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Community Development Agreements: The Hardening and Evaluation of a Norm

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A thesis submitted in partial fulfillment of the requirements for the Master of Laws degree in Law

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Abstract

Large scale mining projects generate highly variable outcomes. Proponents of mining cite benefits including job creation and revenue generation, while critics point to adverse social and economic impacts borne by mining-proximate communities. Community-based concerns about mining operations have raised ethical and social justice considerations relating to human-rights and consent. Community development agreements (CDAs) have emerged as an increasingly common tool to address such concerns and facilitate the delivery of tangible benefits from mining operations to affected communities. The effectiveness of CDAs, however, varies widely depending on the negotiated provisions and their implementation. This work contributes to the understanding of CDAs by refining a comprehensive evaluation framework that can be used to empirically analyze CDAs. The framework is applied to CDAs from Australia, Canada, Papua New Guinea, Ghana, Greenland, Mongolia, and Sierra Leone, following which exploratory statistical analyses are conducted to highlight novel insights that can be drawn from its application.

Keywords

Community Development Agreement, CDA, Mining, Social License to Operate, Resource Development.

Summary for Lay Audience

The mining industry is considered to be both necessary and controversial. On one hand, the current structure of our society demands the extraction of minerals. On the other, large mining projects can generate highly inequitable outcomes, with affected communities bearing the weight of social and environmental costs. Community-based concerns about mining operations have raised ethical and social justice considerations relating to human-rights and consent, which generate conflict between project proponents, government, and local communities. Written contracts between companies and communities, known as community development agreements (CDAs), have emerged as an increasingly common tool to address such concerns and facilitate the delivery of tangible benefits from mining operations to affected communities. Despite their increasing prevalence, the use and effectiveness of CDAs to keep the peace and generate positive outcomes for communities remains a controversial topic. Questions are numerous and far reaching but real answers are few and vague. Are CDAs effective at generating positive outcomes? What contextual factors are important for CDA success? What does a well-drafted CDA look like? How are we to evaluate these agreements? To date, these questions have scarcely been addressed by the literature in an objective and empirical manner. This work contributes to the understanding of CDAs by refining a comprehensive evaluation framework that can be used to empirically analyze CDAs. The framework is applied to CDAs from Australia, Canada, Papua New Guinea, Ghana, Greenland, Mongolia, and Sierra Leone, following which exploratory statistical analyses are conducted to highlight novel insights that can be drawn from its application. For the first time, comprehensive comparative and empirical analyses of CDAs across multiple jurisdictions are conducted, drawing specific attention to the strengths and weaknesses of different CDAs, and the importance of external, contextual considerations.

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To my parents, you gave up everything to give me an opportunity for a better life. With nothing more than a plane ticket and a dream, you left Macedonia and came to a foreign land where you knew no one and had nothing. Everyone's goal in this short journey that we call life is different. Your goal, amongst many others, has been to lay the foundation. My goal is to show you that it was worth it. I am forever indebted to you both and hope that one day I can find the right way to express the totality of my gratitude. Until then, rest assured that this story is far from finished and that the best days are yet to come.

To my two not-so-young-anymore brothers, thank you for having the purest of hearts, the best of intentions and the greatest of ambitions. For as much I dedicate myself to our parents, I work to give that same effort and dedication to you.

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Preface

“We accept it as normal that people who have never been on the land, who have no history or connection to the country, may legally secure the right to come in and, by the very nature of their enterprises, leave in their wake a cultural and physical landscape utterly transformed and desecrated. What's more, in granting such mining concessions, often initially for trivial sums to speculators from distant cities, companies cobbled together with less history than my dog, the government places no cultural or market value on the land itself.”¹

I must confess, when I set out on this research journey, I was in many ways uninformed and, admittedly, ambivalent to the depth of exploitation that our society is built on. The simple truth is that, downstream of a complex supply chain, the general population is well-insulated from the raw impacts that the Westernized standard of consumption has on communities more proximate to the sourcing of our resources.

New resource development projects – such as those in oil, gas, and mining – are proposed every year, holding out promises of wealth and better livelihoods for the impacted local communities. Some argue that it is possible to ensure that impacted populations receive adequate consultation and compensation such that any adverse impacts may be offset. Despite such arguments, there is an undeniable pattern of human rights violations and environmental degradation that permeates the resource development industries.

The research to unfold stands as more than a project – it reflects my personal journey down this rabbit hole. To those who find themselves drawn to understanding these issues, I openly welcome you to a world of curiosities that you will not soon forget.

¹ Wade Davis, *The Wayfinders: Why Ancient Wisdom Matters in the Modern World* (House of Anansi, 2009).

In our every deliberation, we must consider the impact of our decisions on the next seven generations.

—Iroquois maxim

PART 1: CONTEXT AND CONTOURS

A large multinational mining corporation, Mine Inc, has been operating in developing country X since the 1970s. During this time, Mine Inc has maintained close ties with a variety of political regimes within country X, including monarchs, military regimes, militias, and recent democratically elected governments. Mine Inc has seen consistent growth in its revenues and profits over the years, and has also become a key contributor to country X's economy through employment, tax payments and royalties. In addition to this, Mine Inc has made notable contributions to community infrastructure, including building roads, schools, and hospitals and is actively involved in a number of community building ventures. Mine Inc also publishes environmental and social reports and is a member of numerous initiatives that involve non-governmental organizations and community groups. Mine Inc has openly conveyed its commitment to bolstering the proximate communities and has directly entered into written agreements with these communities on issues relating to revenue distribution, negotiation, employment, and a host of other infrastructure initiatives. Mine Inc has received numerous accolades and high-praise for its commitments to sustainable development.

Despite Mine Inc's community engagement efforts and substantial financial contributions that are aimed at promoting welfare and community wellbeing, a number of conflicts that have emerged between the local Indigenous communities, the corporation, and the government. The community has found itself facing the brunt of impacts of Mine Inc's operations, watching first-hand as their sources of livelihood and culture have disappeared due to the environmental damage to their lands and waters. Despite billions of dollars of revenue raised by Mine Inc's over the course of its years of operation, the community's economic, social, and environmental conditions has incrementally worsened and they continue to live in poverty.

In recent years, armed groups have emerged in the region of Mine Inc's operations. These groups have carried out a series of attacks on Mine Inc's facilities and personnel, demanding more equitable outcomes and perhaps even a stoppage of the entire operation. Mine Inc, in an attempt to safeguard its investment and protect shareholder

interests, increases its security personnel. Country X's government has deployed the army to quell protests, resulting in the killing of 15 unarmed villagers and adding to the growing tension between the community and company that continues to this day.²

This story is not unique – rather, it represents an all-too-familiar litany of troubling transgressions within the international extractive sector and supply chain. Through the generation of jobs and opportunities, transnational extractive companies can act as a pillar for the building of rights and prosperity that were previously not available to individuals in developing countries.³ Despite this, public perceptions of the extractive industry remain low⁴ – and for good reason, given that transnational extractive companies have continually been found to be parties to human rights abuses.⁵ Over the last few decades, there has been a clear

² Inspiration for this example is drawn largely from Subhabrata Bobby Banerjee, “Translocal Power and Translocal Governance – The Politics of Corporate Responsibility”, in Thomas Maak et al, *The Routledge Companion to Corporate Social Responsibility*, 1st ed (New York: Routledge, 2021) at 129; See also e.g. Shin Imai, Leah Gardner & Sarah Weinberger, “The 'Canada Brand': Violence and Canadian Mining Companies in Latin America” (2017) Osgoode Legal Studies Research Paper No 17/2017 at 12 [Justice Accountability Project] (In a report published by the Justice and Corporate Accountability Project in 2015, it was found that over a span of 15 years, operations of Canadian TNCs in Latin America had led to 44 deaths and over 400 injuries outside of the workplace); Daniel Rothenberg & Ben Radley, “We miners take our lives in our hands save nothing and believe only in luck’: The lived experience of human rights and labor violations in select artisanal mining sites in North and South Kivu” (2014) at 55, online (pdf): [Heartland Alliance International <pdfs.semanticscholar.org/6c00/255f9d580a8ecc508357d4f4da4a38142b3d.pdf?_ga=2.238510082.320815582.1583003067-1582185279.1583003067>](https://pdfs.semanticscholar.org/6c00/255f9d580a8ecc508357d4f4da4a38142b3d.pdf?_ga=2.238510082.320815582.1583003067-1582185279.1583003067); Nicolas Tsurukawa, Prakash Siddharth & Manhart Andreas, "Social impacts of artisanal cobalt mining in Katanga, Democratic Republic of Congo" (2011) Institute for Applied Technology, online (pdf): [Öko-Institut eV <www.oeko.de/oekodoc/1294/2011-419-en.pdf>](http://www.oeko.de/oekodoc/1294/2011-419-en.pdf).

³ Alice de Jonge, “Transnational corporations and international law: bringing TNCs out of the accountability vacuum” (2011) 7:1 *Critical perspectives Intl Bus* 66–89 at 67.

⁴ See e.g. Gabriel Friedman, “Mining in Canada is shrinking, and a wave of impassioned community opposition is partly to blame”, *Financial Post* (6 June 2019), online: [<financialpost.com/commodities/mining/mining-in-canada-is-shrinking-and-a-wave-of-impassioned-community-opposition-is-partly-to-blame>](http://financialpost.com/commodities/mining/mining-in-canada-is-shrinking-and-a-wave-of-impassioned-community-opposition-is-partly-to-blame); Duncan Hood, “People are dying because of Canadian mines. It’s time for the killing to stop”, *The Globe and Mail* (19 February 2019), online: [<www.theglobeandmail.com/business/rob-magazine/article-people-are-dying-because-of-our-mines-its-time-for-the-killing-to/>](http://www.theglobeandmail.com/business/rob-magazine/article-people-are-dying-because-of-our-mines-its-time-for-the-killing-to/).

⁵ See John Ruggie, UNHRC, *Protect, respect and remedy : a framework for business and human rights:report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, 2008, UN Doc A/HRC/8/5; Shin Imai, Bernadette Maheandiran & Valerie Crystal, "Access to Justice and Corporate Accountability: A Legal Case Study of HudBay in Guatemala" (2014) 35:2 *C J of Developmental Studies* 285.

surge in socio-environmental disputes across the world.⁶ The tense relationship between the extractive industries and Indigenous and non-Indigenous communities across the world is a product of a governance gap, and weak state and corporate mechanisms that have done little to address and alleviate the negative impacts of socio-environmental conflicts.⁷

And yet, to claim that the instances of conflict, human rights abuse and environmental degradation are products of a deliberate malfeasance by greedy and marauding mining executives is overly simplistic and strips the problem of its true nature. The problem and, thus the solution, are not straightforward. The fact of the matter is that many of the companies accused of wrongdoing began their journey with positive intentions for the communities in which they operate. There is a strong and genuine sentiment held by many that corporations can bring benefits to impacted local communities while also seeking a return on value for their investments.

In theory, it is possible to ensure that impacted populations are adequately compensated with economic benefits that may offset the adverse impacts that they experience.⁸ In practice, however, there are significant issues associated with the development of natural resource projects which generate conflict between project proponents, government, and impacted

⁶ See generally Daniel Rothenberg & Ben Radley, "We miners take our lives in our hands save nothing and believe only in luck": The lived experience of human rights and labor violations in select artisanal mining sites in North and South Kivu" (2014) at 55, online (pdf): *Heartland Alliance International* <pdfs.semanticscholar.org/6c00/255f9d580a8ecc508357d4f4da4a38142b3d.pdf?_ga=2.238510082.320815582.1583003067-1582185279.1583003067>; Nicolas Tsurukawa, Prakash Siddharth & Manhart Andreas, "Social impacts of artisanal cobalt mining in Katanga, Democratic Republic of Congo" (2011) Institute for Applied Technology, online (pdf): Öko-Institut eV <www.oeko.de/oekodoc/1294/2011-419-en.pdf>.

⁷ Amissi Melchiade Manirabona & Yenny Véga-Cárdenas, eds, *Extractive Industries and Human Rights in an Era of Global Justice: New Ways of Resolving and Preventing Conflict* (Toronto: LexisNexis Canada, 2019); See also Chaterine Dolan & Dinah Rajak, eds, *The Anthropology of Corporate Social Responsibility* (New York: Berghahn Books, 2016).

⁸ Ciaran O'Faircheallaigh, "Negotiations in the Indigenous World: Aboriginal Peoples and the Extractive Industry in Australia and Canada", online: *Routledge & CRC Press* <www.routledge.com/Negotiations-in-the-Indigenous-World-Aboriginal-Peoples-and-the-Extractive/OFaircheallaigh/p/book/9780815370444>.

Indigenous and non-Indigenous communities.⁹ Managing this conflict and ensuring that resource development projects are designed to mitigate adverse impacts and maximize community benefits are important priorities affecting the national economies and economic sustainability of Indigenous and non-Indigenous populations in resource regions.

Developing a feasible strategy to protect social and environmental rights is not easy. Some postulate that this problem could be resolved with the imposition of new regulations that create liability for the international conduct of extractive corporate empires. While this is noble in theory, state actors are often reluctant to do so – there are costs for exacting rules on business in a state when those rules are not present in other jurisdictions. It is feared that creating legal requirements that are more robust and do not exist elsewhere could lead to a dramatic flight of capital out of a country.¹⁰

In brief, this project is focused on evaluating something that might be referred to as the ‘hardening of a norm’. The growing tension between mining companies and stakeholders has created a dynamic environment where following regulatory standards is no longer sufficient for developers.¹¹ Evolving societal expectations over recent decades have changed the way

⁹ Cameron Gunton & Sean Markey, “The role of community benefit agreements in natural resource governance and community development: Issues and prospects” (2021) 73 *Resources Policy* 102152 at 9; See also Lindsay Galbraith, Ben Bradshaw & Murray B Rutherford, “Towards a new supraregulatory approach to environmental assessment in Northern Canada” (2007) 25:1 *Impact Assessment & Project Appraisal* 27, online: <doi.org/10.3152/146155107X190596>; “The Integration Imperative: Cumulative Environmental, Community, and Health Effects of Multiple Natural Resource Developments”, online: *University of Northern British Columbia* <www2.unbc.ca/greg-halseth/integration-imperative-cumulative-environmental-community-and-health-effects-multiple-natural-resource-developments>.

¹⁰ Jeffrey Bone, *Governing the extractive sector: regulating the foreign conduct of international mining firms*, Global Energy Law and Policy (Oxford, UK: Hart Publishing, 2021) vol 5 at 2.

¹¹ See Jennifer Noel Costanza, “Mining Conflict and the Politics of Obtaining a Social License: Insight from Guatemala” (2016) 79 *World Development* 97; Jason Prno & D Scott Slocombe, “Exploring the origins of ‘social license to operate’ in the mining sector: Perspectives from governance and sustainability theories” (2012) 37:3 *Resources Policy* 346 [Prno & Scolombe, “Origins of the Social License”]; Jason Prno & D Scott Slocombe, “A Systems-Based Conceptual Framework for Assessing the Determinants of a Social License to Operate in the

that the extractive industries conduct their operations around the world. Increasingly, communities affected by resource development operations are demanding to be involved in decision making, placing pressure on extractive companies to produce more equitable and positive outcomes.¹² Extractive companies, who have traditionally found comfort by attaining the proper legal licenses and permits for their operations, are now subject to a form of regulation that extends beyond black letter law. This social acceptance and form of quasi-regulation has become known as the ‘social license to operate’ (SLO). This work is focused on investigating the relationships between the black-letter law and social norms, arguing that the increased salience of issues in the extractive industry and stakeholder conflict has hardened stakeholder expectations into a quasi-regulatory standard. As will be discussed, this is in large part due to a growing consensus that legal requirements, such as securities disclosure obligations or ESG reporting requirements, have yet provide the comprehensive picture required to maintain social control over company behavior, and do not adequately reflect principles of consent and consultation.¹³ Fulfilling stakeholder expectations in today’s

Mining Industry” (2014) 53:3 Environmental Management 672 [Prno & Slocombe, “Systems Based Framework”].

¹² ‘Positive outcomes’ in this context refers to the positive outcomes that may be attained through community development initiatives, such as increasing the strength and effectiveness of communities, improving peoples’ quality of life, and enabling community members to participate in decision making to achieve greater control over their lives. Increasing fairness, equity, and equality are significant factors in this regard. For more on equity, fairness – both procedural and distributional – see e.g. Deanna Kemp & John R Owen, “Community relations and mining: Core to business but not ‘core business’” (2013) 38:4 Resources Policy 523; Catherine Gross, “A Measure of Fairness: An Investigative Framework to Explore Perceptions of Fairness and Justice in a Real-Life Social Conflict” (2008) 15:2 Human Ecology Rev 130; Sameera Hussain et al, “Health intersectoralism in the Sustainable Development Goal era: from theory to practice” (2020) 16:1 Global Health 15; Michael Marmot, “Achieving health equity: from root causes to fair outcomes” (2007) 370:9593 The Lancet 1153–1163; Maureen H McDonough & Patrick D Smith, “Beyond Public Participation: Fairness in Natural Resource Decision Making” (2001) 14:3 Society & Natural Resources 239–249; Tom R Tyler, “Social Justice: Outcome and Procedure” (2000) 35:2 International Journal of Psychology 117–125; John C Besley, “Public Engagement and the Impact of Fairness Perceptions on Decision Favorability and Acceptance” (2010) 32:2 Science Communication 256–280.

¹³ See e.g. Ann M Lipton, “Not Everything Is about Investors: The Case for Mandatory Stakeholder Disclosure” (2020) 37:2 Yale J on Reg 499; Steven Davidoff & Claire Hill, “Limits of Disclosure” (2013) 36:2 Seattle UL Rev 599; Omri Ben-Shahar & Carl E Schneider, “The Failure of Mandated Disclosure” (2011) 159:3 U Pa L Rev 647.

operational landscape generally requires for company commitments that go beyond the black-letter law.¹⁴

The most pertinent example of this ‘hardening’ of stakeholder expectations is the wide-spread adoption of the community development agreement (CDA), which has emerged as an increasingly common instrument to manage local community expectations and quell conflict. Proponents of these negotiated, written agreements argue that these tools can mitigate adverse project impacts, distribute project benefits, and help fulfill project developers and governments’ duties to meet requirements for free, prior, and informed consent (FPIC) by consulting and accommodating communities. While CDAs are not widely obligatory on a global scale, it has become an increasingly common practice for project developers, senior levels of government, and communities to pursue CDA negotiations for new natural resource projects.¹⁵

The use and effectiveness of CDAs to keep the peace and generate positive outcomes for communities is a controversial topic. Questions are numerous and far reaching but real answers are few and vague. Are CDAs an effective tool to address the problems associated with resource development conflicts? Do they truly correlate to positive outcomes? What role do CDAs actually play in sustainable development? What are the internal and external factors of CDA implementation that can generate positive outcomes? Do CDAs present a viable

¹⁴ Hillary A Sale, “The Corporate Purpose of Social License” (2020) 94:4 S Cal L Rev 785; Melanie Dare, Jacki Schirmer & Frank Vanclay, “Community engagement and social licence to operate” (2014) 32:3 Impact Assessment & Project Appraisal 188–197.

¹⁵ Ciaran O’Faircheallaigh, “Social Equity and Large Mining Projects: Voluntary Industry Initiatives, Public Regulation and Community Development Agreements” (2015) 132:1 J Bus Ethics 91 at 97; Jennifer Loutit, Jacqueline Mandelbaum & Sam Szoke-Burke, “Emerging Practices in Community Development Agreements” (2016) 7:1 J Sustainable Dev L & Policy 64 at 65; Kristi Disney Bruckner, “Community Development Agreements in Mining Projects” 44:3 Denver J Intl L & Policy 413 at 422.

solution that can facilitate equitable outcomes? Can they act as a building block for facilitating Indigenous self-determination?

All of these questions underpin the research problem at hand. In short, the fundamental analytical and empirical concern of this work is to address the lack of quantitative evidence and objective evaluation of these agreements. The objective here is to contribute to the development of a consolidated framework that can be used to evaluate CDAs. In turn, this evaluation framework will be applied on a case study basis to obtain a series of data points that can offer novel insight and discussion, with particular attention being drawn to the external governance structures that impact CDA negotiation outcomes.

This work is divided into two parts. Part I (Chapters 1-4) begins with a blank canvas and colours the parameters of the stakes raised by natural resource development projects, the social license to operate, and stakeholder expectations. It demonstrates that the adoption of CDAs and the proliferation of the SLO are not to be viewed in a vacuum, but rather represent a long-standing wave of momentum that draws roots from the historic power disequilibrium that has plagued the extractive industries. Slowly but surely, social norms that have long been considered to be ‘extra-legal’ have merged with regulatory standards to become quasi-legal standards to which actors must be responsive. By means of a literature review, the different roles and frames of CDAs are highlighted, and attention drawn to best-practice guidelines in the literature that have been outlined for CDA drafting and implementation. Part II applies the theory outlined in Part I, highlighting a consolidated framework that can be used to evaluate CDAs in an objective manner. This framework is applied on a case-study basis, spanning projects from Canada, Australia, Greenland, Ghana, Mongolia, Greenland, Sierra

Leone, and Papua New Guinea, following which the data points are analyzed to offer an example of the insights that can be generated through an empirical evaluation framework.

The ultimate ambition of this project is to apply an evaluative framework for CDAs that can allow these agreements to be compared with one another. Through a case-by-case approach, this work consolidates a series of novel data points that can be applied to gain insight into the workings of CDAs. The final aim is not to provide an affirmative or negative to the question of whether CDAs are effective, but rather to highlight the importance of external, contextual factors. Being sensitive to the discrete and unique needs of each local community, the hope is that the framework can be applied by communities and used as a negotiation tool to help foster a level playing field when being approached by extractive companies.

Chapter 1

1 Theoretically Speaking

Over the last decade, empirical research has demonstrated that negotiations between extractive companies and communities have led to highly variable outcomes.¹⁶ Consider the following example:

- 1) Company A, in exchange for community approval and support for the project, has negotiated and signed a written agreement with a community that is situated on a mineral reserve that the company wants to access. The agreement contains substantial financial benefits and provisions that afford the community a key role in project design and environmental management. Provisions include:
 - Royalty payments linked to the value of production.
 - Requirements for local community members to monitor the project.
 - Extensive and detailed provisions to encourage the training, education, and employment of community members, including specific provisions to support vulnerable groups.

- 2) At the same time, Company B entered into negotiations with a community situated on a diamond reserve elsewhere in the state. Seeking community approval and support, the company comes to an agreement with the community that is signed by both parties. The provisions of this agreement include:
 - No royalty payments, but rather fixed dollar payments that will not increase as the project scales up in profitability.
 - Contains only vague commitments by the company to encourage community employment and training.

¹⁶ Ciaran O’Faircheallaigh, *Negotiations in the Indigenous World: Aboriginal Peoples and the Extractive Industry in Australia and Canada* (New York, US: Routledge, 2015) at 1.

- Limits the exercise of legal rights possessed by community members, for example the ability to object to project approval or the proposed environmental management strategies. The agreement specifically states that the signatories “shall not engage in any unreasonable action that could either delay or stop the project”.¹⁷

The negotiations and signing of the agreement occurred over a similar time period and within the same legal jurisdiction. A question therefore arises: why the difference?

1.1 Research Objectives

1.1.1 The Research Problem

In the introduction above, I outlined the objective of this thesis as follows:

In short, the fundamental analytical and empirical concern of this work is to address the lack of quantitative evidence and objective evaluation of these agreements.

¹⁷ *Ibid* at 148 and 175 (These examples are based on real cases in Canada: The Ekati diamond mine and Voisey’s Bay nickel project).

Researchers such as Thomas Gunton,¹⁸ Eric Werker,¹⁹ Murray Rutherford,²⁰ Sean Markey,²¹ Patrik Söderholm,²² Nanna Svahn,²³ Ciaran O’Faircheallaigh,²⁴ Sam Szoke-Burke,²⁵ Andy Hira and James Busumtwi-Sam²⁶ have already laid the foundation for research on CDAs. Through their work, CDAs have emerged as a discrete area of research that is growing rapidly. This being said, a review of the literature reveals that the current state of research in this area – although growing – is still limited.²⁷ This is not particularly surprising given some of the main characteristics of CDAs.²⁸ By their nature, CDAs are dynamic instruments that are context and time dependent – meaning that CDA provisions and designs change from agreement to agreement depending on the objectives of the communities negotiating them.²⁹ These objectives in turn may be influenced by expectations and broader rights or policy

¹⁸ Gunton & Markey, *supra* note 9; See also Thomas Gunton, Eric Werker & Sean Markey, “Community benefit agreements and natural resource development: Achieving better outcomes” (2021) 73 Resources Policy 102155.

¹⁹ Eric Werker, Maggie Cascadden and Katherine Zmuda, “Policies for Generating Socioeconomic Benefits from Natural Resource Extraction Projects: A Research Report for the Government of the Northwest Territories” (23 April 2017), online (pdf): *Legislative Assembly of the Northwest Territories* <www.ntassembly.ca/sites/assembly/files/td_272-183.pdf>.

²⁰ Murray Rutherford, “Impact assessment in British Columbia” in Kevin S Hanna, ed, *Environmental Impact Assessment: Practice and Participation* (Don Mills, Ontario: Oxford University Press, 2016) at 238.

²¹ Jonathan Boron & Sean Markey, “Exerting Sovereignty Through Relational Self-determination: A Case Study of Mineral Development In Stk’emlupsemc te Secwépemc Territory” (2020) 15:4 J Rural & Community Development, online: <journals.brandonu.ca/jrcd/article/view/1822>.

²² Patrik Söderholm & Nanna Svahn, “Mining, regional development and benefit-sharing in developed countries” (2015) 45 Resources Policy 78.

²³ *Ibid.*

²⁴ Ciaran O’Faircheallaigh, “Extractive industries and Indigenous peoples: A changing dynamic?” (2013) 30 J Rural Studies 20; Ciaran O’Faircheallaigh, “Public participation and environmental impact assessment: Purposes, implications, and lessons for public policy making” (2010) 30:1 Environmental Impact Assessment Rev 19–27; Ciaran O’Faircheallaigh & Tony Corbett, “Indigenous participation in environmental management of mining projects: The role of negotiated agreements” (2005) 14:5 Environmental Politics 629–647.

²⁵ Sam Szoke-Burke & Kaitlin Y Cordes, “Mechanisms for Consultation and Free, Prior and Informed Consent in the Negotiation of Investment Contracts” (2020) 41:1 Northwestern J Intl L & Business 49; Sam Szoke-Burke, “Not Only ‘Context’: Why Transitional Justice Programs Can No Longer Ignore Violations of Economic and Social Rights” (2015) 50:3 Texas Intl LJ 465.

²⁶ Andy Hira & James Busumtwi-Sam, “Improving mining community benefits through better monitoring and evaluation” (2021) 73 Resources Policy 102138.

²⁷ Gunton & Markey, *supra* note 9 at 8.

²⁸ *Ibid.*

²⁹ *Ibid* at 7.

regimes that shift over time. Additionally, while research accessibility may be improving, many CDAs are confidential which makes it challenging to undertake comprehensive empirical research to determine their role in resource development.³⁰

A few authors do use empirical evidence in their evaluations and framing of CDAs,³¹ but it must be emphasized that such evidence is scarce.³² The literature evidently suffers from a lack of consistent criteria and evaluative tools for CDAs. In a review of CDA literature, Gunton and Markey found that:

“[M]ore research must be undertaken in critical areas [of CDAs], for example: 1) determinants of [CDA] success (i.e., why some ... succeed in benefiting communities and why some fail)... 2) comprehensive instruments that can improve [CDA] outcomes for all involved parties; 3) the primary underlying question, the role of resource development on community-level economic development; and 4) more empirically based research that uses consistent evaluation frameworks to quantitatively assess the impacts of [CDAs] and the factors affecting [CDA] outcomes.”³³

In line with this, O’Faircheallaigh states that many of the critiques of CDAs are not based on solid empirical evaluation of CDA outcomes and argues for more empirically based analysis to explain differences in outcomes in order to understand how better outcomes can be

³⁰ Doris Dreyer, *Impact and benefits agreements: Do the Ross River Dena benefit from mineral projects?* (Master’s thesis, University of Northern British Columbia, 2004).

³¹ *Ibid*; See also John Loxley, “Assessment of the Mary River Project: Impacts and Benefits” (2019), online (pdf): *Ocean’s North* <www.oceansnorth.org/wp-content/uploads/2019/02/Assessment-of-the-Mary-River-Project-Impacts-and-Benefits-final-draft.pdf>.

³² Gunton & Markey, *supra* note 9 at 8.

³³ *Ibid* at 9.

achieved by local communities.³⁴ This is a conclusion drawn repeatedly throughout the existing research on CDAs.³⁵

The absence of empirical research and analysis of these tools is particularly concerning given that CDAs have emerged as industry norms – their use is widespread across the extractive industries and a multitude of legal jurisdictions.³⁶ Local communities, industry, and interested third parties face difficulties in evaluating the robustness of a given agreement and comparing such agreements with another in the same or different jurisdictions.³⁷ The lack of an evaluative measure hinders a given community’s ability to negotiate, implement, seek advice, share experiences, and evaluate the CDA.³⁸

Adding to this complexity is the fact that one-half of the world’s major mining producer countries have adopted community development requirements into their mining laws.³⁹ While there is variation in these laws, some countries have gone as far as to mandate the drafting, negotiation, and agreement of a CDA in order for mining concessions to be granted. There is a global upward trend of integrating CDAs into hard law that has been overlooked by scholars working at the nexus of natural resource development projects and corporate social

³⁴ Ciaran O’Faircheallaigh, “Explaining outcomes from negotiated agreements in Australia and Canada” (2021) 70 Resources Policy 101922.

³⁵ Gunton, Werker & Markey, *supra* note 18 at 9; Jason Prno, Ben Bradshaw & Dianne Lapierre, “Impact Benefit Agreements: Are they working?” (Paper presented at the Canadian Institute of Mining, Metallurgy and Petroleum Annual Conference, Vancouver, British Columbia, May 11, 2010) [unpublished]; Ciaran O’Faircheallaigh, “Evaluating Agreements between Indigenous Peoples and Resource Developers” in Marcia Langton et al, eds, *Honour Among Nations? Treaties and Agreements with Indigenous People* (Victoria, Australia: Melbourne University Press, 2004) 303.

³⁶ O’Faircheallaigh, *supra* note 15 at 97; Loutit et al, *supra* note 15 at 65; Brucker et al, *supra* note 15 at 422.

³⁷ Maggie Cascadden, Thomas Gunton & Murray Rutherford, “Best practices for Impact Benefit Agreements” (2021) 70 Resources Policy 101921 at 4.

³⁸ *Ibid.*

³⁹ Kendra Dupuy, “Community development requirements in mining laws.” (2014) 1:2 Extractive Industries & Society 200 at 201.

responsibility.⁴⁰ CDAs are becoming increasingly relevant for corporations and communities alike, and thus there is an imminent need to be able to evaluate CDAs, understand what they mean, and the factors that influence their success.

The legal context in which these agreements are drafted, negotiated and signed varies considerably. In some jurisdictions, agreements with Indigenous landowners or local communities must be in place before resource development may proceed.⁴¹ In others, community consent is not required, but there are legal requirements for consultation with Indigenous peoples that overwhelmingly result in the conclusion of agreements.⁴² In many instances, the agreements may not even be required by law, but the corporations themselves decide that the CDA is an essential pre-condition for its investment.⁴³

There is considerable variability in the negotiation outcomes of CDAs and their provisions. Some local communities and Indigenous groups negotiate well, attaining favorable outcomes that allow them to reap substantial economic benefits from agreements, while at the same time achieving a significant role in environmental management and protection of social and cultural values.⁴⁴ Other agreements, negotiated and signed in similar circumstances, generate few economic benefits and do little to help minimize adverse cultural or environmental impacts.⁴⁵ Explaining this variability is critical to being able to understand how more positive outcomes may be achieved, and research to date has not adequately addressed this issue.

⁴⁰ *Ibid.*

⁴¹ O'Faircheallaigh, *supra* note 34 at 1.

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ O'Faircheallaigh, *supra* note 24 at 22.

⁴⁵ O'Faircheallaigh, *supra* note 16 at 70.

Questions on the merits of CDAs and variability in their outcomes stem from the reality that researchers have yet to craft a consolidated theory to unify the different frames and perspectives of CDAs.⁴⁶ Practically speaking, this serves as a barrier because it means that CDAs – although they are commonplace tools in the industry – have not yet been subjected to a universally adopted assessment framework that would allow for an empirical means of evaluation of CDA provisions and implementation. In conjunction with the disproportionate power dynamics in the negotiation of these agreements and the shroud of confidentiality surrounding them, local communities face substantial barriers in the negotiation process and achieving best-outcomes.

In sum, there are three main problems that the current work seeks to address:

- 1) The lack of empirical evidence on CDAs.
- 2) The disproportionate power dynamics in CDA negotiations and how they can be addressed.
- 3) The evolution of these agreements from “soft law” to “hard law” instruments that has been overlooked by scholarship to date.

1.1.2 Original Contribution

CDAs present a number of questions that puzzle academia, communities, and industry alike. Common questions in this realm include: To what extent do CDAs offer an opportunity for Indigenous peoples and local communities to share in the economic benefits created by extractive industries? Do they help minimise or control negative environmental and cultural impacts? Do they constrain the rights of local communities? What factors facilitate the

⁴⁶ Gunton & Markey, *supra* note 9 at 8.

successful implementation of these agreements? Before any of these questions can even begin to be addressed, it is imperative that a unified understanding be developed of how to draft a “successful” CDA and what provisions it is to contain.

Thus, my original contribution to science is to address different limitations and gaps existing within the CDA literature:

- 1) **The lack of case study analysis:** The current research canvasses and comparatively evaluates different CDAs across a range of jurisdictions. This is the first attempt in the literature to engage in an empirical analysis of whole CDAs across multiple jurisdictions and compare them with one another.
- 2) **Consideration of external factors:** Much of the CDA literature to date has been dedicated towards understanding whether CDAs are ethical or whether they have had a positive outcome in a given context. To date, generally speaking, research of this kind has veered away from empirical methods of analyses. Using an analytical scoring framework for CDAs, this work will produce a series of data scores that represent the relative strength of a CDA. In turn, exploratory statistical analyses will be conducted on the various legal and institutional metrics of a country – such as its rule of law and control of corruption – and the relationship that they have with the obtained CDA scores.
- 3) **Building a database of CDA scores:** This research will – for the first time in the literature – publish metrics highlighting the different strengths of CDAs across a range of jurisdictions. These scores are important for answering the following types of questions:

- i. What provisions of CDAs relate to better outcomes? Are some more impactful than others?
- ii. Which companies produce better and more robust CDAs?
- iii. Have CDAs have become more robust over time?
- iv. What is the relationship between rule-of-law indicators, corruption indicators, foreign-investment indicators, and CDA robustness?

1.1.3 Research Boundaries

In contemplating this problem, I wish to emphasize that this particular work does not directly seek to discern whether CDAs are effective or not. Rather, this thesis aims to further develop the methodology for answering this question. Due to the current state of the literature, in order to achieve this research objective, this work must abstain from attempting to resolve the debate of whether CDAs are ‘good’ or ‘bad’. The simple fact of the matter is that questions regarding the efficacy of CDAs have many tantalizing angles and are reflections of complex situations that far escape what may be effectively covered in the current work.

One significant limitation on this work is a reflection of industry and community practices rather than a limitation of the research methodology employed. CDAs are characteristically confidential, which makes it difficult to undertake empirical research on them.⁴⁷ As highlighted by Adebayo and Werker, confidentiality issues mean that most of the provisions

⁴⁷ See Godswill Agbaitoro, “Legal strategy for resolving the socio-economic and environmental symptoms of the resource curse in Nigeria: the role of impact and benefit agreements (IBAs)” (2018) 44:3 *Commonwealth L. Bull.* 381; Christopher Alcantara & Michael Morden, “Indigenous multilevel governance and power relations” (2019) 7:2 *Territory, Politics, Governance* 250; Ken J Caine & Naomi Krogman, “Powerful or Just Plain Power-Full? A Power Analysis of Impact and Benefit Agreements in Canada’s North” (2010) 23:1 *Organization & Environment* 76–98; Courtney Fidler & Michael Hitch, “Impact and benefit agreements: a contentious issue for environmental and aboriginal justice” (2007) 35:2 *Environments J.* 50 at 53.

of different CDAs remain unknown, making it difficult to draw conclusions.⁴⁸ Recent efforts by the Columbia Centre on Sustainable Investment has made strides in creating a public repository of CDAs,⁴⁹ but this database of private CDAs represents only a fraction of the agreements that have been or are active across the world.⁵⁰

Additionally, despite my additions and amendments, the CDA evaluation framework that serves as the basis for this work should be understood as being necessarily incomplete. The establishment of best practices and a statistically reliable evaluation framework is a complex undertaking that requires the “testing of alternative practices relative to outcomes in a variety of contexts to determine if the proposed practice is in fact the best practice.”⁵¹ Some argue that it is not possible to determine whether a particular practice is, in fact, the “best” and that the more realistic pursuit is to determine whether said practice achieves a desired outcome.⁵² Discussion and application of a best-practices evaluation framework should be subject to an ongoing evaluation and revision of both practices and scoring criteria to reflect the greater knowledge and nuance that future research is certain to uncover.⁵³

Importantly, I will also not attempt to employ methodologies that lay beyond my areas of study: namely, the social sciences and the law. Ideally, of course, the avenues explored within

⁴⁸ Eric Adebayo & Eric Werker, “How much are benefit-sharing agreements worth to communities affected by mining?” (2021) 71 Resources Policy 101970 at 1; Neil Craik, Holly Gardner & Daniel McCarthy, “Indigenous – corporate private governance and legitimacy: Lessons learned from impact and benefit agreements” (2017) 52 Resources Policy 379.

⁴⁹ “Open Community Contracts” (last visited June 2022), online: *Columbia Center for Sustainable Investment*, online: <opencommunitycontracts.org> [CCSI Database].

⁵⁰ Hira & Busumtwi-Sam, *supra* note 26.

⁵¹ Cascadden, Gunton & Rutherford, *supra* note 37 at 6, citing Stuart Bretschneider, Frederick J Marc-Aurele Jr & Jiannan Wu, “Best Practices? Research: A Methodological Guide for the Perplexed” (2005) 15:2 J Public Administration Research & Theory 307.

⁵² Cascadden, Gunton & Rutherford, *supra* note 37 at 6; See Eugene Bardach & Eric M Patashnik, *A practical guide for policy analysis: the eightfold path to more effective problem solving* (Washington, DC; CQ Press, 2019).

⁵³ Cascadden, Gunton & Rutherford, *supra* note 37 at 7.

this work would be supplemented with fieldwork and discussions with community members. Surveys and interviews would undoubtedly enrich the discussion to unfold, adding texture and nuance to the evaluation of CDAs. Without such fieldwork, I am not able to draw insights on the successful implementations of CDAs, nor will I attempt to uncover an ultimate conclusion about whether the evaluation scores of different CDAs relate to equitable outcomes.

1.2 Key Concepts

Several concepts are key in appreciating the research problem across its different dimensions: ‘multinational corporations’, the ‘resource curse’, and ‘community development agreements’. Each of these concepts present controversy and issues with terminology that must be clarified.

1.2.1 “Multinational Corporations”

The principal actor that has emerged as the vehicle for the issues discussed in this work is the multinational corporation (MNC). These vast entities, backed by shareholder investment and massive revenue streams, operate indiscriminately across different borders while maintaining headquarters in specific countries. By using their home-state to defend their interests domestically and abroad,⁵⁴ MNCs have become ever growing players in the global economy.⁵⁵ With over 80,000 MNCs now spanning the globe,⁵⁶ it takes no stretch of the imagination to contemplate the increasing influence that MNCs have with respect to social and environmental issues. This is especially evident when discussing the mining and extractive sector and the controversy that surrounds the industry.

⁵⁴ Todd Gordon & Jeffery Webber, *Blood of extraction: Canadian imperialism in Latin America* (Nova Scotia; Fernwood Publishing, 2016) at 13.

⁵⁵ See Carolyn Egri & David Ralston, “Corporate responsibility: A review of international management research from 1998 to 2007” (2008) 14:4 J Int Management 319; Liesbeth Enneking et al, *Accountability, international business operations and the law : providing justice for corporate human rights violations in global value chains* (Abingdon, UK: Routledge, 2020).

⁵⁶ de Jonge, *supra* note 3.

The global extractive industry is one of the largest in the world, operating in more than 100 countries and generating a total revenue of over 5 trillion dollars.⁵⁷ Non-renewable mineral resources play a dominant role in the economies of 81 countries, collectively accounting for a quarter of the world's gross domestic product (GDP).⁵⁸ Foreign direct investment (FDI) continues to grow in the areas of production, natural resource extraction, and social services.⁵⁹ The result is that of the top 100 largest economies in the world, 52 are corporations rather than states.⁶⁰

MNCs are under increasing scrutiny in their home countries and in the countries where they invest to demonstrate that they are operating in a sustainable and community approved manner.⁶¹ The instances of violent upheavals, rebellion, and extended litigation that directly implicates MNCs, serve as reminders of the importance of developing robust and durable mechanisms to support and enforce company-community engagement.⁶²

⁵⁷ Banerjee, *supra* note 2 at 132.

⁵⁸ “Extractive Industries – Overview” (last modified 2016), online: *World Bank* <www.worldbank.org/en/topic/extractiveindustries/overview>.

⁵⁹ Eliza Echeverry, “Violence, Development, and Canada’s New Transnational Jurisprudence” (2018) 4:1 Conflict and Society 167 at 175.

⁶⁰ Julia Ruth-Maria Wetzel, *Human Rights in Transnational Business*, (Switzerland: Springer International Publishing) at 3.

⁶¹ O’Faircheallaigh, *supra* note 24 at 227; Bruce Harvey & Simon Nish, “Rio Tinto and Indigenous Community Agreement Making in Australia” (2005) 23:4 J Energy & Natural Resources L 499; Catherine Coumans, “Realising Solidarity - Indigenous peoples and NGOs in the contested terrains of mining and corporate accountability” in Ciaran O’Faircheallaigh & Saleem Ali, eds, *Earth Matters - Indigenous Peoples, the Extractive Industries and Corporate Social Responsibility*, 1st ed (London, UK : Routledge, 2008).

⁶² O’Faircheallaigh, *supra* note 58 at 227; See David Brereton et al, “World Bank Extractive Industries Sourcebook - Good Practice Notes” (2012), online (pdf): *The World Bank* <documents1.worldbank.org/curated/en/388421468151145000/pdf/712990v20WP0P100Good0Practice0Notes.pdf>; Emily McAteer, Jamie Cerretti & Saleem Ali, “Shareholder activism and corporate behaviour in Ecuador - A comparative study of two oil ventures” in O’Faircheallaigh & Ali, *supra* note 58; Suzana Sawyer & Edmund Terence Gomez, eds, *The Politics of Resource Extraction Indigenous Peoples, Multinational Corporations and the State*, (London, UK: Palgrave Macmillan London, 2012).

1.2.2 “Resource Curse”

Questions about equitable distribution of benefits go to the heart of the scholarly debate of the “resource curse” hypothesis – that is, the notion that countries with an abundance of natural resources are more likely to be poor and to experience civil war and authoritarian governance.⁶³ The resource curse thesis has long dominated social science and ethics debates relating to mining.⁶⁴ Gaining momentum in the 1990s, the theory suggests that natural resource abundance generates economic, political, and social distortions which ultimately undermine the contributions of the extractive industry to development.⁶⁵ Robust support exists to support the conclusion that natural resource wealth tends to adversely affect a country’s governance.⁶⁶ As outlined in a review by Michael Ross, “one type of mineral wealth, petroleum, has at least three harmful effects: It tends to make authoritarian regimes more durable, to increase certain types of corruption, and to help trigger violent conflict in low- and middle-income countries.”⁶⁷

More than 3.5 billion people, comprising half the world’s population, live in resource-rich but cash-poor regions. Subhabrata Bobby Banerjee outlines some features that are shared by a majority of these regions including “weak rule of law, weak governmental legitimacy, large power disparities between communities and business, and the presence of diverse Indigenous populations.”⁶⁸ The point to be emphasized here, and throughout the rest of this work, is

⁶³ Michael L Ross, “What Have We Learned about the Resource Curse?” (2015) 18:1 Annual Rev Political Science 239 at 240-8.

⁶⁴ Anthony Bebbington et al, “Contention and Ambiguity: Mining and the Possibilities of Development: Mining and the Possibilities of Development” (2008) 39:6 Development & Change 887 at 890; Chris Ballard & Glenn Banks, “Resource Wars: The Anthropology of Mining” (2003) 32:1 Annual Rev Anthropology 287–313.

⁶⁵ Bebbington et al, *supra* note 64.

⁶⁶ Ross, *supra* note 63 at 239.

⁶⁷ *Ibid.*

⁶⁸ Gordon & Webber, *supra* note 54 at 31.

that there is a clear pattern across the Americas, Africa, Asia, Europe, and Australia that shows that the benefits that are reaped from natural resource development projects are not equitably shared by the communities that are most impacted by them.⁶⁹

Why does this mismanagement of resource revenue occur? A key pivot in literature in the last decade suggests that it is the underlying political institutions of resource rich-societies that determine the outcomes of resource wealth.⁷⁰ Some scholars argue that states with weak institutions are more likely to rely on resource exploitation for revenue generation, since these states lack institutional foundations that are required for economic development.⁷¹ However, the presence of weak-institutions does not prevent resource-rich states from trying to change course through the creation of new institutions and the adoption of new tools. CDAs are one example of these tools, aimed at fairly distributing the costs and benefits of resource extraction and production in society.

1.2.3 “Community Development Agreements”

There is some definitional ambiguity relating to what a CDA is. Also referred to as impact-benefit agreements and community benefit agreements, the CDA is commonly thought of as a formal, written and negotiated agreement between industry (e.g. the resource extraction company) and local communities agreeing to how these communities will access development initiatives and benefits.⁷² The agreement is designed to “impose obligations on each

⁶⁹ Ballard & Banks, *supra* note 64 at 289.

⁷⁰ Giles Atkinson & Kirk Hamilton, “Savings, Growth, and the Resource Curse Hypothesis” (2003) 31:11 *World Development* 1793; Halvor Mehlum, Karl Moene & Ragnar Torvik, “Institutions and the Resource Curse” (2006) 116:508 *Economic J*; Victor Menaldo, *The institutions curse: Natural resources, politics, and development* (Cambridge, UK: Cambridge University Press, 2016)

⁷¹ Menaldo, *supra* note 70; Ross, *supra* note 63 at 239.

⁷² See O’Faircheallaigh, *supra* note 15 at 96; See also Tapan K Sarker, “Voluntary codes of conduct and their implementation in the Australian mining and petroleum industries: is there a business case for CSR?” (2013) 2:2 *Asian J Bus Ethics* 205.

participating entity and...affect the distribution of costs and the allocation of benefits from a project”⁷³ with the ultimate goal of improving the welfare of mining-affected communities and reducing the conflict around resource extraction. By minimizing the negative project impacts and providing benefits to communities that they could not enjoy in the absence of the development, these agreements can reduce or eliminate conflict surrounding the development.

A key definitional issue involves the concept of “community”, which can be open to a range of differing interpretations. In the context of CDAs, there are two prevailing meanings of “community”.⁷⁴ The first refers to people, often Indigenous, with shared cultural and social ties, through their association with an area of land or water that may be affected by a resource development project. The second refers to people who reside in a location adjacent to, or downstream from, a mining project.⁷⁵

There is no universally accepted definition or parameters of a “local community”.⁷⁶ Note that reliance on either of the two meanings discussed does not imply a singular attitude or approach to resource development or CDAs. Rather, it is meant to highlight the scale of variability that exists in the use of this term. During the negotiation process, reference to local communities may be made in a number of ways including, but not limited to:

“[T]hose that are...impacted or affected by extractive activities;
geographically, as the population living near to an extractive project,

⁷³ Ciaran O’Faircheallaigh, “International recognition of indigenous rights, indigenous control of development and domestic political mobilisation” (2012) 47:4 Australian J Political Science 531.

⁷⁴ O’Faircheallaigh, *supra* note 15 at 96.

⁷⁵ *Ibid.*

⁷⁶ Arun Agrawal & Clark Gibson, “Enchantment and Disenchantment: The Role of Community in Natural Resource Conservation” (1999) 27:4 World Development 629 at 630.

or in the license area, or in the legal jurisdiction in which a project takes place; through geographically-tied cultural identity, as people residing near to a mining area that have a common identity, interest, and/or claim on land in a project area, such as indigenous peoples; through control over property rights, where communities are the holder or owner of land rights in the project area.”⁷⁷

1.3 Thesis Structure

In the *Introduction to Part I*, I briefly outlined the two different parts of this thesis. In total, they comprise seven chapters. Part I establishes the parameters of CDAs, situated in the context of the social license to operate and the fractured history of mining and development. This effectively sets the stage for Part II, which evaluates a number of CDAs based on their provisions and analyzes the resultant scores. The work unfolds as follows:

- Chapter 1 introduces the research problem and outlines the thesis’ original contribution to science while also highlighting the boundaries and limitations of the research. It identifies the difficulty in evaluating CDAs, explaining the motivation behind the work. It then details the thesis structure and discusses the theoretical framework underpinning the research.
- Chapter 2 reviews the history of the extractive industries and the long-standing tension between neoliberal ideals and community rights. It touches on aspects of capitalism, foreign direct investment, and human rights. This chapter sets the frame for the research, and invites the reader to use it as a lens to analyze the remainder of the work.

⁷⁷ Kendra Elizabeth Dupuy, *Harnessing Natural Resources for Development: New Legal Regimes for Localized Benefit Sharing in the Mining Sector* (PhD, University of Washington, 2016) [unpublished] at 28.

- Chapter 3 describes the emergence of the social license to operate and its hardening into a quasi-regulatory norm. It outlines the elusive nature of the social license and its boundaries. Taking note of the confusion that surrounds the term, it discusses how and why the social license is tightening its grip on the extractive industries.
- Chapter 4 is an in-depth discussion of community development agreements. It posits that CDAs are an extension of the SLO, plagued by the same issues of vagueness and inconsistency as the latter. Two different frames are introduced for CDAs, each with competing views on the merits and role of CDAs in sustainable development. The chapter closes with a brief discussion on the lack of empirical data and confidentiality issues which have hindered research in this area.
- Chapter 5 outlines the method of the evaluation process and marks the beginning of Part II of the thesis. Importantly, it reviews a leading CDA best-practice framework and proposes several amendments to its criteria and scoring system. Following this, the framework is applied to score a number of CDAs across a number of jurisdictions. The collected data are then analyzed and interpreted through several statistical means. Through an exploratory analysis, several relationships are identified that can provide insight into CDA robustness and their role in the resource development context.
- Chapter 6 collates the data from Chapter 5 and uses it to draw conclusions on CDAs and sustainable development. The discussion develops against the background of insights uncovered in Chapters 2 through 5, ultimately making recommendations for future avenues of research.

1.4 Theoretical Framework and Themes

This work is guided by blend of theories relating to social norms, extractivism, and political ecology to create a product that is – at its core – grounded in pragmatism. Using the theoretical perspectives discussed below, the ultimate aim is to identify the existing complexities of these agreements and offer explanations for their variability in robustness and outcomes.

1.4.1 Law and Social Norms

“Social norms are hard to describe; they are fuzzy; they drift. People enforce social norms inconsistently, sporadically, unpredictably. Social norms keep a rudimentary sort of order and are surely superior to chaos, but they provoke a longing for predictability, a longing that can be satisfied only by a wealthy and powerful government.”⁷⁸

Drawing on the influence of Eric Posner,⁷⁹ Robert Ellickson,⁸⁰ Stewart Macaulay,⁸¹ and Karl Llewellyn,⁸² among others, this thesis follows a tradition of work that criticizes legal scholarship for focusing too much on the state and, consequently, neglecting the relationship between citizens and the government. One theme that emerges from this is that many legal rules are best understood as efforts to harness the independent regulatory power of social norms. Generally, attempts to codify or legislate social norms are a risky endeavor because norms are poorly understood, complex, and highly sensitive to factors that are difficult to control.⁸³

⁷⁸ Eric A Posner, *Law and Social Norms* (Harvard University Press, 2022) at 221.

⁷⁹ *Ibid.*

⁸⁰ Robert Ellickson, *Order without Law: How Neighbors Settle Disputes* (Cambridge University Press, 1991).

⁸¹ Stewart Macaulay, “Non-Contractual Relations in Business: A Preliminary Study” (1963) 28:55 *American Sociological Rev.*

⁸² Karl Llewellyn, “What Price Contract? – An Essay in Perspective” (1931) 40:704 *Yale LJ.*

⁸³ Posner, *supra* note 78 at 8.

Social norms and social acceptance should be understood as labels that are attached to behavioral regularities that emerge and persist in the “absence of organized, conscious direction by individuals.”⁸⁴ As is discussed below, what distinguishes the SLO as a social norm from other behavioral regularities is that departure from the behavior prescribed by the SLO provokes certain sanctions and responses from community members. These sanctions emerge endogenously, purely as a consequence of community members acting in a rational interest of self and cultural preservation.⁸⁵ From this, we see that MNC behaviors that involve social and environmental interests cannot, today, be purely explained in terms of instrumental threats and obligations to comply with the law, and that there is an increasing incentive for corporations to move “beyond compliance” as a result of the interplay between social pressures and economic constraints.⁸⁶

MNCs, generally speaking, perceive their social obligations as going beyond their legal obligations, and demanding of substantial care and attention.⁸⁷ Over the last several decades, regulatory standards have tightened and growing legal threats have led many MNCs to assume that any hazards or harm that may be brought by the corporation, even if not expressly illegal today, will sooner or later be subject to consequences in the form of public censure, negative impacts on shareholders, government action, and legal liability.⁸⁸ On this point, Neil Gunningham, Robert Kagan, and Dorothy Thornton researched perceptions of the SLO by

⁸⁴ *Ibid.*

⁸⁵ *Ibid* at 9.

⁸⁶ Neil Gunningham, Robert Kagan & Dorothy Thornton, “Social License and Environmental Protection: Why Businesses go Beyond Compliance”(2018) 29:2 L & Social Inquiry 307.

⁸⁷ Gunningham, Kagan & Thornton, *supra* note 86 at 308.

⁸⁸ *Ibid.*

pulp industry corporate executives. One telling response from an environmental manager at a major American MNC goes as follows:

‘The [Environmental Protection Agency] is such a monolith, it can’t adapt. It takes a decade for something to happen. The environmental community is really setting the tone. It’s done far more to make companies accountable for pollution. It does more to keep me on my toes, to give me an incentive to go to my management and say, we have got to do better because the community can sue us and also give us bigger rewards.’⁸⁹

Obligations demanded by a SLO routinely alter legal enforcement mechanisms by pressuring regulators to enforce environmental and community rights more vigilantly, and through the filing of civil suits.⁹⁰ Community members, using the SLO and legitimacy provided by a CDA, may lend extra enforcement energy and weight to the existing regulatory and legal license requirements in a given jurisdiction.⁹¹ In response to this effort, MNCs are pushed towards full legal compliance and, furthermore, investing into beyond-compliance measures that provide a margin of safety against violations.⁹²

A company’s failure to respond appropriately to its breaches of the SLO brings a risk of a tighter regulatory license, as politicians and ultimately regulators respond to community dissatisfaction.⁹³ More broadly speaking, the way that enforcement agencies and state actors

⁸⁹ *Ibid* at 314.

⁹⁰ *Ibid* at 308

⁹¹ Pierre-Yves Le Meur, Leah S Horowitz & Thierry Mennesson, “‘Horizontal’ and ‘vertical’ diffusion: The cumulative influence of Impact and Benefit Agreements (IBAs) on mining policy-production in New Caledonia” (2013) 38:4 Resources Policy 648 at 654.

⁹² Gunningham, Kagan & Thornton, *supra* note 86 at 316.

⁹³ Gunningham, Kagan & Thornton, *supra* note 86 (‘As one senior corporate official from a firm in our sample pointed out, “Local communities have the ability through the political process to create regulations that allow

exercise their discretion may, in part, be influenced by the norms and expectations of the community where the operations take place.⁹⁴

Traditionally speaking then, the SLO has been defined by its extra-legal nature. This, however, is changing. With the emergence of CDAs, it is becoming increasingly evident that the acquisition of the SLO can go through the formal legal system.⁹⁵ With the support of the legal nature of CDAs, the SLO is progressively ‘hardening’ from an illusory, industry driven concept, to a legal institutionalised tool that is elevated beyond traditional perceptions of social norms.

1.4.2 Extractivism and Environmental Justice

Extractivism refers to a mindset and pattern of resource extraction based on removing as much material as possible for as much profit as possible.⁹⁶ Examples of extractivist activities in today’s economy include mineral and coal mining, oil production, and other development activities of the like. Adverse environmental and social consequences in these projects often ensue, given that capturing resources on this enormous scale requires the physical rearrangement of landscapes and sometimes complex chemical processes to attain the desired substances.

Extractivism is not merely the *use* of natural resources, which is something that humans have been doing since the dawn of time.⁹⁷ Rather, it is characterized by a neoliberal, late-capitalist

you to do business... we operate under a license from the public in every place we do business, so we have to be sensitive to public concerns’ at 331).

⁹⁴ *Ibid.*

⁹⁵ Chilenye Nwapi, “Can the Concept of Social Licence to Operate Find Its Way into the Formal Legal System” (2016) 18:2 Flinders LJ 349 at 351.

⁹⁶ Anna J Willow, *Understanding ExtrACTIVISM*, 1st ed (New York: Routledge, 2018) at 3.

⁹⁷ *Ibid.*

outlook that has an inherently unsustainable single-mindedness that favors short-term profit over long term environmental and social consequences. The extractive schemes imposed by MNCs who have been authorized by greater regulatory bodies jeopardize communities' capacity to function as independent entities and undermine place-based identities.⁹⁸ Thus, unlike extraction, extractivism is both a principle *and* a practice – an ideology and a system of operation. The purpose of extractivism is intertwined with the societal inequalities that have historically been developed in the wake of intensified agricultural production and surplus. In this sense, extractivism values natural resources not primarily for what they are and what they may be used for, but for the profits that they yield.⁹⁹

Earth does not have the luxury of boundless, unclaimed territory. Regions that have long been inhabited and valued in ways that are largely incompatible with neoliberal notions of living, are routinely sacrificed in the name of extraction and profit. As stated by Anna Willow:

“[E]xtractivist projects are often perceived as attacks and are, consequently, often met with defensive resistance. Conflicts between those intent on profiting from the removal of natural resources and those determined to protect their lands and lives have been frequent and fierce.”¹⁰⁰

⁹⁸ *Ibid.*

⁹⁹ Willow, *supra* note 96 at 17; See also Hans-Jürgen Burchardt & Kristina Dietz, “(Neo-)extractivism – a new challenge for development theory from Latin America” (2014) 35:3 *Third World Q* 468; Hans-Jürgen Burchardt & Kristina Dietz, “(Neo-)extractivism – a new challenge for development theory from Latin America” (2014) 35:3 *Third World Q* 468; Paul Bowles & Henry Veltmeyer. “Extractivism” in Olaf Kaltmeier et al, eds, *The Routledge Handbook to the Political Economy and Governance of the Americas*, 1st ed (London, UK: Routledge, 2020) 103; Dennis Canterbury, “Extractivism and Neoextractivism” in Dennis Canterbury, ed, *Neoextractivism and Capitalist Development*, 1st ed (New York: Routledge, 2018).

¹⁰⁰ Willow, *supra* note 96 at 3.

Environmental justice is an emerging social movement and area of study that takes action to counter extractivist development and its damaging impacts. It is a polyvalent term¹⁰¹ that represents an interdisciplinary body of literature that includes theories of the environment and justice,¹⁰² sustainable governance,¹⁰³ environmental anthropology,¹⁰⁴ and political ecology.¹⁰⁵ Principally, environmental justice posits that the injustice that is experienced by marginalized groups is expressed in a number of different ways. For example, people with low incomes tend to lack access to educational opportunities and suffer health disparities related to inadequate nutrition or the unaffordability of preventative practices. Marginalized communities are also far more likely to face the brunt of the impacts of a disproportionately damaged environment.¹⁰⁶

1.4.3 Political Ecology

People think about the environments they encounter in culturally constructed and diverse ways. The different ways of viewing and valuing land and resources lead to different ways of using them. As such, landscapes are often highly contested.¹⁰⁷ Here, environmental justice perspectives connect with *political ecology*. Political ecology investigates how power

¹⁰¹ Elizabeth Steyn & Dirk Hanschel, “Environmental Justice” in Marie-Claire Foblets et al, eds, *The Oxford Handbook of Law and Anthropology* 1st ed (Oxford University Press, 2021) at 2.

¹⁰² *Ibid*; See Kyle Whyte, “Settler Colonialism, Ecology, and Environmental Injustice” (2018) 9:1 Environment & Society: Advances in Research 125.

¹⁰³ See Peter Newell, “Contesting Trade Politics in the Americas: The Politics of Environmental Justice” in David Carruthers, ed, *Environmental Justice in Latin America* (Cambridge : MIT Press, 2008) at 49.

¹⁰⁴ Steyn & Hanschel, *supra* note 101 at 3; See Helen Kopnina & Eleanor Shoreman-Ouimet, “An Introduction to Environmental Anthropology” in Helen Kopnina & Eleanor Shoreman-Ouimet, eds, *Routledge Handbook of Environmental Anthropology* (London: Routledge, 2017) at 3.

¹⁰⁵ Steyn & Hanschel, *supra* note 101 at 3; See Gregg Hetherington, *Infrastructure, Environment, and Life in the Anthropocene* (Durham: Duke University Press, 2018).

¹⁰⁶ See generally Michael Mascarenhas, *Where the Waters Divide: Neoliberalism, White Privilege, and Environmental Racism in Canada* (Lexington Books, 2012); Dorceta Taylor, *Toxic Communities: Environmental Racism, Industrial Pollution, and Residential Mobility* (New York: New York University Press, 2014); Fredrick Ekow Jonah & Kofi Adu-Boahen, “Coastal environmental injustice in Ghana: the activities of coastal sediment miners in the Elmina, Cape Coast and Moree area” (2016) 81:2 GeoJournal 185.

¹⁰⁷ Willow, *supra* note 96 at 5.

arrangements between and within human groups concurrently shape and are shaped by available resources and changing ecological conditions.¹⁰⁸

First coined by Eric Wolf, an economic anthropologist, the term ‘political ecology’ was used to underscore the effects of political relationships on human-environment interactions. Defined as “the study of manifold constructions of nature in contexts of power,”¹⁰⁹ political ecology is an interdisciplinary theoretical effort. The concept of ‘power’ can be conceptualized in a variety of ways: as an ‘inscribed capacity’; a collectively produced resource mobilized by groups to achieve a common goal; or as a shifting phenomenon that is manifested as a series of “strategies, techniques, and practices.”¹¹⁰

Political ecology perspectives are united by their attention to how power relationships – at scales that range from small, remote communities to the entire world – guide actions toward the environment and how political factors inform “complex cultural and conceptual interchanges and reciprocal impacts of nature and culture.”¹¹¹ Viewed through the lens of political ecology, power does not merely manifest through the ability to control or dominate groups, but also as a “fluid medium” that is produced collectively through social movements and networks of individuals aiming for the same goals.¹¹² It requires the consideration of a

¹⁰⁸ Mary Lawhon & James T Murphy, “Socio-technical regimes and sustainability transitions: Insights from political ecology” (2012) 36:3 *Progress in Human Geography* 354 at 365; Samantha Jones, “Political Ecology and Land Degradation: How Does the Land Lie 21 Years after Blaikie and Brookfield’s *Land Degradation and Society*?” (2008) 2:3 *Geography Compass* 671; Dianne E Rocheleau, “Political ecology in the key of policy: From chains of explanation to webs of relation” (2008) 39:2 *Geoforum* 716–727.

¹⁰⁹ Søren Hvalkof & Arturo Escobar, “Nature, Political Ecology, and Social Practice: Toward an Academic and Political Agenda,” in Alan Goodman & Thomas Leatherman, eds, *Building a New Biocultural Synthesis: Political-Economic Perspectives on Human Biology* (Ann Arbor, MI: University of Michigan Press, 1998).

¹¹⁰ Lawhon & Murphy, *supra* note 108 at 367.

¹¹¹ Aletta Biersack, “Reimagining Political Ecology: Culture/Power/History/Nature” in Aletta Biersack & James Greenberg, eds, *Reimagining Political Ecology* (Durham, NC: Duke University Press, 2006) 3 at 6.

¹¹² See generally John Allen, *Lost Geographies of Power* (Malden, MA: Wiley-Blackwell Publishing, 2003).

multitude of questions such as: who is represented in development decisions? Where and how are the decisions made? Whose knowledge counts and why? How do power dynamics influence development decisions?

In short, political ecology emphasizes the influence of political and economic contexts on environmental issues.¹¹³ In relation to the current work, CDAs stand as an example of how politics are inevitably ecological and how ecologies are inherently political.

1.5 Conclusion

Thus far I have identified and discussed the research problem (1.1.1); outlined my original contribution to science (1.1.2) and described the boundaries of this work. Following this, I addressed the key terms that are used in the thesis (1.2). I then outlined the structure of the thesis (1.3), followed by a discussion of the theoretical foundations around which this work is constructed (1.4).

With the theory and objectives clarified, the canvas for this work has been set. To add colour, Chapter 2 discusses the emergence and evolution of the mining industry, drawing particular attention to both its benefits and challenges.

¹¹³ See generally Paul Robbins, *Political Ecology: A Critical Introduction* (Malden, MA: Wiley-Blackwell, 2012).

Chapter 2

2 Setting the Stage – The Backdrop of Mining

Each year more than four trillion kilograms of minerals are extracted from the earth¹¹⁴ – enough material to construct over 4000 Eiffel Towers or cover an area greater than 100 football fields.¹¹⁵ Perhaps even more telling, a study by Minerals Education Coalition found that each person in the United States requires over 40,000 pounds of minerals each year in order to maintain their standard of living.¹¹⁶ Buildings, transportation networks, communication systems, machinery and technology of every kind all depend on minerals that are clawed from beneath the earth’s surface.¹¹⁷ Computers and smartphones rely on precious metals such as gold, silver and platinum, as well as rare-earth elements such as europium and yttrium.¹¹⁸ Other mined minerals, such as copper or aluminium, are required for electrical grids and pipes.¹¹⁹ The concrete roads that connect society rely on gravel, sand and varied

¹¹⁴ “All the metals we mine each year, in one visualization”, online: World Economic Forum <www.weforum.org/agenda/2021/10/all-tonnes-metals-ores-mined-in-one-year/>; “Trends in the Mining and Metals Industry: Mining’s Contribution to Sustainable Development” (18 October 2012), online (pdf): *International Council on Mining and Metals* <www.icmm.com/website/publications/pdfs/social-performance/2012/research_romine-1.pdf> [ICMM].

¹¹⁵ Sara Bice, *Responsible mining: Key principles for industry integrity* (Abindon, Oxon: Routledge, 2016) at 1.

¹¹⁶ “How many pounds of minerals are required by the average person in a year? | U.S. Geological Survey” (last visited June 19 2022), online: <www.usgs.gov/faqs/how-many-pounds-minerals-are-required-average-person-year>.

¹¹⁷ John R McNiell & George Vrtis, eds, *Mining North America : An Environmental History Since 1522* (Berkeley: University of California Press, 2017) at 1.

¹¹⁸ See National Research Council of the National Academies, “Minerals, Critical Minerals, and the U.S. Economy | The National Academies Press”, online: <nap.nationalacademies.org/catalog/12034/minerals-critical-minerals-and-the-us-economy> (On the mineral content of a modern American automobile and consumer electronic goods, including computers and cell phones); Committee on Critical Mineral Impacts et al., *National Research Council of the National Academies, Minerals, Critical Minerals, and the U.S. Economy* (Washington, DC: National Academies Press, 2008), 50– 57. (On the mineral content of a modern American automobile and consumer electronic goods, including computers and cell phones); T E Graedel et al, “On the materials basis of modern society” (2015) 112:20 *Proc Natl Acad Sci USA* 6295 (On the significance of minerals to modern life generally).

¹¹⁹ *Ibid.*

mixtures of calcium and silicon.¹²⁰ Even the modern industrial food system and supply chains rely heavily on mining and extractive processes – nitrogen and phosphorous are key elements that support plant yield and growth.¹²¹

The mining industry reaches across the world, ranging from the Amazon Basin, the Australian Outback, the Rocky Mountains, the Democratic Republic of Congo and seemingly everywhere in-between. Whether in the Global North or South, members of industrialized societies are ceaselessly and intensively depleting the world’s finite mineral resources. While nearly every material aspect of our daily lives is facilitated by mining,¹²² many of us never acknowledge the deep connections that we hold to an industry that is a hot-bed for controversy¹²³ and shapes the prospects of future generations.¹²⁴

Whether one views mining as humanity’s heroic mastery of nature or a spectacle of short-term thinking, mining has frequently stood as an analogy for all extraction.¹²⁵ Mining is a lens through which we debate deeper differences of opinion concerning human–environment relationships. It reflects profound societal anxieties about the intensity and pace of

¹²⁰ McNeill & Vrtis, *supra* 117.

¹²¹ William M Stewart et al, “The Contribution of Commercial Fertilizer Nutrients to Food Production,” (2005) 97:1 *Agronomy J* 1.

¹²² Bice, *supra* note 115 at 1.

¹²³ See e.g. Valentina Ruiz Leotaud, “Three Chilean communities maintain protest against Los Pelambres copper miner”, *Mining.com* (26 June 2022), online: <www.mining.com/three-chilean-communities-maintain-protest-against-los-pelambres-copper-miner/>; Ernest Scheyder, “US court upholds Arizona land swap deal for Rio Tinto copper mine”, *Mining.com* (25 June 2022), online: <www.mining.com/web/us-court-upholds-arizona-land-swap-deal-for-rio-tinto-copper-mine/>; Blake Schmidt and James Attwood, “Lithium king crowned in dictatorship sees \$3.5bn fortune at risk”, *Mining.com* (24 June 2022), online: <www.mining.com/web/lithium-king-crowned-in-dictatorship-sees-3-5bn-fortune-at-risk/>; Kimberley Brown, “Indigenous Ecuadorans fight back as metal mining eats into Amazon”, *Mining.com* (24 June 2022), online: <www.mining.com/web/indigenous-ecuadorans-fight-back-as-metal-mining-eats-into-amazon/>; Praveen Menon Byron Kaye and James Redmayne, “‘Appalling’ abuse: Australia to push miners to set up register of offenders”, *Mining.com* (23 June 2022), online: <www.mining.com/web/appalling-abuse-australia-to-push-miners-to-set-up-register-of-offenders/>.

¹²⁴ Richard Herrington, “Mining our green future” (2021) 6:6 *Nature Rev Materials* 456.

¹²⁵ Willow, *supra* note 96 at 107.

environmental transformation, loss of local control, and rapid (and often imposed) sociocultural change.¹²⁶ For its proponents, mining means progress.¹²⁷ But for its critics, mining epitomizes the extractivist desire to remove as much as possible, as quickly as possible, by any means possible.¹²⁸

2.1 Early Roots – For Gold, God, and Glory

Men also, and by his suggestion taught,
Ransacked the centre, and with impious hands
Rifled the bowels of their mother Earth
For treasures better hid. Soon had his crew
Opened into the hill a spacious wound,
And dogged out ribs of gold. Let none admire.¹²⁹

Access to minerals and metals has long underpinned the development of human society.¹³⁰ The struggle for the control of such resources has determined the locations of civilizations, economic growth, and has been a driver of conflict since the dawn of humanity.¹³¹ The industry's long history is closely connected to the history of European expansion and

¹²⁶ Eduardo Galeano, *Open Veins of Latin America: Five Centuries of Pillage of a Continent* (New York: New York University Press, 1997).

¹²⁷ See e.g. “Above and Beyond” (23 June 2022), online (pdf) : *Prospectors and Developers Association of Canada* <issuu.com/pdac-web/docs/annual_report_final?fr=sMWE2NzQ3ODEyNjA>; Carol Bond, “Positive peace and sustainability in the mining context: beyond the triple bottom line” (2014) 84 J Cleaner Production 164; “Social & Economic Development”, online: *Rio Tinto* <www.riotinto.com/sustainability/communities/social-and-economic-development> [Rio Tinto]; “Newmont Corporation - Contributing to Stronger Communities Through Social and Economic Contributions”, online: *Newmont* <www.newmont.com/blog-stories/blog-stories-details/2021/Contributing-to-Stronger-Communities-Through-Social-and-Economic-Contributions/default.aspx>; “Holistic Approach to ESG Will Make Lasting Impact, Says Barrick”, online: *Barrick Gold* <www.barrick.com/English/news/news-details/2022/holistic-approach-to-ESG-will-make-lasting-impact-says-barrick/default.aspx>.

¹²⁸ Willow, *supra* note 96 at 107.

¹²⁹ John Milton, *Paradise Lost* (Indianapolis, IN: Hackett Publishing, 2005) at 35.

¹³⁰ “Natural Resources in 2020, 2030, and 2040: Implications for the United States” (25 July 2013) at 1, online (pdf): *National Intelligence Council Report* <www.dni.gov/files/documents/NICR%202013-05%20US%20Nat%20Resources%202020,%202030%202040.pdf>.

¹³¹ *Ibid.*

colonialism.¹³² Historians use the memorable phrase “gold, God, and glory”¹³³ to encapsulate the motives of the European expansion that began in the 15th century.¹³⁴

The rise of the Spanish Empire in the sixteenth century was famously motivated by the quest for precious metals. At first, the spoils of conquest were marked by gold and silver.¹³⁵ Soon after, desires for control and wealth gave way to a systemic search for new types of mineral deposits.¹³⁶ In South America, the arrival of the Spanish Colonizers was evidently marked by the capitalization of mineral reserves, which allowed for rapid economic development through the intensification of mining activity. Indigenous peoples, branded on their cheeks to demonstrate that they were property of the Spanish Crown, were enslaved and forced to mine on a commercial scale.¹³⁷ The miners followed the *conquistadores*, the knights and soldiers of the Spanish empire, side by side with missionaries and religious leaders, locating mineral reserves and using them to create wealth.¹³⁸ Commanded by Hernán Cortés, Spanish conquistadores and local tribes conquered the Aztec capital city of Tenochtitlán. Mere months after this conquest, Cortés was dispatching miners and foundry men to investigate metal deposits in the southwest of modern-day Mexico.¹³⁹ The establishment of various colonial mining districts

¹³² Willow, *supra* note 96 at 18.

¹³³See David Abernethy, *The Dynamics of Global Dominance: European Overseas Empires, 1415–1980* (New Haven: Yale University Press, 2002)

¹³⁴ *Ibid.*

¹³⁵ McNeill & Vrtis, *supra* 117 at 22.

¹³⁶ *Ibid.*

¹³⁷ Willow, *supra* note 96 at 18.

¹³⁸ Pablo Gabrielli, “Mining conquistadors caused air pollution 200 years before the industrial revolution” (9 February 2015), online: *The Conversation* <theconversation.com/mining-conquistadors-caused-air-pollution-200-years-before-the-industrial-revolution-37391>.

¹³⁹ See McNeill & Vrtis, *supra* 117 at 22; Myles Hudson "Battle of Tenochtitlán" (last modified 15 May 2022), online: *Encyclopedia Britannica* <www.britannica.com/event/Battle-of-Tenochtitlan>; Bernal Diaz del Castillo, Genaro Garcia & Alfred Percival Maudsla, *The True History of the Conquest of New Spain* (London, UK: Hakluyt society, 1967).

under the command of Cortés represents a paradigmatic example of early commodity frontiers.¹⁴⁰

Similarly, the voyages of Columbus and his backers were part of the 15th century imperial outreach to shorten trade routes and to find new resources to support a rising population.¹⁴¹

Columbus travelled to the East Indies with the expectations of attaining mineral wealth that could be traded alongside spices and textiles.¹⁴² While they did encounter gold on the island of Hispaniola, the process of extraction and exportation was one built on the laborious exploitation of the island's inhabitants. Using the forced labour of the Indigenous Taino and enslaved Africans, Hispaniola quickly became an early producer and exporter of gold.¹⁴³ For nearly 300 years, colonial Spanish mining increased its production of copper, gold, silver and other metals, developing a form of proto-industrial production in the early modern world.¹⁴⁴

Similar instances of abuse linked to the extractive sector have occurred across Africa. The expropriation of natural resources was one of the many ways that the colonial powers exerted dominance over local African populations.¹⁴⁵ For example, in what is now modern-day Ghana, the British colonial state removed and imprisoned local leaders and opened the doors for

¹⁴⁰ McNeill & Vrtis, *supra* 117 at 22.

¹⁴¹ *Ibid* at 403 ("While local conditions were variable and thus generalizations difficult, in the middle of the fourteenth century, many parts of western Europe had faced a collective resource shortage: their populations pressed on the limits of medieval agricultural productivity. A reckoning was delayed by the Black Death, but by 1500 or so, the population of western Europe had recovered, and local conditions of scarcity once again appeared.") See William Chester Jordan, *The Great Famine: Northern Europe in the Early Fourteenth Century* (Princeton: Princeton University Press, 1996), at 7-36; Emmanuel Le Roy Ladurie, *The Peasants of Languedoc*, John Day, trans, (Urbana: University of Illinois Press, 1974); William McNeill, "The Impact of the Mongol Empire on Shifting Disease Balances, 1200– 1500," in *Plagues and Peoples* (1976; reprinted, New York: Anchor, 1998), 161– 207.

¹⁴² Hugh Thomas, *Rivers Of Gold: The Rise Of The Spanish Empire, From Columbus To Magellan* (New York: Random House Trade Paperbacks, 2005); Clara Estow, "Reflections on Gold: On the Late Medieval Background of the Spanish Enterprise of the Indies" (1993) 6 *Mediaevistik* 8.

¹⁴³ *Ibid*.

¹⁴⁴ McNeill & Vrtis, *supra* 117 at 23.

¹⁴⁵ Bone, *supra* note 10 at 19.

corporations to appropriate the lucrative gold mining industry.¹⁴⁶ Likewise, the last 150 years of the Congo's history have seen brutality and abuse of local populations stemming from the extractive industries.¹⁴⁷ Similar instances can be found across a multitude of different countries.¹⁴⁸

Historically speaking, there was a stark social and economic disparity between miners and those who conquered them.¹⁴⁹ While the mine owners received wine and clothing from foreign merchants, the miners toiled away in slavery.¹⁵⁰ The colonization of huge areas of the globe – from Ireland, to India, the Indigenous lands of the North and South Americas, and much of Africa – and the early instances of the exploitation of natural resources are the roots of modern day extractivist paradigms. In contemporary times, it is evident that the industry and its challenges have evolved – no longer do we see the same proliferation of territorial conquests and power ruled by colonizers over the colonized. Instead, the centuries of mineral exploitation spurred industrial production and economic growth, which have given rise to new power disequilibria in the resource development context.¹⁵¹

2.2 Modern Day Mining – A Balance of Conflicting Needs

From above, a mine pit appears as a still, contemplative organism, a great grey-brown amoeba alive with a cellular thrum of human activity. It is so wide, your eyes must first work to take it all in, to grasp the expanse, before waking up to

¹⁴⁶ *Ibid* at 20.

¹⁴⁷ Adam Hochschild & Barbara Kingsolver, *King Leopold's ghost: a story of greed, terror, and heroism in Colonial Africa* (Boston, US: Mariner Books, 2020).

¹⁴⁸ Canadian Centre for the Study of Resource Conflict, "Corporate Social Responsibility: Movements and Footprints." (October 2009), Report prepared for the Prospectors and Developers Association of Canada, online (pdf): <caid.ca/CSRRep2009.pdf> at 7, 11 [CCSRC Report].

¹⁴⁹ Daviken Studnicki-Gizbert, *A Nation upon the Ocean Sea: Portugal's Atlantic Diaspora and the Crisis of the Spanish Empire, 1492-1640* (Oxford, UK: Oxford University Press, 2007) at 108.

¹⁵⁰ *Ibid*.

¹⁵¹ See e.g. Joseph Conrad, *Heart of darkness* (Waiheke Island: Floating Press, 2008) at 7.

specks of movement... Dump trucks carry hundreds of tonnes of overburden along the haulage roads, up and out. It is only when one of these trucks rumbles nearby that you begin to grasp the size and depth of the pit. The truck, which in the pit appears like a childhood Tonka toy, rolls on tyres two lanes wide and more than twice as tall as your average miner, each costing more than a Mercedes Roadster. The drivers of these gargantuan gas guzzlers are specially trained and usually earn six figures a year.¹⁵²

Both physically and economically, today's mining industry is one of phenomenal scale. The revenue of the top 40 global mining companies, which represent a vast majority of the whole industry, amounted to nearly \$656 billion USD in 2020¹⁵³ – a value that exceeds the purchasing power of many small-to-medium sized countries.¹⁵⁴ In 2020, the direct contribution of Canada's minerals and metals sector to Canada's gross domestic product (GDP) was \$70 billion, which represented 3% of Canada's total GDP.¹⁵⁵ If the indirect effects from the minerals and metals sector are accounted for, the industry contributes a further \$37 billion to the GDP – a total contribution of \$107 billion to Canada's GDP.¹⁵⁶

Natural resource development is one of the biggest economic drivers at the local, national and global level.¹⁵⁷ This makes sense, given that modern industrial societies are exhibiting an

¹⁵² Bice, *supra* note 115 at 2.

¹⁵³ Melissa Garside, "Topic: Rare earths industry worldwide" (9 March 2022), online: *Statista* <www.statista.com/topics/1744/rare-earth-elements/>.

¹⁵⁴ US Central Intelligence Agency, *The World Fact Book* (Washington, DC: CIA, 2013).

¹⁵⁵ Natural Resources Canada, "Minerals and the economy" (last modified 3 February 2022) online: *Government of Canada* <www.nrcan.gc.ca/our-natural-resources/minerals-mining/minerals-metals-facts/minerals-and-the-economy/20529>.

¹⁵⁶ *Ibid.*

¹⁵⁷ "The Economic Significance Of Natural Resources: Key Points For Reformers In Eastern Europe, Caucasus And Central Asia" (2011), online (pdf): *OECD* <www.oecd.org/env/outreach/2011_AB_Economic%20significance%20of%20NR%20in%20EECCA_ENG>.

increasing functional dependence on minerals and metals. Rare earth metals, for example, have unique capabilities that make them essential to technology, manufacturing, and military sectors.¹⁵⁸ These metals are required for the production of smart phones, electric and hybrid cars, computers, oil refineries, televisions, lighting, fiber optics, superconductors, permanent magnets, and military aircrafts amongst countless other items.¹⁵⁹ In 2012, Americans spent US\$1.25 trillion on household equipment, recreational vehicles, cars and car parts alone.¹⁶⁰ Each of these parts require raw materials – many of them mined – and energy to fuel production and further consumption.

Our appetite for modern life and reliance on the resources to sustain it is compounded by calls for a greener economy and the increasing demand for clean energy.¹⁶¹ In a report published by the World Bank Group, it was found that the demand for minerals, such as nickel, lithium, and cobalt, could increase by approximately 500% by 2050.¹⁶² To meet the demand for the transition to a green economy and clean energy, it is estimated that over 3 billion tons of minerals and metals will be needed for clean power production and energy storage.¹⁶³

pdf>; Innovation Government of Canada, “Report from Canada’s Economic Strategy Tables: Report - Resources of the Future” (last modified 19 October 2018), online: *Government of Canada* <www.ic.gc.ca/eic/site/098.nsf/eng/00026.html>.

¹⁵⁸ Nabeel A Macheri, “Chinese Monopoly in Rare Earth Elements: Supply-Demand and Industrial Applications” (2012) 48:4 *China Report* 449 at 457.

¹⁵⁹ Kathryn Miller et al, “An Overview of Seabed Mining Including the Current State of Development, Environmental Impacts, and Knowledge Gaps” (2018) 4:41 *Frontiers of Marine Science* at 5.

¹⁶⁰ International Energy Agency, “Medium Term Coal Market Report 2012 Fact Sheet” (United States: International Energy Agency, 2012).

¹⁶¹ The World Bank Group, “The Growing Role of Minerals and Metals in a Low Carbon Future”, (June 2017) at 4 and 11, online (pdf): <documents1.worldbank.org/curated/en/207371500386458722/pdf/117581-WP-P159838-PUBLIC-ClimateSmartMiningJuly.pdf>.

¹⁶² The World Bank Group, “Minerals for Climate Action: The Minerals Intensity of the Clean Energy Transition” (11 May 2020) at 12, online (pdf): <pubdocs.worldbank.org/en/961711588875536384/Minerals-for-Climate-Action-The-Mineral-Intensity-of-the-Clean-Energy-Transition.pdf>.

¹⁶³ David Wallace Wells, *The Uninhabitable Earth: Life After Warming*, (Harlow, England: Penguin Books, 2019).

These figures illustrate the importance of minerals and mining in the modern context. A new relationship has emerged between industrial societies and mines that has restructured power dynamics and the natural world in fundamental ways.¹⁶⁴ As minerals and mines have become integrated into the core of economic production, they have altered whole economies, reshaped social and cultural patterns, redirected scientific initiatives, and have placed private corporate power and the fortune of local communities in the spotlight.¹⁶⁵

While Western societies have historically been dominant in the mining industry, developing nations have emerged as significant players in today's global economy. Generating more than one-fifth of total global mineral production, mineral extraction is an increasingly important component of developing economies.¹⁶⁶ Recently discovered mineral deposits in Mongolia, for example, hold the potential to boost foreign investment and generate billions of dollars of revenue.¹⁶⁷ The mining industry's potential to contribute significantly to socio-economic upliftment is a vitally important consideration for emerging countries and rural economies. By virtue of its scale, mining operations require, and thus facilitate, the development of significant infrastructure and may potentially distribute substantial economic benefits to historically impoverished or marginalized communities. For developing nations that are home to the necessary combination of geology and climate, the potential wealth that may be injected into the economy is staggering. For example, one of the world's largest mining companies, Barrick Gold:

¹⁶⁴ McNeill & Vrtis, *supra* 117 at 403.

¹⁶⁵ *Ibid.*

¹⁶⁶ ICMM, *supra* note 114.

¹⁶⁷ Terrence Edwards and Sonali Paul, "Mongolia Risk to Hurt Growth, Even with Oyu Tolgoi Start-Up, Election", *Reuters News* (25 June 2013), online: <www.reuters.com/article/mongolia-mining-idUSL3N0EX1Z120130626>; See also Bice, *supra* note 115 at 2.

- has contributed \$7.9 billion to Mali’s economy over the last 24 years;¹⁶⁸
- represents approximately 5% of the annual tax revenues in the Dominican Republic;¹⁶⁹
- has paid more than \$1.7 billion in tax and excise revenue since 1990.¹⁷⁰

Similarly, Rio Tinto also makes substantial economic contributions to the communities that are impacted by their development operations. In 2021, Rio Tinto contributed:

- \$222.9 million in payments to landowners, which are non-discretionary compensation payments made by the company under land access, mine development, native title, impact benefit and other legally binding compensation agreements;¹⁷¹
- \$72 million in community investments, which comprise voluntary financial commitments;¹⁷²
- \$19.1 million in development contributions, including in-kind donations of assets and employee time that aim to deliver social, economic and/or environmental benefits for a community, and which Rio Tinto is mandated to make under a legally binding agreement, by a regulatory authority or otherwise by law.¹⁷³

However, as alluded to above, these figures and benefits tend to come at a cost that is borne by individuals and communities in the form of environmental and cultural damage.

2.3 An Evolving Industry - Lessons Learned

The Democratic Republic of Congo has an estimated US \$24 trillion in untapped mineral wealth.¹⁷⁴ However, rather than facilitating better health and development outcomes, this

¹⁶⁸ “Barrick Gold Corporation - Mining’s Critical Role in the Fight Against Poverty”, online: <www.barrick.com/English/news/news-details/2021/minings-critical-role-in-the-fight-against-poverty/default.aspx>.

¹⁶⁹ *Ibid.*

¹⁷⁰ *Ibid.*

¹⁷¹ Rio Tinto, *supra* note 127.

¹⁷² *Ibid.*

¹⁷³ *Ibid.*

¹⁷⁴ J Morgan, “DR Congo’s \$24 Trillion Fortune” (2009) 350:52 African Business.

wealth has been found to drive conflict and human rights abuses.¹⁷⁵ Similarly, rebel groups in Angola made use of ‘blood diamonds’ to generate revenue and fuel civil war.¹⁷⁶ As for the mineral deposits in Mongolia, the costs of mineral wealth are measured by the impacts on water and community culture, rather than through conflict. In an area that receives an average annual rainfall of 80 mm per year, Mongolian herders worry that the Oyu Tolgoi mine will contaminate or soak up this resource.¹⁷⁷ Like many other Indigenous communities across the world, they fear that the presence of an open pit mine, zoning requirements, and heavy machinery will defeat their way of life and endanger their culture and livelihood.¹⁷⁸

Concerns are fueled by the dozens of mining spills and tailings dam failures in recent decades. In 1995, the Omai gold mine in Guyana released over 800 million gallons of cyanide and heavy metals sludge which destroyed fish and animal life in close vicinity to the tailings dam, and contaminated river water that was essential for the drinking supplies of communities.¹⁷⁹ In 2000, a tailings dam owned by Aurul, which held 100 metric tonnes of cyanide contaminated water, faulted and unleashed wastewater which eventually reached the Tisza River and then

¹⁷⁵ See e.g. Emily Veale, “Is there Blood on your Hands-Free Device: Examining Legislative Approaches to the Conflict Minerals Problem in the Democratic Republic of Congo Note” (2012) 21:2 *Cardozo J Intl & Comp L* 503; Shannon Raj, “Blood Electronics: Congo’s Conflict Minerals and the Legislation That Could Cleanse the Trade Note” (2010) 84:4 *S Cal L Rev* 981.

¹⁷⁶ Quint Hoekstra, “Conflict diamonds and the Angolan Civil War (1992–2002)” (2019) 40:7 *Third World Q* 1322; See also Logan Hennessy, “Where There Is No Company: Indigenous Peoples, Sustainability, and the Challenges of Mid-Stream Mining Reforms in Guyana’s Small-Scale Gold Sector” (2015) 20:1 *New Political Economy* 126 at 129.

¹⁷⁷ Oyu Tolgoi Watch et al, “A Useless Sham – A Review of the Oyu Tolgoi Copper/Gold Mine Environmental and Social Impact Assessment” (December 2012), online (pdf): *CEE Bankwatch* <bankwatch.org/wp-content/uploads/2013/05/a-useless-sham-OT-ESIA-review-14Dec2012.pdf>.

¹⁷⁸ *Ibid.*

¹⁷⁹ Camille Gaskin-Reyes, “Case Study Guyana: Collapse of Omai Dam Holding Mining Waste” (last visited 19 June 2022), online: *Georgetown – Center for New Designs and Learning in Scholarship* <blogs.commonstudies.georgetown.edu/rio-doce-environment-blog/guyana-collapse-of-the-omami-mine-waste-dam/>.

the Danube.¹⁸⁰ The spill has been called Europe's worst environmental disaster since Chernobyl.¹⁸¹ As recently as 2019, the Córrego do Feijão mine, in Brumadinho, Brazil collapsed and killed 270 people. The list goes on, but in each instance, local people suffered from contaminated waterways, endangered health, and interrupted livelihood.¹⁸²

As described earlier, the deleterious impacts of mining in developing nations are so severe and common that the pattern has been dubbed the 'resource curse'.¹⁸³ The lack of accountability, absence of strong governance and enforcement mechanisms, tolerance of corrupt practices, and profit-motivated business behavior contribute to environments in which the needs of local communities may come secondary to economic gain.¹⁸⁴ However, while developing countries shoulder the bulk of mining's negative impacts, it should be emphasized that these effects can occur to varying degrees wherever mining operations are found. In developed nations, the negative impacts of mining disproportionately affect communities that are more likely to face marginalization and vulnerabilities associated with indigeneity or low socio-economic status.¹⁸⁵ Although it is more likely that impacted communities in developed nations enjoy greater protection from legitimate governments through robust environmental protection

¹⁸⁰ Emma Batha, "Death of a River", *BBC News* (15 February 2000), online: <[news.bbc.co.uk/2/hi/europe/642880.stm](https://www.bbc.com/news/europe-642880)>.

¹⁸¹ *Ibid.*

¹⁸² Shahid Azam & Qiren Li, "Tailings Dam Failures: A Review of the Last One Hundred Years" (2010) 28:4 *Geotechnical News* 50.

¹⁸³ See Richard Auty, *Sustaining Development in Mineral Economies: The Resource Curse Thesis* (London, UK: Routledge, 1993).

¹⁸⁴ Anthony Bebbington et al, "Contention and Ambiguity: Mining and the Possibilities of Development" (2008) 39:6 *Development & Change* 965.

¹⁸⁵ Bice, *supra* note 115 at 5.

regimes, social programmes, and economic compensation, mining nevertheless routinely presents challenges and precipitates conflict.¹⁸⁶

It is evident today that the global mining industry has developed a collective conscience that was not practically present prior to the 20th century. The litany of complaints, concerns, and conflicts has given the industry lesson after lesson, slowly fostering an industry-wide response to the growing social and environmental threats posed by its operations.¹⁸⁷ In what is considered a watershed moment in the industry, the leaching of toxic chemicals into the Papua New Guinean Fly River downstream from BHP Billiton's Ok Tedi mine attracted worldwide attention to the industry.¹⁸⁸ In 1998, the heads of ten major global mining companies came together at the Global Mining Initiative to address the growing scrutiny on the mining industry. This sparked industry-wide interest in the impacts of mining and the duties of companies to prevent, mitigate and respond to those impacts. Social and environmental responsibility has emerged as a widely acknowledged component in the contemporary mining operations.¹⁸⁹

In tandem with this increased attention from industry, resistance movements and conflict reflect an emergent agency of local communities to fight against structural inequalities and corporate power. Examples are far reaching and prevalent across the world, including Newmont Mining's decision to suspend the expansion plans for its mine in Cerro Quilish, Peru; Osisko's decision to abandon its gold mining project in the La Rioja province of

¹⁸⁶ C Deegan, M Rankin and J Tobin, "An Examination of the Corporate Social and Environmental Disclosures of BHP from 1983–1997: A Test of Legitimacy Theory" (2002) 15:3 *Accounting, Auditing & Accountability J* 312.

¹⁸⁷ Bice, *supra* note 115 at 5.

¹⁸⁸ Banks & Ballard, eds, *The Ok Tedi Settlement: Issues, Outcomes and Implications* (Canberra : National Centre for Development Studies and Resource Management in Asia-Pacific, Research School of Pacific and Asian Studies, Australian National University, 1997).

¹⁸⁹ Bice, *supra* note 115 at 7.

Argentina;¹⁹⁰ the Serbian government’s revocation of Rio Tinto’s mine permits in Jadar;¹⁹¹ and numerous others. All of these movements occurred largely outside the formal ‘legal’ and deliberative processes that have traditionally offered security for corporations and their investments.

These trends are representative of a shift in governance and the evolution of a sustainable development paradigm that focuses on the social and environmental impacts of development.¹⁹² Where the expectations of local communities are not fulfilled, conflict and delays are commonplace.¹⁹³ Full legal compliance with state law is no longer a sufficient means to satisfy the rapidly accelerating expectations of society with regards to mining issues.¹⁹⁴ Extending beyond traditional considerations of company operations and government regulation, company-community power asymmetries¹⁹⁵ have been placed in the spotlight.

Emerging from this paradigm shift is the term known as the “social license to operate” (SLO) – a term that refers, generally, to the community’s ongoing acceptance of a company’s

¹⁹⁰ Banajaree, *supra* note 2 at 140 (‘Recent examples include Newmont Mining’s decision to suspend expansion plans for a mine in Cerro Quilish in Peru...Osisko’s decision to abandon its gold mining project in La Rioja province of Argentina...and a Supreme Court decision in India reversing a prior approval given to Vedanta Limited to build a bauxite mine in the state of Odisha...These movements occurred largely outside the formal deliberative processes that tended to exclude local communities from direct participation.’).

¹⁹¹ Ivana Sekularac, “Serbia revokes Rio Tinto lithium project licences amid protests”, *Reuters* (20 January 2022), online: <www.reuters.com/business/retail-consumer/serbian-government-revokes-rio-tintos-licences-lithium-project-2022-01-20/>.

¹⁹² Yenny Vega-Cárdenas & Nathalie Parra, “Nature as a Subject of Rights: A Mechanism to Achieve Environmental Justice in the *Atrato River* Case in Colombia” Amissi Melchiade Manirabona & Yenny Vega-Cárdenas, eds, *Extractive Industries and Human Rights in an Era of Global Justice: New Ways of Resolving and Preventing Conflict* (Toronto: LexisNexis Canada, 2019) 127 at 135.

¹⁹³ Costanza, *supra* note 11.

¹⁹⁴ *Ibid*; See also Peter Edwards et al, “Social Licence to Operate and Forestry - An Introduction to the Special Issue” (2016) 89 *Forestry* 473.

¹⁹⁵ See Lucy Mercer-Mapstone et al, “Power, participation, and exclusion through dialogue in the extractive industries: Who gets a seat at the table?” (2019) 61 *Resources Policy* 190; Obby Phiri, Elisavet Mantzari & Pauline Gleadle, “Stakeholder interactions and corporate social responsibility (CSR) practices: Evidence from the Zambian copper mining sector” (2019) 32:1 *Accounting, auditing, & accountability* 26; See also Robert Klitgaard, *Controlling Corruption* (Berkeley: University of California Press, 2008).

operations.¹⁹⁶ Although contemporary usage of the term first appeared in a publication by William Moore in 1996,¹⁹⁷ the idea is often attributed to a speech made by Jim Cooney in 1997.¹⁹⁸ While Moore's use of the term focuses on environmental stewardship, Cooney's focuses on community well-being. Cooney observed a widespread failure of governments to protect the interests of communities while granting legal licenses for mining.¹⁹⁹ To compensate for government failures which produce community opposition later, Cooney recommended that mining companies seek a social licence – that is, approval – directly from communities. Academia and industry practice indicate that Cooney's conceptualization of the concept has come to dominate discourse and operations within the mining industry.²⁰⁰

From the corporate head-office to the remote mine site, mining companies' policies and actions reflect an acceptance of social responsibility and the SLO concept. Companies are making a greater effort to involve the community in their operations and have formalized community relations roles in these contexts. Reflecting the expanding importance of this social acceptance, community consultation committees are considered to be a conventional practice in today's standards.²⁰¹ The emergent company policies, activities, and public commitments of major miners illustrate a critical shift in the way that companies approach their business. The growing concern with earning and maintaining the SLO²⁰² and going "beyond

¹⁹⁶ O'Faircheallaigh, *supra* note 15.

¹⁹⁷ Nwapi, *supra* note 95 at 353; Edwards et al, *supra* note 191; William Moore, "The social license to operate" *PIMA Magazine* (1996) 22.

¹⁹⁸ Robert Boutilier & Ian Thomson, *The Social License: The Story of the San Cristobal Mine* (New York, NY : Routledge, 2019) at 42 [Boutilier & Thomson, "San Cristobal and the Social License"]

¹⁹⁹ Jim Cooney, 'Reflections on the 20th Anniversary of the Term "Social Licence"' (2017) 35 *J Energy & Natural Resources* L 197

²⁰⁰ Robert G Boutilier, "Frequently asked questions about the social licence to operate" (2014) 32:4 *Impact Assessment & Project Appraisal* 263; Jacqueline L Nelsen, "Social license to operate" (2006) 20:3 *Intl J Mining, Reclamation & Environment* 161.

²⁰¹ Bice, *supra* note 115 at 7.

²⁰² Boutilier & Thomson, *supra* note 198.

compliance”²⁰³ is indicative of an industry that is reflecting on its values, practice, and the impact that it has on the world.

²⁰³ Gunningham, Kagan & Thorton, *supra* note 86 at 316.

Chapter 3

3 The Social License to Operate – A Critical Review

3.1 Pinning Down the Social License – Definitional Ambiguity

Defining the term Social License to Operate (SLO) has proven to be an elusive task – it is a moving target that appears to transcend traditional categorizations. Even today, the SLO remains a poorly defined idea²⁰⁴ that tends to be bundled together with equally popular – but perhaps contentious²⁰⁵ – concepts such as corporate social responsibility (CSR) and sustainability.²⁰⁶ Generally, SLO has been regarded as a metaphorical concept that represents a resource development company having the broad, ongoing approval and acceptance of society to conduct its activities.²⁰⁷ Framed differently, the SLO is indicative of a community's acceptance or approval of a project or the project operator's ongoing presence in the community.²⁰⁸ Thomson and Joyce formally articulated the parameters of the SLO in 2008 arguing that the concept is composed of three elements: (1) it is granted by the impacted community;²⁰⁹ (2) it is informal, intangible and non-permanent; (3) it has to be earned and then

²⁰⁴ Sara Bice, “What Gives You a Social Licence? An Exploration of the Social Licence to Operate in the Australian Mining Industry” (2014) 3:1 Resources 62; See also Martin Brueckner & Marian Eabrasu, “Pinning down the social license to operate (SLO): The problem of normative complexity” (2018) 59 Resources Policy 217.

²⁰⁵ See Michael Blowfield, “Corporate Social Responsibility -The Failing Discipline and Why it Matters for International Relations” (2005) 19:2 Intl Relations 173; Marian Eabrasu, “A Moral Pluralist Perspective on Corporate Social Responsibility: From Good to Controversial Practices” (2012) 110:4 J Bus Ethics 429.

²⁰⁶ See Heather M Farley & Zachary A Smith, *Sustainability: If It's Everything, Is It Nothing?*, 2d ed (London: Routledge, 2020); Brueckner & Eabrasu, *supra* note 204.

²⁰⁷ Prno & Slocombe, *supra* note 11 at 672-3; Susan Joyce & Ian Thomson, “Earning a social licence to operate : Social acceptability and resource development in Latin America” (2000) 93:1037 CIM Bull 49 [Joyce & Thomson, “Earning a Social License”].

²⁰⁸ Nwapi, *supra* note 95 at 355.

²⁰⁹ Ian Thomson & Robert G Boutilier, “Social License to Operate” in Peter Darling (ed), *SME Mining Engineering Handbook*, 3rd ed (Society for Mining, Metallurgy, and Exploration 2011) 1779 at 1782. (The authors clarify that the use of the terms ‘community and stakeholder network’ implies that the license is not granted by a single group or organisation’. Consequently, the approval or acceptance of a handful of supporters is not enough if there is a ‘larger network of opponents’) [Thomson & Boutilier, “Social License”]

maintained.²¹⁰ Similarly, the Australian Centre for Corporate Social Responsibility has defined the term as the “acceptance or approval continually granted to an organisation's operations or project by local community and other stakeholders”.²¹¹ Stakeholders, in this context, are generally defined as networks of “individuals, groups, and organisations that are either affected by the operation or that can affect the operation”.²¹²

The metaphorical nature of the SLO has presented problems for practitioners in resource development, business and the legal profession. Clearly, the SLO is not a ‘license’ as understood in the usual sense. In this context, ‘license’ is used as a metaphor that conveys the formal acceptance of a resource development company’s operations by the local community. It stands for the notion that resource development companies must satisfy some formal criteria in order to gain trust and social acceptance.²¹³ Undoubtedly, the concept has an intuitive appeal in the resource development industries, where practitioners have become accustomed to meeting the conditions of formal licensing processes.²¹⁴ It has been posited that part of the appeal of the SLO stems from the fact that it mirrors the language of legal licenses used by many companies within the industry.²¹⁵ On the other hand, however, the ongoing and shifting nature of community acceptance means that the criteria for attaining and maintaining the SLO are far from clear. Thus, while the language is the same, the metaphor is not perfect. As noted by Pierre Lassonde, former President of Newmont Mining Corporation, the SLO cannot be acquired by simply “going to a government ministry and making an

²¹⁰ *Ibid*; Ian Thomson & Susan Joyce, “The Social License to Operate: What It Is and Why Does It Seem so Difficult to Obtain?” (PDAC Convention, Toronto, March, 2008) [unpublished] [Thomson & Joyce, “PDAC”].

²¹¹ Nwapi, *supra* note 95 at 355; See also Joel Gehman, Lianne M Lefsrud & Stewart Fast, “Social license to operate: Legitimacy by another name?” (2017) 60:2 Canadian Public Administration 293.

²¹² Thomson & Boutilier, “Social License”, *supra* note 209.

²¹³ Kieren Moffat et al, “The social licence to operate: a critical review” (2016) 89:5 Forestry 477 at 480-481.

²¹⁴ *Ibid* at 481.

²¹⁵ *Ibid*.

application”; it requires “far more than money to become part of the communities in which you operate.”²¹⁶

Legal and social licenses speak to the “acceptance” of development companies from different perspectives. The SLO is “perceived as something that must be earned from a community of stakeholders.”²¹⁷ There are no defined parameters that a company must follow to obtain an SLO. Although a legal license provides an indication of the minimum standard of behavior that is expected of an operation, mere regulatory approval does not correspond with social approval for that same activity.²¹⁸ It is defined by the values and expectations of a diverse community of stakeholders and reflects the changing strength and quality of the level of approval granted by a community.²¹⁹ While the government can define and enforce different legislative requirements for a mining license, the SLO is based on beliefs, opinions and perceptions which are subject to change as new information is acquired or when new social pressures come to bear.²²⁰ It is precisely this characteristic that has given rise to debate and uncertainty in academia and industry. Understanding when community acceptance has been granted, how it is to be maintained, and who has granted it are key questions that, if ascertained, stand to benefit both companies and communities.

²¹⁶ Pierre Lassonde, President of Newmont Mining Corporation, ‘What Shade of Green Are You?’ (Melbourne Mining Club, 8 August 2003), online: <www.melbourneminingclub.com/wp-content/uploads/2014/03/Pierre-Lassonde-8-August-2003.pdf>.

²¹⁷ *Ibid*; see also Thomson & Boutilier, “Social License”, *supra* note 206; Boutilier, *supra* note 25.

²¹⁸ Moffat et al, *supra* note 213 at 481.

²¹⁹ *Ibid*.

²²⁰ Thomson & Boutilier, “Social License”, *supra* note 209.

3.2 Emergence of the SLO - Community Acceptance as a Critical Risk Factor

In reaction to a series of economic crises during 1970s that had destabilized the global economy,²²¹ developed countries entered the 1980s with the adoption of restrictive monetary policies that were aimed at reducing inflation.²²² Higher interest rates, lower growth, and declining levels of trade led many developing countries to experience balance-of-payment difficulties in the early 1980s.²²³ These difficulties, in conjunction with large fiscal deficits, contributed to high levels of debt in the public sector and set the stage for the crisis of the 1980s.²²⁴ The debt crisis is generally considered to have started when, in August 1982, Mexico declared that it would no longer be able to service its debt.²²⁵ This ignited a succession of sovereign defaults around the world, with one country after another declaring a similar inability to repay.

The 1980s shouldered the weight of policy reforms that were aimed at stabilization, liberalization and the privatization of key industries, including those within the extractive sector.²²⁶ Collectively known as the Washington Consensus – representing the influence of the World Bank, the International Monetary Fund, and the United States Treasury – developing countries were pressured into deals offering debt relief and financial support conditional on

²²¹ World Economic and Social Survey, “The end of the Golden Age, the debt crisis and development setback”, (13 July 2017) at 50, online (pdf): *United Nations* <www.un.org/development/desa/dpad/wp-content/uploads/sites/45/WESS_2017_ch3.pdf> [World Economic and Social Survey].

²²² *Ibid.*

²²³ *Ibid.*

²²⁴ *Ibid.*

²²⁵ *Ibid.*

²²⁶ *Ibid*; Canterbury, *supra* note 99 at 61-3.

the adoption of such reforms.²²⁷ This led to a loosening of many regulatory standards across different sectors, most evident in the mining sector.²²⁸

The liberalization of mining laws during the 1980s and 1990s was certainly successful in attracting foreign investment.²²⁹ However, this meant that resource extraction companies operated on favorable financial terms in a loose regulatory environment which left many proximate communities vulnerable to experience the brunt of extractive operations. For instance, between 1972 and 1989, the Panguna mine in Papua New Guinea, developed and majority-owned by Rio Tinto, was one of the world's largest copper and gold mines.²³⁰ During this period, the company's local subsidiary, Bougainville Copper Limited discharged over a billion tonnes of mine waste into local river systems, devastating the environment and the health and livelihoods of local communities.²³¹ Unequal distribution and anger over the mine's profits led to an insurrection, triggering a civil war that cost the lives of an estimated 15,000 people.²³² In Africa, the Niger Delta has experienced large swaths of environmental degradation and community destruction that have been closely linked to the operations of Shell Petroleum Company.²³³ The Niger Delta crisis reached its peak when Ken Saro-Wiwa, the leader of a transnational environmental justice movement was arrested and executed in

²²⁷John Jacobs, "An Overview of Revenue Flows from the Mining Sector: Impacts, Debates and Policy Recommendations" in Bonnie K Campbell, ed, *Modes of Governance and Revenue Flows in African Mining* International Political Economy Series (London: Palgrave Macmillan UK, 2013) 16.

²²⁸ Hany Besada & Philip Martin, "Mining codes in Africa: emergence of a 'fourth' generation?" (2015) 28:2 Cambridge Rev Intl Affairs 263.

²²⁹ World Economic and Social Survey, *supra* note 221 at 50-1.

²³⁰ Human Rights Law Centre, "After the mine: Living with Rio Tinto's deadly legacy" (1 March 2020) at 10, online (pdf): static1.squarespace.com/static/580025f66b8f5b2dabbe4291/t/5e7d7cce47c7f816da86005f/1585282297310/AfterTheMineRioTintoDeadlyLegacy.pdf.

²³¹ *Ibid* at 2.

²³² *Ibid*.

²³³ Daniel Litvin, "Trappings of Power: Royal Dutch/Shell and Nigeria" In *Empires of Profit: Commerce, Conquest and Corporate Responsibility* (New York: Texere, 2003).

1995.²³⁴ Similar examples can be found throughout Latin America, Africa, and South America.²³⁵

In the 1990s the industry saw the development of numerous soft law frameworks aimed at fostering sustainable development, equitable benefit sharing, and improving corporate interactions with local communities.²³⁶ Such concepts were first introduced by the 1992 Rio Declaration on Environment and Development²³⁷ and have continually evolved since then.²³⁸ Despite the development of these frameworks, the weakening of domestic regulations meant that corporations faced little accountability for their actions in developing nations. Soft law frameworks and the proliferation of CSR ideals were not able to adequately address the power asymmetries between communities and developers, leaving communities at the mercy of corporate decision makers.²³⁹

By the turn of the century, managing social risk factors had arguably become the most significant challenge for resource development companies.²⁴⁰ The SLO arose due to multiple factors during this period, including increased global awareness of the negative impacts of mining; shareholder pressure to improve practices;²⁴¹ the development of lending policies safeguarding communities and the environment;²⁴² and a steady stream of social activism in the developing world, where affected communities and Indigenous peoples had started to

²³⁴ *Ibid*; see also Philip Mattera, “Royal Dutch Shell: Corporate Rap Sheet”, online: *Corporate Research Project* <www.corp-research.org/royal-dutch-shell>.

²³⁵ See Paul Richards, *Fighting for the rain forest: war, youth & resources in Sierra Leone* (Oxford; Portsmouth, N.H.: The International African Institute in association with James Currey; Heinemann, 1998) (Large-scale diamond smuggling in the 1970s and 1980s had starved the Sierra Leonean government of revenues to pay for public services, fueling local grievances that helped to fuel the outbreak of the country’s civil war in 1992 and kept it going).

²³⁶ Dupuy, *supra* note 77.

²³⁷ Lance N Antrim, “The United Nations Conference on Environment and Development” in Allan E Goodman, ed, *The Diplomatic Record 1992-1993*, 1st ed (Routledge, 2019) 189.

²³⁸ Dupuy, *supra* note 77 at 33.

²³⁹ *Ibid*.

²⁴⁰ Costanza, *supra* note 11.

²⁴¹ See Vega-Cárdenas & Nathalie Parra, *supra* note 192.

²⁴² World Economic and Social Survey, *supra* note 221 at 51.

stake claims to natural resources in competition with states and mining firms.²⁴³ Communities halt or impede on resource development projects, sometimes even without having an recognized legal right to do so.²⁴⁴

The lack of a SLO manifests in a multitude of different ways, including the slow down or shutdown of projects and the creation of a volatile socio-political environment, normally marked by acts of resistance such as protests, roadblocks, boycotts, and coordinated conflict.²⁴⁵ When such situations occur the SLO is considered to be either “withheld” or “withdrawn”.²⁴⁶ Governments may refuse to issue permits or may retract ones that have already been issued where the situation has become socially unstable – such as in Jadar, Serbia, where the Serbian government revoked Rio Tinto’s lithium exploration licenses after the environmental concerns sparked massive protests across the nation.

Across the world, financial losses owing to delays, stoppages and conflict have emerged as critical considerations for resource development companies. In India, for example, extractive projects representing an investment of nearly \$50 million have been halted by massive protests and resistance movements.²⁴⁷ In the Philippines, land disputes put a \$5.9 billion investment

²⁴³ See RG Boutilier, LD Black and I Thomson, “From Metaphor to Management Tool – How the Social License to Operate Can Stabilise the Socio-Political Environment for Business” (2012) *International Mine Management 2012 Proceedings*, Melbourne Australian Institute of Mining and Metallurgy 227. (The authors note that there are numerous mining projects that could not be developed because of the lack of a social license to operate. Notable examples from Latin America are: Las Brisas, El Dorado, Tambogrande, Tia Maria and Rio Grande. Significant opposition concerning the development of coal mining were also registered in New South Wales and Queensland, Australia, while in Canada there have been extensive campaigns against the development of oil sands mining).

²⁴⁴ See Juliette Syn, “The Social License: Empowering Communities and a Better Way Forward” (2014) 28:3–4 *Social Epistemology* 318 at 320-330.

²⁴⁵ Prno & Scolombe, “Origins of the Social License”, *supra* note 6 at 346. See also Costanza, *supra* note 11; Catherine Coumans, “Whose Development? Mining, Local Resistance, and Development Agendas” in Julia Sagebien & Nicole Marie Lindsay, eds, *Governance Ecosystems: CSR in the Latin American Mining Sector* International Political Economy Series (London: Palgrave Macmillan UK, 2011) 114; Lisa J Laplante & Suzanne A Spears, “Out of the Conflict Zone: The Case for Community Consent Processes in the Extractive Sector” (2008) 11 *Yale Hum Rts & Dev LJ* 69.

²⁴⁶ Thomson & Boutilier, “Social License”, *supra* note 206.

²⁴⁷ Subhabrata Bobby Banerjee, “Voices of the Governed: towards a theory of the translocal” (2011) 18:3 *Organization* 323–344.

in a copper and gold mine at risk – a project that was projected to add 1% to the national GDP.²⁴⁸ These actions and the results indicate that new mechanisms of enforcement and regulation are slowly emerging. Resistance movements can serve as the “catalyst for shifts in the political economy leading to changes in social arrangements about property rights, governance, authority, and accountability, which in turn influence decision-making processes and outcomes in corporation”²⁴⁹

Industry publications reflect the importance of SLO, highlighting its evolution into a crucial factor that is considered at the outset of development operations.²⁵⁰ In a report published by Ernst & Young, a multinational professional services firm, “maintaining a social license to operate” was identified to be a top risk faced by the mining industry, ranking as a top 3 risk since 2018.²⁵¹ Much of the risk faced by developers lies in the power of communities to negatively impact the reputation of companies.²⁵² The “reputational capital”²⁵³ of a company can be eroded through boycotts, negative publicity, and legal challenges. The extractive industries have embraced the concept of SLO as a defensive measure that is designed to manage social risks and avoid disruptions to resource development projects.²⁵⁴ Avoiding

²⁴⁸ Clair Provost, “Developers risk losing billions if they fail to address land conflicts”, *The Guardian* (19 September 2013), online: <www.theguardian.com/global-development/2013/sep/19/developers-land-rights-conflicts>. See also Daniel M Franks et al, “Conflict translates environmental and social risk into business costs” (2014) 111:21 *Proc Natl Acad Sci USA* 7576 (Daniel Franks et al concluded that the cost of conflict to a major, world-class mining project was approximately \$20 million per week).

²⁴⁹ Banajaree, *supra* note 2 at 144.

²⁵⁰ Brueckner & Eabrasu, *supra* note 204.

²⁵¹ Ernst & Young, “Top mining and metals risks and opportunities in 2022” (7 October 2021), online: <www.ey.com/en_gl/mining-metals/top-10-business-risks-and-opportunities-for-mining-and-metals-in-2022>.

²⁵² Gunningham, Kagan & Thorton, *supra* note 86 at 315.

²⁵³ *Ibid* at 320; See also Joyce & Thomson, “Earning a Social License” *supra* note 207 (“reputation capital” represents a communications bridge that predisposes NGOs, communities and other groups to enter into open discussion rather than hostile opposition. Reputation capital carries with it credibility, such that the up-front costs and risks associated with gaining social acceptability are reduced).

²⁵⁴ Patrik Söderholm & Nanna Svahn, “Mining, regional development and benefit-sharing in developed countries” (2015) 45 *Resources Policy* 78; See also John R Owen & Deanna Kemp, “Social licence and mining: A critical perspective” (2013) 38:1 *Resources Policy* 29.

damage to reputation and profit act as key drivers for corporate investment in attaining a SLO.²⁵⁵

The transactional approach that corporations take in their management of social risks leads to stark differences in the conceptualisation of SLO between communities and businesses.²⁵⁶

SLO literature, which frequently focuses on the concept from a business perspective,²⁵⁷ indicates that there is some consensus that the SLO is a “highly normative concept”²⁵⁸ that prevents an operation from commencing without the consent of the community.²⁵⁹ Some argue that the modern conceptualization of SLO has fostered a disproportionate power dynamic where activists exploit the term to undermine projects.²⁶⁰ Owen and Kemp posit that while SLO has contributed to raising the profile of social issues, it suffers from a critical failure in that it is not able to develop a collaborative developmental agenda for the extractive industries or to provide a means for restoring the lost confidence of impacted communities and stakeholders.²⁶¹

From a legal point of view, the SLO has been described as a “composite concept”²⁶² and a nexus for cross cutting issues – such as environmental protection, sustainable development,

²⁵⁵ Oliver Salzmann, Aileen Ionescu-Somers, and Ulrich Steger, “Corporate License to Operate (LTO): review of the literature and research options.” (2006), online (pdf): *International Institute for Management Development* <www.imd.ch/research/publications/upload/CSM_Salzmann_Ionescu_Somers_Steger_WP_2006_23.pdf>.

²⁵⁶ Sara Bice & Kieren Moffat, “Social licence to operate and impact assessment” (2014) 32:4 *Impact Assessment & Project Appraisal* 259.

²⁵⁷ Nina Hall et al, “Social Licence to Operate: Understanding how a concept has been translated into practice in energy industries” (2015) 86 *J Cleaner Production* 301 at 302.

²⁵⁸ Nwapi, *supra* note 95 at 358; Nigel Bankes, “The Social Licence to Operate: Mind the Gap” (24 June 2015), online: *University of Calgary, Faculty of Law* <ablawg.ca/2015/06/24/the-social-licence-to-operate-mind-the-gap/>.

²⁵⁹ Nwapi, *supra* note 95 at 358.

²⁶⁰ Owen & Kemp, *supra* note 254.

²⁶¹ *Ibid.*

²⁶² Mihaela-Maria Barnes,, “The ‘Social License to Operate’: An Emerging Concept in the Practice of International Investment Tribunals” (2019) 10:2 *J Intl Dispute Settlement* 328.

human rights, free and prior consultation, and the protection of other fundamental rights²⁶³ – that belongs in the realm of transnational public policy.²⁶⁴ In line with this idea, the SLO has been integrated in the United Nations Guiding Principles on Business and Human Rights (UNGPs),²⁶⁵ which has since become the global standard concerning the recognition, respect and protection of fundamental rights.²⁶⁶ SLO is also credited as having influenced the revision of the ILO Tripartite Declaration Concerning Multinational Enterprises and Social Policy²⁶⁷ and the OECD Guidelines for Multiple National Enterprises.²⁶⁸

To date, there is no static procedure by which resource extraction companies can successfully obtain an SLO.²⁶⁹ Equally pressing is the lack of scholarly consensus on determining when exactly an SLO may be said to have been attained.²⁷⁰ The increasing interest in SLO has produced a corresponding increase in the formal treatment of the concept. Acknowledgment

²⁶³ Laurence Boisson de Chazournes, “Fundamental Rights and International Arbitration: Arbitral Awards and Constitutional Law” in Albert Jan Van den Berg, ed, *Arbitration Advocacy in Changing Times* (Alphen aan den Rijn: Wolters Kluwer Law & Business 2011) at 310 (‘Fundamental rights here do not only encompass the rights of investors but also the rights of other stakeholders such as local and indigenous communities).

²⁶⁴ Vaughan Lowe, “Sustainable Development and Unsustainable Arguments” in *International Law and Sustainable Development* (Oxford: Oxford University Press, 1999) 31–34.

²⁶⁵ John Ruggie, “Corporations and Human Rights: A Survey of the Scope and Patterns of Alleged Corporate-Related Human Rights Abuse (Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises)” A/HRC/8/5 (2008) at para 4; John Ruggie, “Protect, Respect and Remedy: A Framework for Business and Human Rights (Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie)” (2008) A/HRC/ 8/5 54; John Ruggie, ‘Business and Human Rights: Towards Operationalizing the “Protect, Respect and Remedy” Framework: Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises’ (2009) A/HRC/11/13 para 46.

²⁶⁶ John Ruggie, ‘Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework (Report of the Special Representative of the Secretary- General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises)’ (2011) A/HRC/17/31.

²⁶⁷ “Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (MNE Declaration) - 5th Edition (March 2017)” (17 March 2017), online (pdf): <*International Labour Organization* <www.ilo.org/emment/Publications/WCMS_094386/lang-en/index.htm> .

²⁶⁸ Organisation for Economic Cooperation and Development, *OECD Guidelines for Multinational Enterprises*, (OECD Publishing, 2011), online (pdf): <www.oecd.org/daf/inv/mne/48004323.pdf>.

²⁶⁹ See Bice, *supra* note 115 at 63.

²⁷⁰ *Ibid.*

of the concept by governments and regulatory entities has added another interpretational layer to the SLO construct and has brewed a new area of contention in SLO discourse.²⁷¹

²⁷¹ Moffat et al, *supra* note 213; See also Gunningham, Kagan & Thornton, *supra* note 86 at 320, 334-5.

Chapter 4

4 Community Development Agreements: The Hardening of a Norm

4.1 Introduction – A Call for Certainty

Conflicts surrounding mining projects cost human lives, time, energy, and substantial sums of money.²⁷² To avoid these costs, mining companies and mining affected communities have increasingly turned to signing contracts with one another.²⁷³ These contracts, known as community development agreements (CDAs), outline the responsibilities and rights of the parties, as well as the governance mechanisms of the corporate and community stakeholders.²⁷⁴ In addition to the economic benefits that CDAs can provide to communities, these contractual tools can also protect the cultural heritage of Indigenous groups when negotiations meaningfully address the imbalance in bargaining power.²⁷⁵

The emerging trend of CDAs in the resource extraction industry stems from the idea that, in order to proceed with resource development operations, companies need to obtain community approval – that is, the social license to operate (SLO). Due to its amorphous nature, the conceptualization of SLO will likely continue to escape definition and characterization. Nonetheless, the concept has been framed as undergoing a process of “juridification” and “hardening”, where the acquisition of the SLO and the expectations held

²⁷² Rachel Davis and Daniel Franks, “Costs of Company-Community Conflict in the Extractive Sector” (January 2020), online (pdf): *Shift Project* <shiftproject.org/wp-content/uploads/2020/01/Costs_of_Conflict_Davis-Franks.pdf>.

²⁷³ Adebayo & Werker, *supra* note 48.

²⁷⁴ O’Faircheallaigh, *supra* note 24 at 223.

²⁷⁵ Ciaran O’Faircheallaigh, “Negotiating Cultural Heritage? Aboriginal–Mining Company Agreements in Australia” (2008) 39:1 *Development & Change* 25.

by stakeholders are increasingly being approached as a matter of law.²⁷⁶ Research in this area indicates a “proliferation of law” into extra-legal areas, including human rights and transnational business ethics, and an increased legislative regulation of corporations and development processes.²⁷⁷

With a SLO, now physically represented and legitimized by a signed CDA, companies and investors can mitigate the risks associated with protests and conflict that can lead to significant disruption of mining activities.²⁷⁸ However, despite the now widespread adoption of these contractual tools, many of the potential benefits of CDAs are unknown or not well-understood.²⁷⁹

4.2 Legal Reform and The “Hardening” of a Norm

Prior to the turn of the century, state-owned enterprises and industries were privatized and opened for foreign investment, and resource extraction corporations began operating in areas with loose regulation and little oversight.²⁸⁰ However, in the early 2000s, some states and international actors realized that these policy reforms did little to stimulate national development, increase social welfare, and bolster the economy.²⁸¹ Consequently, over the last

²⁷⁶ Mihaela-Maria Barnes, “The ‘Social License to Operate’: An Emerging Concept in the Practice of International Investment Tribunals” (2019) 10:2 J Intl Dispute Settlement 328 at 329; See also Karin Buhmann, “Integrating human rights in emerging regulation of Corporate Social Responsibility: the EU case” (2011) 7:2 Intl JL in Context 139.

²⁷⁷ *Ibid.*

²⁷⁸ Jason Prno & D Scott Slocombe, “Exploring the origins of ‘social license to operate’ in the mining sector: Perspectives from governance and sustainability theories” (2012) 37:3 Resources Policy 346.

²⁷⁹ Craik, Gardner & McCarthy, *supra* note 48.

²⁸⁰ See Bonnie K Campbell, ed, *Mining in Africa: regulation and development* (London, England: Pluto Press, 2009); Gavin Bridge, “Mapping the Bonanza: Geographies of Mining Investment in an Era of Neoliberal Reform” (2004) 56:3 The Professional Geographer 406; Roy Maconachie & Gavin Hilson, “Editorial introduction: the extractive industries, community development and livelihood change in developing countries” (2013) 48:3 Community Development J 347–359.

²⁸¹ *Ibid.*

20 years, efforts have been made to overhaul legislation and renegotiate existing mining agreements. This period has seen the development of a new wave of regulatory codes that reflect voluntary, regional, and transnational initiatives that emphasize transparency and accountability in the resource extraction industries.²⁸² Concepts that are intended to enable companies to obtain community acceptance have been legislated into different mining laws around the world.²⁸³

A study conducted by Kendra Dupuy reveals that “[b]etween 1986 and 2012, thirty-two states adopted new provisions into their mining laws that required firms and/or governments to generate positive socio-economic outcomes for local communities affected by mining operations.”²⁸⁴ The institutionalization of voluntary initiatives and SLO may elevate the concept above the realm of corporate social responsibility and other voluntary initiatives and help address the criticisms described above.²⁸⁵

CDAs, also known as “impact benefit agreements”, are common in these new provisions and are considered to be instrumental in attaining a SLO. These agreements are, in theory, a new way to improve outcomes and reduce conflict between companies and communities “by providing a stable set of expectations among stakeholders and community members, transparency and measurement in regard to the fulfillment of a company’s promises, and a legal/quasi legal document that could potentially be enforced.”²⁸⁶ Over the last five years, CDAs have become the primary vehicle by which mining companies reach an agreement with

²⁸² Campbell, *supra* note 280; Besada & Martin, *supra* note 228; Dupuy, *supra* note 77 at 33.

²⁸³ Nwapi, *supra* note 95 at 361.

²⁸⁴ Dupuy, *supra* note 77 at 26.

²⁸⁵ Nwapi, *supra* note 95.

²⁸⁶ Hira & Busumtwi-Sam, *supra* note 26 at 3.

local communities for access to natural resource reserves in exchange for a variety of benefits.²⁸⁷

4.3 The Agreement Making Process

The agreement making process for CDAs tends to vary with each agreement but can be broken down into several different stages.

4.3.1 Pre-Negotiation Stage

The pre-negotiation stage involves the company and the community or communities laying the groundwork for negotiations.²⁸⁸ The pre-negotiation stage provides the parties with the opportunity to approach and voice concerns regarding significant issues and conflicts, without the risk of a formal commitment.²⁸⁹ Precursor agreements are common at this stage, such as a negotiating framework or a memorandum of understanding which can set out the rules that govern the process for negotiating the CDA.²⁹⁰

4.3.2 Research and Consultation Stage

Generally, this phase includes stakeholder mapping and planning to determine who stands to be affected by the project – that is, the interested and proximate communities.²⁹¹ The company at this stage meets with community representatives to understand capacity limitations and the infrastructure that is required or desired in the place of the project.

²⁸⁷ *Ibid.*

²⁸⁸ Loutit et al, *supra* note 15 at 34.

²⁸⁹ *Ibid.*

²⁹⁰ *Ibid* at 70.

²⁹¹ *Ibid.*

4.3.3 Negotiation and Endorsement of Final Agreement

Once the agreement making process has concluded, the key focus should be the monitoring and the implementation of the agreement to ensure that the parties to the CDA comply with their accepted obligations and that the benefits are distributed in the manner prescribed in the agreement. Importantly, many agreements do not provide any insight or details regarding the first and second stages of the agreement-making process. Rather, knowledge of practices in these early stages tends to rely largely on secondary literature and analysis.²⁹²

4.4 Content of CDAs

As noted, the content of CDAs varies considerably because, as negotiated agreements, they are highly adaptable to local circumstances and priorities.²⁹³ Generally, CDAs provide community consent for proposed or existing resource development activity in return for a package of community benefits and mitigation measures.²⁹⁴ Benefits can include participation of and preference for local businesses in procurement and contracting;²⁹⁵ preferential access to employment opportunities, and training programs to enhance ‘employability’ of community members;²⁹⁶ and a revenue stream for the community related to the scale of the profitability of the operation.²⁹⁷ Impact mitigation measures can focus on management and protection of

²⁹² *Ibid.*

²⁹³ O’Faircheallaigh, *supra* note 16 at 96

²⁹⁴ *Ibid* at 97.

²⁹⁵ Murray Browne & Krista Robertson, “Benefit Sharing Agreements in British Columbia: A Guide for First Nations, Businesses and Governments” (2010), online (pdf) <*Government of British Columbia* <www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/natural-resource-use/land-water-use/crown-land/land-use-plans-and-objectives/westcoast-region/great-bear-forest/hw03b_benefit_sharing_final_report.pdf >; Ginger Gibson & Ciaran O’Faircheallaigh, “IBA Community Toolkit: Negotiation and Implementation of Impact and Benefit Agreements” (2010), online (pdf): *Gordon Foundation* <gordonfoundation.ca/wp-content/uploads/2017/03/IBA_toolkit_web_Sept_2015_low_res_0.pdf>.

²⁹⁶ Agbaitoro, *supra* note 47.

²⁹⁷ *Ibid.*

a community's cultural heritage;²⁹⁸ and community participation in decision making and environmental management.²⁹⁹ The last measure is of particular interest given the tendency for states to reduce their involvement in environmental regulation.³⁰⁰

4.5 A Question of Effectiveness – Two Different Frames

CDAs between mining companies and local communities are negotiated in the majority of all major mining projects in Canada and Australia, and increasingly in developing nations across the world.³⁰¹ Clearly, CDAs present potentially substantial benefits for communities that are often seriously disadvantaged with regards to access to economic opportunities, infrastructure, and social services. However, as will be discussed, agreements can result in significant changes to the relationships that communities have with the state, including the legal and regulatory processes available to them.³⁰²

The ultimate question that permeates literature on CDAs relates to their roles in the resource development process and whether they adequately address the interests of project proponents and impacted communities. In other words, who do these CDAs truly benefit? What is their purpose and impact? In a systemic review of the literature by Cameron Gunton and Sean Markey,³⁰³ it was revealed that there are two principal ways that the role of CDAs have been framed:

²⁹⁸ O'Faircheallaigh, *supra* note 16.

²⁹⁹ Jen Jones & Ben Bradshaw, "Addressing Historical Impacts Through Impact and Benefit Agreements and Health Impact Assessment: Why it Matters for Indigenous Well-Being" (2015) 41 Northern Rev 81.

³⁰⁰ Guillaume Peterson St-Laurent & Philippe Le Billon, "Staking claims and shaking hands: Impact and benefit agreements as a technology of government in the mining sector" (2015) 2:3 Extractive Industries & Society 590 at 592.

³⁰¹ O'Faircheallaigh, *supra* note 24.

³⁰² *Ibid.*

³⁰³ Gunton & Markey, *supra* note 9.

- 1) Instruments that reinforce and legitimize the status quo.
- 2) Instruments that facilitate sustainable development and improve community outcomes.

These are discussed in depth in the review by Gunton & Markey, but some points warrant discussion to provide colour to our analysis.

4.5.1 Instruments That Reinforce and Legitimize the Status Quo of Natural Resource Governance

In this first frame, CDAs are treated as a negative force potentially leaving communities worse off over the long run. The “status quo of natural resource governance” refers to the arrangements and methods by which private project developers, MNCs and senior levels of government target and maintain control over natural resources and lands.³⁰⁴ In doing so, community access to the project benefits becomes limited which leaves community members to shoulder the burden of adverse impacts with little to gain.³⁰⁵

There are several prominent themes outlined in the review, asserting that CDAs:

- Perpetuate unequal power dynamics between communities, project developers, and senior levels of government;³⁰⁶

³⁰⁴ O’Faircheallaigh, *supra* note 24.

³⁰⁵ Sunrita Sarkar et al, “Mining Community Development Agreements-Practical Experiences and Field Studies” (2017), [online \(pdf\): <static1.squarespace.com/static/5bb24d3c9b8fe8421e87bbb6/t/5c29397c8985832b1978115d/1546205568294/CDA-Report-FINAL.pdf>](https://static1.squarespace.com/static/5bb24d3c9b8fe8421e87bbb6/t/5c29397c8985832b1978115d/1546205568294/CDA-Report-FINAL.pdf); Victor Cueva, “Impact Benefit Agreements and economic and environmental risk management in the Arctic” in Cécile Peladeux & Ellen Margrethe, eds, *Governance of Arctic Offshore Oil and Gas*, (London, UK: Routledge, 2017) at 219. Andy Hira & James Busumtwi-Sam, “Mining Community Benefits in Ghana: A Case of Unrealized Potential. Canadian International Resources and Development Institute” (2018), [online \(pdf\): Simon Fraser University <www.sfu.ca/~ahira/pdf/thought-pieces/Ghana%20National%20Policies%20for%20Mining%20Benefits%20Study%20Hira%20Busumtwi%20Sam%20Dec%202018%202018.pdf>](https://www.sfu.ca/~ahira/pdf/thought-pieces/Ghana%20National%20Policies%20for%20Mining%20Benefits%20Study%20Hira%20Busumtwi%20Sam%20Dec%202018%202018.pdf). Gordon Shanks & Sandra Lopes, “Sharing in the benefits of resource developments: a study of First Nations-industry impact benefits agreements” (March 2006), [online \(pdf\): Public Policy Forum <ppforum.ca/wp-content/uploads/2018/05/Sharing-in-the-Benefits-of-Resource-Development-PPF-report.pdf>](https://ppforum.ca/wp-content/uploads/2018/05/Sharing-in-the-Benefits-of-Resource-Development-PPF-report.pdf).

³⁰⁶ Gunton & Markey, *supra* note 9.

- Enable senior levels of government to abdicate their responsibilities to provide services to communities;³⁰⁷
- Perpetuate injustices and/or disagreements within or between neighboring communities;³⁰⁸ and
- Undermine the role of other types of regulatory mechanisms.³⁰⁹

In theory, CDAs could help to manage the uneven bargaining power among foreign companies, the host government, and the local communities and create a more stable foundation for mining community relations.³¹⁰ This frame emphasizes that there are reasons to question this premise. A review of CDA literature reveals the absence of a common framework or universally accepted set of standards on CDAs to guide negotiation and implementation across countries.³¹¹ Communities' capacity in negotiating these agreements is limited, and the agreements often lack minimum standards for disclosure of details.³¹² Thus, they are largely a product of the negotiating power of the parties, which – as previously mentioned – is predominantly in favour of corporations and host governments.³¹³

Processes for ratifying the agreements and their use as an indicator of social acceptance have also been called into question. CDA negotiations tend to be initiated by project developers under existing policy institutions and processes that favor industry development.³¹⁴ Under this frame, CDAs prioritize project certainty and an expeditious process over achieving positive

³⁰⁷ *Ibid.*

³⁰⁸ *Ibid.*

³⁰⁹ *Ibid.*

³¹⁰ Hira & Busumtwi-Sam, *supra* note 26.

³¹¹ See Cascadden, Gunton & Rutherford, *supra* note 37.

³¹² Hira & Busumtwi-Sam, *supra* note 26 at 3.

³¹³ *Ibid.*

³¹⁴ Gunton & Markey, *supra* note 9; See also Alcantara & Morden, *supra* note 47; Dreyer, *supra* note 30.

outcomes for communities.³¹⁵ In some cases, communities sign agreements because they believe they have little choice and that a project will go ahead regardless of whether they approve it or not.³¹⁶

4.5.2 Tools for Facilitating Sustainable Development

In the second frame, CDAs are defined as instruments that facilitate sustainable development. Literature under this frame views CDAs as a positive force, emphasizing their ability to identify and contribute to sustainable community development, including the social, economic, and environmental wellbeing of a community. There are several prominent themes under this frame, arguing that CDAs:

- Facilitate economic and social development in remote communities;³¹⁷
- Restructure power dynamics and allow communities to assert sovereignty;³¹⁸
- Persist as durable policy instruments in the long term;³¹⁹
- Mitigate the adverse impacts of natural resource development;³²⁰
- Secure community approval;³²¹ and
- Reduce conflict between communities, project developers, and senior levels of government.³²²

Under this lens, CDAs offer the opportunity for communities to share in the economic benefits generated by resource extraction. This may be through the revenue generated from

³¹⁵ Gunton & Markey, *supra* note 9.

³¹⁶ O’Faircheallaigh, *supra* note 24.

³¹⁷ Gunton & Markey, *supra* note 9.

³¹⁸ *Ibid.*

³¹⁹ *Ibid.*

³²⁰ *Ibid.*

³²¹ *Ibid.*

³²² *Ibid.*

the projects³²³ and non-revenue benefits such as training opportunities,³²⁴ local business opportunities,³²⁵ and improvement of community infrastructure.³²⁶ CDAs may offer communities access to an income stream in the form of royalty or other payments. CDAs may also assist in meeting a community's short-term and long-term needs relating to health, education, and housing. For example, Aboriginal traditional owners of the Argyle diamond mine project in Western Australia have been able to use the revenues from a CDA signed with Argyle Diamonds Ltd to help facilitate and expand Aboriginal business, enhance education, improve literacy, and support youth development initiatives.³²⁷

Broadly, access to income from resource development projects can provide local communities with a degree of autonomy that allows them to establish their own priorities, rather than needing to rely on public funding based on the priorities of the state.³²⁸ Some argue that this serves to bolster the negotiating power of such communities when dealing with the state in relation to provision of services, land title, and governance.³²⁹ There are concerns that, due to a new stream of income from the project, the government will cut its expenditure and services for the communities.³³⁰ Ciaran O'Faircheallaigh argues that, if done with care and proper judgement, the additional mining revenues can be used as leverage for greater public expenditure for the community and the impacted region.³³¹

³²³ See Alcantara & Morden, *supra* note 47; Dreyer, *supra* note 30.

³²⁴ Agbaitoro, *supra* note 47.

³²⁵ Shanks & Lopes, *supra* note 305.

³²⁶ Gunton & Markey, *supra* note 9.

³²⁷ O'Faircheallaigh, *supra* note 24.

³²⁸ O'Faircheallaigh, *supra* note 15.

³²⁹ *Ibid.*

³³⁰ *Ibid.*

³³¹ *Ibid.*

Importantly, negotiating a CDA may assist in attaining community approval and acceptance for resource development projects; that is, the SLO.³³² From an industry perspective, obtaining an SLO is important for project developers to increase project certainty, protect investments, and manage the expectations of shareholders and local stakeholders.³³³ Research indicates that CDAs are highly valued by shareholders when communities have strong property rights protections, and a history of protests and social mobilization.³³⁴ Such communities are more likely to enter into conflict with the development company, leading to disruptions and delays that negatively impact value. Firms want to invest into resource rich states, but generally lack sufficient information about the quality of the investment environment and its risk profile: Will the government respect the legal permits and investment for the mining project in question? Will local communities uphold the social contract and acceptance? What, in fact, is the social contract? What are its parameters? These are all questions that a CDA can address.

In theory, CDAs can help restructure the power dynamics in a given environment, and help enable communities to assert sovereignty over territories and natural resources.³³⁵ While outcomes may not be guaranteed, and the needs of each community may vary across different project sites, environments, and jurisdictions, CDAs can help address issues that are not adequately addressed through alternative legal mechanisms and that could otherwise motivate conflict or litigation.³³⁶

³³² Bruckner, *supra* note 15; Hira & Busumtvi-Sam, *supra* note 26 at 3.

³³³ Gunton & Markey, *supra* note 9.

³³⁴ Sinziana Dorobantu & Kate Odziemkowska, “Valuing Stakeholder Governance: Property Rights, Community Mobilization, and Firm Value: Valuing Stakeholder Governance” (2017) 38:13 Strategic Management J 2682 at 2683; See also Adebayo & Werker, *supra* note 48.

³³⁵ Gunton & Markey, *supra* note 9.

³³⁶ *Ibid.*

4.6 Variability in Outcomes and Questions of Evaluation

4.6.1 Variability

The limited research that has been effected on CDAs has revealed that the contents and outcomes of CDAs are highly variable.³³⁷ As mentioned above, it is problematic that little empirical work has been done to understand how and why these CDAs differ. There are some exceptions to this trend however, most notably seen in the work of Ciaran O’Faircheallaigh who conducted a comprehensive empirical study examining 45 agreements across Australia’s major mining regions. Roughly 25% of agreements represented strongly positive outcomes for Indigenous signatories, offering substantial economic benefits, environmental preservation and management, and protection of cultural heritage. At the other end of the spectrum, 25% of agreements provided for minimal financial benefits, with little to no role in environmental or cultural heritage management for the Indigenous signatories. The remaining 50% were spread across the spectrum between these two extremes.³³⁸ This pattern is consistent with other research focused on CDAs in Australia,³³⁹ and echoes findings within the Canadian context.³⁴⁰ Other research indicates that CDAs, even in successful cases, generally fail to meet stakeholder expectations. A study by Jason Prno found that while CDAs delivered benefits to community members to varying degrees, most beneficiaries of the agreement expressed disappointment in the final form that the economic and social benefits took.³⁴¹ The details of CDAs are generally not well known in communities, due to the confidentiality of these agreements or poor communication and information sharing by the signatory parties.

³³⁷ O’Faircheallaigh, *supra* note 34 at 2.

³³⁸ *Ibid.*

³³⁹ *Ibid.*

³⁴⁰ *Ibid.*

³⁴¹ Prno, Bradshaw & Lapierre, *supra* note 35.

What explains this variability? Which factors contribute to CDA success in negotiation and implementation? Three possible explanations are outlined in the literature. The first is offered by researchers who propose that CDAs are products of neo-liberal governance strategies that have been designed to maintain corporate and state power and to continue the marginalization of Indigenous peoples.³⁴² A second is that outcomes are determined by the legal regime of the country where the project is situated in.³⁴³ The third posits that variable outcomes could be the result of institutional differences affecting the organizational, political, and negotiating capacity of local communities and Indigenous peoples when negotiating the agreements.³⁴⁴

4.6.2 Instruments of Neo-Liberal Governance Strategies

Canadian and Australian academic writing on negotiated agreements in the resource development context tends to be dominated by the neo-liberal perspective.³⁴⁵ The arguments in this realm of theory rely on analyzing the nature of modern, liberal democratic states and their relations with the actors involved in these agreements, namely corporations and Indigenous peoples.³⁴⁶

At the heart of the company-community power asymmetries are questions about equity and the distribution of the costs and benefits of resource exploitation.³⁴⁷ How should society allocate scarce resources among individuals? With regards to the benefits of extraction, who in the community should receive the financial benefits and how much of it are they entitled

³⁴² *Ibid.*

³⁴³ O'Faircheallaigh, *supra* note 34 at 2.

³⁴⁴ O'Faircheallaigh, *supra* note 15; Dupuy, *supra* note 77.

³⁴⁵ O'Faircheallaigh, *supra* note 15 at 3.

³⁴⁶ *Ibid.*

³⁴⁷ David Bradley et al "Distribution and Redistribution in Postindustrial Democracies" (2003) 55:2 World Politics 193.

to?³⁴⁸ Questions of distributive fairness and justice are generally addressed by governments through the imposition of various policies and law. The crux of this argument then is that the direct negotiation of CDAs between industry and local communities has allowed for the host state to withdraw from its role of regulating relations between the two, which has left the communities vulnerable to exploitation.³⁴⁹

Some academics in this realm assert that CDAs are a “new form of cultural and economic colonization insofar as [they] promote resource extraction in Indigenous territories and restrict sovereign control of communities over affected lands.”³⁵⁰ Agreements are also said to not be representative of a widespread involvement of the communities or Indigenous signatories, but rather to be dominated by lawyers and community elites.³⁵¹

Another popular critique from this perspective is that the agreements focus almost exclusively on generating and distributing the economic benefits of resource development projects. In doing so, the agreements are said to ignore or largely discount their cultural and environmental impacts and to preclude alternative development strategies that would prioritize the cultural and environmental values of the host community.³⁵² By committing to a CDA, community leaders also commit their community to a specific model of development that favors

³⁴⁸ Dupuy, *supra* note 77 at 21.

³⁴⁹ O’Faircheallaigh, *supra* note 34.

³⁵⁰ Emilie Cameron & Tyler Levitan, “Impact and Benefit Agreements and the Neoliberalization of Resource Governance and Indigenous-State Relations in Northern Canada” (2014) 93:1 *Studies in Political Economy* 25 at 33.

³⁵¹ Martin Papillon & Thierry Rodon, “Proponent-Indigenous agreements and the implementation of the right to free, prior, and informed consent in Canada” (2017) 62 *Environmental Impact Assessment Rev* 216; St-Laurent & Billon, *supra* note 300.

³⁵² Ciaran O’Faircheallaigh, “Explaining outcomes from negotiated agreements in Australia and Canada” (2021) 70 *Resources Policy* 101922 at 4; See Ken J Caine & Naomi Krogman, “Powerful or Just Plain Power-Full? A Power Analysis of Impact and Benefit Agreements in Canada’s North” (2010) 23:1 *Organization & Environment* 76.

quantifiable benefits (e.g. employment, education, income) over more nuanced and complex facets of their culture and environment.³⁵³

However, this realm of theory is generally not based on any detailed analysis of the actual agreements themselves. Emphasized by O’Faircheallaigh (2021), the factual accuracy of the neo-liberal critique is open to serious question:

“For instance, as the examples...from the Kimberley and Labrador regions illustrate, some agreements are far from restricted in their focus to economic matters and deal extensively with environmental issues and questions of sustainability. These examples also highlight the fact that not all agreements contain ‘no objection’ clauses, with some specifically protecting the rights of Aboriginal signatories to object to project approvals. Far from being ‘dominated by lawyers and Aboriginal elites’, many negotiations involve extensive community participation”³⁵⁴

Moreover, while the neo-liberal critique can well account for the less positive outcomes of CDA negotiations, it does not explain the variability of positive outcomes that have been documented repeatedly across a variety of different contexts. For example, Innu and Inuit Peoples in Labrador in the Province of Newfoundland and Labrador in Canada, negotiated agreements for the Voisey’s Bay nickel project which affords them a key role in project design and environmental management, and provides for substantial economic and financial benefits.

The Voisey’s Bay agreements:

³⁵³ See Papillon & Rodon, *supra* note 351.

³⁵⁴ O’Faircheallaigh, *supra* note 34 at 4.

- Include royalty payments linked to the value of production, with a further upside when nickel prices are high;³⁵⁵
- Require that the project be developed on a scale much smaller than that desired by project developer. The smaller scale was desired by the communities to reduce the project's environmental impact, and to prolong mine life. This allows the Innu and Inuit more time to develop the capacity to take full advantage of economic opportunities created by the project.³⁵⁶
- Require Innu or Inuit environmental monitors to be on site 365 days a year;³⁵⁷
- Give Innu and Inuit a role in the grant of environmental permits for the project;³⁵⁸
- Include extensive and detailed provisions to encourage Aboriginal employment, including specific provisions on employment of Innu and Inuit women.³⁵⁹

The Voisey's Bay agreement reflects a shift in power over fundamental issues such as the project scale and decisions regarding project infrastructure. In sum then, this perspective does not do enough to analyze and understand the degree of variability between different agreement provisions and their outcomes, and so an alternative explanation must be sought.

4.6.3 Differences in Legal Regimes

Another explanation is that variable outcomes reflect differences in the legal regimes here the resource development project is situated. For example, Indigenous landowners in Australia have a weak position with regards to recognition of their rights and bargaining power.³⁶⁰

Under the *Native Title Act*, Indigenous landowners enjoy only a "Right to Negotiate" with developers. If a negotiated agreement is not achieved within six months, the resource

³⁵⁵ O'Faircheallaigh, *supra* note 16 at 190-2.

³⁵⁶ *Ibid.*

³⁵⁷ *Ibid.*

³⁵⁸ *Ibid.*

³⁵⁹ *Ibid.*

³⁶⁰ *Ibid.*

development company may seek the approval to proceed from the National Native Title Tribunal, a government appointed tribunal. In an analysis by Lily O'Neill et al,³⁶¹ it was found that in 115 out of 118 cases, leading up to May 2019, approval for development was given.³⁶² Additionally, where a matter is referred to the Tribunal for a decision, the Indigenous landowners may no longer obtain rights to a royalty-type payment as a component of the compensation provided from the project. In sum, Indigenous landowners face enormous pressure to reach an agreement during the six-month “Right to Negotiate” period – a pressure which is not applied to developers, who thus obtain a very strong bargaining position.³⁶³

In the Canadian context, until the early-1990s, CDAs were mainly negotiated between government and mining companies, often excluding Indigenous communities.³⁶⁴ In the modern day, the government typically does not play any direct role in the negotiation of these agreements that are also not regulated by any legislation.³⁶⁵ In response to conflicting economic and political pressuring arising from dissatisfied communities, the Canadian government developed “regimes to promote and constrain engagement between extractive firms and affected communities in order to delegate...the responsibility of social mediation onto extractive projects themselves.”³⁶⁶

³⁶¹ Lily O'Neill, *A Tale of Two Agreements: Negotiating Aboriginal Land Access Agreements in Australia's Natural Gas Industry* (PhD dissertation, University of Melbourne, 2017) [unpublished].

³⁶² O'Faircheallaigh, *supra* note 34 at 4.

³⁶³ *Ibid.*

³⁶⁴ Michael Hitch, *Impact and Benefit Agreements and the Political Ecology of Mineral Development in Nunavut* (PhD dissertation, University of Waterloo, 2006).

³⁶⁵ St-Laurent & Billon, *supra* note 300 at 594; See Gibson & O'Faircheallaigh, *supra* note 295.

³⁶⁶ David Szablowski, “Operationalizing Free, Prior, and Informed Consent in the Extractive Industry Sector? Examining the Challenges of a Negotiated Model of Justice” (2010) 30:1–2 *Canadian J Development Studies* 111 at 113.

This led to the adoption of market-related mechanisms proposed by industry to improve its social and environmental legitimacy,³⁶⁷ which has been characterized by “a shift from a traditional (i.e. state-community) to a more liberal system of governance where non-state actors play a central role in governance through company-community agreements.”³⁶⁸ The result of this is a “hybrid regime” of governance, marked by a “selective absence” of the state in negotiations of CDAs, thereby shifting responsibility and power to mining companies.³⁶⁹ This has been framed as a redefining of the government’s role through a “privatization of certain government functions.”³⁷⁰

However, the legal context itself does not offer an adequate explanation for the variability in provisions and outcomes of CDAs – there can be great variability in the robustness and success of these agreements *within the same legal jurisdiction*.³⁷¹ If the variability was purely a matter of the legal regime, then the variability would be better accounted for.

4.6.4 Confidentiality

Transparency is a particularly important issue when discussing CDAs and their variability. As mentioned above, CDAs generally include confidentiality clauses that limit access to the content of the agreements.³⁷² By definition, confidentiality clauses restrict access of these documents to the public and prevent third parties or similarly positioned communities from using these agreements as a reference point. Granted, there are reasons for why confidentiality

³⁶⁷ Bonnie K Campbell, Myriam Laforce & Bruno Sarrasin, *Pouvoir et régulation dans le secteur minier: leçons à partir de l'expérience canadienne* (Québec: Presses de l'Université du Québec, 2012).

³⁶⁸ St-Laurent & Billon, *supra* note 300.

³⁶⁹ *Ibid* at 595.

³⁷⁰ *Ibid*.

³⁷¹ O'Faircheallaigh, *supra* note 34 at 4.

³⁷² Alcantara & Morden, *supra* note 47 at 257.

clauses are commonly used. Some Indigenous groups value confidentiality clauses “out of fear that federal and provincial governments could alter their funding relationship in light of what is established in the [CDA].”³⁷³ However, confidentiality carries clear implications for the company-community power asymmetry in practice. Industry parties benefit from such clauses because they limit the ability of Indigenous groups and signatory communities to examine and leverage other agreements. While companies and industry partners may operate with the endless trove of corporate and expert knowledge, supplemented with teams of lawyers and consultants, the local communities must operate without access to the experiences of other communities.³⁷⁴ Confidentiality provisions may also “severely constrain the capacity of Aboriginal groups to communicate with the media and other stakeholders”.³⁷⁵

The transparency issue brings focus to the differences in the negotiating capacity of the signatories. CDAs are highly technical documents that are, generally speaking, “more closely catered to industry than Indigenous approaches to issues like cultural and ecological conservation.”³⁷⁶ A given community may have only had the opportunity to participate in a single CDA negotiation, whereas major resource development companies may be parties to dozens of CDAs in a multitude of different states and legal jurisdictions.

4.6.5 A Collective Action Problem – Institutional Failures

At the heart of it, the issues discussed thus far represent a collective action problem. Theories on collective action and human behavior tell us that groups of individuals with common

³⁷³ *Ibid.*

³⁷⁴ *Ibid.*

³⁷⁵ Gibson & O'Faircheallaigh, *supra* note 295 at 49.

³⁷⁶ Alcantara & Morden, *supra* note 47 at 257.

interests, such as the provision of goods and services that will benefit society, will not necessarily attempt to work together to further their collective interest. From this perspective, individuals generally have few incentives to provide public goods, given that many people will benefit regardless of whether they contribute. The individual perceives themselves as bearing the greatest cost for providing the good – a perspective that leads to sub-optimal social behavior based on self-interest.³⁷⁷

Mancur Olson has outlined three ways to address collective actions problems: (1) through small groups; (2) coercion; and (3) by providing group members with selective incentives.³⁷⁸

Kendra Dupuy posits that there is a fourth solution: the state can “bear the entire cost of, and assume the responsibility for, providing public goods.”³⁷⁹ In light of the market failure to equitably distribute the benefits of resources, the state can be considered an institutional solution to help reduce the transaction costs of negotiation. O’Faircheallaigh found that neither the scale of the mining, the type of company involved, the corporate policies, nor the timing of the negotiations could account for the overall variability in outcomes. Rather, the analysis clearly demonstrated the impact of overarching legislative frameworks and institutional organization.³⁸⁰

A principal argument relied on in this work is that institutional quality determines, to a large extent, the outcomes of resource wealth. The ability of extractive industries to achieve an equitable distribution of benefits depends not on corporate altruism, but rather on well-

³⁷⁷ Dupuy, *supra* note 77 at 76.

³⁷⁸ Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* (Harvard University Press, 1971).

³⁷⁹ Dupuy, *supra* note 77 at 76.

³⁸⁰ O’Faircheallaigh, *supra* note 15 at 202

designed institutional frameworks and policies that ensure “prudent management and allocation of extractive industry resource benefits.”³⁸¹ Weak states, in contrast to this point, lack the institutional capacity or willingness to provide the public goods and services required to meet basic human needs.³⁸² These states, lacking the ability to carry out their critical responsibilities, are often corrupt, poor, authoritarian, politically unstable, and have a weak rule of law.³⁸³

The weaker a state is, the less likely it is to be able to provide public goods and services.³⁸⁴ As such, one solution for such states is to allocate the responsibility to non-state actors, such as non-governmental organizations or private companies. States can use hard law and financial incentives to target mining forms to assume this responsibility. Problematically, these private companies may lack incentives to do socially desirable things³⁸⁵ and do not necessarily internalize the negative externalities generated by extractive activities – rather, such externalities are often shouldered by those living in proximity to the mining operations.

The distributional imbalance of the costs and benefits of mining is not only a market failure, but also a political one. To turn resource wealth into economic development for communities proximate to the extraction, some states have adopted new legislation to rectify the imbalance, including legislation mandating CDAs or direct revenue distribution to the community. Distribution of mining revenues and benefits to local communities requires the presence of

³⁸¹ Thomas Akabzaa, “Mining in Ghana: Implications for National Economic Development and Poverty Reduction” in Bonnie Campbell, ed, *Mining in Africa: Regulation and Development* (Ottawa: Pluto Press, 2009) at 209.

³⁸² Susan Rice & Stewart Patrick, “Index of State Weakness in the Developing World” (26 February 2008), online: *The Brookings Institute* <www.brookings.edu/research/index-of-state-weakness-in-the-developing-world/>.

³⁸³ Dupuy, *supra* note 77.

³⁸⁴ *Ibid.*

³⁸⁵ Matthew Potoski & Aseem Prakash, *Voluntary Programs: A Club Theory Perspective* (Cambridge, MA: The MIT Press, 2009) at 1.

strong institutions at all levels to prevent corruption and elite capture in the collection, transfer, and use of funds.³⁸⁶ Designing good institutions to facilitate equitable outcomes for communities requires an understanding of the interests of the actors involved, as well as understanding the different tools available to address the problem. As mentioned, CDAs are an emerging model for providing communities access to development initiatives and benefits. As they become increasingly adopted into legislation across the world, it is imperative that more work be done to understand the role that they play, their efficacy, and whether they provide a solution to institutional failures.

³⁸⁶ Erika Weinthal & Pauline Jones Luong, “Combating the Resource Curse: An Alternative Solution to Managing Resource Wealth” (2006) 4:1 Perspectives on Politics 35; Ross, *supra* note 63 at 239.

PART II: THEORY TO PRACTICE – A QUESTION OF
EVALUATION

Chapter 5

5 An Evaluative Framework for CDAs

5.1 Introduction – A Black Box for Negotiation

Theoretically, CDAs can help manage the uneven bargaining power between companies and host communities, and create a more stable foundation for project relations.³⁸⁷ However, the lack of guidance and quantifiable metrics undermines this premise. A review of CDAs by the World Bank made note of the absence of a common framework and universal set of guidelines across countries.³⁸⁸ Ramsey Hart writes that while CDAs have helped some communities increase their oversight of mining areas, the capacity of the communities to negotiate the agreements is limited. As a result, the agreements often lack minimum standards for disclosure of details and largely stand as a product of the negotiating power of communities and their lawyers.³⁸⁹ In some cases, communities are pressured to sign agreements because they feel as that they have little choice in the matter on the whole and that the project would go ahead regardless of whether they protest or not.³⁹⁰ Such views are reinforced repeatedly throughout the literature.³⁹¹

While CDAs can be an effective means of distributing project benefits and attaining a SLO, their effectiveness is contingent on the context and structure of the agreement.³⁹² To date, much of the literature in this realm has focused on the implementation of the agreements with

³⁸⁷ Hira & Busumtwi-Sam, *supra* note 26 at 3.

³⁸⁸ *Ibid.*

³⁸⁹ *Ibid.*

³⁹⁰ Anil Hira, “The hollow core: breakdowns in global governance of CSR” (2020) 6:4–5 Global Affairs 461; O’Faircheallaigh, *supra* note 24.

³⁹¹ Hira & Busumtwi-Sam, *supra* note 26 at 3.

³⁹² Cascadden, Gunton & Rutherford, *supra* note 37.

little focus on the provisions of the agreements themselves. What should be included in a CDA is surprisingly ambiguous, given that these tools have become industry norms.³⁹³ The lack of clear metrics for evaluating these agreements impacts communities' perceptions of the expected outcomes and what is actually achieved.³⁹⁴ This is not to say that there is no research that outlines guidelines and best practices for CDAs – to the contrary, a review of the literature shows at least 30 publications that suggest best practices.³⁹⁵ Yet, while these publications make important contributions, the majority of them fail to provide a complete list of all the best practices that are outlined across a review of the entire literature. In addition, best practices provided for in majority of these publications “are not explicitly defined such that they can be easily implemented.”³⁹⁶

Maggie Cascadden, in collaboration with Thomas Gunton and Murray Rutherford, took note of this and recently published a comprehensive summary of the theory and best practices surrounding CDAs, synthesizing them into a framework to guide the evaluation of CDA provisions and their implementation.³⁹⁷ The framework, in addition to consolidating a list of best-practices for CDAs, provides for explicit sub-criteria and indicators in the form of a checklist that allows for an easier set of guidelines in negotiating, designing, and evaluating CDAs.³⁹⁸ The Cascadden-Gunton-Rutherford evaluation framework is a significant step towards crafting a consolidated theory to unify the different frames and perspectives on

³⁹³ See Cascadden, Gunton & Rutherford, *supra* note 37.

³⁹⁴ Hira & Busumtwi-Sam, *supra* note 26 at 4.

³⁹⁵ See Cascadden, Gunton & Rutherford, *supra* note 37.

³⁹⁶ *Ibid.*

³⁹⁷ *Ibid.*

³⁹⁸ *Ibid* at 6.

CDAs. This framework allows for the use of a uniform set of criteria to evaluate the provisions and implementation of CDAs. As noted by Cascadden et al:

“Ongoing research is...required to refine definitions and test sub-criteria and indicators where necessary to make the framework easier to apply. Although an effort has been made to make the indicators as explicit as possible, the framework can be improved by increasing precision and clarity in the definition of the indicators based on empirical evaluation.”³⁹⁹

In addition, Cascadden et al point out that the “proposed [CDA] evaluation framework should be subject to ongoing case-study testing to confirm the effectiveness of the best practices criteria”.⁴⁰⁰

This work aims to translate theory into practice. Using the Cascadden-Gunton-Rutherford framework as the foundation, the sections to unfold will adopt and refine certain aspects of the framework to make it more inclusive of community concerns and to develop a more complete scoring mechanism. Following this, a case study analysis will be taken of 17 agreements across 7 countries in a novel attempt to compare CDAs from different jurisdictions with one another and evaluate their robustness. In doing so, the hope is that the final product may stand as a reference point for mining affected communities preparing to enter into CDA negotiations. By drawing specific attention to the provisions of CDAs across a multitude of jurisdictions, it becomes possible to add nuance and supplement experience for local communities.

³⁹⁹ *Ibid.*

⁴⁰⁰ *Ibid* at 7.

5.2 Methodology

5.2.1 Introduction to the Framework

Based on a review of 30 best practice studies, stemming from academic, industry, governmental, and non-governmental organization literature, Maggie Cascadden, Thomas Gunton and Murray Rutherford developed a CDA best practice framework that can be used for negotiating agreements.⁴⁰¹ By identifying and merging the best practices contained in the 30 studies, a three-tiered evaluative model was created. The Cascadden-Gunton-Rutherford framework is comprised of 10 general best practice criteria, 44 sub-criteria and 89 specific indicators that are presented in the form of a checklist that may be used to guide the negotiation, implementation and management of CDAs, and to evaluate the robustness of different CDAs based on the provisions that they contain.

I am using the Cascadden-Gunton-Rutherford framework as foundation for two reasons. First, the framework is more comprehensive than any other framework or guideline that has been published to date. For instance, even the most comprehensive studies that were reviewed “contained only 20 of the 44 best practices sub-criteria presented in the proposed framework.”⁴⁰² Second, the framework introduces novel sub-criteria, going beyond existing frameworks by providing explicit indicators in the form of a checklist that allows for a more transparent and easy to follow set of guidelines for negotiating and evaluating CDAs.

I will now canvas the Cascadden-Gunton-Rutherford model and the different criteria identified. Following this, I will highlight the areas that are need of improvement and will describe the modifications that I have made.

⁴⁰¹ Cascadden, Gunton & Rutherford, *supra* note 37 at 3.

⁴⁰² Gunton, Werker & Markey, *supra* note 18 at 2.

5.2.2 Cascadden-Gunton-Rutherford Model

As mentioned, there are 10 overarching best-practice criteria: empowering; respect for local culture; affirmation; open communication; capacity building; equity; enforceability; effective implementation; monitoring and adaptability; and breadth.

5.2.2.1 Criterion 1: Empowering

The empowering criterion concerns the inclusion and empowerment of the community in the CDA negotiation and implementation process.⁴⁰³ As discussed above, unequal power dynamics tend to taint the negotiation and implementation of CDAs.⁴⁰⁴ The sub-criteria are as follows:

1. *Every affected community and stakeholder is a party to the agreement.*⁴⁰⁵ Thus, regardless of whether the stakeholders in question have a formally recognized legal title or their geographic proximity, the goal is to consult with all groups that are to be impacted by the project.⁴⁰⁶
2. *There must be an explicit requirement to consider and include vulnerable and marginalized groups in the CDA process.*⁴⁰⁷ This is particularly important due to the fact that CDA negotiations are usually a product of individuals or organizations who represent the community.⁴⁰⁸

⁴⁰³ *Ibid* at 3.

⁴⁰⁴ Ken J Caine & Naomi Krogman, “Powerful or Just Plain Power-Full? A Power Analysis of Impact and Benefit Agreements in Canada’s North” (2010) 23:1 *Organization & Environment* 76.

⁴⁰⁵ Cascadden, Gunton & Rutherford, *supra* note 37 at 3.

⁴⁰⁶ Courtney Fidler, “Increasing the sustainability of a resource development: Aboriginal engagement and negotiated agreements” (2010) 12:2 *Environ Dev Sustain* 233–244.; Sandra Gogal, Richard Reigert & JoAnn Jamieson, “Aboriginal Impact and Benefit Agreements: Practical Considerations” (2005) 43:1 *Alta L Rev* 129–158; Loutit et al, *supra* note 15 at 30.

⁴⁰⁷ Cascadden, Gunton & Rutherford, *supra* note 37 at 3; see also Sam Szoke-Burke et al, “Negotiating contracts with investors” (September 2018), online: *Columbia Center for Sustainable Investment* <scholarship.law.columbia.edu/sustainable_investment_staffpubs/78/>.

⁴⁰⁸ Szoke-Burke et al, *supra* note 407.

Importantly, these representatives may not be representative of marginalized groups including youth, women, elderly, and ethnic minorities.⁴⁰⁹

3. *Community sovereignty is maintained.*⁴¹⁰ Due to unequal bargaining power, the community may at times consent to the transfer of legal rights to the developer or may even consent to provisions that constrain the legal and political rights of the community.⁴¹¹ These provisions prevent the community from taking action under government legislation, may prevent civil action, mobility rights, and prevent participation in environmental review processes or media interviews.
4. *Funds generated as a result of the CDA should be under the control of the recipient community.*⁴¹² This empowers community members to take control and maintain their sense of agency as they decide, based on their own priorities, how to spend the revenue by from the project.⁴¹³
5. *The community has its own community plan prepared prior to CDA negotiations which reflects the community's goals and objectives.*⁴¹⁴ This novel practice proposed by Cascadden et al looks to ensure that the agreements reflect the specific characteristics and aspirations of the community.

⁴⁰⁹ Prno, Bradshaw & Lapierre, *supra* note 35; ICMM, *supra* note 114; “6 major steps to reach a community development agreement” (May 2016), online (pdf): *Oxfam IBIS* <oxfamibis.dk/sites/default/files/PDF%20global/Sierra%20Leone%20PDF/6_steps_to_reach_a_com_dev_agree.pdf>[Oxfam IBIS].

⁴¹⁰ Cascadden, Gunton & Rutherford, *supra* note 37 at 3.

⁴¹¹ Irene Sosa and Karyn Keenan, “Impact benefit agreements between Aboriginal communities and mining companies: their use in Canada” (2001), online (pdf): *Canadian Environmental Law Association* <www.cela.ca/sites/cela.ca/files/uploads/IBAeng.pdf>; O’Faircheallaigh, *supra* note 24.

⁴¹² Cascadden, Gunton & Rutherford, *supra* note 37 at 3; Craik, Gardner & McCarthy, *supra* note 48; Sarkar et al, *supra* note 305.

⁴¹³ Ciaran O’Faircheallaigh, “Using revenues from Indigenous impact and benefit agreements: building theoretical insights” (2018) 39:1 *Canadian J Development Studies / Revue canadienne d’études du développement* 101.

⁴¹⁴ Cascadden, Gunton & Rutherford, *supra* note 37 at 3.

5.2.2.2 Criterion 2: Respect for Local Culture

This criterion emphasizes the importance of respecting and preserving local cultural and heritage throughout the lifetime of the project.⁴¹⁵ The sub-criteria are as follows:

1. *Project employees take part in cross-cultural training to ensure that they understand local culture and customs.*⁴¹⁶ Cross cultural training is important because it facilitates a respectful and collaborative community-company relationship by supporting the “cultural” integrity of the community.⁴¹⁷
2. *Traditional or community knowledge is included in the project design and management.*⁴¹⁸ There is no universally accepted definition of traditional knowledge, but generally it is understood to mean the “knowledge, know-how, skills and practices that are developed, sustained and passed on from generation to generation within a community, often forming part of its cultural or spiritual identity.”⁴¹⁹
3. *Work schedules should accommodate the cultural needs and traditions of community members.*⁴²⁰ Harvesting practices, cultural events, and local traditional hunting should not be disturbed as a result of the development, as such disruption would detract from the recruitment and retainment of Indigenous employees and would be detrimental to their ways of being.⁴²¹

⁴¹⁵ *Ibid.*

⁴¹⁶ *Ibid*; Dreyer, *supra* note 30; Fidler & Hitch, *supra* note 47; Steven Kennett, *A Guide to Impact and Benefit Agreements*, (Calgary, Canada: University of Calgary Press, 1999).

⁴¹⁷ Cascadden, Gunton & Rutherford, *supra* note 37 at 3; Dreyer, *supra* note 30; Kevin O’Reilly & Erin Eacott, “Aboriginal peoples and impact and benefit agreements: Report of a national workshop” (May 1998) Northern Minerals Program Working Paper No 7, online (pdf): <epub.sub.uni-hamburg.de/epub/volltexte/2010/5127/pdf/NMPWorkingPaper7OReilly.pdf>.

⁴¹⁸ Cascadden, Gunton & Rutherford, *supra* note 37 at 4.

⁴¹⁹ Assembly of First Nations, “Traditional Knowledge” (last visited 20 June 2022), online(pdf): *AFN* <www.afn.ca/uploads/files/env/ns_-_traditional_knowledge.pdf>; Cascadden, Gunton & Rutherford, *supra* note 37.

⁴²⁰ Cascadden, Gunton & Rutherford, *supra* note 37 at 4; Peter Siebenmorgan & Ben Bradshaw, “Re-conceiving impact and benefit agreements as instruments of aboriginal community development in northern Ontario, Canada” (2011) 9:4 Oil Gas Energy Law J.

⁴²¹ Jacqueline Middleton et al, “Indigenous mental health in a changing climate: a systematic scoping review of the global literature” (2020) 15:5 Environ Research Letters 053001; Rebekah J Walker et al, “Prevalence of food

Proposed Modifications

Sub-Criterion 2.3 – Work schedules should accommodate cultural needs: I suggest the addition of several indicators to the framework to better inform the evaluation of whether cultural needs are accommodated within work schedules. They appear as follows:

Original:

2.3) Employee work schedules are designed to suit cultural needs.

- i. Employee work schedules are designed to suit cultural needs.

Amended:

2.3) Employee work schedules are designed to suit cultural needs including:

- i. *Traditional holidays and celebrations.*
- ii. *Traditional practices, such as fishing, harvesting, or hunting.*

The need for this amendment arose from the comparison of different agreements, some of which accommodated traditional practices but made no mention of traditional holidays and celebrations.⁴²²

5.2.2.3 Criterion 3: Affirmation

Considered among some researchers to be the most important factor to CDA success,⁴²³ this criterion measures the commitment of signatories to the CDA and the quality of relationship that exists between the signatories.⁴²⁴ The sub-criteria are as follows:

1. *The agreement is negotiated in good faith.*⁴²⁵ Negotiating in good faith, as articulated by Cascadden et al, means that the “project proponent’s and the community’s intent is to

insecurity and association with mental health in an indigenous population in Panamá” (2021) 24:17 Public Health Nutrition 5869.

⁴²² See Mary River Project Contract 2018.

⁴²³ Dreyer, *supra* note 30; Brereton, *supra* note 61; Kennett, *supra* note 416

⁴²⁴ Cascadden, Gunton & Rutherford, *supra* note 37 at 4.

⁴²⁵ *Ibid.*

- reach a mutually satisfactory agreement that meets the objectives of both parties.”⁴²⁶ There is to be no oppressive or coercive behavior that places undue pressure on reaching an agreement.⁴²⁷
2. *The community-company relationship is trusting and maintained.*⁴²⁸ As a matter of principle, the relationship between the company and the community should begin early on, prior to the regulatory approval of the project, and should be respectful, mutually beneficial, and trusting.⁴²⁹ Parties should aim for a close relationship that fosters open communication and face-to-face interaction throughout the negotiation.⁴³⁰
 3. *The agreement is seen as legitimate by the community.*⁴³¹ Elite capture and corruption are serious concerns in the CDA context, and thus it is imperative that the community is formally involved in creating objectives that guide negotiations and have formal mechanisms, such as a community vote, to hold their representatives accountable.⁴³² The community negotiator and signatory must be accountable and representative of the community.
 4. *The company is committed to the agreement’s success.*⁴³³ A clear, dedicated commitment to the agreement is imperative. Press releases, statements of commitment, and formal affirmation of the agreement by senior management contribute greatly in this regard.⁴³⁴

⁴²⁶ *Ibid.*

⁴²⁷ ICMM, *supra* note 114.

⁴²⁸ Cascadden, Gunton & Rutherford, *supra* note 37 at 4

⁴²⁹ O’Reilly & Eacott, *supra* note 417; Browne & Robertson, *supra* note 295.; Gibson & O’Faircheallaigh, *supra* note 295.

⁴³⁰ Browne & Robertson, *supra* note 295; Canadian Council for Aboriginal Business, “Achieving progressive community relations: key findings from CCAB” (February 2009), online (pdf): *CCAB* <www.ccab.com/wp-content/uploads/2016/08/AchievingAboriginalCommunityRelations_Key_Finding_from_CCAB.pdf> [CCAB Report]; Natural Resources Canada, “Good Practices in Community Engagement and Readiness: Compendium of Case Studies from Canada’s Minerals and Metals Sector” (August 2014), online (pdf): *Natural Resources Canada* <www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/www/pdf/publications/emmc/Good_practice_Compendium_e.pdf> [NRCAN Report].

⁴³¹ Cascadden, Gunton & Rutherford, *supra* note 37 at 4.

⁴³² Gogal, Riegert, Jamieson, *supra* note 406; RESOLVE, “From Rights to Results - An Examination of Agreements between International Mining and Petroleum Companies and Indigenous Communities in Latin America” (September 2015), online (pdf): *RESOLVE* <www.resolve.ngo/docs/from-rights-to-results-sept-2015-final-eng636885104660887798.pdf> [Resolve Report]; O’Faircheallaigh, *supra* note 16.

⁴³³ Cascadden, Gunton & Rutherford, *supra* note 37 at 4

⁴³⁴ ICMM, *supra* note 114.

5. *The CDA's role in the project approval process is clear.*⁴³⁵ This sub-criterion is best represented in jurisdictions where signing the CDA is a prerequisite for project approval. In a growing number of jurisdictions, consultation is mandatory before the project is granted legal approval.⁴³⁶ Adopting a requirement for a CDA into the licensing process, as Sierra Leone and Mongolia have done,⁴³⁷ can serve to increase the degree of consultation and community involvement in the process.⁴³⁸

6. *The CDA does not replace the government's role in supporting the community.*⁴³⁹ It is possible that host governments may perceive the financial support, social benefits, and impact mitigation by CDAs as an incentive to reduce their own contributions.⁴⁴⁰ It is fairly common, especially in remote or less-developed areas that are deficient in infrastructure and essential services, for mining companies to assume the responsibility of patching up the “functional gaps” of the government.⁴⁴¹

Proposed Modifications

Criterion 3.1 – The agreement is negotiated in good faith: The original framework instructs the evaluator to determine whether the agreement was negotiated in good faith. This, however, is subject to a high level of subjectivity based on the sources of the evaluator and their perceptions of what “good faith” is. In an effort to move to a more objective means, another indicator was added.

⁴³⁵ Cascadden, Gunton & Rutherford, *supra* note 37 at 4.

⁴³⁶ Resolve Report, *supra* note 432.

⁴³⁷ Dupuy, *supra* note 77.

⁴³⁸ Gogal, Riegert, Jamieson, *supra* note 406.

⁴³⁹ Cascadden, Gunton & Rutherford, *supra* note 37 at 4.

⁴⁴⁰ St-Laurent & Billon, *supra* note 300 at 596.

⁴⁴¹ *Ibid.*

Original:

3.1) The agreement is negotiated in good faith.

- i. There is evidence that the agreement was signed in good faith, such as a signed agreement clause.

Amended:

3.1) The agreement is negotiated in good faith.

- i. There is evidence that the agreement was signed in good faith, such as a signed agreement clause.
- ii. *There are positive statements (e.g. in press releases, interviews, or publications) on the partnership by community members, company representatives, or the government.*

The idea here is to inform the judgement of whether the agreements were negotiated in ‘good faith’ using publicly available statements and publications. Signed agreement clauses are relatively common across agreements, thus it is likely not the best barometer of whether the negotiations took place in good faith. The key consideration underpinning this criterion is whether there is a genuine commitment to consultation and negotiation between the parties. In the Canadian context, genuine commitment to consultation and the negotiation process has been interpreted by the Supreme Court of Canada as requiring “good faith efforts to understand each other’s concerns and move to address them.”⁴⁴² Reports of protests, conflict, expressions of distrust from community members, forward looking statements by companies and communities, and expressions of commitment are taken together to form an impression of whether consultations were exercised in good faith. Future research should seek to elaborate on concepts of good faith and how it may be better evaluated.

⁴⁴² *Haida Nation v British Columbia (Minister of Forests)*, [2004] 2 SCR 511 at para 49.

Criterion 3.5 – The agreement’s role in the project approval process is clear. The indicator provided in the original framework considers only whether project approval is contingent on the signing of an agreement. While this encapsulates agreements made in jurisdictions where CDAs are mandated, there are key situations that overlooked.

Original:

3.5) The agreement’s role in the project approval process is clear

- i. Project approval is contingent on concluding a CDA with the impacted communities.

Amended:

3.5) The agreement’s role in the project approval process is clear

- i. Project approval is contingent on concluding a CDA with the impacted communities.
- ii. *Community approval has been identified as a critical component of the project.*

The need for this indicator was drawn from the Raglan Mine in Quebec, Canada. In that instance, although the Raglan Mine is located within an area covered by the James Bar and Northern Quebec Agreement, there was no requirement at the time for a CDA with the affected communities in the land claim. Importantly, however, the company planned to use Deception Bay as a port in its operations and also to use Deception Bay and adjacent waters for intermittent shipping of supplies and mineral products.⁴⁴³ At the same time, Inuit beneficiaries under the Agreement claimed to have "rights, titles, claims and interests in the offshore area surrounding Quebec and Labrador, which [were] ... the subject of negotiations with the Government of Canada".

Thus, Falconbridge, the original developer of the Raglan Mine, viewed community approval as critical as it implicated much of their operations. Under the original framework, this nuance

⁴⁴³ See Raglan Agreement page 3.

would not be captured given that Falconbridge did not need an agreement *per se* in order to attain approval for the mining project.

Criterion 3.6 – The agreement does not replace the government’s role in supporting the community. The original framework specifies that this sub-criterion is met when government funding and services are not reduced due to the agreement. In practice, evaluating this sub-criterion based on this one indicator is a difficult task. It is helpful, both to communities and to an interested evaluator of an agreement, to see express statements of assurance within the agreement. Such a provision suggests that the issue was contemplated and discussed by the parties.

Original:

3.6) The agreement does not replace the government's role in supporting the community.

- i. Government services and government funding for the community are not reduced due to the CDA.

Amended:

3.6) The agreement does not replace the government's role in supporting the community.

- i. Government services and government funding for the community are not reduced due to the CDA.
- ii. *It is explicitly stated within the agreement that the CDA is not to replace government services, development or funding.*

5.2.2.4 Criterion 4: Open Communication

Having an open stream of communications helps to build trust and avoid tension. The fourth criterion is thus to engage in open communication.⁴⁴⁴ The sub-criteria are as follows:

1. *A precursor agreement is signed.*⁴⁴⁵ A precursor agreement, such as a memorandum of understanding, can provide the community with additional time to prepare for negotiations and guide their strategy throughout the process.⁴⁴⁶ The precursor agreement should ideally be a signed document that has been reviewed by the signatories, which sets out a framework for the negotiations to unfold and the objectives of the CDA.⁴⁴⁷
2. *The CDA, and precursor agreement, monitoring results, and other relevant information are publicly available.*⁴⁴⁸ As discussed above, confidentiality is a significant barrier when attempting to negotiate, seek advice, evaluate, monitor, and implement the agreement. While there could conceivably be legitimate instances in which sensitive information needs to be confidential to avoid adverse consequences to the community,⁴⁴⁹ there are many deleterious consequences. These clauses can prevent signatory communities from discussing issues with wider communities, collaborating with the media and civil society, and prevent access to judicial and regulatory systems.⁴⁵⁰
3. *Communication between signatories continues throughout project operation.*⁴⁵¹ A systematic, discussion-based process is ideal here. Regularly scheduled meetings between community members and company employees where grievances and concerns may be discussed can help foster open communication channels.⁴⁵² The meetings and discussions should be free

⁴⁴⁴ Cascadden, Gunton & Rutherford, *supra* note 37 at 4.

⁴⁴⁵ *Ibid.*

⁴⁴⁶ Gibson & O’Faircheallaigh, *supra* note 295; NRCAN Report, *supra* note 430.

⁴⁴⁷ Sosa & Keenan, *supra* note 411; Cathleen Knotsch & Jacek Warda, “Impact Benefit Agreements: A Tool for Healthy Inuit Communities?” (March 2009), online (pdf): <ruor.uottawa.ca/bitstream/10393/30211/1/2009_IBA_Summary.pdf>.

⁴⁴⁸ Cascadden, Gunton & Rutherford, *supra* note 37 at 4.

⁴⁴⁹ Craik, Gardner & McCarthy, *supra* note 48; Gogal, Riegert, Jamieson, *supra* note 406.

⁴⁵⁰ Craik, Gardner & McCarthy, *supra* note 48; St-Laurent & Billon, *supra* note 300 at 596; Szoke-Burke et al, *supra* note 407; Papillon & Rodon, *supra* note 351.

⁴⁵¹ Cascadden, Gunton & Rutherford, *supra* note 37 at 4.

⁴⁵² Dreyer, *supra* note 30.

from jargon and conducted in the local language, or the language that is most accessible to the community.⁴⁵³

4. *There is continuity in who is involved with the CDA making and implementation process.*⁴⁵⁴ Continuity in the personnel involved in the negotiation and implementation of the agreement can minimize misunderstandings regarding the intent of the parties.⁴⁵⁵ In addition, this practice helps to maintain the ‘organizational memory’ of information and knowledge created in the course of consultation, negotiation, and implementation.

Proposed Amendments

Novel Sub-Criterion 4.5 – The agreement is accessible to the local community. A trend in the agreements analyzed was the presence of highly technical wording and jargon. The original framework provides for little evaluation on whether the agreement is accessible and understandable to local communities. Aside from providing the agreement in the local language, it is important to acknowledge that development companies enter regions with sophisticated legal teams and technical experts. To mitigate this issue, it is helpful for agreements to have summaries or simplified versions of different provisions to have them simplified.

⁴⁵³ CCAB Report, *supra* note 426; Rio Tinto, “Why Agreements Matter: A Resource Guide for Integrating Agreements into Communities and Social Performance Work at Rio Tinto” (March 2016), online (pdf): *Rio Tinto* <www.riotinto.com/documents/Rio_Tinto_Why_Agreements_Matter.pdf> [Rio Tinto Report]; NRCAN Report, *supra* note 430.

⁴⁵⁴ Cascadden, Gunton & Rutherford, *supra* note 37 at 4.

⁴⁵⁵ O’Faircheallaigh, *supra* note 16; Ciaran O’Faircheallaigh, “Implementing agreements between Indigenous peoples and resource developers in Australia and Canada”, *Aboriginal Politics and Public Sector Management Research Paper No 13* (13 January 2003), online(pdf): <metisportals.ca/MetisRights/wp/wp-admin/images/Implementing%20Agreements%20between%20Indigenous%20Peoples%20and%20Resource%20Developers.pdf>.

Novel:

4.5) *The agreement is accessible to the local community.*

- i. *The agreement is written in a manner such that it avoids overly technical terminology or legal jargon.*
- ii. *The agreement takes into account the literacy level and experience of the community in reading contracts.*
- iii. *The agreement is available in the local language.*

This provision is drawn from the Argyle Management Plan Agreement of the Argyle Diamond Mines in Australia. In that agreement, each section is preceded by a summary of the provisions detailed below it. There is an emphasis on making the agreement easily understandable to those without a technical background.

5.2.2.5 Criterion 5: Capacity Building

Local communities may lack sufficient skills or training to participate in the negotiation process, and may have difficulty participating in the employment and business opportunities opened up by the agreement.⁴⁵⁶ As discussed at length above, the resources and capacity in negotiations are often unequally distributed between companies and communities. This criterion is focused on building the capacity of the community to allow for meaningful participation and effective negotiation in the process.⁴⁵⁷

1. *Each party's capacity is assessed.*⁴⁵⁸ A comprehensive assessment of community capacity should be done. This assessment should address the deficiencies and understand the time

⁴⁵⁶ Cascadden, Gunton & Rutherford, *supra* note 37 at 4; See also Ciaran O'Faircheallaigh, *A New Approach to Policy Evaluation: Mining and Indigenous People* (Burlington, Vermont: Ashgate, 2002); O'Faircheallaigh, *supra* note 16.

⁴⁵⁷ Cascadden, Gunton & Rutherford, *supra* note 37 at 4.

⁴⁵⁸ *Ibid*; See Dreyer, *supra* note 30; Craik, Gardner & McCarthy, *supra* note 48; Gogal, Riegert, Jamieson, *supra* note 406; see also Loutit et al, *supra* note 15.

- and resources that will be required to foster effective participation prior to the commencement of negotiations.
2. *Capacity building initiatives exist and are funded.*⁴⁵⁹ Whether the funding comes from the investing company or the government, it should be sufficient to address capacity restraints, job training, community governance, and local business development.⁴⁶⁰
 3. *There is a dedicated person in charge of employment and training of the local community.*⁴⁶¹
 4. *Capacity building provisions should be locally available.*⁴⁶² The capacity building programs should be delivered at the location of the community to improve access and the participation rate for community residents.

Proposed Amendments

Novel Sub-Criterion 5.5) The agreement promotes equal opportunities and capacity building for vulnerable groups: While the original framework assesses the inclusion of vulnerable groups in the negotiation process, it does not provide express consideration for such groups regarding employment, training and other capacity building initiatives. Thus, a new sub-criterion was created.

Novel:

- 5.5) The agreement promotes equal opportunities and capacity building for vulnerable groups.*
- i. *There are provisions that encourage the recruitment, employment, training, and education of women and other vulnerable groups, including the youth and elderly.*

Novel Sub-Criterion 5.6 – Physical and psychological well-being are prioritized: There is a growing body of evidence suggesting that natural resource development projects may

⁴⁵⁹Cascadden, Gunton & Rutherford, *supra* note 37 at 4

⁴⁶⁰ See Dreyer, *supra* note 30; Craik, Gardner & McCarthy, *supra* note 48; Siebenmorgan & Bradshaw, *supra* note 420; Kennett, *supra* note 416; Knotsch & Warda, *supra* note 447.

⁴⁶¹ Cascadden, Gunton & Rutherford, *supra* note 37 at 4; Kennett, *supra* note 416; Knotsch & Warda, *supra* note 447.

⁴⁶² Cascadden, Gunton & Rutherford, *supra* note 37 at 4; Siebenmorgan & Bradshaw, *supra* note 420.

result in adverse social, economic, and cultural impacts which in turn has cumulative impacts on the health and well-being of individuals and communities.⁴⁶³ Impacted communities are often already vulnerable and may experience the deleterious effects of resource extraction for generations.⁴⁶⁴ There are a host of factors associated with working in the mining industry that may impact the mental health and wellbeing of community members and employees including: working long hours, performing tasks that are both physically demanding and repetitive, working considerable distances from home, and displacement from familial social support networks.⁴⁶⁵ Most mines are located in rural or remote areas, where the availability of local professional support services is limited.⁴⁶⁶ In addition, mining affects the strong cultural ties held by communities and can contribute to a loss of culture and identity⁴⁶⁷ – factors which are closely linked to negative mental health outcomes.⁴⁶⁸

The original framework does not assess whether the CDA in question considers and provides for physical and mental health care. As such, sub-criterion 5.6 is proposed.

⁴⁶³ Melissa Aalhus, Barb Oke & Raina Fumerton, “The social determinants of health impacts of resource extraction and development in rural and northern communities: A summary of impacts and promising practices for assessment and monitoring” (January 2018), online (pdf): *Northern Health* <www.northernhealth.ca/sites/northern_health/files/services/office-health-resource-development/documents/impacts-promising-practices-assessment-monitoring.pdf> at iv; Mindy Thompson Fullilove, “Psychiatric implications of displacement: Contributions from the psychology of place” (1996) (153):12 *American J of Psychiatry*.

⁴⁶⁴ Jameson K Hirsch et al, “Psychosocial Impact of Fracking: a Review of the Literature on the Mental Health Consequences of Hydraulic Fracturing” (2018) 16:1 *Int J Ment Health Addiction* 1 at 2.

⁴⁶⁵ Ross J Tynan et al, “Feasibility and acceptability of strategies to address mental health and mental ill-health in the Australian coal mining industry” (2018) 12:1 *Intl J Mental Health Systems* 66 at 2.

⁴⁶⁶ J S Humphreys, S Mathews-Cowey & H C Weinand, “Factors in accessibility of general practice in rural Australia” (1997) 166:11 *Med J Aust* 577–580.

⁴⁶⁷ Marina Wetzlmaier, “Cultural Impacts of Mining in Indigenous Peoples’ Ancestral Domains in the Philippines” (2012) 5:2 *Austrian Journal of South-East Asian Studies* 335; Theodore Downing et al, “Indigenous peoples and mining encounters: Strategies and tactics” *Mining, Minerals and Sustainable Development, Report 57* (2002), online (pdf): *International Institute for Environment and Development* <pubs.iied.org/sites/default/files/pdfs/migrate/G00548.pdf>.

⁴⁶⁸ Ashlea Williams, Terryann Clark & Sonia Lewycka, “The associations between cultural identity and mental health outcomes for indigenous Māori youth in New Zealand” (2018) 6:319 *Frontiers in public health*; Stephane M Shepherd et al, “The impact of indigenous cultural identity and cultural engagement on violent offending” (2017) 18:1 *BMC Public Health* 50.

Novel:*5.6) Physical and psychological well-being are prioritized*

- i. *There is monitoring and mitigation of health impacts, including the psychological impacts stemming from the project, lifestyle adjustments, and interference with cultural and traditional practices.*
- ii. *Cultural practices are safeguarded and encouraged.*

5.2.2.6 Criterion 6: Equity

The sixth criterion is to achieve an equitable distribution of the benefits and costs.⁴⁶⁹ The sub-criteria are as follows:

1. *No community member is worse off as a result of the project, considering mitigation and compensation.*⁴⁷⁰
The project benefits should be dispersed among community members and mitigation measures should be implemented to ensure that no community member bears a negative personal or social cost as a result of the project.⁴⁷¹ For example, if a community member is no longer able to engage in a traditional activity, the company should work to find a way to mitigate and compensate the community member to their satisfaction for the loss that has been experienced.
2. *Financial benefits are scaled to the total project benefits.*⁴⁷² The financial benefits that are to be distributed to the community should be measured as a percentage of the total project benefits so that the community is aware of the proportional distribution and can assess whether the financial benefits are equitable.⁴⁷³

⁴⁶⁹ Cascadden, Gunton & Rutherford, *supra* note 37 at 5.

⁴⁷⁰ *Ibid.*

⁴⁷¹ Prno, Bradshaw & Lapierre, *supra* note 35.

⁴⁷² Cascadden, Gunton & Rutherford, *supra* note 37 at 5.; Prno, Bradshaw & Lapierre, *supra* note 35.

⁴⁷³ Cameron Gunton et al, "Impact Benefit Agreement Guidebook. Resource and Environmental Management" (March 2020), online(pdf): *Simon Fraser University* <rem-main.rem.sfu.ca/planning/IBA/IBA_Guidebook_2-24.pdf>; Craik, Gardner & McCarthy, *supra* note 48.

3. *Financial benefits are delivered to suit community needs.*⁴⁷⁴ The benefits that are distributed should be simple to administer, flexible, tailored to the local context, and public reported to the community.⁴⁷⁵
4. *Contracts are designed for and favor local businesses.*⁴⁷⁶ Contracting with local businesses supports community economic development, fosters autonomy, and helps to build capacity. By favoring local businesses, communities are able to inject greater financial benefits into their local economy. Companies should agree to measurable targets of the contracts or dollars to be spent on procuring services and products from local companies, including a preferential treatment for local companies in the bidding process.
5. *Community members are preferentially hired.*⁴⁷⁷ In addition to a preferential hiring process, companies should help create opportunities for community members to advance into higher skilled positions.⁴⁷⁸ Career development and retention of community employees is also important.⁴⁷⁹ As with local businesses, measurable targets for community hires are key for effective implementation of this sub-criterion.

Proposed Modification:

Sub-criterion 6.5 – Community members are preferentially hired: An indicator of this sub-criterion, as per the original framework, states that “[t]here are provisions with measurable targets and milestones that require hiring community members.” I propose to break this indicator down into two separate ones, such that agreements that have preferential hiring provisions but do not have measurable targets are still assigned some value. In addition, community members with criminal records may face significant hurdles for finding employment in the resource development context. Overcoming criminal barriers to

⁴⁷⁴ Cascadden, Gunton & Rutherford, *supra* note 37 at 5.

⁴⁷⁵ *Ibid*; Loutit et al, *supra* note 15.

⁴⁷⁶ Cascadden, Gunton & Rutherford, *supra* note 37 at 5; Kennett, *supra* note 416.

⁴⁷⁷ Cascadden, Gunton & Rutherford, *supra* note 37 at 5.

⁴⁷⁸ Kennett, *supra* note 416.

⁴⁷⁹ Fidler & Hitch, *supra* note 47.

employment can create better futures for community members.⁴⁸⁰ Additionally, CDAs are mostly signed with communities whose rights have been legally recognized, meaning that employment and capacity benefits are, at least in some instances, available only to those with legally recognized status.⁴⁸¹ The new proposed indicators attempt to accommodate these factors.

⁴⁸⁰ Aboriginal Mining Education Forum, “Forging Stronger Pathways to Education and Employment: A Report of Proceedings” (February 2013), online (pdf): *Mining Industry Human Resources Council* <mihrc.ca/wp-content/uploads/2020/03/Forging-Stronger-pathways.pdf>; See e.g. Avery Zingel, “Criminal records a barrier to employment in N.W.T., says MLA”, *CBC News* (28 February 2021), online: *CBC* <www.cbc.ca/news/canada/north/criminal-records-employment-nwt-1.5928795>; Levon Sevunts, “Social ills keep many on the sidelines of NWT’s diamond boom”, *Eye On The Arctic* (29 August 2012), online: <www.rcinet.ca/eye-on-the-arctic/2012/08/29/social-ills-keep-many-on-the-sidelines-of-nwts-diamond-boom>.

⁴⁸¹ Joanie Caron, Hugo Asselin & Jean-Michel Beaudoin, “Indigenous employees’ perceptions of the strategies used by mining employers to promote their recruitment, integration and retention” (2020) 68 *Resources Policy* 101793; David Martin, David Trigger & Joni Parmenter “Mining in Aboriginal Australia: economic impacts, sustainable livelihoods and cultural difference at Century Mine, northwest Queensland” in Emma Gilberthorpe & Gavin Hilson, eds, *Natural Resource Extraction and Indigenous Livelihoods: Development Challenges in an Era of Globalization* (New York: Routledge, 2014) at 37.

Original:

6.5) Community members are preferentially hired.

- i. There are provisions with measurable targets and milestones that require hiring community members.
- ii. There are provisions with measurable targets and milestones that support advancement of community members into higher skilled and higher paying positions.
- iii. There are provisions with measurable targets and milestones that support retention of community members in the project workforce.

Modified:

6.5) Community members are preferentially hired.

- i. *There are provisions that prescribe the preferential hiring of community members.*
- ii. *Legal registration and previously legal offences are not significant barriers for employment opportunities.*
- iii. There are provisions with measurable targets and milestones that require hiring community members.
- iv. There are provisions with measurable targets and milestones that support advancement of community members into higher skilled and higher paying positions.
- v. There are provisions with measurable targets and milestones that support retention of community members in the project workforce.

5.2.2.7 Criterion 7: Enforceability

This criterion assesses the level of certainty with which one can expect that the objectives and obligations under the agreement will be met.⁴⁸² Uncertainties regarding the enforceability of a

⁴⁸² Cascadden, Gunton & Rutherford, *supra* note 37 at 5.

CDA can have a detrimental effect on community perception of the agreement, and can hinder the CDA's potential to successful share benefits and mitigate costs.⁴⁸³ The sub-criterion are as follows:

1. *The CDA includes a dispute resolution mechanism.*⁴⁸⁴ The CDA should outline a formal, culturally appropriate and co-managed dispute resolution process that can deal with issues and conflicts that may arise over the course of the agreement.⁴⁸⁵ Cascadden et al prescribe a “mutually agreed upon arbitration process, aimed at resolving disputes in cases where the...parties cannot agree without mediation.”⁴⁸⁶
2. *The CDA is a legally binding document.*⁴⁸⁷ A legally binding CDA adds legitimacy, and helps to ensure that the provisions are implemented, or that contractual remedies can be pursued if they are not.⁴⁸⁸
3. *The CDA is jointly governed with a clearly outlined framework.*⁴⁸⁹ A formal governance structure that is responsible for managing, enforcing and implementing the CDA can promote transparency, accountability, and successful implementation.⁴⁹⁰ It is important that the governance structure is comprised of both community and project representatives so that it reflects the spirit of negotiation and compromise that marks the agreement.⁴⁹¹
4. *The CDA's provisions have measurable targets.*⁴⁹² The objectives outlined in the agreement should have measurable targets and timelines. Specificity to the provisions and promises

⁴⁸³ St-Laurent & Billon, *supra* note 300.

⁴⁸⁴ Cascadden, Gunton & Rutherford, *supra* note 37 at 5.

⁴⁸⁵ Fidler & Hitch, *supra* note 47; Kennett, *supra* note 416; Siebenmorgan & Bradshaw, *supra* note 420; Sosa & Keenan, *supra* note 411; Rio Tinto Report, *supra* note 453; O'Reilly & Eacott, *supra* note 417.

⁴⁸⁶ Cascadden, Gunton & Rutherford, *supra* note 37 at 5.

⁴⁸⁷ *Ibid.*

⁴⁸⁸ O'Reilly & Eacott, *supra* note 417; Oxfam IBIS, *supra* note 409; Szoke-Burke et al, *supra* note 407.

⁴⁸⁹ Cascadden, Gunton & Rutherford, *supra* note 37 at 5.

⁴⁹⁰ Indigenous Support Services and ACIL Consulting, *Agreements between Mining Companies and Indigenous Communities* (Prahan, Victoria: Australian Minerals & Energy Environment Foundation, 2012); Sarkar et al, *supra* note 305.

⁴⁹¹ Brereton, *supra* note 61.

⁴⁹² Cascadden, Gunton & Rutherford, *supra* note 37 at 5.

that are made is essential for enforcement as they provide clarity on the obligations of the parties.⁴⁹³

5. *There are penalties for non-compliance with the CDA.*⁴⁹⁴ Again, like the sub-criterion above, this helps to maintain accountability for all signatories involved.⁴⁹⁵

Proposed Modifications

Sub-Criterion 7.2 – The agreement is a legally binding document. Several indicators are proposed for this sub-criterion. The focus here is to elaborate on the original indicators to give greater nuance to the analysis. Clearly, given that CDAs are negotiated and signed across a variety of jurisdictions, it cannot be easily ascertained whether an agreement is “legally binding” in a given jurisdiction. Adding to this, to date there is a scarcity of litigation and legal writing relating to CDAs and other benefit agreements. I propose that this sub-criterion is better framed as whether the parties *intend* for the agreement to be legally binding. The proposed indicators evaluate whether the agreement has been drafted with a sufficient degree of specificity to give a legal nature. Namely, it is important for the provisions in a given agreement to avoid the use of vague “best efforts” language that is highly discretionary in nature.⁴⁹⁶ Explicit statements on legal rights and the legal nature of the document help indicate the intention of the parties for the agreement to be legally binding. The following amendments are suggested:

⁴⁹³ Sarkar et al, *supra* note 305.; Fidler & Hitch, *supra* note 47; Knotsch & Warda, *supra* note 447.

⁴⁹⁴ Cascadden, Gunton & Rutherford, *supra* note 37 at 5.

⁴⁹⁵ Gibson & O’Faircheallaigh, *supra* note 295; Loutit et al, *supra* note 15; O’Faircheallaigh, *supra* note 16.

⁴⁹⁶ Dayna Nadine Scott, “Extraction Contracting: The Struggle for Control of Indigenous Lands” (2020) 119:2 South Atlantic Q 269.

Original:

7.2) The agreement is a legally binding document.

- i. All provisions are written such that they are legally enforceable
- ii. The agreement has been reviewed by legal experts representing the community.

Modified:

7.2) The agreement is intended to be legally binding

- i. *The agreement avoids the use of vague language that is difficult to enforce (i.e. a reliance on “best efforts” or “reasonable measures”).*
- ii. All provisions are written such that they are legally enforceable, *meaning that they are specific.*
- iii. The agreement has been reviewed by legal experts representing the community.
- iv. *Legal action is expressly stated as an avenue available to the signatories in the event of a breach.*
- v. *There is a choice of law and forum clause.*
- vi. *The agreement explicitly states that it is a legal document.*

Sub-Criterion 7.5 – There are penalties for non-compliance with the agreement. The original indicator for this sub-criterion overlooks the high variability in penalty provisions across different agreements. In particular, this indicator does not consider whether there are penalties for non-compliance that apply to all signatory parties. For example, the CDA for the Khushuut Coal Mine in Mongolia outlines penalties for non-compliance but only for non-compliance by community members. In other words, the local community faces clear financial

ramifications if they violate any aspect of the agreement, however the consequences that the company may face for non-compliance are not clear. Article 14.13 for instance states:

“...The Company is also entitled with the right to demand from Khovd aimag the reimbursement of all financing allocated under this Agreement if the Project operation in 2014 and 2015 was interrupted or illegally stopped for over 30 days in total in respective years...”⁴⁹⁷

This is just one example of a strong penalty that the community faces for non-compliance. There are no penalties outlined for the company in the event of non-compliance. Under the original framework, there is uncertainty as to how this would be evaluated given that there *are* penalties for non-compliance, albeit not applying to all signatories. Thus the proposed amendments are as follows:

Original:

- 7.5) There are penalties for non-compliance with the agreement.
- i. There are penalties for non-compliance with the agreement.

Modified:

- 7.5) There are penalties for non-compliance with the agreement.
- i. There are penalties for non-compliance with the agreement, *including fines, disciplinary measures, and mitigative actions.*
 - ii. *The company and community are both subject to penalties.*

5.2.2.8 Criterion 8: Effective Implementation

Equally important as the negotiation and content of the CDA is its implementation. Effective implementation is marked by the following sub-criteria:

⁴⁹⁷ See MoEnCo Khovd Aimag Agreement.

1. *Each provision is included in an implementation plan.*⁴⁹⁸ Each provision should have a plan that outlines the process, obligations, timelines, and milestones.⁴⁹⁹
2. *There is funding for IBA implementation.*⁵⁰⁰ The funding should be sufficient to cover the implementation of the different provisions, including the costs associated with external consultation, the hiring process, infrastructural requirements and so on.⁵⁰¹
3. *There is an overseer of IBA implementation.*⁵⁰² As found by O’Faircheallaigh, agreements have failed because there was no overarching body or governance structure to oversee the implementation of the agreement.⁵⁰³
4. *The implementation process is collaboratively designed.*⁵⁰⁴ The company and the community should collaborate to design the implementation process of the agreement.⁵⁰⁵ The emphasis here is on levelling the power dynamic, making the signatory communities partners rather than simply beneficiaries.

Proposed Modifications

Sub-Criterion 8.2 – There is funding for agreement implementation: In addition to providing sufficient funding for the implementation of the agreement, it is important for the process of payment to be clearly outlined, in terms of who/what the payments will be made to, who will have access to the payments and funds, and supervision of the payments and fund withdrawals. Provisions help facilitate the establishment of strong local institutions that can

⁴⁹⁸ Cascadden, Gunton & Rutherford, *supra* note 37 at 5.

⁴⁹⁹ Gibson & O’Faircheallaigh, *supra* note 295; Browne & Robertson, *supra* note 295; O’Faircheallaigh, *supra* note 16.

⁵⁰⁰ Cascadden, Gunton & Rutherford, *supra* note 37 at 5.

⁵⁰¹ Gibson & O’Faircheallaigh, *supra* note 295; Sarkar et al, *supra* note 305.

⁵⁰² Cascadden, Gunton & Rutherford, *supra* note 37 at 5.5; St-Laurent & Billon, *supra* note 300 at 596; O’Faircheallaigh, *supra* note 455.

⁵⁰³ O’Faircheallaigh, *supra* note 455.

⁵⁰⁴ Cascadden, Gunton & Rutherford, *supra* note 37 at 5.

⁵⁰⁵ Fidler, *supra* note 406; Gibson & O’Faircheallaigh, *supra* note 295; Knotsch & Warda, *supra* note 447; ICMM, *supra* note 114.

prevent corruption and elite capture in the collection, transfer and use of funds.⁵⁰⁶ The new proposed indicator for this sub-criterion aims to consider the transparency of community-based natural resource payments and funds, by evaluating whether a clear process and rules have been established for payments and fund allocation.

Original:

8.2) There is funding for agreement implementation.

- i. There is sufficient funding to implement employment, business contracting, environment and culture protection, financial, training and education, community development, and closure and reclamation provisions

Modified:

8.2) There is funding for agreement implementation.

- i. There is sufficient funding to implement employment, business contracting, environment and culture protection, financial, training and education, community development, and closure and reclamation provisions.
- ii. *The process of payment is clearly outlined, in terms of when payments will be made and who will have access and supervision of the payments.*

5.2.2.9 Criterion 9: Monitoring and Adaptability

In order to ensure that the project is progressing smoothly and that all signatories are fulfilling their responsibilities, there must be proper monitoring of the agreement. The CDA and its implementation must be monitored and adapted to address deficiencies in achieving CDA

⁵⁰⁶ Dupuy, *supra* note 77 at 121; See Weinthal & Luong, *supra* note 386; Michael Ross, “How Mineral-Rich States Can Reduce Inequality” in Macartan Humphreys, Jeffrey Sachs, & Joseph Stiglitz, eds, *Escaping the Resource Curse*, (New York: Columbia University Press, 2007) 237.

objectives and to address the new risks and adverse impacts that may be developing.⁵⁰⁷

Effective monitoring is marked by the following sub-criteria:

1. *Progress towards CDA objectives and project impacts are periodically monitored.*⁵⁰⁸ The monitoring should be a transparent process with appropriate metrics that is conducted on regularly scheduled basis, the results of which are publicly available.⁵⁰⁹
2. *The community and the company jointly monitor the CDA.*⁵¹⁰ The company should provide for capacity building in relation to the ongoing monitoring of the agreement, agreeing to their participation in the relevant monitoring tasks and processes.⁵¹¹
3. *A baseline assessment of the environmental, cultural, and socioeconomic conditions of the community is conducted.*⁵¹² This assessment should be jointly conducted. Local communities and Indigenous peoples often have long-standing ties to the land which provides key insight into impact assessment and baseline studies. Community members can contribute traditional knowledge and understanding of ecosystems, social issues, and may identify and communicate culturally significant concepts and locations.⁵¹³
4. *There is funding for monitoring.*⁵¹⁴
5. *CDA deficiencies that have been identified in monitoring are mitigated.*⁵¹⁵
6. *There is a process for amending the agreement.*⁵¹⁶ The process for amending the agreement should be straightforward and predictable. Research indicates that an inability to revise

⁵⁰⁷ Cascadden, Gunton & Rutherford, *supra* note 37 at 5.

⁵⁰⁸ *Ibid.*

⁵⁰⁹ Browne & Robertson, *supra* note 295; Loutit et al, *supra* note 15; Rio Tinto Report, *supra* note 453; Szoke-Burke et al, *supra* note 407; Sarkar et al, *supra* note 305.

⁵¹⁰ Cascadden, Gunton & Rutherford, *supra* note 37 at 5.

⁵¹¹ Browne & Robertson, *supra* note 295; Dreyer, *supra* note 30; Loutit et al, *supra* note 15; Rio Tinto Report, *supra* note 453; Szoke-Burke et al, *supra* note 407; Sarkar et al, *supra* note 305.

⁵¹² Cascadden, Gunton & Rutherford, *supra* note 37 at 6.

⁵¹³ *Ibid.*; Szoke-Burke et al, *supra* note 407; Dreyer, *supra* note 30; Siebenmorgan, & Bradshaw, *supra* note 420.

⁵¹⁴ Cascadden, Gunton & Rutherford, *supra* note 37 at 6.; Sosa & Keenan, *supra* note 407; Rio Tinto Report, *supra* note 453.

⁵¹⁵ Cascadden, Gunton & Rutherford, *supra* note 37 at 6; Sarkar et al, *supra* note 305; Browne & Robertson, *supra* note 295.

⁵¹⁶ *Ibid.*

agreements after signing can lead to failure.⁵¹⁷ Circumstances and goals are sure to change during the life of a project, which can span decades. Recognition of this fact and making the agreement a ‘living document’ can facilitate better outcomes.

Proposed Modifications

Sub-Criterion 9.6 – There is a process for amending the agreement. With similar justification as the proposed indicators above, I propose an additional indicator that adds more nuance to the evaluation of this sub-criterion. A number of agreements analysed contain provisions that allude to amendment or renegotiation. However, these provisions are not all written to be equal – some are much more descriptive than others. Consider the amendment provisions of the following two agreements:

Table 1. Comparison of Amendment Provisions	
CDA of Fiskenaasset Ruby Project, Greenland	CDA of Porgera Gold Mine, Papua New Guinea
<p style="text-align: center;">Section 7 – Amendment of Agreement</p> <p>7.1) This agreement may be amended by written agreement of all Parties.</p> <p>7.2) This agreement shall be amended, when it is necessary due to substantially changed circumstances, amended or new agreements regarding use of Greenland Workers or Greenland Enterprises, including conclusion of construction agreements with Greenland Enterprises, or if it is necessary to meet requirements under the Mineral Resources Act, the Licence, or other rules of law, licence terms or provisions from time to time in force in Greenland.</p> <p>7.3) An amendment of this agreement shall be set out in an addendum to this agreement. If major amendments are agreed, a new version of the agreement shall be made by the Parties.</p> <p style="text-align: center;">8 – Amendment of Appendices</p> <p>8.1) The Appendices may be amended by written agreement of all Parties.</p> <p>8.2) The Appendices shall be amended, when it is necessary due to changed circumstances, amended or new agreements regarding use of Greenland Workers or Greenland Enterprises and conclusion of construction agreements with Greenland Enterprises, or if it is necessary to meet requirements under the Mineral Resources Act, the Licence or other rules of law, licence terms or provisions from time to time in force in Greenland.</p> <p>8.3) Before the first of March each year the Parties shall discuss the application and effect of all the Appendices in the previous</p>	<p>Section 27 – Variation: The parties may from time to time by Agreement in writing vary any of the provisions in this Agreement.</p>

⁵¹⁷ Prno, Bradshaw & Lapierre, *supra* note 35.

<p>year and agree the contents of draft appendices for the following year and subsequent years.</p> <p>8.4) The Greenland Authorities shall submit the draft appendices mentioned in clause 8.3 for consultation. The consultation procedure shall include local public authorities, Greenland employers' organisations and workers' organisations as well as local Greenland associations and organisations, whose articles of association aim to promote important interests in connection with social sustainability or environmental protection. In connection with the consultation, the consulted parties shall be given information, that can form the basis for comments on aspects in this agreement. that have particular significance for Greenland Enterprises, Greenland Workers or in relation to the social or environmental impacts of the activities under the Licence.</p> <p>8.5) No later than May each year, the Parties shall agree on and sign all the appendices for the following and subsequent years.</p> <p style="text-align: center;">9 – Principles for Amendments of Plans under this Agreement</p> <p>9.1) Amendments of Plans under this Agreement</p> <p>9.1.1) The Plans to be made by the Licensee under this agreement, which are the Benefit and Impact Plan, the Monitoring Plan and the Evaluation Plan, shall be kept updated in relation to changed circumstances and developments. The Licensee shall amend a Plan under this agreement, when this is required. It may for example be required in connection with an amendment of a mineral exploitation plan or closure plan, or with a development in mineral exploitation activities, in society or in socio-economic or other matters comprised by this agreement and its objective. The Licensee shall submit an amended Plan as soon as reasonably possible and no later than 28 days after the occurrence of the changed circumstance or development. An amendment of a Plan under this agreement shall be approved by the Greenland Authorities.</p> <p>9.1.2) The Licensee shall as far as possible plan and implement changes regarding activities and Plans under this agreement in accordance with the provisions and objectives of this agreement, which would apply to corresponding initial activities and Plans under this agreement.</p>	
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It is clear that these agreements differ dramatically in their process for amendment. A new sub-indicator is proposed to help account for this:

Original:

9.6) There is a process for amending the agreement.

- i. There is a process by which the parties can re-open the agreement for negotiation.

Modified:

9.6) There is a process for amending the agreement.

- i. There is a process by which the parties can re-open the agreement for negotiation.
- ii. *The process is descriptive and accessible to community members.*

Novel Sub-Indicator 9.7 – There is a transitional plan outlined in the event of a change in ownership: Mining projects typically go through several phases including exploration, development, extraction, rehabilitation and post-closure. Importantly, the ownership of the respective rights granted during the different phases may change.⁵¹⁸ In the event of a change of ownership, sometimes spurred by insolvency issues or the competitive acquisition by other development companies, it is important that the CDA stipulates the rights that will be honoured by the successor company.⁵¹⁹ Doing so ensures continuity to the agreement and may help provide certainty for communities who have already signed a CDA with a particular company.

Novel:

9.7) *There is a transitional plan outlined in the event of a change in ownership.*

- i. *The rights and obligations of the signatories are outlined in the event of a change in ownership.*

⁵¹⁸ James M, Otto, “How Do We Legislate for Improved Community Development?” in Tony Addison & Alan Roe, eds, *Extractive industries: the management of resources as a driver of sustainable development* UNU-WIDER studies in development economics, first edition ed (Oxford, United Kingdom: Oxford University Press, 2018) at 690.

⁵¹⁹ *Ibid.*

5.2.2.10 Criterion 10: Breadth

The CDA should be sufficiently broad to cover the full range of the project's impacts and to encompass all phases of the project.⁵²⁰ The sub-criteria are as follows:

1. *The CDA addresses all project phases: construction, operation, and closure and reclamation.*⁵²¹ Mining projects have a limited lifespan, making it imperative to ensure that there are ongoing benefits after the closure of the project to ensure long-term benefits to the community.
2. *The CDA contains the breadth of necessary provisions.*⁵²² This includes provisions for financial benefit distribution, employment, training, contracting, environmental protection, and protection of culture and sacred cultural sites. Mitigation provisions should also be included for all potential adverse effects.⁵²³

5.2.3 Scoring of the Cascadden-Gunton-Rutherford model

The evaluation prescribed by Cascadden et al includes a verbal assessment for each sub-criterion and a final rating using a four-point scale.⁵²⁴ The rating system is based on a scoring methodology developed at Simon Fraser University by the Sustainable Planning Research Group.⁵²⁵ Regardless of whether the sub-criterion is a dichotomous, quantitative, or qualitative factor, the evaluation of it is based on the following scale:

- **Not met** = two or more major deficiencies.
- **Partially met** = no more than one major deficiency.

⁵²⁰ Cascadden, Gunton & Rutherford, *supra* note 37 at 6.

⁵²¹ *Ibid*; Kennett, *supra* note 416; Resolve Report, *supra* note 432.; Szoke-Burke et al, *supra* note 407

⁵²² Cascadden, Gunton & Rutherford, *supra* note 37 at 6.

⁵²³ *Ibid*; Dreyer, *supra* note 30; Gogal, Riegert & Jamieson, *supra* note 406; ICMM, *supra* note 114; Knotsch & Warda, *supra* note 447; Loutit et al, *supra* note 15; Prno, Bradshaw & Lapierre, *supra* note 35.; Siebenmorgan, & Bradshaw, *supra* note 420.

⁵²⁴ Cascadden, Gunton & Rutherford, *supra* note 37 at 9.

⁵²⁵ Meghan Ellis, Thomas Gunton & Murray Rutherford, "A methodology for evaluating environmental planning systems: a case study of Canada" (2010) 91:6 J Environmental Management 1268 at 1270.

- **Largely met** = no major deficiencies.
- **Fully met** = no deficiencies.

Following the evaluation of the sub-criterion according to the scale above, the final step is to calculate an aggregate score for the criterion in question. After finding the performance rating for each criterion, they are summed to calculate an overall score. The points are assigned as follows:

Verbal Assessment	Deficiencies	Points
<i>Not met</i>	Two or more major deficiencies.	0
<i>Weak</i>	No more than one major deficiency	1
<i>Strong</i>	No major deficiencies.	2
<i>Fully Met</i>	No deficiencies.	3

Thus far I have discussed the original framework and my proposed amendments. The next section will introduce the modified Cascadden-Gunton-Rutherford framework, the modified rating system, and will then apply them to a series of cases.

5.3 The Current Research – A Global Study of Existing CDAs

5.3.1 Introduction

The Cascadden-Gunton-Rutherford framework provides a comprehensive tool that assists in developing, managing, and evaluating CDAs. The validity of the framework, as outlined above, is supported by the existing literature and shared consensus of CDA best practices on which the framework is based. Despite this, however, Cascadden et al caution that the best practices that have been derived from the literature review have not all been rigorously tested to

determine their impact on outcomes.⁵²⁶ In particular, Cascadden et al identify two areas that warrant further investigation and refinement:

- 1) The evaluation framework should be subjected to ongoing case study testing to confirm its effectiveness on evaluating best-practices criteria.⁵²⁷
- 2) Ongoing research is required to “refine definitions and test sub-criteria and indicators where necessary to make the framework easier to apply.”⁵²⁸

Thus, part of the current work involves building on the Cascadden-Gunton-Rutherford framework with the aim of increasing precision and clarity of the indicators and the rating system itself.

In the sections that follow, I engage in an analysis of publicly available CDAs from a range of jurisdictions with the intention of applying a modified version of the Cascadden-Gunton-Rutherford framework. This dataset represents a new and novel contribution to the existing empirical evidence regarding the provisions and negotiation outcomes of CDAs, and remains the only dataset to analyze whole CDAs across multiple countries. After scoring them, an analysis of the data is done to identify whether any statistically significant relationships or differences exist across a series of variables.

⁵²⁶ Cascadden, Gunton & Rutherford, *supra* note 37 at 8.

⁵²⁷ *Ibid.*

⁵²⁸ *Ibid.*

5.3.2 Modified Cascadden-Gunton-Rutherford Model – A Sharpening of the Blade

In modifying the original Cascadden-Gunton-Rutherford framework, the aim was not to develop a new analytical tool, but rather to refine and sharpen the existing one. Keeping to spirit of the original framework, new sub-criterion and indicators are proposed that provide nuance to the original criteria. The newly introduced sub-criterion and indicators are drawn from literature and leading provisions⁵²⁹ in the analyzed CDAs. Table 2 outlines the modified framework, adding emphasis to the new sub-criterion and indicators that have been adopted.

Table 2. Modified Cascadden-Gunton-Rutherford Framework

Criteria	Sub-Criteria	Indicator	Rating	Recommendations
1. Empowering	1.1 Every affected community is a participant in the agreement making process	<ul style="list-style-type: none"> i. All communities with legal rights impacted by the project are consulted. ii. All communities with unrecognized legal rights impacted by the project site are consulted. iii. All communities who may experience downstream effects of the project are consulted. 		
	1.2 Vulnerable and marginalized groups are included in the agreement making process	<ul style="list-style-type: none"> i. Women, youth, or elder groups impacted by the project are consulted in the CDA-making process. ii. The agreement community negotiation team includes representatives from marginalized interests. 		
	1.3 Community sovereignty is maintained	<ul style="list-style-type: none"> i. The community retains all of its rights, such as governance, access to land and resources, participation in regulatory processes, and land monitoring powers, in the agreement. 		
	1.4 Agreement funds are managed by the recipient community	<ul style="list-style-type: none"> i. All funds paid to the community under the agreement are managed by the recipient community. 		
	1.5 The community has its own goals and development plan, which the project is only a part of	<ul style="list-style-type: none"> i. The impacted community has its own long-term development plan for the area. ii. The development plan was prepared prior to commencement of agreement negotiations and the negotiations are guided by the community objectives in the development plan. 		
2. Respects Local Culture	2.1 Project employees take part in cross-cultural training	<ul style="list-style-type: none"> i. There is cross-cultural training available to project employees. ii. Cross cultural training is mandatory for all employees. 		

⁵²⁹ “Leading provision” in this context refers to a stand-out provision in a given CDA that was not covered in any of the analyzed agreements.

	2.2 Traditional or community knowledge is included in the project design and management	<ul style="list-style-type: none"> i. Traditional knowledge is collected or known by the project designers. ii. Traditional knowledge is used to design the project.
	2.3 Employment schedules accommodate community members' cultural needs	<p>Employee work schedules are designed to suit cultural needs including:</p> <ul style="list-style-type: none"> i. Traditional holidays and celebrations. ii. Traditional practices, such as fishing, harvesting, and hunting.
3. Affirmation	3.1 The agreement is negotiated in good faith	<ul style="list-style-type: none"> i. There is evidence that the agreement was signed in good faith, such as a signed agreement clause. ii. There are positive statements on the partnership by community members, company representatives, or government.
	3.2 The community-company relationship is trusting and maintained	<ul style="list-style-type: none"> i. The community and company see each other as trustworthy ii. There are regularly scheduled face-to-face interactions between company employees and community members.
	3.3 The agreement is seen as legitimate by the community	<ul style="list-style-type: none"> i. The negotiator or negotiation team representing the community is accountable to and approved by the community. ii. The agreement is formally approved by the community by a community vote.
	3.4 The company is committed to the agreement's success	<ul style="list-style-type: none"> i. Employees, including upper-level management, formally affirm commitment to the CDA, either by signing the CDA or by a formal declaration of support for the agreement.
	3.5 The agreement's role in the project approval process is clear	<ul style="list-style-type: none"> i. Project approval is contingent on concluding an CDA with the impacted communities. ii. Community approval is identified as a critical component of the project.
	3.6 The agreement does not replace the government's role in supporting the community	<ul style="list-style-type: none"> i. Government services and government funding for the community are not reduced due to the agreement. ii. It is explicitly stated within the agreement that the CDA is not to replace government services, development or funding.
4. Open Communication	4.1 A precursor agreement is signed (e.g. a memorandum of understanding)	<ul style="list-style-type: none"> i. There is a signed, public precursor agreement that provides a framework for agreement negotiations. ii. The precursor agreement outlines the objectives and process of negotiating an agreement.
	4.2 the CDA, any precursor agreement, monitoring results, and other CDA relevant information are publicly available	<ul style="list-style-type: none"> i. The CDA precursor agreement is publicly available. ii. The CDA is publicly available. iii. The CDA's monitoring results are publicly reported on a regular basis. iv. The CDA and monitoring results are available in the local language(s).
	4.3 Communication between signatories continues to throughout project operation	<ul style="list-style-type: none"> i. There are regularly scheduled meetings that community members and company employees can attend to discuss CDA performance and project management issues. ii. Community members and company employees are able to discuss all matters and grievances at these meetings.

		<ul style="list-style-type: none"> iii. If needed or requested communication is done in the locally spoken language(s).
	4.4 There is continuity in who is involved with the CDA making and implementation process	<ul style="list-style-type: none"> i. There is staff continuity throughout CDA negotiation and CDA implementation. ii. New staff are required to complete an CDA orientation program managed by the community and company.
	4.6 The agreement is accessible to the local community	<ul style="list-style-type: none"> i. The agreement is written in a manner such that it avoids overly technical terminology or legal jargon. ii. The agreement takes into account the literacy level and experience of the community in reading contracts. iii. The agreement is available in the local language.
5. Capacity Building	5.1 Each party's capacity is assessed	<ul style="list-style-type: none"> i. The capacity of the community to participate in CDA negotiations and manage the CDA is assessed by the community and any capacity constraints are identified. ii. Parties have sufficient time to fully prepare for negotiations. iii. The signatories develop a plan to address all identified capacity constraints prior to commencement of CDA negotiations.
	5.2 Capacity building initiatives exist and are funded	<ul style="list-style-type: none"> i. There is sufficient funding and resources to address community capacity restraints. ii. Sufficient resources are provided for job training. iii. Sufficient resources are provided to develop community governance capacity necessary for management of the agreement. iv. Sufficient resources are provided for local business development.
	5.3 There is a dedicated person in charge of employment and training of the local community	<ul style="list-style-type: none"> i. There is a dedicated person accountable to the community in charge of employment and training of local community members.
	5.4 Capacity building provisions should be locally available	<ul style="list-style-type: none"> i. There are job training and capacity building initiatives provided within the community
	5.5 The agreement promotes equal opportunities and capacity building for vulnerable groups	<ul style="list-style-type: none"> i. There are provisions that encourage the recruitment, employment, training, and education of women and other vulnerable groups, including the youth and elderly.
	5.6 Physical and psychological well-being is treated as a priority	<ul style="list-style-type: none"> i. There is monitoring and mitigation of health impacts, including the psychological impacts stemming from the project, lifestyle adjustments, and interference with cultural and traditional practices. ii. Cultural practices are safeguarded and encouraged.
6. Equity	6.1 No community member is worse off as a result of the project, considering mitigation and compensation	<ul style="list-style-type: none"> i. There are provisions to ensure that any member of the community adversely impacted by the project is fully compensated for adverse effect
	6.2 Financial benefits are scaled to the total project benefits	<ul style="list-style-type: none"> i. The financial benefits for the community are assessed as a proportion of total financial project benefits, defined in terms of gross project revenue and net project value ii. Financial benefit payments to the community are based on overall project profitability

	6.3 Financial benefits are delivered to suit community needs	i. The financial payment benefit formulas are consistent with community objectives for a stable and predictable flow of payments.
	6.4 Contracts are designed for and favour local businesses	<ul style="list-style-type: none"> i. Local businesses have an advantage in the contract bidding processes. ii. Contracts are unbundled to allow for small local business participation. iii. There are measurable targets for contracting with local business.
	6.5 Community members are preferentially hired	<ul style="list-style-type: none"> i. There are provisions that prescribe the preferential hiring of community members. ii. Legal registration and previously legal offences are not significant barriers for employment opportunities. iii. There are provisions with measurable targets and milestones that require hiring community members. iv. There are provisions with measurable targets and milestones that support advancement of community members into higher skilled and higher paying positions. v. There are provisions with measurable targets and milestones that support retention of community members in the project workforce.
7. Enforceability	7.1 The CDA includes a dispute resolution mechanism	<ul style="list-style-type: none"> i. There is a provision for dispute resolution in the agreement. ii. Dispute resolution is co-managed by the community and project representatives. iii. The dispute resolution process provides for a mutually agreed on arbitration process to resolve the dispute if agreement parties cannot agree on a resolution.
	7.2 The CDA is a legally binding document	<ul style="list-style-type: none"> i. The CDA avoids the use of vague language that is difficult to enforce (i.e. a reliance on “best efforts” or “reasonable measures”). ii. All provisions are written such that they are legally enforceable, meaning that they are specific. iii. The CDA has been reviewed by legal experts representing the community. iv. Legal action is expressly stated as an avenue available to the signatories in the event of a breach. v. There is a choice of law and forum clause. vi. The agreement explicitly states that it is a legal document.
	7.3 The CDA is jointly governed with a clearly outlined framework	<ul style="list-style-type: none"> i. There is a clear CDA governance structure that outlines who is responsible for managing each component of the CDA. ii. The CDA is jointly governed by community and project representatives.
	7.4 The CDA’s provisions have measurable targets	i. The CDA provisions have measurable targets and milestones.
	7.5 There are penalties for non-compliance with the CDA	<ul style="list-style-type: none"> i. There are penalties for non-compliance with the CDA, including fines, disciplinary measures, and mitigative actions. ii. The company and community are both

		subject to penalties.
8. Effective Implementation	8.1 Each provision is included in an implementation plan	i. Each CDA provision has an implementation plan that includes milestones, resources (funding and human), and the responsible party.
	8.2 There is funding for CDA implementation	i. There is sufficient funding to implement employment, business contracting, environment and culture protection, financial, training and education, community development, and closure and reclamation provisions. ii. The process of payment is clearly outlined, in terms of when payments will be made and who will have access and supervision of the payments.
	8.3 There is an overseer of CDA implementation	i. There is a person or committee in charge of implementing the CDA. ii. The implementation person or committee is paid. iii. The implementation person or committee is accountable to both the community and the company.
	8.4 The process is collaboratively designed	i. The community and the company. collaborate to design the CDA implementation process. ii. Each party's role in CDA implementation is made clear.
9. Monitoring and Adaptability	9.1 Progress towards CDA objectives and project impacts are periodically monitored	i. There is a monitoring plan. ii. All provisions and impacts are monitored on a regularly scheduled basis. iii. Monitoring is done with appropriate metrics relevant to the objectives and targets.
	9.2 The community and company jointly monitor the project and the CDA	i. All CDA signatories comanage monitoring.
	9.3 A baseline assessment of the environmental, cultural, and socioeconomic conditions of the community is conducted	i. There is a baseline environmental assessment. ii. There is a baseline socioeconomic assessment. iii. There is a baseline cultural assessment. iv. The community is involved in all baseline assessments.
	9.4 There is funding for monitoring	i. There is adequate funding for monitoring provided in the CDA.
	9.5 CDA deficiencies that have been identified in monitoring are mitigated	i. There is a provision in the IBA requiring any deficiencies identified in monitoring results to be mitigated.
	9.6 There is a process for amending the agreement	i. There is a process by which the parties can re-open the CDA for negotiation. ii. The process is descriptive and accessible to community members.
	9.7 There is a transitional plan outlined in the event of a change in ownership.	i. The rights and obligations of the signatories are outlined in the event of a change in ownership.
10. Breadth	10.1 The CDA addresses all project phases: construction, operation, and closure and reclamation.	i. The CDA addresses the construction, operation, closure, and reclamation phases of the project. ii. There is a closure and remediation plan. iii. The community comanages project closure and reclamation. iv. Ownership of all project related infrastructure after project closure is clearly defined.

10.2 The CDA contains the breadth of necessary provisions	There are provisions in the CDA covering community involvement in the following activities: i. Employment ii. Business contracting. iii. Training and education. iv. Financial payments to community. v. Cultural protection including protection of cultural and sacred sites. vi. Environmental protection.
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With the addition of the new sub-criterion, the maximum score attainable for a CDA on this modified scale is 144 points.

5.3.2.1 Scoring

In addition to the introduction of several new sub-criteria and indicators, a modification is made to the scoring mechanism used by Gunton, Ellis and Rutherford⁵³⁰ and subsequently Cascadden et al.⁵³¹ The aforementioned four-point rating scale may lead to some confusion or misconceptions regarding the agreement and the provisions that are being analyzed and scored. Research in the social sciences indicates that four point rating scales are likely to distort results, as they force a choice between two opposing perspectives.⁵³² Support exists for the proposition that a five point scale is preferable to a four point scale.⁵³³ A five point scale, while maintaining good data quality, has higher levels of internal consistency and greater construct validity – that is, it reflects a better measure of one’s true opinion on a matter.⁵³⁴ Care was taken to not expand the scale any further, as some research suggests that larger scales produce

⁵³⁰ Ellis, Thomas Gunton & Murray Rutherford, *supra* note 525.

⁵³¹ Cascadden, Gunton & Rutherford, *supra* note 37 at 9.

⁵³² Ron Garland, "The mid-point on a rating scale: Is it desirable" (1991) 2:1 Marketing Bull 66 at 69; Nina Østerås et al, "A randomised comparison of a four- and a five-point scale version of the Norwegian Function Assessment Scale" (2008) 6 Health Qual Life Outcomes 14.

⁵³³ Bert Weijters, Elke Cabooter & Niels Schillewaert, "The effect of rating scale format on response styles: The number of response categories and response category labels" (2010) 27:3 Intl J Research in Marketing 236.

⁵³⁴ *Ibid*; Østerås et al, *supra* note 532.

more variance than five point scales.⁵³⁵ In the context of the present research, a four point-scale can undermine the validity of the evaluative framework. With a four point scale, the evaluator is essentially to choose whether a provision is weak or strong, with little room to incorporate the varying degrees of depth that may be afforded to some indicators in comparison to others of the same sub-criterion.

The proposed scoring scale is as follows:

Table 3. Modified Scoring Scale

Verbal Assessment	Deficiencies	Points
Not met	Absence of the articulated sub-criterion and indicators in the agreement.	0
Weak	Two or more major deficiencies.	1
Sufficient	No more than one major deficiency.	1.5
Strong	No major deficiencies.	2
Fully Met	No deficiencies; goes beyond the indicators listed and attaches greater depth to its provisions.	3

5.3.3 Methodology

Most CDAs are not publicly available so it is inherently difficult to conduct a comprehensive study of their provisions. As emphasized throughout this work, the lack of transparency with these agreements is in and of itself a cause for concern.⁵³⁶ For example, in Canada, despite an

⁵³⁵ Andrew M Garratt, Jon Helgeland & Pål Gulbrandsen, "Five-point scales outperform 10-point scales in a randomized comparison of item scaling for the Patient Experiences Questionnaire" (2011) 64:2 J Clin Epidemiol 200; John Dawes, "Five point vs. eleven point scales: Does it make a difference to data characteristics" (2002) 10:1 Australasian J Market Research.

⁵³⁶ Hira & Busumtwi-Sam, *supra* note 26 at 4

estimated 265 active CDAs, very few people have been able to read and analyze them because they are obscured from the public view through confidentiality clauses.⁵³⁷ This can result in a critical lack of knowledge for governments and communities as they try to negotiate the best terms, as it prevents opportunities to learn from other's past successes or missteps.⁵³⁸

Despite the existing confidentiality issues, there is a growing trend for transparency in CDAs.⁵³⁹ Most notably, joint efforts by the Columbia Center of Sustainable Investment (CCSI) at Columbia University, the Natural Resource Governance Institute, and the World Bank have led to the creation of publicly available databases of CDAs.⁵⁴⁰ Similarly, the Sustainable Development Strategies Group⁵⁴¹ has created its own repository of publicly available CDAs.⁵⁴² In addition to searching through these databases for CDAs, a Google search was done for mining CDAs. In each instance, the CDA was downloaded and evaluated based on the modified framework outlined above.

A main motivation of this project is to begin building a scored database of CDAs that can be used to compare CDAs with one another and analyze them across a multitude of external variables. Posited by Ciaran O'Faircheallaigh⁵⁴³ and Kendra Dupuy,⁵⁴⁴ negotiation and resource development outcomes may be a product of overarching governance structures and external power dynamics. Seeking to build on these contributions, the scores obtained here

⁵³⁷ Chris Hummel, "Behind the Curtain, Impact Benefit Agreement Transparency in Nunavut" (2019) 60:2 *Le Cahiers de Droit* 367 at 371.

⁵³⁸ *Ibid.*; Papillon & Rodon, *supra* note 351 at 216.

⁵³⁹ Hummel, *supra* note 537 at 372.

⁵⁴⁰ CCSI Database, *supra* note 49; "Resource Contracts" (last visited June 2022), online: *Columbia Center for Sustainable Investment* <resourcecontracts.org>.

⁵⁴¹ Sustainable Development Strategies Group, "CDA Library" (last visited June 2022), online: <www.sdsg.org>.

⁵⁴² *Ibid.*

⁵⁴³ O'Faircheallaigh, *supra* note 16.

⁵⁴⁴ *Ibid.*

are compared against a series of variables representing the governance level within a given country. These metrics have been obtained from the Worldwide Governance Indicators (WGI) Project, which is a research initiative that summarizes the views on the quality of governance provided by a large number of enterprise, expert, and citizen respondents in developed and developing countries. The WGI reports aggregate and individual governance indicators for over 200 countries and territories over the period between 1996–2020, for six dimensions of governance:⁵⁴⁵

1. Voice and Accountability
2. Political Stability and Absence of Violence/Terrorism
3. Government Effectiveness
4. Regulatory Quality
5. Rule of Law, and
6. Control of Corruption.

The WGIs are drawn from a number of different data sources by the World Bank, capturing the views and experiences of survey respondents and experts in the public and private sectors, as well as various non-governmental organisations (NGOs). These data sources include: surveys of households and firms; NGOs; commercial business information providers; and public sector organizations.⁵⁴⁶

In addition to these analyses, this work also engages in an exploratory analysis of Kendra Dupuy's research relating to community development requirements in different countries. In Dupuy's study, it was found that foreign-direct investment is a significant and positive

⁵⁴⁵ World Governance Indicators, "WGI 2021 Interactive - FAQ", online: *World Bank* <info.worldbank.org/governance/wgi/Home/FAQ> [WGI Indicators].

⁵⁴⁶ *Ibid.*

predictor of community development requirements for mining projects.⁵⁴⁷ I investigate this finding and evaluate whether greater foreign-direct investment relates to more robust CDAs. In addition, I engage in an exploratory analysis using Dupuy's Firm Community Development Responsibility Index,⁵⁴⁸ which represents the degree of responsibility that is bestowed on companies in a given legal jurisdiction with regards to community development. Using this index, I analyse whether assigning greater community development responsibility relates to CDA robustness.

5.3.4 Variables of Interest

5.3.4.1 Dependent Variables

The dependent variables to be analyzed are drawn from the evaluative framework. For clarity, the variables of interest are:

1. Overall Score on the Modified Cascadden-Gunton-Rutherford Framework
2. Empowerment
3. Respects Local Culture
4. Affirmation
5. Open Communication
6. Capacity Building
7. Equity
8. Enforceability
9. Effective Implementation
10. Monitoring and Adaptability, and
11. Breadth.

⁵⁴⁷ Dupuy, *supra* note 77 at 86.

⁵⁴⁸ *Ibid* at 72.

5.3.4.2 Independent Variables

The independent variables that will be analyzed are drawn from the WGI:

1. *Voice and Accountability*. This measure captures the perceptions of the extent to which a country's citizens are able to participate in selecting their government, as well as freedom of expression, freedom of association, and a free media.⁵⁴⁹
2. *Political Stability and Absence of Violence/Terrorism*. This measure captures perceptions of the likelihood of political instability and politically-motivated violence.⁵⁵⁰
3. *Government Effectiveness*. This measure represents the quality of public services, the quality of the civil service and the degree of its independence from political pressures, the quality of policy formulation and implementation, and the credibility of the government's commitment to such policies.⁵⁵¹
4. *Regulatory Quality*. This measure represents the ability of the government to formulate and implement sound policies and regulations that permit and promote private sector development.⁵⁵²
5. *Rule of Law*. This measure captures perceptions of the extent to which agents have confidence in and abide by the rules of society, and in particular the quality of contract enforcement, property rights, the police, and the courts, as well as the likelihood of crime and violence.⁵⁵³

⁵⁴⁹ WGI Indicators, *supra* note 545.

⁵⁵⁰ *Ibid.*

⁵⁵¹ *Ibid.*

⁵⁵² *Ibid.*

⁵⁵³ *Ibid.*

6. *Control of Corruption*. This measure captures perceptions of the extent to which public power is exercised for private gain, including both petty and grand forms of corruption, as well as "capture" of the state by elites and private interests.⁵⁵⁴

Another variable of interest is the *level of responsibility* held by a company in a given jurisdiction. This variable will be drawn from the Firm Community Development Responsibility Index by Kendra Dupuy:

Category	Scoring
1) Firms are assigned responsibility for carrying out community development activities	0 = Firms not assigned to carry out community development activities (the state is assigned responsibility). 1 = Firms are assigned responsibility for carrying out community development activities.
2) Specificity of community development project requirements for firms	0 = No specificity for firms' activities. 1 = Firms are required to work on specific issue areas, spend a specific financial amount, and/or implement projects within a specific timeframe.
3) Requirement for firms to develop specific, documented community development plans and/or enter into formal agreements with either governments or local communities	0 = Firm is not required to develop plans or enter into agreements or contracts with explicit community development plans outlined. 1 = Firm must develop/present a plan or agreement in order to acquire mining rights.

⁵⁵⁴ *Ibid*

⁵⁵⁵ Dupuy, *supra* note 77 at 72.

Minimum Total Points Possible = No Responsibility = 0
Low Responsibility = 1
Medium Responsibility = 2
Maximum Total Points Possible = High Level of Responsibility = 3

Table 5. Distribution of Countries Across Firm Responsibility Index			
<i>0 (no firm responsibility assigned; state is responsible)</i>	<i>Low Responsibility: 1 index category required (firms are assigned responsibility for community development)</i>	<i>Medium Responsibility: 2 index categories (category number in parentheses)</i>	<i>High Responsibility: 3 index categories required</i>
Ghana (1991) ⁵⁵⁶ Sierra Leone (2001) Bolivia (2014)	Australia (1993)	Mongolia (2006)	Papua New Guinea (1992) Canada (2002) Sierra Leone (2009) Greenland (2009)

5.4 Results

5.4.1 Governance and CDA Robustness

5.4.1.1 Sample Selection

Colombia Center on Sustainable Investment at Columbia University and the Sustainable Development Strategies Group offer some publicly available databases with CDA texts, ranging from a number of different industries in the resource development context. These databases were supplemented with a google search for CDAs. Due to the lack of homogeneity

⁵⁵⁶ Parentheses refer to the year of adoption.

between the different extractive sectors and an interest in reducing confounding variables, the current analysis excludes CDAs that are outside the mining industry. There are several reasons for this decision:

- In contrast to other extractive industries, mining exploration often takes place in a context of extremely limited prior geological knowledge or data.⁵⁵⁷
- Mining laws and regulations are generally very detailed with regards to procedures and institutional structure, roles, and mandates, because they have to apply across a diverse sector.⁵⁵⁸
- Traditionally speaking, gas operations include a significant state element in the transportation and distribution, and sometimes in the exploration and production phases as well.⁵⁵⁹ A study by the Raw Minerals Group, commissioned by the World Bank, concluded that poor performance in mining is not a “corollary of state ownership”.⁵⁶⁰ The effect of state involvement is a contrasting feature between the mining and gas sector: “The success of a state-owned mining company is determined by governance framework/structure, assets and capital base”.⁵⁶¹
- Generally, there are distinct laws and legislative frameworks for oil and gas activities and for the mining of minerals. Differences in legal design suggest the existence of underlying differences between different extractive industries.⁵⁶²

⁵⁵⁷ Peter D Cameron & Michael C Stanley, “Oil, Gas, and Mining” (2017), online (pdf): *World Bank* <openknowledge.worldbank.org/bitstream/handle/10986/26130/9780821396582.pdf> at 44.

⁵⁵⁸ *Ibid* at 43.

⁵⁵⁹ *Ibid* at 44.

⁵⁶⁰ Raw Minerals Group, “Overview of State Ownership in the Global Minerals Industry”, (2011), online (pdf): *World Bank* <openknowledge.worldbank.org/bitstream/handle/10986/16968/828480NWP0Extr00Box379875B00PUBLIC0.pdf?sequence=1&isAllowed=y> at 33.

⁵⁶¹ *Ibid*.

⁵⁶² See Douglas K Reece, “Competitive Bidding for Offshore Petroleum Leases” (1978) 9:2 *Bell J Economics* 369; Steven Barnett & Rolando Ossowski, “Operational Aspects of Fiscal Policy in Oil-Producing Countries” (2002) IMF Working Paper 02/177; Cameron & Stanley, *supra* note 553 at 43.

- A different balance of capital and operating costs between the extractive industries, as mining has higher capital costs⁵⁶³ and needs more people during production, ongoing equipment investment, and continuous management of local environmental impacts.⁵⁶⁴

In addition, CDAs that did not have both the company and community as signatories were omitted. A key motivation for this work is to help investigate negotiation outcomes and power dynamics between companies and communities – as such, agreements that are strictly between the government and the company (which may or may not distribute benefits to a given community) and agreements between communities and the government (which do not involve the company in negotiations) are not of primary interest.⁵⁶⁵

In total, these omissions reduced the sample size to 17 publicly available mining CDAs across seven different jurisdictions including: Australia, Canada, Greenland, Mongolia, Papua New Guinea, Sierra Leone and Ghana. As a whole, the CDAs analysed likely do not constitute a wholly representative sample of the total number of CDAs that are implemented in practice. This being said, it must be emphasized that industry practices of confidentiality inherently limit the certainty with which one can make conclusions based on the current publicly available dataset. More CDAs must be obtained to obtain more robust results, but this may only happen through industry-led initiatives that bridge the knowledge gap between the public and industry practice.

⁵⁶³ See Roberto Álvarez & Rodrigo Fuentes, “Paths of Development, Specialization, and Natural Resources Abundance” (2006) Central Bank of Chile Working Paper No 383; Ousman Gajigo, Emelly Mutambatsere & Guirane Ndiaye, “Gold Mining in Africa: Maximizing Economic Returns for Countries” (2012) African Development Bank Group Working Paper No 147.

⁵⁶⁴ Cameron & Stanley, *supra* note 557 at 45.

⁵⁶⁵ The differences between company-community CDAs, company-government-community CDAs, government-community CDAs, and company-government contracts present an unexplored avenue of research that is deserving of attention. For example, how do such agreements differ in their provisions? How do they differ in their outcomes? In the midst of current analysis and review, differences appeared to exist in terms of structure and content of these agreements depending on signatories involved. This, of course, is not a conclusive finding but one that is nonetheless worth noting.

5.4.1.2 Data and Descriptive Statistics

Table 6, organized from highest to lowest, summarizes the average scores per country.

Table 6. Average Overall Score By Country		
Country	Score	Score (%)
	<i>Maximum Score Possible = 144</i>	
Australia (1)	101.00	70.1%
Greenland (2)	99.25	68.9%
Canada (6)	100.50	69.8%
Papua New Guinea (3)	77.18	53.6%
Mongolia (2)	71.25	49.5%
Sierra Leone (2)	69.75	48.4%
Ghana (1)	69.00	47.9%

5.4.1.2.1 Bivariate Correlational Analysis: Governance Indicator Scores and Overall CDA Scores

A bivariate correlational analysis was conducted between the overall score on the evaluative framework and six different governance indicators. Upon investigation, the highest correlate to CDA robustness was Regulatory Quality, $r = .73, p < .01$. It is also worth noting that each of the remaining governance indicators were found to have significant positive correlations with Overall CDA Scores:

Table 7. Correlations between Overall CDA Score and Governance Indicators	
Control of Corruption Rating	$r = .67, p < .01^{**}$
Voice and Accountability Rating	$r = .69, p < .01^{**}$

Political Stability and Absence of Violence/Terrorism Rating	$r = .54, p < .05^*$
Government Effectiveness Rating	$r = .69, p < .01^{**}$
Regulatory Quality Rating	$r = .73, p < .01^{**}$
Rule of Law Rating	$r = .71, p < .01^{**}$

The results also show that the governance indicators themselves have significant positive correlations with one another, ranging from $r = 0.87$ to $0.99, p < .001$. This suggests that a country's overall level of governance is positively related to how robust CDAs are in that jurisdiction.

5.4.1.2.2 Multiple Linear Regression Analysis

In addition, a multiple linear regression analysis was conducted to evaluate whether the raw WGI Indicator Scores may predict CDA robustness. The results are available below.

Table 8. Multiple Linear Regression Results: WGI Indicator Scores x CDA Robustness	
	Robustness
Control of Corruption Rating	$F(15) = 12.24, p = .003^{**}$
Voice and Accountability Rating	$F(15) = 13.42, p = .002^{**}$
Political Stability and Absence of Violence/Terrorism Rating	$F(15) = 6.36, p = .023^*$
Government Effectiveness Rating	$F(15) = 18.22, p < .001^{***}$
Regulatory Quality Rating	$F(15) = 16.98, p < .001^{***}$

Rule of Law Rating	$F(15) = 19.52, p < .001^{***}$
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The results reveal that the WGI Governance Indicator Ratings add significantly to the prediction of CDA robustness. Notably, Regulatory Quality Ratings, Rule of Law Ratings, and Government Effectiveness Ratings were found to be the greatest predictors, respectively.

5.4.1.3 Inferential Statistics

This analysis focused on investigating the differences in CDA robustness/score between countries that rate high on specific governance indicators and those that rank low on specific governance indicators.

Countries that were ranked higher than the 60th percentile by the WGI were classified as “High” for a given governance indicator (coded as ‘1’). Those that ranked lower than the 60th percentile were classified as “Low” for that indicator (coded as ‘2’).⁵⁶⁶ This allowed for the determined scores to be split into separate groups: (1) CDAs from countries with a high governance indicators; (2) CDAs from countries with low governance indicators. Given that a significant correlation has been identified between governance indicators and CDA robustness, it follows that there should be significant differences in the average overall CDA score between high governance rated countries and low governance rated countries.

5.4.1.3.1 *t*-Test: Overall Scores x Governance Indicators

The data collected were analyzed using a one-tailed independent sample t-test. A one-tailed test was used after identifying a positive relationship between CDA robustness and a country’s

⁵⁶⁶ N.b. The 60th percentile was chosen as it is the median identified by the WGI.

governance rating. Research by O’Faircheallaigh also suggests that strong regulatory frameworks and high levels of governance can lead to better CDA outcomes.⁵⁶⁷

Levene’s test for equality of variance was not significant for any of the grouped governance indicators. The results are shown in Table 9 below.

Table 9. Results for Levene’s Test: Governance Indicators	
Corruption Control	Levene $F(1, 15) = .67, p = .43$
Freedom of Voice and Accountability	Levene $F(1, 15) = .67, p = .43$
Political Stability	Levene $F(1, 15) = .47, p = .50$
Government Effectiveness	Levene $F(1, 15) = .67, p = .43$
Regulatory Quality	Levene $F(1, 15) = .67, p = .43$
Rule of Law	Levene $F(1, 15) = .67, p = .43$

Non significance in this context means that the variances between the high and low governance groups were not significantly different from each other. Thus, since there was no significant difference between the variances, the variances could be treated as equal. This allows for more confidence in the results of the independent t-test.

The independent t-tests conducted revealed that high governance countries have more robust CDAs based on the modified evaluative framework. This pattern was exhibited across all governance indicators by the WGI. The results may be summarized as follows:

⁵⁶⁷ Dupuy, *supra* note 77 at 72.

Table 10. *t*-Test Results: High/Low Governance Level x CDA Robustness

Countries with a high control of corruption have more robust CDAs ($M = 100.28, SD = 11.12$) than countries with a low control on corruption ($M = 72.81, SD = 14.47$).	$t(15) = 4.42, p < .001^{***}$
Countries with high freedom of voice and accountability have more robust CDAs ($M = 100.28, SD = 11.12$) than countries with low freedom of voice and accountability ($M = 72.81, SD = 14.47$).	$t(15) = 4.42, p < .001^{***}$
Countries with high political stability have more robust CDAs ($M = 95.00, SD = 17.86$) than countries with low political stability ($M = 73.33, SD = 11.31$).	$t(15) = 2.67, p = .02^*$
Countries with high government effectiveness have more robust CDAs ($M = 100.28, SD = 11.12$) than countries with low political stability ($M = 72.81, SD = 14.47$).	$t(15) = 4.42, p < .001^{***}$
Countries with high regulatory quality have more robust CDAs ($M = 100.28, SD = 11.12$) than countries with low regulatory quality ($M = 72.81, SD = 14.47$).	$t(15) = 4.42, p < .001^{***}$
Countries with a high rule of law have more robust CDAs ($M = 100.28, SD = 11.12$) than countries with a low rule of law ($M = 72.81, SD = 14.47$).	$t(15) = 4.42, p < .001^{***}$

5.4.2 Foreign Direct Investment and CDA Robustness

A bivariate correlational analysis was conducted between the overall score on the evaluative framework and FDI inflow in a given year. The FDI inflow is measured as a percentage contribution to GDP in a given year. One CDA from Papua New Guinea was excluded and all CDAs from Greenland were excluded from the analysis due to the lack of FDI data available on the World Bank database for those countries. A statistically significant relationship was not identified between these two variables, $r = -.48, p = .084$.

5.4.3 Firm Community Development Responsibility and CDA Robustness

The data obtained from the CDAs was investigated using a one-way analysis of variance (ANOVA). This method of analysis allowed for the comparison of means across multiple groups and to determine if they differed significantly from one another. The current investigation used a one-way ANOVA in order to test the effects that firm community development responsibility has CDA robustness. In other words, the ANOVA was used to evaluate whether the amount of responsibility conferred to a company through legislative schemes had a relationship with the level of CDA robustness.

Levene's test for equality of variance was not significant. $F(1, 13) = .786, p = .39$. This indicated that the variances between the groups do not differ significantly and that the assumption of homogeneity of variances was not violated.

The ANOVA was not significant, $F(3, 13) = 1.1, p = .203, \eta^2 = .2$. Thus, jurisdictional differences in the amount of responsibility assigned to firms for community development through did not produce a significant difference in CDA robustness.

5.5 Summary of Results

The small sample size of the dataset inherently prevents drawing conclusions with a high degree of certainty. Nonetheless, the findings based on the available data indicate that a statistically significant relationship exists between WGI Governance Indicators and CDA robustness. Importantly, the bivariate regression conducted indicates that the WGI scores add significantly to the prediction of CDA robustness. This relationship was found to exist for both a calculated historic average of a country's governance score, as well as the governance scores relating to the year that the agreement was signed. Chapter 6 discusses the theoretical

implications of this relationship and how it relates to the existing body of research on CDAs. In particular, it lends support for the proposition that the institutional features of a host country are related to – and perhaps predictive of – negotiation outcomes and CDA robustness.

A relationship was not identified between the level of community development responsibility that countries assign private mining firms and CDA robustness. It is also worth noting that the majority of publicly available mining CDAs (i.e. 13 agreements out of 17) are from operations in countries that assign a high degree of responsibility to private companies. Furthermore, there was no relationship identified between CDA robustness and countries with legislated community development requirements. The possible implications of this are discussed in the next section.

In sum, this dataset represents a novel contribution to the existing empirical evidence regarding the nature of CDAs and is, to date, the only dataset to investigate CDA provisions and their relationship to institutional factors. At a minimum, it invites further investigation into institutional dynamics and the effect that they have on CDA negotiation, robustness, and outcomes.

Chapter 6

6 Community Development Agreements – The Road Ahead

6.1 The Importance of Institutional Design and Strength

In Chapter 4, I identified a critical question and debate underpinning the variability in negotiation outcomes and CDA robustness:

“What explains this variability? Which factors contribute to CDA success in negotiation and implementation? Three possible explanations are outlined in the literature. The first is offered by researchers who propose that CDAs are products of neo-liberal governance strategies that have been designed to maintain corporate and state power and to continue the marginalization of Indigenous peoples.⁵⁶⁸ A second is that outcomes are determined by the legal regime of the country where the project is situated in.⁵⁶⁹ The third posits that variable outcomes could be the result of institutional differences affecting the organizational, political, and negotiating capacity of local communities and Indigenous peoples when negotiating the agreements.⁵⁷⁰”

The analysis of CDAs in Chapter 5 goes to the heart of this question and lends support to theories that institutional strength is predictive – and perhaps even a cause – of poor social and economic outcomes in the resource development context. Traditionally, poor outcomes have been used as evidence to support the aforementioned “resource curse” hypothesis – that

⁵⁶⁸ Prno, Bradshaw & Lapierre, *supra* note 35.

⁵⁶⁹ O’Faircheallaigh, *supra* note 34 at 4.

⁵⁷⁰ O’Faircheallaigh, *supra* note 15; Dupuy, *supra* note 77.

is, the theory that natural resources are a hindrance to economic growth.⁵⁷¹ Recently, however, insights have emerged from a key turn in the literature proposing that natural resources are neither a curse nor a blessing. Known as ‘institutionalism’,⁵⁷² this theory asserts that weak institutions – marked by factors such as poor rule of law, lack of economic freedom, poor enforcement mechanisms – negatively affect growth and development.⁵⁷³ Despite their differences, these two schools of thought have much in common; namely, both perspectives stress the vital role of institutions in securing good outcomes for impacted communities.⁵⁷⁴ Research supporting this contention is growing, showing that institutional strength is positively and strongly correlated with economic success in resource economies.⁵⁷⁵

Negotiation and bargaining power are significant factors for impacted communities interested in securing equitable outcomes.⁵⁷⁶ In a study by Ciaran O’Faircheallaigh, it is suggested that overarching characteristics of weak institutions serve to create a structural inequality in negotiating positions by generation differential pressures and incentives on impacted communities and mining companies.⁵⁷⁷ O’Faircheallaigh is not alone in this sentiment – there are a number of research publications that acknowledge the importance of external factors for

⁵⁷¹ Peter Kaznacheev, “Curse or Blessing? How Institutions Determine Success in Resource-Rich Economies” (11 January 2017), online(pdf): *Cato Institute* <www.cato.org/policy-analysis/curse-or-blessing-how-institutions-determine-success-resource-rich-economies> at 6.

⁵⁷² *Ibid.*

⁵⁷³ *Ibid.*

⁵⁷⁴ *Ibid.*

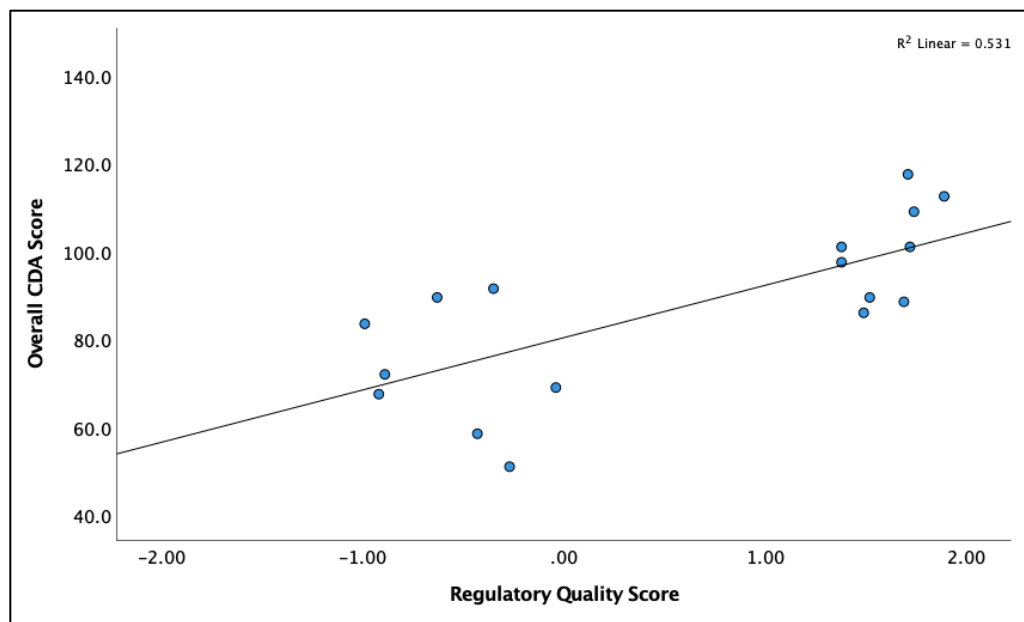
⁵⁷⁵ See e.g. Anne Krueger, Maurice Schiff, & Alberto Valdés, eds, *Latin America: The Political Economy of Agricultural Pricing Policy - Volume 1* (Baltimore: Johns Hopkins University Press, 1991), See also Deepak Lal and Hla Myint, *The Political Economy of Poverty, Equity and Growth: A Comprehensive Study* (Oxford: Clarendon Press, 1999); William Easterly & Ross Levine, “Africa’s Growth Tragedy: Policies and Ethnic Divisions” (1997) 112 QJ Economics 1203–50; Gary McMahon, “Natural Resource Curse: Myth or Reality?” (1997) Economic Development Institute, World Bank, online (pdf): <[fdocuments.net/document/mcmahonnatural-resource-curse-myth-or-reality.html](http://documents.net/document/mcmahonnatural-resource-curse-myth-or-reality.html)>.

⁵⁷⁶ O’Faircheallaigh, *supra* note 15.

⁵⁷⁷ *Ibid* at 202.

negotiation outcomes.⁵⁷⁸ The analysis conducted here lends further support for these propositions. For both the averaged percentile-based metrics of the WGI scores and the raw-scores of WGIs in a given year, positive and significant relationships were identified between the overall robustness of CDAs and the different criteria. Notably, regulatory effectiveness and rule of law metrics emerged as the strongest predictors of overall scores on the modified Cascadden-Gunton-Rutherford framework. Figures 1 - 6 provide a graphical depiction of the identified relationships between WGI scores in the year of the agreement and overall CDA robustness.

Figure 1. Overall CDA Score x Regulatory Quality Rating



⁵⁷⁸ *Ibid* at 20; See also Daniel Druckman, “The Situational Levers of Negotiating Flexibility” (1993) 37:2 *J Conflict Resolution* 236; Min Li, Leigh Tost & Kimberly Wade-Benzoni, “The Dynamic Interaction of Context and Negotiator Effects: A Review and Commentary on Current and Emerging Areas in Negotiation” (2007) 18:3 *Intl J Conflict Management* 222; Stephen E Weiss, “The long path to the IBM-Mexico agreement: an analysis of the microcomputer investment negotiations 1983–86” (1990) 21:4 *J Intl Business Studies* 565; Linda L Putnam & Ryan P Fuller, “Turning Points and Negotiation: The Case of the 2007–2008 Writers’ Strike” (2014) 7:3 *Negotiation & Conflict Management Research* 188.

Figure 2. Overall CDA Score x Rule of Law Score

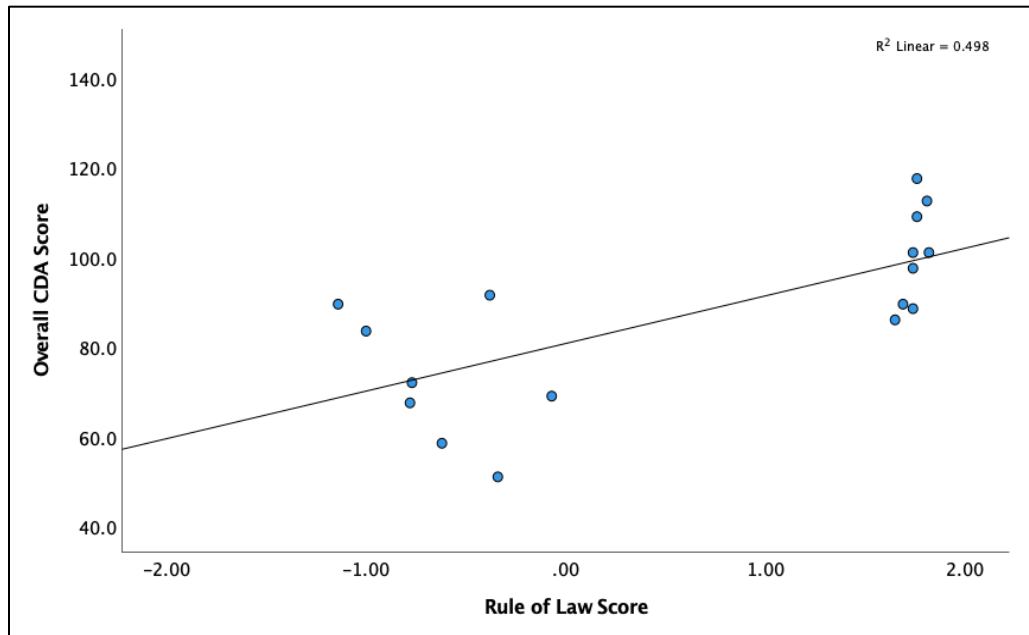


Figure 3. Overall CDA Score x Control of Corruption Score

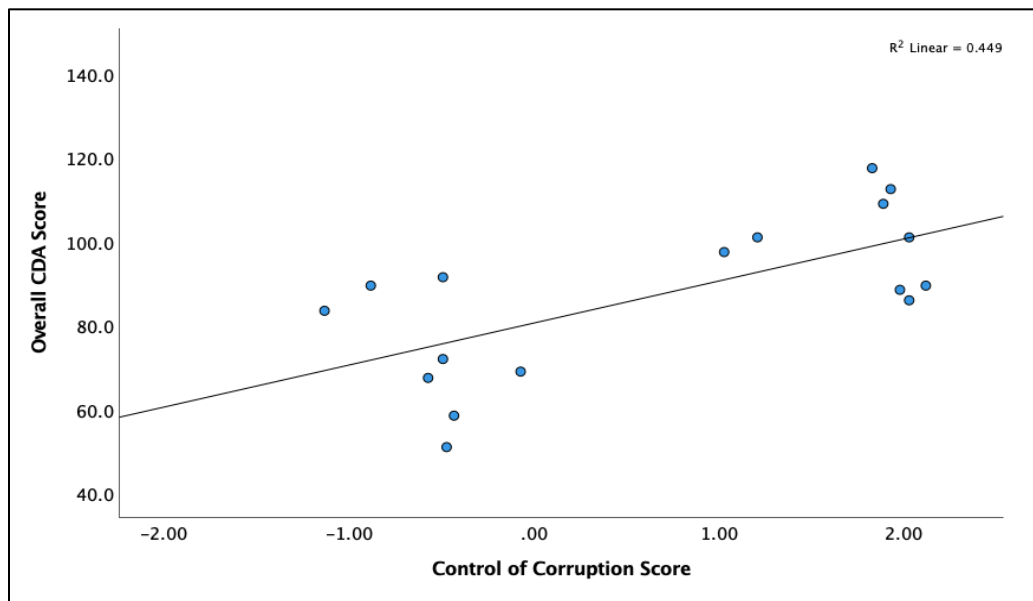


Figure 4. Overall Score x Freedom of Voice and Accountability Score

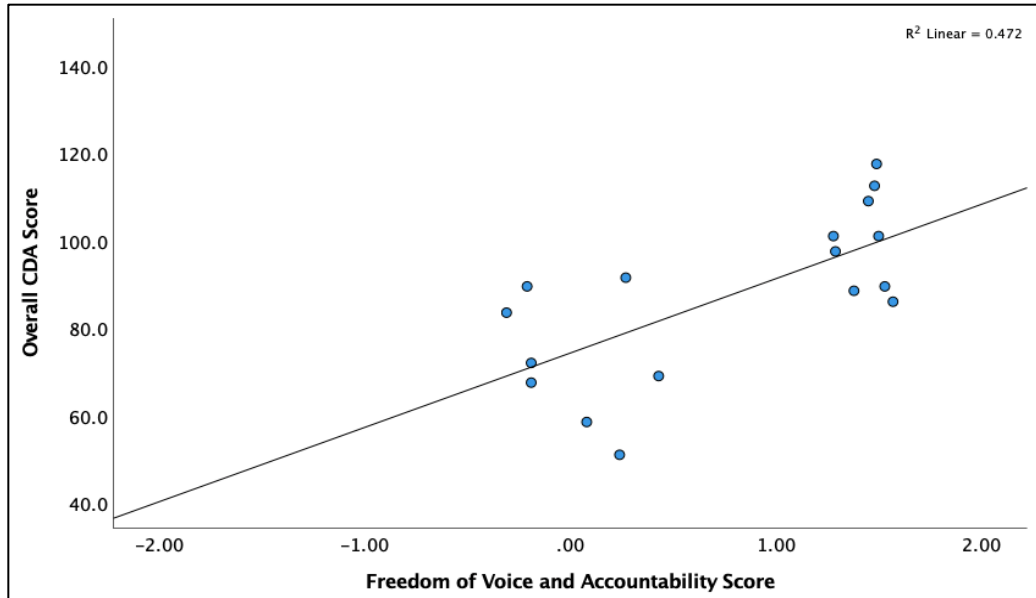


Figure 5. Overall CDA Score x Political Stability Score

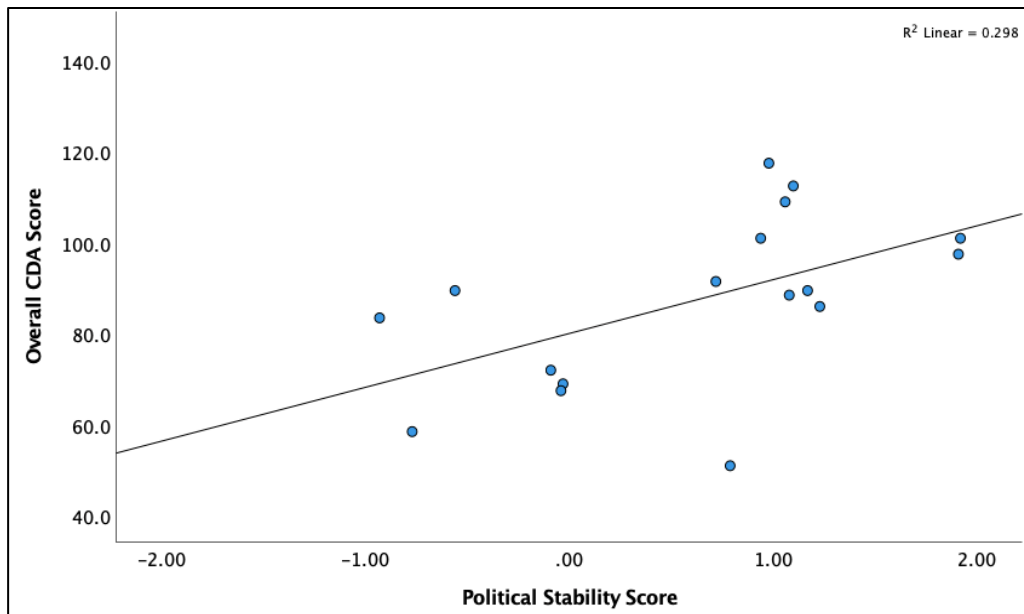
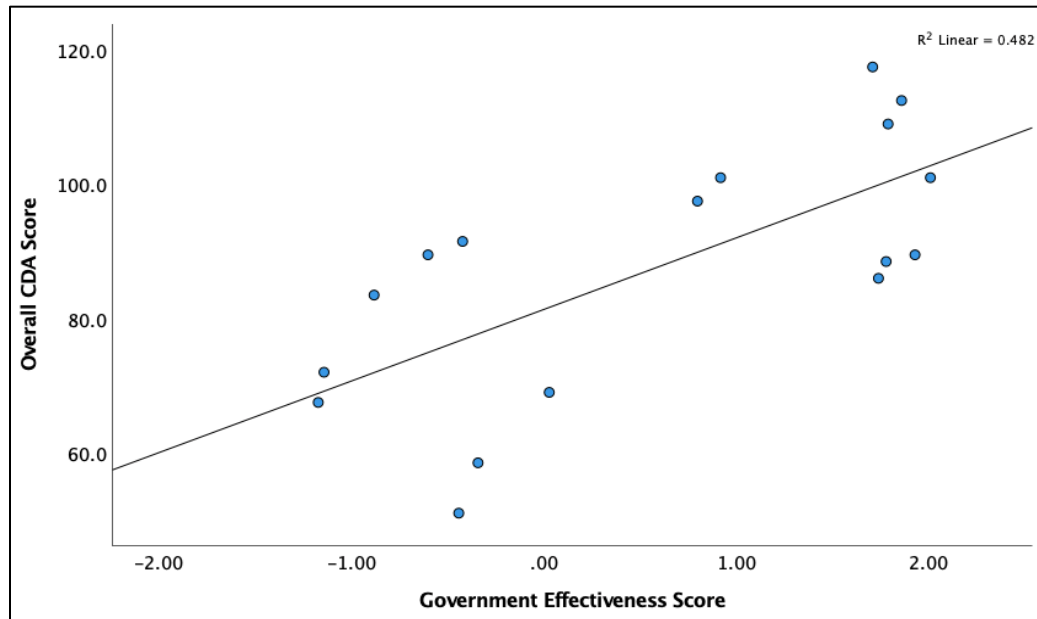


Figure 6. Overall CDA Score x Government Effectiveness Score



Negotiations of CDAs rely more on just the skills and power that each party brings to the table.⁵⁷⁹ These negotiations “take place in an institutional and social context, which profoundly shapes what happens in the individual negotiation.”⁵⁸⁰ Research to date, however, has not analyzed these external factors to a significant degree.

6.2 Limitations

There are several limitations to this study that should be emphasized at this point.

- 1) *Small Sample Size.* The small sample size in this work makes it difficult to determine whether the outcome is a true finding. It is possible that the significant relationship identified between WGI Governance Indicators and CDAs is a spurious finding. More

⁵⁷⁹ Susan Sturm, “Negotiating Workplace Equality: A Systemic Approach” (2009) 2:1 *Negotiation & Conflict Management Research* 92 at 93.

⁵⁸⁰ *Ibid.*

work must be done to increase transparency around CDAs and bring them further into the public domain to allow for study.

- 2) *Confounding Variables.* CDA robustness may be correlated with some other external variable that has not been identified in this study. For example, it is possible that the WGI Indicators are highly related because there is underpinning variable that has not been identified. More research must be done to understand the nature of the WGI indicators and the factors that most impact their rating.
- 3) *Scoring Limitations.* Although much effort was made to be as transparent and objective as possible in the assessment, the evaluation still relies on subjective assessments, which may vary from analyst to analyst. Further case study research and application of the modified Cascadden-Gunton-Rutherford framework is needed to understand its validity.
- 4) *Lack of Outcome Evaluation.* The modified Cascadden-Gunton-Rutherford framework does not include the evaluation of outcomes of the agreements. As discussed in the next section, the framework and scores attained creates an analytical foundation by which the relationship between the provisions of CDAs and their outcomes may be investigated.

6.3 Closing Thoughts - The Value of Empirical Analysis

Underpinning the totality of this work is the fact that the role and merits of CDAs cannot be understood nor resolved without addressing the larger question of whether natural resource development leads to a long term sustainable growth or environmental and societal

degradation. As stated by Gunton and Markey, there is a fundamental choice that must be made:

“Should communities integrate into world economies by pursuing export-based resource development subject to the uncertainty of international commodity cycles and finite local natural resources or should they pursue alternative community-based development strategies focused on meeting local needs to avoid the resource curse?”⁵⁸¹

If the resource development path is chosen, the empirical evaluation of CDAs presents two primary benefits: (1) the elevation of negotiating power; and (2) the explanation of outcome variability.

6.3.1 Elevating Negotiating Power

CDAs can play a key role in balancing voluntary corporate initiatives and public regulation. Given that they are contracts that are negotiated by the communities themselves, there is potential for CDAs to allow for a high degree of flexibility in the management of projects and the distribution of their benefits.⁵⁸² As discussed, the content of CDAs varies considerably from one instance to another; they are highly adaptable and usually reflect local circumstances and priorities. This variability suggests that CDAs, at a minimum, have the potential to address issues that are of critical importance in specific local contexts.⁵⁸³ Whether this potential is realised relates closely to factors such as community representation in negotiations, community capacity and, perhaps more importantly, the bargaining power of communities.

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⁵⁸¹ Gunton & Markey, *supra* note 9 at 9.

⁵⁸² O’Fairchealligh, *supra* note 16.

⁵⁸³ *Ibid.*

⁵⁸⁴ *Ibid.*

The scale of benefits and the efficacy of a CDA reflect the relative bargaining power of communities, on the one hand, and developers on the other. The degree of community cohesion, strength of local political organisations, the quality of community leadership, and a community's prior history of dealing with development projects are all important factors that impact bargaining power.⁵⁸⁵ The communities facing the potential development projects are commonly located in remote areas and often face poverty.⁵⁸⁶ Although some communities are more prepared and successful than others in negotiating CDAs, it is a common instance for a community to enter the negotiations over a mining project with limited capacity, knowledge and resources, which places them in a position of inferiority in terms of negotiation power.⁵⁸⁷

An assessment framework and a descriptive database of scores helps build community knowledge and improves the capacity of community representatives to articulate and promote the full range of community interests. As discussed above, the confidentiality issues permeating this industry carry clear implications for the negotiating capacity of communities: communities must operate without access to the experiences of other communities. Initiatives, such as the Open Community Contracts initiative by the Columbia Center on Sustainable Investment, are important steps towards increasing the accessibility of agreements to communities, practitioners, and researchers. This framework and its application helps to build on such initiatives, providing community members with a tool that they may use to compare and contrast different agreements. By scoring the agreements as a whole and their provisions,

⁵⁸⁵ *Ibid.*

⁵⁸⁶ St-Laurent & Billon, *supra* note 300; Naomi Adelson, "The embodiment of inequity: health disparities in aboriginal Canada" (2005) 96:2 Can J Public Health S45.

⁵⁸⁷ St-Laurent & Billon, *supra* note 300.

decisions can be made on whether an agreement is ‘weak’ or ‘strong’ and negotiation goals can be more readily identified.

6.3.2 Evaluating the Efficacy of CDAs

As discussed in Chapter 4, there is a lack of consensus regarding the role of CDAs. To date, the existing literature has been divided on whether these agreements reinforce the status quo or whether they facilitate community development. It has been repeatedly established in the literature that CDAs are context dependent, and their ability to benefit a community depends on a host of internal and external factors.⁵⁸⁸ Lost in this discussion however is the fact that CDAs have emerged as industry norms and are very likely to continue being negotiated.⁵⁸⁹ As such, it is important to bring attention to whether CDAs relate to positive outcomes and how the outcomes can be improved for the communities that negotiate them.

By committing to a uniform mechanism of scoring these agreements, a host of research questions may be addressed. The current work provides a cursory example of the kinds of analyses and insights that can be drawn from scoring CDA provisions. In addition to investigating the relationships that CDAs have with external factors, such as institutional strength, it becomes possible to empirically analyze CDA provisions with the outcomes of CDA implementation. Some preliminary questions that are worthy of investigation include:

- Do more robust CDAs correlate to better outcomes? Is there a causal relationship?
- What provisions of CDAs are most predictive of successful implementation?
- What provisions undermine CDA successful implementation?
- What internal and external factors are most predictive of CDA robustness?

⁵⁸⁸ O’Faircheallaigh, *supra* note 16 at 4.

⁵⁸⁹ Gunton & Markey, *supra* note 9.

- How do CDAs negotiated between companies and communities differ from benefit agreements negotiated between governments and communities?
- Does a CDA that has been renegotiated to approve on an earlier version relate to better outcomes in a given instance?

Given the global uptake of legislating community development requirements, these questions are critical importance. This work has taken another incremental step towards identifying the variability in negotiation outcomes. A significant positive relationship was established between a country's governance strength and the robustness of the CDAs. Further case study research, and thus greater transparency from industry itself, is required to better analyze these questions. Unless the reasons for variability are properly understood, an understanding of how more positive outcomes can be achieved using CDAs will continue to elude researchers, communities, and industry.

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