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How do we legislate for improved community development?

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Abstract: A large mining project has the potential to be a partner in assisting local communities in their development efforts. Communities located in close proximity to a large mine have every right to expect that the project will benefit their community. Often, reality falls short of their expectations and a hostile environment can result. The use of a contract between a miner and neighbouring communities can be a valuable tool to achieve community development and to help define and manage expectations. This paper introduces the principal issues involved in legislating requirements for community development agreements and also contains model mining act provisions and regulations.

Keywords: community development agreement, mining, mining law, mining regulations, sustainable development

JEL classification: O13, Q32, Q34, Q38

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1 Challenges of non-renewable resources-led development

It is the nature of non-renewable natural resources that an extractive minerals project has a finite lifespan and that once the minerals have been depleted, the project will cease operation. Governments have choices in deciding what they want to achieve from the extraction of minerals during a project's life and have a variety of regulatory and other tools by which to achieve their objectives. Historically, the primary objective of many governments was to obtain fiscal revenues from an extractive project and to use larger projects as a means to build infrastructure that will benefit society. More recently, governments are additionally looking to achieve benefits for local communities both in the near term while operations are on-going but also on a sustainable basis. According to MMSD:

At the local level, sustainable development is about meeting locally defined social, environmental, and economic goals over the long term. Interactions between the mine and community should add to the physical, financial, human, and information resources available—not detract from them. The challenge is to ensure that the effects of interactions are regarded as positive by those affected locally as well as by the promoters of the project, and that communities develop in ways that are consistent with their own vision. This may be realized through, for example, the provision of social services, income, or skills development. MMSD (2002: 198)

Many large projects implement corporate social responsibility (CSR) programmes which often include benefits for nearby communities. In some cases, such programmes can include binding contracts with communities or more informal written approaches, such as a non-enforceable memorandum of understanding. Increasingly, governments are mandating in legislation that extractive industry projects must have programmes for community development rather than relying on voluntary efforts.

One means that regulators have to achieve benefits at the community level is to require extractive companies to enter into community development agreements (CDAs). Not all governments that require community development programmes require CDAs; however, CDAs can be a useful approach that provides both the project and the community with a mutually agreed means to define the attributes of project-assisted development in a way that can help to manage expectations. This paper looks at one aspect of CDAs—the legislation that can be used to regulate CDA requirements. The concept of a CDA, a contract between an economic enterprise and a community, can be applied to both the mining and oil and gas sectors, but at the present time, the use of CDAs for mining projects is becoming commonplace although they are rarely used in the petroleum sector. In this paper, the emphasis is on mining sector CDA legislation.

The term community development agreement is sometimes used in a broad sense but for the purposes of this paper, a CDA is narrowly defined as 'a legally binding contract between the holder of an authorization granting the rights to extract minerals, and a community (or communities) that will be affected by the exercise of those rights, that addresses matters concerning community development'.

2 Respective roles of government and investors in community development

The respective roles of government and extractive companies with regard to community development are complex and vary considerably from nation to nation and from project to project. There is a history of mines contributing to community development in ways ranging from the building of company towns, to guaranteeing infrastructure bonds, to paying locally imposed property taxes, to building schools and health clinics, to providing financing and training for local enterprises, and to supporting local sourcing of goods, services and employees. There has long been a dialogue within the political science field about whether community development should be government or private sector-led.¹ At the heart of the argument is the issue of sustainability: the miner will eventually depart when the mine closes but the government will remain and thus their respective planning horizons and long term objectives may be quite different. Also, miners are expert at mining, while governments are experienced in developing health, education, and community infrastructure. Historically, miners have tended to regard local communities from the viewpoint of how the community can serve the mine, for example as a source of employees and housing, rather than how the mine can serve the community, sometimes resulting in non-sustainable enclave-type development. Regardless of the academic argument about whether community development should be government or miner-led, in practice, most communities do not care, as long as beneficial development takes place.

Few areas present a greater challenge than the relationship between mining companies and local communities. ... Widespread community demands for relevant, direct, and sustained benefits from mineral wealth are a relatively recent phenomenon, so frequently neither government institutions nor companies or communities themselves have been properly equipped to respond to them. In areas of weak governance, communities often turn to the operating companies, which have found themselves providing development services to obtain or to maintain their social licence to operate. A new relationship is beginning to emerge, based on recognition of the rights of communities and the need for community participation in decision-making. Moreover, new initiatives seek to avoid the company assuming the role and responsibilities of government, but rather focus on improving the capacity of local government and other local institutions to deliver mine-derived benefits over the long term. (MMSD 2002: xix)

The legal system can be used to define the respective roles of extractive companies in the community development process. Requiring CDAs in fragile states may have particular significance. If the central government is unable or unwilling to fund development at the community level, a CDA may provide development opportunities otherwise unobtainable. A challenge in drafting CDA legislation is how to balance the respective development roles of government and the miner. Ideally, development efforts under a CDA will act to complement government-led development, not displace it.

¹ For an introduction to mining and its growing role in local and sustainable development, and its potential negative impacts the author recommends Evans et al. (2001), Richards (2009), Crowson (2003, 2007), and the various publications of the Mining, Minerals and Sustainable Development (MMSD) project (IIED n.d.).

3 Voluntary vs mandatory approaches

If a government desires that mining companies play a role in community development, it may decide to allow that role to be defined voluntarily by the miner or may impose mandatory requirements. In the last two decades there have been many mining projects worldwide that have been unable to move from discovery to development because of community opposition. Often times, even if a project is built, it may attract the future ire of communities if their current and evolving expectations are not met. This has led many of the world's mining companies to place an increased emphasis on CSR programmes including community development. Additionally, mining sector organizations such as the International Council on Mining and Metals have done work to help define community development good practice. In 2003, the council committed its members to a sustainable development framework of ten principles including '9. Contribute to the social, economic and institutional development of the communities in which we operate'.²

In support of this commitment the organization has since prepared a number of supporting 'tools' for optional use by its members including: Community Development Toolkit (ICMM 2005, 2012) and Partnerships for Development Toolkit (ICMM 2011). The first of these is discussed and assessed in detail in McDonald (2017).

Relying on companies to voluntarily assist in community development is risky—not all firms are good corporate citizens and not all are competent to know how to offer such assistance. For this and other reasons, an increasing number of governments are now mandating the use of CDAs or other community development tools in their mining legislation rather than relying simply on voluntary approaches. While many companies balk at the concept of increased regulation rather than being able to achieve desired outcomes according to their own means, most would agree that CDAs, whether required by legislation or not, can be a useful tool to manage community expectations.

The use of community development statutory requirements does not preclude voluntary programmes—they are not mutually exclusive. Hybrid approaches combining mandated elements and voluntary activities are not uncommon.³ In nations where the mining or environmental law requires community development, that requirement can form the core of or complement a CSR programme. When drafting the original model CDA law and regulations provisions which appear in an improved form in this paper's Annex, the author took into account the ICMM Community Development Toolkit and examined many existing CDAs. An attribute of a good law is being able to achieve a degree of consensus between policy makers, regulators, beneficiaries, and those that will be regulated on issues such as objectives, processes, and good practice.

3.1 Legal mandates: acts of law and state mining agreements

Governments have two main ways in which to legally impose community development requirements on the private sector—state agreements and statutes. A state agreement is a contractual agreement between the owner of the rights of extraction and the government and sets out the mutually agreed obligations and rights of the parties. During the post-colonial era up through the 1990s, such agreements for individual large projects were commonplace throughout the developing world but in recent times, their use has been reduced as laws relating to mining

² See ICMM (n.d.) for the full set of sustainable development principles.

³ A good example is Brazil with the situation there being described in some detail in ICMM (2013).

(mining law, environmental law, labour law, income tax law, etc.) generally have improved thereby negating the need for project-specific agreements. Provisions in agreements can find their way into statutes over time. For example, Guinea developed a model mining agreement in 2006 that contained extensive CDA provisions. It introduced a new mining law in 2011 containing similar CDA requirements obviating the need to address that subject in future agreements (AMLA n.d.a). Like in Guinea, other nations have now addressed community development requirements in their mining laws. According to Schott et al. (2015):⁴ ‘Since the mid-1980s thirty two countries have adopted community development provisions in mining codes, with nine countries currently in the process’ (Schott et al. 2015).

Table 1 lists countries whose mining law (or model agreement) requires some sort of community development action. The list includes a wide variety of community development related requirements, not all of which include a CDA as defined for the purposes of this paper. For readers interested in a short description of the specific community development requirement in most of the jurisdictions listed in the table, the author recommends Penagos et al. (2014). For the African nations listed in Table 1, their mining laws, including the community development requirements, are accessible through the African Mining Legislation Atlas (AMLA n.d.b).

Table 1: Countries where community development is required by law or agreement

Country	Country
Afghanistan	Liberia
Autonomous Region of Bougainville	Mali
Burkina Faso (pending)	Malawi (pending)
Canada (several subnational jurisdictions)	Mongolia
Central African Republic	Mozambique
China	Myanmar (pending)
Colombia	Namibia
Democratic Republic of Congo	Nicaragua
Ecuador	Niger
Equatorial Guinea	Nigeria
Eritrea	Oman
Ethiopia	Papua New Guinea
Fiji (pending)	Peru
Ghana	Philippines
Guatemala	Sierra Leone
Guinea	South Africa
India	South Sudan
Indonesia	Togo
Kazakhstan	Vietnam
Kenya	Yemen
Kyrgyzstan	Zimbabwe
Laos	

Source: Derived from Dupuy (2014), Penagos et al. (2014), and various CDA-related projects executed by the author.

3.2 World Bank CDA initiative

Given the growing interest in CDAs and their application to extractive projects, in 2010 the World Bank launched a multi-year specialized research project intended to investigate the nature and usage of CDAs and to provide associated information and guidance to governments, industry, communities, and other concerned stakeholders. The work was conducted in several stages. In the initial stage, a review was done of existing CDA agreements and community development extractive industries initiatives worldwide. A conceptual framework was developed to identify key building blocks to enable extractive-led community development and that framework was then

⁴ Based largely on work by Dupuy (2014).

used to draft preliminary model CDA regulations and guidelines suitable for use with a mining law. The second phase of the project involved extensive consultations with a broad spectrum of stakeholders including reviews of the draft regulations and guidelines. Following this preliminary work, field research was commissioned to assess the community development practice in selected countries and to further evaluate the results of the preliminary phases. Based on this work the model mining regulations and guidelines were improved. The model mining law and regulations presented in this paper, in part, are based on that work.⁵ Finally, research was done on the processes and frameworks used to negotiate, structure, and implement CDAs. The project culminated with the publication of a major multi-volume sourcebook on CDAs (World Bank 2012). For readers that are interested in CDAs, the sourcebook remains one of the most comprehensive sources of information and case studies on the subject.

4 Legislated requirements

4.1 What is a CDA?

There are many forms of agreements that aim to provide a formal or semi-formal linkage between an extractive industry project and nearby communities. Such agreements go by many names such as: impact and benefit agreements; access and benefits agreements; indigenous land use agreements; partnering agreements; contracts with the community; landowner agreements; shared responsibilities agreements; community joint venture agreements; empowerment agreements; benefits sharing agreements, and so forth. Some of these agreements are intended as an informal, non-binding means by which the signatories mutually express their views on certain topics, such as in a memorandum of understanding. Others take the form of a legally binding contract or even a treaty. Today, the use of various forms of agreements between extractive companies and communities is becoming widespread, but CDA use is not yet considered standard practice in many nations. However, in some nations, such as Canada, their use is nearly universal for large extractive projects.⁶ Some agreements are held confidentially, but many are available on publicly accessible databases.⁷ As was indicated at the beginning of this paper, for the purposes of this paper regarding CDA legislation, a CDA means a legally binding contract between the holder of an authorization granting the rights to extract minerals and a community (or communities) that will be affected by the exercise of those rights that addresses matters concerning community development.

One of the advantages of a legislated approach to CDA requirements, versus just allowing a miner to determine whether one is required and what it should contain, is that it avoids problems that arise when every mine is handled on an ad hoc basis. For example, over the past decade in the Solomon Islands, companies exploring for gold, nickel, and other minerals began entering into ad

⁵ The author of this paper was lead author of the World Bank model CDA regulations (Otto 2010). The model legislation provided in this paper reflects an evolution of that legislation based on the author's subsequent experience in drafting mining laws and regulations for nations in the African, Asian, and Pacific regions.

⁶ In Canada, the use of 'impacts and benefits agreements' between aboriginal groups and companies that extract minerals from their lands is widespread and although such agreements are not required by statute, they are in common use with over 180 in use in 2012. Miningfacts.org (2012) defines an impact and benefits agreement as: '... a formal contract outlining the impacts of the project, the commitment and responsibilities of both parties, and how the associated Aboriginal community will share in benefits of the operation through employment and economic development'. Sosa and Keenan (2001) provide a good overview of impact and benefits agreements in Canada.

⁷ See for example the Agreements, Treaties and Negotiated Settlements Project collection (ATNS n.d.).

hoc land access agreements, which differed greatly. When it became known to communities that some agreements were substantially more beneficial than others, the viability of some agreements became questionable and pressure was brought on politicians and local leaders to ensure that all communities got a fair deal. As a result, the government requested assistance to draft a standardized model land access agreement that would be suitable for introduction as a requirement under its mining regulations. O'Faircheallaigh has observed:

Agreements between commercial developers and local communities are becoming more common in virtually all parts of the world, from inner city America to remote mining regions. The need for such ‘community development agreements’ (CDAs) is especially acute in mining, where environmental and social costs are often borne by communities while project benefits accrue in national capitals and global financial centres, leading to conflict between local people and miners. O'Faircheallaigh (2012: 222).

It is important not to confuse community development requirements, CDA or otherwise, with impact compensation—these are two separate concepts. Most mining laws require that if a mine causes damage to personal or community property or property rights, the owner of that property or right must be compensated by the miner. Compensation payments are different from an investment by the miner in community development. A compensation payment is usually a one-time payment for a real property loss, while CDA funding requirements can be on-going and seek to achieve development objectives (for example, human capital enhancement, micro-business creation, etc.).

4.2 Parties to a CDA

If a CDA is required by law, who should be a party to the agreement? Obviously, the community and the company holding the extraction rights should be parties, but what is the role of district, provincial, and national government? In many situations, it makes sense for the community's local government (for example, an elected city council, tribal elders, or mayor's office) to be a party to the agreement, but where such a government is absent or not respected or accepted by the community, it can be a challenge to identify who is best positioned to represent the community. This is a challenge for policy makers and law-drafters particularly in nations that have a combination of elected and traditional leaders. One approach is to require in the law that a CDA be ratified by the community according to such process and in such manner as is customary for such community to make decisions on matters affecting the community as a whole. This approach allows flexibility from one locale to another. In a legislated approach, it can be made clear who the CDA parties are, avoiding the uncertainty that may arise where a purely miner-led voluntary approach is allowed.

The role of higher levels of government can be to act as the regulator of the CDA mandate rather than be a party to it. For example, a ministry of mines can be given the role of: ensuring that all miners who are required to have CDAs do indeed have them; ensuring that a CDA addresses all mandatory subject matter; monitoring a CDA to make sure it is being implemented; taking appropriate actions (such as levying fines or suspension or cancellation of rights) if implementation is not proceeding as required, and so forth. The responsible ministry can also act as a repository of CDAs, provide information about CDA requirements tailored for use by communities (such as maintaining a website), and make compliance reports available to the public.

4.3 Participatory processes: meeting the needs of disparate communities

The process by which CDAs are negotiated and agreed can be complicated. One of the benefits of a legislated CDA approach is that a clear but flexible roadmap can be provided to guide the parties with regard to the CDA negotiation process. This can be particularly helpful when there are a number of communities involved that may have distinct cultural differences and varying expectations. The use of sociologists, mediators, and others who specialize in local-level negotiations can be an important part of the CDA process.⁸ An agreement that constitutes a great fit for one community may be inappropriate for another.

There is a real possibility that a community may not want a mine nearby, especially if mine development requires a resettlement process. Its future vision may emphasize preservation of the status quo or slow improvements that will not endanger social value systems. Evans has summarized the differing objectives that sometimes occur between well-intentioned miners and local communities:

Today, mining companies are clamoring to take the lead in defining sustainability, offering schools, and hospitals and jobs in return for the mineral wealth, supposedly extracted with minimal long-term environmental harm. However, for communities facing the bulldozer, the concept of and the reality of ‘sustainable mining’ is not necessarily the same. (Evans et al. 2001: 250)

In most nations, minerals belong to the state and it is often in the state’s interest to see its mineral resources developed for the good of all its citizens, even if a local community opposes mining. Participatory processes where a community is hostile to a mine can thwart the dialogue necessary to create a CDA. A mining law that requires CDAs needs to address this situation, either by embracing the concept of prior informed consent or providing an exemption from a CDA requirement in certain situations.

4.4 Community contract negotiating capacity

As defined in this paper, a CDA is a legally binding contract. A basic principle underlying contract law is that a contract is a legally binding agreement between two or more competent and consenting parties. Gibson and O’Faircheallaigh have discerned:

Once a decision to negotiate is made, a community and its leaders need to undertake a hard-headed assessment of their position in relation to the company, the government authorities that will approve or reject the project, and the wider economic and political context. Gibson and O’Faircheallaigh (2010:11)

However, many communities lack the capacity and competency effectively to negotiate or understand the ramifications of terms in a community development agreement. Lacking such capacity, they are vulnerable to agreeing to terms that may not be in their long-term best interest. Over time, a lop-sided agreement risks becoming obsolete when the community realizes that the agreement is suboptimal. For this reason, some CDA legislation requires that CDAs address key mandatory issues and that the community be provided with either experienced counsel or be

⁸ Gibson and O’Faircheallaigh (2010) offer CDA negotiations advice, including who to include in negotiation processes, in the form of a detailed negotiations toolkit.

assisted to develop its own negotiating capacity. For example Section 123 (10) of the mining law of the Autonomous Region of Bougainville requires:

If in the opinion of the Secretary a qualified community that is entitled to a community development agreement lacks the capacity to effectively negotiate a community development agreement, the holder of a large-scale mining lease shall assist to build that capacity including the provision of such funds to the qualified community for capacity-building and preparation as are reasonable in the circumstances.⁹

If CDAs are created in an unregulated environment, there can be a greater likelihood that a community may not have the capacity and competence protection that the Bougainville legislation provides.

In some cases, non-governmental organizations may be able to play an important advisory role where such legal protection is unavailable. For example, in Ghana, NGOs were made part of the group that negotiated the CDAs for the Ahafo gold project.¹⁰ In a case study-based analysis of CDAs, Brereton et al. (2011: 15) note that ‘the success of a CDA relies heavily on all parties having the capacity to participate constructively in the agreement making process, support the agreement over time and deliver on their respective commitments’.

5 Mining act and mining regulations provisions

In this section, the core issues that underlie a CDA requirement in a mining act and the associated regulations are introduced. Such core issues also can apply to a petroleum law but few nations have moved to apply CDA requirements to oil and gas projects. It is typical in mining acts that CDA-related provisions are few, short, and to the point with details instead provided in the mining act regulations. Model mining act and mining regulations CDA provisions are provided in the Annex to this paper to specifically illustrate the general points made in this section.

5.1 Which operations require CDAs?

The mining industry is comprised of many types and sizes of projects and not all operations are amenable to CDA requirements. For example, imposing CDA requirements on an artisanal miner or a small quarry would not be practical. This is also true for operations that will have a short duration or that will generate only minimal revenues. It is therefore necessary for a mining law to define the types and scale of operations that will be subject to CDA requirements. Generally, CDAs make sense where the scale and duration of a project have the potential to make a substantial contribution to local sustainable development without imperilling the economic viability of the project. One approach is to determine whether CDA requirements make sense on a case-by-case basis. However, an approach that relies on administrative discretion to make such a determination poses risks for the project investor, government, and the affected communities. Other approaches can provide greater certainty.

If the mining law makes provision for several types of mining authorizations, the CDA requirement can be applied to specified licence types, such as a large-scale mining licence, or

⁹ Bougainville Mining Act 2015, Sec.123(10).

¹⁰ For case studies of CDA processes and participants see Sarkar et al. (2010).

alternatively, some licence types can be exempted (artisanal mining licence, quarry licence, etc.). The following example illustrating a linkage between licence type and a CDA requirement is from South Sudan:

68. Community Development Agreements

(1) A Large-Scale Mining Licence Title Holder shall

...

(b) enter into Community Development Agreements with such communities in cooperation with relevant government authorities.¹¹

Another similar approach is to require CDAs if certain scale-of-operations criteria are exceeded. An example of this approach is found in the Sierra Leone mining act:

139. Where community development agreement is required.

(1) The holder of a small-scale or large-scale mining licence is required to have and implement a community development agreement with the primary host community if its approved mining operation will or does exceed any of the following limits-

(a) in the case of extraction of minerals from primarily alluvial deposits, where annual throughput is more than one million cubic metres per year;

(b) underground mining operations, where annual combined run-of mine ore and waste production is more than one hundred thousand tonnes per year (waste material not exiting mine mouth to be excluded);

(c) in the case of open-cast mining operations extracting minerals from primarily non-alluvial deposits, where annual combined run-of mine ore, rock, waste and overburden production is more than two hundred and fifty thousand tonnes per year; or

(d) where the licence holder employs or contracts more than one hundred employees or workers at the mine site on a typical working day (including all shifts).¹²

¹¹ Section 68, Mining Act, 2012 (South Sudan).

¹² Section 139, The Mines and Minerals Act, No.12 of 2009 (Sierra Leone).

5.2 Which communities qualify for a CDA?

If a mining law requires that a miner enter into community development agreements it is important to define what constitutes a community for the purposes of such a requirement. For the purposes of CDAs, ‘community’ can generally be considered ‘a particular area or place considered together with its inhabitants’.¹³ However, in order to be practical, this broad definition needs to be refined. For example, the area around a mine may be populated by numerous clans or small family units each of which may consider themselves a community. To require a separate agreement with every clan or family would place an undue burden on both the miner and the regulator. Additionally, since being party to a CDA implies the receipt of benefits, every community would like to qualify for an agreement, even if located far from the project. If the number of communities is too large, the benefits may be too diluted to achieve meaningful sustainable development. This then leads to the concept of ‘qualified community’ where the law defines the term using parameters that limit the sphere of beneficiaries.

Some governments may desire to focus the community development agreement effort on a single qualified community that can act as a regional facilities hub for other neighbouring communities. By concentrating expenditure on a single ‘host’ community, it may be possible to build infrastructure, such as a hospital, that would not be possible if the available CDA resources were disbursed among several or many communities. This single host community approach was embodied in the Sierra Leone mining act:

139. Where community development agreement is required.

- (1) The holder of a small-scale or large-scale mining licence is required to have and implement a community development agreement with the primary host community ...
- (2) The primary host community is the single community of persons mutually agreed by the holder of the small-scale or large-scale mining licence and the local council, but if there is no community of persons residing within thirty kilometres of any boundary defining the large-scale mining licence area, the primary host community shall be the local council.
- (3) If the holder of the small-scale or large-scale mining licence and local council cannot agree on which community is the primary host community, the licence-holder may notify the Minister requesting clarification, and the Minister shall notify the licence holder and local council within sixty calendar days from the date of such notice, specifying which community is the primary host community.¹⁴

Similar single host community provisions are provided in the 2011 Mozambique model mining agreement,¹⁵ the Nigerian mining regulations,¹⁶ and the mining regulations of Yemen.¹⁷ One of the challenges of the primary host community approach is that other communities nearby may feel slighted resulting in possible hostile attitudes. To alleviate this, broader poverty reduction initiatives that encompass communities that do not have a CDA may be useful. A possible problem

¹³ This is one of several definitions for the word ‘community’ offered by Oxford Dictionaries, at: http://www.oxforddictionaries.com/us/definition/american_english/community (accessed 15 April 2016).

¹⁴ Section 139, The Mines and Minerals Act, No.12 of 2009 (Sierra Leone).

¹⁵ Section 19.2, unpublished 2011 Mozambique Model Mining Agreement.

¹⁶ Section 193(5), Nigerian Minerals and Mining Regulations, S.I. 47 of 2011.

¹⁷ Article 73, Executive Regulation of Law No. (22) for the year 2010 regarding Mines and Quarries (Yemen).

with a mandated primary host community requirement is that once a company has met its statutory CDA requirement, it may have little incentive to work further afield with other communities.

While some governments focus CDA resources on a single qualified community, others take a more egalitarian approach and a project may be required to enter into CDAs with all communities that meet prescribed criteria. This approach has merit in that it can avoid situations where one community is perceived to receive benefits to the detriment of other communities, perhaps setting the stage for a hostile situation. The following example is from the mining law of the Autonomous Region of Bougainville in Papua New Guinea:

2. INTERPRETATION.

(1) In this Act, unless the contrary intention appears:

‘Qualified Community’ means any community of more than 1,000 persons who by tradition or by circumstances constitute a social community that usually reside within:

- (a) a large-scale mining lease area and any associated lease for mining purposes area; or
- (b) fifteen (15) kilometres of any boundary defining a large-scale mining lease; or
- (c) an area-of-influence, identified in an environmental impact assessment prepared as a requirement under the PNG Environment Act 2000, that will be affected in a major way by large-scale mining lease operations; or
- (d) a village or township that will house more than ten (10%) of the workers employed or contracted by a large-scale mining lease holder, and

which is thus eligible to enter into a community development agreement with the holder of a large-scale mining lease;

...

123. COMMUNITY DEVELOPMENT AGREEMENTS

(5) Subject to Subsection (6), the holder of a large-scale mining lease is required to have and implement community development agreements with all qualified communities that are willing to enter into a community development agreement.¹⁸

Where a mining law seeks to provide an egalitarian approach, it may strive to provide CDA benefits to a wide number of small disparate groups by requiring such ‘sub-communities’ to aggregate into a more manageable ‘qualified community’ that is then the party to the CDA. Since the benefits that derive from a CDA can be substantial, there is a strong incentive for smaller communities to join together to form a community that qualifies for a CDA. The following example is also from the Autonomous Region of Bougainville in Papua New Guinea:

91. INTERPRETATION FOR THIS PART.

In this Part, words and expressions shall have the meanings ascribed to them in the Act and as follows:

...

¹⁸ Sections 2 and 123, Bougainville Mining Act, 2014 (Autonomous Region of Bougainville, Papua New Guinea).

‘Sub-Community’ means any social community of less than 1,000 persons that otherwise meets the definition of a qualified community.

92. IDENTIFICATION OF QUALIFIED COMMUNITIES.

...

(3) Sub-communities may join to form a Qualified Community and any such joining shall be recorded in a registry of sub-communities comprising the Qualified Community.

(4) Sub-communities do not qualify for a community development agreement.¹⁹

5.3 Mandatory CDA obligations under the mining act

In this author’s opinion, when drafting CDA requirements for a mining law, at least four core obligations should be addressed for projects that are required to have CDAs:

- the project has a development obligation with regard to certain communities;
- the project’s development activities must be agreed in its CDAs;
- the agreed CDA activities must be implemented; and
- the activities must be periodically reported so that the regulator can verify that the CDA is being implemented.

Below are sample clauses extracted from the model mining act article provided in the Annex that address these obligations.

The holder of a large-scale mining licence must assist in the development of qualified communities affected by its operations to promote sustainable development, enhance the general welfare and the quality of life of the inhabitants and must recognize and respect the rights, customs and traditions of local communities.

The holder of a large-scale mining licence is required to have and implement community development agreements with all communities that meet the definition of a qualified community that are willing to enter into a community development agreement.

The holder of a large-scale mining licence is required to reasonably comply with its approved community development agreements.

The holder of a large-scale mining licence must:

- (a) expend on community development no less than [x per cent] of its annual gross sales revenues, in such manner, at such time and on such activities as are prescribed; and
- (b) submit annually, at such time and in such form and manner as are prescribed, a community development expenditure report;
- (c) submit semi-annually, at such time and in such form and manner as are prescribed, a community development agreement report for each community development agreement associated with its mining licence; and

¹⁹ Sections 91 and 92, Mining Regulations, 2015 (Autonomous Region of Bougainville, Papua New Guinea)

(d) periodically, as is prescribed, update its community development agreement(s).

The requirement in the last example clause also requires the licence holder to annually expend a minimum amount on community development (including but not limited to expenditure on CDA activities) based on a specified percentage of its gross revenue. In this author's experience, this is an important option for policy makers to consider. By providing a sure and unambiguous income stream, there is a much higher prospect that CDA activities will be implemented, and also that the beneficiary communities will have a better understanding of funding levels, thus acting as a way to manage expectations. Such a provision also aids CDA negotiations because the funding requirement is set out in the law and is not open to negotiation. In discussions with industry, the author learned that many mines voluntarily expend around 2 per cent of gross revenues on CSR programmes, but the amount is highly variable from project to project. Thus, a statutory requirement for CDA-related expenditure of around 2 per cent would probably not be considered as unreasonable by many mining companies.

As a further aid to CDA negotiations, the author also recommends that mining law regulations be adopted to statutorily set out topics that a CDA must address. In practice, such regulations provide a blueprint for negotiations and protect the interests of communities by ensuring that key subject matter is covered. The model regulations provided in the Annex contain a list of mandatory topics that a CDA must cover. One of the key topics addressed in the regulations is a requirement for a CDA to contain a 'development plan' jointly prepared by the miner and the community which forms the core of the CDA. The model regulations articles that related to a development plan were inspired by the findings of a major study of mining and its role in sustainable development undertaken by the Mining, Minerals and Sustainable Development Project (MMSD 2002: xxviii):

The CSDP [*community sustainable development plan*] should be based on the community's concept of how the mine can best contribute to achieving its social, environmental, and economic goals. The plan should provide the fundamental framework for relationships among the company, the community, and the government (and any other parties) through the project life and into post-closure. It should identify the specific actions needed and the respective roles and responsibilities to achieve the agreed-upon vision. It could also create some obligations, on all sides, for taking those steps. Independent mechanisms for monitoring and evaluation, including clear and agreed indicators of performance, need to be included. The plan will need to evolve and be amended over the life of the project to reflect changing priorities and capacities. (MMSD 2002: xxviii)

While the model regulations in the Annex set out a list of mandatory topics that must be addressed in a CDA, they do not specify how each of the topics is to be resolved. For example, the regulations require that a CDA must contain grievance and dispute resolution provisions but do not say what they are—that is for the miner and the community to negotiate and agree. In this way, each agreement is different, recognizing that every community and project will have their own unique needs and attributes. It is important to distinguish between obligations imposed under the mining law and those that arise under the terms of a negotiated CDA: the former are statutory obligations and the latter, contractual obligations.

5.4 Enforcement, offences and penalties

A mining law that requires the use of CDAs and that imposes related obligations often contains provisions to enforce compliance. Failure to comply with a statutory obligation is deemed an offence and a substantial fine may result for non-compliance. Additionally, linking non-compliance to an administrative action, such as suspension or cancellation of the extractive right, is a valuable enforcement tool for regulators. For obligations arising under the CDA, in contrast to those arising under the mining law, the parties to the agreement have recourse to the appropriate court or other dispute resolution methods set out in the agreement.

5.5 Applicability to pre-existing mining rights

One of the challenges in drafting a mining law that requires CDAs is how to handle pre-existing projects and arrangements. Should all such projects be exempt? How should pre-existing arrangements between a mine and community be addressed? One approach is to allow such projects a defined time period in which to obtain required CDAs that meet new statutory requirements. The author has drafted the following example of such an approach: ‘the holder of an authorization to conduct large-scale mining operations that currently is in force but that was granted prior to the adoption of this Act is required to comply with this article and must be in compliance with this article no later than two years from the effective date of this Act’.

Another approach, which the author of this paper does not advocate, is for a new mining law to remain silent on the transition issue. In this latter approach (taken by Nigeria and Sierra Leone in their most recent mining laws) all miners of a certain scale must have CDAs, but no time period for effecting the requirement by pre-existing operations is stated; in effect, upon the day that the law becomes effective they are liable to have CDAs. It is then left to the regulator to determine when to commence an enforcement action. This approach allows a great deal of flexibility, but some regulators may be hesitant to commence enforcement.

It is a fundamental nature of a new law that the ‘rules of the game’ change, otherwise why not just keep the existing law? When a country imposes CDA requirements in a new law, the policy principle driving those requirements is that the nation has certain expectations with regard to community development that must be met according to the new system, not the old one. Thus, if a miner has a pre-existing approach to community development it must ensure that its approach conforms to the new law.

5.6 Legal effect of a CDA

As has been mentioned earlier in this paper, there are many forms of agreements between extractive firms and communities. A law requiring CDAs should clearly define the legal nature of required CDAs. A CDA, as defined in this paper, is a legally binding contract and is enforceable by recourse to the appropriate court.

5.7 Effect of transfer of the underlying exploration/mining right

Extractive industry projects typically go through several phases including exploration, development, extraction, rehabilitation and post-closure. For many projects, ownership of the respective rights granted during the various phases may change. This is particularly true of the transition from the exploration phase to the development phase. A key part of a law addressing CDAs is to define at what phase such agreements are required and to require that a CDA entered into by a company will be honoured by a successor company. Many laws that require CDA’s

impose the requirement at the development stage. Requiring a CDA at the exploration stage is impractical because the nature and location of the resource will at that stage be unknown.

6 Concluding remarks

The use of CDA legislation to achieve community level benefits is just one option for governments. Some governments may place no direct emphasis on community development with the expectation that a community that is located in close proximity to a mine will benefit from project-related employment and other linked opportunities. Many extractive companies have CSR programmes that may be directed, at least in part, toward community development. Other nations prefer that, instead of benefits flowing to a community via a direct link between the project and the community, the community will be a recipient instead of a portion of the fiscal revenues generated by the project.²⁰ The widespread use of CDA legislation is a relatively new phenomenon and the efficacy of CDAs as a means to achieve community-level benefits is still to be determined. However, when compared to approaches that rely entirely on voluntary actions by companies/projects, statutorily mandated CDAs greatly reduce the risk that sustainable community development will not take place. If the CDA legislation is robust, such as the model legislation appearing in the Annex, it can provide a clear roadmap for mandatory processes, approvals, monitoring, and enforcement, all of which are lacking in an unregulated approach to mine-assisted community development. Some of the advantages of a regulated CDA approach versus a mining law that is silent about community development include:

- the different roles and responsibilities of the miner, communities, and government can be made clear;
- communities that are qualified for development assistance are identifiable;
- qualified communities will have a written and enforceable contract with the miner that identifies their rights and obligation regarding development;
- the expectations of the community can be aligned to a practical level of funding;
- miners will know the minimum level of annual development funding that they must provide;
- CDA minimum content guidance can ensure that key issues are addressed;
- formal grievance and dispute resolution approaches can be established; and
- the probability of development implementation is high because non-compliance can result in fines, penalties, or possible cancellation of the right to mine in addition to civil action arising through the application of contract law.

²⁰ Examples of where a portion of a project's fiscal revenues are allocated by law, rather than through the budgeting process, back to local communities: property taxes in the United States; a statutory portion of income tax in Peru; a statutory portion of royalty in Brazil.

One of the downsides of a regulated CDA requirement is that it can impose an administrative burden on the regulatory agency. It may be necessary to hire officers and provide them with appropriate training and resources.

While a CDA—either one required by law or entered into voluntarily—is no guarantee that the boom and bust cycle that communities experience when a mine closes will be avoided; if the agreement includes objectives that address sustainable development, it can be hoped that mine closure will have a lesser impact than had the CDA not been in place. Miners have always had the option to assist in community development. The question for government is whether it is satisfied with allowing miners to offer development assistance on an ad hoc basis or whether that assistance should be required by law and regulated.

References

- AMLA (African Mining Legislation Atlas) (n.d.a). ‘Article 130, Code Minier 2011, Loi L/2011/006 /CNT (Guinea)’. Article 130, Code Minier 2011, Loi L/2011/006 /CNT (Guinea). Available at: <http://www.a-mla.org> (accessed 18 April 2016).
- AMLA (African Mining Legislation Atlas) (n.d.b). African Mining Legislation Atlas website. Available at: <http://www.a-mla.org/> (accessed 22 June 2016).
- ATNS (Agreements, Treaties and Negotiated Settlements Project) (n.d.). ‘ATNS Database’. Available at: <http://www.atns.net.au> (accessed 16 April 2016).
- Brereton, D., J. Owen, and J. Kim (2011). ‘Good Practice Note—Community Development Agreements’. St Lucia: Centre for Social Responsibility in Mining, University of Queensland. Available at: http://www.eisourcebook.org/cms/files/csrn_good_practice_notes_on_cdas_document_final_260911.pdf (accessed 27 June 2016).
- Crowson, P. (2003). *Astride Mining: Issues and Policies for the Minerals Industry*. London: Mining Journal Books.
- Crowson, P. (2007). *Adding Public Value: The Limits of Corporate Responsibility*. Oxford: Oxford Policy Institute.
- Dupuy, K. (2014). ‘Community Development Requirements in Mining Laws.’ *The Extractive Industries and Society*, 1(2): 200–15.
- Evans, G., J. Goodman, and N. Lansbury (2001). *Moving Mountains: Communities Confront Mining and Globalisation*. Otford, New South Wales: Mineral Policy Institute and Otford Press.
- Evans, G., G. Russell, and R. Sullivan (2001). ‘An International Regulatory Framework?’. In G. Evans, J. Goodman, and N. Lansbury (eds), *Moving Mountains: Communities Confront Mining and Globalisation*. Otford, New South Wales: Mineral Policy Institute and Otford Press.
- Gibson, G., and C. O’Faircheallaigh (2010). *IBA COMMUNITY TOOLKIT: Negotiation and Implementation of Impact and Benefit Agreements*. Toronto: Gordon Foundation. Available at: https://www.aofoa.ca/aofoadocs/L3/L3a%20-%20IBA_toolkit_March_2010_low_resolution.pdf (accessed 28 June 2016).
- ICMM (2005). *Community Development Toolkit*. London: International Council for Mines and Metals.
- ICMM (2011). *Mining: Partnerships for Development Toolkit*. London: International Council for Mines and Metals. Available at: <http://www.icmm.com/document/2607> (accessed 17 April 2016).

- ICMM (2012). *Community Development Toolkit—Revised*. London: International Council for Mines and Metals. Available at: <http://www.icmm.com/document/4080> (accessed 17 April 2016).
- ICMM (2013). *The Mining Sector in Brazil: Building Institutions for Sustainable Development*. London: International Council for Mines and Metals.
- ICMM (n.d.). ‘ICMM 10 Principles: Principle 9’. Available at: <https://www.icmm.com/en-gb/about-us/member-commitments/icmm-10-principles/icmm-principle-9> (accessed 17 April 2016).
- IIED (International Institute for Environment and Development) (n.d.). ‘Mining, Minerals and Sustainable Development (MMSD) Project’. Available at <http://www.iied.org/mining-minerals-sustainable-development-mmsd> (accessed 7 March 2017).
- Macdonald, C. (2017). ‘The Role of Participation in Sustainable Community Development Programmes in the Extractives Industries’. WIDER Working Paper 2017/28. Helsinki: UNU-WIDER.
- Miningfacts.org (2012). *What are Impact and Benefit Agreements (IBAs)?*. Vancouver: Fraser Institute. Available at: [http://www.miningfacts.org/Communities/What-are-Impact-and-Benefit-Agreements-\(IBAs\)/](http://www.miningfacts.org/Communities/What-are-Impact-and-Benefit-Agreements-(IBAs)/) (accessed 16 April 2016).
- MMSD (2002). *Breaking New Ground*. London: Mining, Minerals and Sustainable Development Project/IIED. Available at: <http://pubs.iied.org/pdfs/G00910.pdf> (accessed 28 June 2016).
- O’Faircheallaigh, C. (2012). ‘Community Development Agreements in the Mining Industry: An Emerging Global Phenomenon’. *Community Development*, 44(2): 222–38. Available at: <http://www.tandfonline.com/doi/abs/10.1080/15575330.2012.705872> (accessed 28 June 2016).
- Otto, J. (2010). *Mining Community Development Agreements: Source Book (Vol. 4): Community Development Agreement Model Regulations and Example Guidelines*. Washington, DC: World Bank. Available at: <http://documents.worldbank.org/curated/en/2010/06/16798660/mining-community-development-agreements-source-book-vol-4-4-community-development-agreement-model-regulations-example-guidelines> (accessed 17 April 2016).
- Penagos, M.D., J. Mandelbaum, and P. Toledano (2014). *Requirements for Community Development Agreements in Mining Laws*. Available at: <http://ccsi.columbia.edu/files/2015/01/Community-Development-Requirements-in-Mining-Laws-Matrix-November-2014-.pdf> (accessed 22 June 2016).
- Richards, J. (ed.) (2009). *Mining, Society and a Sustainable World*. Heidelberg: Springer.
- Sarkar, S., A. Gow-Smith, T. Morakinyo, R. Frau, and M. Kuniholm (2010). *Mining Community Development Agreements—Practical Experiences and Field Studies*. Washington, DC: Environmental Resources Management for the World Bank. Available at: <http://www.sds.org/wp-content/uploads/2011/06/CDA-Report-FINAL.pdf> (accessed 22 June 2016).
- Schott, J., F.M. Conteh, N. King, D. Desai, and N. Menzies (2015). ‘Development from the Ground up? Mining Community Development Agreements in Sierra Leone.’ World Bank ‘Governance for Development’ blogsite. Available at: <http://blogs.worldbank.org/governance/development-ground-mining-community-development-agreements-sierra-leone> (accessed 18 April 2016).
- Sosa, I., and K. Keenan (2001). *Impact Benefit Agreements between Aboriginal Communities and Mining Companies: Their Use in Canada*. Toronto: Canadian Environmental Law Association & Environmental Mining Council of British Columbia. Available at:

<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.473.2025&rep=rep1&type=pdf>
(accessed 27 Jun 2016).

World Bank (2012). *Mining Development Agreements Sourcebook*. Washington, DC: World Bank.
Available at:
http://siteresources.worldbank.org/INTOGMC/Resources/mining_community.pdf
(accessed 18 April 2016).

Annex

Model CDA mining act and regulations articles

The following example article illustrates how the topics described above can be addressed in a mining act. While the example is a ‘good practice’ model, the development of mining act CDA provisions must be crafted to meet specific jurisdictional needs and requirements.

Article {x}. Community development agreements

(1) In this Article, “Qualified Community” means any community of more than 3,000 persons who by tradition or by circumstances constitute a social community and:

- (a) that reside within twenty (20) kilometres of any boundary defining a large-scale mining licence area; or
- (b) that reside within an area-of-influence, identified in an environmental impact assessment report prepared as a requirement under the *{environment act}* that may be affected in a major way by large-scale mining licence operations; or
- (c) that the *{multi-ministerial board}* has otherwise determined to be a Qualified Community and

which is thus eligible to enter into a community development agreement with the holder of a large-scale mining licence.

(2) The holder of a large-scale mining licence must assist in the development of qualified communities affected by its operations to promote sustainable development, enhance the general welfare and the quality of life of the inhabitants and must recognize and respect the rights, customs and traditions of local communities.

(3) The holder of an authorization to conduct large-scale mining operations that currently is in force but that was granted prior to the adoption of this Act is required to comply with this article and must be in compliance with this article no later than one year from the effective date of this Act.

(4) Subject to paragraph (6), the holder of a large-scale mining licence is required to have and implement community development agreements with all communities that meet the definition of a qualified community that are willing to enter into a community development agreement.

(5) Subject to paragraphs (3) and (6), no mine development may proceed on a large-scale mining licence area until the mining licence holder has any community developments agreement required by this article ratified and approved in such form and manner and containing such content as are prescribed.

(6) Where a community that meets the requirements to be a qualified community is unwilling or unable to ratify a community development agreement pursuant to the prescribed procedures, the respective large-scale mining licence owner is relieved of its obligation to enter into a community development agreement with that community.

(7) A community development agreement will come into force on the date it is approved in the prescribed manner.

(8) The holder of large-scale mining licence may submit a revised community development agreement for approval in such form and manner and containing such content as are prescribed.

(9) Where a qualified community that is entitled to a community development agreement lacks the capacity to effectively negotiate a community development agreement, the holder of a large-scale mining licence shall assist to build that capacity including the provision of such funds to the qualified community for capacity-building and preparation as are reasonable in the circumstances.

(10) The holder of a large-scale mining licence is required to reasonably comply with its approved community development agreements.

(11) A copy of any community development agreement approved under this article, including an updated community development agreement, shall be

- (a) available to the public at the office of the Registrar, and

- (b) shall be posted by the Registrar on the website of the Registrar until such time as the agreement is no longer in effect.
- (12) The holder of a large-scale mining licence must:
 - (a) expend on community development no less than [x per cent (x%)] of its annual gross sales revenues, in such manner, at such time and on such activities as are prescribed; and
 - (b) submit annually, at such time and in such form and manner as are prescribed, a community development expenditure report;
 - (c) submit semi-annually, at such time and in such form and manner as are prescribed, a community development agreement report for each community development agreement associated with its mining licence; and
 - (d) periodically, as is prescribed, update its community development agreement(s).
- (13) The holder of a tenement that fails to substantially comply with paragraph (12)(b) or (12)(c) is guilty of an offence and liable on conviction, to a fine and a default penalty of a fine for every day from the submission deadline until the day on which the report is accepted, as prescribed in the Regulations.
- (14) Where a large-scale mining licence is transferred to another party, the transferee is deemed to assume all rights and obligations of the transferor under any community development agreements entered into by the transferor relating to that large-scale mining licence.
- (15) The Minister must suspend without limit a large-scale mining licence if the licence holder fails to substantially comply with prescribed requirements:
 - (a) to identify all qualified communities; or
 - (b) to have and implement approved and ratified community development agreements with all qualified communities; or
 - (c) to expend the minimum annual amount on community development.

The following example provisions are mining regulations that act to supplement the model mining act article. Generally, the purpose of regulations is to provide details that support the administration of requirements set out in the mining law to which the regulations relate (such as the content of a report that is required to be submitted under the law). While the example below is a ‘good practice’ model, the development of CDA regulations must be crafted to meet specific jurisdictional needs and requirements.

PART {X}. COMMUNITY DEVELOPMENT AGREEMENT REGULATIONS

1. Objective of this Part

The objects of this Part are:

- (a) to involve communities affected by a large-scale mining operation in decisions relating to the exploitation of natural resources in their areas and promote a safe and healthy environment;
- (b) to enhance the sustainable social, cultural and economic well-being of communities that may be affected by mining operations;
- (c) to define when community development agreements are required and to provide a framework for such agreements;
- (d) to ensure accountability and transparency in mining related community development.

2. Interpretation of this Part

In this Part, words and expressions shall have the meanings ascribed to them in the Act and as follows:

“ratified community development agreement” means a community development agreement that has been approved by the respective qualified community according to such process and in such manner as is customary for such community to make decisions on matters affecting the qualified community as a whole;

“Sub-Community” means any social community of less than 3,000 persons that otherwise meets the definition of a qualified community.

3. Identification of qualified communities

- (1) The holder of a large-scale mining licence must:

- (a) before commencing mine development (or if the mining licence came into force before the effective date of the Act and mine development has already commenced or has been completed, within one year of the effective date of the Act); and
 - (b) at five (5) year intervals after the year in which commercial scale minerals extraction (or if the mining operation commenced before the effective date of the Act, at (5) year intervals from the year in which the Act came into effect), identify all Qualified Communities and submit a draft list of such Qualified Communities to the Registrar.
- (2) The Commissioner, in consultation with local government authorities and traditional leaders in the area in proximity to which the large-scale mining licence is located, within sixty (60) calendar days of receiving a submission under subregulation (1), shall approve or amend the draft Qualified Community list, and if the Commissioner amends the list, the Commissioner shall notify the large-scale mining licence applicant or holder explaining the reasons for such modification.
- (3) Sub-communities may join together to form a Qualified Community.
- (4) Sub-communities, on their own, do not qualify for a community development agreement.
- (5) A Sub-Community may at any time notify the Commissioner that it believes it is a Qualified Community with regard to a large-scale mining licence.
- (6) The Commissioner, in consultation with local government authorities and traditional leaders, within sixty (60) calendar days of receiving a notice under subregulation (5), shall notify both the Sub-Community and the respective mining licence holder whether the community is a Qualified Community, and if it is not a Qualified Community, explain the reason why not.
- (7) The Commissioner must reject a request submitted under subregulation (5) if that community of persons does not meet the definition of a Qualified Community.

4. Form of application for approval of a community development agreement

- (1) An application for the approval of a community development agreement or revised community development agreement must be on *{Form: Application for Approval of Community Development Agreement}* and must have attached to it:
 - (a) the community development agreement for which approval is sought; and
 - (b) in the case of an application for the approval of a revised community development agreement, a written explanation explaining why the revision is necessary.
- (2) An applicant registering an application for approval of a community development agreement must pay the Application for Approval of Community Development Agreement fee set out in the *{fee schedule}* to these Regulations.
- (3) An applicant registering an application for approval of a revised community development agreement must pay the Application for Approval of Revised Community Development Agreement fee set out in the *{fee schedule}* to these Regulations.

5. Approval of community development agreement

- (1) A ratified community development agreement or ratified revised community development agreement agreed and signed by the authorized representatives of the holder of a large-scale mining licence and a Qualified Community shall be submitted to the Registrar pursuant to regulation 4 for approval.
- (2) The *{multi-ministerial board}* shall inform the Commissioner whether any ratified community development agreement submitted under this regulation meets all content requirements set out under the Act and regulation 6.
- (3) If a ratified community development agreement meets all content requirements set out under the Act and regulation 6, the Commissioner, on the advice of the *{multi-ministerial board}*, must approve such agreement, and if the agreement does not meet such requirements, the Commissioner must reject it.
- (4) A community development agreement shall come into force upon the date that it is approved by the Commissioner.
- (5) If a ratified community development agreement or ratified revised community development agreement is not approved by the Commissioner, the Commissioner shall notify both the holder of the large-scale mining licence and the Qualified Community representative, and such notices shall contain the specific reasons for denial and the means or directions by which such reasons may be corrected.
- (6) The Commissioner shall cause, within seven (7) calendar days from the date on which a notification is made under subregulation (5), a copy of the notification to be put on open file with the Registrar for access by the public.

(7) The holder of a large-scale mining licence and the Qualified Community representatives whose application to approve a community development agreement has been denied may submit any number of amended ratified community development agreements and such submissions do not require the payment of any additional processing fee.

(8) If the holder of a large-scale mining licence and a Qualified Community are unable to agree on the terms of a community development agreement, they may by mutual consent seek to resolve their differences through mediation as provided under the Act.

(9) If the holder of a large-scale mining licence and a Qualified Community fail after reasonable good faith attempts to conclude a Community Development Agreement by the time the holder is ready to commence mine development work on the licence area, the holder or the Qualified Community may refer the matter, jointly or individually, by notification to the {*multi-ministerial board*} for resolution, and the decision of the {*multi-ministerial board*} thereon shall be final.

(10) A notification under subregulation (9) from either or both parties shall include:

- (a) the draft community development agreement proposed by the party;
- (b) description of the efforts to negotiate an agreement or revised agreement;
- (c) issues that have been agreed;
- (d) issues that have not been agreed;
- (e) proposals to resolve disputed issues, and

the {*multi-ministerial board*} shall determine the matter within ninety (90) calendar days of such notification.

(11) If a Qualified Community is unwilling or unable to ratify an agreement decided pursuant to subregulation (9), the large-scale mining licence holder is relieved of its obligation to enter into a community development agreement with that Qualified Community and to provide development assistance to that community.

(12) The Registrar, within thirty (30) calendar days from the date on which a community development agreement is approved, shall cause a copy of the agreement or revised agreement to be put on file at its office for free public access and post it on the website of the Registrar.

6. Content of community development agreement

(1) Goals, objectives, obligations and activities specified in a community development agreement should aim to achieve sustained community development that:

- (a) lasts from generation to generation;
- (b) is based on the actual needs of the community;
- (c) is maintainable within available income;
- (d) is well planned, monitored and evaluated;
- (e) has long term, sustainable benefits;
- (f) respects the environment;
- (g) prepares the community for closure of the mine;
- (h) complements but does not replace government-led development and services;
- (i) is in accord with local and regional government development plans; and
- (j) recognises and incorporates traditional knowledge.

(2) In accordance with subregulation (1), the holder of a large-scale mining licence that is required to have one or more ratified community development agreements must negotiate with each Qualified Community the terms of a community development agreement, and all such agreement(s) shall include at least the following mandatory provisions:

- (a) the assembly, authority, board, body, commission, committee, council, forum, foundation, person, persons, trust or other entity that shall manage the Community Development Agreement;
- (b) the person or body that represents the Qualified Community for the purposes of the Agreement;
- (c) the means by which a registry of Sub-Communities, if any, comprising the Qualified Community will be developed, maintained and updated;
- (d) the means by which Sub-Communities of a Qualified Community will participate in the community development agreement related decision-making processes;
- (e) the means by which the interests of women, youth and marginalized groups of the Qualified Community will be represented in the community development agreement related decision-making processes and implementation;
- (f) the goals and objectives of the community development agreement;
- (g) description of the physical area where the Qualified Community resides;

- (h) a Qualified Community development programme plan that shall include at least the following subject matter:
 - (i) objectives;
 - (ii) milestones;
 - (iii) on-going activities in each of the four following categories: human resources development, economic development, social infrastructure and health;
 - (iv) implementation timetable;
 - (v) schedule of anticipated expenditures, if revenues allow;
 - (vi) metrics by which to measure progress;
 - (vii) periodic reporting including actual expenditures;
 - (viii) how the plan ensures the use of appropriate technology and material selection suitable to local capacity and physical conditions;
 - (ix) how the plan works in coordination with government plans, services, infrastructure and activities provided to or affecting the Qualified Community;
 - (x) how the provision of any service provided by the large-scale mining licence holder to the Qualified Community will be terminated or transferred to the Qualified Community, Sub-Communities or other entity;
 - (xi) how and when the plan will be periodically updated;
 - (xii) how the plan and amendments to the plan will be ratified by the Qualified Community; and
 - (xiii) such other content as may be mutually agreed by the Qualified Community and the licence holder;
- (i) the roles and obligations of the large-scale mining licence holder to the Qualified Community, that may or may not be part the development programme plan required under subregulation (2)(h), including but not limited to:
 - (i) undertakings with respect to the social and economic contributions that the project will make to the sustainability of the Qualified Community;
 - (ii) assistance in creating self-sustaining, income-generating activities, such as but not limited to, production of goods and services needed by the mining operation and the Qualified Communities;
 - (iii) consultation with the Qualified Community in the planning of mine closure and post-closure measures that seek to prepare the Qualified Community and its Sub-Communities for the eventual closure of the mine;
- (j) the roles and obligations of the Qualified Community and its Sub-Communities to the large-scale mining licence holder;
- (k) the means by which the community development agreement shall be reviewed by the large-scale mining licence holder and Qualified Community every five (5) calendar years, and the commitment to be bound by the current agreement in the event that any modifications to the agreement sought by one party cannot be mutually agreed with the other party;
- (l) the consultative and monitoring frameworks between the large-scale mining licence holder and the Qualified Community, and the means by which the Qualified Community and its Sub-Communities may participate in the planning, implementation, management, measurement (including indicators) and monitoring of activities carried out under the agreement;
- (m) the means by which any funds made available under the agreement are to be disbursed, for what purposes they may be disbursed, what accounts must be kept and by whom, and reporting and third-party auditing requirements;
- (n) grievance and dispute resolution provisions including:
 - (i) the mechanisms whereby the Qualified Community, Sub-Communities and members of the Qualified Community may lodge a grievance with the large-scale mining licence holder;
 - (ii) the mechanisms whereby the large-scale mining licence holder may lodge a grievance with the Qualified Community;
 - (iii) a statement to the effect that both the large-scale mining licence holder and Qualified Community agree that any dispute regarding the agreement shall in the first instance be resolved by consultation between the licence holder and the Qualified Community representative(s);

- (iv) the dispute resolution mechanism to be used when consultation between the large-scale mining licence holder and the Qualified Community representative(s) fails;
- (o) the process by which the agreement may be modified;
- (p) severability of articles;
- (q) the applicable law, which shall be the law of {country};
- (r) reasons and procedure for declaring force majeure;
- (s) duration of the agreement;
- (t) suspension / termination of the agreement;
- (u) assignment of the agreement or any right or obligation thereunder;
- (v) transfer of all community development agreement rights and obligations to any party to whom the large-scale mining licence transfers its mining licence;
- (w) how notifications to respective parties must be done;
- (x) location where the community development agreement may be accessed by members of the Qualified Community and its Sub-Communities; and
- (y) the agreement signatories, that may for the Qualified Community be the representatives of the Qualified Community, representatives of Sub-Communities comprising the Qualified Community, traditional authorities, community members or any combination thereof, non-governmental organizations and others as the need requires.

(3) In accordance with subregulation (1), a community development agreement must take into account the unique circumstances of the holder of the large-scale mining licence and Qualified Community, and the issues to be addressed in the agreement and development programme plan may include some, none or all the following:

- (a) role of local government;
- (b) role of traditional leaders;
- (c) educational scholarship, apprenticeship, technical training and employment opportunities for the people of the Qualified Community and its Sub-Communities;
- (d) employment quota or percentage allocation for Sub-Communities;
- (e) financial or other forms of contributory support for infrastructural development and maintenance such as education, health or other community services, roads, water and power;
- (f) assistance with the creation, development and support to small-scale and micro enterprises;
- (g) special programs that benefit women;
- (h) special programs that benefit youth;
- (i) special programs that benefit marginalized groups;
- (j) special programs that benefit the disabled;
- (k) special programs that benefit Sub-Communities within the Qualified Community;
- (l) agricultural enhancement and product marketing;
- (m) protection of natural resources;
- (n) support for cultural heritage and sports;
- (o) treatment of meeting-place trees, cultural and sacred sites;
- (p) treatment of ecological systems, including restoration and enhancement, for traditional activities such as hunting and gathering;
- (q) language training to further employment prospects;
- (r) how cultural values will be respected;
- (s) cross-cultural training requirements;
- (t) malaria, AIDS and drug dependency prevention and intervention;
- (u) land access;
- (v) the assumption of specified obligations of the large-scale mining licence holder by the Qualified Community, Sub-Communities and/or government on an evolving basis and/or upon termination of the agreement;
- (w) methods and procedures of environment and socio-economic management, and local governance enhancement;
- (x) requirements with regard to third parties such as the large-scale mining licence holder's contractors and suppliers;
- (y) the involvement of non-governmental organizations;
- (z) access to infrastructure; and

- (aa) other matters as may be agreed.
- (4) A community development agreement cannot address any of the following matters:
- (a) the imposition of any additional rent, fee, or tax for the benefit of the Qualified Community that is not set out in the Act or other law;
 - (b) the payment of any sum of money by the licence holder to the Qualified Community that is not directly related to a specific development activity detailed for implementation under the agreement or the agreement's development plan;
 - (c) the provision of any passenger car, truck, motorcycle or four-by-four vehicle to any individual, traditional authority or single family unit of the Qualified Community or to the Qualified Community (other than a specialized purpose vehicle such as an ambulance, fire engine, water truck or bus);
 - (d) the provision of any monetary amount, service, good, or facility for the sole benefit of an individual, traditional authority or single family unit;
 - (e) the provision of any payment or service to a unit of the military;
 - (f) any matter that is illegal under any applicable law.

7. Community development agreement to compliment other development

The holder of large-scale mining licence that is required to enter into a community development agreement with a Qualified Community shall take into consideration:

- (a) any community development agreements it, or another licence holder, has with other Qualified Communities so that such agreements complement one another to achieve synergistic development across the communities;
- (b) any existing community development agreements entered into by that Qualified Community with other holders of large-scale mining licences so that its community development agreement complements such existing agreements, and may, but is not required to, become a party to any such existing agreements;
- (c) any government local or regional development plans or schemes so that the agreement is in harmony with and complements such plans or schemes; and
- (d) any government services provided or that will be provided to a Qualified Community so as not to displace that service.

8. One agreement may include more than one Qualified Community

If the holder of a large-scale mining licence is required to enter into community development agreements with more than one Qualified Community, the licence holder may enter into one or several community development agreements that include multiple Qualified Communities, but the licence holder must have a separate community development agreement with a Qualified Community that does not want to be part of a multiple party agreement.

9. Replacement of multiple agreements with a single agreement

If the holder of a large-scale mining licence has entered into more than one community development agreement and the parties to two or more of these agreements now want to replace their agreements with a single community development agreement, such new agreement shall be submitted for approval under regulation 5.

10. New Sub-Community

Any Sub-Community not appearing in the registry of Sub-Communities constituting a Qualified Community may with the approval of the body responsible for the management of a community development agreement be added to such registry at any time and shall then be considered a Sub-Community of that Qualified Community for the purposes of these Regulations.

11. Only one agreement required if community is the same

If a person is the licence holder of more than one large-scale mining licence and these Regulations would otherwise require the person to enter into a ratified community development agreement with the same Qualified Community under each large-scale mining licence, only a single community development agreement and semi-annual community development report are required with regard to that community.

12. Community development minimum expenditure requirement

(1) The holder of a large-scale mining licence that has entered into one or more approved and ratified community development agreements shall expend no less than point five per cent (0.5%) of the gross revenue amount earned pursuant to that licence from mineral sales in the previous calendar year to collectively implement its community development agreement(s) or otherwise promote community development as allowed in this regulation.

(2) If during any calendar year the holder of a large-scale mining licence expends an amount on community development in excess of the required annual minimum expenditure amount, such excess amount may be applied to satisfy up to fifty per cent (50%) of its community development expenditure requirement in the next calendar year.

(3) If during any calendar year the holder of a large-scale mining licence does not expend an amount at least equal to the minimum annual expenditure amount required under subregulation (1), including any excess amount carried forward from the previous calendar year pursuant to subregulation (2), the large-scale mining licence shall be subject to suspension by the Commissioner until such time as the deficient amount is expended.

(4) The value of community development related work (if the expenditures by the holder of a large-scale mining licence are reasonable, documented in sufficient detail to establish their authenticity to the satisfaction of the Commissioner, and directly related to the objectives of one or more ratified community development agreements) includes:

(a) at full cost (whether incurred directly by the holder of the large-scale mining licence or indirectly through payments to a contractor, community trust, community foundation or other legal entity) work or funds irrevocably committed to fulfil any obligation of the licence holder specified in a ratified community development agreement;

(b) to a total not more than ten per cent (10%) of the minimum expenditure requirement pursuant to subregulation (1) (whether incurred directly by the holder or indirectly through payments to a contractor, community trust, community foundation or other legal entity):

(i) salaries and benefits of any person responsible for managing the implementation of one or more community development agreements if such responsibilities comprise over fifty per cent (50%) of that person's time;

(ii) social baseline studies including: the gathering and compilation of baseline data that describes the state of the social and economic environment and characteristics of the populations living in the area, assessment of the potential social and economic impacts of the project upon communities, and competencies assessment (measuring and recording skills in a community);

(iii) participatory planning (the preparation of development programme plans where community members participate in the planning effort);

(iv) social mapping studies;

(v) institutional analysis processes (processes for identifying and discussing what institutions are present in and around a community);

(vi) problem census taking (processes by which community members articulate the problems they consider need addressing in their community);

(vii) implementation of any part of a government development plan for a Qualified Community;

(viii) training programmes for members of a Qualified Community;

(ix) consultation processes between the licence holder and a Qualified Community or members of a Qualified Community and or local government that are related to the implementation of a community development agreement;

(x) community development agreement monitoring;

(xi) conflict management activities (the implementation of a grievance process, other than Court actions, as stipulated in a community development agreement);

(xii) such other expenditures as may be reasonably approved in writing by the Commissioner.

(c) to a total of not more than ten per cent (10%) of the minimum expenditure requirement pursuant to subregulation (1), work that benefits more than a single Qualified Community that is not in furtherance of any individual community development agreement but such work is approved in writing by the Commissioner, in consultation

- with the *{multi-ministerial board}* as qualifying as community development work (such as shared infrastructure);
- (d) to a total of not more than five per cent (5%) of the minimum expenditure requirement pursuant to subregulation (1), administrative expenses;
 - (e) funds extended to a qualified community in order for that community to build its capacity and enable it to effectively negotiate a community development agreement may be carried forward for expenditure reporting purposes to the first year of mineral sales and then claimed as a qualifying expenditure in equal amounts over the next five (5) years.
- (5) The value of community development related work does not include:
- (a) the payment by the holder of a large-scale mining licence to any salaried worker it employs except as provided under subregulation (4)(b)(i); or
 - (b) the purchase of any good by the licence holder from a Qualified Community or community member that will be consumed, used or sold by the licence holder.

13. Community development agreement reporting requirements

- (1) The holder of a large-scale mining licence that has a community development agreement shall submit to the Registrar:
- (a) a report substantially as set out in *{Form to Submit Community Development Agreement Semi-Annual Report}* to these Regulations no later than July 31, providing the information required by subregulation (2) for January through June in the current calendar year;
 - (b) a report substantially as set out in *{Form to Submit Community Development Agreement Semi-Annual Report}* to these Regulations no later than January 31, providing the information required by subregulation (2) for July through December during the prior calendar year; and
 - (c) a report and attachments substantially as set out in *{Form to Submit Community Development Expenditure Annual Report}* to these Regulations not later than February 15 detailing its community development expenditures and total expenditure for January through December during the prior calendar year, signed by the licence holder (such report shall be sufficiently detailed, including a breakdown of expenditures as per subregulation 12(4) of these Regulations, for the Commissioner to verify that the amount and types of expenditure to meet minimum expenditure requirements).
- (2) A community development agreement semi-annual report must contain at least the following information for the period being reported:
- (a) description the goals of the community development agreement;
 - (b) description of the community development objectives and how they are to be met;
 - (c) community development agreement activities, milestones and results for the period being reported;
 - (d) development programme plan activities, milestones, expenditures and results for the period being reported;
 - (e) description of community related challenges encountered, how these challenges are or may affect the project, and how the challenges are or will be addressed;
 - (f) description of environmental and social impacts of community development agreement activities;
 - (g) other information as may be requested in writing by the Commissioner;
 - (h) other information that the licence holder wants to report; and
- any such descriptions and information shall be sufficiently detailed so that the Commissioner can determine whether the community development agreement is succeeding.
- (3) A report submitted pursuant to this regulation shall have been prepared under the supervision of a duly authorized director or officer of the holder of the large-scale mining licence and shall be accompanied by an attestation signed by such supervising director or officer that the information in such report is substantially accurate and true.
- (4) If a report submitted under this regulation is not accompanied by the signed attestation required by subregulation (3), the report shall not be accepted by the Registrar and does not meet the requirements of the Act.
- (5) At the time that any complete community development agreement semi-annual report or community development annual expenditure report is accepted by the Registrar, the Registrar

must issue to the person submitting such report a completed and stamped receipt in {*Form: Receipt for Submitted Report*}.

14. Community development agreements and reports available to the public

(1) All community development agreements, community development agreement semi-annual reports and community development annual expenditure reports (including all required attachments) submitted by past and present mining licence holders in furtherance of these regulations shall be open to free inspection by members of the public at the office of the Registrar.

(2) On payment of the fee prescribed in the {*fee schedule*}, any member of the Public shall be entitled to obtain a copy from the Registrar of any community development agreement, community development agreement semi-annual report, or community development annual expenditure report submitted by a past or present mining licence holder

(3) A community development agreement, community development agreement semi-annual reports and community development annual expenditure reports (including all required attachments) submitted by a large-scale mining licence holder in furtherance of these Regulations shall be open to free inspection by any member of the Qualified Community party to such agreement at the office of the mining licence holder located closest to that community during normal office hours.

15. Suspension of large-scale mining licence

(1) The Minister must suspend without limit a large-scale mining licence if the holder of the licence fails to substantially comply with:

- (a) Article {*Community development agreement*} of the Act (requirement to have and implement community development agreements with all Qualified Communities); or
- (b) subregulation 3(1) of these Regulations (requirement to identify all Qualified Communities); or
- (c) subregulation 12(1) of these Regulations (requirement to expend annual amount on community development).

(2) The Minister, before suspending any large-scale mining licence pursuant to subregulation (1), shall give notice to the licence holder and in such a notice, shall require the licence holder to remedy, in not less than ninety (90) calendar days, any breach of these Regulations.

At the local level, sustainable development is about meeting locally defined social, environmental, and economic goals over the long term. Interactions between the mine and community should add to the physical, financial, human, and information resources available—not detract from them. The challenge is to ensure that the effect of interactions is regarded as positive by those affected locally as well as by the promoters of the project, and that communities develop in ways that are consistent with their own vision. This may be realized through, for example, the provision of social services, income, or skills development. Enhancing community values presents a particular challenge, given the often intense social change brought about by mining and the potential influx of outsiders (MMSD 2002: 198).