

**Model Mining Development Agreement (MMDA) Minutes**  
**Kelli Schulte, Rapporteur**

Prospectors and Developers Association of Canada Convention 2010  
Model Mining Development Agreement (MMDA) Workshop  
206 AD, North Building- Metro Toronto Convention Center  
March 8, 2010  
9:00am- 12:00pm

This document is an attempt to capture the thrust of the comments received at the Toronto consultation on March 8. The meeting was held this date because it was shortly after the World Mines Ministries Forum (where there was also discussion of the MMDA) in the hope of facilitating attendance by governments.

In the end there were approximately 120 attendees.

We apologize in advance to any attendees whose names are given incorrectly or incompletely.

**Identified Government Representatives**

Ecuador  
Canada  
Uruguay  
Albania  
Fiji

**Administrative Group of the Mining Law Committee**

Robert Bassett  
Elizabeth Bastida  
Michael Bourassa  
Luke Danielson  
Peter Leon  
Howard Mann

**9:00 – 9:15**

*Welcome, Introduction to IBA, SEERIL and Mining Committee- Peter Leon, Webber Wentzel, Johannesburg and Chair, IBA Mining Committee (See Power Point Presentation: IBA Introduction)*

9:15 – 9:40

*Introduction to MMDA project- Bob Bassett, Holland & Hart, Denver*

The goal of this workshop is to explain what we have done thus far and where we are at with the MMDA.

9:40 – 10:15

*Tenure Issues- Michael Bourassa, Fasken Martineau, Toronto* (See Power Point Presentation: Bourassa-MMDA\_Mineral Tenure)

**Richard Ward:** How do you see a mining development agreement in the context of capacity building and institutional development in the host country? And, over time do you see that the objective of the mining agreement should be to capture fewer aspects of the investment in the operation that are not covered by the local law and local regulation or, do you see this as something where going forward is more of a framework for supplanting normal corporate law?

Have you considered how the agreement will dovetail with the Equator Principles and the undertakings as opposed to the undertakings that the Equator Principles impose on lenders and companies?

**Robert Bassett:** In terms of this supplanting law, the vision that we have had is that we are dealing with situations where there is not what we would call a mature code. So, to the extent that a country would enact a more modern mining code then I don't think this type of agreement would be necessary. There are situations, and you may have seen them, where there is a mature mining code but, it needs to be supplanted with an additional agreement because the code does not provide for things or there may not be detailed regulations that apply to things. So, rather than supplanting the law I think the vision we have shared amongst ourselves is that this is for those situations where you don't have that mature mining code. You don't need this agreement in Ontario; you can't have this agreement in the United States; but in jurisdictions where you don't have that code it's applicable.

In terms of the Equator Principles... my personal response would be no, tell me more. How do you see the Equator Principles influencing what we are doing?

**Ward:** Well certainly from the lenders perspective the Equator Principles imposes obligations on the lender that are not necessarily prescribed in a law or regulation; therefore presenting a somewhat subjective environment where you could have a default in a loan because an export credit agency decides they aren't happy with the way you are interacting with the a particular community. I find that troublesome from a lender's perspective to face the potential for default when a company may not be in violation with local law or in terms of the mining agreement.

**Bassett:** Do you think that by having this model/ examples out there best practices would assist the lending institutions in having some sort of touchstone to look at or do you think it would get in the way?

**Ward:** I am not sure but, I think it would be good for you to consider how you might capture some of these subjective obligations that the financing end of the development faces to a greater extent today as a result of the proliferation of the Equator Principles. I am not saying they are a bad thing but, it is a grey area.

**Peter Leon:** Point is very well made and we will certainly take it. What we are trying to do with this is to create some objective principles which are not top down. We want to create a best practice model hopefully some of the Equator Principles will be addressed.

**Howard Mann:** When we get to the community development component of this presentation you should see quite a bit of complimentary principles and implementation of the Equator Principles; or a framework for implementing them into the contract within the community development process and dispute settlement processes between the company, the government, and the community and how they fit together will create a compliance model rather than an enforcement model.

**Sokol Mati (Albania):** In Albania a mining license depends on groups of minerals and a rehabilitation plan must be applied at the beginning of the code.

In Albania a new mining law is being drafted; this could be used as a model guideline.

**Adolfo Duranona (Baker & McKenzie, Buenos Aires):** How does this apply in the case of bi-lateral investment agreements with the investor?

Recommends that the government have a public bidding process.

**Bassett:** When bi-lateral treaties are in place there is often no prescriptive statement. One would have to choose an option that contains these provisions.

In the case of bidding: selection of local providers?

**Duranona:** Bidders should be selected by the company for higher credibility—not the government. The government and the company play a significant role but, government discretion makes things difficult for the company.

**Francisco Urrutia: (Colombia):** How should the duration of the project be determined and how should extensions be provided for? Should the company have a right to ask for an extension? How to deal with changes that occur throughout the mining process? There is a certain amount of uncertainty in extensions; should mining be modeled more like oil and gas—based on economic viability?

**Michael Bourassa:** Terms of the deposit should be based on economic viability. So long as the mine can show that it is economically viable, or working towards it, and it is still in production renewability should be based on viability.

**Urrutia:** Certainty of extensions should exist from day one. In Columbia we have 30 year contract it must then be renegotiated in twenty years but, there is a worrisome tendency that a government may deny extension despite economic viability or that it may ask for a double royalty. This is currently being challenged in Constitutional Court.

**Carlos (Brazil):** Have you found an objective way to examine what a company is doing on the ground through the MMDA? How about in terms of a government right to assess the meeting of minimum expenditures?

**Bourassa:** It is reasonable for the government to say that a company needs to spend “x” million dollars per year but, in the government situation clear parameters would need to be established. Perhaps, dispute resolution could be used to make these determinations.

**10:15 – 10:30**

*Coffee Break*

**10:30 – 11:10**

**Party Obligations- Bob Bassett, Holland & Hart, Denver** (See Power Point Presentation: MMDA-Robert Bassett- Party Obligations)

**Bassett:** How do you move from a contract into an enforceable agreement?

**John Williams (Duncan & Allen):** The constitution could be used. It is also important to establish who is authorized to enact this agreement? The creation of legislation that grants authority to a particular person/ entity is essential.

Observation: I have found that in the tenure area what works the best is to make sure the obligation to maintain the rights are limited, objective, and straightforward; if a company complies with those, it maintains its property rights (tenure). Now it may have to jump through a lot more hoops in order to have the right to operate in a particular fashion—that’s going to involve more explanations, more reviews, more transparency, and so on. As someone who is usually looking at this from the government side-- I find that there is a tendency at the outset for governments to want to regulate everything as a condition for the rights. This doesn’t offer any security to the mining company.

Operating rights and obligations are entirely different from tenure rights—this is where we get into questions about the commercial viability of the deposit, feasibility studies, EIS, community obligations, and so on and so forth. This is an important distinction.

I would suggest you really look at the obligations to maintain tenure vs. the obligations to operate in a particular fashion.

**Bourassa:** Excellent point. Hopefully we have set this up by what we are doing here, with separating tenure from rights and obligations. Rights and obligations consist of all kinds of rights and obligations; this is why we tried to use the word commercial. Maybe operating rights and obligations is more of what we are talking about. Thanks.

**Bassett:** One of the interesting things we have seen in the agreements we have looked at is that some of the agreements have stability clauses that apply to all laws not just financial laws. Others have much more limited stability clauses that say that government should not enact any law that would have a negative material adverse effect.

Should a contract like this have some kind of stability agreement either within it or, attached to it? Should there be a separate stability agreement?

**Charles McPherson:** In many places the government pledges not to legislate but, contracts must be able to be legislated in order to ensure a neutral agreement. You do not want an agreement to be one sided, if changes are made they need to be symmetrical. Often times, there is an asymmetry where the company gains on the positive side and is saved on the negative end as well.

**Leon:** In many countries it would be unconstitutional to say that the government cannot legislate. A stability clause must allow for legislation. A way around that is to allow for some type of fiscal adjustment, like you do in the oil industry, or the government can provide some form of compensation to the company rather than having an outright prohibition on legislature.

**Bassett:** Sometimes legislature will say we cannot bind future legislatures. One wonders, to what extent can you do this at a contractual level?

**Mann:** To show that active debate exists even within the group...this is a place where the Equator Principles can be applied; another place to look is at John Ruggie's process on business and human rights. His process for looking at stabilization clauses from a human rights perspective doesn't look at a legislation freeze, it looks at an economic equilibrium type of stabilization agreement; but, even within that, one might wonder what is the real legitimate scope of that kind of provision and for what kind of measures should government be called upon to compensate?

Should this be applied with changes that keep with the operating standards and/or should we look at more arbitrary clauses? How about changes that are expected to raise environmental standards/ human rights standards/ labor standards?

Should we be looking at more restrictive clauses or, does this start with arbitrary and discriminatory changes in the law?

**Bassett:** At what point should the contract be renegotiated? Are there standards to do that? At what point can the company trigger a renegotiation/ revision of the contract in the manner that the government can do so?

If government is bound by a stability agreement and can't unilaterally make a change-- at what point can a company ask outside forces to come in and influence change?

**Urrutia:** There is still a lot of doubt around clauses that use the term material adverse effects; any contractual stability is better. In Columbia, you can stabilize a contract for up to 20 years, not in everything, but a company can cancel a contract at any point. It is then subject to all new laws but, you can stabilize them... despite the risks, this may be preferable rather than having a fuzzy clause about material adverse effects.

**Bassett:** Yes, there is a need to define what a "material adverse effect" constitutes if it is to be used in the language of a contract. It needs to be quantified otherwise it is fuzzy language.

Should national government bind local regulation?

**Argentinean attendee:** In Argentina we have a tax stability law. There isn't a law that tax stability can be moved for 30 years if a project has been approved but, we have had a recent change... a resolution for taxing mineral exports. A national government can promise everything you want but, local jurisdiction is more important.

**Deanna:** In mining investment, the national government can help by respecting stability (ie: eliminating custom duties to importation of machinery for project) but, we will always need two jurisdictions.

**Bassett:** Are these stability issues raised in West Africa? Burkina Faso, other jurisdictions you have dealt with-- how?

**Louise Vaillancourt-Chatillon:** The stability issues are a big issue [in West Africa]. First of all because sometimes you deal with crown corporations that will proudly announce to you that they are not dependent on government. You then sign a contract with a crown corp. and you start asking where these stability clauses come from do? Language in the agreement will say that your partner (Crown Corporation) will do everything possible to ensure that your title remains good but, they are not the government so, there is no enforceability.

So, if government decides to expropriate all nickel producing companies where do you stand? You lose everything and your partner (the crown corporation) does not lose much. There is a two level discussion—this can be confusing

In West Africa, regulations are pretty clear. So, when you sign on, you know you will have to go to your local government for water rights, etc... If you do it right you get it, if you do not then you won't.

**Bassett:** Should we have a parallel project for grievance between the government and the state owned enterprises or, will our project assist in dealing with state owned enterprises as well?

**Vaillancourt-Chatillon:** I think your project will be useful with whomever you are negotiating. State owned enterprises still do not have access to government—they are your barrier. You are limited. Negotiation with a state owned enterprise may or may not be enforceable.

You can always build in compensation in case you are on the losing end of law or arbitration.

**Fernando Aguirre:** (About state-owned company contracts) In Bolivia, this is extremely important because we are now making a distinction between an administrative contract—signed with state (substitution of concession) and commercial agreements—signed with state owned enterprise (joint venture agreement).

**11:10 – 11:50**

*Community Development- Luke Danielson, Sustainable Development Strategies Group, Denver and Howard Mann, International Institute for Sustainable Development, Ottawa* (See Power Point Presentation: MMDA- Luke Danielson and Howard Mann- Community Development)

What mechanisms can be built into this model agreement to promote compliance? Liaison? Responsive person?

**Ian Thompson:** Once again we are at a point where we are looking at the mine, the community and the government. Mine's do not come into being out of nowhere. This idea is forward looking in environmental and social impact but, these kick in well before the mine is actually there. So, at what point do agreements like this and the CDA kick in? At the beginning of the exploration phase, during exploration, when the company is prepared to declare that a mine exists? How does this package fit into the overall mining cycle?

There could be 1, 5, 10, 15, maybe 20 years while numerous interactions occur before “the mine.”

**Luke Danielson:** This is a very critical question but, these contracts were entered into when they were entered into so, it is important but not internal to the contracts. This is something we will have to talk about as a group to see what we can do with it.

**Bassett:** Personal view is that this is a model mine development agreement project and, at some point you are talking about the fact that a commercial decision has been made and that we are going to develop a mine. I do not see that this would be as useful at the beginning of the

exploration phase as you talked about the other day because, while there is some overlap, this is a development agreement. It is limited but, we cannot solve all the world's problems at once.

**Thompson:** I would just like to suggest that the existence and potential for these agreements sets expectations with the communities and that they are going to want to know a lot about this early in the process.

**Tom Cushman (Madagascar):** Not just a Madagascar problem, not just an African Problem? What do you do when the rules change? When the Constitution changes? When the government no longer seems to have the interest of its people at heart and it turns into a bit of a kleptocracy?

We have had numerous instances where mining contracts in legislation (ie: Rio Tinto did a beautiful job cuing them) but, what is local changed. We used to have provinces (6), now we have regions (22) but, we forgot to change the law accordingly.

Similarly, law will be written by the parliament but, the rules were written by the ministry and they can change every time there is a new minister. With the coup a year ago we dissolved the Parliament—no longer a legislature that can change the legislation.

When we do these contracts we have the problem of-- who is counterparty? How responsible is this person? A stability agreement with a plunderous government is going to be enforceable where and when?

Not just a problem to Madagascar—though it will probably never be a problem you will see in Ontario- but, these are the areas where we end up with great concern; and, while we would love to get really perfect agreements there has got to be a plan B for when it all goes wrong.

**Danielson:** We really appreciate that very much. We are all deeply aware of the fact that there are a tremendous number of problems that we cannot solve. Ghandi made a comment about communism, that he heard that people were trying to invent a system so perfect that no one needed to be good. We will never be able to create a contract that will eliminate the need for some virtue in the humans that apply it and, a contract can be a step towards a more stable regime; but, it won't create it.

**Cushman:** Madagascar was really the poster child for how we are supposed to do these things right, the World Bank threw a lot of money at it, and great experts, it had all of these topics in these programs, and it worked well; if only we could keep gangsters out of government it would have make all of our lives a little easier.

**Richard Ward:** My question is about the EITI. With EITI all payments are disclosed and you try to account for funds to see if they match. I would suggest that this be incorporated into the MMDA as an international best standard. It is probably not in any of the agreements you are looking at now but, I just wanted to throw that out there.



**Danielson:** That is an excellent idea. For the government and company whom have both subscribed to EITI to sign a contract that isn't compliant would not make sense. Thank you. Great idea.

**Mann:** Not just those where the company and government are subscribers to EITI but, perhaps even more so when they are not subscribers-- when it is needed the most. We are conscious of this.

**Danielson:** Transparency is a huge issue that runs all the way through, it is not our job to impose our ideas.

**Roderick Salazar (Philippines):** I just wanted to confirm that CDA is being implemented on three levels in the Philippines: legislation; mineral production sharing agreement and the financial and technical assistance agreement between the mining company and government; and in the feasibility study-- which has to be completed by mining company prior to commencing development. There is a social development management plan and environmental management plan that has to be approved by the Mining Bureau before company can commence. This is the Philippines so far as community development is concerned.

**Danielson:** Our goal at this stage, at least the concept that we are talking about, is to make a web based set of model clauses that have alternative versions of key clauses; and we want to make this a resource that is available for use to people who think that it is in their interest to do so.

**John Williams:** A problem that exist between even sophisticated companies is going to be that one set of people are negotiating the agreement while another set is involved in implementation of the agreement. Howard talked about the importance of setting up a project governance system with the community and government; but, it is important to be aware of the fact that the people that implement and regulate the project have to deal with the problems of the real world; not hypotheticals discussed during negotiations. Perhaps we could set up oversight committees in order to enhance the projects governance.

They are going to have to have some institutional memory of why certain things were negotiated one way originally. In this way we can turn agreements into an operating manual/ guidance that can actually be used by company or government in order to keep track of why we did what we did, in order to move forward.

**Danielson:** So, at the local level, there may be some type of joint committee or community council that is recognized under agreement? Do you think this would be helpful at the national level?

**Williams:** Since you will be creating laws at this level in the agreement you need liaison mechanisms in moving forward. You do not want it handed off to someone else. It is very important for these people to know why something was done when implementing it. This will avert misimpression (i.e.: overpaying, underpaying, not the way it was intended) and implementation of what was really negotiated in the contract can be employed with guidance.

**Andrew Mcalister (East Africa):** Efforts need to be made in administrations that don't have deep experience in the mining sector to engage regulatory bodies in the negotiation process so, that they develop a deeper understanding of what is going on. In some cases implementation parties (i.e.: tax, environment) sometimes go their separate ways but, this can give guidance if we are really try to engage all regulation authorities in the negotiation process.

**Ignacio Randle (Argentina):** Comments: When you engage with the federal government, the federal government can invite the provinces and local governments to adopt these guidelines; of course this is not an obligation. But, once the provinces have adopted these principles, a mining company knows in advance whether or not they have been adopted before getting to a special jurisdiction.

So, instead of getting to the point where the federal government tries to impose taxation on the local government, the federal government provides you with a guarantee—you will get a credit from the government used towards the local government and it will be offset internally. In this way, you don't have to fight two battles at the same time. .

The larger the guarantees and longer the period of the time, willingly or not, the government might find it difficult to keep agreements because none of us knows what will happen in 20-30 years time. The agreements need to be flexible from day one if you want compliance.

**Danielson:** A mining CEO told me that the agreement will be renegotiated every 5-10 years whether I want it to or not so, it is better if the agreement provides an orderly process for that.

**Andrews (Chile)** - There are different facets of Government that cannot act unless they have the power to represent the country in a deal with a private entity. It is very important when dealing with a government official that you understand what is authorized to that government officer.

This is important because sometimes you have to say that you would rather wait for a new law that appoints an officer so, that this specific government officer can negotiate an agreement.

If you don't, the country can deny your contract at a later time, because that minister whom signed was not authorized to sign.

Likewise, sometimes entities don't have the power to manage funds and you must create a foundation to manage those funds.

**Aguirre:** When you speak of a separate community development agreement, do you mean to say that since this is the result of a consultation procedure that is under the law or national agreement, that there is a veto power by the community in case there is no CDA? What does it really mean to have a CDA? What if you don't have it?

**Ian Thompson:** How would this fit into the framework of free prior and informed consent? For instance where would indigenous people fit into this project?

**Danielson:** At this stage, we are not here to come up with a unique text. We are here to provide existing contract practices and their solutions; we are not going to tell people which solutions to adopt but, all are present in the documents.

**Colombian Attendee:** This should be flexible enough to adopt local regulations. In Columbia we have to adopt ILO169, which requires consultation with indigenous communities. This must take place in order to get an environmental license; communities must be consulted. This is where you could apply these principles because; the result of this consultation is framed into an agreement and enforced by the environmental license. The problem is negotiating this agreement is difficult--especially with indigenous people- because; it is difficult to identify stakeholders and these stakeholders often change over the course of time.

**11:50 – 12:00**

Peter Leon

*Summary, Invitation for further comment*

“Mining can be a force for good in the developing world.”

**Take Aways:**

- Equator Principles and Subjectivity
- Not triggering a fork in the road through the results of dispute resolution mechanisms
- Obligations to maintain tenure rights, as opposed to operating obligations
- Stability clauses and adverse effects— what do you do about the constitutional situation in a country?
- Leakage into communities in terms of promoting access to development and supply cycling.
- Capacity building and domestic law

\**Point of the morning* represented by Tom Cushman: Problems of dealing with a predatory state and when your whole legal system goes out the window, what do you do?

*Short, simplistic answer:* This might be a good reason to have a model agreement because; even if the government changes and becomes predatory the agreement can be enforced against the government on a principle of state succession.

-EITI

- Implementation in developing countries—institutional memory
- Authority to represent government.

This is just the beginning of this project. We are having another meeting just prior to SEERIL meeting (24-25 April) with civil society organizations—the consultation will be organized by Luke Danielson and Howard Mann.

We appreciate your participation and we look forward to your feedback.

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