



Sustainable Development
Strategies Group

"COMMUNITY BENEFITS SHARING POLICY NOTE

September 25, 2012

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1. INTRODUCTION

The Government of Afghanistan (GoA), with support from the World Bank (WB), is currently developing a Resource Corridor strategy. One key aspect of this strategy is addressing the social issues around the mining sector and, more specifically, community benefits sharing. Through written and verbal exchanges with representatives from the Afghan Ministry of Mines, a number of issues have been highlighted. In this context, this policy note addresses the rationale for a community benefits sharing framework, the process and methodology of developing Community Development Agreements (CDAs), some major points that should be considered in CDAs (relationship building, ongoing communications, and the process of working with communities), and the governance of CDAs.

2. RATIONALE FOR COMMUNITY BENEFITS SHARING

2.1 Reasons to Share Benefits from Mining with Local Communities

What is the rationale behind sharing the benefits generated from mining activities with local communities? A considerable number of national governments have at some point taken the view that, under the Constitution (or applicable law), all natural resources belong to the people, or to the State as representative of the people, and thus the national government can and should decide how to allocate the benefits that arise from them, providing no particular reasons why any of these resources should go to communities in the region around the mine. Most governments have, however, begun to take a different approach that provides substantial benefits to local communities. These governments have found that overlooking the needs of local communities is detrimental and ineffective for the following four reasons.

2.1.1 The Need to Manage Change

The development of a mine unleashes a tremendous process of change that is felt most strongly in the area immediately around that mine. Some resources are needed to manage those changes, or the result can be social chaos.

For example, suppose there is a mining project site in Central America. In a few months, several thousand construction workers will arrive to begin constructing the mine. These workers will be overwhelmingly male and single. The entire regional police force is two officers, who share a bicycle for transportation. Without some local resources to increase law enforcement capacity, serious problems are inevitable. This is a small example; there are many others. Water use by the project may change the availability of

water for local farmers; impacts on ecosystems may mean that subsistence resources (fish, game animals, desert fruits, access to grazing areas) are no longer available. There may be a large migration of people from other parts of the country who are drawn by the economic opportunities, but who arrive in places that have no housing for them. Prices of housing and staple food commodities may rise dramatically. Additionally, social impacts may arise, such as pressure for change in traditional gender relationships.

It is well documented that the influx of workers and migrants drawn by opportunities into the area will bring significant health care challenges – for example, the spread of sexually transmitted diseases, including HIV/AIDS. Management of this dramatic process of change without creating chaos requires a substantial increase in the capacity of local institutions in health, education, housing, transportation and a variety of other areas. This simply cannot be achieved without an allocation of funds.

2.1.2 Managing Emerging Disparities

Some local people will be well equipped with the skills, education, or just good luck, to allow them to take advantage of this process of change. These individuals may experience an increase in their quality of life, at least temporarily, due to the mine. Many others, however, will not be in a position to share in the benefits. The emergence of dramatic disparities of wealth, and access to benefits, can create social conflict, particularly if the line between "have" and "have not" reflects other lines of social cleavage, such as racial, ethnic or language differences. Some resources are necessary to ensure that local societies can benefit broadly from development. This could, for example, include training programs to expand the group of people who are qualified for mining related employment and opening of schools. If only a few community members benefit from development, and the majority actually become worse off, the result in general will be a great increase in social tensions, and in the worst cases, violence.

2.1.3 Ameliorating Negative Impacts

Not all of the impacts of mine development are positive. Some people, often the poorest or least advantaged, may suffer and become worse off if adequate resources and procedures are not available to ameliorate the negative impacts that often result from mining projects. The list of possible issues is very long. Not all these issues exist at every site, but issues observed include:

- Loss of livelihoods that are dependent upon subsistence resources
- Inflation in the cost of housing, staple foods, and other necessities
- Introduction of new diseases and other public health problems (e.g. traffic accidents)
- Loss of personal security and increases in petty crime
- Loss of authority of traditional cultural institutions

These are common examples. There are many others. Experience teaches that even with the best approaches these are very difficult for local people to experience. With no resources and no capacity in local institutions, the results are likely to be very negative.

2.1.4 Capturing as Many Benefits as Possible

There are certain types of development benefits that can only be captured in the local communities around the mine. If these benefits are not captured locally, they are not captured at all, and are simply lost. Sometimes some resources are necessary to capture those benefits.

For example, the mining company will almost certainly develop some form of telecommunications capacity, such as a cell phone tower. With some planning, this can be made available to local people and institutions as a shared resource. But without some means of obtaining cell phones for local government, or for villagers, these benefits amount to nothing.

Mining companies have often been willing to build schools, or to build clinics. But without teachers or nurses, there are no development benefits. And there are many vacant schools and vacant clinics around mine sites, where companies have done their share but government has not done its share. The company will almost always bring electrical energy in to the area. This opens up the opportunity for rural electrification. But again, there must be a government share if this is going to work.

What these and many other examples have in common is that there is a great opportunity for development benefits, but the benefits cannot be realized unless, for example, there is a local fund¹ that allows local institutions to do their share to capture those benefits. Absent such a fund, the benefits are likely to be lost. Or, if the whole burden falls on the mining company, the costs to the company increase, and the company may find the role of "surrogate government" to be both uncomfortable and unsustainable.

There is increasing focus on the benefits from employment and employment training in mining and mine related activities. There is also greater emphasis on the benefits that may accrue when there is a conscious effort to build the capacity of local businesses to sell goods to the mine. Economic linkages, capacity building, employment, training, infrastructure – these are types of benefits that really can only be harvested locally, but

¹ A local fund may be composed of funds from the company, the government, or both, and may be supplemented with funding from grants from public or private foundations. These funds are utilized for planning, consultations, ongoing communications, and according to the priorities agreed upon in the community benefits sharing agreement or CDA. For further explanation, see Section 4.5 below. *See also* World Bank, *Mining Community Development Agreements Source Book* (2012).

can be experienced only with the provision of some capacity in government and other local institutions to capture such benefits.

2.2. ISO Guidance on Social Responsibility

Under the International Organization for Standardization Guidance on Social Responsibility (ISO 26000:2010),² it is widely accepted today that organizations have a relationship with the communities in which they operate.³ This relationship should be based on community involvement so as to contribute to community development. Community involvement, either individually or through associations seeking to enhance the public good, helps to strengthen civil society. Organizations that engage in a respectful manner with the community and its institutions reflect and reinforce democratic and civic values. Community involvement and community development are both integral parts of sustainable development. Community involvement goes beyond identifying and engaging stakeholders in regard to the impacts of an organization's activities; it also encompasses support for and building a relationship with the community. Above all, it entails acknowledging the value of the community.⁴

2.3 Community Development Agreements

Mine development creates dramatic social, ecological, and economic change in regions surrounding mine sites and transportation corridors. Without some resources to manage this process, and widen the circle of people who can benefit from development, the result will be that only a few people do very well by the process, and most do not. Indeed, many people, including many of those already poor, are likely to be made worse off. This will inevitably lead to social conflict. The social conflict will interfere with the development process, and in many cases around the world has made mining simply untenable: mining cannot effectively go forward without community support. Where it

² See ISO 26000 – Social Responsibility Webpage, http://www.iso.org/iso/social_responsibility.

³ An organization should consider itself as part of, and not separate from, the community in approaching community involvement and development; recognize and have due regard for the rights of community members to make decisions in relation to their community and thereby pursue, in the manner they choose, ways of maximizing their resources and opportunities; recognize and have due regard for the characteristics, for example, cultures, religions, traditions and history, of the community while interacting with it; and recognize the value of working in partnership, supporting the exchange of experiences, resources and efforts. ISO 26000:2010.

⁴ An organization's community involvement should arise out of recognition that the organization is a stakeholder in the community, sharing common interests with the community. An organization's contribution to community development can help to promote higher levels of well-being in the community. Such development, generally understood, is the improvement in the quality of life of a population. Community development is not a linear process; moreover, it is a long-term process in which different and conflicting interests will be present. Historical and cultural characteristics make each community unique and influence the possibilities of its future. Community development is therefore the result of social, political, economic and cultural features and depends on the characteristics of the social forces involved. Stakeholders in the community may have different, even conflicting, interests. Shared responsibility is needed to promote well-being of the community as a common objective. ISO 26000:2010.

tries to do so, the costs in the long run have usually proven to be excessive and the mining venture is not successful. One possible solution to these problems is to develop a CDA, which in essence supports two goals: to improve relationships among all stakeholders, and to promote sustainable benefits that flow to these stakeholders. While a CDA is not the only method available to achieve these goals, many groups are now turning to CDAs to provide a comprehensive strategy to ensure that consultation with impacted communities occurs, and that benefits are shared in a more equitable and sustainable way.

In sum, the rationale for community benefits sharing includes:⁵

- **Equity:** Local people are entitled to special consideration because they bear a disproportionate share of negative economic, social and environmental impacts related to natural resource development;
- **Economic Development:** Mining offers an opportunity to kick start economic development in a limited geographic area; diversifying economic activity early in the mining process will help sustain the local economy after mine closure
- **Expediency:** Community benefits sharing agreements promote transparent and regular communication processes from the beginning of the development project, and help parties avoid and more easily resolve any related issues or conflicts.

3. PROCESS & METHODOLOGY

The process by which communities participate in consultation and negotiation is at least as important as the ultimate result. The objective is to develop long-term relationships based on confidence and trust; if the process involves lack of respect, is too rushed, or lacks regard for the particular community's culture, it can create problems that are very difficult to overcome.

In addition, no agreement will ever be able to foresee all potential problems or consequences. An effective agreement therefore needs to include ongoing processes for information sharing, addressing material changes as they arise, and for resolving issues and conflicts. If good relationships and procedures are already in place, adjusting to change will be relatively easy.

How to engage with communities and the process involved with ongoing communications under difficult circumstances are core issues to be addressed for a successful policy of community benefit sharing. This section focuses on relationship

⁵ Olle Östensson, Caromb Consulting, Presentation at Minerals Taxation & Sustainable Development Seminar, Dundee Annual Meeting, London, (June 27, 2012).

building, ongoing communications, and the process of working with communities to develop social agreements.

The Government of Afghanistan's Social Policy Guidelines for Mining Sector expresses some key ideas to consider. The first one is a reminder that most benefit sharing arrangements in mining are Corporate Social Responsibility activities of the companies directed towards community development rather than actual sharing of the benefits. A second idea is that companies should create provisions to share benefits with the affected communities through wide-based agreements covering aspects like economic development; employment generation; vocational training; business opportunities; social, cultural and community support; environmental and health protection; etc. A third idea is that new and innovative options for social welfare in the mine area, including means of alternate livelihoods, education of children, health care facilities, etc., should be explored. Experience and the example of many cases show that CDAs, known under numerous names adopted in different countries, are a particularly appropriate way to promote and deliver community benefit sharing.

3.1 Objectives

The objective of GoA's social policy will be to:

Ensure that activities under the different projects will: Enhance social and economic development by seeking opportunities to address poverty; contribute to community development through close collaboration with local communities; community consultation and involvement in the process of development; contribute to mitigate negative social impacts of the project especially on the project affected communities; prevent or compensate any loss of assets and livelihood; enhance positive environmental and social outcomes; protect human health; protect rights of mine workers; provide social protection to workers and their families; support gender equality principles and; ensure compliance with World Bank safeguard policies.⁶

According to the World Bank, companies should contribute positively to the long-term development of impacted communities, regions and nations. This is achieved either through a regulatory framework wherein companies are legally required to engage in delivering social and economic benefits, or through negotiations between companies and local stakeholders as part of a broader commitment to Corporate Social Responsibility principles.⁷

⁶ Islamic Republic of Afghanistan Ministry of Mines, *Social Policy Guidelines for Mining Sector in Afghanistan* 8 (Aug. 14, 2011), available at http://mom.gov.af/Content/files/Social_Policy_Guidelines.pdf.

⁷ Centre for Responsibility in Mining Sustainable Minerals Institute, *World Bank Extractive Industries Source Book: Good Practice Notes on Community Development Agreements* 1 (2011), available at <http://www.csr.m.uq.edu.au/Portals/0/docs/CSRM-CDA-report.pdf>. There are a number of instruments that can be used to deliver benefits to communities impacted by mining projects. These include

The World Bank states that key defining features of a good CDA practice are the following:⁸

- The agreement is arrived at through fair negotiation and/or facilitation;
- Communities, or community representatives, are engaged in these negotiations;
- The agreement is formalized in some form of written text, which may sometimes, but not always, take a legal form;
- There is an intention to create mutual obligations between the parties, whether or not these are legally enforceable; and
- The agreement includes provisions that address broader development objectives, rather than being focused narrowly on financial compensation.

Among the risks that should be *avoided*, the following should be considered:

- Parties lacking understanding or commitment to the process. This situation could lead to a legacy of uncertainty, mutual distrust and cynicism.⁹
- Rigid agreements, the product of a formal, legal process which constrains thinking and limits the capacity of the parties to adapt to changing circumstances.¹⁰
- Without clearly defined objectives and roles, a CDA may be viewed as compensating for or fulfilling the role of government, or as duplicating important local or regional initiatives.

Among the factors present in successful agreements, the following should be considered:¹¹

- The process that led to the agreement was inclusive and is seen as fair and equitable by members and representatives of the communities that are party to the agreement.

“company-controlled social investment programs, government-approved community development and impact mitigation plans, development forums, bilateral and multi-sector partnerships and collaborations, formal agreements, and community-controlled trusts and development funds.”

⁸ *World Bank Extractive Industries Source Book* (2011), *supra* note 7 at 1.

⁹ Likewise, if a community feels that they have been “pressured or misled into signing an agreement and that the outcome is unfair, or the result of a ‘back room deal,’ this is likely to exacerbate, rather than ameliorate, conflict and discord and will make it difficult to hold the agreement together over time.” *Id.* at 10.

¹⁰ “For example, the developer may take a view that the agreement sets the limit on what they need to do in terms of development initiatives and who they need to engage with. Similarly, community representatives may become overly focused on ensuring compliance with some relatively minor aspects of the agreement, at the expense of the ‘bigger picture.’” *Id.*

¹¹ *Id.* at 11.

- There is commitment amongst all parties to making the agreement work. Commitment, in simple terms, means that each of the parties understand and accept their obligations under the agreement, see it as having value, and act in ways that are reinforcing and affirming, rather than undermining.
- Each party has an understanding of the other's objectives and needs and there is clarity around obligations and commitments. These are clearly identified and expressed in the agreement.
- The agreement includes effective governance arrangements for managing the relationship between the parties on an ongoing basis and adequate resources are allocated to support these arrangements.
- There is periodic monitoring, review and adjustment of the agreement, to ensure that governance mechanisms are working effectively and progress is being made towards key objectives.
- The agreement is sufficiently flexible to enable adjustments to be made when circumstances change and/or when it becomes apparent that desired outcomes are not being achieved.

3.2 Community Engagement

Communities should be part of the mining process.¹² Currently, the understanding among scholars is that:

[P]roject sponsors and financiers incorporate community involvement and consent procedures and requirements into their project and investment decision making, planning, and operations at the very beginning, and that host

¹² There is a growing body of relevant literature on communities' participation regarding mining projects. Among others, the following texts, written under the Mining, Minerals and Sustainable Development (MMSD) process should be consulted: Theodore E. Downing, Jerry Moles, Ian McIntosh & Carmen Garcia-Downing, Mining, Minerals and Sustainable Development, *Indigenous Peoples and Mining Encounters: Strategies and Tactics* (2002), available at <http://pubs.iied.org/pdfs/G00548.pdf>; b) Ginger Gibson, Mining, Minerals, and Sustainable Development, *Community Information Needs: Access to Information Through the Mining Life Cycle* (2002), available at <http://pubs.iied.org/pdfs/G00669.pdf>; Ginger Gibson, Mining, Minerals and Sustainable Development, *Building Partnerships: Key Elements of Capacity Building: An Exploration of Experiences with Mining Communities in Latin America* (2002), available at <http://pubs.iied.org/pdfs/G00538.pdf>; Susan A. Joyce, Mining, Minerals and Sustainable Development, *Social Impact Assessment in the Mining Industry: Current Situation and Future Directions* (2002), available at <http://pubs.iied.org/G01023.html>; Fernando Loayza Careaga, Mining, Minerals, and Sustainable Development, *Access to Information: A Key to Building Trust in the Minerals Sector: The Government Role* (2001), available at <http://pubs.iied.org/pdfs/G00532.pdf>; Kwabena Mate, Mining, Minerals and Sustainable Development, *Communities, Civil Society Organizations and the Management of Mineral Wealth* (2002), available at <http://pubs.iied.org/pdfs/G00872.pdf>; George (Rock) Pring, Mining, Minerals and Sustainable Development, *The Law of Public Participation in Mining and Resources Development* (2001), available at <http://pubs.iied.org/pdfs/G00533.pdf>.

governments incorporate such procedures and requirements into their permitting processes.¹³

The core idea is that:

[M]ining companies must proactively engage with local communities in a consultative, participatory, culturally appropriate, and mutually acceptable manner including redress of grievances of the communities throughout the life cycle of the project.¹⁴

The Social Policy Guidelines for Mining Sector in Afghanistan accurately lists current best practices on community engagement.¹⁵ Among them, special consideration should be given to the following:

- The process of consultation with affected communities should begin together with exploration and before operation.
- Companies should prepare a profile of the local area, the existing socio-economic conditions of the communities at the time of the start of the project and identify key stakeholders.
- Companies should assemble a consultation plan with the communities to guide the government-led public consultation process.
- Companies should hold consultations with the community in the native language and in a manner that is culturally appropriate, using mechanisms and institutions that are recognized by the affected communities to ensure the participation of marginalized groups within communities.¹⁶
- Inclusiveness should be the guiding principle for negotiations, with a view toward including marginalized groups within communities, as well those risk-bearing groups living downstream and adjacent to the mine sites.

¹³ STEVEN HERZ, ANTONIO LA VIÑA & JONATHAN SOHN, WORLD RESOURCES INSTITUTE, DEVELOPMENT WITHOUT CONFLICT: THE BUSINESS CASE FOR COMMUNITY CONSENT 3 (2007).

¹⁴ *Social Policy Guidelines for Mining Sector in Afghanistan*, *supra* note 6 at 10. The Guidelines add that, “in order for this dialogue to be meaningful, companies should disclose all information relating to likely impacts of the project to the affected persons in a manner they can understand properly. Mining companies should carry out social impact assessments including impacts on gender; provide baseline studies; and ensure meaningful community participation in carrying out [Social Impact Assessments], baseline studies, independent audits and verification of compliance. The engagement with the communities can be done through a variety of processes like informal discussions, formal and structured engagement programs, public displays, public meetings, visitor centers, newsletters, websites, workshop, focus groups etc.”

¹⁵ *Id.* at 10 - 11. The Guidelines add that, “companies should make all efforts to ensure participation of women and other vulnerable groups in the consultation process through targeted engagement and mobilization. Companies should provide the communities with independent technical and legal advice if required to assist them in their meaningful participation in public consultation.”

¹⁶ Such as women; the elderly; ethnic, religious, class, or caste groups; and the illiterate. This is particularly relevant in the case of Afghanistan, considering the diversity of ethnic groups and languages.

- Companies should share relevant information with the communities about potential social risks, risk mitigation strategies, the social and cultural benefits and Corporate Social Responsibility activities planned by the company.¹⁷
- Companies should allow sufficient time for the communities to seek clarifications to help them participate in the decision-making processes. Consultations should be open and transparent to all members of the community.
- Companies should possess the expertise in conducting community consultations that respect local consultative practices and traditions, and should follow logical timeframes.

Additionally, it is important to consider one of the most challenging aspects about the community context: communities are almost infinitely variable and complex. Differences in factors such as local leadership, governmental structures, community cohesion, level of development, and culture, mean that no single framework is likely to work everywhere. Thus, several models should be available. While trying to define several community “types” also falls short of representing the complexity that exists, it at least provides some opportunity to address the immense variation.

Therefore, a rough framework is presented below to outline how different community characteristics might influence the process of developing a CDA. This framework can aid in understanding of communities so that the CDA can respond to unique community variables. Three potential community models include:

Model A: Cohesive Communities with Robust Local Government

- The community is characterized by cohesion. It is supported by functioning and capable institutions of local government, which are in turn supported by a functioning national government.
- The local government provides a legitimized political leadership as a counterpart for company efforts (e.g. elected officials), such as an elected mayor or council.
- Local legal structures (e.g. legislation, regulations, permitting processes) are in place.
- Funding and resources (e.g. monetary support; access to information) are available to the local community from higher levels of government.

¹⁷ In this regard, they should explain the Mining Plan, Environmental Social Impact Assessment (ESIA), Social Management Plan (SMP), Resettlement Action Plan (RAP), and Socioeconomic Development Plan to the communities.

Model B: Traditional Communities but Lacking Strong Formal Local Government

- The community is characterized by cohesion and is supported by some established/traditional local structure (rather than a formal local government).
- Although there is no local government to provide elected leadership, the community generally recognizes some form of leadership through tradition or custom.
- No formal legal structures are in place, but the community recognizes some form of rule structure through, for example, tradition or custom (e.g. complex but unwritten tribal customs).
- Funding and resources are not readily available from other government institutions.

Model C: No Strong Formal Legal or Traditional Authority; Divided Community

- A local community or communities exist, but may not be cohesive, and are not supported by an established institutional structure. There may be deep divisions between long time local residents and in-migrants, or along linguistic or ethnic lines, or based on status.
- The community as a whole does not recognize any one institution of leadership, and organs of local government either do not exist or have very low levels of capacity.
- The community as a whole does not recognize a legal structure, or tradition, or governing custom.
- Funding and resources are not readily available from other government institutions.

Key Differentiations among Community Models

	Model A	Model B	Model C
Institutional Leadership	Political/Elected representative	Traditional leaders	Not in place; Must be established
With whom is the CDA Negotiated?	Political/Elected representatives, perhaps validated by broad community approval	Traditional leaders, perhaps validated by broad community approval	Leadership must be established and legitimized before any negotiations can occur
Structure of Rules	Established legal regime	Customary rules (may be difficult to determine and apply; may need to establish concretely)	Not in place; Must be established
Approach to Capacity Building	Build the strength of existing institutions	Work with traditional leadership (and <i>other</i> community members)* to develop more formal structure with legal status	Work with community members to organize some kind of legitimate leadership structure
Consent Process (what should be necessary to show community consent)	Leadership approval backed by popular vote	Approval by both traditional leadership and majority approval (possibly by vote)	Must be established; Perhaps some form of majority approval with protection of minority rights
Overall Role of CDA	May be limited to supplementing what is provided for by formal structures	Must formalize and give legal standing to traditional or customary leadership	Must establish some kind of leadership and a framework for relationships between stakeholders

** Traditional leadership may not fairly represent the interests of all groups within a larger community. For example, certain social classes, women, and other marginalized groups may be excluded from the leadership process. Therefore, it is important to identify these groups and work to ascertain the interests of the wider community. Of course, this may also be true in communities with established or elected political representatives.*

This table suggests that a CDA may serve different purposes for a community depending upon the community's unique characteristics. For example, a CDA might serve a *supplementary role* in Model A because the existing institutions and leadership can support community interests, and the need for a CDA is simply to address additional

issues not adequately provided for in the legal structure, to provide a framework for benefit sharing.

In Model B, there is leadership, but it lacks formal recognition in law and clearly enforceable legal rights. The CDA is needed to *establish a mutually accepted and legally recognized framework* for the relationship between the traditional leadership, the national government, and the project developer.

In cases like Model C, the lack of community cohesion or an accepted structure of institutions and rules may mean that the CDA needs to be a focal point for developing these things. The CDA therefore becomes an *incentive for different elements in the community to come together and create a leadership structure*. Attempting to negotiate a CDA before this structure is in place can actually be dangerous; the history of signing agreements with individuals the company simply selects as leaders is filled with unsuccessful outcomes. Model C may require greater capacity building before a CDA is possible, such that there may be a need for an external actor of some sort to provide resources and assistance for capacity building.

3.3 Voluntary vs. Mandatory Agreements

The debate regarding whether CDAs should be voluntary mechanisms which companies may or may not adopt, versus a government mandated mechanism, required under mining law and regulations, has yet to be resolved.¹⁸ The success of either method will depend greatly on the context in which it is utilized, and the level of commitment of the company, in particular, to develop and maintain genuine relationships with communities.

While mandatory approaches may promote more equitable benefits sharing from one community to another, potentially avoiding the issue of one community reaping great benefits under a voluntary CDA, while a nearby community receives little to nothing, a “one-size-fits all” approach is particularly to be avoided when working with communities whose needs, cultures, priorities, and traditions differ widely from one region to another, and even within a region itself. Furthermore, mandatory CDAs may be inflexible; as further detailed below, CDAs must be flexible, allowing adaptation from one community’s needs to another, and enabling parties to amend the agreement without too much hassle, in order to respond to material changes that occur during the often lengthy and complex lifetime of a natural resource development project. On the other hand, mandatory approaches can provide greater legal certainty and standardization, and can even be a motivating force to promote changes in corporate

¹⁸ See, e.g., Global Reporting Initiative, et. al, *Carrots and Sticks – Promoting Transparency and Sustainability: An update on Trends in Voluntary and Mandatory Reporting Approaches to Sustainability Reporting* 8 (2010), available at <https://www.globalreporting.org/resourcelibrary/Carrots-And-Sticks-Promoting-Transparency-And-Sustainability.pdf>.

culture, contributing to greater sharing of benefits beyond the jurisdiction where such corporate behavior is required.

Voluntary approaches also come with potential risks and rewards. Voluntary approaches to CDAs may have the benefits of providing flexibility and promoting provisions uniquely tailored to a community's needs, potentially allowing parties to explore beneficial options that would not have been explored under a mandatory approach. Voluntary approaches, however, may lead to misunderstanding between one community that greatly benefits from an agreement with a company, and a nearby community who, having no CDA, may have received few or no benefits from an agreement (or lack thereof) with another company. Parties may also have greater difficulty enforcing a voluntary agreement, as opposed to one that is required by law.

Under either approach, but particularly with mandatory mechanisms, flexibility must be allowed to enable the CDA to address the unique needs of each particular community, and to contribute sufficient time, effort, and resources to developing positive community relationships that will help make the CDA, and the overall project, most successful. A standard framework for CDAs, such as that provided at Annex I, Example 5, is recommended. Such a framework, detailing a list of factors parties are required to address, while leaving the specific details to be negotiated to meet the unique needs and interests of the particular parties, is greatly recommended over a rigid form agreement that each company and community party may be required to sign. A rigid form agreement is not likely to conform to the unique and particular needs of each community, and thus is less likely to contribute to building positive relationships with communities who would have little or no say in the terms of a pre-established agreement and may actually be disgruntled if forced to become a party to such an agreement.

Therefore, where a mandatory approach to CDAs is taken, and such approaches can certainly be successful, the level of success will likely be closely related to the ability of the mechanism to respond to the needs of each individual community, to be flexible, to develop through a process of genuine and ongoing relationship building with the community, and to provide clear and realistic procedures for CDA amendment, allowing parties to adapt the CDA to changing environments. These characteristics of CDAs are discussed in greater detail below.

4. CONTENT

While content of the agreement must be developed according to the specific circumstances under which the agreement is made and the needs and priorities of the parties, there are some key aspects that should be covered in any agreement. These include, but are not limited to, the following:

4.1 Parties to the Agreement

Parties to the CDA should include, at a minimum, local government representatives, mining company representatives, civil society organizations, and communities that are or will be affected by the project. Determining which communities will be parties to the agreement may be the most important factor in determining the success of the agreement. This is often a difficult process, which can be eased through increased transparency of information and an early commitment of time and resources to consultation with communities.¹⁹

Criteria for determining which communities and community members will be consulted and may become parties to the agreement include the following:²⁰

- Self-identification
- Assessment of risks and impacts, including Environmental and Social Impact Assessments
- Ongoing monitoring and adjustment
- Loss of land or access to land (may include seasonal use of land)
- Resettlement
- Physical impacts to land
- Economic loss and/or loss of livelihood, including artisanal miners
- Cultural impacts
- Health implications
- Legal or traditional ownership of land rights and/or mineral rights
- Future impact
- Objectives of the agreement
- Community expectations
- Common interests
- Local and regional governance structures and elected officials
- Customary and traditional community leaders
- Communities providing employees, supplies and services
- Communities along transportation routes

The World Bank emphasizes self-identification, assessment of risks and impacts, and ongoing monitoring and adjustment as primary procedures to guide identification of “qualified” communities: communities that will participate in negotiation and implementation of the agreement.²¹ Self-identification is most effective in the early

¹⁹ *World Bank Extractive Industries Source Book* (2011), *supra* note 7 at 13; World Bank Oil/Gas and Mining Unit, *Mining Community Development Agreements Source Book* (2012), *supra* note 1 at 18.

²⁰ *World Bank Extractive Industries Source Book* (2011), *supra* note 7 at 3 – 6; *Mining Community Development Agreements Source Book* (2012), *supra* note 1 at 18; International Council on Mining & Metals (ICMM) *Community Development Toolkit* 45 (2012).

²¹ *Mining Community Development Agreements Source Book* (2012), *supra* note 1 at 18.

stages of project development, and involves providing communities with an opportunity to determine themselves to be affected, and to explain their interests in the project.²²

Self-identification does not mean that any community member can simply declare him or herself to be “affected,” and then automatically become part of the “qualified” community, but that persons are given an opportunity to be heard and to explain unique project impacts that may not be apparent through other means of assessment. In this way, self-identification is a particularly effective tool for engaging with communities and stakeholders to better understand unique circumstances and customs, such as traditional and seasonal land use, local leadership structures, and identification of marginalized or vulnerable groups.²³ Self-identification is widely recognized as an international best practice, referenced in IFC Performance Standards 1 and 7,²⁴ and the World Bank’s Operating Policy 4.10.²⁵

Questions to Consider in Evaluating Stakeholders:²⁶

- **Who will be affected by negative impacts of this project?**
- **Who will benefit from the project?**
- **Who will be responsible for implementing measures to mitigate the negative impacts?**
- **Whose co-operation, expertise or influence would be helpful to the success of the project?**
- **Who are the most vulnerable, least visible and voiceless, for whom special consultation efforts may have to be made?**
- **Who supports or opposes the changes that the project will bring?**
- **Whose opposition could be detrimental to the success of the project?**
- **Who might have resources to contribute?**
- **Who will make decisions?**

Impact assessments and risk assessments should also be considered. While not every community mentioned in such assessments will necessarily need to be a party to the agreement, the assessment provides very useful indicators regarding the impact of the

²² *Mining Community Development Agreements Source Book* (2012), *supra* note 1 at 18.

²³ *Id.* at 18 – 19. .

²⁴ IFC Performance Standard 1 covers Social and Environmental Assessment and Management Systems; IFC Performance Standard 7 covers Indigenous Peoples, *see* http://www1.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/ifc+sustainability/publications/publications_handbook_pps.

²⁵ OP 4.10 is the World Bank’s Operating Policy regarding Indigenous Peoples. *See* <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTOPMANUAL/0,,contentMDK:20553653~menuPK:4564185~pagePK:64709096~piPK:64709108~theSitePK:502184,00.html>.

²⁶ *ICMM Community Development Toolkit*, *supra* note 20 at 47.

project.²⁷ It is important to consider not only the physical impacts, but also social, economic, and other impacts, such as those indicated in the lists provided above in this sub-section. Consultations with stakeholders have shown that application of arbitrary geographical boundaries without consideration of specific cultural and geographic impacts is insufficient to determine qualified communities, and can result in conflict and misunderstanding.²⁸ Therefore, identification of qualified communities should go beyond geographic boundaries to also consider social and cultural impacts. This requires early and ongoing communication with stakeholders.

Ongoing monitoring programs are also needed, to monitor impacts on qualified communities, and, importantly, to re-evaluate the definition of qualified communities throughout the life of the mine.²⁹ The monitoring program should be a key term in the CDA, and should allow for additional individuals and communities to be added to the agreement as circumstances require.³⁰

4.2 Communications

One of the most beneficial aspects of a CDA is that it provides a method of ongoing communication throughout the life of the resource development project and beyond. Open communication promotes trust and deters conflict.

Communities must have access to information about negotiation and implementation of the CDA, as well as about the resource development project. This process often begins with selection of community representatives who will engage in CDA negotiations and ongoing decision-making. Such representatives should ideally be selected through a democratic selection process to ensure that community members have a voice in choosing their representative.³¹ A clear mechanism should be established to ensure the representatives work to advance community interests and values. Such a mechanism should specify both the process of selecting representatives as well as methods for ongoing communication, in both directions, between the community representatives and the represented community.

²⁷ *Mining Community Development Agreements Source Book* (2012), *supra* note 1 at 18 – 19.

²⁸ *Id.*

²⁹ *Id.* at 20.

³⁰ *Id.*

³¹ *World Bank Extractive Industries Source Book* (2011), *supra* note 7 at 10 – 11.

Other important factors in improving communications include:³²

- **Begin the communications process *early* – as the exploration process begins, or even earlier, to establish trust and a positive communication pattern**
- **Ongoing information sharing about the CDA, including CDA negotiations, and about the resource development process**
- **Provide information in a language and through a medium that is accessible to community members (i.e., translation into multiple languages where multiple languages are spoken; use of radio broadcasts where literacy rates are low; and provision of clearly defined concepts and summaries where information is complex or technical)**
- **Special emphasis on communications with minority groups: including input from and communication with women, youth, and religious and economic minorities**
- **Including a budget in the CDA that provides sufficient resources for ongoing communications**

4.3 Roles and Responsibilities

It is important that the CDA outline the roles and responsibilities of each party to the agreement. In particular, the roles of industry and government should be clearly defined. Such definitions should be designed to avoid situations where the company is taking on traditional government functions, functions that it cannot sustain after the life of the mine. While roles and responsibilities will differ depending on the particular circumstances of the parties, some guidelines are provided below.

- **Industry³³** should participate in good faith in the CDA negotiation process; act transparently; help manage expectations of what the company will and will not do; provide financial resources; assist in creating income-generating activities for the affected community; respond promptly to community concerns and grievances; maintain open communication; consult with communities and government parties throughout negotiation and implementation of the

³² *World Bank Extractive Industries Source Book* (2011), *supra* note 7 at 13.

³³ The MMDA provides the following example text in its Annex B: “(f) The obligations of the Company to the affected community including but not limited to: (a) Undertakings with respect to the social and economic contributions that the project will make to the sustainability of the community; (b) Assistance in creating self-sustaining, income-generating activities, such as but not limited to, production of goods and services needed by the mine and the community; (c) Consultation with the community in the planning of mine closure measures that seek to prepare the community for the eventual closure of the mining operations.” INTERNATIONAL BAR ASSOCIATION, MMDA 1.0 MODEL MINE DEVELOPMENT AGREEMENT 171 (2011), *available at* http://www.mmdaproject.org/presentations/MMDA1_0_110404Bookletv3.pdf.

agreement, and in the planning of mine closure measures; inform parties of any material changes in project activities; and honor its commitments in the CDA.³⁴

- **National and Regional Government** may or may not be parties to the CDA, but should support the CDA by providing an enabling regulatory environment; acting as an “honest broker” to aid parties in reaching agreement; contributing resources; aiding with advisory and monitoring committees; providing information to communities; coordinating with regional and local initiatives; and supporting capacity building programs.³⁵
- **Local Government** should be representative of qualified communities; participate in CDA governance; deliver programs that are aligned with the CDA; and cooperate with national and regional government roles.³⁶
- **Communities** should participate in good faith; honor commitments; utilize procedures outlined in the CDA; actively participate in governance; and actively participate in program delivery.³⁷
- **Community Representatives** should represent the interests of the community as a whole; inform communities about agreement milestones and disbursement of funds; communicate information, as agreed by the community, to the company and government parties; and act ethically and with due diligence, particularly with regard to financial administration and allocation.³⁸

4.4 Capacity Building

CDAs will be most successful when all parties have equitable capacity to negotiate, participate, and perform their commitments under the agreement.³⁹ In particular, communities with limited capacity are too often overlooked by governments and developers during negotiation and agreement implementation phases. This is a tremendously unfortunate misstep, as failing to consult with these communities and to recognize the opportunity to benefit such communities through capacity development may result in misunderstanding, mistrust, and conflicts that are later difficult to address.

³⁴ *Mining Community Development Agreements Source Book* (2012), *supra* note 1 at 25; MMDA 1.0 MODEL MINE DEVELOPMENT AGREEMENT, *supra* note 33 at 171.

³⁵ *Mining Community Development Agreements Source Book* (2012), *supra* note 1 at 25.

³⁶ *Id.*

³⁷ *World Bank Extractive Industries Source Book* (2011), *supra* note 7 at 26 – 27.

³⁸ *Id.* at 27.

³⁹ *Mining Community Development Agreements Source Book* (2012), *supra* note 1 at 15.

Capacity building may be advanced by the following:⁴⁰

- Where a party to the CDA lacks capacity, delay the negotiation or implementation phase, where possible, until adequate capacity is developed
- Include periodic review of capacity to ensure that capacity is being developed and maintained, and to adjust capacity building approaches as necessary.
- Provide ongoing financial and logistical assistance for community involvement.
- Incorporate support from independent experts as needed by communities to aid in understanding the agreement and the development process, and to maximize transparency and success of the process.
- Provide training workshops that help parties develop and improve negotiation skills, understand the natural resource development process, protect associated rights, and understand the benefits and obligations under the agreement.
- Recognize that capacity building is not only important for communities, but also for governments and companies who may need to enhance the skills and knowledge of their staff and leadership.

4.5 Budget

CDAs will be most effective when adequate funding is provided to support capacity building for parties to the agreement, both for ongoing outreach to communities and for community participation, and to implement all activities and procedures specified in the agreement. Such financial support should be provided by the mining investor and the government, and should provide for the negotiation and implementation of the CDA.⁴¹

Suggestions for the CDA budget include:⁴²

- Ensure that the budget includes all aspects of the CDA process, including support for negotiation expertise, travel expenses, communications, consultation activities, research, translation, staff salaries, and ongoing public outreach.
- Develop and begin managing the CDA budget early in the CDA negotiation process.
- Allocate funds in the CDA budget to ongoing budget management and oversight.
- Establish clear agreements with banks and any other intermediaries.
- Incorporate a rigorous and transparent financial monitoring process and accounting system for all funds.

⁴⁰ *World Bank Extractive Industries Source Book* (2011), *supra* note 7 at 15 – 24.

⁴¹ Ginger Gibson and Ciaran O’Faircheallaigh, *IBA Community Toolkit: Negotiation and Implementation of Impact and Benefit Agreements* (2010) at 80, available at <http://www.ibacommunitytoolkit.ca/>.

⁴² *Id.* at 82; *Mining Community Development Agreements Source Book* (2012), *supra* note 1 at 56 – 59.

4.6 Problem-Solving & Dispute Resolution

Because the term “conflict resolution” often carries a negative meaning, particularly in areas where violence and conflict have been prevalent, the term “problem solving” may more accurately convey the point that parties to the CDA need a mechanism for solving disputes. Such problem-solving mechanisms can aid parties to the CDA in working out any issues that arise in a diplomatic and effective way, and can even contribute to broader efforts to build peace in areas where conflict levels are high for reasons unrelated to the natural resource development project.

Important factors to consider in problem solving and dispute resolution include:⁴³

- Ongoing communications, as elaborated above, with particular emphasis on communications at each new stage of development
- Ensuring that communities that are part of the CDA benefit in an equitable way
- Establishing a clear mechanism by which the agreement may be modified or amended
- Training parties to the CDA in culturally appropriate conflict mediation and resolution processes
- Ensure that parties to the CDA understand past and present conflicts that pertain to the communities involved
- Involve marginalized and vulnerable community members and groups, to be certain they have a voice in the community development process and opportunities to benefit from the CDA
- Be certain that CDA representation includes women, youth and diversity in terms of religion, ethnicity and language
- Representatives should be knowledgeable regarding local cultures and customs
- The CDA should provide for regular consultation with a range of stakeholders, not only formal community leaders
- Address conflicts as early and transparently as possible, to avoid escalation

5. GOVERNANCE

CDAs are not imposed by government or by the company; they are negotiated among all stakeholders. And they take time – time, patience and ongoing effort. The way CDAs are to be managed and enforced are also part of the CDA negotiations. Rules to be applied should have legitimacy, and broad and consistent participation will increase success. Outlining clear purposes, monitoring procedures, and periodic reviews will allow parties to track and measure development against established and mutually agreed criteria. The

⁴³ CommDev: The Oil, Gas and Mining Sustainable Community Development Fund, *Community Development and Local Conflict: A Resource Document for Practitioners in the Extractive Sector* (2008), available at <http://commdev.org/content/document/detail/1801/>.

very process of negotiating and developing an agreement can be a long-term benefit, as it can help communities develop negotiation and management skills, while gaining an advanced understanding of the natural resource development process. The negotiation process also encourages positive ongoing relationships among the parties to the agreement, instilling confidence and respect. The process is thus as important as the product, and should result in clearly defined roles, responsibilities and governance mechanisms.⁴⁴ Examples of such governance mechanisms are provided below.

5.1 Foundations, Trusts and Funds

CDAs are often managed by a community foundation or development forum, which is administered by representatives from qualified communities and stakeholder groups. In this regard, efforts should be made to engage all stakeholder groups, including vulnerable and marginalized groups, who may otherwise not have a voice in the process. Experience shows that foundations, trusts, and funds (FTFs)⁴⁵ are adequate instruments for companies and governments to use to share the benefits of mining operations with communities. To succeed, however, FTFs must be properly integrated in their local context and must have a level of complexity proportionate to their vision, funding, and capacity.⁴⁶ The creation and use of community or private sector FTFs to implement CDA initiatives and allocate money to specific projects is one of the means to achieve the objectives set forth in the CDA. FTFs may also help attract partners and external funding, while promoting community participation in management and decision-making.⁴⁷

⁴⁴ Participatory approaches in aspects of negotiating and implementing CDAs are strongly recommended, and represent international best practices in cultivating community and stakeholder ownership and empowerment. ISO 26000:2010, *supra* note 2.

⁴⁵ See Annex I, Example 6 for sample text.

⁴⁶ Investment in communities that is strategically aligned with business goals provides greater returns to the company. As the returns to the company are greater, there is typically greater company commitment to social investment, and thus returns to the community can be expected to be better and more consistent. Community social investment is an established part of sustainable development programs, especially in developing countries. See Jim Otto, World Bank Group, *Community Development Agreement Model Regulations & Example Guidelines* (June 2010) at 1, available at http://www-wds.worldbank.org/external/default/WDSPContentServer/WDSP/IB/2011/05/02/000386194_20110502032111/Rendered/PDF/614820WPOP11781na10Report0June02010.pdf.

⁴⁷ The mining sector typically uses foundations, trusts, and funds (FTFs) for three main purposes: 1. Government Payments: Government may collect funds from mining companies through taxes, royalties, voluntary contributions, revenue sharing, or other payment schemes. All or parts of these funds are typically intended for redistribution to qualified communities, which may be accomplished through an FTF structure. 2. Compensation: Payments made by mining companies to compensate or offset impacts generated by a project may be routed through FTFs. 3. Community Investment: Voluntary contributions made by a mining company, beyond the scope of a project's impacts or normal business operations, may be implemented through an FTF structure. See *Community Development Agreement Model Regulations & Example Guidelines*, *supra* note 46.

Funds may be local and/or national. The FTF must be designed to respond to the context in which it is established, its purpose and the interests of its stakeholders. Acknowledging this, ten areas of leading practice for FTFs have been identified:⁴⁸

- A clearly defined strategic vision, outlining its role as a development actor in the local environment;
- A single purpose, i.e., either community investment, compensation or government payments, but not a combination;
- A representative multi-stakeholder governing body;
- An endowed fund to enable sustainability;
- High levels of co-financing and collaboration;
- Transparent practices and associated accountability;
- Efficient administration structures to maximize development delivery;
- Flexibility to adapt to changing development practices and operating conditions;
- Incentive schemes to retain high caliber staff; and
- Impact based monitoring and evaluation.

The past two decades saw the formation of several FTFs in the mining industry. Many of these were connected with land use agreements or were due to external drivers, such as government pressure or regulation. FTFs nevertheless have become an acknowledged vehicle for community benefits sharing. Mining companies often opt to create FTFs because they provide a formalized, independent structure for strategic community investment. The independent structure may facilitate the development of partnerships, help to build trust, provide tax advantages, and attract professionals in community development.⁴⁹

5.2 Grievance Mechanism

The Social Policy Guidelines for Mining Sector in Afghanistan state that:

[C]ompanies should establish mechanisms for grievance redress at the project level which seeks to address grievances of the community in a time bound manner and to the satisfaction of the aggrieved project affected persons.⁵⁰

An effective grievance mechanism is a key component of a successful CDA. Grievance and dispute resolution mechanisms should be implemented in the CDA development

⁴⁸ World Bank, *Mining Foundations, Trusts, and Funds: A Sourcebook* 11 – 12 (2012), available at http://siteresources.worldbank.org/EXTOGMC/Resources/Sourcebook_Full_Report.pdf. This Sourcebook also provides useful examples of FTFs in Papua New Guinea, Peru, South Africa, Mozambique, and Namibia.

⁴⁹ TARA LEE ASHWORTH LOUNSBERY, *FOUNDATIONS IN THE MINING INDUSTRY: CHARACTERISTICS, STRUCTURE AND EXIT STRATEGIES* 83 (University of British Columbia 2011).

⁵⁰ *Social Policy Guidelines for Mining Sector in Afghanistan*, *supra* note 6 at 10.

process in a timely manner, should be fair and transparent, and should allow a means to address any conflicts or concerns.

The International Bar Association's Model Mining Development Agreement Version 1.0 (MMDA 1.0) provides a list of examples of dispute resolution clauses, including cooperative approaches, use of an independent third party, negotiation, and arbitration. The methods selected by the parties should be culturally appropriate for the community, and should be based on consultation with all parties. The grievance mechanism should involve local leadership and institutions, such as traditional leadership bodies or local councils. For example, the Ahafo Project in Ghana created a complaints resolution committee that involved community representatives in the resolution process and was very successful in resolving disputes.⁵¹

The grievance mechanism and other "problem-solving" approaches outlined in the CDA should incorporate the following principles:

- **Cultural appropriateness:** The instrument must be culturally suitable and locally relevant, incorporating local traditions.
- **Proportionality:** The instrument should be able to respond to complaints involving the level of risk and potential adverse impact to communities.
- **Accessibility:** The process should be clearly communicated and should be physically, linguistically, and technologically accessible to all qualified communities and stakeholder groups. Participation should be at no cost to communities.
- **Accountability and transparency:** The mechanism should ensure accountability of all parties to commitments made under the CDA, and should promote transparency and access to information.

5.3 Financial Management

Financial management, oversight and transparency are closely linked to the success of the CDA. The budget should be made in a consultative manner, taking into consideration local traditions, politics, institutions, and capacity. Contributions of funds from the mining company, government, and other sources should be made public and closely monitored, as should expenditures by communities or foundations. Payments and expenditures should be reviewed on a regular basis to ensure they are aligned with the objectives and procedures specified in the CDA.

Budgeting for the development of the CDA process, the implementation of the agreement, and any subsequent community investment activities can be a difficult job. Sometimes, national legislation dictates specific funding amounts and may be collected by the government through taxes and royalties. In some cases, it might be specified that

⁵¹ *Mining Community Development Agreements Source Book* (2012), *supra* note 1 at 50.

all or part of these resources must be redistributed at a local level. In others, mining agreements or contracts identify funding amounts and how they should be reassigned to particular initiatives or communities. The CDA must be aligned with such policies and legislation. For additional information regarding budgeting, see Section 4.5 above.

5.4 Accountability and Transparency

Tracing funding allocations and disbursements can help to ease apprehensions concerning accountability and transparency of payments. In addition to public records, CDA signatories should plan and agree upon a schedule and an approach to auditing checks and balances. These steps help manage the concerns of parties making direct payments to managed funds or central government, or to local government. In some cases companies have complained of funds being diverted to areas outside of the operational footprint of the mining project, or of funds being spent on projects that do not directly address local needs. Increased transparency can help parties address such concerns.

An effective CDA promotes transparency, particularly with respect to the allocation and spending of funding and royalties. The agreement should consider provisions to make sure that funding goes to priority areas. It should also consider provisions to include monitoring programs involving representatives of various stakeholder groups.⁵² Finally, the CDA should outline procedures for regular auditing and reporting.⁵³

5.5 Closure Planning

Dependency on mineral resources for participants within the development process can result in wide-ranging socioeconomic risks and effects, resulting in serious impacts to quality of life when mineral benefits are removed. To confront this prospective dependency, the CDA process needs to address the implications of closure planning and potential cessation of community development initiatives from the outset. Any community development initiatives should clearly include a vigorous exit strategy that includes capacity building, the progressive and transparent transfer of authority, roles and responsibilities, benefits, and ongoing monitoring and evaluation.

⁵² The Ahafo Project in Ghana, for example, created a Monitoring & Evaluation Unit to review all CDAs and community development initiatives. See *Mining Community Development Agreements Source Book* (2012), *supra* note 1 at 50.

⁵³ Boubacar Bocoum and James Otto, World Bank Oil, Gas & Mining Policy Division, Presentation at PDAC: Common Reference Community Development Framework: Consultation Workshop (March 7, 2010), available at http://siteresources.worldbank.org/EXTOGMC/Resources/community_agreements_PDAC_v5.pdf.

ANNEX 1: EXAMPLE CLAUSES FROM THE MMDA

Note: The examples below are provided for illustrative purposes and guidance only, and should not be used to create legal relationships.

Example 1:

The Company shall enter into Consultation and negotiations with the objective of concluding one or more community development agreements or agreements with communities impacted by the Project, to promote sustainable development and enhance the general welfare and quality of life of inhabitants, as well as to recognize and respect the rights, customs, traditions and religion of the affected persons (each, a “Community Development Agreement”). It is the objective of each of the Parties hereto that the Mining Operations shall be carried out in a manner that is consistent with the continuing economic and social viability of centers of population that have formed and which may form as a result of such operations during the term of this Agreement. Upon request of the State at any time the Company shall consult with the State and with the community mutually to establish plans and programs for the implementation of this objective and thereafter the Company shall cooperate with the State with regards to its effort concerning the realization of such plans and programs. Each Community Development Agreement shall be subject to Applicable Law, and shall:

- (a) Address both how local communities can take advantage of the development opportunities presented by the Project, and how the Project’s adverse impacts can be mitigated;
- (b) Serve as the agreement that specifies how the Company’s obligation to spend funds for local development shall be met;
- (c) Address environmental, social, and economic conditions during mining and after mine closure, and the eventual transition from a mining economy to a post-mining economy in the Project Area as may be agreed upon among the Parties to such Community Development Agreement.⁵⁴

Example 2:

The Contractor shall assist in creating self-sustaining, income-generating activities, such as but not limited to, reforestation and production of goods and services needed by the mine and the community. Where traditional self-sustaining income and community activities are identified by such communities to be present, the Contractor shall work with such communities in the preservation or enhancement of such activities.

⁵⁴ MMDA 1.0 MODEL MINE DEVELOPMENT AGREEMENT, *supra* note 32 at 109.

Example 3 (Community Resources):

Community Responsibility. It is the policy of the Government and the obligation of the Concessionaire that Operations shall be carried out by the Concessionaire in a manner that is consistent with the continuing economic and social viability of centers of population that have formed and which may form as a result of Operations during the term of this Agreement. Upon request of the Government at any time, the Concessionaire shall consult with the Government and the local communities affected by the Concessionaire's Operations to mutually establish plans and programs for the implementation of this objective, and thereafter the Concessionaire shall in good faith cooperate with the Government with regard to its efforts concerning the realization of such plans and programs.⁵⁵

Example 4:

The Company shall establish cooperation agreements with local administrative organizations in accordance with applicable law and these agreements may include the establishment of local development and participation funds, local participation committees and local environmental monitoring committees.⁵⁶

Example 5:

The provisions of the CDA will include the following:

- (a) The person, persons, board, committee, foundation, trust, forum, body or other entity registered or incorporated under the laws of the State which shall manage the CDA;
- (b) The duly elected person or body that represents each affected community for the purposes of the CDA;
- (c) The means by which members of any affected community will participate in the community's CDA related decision-making processes;
- (d) The means by which the interests of women, minority or marginalized groups within the community will be represented in the community's CDA related decision-making processes and implementation;
- (e) The goals and objectives of the CDA, including an objective to improve the Human Development Index of the affected community by certain agreed measures;
- (f) The obligations of the Company to the affected community including but not limited to: (a) Undertakings with respect to the social and economic contributions that the project will make to the sustainability of the community; (b) Assistance in creating self-

⁵⁵ MMDA 1.0 MODEL MINE DEVELOPMENT AGREEMENT, *supra* note 32 at 111.

⁵⁶ *Id.* at 112.

sustaining, income-generating activities, such as but not limited to, production of goods and services needed by the mine and the community; (c) Consultation with the community in the planning of mine closure measures that seek to prepare the community for the eventual closure of the mining operations;

(g) The obligations of the affected community to the Company;

(h) The means by which the CDA shall be reviewed by the Company and the affected community every five (5) calendar years, and the commitment to be bound by the current CDA in the event that any modifications to the CDA sought by one Party cannot be mutually agreed with the other Party;

(i) The consultative and monitoring frameworks between the Company and the affected community, and the means by which the community may participate in the planning, implementation, management, measurement (including indicators) and monitoring of activities carried out under the CDA;

(j) The language(s) to be used in the preparation of reports, plans, and other written matters required under the CDA;

(k) The means by which any funds made available under the CDA are to be disbursed, for what purposes they may be disbursed, what accounts must be kept and by whom, and reporting and auditing requirements;

(l) The mechanisms under local laws and customs whereby the affected community (including members of the affected community) and the Company may lodge a grievance with each other, provided that where no such mechanism exists or is inadequate or less stringent, the grievance mechanism under paragraph 23 of IFC Performance Standard 1 shall be adopted;

(m) A statement to the effect that both the Company and the affected community or communities agree that any dispute regarding the CDA shall in the first instance be resolved by consultation between the holder and the affected community representative(s);

(n) The dispute resolution mechanism to be used when consultation between the holder and the affected community representative(s) fails, which shall be the most effective of any mechanism agreed by the Parties, or as stipulated in this CDA, or as provided under the paragraph 23 of IFC Performance Standard 1.

(o) The applicable law;

(p) Reasons and procedure for declaring Force Majeure;

(q) Duration of the CDA;

(r) Termination of the CDA;

(s) Transfer of all CDA rights and obligations to any party to whom the Company transfers its mining right;

(t) How notifications to respective Parties shall be done;

(u) Location where the CDA may be accessed by members of the community; and

(v) The CDA signatories, and witnesses where applicable.

(w) A breach by the Company of the terms of the CDA shall be considered to be a breach of this CDA, and the State shall be entitled to terminate the CDA upon the failure of the Company to diligently and consistently pursue a course of action that is reasonably intended to remedy the breach within sixty (60) Days of being notified in writing by the community of the breach.

(x) The Company shall provide an annual payment of [X AMOUNT] which shall be deposited into a segregated Central Bank account to be managed and disbursed for the benefit of the State communities affected by the Project, as provided in the Community Development Agreement or Agreements. The first annual payment shall be made to the State on the Effective Date and each subsequent payment shall be made on the anniversary date of the Effective Date. A development committee shall be appointed by or selected in accordance with procedures established by the State in Consultation with the Local Government, which procedures may be stated in any Community Development Agreement with local communities or Indigenous and Tribal Peoples. Such committee shall develop an annual budget in Consultation with the State and the Company, and the State shall make disbursements from the segregated Central Bank account in which such funds are deposited in accordance with such budget, the instructions of the committee, and any applicable Community Development Agreement. The budget and disbursements by the State shall be public and shall be subject to the same audit procedures provided for expenditures by the State and as may be further provided by Applicable Law. Periodic reports and audit reports shall be made available to the Company and to the public.⁵⁷

Example 6⁵⁸

The Company shall provide an annual payment of [X AMOUNT] to a Community Development Foundation established as part of the Community Development Plan, which shall be managed and disbursed, in efforts to promote local and regional development, or health education and welfare in the communities affected by the Project. The governing body of the Community Development Foundation shall include members of communities affected by the Project. The annual budget and disbursements from the Community Development Foundation shall be public and shall be subject to audit procedures provided for by Applicable Law and the terms of the agreement. Periodic reports and audit reports shall be made available to the Company, to the State, and to the public.

⁵⁷ MMDA 1.0 MODEL MINE DEVELOPMENT AGREEMENT, *supra* note 32 at 171.

⁵⁸ *Id.* at 173.