the holder to safe-guard the environment in accordance with this Act or another enactment, and

(e) dealing with the settlement of disputes.

So despite the TCA's silence, ***section 48 of Act 703 is the only possible legal basis for granting tax concessions to AGAG, via section 49.***

It is clear from the use of the word 'may' in sections 48 (1) and 49 (1) that the power vested in the Minister to enter into a stability or development agreement is a discretionary power. Section 48 does not set out the conditions that must be satisfied before the Minister enters into a stability agreement. Under section 49 (1) a minimum proposed investment of over US $500m is a precondition, but not a sufficient basis for the exercise of the Minister's discretion to enter into a development agreement. This means that a mining lease holder is not entitled to get a development agreement under section 49 (1) simply because he plans to invest more than US$500m. ***Meeting the investment threshold alone is not a sufficient ground for a development agreement***.

Above all, the Minister's exercise of discretion under Sections 48 and 49 of Act 703 must be in the interest of the Ghanaian people.

5. Considering the non-renewable nature of mineral resources and the fact that the Executive manages these resources as trustee on behalf of the present and future generations of Ghanaians, the failure of Act 703 to provide criteria to guide the Minister's discretion under sections 48 and 49 is a serious gap in the law. That notwithstanding, it is a general principle that a trustee must manage trust property in a responsible manner, and primarily in the interest of the beneficiaries. It is therefore a reasonable implied criterion that **the Minister's use of discretionary powers under Sections 48 and 49 of Act 703, and any agreement under these two sections must pass the test of being primarily in the interest of the Ghanaian people.**

The current national context of a public consensus (government and society) on the need to reverse the practice and history of inequitable mining agreements and optimise the development benefits that accrue to the Ghanaian people is an affirmation of the above point. This also concretises the provisions of Article 296 of the 1992 Constitution on the exercise of discretionary powers, which provides that the exercise of such powers should, among other things, be fair and not capricious or arbitrary.

6. The government's covering memo on the TCA is long on AGAG's plans and the challenges the firm faces around the redevelopment of the mine, but singularly weak in isolating the unique mischiefs being addressed and in making a case for each and all of the benefits being given AGAG under the TCA and DA. **Is it credible for the Memo to strongly imply that without the concessions being given AGAG, will not invest in re-developing a high-quality gold mine whose rich endowments are well known?** No evidence is offered by the Memo in support of this claim. Instead there are opaque phrases which sound more like cheerleading for AGAG than verifiable justification for the concessions being made to the firm. For example "the nature of the ore body and operations make an investment into the redevelopment of the mine challenging to deliver the requisite returns, especially in the first ten years of the life of the mine" (clause 4.8) and "To make the required investment, AGA has indicated that it would need Government support" (clause 4.13) and "under the current circumstances the Obuasi Mine is not operating and without the assistance of Government, in terms of approving the Agreements it is likely to continue that way" (clause 6.1). No evidence is provided for any of these self-serving assertions.

The covering memorandum to Parliament on the TCA from the Minister of Finance makes claims about the benefits Ghana and its people will derive from the TCA and DA and various concessions being granted AGAG towards the re-opening of the Obuasi mine. These fall under four broad heads – government revenue from taxes and other fiscal imposts, local content through supply of goods and services, employment and the development of Obuasi and its surrounding communities. What Ghana is giving away to AGAG is clearly set out in detail in various provisions of the TCA and DA. This is in sharp contrast to the general and imprecise terms in which the benefits to Ghana are set out.

a. What evidence is there in support of the claims made in the memo about the benefits to Ghana? Can the Government offer any concrete basis for arriving at these potential benefits, e.g., from "Local Content and Employment (and its multiplier effects)" (clause 5.2 of the Memo)? The provision of this evidence is crucial and indispensable if Parliament is to make an informed decision about the DA and TCA.
b. Late last year the Ghana Government launched a National Suppliers' Development Programme to systemise the development of local content in the mining sector. A major mine re-development like that planned for Obuasi is a unique opportunity for advancing the Programme. Was the Programme taken into account before AGAG was granted US$177m worth of import duty waiver for imports under the project?
c. There is no evidence before Parliament of measurable and enforceable commitments by AGAG under the DA or TCA, guaranteeing secure and decent work for its workforce. Recent history makes such a commitment necessary. Two years ago Gold Fields Ghana Ltd and the Minister of Lands and Natural Resources made public assertions, accepted by Parliament, that keeping existing staff in work and increasing the numbers of direct employees were key justifications for concessions under two development agreements signed with Gold Fields in March 2016. As is well-known, a few weeks ago Gold Fields controversially laid off staff in a bid to cut costs (the very costs that the fiscal concessions in the Development Agreements were announced as covering) and turned to casualized, insecure contract labour. Both government and Parliament have, so far, gone along with this brazen deceit.
d. Claims are made, again under clause 5.2 of the Memo, about the beneficial outcomes of the project in terms of corporate social responsibility and local community support. However neither the TCA nor DA contain any measurable and binding commitments by AGAG in respect of employment, community development or corporate social responsibility.
e. According to the Minister's memo the principal negative impact from the TCA and DA not being approved and the mine, therefore, not re-opening will be loss of mineral revenue. This is the discredited narrow basis on which Ghana has been giving away concessions, year after year.
f. Gold mining comes with significant negative social and environmental impacts. There is no evidence before Parliament about how these impacts have been evaluated, costed and planned for in this instance. Very often poor planning in this regard leaves Governments and societies with expensive, long term burdens to be addressed at great financial and social cost, far outweighing the immediate benefits of revenue accruing to the Government.

ANALYSIS OF THE TERMS OF THE TCA AND DA

Fiscal Concessions under clause 3.1 of the TCA

7. The TCA grants AGAG various tax concessions all of which amount to reductions or waiver of taxes payable to the state. These concessions are then frozen (stabilized) for ten years under the terms of the DA, with an option to be extended another 5 years if certain conditions are met. The covering Memo from the Minister of Finance offers ***a conservative estimate of US$275m of revenue foregone*** because of these concessions. Government projects to earn US$304m as revenue during the first ten years of the redeveloped mine. This makes the $275m a huge giveaway that leaves the Government with less than US30m as revenue. These reductions and waivers comprise of

a. a reduced corporate income tax rate,
b. concessionary treatment of unutilised capital allowances carried forward,
c. waiver of import duties (amounting US$177m) in respect of goods to be imported for the project,
d. a special sliding scale for royalties starting at 3%, i.e., below the current fixed rate of 5%, and
e. exemption from the application of section 62 (1) of the Income Tax Act, 2015 (Act 896).

It is unclear under which law these reductions and waivers are being granted. It certainly cannot be under the Minerals and Mining Act, 2006 (Act 703). This is because, as clearly set out above, the Minister's powers under section 48 of Act 703 to give fiscal concessions are limited to freezing (stabilizing) existing tax and other fiscal obligations and *do not extend to giving reductions or waivers in respect of existing obligations*. Nor does Parliament have the power under Article 174 (2) of the Constitution to grant fiscal concessions *on its own motion*.

On the face of it, therefore, the fiscal concessions proposed for AGAG under the TCA are illegal because they have no basis in the Constitution or the relevant legislation, i.e. Act 703.

8. The fiscal concessions proposed for AGAG are very similar to those granted to Gold Fields Ghana (GFGL) in March 2016 under Development Agreements for its Tarkwa and Damang mines. The GFGL fiscal concessions themselves were lifted from the Revised Newmont Investment Agreement of March 2015. That the renegotiation of the original 2003 Newmont Agreement brought substantial improvements to that Agreement is clear from the terms of the Revised Newmont Agreements of 2015. The latter agreements ***increased*** the fiscal obligations of Newmont and raised government's revenue gains. Despite these improvements, the 2015 Newmont Agreements constitute a legal outlier because the validity of the fiscal concessions derives from the terms of the 2003 agreement and the then applicable laws. They are not creatures of Act 703 of 2006, and therefore the fiscal concessions, which do not meet the requirements of currently binding legislation, cannot be lawfully used as a benchmark for agreements under sections 48 and 49 of that law. Thus, the erroneous and misguided use of fiscal terms of the 2015 Newmont Agreement as the basis for fiscal concessions in subsequent agreements has far reaching negative consequences for the legal regime governing mining, effectively nullifying the application of existing fiscal laws to any mining firm that is ready to invest more than US$500m.

Stabilization under clause 4 of the DA

9. The DA gives a stability period of 10 years to AGAG, during which period it will not be affected by adverse changes in the fiscal regime, on exchange controls, transfer of capital and remittance of dividends. The duration and coverage of stabilization/freezing provisions for an investor are usually determined on the

basis of an estimation of a reasonable capital recovery period, or special time-bound needs like repayment of loans secured for a new project. No such justification is offered for the range of fiscal concessions covered by the stabilization provisions under clause 4 of the DA, nor for the 10-year duration. Stability clauses are not meant to be sweeteners for investors, but should be responding to a verifiable need or challenge facing the investment. That is why the grant of stability agreements under Act 703 are at the discretion of the Minister, a discretion power that must be exercised on a reasonable basis.

AGAG Covenant in respect of Community Trust under clause 8.1 of DA

10. AGAG undertakes to contribute US$2.00 per ounce of gold it sells from the Obuasi Mine to the AngloGold Ashanti Obuasi Community Trust. The disbursement of the funds from the Trust are to be determined by the board of the Trust. The creation of the Obuasi Trust was first provided for under the 2004 Stability Agreement between the Government and Anglogold. Under that agreement AGAG was to contribute 1% of its ***profits*** to the Trust. AGAG did not create the trust till 2012, but interestingly, it was not held to account by government. The new provision for $2.00 per ounce of gold produced is an important variation because the $2.00 per ounce is not coming from AGAG's profits but is to be treated as an expense, which will reduce AGA's taxable income, thereby further reducing government's revenue take. **In effect it is the State that is contributing to the Obuasi Community Trust!** Based on the production and price projections in the Government's memo to Parliament the total contribution to the Trust over the first 10 year period will be in the region of US$6.4m, a modest average of $640,000 (about GHC 13m at current exchange rates) per annum.

11. The clause on the Community Trust represents the only obligation, qualified and limited as just indicated, undertaken by AGAG under the DA towards the development of Obuasi and its surrounding communities. The Government's Memo to Parliament (clause 5.2) creates the impression that the reopening of the mine will somehow bring health and education benefits beyond the utilisation of the Community Trust. The true position is, however, that ***AGAG has no*** **obligation** ***under the DA to support or invest in any community facility or project*****.** This retrograde approach is just the kind of attitude which has made Obuasi **a grim example of an** ***underdeveloped mining town which has enriched shareholders thousands of miles away.***

The DA should clearly commit AGAG to a CSR initiative which will directly impact the lives of the communities around the mine. AGAG should be made to follow the growing practice of large mines elsewhere that consciously seek to stimulate local economic and social development through planning for local/community level procurement of goods and services alongside investment in social infrastructure and services. ***Parliament should demand that AGAG produce a plan showing how it intends to build local level economic linkages and stimulate employment creation as an integral part of the mine re-development plan. Also, given the fact that AGAG is not the sole contributor to the Community Trust, it should produce an indicative plan, based on consultation with the districts within which the AGAG concession is located, of how the resources of the Community Trust will be utilised*****.**

Local Content (procurement of local Goods and Services) under clause 8.3 of the DA

12. Pronouncements by President Akufo-Addo and other leading government officials as well as the launch of the National Suppliers' Development Programme late last year underline the importance of increased local content for deepening the developmental contribution of the mining sector. This is significantly undermined by the massive (in our view illegal) $177m import duty waiver granted AGAG under the TCA. No evidence is offered to show that the listed goods cannot be procured locally. Moreover, clause 8.3 places no

obligation on AGAG in respect of local content, beyond the minimalist statutory standard. This is a grave omission, given the extent of the overall concessions granted to AGAG.

The DA should be revised to include specific measurable targets for local procurement of goods and services beyond the statutory minimum and these targets should help advance the implementation of the National Suppliers' Development Programme.

Employment and Training under clause 9 of the DA

13. The controversial lay-off of permanent employees in favour of casual sub-contracted workers and the tragic death of sub-contracted workers at Newmont's Ahafo mine have drawn public attention to the importance of the quality of work in the large scale mining sector. The Government Memo (clause 5.2) projects that 'the number of persons employed directly at Obuasi during operations by AGAG and its sub-contractors will be between 2000 and 2500, with an additional 1500 being employed during the construction phase'. The economic contribution to the economy through employment and other community investments represents about 7% of the total revenue pie over the life of the mine'.

There is no indication of how the 7% figure was arrived at, what proportion represents the cost of labour, how many of these workers will be permanent workers, directly employed by AGAG and how many will be sub-contracted labour, without job and income security. Casualization of work through sub-contracting allows the mining firm to drive down the cost of labour. This not only reduces what comes back into the local economy but could sow the seeds of social conflict and labour unrest, something which found extreme and tragic expression in the police killing of protesting miners at Marikana in South Africa. The accelerating race among the mining companies to reduce the numbers of permanent employees to the barest minimum is not simply a matter of business costs but a socio-economic issue of public interest. 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 generally, employers on the other hand may resort to 'needless' redundancies in order to cut costs and maximize their returns. This phenomenon 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. In the circumstances, it is proposed that:

a. **AGAG and government provide information to Parliament about the employment model for the redeveloped Obuasi mine and the rationale for the use of permanent or sub contracted workers. The plan should have an affirmative action component for women and persons from the mine community.**
b. **The term *"permanent employee*" be clearly defined under clause 1.1 (definitions and interpretations) of the DA. The lack of a clear definition of "permanent employee" leaves a major gap for possible exploitation. A precise definition of the term "permanent employee" will prevent its interpretation to suit the convenience of the employer and also help eliminate possible implementation and compliance gaps.**
c. **The protection of labour should also form part of the stability terms (Clause 4 of the DA) and be a condition for the grant of fiscal concessions, by the inclusion of the following clauses:**
    i. During the initial stability period (10 years) from the Effective Date, AngloGold shall not implement any retrenchment programme at the Obuasi mine (it being understood that

individual dismissals made from time to time for cause do not constitute a retrenchment programme)

ii. ***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.***

The proposal in c (ii) above seeks to ensure job security, guaranteed pensions, and income security for these workers and their households under any such arrangement. The employment relationship must 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.

14. AGAG undertakes under clause 9.2 to provide on a continuing basis for the training of Ghanaians to qualify for skilled, technical administrative and managerial positions. AGAG has publicly claimed that the new mine will employ new technologies and entail skills which are not available in the Ghanaian labour market. In anticipation of this development, ***Parliament should insist on the production of satisfactory plans for the training of Ghanaians to take up these roles, with measurable targets and outputs, before approval of the DA and TCA.***

Confidentiality under clause 12.2 of the DA

15. Clause 12.2 of the DA has a very sweeping provision against disclosure of a broad range of information pertaining to the contract or AGAG's operations. The government is a trustee of the minerals which have been conceded to AGAG to mine for the benefit of both the firm and the Ghanaian people. The presumption about information disclosure should be in favour of as much disclosure as possible to the Ghanaian public as part of the accountability of the government and the mining company for their stewardship. The confidentiality provision as it stands is too broad and not time bound.

Information on mineral reserves, sales and production data go the heart of whether the company is fully disclosing the primary information which allows informed judgment about the equity of the relationship. These issues are at the heart of the dispute in Tanzania between the Government and the gold mining firm Acacia Mining with the government accusing Acacia of not fully disclosing its production. The environmental and social impacts of mining are not private matters for the mining firm but matters of inter-generational public interest so it is difficult to understand why information on the amount a company has set aside for reclamation should be confidential. The confidentiality clause should be revised to start with a presumption of a public interest in disclosure of information about the exploitation of the mineral, including production data, mineral reserves, amount set aside for reclamation, and a narrowing down of what is confidential to cover only issues that can be shown to involve commercial and corporate secrets.

Status of Environmental Protection laws under clause 20 of DA

16. Under clause 20 of the DA, AGAG is to be allowed special treatment in respect of the applicability or mode of application of changes in the laws on environmental protection, which adversely affect AGAG, its operations or rights and obligations. It is shocking that the DA contains this provision, considering that weak environmental protection and, therefore, the intergenerational environmental, health, social burdens left by mining are part of the damaging, un-costed legacy of the mining industry in Ghana. The protection of the environment as an obligation owed to present and future generations is set out in the Directive Principles of

State Policy in Chapter 6 of the 1992 Constitution. These Directive Principles have an overarching application to all institutions, persons laws and policy decisions. Article 36 (9) of the Constitution provides as follows:

> *"The State shall take appropriate measures needed to protect and safeguard the national environment for posterity; and shall seek cooperation with other states and bodies for purposes of protecting the wider international environment for mankind."*

The obligation imposed by the Constitution on the state, policy makers and all legal persons to protect the environment cannot be waived or varied for a single firm because of the cost of compliance. The qualification in clause 20 in respect of environmental laws should, therefore, be removed and AGAG made subject to changes in the environmental laws during the stability period.

Policies Issues arising from the AGAG Agreements

In addition to the specific issues raised about the terms of the AGAG Development Agreement and Tax Concession Agreement the two agreements raise several policy as well as legal issues which go beyond their terms. Key among such issues are the following:

Gaps in sections 48 and 49 of Minerals and Mining Act, 2006, (Act 703)

17. The current practice, as exemplified by the present AGAG development agreement and the two Gold Fields Development Agreements of March 2016, seems to be that once a mining firm commits to invest more than US$500m it gets a development agreement containing concessionary fiscal and other terms which are stabilized for a number of years. In both instances the mining firm assumed some obligations. However analysis of these undertakings as well as comparison of the Gold Fields and AGAG agreements show that these undertakings are generally weak in their development value to the country, and difficult to measure. To compound matters, there is no specification of benchmarks for measuring whether and to what degree the undertakings are being fulfilled. To address these problems,

The provisions of Section 49 of the Minerals and Mining Act, 2006 (Act 703) must be amended to:

a. **provide criteria to guide the Minister in exercising the discretion to enter into a development agreement as well as the duration of the agreement, and**
b. **commit the beneficiary investor to fulfil its undertakings**
    - **in accordance with specified, measurable and time-bound benchmarks, and**
    - **subject to stated sanctions (withdrawal of concessions) for non-performance.**

18. **What issues can or cannot be covered by a stability agreement?** Stability clauses are generally intended to protect the economic viability of an investment but increasingly the scope of what gets treated as a legitimate variable for stabilization is informed by sensitivity to sustainable development and human rights considerations based on national constitutions and the growing body of international law on environmental protection and human rights. Several studies have however shown that stability clauses in contracts in Africa's extractive sectors have tended to have very sweeping provisions with the effect of undermining human rights and sustainable development outcomes in the host country. Section 48 (1) (b) of Act 703 clearly sets out the fiscal issues that can be the subject of the stability agreement. On the other hand Section 48 (1) (a) as it currently stands is very sweeping because changes in laws or action under a law on any issue can be the subject of a stability agreement.

Act 703 should be amended to align with the growing trend to more carefully delimit the issues, primarily fiscal issues, which can be the subject matter of stability clauses and a tendency to exclude human rights and environmental issues from the purview of stability agreements.

19. **What factors determine the duration of a stability agreement under Section 48 of Act 703?** Section 48 (1) of the Act provides for a maximum period of 15 years for stability agreements but offers no guidance on what criteria/considerations should inform the Minister's decision on the duration of a particular stability agreement. Based on the suggestion above about the subject coverage of stability agreements under section 48**, the duration of a stability agreement should be linked to projections of the period reasonably required, on the basis of existing conditions, including fiscal provisions, for repaying debt, recovering invested capital, and other such factors as formed the basis for determining the initial viability of the investment**.

Policy incoherence and inadequate stakeholder participation in the design of the AGAG agreements.

20. The overall character of the TCA and DA testify to the continuing grip of an investment attraction priority rather than structural economic transformation perspective on mineral policy. This is despite the adoption of policy frameworks to promote structural transformation and President Akufo-Addo's many pronouncements about the need to break with raw material commodity export dependence. The huge waiver of duties on imported inputs during stability period raises questions about the coherence between this big mine redevelopment project and the rolling out of the National Suppliers' Programme and increasing local content.

21. The contents of the Agreements also reflect inadequate engagement by the Government with key domestic business and civic constituencies such as labour unions and affected communities during the negotiation of the AGAG agreements. it is doubtful if the perspectives of relevant Ghanaian producers was taken into account before the various clauses on local content, including the massive waiver of import duties, were agreed. Similarly, the absence of any obligations on AGAG in respect of local community development and building district level economic linkages is unlikely to have happened if there had been a robust engagement by the government with stakeholders including communities in the Obuasi area, their civic organisations and trade unions on the terms of the TCA and DA.

The policy incoherence and inadequate stakeholder engagement around the AGAG agreements are merely instances of persistent systemic failures and weaknesses in development policy making which must be urgently addressed.