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1. Introduction

1.1 Background

The notion of the state sharing production of minerals with companies as part of a commercial enterprise has been in existence throughout the latter half of the twentieth century. Such agreements are commonly recorded in a Mining Development Agreement or a Mining Exploration and Development Agreement, which are widely used to record arrangements for mineral exploration and production, traditionally in countries with developing economies. The exploration element of a mining project may be dealt with in a separate agreement or licence; for the avoidance of doubt, throughout this guide we will refer to both types of agreement collectively as “MEDAs”; however, please note that an exploration element may not be present in all agreements. Under a MEDA, a state (as the owner of the minerals, for example, coal, iron ore) grants an investor a licence to undertake mining, development and (sometimes) exploration activities, and to provide the requisite finance and technical skills in order to explore for (and hopefully produce) minerals in accordance with the local mining legislation. In contrast to production sharing contracts (PSCs) commonly seen in the oil and gas industry, in a MEDA the investor is granted an exclusive right to exploit within a defined area (generally known as the contract area) and to process, market and sell any minerals it successfully extracts; in return, it pays the state for this right, by way of taxes, royalties and rentals. The state will usually be represented by the government or a government body (the State). The terms of a MEDA will typically refer to the mining code or local mining legislation of the State and so will need to be read in conjunction with those documents. In some cases, the mining code or legislation may flesh out the provisions of the MEDA; in others, the MEDA may supplement the matters dealt with in the mining code or legislation, or even alter their application.

In terms of the respective parties’ objectives in negotiating a MEDA, generally an investor will want to negotiate for itself as much control as possible over operations, and it will want any State intervention in the running of the project kept to a minimum. Naturally, it will be keen to keep its costs low, by negotiating favourable tax provisions and the ability to recover (at least some of) its costs. The State’s primary interests are financial; it wants to make the maximum profit possible and have access to an investor’s resources and relevant expertise, by expending minimal time and money. However, it will also want to ensure that the investor is undertaking a sufficient work program (which may include meeting a minimum level of expenditure). In addition, the State will typically be concerned to secure as many rights and benefits for the local community as possible, for example, jobs and training for local workers and access to medical care.

1.2 The MEDA model

In carrying out our review, we found that, in comparison with PSCs, which appear to be more widely established, copies of MEDAs (both model forms and those negotiated between a State and an investor) are less widely available in the public domain. In addition, many jurisdictions do not appear to have a model form agreement (also in contrast with PSCs, where many jurisdictions have a standard form of agreement). As a consequence, our review was limited to a relatively small sample of documents, some of which were a number of years old.

We did, however, review two notable examples of ‘model’ form mining agreements during the preparation of this guide; these are the Model Mining Development Agreement (the MMDA) and the Indonesian Contract of Work. We thought it would be useful to make you aware of their existence in the mining sector, given that forms of standardised MEDAs are uncommon; accordingly, we have set out a brief summary of these documents at Schedule 2. However, we note that these model form agreements apply in specific sets of circumstances and to particular parties and should not be regarded as the archetypical forms of MEDA.

Allen & Overy are very grateful to Peter Leon of Webber Wentzel for his contributions to this guide.
2. Key terms review

A degree of standardisation across MEDAs is evident, although to a much lesser extent than with PSCs. A number of model form agreements exist across jurisdictions in Africa, Central Asia and South-East Asia; where this is the case, the model form has been used as a starting point or precedent, with modifications resulting from negotiations between the investor and state concerned noted. In some jurisdictions, the model form agreement may require approval by parliament, and so variations to it should, at least in theory, be kept to a minimum. The jurisdictions reviewed are set out in the ‘Key terms table’ on page 16, which provides an indication, at a high level, of which key terms apply by jurisdiction.

This section provides a high level summary of the key terms common to MEDAs, and an overview of the key legal issues arising from such provisions. Where appropriate, we have highlighted differences between the comparative provisions found in a PSC. When reviewing a MEDA, it is important to consider not only the language in which the terms themselves have been framed, but also to consider what material terms might have been omitted.

Many of the key words and phrases are defined in the ‘Glossary’ section beginning on page 17. For your reference, we have also included a number of sample clauses in Schedule 1 beginning on page 21. Please note that the sample clauses are taken from existing MEDAs reviewed for the purpose of preparing this guide; as such, they are illustrative only and not recommended for use as precedent clauses or for use in any particular agreement.

2.1 Parties

The parties to a MEDA will invariably be the State (or a minister representing the State), on the one hand, and an investor on the other. It is common for there to be a consortium of investors who are collectively defined in the contract as “the Contractor” or “the Investor”. It is also common for the investor to be a local special purpose vehicle, with its parent company being party to the MEDA.

For the avoidance of doubt, throughout this section we will refer to an investor and a consortium of investors collectively as “the Contractor”, and the state entity or entities, whether the government or minister representing the state as “the State”. The relationship between Contractors (e.g. under a joint venture agreement) is beyond the scope of this guide.

2.2 Start date

The parties’ obligations under a MEDA generally commence on the “effective date”. This can be a fixed date, and in many jurisdictions examined it is defined as the date of execution of the agreement (e.g. Guinea, Indonesia); it can also be determined by the occurrence of a particular event, such as the date on which the contract is ratified by the legislature (e.g. Liberia) or the date on which a relevant permit or approval is obtained (e.g. Mali). The effective date indicates when the parties’ obligations in relation to the project commence.

2.3 Term

Mining activities are licensed in stages and different licences may be granted for each stage. The term of a MEDA is generally around 25-30 years, with an option to extend for a further period (or periods) of 10-25 years (to do so, the Contractor may be required to seek approval from the State). Many contracts divide the contractual term into a number of consecutive phases, for example, the “exploration phase” and the “production phase”; in others, some phases (commonly the exploration phase) may be dealt with in a separate agreement or licence. The Contractor undertakes exploration activities in the exploration phase and, should it discover any minerals that can be commercially exploited, it will carry out a feasibility study (see paragraph 2.7). Once a feasibility study has been approved, the Contractor will aim to proceed to production, i.e. extraction of the discovered resources.
Where the contract provides for an exploration phase, this commences on the effective date and the production phase commonly starts after approval of a feasibility study. An extension is generally permitted if the Contractor has been forced to suspend its activities, such extension being equal to the period of suspension.

The long life of the agreement reflects the substantial capital investment required to facilitate the operation of the project. There may be a degree of flexibility with respect to the contract duration to reflect the bargaining power of the Contractor party or parties (as the case may be). However, from our review, the duration tends to be of a similar length.

Mining agreements may only address the development/production phase of the project and assume that exploration and discovery have already occurred. In such circumstances, the details relating to exploration may be recorded in a separate agreement. The MMDA (see Schedule 2 for further detail) is an example of this type of mining agreement.

2.4 Operations and control

Typically, the Contractor will be solely in charge of operations under the contract (unless it decides to appoint an operator). However, in some jurisdictions an operator may be appointed to assist the Contractor in carrying out the mining operations (e.g. Guinea, Philippines); these provisions are typically brief and there is little detail relating to, for example, the operator’s role, its responsibilities and appointment. A committee may be appointed to assist with carrying out certain administrative tasks relating to the operations (e.g. Mongolia).

2.5 Work program and budgets/minimum work obligations

All operations carried out by the Contractor will be in accordance with approved work programs and budgets, in relation to the different phases of the MEDA. The Contractor is typically obliged to prepare and submit such documents to the State on an annual basis, which may also set out any minimum expenditure commitments (e.g. Indonesia, Philippines).

The minimum work and expenditure commitments of the Contractor are usually set out in the MEDA; however, such provisions are generally less prescriptive than those found in PSCs. This is due, in part, to the approach taken to exploration risk in MEDAs; generally a mining concession is considered to be a much lower risk than a petroleum concession as parties generally seem to have a better sense of what can be exploited at the start of a project, in comparison with petroleum concessions, where there is considered to be a generally higher risk that the Contractor may not make a commercial discovery. Such obligations are, nevertheless, key to ensuring that the Contractor invests time and money in exploring the contract area and to defining the extent of the Contractor’s risk.

The extent of the work and expenditure obligations vary across jurisdictions; in some, the Contractor must use commercially reasonable efforts to incur capital expenditure (e.g. Liberia); in others, it is required to submit detailed work and expenditure programs to the State (e.g. Sierra Leone). Where the Contractor fails to meet its minimum expenditure commitments, it is typically required to compensate the State to account for the deficit (e.g. Guinea); however, where failure to comply occurs due to an event of force majeure, this is generally excluded. The Contractor may, if in any contract year it performs more work than required in that year, have the ability to carry forward any work performed and subtract it from the work to be performed in future years, without prejudice to its rights and obligations under the contract (e.g. Philippines).

2.6 Relinquishment

Relinquishment obliges the Contractor to surrender certain parts of the contract area to the State after a given period of time; these are typically areas that have not been exploited (and are not expected to be exploited). Typically, provisions relating to relinquishment included in a MEDA only cover the exploration phase of a mining project, with the time frame for relinquishment usually coinciding with the end of the exploration phase and/or any feasibility study. The area to be surrendered by relinquishment is defined as a percentage of the original contract area. In general, the provisions
are less detailed than those found in PSCs. The rationale behind relinquishment provisions is efficiency; if there is little interest for mineral exploration on a particular area, the Contractor should ‘discard’ that area and concentrate on those where there are such interests. In addition, it provides the Contractor with a powerful incentive to undertake preliminary work on the entire contract area. The Contractor is generally given the right to determine which areas it will relinquish.

The proportion subject to compulsory relinquishment varies across jurisdictions. Generally, of the contracts reviewed, if the Contractor extends the exploration period it must relinquish a minimum of 25 percent of the original contract area by the end of the ‘initial’ exploration phase, which increases to 50 percent by the end of the exploration phase. Throughout this period, the Contractor will continue to carry out the specified work program. By the end of a feasibility study, the percentage of land required to be retained by the Contractor may be as low as 25 percent.

An option usually exists for the Contractor to voluntarily relinquish any part of the contract area. To exercise such a right, generally the Contractor must fulfil its obligations under the contract, for example, any minimum expenditure requirements (e.g. Liberia).

Following relinquishment, the Contractor will usually be obliged to remove its equipment, plant and machinery, and installations from the relinquished area.

### 2.7 Commercial discovery/feasibility study

Generally, the Contractor is obliged to inform the State promptly following any discovery. If the Contractor considers the discovery is significant and worthy of appraisal, it will sometimes be required to submit a research and development permit request or notice to the State. Following completion of any research and development, which typically has to be completed within a set time frame, the Contractor will determine whether the discovery is commercial. If so, the Contractor will commence work on the area in question.

Prior to any commercial production, the Contractor is commonly required to prepare a feasibility study in accordance with industry practice and sound engineering principles, to gain an understanding of the strengths and weaknesses of the proposed venture. Ultimately, both parties are interested in determining the project’s prospects of success and so feasibility studies (and the provisions relating thereto) are an important part of a MEDA. Such studies are typically required to contain various plans and sub-studies, for example, in relation to engineering, environmental impact, infrastructure and socio-economic development. They may also include a detailed investment budget. The Contractor is generally obliged to prepare and submit a feasibility study to the State for its review and/or approval; following approval, the Contractor is able to construct and operate the mines necessary to extract the minerals. The Contractor may also be obliged to prepare and produce geological and other types of maps and reports and make these available to the State (e.g. India, Indonesia, Liberia) or to the ‘scientific community’ (e.g. Philippines).

### 2.8 Infrastructure

An important part of a MEDA is the securing of access rights to infrastructure and/or the granting of rights to develop infrastructure; in particular, in Africa this is a critical issue for mining developers. Typically, the Contractor is granted the right to construct and operate any infrastructure necessary for the project, which includes roads, rail and ports, and plots of land may be dedicated or reserved to the Contractor for this purpose. The costs of developing such infrastructure are generally borne by the Contractor, although the State may provide some assistance in the form of obtaining any necessary permits and financing authorisations (e.g. Guinea). The Contractor may be permitted to deduct such costs from its taxable income (e.g. Mongolia).

A MEDA may provide for the Contractor to give third parties access to any infrastructure it has built in relation to the project (this was found in around half of MEDAs reviewed). Generally, the Contractor has control over the granting of such access and can make it subject to certain conditions being met, for example, that the access does not interfere with the operation of the project. In contrast, in Indonesia, the provision of such access is mandatory to members of the
public and the State, although the Contractor can impose a charge for access. An access fee was also seen in Mongolia, where the Contractor can impose payments or tolls on persons using certain infrastructures and services it has funded. In some jurisdictions, the Contractor has exclusive rights to use any infrastructure it has constructed and can choose whether to permit third parties access (e.g. Guinea).

In addition, there is an emerging trend towards ‘resource for infrastructure’ deals, which is an option some countries are pursuing (in particular, in Africa) to ensure that infrastructure will be built in return for rights to minerals extracted. This has been a feature of a number of recent transactions where investors from China have invested in African projects, with the Export-Import Bank of China providing financing for the infrastructure element of the project.

2.9 Cost recovery

In a MEDA there is typically no provision for the Contractor to recover its exploration and production costs from the State through “cost recovery” as that term is understood in the PSC context (in a PSC, the Contractor is generally entitled to recover its exploration and production costs from available oil production or gross revenues). Instead, it is typical for the Contractor to be entitled to cost recovery mechanics through the loss carry forward provisions of the relevant jurisdiction’s tax code. Although this might not be equivalent to cost recovery in terms of monetary value (i.e. the Contractor is unlikely to recover 100 percent of its costs), it typically enables the Contractor to defer payment of income tax until its losses are exhausted (usually subject to limits), which can achieve a similar result.

The Contractor typically has sole responsibility for financing the project, although it is generally free to finance the project as it chooses, such as by way of issuing shares (e.g. Indonesia), by borrowing (e.g. Papua New Guinea (PNG)) or both. In PNG, there is provision for the State to compensate the Contractor for costs incurred in relation to operations where the State discriminates against the Contractor (although the provision does not elaborate in what context this would apply). The State may also agree to reimburse the Contractor for any taxes or charge relating to export (excluding royalties); however, such provisions were not common in the MEDAs reviewed.

2.10 Taxation/Royalty

The Contractor is typically obliged to make a number of payments to the State during the term of the contract, including those set out below. In order to evaluate the total sharing of benefits from mine development, all payments and benefits owing to the State should be aggregated and viewed as a whole. The timing of such payments should also be considered, as this can impact on the risk assessment of a project; for example, whether some payments (e.g. import duties) in early phases of the project can be recovered in later phases as losses.

It should be noted that ‘super profit’ taxes on mining activities are becoming increasingly popular in resource endowed economies, with States readjusting their regulatory frameworks to cash in on the mining boom. Around 25 countries have already increased or have announced plans to increase their tax and royalty regimes for the mining sector in recent years, most recently in Australia, Ghana, Guinea, Peru and Zambia. Such regulatory change could inspire other African nations to follow suit; indeed, the Namibian and South African governments are currently considering a super profit tax, and a number of countries are considering various mechanisms to divert more revenue to the State (e.g. Tanzania). The effects of such regulatory changes, although imposed by legislation and therefore applying in addition to the provisions of a MEDA, may filter through into future taxation and royalty provisions.

(a) Taxation

The Contractor is typically required to pay various taxes in accordance with the applicable laws of the jurisdiction, including income tax, export tax and duties, import duties, and stamp duty. The tax provisions of a MEDA are some of the most heavily negotiated, as stability of the tax regime and keeping costs as low as possible are very important to the Contractor.
The basis upon which income tax is calculated varies between jurisdictions, depending on the domestic income tax regime. In some contracts, specific reference is made to the percentage of tax payable (e.g. Indonesia, Sierra Leone). Commonly, the tax provisions in the contracts are very extensive (e.g. Mongolia, Sierra Leone) and may allow the negotiating parties to modify the existing tax regime or to establish a special taxation regime to apply to the Contractor (this may also be done through a stabilisation clause (see paragraph 2.17)). In some jurisdictions, the Contractor is given the benefit of certain exemptions from the tax regime, for example, tax ‘holidays’ (i.e. exemptions from payment of certain taxes for the first 25 years of the contract term) (e.g. Liberia).

Please see paragraphs 1 and 2 of Schedule 1 for sample tax clauses taken from existing MEDAs reviewed.

(b) Royalty

Royalties are payable by the Contractor to reflect its exploitation of the State’s minerals and are typically agreed upon as a percentage of the volume or value of extracted minerals from the contract area, and may vary between different minerals. Royalties are generally paid to the owner of the minerals (invariably the State), in contrast to “surface rent”, which is generally paid to the owner of the land constituting the contract area. Adjustments may be made to the percentage to account for any transportation costs from the delivery point to the point of export. In the Indonesian Coal Contract of Work (CCoW), the royalty is to be delivered to the State in cash at the FOB price.

Payment of royalties may be provided for under the applicable law of a jurisdiction; if not, royalties may be negotiated by agreement between the State and the Contractor. The rate may depend upon a number of factors such as the contract area, the size of the project, and the bargaining power of the Contractor. Our review reflected a range of between 0.5 and 13.5 percent levied on the total production of minerals. A sliding scale royalty rate may be used based on the profitability of operations (e.g. Indonesian Contract of Work (CoW)). Variations are evident in some jurisdictions; for example, an exemption from certain royalties for the first 6 years of commercial production (e.g. Guinea), which serves to reduce risk for the Contractor.

Royalties are generally allowed as a deductible expense in calculating the Contractor’s income for tax purposes.

Please see paragraph 3 of Schedule 1 for a sample royalty clause taken from an existing MEDA reviewed.

2.11 Valuation

Valuation provisions in relation to sales of minerals by the Contractor (on its and the State’s behalf) to third parties are not commonly found in MEDAs; however, it is possible that the use of advance pricing agreements (where the parties agree on price determination formulae or benchmarks in advance) may become more widespread. Where reference to the price of minerals is made, the market price is generally the FOB market price at the delivery point realised by the Contractor. The Contractor may be required to use best efforts to obtain the highest price (e.g. Indonesia) and on competitive terms that will maximise economic return (e.g. PNG, Philippines). In PNG, the Contractor is required to submit to the State for approval its proposed pricing of a sale. Unlike in PSCs, sales to affiliates must typically be on arms’ length commercial terms.

2.12 Participating interests

These are the interests held by the respective participants in the venture. The State will generally have an option to acquire an interest in the operations carried out under the licence; however, in contrast with PSCs (where the State generally has an option to participate as a contractor within the framework of the overall agreement), the interest taken by the State in a MEDA is typically an equity interest in the Contractor or a joint venture vehicle. Acquiring such an interest provides the State with an opportunity to increase its expected profit from the project. The option to acquire an interest is usually limited to a minority share, between 10 and 15 percent. From the sample of documents reviewed, the largest interest was 34 percent, with an option to acquire a further 16 percent (Mongolia). The acquisition price will be
determined independently and based upon fair market value. Such interests are usually only relevant where there is an unincorporated joint venture in place.

The State may have the right to sell its stake in the Contractor; where it chooses to do so, the Contractor usually has a right of pre-emption to purchase such stake, or the State may be required to obtain approval from the Contractor prior to any sale (e.g. Guinea).

2.13 Community development

Such provisions can be extensive, and usually provide for the Contractor to employ local citizens and contractors where possible and to provide and/or contribute financially to various training schemes and schooling for local workers. Expenditures vary from one-off lump sums to annual payments. The Contractor can typically only employ foreign personnel, contractors or materials if it has exhausted all local possibilities and there are no adequate local equivalents (e.g. Indonesia) or if foreign personnel, contractors or materials are significantly cheaper.

In terms of employment, most jurisdictions require the Contractor to make the employment of local personnel ‘top priority’ (e.g. Guinea, Indonesia). In one sample (Indian) contract reviewed, the Contractor was not permitted to employ foreign workers except with the previous approval of the State. The Contractor may also be obliged to attempt to attract qualified citizens working overseas back to employment in the State (e.g. Zambia). In addition, the Liberian contracts reviewed contained personnel obligations such as management targets for Liberian nationals and restrictions on expat workers in unskilled positions. In terms of training, the requirements are usually extensive, including comprehensive training for both local and expat employees (e.g. Indonesia) and promoting graduate training programs at universities (e.g. Liberia). In Liberia, the Contractor is required to provide free medical care to local personnel, as well as to members of the local community. There may also be an explicit obligation for the Contractor to respect the regulations, customs and traditions of the local community and/or indigenous peoples (e.g. Philippines, Sierra Leone).

Given the lengthy duration of MEDAs, these obligations can be significant. As they appeared in all of the contracts reviewed, inclusion is likely non-negotiable. However, there may be scope for negotiation in terms of the level of obligation required. Commentators have suggested that, in general, a Contractor’s obligations in relation to health care should only extend to employees; a requirement to provide health care to the community is unsustainable because it promotes dependency on the Contractor, rather than such care being the responsibility of the State.

A practice has developed whereby Contractors enter into community development agreements (CDAs) with mine-affected communities; a template for such an agreement is annexed to the MMDA. In particular, both Liberia and Nigeria now require Contractors to enter into binding CDAs with communities. In addition, the Economic Community of West African States (ECOWAS) has adopted a binding directive on the “Harmonization of Guiding Principles and Policies in the Mining Sector”. It requires ECOWAS member states, among other things, to ensure protection of the national interest, community interests and the environment, as well as local procurement and employment.

Another current issue that may be addressed in this provision is access to farming land. This issue arises where a resource (which, as mentioned in the Introduction, is owned by the State) is discovered on rural property and access to the land is sought by a mining or exploration company. Where this is the case, the Contractor will usually make a proposal to the farmer(s) affected in return for access, which may be in the form of monetary compensation, but could also include provisions that benefit the local community. The State may also be involved in such proposals and negotiations.

2.14 Indigenous communities

The treatment of indigenous communities is a current issue that may arise in the context of a MEDA. Indigenous peoples are increasingly being granted a “right to negotiate” where, for example, the State proposes to grant exploration or mining leases to mining companies on lands that indigenous peoples customarily own, occupy or otherwise use. The
mining company will typically make a proposal to the indigenous group affected in return for access to their land, which may be in the form of monetary compensation, but could also include employment and business opportunities, resettlement in a new location, and/or securing protection of their cultural heritage and environment. There may be provision in a MEDA for the State to facilitate any agreements that the Contractor and indigenous peoples may enter into (e.g. Philippines).

The concept of Free, Prior and Informed Consent (FPIC) has been the subject of increasing discussion over the past few decades. FPIC is the principle that those seeking to interact with indigenous groups may be required, before undertaking proposed projects that may affect the lands indigenous groups customarily own, occupy or otherwise use, to either provide evidence that (i) consent has been obtained; or (ii) consultation in good faith with the goal of achieving FPIC has been carried out. At present, there are very limited circumstances in which consent is an absolute requirement for a development project, with prior consultation being the most common approach.

FPIC is now a key principle in international law, with the International Labour Organization’s C169 Indigenous and Tribal Peoples Convention 1989 (ILO 169) stating that States shall consult indigenous peoples where their rights will be affected (although we note that this does not extend to obtaining actual consent). The ILO 169 is a binding instrument of international law on the states party to it; however, to date it has been ratified mostly by South American and Latin American nations. Although the ILO 169 is of limited relevance to this guide, given the jurisdictions it covers, it is nevertheless an indicator of the increasing recognition of the FPIC principle. In addition, the International Finance Corporation (the IFC), an affiliate of the World Bank Group that provides advice and financing for private sector projects and ventures in developing countries, has developed a set of standards (the Performance Standards) setting out the requirements for receiving IFC support and defining the roles and responsibilities of project proponents in managing projects. Performance Standard 7 directly addresses indigenous peoples in relation to IFC projects and requires FPIC to be obtained from indigenous communities affected by a proposed project. However, the Performance Standards only apply in the private sector and do not apply to states, and thus they also have limited application to this guide (but again are reflective of the importance of the FPIC principle).

The MEDAs reviewed did not provide for FPIC to be obtained by the State where indigenous groups are affected; however, given the recent focus in the international arena towards enshrining the rights of indigenous groups to consultation and consent, this concept may filter through into the provisions of future MEDAs.

2.15 National economic interest

Many MEDAs oblige the Contractor to give preference to local suppliers, provided the local services and materials are competitive in performance, price, quality, and availability to foreign equivalents, and it may be required to report annually on the extent it has done so (e.g. Liberia). In Guinea, where the Contractor is responsible for transportation of the exported minerals, it undertakes to prioritise the loading of such minerals onto Guinean vessels. In Sierra Leone, the Contractor is required to pay an inspection fee of 1.5 percent of the CIF price of any imported goods. Some agreements go further, requiring the Contractor to actively contribute to local business development; in Zambia, for example, the Contractor is required to identify an employee to assist Zambian citizens in setting up businesses that can offer services to the Contractor. The Contractor may also be required to undertake infrastructure development, including road, rail and port development.

An example of a jurisdiction with particularly extensive national economic interest provisions is Indonesia, where foreign holders of mining licences are required to divest their interests by at least 51 percent by the end of the 10th year of production. The divested interests must be offered to various parties in the following order of priority: (i) the central government; (ii) provincial/regional governments; (iii) central government owned enterprises; (iv) regionally-owned enterprises; and (v) Indonesian privately-owned companies. Holders of Indonesian mining licences, known as IUPs (as well as existing holders of CoWs and CCoWs), must also meet domestic demand before exporting minerals or coal, with the Ministerial Regulation No. 34 of 2009 issued by the Ministry of Energy and Mineral Resources requiring
producers of coal and minerals in Indonesia to allocate a portion of their annual production output to the domestic market. The State sets such portion based on the estimate of annual demand proposed by potential domestic buyers in the previous year, with heavy penalties applying to holders of IUPs failing to meet this obligation.

In addition, the New Mining Law imposes an obligation on holders of IUPs to “increase the added value of the mineral or coal resources”, i.e. an obligation to process or refine the relevant commodity within Indonesia and, as part of its mining tax changes, the Indonesian government proposed a new export levy of 25 percent on mining exports in 2012 (increasing to 50 percent in 2013). Many jurisdictions are also now seeking to having minerals beneficiated in-country prior to export; South Africa has announced a beneficiation strategy, as has Indonesia, Vietnam and Zimbabwe.

2.16 Currency exchange control

Around half of the contracts reviewed contained currency exchange control provisions. These provisions generally grant the Contractor a number of rights in relation to payments and currency exchange, including a right to make a payment in the currency of the State concerned or any foreign currency, to freely convert funds, to pay foreign employees in foreign currency, and to remit proceeds from mineral sales abroad. These rights may be retained in the event of a change in the foreign exchange laws (e.g. Zambia). It is often a prerequisite that the Contractor complies with all applicable exchange control laws and any other laws.

2.17 Stabilisation

Stabilisation clauses address the Contractor’s concerns that the State may, following signing, implement measures that adversely affect the Contractor’s commercial and/or financial position under the contract, for example amending the tax regime, by seeking to maintain the stability of the terms originally agreed. The inclusion of a stabilisation clause seeks to protect the Contractor, as it controls the State’s ability to materially alter the original terms agreed upon and may also ensure that where the State does so, the Contractor is adequately compensated.

There are two types of stabilisation clauses that may be seen in MEDAs: in the event that any change in the laws, regulations or policies of the State adversely affect the Contractor’s rights, obligations and/or benefits under the contract, either:

- the new laws, regulations or policies do not apply to the contract and so the Contractor’s position in relation to those areas does not change, i.e. an automatic disapplication of the new laws to the agreement; or
- the Contractor, while not being exempt from the application of regulatory changes, is entitled to compensation by the State for any materially adverse impact of such changes to its financial position or prospects. Although this type of stabilisation clause was not seen in the contracts reviewed, it is becoming increasingly attractive to states in African jurisdictions.

However, if the Contractor benefits from such a change, for example, a more favourable tax regime, the Contractor is generally permitted to take advantage of such benefit (e.g. Guinea, Indonesia). In some countries, the stabilisation provision has a long-stop date (e.g. Zambia).

The stabilisation clause is likely to be the most controversial in the MEDA. Some commentators have serious concerns about the use of such clauses; indeed, many states no longer allow stabilisation. However, others strongly advocate its inclusion, arguing that investors require proof of a strong record by a state in honouring arrangements relating to stability, particularly in relation to taxation.

2.18 Title to assets

Unlike in a PSC, title to all movable and fixed assets acquired by the Contractor during the course of the operations does not typically vest in the State; instead, the Contractor generally retains its rights of ownership during and after the course of operations. Where there is a joint venture in place, assets acquired in common are held by the parties on a
pro-rata basis in accordance with their respective participating interests. However, title to property used in the mining operations may transfer automatically to the State upon termination or surrender without charge to the State (e.g. Indonesia, Liberia, Sierra Leone). Notably, the contracts reviewed did not contain any provisions relating to title to data and technical information.

2.19 Force majeure risk

Force majeure provisions are often included in MEDAs to provide for events or circumstances beyond the control of either party, which cause a party to fail to meet its obligations (other than a payment obligation) under the MEDA. In such circumstances, the party concerned is relieved from liability. The party claiming an event of force majeure is often required to use reasonable efforts to remove the causes of non-performance and to complete performance as promptly as possible.

The term “force majeure” is an area of key negotiation between the parties, and as such it is important for the term to be defined with accuracy and detail. Having said that, force majeure provisions usually include common features, such as:

- a detailed definition of a force majeure event;
- the obligations surrounding a force majeure event: these usually require the party claiming force majeure to serve notice to the other party and use all reasonable efforts to correct the situation as promptly as possible;
- examples of events which constitute a force majeure event: this is usually a standard list and may be exhaustive or non-exhaustive; however, some jurisdictions have a broader list of examples than others; and
- a specific list of events which will not constitute a force majeure event: for example, any act or event that renders the performance of an obligation more difficult or onerous for the party in question, or any obligation to pay money under the contract, may be excluded from the definition of a force majeure event.

Another common feature of force majeure clauses is provision for the term of the agreement to be extended by the length of time that the force majeure event delays the operations, although in some countries such suspension requires prior approval from the State or a government department (e.g. Philippines).

A number of the MEDAs reviewed include as an event of force majeure any dispute with persons who claim they may be significantly affected by mining operations, including users and occupants of other mining licences, members of the local community, industry and surface owners and occupants (e.g. Guinea, Philippines). In the case of the Philippines contract reviewed, this list of persons extends to indigenous cultural communities.

Please see paragraph 4 of Schedule 1 for a sample force majeure clause taken from an existing MEDA reviewed.

2.20 Indemnities and liabilities

A MEDA may not explicitly outline the allocation of liability between parties with respect to loss or damage to each party’s personal property or interests arising from activities contemplated under the MEDA. Where this is the case, liability will be allocated according to the laws governing the agreement. In the MEDAs reviewed, the regimes set out in the indemnities and/or liability provisions are fairly standard. Generally, the indemnity provisions reflect a “fault based” approach, providing for the Contractor to indemnify the State against all claims and accounts caused by or resulting from the operations conducted by the Contractor. Variations on this provision include disapplying the benefit of an indemnity where the Contractor commits gross negligence or wilful misconduct (e.g. Guinea), commits negligence, but excluding strict liability offences (e.g. PNG), or commits a fundamental breach of contract (e.g. Guinea). In the contracts reviewed, it was rare for the State to indemnify the Contractor.

Similarly, in the MEDAs that include liability provisions, such clauses generally provide that the Contractor is liable for loss and damage caused during the conduct of operations to third parties. We note that a number of the contracts provide for joint and several liability as between the Contractor and the operator, where appropriate (e.g. Liberia).
2.21 Assignment

The assignment provision is one of the most important clauses in a MEDA. Typically, MEDAs permit the Contractor to assign part or all of its rights and obligations under the agreement to an affiliate or non-affiliate, with or without prior authorisation of the State. The Contractor may also require the prior approval of the State before it can transfer shares and voting rights in it or other project companies. In some circumstances, approval may not be required; for example, where the transfer of shares is less than 50 percent of the share capital of the Contractor party (e.g. Guinea); or where the transfer of shares of the Contractor party is to an affiliate or subsidiary of the Contractor (e.g. Indonesia, Liberia). In Sierra Leone, an assignment of an interest under a MEDA to a Sierra Leone corporation can be made without obtaining the State’s consent.

Conditions may be attached to an assignment; the extent of such conditions vary across jurisdictions. Typically, the assignment clause stipulates that the Contractor will remain liable for its obligations under the agreement except to the extent that the assignee assumes them (e.g. Guinea, Indonesia).

The rationale for such provisions is the concern of states to minimise disruption to operations and ensure that the assignee is of the same financial standing and/or technical ability as the assigning Contractor party. However, assignment provisions may be arbitrary. For example, as mentioned in paragraph 2.15 above, in Indonesia there is a legal requirement on foreign holders of mining licences to divest their interests by at least 51 percent by the end of the 10th year of production, to either a State entity or a local Indonesian entity, with no exceptions. Similarly, Zimbabwe has commenced 51 percent “indigenization” laws (which require foreign-owned mining companies to transfer controlling stakes to local investors or risk losing permits), and Mongolia has placed a 49 percent cap on foreign ownership of strategic mines.

2.22 Environment

Another common provision is to require the Contractor to take necessary and adequate steps to ensure operations are conducted in compliance with environmental laws and regulations. The extent of this obligation varies across jurisdictions; however, the Contractor is generally required to:

- abide by all laws, regulations etc to protect the environment;
- take reasonable measures to protect and minimise damage to the environment;
- produce an environmental impact assessment plan;
- clean up following any damage caused; and
- take reasonable efforts to restore the area upon relinquishment and/or abandonment.

The Contractor will generally be required to allocate funds dedicated to minimising environmental impact and/or financing environmental restoration and remediation. The obligations imposed on the Contractor in relation to such funds vary. In some jurisdictions, the Contractor has complete freedom over the accounts in which the funds are placed as regards access and spending (e.g. Guinea); in others, more stringent conditions may be placed on the fund, for example placing it in a bank account established by the State (e.g. Mongolia). New and changing legislation in this area in many jurisdictions means that environmental issues are likely to be increasingly important for States and Contractors in the future.

2.23 Termination

A MEDA will generally end as a consequence of the natural expiry of the contract term or because an event has arisen which entitles a party to terminate under the MEDA and the party has exercised that right.
In addition to natural expiry, the contract will set out several events or circumstances giving rise to a termination right, which are usually in favour of the State. Such events may include:

- interruption of production for a defined number of consecutive days;
- failure of the Contractor to comply with its expenditure undertakings (including dead rent, royalties and rentals);
- failure of the Contractor to make any payment required under the contract;
- an insolvency event; or
- interruption of production for a defined number of consecutive days.

The Contractor is usually given a period in which to remedy the default. If a termination event is caused by force majeure, neither occurrence of the termination event nor its unremedied continuance (for a specified period) will result in termination.

The Contractor may have the right to terminate early by giving notice to the State. In some jurisdictions, this right is restricted, with exercise being limited, for example, to where the State fails to comply with its material obligations (e.g. Indonesia) or to where the Contractor considers that continued mining is no longer feasible (e.g. Philippines). The exercise of such a right may also be conditional upon the Contractor having complied with any expenditure undertakings or obtained prior approval from the State.

On termination, the Contractor is generally granted a period of six months to one year in which to remove all of its buildings, structures, plants, machinery or effects. Any such property which is not removed by this time may automatically become the property of the State (e.g. India, Sierra Leone), or the Contractor may be required to sell such property to the State at a specified price (e.g. Indonesia).

### 2.24 Confidentiality

A typical confidentiality clause in a MEDA provides for a party to obtain the prior consent of the other party before it can disclose “confidential information” to a third party; this is generally defined to include industrial, financial, commercial, scientific, technical or personnel information provided by one party to the other. In the contracts reviewed, such provisions were brief and often vague.

The provision will generally contain a long-stop date, after which the confidentiality obligations will cease to exist. In the sample of documents reviewed, this was generally three years following termination of the contract, but sometimes the obligation ceased upon termination of the contract itself.

In the majority of contracts reviewed, the definition of “confidential information” does not include the contract itself; on the contrary, a number of MEDAs explicitly provide that the contract is not a confidential document and/or is to be made public (e.g. Liberia). The MMDA also provides that the contract is a public document that is open for inspection by members of the public.

Please see paragraph 5 of Schedule 1 for a sample confidentiality clause taken from an existing MEDA reviewed.

### 2.25 Governing law and dispute resolution

The governing law is typically the law of the jurisdiction concerned, although some jurisdictions adopt the laws of France as an international standard (e.g. Guinea). Rules of international law may also be applicable (e.g. Mongolia, Sierra Leone).

In the case of a dispute arising between the parties, generally the contracts provide for the parties to attempt to amicably resolve the dispute between themselves, with alternative dispute resolution (ADR) (including conciliation, expert determination and/or arbitration) as a last resort when such discussions have failed. Typically, the contracts provide that the parties have to attempt to amicably resolve the dispute for a certain period of time (typically three months) before they resort to ADR (e.g. Indonesian CoW, Philippines, Sierra Leone).
Conciliation is a form of ADR whereby the parties to the dispute agree to use the services of a conciliator, who meets with parties separately in an attempt to resolve their differences, with the aim of bringing about a negotiated settlement. Conciliation differs from arbitration in that the process has no legal standing. The conciliator generally has no authority to seek or call witnesses or to make an award.

In expert determination, the parties agree to be bound by the decision of an independent third party (i.e. an expert). It is often the quickest and most effective way of solving disputes of a technical nature or disputes that are relatively simple in terms of content. The parties will generally agree the remit of the expert and the procedures that are to be followed.

In contrast, arbitration is a proceeding whereby a dispute is resolved by one or more impartial adjudicators and a legally binding and enforceable decision is imposed upon the parties to the dispute, although a concern for a Contractor could be whether it will receive a fair hearing where the counterparty to an arbitration is a state. Arbitration is commonly used for the resolution of commercial disputes, and a number of international bodies, for example, the International Chamber of Commerce (ICC) and the United Nations Commission on International Trade Law (UNCITRAL), have established rules governing arbitration procedures and institutions to administer and oversee arbitration matters. Where arbitration is necessary, the contracts typically contemplate using an international arbitration forum, such as the International Court of Arbitration, the London Court of International Arbitration or the Singapore International Arbitration Centre. An issue for a Contractor to consider in relation to arbitration are the rules relating to enforcement of arbitral awards. The 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) is one of the key instruments in international arbitration which, broadly, requires courts of contracting states to give effect to private agreements to arbitrate and to recognize and enforce arbitration awards made in other contracting states. A large number of countries in Africa, Central Asia and South-East Asia have adopted the New York Convention.

Another issue to consider in relation to dispute resolution more generally is the enforceability of orders made against a state. In some jurisdictions a state may have sovereign immunity, which may make it difficult for a Contractor to bring a suit against it or to enforce an award granted in the Contractor’s favour. In some jurisdictions, such immunity is expressly waived in respect of the enforcement and execution of any award rendered by an arbitral tribunal under the contract (e.g. Guinea, Liberia). Such a waiver is included in the MMDA.

Please see paragraph 6 of Schedule 1 for a sample dispute resolution clause taken from an existing MEDA reviewed.

2.26 Anti-bribery/corruption

Provisions relating to anti-bribery and/or corruption were seen in around one-third of MEDAs reviewed, and we note that this is a developing body of law internationally, with extensive and far-reaching legislation being introduced relatively recently, for example in the UK and the US. Where such provisions are included, these are generally quite extensive, requiring the Contractor to warrant that it has not made and will not make any gift or reward to any officials or employees of the State to induce or reward such persons for any acts taken in accordance with their duties.
3. Key terms table

The following table provides an indication, at a high level, of which key terms apply in MEDAs by jurisdiction.

<table>
<thead>
<tr>
<th>Country/Clause</th>
<th>Royalty</th>
<th>Bonus</th>
<th>Taxation</th>
<th>Work program</th>
<th>Feasibility study</th>
<th>Operator</th>
<th>Cost recovery</th>
<th>Commercial recovery</th>
<th>Participating interests</th>
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<th>Stabilisation</th>
<th>Assignment/withdrawal</th>
<th>Change of control</th>
<th>Termination</th>
<th>Exploitation</th>
<th>Liability</th>
<th>Foreclosure</th>
<th>Inheritance</th>
<th>Currency exchange control</th>
<th>Natural economic interests</th>
<th>Community development</th>
<th>Valuation</th>
<th>Security</th>
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<th>Governing law</th>
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4. Glossary

**Affiliate:** two parties are affiliates if either party has the power to control the other, or a third party controls both. Affiliates may be subject to more strenuous legal requirements than two unconnected parties.

**Alternative Dispute Resolution:** a process for resolving disputes between parties, often in lieu of or prior to litigation. Often the initial step involves elevating the dispute to senior management to negotiate a resolution and, if that fails, with an arbitration or expert determination mechanism to follow. Parties include a dispute resolution clause in contracts to define how a disagreement is to be resolved. Arbitration is more common than other forms of dispute resolution in a mining context. See also: Arbitration, ICC.

**Arbitration:** a proceeding often held in an attempt to avoid litigation and conducted by a person or panel of people, who are not judges, in a neutral forum. Arbitration awards are generally enforceable internationally and parties can draft arbitration clauses into their contracts to specify the rules of the proceeding.

**Arms’ Length Transaction:** a transaction where a willing (but not anxious) seller and buyer, with no prior relationship, act independently to reach an agreement. It is important for a transaction to be at arms’ length to demonstrate that price and other requirements are fair and representative of transactions of a similar type in the market and are not ‘friendly’ transactions to, for example, avoid tax.

**Assignment:** the transfer of one party’s rights or property to another (in order for obligations to be transferred, the consent of the other contracting party may be required).

**Authorisations:** concessions owned by the state, leased or licensed to proponents.

**Base Metals:** in mining, base metals refers to industrial non-ferrous metals excluding precious metals. These include copper, lead, nickel and zinc.

**Capital Expenditure:** the amount of money required to purchase the right to mine a deposit, to purchase the plant and equipment required to operate it, for preliminary development and for working capital.

**Change of Control:** where one company is acquired by another, or when an existing or new shareholder acquires a majority shareholding.

**CIF Price:** the cost, insurance and freight price. The CIF Price is the price of a good delivered at the frontier of the importing country, including any insurance and freight charges incurred to that point, before the payment of any import duties or other taxes on imports or trade and transport margins within that country.

**Commercial Discovery:** the discovery of minerals of a sufficient quantity to make any potential production potentially profitable.

**Concession:** the grant of exclusive privileges by the state or a controlling authority. In the context of mining contracts, it specifically refers to a grant of land or a grant of rights to the mineral resources themselves, with the right to enter land to do so, on which the mining company carries out a commercial undertaking and pays rent and usually a royalty to the granting authority. Also known as a tenement, licence or an authority to mine.

**Contractor:** the person or company who signs the contract to perform specified obligations. In mining, the contractor is typically an experienced miner, who may then sub-contract to others certain aspects of the work.

**Dead Rent:** rent that must be paid on a mining lease, regardless of whether minerals are extracted.

**Delivery Point:** the location where the commodity will be delivered. Due to transportation costs, the chosen location will have an effect on the net cost. Thus, in order to specify a single contractual price, the delivery point is an essential detail.
**Exploration:** the search to identify areas that may warrant examination of areas for mineral discoveries, including geological, geophysical and topographical surveys and drilling prospecting wells. The aim of exploration is the discovery of commercial deposits.

**Expropriation:** compulsory seizure of private property by, or compulsory surrender of private property to, a government authority, ostensibly for the public benefit.

**Fair Market Value:** the price a willing buyer would pay a willing seller for a given property or asset, provided both parties are unrelated, know the relevant facts and are under no compulsion to participate in the transaction. Given these conditions, fair market value should be an accurate representation of an asset’s worth.

**FOB Price:** the free on board price. The FOB Price means the costs associated with delivery, inspection and loading involved in putting minerals on a tanker at a seller’s facilities which are included in the agreed price. The buyer pays all additional costs to transport and unload the cargo.

**Force Majeure:** a force majeure clause removes liability for unavoidable catastrophes that occur without default of either party and produce a fundamentally different situation to that contemplated by the parties when entering the contract, rendering obligations incapable of being performed. For example, natural disasters, war, blockades and riots are often considered force majeure events, and liability is suspended for the duration of the event.

**Governing Law:** the law chosen by the parties to apply to the contract and any dispute arising from it.

**Guarantee:** a written promise to pay another party’s debt or perform their contractual obligations if that party fails to pay or perform.

**ICC:** the International Chamber of Commerce. The ICC’s International Court of Arbitration (the **Court**) is one institution administering arbitration, and parties may elect to have disputes governed by it, the ICC Rules of Arbitration (the **Rules**) or both. Originally established in Paris, the Court primarily ensures the Rules are correctly applied. The Court also has oversight powers, including appointment of arbitrators, review of awards and fixing tribunal fees. Other well known arbitral bodies include the London Court of International Arbitration and the Singapore International Arbitration Centre.

**Indemnity:** an undertaking to compensate for or provide protection against damage, loss or liability. In a contractual relationship, the concept of indemnity can arise where one party agrees to pay for the potential losses of the other, or to protect themselves from liability arising from such losses.

**Insolvency/Act of Insolvency:** insolvency means being unable to pay debts when they are due. Acts of insolvency sufficient to enable termination of a contract generally include compulsory or voluntary liquidation, arrangements with creditors for assignment and the appointment of an administrator.

**Joint Venture:** a joint venture is a contractual agreement whereby two or more parties join together for the purpose of executing a particular business undertaking. Mining companies often use joint venture structures amongst themselves.

**JORC:** the Joint Ore Reserves Committee. This body is sponsored by the Australian mining industry and its professional organisations, and has been in existence for over 30 years. The committee is responsible for preparing the Code for Reporting of Mineral Resources and Ore Reserves (the **JORC Code**).

**JORC Code:** the JORC Code is widely accepted as a standard for professional reporting purposes and was first published in 1989, with the latest revised version being published late in 2004. Since 1989 and 1992 respectively, the JORC Code has been incorporated in the Listing Rules of the Australian and New Zealand Stock Exchanges, making compliance mandatory for listing public companies in Australia and New Zealand.

**Liability:** legal responsibility for the consequences of one’s acts or omissions, enforceable by civil remedy or criminal punishment.
**Material Breach:** a substantial failure in the performance of a contract, typically a breach of a material term. An insignificant divergence from the terms of the contract will generally not be considered a material breach. See also: Material Term.

**Material Term:** an essential term of a contract. A term may be expressly designated as ‘material’ by the parties or such intention may be objectively inferred by a court, considering whether the promise is of such importance that the relevant party would not have entered the contract unless assured of its substantial performance. Material terms often include a description of the product, the price, the quantity and the delivery date.

**MEDA:** Mining Exploration and Development Agreements. MEDAs are widely used arrangements for mineral exploration and production.

**Mineral/Ore Reserve:** an estimate of the tonnage and grade that is expected to be delivered to the mill or treatment plant. The estimate, taking into account any factors that may affect this estimate (e.g. marketing, legal and environmental factor), is the economically mineable part of a mineral resource.

**Mineral/Ore Resource:** an estimate of tonnage and grade for a body of minerals, based on a sample of that body. The estimate represents a realistic inventory that, under assumed and justifiable technical and economic conditions might, in whole or in part, become economically extractable. Any portions of a deposit that do not have reasonable prospects for eventual economic extraction are not mineral resources.

**MMDA:** the Model Mining Development Agreement. The MMDA was developed in 2010 by the International Bar Association and is intended to be a form of model mining agreement. It provides representative language for the provisions commonly found in a mining development agreement, with example clauses taken from existing agreements.

**Open-Pit Mining:** the process of extracting metal ores and minerals that lie near the surface by removing the overlying material and breaking and loading the ore. Also known as open-cast or open-cut mining. See also: Underground Mining.

**Operating Committee:** a committee of representatives of the participant under a MEDA or mining joint operating agreement to supervise management of the project.

**Operator:** the entity responsible for managing the day to day operation of the mineral exploration and development.

**Production:** the commercial exploitation of minerals found in an authorised contract area, specifically the operation that brings minerals to the surface and prepares them for processing, but more generally may be considered to include all incidental activities, including the design, construction, installation, operation and maintenance of any plant and infrastructure and the mining, processing, stockpiling, transportation, export and sale of products. This phase may also be referred to as exploitation or development.

**PSC:** a Production Sharing Contract. A PSC is a widely-used agreement between a state and an oil company, which enables the company to explore and develop oil and gas reservoirs within a specified area in return for performance of specific obligations, including payment of royalties and tax.

**Reporting Standards:** these are minimum standards for classification and reporting of mineral deposits based on their geologic certainty and economic value. Mineral deposits are generally classified as Mineral/Ore Resources and Mineral/Ore Reserves. There are several classification schemes used worldwide, the most common being the JORC Code (Australia), CIM Standards (NI 43-101) (Canada), the SAMREC Code (South Africa), SME Guidelines (USA) and The Reporting Code (UK/Western Europe).

**Royalty:** a payment by the mining company to the state, representing the landowner’s share of the value of minerals produced on a property. It is commonly a fractional share of the net market value.
**Sovereign Immunity:** the legal doctrine that a state cannot be sued without its consent. The extent a state is immune within its own jurisdiction varies according to country, while principles of international law exempt states from legal proceedings in another country. However, if states are acting as contracting bodies, sovereign immunity may not be available in an international or foreign court. In addition, a state may elect to waive this immunity when negotiating a contract.

**Stabilisation:** in the context of mining contracts, a stabilisation clause seeks to address a party’s concerns that the state may, in future, reverse policies upon which the agreement was entered into; for example, the taxation regime. The clause attempts to maintain the original contract equilibrium.

**Surface Rent:** an amount payable for use of land, based on a flat rate per unit of measurement.

**Subsidiary:** an enterprise controlled by another (called the parent). Generally this relationship exists where one company can appoint or remove another company’s directors, where one company can cast more than 50 percent of the maximum number of votes at a general meeting of another company or where one company holds more than 50 percent of the issued capital of another company.

**UNCITRAL:** the United Nations Commission on International Trade Law. A commission sponsored by the UN and established in 1966, UNCITRAL meets annually to discuss issues regarding international trade law. It published the 1985 Model Law on International Commercial Arbitration and adopted its Arbitration Rules (the Rules) in 1976. The Rules provide for ad hoc arbitration, as UNCITRAL does not provide administrative services. Parties should therefore consider designating an arbitral institution to act as an administering authority when electing to have the Rules apply in the event of a dispute.

**Underground Mining:** the techniques used to extract minerals found deep below the surface, e.g. where the overlying material is thick. See also: Open-Pit Mining.

**Waiver:** the expressed or implied intentional and voluntary giving up of a legal advantage, claim, requirement or right. In essence, a waiver removes a real or potential liability for a party under the agreement.

**Withholding Tax:** income tax deductions on dividends and salaries. Withholding taxes are collected at the point of income disbursement and are paid directly to the state by the collecting entity.

**Work Program and Budget:** work program and budget for the conduct of operations, including the minimum work obligations and expenditure commitments, which may be subject to approval of the Operating Committee.
Schedule 1 – Example clauses

1. Tax (General) (Indonesia)

*Contract of Work (7th generation) between the Republic of Indonesia and the Company*

Subject to the provisions in this Agreement, the Company shall pay to the Government and fulfil its tax liabilities including its obligations as a tax withholder as hereinafter provided:

(i) Dead rent in respect of the contract of Work Area or the Mining Area;
(ii) Royalties in respect of the Company’s production of Minerals;
(iii) Corporate Income Tax in respect of income received or accrued by the Company;
(iv) Personal Income Tax (Article 21/26);
(v) Obligation to withhold income tax under Article 23 and or Article 26 of the Income Tax Law 1994 in respect of payment of dividends, interest, including remuneration due to loan payment warranty, rents, royalties and other income related to the utilization of property, remuneration for technical and management services as well as any other services;
(vi) Value Added Tax (VAT) and Sales Tax on Luxury Goods on import and or delivery of taxable goods and or services;
(vii) Stamp Duty on documents;
(viii) Import Duty on goods imported into Indonesia;
(ix) Land and Building Tax in respect of:
   (a) the Contract of Work Area or the Mining Area; and
   (b) the utilization of land and building in the area where the Company constructs facilities for its mining operations.
(x) Levies, taxes, charges and duties imposed by Local Government in Indonesia which have been approved by the Central Government;
(xi) General administrative fees and charges for facilities or services rendered and particular rights granted by the Government to the extent that such fees and charges have been approved by the Central Government;
(xii) Duty on registration and transfer of ownership of motorized vehicles and ships in Indonesia.

The Company shall not be subject to any other taxes, duties, levies, contributions, charges or fees now or hereafter levied or imposed or approved by the Government other than those provided for in this Article and elsewhere in this Agreement.

2. Tax (Income Tax) (Mongolia)

*Investment Agreement between the Government of Mongolia and the Investor dated 6 October 2009*

The annual taxable income of 0-3.0 billion togrogs of the Investor taxable under Corporate Income Tax Law shall be taxed at the rate of 10% (ten percent). If annual taxable income exceeds 3.0 billion togrogs it shall be 300.0 million togrogs plus 25% (twenty five percent) of taxable income exceeding 3.0 billion togrogs.
3. Royalty (Liberia)


15.1 Royalties

(a) Except as may be provided by amendment to the Revenue Code subsequent to the Effective Date, the Concessionaire shall no later than 30 days following the date of (i) shipment (in the case of exports by the Concessionaire); or (ii) of sale or other disposition (whichever is earlier), in the case of transactions in which the Concessionaire transfers title to Product(s) before the Product(s) leave Liberia, pay to the general revenue account of the Government a royalty for Product(s) in that shipment (or subject to such sale or other disposition) at the percentage rate stated in subsection (b) times the Reference Price for each unit of Product, FOB Liberia (such payment collectively, the “Royalty”). Each payment shall be accompanied by a statement from the Concessionaire showing in such reasonable detail as the Ministry of Finance may require the basis of computation of Royalties due.

(b) The royalty rate for shipments or sales of Iron Ore in any month during the Term shall be as follows: (i) when the Index Price is US$100 per metric ton or less the royalty will be 3.25%; (ii) when the Index price is greater than US$100 per metric ton and less than US$125 per metric ton, the royalty will be 3.5%; (iii) when the Index Price is greater than US$125 per metric ton and less than US$150 per metric ton, the royalty will be 4.0%; and (iv) when the Index Price is US$150 per metric ton or more the royalty will be 4.5%. The “Index Price” shall be the CVRD spot price FOB Brazil for shipment to China for the same product of equivalent grade and quality produced at [mine].

4. Force Majeure (Zambia)

Amended and Restated Development Agreement between the Government of the Republic of Zambia and the Contractor dated 2004

25.1 Any failure on the part of a Party hereto to comply with any of the terms, conditions and provisions of this Agreement (except any obligation of a Party to make payment of money to the other Party) shall not be grounds for termination or give the other Party hereto any claim for damages insofar as such arises from Force Majeure, if the first-mentioned Party:

25.1.1 has taken all reasonable precautions, due care and reasonable alternative measures with the objective of avoiding such failure and of carrying out its obligations under this Agreement; and

25.1.2 has given notice to the other Party of the occurrence of Force Majeure on becoming aware of such an event.

The first-mentioned Party shall take all reasonable measures to overcome the Force Majeure and to fulfil the terms and conditions of this Agreement with the minimum of delay (provided that no Party has an obligation to settle a labour dispute or to test the constitutionality of any legislation or law) and shall give notice to the other Party on the restoration of normal conditions.

25.2 For the purposes of this Agreement, Force Majeure means act of war (whether declared or undeclared), invasion, armed conflict, act of foreign enemy, act of terrorism, martial law, military or usurped power, insurrection, revolution, civil disturbances, blockades, riot, embargoes, strikes, lock-outs and other labour conflicts, sabotage, criminal damage, land disputes, epidemics, plague, volcanic eruptions, earthquakes, subsidence, heave, landslip, collapse, rock falls, storms, cyclones, floods (including flooding of underground mine works), explosions (including nuclear explosions), fires, lightning, methane and other underground gases and the explosion thereof, radioactive or chemical contamination or ionising radiation unless the source or
cause of the contamination, radiation or other hazardous thing is brought or has been brought onto or near [the Contractor’s] operations by the Party claiming Force Majeure or those employed or engaged by the Party claiming Force Majeure unless it is or was essential for the construction or operation of the Facilities, non-availability of electrical power, gas, water or other utilities other than due to the negligence or default of [the Contractor], restrictions imposed by the government or other authorities of any country which has jurisdiction either over [the Contractor] or its operations (provided that [the State] will not be entitled to claim a Force Majeure Event as a result of restrictions imposed by Zambian governmental authorities) or destruction of, damage to or unavailability of materials, equipment or supplies and any other event which the Party claiming Force Majeure could not reasonably be expected to prevent or control.

5. Confidentiality (Liberia)


32.1 Confidential Information

(a) Subject to the limitations below and subject to applicable Law, for a period of three years from disclosure, each party agrees not to divulge information designated in writing at the time of delivery as confidential information (“Confidential Information”) by the other party to any other Person without the prior written consent of the designating party. By designation of information as Confidential Information, a party will be deemed to have represented that after review of such information it has reasonably determined that the release of such information to third parties would materially adversely affect the party or its economic well-being. In any event, Confidential Information does not include information that (a) was publicly available or otherwise known to a party prior to the time of disclosure to it and not subject to a confidentiality obligation; (b) subsequently becomes publicly known through no act or omission by a party; (c) otherwise becomes known to a party other than through disclosure to such party by the other party; (d) constitutes financial statements delivered to the Government under Section 1 that are otherwise publicly available; (e) is mainly of scientific rather than commercial value, such as geological and geophysical data relating to 89 areas in which the Concessionaire no longer holds a valid exploration license and has not designated as a Proposed Production Area; or (f) has been disclosed pursuant to generally applicable Law or a final order of any court having jurisdiction that is not subject to appeal.

(b) Each party will maintain the confidentiality of Confidential Information disclosed to it in a manner consistent with procedures adopted by such party to protect its own confidential information, provided that such party may deliver or disclose Confidential Information to (i) its financial, legal and other professional advisors (to the extent such disclosure reasonably relates to the administration of this Agreement); or (ii) any other Person to which such delivery or disclosure may be necessary or appropriate (1) to effect compliance with any law, rule, regulation or order applicable to such party; (2) in response to any subpoena or other legal process; (3) in connection with any litigation to which such party is a party if reasonably delivered necessary to protect such party’s position in such litigation; or (4) if an Event of Default has occurred and is continuing but only to the extent such party reasonably determines such delivery and disclosure to be necessary or appropriate in the enforcement or for the protection of the rights and remedies under this Agreement.

(c) This Agreement and any amendments thereto are not confidential. The Concessionaire is not entitled to confidential treatment of information relating to the timing and amount of royalties and other payments specifically due under the terms of this Agreement or of Taxes and Duties payable by the Concessionaire or the rates at which such royalties, other payments or Taxes and Duties become due or are assessed, or information that is necessary to compute the amount of such royalties or other payments becoming due.
6. Dispute Resolution (Papua New Guinea)

Standard Mining Development Contract (Draft) between the Independent State of Papua New Guinea and the Company

23.1 For purposes of this Clause, “Dispute” means any dispute, disagreement, controversy or claim arising out of or relating to this Contract, or the interpretation or performance of provisions of this Contract or the breach, termination or validity thereof, which the Parties are unable to resolve by mutual agreement within a reasonable time. It does not include any difference of view or disagreement which, pursuant to provisions of this Contract, has been submitted for determination of a Sole Expert.

23.2 Any Dispute between the State and the Company (any one or more of the Joint Venturers) shall be settled by arbitration under the Arbitration Rules, as at present in force, of the United Nations Commission on International Trade Law (hereinafter in this Clause called the “UNCITRAL Arbitration Rules”), subject to such modifications as the parties to the Dispute may agree in writing at the time.

23.3 For the purposes of the arbitration of any Dispute under the UNCITRAL Arbitration Rules:
(a) the appointing authority shall be the Chairman of the Administrative Council of the International Centre for the Settlement of Investment Disputes;
(b) an agreed appointee shall be appointed as a single arbitrator, but if within thirty (30) days of the receipt by the respondent of the notice of arbitration the parties have not agreed on a single arbitrator, the number of arbitrators shall be three;
(c) the place of arbitration shall be Sydney, Australia (in which case the International Arbitration Act 1974 of the Commonwealth of Australia and the UNCITRAL Model Law on International Commercial Arbitration as adopted thereunder will apply to the arbitration) or such other place as the parties to the Dispute may agree; and
(d) the language to be used in the arbitral proceedings shall be English.

23.4 An award in arbitration proceedings under this Clause shall be binding on the parties to the Dispute and judgment thereon may be entered in any court having jurisdiction for the purpose.

23.5 The State hereby irrevocably waives any claim to immunity:
(a) in respect of proceedings on the merits of the claim which is the subject of such arbitration;
(b) in respect of proceedings to enforce any such award including, without limitation, immunity from service of process and from the jurisdiction of the Court; and
(c) in respect of execution of any such award against the property of the State, being property of the State held for commercial purposes.

23.6 Unless otherwise agreed or provided, the cost of any arbitration procedure will be borne:
(a) equally by the two parties to the Dispute where it has been referred jointly by them; or
(b) otherwise, by the unsuccessful party in accordance with the UNCITRAL Arbitration Rules.

23.7 Nothing in this Clause shall apply to any Dispute between the State and its nominee and where the Joint Venturers are jointly parties to a Dispute with the State, for purposes of this Clause and notwithstanding anything in the Joint Venture Agreement, the nominee shall be deemed not to be a party to that Dispute.

23.8 Where a Dispute has been referred to arbitration pursuant to this Clause, neither Party shall be entitled to exercise any rights or election arising in consequence of any alleged default by the other arising out of the subject matter of the Dispute until the Dispute has been resolved by the decision of the arbitrators.
23.9 Notwithstanding that the arbitration of any Dispute may be held outside Papua New Guinea, it is acknowledged that the reference of disputes to arbitration under this Clause is a submission to arbitration by an agreement which is governed by Papua New Guinea law and therefore the Arbitration Act (Chapter 46) applies for the purposes of enforcement of any resulting award in Papua New Guinea.

23.10 Where any difference of view or disagreement between any two or more of the Parties is, pursuant to any other provision of this Contract, submitted for determination of a Sole Expert, the Sole Expert shall act as an expert and not as an arbitrator, and accordingly the foregoing provisions of this Clause do not apply. A determination by a Sole Expert shall be binding on the Parties. Unless otherwise agreed, the cost of submitting any such matter to a Sole Expert will be borne:

(a) if one Party calls for the matter to be determined by the Sole Expert and loses, by that Party;

(b) if one Party calls for the matter to be determined by the Sole Expert and wins, equally by all Parties to the determination; and

(c) if a number of Parties jointly submit the matter to be determined by the Sole Expert, equally by all of them.
Schedule 2 – Examples of model form MEDAs

A brief summary of the Model Mining Development Agreement (the MMDA) and the Indonesian Contract of Work (CoW) are set out below.

1. The Model Mining Development Agreement

The MMDA was developed in 2010 by the Mining Law Committee of the International Bar Association, for use by mining companies and host governments in mining projects. The Mining Law Committee collected and analysed over fifty existing mine development agreements and prepared a model agreement with representative language for each provision, with example clauses taken from existing agreements. The MMDA is primarily aimed at developing countries, particularly those where a model mining agreement is not in place or effective. It is also aimed at developing countries with a mining code that requires supplementation by private agreement. We have incorporated an analysis of the MMDA to supplement our review in the ‘Key Terms Review’ section.

2. The Indonesian Contract of Work

Indonesia is one of the few jurisdictions that has implemented a distinct regime for recording mineral exploration and production arrangements (including the establishment of a model form MEDA). For many years, the governing agreement under this regime was the CoW, which was essentially a model agreement signed between a foreign investment company incorporated in Indonesia and the State, covering all stages of a mining project and setting out the rights and obligations of the parties thereto. The legal framework for coal mining was dealt with by a parallel, but separate, regime known as a Coal Contract of Work (CCoW). Each revision of these agreements was referred to as a new “generation” of contract of work. The last CoW to be signed was the seventh generation and to date, a total of three generations of CCoW have been signed.

To encourage new investment in the Indonesian mining sector, particularly in the coal mining industry, the Government of the Republic of Indonesia enacted Law No. 04 of 2009 regarding Minerals and Coal Mining, which introduced a new single licensing system for mining that replaced the previous CoW and CCoW systems. Although the CoW and CCoW regimes have now been replaced we have, where appropriate, incorporated an analysis of the current generations of the CoW and CCoW as part of our review in the ‘Key Terms Review’ section, as there are likely to be holders of CoWs and CCoWs still in existence.
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