

**DENR Administrative Order
No. 99-56
December 27, 1999**

SUBJECT : Guidelines Establishing the Fiscal Regime of Financial or Technical Assistance Agreements.

Pursuant to Section 81 and other pertinent provisions of Republic Act No. 7942, otherwise known as the Philippine Mining Act of 1995 (the "Mining Act"), the following guidelines establishing the fiscal regime of Financial or Technical Assistance Agreements (FTAA) are hereby promulgated.

Section 1. Scope

This Administrative Order is promulgated to:

- a. Establish the fiscal regime for FTAA's which the Government and the FTAA Contractors shall adopt for the large-scale exploration, development and commercial utilization of mineral resources in the country; and
- b. Provide for the formulation of a Pro Forma FTAA embodying the fiscal regime established herein and such other terms and conditions as provided in the Mining Act and the Implementing Rules and Regulations (IRR) of the Mining Act.

Sec. 2 Objectives

The objectives of this Administrative Order are:

- a. To achieve an equitable sharing among the Government, both National and Local, the FTAA Contractor and the concerned communities of the benefits derived from mineral resources to ensure sustainable mineral resources development; and

- b. To ensure a fair, equitable, competitive and stable investment regime for the large scale exploration, development and commercial utilization of minerals.

Sec. 3 Fiscal Regime of a Financial or Technical Assistance Agreement

The Financial or Technical Assistance Agreement which the Government and the FTAA Contractor shall enter into shall have a Fiscal Regime embodying the following provisions:

- a. General Principles. The Government Share derived from Mining Operations after the Date of Commencement of Commercial Production shall be determined in accordance with this Section.
- b. Occupation Fees. Prior to or upon registration of the FTAA and on the same date every year thereafter, the Contractor shall pay to the concerned Treasurer of the municipality(ies) or city(ies) the required Occupation Fee over the Contract Area at the rate provided for by existing laws, rules and regulations.
- c. Deductible Expenses. Allowable deductible expenses shall include all the expenses incurred by the Contractor directly, reasonably and necessarily related to the Mining Operations in the Contract Area in a Calendar Year during the Operating Phase. Allowable deductible expenses shall include the following:
 - 1. Mining, milling, transport and handling expenses together with smelting and refining costs other than smelting and refining costs paid to third parties;
 - 2. General and administrative expenses actually incurred by the Contractor in the Philippines;
 - 3. Consulting fees:
 - a) incurred within the Philippines for work related to the project

- b) incurred outside the Philippines for work related to the project: *provided*, That such fees are justifiable and subject to the approval of the Director.
4. Environmental expenses of the Contractor including such expenses necessary to fully comply with its environmental obligations as stipulated in the environmental protection provision of the FTAA and in the IRR;
5. Expenses for the development of hosts and neighboring communities and for the development of geoscience and mining technology as stipulated in the FTAA and in the IRR together with the training costs and expenses referred to in the FTAA;
6. Royalty payments to Claimowners or surface land owners relating to the Contract Area during the Operating Phase;
7. Continuing exploration and mine development expenses within the Contract Area after the pre-operating period;
8. Interest expenses charged on loans or such other financing-related expenses incurred by the Contractor subject to the financing requirement in the FTAA, which shall not be more than the prevailing international rates charged for similar types of transactions at the time the financing was arranged, and where such loans are necessary for the operations; and
9. Government taxes, duties and fees.

Ongoing Capital expenditures shall be considered as capital expenses subject to Depreciation Charges.

“Ongoing Capital Expenditures” shall mean expenses for approved acquisitions of equipment and approved construction of buildings necessary for the Mining Operations as provided in its approved Mining Project Feasibility Study.

“Depreciation Charges” means the annual non-cash deduction from the Operating Income for the use of fixed assets that are

subject to exhaustion, wear and tear and obsolescence during their employment in a Mining Operation. Its applicability and computation are regulated by existing taxation laws, the Mining Act and the IRR. Incentives relating to depreciation allowance shall be in accordance to the provisions of the mining Act and the IRR.

“Operating Income” means the Gross Output less deductible Expenses, while “Gross Output” has the meaning ascribed to it in the National Internal Revenue Code.

- d. Payment of Government Taxes and Fees. The Contractor shall promptly pay all the taxes and fees required by the Government in carrying out the activities covered in the FTAA and in such amount, venue, procedure and time as stipulated by the particular law and implementing rules and regulations governing such taxes and fees subject to all rights of objection or review as provided for in relevant laws, rules and regulations. In case of non-collection as covered by Clause 3-g-1 of this Section, the Contractor shall follow the prevailing procedures for availment of such non-collection in accordance with pertinent laws, rules and regulations. Where prevailing orders, rules and regulations do not fully recognize and implement the provisions covered by Clause 3-g-1 of this Section, the Government shall exert its best efforts to ensure that all such orders, rules and regulations are revised or modified accordingly.
- e. Recovery of Pre-Operating Expenses. Considering the high risk, high cost and long term nature of Mining Operations, the Contractor is given the opportunity to recover its Pre-Operating Expenses incurred during the pre-operating period, after which the Government shall receive its rightful share of the national patrimony. The Recovery Period, which refers to the period allowed to the Contractor to recover its Pre-Operating Expenses as provided in the Mining Act and the IRR, shall be

for a maximum of five (5) years or at a date when the aggregate of the Net Cash Flows from the Mining Operations is equal to the aggregate of its Pre-operating Expenses, reckoned from the Date of Commencement of Commercial Production, whichever comes first. The basis for determining the Recovery Period shall be the actual Net Cash Flows from Mining Operations and actual Pre-Operating Expenses converted into its US dollar equivalent at the time the expenditure was incurred.

“Net Cash Flow” means the Gross Output less Deductible Expenses, Pre-Operating Expenses, Ongoing Capital Expenditures and Working Capital charges.

- f. Recoverable Pre-Operating Expenses. Pre-Operating Expenses for recovery which shall be approved by the Secretary upon recommendation of the Director shall consist of actual expenses and capital expenditures relating to the following:
1. Acquisition, maintenance and administration of any mining or exploration tenements or agreements covered by the FTAA;
 2. Exploration, evaluation, feasibility and environmental studies, production, mining, milling, processing and rehabilitation;
 3. Stockpiling, handling, transport services, utilities and marketing of minerals and mineral products;
 4. Development within the Contract Area relating to the Mining Operations;
 5. All Government taxes and fees;
 6. Payments made to local Governments and infrastructure contributions;
 7. Payments to landowners, surface rights holders, Claimowners, including the Indigenous Cultural Communities, if any;

8. Expenses incurred in fulfilling the Contractor's obligations to contribute to national development and training of Philippine personnel;
9. Consulting fees incurred inside and outside the Philippines for Work related directly to the Mining Operations;
10. The establishment and administration of field and regional offices including administrative overheads incurred within the Philippines which are properly allocatable to the Mining Operations and directly related to the performance of the Contractor's obligations and exercise of its rights under the FTAA;
11. Costs incurred in financial development, including interest on loans payable within or outside the Philippines, subject to the financing requirements required in the FTAA and to a limit on debt-equity ratio of 5:1 for investments equivalent to 200 Million US Dollars or less, or for the first 200 Million US Dollars of investments in excess of 200 Million US Dollars; or 8:1 for that part of the investment which exceeds 200 Million US Dollars: *Provided*, That the interests shall not be more than the prevailing international rates charged for similar types of transaction at the time the financing was arranged;
12. All costs of constructing and developing the mine incurred before the Date of Commencement of Commercial Production, including capital and property as hereinafter defined irrespective as to their means of financing, subject to the limitations defined by Clause 3-f-11 hereof, and inclusive of the principal obligation and the interests arising from any Contractor's leasing, hiring, purchasing or similar financing arrangements including all payments made to Government, both National and Local; and
13. General and administrative expenses actually incurred by the Contractor for the benefit of the Contract Area.

The foregoing recoverable Pre-Operating Expenses shall be subject to verification of its actual expenditure by an

independent audit recognized by the Government and chargeable against the Contractor.

g. Government Share

1. Basic Government Share. The following taxes, fees and other such charges shall constitute the Basic Government Share:

- a) Excise tax on minerals;
- b) Contractor's income tax;
- c) Customs duties and fees on imported capital equipment;
- d) Value added tax on the purchase of imported equipment, goods and services;
- e) Withholding tax on interest payments on foreign loans;
- f) Withholding tax on dividends to foreign stockholders;
- g) Royalties due the Government on Mineral Reservations;
- h) Documentary stamps taxes;
- i) Capital gains tax;
- j) Local business tax;
- k) Real property tax;
- l) Community tax;
- m) Occupation fees;
- n) All other local Government taxes, fees and imports as of the effective date of the FTAA;
- o) Special Allowance, as defined in the Mining Act; and
- p) Royalty payments to any Indigenous People(s)/Indigenous Cultural community(ies).

From the Effective Date, the foregoing taxes, fees and other such charges constituting the Basic Government Share, if applicable, shall be paid by the Contractor: *Provided*, That above items (a) to (g) shall not be collected from the Contractor upon the date of approval of the Mining Project Feasibility Study up to the end of the Recovery Period.

Any taxes, fees, royalties, allowances or other imposts, which should not be collected by the Government, but nevertheless paid by the Contractor and are not refunded by the Government before the end of the next taxable year, shall be included in the Government Share in the next taxable year. Any Value-Added Tax refunded or credited shall not form part of Government Share.

2. Additional Government Share. Prior to the commencement of Development and Construction Phase, the Contractor may select one of the formula for calculating the Additional government Share set out below which the Contractor wishes to apply to all of its Mining Operations and notify the Government in writing of that selection. Upon the issuance of such notice, the formula so selected shall thereafter apply to all of the Contractor's Mining Operations.

a) Fifty-Fifty Sharing of the Cumulative Present Value of Cash Flows. The Government shall collect an Additional Government Share from the Contractor equivalent to an amount which when aggregated with the cumulative present value of Government Share during the previous Contract Years and the Basic Government Share for the current Contract year is equivalent to a minimum of fifty percent (50%) of the Cumulative Present Value of Project Cash Flow before financing for the current Contract Year, as defined below.

Computation. The computation of the Additional Government Share shall commence immediately after the Recovery Period. If the computation covers a period of less than one year, the Additional Government Share corresponding to this period shall be computed *prorata* wherein the Additional Government

Share during the year shall be multiplied by the fraction of the year after recovery. The Additional Government Share shall be computed as follows:

Project Cash Flow Before Financing and Tax (“CF”) for a taxable year shall be calculated as follows:

$$CF = GO - DE + I - PE - OC$$

Cumulative Present Value of Project Cash Flow (“CP”) shall be the sum of the present value of the cumulative present value of project cash flow during the previous year ($CP_{i-1} \times 1.10$) and the Project Cash Flow Before Financing and Tax for the current year (“CF”), and shall be calculated as follows:

$$CP = (CP_{i-1} \times 1.10) + CF$$

Cumulative Present Value of Total Government Share Before Additional Government Share (“CGB”) shall be the sum of the present value of the cumulative present value of the Total Government Share during the previous year ($CGA_{i-1} \times 1.10$), and the Basic Government Share for the current year (BGS), and shall be calculated as follows:

$$CGB = (CGA_{i-1} \times 1.10) + BGS$$

The Additional Government Share (“AGS”) shall be:

$$\text{If: } CGB \geq CP \times 0.5 \text{ then } AGS = 0$$

$$\text{If: } CGB < CP \times 0.5 \text{ then } AGS = [CP \times 0.5] - CGB$$

Cumulative Present Value of Total Government Share (CGA):

$$CGA = CGB + AGS$$

where:

- BGS = Basic Government Share shall have the meaning as described in Clause 3-g-1 hereof;
- GO = Gross Output shall have the same meaning as defined in the National Internal Revenue Code;
- DE = Deductible Expenses shall have the meaning as described in Clause 3-c hereof;
- I = Interest payments on loans included in the Deductible Expenses shall be equivalent to those referred to in Clause 3-c-8 hereof;
- PE = unrecovered Pre-Operating Expenses;
- OC = On-going Capital Expenditures as defined in Clause 3-c hereof;
- CP_{i-1} = cumulative present value of project cash flow during the previous year; and
- CGA_{i-1} = cumulative present value of total Government Share during the previous year.

- b) Profit Related Additional Government Share. The Government shall collect an Additional Government Share from the Contractor based on twenty-five percent (25%) of the additional profits once the arithmetic average of the ratio of Net Income After Tax To Gross Output as defined in the National Internal Revenue Code, for the current and previous taxable year is 0.40 or higher rounded off to the nearest two decimal places.

Computation The computation of the Additional Government Share from additional profit shall commence immediately after the Recovery Period. If the computation covers a period of less than a year, the additional profit corresponding to this period shall be computed *prorata* wherein the total additional profit during the year shall be multiplied by the fraction of the year after recovery.

The additional profit shall be derived from the following formula:

If the computed average ratio as derived from above is less than 0.40:

$$\text{Additional Profit} = 0$$

If the computed average ratio is 0.40 or higher:

$$\text{Additional Profit} = \frac{[\text{NIAT} - (0.40 \times \text{GO})]}{(1 - \text{ITR})}$$

The Additional Government Share from the additional profit is computed using the following formula:

Additional Government Share

$$\text{From Additional Profit} = 25\% \times \text{Additional Profit}$$

Where:

NIAT = Net Income After Tax for the particular taxable year under consideration.

GO = Gross Output from operations during the same taxable year
ITR = Income Tax Rate applied by the Bureau of Internal Revenue in computing the income tax of the Contractor during the taxable year.

c) Additional Share Based from the Cumulative Net Mining Revenue. The Additional Government Share for a given taxable year shall be calculated as follows:

(i) Fifty percent (50%) of cumulative Net Mining Revenue from the end of the Recovery Period to the end of that taxable year;

LESS

(ii) Cumulative Basic Government Share for that period as calculated under Clause 3-g-1 hereof;

AND LESS (if applicable)

(iii) Cumulative Additional Government Share in respect of the period commencing at the end of the Recovery Period and expiring at the end of the taxable year immediately preceding the taxable year in question.

“Net Mining Revenue” means the Gross Output from Mining Operations during a Calendar year less Deductible Expenses, plus Government taxes, duties and fees included as part of Deductible Expenses.

3. Failure to Notify. If the Contractor does not notify the Government within the time contemplated by Clause 3-g-2 of the formula for calculating the Additional Government

Share which the Contractor wishes to apply to all of its Mining Operations, the Government shall select and inform the Contractor which option will apply to the latter.

4. Filing and Payment of Additional Government Share. Payment of the Additional Government Share shall commence after the Recovery Period. The Additional Government Share shall be computed, filed and paid to the MGB within fifteen (15) days after the filing and payment of the final income tax return during the taxable year to the Bureau of Internal Revenue. Late filing and payment of the Additional Government Share shall be subject to the same penalties applicable to late filing of income tax returns. The Contractor shall furnish the Director a copy of its income tax return not later than fifteen (15) days after the date of filing.

A record of all transactions relating to the computation of the Additional Government Share shall be maintained by the Contractor and shall be made available to the Secretary or his/her authorized representative for audit.

- h. Sales and Exportation – The Contractor shall endeavor to dispose of the minerals and by-products produced in the Contract Area at the highest commercially achievable market price and lowest commercially achievable commissions and related fees in the circumstances then prevailing and to negotiate for sales terms and conditions compatible with world market conditions. The Contractor may enter into long term sales and marketing contracts or foreign exchange and commodity hedging contracts which the Government acknowledges to be acceptable notwithstanding that the sale price of minerals may from time to time be lower, or that the terms and conditions of sales are less favorable, than those available elsewhere.

The Government shall be informed by the Contractor when it enters into a marketing agreement with both foreign and local buyers. The Contractor shall provide the Government a copy of the final marketing agreement entered into with buyers subject to the confidentiality clause of the FTAA.

The Government shall be entitled to check and inspect all sales and exportation of minerals and/or mineral products including the terms and conditions of all sales commitments.

Sales commitments with affiliates, if any, shall be made only at prices based on or equivalent to arm's length sales and in accordance with such terms and conditions at which such agreement would be made if the parties had not been affiliated, with due allowance for normal selling discounts or commissions. Such discounts or commissions allowed the affiliates must be no greater than the prevailing rate so that such discounts or commissions will not reduce the net proceeds of sales to the Contractor below those which it would have received if the parties had not been affiliated. The Contractor shall, subject to confidentiality clause of the FTAA, submit to the Government evidence of the correctness of the figures used in computing the prices, discounts and commissions, and a copy of the sales contract.

The Contractor undertakes that any mining, processing or treatment of Ore by the Contractor shall be conducted in accordance with such generally accepted international standards as are economically and technically feasible, and in accordance with such standards the Contractor undertakes to use all reasonable efforts to optimize the mining recovery of Ore from proven reserves and metallurgical recovery of minerals from the Ore: *Provided*, That it is economically and technically feasible to do so.

For purposes of this Clause 3-h, an affiliate of an affiliated company means:

- a) any company in which the Contractor holds fifty percent (50%) or more of the shares;
- b) any company which holds fifty percent (50%) or more of the Contractor's shares;
- c) any company affiliated by the same definition in (a) or (b) to an affiliated company for purposes of the FTAA;
- d) any company which, directly or indirectly, is controlled by or controls, or is under common control by the Contractor;
- e) any shareholder or group of shareholders of the Contractor or of an affiliated company; or
- f) any individual or group of individuals in the employment of the Contractor or of any affiliated company.

Control means the power exercisable, directly or indirectly, to direct or cause the direction of the management and policies of a company exercised by any other company and shall include the right to exercise control or power to acquire control directly or indirectly, over the company's affairs and the power to acquire not less than fifty percent (50%) of the share capital or voting power of the Contractor. For this purpose, a creditor who lends, directly or indirectly, to the Contractor, unless he has lent money to the Contractor in the ordinary course of money-lending business, may be deemed to be a Person with power to acquire not less than fifty percent (50%) of the share capital or voting power of the Contractor if the amount of the total of its loan is to less than fifty percent (50%) of the total loan capital of the company.

If a person ("x") would not be an affiliate of an affiliated company ("y") on the basis of the above definition but would be an affiliate if each reference in that definition to "fifty percent (50%)" was read as a reference to "forty percent (40%)" and the Government has reasonable grounds for

believing that “x” otherwise controls “y” or “x” is otherwise controlled by “y”, then, upon the contractor being notified in writing by the Government of that belief and the grounds therefore, “x” and “y” shall be deemed to be affiliates unless the Contractor is able to produce reasonable evidence to the contrary.

1. Price or Cost Transfer. The Contractor commits itself not to engage in transactions involving price or cost transfers in the sale of minerals or mineral products and in the purchase of input goods and services resulting either in the illegitimate loss or reduction of Government Share or illegitimate increase in Contractor’s share. If the Contractor engages affiliates or an affiliated company in the sale of its mineral products or in providing goods, services, loans or other forms of financing hereunder, it shall do so on terms no less than would be the case with unrelated persons in arms-length transactions.

Sec. 4 Pro Forma FTAA Contract

The fiscal regime provided herein, and the terms and conditions provided in the Mining Act and IRR shall be embodied in a Pro Forma FTAA Contract to be prepared by the Department of Environment and Natural Resources. The Pro Forma FTAA Contract shall also incorporate such other provisions as the DENR may formulate as a result of consultations or negotiations conducted for that purpose with concerned entities.

The Pro Forma FTAA Contract shall be used by the DENR, the Negotiating Panel and the mining applicant for negotiation of the terms and conditions of the FTAA. *Provided,* That the terms and conditions provided in the Pro Forma FTAA Contract shall be incorporated in each and every FTAA.

Sec. 5 Status of Existing FTAA

All FTAA's approved prior to the effectivity of this Administrative Order shall remain valid and be recognized by the Government: *Provided*, That should a Contractor desires to amend its FTAA, it shall do so by filing a Letter of Intent (LOI) to the Secretary thru the Director: *Provided, further*, That if the Contractor desires to amend the fiscal regime of its FTAA, it may do so by seeking for the amendment of its FTAA's whole fiscal regime by adopting the fiscal regime provided hereof: *Provided, finally*, That any amendment of an FTAA other than the provision on fiscal regime shall require the negotiation with the Negotiating Panel and the recommendation of the Secretary for approval of the President of the Republic of the Philippines.

Sec. 6 Repealing Clause

All orders and circulars or parts thereof inconsistent with or contrary to the provisions of this Order are hereby repealed, amended or modified accordingly.

Sec. 7 Effectivity

This Order shall take effect fifteen (15) days upon its complete publication in newspaper of general circulation and fifteen (15) days after registration with the Office of the National Administrative Register.

Quezon City, Philippines,

(Sgd.) ANTONIO H. CERILLES
Secretary

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