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### Emerging Practices in Community Development Agreements

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## EMERGING PRACTICES IN COMMUNITY DEVELOPMENT AGREEMENTS

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### ABSTRACT

Community Development Agreements (CDAs) have the potential to facilitate the delivery of tangible benefits from large-scale investment projects, such as mines or forestry concessions, to affected persons and communities. To be effective, however, CDAs must be adapted to the local context, meaning that no single model agreement or process will be appropriate in every situation. Nonetheless, leading practices are emerging which can be required by governments, voluntarily adopted by companies, and demanded by communities. These practices are grounded in ensuring that all parties are sufficiently informed, capacitated, and prepared to engage in meaningful negotiations regarding how the investor's operations should benefit local stakeholders. This article reviews existing research on CDAs, as well as available agreements from the extractive sector in Australia, Canada, Laos, Papua New Guinea, Ghana and Greenland. It articulates seven broad leading practices and how different stakeholders could work to achieve more effective agreements.

**Keywords:** Community development agreement, extractive, investment, leading practices.

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## 1. INTRODUCTION

A Community Development Agreement (CDA)<sup>1</sup> has the potential to facilitate the delivery of tangible benefits from large-scale investment projects, such as mines or forestry concessions, to affected communities and individuals. In formalising agreements between an investor company and one or more communities affected by that company's projects, CDAs set out how the benefits of an investment project are intended to be shared with local communities. CDAs are becoming more and more common, and stand as an important opportunity for ensuring the self-determined development of local communities. This article seeks to identify leading practices from past CDA negotiations that increase the likelihood that a CDA will translate into lasting benefits for those affected.

The article focuses on practices that companies and communities can institute, but may also be of relevance to governments, who can encourage investors to adopt good practices and, in some cases, mandate such practices through legislation or regulation. Indeed, in some instances, governments are also signatories to a CDA, and can thus influence how negotiations proceed. The role of governments is especially important where local communities lack capacity or sufficient resources to represent their position effectively. Governments can exert considerable influence over how companies engage with communities through stipulations in applicable legislation or investor-state agreements establishing investment projects.

Part 2 of this article contextualises CDAs and explains what is meant by "leading practices." The article then roughly maps out the agreement-making process in Part 3, before identifying and explaining seven leading practices in Part 4. Part five is the conclusion.

## 2. IDENTIFYING LEADING PRACTICES

The authors sought to identify practices relating to both the content of CDAs and the processes used to arrive at agreement.<sup>2</sup> Among other factors, the vast

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1 The "term community development agreement" (or CDA) is used in this article to describe all agreements between communities and the extractive industry companies with the similar goals of promoting community development. These are also sometimes referred to as "community benefit agreements", "impact benefit agreements," or "social agreements." For a longer list of terms that are also used to describe such agreements, see Box 2.1 in World Bank, "Mining Community Development Agreements: Source Book," (March, 2012), p. 5.

2 A summary of key points in the CDAs reviewed is available at the Columbia Centre on Sustainable Investment's Community Development Agreements

differences between communities, companies, geographical locations and regulatory contexts make it difficult to identify “best practice” or model CDAs that will always be appropriate. In addition, many agreements contain provisions that render part or all of the agreement confidential, which limits the ability of researchers to obtain the full text of agreements, and identify other trends of predominant practices. For these reasons, this article focuses on leading practices discoverable from a review of publicly available CDAs.<sup>3</sup> It also examines existing tools, research and analysis regarding certain agreements and case studies in the extractives sector.<sup>4</sup>

This article also refers to legislative requirements governing the creation of CDAs in particular countries. It focuses on Australia’s legislative regime

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webpage: <http://ccsi.columbia.edu/files/2015/05/Final-Matrix-CDA-April-2015.xls>. The review broke down the benefits provided to communities into nine broad categories: financial, infrastructure, employment, training, business development, education, community welfare projects, cultural programmes, and mine closure and rehabilitation plans. These categories are intended to form umbrellas for a wide range of highly specific benefits. They describe the overarching goals of the many different benefits provided in both the CDAs reviewed and those discussed and referred to in toolkits and reports.

- 3 Those that were identified in the review for this brief were from Australia, Canada, Papua New Guinea, Ghana, Laos and Greenland. Out of these, Ghana and Laos do not have a legislative or constitutional requirement to negotiate with impacted, local communities. Full text versions of CDAs are available from CCSI’s website (<http://ccsi.columbia.edu/work/projects/community-development-agreements-frameworks-and-tools/>), from the Agreements, Treaties and Negotiated Settlements website (<http://www.atns.net.au/browse.asp>) and the CDA Library maintained by Sustainable Development Strategies Group (SDSG) (<http://www.sds.org/archives/cda-library/>).
- 4 InterGroup Consultants, “Aboriginal Engagement in Resource Development Industry Leading Practices,” (October, 2008); Indigenous Support Services, “Agreements between Mining Companies and Indigenous Communities: A Report to the Australian Minerals and Energy Environment Foundation,” (December, 2001); Centre for Social Responsibility in Mining, “Agreement-making with Indigenous Groups: Oil & Gas Development, Australia,” (2012); Ginger Gibson and Ciaran O’Faircheallaigh, “IBA Community Toolkit: Negotiation and Implementation of Impact and Benefit Agreements,” (March, 2010); International Council on Mining & Metals, “Community Development Toolkit,” (2012); International Council on Mining & Metals, “Good Practice Guide: Indigenous Peoples and Mining,” (2010); International Finance Corporation, “Stakeholder Engagement: A Good Practice Handbook for Companies Doing Business in Emerging Markets,” (2007); Centre for Social Responsibility in Mining, “World Bank Extractive Industries Sourcebook: Good Practice Notes,” (March, 2012); World Bank, “Mining Community Development Agreements: Source Book,” (March, 2012), *Community Development Agreement Model Regulations & Example Guidelines*, (World Bank Group, Final Report, submitted by James M. Otto, 2011).

for CDAs, as a majority of the agreements reviewed were Australian. The Australian government bears a legal duty to negotiate and/or consult with stakeholders in certain contexts.<sup>5</sup> However, the obligations attached to this governmental duty are broadly framed and generally only apply to land where certain formal tenure rights, specifically, native title rights, are held or claimed by indigenous peoples. This has helped spur on leading practices by companies. Indeed, the CDA practices of some companies operating in countries requiring CDAs – generally companies with considerable size and experience, and who have internal mandates promoting meaningful community engagement – often go beyond such mandatory requirements.<sup>6</sup>

Before exploring the agreement-making process, it is necessary to consider the rights of indigenous peoples at international law, which inform many leading practices in community engagement and CDAs. Indigenous peoples are often some of the world's most disadvantaged societal groups and have successfully campaigned for an international regime of rights that extends beyond universal human rights protections.<sup>7</sup> One of the most significant of these protections is the principle of free, prior, and informed consent (FPIC).<sup>8</sup> The requirement to obtain an indigenous community's FPIC obliges governments and, where relevant, companies to ensure that indigenous communities agreeing to a project are adequately *informed* of the project's likely positive and negative impacts, and are providing their consent *free* from any pressure or interference and *prior* to the commencement of the

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5 See, e.g., Australia's *Native Title Act 1993* (Cth), s 25; Gibson and O'Faircheallaigh, 2010, *op. cit.*, p. 30. Canada's laws contain a similar requirement, which may be satisfied by an agreement between company and community.

6 For example, the Argyle Diamond Mines Agreement in Australia (2004-2005) and the Raglan Agreement in Northern Quebec, Canada (1995) are widely considered to be some of the most innovative CDA examples more than 10 years on: Centre for Social Responsibility in Mining, "Agreement-making with Indigenous Groups: Oil & Gas Development, Australia," 2012, *op. cit.*, p. 21; International Council on Mining & Metals, 2010, *op. cit.*, p. 65.

7 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP); International Labour Organisation, *Indigenous and Tribal Peoples Convention*, 1989 (No. 169). See also International Finance Corporation, "Performance Standards on Environmental and Social Sustainability" (January, 2012).

8 UNDRIP Article 32(2) provides that "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilisation or exploitation of mineral, water or other resources".

project. Consultations with indigenous peoples should, therefore, be carried out with the object of obtaining the community's consent.<sup>9</sup> Communities should also be able to effectively participate in the project approval process, which may include negotiating a CDA.

International best practices dictate that consultations and negotiations with non-indigenous communities should also be guided by the principles of FPIC,<sup>10</sup> even where the government or the company may not be required to do so under domestic or international law. The United Nations Committee on Economic, Social and Cultural Rights has also urged various states to accord rights to informed consent to non-indigenous communities affected by extractives projects<sup>11</sup> and other projects requiring their relocation.<sup>12</sup> Companies

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9 International Labour Organisation, *Indigenous and Tribal Peoples Convention*, 1989 (No. 169), Art. 6(2).

10 See, e.g., China Chamber of Commerce and Metals Minerals and Chemicals Importers and Exporters, *Guidelines for Social Responsibility in Outbound Mining Investments*, [http://www.srz.com/files/upload/Conflict\\_Minerals\\_Resource\\_Center/CCCMC\\_Guidelines\\_for\\_Social\\_Responsibility\\_in\\_Outbound\\_Mining\\_Operations\\_English\\_Version.pdf](http://www.srz.com/files/upload/Conflict_Minerals_Resource_Center/CCCMC_Guidelines_for_Social_Responsibility_in_Outbound_Mining_Operations_English_Version.pdf), Art. 2.4.5 (calling on companies to “[p]rotect the rights for free, prior and informed consent of local communities including indigenous peoples”). In other sectors, see, e.g., Roundtable on Sustainable Palm Oil, *Principles and Criteria for the Production of Sustainable Palm Oil* (2013), Principle 2.3 (“Use of the land for oil palm does not diminish the legal, customary or user rights of other users without their free, prior and informed consent”); Forestry Stewardship Council, *FSC Principles and Criteria for Forest Stewardship*, para. 2.2. (Local communities with legal or customary tenure or use rights shall maintain control, to the extent necessary to protect their rights or resources, over forest operations unless they delegate control with free and informed consent to other agencies.)

11 Committee on Economic, Social and Cultural Rights, *Concluding observations on the initial report of Mauritania, adopted by the Committee at its forty-ninth session* (12-30 November 2012) (December 10, 2012), UN Doc. E/C.12/MRT/CO/1, para. 8 (“The Committee calls on the State party to ... ensure that the free, prior and informed consent of the population is obtained in decision-making processes on extractive and mining projects affecting them”).

12 Committee on Economic, Social and Cultural Rights, *Consideration of reports submitted by States parties under articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights - Mexico*, UN Doc. E/C.12/MEX/CO/4, June 9, 2006 para. 28 (“The Committee urges the State party to ensure that the indigenous and local communities affected by the La Parota Hydroelectric Dam Project or other large-scale projects on the lands and territories which they own or traditionally occupy or use are duly consulted, and that their prior informed consent is sought, in any decision-making processes related to these projects affecting their rights and interests under the Covenant”); Committee on Economic, Social and Cultural Rights, *Concluding observations on the third periodic report of Azerbaijan, adopted by the Committee at its fiftieth*

should, therefore, ensure that they engage in meaningful consultation with communities by affording them the information and resources necessary to effectively negotiate an agreement that meets their needs and priorities.

### 3. THE AGREEMENT-MAKING PROCESS

The agreement-making process for CDAs varies with each agreement but can be broken down roughly into three stages. In practice, these stages may be conflated or overlap, or occur in a slightly different order. First, the *pre-negotiation stage* involves the company and the community or communities laying the groundwork for negotiations. This may include precursor agreements such as a memorandum of understanding (MOU) or a negotiating framework, each of which set out rules to govern the process for negotiating the CDA.

Second, the *research and consultation stage* incorporates stakeholder mapping to determine who stands to be affected by the project, as well as impact assessments, such as Environmental and Social Impact Assessments (ESIAs), which are often legally mandated, and Human Rights Impact Assessments (HRIAs). During this stage the company or government should provide capacity building, to ensure community agency and ownership of the process, and education about the proposed project to communities that stand to be affected. Third, no agreement can be concluded without the actual *negotiation process and endorsement of the final agreement*. Once the agreement-making process has been concluded, monitoring and implementing the agreement then becomes a key focus to ensure that parties comply with obligations, and that the promised benefits are transferred to community parties.

Many of the agreements reviewed do not provide details regarding the first and second stages of the agreement-making process. The leading practices discussed below relating to these stages, therefore, rely largely on secondary literature and analysis. In addition, the review did not include an examination of how the CDAs operate in practice. Further research is needed to understand the impact that terms of the agreements can have in practice, and to identify additional leading practices that can be effectively included in future CDAs.

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*session (29 April-17 May 2013) (June 5, 2013), UN Doc. E/C.12/AZE/CO/3, para. 22 (“The Committee also urges the State party to ensure that any relocation of homes necessary for city renewal is carried out with prior consultations among affected households, with their informed consent and with full respect to the safety and dignity of people following an adequate and transparent procedure.”).*

#### 4. LEADING PRACTICES

It should be noted that the concept of a leading practice is relative; the practices of a leading company may be better than other companies, but this does not necessarily mean that they are always rights-compliant or constitute a “gold standard” of practice. More may be required at each stage, depending on the laws in force and the likely extent of impacts on the rights of community members and other individuals. The analysis was also conducted on the basis that the prevalence of a particular practice or clause does not necessarily denote that such a practice or clause is desirable or recommended.

The leading practices are as follows:

##### **4.1 Conduct Extensive Research and Consult Widely to Identify all Communities, and the Individuals who Will Represent Them, in the CDA Negotiation Process**

Determining which communities to engage with is a complex but crucial aspect of the CDA negotiating process. Various types of groups may need to be considered. Communities that have a recognised legal right to land within or near the proposed project area may be able to enforce a right to consultation or consent, or to benefit sharing, based on the country’s laws. Another category of potential parties to the CDA is any other proximate communities and individuals that, while not formally recognised as having legal title over the land, may also stand to be adversely affected by the project. A third category concerns communities that are not located on or near the project but which may be affected by the project’s “downstream” impacts.

Some countries’ laws require that companies engage with particular communities. For example, Australia’s *Native Title Act 1993* requires companies that have been granted a mining licence to negotiate with aboriginal families and communities that have a legally recognised interest in the land as native title holders or registered native title claimants.<sup>13</sup> This law does not require the company to consult and negotiate with the second and third categories of community members described above. The law does, however, provide for a more inclusive alternative;<sup>14</sup> companies establishing

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<sup>13</sup> *Native Title Act 1993* (Cth), s 25.

<sup>14</sup> The *Native Title Act 1993* (Cth) provides protection for native title holders (including persons who have asserted native title rights and are awaiting determination) rights as against all “future acts”. Future acts are defined as acts that affect native title (i.e., government granted leases or licences to mine). A future act is invalid if it is not first subject to negotiation with the native title



extractive projects in Australia can opt to pursue an Indigenous Land Use Agreement (ILUA), which expands the groups to be included in the agreement-making process beyond those who have a legal right to be consulted.<sup>15</sup>

Leading companies often go beyond what is legally required, to include the second and third categories of community members when determining who will be party to a CDA. Companies can identify relevant community groups and stakeholders by undertaking impact studies, typically with respect to environmental, social, health, cultural and/or human rights impacts. These assessments often begin by identifying any legal requirements to consult or negotiate with communities, before then identifying the (often broader) group of stakeholders that may be impacted by the project. For instance, an agreement between Argyle Diamond Mines Pty Ltd (Argyle), the Kimberly Land Council, and the traditional owners of the land, extended beyond the parties with whom Argyle was legally required to enter into an agreement. Argyle sought to include not only those traditional owners that had or sought legal recognition of their native title rights under Australia's Native Title Act but all community members with "rights and interests ... held by the [traditional owners] under Aboriginal laws and customs in relation to the Agreement Area".<sup>16</sup>

Other agreements exclusively define the affected communities geographically according to whether they are within the project area or an area affected by the project. For example, the Memorandum of Agreement Relating to the Hidden Valley Gold Project, in Papua New Guinea, separately defines the communities within the project area from other "Affected Communities" who do not fall within the project area but are affected by the

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holders. At a minimum, the Act protects native title holders' right to negotiate. The right to negotiate framework is more rigid and if no agreement is reached within a specified timeframe, the parties must refer the issue to the arbitral body (which may be a state body if the relevant state has so specified or the National Native Title Tribunal (NNTT)). The Act also sets out an alternative pathway that satisfies the right to negotiate requirements but is more flexible and does not have time restrictions. This procedure is called an Indigenous Land Use Agreement and becomes effective once it is registered with the NNTT: *Native Title Act 1993* (Cth), Part 2, Div 3, subdiv P (right to negotiate) and subdiv B-E (ILUAs).

15 See, e.g., Argyle Diamond Mine Participation Agreement, Indigenous Land Use Agreement, 2005, Schedule 1, ILUA, <http://ccsi.columbia.edu/files/2015/01/Australia-Native-Title-Holders-Argyle-2005-Agreement.pdf>

16 International Council on Mining & Metals, 2010, *op. cit.*, p. 42.

increased traffic on the highway, use of the river, or are landowners within the mining easement granted to the company.<sup>17</sup>

For the Ahafo Gold Project in Western Ghana, the beneficiaries of a fund established by the mine are limited to the communities directly affected by the mine and located within the boundaries of the concession. In the project's Social Responsibility Agreement, the local community is defined as "Community towns that are physically located in the Mining Lease of Newmont Ghana Gold Limited within the current operational area of the Ahafo Mine Project or within the Mining Lease area under active exploration and community/traditional areas that have a significant amount of its traditional land covered by the Mining Lease of Newmont Ghana Gold Limited within the current operational area of the Ahafo Mine Project or within the area of the Mining Lease under active exploration."<sup>18</sup> The agreement lists the towns considered to be part of the local community at the time the agreement was entered into, and also provides for annual review of the composition of the local community.<sup>19</sup>

Other agreements take a broader approach to defining the communities who participate in the negotiation process. The Diavik Diamonds Project's Socio-Economic Monitoring Agreement broadly defines the relevant communities as including Canada's Aboriginal communities in specific regions proximate to the project. In this agreement, Aboriginal authorities for these regions may exercise an option to become signatories to the agreement, and once signatories, may also exercise an option to become parties to the agreement.<sup>20</sup>

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17 Memorandum of Agreement Relating to the Hidden Valley Gold Project between the Independent State of Papua New Guinea and The Morobe Provincial Government; Morobe Consolidated Goldfields Limited; Nakuwi Association Inc.; the Wau Rural Local Level Government; The Watut Rural Local Level Government; and Wau Bulolo Urban Local Level Government, Part. A (May 5, 2005) <http://ccsi.columbia.edu/files/2015/01/PNG-Local-Governments-Hidden-Valley-Gold-Project-2005-Agreement.pdf>

18 Ahafo Social Responsibility Agreement between the Ahafo Mine Local Community and Newmont Ghana Gold Limited (2008), Schedule 1, Clause 1, <http://ccsi.columbia.edu/files/2015/01/Ghana-Ahafo-Mine-Local-Community-Newmont-Ghana-Gold-Ltd-2008-Social-Responsibility-Agreement.pdf>

19 *Ibid.*, Schedule 1, Clause 2.

20 Diavik Diamonds Project, Socio-Economic Monitoring Agreement between Diavik Diamond Mines Inc., the Government of the Northwest Territories, and Aboriginal signatories and parties (October 2, 1999), Art. 1.3.1, <http://ccsi.columbia.edu/files/2015/01/Canada-Northwest-Territories-and-Aboriginal-Peoples-Diavik-Diamond-Mines-1999-Agreement.pdf>.

Companies can also conduct anthropological and demographic research, such as ethnographies and social mapping, to better understand local groups and cultures as part of determining who should be a party to a community development agreement. Such research can help ensure the inclusion of groups or individuals who may not be evident through ordinary community consultation processes.<sup>21</sup> This can be especially important when dealing with land traditionally occupied by indigenous peoples or other customary communities, who may conceive of their community based on broad family relationships and shared culture and history, rather than geographical location or legal rights to the land. Some community members may not be located on or near the land in question at the time a company arrives, but may still have strong cultural ties and legal entitlements to the land, and may thus stand to be adversely impacted by the project activities.

The Argyle Diamond Mine Agreement describes its extensive pre-agreement consultation and research efforts, including an ethnography to identify the traditional owners of the lease area. The terms of the ethnography were set out in a memorandum of understanding (a precursor agreement) between the company and the Kimberly Land Council (the region's peak indigenous body, and the only recognised representative body for the region under federal law) and provided that the ethnography was to be conducted by the Kimberly Land Council and peer-reviewed by a consultant appointed by the company.<sup>22</sup> Despite having a long history of mining operations in the area and having already entered into numerous agreements with different traditional owners and their families, Argyle was focused on ensuring that all traditional owners – not just those Argyle had dealt with previously – be identified and consulted. Research to identify relevant community groups does not need to be completed prior to the initial contact with what is thought to be the community or its representatives. Rather, the goal is for all relevant interests to be represented when the negotiations begin, and for all relevant persons to be consulted prior to the finalisation of the CDA.<sup>23</sup>

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21 Joint Working Group on Indigenous Land Settlements, "Guidelines for best practice, flexible and sustainable agreement making", (August, 2009), p. 8.

22 Argyle Diamond Mine Participation Agreement, Indigenous Land Use Agreement, 2005, Schedule 1, ILUA, p. 66 <http://ccsi.columbia.edu/files/2015/01/Australia-Native-Title-Holders-Argyle-2005-Agreement.pdf>

23 Ciaran O'Fairchaellaigh, "Negotiating Major Project Agreements: The 'Cape York Model,'" AIATSIS Research Discussion Paper 11 (2000).

Since the organisational structures of communities may not co-relate with who has and who does not have a legal interest in the land, it may be necessary to consult beyond simply those who have a legal interest in the land.<sup>24</sup> Companies who carry out sufficient research on the cultural and structural features of the impacted persons and groups will be best placed to avoid or minimise, where possible, intra-community conflict over the terms and benefits contained in the final agreement.

Finally, as well as determining which communities will be involved, it is essential that extractive companies also carry out sufficient research and consultations to determine who will participate in the negotiation process on behalf of those communities. Companies should aim to facilitate an inclusive process, through which all relevant interests are represented. The process should also function in a way that demonstrates respect for local culture and decision-making processes.<sup>25</sup> Leading companies also seek to ensure that the members of the community participating in negotiations have the backing of the community, and regularly seek input from community members.<sup>26</sup> Potentially marginalised groups, such as women or children should also be adequately represented.<sup>27</sup> This is often a challenging task, but can be assisted by focusing on ensuring that the process has integrity and is based on democratic principles.

The Papua New Guinea LNG Project Umbrella Benefits Sharing Agreement sets out how community representatives were appointed to negotiate with the company and ultimately provide the community's consent. It describes a process whereby representatives of landowners within the mining licence areas attended pre-negotiation meetings, held over a three-to-four-week period, and represented their interests. The representatives were selected by the landowners in separate meetings. Quotas were used to ensure that leaders were selected from all clans identified during the company's social mapping and landowner identification studies, and that there was at least one-woman representative

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24 O'Fairchaellaigh, 2000, *op. cit.*; Kunanayagam and Tomlinson, 2011, *op. cit.*; Centre for Social Responsibility in Mining, "Agreement-making with Indigenous Groups: Oil & Gas Development, Australia," 2012.

25 International Council on Mining & Metals, 2010, *op. cit.*, pp. 17, 20.

26 MiningFacts.org, What are Impact and Benefit Agreements? available at <http://www.miningfacts.org/Communities/What-are-Impact-and-Benefit-Agreements-%28IBAs%29/>.

27 See, eg, PNG LNG Project Umbrella Benefits Sharing Agreement, Art. 5.2(a) (iii), <http://ccsi.columbia.edu/files/2015/01/PNG-Landowners-LNG-Project-Companies-2008-agreement.pdf>

from each licence area. It should be noted that informed consent processes often take far longer than the time allowed for in this agreement.<sup>28</sup>

Ensuring appropriate representation of different interests is also important where multiple groups occupy the project area. There may be internal conflicts within the broader community, often as a consequence of previous unequal treatment by government or other entities, which may require a more nuanced consultation process and, potentially, multiple agreements.

#### **4.2 Develop a Precursor Agreement and Provide Appropriate Support to Allow the Community to Prepare for Negotiations**

A fundamental principle of negotiation is to ensure a level playing field.<sup>29</sup> This principle should underpin the entire agreement-making process.<sup>30</sup> Creating a precursor agreement, such as a memorandum of understanding, is increasingly recognised as an essential starting point for the CDA-making process.<sup>31</sup> Its purpose is to establish the “rules of the game” for the subsequent negotiation process that can serve as a reference point for future negotiations. The precursor agreement should:

1. Where needed, set out the process for identifying the parties to the future CDA
2. Set out the parties’ goals for the project and each negotiation stage
3. Identify the negotiators for both sides
4. Specify protocols and methods of communication between the company and the community
5. Establish an agreed-upon time frame for the negotiations
6. Outline what will be required prior to, and in addition to,

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28 Papua New Guinea LNG Project Umbrella Benefits Sharing Agreement, Art. 5, <http://ccsi.columbia.edu/files/2015/01/PNG-Landowners-LNG-Project-Companies-2008-agreement.pdf>

29 Centre for Social Responsibility in Mining, “Agreement-making with Indigenous Groups: Oil & Gas Development, Australia,” 2012, *op. cit.*, p. 58, Centre for Social Responsibility in Mining, “World Bank Extractive Industries Sourcebook: Good Practice Notes,” 2012, *op. cit.*, p. 31.

30 International Council on Mining & Metals, 2010, *op. cit.*, p. 58; Kunanayagam and Tomlinson, 2011, *op. cit.*

31 O’Faircheallaigh, 2000, *op. cit.*; Gibson and O’Faircheallaigh, 2010, *op. cit.*, p. 78; Ramanie Kunanayagam & Kathryn Tomlinson, “Indigenous Peoples and Extractive Projects: Success Factors in Compensation and Benefit Sharing Agreements,” 9(4) *Oil, Gas & Energy Law Intelligence* (2011).

negotiations (for example, capacity-building, funding arrangements, impact studies)

7. Establish expectations and a shared understanding of the meaning of “consultation”.<sup>32</sup>
8. Articulate how the negotiation process itself will be funded.<sup>33</sup>

There will often be several precursor agreements associated with a single project to ensure that the CDA negotiation process is fair and effective. This approach is illustrated by the Argyle Diamond Mine Agreement,<sup>34</sup> whose pre-negotiation stage lasted several years. Documents attached to this agreement include numerous precursor agreements and the various consultation and communication tools used during the agreement-making stage. In addition to environmental impact assessments, which were required by law, the company, community and other stakeholders came together in numerous meetings, using a variety of communication tools, including posters, videos and workshops to ensure that all participants understood what was being discussed and decided. The company also consulted with the local community members and representatives regarding specific issues, such as water resources and land rehabilitation.

There are a number of advantages to beginning the process with one or more pre-negotiation agreements. Such agreements allow the parties to address past grievances and enable the company to demonstrate its commitment to engaging with the community. They also constitute a formalisation of the relationship between the parties, to ensure all parties feel that the agreed process is fair and equitable.<sup>35</sup> One of the essential features of a pre-negotiation framework is identifying whether the mining company will contribute “participatory funding.”<sup>36</sup> Participatory funding is the money and other resources necessary to ensure the community’s effective participation in the negotiation process. For example, the community may need to hire advisers and legal representatives, or engage in negotiation training or other capacity-

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32 InterGroup Consultants, 2008, *op. cit.*, pp. 19, 24.

33 For a more comprehensive list of topics usually included see Gibson and O’Faircheallaigh, 2010, *op. cit.*, p. 79.

34 Argyle Diamond Mine Participation Agreement, Indigenous Land Use Agreement, 2005, Schedule 1, ILUA, <http://ccsi.columbia.edu/files/2015/01/Australia-Native-Title-Holders-Argyle-2005-Agreement.pdf>

35 International Council on Mining & Metals, 2010, *op. cit.*, p. 55; Kunanayagam and Tomlinson, 2011, *op. cit.*

36 InterGroup Consultants, 2008, *op. cit.*, p. 25.

and institution-building programmes designed to ensure community agency and ownership of the process.<sup>37</sup> This is particularly important when engaging with indigenous or customary communities, where there may be a higher likelihood of linguistic and cultural barriers between the company and the community.

Leading practices also include determining the scope and extent of participatory funding needed during the course of negotiations. Determining the community participation budget as early as possible will help to avoid any funding-related limitations on what can be accomplished between the parties. There may be a role for government to provide funding, and multilateral institutions and non-governmental organisations may be willing to contribute funds as well. Due to the high cost of capacity building and the negotiation process, companies will often need to provide at least some of the funds.<sup>38</sup>

In addition to capacity-building programmes and external advisers or experts to assist the community in the negotiation process, participatory funding can also contribute to the establishment of decision-making processes or institutions, if none exists, to ensure that every member of the community is or can be involved in the decisions made during negotiations and throughout the life of the project. Of the 22 agreements reviewed, few contain reference to or details of precursor agreements made during negotiations. The Argyle Diamond Mine Agreement details each of the precursor agreements made between the parties and annexes in full the Memorandum of Understanding that sets out negotiating principles and stages, the substantive issues for negotiation and the financial assistance Argyle would provide for the negotiation process.<sup>39</sup> According to the MOU, Argyle would give the Kimberley Land Council (KLC) an advance payment which would then be followed by payments to meet KLC's expenses during negotiations.<sup>40</sup>

KLC also agreed to seek government funding, with Argyle making up any difference in funding.<sup>41</sup> The agreement also contained a schedule of the amounts paid to KLC for the benefit of the traditional owners during the negotiation

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37 InterGroup Consultants, 2008, *op. cit.*, pp. 17, 25; Kunanayagam and Tomlinson, 2011, *op. cit.*

38 O'Fairchaellaigh, 2000, *op. cit.*; Native Title Payments Working Group, "Native Title payments working group report", p. 3.

39 Argyle Diamond Mine Participation Agreement, Indigenous Land Use Agreement, 2005, Schedule 1, <http://ccsi.columbia.edu/files/2015/01/Australia-Native-Title-Holders-Argyle-2005-Agreement.pdf>.

40 *Ibid.*, Memorandum of Understanding, Art. 4.

41 *Ibid.*, Art. 4.4.

process, which totalled AUD\$2million.<sup>42</sup> In contrast, the Raglan Agreement, which concerned a project in Quebec, Canada, provided funding for the negotiation process on a reimbursement basis only, rather than an initial grant of money.<sup>43</sup>

It is also appropriate to determine how representatives from the local and/or national government will be involved. Governments can facilitate negotiations between the company and community, or attend negotiations as an independent third party.<sup>44</sup> In other cases, it may be appropriate to conduct negotiations without government involvement.

Companies demonstrating leading practices also recognise that cultural and linguistic differences can present barriers to the agreement-making process. Companies increasingly provide cultural awareness training to their staff to aid the communication process.<sup>45</sup> Other effective practices for companies include having employees learn the local language, collaboratively developing definitions of technical terms for which local languages may not have equivalents, and developing other approaches to engagement and negotiations that are not overly legal or technical.<sup>46</sup> Encouraging greater understanding of each party's legal and cultural traditions can also be achieved through orientation programmes and meetings.

### **4.3 Facilitate the Community's Articulation of a Negotiating Position**

Through a negotiating position, a community can express how it wishes be involved in and benefit from the project.<sup>47</sup> Negotiating positions can act as a starting point for negotiations, providing the mining company with a clear

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42 Argyle Diamond Mine Participation Agreement, Indigenous Land Use Agreement, 2005, Schedule 1, Art. 7.

43 ICMM, *op. cit.*, 2010, p. 65.

44 MiningFacts.org, "Case Study: Diavik Diamond Mine," in What Are Impact and Benefit Agreements? available at <http://www.miningfacts.org/Communities/What-are-Impact-and-Benefit-Agreements-%28IBAs%29/>.

45 International Council on Mining & Metals (2010), *op. cit.*, p. 33 (describing cultural awareness training carried out by Cerrejon Coal in the Guajira region of Colombia, where approximately 40% of the 656,000 inhabitants are Wayuu).

46 Kunanayagam and Tomlinson, 2011, *op. cit.*; International Council on Mining & Metals, 2010, *op. cit.*, pp. 20, 29, 32; Centre for Social Responsibility in Mining, "Agreement-making with Indigenous Groups: Oil & Gas Development, Australia," 2012, *op. cit.*, p. 54.

47 O'Fairchaellaigh, 2000, *op. cit.*, p. 14.



articulation of the community's priorities and interests.<sup>48</sup> They are generally articulated in non-technical or legal terms and act as a general expression of priorities, rather than a "bottom line" or binding legal offer from the community. They can also act as a vehicle for community members to collectively reflect upon priorities before negotiations begin, and help to draw attention amongst community members to the negotiation process.<sup>49</sup> A negotiating position is generally discussed and approved internally by the community before being presented to the company.

A negotiating position can also serve as a point of reference and comparison for the community. The community can assess proposals made by the company or by specific community members against the negotiating position to determine how such proposals do and do not meet their priorities.<sup>50</sup> This can also assist the company in obtaining the community's free, prior, and informed consent on decisions that are put to it. The scope and depth of a negotiating position will vary from community to community, depending on the project's likely impacts.

While the negotiating position is developed by the community, companies can assist this process by allowing sufficient time and privacy for the community to internally determine its position. Company contributions for participatory funding can also assist communities to conduct sufficient outreach, research and internal coordination, enabling them to arrive at an agreed upon negotiating position.

Developing a negotiating position is an essential stage in the "Cape York Model" for negotiating major project agreements with indigenous peoples in Cape York, Australia. Under this model, the negotiating position is drafted by a land council representing the indigenous people of a specific region, and is based on the priorities and issues identified in impact assessments and any other available preliminary research.<sup>51</sup> Those representing the community are chosen around the time that the negotiating position is developed. The representatives are then tasked with pursuing the negotiating position, and any changes to the position or final decisions regarding the agreement must be referred back to community members to decide.<sup>52</sup> While the Cape York Model articulates the development of a negotiating position as a distinct

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48 Indigenous Support Services, *op. cit.*, p. 46.

49 O'Fairchaellaigh, 2000, *op. cit.*, p. 14.

50 O'Fairchaellaigh, 2000, *op. cit.*, p. 14.

51 O'Fairchaellaigh, 2000, *op. cit.*, p. 14.

52 O'Fairchaellaigh, 2000, *op. cit.*, p. 14.

stage in the agreement-making process, it may be incorporated into other stages of the negotiation process, depending on how the community wishes to proceed.

#### **4.4 Ensure Community Participation and Informed Decision-Making during Negotiations and Other Processes**

Leading companies incorporate a participatory approach into all aspects of agreement making,<sup>53</sup> and planning for the project. One common way in which community involvement in the preparatory phases of the project occurs is through domestic law requirements for the carrying out of social and environmental impact assessments.<sup>54</sup> When carried out in a consultative manner, such processes provide a vehicle for communities that stand to be affected by the project to share their perspectives. For example, where indigenous peoples with long-standing ties to the land are involved in an impact assessment, they can contribute their traditional knowledge and understanding of the land and nearby ecosystems by identifying areas that are used as the basis for local livelihoods, as well as are culturally significant or ecologically sensitive.

Community participation and informed decision-making can also be facilitated by ensuring that sufficient information is provided to communities during the pre-negotiation stage. Leading industry practices include providing information about the project in a timely and culturally appropriate manner, and in a format that is accessible by community members.<sup>55</sup> Ensuring community participation and informed decision-making will not only benefit community members; there is also increasing evidence that it can improve a project's financial performance.

Recent studies have drawn a direct link between company-community conflicts arising from unmitigated environmental and social risks, and significant business costs for the mining company.<sup>56</sup> One study noted that in

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53 World Bank, *Mining Community Development Agreements: Source Book* (2012), 14.

54 With respect to indigenous peoples, this involvement is enshrined in the United Nations Declaration on the Rights of Indigenous Peoples, Articles 18 and 19.

55 See, e.g., International Council on Mining & Metals, "Good Practice Guide: Indigenous Peoples and Mining," (2010), p. 15, para. 3.

56 Daniel M. Franks, Rachel Davis, Anthony J. Bebbington, Saleem H. Ali, Deanna Kemp, and Martin Scurrah, "Conflict translates environmental and social risk into business costs," *PNAS* Vol. 111, No. 21 (27 May 2014); The Munden Project, "Communities as Counterparties: Preliminary Review of Concessions and Conflict in Emerging and Frontier Market Concessions," 30 October 2015.

addition to a legislative and policy environment that encourages impact assessment and management, the increased involvement of communities in dialogue and decision-making during the early stages of a project is an important means of managing environmental and social risks.<sup>57</sup> In order to facilitate this dialogue and direct participation, companies must ensure that the local community is represented and involved in all of the pre-agreement stages, so that the community can shape and consent to decisions made as part of that process.

Many companies regard the prospect of allowing community participation in decision-making for the project itself, rather than only the CDA, with great caution. This is because meaningful community participation in decision-making means that the company has less control over decisions that can impact on the project's timetable and budget.<sup>58</sup> On the other hand, allowing for greater community engagement and control may avert conflicts between the company and the community, whose costs can be greater than those associated with any changes to spending or work timetables that communities may pursue.<sup>59</sup>

The stage at which the community is engaged can also have a substantial impact on the financial costs to the company and the sustainability of the project. If companies choose not to address risks until a conflict or complaint arises, then their options for properly addressing the grievance become limited.<sup>60</sup> In addition, while responding to grievances can have an immediate mitigating effect in the short term, it will not necessarily contribute to the long-term stability of the project and the company-community relationship.

#### **4.5 Ensure that Benefits Shared Extend beyond Financial Compensation**

It is now generally recognised that monetary compensation, while often legally required, will seldom ensure that affected communities' lives and livelihoods can be properly restored.<sup>61</sup> One ex-World Bank staffer, for instance, has

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57 Franks et al, 2014, *op. cit.*, p. 7580.

58 InterGroup Consultants, 2008, *op. cit.*, p. 17.

59 Franks, 2014, *op. cit.*, p. 3.

60 For an overview of government- and company-established grievance mechanisms, see "Grievance Mechanisms", *Negotiation Support Portal*, <http://negotiationsupport.org/roadmap/grievance-mechanisms-0>

61 Centre for Social Responsibility in Mining, "World Bank Extractive Industries Sourcebook: Good Practice Notes," 2012, *op. cit.*, p. 5; International Council on Mining & Metals, 2010, *op. cit.*, p. 67; Native Title Payments Working Group Report (2009), p. 7; Kunanayagam and Tomlinson, 2011, *op. cit.*

lamented that the limits of compensation as a remedy “reinforce the main poverty risks inherent in forced displacements.”<sup>62</sup> This is due to the many ruptures to economic, social, cultural, and other networks that occur when a community is forced off its land, which are often unquantifiable. The more effective CDAs share benefits flowing from the resource development to promote broader long-term and ongoing economic and social participation in the project.<sup>63</sup> Such benefits include financial contributions, such as a royalty stream linked to production, and non-financial benefits, such as local employment opportunities and commitments to source goods and services from local providers. Monetary compensation can still be effectively employed to acknowledge those project impacts that cannot be adequately remedied.

One of the goals of benefit sharing is to strengthen a community’s capacity for self-determined development by improving its physical, economic and human capital.<sup>64</sup> This includes efforts to avoid communities becoming overly dependent on income streams from the project, which can leave them vulnerable if the project fails or becomes less productive. This is another reason for designing CDAs to provide a combination of financial and non-financial benefits; such a combination can help to link community well-being to the sustainability of the project, while also providing transferable skills, such as business and management skills, that equip the community to continue its economic development after the mine project closes.

Financial benefits provided to communities should be predictable, stable, comprehensible, and sufficiently adapted to the project and the community. Additionally, they should be founded on recognition of and respect for the community’s aspirations. Revenue sharing between different levels of government and local communities has also been increasingly employed in recent years.<sup>65</sup> This approach seeks to address the fact that while federal governments usually receive most of the revenue from a project, it is the local branch of government, and the community itself, which encounters the majority of social and economic impacts.

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62 Michael M. Cernea, “For a New Economics of Resettlement: A Sociological Critique of the Compensation Principle,” 175 *International Social Science Journal* (2003) pp. 5, 17.

63 Centre for Social Responsibility in Mining, “World Bank Extractive Industries Sourcebook: Good Practice Notes,” 2012, *op. cit.*, p. 5; International Council on Mining & Metals, 2010, *op. cit.*, p. 67; Native Title Payments Working Group Report (2009), p. 7; Kunanayagam and Tomlinson, 2011, *op. cit.*

64 International Council on Mining & Metals, 2010, *op. cit.*, p. 81.

65 InterGroup Consultants, 2008, *op. cit.*, p. 81.

Revenue sharing can take various forms.<sup>66</sup> Communities can receive *fixed payments*, which are predictable and more easily understood,<sup>67</sup> but which will not increase if the project's profitability does. They can also receive royalties based on the *volume of outputs or the volume of production*, which are not directly vulnerable to commodity price drops, but which also will not deliver additional benefits when the project becomes more profitable. Approaches which maximise the potential gain for communities, but which also contain the most risk and dependence on market trends, include revenue streams based on company profits or the allocation to the community of an equity share in the project company. CDAs can also set out a combination of different types of revenue streams. For instance, the Newmont Ahafo Mine Development Foundation Agreement contains multiple types of financial benefit sharing. The agreement requires the company to pay to a community foundation US\$1 for every ounce of gold from the mine sold, as well as 1 per cent of the company's net pre-tax income, and of any gains made in selling assets that total US\$100,000 or more.<sup>68</sup>

Non-financial benefit sharing encompasses a wider spectrum of benefits, including employment, training, business development, and infrastructure and/or support services. The specific benefits that are included in any agreement will depend on the community's context and aspirations, as well as the project itself.<sup>69</sup> When implemented appropriately, each type of benefit operates to improve the opportunities and earning potential for members of the community, potentially contributing to the sustainability of the CDA itself.<sup>70</sup>

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66 For a comprehensive summary of the many different forms that financial benefits can take, see Gibson and O'Faircheallaigh, 2010, *op. cit.* For a more detailed discussion see, Centre for Social Responsibility in Mining, "Agreement-making with Indigenous Groups: Oil & Gas Development, Australia," 2012, *op. cit.*, p. 81. See, e.g., Agreement between Newmont Ahafo Development Foundation and Newmont Ghana Gold Limited, 2008, Clause 11.1 <http://ccsi.columbia.edu/files/2015/01/Ghana-Ahafo-Mine-Local-Community-Newmont-Ghana-Gold-Ltd-2008-Development-Foundation-Agreement.pdf>

67 Centre for Social Responsibility in Mining, "Agreement-making with Indigenous Groups: Oil & Gas Development, Australia," 2012, *op. cit.*, p. 79.

68 Agreement between Newmont Ahafo Development Foundation and Newmont Ghana Gold Limited, Art. 11.1, <http://ccsi.columbia.edu/files/2015/01/Ghana-Ahafo-Mine-Local-Community-Newmont-Ghana-Gold-Ltd-2008-Development-Foundation-Agreement.pdf>.

69 Centre for Social Responsibility in Mining, "Agreement-making with Indigenous Groups: Oil & Gas Development, Australia," 2012, *op. cit.*, p. 75.

70 International Council on Mining & Metals, 2010, *op. cit.*, p. 81; Centre for Social Responsibility in Mining, "Agreement-making with Indigenous Groups: Oil & Gas Development, Australia," 2012, *op. cit.*, pp. 75, 92.

Each of these benefits is discussed only at a high level in this article, given the complexities and variation that different contexts can introduce.

#### 4.5.1 *Employment*

Employment opportunities are regarded as one of the most desirable benefits that CDAs can provide communities. One study has noted, however, that solely providing training and preferential access to job opportunities will generally be insufficient to meet the needs of the local community.<sup>71</sup> Instead, leading practices implement employment opportunities alongside meaningful community involvement in the project's development and the design of mitigation measures and remedies for adverse impacts, alongside other project benefits discussed in this section.<sup>72</sup> In low-income communities, common barriers to fulfilling a company's employment goals include low education levels and a lack of employment experience; companies will need to invest in skills development and training initiatives amongst community members to overcome such challenges. Studies have also shown that CDAs which involve specific or rolling targets for job creation and employment training help ensure that the company is committed to hiring locally and carrying out trainings on an ongoing basis.<sup>73</sup>

One publicly available agreement that provides detailed provisions regarding benefit-sharing and community participation is the Diavik Diamonds Project Socio-Economic Monitoring Agreement.<sup>74</sup> While this particular agreement does not provide any formal ownership of equity in the project, it does provide employment and training benefits that increase the stake and role of members of aboriginal communities in the mine's operation. The agreement places a strong focus on recruiting, training and retaining its employees, including prescribing a workforce quota for members of local aboriginal communities using a cumulative percentage goal at various stages of the project.<sup>75</sup> The company retains considerable discretion over its employment practices, however, and there is no penalty that applies if it does

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71 InterGroup Consultants, 2008, *op. cit.*, Executive Summary.

72 InterGroup Consultants, 2008, *op. cit.*, Executive Summary.

73 Gibson and O'Faircheallaigh, 2010, *op. cit.*, p. 145.

74 The authors understand that this agreement is in the process of being disbanded.

75 Diavik Diamonds Project, Socio-Economic Monitoring Agreement between Diavik Diamond Mines Inc., the Government of the Northwest Territories, and Aboriginal signatories and parties (2 October 1999), Art. 3.2, Appendix A, <http://ccsl.columbia.edu/files/2015/01/Canada-Northwest-Territories-and-Aboriginal-Peoples-Diavik-Diamond-Mines-1999-Agreement.pdf>.

not meet its recruitment goals. The agreement also actively promotes and encourages careers in diamond mining for the youth of the region where the mine is located, although again this is left at the discretion of the company, and no details are provided in the agreement.

In addition, the agreement establishes a number of training programmes aimed at increasing access to jobs for members of aboriginal communities and equipping them with transferable and project-related skills, such as technical, technological, supervisory and managerial roles.<sup>76</sup> To help retain employees, the company has created a rotation work schedule (four weeks on, two weeks off) that is compatible with the schedules of aboriginal employees practicing a traditional lifestyle. It also funds community research projects addressing barriers to successful employment.

An example of a CDA that emphasises the importance of cultural sensitivity in employment as a key means of retaining aboriginal employees is the Raglan Agreement. That agreement seeks to encourage social harmony within the workforce by promoting inter-cultural understanding through cross-cultural training for all supervisors and managers, inviting local artists to perform outside of working hours at the project site, organising sports events between employees and residents, and ensuring access to traditional food sources.<sup>77</sup> The Argyle Diamond Mine Participation Agreement's Management Plan Agreement also demonstrates how CDAs can facilitate the company to help local businesses develop. In it the company commits to helping traditional owners establish businesses and develop good management practices, and where appropriate, an Argyle employee would help the business on an ongoing basis for three years.

Even though companies promised to create job opportunities, the review of CDAs for this article did not reveal a practice of establishing procedures or penalties for when a company does not meet the targets or other employment goals set out in CDAs. Furthermore, agreements tend to contain clauses that leave considerable discretion in the company's hiring methods or weaken its hiring obligations by limiting the circumstances under which a company must employ a member of the local community over another non-local candidate. One potential reason for the reluctance to be tied to strict obligations is that a company cannot be sure that it will meet the targets, which depend

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76 *Ibid.*, Art. 3.3, Appendix B.

77 Raglan Agreement between Makivik Corporation and Others and Société Minière Raglan du Québec Ltée (1995), Art. 5.5, Draft available at: <http://pubs.aina.ucalgary.ca/makivik/ci236.pdf>

on the alignment of several variables, including availability of willing and qualified individuals and the operator's ability to meet the intended construction and development timetable. Nonetheless, in order to ensure that CDAs lead to more tangible employment benefits for local communities, companies should agree to clear and enforceable commitments to carry out programmes for training and recruitment of candidates from the local community.

While many companies have found it difficult to retain local community employees, some practices have led to increased employee retention. These include providing clear, accessible career advancement pathways for employees, as well as initiating mentoring programmes for less experienced employees, establishing initiatives to eliminate workplace racism and bias, and offering pre-employment and on-the-job skills training programmes. Some analysts also emphasise the importance of increasing the number of local community members in management positions.<sup>78</sup>

#### 4.5.2 Training

Training, which is closely linked to employment, has traditionally focused on ensuring that workers learn the skills necessary for their day-to-day employment on the project. Companies seeking to foster more enduring community development could increase efforts to provide programmes that meet other needs of the local community, providing transferable skills and training for occupations that serve both the project and the community, as well as those that can be useful in promoting sustainable development beyond the life of the mine.<sup>79</sup>

#### 4.5.3 Business Development

In relation to business development or "supply chain procurement", the review revealed that companies seem to view the most effective way of utilising and supporting local businesses is to form joint ventures with existing and new local businesses to provide goods or services to the project.<sup>80</sup> Business development trainings for members of local communities are also often carried out. For instance, the Diavik Socio-Economic Monitoring Agreement sets out a range of business capacity-building commitments "to assist and enable

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78 InterGroup Consultants, 2008, *op. cit.*, p. 60.

79 InterGroup Consultants, 2008, *op. cit.*, p. 64.

80 Centre for Social Responsibility in Mining, "Agreement-making with Indigenous Groups: Oil & Gas Development, Australia," 2012, *op. cit.*, p. 92; InterGroup Consultants, 2008, *op. cit.*, p. 69.



Northern Businesses to take advantage of Project related business opportunities.”<sup>81</sup>

#### 4.5.4 Infrastructure

Company and community efforts to ensure greater community participation have extended to the realm of infrastructure and service provision. This is notable given that communities were previously not generally regarded as potential owners or managers of key infrastructure and other services, particularly in developing countries and in rural or remote regions. Leading practices include seeking the advice and involvement of local community members to ensure that services and infrastructure meet the community’s needs.<sup>82</sup> In some cases, CDAs may outline where infrastructure built for a project may be shared, utilised, as well as managed, maintained and even owned, by communities. CDAs may also set up financial flows to community organisations which may then be able to fund specific development or infrastructure projects. National and local governments should generally be involved to ensure that the new infrastructure projects align with the national and local priorities for development of infrastructure.

It is also essential that companies consider the sustainability of infrastructure and service provision for after the project has concluded. A useful approach can be to strengthen management bodies and establish partnerships with existing government institutions in order to best prepare for mine closure.

The Development Foundation Agreement between Newmont Ahafo Development Foundation and Newmont Ghana Gold Ltd is an example of an attempt to foster greater community participation and public ownership of the project and associated benefits. The agreement provided that infrastructure projects completed were jointly owned by the community’ and the District Assembly, and allocated to them the responsibility for their maintenance and management. Where personnel or other resources would be required, the District Assembly agreed to liaise with the local government agency.<sup>83</sup> The

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81 Diavik Diamonds Project, Socio-Economic Monitoring Agreement between Diavik Diamond Mines Inc., the Government of the Northwest Territories, and Aboriginal signatories and parties (October 2, 1999), Appendix C, <http://ccsi.columbia.edu/files/2015/01/Canada-Northwest-Territories-and-Aboriginal-Peoples-Diavik-Diamond-Mines-1999-Agreement.pdf>.

82 International Council on Mining & Metals, 2010, *op. cit.*, p. 86.

83 Ahafo Development Foundation Agreement between the Ahafo Mine Local Community and Newmont Ghana Gold Limited (2008), Art. 9.4, <http://ccsi.columbia.edu/files/2015/01/Ghana-Ahafo-Mine-Local-Community-Newmont-Ghana-Gold-Ltd-2008-Development-Foundation-Agreement.pdf>.

agreement does not specify other means of obtaining financial or other resources if the government agency is unable to assist. It also does not require the company to assist in the development of a maintenance and management plan for the project. Instead, the process under which these projects would be developed includes the involvement of the newly created Ahafo Development Foundation, which is run by a board of trustees and composed of company and community representatives.

The Foundation is established under a related social responsibility agreement, and its role is to consider proposals from District Assemblies for sustainable development projects and fund those it approves. The agreement set out that the Foundation would receive revenue from the project, which could be applied towards programmes for developing infrastructure and delivering other services.<sup>84</sup> In this example, the Foundation acted as an intermediary body, limiting Newmont's financial and managerial responsibility over infrastructure and service provision.

A different arrangement was established by the Memorandum of Agreement relating to the Development of the Porgera Gold Mine Project in Papua New Guinea, which required the joint venture company to ensure the supply of electricity to individual houses in existing *and* future resettled residential settlements of families whose resettlement was linked to the grant of mining concessions.<sup>85</sup> No end date was specified for this obligation, although the electricity can be subject to the usual charges by the electricity supplier.<sup>86</sup>

#### **4.6 Ensure Strong, Accountable Governance Arrangements to Facilitate Effective Implementation, Monitoring, Review and Potential Adjustment of the Agreement**

##### **4.6.1 Governance Mechanisms**

In order to secure the effective functioning of the CDA, leading practice agreements include governance arrangements for managing the ongoing

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84 *Ibid.*, Art. 11.1.

85 Memorandum of Agreement relating to the Development of the Porgera Gold Mine Project between the Independent State of Papua New Guinea and Porgera Landowners, Art. 18, <http://ccsi.columbia.edu/files/2015/01/PNG-Porgera-National-Government-1989-Agreement.pdf>

86 The Joint Venture was also not a party to the agreement, although it is unclear whether an investment contract between Papua New Guinea and the joint venture company impacts on the enforceability of this obligation.

relationship between the local community and the company.<sup>87</sup> These provisions typically cover aspects of the CDA such as liaison and management committees, financial management structures, dispute resolution processes, and monitoring and review processes. Designing and establishing governance arrangements depend heavily on the local context, including the specific community's existing organisational and deliberative structures and its capacity for following and enforcing governance procedures.<sup>88</sup>

The company should also provide capacity building for the community in relation to the ongoing monitoring and implementation of the CDA, and participation in any relevant structures. One example of a governance structure is a liaison committee that comprises company and community representatives who are charged with managing company-community relations, as was done in the Regional Indigenous Land Use Agreement for Small Scale Mining in Victoria, Australia. In that agreement, the indigenous community signatories to the agreement appointed the Dja Dja Wurrung Clans Aboriginal Corporation (a body recognised under Australia's Native Title Act as being legally capable of representing the interests of indigenous peoples) to act as a communication liaison between the community and the miners.<sup>89</sup> The agreement did not provide further detail on the frequency of meetings or specific responsibilities and functions. Such structures will be most effective when clear rules are drawn regarding how disputes or grievances will be managed.

Structures that can be established can be charged with oversight and monitoring of the agreement. For instance, the Ahafo Ghana Gold Mine's agreement established an Agreement Forum that was granted oversight responsibility for the implementation of the agreement.<sup>90</sup> The agreement also established a Community Consultative Committee that would manage

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87 International Council on Mining & Metals, 2010, *op. cit.*, p. 69.

88 Centre for Social Responsibility in Mining, "Agreement-making with Indigenous Groups: Oil & Gas Development, Australia," 2012, *op. cit.*; Centre for Social Responsibility in Mining, "World Bank Extractive Industries Sourcebook: Good Practice Notes," 2012, *op. cit.*, p. 31; Kunanayagam and Tomlinson, 2011, *op. cit.*

89 Regional Indigenous Land Use Agreement for Small Scale Mining in Victoria, Australia between the Dja Dja Wurrung People and Prospectors & Miners' Association of Vicotira Incorporated, <http://ccsi.columbia.edu/files/2015/01/Australia-Dja-Dja-Wurrung-People-Prospectors-Miners-Association-of-Vic-2009-Agreement.pdf>

90 Ahafo Social Responsibility Agreement between the Ahafo Mine Local Community and Newmont Ghana Gold Limited (2008), Arts. 5-9, <http://ccsi.columbia.edu/files/2015/01/Ghana-Ahafo-Mine-Local-Community-Newmont-Ghana-Gold-Ltd-2008-Social-Responsibility-Agreement.pdf>

information and communication between the company, community and other stakeholders.<sup>91</sup>

Alongside building capacity and establishing governance structures in the community, is the issue of sharing decision-making power. In recent years, there has been a trend towards increasing the amount of decision-making responsibilities in local community hands, though the balance remains firmly in the company's favour. This has been reflected in CDAs that include, for example, an environmental committee constituted entirely by local community members whose function is to assess the environmental impact of the mine and make recommendations for action.<sup>92</sup> Partnerships, including with civil society organisations, are particularly useful where the community needs assistance in implementing the agreement and holding the company to its end of the bargain. Companies should also be willing to engage in collaborative capacity-building with community members and other stakeholders through adequately funded representative bodies.

#### 4.6.2 *Monitoring*

Leading practice agreements provide for ongoing monitoring and review of the agreement's implementation to ensure that the local community is appropriately involved, and has the best possible chance of maximising any benefits of the project. These procedures also further the goals of transparency and accountability, and help to ensure the local community obtains a degree of ownership and control over the project.

Available literature shows, however, that most agreements fall short in meeting expectations at the implementation stage.<sup>93</sup> Indeed, many of the CDAs reviewed for this article did not contain detailed provisions concerning implementation and monitoring. A number of strategies exist to ensure greater accountability in implementation. Implementation may be improved where companies partner with local civil society groups to ensure that CDA

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91 *Ibid.*, Arts. 18-19.

92 International Council on Mining & Metals, 2010, *op. cit.*, p. 69.

93 Centre for Social Responsibility in Mining, "World Bank Extractive Industries Sourcebook: Good Practice Notes," 2012, *op. cit.*, p. 31-34.

commitments are fulfilled.<sup>94</sup> Similarly, companies can strengthen the local and regional government's administrative and local delivery capacity, and help to develop a cooperative relationship with such actors to assist with service delivery under the CDA.

The Diavik Diamonds Agreement provides an example of a complex governance arrangement aimed at monitoring of an agreement; it created a Group Advisory Board whose role is to assist, coordinate, monitor, review and advise all parties in relation to the project across a broad range of issues, such as employment, training and business development. It is also responsible for ensuring that all parties fulfil their commitments under the agreement. The Board is composed of representatives of all parties to the Agreement (including Diavik Diamond Mines, the Northwest Territories Government and several Aboriginal signatories and parties listed in the agreement document), and is charged with monitoring the mine's progress, as well as its social and economic impacts.<sup>95</sup>

#### 4.6.3 Enforcement

Effective grievance mechanisms and strong enforcement mechanisms are key to strengthening the impetus on the company to implement the agreement effectively.<sup>96</sup> The most common approach among available Canadian and Australian agreements is to establish a dispute resolution framework that emphasises amicable resolution through dialogue and mediation before either party has a right to enforce the contract in court or at a tribunal. Some

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94 For example, the Participatory Environmental and Social Management Programme (PESMP) undertaken by Hunt Oil in the southern region of Peru was established by an independent NGO to provide an opportunity for communities to participate in monitoring the project's environmental and social performance. The PESMP involved community members, local authorities, civil society, government officers and international financial institutions: IPIECA, "Indigenous Peoples and the oil and gas industry: Context, issues and emerging good practice", (2012), pp. 32-5.

95 Diavik Diamonds Project, Socio-Economic Monitoring Agreement between Diavik Diamond Mines Inc., the Government of the Northwest Territories, and Aboriginal signatories and parties (October 2, 1999), Art. 2.1, <http://ccsi.columbia.edu/files/2015/01/Canada-Northwest-Territories-and-Aboriginal-Peoples-Diavik-Diamond-Mines-1999-Agreement.pdf>.

96 For a more in-depth discussion of grievance mechanisms in community engagement, see Mandelbaum and Loutit, "Extractive Industry Investments and Human Rights" in *Research Handbook on Human Rights and Investments* (Yannick Radi, ed., forthcoming).

agreements impose an obligation on the company to pay compensation for loss or damage caused by non-performance of a contractual obligation.<sup>97</sup> Where agreement clauses are vaguely worded, however, proving that particular obligations exist, or have been breached, may be difficult. Similar challenges in enforcement will occur for provisions leaving considerable discretion to the company – for example in the fulfilment of imprecisely worded employment targets.

Even where clauses are clearly worded, communities may struggle to enforce the agreement and obtain remedies for breaches if the country lacks a reliable and accessible legal system and the company is not interested in responding to the community's concerns or complying with its contractual obligations. One way to ensure that an agreement is enforceable is to tie the enforcement of the CDA to the company's investment agreement with the state, or other agreements by which the company is granted rights to carry out the project. This could be done by drafting the investor-state agreement so that certain breaches of the CDA by the company would be considered a material breach of the investor-state agreement, thus giving the state the option of terminating the agreement. The state would then have additional leverage when seeking to persuade the investor to comply with the CDA.

Alternatively, states can enact laws that deem conditions in a community-company agreement to be conditions of mining authorisations. For instance, the *Mineral Resources Act 1989* in the Australian state of Queensland requires negotiation and consultation with registered native title holders or claimants<sup>98</sup> for mining leases over Aboriginal reserve lands in certain circumstances.<sup>99</sup> Such negotiations may result in a negotiated agreement between the company, the native title holders or claimants and the state government, in which the native title holders consent to the granting of the proposed mining lease.<sup>100</sup> The relevant Minister, on behalf of the state government, can then consent to the conditions of that agreement being deemed to be conditions of the mining lease itself,<sup>101</sup> meaning that a breach of a condition between an affected native title holder or claimant can jeopardise the validity of the company's authorisation to carry out mining activities.

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97 This type of enforcement clause can be seen in the Greenlandic agreements reviewed: see <http://ccsi.columbia.edu/work/projects/greenland-2/>.

98 *Mineral Resources Act 1989* (Qld), s 655 describes which native title holders and claimants are covered.

99 *Mineral Resources Act 1989* (Qld), Schedule 1A, ss. 658, 659.

100 *Ibid.*

101 *Ibid.*, s. 276A.

#### 4.7 Plan for Mine Closure and Legacy Issues

Sustainable CDAs are judged not only by their success during the life of the project but also after mine closure. Two important goals of a CDA should be to ensure that the project's environmental effects are appropriately managed and remediated, and that closure does not abruptly halt the community's socio-economic development. Leading practice agreements start to plan for closure from the beginning of the project, and ensure that closure planning remains a central focus throughout the project. Some leading methods to plan for closure include the following.<sup>102</sup>

1. Make known the expected closure date, or the timetable for determining the likely closure date. This needs to be communicated with provisos regarding the fact that projects can be subject to temporary or permanent closure for unexpected reasons, such as the fall of commodity prices, natural disasters, and social unrest.
2. Actively engage the community on how the impact of closure can be addressed (see Box 10 for examples of how this was done in some of the agreements reviewed).
3. Assist the community to develop alternative local economies
4. If necessary, design and implement low-tech physical infrastructure, which the community and/or local government can maintain post-closure
5. Contribute to the building of community governance capacity for dealing with any mine legacy issues (see Leading Practice 6).

Although the importance of planning for closure is generally acknowledged, many of the agreements reviewed do not provide much detail on the issue of mine closure and environmental rehabilitation. The agreements reviewed often state that the parties agree to create a closure and rehabilitation taskforce and/or plan at some future time, but precise details and actions are usually not included. Agreements should include action plans for dealing with expected and unexpected closure at the outset and create a closure taskforce at the time of execution of the agreement in order to ensure that closure and rehabilitation are given the necessary attention throughout the life of the project.

Exceptions to this trend include the Tolukuma Gold Mining Project Agreement, which states clearly how the community will be engaged in relation

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102 International Council on Mining & Metals, 2010, *op. cit.*, p. 92.

to mine closure and rehabilitation. The agreement sets out that the Papua New Guinean national government will create a task force three years prior to the closure, and require that a Conceptual Mine Closure Plan be circulated for comment by key stakeholders to ensure rehabilitation of the project area and sustainability of the local communities.<sup>103</sup>

The Agreement between Newmont Ahafo Development Foundation and Newmont Ghana Gold Ltd also provides useful detail on mine closure. It provides that the company and the community will work together to identify and develop programmes for the closure and reclamation of the mine. The agreement includes a closure plan, to be administered by a mine closure panel, which is made up of stakeholders in the community and company. The company will also assist in capacity building and training for those members of the community who will participate in the closure and reclamation programmes.<sup>104</sup>

#### **4.8 CDAs Should Generally not be Confidential**

Consistent with the objectives of transparency, accountability and good governance, there is a growing recognition that confidentiality clauses in CDAs should be avoided, or be heavily qualified.<sup>105</sup> Confidentiality provisions can weaken the capacity and power of local communities by prohibiting them from communicating with the media and other stakeholders for advice, support and informational purposes, when needed.<sup>106</sup> Companies or industry bodies may argue that CDAs contain commercially sensitive information and hence ought not to be publicly disclosed. This argument is undermined by the fact that such agreements may be extensively circulated within the private sector already, and that they do not generally contain information that, if

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103 Memorandum of Agreement (revised) relating to the Tolukuma Gold Mining Project between the Independent State of Papua New Guinea and the Central Provisionsal Government, the Waitape Local Level Government and Tolukuma Gold Mines Limited and Yulai Landowners Association Inc (2007) Art. 11, <http://ccsi.columbia.edu/files/2015/01/PNG-Tolukuma-Clayfield-Pty-Ltd-2007-Agreement.pdf>

104 Ahafo Social Responsibility Agreement between the Ahafo Mine Local Community and Newmont Ghana Gold Limited (2008), Schedule 4, <http://ccsi.columbia.edu/files/2015/01/Ghana-Ahafo-Mine-Local-Community-Newmont-Ghana-Gold-Ltd-2008-Social-Responsibility-Agreement.pdf>

105 International Council on Mining & Metals, 2010, *op. cit.*, p. 60; InterGroup Consultants, 2008, *op. cit.*, p. 89.

106 Gibson and O'Faircheallaigh, 2010, *op. cit.*, pp. 47-48.



disclosed, would have a concrete impact on the company's competitiveness. Confidentiality provisions are sometimes requested by a community itself;<sup>107</sup> this can put future communities at a disadvantage by limiting the number of past agreements available, thus reducing their ability to learn from the experience of other communities.<sup>108</sup> Efforts by researchers to comprehensively analyse CDAs are also undermined. Knowledge of what has and what has not worked with respect to CDAs will accordingly often be limited by one's ability to gain insider information from companies or other stakeholders, meaning that any lessons learned by such information can only be published as a secondary source, meaning that key details may be left out.

As stated above, the review of CDAs conducted for this article was limited to those where full text documents were accessible to the public. Databases such as that of the Agreements, Treaties, and Negotiated Settlements project (ATNS)<sup>109</sup> go a long way in providing access to information about agreements and the agreements themselves, though at the time of the review, of the 1942 entries in the database, only 22 provided full text documents relating to a specific agreement.<sup>110</sup> More agreements can be found through internet research, including via local government websites, but even in countries where community agreements are legally required, only a limited number are publicly available.

## 5. CONCLUSION

While an effective CDA will be adapted to local context, the broad practices described in this article will be generally applicable across jurisdictions and communities. A key practice is to ensure meaningful community involvement in the agreement-making process and in decision-making regarding the project itself, in accordance with FPIC norms and standards. This will help to ensure that the CDA, and the agreement-making process, are responsive to the needs, aspirations and local conditions of the community. Meaningful community

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107 Comment from practitioner in the field.

108 What are Impact and Benefit Agreements? available at <http://www.miningfacts.org/Communities/What-are-Impact-and-Benefit-Agreements-%28IBAs%29/>.

109 Agreements, Treaties and Negotiated Settlements Project, available at: <http://www.atns.net.au>.

110 Other organisations have also started collections of CDAs, for example: <http://www.sdsg.org/archives/cda-library/>.

involvement can be facilitated by identifying all impacted stakeholders, providing information, resources and capacity building to help foster a more balanced playing field, and by implementing processes that involve community members in the governance and oversight of the agreement's implementation. These practices should be adopted as early as possible in the process, and be carried out through to and beyond mine closure, with the aim of ensuring the community's self-determined development. CDAs will be most effectively implemented where the company builds the agreement into its business processes and takes its obligations seriously.<sup>111</sup> Where this is not done, the risk of grievances and opposition from community members increases, as do the likely financial costs to the company's operations.

Despite the leading practices described in industry guides and policy documents, it is difficult to find many CDAs that exhibit them. There is, therefore, a great need for all stakeholders to work to establish more effective CDAs, and to work towards their public disclosure. Governments should focus on sensitising investors to the need for meaningful community engagement, enforcing more detailed legislative requirements for CDAs and enhancing community access to legal advisors and other support. Companies should continue to adopt leading approaches when entering into them, including making available sufficient funding and opportunities for communities to prepare for negotiations. Finally, communities will be best placed to achieve an advantageous CDA where they effectively self-organise, carry out effective and democratic processes to identify key priorities and negotiating positions, and demand these leading practices of companies when negotiating such agreements.

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111 Comment from practitioner in the field.