

It's just a clause, isn't it?

clauses, contracts and their generational impacts No. 2

Navigating Company-Community Relationships through Community Development Agreements, by Kristi Disney Bruckner, Sustainable Development Strategies Group

Whether you are a mine manager or investor, a member of a mine-affected community, a leader of a government body or NGO, or are involved in the mining sector in some other way, you likely have a lot of experience with managing change.

Parties need tools to help them assess and navigate that change. They may turn to a "Community Development Agreement (CDA)" to generate solutions during times of change, but too often will find an agreement with no mechanism for evaluation or improvement to respond to change. The CDA may be very fixed and inflexible in the face of change. This can amplify frustration for all Parties and misunderstanding in times when open communication, honest evaluation of the options, and proactive responses are needed the most.

This edition of **"It's Just a Clause, Isn't It?"** explores a Relationship Committee mechanism in a CDA that helps Parties to regularly review, assess, and improve their plans and the outcomes of their overall agreement.

We should clarify the term "community development agreement" as an agreement between a mining company and one or more mine-affected communities (and/or a local government on behalf of a community) to deliver socio-economic benefits such as jobs, social investments, and/or revenue sharing.

Some countries, like Liberia, use a model mine development agreement that requires a CDA; other governments, like Mongolia, have a model CDA serving as a template; and still other governments outline requirements for CDAs, in very general to more specific terms, in national or subnational legislation.

CDAs are a tool for managing a mine's impacts and benefits with varying degrees of success depending on a range of factors. Greater scrutiny of CDAs is needed to ensure improved practice and shared learning within and across stakeholder groups. This is particularly true as legislation begins to require such agreements and as existing agreements reach the end of their term, presenting opportunities to negotiate new and improved deals.

Good practice in CDAs involves the prospective Parties negotiating the agreement. Because the Parties, types of projects, and circumstances vary widely, it is not possible for any one model agreement to be well-suited for all variations without substantial flexibility and room for negotiation. Where legislation requires CDAs, a good approach may be to provide a list of topics to be included in a CDA but not limit Parties solely to those topics. This can balance establishing some agreed norms and expectations with the benefits of negotiation and developing an agreement that responds to unique circumstances. Guidance can help Parties avoid costly mistakes and can be regularly improved to incorporate lessons learned and good practice.

So, here is our clause....



Establishment of [Relationship Committee]

X. The [Relationship Committee] is established and comprises 4 [Company] and 26 [Community] Representatives.

...

The functions of the [Relationship Committee] are to:

- a. foster and maintain a positive relationship between the parties in accordance with the relationship principles set out [above];*
- b. monitor the ongoing implementation of Management Plans and make recommendations to the parties as to how particular Management Plans should be implemented and how implementation of those Management Plans could be improved;*
- c. conduct a regular review in relation to each Management Plan and provide to [Company] and [Community] reports succinctly addressing:
 - (1) the effectiveness of implementation and resourcing;*
 - (2) the operational successes and difficulties;*
 - (3) recommendations for variation of the content or implementation of each Management Plan;**

Some agreements will call this committee the "Management Committee." Other agreements have multiple committees, but far too many agreements have no committee like this at all and miss its many advantages.

The Relationship Committee referenced above is described in pages of detail in the actual agreement's text, providing a high level of clarity. This excerpt is focused on the committee's function to monitor ongoing implementation and make recommendations for improved implementation. These functions are often completely absent from CDAs or are so generic that they are meaningless. This results in missed opportunities to improve relationships; to learn through the process of implementation, evaluation, and reflection; and to advance the benefits of CDAs for all Parties involved.

The sections below will discuss this excerpt by asking: Who? What? When? Where? Why? How? Then What? and then lay out some pros and cons to the agreement's approach.

Who?

In this example, the Relationship Committee included four company representatives and 26 community representatives, each with a three-year term. A company representative and a community representative acted as co-chairs, each with a Deputy Chair of the opposite gender.

This approach's advantage is the opportunity to include many community representatives and their perspectives in the Committee. Broad community representation is important because "the community" will almost never have "a" single perspective. The

number of representatives above corresponded to a particular family or estate. The agreement specified the requirement of "opposite gender" for the Deputy Chair. Other agreements have added more detailed requirements, i.e. from specific community groups or categories of qualifications to ensure that men and women, youth, religious groups, etc. are represented. This broad cross-section of the community allows a better understanding of the range of its perspectives, concerns, and objectives.

The balance of 26 community representatives to four company representatives may make the community representatives feel more comfortable and empowered vis-a-vis the company representatives. However, the number of company representatives may limit additional important knowledge or experience that would enrich discussions and and may limit development of company relationships with community representatives that can positively impact company culture and morale.

Company Representatives may feel more comfortable with more of their company counterparts in the Relationship Committee, but such benefits could be outweighed by negative impacts if the Community Representatives felt overpowered by a large company presence. The parties should discuss and evaluate these dynamics. Having one company co-chair and one community co-chair can help establish balance on many levels including meeting preparation, facilitation, and follow-up and can help equalize power and decision-making dynamics for the long-term benefit of the relationship, the agreement, and the project.

What?

This Relationship Committee's functions went beyond "foster and maintain a positive relationship between the parties". Many agreements just stop there. The relationship's principles are present, with its practical, proactive functions, including monitoring and recommendations for improvement. The clause even outlines what will be included in company reports and communicated to the community following regular reviews: a succinct report stating what worked, what didn't work, and what should be changed in the plan or its implementation to promote improvement.

A Relationship Committee can have many other functions. Here the function includes a detailed monitoring, evaluation and improvement function—so practical yet so often overlooked in CDAs for various reasons which may include:

- Some Parties are simply new to CDAs or unsure what monitoring and evaluation involve and how to carry this out;
- Other Parties may be fearful of inviting change to the agreement or to how it is implemented;
- Companies may be concerned that changes will lead to greater expenditures, possibly at a time when they are not yet making substantial profits or need to assure investors that the project is on budget;
- However, the monitoring and evaluation function is important for ongoing improvement of the agreement and its implementation. Development of monitoring and evaluation capacity can also improve management of small and medium sized enterprises (SMEs) and support economic diversification and resilience throughout the community.

When?

In this example, the Relationship Committee agreed to meet at least quarterly to monitor ongoing implementation of the Management Plans. The committee also agreed to meet at the request of either of the Co-Chairs. This timeline of meeting at least every three

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months with additional meetings as needed is conducive to relationship building yet not so infrequent that major issues or opportunities are overlooked in the monitoring and evaluation function. However, these meetings are also time away from other obligations. These variables must be taken into consideration and costs mitigated in a manner deemed appropriate to the Parties.

Where?

This agreement established the mine site as the meeting location. This may be a secure place to meet that becomes familiar to the Parties over time. The safety of community representatives to participate in meetings may be a major issue in some regions and at times a top concern. In other regions, the Parties may prefer to meet at a community center or government hall or even a space built for the Parties through the agreement. All relevant factors for the Parties, e.g., safety, distance of travel, and related costs, should be considered when determining meeting locations.

Why?

Why establish a Relationship Committee? This can be elaborated in the Committee's functions as well as its relationship principles, all detailed in the CDA. As noted above, it is important for prospective Parties to discuss pros and cons, generate options, and negotiate the agreement's particulars. This is not only because of the agreement's quality and relevances, but also because it builds relationships. Relationship principles



can be a good place to start. Questions to ask include:

- What principles do the Parties value?
- Why are the Parties working together?
- How will the Parties relate to one another?

How?

How will the Relationship Committee operate? Will it have support staff and a budget? In the above agreement, the Committee can set up sub-committees, hire experts, and arrange for trainings to build knowledge and capacity to fulfill its obligations. This is important as both the Company and Community Parties may be completely new to their roles and functions. Having access to trainings, experts, and support can aid implementation of the agreement and enhance development objectives.

Company representatives often find that while building capacity of community representatives takes time and resources, this leads to more successful and lasting negotiated agreements with improved management and outcomes. Companies must invest in building their capacity as well and in investing in the needed experts for the Parties to successfully monitor, evaluate, and improve implementation of their agreement.

Then What?

What happens if the Relationship Committee wants to change part of the agreement or how it is being implemented? In the above agreement, a unanimous vote of the Relationship Committee is needed, signed by all representatives present at the meeting in which the changes were made. This provides a clear method for variation of the agreement. However, especially where a change is material, the Representatives may wish

to specify how they will inform their broader constituencies and solicit input on a proposed change. In this agreement, any community member could attend the meetings of the Relationship Committee as observers. The Committee may also invite guests. This could be helpful when critical discussions will be held and votes cast. It could also possibly be disruptive if addressing a heated or sensitive topic, so some reasonable boundaries for participation could be established and agreed by the Parties in advance.

Many CDAs do not include any clause regarding how the agreement may be amended. However, this can be extremely useful to help navigate change or modify aspects of an agreement that are outdated or simply are not working to meet the objectives of the Parties.

To learn more about community development in the mining sector or to share your experience, check out the Community Development in Mining Collection, a new resource recently launched by the International Institute for Environment and Development (IIED), Sustainable Development Strategies Group (SDSG), and the Columbia Center on Sustainable Investment (CCSI).

The collection includes community development laws and agreements for the mining sector and already contains almost 300 pieces of legislation from 54 countries in an interactive map and searchable online database. The online resource aims to facilitate research, inform public debate about policy design, and improve local development outcomes. View the website and access news about the launch in English, Spanish, and French at the below link. 

<https://www.iied.org/mapping-community-development-requirements-mining-sector>



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Please note: The above article represents the views of the author herself and does not in any way reflect views of the CONNEX Support Unit, its Board, its employees or its funders.

Do you have suggestions of types of clauses or any other comments?

Are you a government keen to discuss CONNEX's negotiation support services on a confidential basis? Let's talk....

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Next edition....clauses and climate change with the Columbia Center on Sustainable Investment. See you then.