

The IBA's Model Mining Development Agreement

Maître François SERRES



Key Issues

- ❖ MMDA Website View
- ❖ The IBA and the Mining Law Committee (“MLC”)
- ❖ Development and elaboration process of MMDA project
- ❖ Need for the MMDA
- ❖ Intended use of the MMDA
- ❖ Presentation of the MMDA Draft
- ❖ Presentation of China-Liberia Convention
- ❖ Presentation of China-DRC Convention
- ❖ Conclusion



Welcome! MMDA Project Home Page

[Download and print MMDA 1.0 Oct. 4 draft in PDF \(281 Pages\)](#)

[View MMDA 1.0 October 4, 2010 Draft Online](#)

The MMDA is a project of the Mining Law Committee of the International Bar Association.

[What is the Model Mining Development Agreement Project?](#)

[What is the Mining Law Committee?](#)

[What is the MMDA development process?](#)

[How to use this website.](#)

[View and comment on the MMDA 1.0 October 4 draft](#)

MMDA Current Status

October 4 – The MMDA website is currently open for public comment. Feedback received by December 20, 2010 will be considered in the final draft of MMDA 1.0. Please share your thoughts!

The International Bar Association

- ❖ Established in 1947
- ❖ World's leading organisation of international legal practitioners, Bar associations and law societies
- ❖ Membership of over 40,000 lawyers and 197 Bar associations and law societies
- ❖ Divided between
 - Legal Practice Division
 - Public and Professional Interest Division
- ❖ Role to provide legal expertise internationally and in all fields
- ❖ Publications and conferences

Section on Energy, Environment, Natural Resources and Infrastructural Law

- ❖ 2,400 lawyers in private practice, oil and mining companies, international organisations, governments and academia
- ❖ Coordinates the activities of 6 Committees
- ❖ Advancement of the development and understanding of the law affecting natural resources and project management

The Mining Law Committee

- ❖ Promote an interchange of ideas, information, ideas and views and knowledge
- ❖ Chaired by Peter Leon

The Development Process of the Project

- ❖ IBA Mining Law Committee (MLC) annual meeting July 2009
 - *Idea to develop a MMDA for use in the developing world*
 - *To be used by companies and governments in mining development projects*
- ❖ Project launched in Vancouver on 4 October 2009
- ❖ Civil society and university-based groups participation
 - *Enabled to achieve a balanced product*
 - *Facilitated outreach and ownership by civil society*
- ❖ Analyse of over 50 existing mining agreements
 - *Drew lessons from previous experiences*
 - *Allowed reaching a comprehensive draft with example clauses from other agreements*

MMDA Elaboration Process

MLC Working Group:

- Confidential database
- Identification of best provisions
- Identification of concerns and ideas
- Redaction of draft MMDA

Actors:

- Administrative committee to supervise drafting process
- Stakeholders: government industry, civil society, universities

Public Consultation:

Draft online for public comment in December 2010

The Need for the MMDA

- ❖ **Impact of mining on communities and environment**
- ❖ **Raising interest and awareness of governments and companies in sustained development of mine-impacted communities**
- ❖ **Need for community support for mining development**
- ❖ **Increasing legislative requirements for Community Development Agreements**
- ❖ **Need for consistency and regional harmonisation**
- ❖ **World Bank Group and International Council for Mining and Minerals standards**

Impact of Mining on Local Communities

- ❖ *Unsound MDAs affect local communities:*
 - Impact on environment
 - Affects livestock and agriculture
 - Destruction of property
 - Destruction of cultural heritage and land
 - Displacement of people
 - Forced relocation
 - Conflict
- ❖ *Case study examples*
 - South Africa
 - Zimbabwe
 - DRC

The Use of the MMDA Project

No Mining Code in Country

- Template for mining development agreements
- Guidance on applicable standards

- ❖ Contribute to **sustainable development** and **environment protection**
- ❖ Emphasise the relationship between the **project**, the **State** and **local communities**
- ❖ Provide an agenda for **structured negotiations**
- ❖ **Ownership** and **capacity-building** for **civil society**
- ❖ **Not prescriptive: promotion**, rather than enforcement, model

Mining Code in Country

- Supplement to Code
- Template for later agreements

Inclusion of Best Practice Principles

❖ Context-sensitive clauses:

- Efficient macro-economic management (s. 10.0, 11.0, 14.0)
- Environmental sustainability (s. 2.6; 12.1)
- Social responsibility (s. 12.2; 24.0-29.0)

❖ Regulatory and guarantee clauses:

- Effective legal and regulatory framework (s.17.0; 19.0; 37.0)
- Security of tenure and regulatory certainty (s. 2.3; 2.4; 7.0; 10.7; 15.0-16.0)
- Competitive fiscal and taxation conditions (s. 5.0; 6.0; 8.0; 10.0; 17.2)
- Effective investment protection (s. 2.2-2.4; 18.0; 43)

Inclusion of Best Practice Principles (2)

❖ Public institutions' role and power

- Objective criteria for grant of exploration and mining licences (s. 18.0)
- Limited administrative discretion (s. 2.6.6; 2.9; 10.1-2; 13.0)
- Defined role for government (s. 22.0)
- Efficient mining sector institutions and administrative capacity (s. 3.0)
- Transparency (s. 9.0; 11.3; 35.0)

Concerns of All Parties Addressed

❖ Mining Companies

- *Stable economic, social and regulatory environment*

❖ Host governments

- *Steady and fair resources rent*

❖ Other participants

- *Social, economic and environmental development of mine-affected communities*

State Obligations

- ❖ *State assurances and obligations* (17.0)
 - Pass legislation to approve agreement (17.1)
 - ✓ State must use best effort to enact law to ratify agreement
 - Tax stabilisation clause (17.2)
 - ✓ State not to increase tax during tax stabilisation period
- ❖ *Fair and economical project operation* (18.0)
 - Non-discrimination towards company (direct and indirect)
 - Non-cancellation (parties must fulfil their obligations during contract length)
- ❖ *Availability of infrastructure* (21.0)
 - Possible use of existing infrastructure by company

Company Rights and Obligations

❖ Goodwill payment of company to State (3.0)

- Used by State to develop institutions and expertise to perform obligations
- To assist communities cope with project impact

❖ Financing (10.0)

- Security interest (10.1)
 - ✓ Company can encumber interests under agreement
- Debt-equity ratio (10.3)
 - ✓ This ratio of indebtedness must not exceed an agreed proportion
- Parent company guarantee (10.5)
 - ✓ Guarantee of payments; performance of obligations; compliance with obligations

Company Rights and Obligations (2)

- ❖ Applicability of IFC standards and Equator principles (12.1)
- Financial industry standards for social and environmental risk management in project financing
- ❖ Company rights (23.0)
 - Marketing of minerals (23.1)
 - ✓ Right to market, sell and export products at international market
 - ✓ Expend and repatriate sale proceeds in local and foreign currencies
 - Affiliated company transactions (23.2)
 - ✓ Respect of OECD's Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations and other similar guidelines

Community Protection

- ❖ *Traditional and native titles* (2.5)
 - Presumption of rightful occupation of land for indigenous and tribal people
 - Company to pay annual rent to the owner
- ❖ *Company hiring decisions*
 - Cannot hire foreigners for unskilled labour (23.4)
 - Local preference (28.0)
 - Labour standards (29.1): law of country applicable; guidance of Good Industry Practice and internationally recognised standards; no child labour
 - Health and safety of employees and contractors (29.2)
- ❖ *Use of local goods and services* (25.0) (local preference)
- ❖ *Local community development* (26.0)
 - Community development agreements drafted with communities (26.1)
 - Local business development plan (26.3)
- ❖ *Parties' commitment to respect human rights* (12.2)

Community Protection (2)

- ❖ *Availability of products for domestic industry* (32.0)
- ❖ *Rights of host country citizens: dispute resolution* (31.0)
 - Company grievance mechanism for local communities concerns re: the activities of the company (31.1)
 - Forum for claims and disputes (31.2)
- ❖ *Community health* (27.0)
 - Modern healthcare
 - Subsidised health education and medical treatment
- ❖ *Training and Education* (28.0)
- ❖ *Local business development*
- ❖ *Indigenous community relations*
- ❖ *Revenue sharing* (9.0)
 - State sharing of revenues with local governments (9.1)
 - Company payments of local governments (9.2)

Transparency

- ❖ *Obligations prior to construction* (2.6)
 - Feasibility and impact statements (environment, social impact, financing)
 - State can review, comment and request changes (2.6.6)
- ❖ *Production statement* (5.2)
 - States the quantity, quality and size of minerals produced
 - Freely available upon request by any person
- ❖ *Financial records and financial statements by company* (11.2)
 - Information in compliance with applicable law of country
- ❖ *Transparency and publication of payments* (11.3)
 - Extractive industries transparency initiative implementation
- ❖ *Prevention of corruption* (12.3)
 - Concerns State and Company officials
 - Cooperation with foreign States in prevention of corruption

Transparency (2)

- ❖ *Inspection of books, records and information, independent audit* (14.0)
 - Conducted by independent technical inspector
 - Can visit and inspect sites, plants, facilities, warehouses and offices at any day
 - Must minimise inconvenience to company
- ❖ *Availability of information* (35.0)
 - Contract is a public document (35.1)
- ❖ *Periodic review* (41.0)
 - Every 5 years
 - Take account of change of circumstances and experience gained
 - Aim to maximise benefits and minimise drawbacks

Regime of Contract

❖ *Applicable law and jurisdiction* (40.0)

- Law of government
- Treaty provisions (human rights, bilateral investment)

❖ *Cooperation and arbitration* (37.0)

- Amicable resolution preferred; then independent expert
- Recourse to ICSID in case of disagreement

❖ *Assignment* (34.0)

- Need for State approval
- Condition of technical, financial and managerial capacity of successor

China-Liberia Convention

❖ Feasibility study (5.2):

- Environment assessment and management plans (5.3)
- Social impact assessment and action plans (provide for potential for resettlement) (5.4) **NO liaising with local communities provided for**
- Skills and technology development plans (5.5)
- To be passed on to the Minister who may: request additional information; recommend changes (5.7)
- Withholding of approval **rarely** possible

❖ Infrastructure (6.6)

- Can be developed by Company
- Resettlement and reimbursement of displaced landowners provided for: **NO liaising with local authorities/indigenous communities; NO obligation to seek alternative plans if the activities affect the indigenous communities**

China-Liberia Convention (2)

❖ Extensive rights of Company:

- Exclusive right to use land in concession area; government responsible for all relocation costs (7.1)
- Possible acquisition of land not owned by government (7.5)
- Assignment: rarely requires state approval; NO provisions on technical/financial/managerial capacity requirement (22)

❖ Strong police powers on controlled area (9.2)

❖ Taxes

- Taxes and royalties (14.1ff; 15.1ff)
- Stabilisation (14.4)

❖ Arbitration (26.3ff)

- Panel of three or single arbitrator(s)
- In **Singapore**

❖ Liberian law applicable (29.1)

China-Liberia: Transparency

- ❖ Reporting (6.8)
 - Financial
 - Production
- ❖ Above-mentioned feasibility study
- ❖ Financial reporting (17.6)
 - Yearly financial statements
- ❖ Books and records (20.2)
- ❖ Access to information (19.1)
 - Information on concession area
 - To be made available to the concessionaire
- ❖ Confidentiality (32.1)
 - Confidential data kept confidential for a 3-year period
 - Timing and payment of royalties and other payments may not be confidential
- ❖ Periodic review (30.0)
- ❖ **NO provisions on the prevention of corruption**

China-Liberia: Community / Environment

❖ Community responsibility

- Consultation with government and local communities (8.1)
- Fixed annual contribution for community funding (8.2)

❖ Health

- Reasonable access to healthcare
- **NO mention of modern quality**

❖ Employment

- Safety procedures (9.1)
- Obligation to hire local for unskilled positions (11.1)
- Preference for locals and affirmative action provided for (11.1)

❖ Training and education (11.2; 11.3) – Obligation to **finance** education

❖ Environment

- Reference to international environmental standards (13.1)
- Environment audit and government inspection (13.2 and 3)

❖ National preference for goods and services (12)

❖ Encouragement of local business **only in preamble**

❖ **NO specific provision on the protection of human rights by parties**

China-Liberia: Conclusions

- ❖ Not enough emphasis on **transparency**
 - Nothing on corruption
 - Too much leeway for confidentiality
- ❖ Not enough strong guarantees for protection of **communities**
 - Not enough participation / consultation of local communities provided for
 - Community development not sufficiently encouraged and taken into account
 - No specific provisions on human rights protection
- ❖ Too much **power** awarded to company
 - Too large policing powers
 - Too large powers on land (no provision about presumption of lawful occupation for indigenous and tribal peoples)

China-DRC Convention

- ❖ Collaboration convention between
 - DRC
 - Chinese companies Group (China Railway and Sinohydro)
- ❖ Object to develop a mining project and an infrastructure project in Congo
- ❖ Joint venture whereby State-owned Gecamines will sell shares and rights on mine deposits
- ❖ Chinese Group financing (1.2.1) for infrastructure construction

China-DRC Convention (2)

- ❖ Feasibility study ⁽⁶⁾
 - On the mining project, to determine profit to Chinese group
 - Approbation of Gecamines authorities and Chinese group; to be validated by Chinese and DRC governments
 - **NO provision on environmental / social impact**
- ❖ **No provisions on community protection and human rights**
- ❖ **No provisions on transparency and prevention of corruption**
- ❖ **Weak local preference provisions**
 - Preference for local businesses for goods and services

China-DRC Convention (3)

- ❖ Obvious imbalance in obligations:
 - Only Chinese group **interests** taken into account
 - DRC **commits to concede more** mining concessions and other resources in case Chinese group does not reach expected benefits (10.3)
 - Chinese Group **exonerated from taxes** for import, export and related to mining activities for a first period (14.2.1)
 - Subsequently, these will be considered **expenses related to the development of infrastructure** (14.2.4)
 - **DRC is in charge of security** on mining project sites (14.3.2)
- ❖ NO reference to any international standards in any field
- ❖ NO provisions on labour law

Conclusion

MMDA helps achieve stronger protection of indigenous communities' rights

MMDA increases environmental safeguards

MMDA ensures balanced terms of agreement

MMDA provides guidance as to regime of agreement

MMDA enhances transparency and prevention of corruption

MMDA allows better participation of all stakeholders