

MODEL MINE DEVELOPMENT AGREEMENT (MMDA)

SPONSORSHIP

The MMDA was developed by the Mining Law Committee of the International Bar Association. Development of the MMDA was managed by an Administrative Committee, whose members are identified on the project website, www.mmdaproject.org

In April, 2009,, the Mining Law Committee of the International Bar Association (“the Committee”) established a project to develop a Model Mine Development Agreement (MMDA) that can be used by mining companies and host governments for mining projects in developing countries. The project is led by the Mining Committee, with civil society and university-based groups working with the Committee to ensure a well-balanced final product is achieved.

The Committee collected and analyzed over 60 existing mine development agreements over a two year period, and then assembled the model agreement to contain representative language for each provision with links to example clauses taken from the existing agreements. The project is aimed primarily as a tool for use with and in developing countries, in particular where a mature mining code is not in place or effective. The MMDA may also be of use where the mining code must be supplemented by private agreement, or as a template for agreements with state owned mining enterprises.

The MMDA project seeks to provide a tool with a specific starting point. It asks what a mining contract might look like if the process started from the precept of a project aiming to contribute to sustainable development not simply of the project itself, but of the local, regional and national communities. While the project clearly recognizes that a mine development must be commercially viable to proceed, it also recognizes this is no longer the only issue around which contract negotiations should proceed. Rather, all parties to a negotiation should take a broader, and integrated, look at the relationship between the proposed project, the state and the local communities. The natural, social and economic environments around mining projects are, in effect, also essential considerations today.

The final product is web-based and publicly accessible. It is not “prescriptive” in the sense of setting out one standard form. Rather, it seeks to provide an agenda for negotiations based on a sustainable development objective that is common to all parties. Its public nature will also allow local communities and civil society groups to contribute in a sound manner to negotiation processes. By setting out a comprehensive and common template, it is hoped the project will enable and assist better structured negotiations, and better lasting results in mining projects.

OBJECTIVES

Some developing countries base their strategies for social and economic development on mineral endowments. This means that the terms on which foreign mining investors are granted access to those resources are critical to ensuring that countries receive a reasonable return for their resources, within a framework that directs resource rents to positive forms of development.

If national objectives include ensuring that development benefits flow from resource transactions, the desire to receive more benefits is constrained by the reality that such transactions must remain attractive to investors. If they are not, there will be no investment, and no benefits. Mining investment is long term high risk and capital intensive investment, it is fixed in place, and investors reasonably want some sort of assurance that they will have a chance to succeed. If they do not have some protection for their capital, they are not likely to invest.

Thus while good mine development agreements are certainly not sufficient to create development; equally certainly they are a condition necessary to success.

Mine development agreements therefore have a dual nature. They are on one hand commercial contracts, which need to provide commercial terms attractive to investors. On the other, they are disposing of publicly owned assets which may be of enormous importance to the future of nations, and are therefore public policy documents of considerable significance. The idea that public policy of this importance is established in documents that are in their entirety confidential is increasingly regarded as unsupportable. And investors increasingly realize that agreements tied too tightly to the personality of a particular minister or to a political party are in fact unstable regardless of the forms of legality; they would in many cases like their agreements to have a broader expression of national support.

Civil society has in many cases been excluded from the process of negotiation and review of mine development agreements. This has become an increasing source of grievance, and an increasing concern: without some sort of public accountability for its stewardship of national wealth, the performance of government may fall short of what is needed. Allegations of poor performance by ministries and corruption of ministers will flourish and multiply.

In short, many governments are looking for better deals, investors are deeply concerned about the long term security of their assets and the conditions of investment, and civil society wants to be more included in what must become a more transparent process.

The objective must therefore be one of balance: balance between the investor's legitimate demands for security of investment terms and governments' legitimate demands for development benefits; balance between the agreement as public policy document and the

agreement as commercial contract; and balance between the overriding need for transparency of agreements and the narrow range of issues where confidentiality can clearly be justified.

The vision is that if there can be a broader consensus as to what these agreements should look like, what is necessary in them, and what is out of bounds, we can develop a new generation of agreements that:

- Create conditions for much greater development benefits in host countries; while
- Creating agreements that are more stable because they are based on a broader national consensus.

CONSTRAINTS

Key constraints in developing and negotiating improved mine development agreements have included:

- The fact that there is, to the best of our knowledge, no general source of information on what is typically in such agreements, what the key issues for negotiation are, what kinds of terms are most important to development strategies, or what terms are of most concern to investors;
- Understanding the implications of such agreements for national development requires strong interdisciplinary teams of experts in fields including geology, taxation and fiscal implications, mineral economics, law, and development issues. Many countries have found it very difficult to build this capacity, and very hard to find truly independent sources of advice, free of potential conflicts of interest.
- Inability to share and learn from experience, including case studies of success and failure, where so much of the relevant material is not in the public domain.
- Inability of governments to judge accurately the going 'market price' in such agreements, for similar reasons.

The MMDA does not address all these concerns; it does hope to be at least a partial response to some of them. Above all, it should be a resource that can serve as a basis for discussion among the actors, increasing understanding of the issues in such agreements, and a best available snapshot of the best of current practice in the area.

PRINCIPLES

The development of the MMDA was based on several key principles, which included:

1. Consultation and Stakeholder Acceptance

In an effort to ensure the balance necessary to effective and equitable agreements, the Mining Committee took a highly consultative approach to developing the MMDA. This very considerable effort to work with a variety of stakeholders in government, industry and civil society has been designed to produce a result that can be the basis for discussion by all these interests. The nearly two year consultative process is described on the MMDA web site, www.mmdaproject.org

2. Current Practice as a Starting Point

Preparation of the MMDA started with obtaining copies of some 60 existing mine development agreements. Some were public; others were shared with the Committee on the basis of confidentiality. It is thus rooted in existing practice.

The Committee proceeded by “deconstructing” the agreements and removing identifying information (*e.g.* names of countries, or companies, or precise royalty rates). In a process described on the MMDA web site, www.mmdaproject.org, the Committee then examined each of the categories of clauses: *e.g.* fiscal terms, tenure, rights and obligations; community and sustainable development, and ‘other,’ to identify clauses that were clearly written and reflected some balance between interests of governments and those of investors. The Committee also developed a ‘table of contents’ that included the clauses typically found in such agreements, arranged in a logical order.

For each such heading, the Committee identified a lead clause, in most circumstances taken from an existing agreement with little modification, and several alternative clauses, also from existing agreements. This gives the user an opportunity to review the drafting approaches taken by a variety of practitioners as to each of the key clauses.

3. Not a prescriptive approach

As indicated, the MMDA is not a unique agreement; it cannot (and certainly should not) be simply printed out and used. It is a source of information and ideas for drafters and is not a substitute for analyzing and understanding the issues in a give situation. It does not mandate approaches to any problem.

If it has a bias, it is a bias resulting from a consensus among some of the world's leading mining lawyers, who participated in creating it, that certain clauses were more clearly drafted than others, or represented balanced approaches to key problems of drafting.

4. *Flexibility*

Because the dynamics of the market for each of the different minerals are distinct, national legislation and practice differ, and the size and economics of projects differ, the MMDA intends to offer a variety of different options which can help adapt mining contracts to particular circumstances.