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Emerging Practices in Community Development Agreements

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Key Points

1. Companies increasingly recognize the risks associated with not engaging with communities. CDAs can build community engagement into business processes, minimizing conflict and contributing to the stability of the project.

2. Steps taken before a CDA is negotiated can be key to ensuring an effective and representative outcome. Stakeholder mapping, pre-cursor agreements, open and regular communication, as well as capacity-building and education efforts can play important roles.

3. Increased recognition of indigenous peoples' rights to lands and resources has led to closer engagement with affected communities. Leading companies extend consultation and consent processes to all affected communities, including non-indigenous communities whose rights may not be as clearly defined.

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A Community Development Agreement or CDA can be a vital mechanism for ensuring that local communities benefit from large-scale investment projects, such as mines or forestry concessions. In formalizing agreements between an investor and a project-affected community, CDAs set out how the benefits of an investment project will be shared with local communities. In some countries CDAs are required by domestic legislation; in others, they are entered into voluntarily. The most effective CDAs are also adapted to the local context, meaning that no single model agreement or process will be appropriate in every situation. Nonetheless, leading practices are emerging which can be required by governments or voluntarily adopted by companies and communities. This brief reviews existing research, as well as available agreements from the extractive sector in Australia, Canada, Laos, Papua New Guinea, Ghana and Greenland, to highlight these leading practices.

1. Introduction

Community Development Agreements (CDAs)[a] between resource companies and stakeholders affected by company projects are becoming more and more common, and stand as an important opportunity for ensuring the self-determined development of local communities.

Among other factors, the vast differences between communities, companies, geographical locations and regulatory contexts make it difficult to identify 'best practice' or model CDAs that will always be appropriate.

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There have, however, been a number of efforts to analyze existing agreements in the extractives sector, which has led to a body of literature on good practices regarding the content of, and processes of negotiating, CDAs, including several toolkits as well as model regulations and guidelines.[i]

The purpose of this brief is to present emerging good practices that stakeholders can utilize when embarking upon the CDA negotiation process. The brief focuses on practices that *investors* can institute. It will also be of relevance for governments, who can encourage investors to adopt good practices and, in some cases, mandate such practices through legislation or regulations. The role of governments is especially important where local communities lack capacity or sufficient resources to effectively represent their position. Governments can exert considerable influence over how companies engage with communities through stipulations in the legislation or investor-state agreements establishing investment projects. Investor-state agreements typically do not involve community input, but they can affect and limit any subsequent CDA by, for example, defining local communities, the impact area, or the scope of engagement required.

The research for this brief included a review of available CDAs,[ii] as well as a review of existing literature. The review sought to identify practices relating to both the content of CDAs and the processes used to arrive at agreement. A summary of key points in the CDAs reviewed is available at the Columbia Center on Sustainable Investment's Community Development Agreements webpage.[iii] Unfortunately, many CDAs contain provisions that render part or all of the agreement confidential. This prevents researchers from obtaining the full text of agreements, limiting their ability to fully understand how CDAs operate. The review was limited to those CDAs that are publicly available in full text.[iv]

The agreement-making process for CDAs varies with each agreement but can be roughly broken down into three stages. In practice, these stages may be conflated or overlap, or occur in a slightly different order.

1. The **pre-negotiation stage** involves the company and the community or communities laying the groundwork for negotiations. This may include precursor agreements such as a memorandum of understanding (MOU) or a negotiating framework, each of which set out rules to govern the process for negotiating the CDA.

2. The **research and consultation stage** incorporates stakeholder mapping to determine who stands to be affected by the project, as well as impact assessments, such as Environmental and Social Impact Assessments (ESIAs), which are often legally mandated, and Human Rights Impact Assessments (HRIAs). During this stage capacity building, to ensure community agency and ownership of the process, and education about the proposed project should be provided by the company or government to communities that stand to be affected.

3. The final stage is the actual **negotiation process and endorsement of the final agreement**.

Once the agreement-making process has concluded, monitoring and implementing the agreement then becomes a key focus.

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

A brief overview of legislative requirements that govern the creation of CDAs in particular countries is also included in this document. It focuses on Australia's legislative regime for CDAs, as a majority of the agreements reviewed were Australian.

In Australia the government bears a legal duty to negotiate and/or consult with stakeholders.[v] However, the obligations attached to this governmental duty are broadly framed and generally only apply to land where

formal legal title is held by indigenous peoples. The CDA practices of some companies operating in countries requiring CDAs—generally those with considerable size and experience, and who have internal mandates promoting meaningful community engagement—go beyond such mandatory requirements.[vi]

Indigenous peoples are often some of the world's most disadvantaged societal groups and have successfully campaigned for an international regime of rights that extends beyond universal human rights protections.[vii] One of the most significant of these protections is the principle of free, prior, and informed consent (FPIC).[viii] The requirement to obtain an indigenous community's FPIC obliges governments and, where relevant, companies to ensure that indigenous communities agreeing to a project are *informed* of the project's likely positive and negative impacts, and are providing their consent *free* from any pressure or interference and *prior* to the commencement of the project. Consultations with indigenous peoples should therefore be carried out with the object of obtaining the community's consent.[ix] Communities should also be able to effectively participate in the project approval process, which may include negotiating a CDA. International best practices dictate that consultations and negotiations with non-indigenous communities should also be guided by the principles of FPIC,[x] even where the government or the company may not be required to do so under domestic law. Companies should ensure that they engage in meaningful consultation with communities by affording them the information and resources necessary to effectively negotiate an agreement that meets their needs and priorities.

This brief considers leading practices for embarking upon a CDA process with project-affected communities; however, more may be required at each stage depending on the laws in force, and the likely extent of impacts on the community's rights.

2. Leading Practices

2.1 Leading Practice 1

Conduct extensive research and consult widely to identify all communities, and the individuals who will represent them, in the CDA negotiation process.

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

Some countries' laws require that companies engage with particular communities. For example, the Australian Native Title Act requires companies who have been granted a mining license to negotiate with Aboriginal families and communities that have a legally recognized interest in the land as native title holders or registered native title claimants. This law does not require the company to consult and negotiate with the second and third categories of community members. The law does however, provide for a more inclusive alternative;[xi] companies establishing extractive projects in Australia can opt to pursue an Indigenous Land Use Agreement (ILUA), which expands the groups to be included in the agreement-making process beyond those who have a legal right to be consulted.[xii] Box 1 shows some examples of the way communities have been defined in various agreements.

Leading companies often go beyond what is legally required, to include the second and third categories of community members when determining who will be party to a CDA.[xiii] Companies can identify relevant community groups and stakeholders by undertaking impact studies, typically with respect to environmental, social, health, cultural and/or human rights impacts. These assessments often begin by identifying any

legal requirements to consult or negotiate with communities, before then identifying the (often broader) group of stakeholders who may be impacted by the project.

Box 1: Defining the Community

The **Argyle Diamond Mine Agreement,** between Argyle Diamond Mines Pty Ltd (Argyle), the Kimberly Land Council, and the traditional owners of the land, extended beyond the parties with whom Argyle was legally required to enter into an agreement. Argyle sought to include not only those traditional owners that had or sought legal recognition of their native title rights under Australia's *Native Title Act* but all community members with "rights and interests…held by the [traditional owners] under Aboriginal laws and customs in relation to the Agreement Area".

Other agreements exclusively define the affected communities geographically according to whether they are within the project area or an area affected by the project. For example, the **Memorandum of Agreement Relating to the Hidden Valley Gold Project**, in Papua New Guinea, separately defines the communities within the project area from other "Affected Communities" who do not fall within the project area but are affected by the increased traffic on the highway, use of the river, or are landowners within the mining easement granted to the company.

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

Other agreements take a broader approach to defining the communities they intend to benefit. The **Diavik Diamonds Project's Socio-Economic Monitoring Agreement** broadly defines the relevant communities as including Canada's Aboriginal communities in specific regions proximate to the project. In this agreement, Aboriginal authorities for these regions may exercise an option to become signatories to the agreement, and once signatories, may also exercise an option to become parties to the agreement.

Companies can also conduct anthropological and demographic research, such as ethnographies and social mapping, to better understand local groups and cultures as part of determining who should be a party to a community development agreement. Such research can help ensure the inclusion of groups or individuals who may not be evident through ordinary community consultation processes.[xiv]

This can be especially important when dealing with land traditionally occupied by indigenous peoples or other customary communities, who may conceive of their community based on broad family relationships and shared culture and history, rather than geographical location or legal rights to the land. Some community members may not be located on or near the land in question at the time a company arrives, but may still have strong cultural ties and legal entitlements to the land, and may thus stand to be adversely impacted by the project activities. Box 2 provides greater detail on the ethnography conducted by Argyle Diamond Mine to ascertain the traditional owners of the project land.

Box 2: Consultation and Research Techniques

The **Argyle Diamond Mine Agreement** provides in detail its extensive pre-agreement consultation and research efforts, including an ethnography to identify the traditional owners of the lease area. The terms of the ethnography were set out in a memorandum of understanding (a precursor agreement) between the company and the Kimberly Land Council (the region's peak indigenous body, and the only recognized representative body for the region under federal law) and provided that the ethnography was to be conducted by the Kimberly Land Council and peer-reviewed by a consultant appointed by the company. Despite having a long history of mining operations in the area and having already entered into numerous agreements with different traditional owners and their families, Argyle was focused on ensuring that all traditional owners—not just those Argyle had dealt with previously—be identified and consulted.

Research to identify relevant community groups does not need to be completed prior to the initial contact with what is thought to be the community or its representatives. Rather, the goal is for all relevant interests to be represented when the negotiations begin, and for all relevant persons to be consulted prior to the finalization of the CDA.[xv]

Since the organizational structures of communities may not co-relate with who has and who does not have a legal interest in the land, it may be necessary to consult beyond simply those who have a legal

interest in the land.[xvi] Companies who carry out sufficient research on the cultural and structural features of the impacted persons and groups will be best placed to avoid or minimize, where possible, intra-community conflict over the terms and benefits contained in the final agreement.

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

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

Box 3: Identifying Community Representatives

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

2.2 Leading Practice 2

Develop a pre-negotiation agreement, such as a memorandum of understanding, that establishes among other things the negotiation framework, and funding for each stage. Commence culturally sensitive orientation programs and/or negotiations training to ensure meaningful negotiations and approval of the final agreement.

A fundamental principle of negotiation is to ensure a level playing field.[xx] This principle should underpin the entire agreement-making process.[xxi]

Creating a pre-negotiation agreement is increasingly recognized as an essential starting point for the CDA-making process.[xxii] Its purpose is to establish the "rules of the game" for the subsequent negotiation process that can serve as a reference point for future negotiations. The agreement should:

1. Where needed, set out the process for identifying the parties to the future CDA
2. Set out the parties' goals for the project and each negotiation stage
3. Identify the negotiators for both sides
4. Specify protocols and methods of communication between the company and the community
5. Establish an agreed-upon time frame
6. Outline what will be required prior to, and in addition to, negotiations (for example, capacity-building, funding arrangements, impact studies)
7. Establish expectations and a shared understanding of the meaning of "consultation"[xxiii]
8. Articulate how the negotiation process itself will be funded.[xxiv]

There will often be several precursor agreements associated with a single project to ensure that the CDA negotiation process is fair and effective. This approach is illustrated by the Argyle Diamond Mine Agreement, [xxv] whose pre-negotiation stage lasted several years, which is described in Box 4.

Box 4: Precursor Agreements and Preparatory Work

The **Argyle Diamond Mine Agreement** documents (Schedule 1, ILUA) include numerous precursor agreements and the various consultation and communication tools used during the agreement-making stage. In addition to environmental impact assessments, which were required by law, the company, community and other stakeholders came together in numerous meetings, using a variety of communication tools, including posters, videos and workshops to ensure that all participants understood what was being discussed and decided. The company also consulted with the local community members and representatives regarding specific issues, such as water resources and land rehabilitation.

There are a number of advantages to beginning the process with one or more pre-negotiation agreements. Such agreements allow the parties to address past grievances and enable the company to demonstrate its commitment to engaging with the community. They also constitute a formalization of the relationship between the parties, to ensure all parties feel that the agreed process is fair and equitable.[xxvi]

One of the essential features of a pre-negotiation framework is identifying whether the mining company will contribute "participatory funding."[xxvii] Participatory funding is the money and other resources necessary to ensure the community's effective participation in the negotiation process. For example, the community may need to hire advisers and legal representatives, or engage in negotiation training or other capacity- and institution-building programs to ensure community agency and ownership of the process.[xxviii] This is particularly important when engaging with indigenous or customary communities, where there may be a higher likelihood of linguistic and cultural barriers between the company and the community.

Leading practices also include determining the scope and extent of participatory funding needed during the course of negotiations (see Box 5 for examples). Determining the community participation budget as early as possible will help to avoid any funding-related limitations on what can be accomplished between the parties. There may be a role for government to provide funding, and multilateral institutions and non-governmental organizations may be willing to contribute funds as well. Due to the high cost of capacity building and the negotiation process, companies will often need to provide at least some of the funds.[xxix]

In addition to capacity-building programs and external advisers or experts to assist the community in the negotiation process, participatory funding can also contribute to the establishment of decision-making processes or institutions, if none exist, to ensure every member of the community is or can be involved in the decisions made during negotiations and throughout the life of the project.

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

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

Box 5: Pre-agreement Preparatory Work

Of the 22 agreements reviewed, only two contained reference to or details of precursor agreements made during negotiations. The **Memorandum of Understanding between Rio Tinto Exploration Pty Ltd and the Northern Land Council** was itself a precursor agreement, which formed the foundation for future negotiations between the company and impacted communities.

The **Argyle Diamond Mine Agreement** details each of the precursor agreements made between the parties and annexes in full the Memorandum of Understanding that sets out negotiating principles and stages, the substantive issues for negotiation, and, the financial assistance Argyle would provide for the negotiation process. According to the MOU, Argyle would give the Kimberley Land Council (KLC) an advance payment initially which would then be followed by payments to meet KLC's expenses during negotiations. KLC also agreed to seek government funding, with Argyle making up any difference in funding. The agreement also contained a schedule of the amounts paid to KLC for the benefit of the traditional owners during the negotiation process, which totaled AU$2m.

In contrast, the **Raglan Agreement**, which concerned a project in Quebec, Canada, provided funding for the negotiation process on a reimbursement basis only, rather than an initial grant of money.

2.3 Leading Practice 3

Facilitate the local community's articulation of a negotiating position.

Through a negotiating position, a community can express how it wishes be involved in and benefit from the project.[xxxiii] Negotiating positions can act as a starting point for negotiations, providing the mining company with a clear articulation of the community's priorities and interests.[xxxiv] They are generally articulated in non-technical or legal terms and act as a general expression of priorities, rather than a "bottom line" or binding legal offer from the community. They can also act as a vehicle for community members to collectively reflect upon priorities before negotiations begin, and help to draw attention amongst community members to the negotiation process.[xxxv] A negotiating position is generally discussed and approved internally by the community before being presented to the company.

The negotiating position also serves as a point of reference and comparison for the community. The community can compare proposals made by the company or by specific community members against the negotiating position to determine how such proposals meet their priorities.[xxxvi] This can also assist the company in obtaining the community's free, prior, and informed consent on decisions that are put to it. The scope and depth of a negotiation position will vary from community to community, depending on the project's likely impacts.

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

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

2.4 Leading Practice 4

Ensure community participation in the agreement-making process, including informed decision-making during negotiations and involvement in completing impact assessments.

Leading companies incorporate a participatory approach into all aspects of agreement making,[xxxix] and planning for the project. One common way in which community involvement in the preparatory phases of the project occurs is through domestic law

requirements for the carrying out of social and environmental impact assessments.[xl] When carried out in a consultative manner, such processes provide a vehicle for communities that stand to be affected by the project to share their perspectives. For example, where indigenous peoples with long standing ties to the land are involved in an impact assessment, they can contribute their traditional knowledge and understanding of the land and nearby ecosystems, including by identifying areas that are used as the basis for local livelihoods, are culturally significant, or are ecologically sensitive.

Community participation and informed decision-making can also be facilitated by ensuring that sufficient information is provided to communities during the pre-negotiation stage. Leading industry practices include providing information about the project in a timely and culturally appropriate manner, and in a format that is accessible by community members.[xli]

Recent studies have drawn a direct link between company-community conflicts arising from unmitigated environmental and social risks, and significant business costs for the mining company.[xlii] One study noted that in addition to a legislative and policy environment that encourages impact assessment and management, the increased involvement of communities in dialogue and decision-making during the early stages of a project is an important means of managing environmental and social risks which can translate into increased costs for the company.[xliii] In order to facilitate this dialogue and direct participation, companies must ensure that the local community is represented and involved in all of the pre-agreement stages, so that the community can shape and consent to the decisions made as part of that process.

Many companies regard the prospect of allowing community participation in decision-making for the project itself, rather than only the CDA, with great caution. This is due to the desire of investors to maintain control over decisions that can impact on the project's timetable and budget.[xliv] On the other hand, allowing for greater community engagement and control may avert conflicts between the company and the community, whose costs can be greater than those associated with any changes to spending or work timetables that communities may pursue.[xlv]

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

2.5 Leading Practice 5

Benefit sharing means more than financial compensation for use of the land or displacement.

It is now generally recognized that monetary compensation, while often legally required, will seldom ensure that affected communities' lives and livelihoods can be properly restored.[xlvii] The more effective CDAs share benefits flowing from the resource development to promote broader long-term and ongoing economic and social participation in the project.[xlviii] Such benefits include financial contributions, such as a royalty stream linked to production, and non-financial benefits, such as local employment opportunities and commitments to source goods and services from local providers. Compensation can still be effectively employed to acknowledge those project impacts that cannot be adequately remedied.

One of the goals of benefit sharing is to strengthen a community's asset base by improving the community's physical, economic and human capital.[xlix] This includes efforts to avoid communities becoming overly dependent on income streams from the project, which can leave them vulnerable if the project fails or becomes less productive. This is another reason for designing CDAs to provide a combination of financial and non-financial benefits, thereby linking community wellbeing to the sustainability of the project, while also providing transferable skills, such as business and management skills that equip the community to continue its economic growth after the mine project closes.

Financial benefits provided to communities should be predictable, stable, comprehensible, and well adapted to the project and the community. Additionally, they should be founded on recognition of and respect for the community's aspirations.

Revenue sharing between different levels of government and local communities has been increasingly employed in recent years.[l] This approach seeks to address the fact that while federal governments usually receive most of the revenue from a project, it is the local branch of government, and the community itself, which encounters the majority of social and economic impacts.

Revenue sharing can take various forms. [li] Communities can receive *fixed payments*, which are predictable and more easily understood,[lii] but which will not increase if the project's profitability does. They can also receive royalties based on the *volume of outputs or the volume of production*, which are not directly vulnerable to commodity price drops, but which also will not deliver additional benefits where the project becomes more profitable. Approaches which maximize the potential gain for communities, but which also contain the most risk and dependence on market trends, include revenue streams based on company profits or the allocation to the community of an equity share in the project company.

Box 6: **Financial Benefit Sharing**

The **Newmont Ahafo Mine** Community Development Agreement contains multiple types of financial benefit sharing. The agreement requires the mining company to pay to a community foundation US$1 for every ounce of gold from the mine sold, as well as 1% of the company's net pre-tax income, and of any gains made in selling assets that total US$100,000 or more.

Non-financial benefit sharing encompasses a wider spectrum of benefits, including employment, training, business development, and infrastructure and/or support services. The specific benefits that are included in any agreement will depend on the community's context and aspirations, as well as the project itself.[liii] When implemented appropriately, each type of benefit operates to improve the asset-base of the community and its overall wellbeing, ultimately contributing to the sustainability of the CDA itself.[liv]

Each of these benefits is discussed only at a high level in this brief, given the complexities and variation that different contexts can introduce. Box 7 details some of the more comprehensive benefit-sharing examples found in the review.

Employment

Employment opportunities are regarded as one of the most desirable benefits that CDAs can provide communities. One study has noted, however, that solely providing training and preferential access to job opportunities will generally be insufficient to meet the needs of the local community and ensure its ownership in the project.[lv] Instead, leading practices implement employment opportunities alongside meaningful community involvement in the project's development and the design of mitigation measures and remedies for adverse impacts, alongside other project benefits discussed in this section.[lvi] In low-income communities, common barriers to fulfilling a company's employment goals include low education levels and a lack of employment experience, because of which companies will need to invest in skills development and training initiatives amongst community members.

Studies have also shown that CDAs which involve specific or rolling targets for job creation and employment training help ensure that the company is committed to hiring locally and carrying out trainings on an ongoing basis.[lvii]

Box 7: Non-financial benefit-sharing examples

One publicly available agreement that provides detailed provisions regarding benefit-sharing and community participation is the **Diavik Diamonds Project Socio-Economic Monitoring Agreement**. (The authors understand that this agreement is in the process of being disbanded). While this particular agreement does not provide any formal ownership of equity in the project, it does provide employment and training benefits that increase the stake and role of members of Aboriginal communities in the mine's operation. The agreement places a strong focus on recruiting, training and retaining its employees. This includes prescribing a workforce quota for members of local Aboriginal communities using a cumulative percentage goal at various stages of the project. The company retains considerable discretion over its employment practices, however, and there is no penalty that applies if it does not meet its recruitment goals. The agreement also actively promotes and encourages careers in diamond mining for the youth of the region where the mine is located, although again this is left at the discretion of the company, and no details are provided in the agreement. In addition, the agreement establishes a number of training programs all geared towards increasing access to jobs for members of Aboriginal communities and equipping them with transferable and project-related skills, such as technical, technological supervisory and managerial roles. To help retain employees, the company has created a rotation work schedule (four weeks on, two weeks off) that is compatible with the schedules of Aboriginal employees practicing a traditional lifestyle. It also funds community research projects addressing barriers to successful employment.

The **Raglan Agreement** emphasizes the importance of cultural sensitivity in employment as a key means of retaining Aboriginal employees. Specifically, the agreement seeks to encourage social harmony within the workforce by promoting inter-cultural understanding through cross-cultural training for all supervisors and managers, inviting local artists to perform outside of working hours at the project site, organizing sports events between employees and residents, and ensuring access to traditional food sources.

The **Argyle Diamond Mine Participation Agreement: Management Plan Agreement** demonstrates how CDAs can facilitate the company to help local businesses develop. In it the company commits to helping traditional owners establish businesses and develop good management practices, and where appropriate, an Argyle employee would help the business on an ongoing basis for three years.

Despite the promise of efforts by companies to promote employment, the review of CDAs did not reveal a practice of establishing procedures or penalties for when a company does not meet the targets or other employment goals set out in CDAs. Further, agreements tend to contain clauses that leave considerable discretion in the company's hiring methods or weaken its hiring obligations by limiting the circumstances under which a company must employ a member of the local community over another non-local candidate. One likely reason for the reluctance to be tied to strict obligations is that a company cannot be sure that it will meet the targets, which depend on the alignment of several variables, including availability of willing and qualified individuals and the operator's ability to meet the intended construction and development timetable. Nonetheless, in order to ensure that CDAs lead to more tangible employment benefits for local communities, companies should agree to clear and enforceable commitments to carry out programs for training and recruitment of candidates from the local community.

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

Training

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

Business development

In relation to business development or "supply chain procurement", the review revealed that companies seem to view the most effective way of utilizing and supporting local businesses is to form joint ventures with existing and new local businesses to provide goods or services to the project.[lx]

Infrastructure

Company and community efforts to ensure greater community participation have extended into the realm of infrastructure and service provision. This is notable given that communities were previously not generally regarded as potential owners or managers of key infrastructure and other services, particularly in developing countries and in rural or remote regions.

Box 8: Infrastructure development and service provision

The **Agreement between Newmont Ahafo Development Foundation and Newmont Ghana Gold Ltd** is an example of a company seeking to foster greater community participation and public ownership of the project and associated benefits. The agreement provided that infrastructure projects completed were jointly owned by the community and the District Assembly, and allocated to them the responsibility for their maintenance and management. Where personnel or other resources would be required, the District Assembly agreed to liaise with the local government agency. The agreement does not specify other means of obtaining financial or other resources if the government agency is unable to assist. It also does not require the company to assist in the development of a maintenance and management plan for the project. Instead, the process under which these projects would be developed includes the involvement of the newly created Ahafo Development Foundation, which is run by a board of trustees and composed of company and community representatives. The Foundation is established under a related social responsibility agreement, and its role is to consider proposals from District Assemblies for sustainable development projects and fund those it approves. The agreement set out that the Foundation would receive revenue from the project, which could be applied towards programs for developing infrastructure and delivering other services. In this example, the Foundation acted as an intermediary body, limiting Newmont's financial and managerial responsibility over infrastructure and service provision.

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

Leading practices include seeking the advice and involvement of local community members to ensure that services and infrastructure meet the community's needs.[lxi] In some cases, CDAs may outline where infrastructure built for a project may be shared, utilized, as well as managed, maintained and even owned, by communities. CDAs may also set up financial flows to community organizations which may then be able to fund specific development or infrastructure projects. National and local governments should generally be involved to ensure that the new infrastructure projects align with the national and local priorities for development of infrastructure.

It is also essential that companies consider the sustainability of infrastructure and service provision for after the project has concluded. A useful approach can be to strengthen management bodies and establish partnerships with existing government institutions in order to best prepare for mine closure. Box 8 provides examples of the approaches taken to infrastructure in two agreements.[lxii]

2.6 Leading Practice 6

There must be strong, accountable governance arrangements in the agreement to facilitate effective implementation, including after mine closure. This should also involve a system of ongoing monitoring and review with mechanisms that allow for adjustment of the terms of the agreement when necessary.

Governance mechanisms

In order to secure the effective functioning of the CDA, leading practice agreements include governance arrangements for managing the ongoing relationship between the local community and the company.[lxiii] These provisions typically cover aspects of the CDA such as liaison and management committees, financial management structures, dispute resolution processes, and monitoring and review processes. Examples of the different types of arrangements are shown in Box 9.

Designing and establishing governance arrangements depends heavily on the local context, including the specific community's existing organizational and deliberative structures and its capacity for following and enforcing governance procedures.[lxiv] It may be necessary to create new structures in collaboration with the community, through a process that demonstrates respect for custom and culture,[lxv] although this can be undermined if the local government restricts the local community's ability to organize.

The company should also provide capacity building for the community in relation to the ongoing monitoring and implementation of the CDA, and participation in any relevant structures. One example of a governance structure is a liaison committee that comprises company and community representatives who are charged with managing company-community relations. Such structures will be most effective when clear rules are drawn regarding how disputes or grievances will be managed.

Alongside building capacity and establishing governance structures in the community, is the issue of sharing decision-making power. In recent years, there has been a trend towards increasing the amount of decision-making responsibilities in local community hands, though the balance remains firmly in the company's favor. This has been reflected in CDAs that include, for example, an environmental committee constituted entirely by local community members whose function is to assess the environmental impact of the mine and make recommendations for action.[lxvi]

Partnerships, including with civil society organizations, are particularly useful where the community lacks the capacity to implement the agreement and to hold the company to its end of the bargain. Companies should also be willing to engage in collaborative capacity-building with community members and other stakeholders through adequately funded representative bodies, such as the Foundation in the Ramu Nickel/Cobalt Project and the Group Advisory Board established by the Diavik Diamonds Agreement, as described in Box 9.

Box 9: Governance Arrangements for Implementation

The need for, and sophistication of, governance arrangements to be provided in the CDA will vary with each community and project. At a minimum, agreements may establish a liaison body, as was done in the **Regional Indigenous Land Use Agreement for Small Scale Mining** in Victoria, Australia. In that agreement, the indigenous community signatories to the agreement appointed the Dja Dja Wurrung Clans Aboriginal Corporation (a body recognized under the Native Title Act as being legally capable of representing the interests of indigenous peoples) to act as a communication liaison between the community and the miners. The agreement did not provide further detail on the frequency of meetings or specific responsibilities and functions.

The agreement made in connection with the **Ramu Nickel/Cobalt Project** established a foundation composed of representatives from the national government, provincial government, local level government, landowners and the company, to implement the planned infrastructure projects.

For the **Ahafo Ghana Gold Mine**, the agreement established an Agreement Forum that was granted oversight responsibility for the implementation of the agreement. In addition, the agreement established a Community Consultative Committee that would manage information and communication between the company, community and other stakeholders. The agreement also provided for the ownership and maintenance of completed infrastructure projects, stating that those projects were jointly owned by the community and the district assembly, and both were responsible for maintenance and sustainability of all projects.

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

Monitoring

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

Available literature shows, however, that most agreements fall short in meeting expectations at the implementation stage.[lxvii] Indeed, many of the CDAs reviewed for this brief did not contain detailed provisions concerning implementation and monitoring. A number of strategies exist to ensure greater accountability in implementation. Implementation may be improved where companies partner with local civil society groups to ensure that CDA commitments are fulfilled.[lxviii] Similarly, companies can strengthen the local and regional government's administrative and local delivery capacity, and help to develop a cooperative relationship with such actors to assist with service delivery under the CDA.

Enforcement

Effective grievance mechanisms and strong enforcement mechanisms are key to strengthening the impetus on the company to implement the agreement effectively.[lxix] The most common approach among available Canadian and Australian agreements is to establish a dispute resolution framework that emphasizes amicable resolution through dialogue and mediation before either party has a right to enforce the contract in court or at a tribunal. Alternatively, the agreement may impose an obligation on the company to pay compensation for loss or damage caused by non-performance of a contractual obligation,[lxx] or to set up a project-level non-judicial grievance mechanism. Where agreement clauses are vaguely worded, however, proving that particular obligations exist, or have been breached, may be difficult. Similar challenges in enforcement will occur for provisions leaving considerable discretion to the company—for example in the fulfillment of imprecisely worded employment targets.

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

2.7 Leading Practice 7

The agreement must plan for mine closure and legacy issues.

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

In addition to structuring financial and non-financial benefits to provide sustainable benefits for the community, some good practice methods to plan for closure include the following.[lxxi]

1. Make known the expected closure date, while also noting that mines can be subject to temporary or permanent closure for unexpected reasons, such as the fall of commodity prices, natural disasters, and social unrest[lxxii]
2. Actively engage the community on how the impact of closure can be addressed (see Box 10 for examples of how this was done in some of the agreements reviewed)
3. Assist the community to develop alternative local economies
4. If necessary, design and implement low-tech physical infrastructure, which the community and/or local government can maintain post-closure

5. Contribute to the building of community governance capacity for dealing with any mine legacy issues (see Leading Practice 6).

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

Box 10: Mine Closure Planning

The **Tolukuma Gold Mining Project Agreement** states clearly how the community will be engaged in relation to mine closure and rehabilitation. The Papua New Guinean national government will create a task force three years prior to the closure, and require that a Conceptual Mine Closure Plan be circulated for comment by key stakeholders to ensure rehabilitation of the project area and sustainability of the local communities.

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

2.8 Leading Practice 8

As far as possible, CDAs should not be confidential

Consistent with the objectives of transparency, accountability and good governance, there is a growing recognition that confidentiality clauses in CDAs should be avoided, or be heavily qualified.[lxxiii] Confidentiality provisions can weaken the capacity and power of local communities by prohibiting them from communicating with the media and other stakeholders for advice, support and informational purposes, when needed.[lxxiv] Confidentiality provisions are sometimes requested by a community itself;[lxxv] this can put future communities at a disadvantage by limiting the number of past agreements available, thus reducing their ability to learn from the experience of other communities.[lxxvi] Efforts by researchers to comprehensively analyze CDAs are also undermined. Knowledge of what has and what has not worked with respect to CDAs will accordingly often be limited by one's ability to gain insider information from companies or other stakeholders, meaning that any lessons learned by such information can only be published as a secondary source, and key details will often be missing.

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

3. Conclusions

Although a standard model CDA will not be appropriate for every context, the broad practices described in this brief should be applicable across jurisdictions and communities. A key practice is to ensure meaningful community involvement in the agreement-making process and in decision-making regarding the project itself. This will help to ensure that the CDA, and the agreement-making process, are responsive to the needs, aspirations and local conditions of the community. Meaningful community involvement can be facilitated by identifying all impacted stakeholders, providing information, resources and capacity-building to help foster an even playing field, and implementing structures that involve community members in the governance and oversight of the agreement's implementation. These practices

should be adopted as early as possible in the process, and be carried out through to and beyond mine closure, with the aim of ensuring the community's self-determined development. CDAs will be most effectively implemented where the company builds the agreement into its business processes.[lxxix] As noted above, recent studies have revealed that where this is not done, there is more likely to be a calculable cost to the company as a result of conflict with the community.

Despite the leading practices described in industry guides and policy documents, it is difficult to find many CDAs that exhibit them. There is therefore a great need for all stakeholders to work to establish more effective CDAs; governments should focus on enforcing more detailed legislative requirements for CDAs and enhancing community access to legal advisors and other support, companies should continue to adopt leading approaches when entering into them, and communities should continue to demand such practices when negotiating such agreements.

Publishing existing CDAs would assist in distilling current leading practices in this evolving area, as would further field research on lessons learned from the implementation of CDAs over the course of long-term projects.

The Columbia Center on Sustainable Investment (CCSI), a joint center of Columbia Law School and the Earth Institute at Columbia University, is a leading research center and forum dedicated exclusively to the study, practice and discussion of sustainable international investment (SII) worldwide. Through research, advisory projects, multi-stakeholder dialogue and educational programs, CCSI constructs and implements an investment framework that promotes sustainable development, builds trusting relationships for long-term investments, and is easily adopted by governments, companies and civil society.

Notes

[a] The term community development agreement is used in this brief to describe all agreements between communities and the extractives industry with the similar goals of promoting community development. For a list of terms that are also used to describe such agreements, see Box 2.1 in World Bank, "Mining Community Development Agreements: Source Book," (March, 2012), p. 5.

[i] InterGroup Consultants, "Aboriginal Engagement in Resource Development Industry Leading Practices," (October, 2008); Indigenous Support Services, "Agreements between Mining Companies and Indigenous Communities: A Report to the Australian Minerals and Energy Environment Foundation," (December, 2001); Centre for Social Responsibility in Mining, "Agreement-making with Indigenous Groups: Oil & Gas Development, Australia," (2012); Ginger Gibson and Ciaran O'Faircheallaigh, "IBA Community Toolkit: Negotiation and Implementation of Impact and Benefit Agreements," (March, 2010); International Council on Mining & Metals, "Community Development Toolkit," (2012); International Council on Mining & Metals, "Good Practice Guide: Indigenous Peoples and Mining," (2010); International Finance Corporation, "Stakeholder Engagement: A Good Practice Handbook for Companies Doing Business in Emerging Markets," (2007); Centre for Social Responsibility in Mining, "World Bank Extractive Industries Sourcebook: Good Practice Notes," (March, 2012); World Bank, "Mining Community Development Agreements: Source Book," (March, 2012), *Community Development Agreement Model Regulations & Example Guidelines*, (World Bank Group, Final Report, submitted by James M. Otto, 2011)..

[ii] Those that were identified in the review for this brief were from Australia, Canada, Papua New Guinea, Ghana, Laos and Greenland. Out of these, Ghana and Laos do not have a legislative or constitutional requirement to negotiate with impacted, local communities.

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

[iv] Full text versions of CDAs are available from CCSI's website (http://ccsi.columbia.edu/work/projects/community-development-agreements-frameworks-and-tools/), from the Agreements, Treaties and Negotiated Settlements website (http://www.atns.net.au/browse.asp) and the CDA Library maintained by Sustainable Development Strategies Group (SDSG) (http://www.sdsg.org/archives/cda-library/).

[v] Gibson and O'Faircheallaigh, 2010, op. cit., p. 30. Canada's laws contain a similar requirement, which may be satisfied by an agreement between company and community.

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

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

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

[ix] International Labour Organization, Indigenous and Tribal Peoples Convention, 1989 (No. 169), Art. 6(2).

[x] See, e.g., Roundtable on Sustainable Palm Oil, *Principles and Criteria for the Production of Sustainable Palm Oil* (2013), Principle 2.3 ("Use of the land for oil palm does not diminish the legal, customary or user rights of other users without their free, prior and informed consent"); Forestry Stewardship Council, *FSC Principles and Criteria for Forest Stewardship*, para. 2.2. (Local communities with legal or customary tenure or use rights shall maintain control, to the extent necessary to protect their rights or resources, over forest operations unless they delegate control with free and informed consent to other agencies.)

[xi] The Australian Native Title Act 1993 (Cth) provides protection for native title holders' (including persons who have asserted native title rights and are awaiting determination) rights as against all "future acts". Future acts are defined as acts that affect native title (i.e., government granted leases or licenses to mine). A future act is invalid if it is not first subject to negotiation with the native title holders. At a minimum, the Act protects native title holders' right to negotiate. The right to negotiate framework is more rigid and if no agreement is reached within a specified timeframe, the parties must refer the issue to the arbitral body (which may be a state body if the relevant state has so specified or the National Native Title Tribunal (NNTT)). The Act also sets out an alternative pathway that satisfies the right to negotiate requirements but is more flexible and does not have time restrictions. This procedure is called an Indigenous Land Use Agreement and becomes effective once it is registered with the NNTT: *Native Title Act 1993* (Cth), Part 2, Div 3, subdiv P (right to negotiate) and subdiv B-E (ILUAs).

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

[xiii] International Council on Mining & Metals, 2010, op. cit., p. 42.

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

[xv] Ciaran O'Faircheallaigh, "Negotiating Major Project Agreements: The 'Cape York Model'," AIATSIS Research Discussion Paper 11 (2000).

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

[xvii] International Council on Mining & Metals, 2010, op. cit., pp. 17, 20.

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

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

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

[xxi] International Council on Mining & Metals, 2010, op. cit., p. 58; Kunanayagam and Tomlinson, 2011, op. cit.

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

[xxiii] InterGroup Consultants, 2008, op. cit., pp. 19, 24.

[xxiv] For a more comprehensive list of topics usually included see Gibson and O'Faircheallaigh, 2010, op. cit., p. 79.

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

[xxvi] International Council on Mining & Metals, 2010, op. cit., p. 55; Kunanayagam and Tomlinson, 2011, op. cit.

[xxvii] InterGroup Consultants, 2008, op. cit., p. 25.

[xxviii] InterGroup Consultants, 2008, op. cit., pp. 17, 25; Kunanayagam and Tomlinson, 2011, op. cit.

[xxix] O'Faircheallaigh, 2000, op. cit.; Native Title Payments Working Group, "Native Title payments working group report", p. 3.

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

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

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

[xxxiii] O'Faircheallaigh, 2000, op. cit, p. 14.

[xxxiv] Indigenous Support Services, op. cit, p. 46.

[xxxv] O'Faircheallaigh, 2000, op. cit, p. 14.

[xxxvi] O'Faircheallaigh, 2000, op. cit, p. 14.

[xxxvii] O'Faircheallaigh, 2000, op. cit, p. 14.

[xxxviii] O'Faircheallaigh, 2000, op. cit, p. 14.

[xxxix] World Bank, Mining Community Development Agreements: Source Book (2012), 14.

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

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

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

[xliii] Franks et al, 2014, op. cit., p. 7580.

[xliv] InterGroup Consultants, 2008, op. cit., p. 17.

[xlv] Franks, 2014, op. cit., p. 3.
[xlvi] For a discussion of government- and company-established grievance mechanisms, see "Grievance Mechanisms", *Negotiation Support Portal*, http://negotiationsupport.org/roadmap/grievance-mechanisms-0
[xlvii] Centre for Social Responsibility in Mining, "World Bank Extractive Industries Sourcebook: Good Practice Notes," 2012, op. cit.,, p. 5; International Council on Mining & Metals, 2010, op. cit., p. 67; Native Title Payments Working Group Report (2009), p, 7; Kunanayagam and Tomlinson, 2011, op. cit.
[xlviii] Centre for Social Responsibility in Mining, "World Bank Extractive Industries Sourcebook: Good Practice Notes," 2012, op. cit.,, p. 5; International Council on Mining & Metals, 2010, op. cit., p. 67; Native Title Payments Working Group Report (2009), p, 7; Kunanayagam and Tomlinson, 2011, op. cit.
[xlix] International Council on Mining & Metals, 2010, op. cit., p. 81.
[l] InterGroup Consultants, 2008, op. cit., p. 81.
[li] For a comprehensive summary of the many different forms that financial benefits can take, see Gibson and O'Faircheallaigh, 2010, op. cit. For a more detailed discussion see, Centre for Social Responsibility in Mining, "Agreement-making with Indigenous Groups: Oil & Gas Development, Australia," 2012, op. cit., p. 81. See, e.g., Agreement between Newmont Ahafo Development Foundation and Newmont Ghana Gold Limited, 2008, Clause 11.1 http://ccsi.columbia.edu/files/2015/01/Ghana-Ahafo-Mine-Local-Community-Newmont-Ghana-Gold-Ltd-2008-Development-Foundation-Agreement.pdf
[lii] Centre for Social Responsibility in Mining, "Agreement-making with Indigenous Groups: Oil & Gas Development, Australia," 2012, op. cit., p. 79.
[liii] Centre for Social Responsibility in Mining, "Agreement-making with Indigenous Groups: Oil & Gas Development, Australia," 2012, op. cit., p. 75.
[liv] International Council on Mining & Metals, 2010, op. cit., p. 81; Centre for Social Responsibility in Mining, "Agreement-making with Indigenous Groups: Oil & Gas Development, Australia," 2012, op. cit., pp. 75, 92.
[lv] InterGroup Consultants, 2008, op. cit., Executive Summary.
[lvi] InterGroup Consultants, 2008, op. cit., Executive Summary.
[lvii] Gibson and O'Faircheallaigh, 2010, op. cit., p. 145.
[lviii] InterGroup Consultants, 2008, op. cit., p. 60.
[lix] InterGroup Consultants, 2008, op. cit., p. 64.
[lx] Centre for Social Responsibility in Mining, "Agreement-making with Indigenous Groups: Oil & Gas Development, Australia," 2012, op. cit., p. 92; InterGroup Consultants, 2008, op. cit., p. 69.
[lxi] International Council on Mining & Metals, 2010, op. cit., p. 86.
[lxii] Centre for Social Responsibility in Mining, "Agreement-making with Indigenous Groups: Oil & Gas Development, Australia," 2012, op. cit., p. 90; Centre for Social Responsibility in Mining, "World Bank Extractive Industries Sourcebook: Good Practice Notes," 2012, op. cit., p. 24.
[lxiii] International Council on Mining & Metals, 2010, op. cit., p. 69.
[lxiv] Centre for Social Responsibility in Mining, "Agreement-making with Indigenous Groups: Oil & Gas Development, Australia," 2012, op. cit.; Centre for Social Responsibility in Mining, "World Bank Extractive Industries Sourcebook: Good Practice Notes," 2012, op. cit., p. 31; Kunanayagam and Tomlinson, 2011, op. cit.
[lxv] International Council on Mining & Metals, 2010, op. cit., p. 20.
[lxvi] International Council on Mining & Metals, 2010, op. cit., p. 69.
[lxvii] Centre for Social Responsibility in Mining, "World Bank Extractive Industries Sourcebook: Good Practice Notes," 2012, op. cit., p. 31-34.
[lxviii] For example, the Participatory Environmental and Social Management Program (PESMP) undertaken by Hunt Oil in the southern region of Peru was established by an independent NGO to provide an opportunity for communities to participate in monitoring the project's environmental and social performance. The PESMP involved community members, local authorities, civil society, government officers and international financial institutions: IPIECA, "Indigenous Peoples and the oil and gas industry: Context, issues and emerging good practice", (2012), pp. 32-5.
[lxix] For a more in-depth discussion of grievance mechanisms in community engagement, see Mandelbaum and Loutit, "Extractive Industry Investments and Human Rights" in *Research Handbook on Human Rights and Investments* (Yannick Radi, ed., forthcoming).
[lxx] This type of enforcement clause can be seen in the Greenlandic agreements reviewed.
[lxxi] International Council on Mining & Metals, 2010, op. cit., p. 92.
[lxxii] Indeed, such circumstances further underline the need to have a closure plan from the project's early stages.
[lxxiii] International Council on Mining & Metals, 2010, op. cit., p. 60; InterGroup Consultants, 2008, op. cit., p. 89.
[lxxiv] Gibson and O'Faircheallaigh, 2010, op. cit., pp. 47-48.
[lxxv] Comment from practitioner in the field.
[lxxvi] What are Impact and Benefit Agreements?, available at http://www.miningfacts.org/Communities/What-are-Impact-and-Benefit-Agreements-%28IBAs%29/.
[lxxvii] Agreements, Treaties and Negotiated Settlements Project, available at: http://www.atns.net.au (last visited October 19, 2014).
[lxxviii] Other organizations have also started collections of CDAs, for example: http://www.sdsg.org/archives/cda-library/.
[lxxix] Comment from practitioner in the field.