

## MODEL MINE DEVELOPMENT AGREEMENT SUMMARY

Mine development agreements are long-term investment agreements between national governments, principally in the developing world (particularly Africa), and mining companies for the development of specific ore deposits. There is much current focus on these agreements in development studies, and broad consensus both that there are considerable problems with many such agreements, and that these problems may play a role in the failure of many mineral rich countries to reap the expected development benefits, including poverty alleviation, from their mineral endowments.

The Model Mine Development Agreement project was a nearly three-year process of research, discussion and – above all – consultation conducted by the Mining Law Committee of the International Bar Association. The product of the project, the “MMDA 1.0,” is a tool intended to help increase understanding of Mine Development Agreements, and to aid in improving the level of practice in their negotiation. It is freely available at [www.mmda.org](http://www.mmda.org), and is designed to present drafters with a variety of potential solutions to common drafting issues based on current best practice.

The impetus for the MMDA Project came from developments in the Democratic Republic of Congo (DRC). In July 2006, President Kabila issued a “Governance Contract” that, among other things, called for transparency in the mineral sector and renegotiation of inequitable mining agreements. The DRC Government asked the World Bank for a recognized benchmark against which to measure existing agreements to determine which were reasonable and appropriate and which were not. The World Bank could not identify any standard practices for such agreements, as there were none.

The International Bar Association developed a project to address this void, under the auspices of the International Bar Association's Mining Law Committee,<sup>1</sup> which in turn falls under the Section on Energy, Environment, Natural Resources and Infrastructure Law (SEERIL).<sup>2</sup> The Mining Law Committee established an Administrative Committee<sup>3</sup> to develop the MMDA under

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<sup>1</sup>See Mining Law Committee, [http://www.ibanet.org/LPD/SEERIL/Mining\\_Law/Default.aspx](http://www.ibanet.org/LPD/SEERIL/Mining_Law/Default.aspx) (last visited July 16, 2012).

<sup>2</sup> See Section on Energy Environment, Natural Resources and Infrastructure Law, <http://www.ibanet.org/LPD/SEERIL/Default.aspx> (last visited August 13, 2012).

<sup>3</sup>Committee members were: Peter Leon, *IBA Mining Law Committee Chair*; Webber Wentzel, *South Africa*; Bob Bassett, *MMDA 1.0 Project Coordinator*; Holland & Hart, *U.S.*; Elizabeth Bastida, *University of Dundee, UK*; Michael Bourassa, *Fasken Martineau, Canada*; Stephane Brabant, *Herbert Smith, Paris*; Jim Cress, *Holme, Roberts & Owen, U.S.*; Luke Danielson, *Sustainable Development Strategies Group, U.S.*; John Grace, *Grace Legal Pty. Ltd., Australia*; Barry Irwin, *Allen & Overy, Australia*; Charles Lawton, *Arbitrator, UK*; Howard Mann, *International Institute for Sustainable Development, Canada*; Rory Moriarty, *Clayton Utz, Australia*; Rahamat Soemadipradja, *Soemadipradja & Taher, Indonesia*.

the guidance of the Mining Law Committee. The then chair of the Committee, Peter Leon, was a member of the Administrative Committee.

### **The Process of Developing the MMDA**

The Administrative Committee was determined to proceed slowly and carefully, according to these principles:

- The committee's work had to be open and transparent;
- The first step should be to define the current state of practice;
- The MMDA should be based on existing agreements -- the best of current practice; and
- The process of developing the MMDA should be as highly consultative as time and resources would permit.

Many mine development agreements are confidential and not in the public domain. With the cooperation of a number of leading practitioners, the Committee assembled a library of some 60 existing agreements, which were stripped of their identifying features. The work of the distinguished Australian mining lawyer John Grace enabled the committee to begin drafting a table of contents. The 60 agreements were 'deconstructed' into individual clauses on specific subjects according to the draft table of contents.

Subcommittees were formed for each of the five main MMDA categories: Tenure, Finance, Rights and Obligations, Communities and Sustainable Development, and all "Other" clauses. Each subcommittee<sup>4</sup> consisted of a senior lawyer who was an expert in the particular subject matter, assisted by Research Fellows, by legal interns, and pro bono associate attorneys who came to the project through their law schools and law firms. These subcommittees had two major functions. First, they selected in each category clauses that seemed clearly written and reasonably balanced in their treatment of the interests of the parties. Second, they evaluated the responses that surfaced during the very considerable process of consultation.

The goal was to create a balanced product that might create more stability of contract conditions, to the benefit of investors, and more development benefits for host countries and their communities.

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<sup>4</sup> The chairs of each subcommittee where: 1) Tenure – Michael Bourassa, 2) Fiscal – Barry Irwin and Jim Cress, 3) Rights and Obligations – Rahmat Soemadipradja and Elizabeth Bastida, 4) Communities and Sustainable Development – Luke Danielson and Howard Mann, and 5) Other – Bob Bassett.

## **Consultation**

Consultation began in March 2010, with the presentation of the first outline of the MMDA at a meeting timed to coincide with a Prospectors and Developers Association of Canada and World Mines Ministries Forum meeting in Toronto. Over 120 people attended, and there was a long and lively discussion.

In April 2010, the consultation process continued with an intensive two-day Civil Society Consultation,<sup>5</sup> also held in Toronto, attended by civil society representatives from Mongolia, Kazakhstan, Peru, Chile, Papua New Guinea, Canada, Ghana, South Africa, Indonesia, the United Kingdom, Canada, the United States, and elsewhere.

The MMDA Project website made each draft of the MMDA 1.0 available for comment. The Administrative Committee also maintained an MMDA e-mail list that included the advisory committee, contributors of example agreements, consultation participants, individuals who became interested in the project, and anyone else who cared to join. As new MMDA drafts were completed, they were not only posted on the MMDA Project website, but were also distributed to this list; the goal was complete transparency of process.

Throughout the summer of 2010 various members of the Administrative Committee sought further reaction and comment from diverse audiences, including the Governance for Extractive Industries forum in the UK; a World Economic Forum sponsored meeting in Ulan Bataar; and a Soros Foundation-Kazakhstan Public Finance Transparency Program meeting in Astana.<sup>6</sup> Administrative Committee members also attended discussions by invitation at the John F. Kennedy School of Government at Harvard University, the African Union and the United Nations Economic Commission for Africa in Addis Ababa, and the China University of Geosciences and the Law Centre of Chinese Ministry of Land and Resources in Beijing.

## **First Draft**

The first draft MMDA was completed on August 12, 2010. It was circulated to the MMDA e-mail list, which by that time had grown to over two hundred. The draft was also made available to Mining Law Committee members, MMDA Project sponsors, members of the Rocky Mountain Mineral Law Foundation, and anyone else who expressed interest. It was posted on the MMDA Project website.

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<sup>5</sup>Notes from all consultation meetings are available on the MMDA project website, [www.mmdaproject.org](http://www.mmdaproject.org)

<sup>6</sup> See MMDA Development Timeline and Events, available at: [http://www.mmdaproject.org/?page\\_id=10](http://www.mmdaproject.org/?page_id=10) (last visited August 13, 2012).

## **Second Draft**

In September 2010, the Administrative Committee collected all comments and consultation reports and divided into its five subcommittees to redraft the MMDA, with the goal of preparing a new draft MMDA to release at the October 4, 2010 International Bar Association Annual Meeting in Vancouver.

The great majority of comments were accepted and incorporated in some manner into the new draft; all comments were taken seriously and discussed. It became clear that there were some areas in which practice is developing very rapidly. Since existing agreements may not fully address these problems, a few supplemental provisions were drafted to address such issues.

## **MMDA 1.0**

The second draft was available for public comment and web-based consultation through December 20, 2010. Between October and the end of December 2010, interested parties sent a multitude of thoughtful comments that were posted on the MMDA website, submitted via e-mail, or sent in detailed hand-written notes. The Administrative Committee again made a comprehensive assessment of all submitted comments. Between January and March 2011, based on hundreds of comments, detailed minutes from dozens of consultation meetings held around the world, and numerous rounds of drafting, consultations and redrafting, the Administrative Committee completed a final draft of what had come to be known as “MMDA 1.0.”

MMDA 1.0, available in a variety of formats, can be viewed and downloaded at [www.MMDAProject.org](http://www.MMDAProject.org). The Administrative Committee’s hope is that the MMDA, which will soon be available in French and Portuguese, will continue to be a focus for efforts to address the many difficult and varied issues that arise in mining development agreements.

MMDA 1.0 is a tool intended to help increase understanding of mine development agreements, and to aid in improving the level of practice in their negotiation. MMDA 1.0 is intended not as a “form” where blanks can be filled in and a document signed, but as a template and source of ideas for negotiating and drafting mine development agreements. The aspiration is to help achieve more balanced, transparent and equitable mining agreements, in the hope that these will lead both to more development benefits for host countries and more stable investment conditions for investors.