

Ad Hoc Committee on Mining and Sustainable Development

Review of the MMDA 1.0

The International Network on Displacement and Resettlement

INDR Ad Hoc Committee

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The International Network on Displacement and Resettlement's Ad Hoc Committee on Mining and Sustainable Development reviewed a draft of the Model Mining Development Agreement's [template for negotiating and drafting a mining development agreement](#) – version 1.0.

The template emerged from a realization by the mining industry and governments that their negotiations are often cloaked in secrecy, meaning that both parties are unaware of the options that might be on the table if they had full knowledge of all other national/company agreements. The resulting draft protocol, prepared under the direction of the Mining Law Committee of the International Bar Association, reviewed hundreds of these agreements, putting forth the options for all to consider. This herculean work pulls together the best examples from existing agreements.

The INDR is concerned about the impacts of mining on the sustainable development of local societies affected by agreements between governments and mining companies. We are particularly concerned with the socio-cultural and economic well-being of indigenous host-communities to be impacted by mining projects.

We point out that the industry has a poor reputation for its treatment of people in the way of development. Our review found the template needed to be significantly strengthened to guarantee that the MMDA's proposed public nature will in reality allow local communities and civil society groups to contribute in a sound manner to negotiation processes. Equitable representation and active inclusion of those who ascribe themselves as indigenous or traditional communities in these processes are paramount if these goals are to be met.

And we offer more than our findings. We offer concrete actions that the MMDA project may take to enhance Version 1.0 to be consistent with their objectives and results that embody truly sustainable development by safeguarding the socio-cultural and economic wellbeing of indigenous host communities.

Transparency: Although the MMDA template seems focused on guiding the relationship between mining companies and the national government of the mining project host-state, its proposed terms and provisions may be exposed to significant flaws if it fails to effectively anticipate or be cognizant of project host-communities as valid stakeholders. Elements of MMDA may preemptively influence any separate

community level agreements that may be entered into between the local communities and the mining project promoters. Before adoption of an agreement, the information about the MMDA should be made available to communities and people who will be impacted by the project in a format and language that they understand, and within a timely, culturally appropriate manner. Sufficient time to review relevant documents and to attend relevant meetings should also be accommodated. The communities, not the government or companies, should determine what is considered culturally appropriate. This approach increases the strength of an agreement by providing the companies and government with less local conflict once an agreement is made. **In sum, the MMDA should not be kept secret; it should be shared with the communities affected in the language and mode understandable to them.**

Sovereignty: The MMDA presumes that States have absolute ownership rights over land and natural resources in all jurisdictions. In many countries, the rights of the government are constrained by other agreements or their own Constitutions or laws. This will make application of the MMDA difficult in some jurisdictions including U.S and Canada where the legal right to permit development of natural resources lies with indigenous groups hosting the project. **The template should be modified to avoid making this presumption, perhaps by a clause that all parties to the agreement cannot override preexisting agreements of communities and people in the project affected area.**

Applicable Laws: The MMDA lacks a clear definition for the term “existing applicable laws” (section 1.1). Although it appears that additional context to the definition of “applicable laws” were provided subsequently in section 35.0, it is suggested that a clearer and more comprehensive definition of “existing applicable laws” under the designated definition clause (section 1) would be more effective. Vagueness as to the full meaning and coverage of the term “applicable laws” can potentially lead to disenfranchisement of the parties as well as the project host-communities. **Merging the supplementary explanation under section 35.0 with “applicable law” definition of section 1 is highly recommended.**

Self-Ascription/Collective Rights: The definition for “indigenous peoples” should be flexible, inclusive and a subjective approach that embraces all groups who self-ascribe as indigenous. Not all participant groups are recognized as indigenous in their home countries so an emphasis on “self-ascription as indigenous” is essential. Ignoring this in an agreement may put the people and the project at risk of disruption and losses. A separate definition of the term “indigenous rights”, which align with current international normative recognition of individual human rights as well as collective

rights, may be needed. This is due to the possibility that some countries may have a different collection of rights for indigenous peoples, which might be substandard to the international normative prescriptions. The revised comprehensive definition should also clearly address the right of indigenous groups to consultation.

Cultural Integrity: MMDA agreements may, on the ground, directly address the need to protect the cultural integrity of host communities. This issue is not addressed. Local communities affected by the project may be at risk of losing physical and non-physical assets, including homes; communities; productive lands; income-earning opportunities; resources such as forests, rangelands, and fishing areas; commercial properties; tenancy; important cultural sites; and social and cultural networks. **We recommend the deployment of safeguard mechanisms during the preparation of an agreement, that finances and designates a responsible and independent entity to estimate the local risks, develop organizational arrangements, and secure necessary financing for the accommodation or replacement of livelihoods before a mining project goes forward.**

Forced Resettlement: It is unclear under the current MMDA whether the processes for identifying risks and impacts required to be submitted to the State (under section 2.4) incorporates a management/mitigation program for involuntary resettlement. **Such provisions would assure full compliance with international standards on involuntary resettlement (The World Bank Operational Policy 4.12, IFC PS5, and The Equator Principles).** Mandatory elements include a comprehensive Resettlement Action Plan (RAP), a livelihood restoration plan, benefit sharing with those affected, and grievance mechanisms as part of the ESIA requirement to be submitted to the State. The plans must also include which party (company and/or State) should underwrite the cost of the resettlement or restoration plan, cultural and intergenerational impact risk assessments, and realistic timelines for implementation set in meaningful consultation and participation with the communities being impacted.

In addition, these plans should include not be limited to compensation and/or replacement rate for losses, but should be conceived and executed as sustainable development programs, providing sufficient resources to enable persons displaced by the project to be project beneficiaries (The World Bank OP4.12 objectives). The agreements provisions should default to the highest international standards in accordance with UN Human Rights norms or those of international financial institutions such as (but not limited to) the IFC Performance Standards. Unless local provisions for the project affected people are higher. The template should incorporate these standards which are routinely required for international financing.

Water: The peoples' connection to the water is life. Every part of our lives requires water- from our physical bodies, our ontologies, epistemologies, to our ideologies. Our mistaken belief that water is unlimited has led to wasteful technologies, contamination, and overuse. Oceans, rivers, lakes and streams are continually dammed, levied and manipulated for the purposes of water storage and use in resource extraction. Some of the last remaining bodies of fresh potable water exist in the same areas as vast deposits of minerals. Others struggle to obtain healthy, clean potable water, and fight to maintain minimum water levels of aquifers in support of sustainable, traditional land use practices such as multi-generational farming, grazing and harvesting. In combination with increased development, global water shortages will begin to require international attention and protection as trans-boundary disputes emerge over the protection of water and respective rights. This is particularly relevant in cases where a portion or all of the water rights reside in a third party other than the government or perhaps such right is being contested, and may not continue to be held by the state.

On the provisions relating to grant of mine development rights, the clause relating to **water rights ought to include, the prohibiting of any action that would: alter the quantity, quality or rate of flow, including seasonal rate of flow of water, interfere with the use of water for human consumption, public navigation and passage on water, the use of water for emergency purposes, any use for hunting, trapping, grazing, farming or fishing by the public, or result in a deposit of waste that would affect the above.**

The MMDA should also consider allowing for the protection of water sources in its natural state including, watersheds, watercourses, right-of-ways, prevention of water storage, changes to navigable waters, aquifers both static and seasonal. Essentially, nothing should be developed to impede the ability of any person to use water for a domestic use and/or derogate from previously held agreements or international statutes and water rights. In lieu of an agreement, the lack of an agreement should not be construed to grant a priority use to any one person or in preference of development, or the abrogation of right, nor shall compensation be deemed sufficient in removing a person's ability to access water for the sustainment of their chosen livelihood. The replacement value of water is unquantifiable, it is the one resource science has yet to successfully duplicate or replace and therefore should be of paramount concern.

Revenue Sharing and Sustainable Mining: The calculus and negotiation protocols regarding the question of royalty under MMDA appear to wholly disregard any royalty percentage [or] revenue sharing agreement that may be due by right to the indigenous host-communities or that may be entered into between the affected communities,

company and/or government. This revenue is over and above the costs associated with involuntary resettlement or damage mitigation. In addition, “earmark” funds from revenue sharing for specific projects to benefit the affected communities’ needs, derived from mining activity, should be identified. The valuing of the royalty and revenue sharing agreement should be done in substantive consultation with the affected communities. This is particularly relevant where rights to the minerals or sub-surface is vested in a party other than the State (e.g. the community), aiding in the determination of governments’ entitlement to royalty payments. Additionally, the royalty dispute resolution mechanisms prescribed under MMDA section 4.5 should ensure adequate protection for the royalty or revenue sharing rights of affected communities. **This element should be routinely incorporated in the financial modeling for a project.**

Security Force: Clarification should be offered regarding the broad power ceded to a company under the MMDA to maintain a “security force” (sections 2.2 on Exclusivity and 19.3). This provision is disturbing as it suggests that the company can implement a military style security operation against local communities under the pretense of protecting personnel and the appropriated mining areas. The term security force may be misconstrued and has, in the past, led to unnecessary conflict and reprisal. To mitigate the negative perception of the term (security force), which may suggest opposition toward the affected communities, a culturally apposite term and solution should be utilized to promote collaboration and balance. Consequently, it is suggested that the term security force be replaced by terms such as “asset protection unit”, “corporate security & protection unit” or such similar terms.

Provision for the establishment of any security unit should be accompanied with a clear implementation strategy for a culturally acceptable solution to security concerns, which should be determined in close consultation with affected communities.

Adoption of a clear human rights framework into the company’s security activities or project’s operational practices would be essential, especially in conflict prone areas, to any effort aimed at protecting project host-communities against abuse. Training of company personnel (whether official personnel, company associates, or partner entities tasked with acting on the company's behalf), in human rights and cultural sensitivity, should be an integral part of this effort. Again, **such provisions protect the sustainability of the agreement.**

Apply Highest Standard: References made to relevant guiding international frameworks mainly cites all IFC Performance standards. It does seem to suggest that IFC Performance standards are the only relevant framework that will guide

implementation of MMDA. More importantly, where references to other instruments have been made, outdated frameworks are cited. For example, in terms of Involuntary Resettlement, the World Bank's Operational Directive- OD 4.30 which was cited in the MMDA has now been replaced by the Operational Policy- OP 4.12, and Bank Procedure Statement- BP 4.12. **There may be need to revise the various examples and the instruments cited in the MMDA, with default mechanism directed to the highest international framework.**

Recommendations to the MMDA Committee's next draft.

The committee recommends ten improvements:

1. Expand stakeholder inclusion. In the protocol there is a disregard of the host-communities as valid stakeholders, particularly with interaction and consultation in a culturally appropriate and transparent way, as determined by the community.
2. Avoid ignoring established, limited sovereignty. The supposition that States have absolute sovereignty and rights over land and natural resources in all jurisdictions conflicts with a number of jurisdictions where permission to develop lies constitutionally with indigenous groups inherent in their customary laws, treaties, and within international agreements.
3. Correct the ambiguity of MMDA's reference to "existing applicable laws" lacks clarity therefore a clearer explanation needs to be provided to prevent disenfranchising people.
4. Ensure the inclusion of all groups who self-ascribe as indigenous in the definition of 'indigenous peoples'. Create a definition for 'Indigenous rights' that recognizes human rights as well as collective rights in the protocol.
5. Assure risk assessment and mitigation. In order to ensure cultural integrity, an agreement is necessary to finance and designate a responsible independent entity to estimate the local risks, develop organizational arrangements, and provide for accommodation or replacement of livelihoods *before* a mining project goes forward.
6. Include a clear provision for alignment of any agreement with the international safeguards on involuntary resettlement that assures a forced displacement is implemented as a development project.
7. Fold into any agreement a protocol to protect water associated with a project as a sustainable resource with multi-generational use, to allow for the protection of water rights as well as protection of water sources in their natural state, and to prohibit action that alters the quantity, quality or rate of flow.

8. A provision must be included to recognize any royalty percentage [or] revenue sharing agreement that may be due, by right, to the project host-communities or that may be entered into between the affected communities, company and/or governments.
9. The term security force needs to be replaced by terms such as "asset protection unit", "corporate security & protection unit" or such similar terms. Provision for the establishment of any security unit should be accompanied with a clear implementation strategy for culturally acceptable solutions to security concerns.
10. Revisions of the MMDA must be guided by the highest operational standards and include appropriate mechanisms for feedback.

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