MEMORANDUM OF OPINION

TO: **LUKE DANIELSON**

FROM: **DOMINIC AYINE**

SUBJECT: **COMMENTS ON MODEL MINING DEVELOPMENT AGREEMENT**

DATE: **SEPTEMBER 1O, 2010**

I have had the pleasure of reviewing the Model Mining Development Agreement ("MMDA") in accordance with the Terms of Reference contained in your letter of August 20, 2010 and wish to comment as follows:

General Comments

1. **Gaps in the MMDA**

The drafters of the MMDA have done an excellent job of producing a highly sophisticated and comprehensive model agreement that in many respects reflects and goes beyond existing practice in the mining industry. My review of the MMDA shows that it is a significant improvement on some of the mining contracts between governments and companies that I have seen in Ghana and Sierra Leone. Further and more importantly, the MMDA, if adopted and implemented by governments and the mining industry even in its current form, will move us closer to the attainment of some of the goals of sustainable development and provide better benefits for host countries and local populations than is currently the case.

That said, there appears to be a number of gaps in the MMDA that may require filling in order to make it more complete and increase its potential usefulness to governments, companies and local communities. The first gap relates to the assumption that all mineral resources are owned by the government or state. This assumption and the provisions of the MMDA that supports it means in effect that the MMDA will be of limited use in jurisdictions where public ownership of mineral resources is either rare or even nonexistent. This is because the set of rights that the government could grant and or the obligations that it could assume under the MMDA flow sometimes directly from its property in the mineral resources. However, one could argue that if the MMDA is meant to aid mineral-rich developing countries, then it would be right to assume public ownership of mineral resources since most, if not all, developing countries tend to vest ownership of minerals in the state. This notwithstanding, I would suggest that there be inserted in the agreement alternative language to take care of situations where the right to subsurface minerals is vested in a private person or community. In that case the agreement on mine development would be a trilateral agreement among the Government, the company and the owner of the mineral resource as opposed to its current bilateral nature of the MMDA. I propose the language in **Box 1** below:

Box 1: Suggested Language where mineral resources privately owned

In the recitals:

Whereas [name of person/community] owns all the subsurface minerals found within the mine area;
Whereas the government seeks to regulate the extraction of the aforesaid minerals in the public interest

Subsection 2.2: Grant of Mine Development Rights
[Name of person/community] hereby grants to the company full and complete access.....

This may mean substantial changes to a number of the substantive provisions. For instance the rent and royalty clauses may have to change to reflect the right of the private owner to these payments whereas the tax-related and regulatory provisions would remain the same.

On the issue of ownership, clause 2.2.2 on "Legal Title to Minerals" requires a bit of redrafting to make clear the intent and purpose of the second sentence thereof. Whereas the first sentence is clear as to the obligation of the government to guarantee that property in the mineral is vested in the company, the obligation to ensure that the local or native people are in fact the rightful owners of the land may be difficult to implement in practice. From the Ghanaian experience, local or native people do not usually comprise a homogenous lot called "owners". Land is usually owned by either the stool (i.e. communal land) or the individual members of the community. Apart from the owners, there are usually other persons with rights over the land, including especially tenant farmers. In order to cater to the needs of this group, Ghanaian law recognizes not only owners, but also lawful occupiers of the land for purposes of the payment of compensation and the distribution of royalties and ground rent. In this regard, the term "informal occupant" in the MMDA [see clause 2.3.3(b)(iv)] is an unhappy term. If informality relates to the fact that such occupants do not possess formal documents of title to the land subject to a mining development agreement, then it would seem from the Ghanaian context that it covers almost everyone with a claim to the land. This is because formal or registered titles are rare in most areas where mining operations take place.

Consequently, the question of ownership or lawful occupation and the entitlements flowing from it is left to be determined by the company in agreement with local people on a case-by-case basis. From our experience, it is very difficult, if not impossible, for the government to guarantee ownership of land; the government merely exercises its constitutional right of ownership of the mineral resource by granting the right to exploit the mineral to the company subject to the surface rights of the owners or lawful occupiers of the land. In its present form, clause 2.2.2 leaves open the possibility of suits by companies against governments in case of disputes about the ownership rights of local communities.

Still on the issue of ownership, clause 2.2.3 provides for the payment of rent to owners of surface rights at a reasonable rate agreed to by the company and the owner. But it is thus not immediately clear whether it is the owners of surface rights who are entitled to the ground rent or the government. This is because the same clause explicitly provides that the rent payable for the disturbance of surface rights must be credited to the company against its annual ground rent obligations to the government. In other words, there is in effect no clear distinction between the "rent to the titleholder" and the "annual rental payable to the Government under this Agreement." If, as is currently proposed, the company is credited by the government for payment of rent to local owners, then the rent obligation runs directly to the government and not to the local communities. As a practical matter in Ghana, ground rent is paid by mining companies to a government agency (the Lands Commission) which then pays land owners under a statutory formula through the Office of the Administrator of Stool Lands. Under that statutory scheme, it is made clear that the annual ground rent is due to land owners but is collected by the government for distribution.

A related issue that has not been adequately addressed by the MMDA is the issue of compensation for land takings and or for the disturbance of surface rights. Clause 2.3.3(b)(v) imposes an obligation on the company to "make satisfactory arrangements for payment of a fair and reasonable compensation for any prospective damage to any crops, buildings, trees or works therein." It is thus implied that owners or lawful occupiers of land subject to a mine development agreement are entitled to compensation that is fair and reasonable. However, given the importance and thorny nature of the issue of compensation, stronger and more explicit language may be required to guarantee the right to compensation by those whose surface rights are disturbed in the course of mine development. Thus language similar to that in **Box 2** may be inserted in the section of the MMDA dealing with social impact assessment to cater to this gap.

Box 2: Compensation for disturbance of surface rights

The owner or lawful occupier of land acquired for the development of a mine shall be entitled to the prompt payment of fair and adequate compensation for the disturbance of the surface rights of that owner or lawful occupier. The compensation payable to such owner or lawful occupier may include compensation for deprivation of the use of the natural surface of the land, loss of or damage to immovable properties on the land, loss of earnings or sustenance suffered by the owner or lawful occupier and loss of expected income.

For the purposes of the payment of compensation for the disturbance of surface rights a valuation of the loss suffered or to be suffered by the owner or lawful occupier shall be undertaken by a certified independent valuer in accordance with accepted international principles of valuation

Another area that needs to be adequately addressed in the MMDA is that of security as reflected in clause 22.5. While it is acceptable to grant the company the right to establish its own security force to maintain law and order and to protect its investments, it is important to include safeguards against the use of that security force to abuse the rights of local

communities. To do so, it is insufficient to encourage compliance with existing law including the applicable human rights law of the country. In the Ghanaian context, there have been horrible incidents of guard dogs being used by the private security of a mining company to maul local residents trespassing on a mining concession. I would suggest that more explicit safeguards be incorporated into the MMDA to safeguard against abuses of that kind. In this respect, language analogous to that in **Box 3** may be incorporated into the MMDA as sub-clauses to clause 22.5.

Box 3: Use of Private Security by Company

Where the company establishes and maintains its own security force either directly or under contract with other persons, the company shall ensure that its security personnel do not engage in acts of brutality against members of the local community whether or not found within the mining area.

Without prejudice to the generality of the foregoing the company's security force shall not beat, maim or cause other bodily injury to members of the local community whether or not such members have entered the mining area with or without the permission of the company.

Where a member of the local community has been arrested and detained the arrest and detention shall be in accordance with the Constitution of [Country] and in any event a member of the local community who has been arrested and detained by the company's security force shall be handed over to the nearest police station within [forty-eight hours] of such arrest and detention

Where the security force established and maintained by the company engages in any acts contrary to this Agreement, without prejudice to any criminal action that may be instituted under the laws of [Country], it shall be liable to pay compensation to the affected community member.

Finally, I think that a major gap in the MMDA is the absence of provisions on local beneficiation in the downstream mining industry. Clause 31.0 which deals with forward linkages could be modified to provide for local downstream beneficiation. Over and above the local content provisions relating to the use of local goods and services which constitutes side-stream beneficiation, downstream beneficiation has the potential to unlock economic growth, create jobs and ensure the sustainable development of a mineral-rich developing country. Admittedly, there is not much that can be done by way of contractual provisions in the MMDA committing a company to forward integration with the downstream sector, especially in relation to capital-intensive activities such as smelting and refining of minerals, but provisions on incentives for doing so may end up encouraging companies willing and able to engage in local downstream beneficiation. I do not have any particular proposals in mind but it is something I strongly believe should be encouraged within the framework of the MMDA.

2. Balance of Interests

The MMDA is fairly balanced in terms of how it takes account of the interests of companies, the government (or country) and local communities. Indeed, from my review of mining leases in Ghana and mineral contracts in Sierra Leone, the MMDA is a far more balanced framework than what currently exists in these countries. For instance while a typical mining agreement in these countries does not completely omit to provide for the protection of the environment and the basic human rights of communities, it is often the case that they do not go as far as the MMDA proposals on these issues. Indeed, certain mining leases in Ghana that I have examined do not even contain elaborate provisions on mine closure and the environmental liabilities of companies at that stage of mine development. In the Ghanaian context, what is normally provided for in a mining lease is a general obligation on the part of the company to leave the surface of the mine area in a "usable condition and to restore all structures thereon not the property of the Company to their original condition." In short, the MMDA goes much further in incorporating the interests of all the stakeholders- the company, the government, the community and labor- than is usually the case in countries such as Ghana.

Having said that, I think the MMDA also imposes certain onerous obligations on government that, in some cases, seem to privilege the interest of the company over those of the government and society as a whole. Examples of such onerous obligations include those in clauses 20.3(c) and 20.7.2. While the former imposes an obligation on the government to virtually guarantee an uninterrupted supply of electricity to the company through all commercially reasonable good faith efforts, the latter imposes obligations to construct new roads to the mining area in order to facilitate the operations of the company. If the supply of electricity is by a third party, what form should a government guarantee of reliability of supply take? That is, what are "reasonable commercial efforts" and what are the financial implications of this obligation? Also, by proposing that the government engages in the construction of new roads to the mining area, the MMDA ignores the onerous financial burden that this may impose on cash-trapped developing country governments. This may, in the case of mine development in remote parts of the country, compel government to re-order priorities and to budget for road construction and thus shift resources away from other needs in order to promote the interest of the company in operating the mine.

In the area of fiscal measures, the MMDA proposals seem to fairly balance the interest of the company in making a fair return on its investment with the governmental interest in revenue. However, the proposals give away too much when it comes to customs duties. For instance, not only is the company, its subcontractors and agents entitled to import goods meant for the project free of customs duties and other charges but also they are entitled to re-export such goods free of customs duties when the goods are no longer needed for the project. Expatriate personnel are also entitled to import and re-export their personal effects into and from the country free of customs duties. It is my opinion that this gives away too much to the company and its personnel without taking account of the governmental need in raising revenue from customs duties and charges. While it makes sense to encourage companies to investment in developing the mineral resource by exempting them from the payment of customs duties on plant, machinery and equipment specifically and exclusively meant for its mining operations, there is no reasonable basis for extending that privilege to employees and subcontractors. Indeed, in the case of subcontractors and employees, it

cannot be guaranteed that such imported goods would be used specifically and exclusively for the mining project and that the regime of exemptions would not be subject to abuse to the disadvantage of the governmental interest in revenue. I propose that the regime of exemptions from ordinary customs duties should be limited to the importation of plant, machinery and equipment specifically and exclusively meant for the project. In this context, the generic term "goods" should either be defined narrowly as meaning plant, machinery, equipment and accessories or be directly substituted by these terms in the substantive provisions of the MMDA dealing with customs duties.

3. Relationship to and Encouragement of Local-level Agreements

In relation to the MMDA, I understand the term "local level agreement" to mean two things. First, it means an agreement that directly governs the relationship between a national government and a mining company in relation to the development of mineral resources. Second, it means an agreement between the company and a local community or local government entity that governs specific matters arising out of the operationalization of a national level agreement on mine development. If that understanding is correct then the MMDA passes as an international model that may be adopted *mutatis mutandis* for local purposes.

In the context of the first meaning, I think that the MMDA relates fairly well to the local-level agreements that I am familiar with. In terms of scope, even though the MMDA goes much further than the local agreements on mine development, its substantive provisions fairly reflect the basic orientation of these agreements in many areas, including in particular mine development rights and obligations, and fiscal measures. In many respects therefore, the MMDA is not out of tune with local agreements governing mine development.

There are however many areas in which the MMDA proposals would serve as useful and innovative additions to local level agreements both in terms of the scope of individual provisions as well as the scope and depth of entire agreements. Relative to the local or national mining development agreements that I am familiar with, many of the provisions of the MMDA are innovations that should, when adopted, encourage more balanced local agreements. To be specific, the provisions dealing with fair and economical mining operations (clause 17), affiliated company transactions (clause 22.2), company control over hiring (clause 22.4), security (clause 22.5), supply chain in relation to local goods and services (clause 24.0), local community development (clause 25), employment and training of local citizens (clause 27), rights of host country citizens (clause 30) and forward linkages (clause 31) are novel in many respects and should improve the framework of local agreements.

I believe that the MMDA would also relate to and encourage local level agreements of the second kind, that is, agreements between the company and local communities on specific aspects of the development of the mine. In particular, agreements on local community development, health and education as well as local business development can benefit significantly from the substantive provisions of the MMDA. Indeed, a major contribution in this regard is the Community Development Agreement annexed to the MMDA. The terms and conditions of that model CDA could substantially encourage the development of local agreements on local community development. However, rather than remain at the level of a

statement of objectives, I would suggest that draft or proposed text underpinning each objective should be developed as a component of the MMDA.

Currently in Ghana issues relating to community development are left to be regulated by the internal policies of mining companies who design these community development initiatives without due consultation with beneficiary communities. In fact, these initiatives are often meant to boost the public relations profile of the companies, depicting them positively as companies that have a social conscience than to stimulate actual community development. The CDA should tie companies to actual legal commitments and benchmarks that should, when properly implemented, result in actual community development. In this regard, the proposal for a Community Development Foundation is an excellent proposal and constitutes, in my opinion, a better institutional mechanism for coordinating issues relating to community development than the Regional Development Council. The latter sounds like a bureaucratic institution embedded in the public sector whereas the Community Development Foundation appears to be a community-level private sector body charged with implementing the community development initiatives tied to the development of the mineral resources. At this level, it is easier to monitor and evaluate the performance of the Foundation in relation to the implementation of the community development commitments of the company and to hold the members of the Foundation accountable for their actions.

4. Relationship to Presumed Exploration Phase

In its current form, the MMDA seems to take as a given the rights and obligations of the company and the government in relation the exploration phase of mining. The only exception relates to fiscal measures prior to the commencement of commercial production. In relation to such measures, the rights of the company that have accrued during the exploration stage are carried into the development phase (and rightly so) in order to determine the current tax obligations of the company. In respect of the other aspects of the exploration phase, e.g. health, safety and environmental obligations arising out of the exploration activities of the company are assumed away. This approach seems to be in line with existing or conventional practices in the industry. In Ghana mining leases do not make explicit references to rights and obligations arising out of exploration phase activities.

I take the view that since rights to work the mining area at the development phase are often tied to those subsisting during the exploration phase, an explicit reference to obligations of the company during the exploration phase in the MMDA would be apposite. A provision similar to that in **Box 4** would be appropriate in this regard.

Box 4: Relationship to Exploration Phase

The rights, obligations and liabilities of the company and the Government subsisting prior to the commencement of commercial production shall continue and bind both the company and the government during and throughout the phase of such commercial production

Specific Comments

Clause 2.2(a): Co-existence of minerals and right of company to other minerals

The government should be given the right to decide whether it wishes to grant the mining company further rights with respect to other minerals found in the mining area. The MMDA should be made specific to certain minerals so that if additional minerals are found, the government should decide whether the company should be granted right to exploit such other minerals. Granting the company priority over such minerals or other grants of rights in relation to other natural resources can be problematic especially in situations where the right to such resources predated the grant of the mineral right under the MMDA.

Clause 2.2(f): Title to Land vested in native people

This clause assumes that all land for mining purposes is vested in local communities. However in some cases the land is vested in the state or government, including local government agencies. In this regard, I propose that language be added to the effect that "where land subject to this agreement is not public land or land that has been compulsorily acquired for the development of a mining resource, the company shall receive cooperation and..."

Clause 2.3.2(a): Translation of EIA into Local Language

In situations where the mining area is inhabited by persons from different ethnic groups who speak different languages, it would be impracticable to translation a bulky document such as the EIA into all the languages. I suggest that either the requirement to translate the EIA into the language of the local population be dropped or it should be maintained but with the qualification that there be a request from the people to have the EIA translated into a language other than English.

Clause 2.3.2(c): Company to comply with certain environmental laws

In some cases, such as in Ghana, there are no laws on air quality standards and so on. I suggest that this clause be amended to the effect that in the absence of such domestic laws, international legal standards should apply automatically and that each party accepts to be bound by these standards.

Clause 2.3.3(b)(viii): In this clause the word "unreasonably" should be inserted before the word "interfere" as a qualification.

Clause 2.3.3(c): This is an excellent provision. From experience in Ghana most conflicts with mining companies often arise in the context of uncertainty with regard to the date of settlement of communities claiming compensation for the disturbance of their surface rights within the mining area.

Clause 5.1(a): Royalty payable on other minerals: My comment on clause 2.2(a) applies here as well. This clause assumes that government would permit the company to exploit other mineral resources subject to the payment of the royalty as calculated. However, in

practice, governments tend to make the grant on entirely different terms to the same grantee or even to third parties.

Clause 9.2: Government and Central Bank Obligation in securing finance

This clause is a bit unclear. What is the nature of the obligation being assumed by the government and the Central Bank? Can they be sued for not using their offices to ensure that the company accesses financing for its operations? I propose that this clause be re-examined to ensure that it is imposing a clear, legitimate and justiciable legal obligation.

Clause 9.4: Foreign Currency Remittance and Availability

It is my view that the provisions dealing with foreign currency remittances and the availability of such foreign currency may result in problems for the capital account of the country. The right to remit and to transfer foreign currency out of the country is too broad and too liberal. There is the need to tighten the provisions a bit.

Clause 9.4(i): This clause seems to be the same in substance as clause 9.4(b**)**

Clause 9.7(a): The sentence beginning with the words "..except in accordance with the general applicable law and a court order" should be revised to read "except in accordance with the general applicable law and an order of a court of competent jurisdiction.

Clause 10.5: This clause seems to be in substance the same as that contained in clause 9.4(d). There is no need for the repetition.

Clause 11.1: Applicability of IFC Performance Standards

In this clause, the phrase "International Finance Company" should read "International Finance Corporation." Rather than rely on the best endeavours of the company, I propose that the clause should state that the IFC Performance Standards are deemed to have been incorporated into MMDA and are binding on the parties thereto. Stronger reliance on the IFC Performance Standards is helpful to countries that lack the appropriate domestic legislation and standards to deal with the issues covered by the Standards.

Clause 11.2(b) should make reference to the CCPR and CESCR

I suggest that this clause should make explicit reference to the Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights and state categorically that companies and governments have to adhere to the principles of these Covenants. It has been difficult in practice to pray the provisions of these two important human rights instruments in aid of mining communities before Ghanaian courts and tribunals because of the fact that most judges tend to think that they are not directly applicable under the domestic law of Ghana. A commitment to comply with their provisions in a mining development agreement makes it easier to rely on their provisions where the mining is alleged to have defaulted on its human rights obligations.

Clause 11.2(d) Human right compliance assessment for mining companies

This is a brilliant idea. A well conducted and well publicized human rights compliance assessment would make it possible for mining companies and human rights groups to work together to ensure respect for and the protection of the basic rights of mining communities instead of the situation where mining companies are striving to portray themselves has respecters of human rights while human rights groups are busy accusing them of human rights abuses.

Clause 14.0: Waiver of Ownership or Equity Interest

This appears not to make sense in the context of countries where legislation already provides for state participation in mining operations. Given the fact that legislation trumps agreements such as the MMDA, it is certain that absent the political will to change the regime on state equity participation in mining ventures, this clause may never be adopted by countries willing to use the MMDA as a model framework for the design of their mining development agreements. A more practical approach would be to limit the extent of state equity participation by providing for a maximum equity stake that may be acquired by the state in any one mining venture.

Clause 20.5(iv): There should be language in this clause to take account of situations in which the operations of the company cause or threaten to cause shortage of potable water due to pollution resulting from such operations. In certain mining communities in Ghana, it is not uncommon to find that the operations of a mining company have caused significant pollution to water sources within the community, making the availability of potable water problematic for the community. In such cases what mining companies do is to supply such communities with water using tanker services. An obligation should be imposed on companies to ensure regular supply of potable water in such situations as follows:

Where the company through its operations causes a shortage of potable water within a community in the mining area, the company shall supply potable water of a higher or comparable standard to the said community without delay or default.

Clause 20.7: Fee simple in 20.7(3) and 20.7(4): Since most of the common law countries that may adopt the MMDA have abolished the notion of fee simple, it may be better to use the term leasehold interest for specified number of years as opposed to the fee simple

Clause 21.0(a): It is not really clear from this clause with whom should the government negotiate the financial benefits to mining communities.

Clause 24.1: To what extent will this obligation violate the WTO TRIMS Agreement as well as the national treatment obligations under the General Agreement on Trade in Services?

Clause 37.4: Retention of Assets on Surrender etc

This provision of the MMDA seems to run contrary to the practice in countries such as Ghana where legislation provides for the surrender of all equipment to the state or government upon the surrender, expiration or termination of mining contracts. In these countries, substantial capital allowances are granted to mining companies in respect of

capital acquired and used specifically and exclusively for mining operations. In the Ghanaian context, the Minerals and Mining Act provides that upon termination of a mineral right, the holder of the right is entitled to remove the plant or equipment for the sole purpose of engaging in another relevant mining activity in the country. Where the mining plant has not been removed by the mineral right-holder, then the plant vests in the state upon the expiration of two months' notice to remove the plant from the mining area. The rationale for vesting the plant in the state is that the plant or equipment has benefited from the capital allowance granted to the company by the state and has been depreciated for purposes of the determination of the tax liability of the company. To require the government to acquire such equipment when it has already paid for it indirectly through the capital allowances granted to the company may not seem a fair provision.