FIELD
Foundation for International Environmental Law and Development

I. General comments on the MMDA

A. Are there any gaps in the agreement? If so, on what subjects? Can you suggest specific clauses or other language to address these gaps?

I have not identified any significant gaps in the MMDA. However, please see Section II for my comments on existing clauses in the agreement.

B. Does the agreement provide a proper balance between the interests of the Company, the Government, and other interests in society? Please suggest how to improve this balance.

The MMDA appears to strike a fair balance between the interests of the Parties and other third parties. Certain of my comments on specific clauses address this.

C. This agreement is not a local level agreement, but does it properly relate to and encourage local level agreements? Please suggest how we might provide the right kind of enabling and supportive framework for positive local level agreements in the context of sustainable development.

The requirement in paragraph 25.1 that the Company enter into the negotiation of a Community Development Agreement (CDA) with communities impacted by the project directly links the MMDA with local level agreements, and the objectives in Annex B provide a useful framework for the CDA. Nevertheless, while the MMDA specifies that negotiation of a CDA begin within thirty days of the Effective Date, it fails to specify when the CDA must be finalised and put in place. For the MMDA to 'properly relate' to local level agreements, they should be in place, say, by the Date of Commencement of Commercial Production. I doubt that a Company would agree to the provision in paragraph 25.2 where a material breach of the CDA automatically constitutes a breach of the MMDA. It is not clear to me that materiality under the two agreements is comparable, nor that a breach of the CDA necessarily means that the Company is not meeting the objective of the MMDA as set out in the preamble.

D. This agreement is a development agreement, not an exploration stage agreement. Again, does it properly relate to the presumed earlier exploration phase agreement? Please suggest how we might provide the right kind of enabling and supportive framework for positive exploration stage agreements in the context of sustainable development.

Since exploration happens in advance of development, and the entity doing the exploration is not necessarily the same entity engaged in development, I am not sure it is feasible, *ex post*, for the MMDA to provide an enabling or supportive framework for a positive exploration agreement in the context of sustainable development. Drafting a separate model mining exploration agreement (MMEA) with provisions similar to those of the MMDA, then 'marketing' them as an indivisible pair, is a possible option for encouraging sustainable practices throughout the mining lifecycle.

E. Other general comments?

Where the host country and the company's home country have entered into a bilateral investment treaty (BIT), there should be consistency between the provisions

in the BIT and the MMDA. Reference to an existing BIT could be made in paragraph 39.0 Applicable Law.

The MMDA uses a tax and royalty model as opposed to a production sharing model. The drafters may wish to consider whether the production sharing model should be made an option.

II. Comments on specific clauses

A. *Please comment on the text of the agreement as necessary. This does not require comment on every clause of the text, but, using your expertise and knowledge, providing substantive comments on sections of the text that you find to be particularly important or most in need of improvement.*

B. *These comments should to the extent possible be in the form of actual text that could be inserted into the agreement*.

1.1 Definitions "Indigenous or Tribal Populations": ILO 169 defines indigenous and tribal *peoples*, not populations. Therefore, the word 'populations' should be replaced with 'peoples'.

2.2.2 Legal Title to Minerals: 'native people' should be changed to 'indigenous peoples' which is consistent with accepted terminology in international law (e.g ILO 169 and the Declaration on the Rights of Indigenous Peoples).

2.2.3 Traditional and Native Titles: 'native' in the header and the body of the text should be changed to 'indigenous' and 'native people' should be changed to indigenous peoples'.

2.3.2 Environmental Protection: the language in the chapeau is not operative. It could be amended to read, "Throughout the lifecycle of the Project, the Parties to this Agreement shall endeavour to eliminate, minimise or mitigate any adverse environmental impacts, and provide compensation for unavoidable loss or damage to the [COUNTRY]'s natural resources and ecosystems."

2.3.2(a) the objective of an EIA is to evaluate the likely impact of a proposed activity on the environment. The Environmental Management Plan would then be formulated to address these likely impacts. The Management Plan should be formulated in consultation with local and indigenous communities that may be impacted by the Project. The EIA / Management Plan should consider the impacts on the Project Area (not just the Mine Area). Sub-paragraph (xii) describes the Government's 'right' to review the Management Plan and should not be a component of the EIA / Management Plan itself.

2.3.3 Social Impact Assessment and Action Plan: Sub-paragraph (a) appears to be the objective of the SIA and Action Plan and should / could become part of the chapeau – "To ensure that the Project does not disturb or unreasonably interfere with the living conditions of the population lawfully settled within the Mining Area, and to cause its employees and contractors to respect the customs of local and indigenous peoples, the Company shall conduct a Social Impact Assessment and prepare an Action Plan which includes the following:" – then continue with the text in sub-paragraph (b). In sub-paragraph (b)(vii) change 'native or other community' to 'local or indigenous community'.

2.3.5 Requested Changes by the Government: The government should be able to request revisions that impact the economics of the Project if this is justified. I am concerned that 45 days is not a long enough time for government review, especially for developing country governments with limited capacity.

8.0 Taxation: Generally, in this section, the provisions of existing double tax treaties, which may provide more favourable tax positions for the Company, would need to be taken into account – especially in respect of income tax, withholding tax and the tax on expatriate employee income. The formula for determining the depreciation on capital items (8.3(g)) is fairly prescriptive. At the end of the day, this would need to be consistent with applicable country law.

10.3 Transparency and Publication of Payments: I suggest adding the following wording before the text currently in the Agreement – "The Government shall commit to implementing the Extractive Industries Transparency Initiative (EITI) and, where appropriate, the Company shall contribute to [COUNTRY]'s implementation of the EITI by becoming an EITI Supporting Company."

10.4 Accounting Standards: suggest changing 'generally accepted accounting principles' to 'International Financial Reporting Standards'.

11.1 Applicability of IFC Performance Standards and Equator Principles: Who determines whether Applicable Law in this case is 'inadequate or less stringent'? Perhaps it would be better to require compliance with these internationally developed standards.

11.2 Parties' Commitment to Protecting Human Rights: sub-paragraph (a) seems out of place. I would consider deleting it. In sub-paragraph (b) consider adding the following wording after the word 'Rights' – ", the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and other".

11.3 Prevention of Corruption: In sub-paragraph (c), I am not sure that the EITI is really applicable. Instead, it might be worth referring to the United Nations Convention against Corruption. The Convention requires countries to establish criminal and other offences to cover a wide range of acts of corruption if these are not already crimes under domestic law.

13.2 Independent Audit: Suggest changing 'not conflicted (under professional rules)' to 'fully independent'.

14.0 Waiver of Ownership / Equity Interest: I am not sure why the Government would / should agree to waive this right.

16.2 Tax Stabilisation Clause: This should be a negotiated option. In Kazakhstan, for example, recent changes in the tax code abolished stabilisation clauses for tax royalty agreements. This has simplified the tax regime and allowed the government to participate in the 'front-end' of the life of extractive industries contracts.

27.0 Employment and Training of Local Citizens: We need to understand what 'local' means in this context. If the intent is to employ and train individuals from the Mine Area, then the provisions in this paragraph need to be more specific. As it currently reads, the Company can draw from the work force of the entire country, bringing in well-educated and trained individuals from major cities or centres of

population in the country, which provides little if any benefit to local and indigenous communities living in the Mine Area.

28.1 Labour Standards: In addition to the IFC Policy Statement, we should consider including the legally binding UN Convention on the Rights of the Child.

30.0 Rights of Host Country Citizens: In addition to grievance mechanisms and dispute resolution clauses, we should consider adding clauses on the right of access to information and the right of the public to participate in (environmental) decision-making. The three components (access to information, public participation and access to justice) are the notions expressed in Rio Principle 10 and subsequently in the Aarhus Convention.

34.2 Certain Information Confidential: Could / should sub-paragraph (b) be moved to the definitions section?