18 August 2010

Dear Luke and Kristi,

Thank you very much for sharing the draft Model Mining Development Agreement (MMDA) with me. As agreed, please find some comments below.

I should emphasise that the comments were put together under intense time pressure – some of them may have been better thought through had more time been available. For this reason, drafting suggestions are kept to a minimum, and should be reviewed particularly carefully before integrating them in the text.

I. GENERAL COMMENTS ON THE MMDA

"We would like your general comments on the draft MMDA as you receive it, its potential usefulness, completeness and balance".

I found the draft MMDA a truly impressive piece of work, and would like to congratulate the team that has produced it for the high quality of the text.

The overall structure works well, key sustainable development issues are integrated in the contract, the language is generally clear (relative to a document of this nature).

Many parts of the MMDA seem to build on existing best contractual practice, though with some important innovations (e.g. explicit references to human rights and EITI). This "incremental" approach makes a lot of sense and is needed to get the necessary buy-in from contract negotiators.

I think that, when finalised, the MMDA will be a very useful tool for company and government negotiators as well as for their civil society scrutinisers, by offering examples of legal text that integrate sustainable development issues better than most currently available models.

The one general concern I have is linked to my being somewhat wary of "model agreement" approaches. So much depends on context, and mining contracts inevitably vary so much due to geological, technical, legal, economic, sectoral (i.e. different minerals) and other specificities. From a sustainable development perspective, flexibility is also needed to reflect the multiple realities of sustainable development – issues and challenges vary across countries and even across projects. It is crucial, I think, that the MMDA is not presented/perceived as a "one-size-fits-all" solution where only the blanks (country name, $ amounts) need to be filled.

I know that this is not what you are trying to do. I understand that, once finalised, the MMDA will be posted online and that software will enable readers to access alternative examples of the clauses featured in the MMDA. This would go some way towards offering flexibility - but not in relation to whether some provisions should be included in the contract in the first place.

For example, some governments may have legitimate reasons not to include "local content" provisions (e.g. article 24.1), perhaps in light of possible inconsistencies with WTO or BIT obligations. The same applies to stabilisation (article 16.2): although many mining contracts do contain these clauses, it should not be assumed that stabilisation is a necessary part of all mining contracts: it is up to the negotiating parties to decide whether to include one, and the company should be expected to negotiate for it.

This comment is not meant to detract value from the document. As I said, the fact that the MMDA provides actual text that negotiators can adapt to their context is extremely useful. But, at the very least, my comment does call for a robust introductory note that explains how the MMDA is meant to be used.

In fact, article 8 on taxation starts with a warning that the provision is only "intended for use as a starting point for discussions between the parties" and that it will need to be adapted to reflect relevant tax law. This warning makes sense but it is not clear why it is only included with regard to taxation. A warning like this should really apply across the board – e.g. the content and level of detail of provisions on environment protection will also need to be adapted to the national law context (eg whether the host country has decent environmental legislation, whether the contract needs to fill specific gaps, etc). Perhaps this brief text could provide the starting point for a more developed introductory note on the whole MMDA?

I also wonder whether, apart from the web-based facility discussed above, the MMDA itself may provide multiple text options for parts of the contract. That would not only provide more choice – it would also make it clearer that this is not a standard contract just waiting for signature.

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

I found the MMDA quite comprehensive as far as sustainable development issues are concerned, and could not immediately identify major topics that were left out. Some of the comments on specific clauses (see below) do involve filling gaps in specific parts of the MMDA.

"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".

Overall, the contract does a good job at reconciling competing interests. If taken on board, some of my specific suggestions below would alter the balance struck by the contract.

"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 exploration stage agreements in the context of sustainable development".

The MMDA is closely interlinked to a Community Development Agreement (CDA). The legal requirement to conclude a CDA (article 25.1) and specific indication of what this should include (Annex B) are effective ways to "encourage local level agreements" – and to reconcile two

competing needs: enabling communities to decide on their development priorities, on the one hand, and entrenching the company's obligations towards the community in the MMDA, on the other.

A few more specific comments:

- What are the sanctions if the Company fails to comply with 25.1? Perhaps worth explicitly stating that this constitutes a "material breach" of the contract justifying termination under article 37.2(b). In which case, at what point in time would this breach be deemed to have happened – the draft currently provides no fixed timeframe for concluding the CDA, and rightly so to avoid tick-boxing exercises, but perhaps the signature of the CDA could be tied to project stages? Also, what happens if the company complies (ie "enters into negotiations") but negotiations fail and no CDA is signed?
- Even more fundamentally, in many contexts part of the problem is that investors engage with local communities only after a concession has been signed and key decisions have been taken – which is also the approach proposed in the MMDA. At that point, local leverage is often limited. In some jurisdictions (eg in Ghana certainly in forestry but I think also in mining) companies must sign CDAs ("Social Responsibility Agreements") before being able to get a contract with the state. Also, it should be possible to frame national legislation to require competitive bidding for mining contracts (as is more commonly done in petroleum) and to include benefits under a proposed CDA as part of the criteria to assess competing bids (I think Kazakhstan was going in this direction but worth checking).
- Local leverage in negotiations is likely to increase if article 25.1 requires the company to disclose to the community key information about the project, including financials - information asymmetries may mean that communities settle for far less than the company would be prepared to provide.
- Also, it would be good to include in 25.1 a minimum annual funding level - perhaps though a formula like "X% of annual revenues or $XXX, whichever is higher", so as to provide resources for project stages where there are no or little revenues and to allow possibly higher amounts when revenues start to flow.
- 25.2. CDA prevailing over MMDA in case of inconsistencies. This may be dangerous – the negotiating power of local communities is often very weak compared to companies. There is a risk that the company might get away with lower standards than were required in the contract negotiated with the government.
- 25.2. "A final written and reasoned decision of a duly constituted court" – it is true that there is often contestation as to whether a CDA has been breached, but this seems a steep requirement. How about a more general "a duly established breach"? On the other hand, the last para at p. 66, in Annex B, covers the same issue but makes no mention of court decisions – so at least for consistency the two provisions should be harmonised.
- The para at p. 66 also states in general terms that a breach of the CDA constitutes a breach of the agreement giving rise to contract termination. This is likely to worry companies, not only because there may be contestation as to whether a breach has occurred but also because given the monetary value of the CDA relative to the MMDA, a breach of the CDA is unlikely to be "material" within the overall MMDA context as required by article 37.2(b). At the moment, any breach of the CDA would entitle the government to terminate the contract. Perhaps this para could require the breach of the CDA to be "material" relative to CDA terms?

- The list of issues to be addressed by the CDA, featured in Annex B, is long and detailed – rightly so as community-investor agreements are often too vague. But there are also dangers in making the CDA an unduly "legalese" document – not least because the more complex the document the more likely it is that lawyers acting "on behalf of" communities become the real drivers of community positions. I wonder whether it makes sense to prune this list a bit to focus on key aspects.
- Still on Annex B: worth emphasising more that the CDA should also spell out the obligations of the Company with regard to minimising adverse impacts on local communities (as required by article 25.1(b)). "Holder" in (m) and (n) – I understand but it is unclear. Some other provisions are also not immediately clear – eg (o) on "Severability of articles".
- "Acceptance of obligations of prior owners". Title unclear. Why "Unless specifically waived by the affected communities in writing"?. It is best for the CDA to be enforceable in all cases – the community can then decide not to claim its rights under it.

"E. Other general comments?"
See upfront text on "model agreements" and flexibility.

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".

Preamble. "Whereas, the objective of this Agreement is develop the mineral resources in a manner to contribute to the sustainable development of the Country and its communities, through a process in which the production and use of nonrenewable natural resources takes place in an equitable framework, and to promote long term stability in the conditions of mining investment;"
Important clause: excellent that the preamble explicitly mentions sustainable development as an objective – this can provide useful guidance on MMDA interpretation. But the actual formulation is a bit unclear – eg what does "and to promote long term stability in the conditions of mining investment" link to – to "the objective […] is" or to "in a manner to"? Grammar seems to suggest the latter but promoting stability is more an objective of the Agreement than a "manner" in which minerals are developed. Also not sure what "through a process in which" means, and whether that whole sentence adds anything in practice. How about something like: "Whereas, the objective of this Agreement is to develop the mineral resources in a manner that contributes to the sustainable development of the Country and its communities, and to promote long-term stability in the conditions of mining investment."

1.1. Definitions. **"Consultation".** "Without any deadlines" – likely to raise concerns among companies and governments. Reference to Akwe:Kon is good – though, as I understand it, this instrument emerged from a specific indigenous peoples / traditional knowledge / biodiversity context and discusses impact assessments (cultural, social, environmental) more than consultation

per se – of course, guidance on process may still be very relevant. But why bypass the FPIC discussion altogether, even for indigenous peoples where FPIC is part of international law and even in the form of "free, prior and informed consultation" that seems to be accepted by lenders (see IFC standards, Equator Principles)?

1.1. Definitions. "Good Industry Practice". Excellent to provide this specific definition to ensure this expression has actual implications.

1.1. Definitions. "Royalty" (and article 5.1, "calculation of royalty"). I am no tax specialist and would recommend having this and other tax provisions reviewed by a specialist. On this specific clause - fiscal matters are likely to require much flexibility in drafting given the widely diverging economics of mining projects. Also, different fiscal regimes require very different capacity to administer them – more flexible regimes can be more advantageous to the host country but also require greater capacity. So - why the choice of "specific" (i.e. volume-based) royalties as default? And why only use a fixed rate rather than a sliding scale based on production or profitability? A fixed-rate, specific royalty appears a simple one to administer and as such a good option for LDCs – but is it always the best option?

1.1. Definitions. ""Security Interest" means any mortgage, pledge, lien, charge, assignment, hypothecation or Security Interest or any other agreement or arrangement having a similar effect." Delete "or Security Interest"?

2.1. Term of this Agreement. Through bracketed text, this article suggests a default option of 25 years times four – i.e. a total of 100 years. I would suggest leaving the "[ ]" blank.

2.2.2. Legal title to minerals. The sentence "The Company shall, consistent with Section 2.3.3, receive cooperation and verification from the Government to ensure that the local or native people are in fact the rightful owners of the area" looks out of place. Perhaps best moved to 2.2.3?

2.3.2. Environmental protection. "while protecting the natural capital of [*COUNTRY*] and the productivity of its ecosystems," seems to suggest that environmental protection is mainly an economic issue ("capital", "productivity") – it is obviously not. Clause (a): "unnecessary and undue degradation" – might a more specific / narrower formula be developed? Clause (a)(i): a key function of the EIA is to assess alternative options so as to choose the one that minimises adverse environmental impacts – worth making this clear in the text? Clause (a)(v): the point about local consultation is relevant throughout, not just to post-mining issues. Are there differences e.g. between underground and open-pit mining (e.g. re: clause (a)(xi))? Content-wise, clause (a)(xii) seems a separate provision rather than the last point in the list.

2.3.3. Social impact assessment and action plan. As a reader, I note and fully support the caution the drafters took in writing this section, esp on resettlement. This is an area where local communities may suffer major adverse impacts and it is important to reflect this in the draft. Though I also found the text a bit awkward at times and wonder whether it could be sharpened up without losing on safeguards for local groups. E.g. clause (b)(i) "the Company shall move with utmost caution" does not actually mean much in terms of enforceable obligations. On the other hand, in section (b), why just say "using guidance from Performance Standard 5", rather than straightforwardly requiring compliance with this standard? Where the IFC is not involved, the

standards may still be applied – and even where it is, it is good to refer to PS 5 in the contract, i.e. at an early stage and before the project gets to lenders so that any costs involved are fully factored in. Clause (b)(ii) – a bit unclear: the sentence "Mitigate […] impacts […] by ensuring […]" disclosure of info etc suggests a causal connection – but in my mind the two issues are linked but separate – and measures must *both* mitigate impacts *and* ensure disclosure and participation.

2.3.5. Requested changes by government. "provided further that such requested revisions shall not materially impact the economic returns of the Company as shown in the Feasibility Study." What happens if legitimately justifiable requests for revisions do impact returns? Perhaps best to allow this option, even if it means restoring the economic equilibrium of the contract?

10.3. Transparency and publication of payments. Great to include this provision.

11.1. Applicability of IFC performance standards and Equator Principles. "Where Applicable Law and regulations […] are inadequate or less stringent than any applicable international standards"; I would suggest deleting "inadequate or" – not only because this is a subjective assessment but also because governments may be unwilling to qualify their legislation as "inadequate" in a contract they sign. "Shall endeavor to comply with" – why not just require compliance with evolving IFC standards?

11.2. Human rights. Given the human rights heading, para (a) struck me as strange, as it talks of "economic and social viability". (b) "human rights of all individuals" – and groups? 11.2.(c) (and 22.5), on security – excellent to include explicit reference to VPSHR; though worth including first a more general statement requiring that security operations must respect internationally recognised human rights, then refer to VPSHR as source of guidance? (d) human rights impact assessment: given the lengthy discussion of impact assessments in 2.3, this provision comes a bit out of the blue, perhaps worth cross-referencing 2.3 and 11.2.(d)? At what stage should the human rights impact assessment be undertaken?

11.3. Prevention of corruption. Good to have this provision in. But the current text seems to mainly reiterate that company and government shall comply with applicable law – which would apply anyway. Section (c) on publicity of payments and EITI is good but repeats 10.3 and 34.1(d). So in practice this norm appears to have limited normative content (though the definition of corruption in 11.3(d) may be different to those under applicable national laws). I found the following text in a model petroleum contract – perhaps parts of it may be integrated in 11.3? Interesting features include:

- Explicitly covers affiliates, subcontractors and consultants;

- Refers to disciplinary as well as legal action, and requires company to take action where applicable;

- Explicitly refers to the Anti-Corruption Convention.

"(a) The Government and the Concessionaire agree to cooperate on preventing corruption. The Parties undertake to take administrative disciplinary actions and rapid legal measures in their respective responsibilities to stop, investigate and prosecute in accordance with national law any person suspected of corruption or other intentional misuse resource.

(b) No offer, gift, payments or benefit of any kind, which would or could be construed as an illegal or corrupt practice, shall be accepted, either directly or indirectly, as an inducement or reward for the execution of this [Agreement].
(c) The above paragraph (b) is equally applicable to the Concessionaire, its Affiliated Companies, agents, representatives, Subcontractors or consultants when such offer, gift, payments or benefit violate:

(i) the applicable laws of the [COUNTRY];

(ii) the laws of the country of formation of the Concessionaire or of its ultimate parent company (or its principal place of business); or,

(iii) the principles described in the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, signed in Paris on December 17, 1997, which entered into force on February 15, 1999, and the Convention's Commentaries."

14.0. Waiver of ownership. Why include this in the model contract?

16.2. Stabilisation. Why not structure the tax stabilisation as "double-edged" - requiring the parties to restore the economic equilibrium in cases not just where host action negatively affects the project but also when this action directly or indirectly reduces the tax burden? Here is an example I have from Kazakhstan: "In the event of an improvement of the Contractor's situation under this Agreement […] as a result of changes in legislation of Kazakhstan […], the individual terms of this Agreement can be changed by mutual consent of the parties for the purpose of preserving the balance of their economic interests under this Agreement".

As for the provision on social and environmental standards, the test of "reasonableness" does not feature, for instance, in article 37 of the Energy Charter Model HGA 2007: "provided however that the obligation to take one of the actions referred to above shall not apply in relation to a Change of Law if the Host Government establishes that that Change of Law reflects a change in standards generally applicable in relation to standards of environmental protection, safety, employment, training, social impact or security in the [petroleum] [gas] industry internationally."

By the way, the Energy Charter Model HGA provides a good example of how to use multiple text options in a model contract (including on stabilisation).

20. Infrastructure. This provision sits under "Government obligations" but features several company obligations – seems an odd fit.

22.2. Affiliated company transactions. "Affiliate" is not defined in 1.1. I would suggest adding a definition. Here is an idea for some text: "Affiliate means an entity that directly, or indirectly through one or more intermediaries, Controls, is Controlled by, or is under common Control with the Company. For purposes of this definition, Control means the possession, directly or indirectly, of the power to direct or cause the direction of the management or policies of an entity, whether through the ability to exercise voting power, by contract or otherwise". For some minerals, it should be possible to seek more specific international indexations eg on specific commodity exchanges or to downstream prices (eg aluminium prices for bauxite). Also, the transfer pricing provision focuses on sales – why not extend it to all transactions with Affiliates?

22.5. Security. See comment above on 11.2.

24.1. Local preference. Worth including explicit reference to subcontractors to make sure local content requirements are passed through the contracting chain. This can be done by inserting "its Contractors and Subcontractors" between "The Company" and "shall"; or by adding an obligation on the Company to pass through local content requirements – eg "In addition, the Company agrees to include in each contract or work order with its Contractors a provision requiring them to adhere to the requirements of this article, and to require their sub-contractors to do so, with respect to any activities undertaken in [COUNTRY] by such contractors and their sub-contractors on behalf of the Company."

25. CDA. See comments under I(C).

27.1. Minimum employment levels. May be clustered with 22.4?

27.2-4. Training. Perhaps worth including provisions on the secondment of government officials with the Company?

23-29. Company obligations. "Local content" issues are dealt with under 22.4 (employment), 24 (goods and services) and 27 (again employment) – perhaps these provisions could be brought together under company obligations (and 22.4 may simply refer to them)? Also, I wonder whether the sequencing of "Company obligations" would work better as follows: 24 – supply chain; 25 – employment and training (current 27 plus 22.4(a)); 26 – labour standards (currently 28); 27 – local community development (current 25); 28 - Community health (now 26); then mining closure etc.

30.1. Company grievance mechanism. "IFC Performance Standard 23" – not sure what this is. "If the Company anticipates…" leaves much discretion with the company. The provision emphasises proportionality, consultation etc – but important to stress independence and impartiality too.

31. Forward linkages. This provision sits oddly after the "remedy" provisions. Also, 31.1 and 31.2 are on very different topics. The relationship between articles 31.2 (payments to local communities) and 25 (local community development) is unclear. Possible to cluster the two? 31.2(a) and elsewhere – annual payments are set as fixed amounts – see my point above re: combining fixed amounts *and* % of revenues or other figure (under I(C)).

32.1. Contractors and subcontractors. The heading refers to both, the text explicitly discusses subcontractors, but these are seemingly defined to include both – I would suggest harmonising the approach? Not sure about the legal value of this provision – can it really create obligations ("shall be bound") for third parties? Might it make sense to have instead an obligation for the Company to make sure that all contracts with contractors and subcontractors comply with the Company's obligations under the contract?

36.1. "Cooperation". But then mainly about disputes. Some contracts establish committees with members from both parties to periodically review implementation and discuss any matters. Dormant institution in many cases, but can be useful.

36.2. Arbitration. Formulation a bit unclear. "All disputes … for which [ICSID] would declare itself not competent…" – does that mean that ICSID is the default option? If so, worth stating clearly.

39. Applicable law. Inclusion of all human rights treaties "to which the Government is a party" – worth adding something like "from time to time" i.e. including those it may ratify in future.

Annex B. See comments under I(C).

Thank you again for giving me the opportunity to provide input into this important initiative. I think that you have done a great job at putting together this draft and that, once it becomes available, the MMDA can provide very useful material for negotiators and their civil society scrutinisers. I hope that my comments might be of help in finalising the text.

Best

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