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**Towards community benefits derived from mining: Assessing the potential
role of Community Development Agreements in Zimbabwe**

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ABSTRACT

Mining is a significant economic contributor in both developing and developed countries. With the industry responsible for the creation of cities, communities, industries, employment, and infrastructure. Although mining has positive economic benefits, there are negative social, economic and environmental consequences of mining. There are host communities who are yet to see the benefits of mining activities. This has placed community development in mining areas at discussions of the benefits of mining outside the economy. Zimbabwe as a developing country has placed mining at the centre of its development agenda. With the industry receiving investments. This begs the question of whether communities will receive equitable benefits from continued mining operations.

To address the issue of community development, Zimbabwe enacted the Indigenisation and Economic Empowerment Act. With the aim of providing measures for economic empowerment of indigenous Zimbabweans. This was to be achieved by ensuring that indigenous Zimbabweans had controlling stake in businesses. To this end community share ownership trusts were promulgated into the indigenisation laws. These trusts were to receive a 10% ownership share in mining businesses and financial pledges to capitalize the trusts. The success of CSOTs has been a mixed bag with most the CSOT non-functional. With the amendments to the Indigenisation laws, the legal position of CSOT is not clear.

This study examines the potential of community development agreements (CDAs) as a tool that ensures communities receive equitable benefits. It investigates this potential by analysing the Zimbabwean legal framework. It looks at CDA as a tool that might be utilized in Zimbabwe by looking at the advantages and disadvantages of CDAs. This also includes examining how other jurisdictions have adopted CDAs. In countries such as Australia and Canada, the negotiation of CDAs has become standard practice for all new resource development projects. This study will examine the approaches taken by Australia, Canada and South Africa in incorporating CDAs in their frameworks.

LIST OF ACRONYMS

| | |
|-------|---|
| CDA | Community Development Agreement |
| CALS | Centre of Applied Legal Studies |
| CSOT | Community Share Ownership Trust |
| CSR | Corporate Social Responsibility |
| ESG | Environment Social Governance |
| IBA | Impact and Benefits Agreements |
| ICMM | International Council on Mining and Metals |
| IEEA | Indigenisation and Economic Empowerment Act |
| ILUA | Indigenous Land Use Agreements |
| MPRDA | Mineral and Petroleum Resources Development Act |
| NGO | Non-Governmental Organisation |
| NTA | Native Title Act |
| SLP | Social Labour Plan |

KEYWORDS

Community Development Agreements, Mining, Zimbabwe, Indigenisation and economic empowerment, Community Development

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CHAPTER 1: INTRODUCTION

1.1. Background

Zimbabwe has a long history of mining. The sector is a diversified sector, with the country having the second largest platinum deposits and high-grade chromium.¹ Other minerals extracted in Zimbabwe include gold, diamonds, coal, and PMG metals.² The Zimbabwean mining industry plays an important role in the economy as it contributes about 12% of the country's gross domestic product (GDP).³ Despite the mineral extraction activities in Zimbabwe, the country is still suffering economic challenges. Although Zimbabwe is facing economic challenges, mining activities continue to take place in the country. This raises questions about how neighbouring communities in mining areas are benefiting from the mining activities, as well as how is the law promoting and protecting the interest of local communities. According to Wushe, the absence of corporate community engagement which has been due to the absence of natural resource appropriation laws has empowered investors at the expense of local inhabitants.⁴ This is particularly true in Zimbabwe, where the Mines and Minerals Act of 1961 fails to protect the rights of the communities in mining areas. In the case of Zimbabwe, Murombo points out that community participation in the mining industry is virtually non-existent under the current legal framework.⁵ Consequently, the only way for local communities to benefit is indirectly through development initiatives by the central and local governments, as well as other incidental infrastructure put in place by mining companies.⁶

In addition to the above, another potential way communities can benefit from mining projects is through an ownership stake as a community share ownership scheme as provided for by the Indigenisation and Economic Empowerment Act (IEEA). According to the IEEA 2010 Regulations, a 10% indigenisation share disposal is available for ownership by a community share ownership scheme. The

¹ International Trade Administration, <https://www.trade.gov/country-commercial-guides/zimbabwe-mining-and-minerals> (last accessed 11 November 2021).

² International Trade Administration, <https://www.trade.gov/country-commercial-guides/zimbabwe-mining-and-minerals> (last accessed 11 November 2021).

³ International Trade Administration, <https://www.trade.gov/country-commercial-guides/zimbabwe-mining-and-minerals> (last accessed 6 October 2021).

⁴ T Wushe 'Corporate community engagement (CCE) in Zimbabwe's mining industry from the Stakeholder Theory perspective' Doctoral dissertation, University of South Africa 2014 3.

⁵ T Murombo 'Law and the indigenisation of mineral resources in Zimbabwe: any equity for local communities?' (2010) 25 *Southern African Public Law* 581.

⁶ Murombo (n 5 above) 581.

challenge with community share ownership schemes is that it is not mandatory. Section 3 (1) of the IEEA ensures that the state secures a 51% of shares or other ownership interest in mining companies with or without the participation of a community share ownership scheme or employee share ownership scheme or trust, or both.⁷ Community share ownership schemes are guaranteed a share when a business is restructuring or is merging with another business. The law then requires that part of the 51% be held by a community share ownership scheme or employee share ownership scheme or trust, or both.⁸ It is difficult to make a case that the local communities in Zimbabwe will enjoy benefits stemming from mineral extraction activities in Zimbabwe.

According to O’Faircheallaigh large mining projects can generate highly inequitable outcomes, with affected communities bearing the burden of social and environmental costs while economic benefits accrue largely to domestic and foreign metropolitan centres.⁹ Mineral resources are finite, which makes it important to plan the life of the mine and sharing of the benefits. Owing to the possible inequitable outcome from a mining project, there is a need for a more equitable distribution of positive and negative effects of mining activities. To address this issue, O’Faircheallaigh highlights two prominent broad approaches.¹⁰ The two approaches are voluntary industry initiatives, and government regulation.¹¹ These two approaches have their own drawbacks. A drawback of government regulation is that government regulation can be rigid and insensitive, particularly to local and regional circumstances.¹² As a result, some of the most devastating social and environmental consequences of mining are due to national regulators’ inability to consider local interests. Industry capture is a common problem in regulatory frameworks. Industry initiatives such as CSR programs have the ability to provide significant benefits to affected communities while minimizing harmful social and environmental consequences. However, the lack of any mechanism for communities or public interest organizations to enforce company commitment is a key constraint of CSR operations.¹³ Another drawback of CSR is that firms may abandon CSR projects and non-regulatory environmental operations because of a change in ownership, a new CEO’s priorities, or changes in the economy.¹⁴

⁷ Section 3 (1) Indigenisation and Economic Empowerment Act 14 of 2007 [Chapter 14:33].

⁸ Section 3 (2)(c) Indigenisation and Economic Empowerment Act 14 of 2007 [Chapter 14:33].

⁹ C O’Faircheallaigh ‘Social equity and large mining projects: Voluntary industry initiatives, public regulation and community development agreements’ (2015) 132 *Journal of Business Ethics* 91.

¹⁰ O’Faircheallaigh (n 9 above) 91.

¹¹ O’Faircheallaigh (n 9 above) 91.

¹² O’Faircheallaigh (n 9 above) 91.

¹³ O’Faircheallaigh (n 9 above) 93.

¹⁴ O’Faircheallaigh (n 9 above) 93.

A possible means to address the above is Community Development Agreements (CDAs). CDAs constitute a growing phenomenon in the mining industry that has emerged as a mechanism that can bridge the gap left by voluntary and public regulation. According to O’Faircheallaigh CDAs can avoid or minimize the risk of local conflicts if they serve to enhance the benefits local communities derive from projects to mitigate their negative impact.¹⁵ CDAs as formal agreements create a relationship between mining companies and communities. These agreements are popular because they set out how the benefits of an investment project are intended to be shared with the local communities.¹⁶

The adoption of CDAs in the policy and legal frameworks has resulted in two prominent approaches. There is the voluntary approach and the mandatory approach. Countries such as Guinea, Sierra Leone, Kenya, South Sudan, and Nigeria have followed the mandatory CDA approach. Mining legislation in these countries mandates CDAs. Thus, each jurisdiction has an opportunity to elect the best possible approach that suits its context.

1.2. Problem Statement

Zimbabwe is “open for business” has been the mantra touted by the current government.¹⁷ The administration has aired various pronouncements and commitments to improving the business environment and the economy. Various initiatives have been pronounced such as amendments to the Indigenisation and Economic Empowerment Act, the National Development Strategy, and a mining roadmap. The mining roadmap is aimed at transforming the mining sector into a USD\$12 billion economy.¹⁸

Despite these positive steps, questions remain as to how communities in mining areas benefit from the exploitation of mineral resources in their communities. With members in the Chiadzwa diamond community and Mutoko black granite mining community having returned few benefits from mining activities,¹⁹ for future purposes how can these incidents be avoided? The legal framework has failed to ensure that communities manage to benefit from mining activities. Mlambo questions the impact

¹⁵ C O’Faircheallaigh ‘Community development agreements in the mining industry: an emerging global phenomenon’ (2013) *Community Development* 226.

¹⁶ J Loutit *et al* ‘Emerging practices in community development agreements’ (2016) 7 *Journal of Sustainable Development Law and Policy* 65.

¹⁷ J Ndimande & KG Moyo ‘Zimbabwe Is Open for Business’ (2019) 23 *World Affairs: The Journal of International Issues* 129.

¹⁸ Kubatana ‘USD 12 Billion Mining Economy by 2023: What are the Key Enablers?’ <https://kubatana.net/2020/07/31/usd-12-billion-mining-economy-by-2023-what-are-the-key-enablers/> (accessed 13 November 2021).

¹⁹ S Gukurume & L Nhodo ‘Forced displacements in mining communities: politics in Chiadzwa diamond area, Zimbabwe’ (2020) 38 *Journal of Contemporary African Studies* 39–54.

of mining on the social and economic welfare of the general citizenry of Zimbabwe, as well as the development of the country from a less developed country to a more advanced and industrialised country.²⁰ Mlambo argues that there is a need for policies in the mining sector that promote sustainable development.²¹

1.3. Aims and objectives

1.3.1. Aims

In view of the above, the aim of this research is to examine CDAs as a possible solution towards ensuring community benefit in mining communities in Zimbabwe.

1.3.2. Objectives

To achieve this aim, this study will first examine the Zimbabwean legal framework on community development in chapter 2. The Zimbabwean legal framework will assist in identifying its nature and shortcomings. To understand the potential of CDAs, an analysis of the definition of CDAs, the advantages and disadvantages of CDAs is important. The definition is the basis of understanding CDAs. This will be the focus of chapter 3. Understanding the definition is inadequate, there is a need for practical illustration of how CDAs operate. The study therefore incorporate the practical illustration in chapter 4 by examining CDAs in Australia, Canada and South Africa.

1.4. Research Questions

1.4.1. Primary research question

The overarching research question that this study seeks to answer is whether CDAs are a feasible solution to the challenge of securing community benefits in Zimbabwe's mining communities.

1.4.2. Secondary research questions

In addressing the broad research question, the following sub-questions need to be addressed.

- What is a CDA and what are the advantages and disadvantages associated with its implementation in the extractive industry?
- What is the current community development approach in the Zimbabwean extractive industry?
- What is the potential of CDAs in the Zimbabwean extractive industry?

²⁰ Mlambo 'Extractives and Sustainable Development I; Minerals, Oil & Gas Sectors in Zimbabwe' 2017 *Friedrich-Ebert-Stiftung* 1.

²¹ Mlambo (n 20 above) 1.

1.5. Research methodology

This is desktop-based research. The study will include a descriptive and analytical approach to primary and secondary sources. Primary sources utilized in this study include Acts and regulations.

The Mines and Minerals Act is the fundamental piece of legislation governing Zimbabwe's extractive industry. The goal of using this act is to have a better understanding of Zimbabwe's extractive industry's legal framework. The Indigenisation and Economic Empowerment Act (IEEA) is another act that has an impact on the extractive industry. The IEEA focuses on Zimbabwe's economic empowerment. Various industry sectors, notably the extractive sector, are subject to ownership restrictions under the legislation. It also elucidates how indigenous ownership might be attained. It also addresses community share ownership schemes which will be discussed in this study. The Rural District Council Act was enacted to establish rural district councils and proclaim districts, to bestow and impose functions on rural district councils, and to provide for the administration of their regions, as well as to provide for things relating to or incidental to the aforementioned. The rural district councils are also involved in the oversight of extractive companies' activities. Ward development committees, Rural district development committees, Environment committees, and subcommittees are all involved in providing oversight of extractive activities.

Secondary sources relied upon include journals, books, and policy documents (electronic). To understand what a CDA is, the advantages and disadvantages of CDAs journals, books and policy documents become an important source of information.

The study incorporates illustrative examples from Canada, Australia, and South Africa. As highlighted above, in some jurisdictions CDAs are mandatory, while in others they are voluntary. In the case of Canada, the Inuit Impact and Benefit Agreement is required by the Nunavut Land Claims Agreement Act in Canada.²² Whereas in the Northwest Territories several agreements between First Nations and the government require company-community agreements.²³ This approach by Canada offers valuable lessons for Zimbabwe.

Australia as an illustrative example provides a unique understanding of how CDAs are regulated. The law in Australia requires that mining companies engage with certain communities. Companies that have been granted a mining license in Australia are required by the Native Title Act 1933 to deal with aboriginal families and communities that have a legally recognized interest in the land as native title

²² KD Bruckner 'Community development agreements in mining projects' (2015) 44 *Denv. J. Int'l L. & Pol'y* 422.

²³ Bruckner (n 22 above) 422.

holders or registered native title claimants.²⁴ This law exempts the firm from consulting and negotiating with the second and third groups of community members.²⁵ The Australian approach to CDAs can be contrasted with Zimbabwe's Indigenisation and Economic Empowerment Act approach. The Australian approach offers lessons that can be applied to the Zimbabwean context. As such Australia is selected as an illustrative example. South Africa was selected because it has incorporated CDAs into the national regulatory framework in the form of social labour plans.²⁶

1.6. Relevance of study

The significance of the study is to contribute to the academia on community development in mining communities. Mining communities continue to be at the centre of discussion because of the challenges these communities are experiencing due to mining activities. The demand for resources to support the green revolution means that mining operations are still relevant. As mining operations continue, there is still a need for research on how to achieve equitable distribution of benefits whilst striving for sustainable development.

1.7. Chapter overview

The study will commence in Chapter 2. The objective of this chapter is to discuss the current legal framework in Zimbabwe regarding community development in mining communities. This will include an analysis of the laws applicable and policy documents.

Chapter 3 will define CDAs, and explore the different definitions attached to CDAs. Literature on the advantages and disadvantages of CDA's in the extractive industry. This chapter will start to explore the shifts that have contributed to the development and growth of CDAs.

CDAs have been touted as a standard practice in new mining projects in other jurisdictions. Accordingly, Chapter 4 will consider some of the countries that adopted and accepted CDAs as a standard practice. The Australian, Canadian, and South African legal frameworks will be analysed. The purpose is to understand how CDAs have been incorporated into the respective legal frameworks. And to draw out lessons for Zimbabwe.

The study will conclude in Chapter 5 with a summary of the study's findings and addressing the research question and stating recommendations.

²⁴ Loutit *et al* (n 16 above) 70.

²⁵ Loutit *et al* (n 16 above) 70.

²⁶ See Mineral and Petroleum Resource Development Act 28 of 2002 (MPRDA), Revised Social and Labour Plan Guidelines, Mineral and Petroleum Resource Development Act Regulations.

CHAPTER 2:

MINING COMMUNITY DEVELOPMENT LEGAL FRAMEWORK IN ZIMBABWE

2.1. Introduction

The extractive industry in Zimbabwe consists of various acts dealing with various aspects related to the industry. In some instances, these acts refer to each other and the acts exist mutually exclusive to each other. For the purposes of this study, the focus will be on the Mines and Minerals Act, Indigenisation and Economic Empowerment Act (IEEA) together with its regulations and amendments, and the Rural District Councils Act.²⁷ The Mines and Minerals Act is the primary legislation regulating the mining industry in Zimbabwe. The Act mainly focuses on mineral right allocation, the type of licences and administration matters. Whereas the IEEA focuses on indigenisation and economic empowerment as well as matters around community development. The Mines and Minerals Act is an old act that was enacted during the colonial era. Its focal point is mineral extraction, with little or no attention to sustainable development or community development. The Act has not seen major amendments over the years. The new mines and minerals Act has been in parliament for several years. The Mines and Minerals Act in its present form is silent on community development. There is a heavy reliance on the provisions of the IEEA.

Henceforth, the objective of this chapter is to provide an in-depth analysis of the community development legal framework in Zimbabwe. Accordingly mineral rights in Zimbabwe are discussed in section 2.2. Followed by an examination of the IEEA and its influence on community development in section 2.3. With section 2.4 discussing the community share ownership schemes. The shortcomings of community share ownership schemes are discussed in 2.5. The chapter will be concluded in section 2.6 by highlighting the Zimbabwean community development legal framework.

2.2. Mineral rights in Zimbabwe

The Mines and Minerals Act vest the right to minerals in the President.²⁸ The President is responsible for the issuance and cancellation of special mining permits.²⁹ These relate to the rights targeted at coal, oil, and gas mining. The Zimbabwean legislation does not deal with reconnaissance. The types of

²⁷ Mines and Minerals Act of 1961 [Chapter 21:05], Indigenisation and Economic Empowerment Act of 2007 [Chapter 14:33], Rural District Councils Act [Chapter 29:13].

²⁸ Section 2 of the Mines and Minerals Act of 1961 [Chapter 21:05].

²⁹ Section 163 of the Mines and Minerals Act of 1961 [Chapter 21:05].

licences available are a prospecting licence (including an exclusive prospecting licence), a mining lease, and special mining leases.³⁰

The challenge with the Mines and Minerals Act is that it is silent on community development. An argument may be made to the extent that the Act was enacted during the colonial era. The main driver during the period was profit. In addition, sustainable development was not on the developmental agenda of the country at the time. In the modern-day world it is expected that the legal frameworks and policy directives that encourage sustainable development and community development are in place or are in the process of implementation at the very least. In the Zimbabwean context, the Mines and Minerals Act has not been amended to reflect any changes taking place globally. Community development was addressed by the IEEA which will be discussed below.

2.3. Indigenous and Economic Empowerment Act (IEEA)

The IEEA was first enacted in 2007 to provide measures for the economic empowerment of indigenous Zimbabweans.³¹ This economic empowerment was going to be achieved by ensuring the indigenous Zimbabweans had controlling stakes in businesses. In terms of section 3 of the 2007 version of the Act, the government had to secure at least 51 *per cent* of every public company and any other business owned by indigenous Zimbabweans.³² This provision applied to mergers, restructuring, unbundling, and relinquishment of a controlling interest in a business.

The Act introduced other measures such as the establishment of the National Indigenisation and Economic Empowerment Fund. The fund was established to mainly finance indigenous Zimbabweans' share acquisitions, management buy-ins and buy-outs, business start-ups, rehabilitation and expansion, market research and capacity-building project on behalf of indigenous Zimbabweans.³³ In addition to the above, the fund was also established to serve "other purposes" that the minister considers will promote the economic empowerment of indigenous Zimbabwe.³⁴ The minister is therefore empowered by the Act to undertake activities that are beyond the activities listed above.

Although the Act brought about empowerment measures, the Act was silent on community development. Community development was only introduced by Indigenisation and Economic Empowerment (General) Regulations, 2010. It is through this statutory instrument that three types of schemes were introduced — the employee share ownership scheme/ trust (ESOT), the community

³⁰ See Part IV, VI, VIII, and IX of the Mines and Minerals Act of 1961 [Chapter 21:05].

³¹ Preamble of the IEEA Act of 2007 [Chapter 14:33].

³² Section 3 of the IEEA Act of 2007 [Chapter 14:33].

³³ Section 12 of the IEEA Act of 2007 [Chapter 14:33].

³⁴ Section 12 (2) (e) of the IEEA of 2007 [Chapter 14:33].

share ownership scheme (CSOS/T) and the Management Share Ownership Scheme (MSOT).³⁵ The statutory instrument opened the door for employees, communities, and those in management to benefit from businesses. The benefit was to be achieved through the acquisition of shares in a business entity. CSOT is discussed in section 2.4.

The Indigenisation law has been changed a few times in the last few years. These changes have had a direct impact on the status of CSOT in Zimbabwe. It is worthwhile to note the amendments as they are crucial in understanding the legal framework of community development. The amendments have been targeting section 3 mainly. The first amendment of the Act came in 2018 whereby the 51% indigenous share ownership in businesses was restricted to the diamond and platinum industry. The amended section at that stage read as follows:

“(1) The State shall, by this Act or through regulations under this Act or any other law, secure that at least fifty-one per centum of the shares or other ownership interest of every designated extractive business, that is to say a company, entity or business involved in the extraction of—

(a) diamonds; or

(b) platinum;

shall be owned through an appropriate designated entity (with or without the participation of a community share ownership scheme or employee share ownership scheme or trust, or both).”³⁶

According to section 2 of this Act, there are three appropriate designated entities — the Zimbabwe Minerals Marketing Corporation, the Zimbabwe Consolidated Diamond Company, and the National Indigenisation and Economic Empowerment Fund.³⁷ The effect of this amendment was that businesses involved in the extraction of diamond and platinum could not merge or restructure unless an appropriate designated entity held a controlling interest in the newly merged business; conversely, they could not de-merge or unbundle unless an appropriate designated entity held a controlling interest in all the resulting businesses. A controlling interest in a diamond or platinum firm had to be relinquished to an appropriate designated entity if a shareholder relinquished a controlling interest in the business over a defined minimum. Foreign investors could not get diamond or platinum mining investment licenses unless they reserved a controlling interest in their companies to an appropriate designated entity. All the above could take place with or without the participation of a CSOS or an ESOS. Following this amendment, community participation was left to the discretion of the mining

³⁵ Silveria House ‘Towards legal empowerment of Community Share Ownership Trust in Zimbabwe’ Policy Brief No 2 2021 at 1 available at <https://kubatana.net/2021/09/13/towards-legal-empowerment-of-community-share-ownership-trusts-in-zimbabwe-policy-brief-no-2-2021/> (accessed 14 November 2021).

³⁶ Section 3 of the IEEA Act 14 of 2007 [Chapter 14:33] as amended by section 42 of the Finance Act, 2018 (No. 1 of 2018).

³⁷ Section 2 of the IEEA Act 14 of 2007 [Chapter 14:33] as amended by section 42 of the Finance Act, 2018 (No. 1 of 2018).

businesses. The legal framework, therefore, created an opportunity for the exclusion of communities in the ownership of the business.

Commenting on the impact of the 2018 amendments, the Silveria House Policy brief raised some points of concern about the amendments. The policy brief noted that the Act had a detrimental impact on the continuous capitalization of CSOTs since it allowed investors to choose whether to support CSOTs, their capitalisation, and the fulfilment of earlier financial obligations to the CSOTs.³⁸ Whether the business is involved in diamond, platinum or any other form of mineral extraction, the impact of these amendments is that they are all not obliged to support CSOTs. Another concern raised by the Policy brief is that the amendment relegated CSOTs to the status of perpetual dependents, and therefore weakened their position.³⁹ The Act thus, granted qualifying businesses unrestricted authority and renders CSOTs dependent on the goodwill of these businesses. Chakona *et al* note that even though rural communities in Zimbabwe are endowed with huge natural resources, no substantive economic empowerment plan for rural communities was implemented following the repeal of the IEEA in 2018.⁴⁰

Another amendment was enacted in 2021 which altered the legal framework to some extent. The latest section 3 of the IEEA applies to firms involved in extracting “any minerals” that the Minister in charge of administering the Act may choose to prescribe by notice in the Gazette.⁴¹ Thus, the entire mining industry or sections of the mining industry may be subject to indigenious quotas. The new section 3 mandates the state to secure a 51% share of any extracting business with or without the participation of a CSOT or ESOS. The participation of communities and employees is at the discretion of the state and the extractive business.

2.4. Community Share Ownership Trusts in Zimbabwe

The Zimbabwean legal framework prior to the enactment of the IEEA did not have a model or legal structure that allowed communities to acquire shares in the commercial exploitation of natural resources in their areas. Mining communities in Zimbabwe used to acquire benefits through Corporate Social Responsibility (CSR) projects. CSR's shortcomings necessitated the creation of a new legal framework. This resulted in the creation of CSOTs and ESOT. Section 14B of the Indigenisation and

³⁸ Silveria House (n 35 above) 6.

³⁹ Silveria House (n 35 above) 6.

⁴⁰ PO Chakona *et al* 'Community Share Ownership Trusts and Economic Empowerment: A Case Study of Rural Communities in Zimbabwe' (2021) 2 *Indiana Journal of Humanities and Social Science* 2.

⁴¹ Section 3 of the IEEA Act 14 of 2007 [Chapter 14:33] as amended by section 36 of the Finance (No. 2) Act, 2020 (No. 10 of 2020).

Economic Empowerment (General) Regulations, 2010 regulates CSOTs in Zimbabwe. CSOTs were viewed as a tool to increase local community participation in shareholdings in various enterprises that operate in their area. The goal of CSOTs was to allow inhabitants of rural district councils to profit from businesses that utilise the community's natural resources by transferring 10% ownership of the company.⁴² According to Chikosi and Kurebwa, CSOTs have been used in Zimbabwe to promote broad-based community social and economic empowerment as well as the utilization of mineral resources for social and economic empowerment.⁴³

As noted above CSOT was established to ensure that communities benefit from the natural resources in their area. Section 14B (1) adopts a broad definition of natural resources. In terms of the section, natural resources include the air, soil, waters and minerals, trees, grass, animals, streams, and landscape of archaeological interest only to mention a few.⁴⁴ For this purpose, the discussion of natural resources will be limited to minerals. A CSOT is established by a deed of trust that has to be registered with the Deeds Office.⁴⁵ Ministerial approval is required to establish the CSOT. The CSOT will be managed by a trustee or trustees who is, or are, appointed by a Rural District Council or a combination of the Rural District Council and the qualifying business concerned. The Act differentiates the appointment of a trustee or trustees.⁴⁶ The differentiation is based on whether the beneficiary community members are residents of a Rural District Council, or they are residents of one or more wards of a Rural District Council or they are members of a distinct community.⁴⁷ This differentiation is derived from the Rural District Councils Act which provided the definition of a community that was used in the 2010 General regulations framework to define a CSOT.⁴⁸

CSOTs are governed by Boards of Trustees, which include traditional chiefs, district development coordinators (DDCs), and Chief Executive Officers of Rural District Councils (RDCs), among a variety of other interest groups.⁴⁹ These groups also included representatives from youth, women, and business.⁵⁰ Additional board members may be appointed by the minister if needed to serve as

⁴² BM Shumba 'An Evaluation of Indigenisation Policy in Zimbabwe' unpublished Master's thesis, University of KwaZulu-Natal, 2014 62.

⁴³ VG Chikosi & J Kurebwa 'The Role of Community Share Ownership Trusts in Ensuring Sustainable Rural Livelihoods: The Case of Zimunya-Marange in Zimbabwe' (2019) 15 *Canadian Social Science* 37.

⁴⁴ Section 14B (1) of the Indigenisation and Economic Empowerment (General) Regulations, 2010.

⁴⁵ Section 14B (3) of the Indigenisation and Economic Empowerment (General) Regulations, 2010.

⁴⁶ See Section 14B (3) (a), (b), (c) of the Indigenisation and Economic Empowerment (General) Regulations, 2010.

⁴⁷ See Section 14B (3) (a), (b), (c) of the Indigenisation and Economic Empowerment (General) Regulations, 2010.

⁴⁸ See Section 14B (1) of the Indigenisation and Economic Empowerment (General) Regulations, 2010.

⁴⁹ Chakona et al (n 40 above) 2.

⁵⁰ Chakona et al (n 40 above) 2.

representatives of the state or other interest groups. According to the Cabinet framework, the Minister may appoint members to the Trust Board as he or she may deem fit.⁵¹

The CSOT framework ensured that companies operating within the community cede 10% of the ownership to the community. This, however, is disputed by some authors who point out that the IEEA and its regulations do not mandate companies to cede the 10%. Chikosi and Kurebwa point out that there are no legislative requirements for mining firms to cede shares to communities, CSOT likewise lacks adequate legal backing.⁵² From the available literature, companies must cede 10% to the communities. The revenue generated from the shareholding would then be used to construct and maintain roads, schools, dip tanks, hospitals, waterworks, water sanitation works and the conservation of the environment.⁵³ According to the Regulations, dividends accruing to the CSOT must be separated from the Rural District Council funds.⁵⁴

2.5. Shortcomings of the CSOT model in Zimbabwe

The legal framework as discussed above has some deficiencies which affect its effectiveness. The idea of community involvement in mining projects was a welcomed development. The government expected that through launching CSOTs, a solid foundation for rural community economic empowerment would be created. It was projected that the outcomes were going to positively impact all economic sectors of the country, leading to the accelerated economic development of the country.⁵⁵ The success of these CSOTs is a point of debate. Different communities have varied successes as witnessed by the number of CSOTs that are still operational. To gain further understanding of the success of CSOTs in Zimbabwe, Mawowa observes that analysing communities involved in resource extraction in Zimbabwe can be analysed on three levels.⁵⁶ These can be categorized as follows: (1) policy as enacted; (2) policy as declared (via official documents or public announcements); and (3) policy as it is practised.⁵⁷ It is at these levels that conclusions can be deduced about the success of CSOT in Zimbabwe. It is from this premise that the challenges of CSOTs are discussed below.

⁵¹ S Mawowa 'Community Share Development Trust (CSOT) in Zimbabwe's Mining Sector' (2013) *Zimbabwe Environmental Law Association (ZELA)* 21.

⁵² Chikosi & Kurebwa (n 42 above) 30, Shumba (n 41 above) 72.

⁵³ Section 14B (4)(a) of the Indigenisation and Economic Empowerment (General) Regulations, 2010.

⁵⁴ Section 14B (5) of the Indigenisation and Economic Empowerment (General) Regulations, 2010.

⁵⁵ Chakona et al (n 40 above) 2.

⁵⁶ Mawowa (n 51 above) 28.

⁵⁷ Mawowa (n 51 above) 28.

2.5.1. Financing

According to the Silveria policy brief, in 2018 there was a total of 61 registered CSOTs.⁵⁸ Of the 61, 55 are regarded as not operational due to a lack of funding from qualifying businesses. Chakona *et al* also note that the bulk of multinational corporations stopped contributing to the fund following the repeal of the IEE Act in 2018, hence the dysfunctionality of several CSOTs.⁵⁹ Chakona *et al* lament the fact that rural residents will continue in poverty because of the lack of a substantive economic empowerment model after the 2018 repeal.⁶⁰ The IEEA Act and its regulations however are silent on the issue of pledges by mining companies. This has led to criticism of the financial model being utilized. What the legal framework provides for is the fact that dividends accruing to a CSOT must be used for purposes in section 14B (4). Therefore, the CSOT will be entitled to funds if a company has declared dividends. There is a loophole in the legal framework on what happens when dividends are not declared. This financial model clearly has not yielded the intended success as witnessed by the number of CSOT that are not operational.

2.5.2. Lack of monitoring and evaluation mechanisms

The legal framework is silent on monitoring and evaluation mechanisms in general. This is problematic for local communities as they are unable to hold the trustee/ trustees and businesses accountable. A monitoring and an accountability mechanism are vital tools that ensure that qualifying business honours their pledges. It also checks the activities of the trustee/trustees tasked to manage the trust. Perhaps the availability of an evaluation and monitoring system would have ensured that the 55 non-operational CSOTs remain operational.

2.5.3. Commodity price risk

The nature of the CSOT framework is that communities acquire shares in the mining entity. This exposes the community to commodity price risk. During a commodity price boom, the community will stand to benefit. However, the community will also share the risk of the price drop. This will have an impact on the funds available to the CSOT. The Zimbabwean legal framework is silent on whether communities will be protected from commodity risk. This puts to question the sustainability of the current CSOT legal framework in Zimbabwe.

⁵⁸ Silveria House (n 35 above) 3.

⁵⁹ Chakona et al (n 40 above) 2.

⁶⁰ Chakona et al (n 40 above) 2.

2.5.4. *Lack of legal certainty*

The frequent nature of the amendments to the IEEA has opened a door to legal certainty on CSOTs. It is highly doubtful that CSOTs leaders formed part of the discussions to amend IEEA. The IEEA in its current state has allowed mining companies to elect to structure their ownership to include CSOT. The law has also facilitated the distinction between communities based on the type of minerals mined in the area. This distinction has the potential adverse consequences on communities as they might not be able to engage with project developers and receive funding.

The CSOT framework is silent on whether communities have legal recourse against the owners of a mining company for not fulfilling financial pledges. It is unclear whether such a requirement is available under the IEEA. There has been no other statutory instrument or brief dealing with this issue. It appears that communities have to use other legal instruments outside of the IEEA.

2.6. Conclusion

The objective of chapter was to examine the community development legal framework of Zimbabwe. This examination was conducted by looking at the IEEA, Mines and Mineral Act. Thereafter, CSOT were discussed. Community development was initially a voluntary exercise by businesses through CSR. The Zimbabwean mining industry's primary legislation the Mines and Minerals Act focuses more on the administration of the industry. That is, the focus is more on mineral rights applications, types of mineral rights and the processes to be followed. Community development is a theme that is absent from the Mines and Minerals Act. To address the shortcomings of the Mines and Minerals Act, the IEEA was enacted. The enactment of the IEEA changed the community development landscape. The IEEA introduced CSOTs, a tool that was designed to empower resource-based communities. Several CSOTs were established, however, some of the CSOTs have not yielded the stated goals. The CSOT framework has loopholes which are to the detriment of the community. The problems with CSOTs in Zimbabwe start with the purported structure of CSOT, to the frequent changes in the legislation and other factors identified above. These shortcomings facilitate a discussion on potential solutions to these problems. It also allows for a look at how other jurisdictions have facilitated community developments in their legal frameworks.

To address the shortcoming of CSOT as identified in this chapter, the next section of this study will examine whether the phenomenon of CDAs has the potential tool to uplift Zimbabwean communities.

CHAPTER 3:

COMMUNITY DEVELOPMENT AGREEMENTS A NEW HOPE FOR COMMUNITIES

3.1. Introduction

The issue of benefits accruing to mining host communities is contentious as seen with several protests against mining companies.⁶¹ Host communities are expressing disappointment in not enjoying the benefits of mining projects.⁶² These communities have had to live with the impact of mining operations in their community. Communities have been more outspoken in their demands for benefits, and mining firms are worried about the necessity and methods for obtaining and upholding their "social license to operate" based on local community support.⁶³ To minimize the impact of mining several approaches toward community benefit are followed. There is public regulation and voluntary initiatives (CSR). However, there is a new wave of community development approaches in the form of Community Development Agreements (CDAs). These agreements are becoming increasingly popular within the mining sector because they provide opportunities for the sustainable development of local communities.⁶⁴ CDAs between businesses and impacted communities have helped address the demands and expectations of a wide range of stakeholders.⁶⁵ They are now increasingly seen as a crucial tool for outlining the responsibility of mining firms to the communities they have an impact on, as well as the functions of local, state, and federal governments, as well as non-governmental organisations.⁶⁶ This chapter will focus on defining CDAs, the advantages and disadvantages of CDAs, instances where CDAs are formed and the community development approach in Zimbabwe.

⁶¹ Business and Human Rights Resource Centre <https://www.business-humanrights.org/en/latest-news/south-africa-community-protests-against-rio-tintos-richards-bay-mine-over-unequal-treatment-of-host-communities-disrupt-operations/> (accessed 2 August 2022).

⁶² P Zvavahera et al 'The Indigenisation Policy and Economic Emancipation in Zimbabwe: A Case Study of the Zimunya-Marange Communities' 2018 6 *Business and Management Horizons* 19.

⁶³ World Bank 'Mining Community Development Agreement: Source Book' 2012 <https://openknowledge.worldbank.org/handle/10986/12641> (last accessed 3 August 2022).

⁶⁴ C Nwapi 'Legal and institutional frameworks for community development agreements in the mining sector in Africa' (2017) 4 *The Extractive Industries and Society*, 4(1) 203.

⁶⁵ World Bank 'Mining Community Development Agreement: Source Book' <https://openknowledge.worldbank.org/handle/10986/12641> 2012 ix (last accessed 3 August 2022).

⁶⁶ World Bank 'Mining Community Development Agreement: Source Book' <https://openknowledge.worldbank.org/handle/10986/12641> 2012 ix (last accessed 3 August 2022).

3.2. Community development approaches global developments

Mineral development projects have the potential to change the livelihoods of many communities. Mineral development has the potential to build new communities and enrich existing ones.⁶⁷ Roads, schools, clinics, businesses, and jobs can all be brought to previously underdeveloped and rural areas through new initiatives.⁶⁸ At the same time, mineral development projects have the potential to generate highly inequitable outcomes, with affected communities bearing the burden of social and environmental costs while economic benefits accrue largely to domestic and foreign metropolitan centres.⁶⁹ According to the ICMM production, investment, employment, taxation and royalties, as well as immediate consequences on the economy, have historically been used to describe the development implications of mining.⁷⁰ Eventually, questions such as the impact of mining activities on quality of life and the magnitude of these impacts started to receive attention. Local development implications have also received increased attention, such as the use of local resources for infrastructure and skill development as well as the purchase of goods and services.⁷¹ Moreover, the development of sustainable development goals and implementation thereof has increased the focus on local development.

Early developments in the social impacts of mining can be traced to the adoption of the Global Mining Initiative (GMI) resolution. The GMI is an independent multi-year, multistakeholder resolution aimed at researching the social impacts of mining.⁷² The ICMM conducted its own research on the socio-economic impacts of mining and developed a community development toolkit.⁷³ The toolkit provides the practical ways in which mining companies measure the positive and negative impacts of their

⁶⁷ IIED 'Local Communities and Mines' in IIED The Report of the Mining, Minerals and Sustainable Development Project (2002) 198.

⁶⁸ IIED 'Local Communities and Mines' in IIED The Report of the Mining, Minerals and Sustainable Development Project (2002) 198.

⁶⁹ O'Faircheallaigh (n 9 above) 91.

⁷⁰ International Council on Mining and Metals (ICMM) 'Approaches to Understanding Development Outcomes from Mining 2013 4 https://www.icmm.com/website/publications/pdfs/social-performance/2013/research_understanding-development-outcomes-2013.pdf (accessed 15 August 2022).

⁷¹ International Council on Mining and Metals (ICMM) 'Approaches to Understanding Development Outcomes from Mining 2013 4 https://www.icmm.com/website/publications/pdfs/social-performance/2013/research_understanding-development-outcomes-2013.pdf (accessed 15 August 2022).

⁷² World Economic Forum 'Voluntary Responsible Mining Initiatives: A Review' White Paper 2015 https://www3.weforum.org/docs/Voluntary_Responsible_Mining_Initiatives_2016.pdf (accessed 15 August 2022).

⁷³ TM Mugo 'Safeguarding rights of mining communities in South Africa, An Analysis of the Legal Mechanisms in force with particular focus on Community Development Agreements' Master's thesis, University of Cape Town, 2021 12.

mining activities.⁷⁴ Financial institutions moved towards responsible and sustainable finances. The creation and subsequent implementation by financial institutions of the Equator principles ensure that financiers encourage responsible environmental stewardship and socially responsible development, including upholding the duty to protect human rights by undertaking due diligence.⁷⁵ Financial institutions are therefore unable to offer project finance or project-related corporate loans to projects where the client is not willing to or is unable to abide by the Equator Principles.⁷⁶ Other financial institutions such as the World Bank, have contributed to community development through research. The World Bank developed a handbook on CDAs. The handbook deals with the main considerations and processes regarding the development and implementation of CDAs in the mining industry.⁷⁷ Through this research, mining companies have a guideline on CDAs and how to negotiate and implement an agreement.

The shift in attitude towards community development is not limited to a particular period. The shifts are ever-evolving to accommodate development requirements at a particular time. More recently environmental, social and governance (ESG) has gained increased attention. The mining sector has long dealt with many ESG issues, so it is not entirely new to them. What has changed is the elevated expectations and increased involvement of the financial community, providing an opportunity for progressive metals and mining firms to distinguish themselves by generating value sustainably and reducing business risks.⁷⁸ Investor demands for more focus on environmental, social, and governance-related issues and data have been a major factor in the rise of ESG.⁷⁹ In other words, investors are beginning to evaluate factors besides financial statements, such as a mining organization's culture, competitive edge, and ethics. The ESG demands have fostered an environment whereby mining companies, financial institutions, and regulators, NGOs look at community development from another

⁷⁴ International Council on Mining and Metals (ICMM) 'Approaches to Understanding Development Outcomes from Mining 2013' 8 https://www.icmm.com/website/publications/pdfs/social-performance/2013/research_understanding-development-outcomes-2013.pdf (accessed 15 August 2022).

⁷⁵ Equator Principles 'The equator principles: A financial industry benchmark for determining, assessing and managing environmental and social risk' 2016 2 https://www.equator-principles.com/app/uploads/The_Equator_Principles_III_June2013.pdf (accessed 8 October 2022).

⁷⁶ Equator Principles 'The equator principles: A financial industry benchmark for determining, assessing and managing environmental and social risk' 2016 2 https://www.equator-principles.com/app/uploads/The_Equator_Principles_III_June2013.pdf (accessed 8 October 2022).

⁷⁷ World Bank 'Mining Community Development Agreement: Source Book' <https://openknowledge.worldbank.org/handle/10986/12641> (2012) 1 (last accessed 3 August 2022).

⁷⁸ DSS 'Accelerating the Impact of ESG in Mining – Shifting from Strategy to Implementation' <https://www.consultdss.com/4a0c40/globalassets/assets/documents/ar-accelerating-esg-mining.pdf> (Accessed 8 October 2022) 4.

⁷⁹ D Walker 'ESG insights: what does ESG mean for the mining industry' SLR Consulting www.slrconsulting.com (accessed 8 October 2022).

lens. ESG has encouraged companies to invest in the social and environmental needs of the communities where their operations are based. Mining companies failing to implement strategies in line with the “S” in ESG face reputational risk which may negatively affect operations. Sustainable development goals (SDGs) are also incorporated into ESG strategies.

Discussed in detail this section is the development of different approaches to community development globally over the years. Development in community development approaches is an ongoing exercise as newer challenges and opportunities arise. The next section will discuss CDAs, a growing practice in the mining industry.

3.3. Defining community development agreements

Before defining CDAs, it is important to note that CDAs are also known by other terms. Although these agreements share fundamental characteristics, they vary in content, legal structure and scale. For the purposes of this study, the term CDA will be utilized. Although references to other terms will be used during a discussion of a particular jurisdiction that uses a different term.

Table 1 Other names of Community Development Agreements

| | |
|--------------------------------------|-------------------------------------|
| Community Development Initiatives | Exploration Agreements (Canada) |
| Voluntary Agreements | Impact Benefit Agreements (Canada) |
| Indigenous Land Use Agreements | Social Trust Funds (Peru) |
| Partnering or Partnership Agreements | Investment Agreements (Mongolia) |
| Community Contracts | Benefits Sharing Agreements (Chile) |
| Landowner Agreements | Social Responsibility Agreements |
| Shared Responsibilities Agreement | Participation Agreements |
| Community Joint Venture Agreements | Socio-economic Monitoring Agreement |
| Empowerment Agreements | |

Adapted from World Bank Extractive Industries Sourcebook, Good Practice Notes: Community Development Agreements (Centre for Social Responsibility in Mining, University of Queensland, 2011).

O’Faircheallaigh defines CDAs as formal agreements between developers (private or public) and community representatives or organisations.⁸⁰ These agreements according to O’Faircheallaigh are designed to minimise negative project impacts and ensure that local communities obtain benefits from development they would not enjoy in the absence of agreements, thus helping to reduce or eliminate conflict surrounding development.⁸¹ A UN working paper defines CDAs as a legally binding contract between the holder of an authorization granting the rights to extract minerals, and a

⁸⁰ O’Faircheallaigh (n 9 above) 96.

⁸¹ O’Faircheallaigh (n 9 above) 96.

community (or communities) that will be affected by the exercise of those rights, that addresses matters concerning community development.”⁸² This study will follow the definition outlined above.

The conclusion of CDAs is attributed to the legal framework of particular jurisdictions. There is currently no uniformity as to when many parties conclude a CDA. Available literature has illustrated that CDAs may be concluded in instances; Where indigenous lands are present, and it is legally required to negotiate the conditions of access/use with the traditional landowners; Where government regulations specifically require developers to enter into a formal agreement; Where there have been conflicts between a developer and local communities and the developer has voluntarily negotiated an agreement to resolve these conflicts.⁸³

Otto notes that a distinction needs to be made between CDA requirements with impact compensation.⁸⁴ In most instances, miners are obliged by law to compensate an owner if a mine causes personal or community property or property rights. Payments of compensation are distinct from the miner's investment in community development.⁸⁵ While CDA financing needs might be ongoing and work to achieve development objectives (such as improving human capital, starting microbusinesses, etc.), compensation payments are often one-time payments for real property losses.⁸⁶

3.4. Benefits of CDA

The growing expectation that extractive industries should contribute positively to the long-term development objectives of affected communities and governments has been the driving force behind the trend of signing CDAs.⁸⁷ There seems to be a realisation that signing these agreements has benefits for mining companies, host communities and governments. According to the World Bank, a CDA has two core goals.⁸⁸ That is improving relationships between companies, communities, governments, civil

⁸² JM Otto ‘How do we legislate for improved community development’ in T Addison & A Roe(eds) *Extractive industries: the management of resources as a driver of sustainable development* (2018) 680.

⁸³ World Bank ‘Mining Community Development Agreement: Source Book’ <https://openknowledge.worldbank.org/handle/10986/12641> (2012) 9 (last accessed 3 August 2022). B, Boubacar *et al* World Bank extractive industries sourcebook: good practice notes (2012) 8 <https://documents.worldbank.org/en/publication/documents-reports/documentdetail/388421468151145000/world-bank-extractive-industries-sourcebook-good-practice-notes> (last accessed 3 August 2022).

⁸⁴ Otto (n 82 above) 680.

⁸⁵ Otto (n 82 above) 680.

⁸⁶ Otto (n 82 above) 680.

⁸⁷ World Bank ‘Mining Community Development Agreement: Source Book’ <https://openknowledge.worldbank.org/handle/10986/12641> (2012) 6 (last accessed 3 August 2022).

⁸⁸ World Bank ‘Mining Community Development Agreement: Source Book’ <https://openknowledge.worldbank.org/handle/10986/12641> (2012) 5 (last accessed 3 August 2022).

society, and other stakeholders.⁸⁹ The second goal is promoting sustainable and mutually rewarding benefits from mining projects including pro-poor initiatives and other strategies which may be beyond the immediate scope of impacts for a project.⁹⁰ From the back of these core goals, several benefits flow.

CDAs as a mechanism minimise the negative impacts of projects as it allows all the parties affect to discuss and agree on mitigation approaches. Negotiations form part of the foundation of a successful CDA. It empowers host communities with an opportunity to protect their environments from the immediate negative impacts of the long-term effects of mining. This is partly why CDAs are viewed as an alternative to voluntary initiatives and public regulation approaches to community development.⁹¹ There is criticism levelled against voluntary and public regulation. Voluntary initiatives have been criticised for the lack of a mechanism to allow communities or public interest organizations to enforce corporate commitments to CSR initiatives.⁹² A further issue is that businesses may give up CSR projects and extra-regulatory environmental operations due to changes in ownership, a new CEO's shifting goals, or changes in the state of the economy.⁹³

In recent decades, public regulation has been heavily criticized because it involves centralized, bureaucratic standard setting that is inflexible, inefficient, cumbersome, and excessively costly for industry; is ineffective due to insufficient government funding, a reluctance by authorities to prosecute, and by courts to impose maximum penalties; and fails to provide incentives for industry to exceed minimum compliance outcomes required by regulation.⁹⁴ Another key issue is regulatory failure or regulatory capture, which poses the possibility of regulatory organizations forming tight ties with the industry and failing to protect the public interest.⁹⁵ It is against this backdrop that CDAs have been presented as a mechanism that minimises the negative impacts of mining projects. This is due to nature of CDAs in that they can operate without public regulation.

The nature of a CDA is regarded as one of the most significant benefits arising from the CDA process according to Bruckner.⁹⁶ The measurable nature of CDAs as a development tool, as well as the

⁸⁹ World Bank 'Mining Community Development Agreement: Source Book' <https://openknowledge.worldbank.org/handle/10986/12641> (2012) 5 (last accessed 3 August 2022).

⁹⁰ World Bank 'Mining Community Development Agreement: Source Book' <https://openknowledge.worldbank.org/handle/10986/12641> (2012) 5 (last accessed 3 August 2022).

⁹¹ O'Faircheallaigh (n 9 above) 8

⁹² O'Faircheallaigh (n 9 above) 93.

⁹³ O'Faircheallaigh (n 9 above) 93.

⁹⁴ O'Faircheallaigh (n 9 above) 95.

⁹⁵ O'Faircheallaigh (n 9 above) 95.

⁹⁶ Bruckner (n 22 above) 424.

establishment of clear objectives, methods, and a review process, enables the tracking and measurement of development against established and mutually agreed-upon criteria.⁹⁷ This procedure holds an advantage over voluntary initiatives which are criticised for lacking tracking and performance measures.

The process of negotiating a CDA deemed to be a benefit on its own. This is because the process allows for the building of positive relationships between the company and affected communities; identification of shared interests; improves the parties' ability to manage change and quickly address grievances before they escalate into major conflicts, and provides long-term sustainable benefits because it assists communities in building their capacity for negotiation and agreement making.⁹⁸ Therefore the negotiation process affords communities a chance to gain a better knowledge of the financial and other constraints that a developer operates under, which facilitates shared expectations.

CDAs also benefit all parties by providing more predictability. It informs developers about the expectations they should have. Communities are also aware of their responsibilities and what to anticipate from the developer and government when they are involved. This decreases the potential of future ambiguity and uncertainty, as well as the possibility of shifting the goalposts.' As a result, defining common commitments contributes to the development of a sense of shared responsibility. It also improves the social license to operate a project. CDAs also allow all parties to commit to long-term obligations. Given that key persons, organizational structures, and even ownership arrangements frequently change throughout the life of a project, this may be crucial.

The benefits of CDAs are summarized in the table below. The table was

Table 2 Benefits of Community Development Agreements

| |
|--|
| <p>Clarity and Transparency</p> <ul style="list-style-type: none"> ✓ Establishing a framework for the relationship between the company and the community. ✓ Specifying where benefits will be directed and how they will be allocated. ✓ Helping all parties to clarify and manage expectations, and establishing a transparent and participatory framework with measurable outcomes. ✓ Clarifying roles and responsibilities of various parties, including communities, government, and mining companies. ✓ Increased transparency and accountability on behalf of the mining industry. |
| <p>Engagement</p> <ul style="list-style-type: none"> ✓ increased participation of community members, government, and other stakeholders in the determination of how benefits will be managed and implemented. |

⁹⁷ World Bank 'Mining Community Development Agreement: Source Book' <https://openknowledge.worldbank.org/handle/10986/12641> (2012) 7 (accessed 3 August 2022).

⁹⁸ Bruckner (n 22 above) 424. See also World Bank 'Mining Community Development Agreement: Source Book' <https://openknowledge.worldbank.org/handle/10986/12641> (2012) 7 (accessed 3 August 2022).

| |
|---|
| <p>Clarity and Transparency</p> <ul style="list-style-type: none"> ✓ Establishing a framework for the relationship between the company and the community. ✓ Specifying where benefits will be directed and how they will be allocated. ✓ Helping all parties to clarify and manage expectations, and establishing a transparent and participatory framework with measurable outcomes. ✓ Clarifying roles and responsibilities of various parties, including communities, government, and mining companies. ✓ Increased transparency and accountability on behalf of the mining industry. |
| <ul style="list-style-type: none"> ✓ Enhancing consultation and dialogue regarding local development goals, and helping communities articulate their goals and strategize how to achieve them. ✓ Establishing a framework for engagement over the life of the project. ✓ Helping to build trust and respect between industry and communities, as well as between various stakeholder groups. |
| <p>Capacity Development</p> <ul style="list-style-type: none"> ✓ Identifying capacity building needs, e.g., through a capacity needs assessment. ✓ Helping communities to build their capacity for negotiation, agreement-making, and project planning and implementation. ✓ Helping communities understand the mining industry and the constraints under which developers operate. ✓ Maximise benefits to communities. |
| <p>Business Best Practices</p> <ul style="list-style-type: none"> ✓ Helping mining companies meet their CSR standards (internal and external). ✓ Helping mining companies obtain their social license to operate. ✓ Improving project design and implementation through local knowledge and ideas |
| <p>Sustainability</p> <ul style="list-style-type: none"> ✓ Facilitating the collection of data, results measurement, and the reporting of change over time. ✓ Sharing responsibilities for program delivery and outcomes through joint ownership of community development programs. ✓ “Locking in” all parties to long-term objectives and commitments, even though potential changes in ownership and personnel. ✓ Reducing risk and improving certainty for all parties in terms of expectations, obligations, and goals. ✓ Establishing a framework for the allocation of benefits throughout the life of the project. |

Adapted from the World Bank Community Development Agreements source book 2012.

The benefits and success of CDAs will depend on several factors. The content of the agreement itself, and the process in which the agreement was concluded are some of the factors that will affect the success of a CDA. The important point to note is that CDAs do provide that avenue for communities to benefit from mineral extraction processes.

3.5. The downside to CDAs

Although CDAs have the potential to deliver the potential benefits identified above, there are downsides or risks associated with entering a CDA. These risks may result in negative outcomes for the community party to the agreement. The potential risks associated with CDAs are summarised below.

Table 3 Risks Associated with CDAs

| |
|---|
| <p>Requiring communities to enter into formal agreements can foster a counterproductive environment of mistrust and uncertainty if parties lack a commitment to or understanding of the process.</p> |
| <p>Potential perceptions that a community or group feels that they have been pressured or misled into signing an agreement and that the outcome is unfair, or the result of a ‘back-room deal’, this is likely to exacerbate, rather than ameliorate, conflict and discord and will make it difficult to hold the agreement together over time.</p> |
| <p>Formal agreements, and the legal stipulations that they often include, can lead to an interpretation of compliance that results in a minimalistic approach. The developer may take a view that the agreement sets the limit on what they need to do in terms of development initiatives and who they need to engage with. Similarly, community representatives may become overly focused on ensuring compliance with some relatively minor aspects of the agreement, at the expense of the ‘bigger picture’.</p> |
| <p>The concerns and interests of groups that do not form part of the ‘qualified community’ may be overlooked. Examples include immigrant artisanal miners who reside locally, and who derive their livelihood almost exclusively from the local area, but who do not have the status of landowners.</p> |
| <p>Without clearly defined objectives and roles, a CDA may be viewed as compensating for or fulfilling the role of government, or as duplicating important local or regional initiatives. This could lead to a dependency on the mining company beyond the intended scope.</p> |

Adapted from *World Bank Community Development Agreements source book 2012, Good practice note: Community development agreements*⁹⁹

3.6. Conclusion

This chapter focused on the discussion of CDAs. A working definition of a CDA for the purposes of this study was identified. The working definition highlighted that a CDA is a formal agreement between project developers and community representatives or organisations. The perceived benefits and risks associated with the conclusion of a CDA were highlighted. Indeed, CDAs have the potential to contribute positively to the livelihood of mining communities if implemented correctly. Communities in Australia and Canada have managed to achieve positive results and relationships with mining project developers through legally binding negotiated agreements. This success is attributed to the nature of CDAs as well as the legal framework. The next chapter will highlight how countries such as Australia, Canada, and South Africa incorporated the CDA mechanism into their legal framework. The manner in which CDAs are incorporated will provide lessons for Zimbabwe.

⁹⁹ World Bank ‘Mining Community Development Agreement: Source Book’ <https://openknowledge.worldbank.org/handle/10986/12641> (2012) 9 (last accessed 8 August 2022).

CHAPTER 4:

CDA'S IN AUSTRALIA, CANADA, AND SOUTH AFRICA

4.1. Introduction

In the preceding chapter, it was highlighted there are benefits that are associated with the conclusion of a CDA. The caveat, however, is that certain conditions must be present for a CDA to be successful. As noted earlier, CDAs are required in instances where there is a legal obligation to enter into an agreement or where company standards and policies require an agreement, and where having an agreement will not result in conflict. The circumstances under which an agreement is concluded also influence the outcome of the agreement. Owing to the fact CDAs are required under various circumstances, different jurisdictions have adopted different approaches to incorporated CDAs in the legal frameworks. Countries such as Australia, Canada, and increasingly developing nations are employing negotiated, legally enforceable agreements with project developers to guarantee that the problems detected through impact assessments are addressed and remain addressed throughout the project life.¹⁰⁰ This section of the study will highlight the approaches to community development in select jurisdictions of Australia, Canada, and South Africa. Positive results in the select jurisdictions have been observed in these jurisdictions. The aim of considering other jurisdictions is to assist in accessing the potential of CDAs as a powerful mechanism towards community benefits in Zimbabwe's mining sector.

4.2. South Africa

4.2.1. Introduction

South Africa has a long and rich mining history. The Centre for Applied Legal Studies (CALS) describes the industry as both a beneficiary and a driver of colonialism and apartheid in their economic, social, and legal manifestations.¹⁰¹ In their assessment of the industry CALS concludes that the history of mining in South Africa led to inequality.¹⁰² CALS, however, acknowledges that the MPRDA contains provisions that are aimed at transforming the South African mining sector. Despite the history of the

¹⁰⁰ C O'Faircheallaigh 'Shaping projects, shaping impacts: community-controlled impact assessments and negotiated agreements (2017) 38 *Third World Quarterly* 1182.

¹⁰¹ CALS 'The Social and Labour Plan Series Phase 3: Alternative Models for Mineral-Based Social Benefit by the Centre for Applied Legal Studies' (2018) 8 <https://www.wits.ac.za/cals/our-programmes/environmental-justice/social-and-labour-plans/> (accessed 8 August 2022)

¹⁰² CALS 'The Social and Labour Plan Series Phase 3: Alternative Models for Mineral-Based Social Benefit by the Centre for Applied Legal Studies' (2018) 8 <https://www.wits.ac.za/cals/our-programmes/environmental-justice/social-and-labour-plans/> (accessed 8 August 2022)

industry, the mining sector in South Africa contributes significantly to the South African economy. According to the *Minerals Council*, the mining sector contributed an estimated R481 billion to the GDP, an estimated R78 billion tax contribution and employed about 458,954 people in 2020.¹⁰³ The positive economic impact of mining in South Africa is also accompanied by disgruntlement and disruptions by communities. At the centre of the community's grievances is the lack of positive benefits that flow from mining and or a failure to uphold promises.¹⁰⁴ In light of the above, this section of this study will provide an overview of the provisions relating to the community development approach in South Africa.

4.2.2. *Community Development: Social and Labour Plans*

Social Labour Plans (SLP) are a tool utilized in South Africa that seeks to ensure that communities attain positive benefits from mining projects. Mining companies must submit an SLP to the Department of Mineral Resources and Energy before a mining right can be granted, according to Regulation 42 of the Minerals and Petroleum Resources Development Act.¹⁰⁵ It is important to point out that an SLP is only included in the application for mining rights, as opposed to applications for a prospecting licence. The MPRDA provides for various types of mining rights, including reconnaissance permits, prospecting rights, permission to remove minerals while prospecting, retention permits, mining permits, and mining rights.¹⁰⁶ According to the Mining Charter, SLPs are the tools for achieving transformation.¹⁰⁷ Thus, consideration of mining communities' interest during the application stage is made possible by the requirements for consultation, environmental authorization, SLP, and adherence to the Mining Charter.¹⁰⁸

The MPRDA does define an SLP.¹⁰⁹ The definition can be decoded from the objectives of an SLP as provided by the MPRDA Regulations and the SLP Toolkit. According to the SLP Toolkit, "a social and labour plan is a document that mining companies are required to submit to the Department of Mineral Resources (DMR) as part of their applications for mining rights."¹¹⁰ Essentially, it is a collection of

¹⁰³ Minerals Council South Africa Facts and Figures 2021 <https://www.mineralscouncil.org.za/industry-news/publications/facts-and-figures> (accessed 8 August 2022).

¹⁰⁴ Mining community grievance with Anglo-American <https://www.wits.ac.za/news/sources/cals-news/2022/anglo-american-cheats-seraleng-community-of-housing.html> 29 July 2022 (accessed 8 August 2022).

¹⁰⁵ Regulation 42 of the Mineral and Petroleum Resources Development Regulations of 2004.

¹⁰⁶ Mugo (n73 above) 26.

¹⁰⁷ Minerals Council South Africa <https://www.mineralscouncil.org.za/sa-mining/slps> (accessed 8 August 2022).

¹⁰⁸ Mugo (n 73 above) 26.

¹⁰⁹ See Mineral and Petroleum Resources Development Regulations of 2004.

¹¹⁰ CALS 'Social and Labour Plan Mining Community Toolkit' (2017) 4 <https://www.wits.ac.za/cals/our-programmes/environmental-justice/social-and-labour-plans/> (accessed 8 August 2022).

promises the mine makes which become legal commitments once the application is approved by the DMR.¹¹¹ The SLP outlines what the company will do for communities and workers, as well as how, when, and how.¹¹² Applicants for mining and production rights must develop and implement comprehensive programs such as human resources development programs, mine community development plans, housing and living conditions plans, employment equity plans, and procedures to save jobs and manage downscaling/closure as part of their SLPs before being granted mining or production rights.¹¹³ Thus, SLPs cover a range of issues which all form part of the social fabric of a community.

The requirement of submitting an SLP as part of a mineral right application entails that the mining company needs to conduct a social assessment. To conduct this social assessment, the mining company will need to engage with the community to understand their developmental needs.¹¹⁴ According to Mugo, the SLP guidelines are unclear whether the mining company is required to consult with the community during the drafting of the SLP.¹¹⁵ This point is also alluded to by Lamola, who went on further to state the failure to provide a participatory framework extends throughout the lifecycle of the SLPs.¹¹⁶ The absence of a participatory framework has an impact on the effectiveness of the SLPs mechanism. Community participation is imperative in the drafting of an SLP as the contents of the SLP will be applied in the community.

According to regulation 43 of the MPRDA Regulations, SLPs are valid until a closure certificate has been issued.¹¹⁷ To prevent variation of the contents of SLPs by mining companies, the regulations prohibit the amendment or variation of SLPs without the consent of the Minister.¹¹⁸ This provision applies in instances where a mineral right has been issued. The legal framework provides for monitoring and evaluation mechanisms. The legal framework mandates a holder of the mining right to submit an annual report on compliance with the SLP. A deficit in the legislative framework is the absence of consequences for the failure to submit the annual compliance report. The legal framework

¹¹¹ CALS 'Social and Labour Plan Mining Community Toolkit' (2017) 4 <https://www.wits.ac.za/cals/our-programmes/environmental-justice/social-and-labour-plans/> (accessed 8 August 2022).

¹¹² CALS 'Social and Labour Plan Mining Community Toolkit' (2017) 4 <https://www.wits.ac.za/cals/our-programmes/environmental-justice/social-and-labour-plans/> (accessed 8 August 2022).

¹¹³ RO Lamola 'The enforceability of social and labour plans in the South African mining industry' Masters dissertation, University of Pretoria, 2017 33.

¹¹⁴ Mugo (n 73 above) 32.

¹¹⁵ Mugo (n 73 above) 32.

¹¹⁶ Lamola (n 113 above) 36.

¹¹⁷ Regulation 43 of the Mineral and Petroleum Resources Development Regulations of 2004.

¹¹⁸ Regulation 42 of the Mineral and Petroleum Resources Development Regulations of 2004.

only provides for the suspension or cancellation of a mining right or permit in the event of a breach of conditions attached to the mining right.¹¹⁹

4.2.3. *Lessons*

SLPs offer a safeguard for communities at the earliest possible time in the lifecycle of a mine. This allows a community to be involved in the planning of the future of the community once operations begin and end. SLPs are a positive step as the Government also has an opportunity to safeguard the interest of the communities before any adverse events have taken place. The implementation of SLPs might leave a lot to be desired, however, as a system, it allows for community participation from the beginning of the mining project.

4.3. **Australia**

4.3.1. *Introduction*

Negotiated agreements in Australia prior to 1992 yielded mixed results for communities. According to O’Faircheallaigh before 1992, there was no legislative or constitutional recognition of inherent indigenous rights in Australia.¹²⁰ This impacted the bargaining power of indigenous communities. Therefore, indigenous Australians were only able to get IBAs when special legislative enactments established a statutory right to negotiate or where specific mining companies decided that doing so was politically prudent.¹²¹ A 1992 High Court decision held that Mabo native title, which represents indigenous land ownership, survived the introduction of British control in 1788.¹²² This court case recognised native title at common law.¹²³ The court determined that native title had persisted since before colonization and could coexist with Australian common law as long as it had not since been extinguished.¹²⁴ The court further mentioned that traditional connection to or occupation of the land was the source of native title.¹²⁵ The type of the traditional tie or activity determined the nature and

¹¹⁹ Section 47 of the MPDRA.

¹²⁰ C O’Faircheallaigh ‘An Australian Perspective on Impact and Benefit Agreements’ (2000) 25 *Northern Perspectives Canadian Arctic Resources Committee*.

¹²¹ O’Faircheallaigh (n 120 above).

¹²² O’Faircheallaigh (n 120 above). See also *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

¹²³ P Crooke et al 2006 ‘Implementing and monitoring indigenous land use agreements in the minerals industry: the Western Cape communities co-existence agreement’ in M Langton & O Mazel & L Palmer & K Shain & M Tehan (eds) *Settling with Indigenous People: Modern Treaty and Agreement Making* (2006) 98 – 99.

¹²⁴ M Limerick et al ‘Agreement-making with indigenous groups: oil and gas development in Australia’ Centre for Social Responsibility in Mining (2012) 28 <https://www.csr.uq.edu.au/publications/agreement-making-with-indigenous-groups> (accessed 20 August 2022).

¹²⁵ Limerick et al (n 124 above) 29.

substance of the native title.¹²⁶ The Mabo decision, therefore, changed the legal landscape for indigenous communities.

Flowing from this decision, the Native Title Act (NTA) was enacted. The NTA allows native title holders to exercise their right to negotiate over future actions, such as the awarding of mining leases.¹²⁷ A crucial component of the native title legal system is that negotiations with Indigenous people must take place even in cases where the existence of native title has not yet been established.¹²⁸ Under the NTA, a resource firm might be required to engage in negotiations even in cases where there are merely registered native title claimants, in addition to native title holders.¹²⁹ The NTA recognizes two important categories of agreements: those that address native title determination and those that address potential future actions on native title-affected property. For resource development purposes, the second category is of relevance to resource development companies. The NTA proposes two pathways to resolving the potential impact on native titles. The first pathway is the negotiation and signing of an Indigenous Land Use Agreement (ILUA). The section below will discuss the ILUA to an extent. The second route is the right-to-negotiate (RTN) procedure, which results in what is referred to as section 31 agreements. For purposes of this study, the focus will be on ILUAs.

According to Loutit *et al*, in Australia, the government bears a legal duty to negotiate and/or consult with stakeholders in certain circumstances.¹³⁰ For example, the NTA stipulates that government must be a party to the ILUA in cases where the native title would be extinguished by an agreement.¹³¹ However, the obligations attached to this governmental duty are broadly framed and generally only apply to land where formal legal title is held by indigenous peoples.¹³² The NTA requires companies that have been granted a mining license to negotiate with aboriginal families and communities that have a legally recognized interest in the land as native title holders or registered native title claimants.

4.3.2. *Community development through Indigenous Land Use Agreements (ILUAs)*

States and territories are increasingly supporting ILUAs as a means of achieving native title outcomes and offering alternatives to native title claims.¹³³ The National Native Title Tribunal defines an ILUA as

¹²⁶ Limerick *et al* (n 124 above) 29.

¹²⁷ O'Faircheallaigh (n 120 above).

¹²⁸ Limerick *et al* (n 124 above) 31.

¹²⁹ Limerick *et al* (n 124 above) 31.

¹³⁰ Loutit *et al* (n 16 above) 67.

¹³¹ Limerick *et al* (n 124 above) 70.

¹³² Loutit *et al* (n 16 above) 67.

¹³³ Australian Human Rights Commission 'Native Title Report' (2006) 31 <https://humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/publications/native-title-report-2006> (accessed 20 October 2022).

a voluntary agreement between native title parties and other people or bodies about the use and management of areas of land and/or waters.¹³⁴ As such an ILUA is a negotiated agreement. An ILUA operates as a binding contract between the contracting parties.¹³⁵ The area of application of an ILUA includes areas where native title has been determined to exist in at least part of the area, a native title claim has been made, and no native title claim has been made.¹³⁶ The Australian legal framework allows for the registration of ILUAs. A registered ILUA is binding on all the native title holders to the terms of the agreements.

The following are some examples of topics that ILUAs can cover: the acceptance of future developments by holders of native title, the relationship between native title rights and other people's rights, agreements regarding access and management, surrender of native title and compensation. An ILUA allows parties to agree on an array of matters in addition to the usual issues such as compensation and employment. It is this flexibility and room for creativity that has enabled ILUA to achieve success in Australia.

4.3.3. Case Study: Argyle Mine

One may argue that the ILUA and Argyle Management Plan Agreement (AMPA) together represent the most comprehensive agreements ever signed in Australia between a resource corporation and traditional owners.¹³⁷ The agreement was signed between Traditional Owners of the East Kimberley region of Western Australia, the Kimberley Land Council, and Argyle Diamond Mine. The ILUA focused on the financial benefits. The AMPA consisted of eight management plans. These include Aboriginal site protection; Training and employment; Cross-cultural training; Land Access; Land Management; Decommissioning; Business development and contracting; and Devil Springs.¹³⁸ This agreement illustrates what can be achieved by negotiated agreements. The agreement highlights the importance of negotiations prior to signing an agreement. Negotiated agreements allow parties to broaden the content and scope of the agreement. Something that might not be possible with voluntary initiatives or public regulation. In the case of the Argyle agreement the parties were able to agree on several matters which both parties deemed important. Another good aspect of this agreement was the establishment of the relationship committee. This relationship committee was tasked with monitoring

¹³⁴ National Native Title Tribunal www.nntt.gov.au (accessed 20 October 2022).

¹³⁵ National Native Title Tribunal www.nntt.gov.au (accessed 20 October 2022).

¹³⁶ National Native Title Tribunal www.nntt.gov.au (accessed 20 October 2022).

¹³⁷ Australian Human Rights Commission 'Native Title Report' (2006) 125 <https://humanrights.gov.au/our-work/native-title-report-2006-chapter-5-argyle-participation-agreement> (Accessed 20 October 2022).

¹³⁸ Australian Human Rights Commission 'Native Title Report' (2006) 125 <https://humanrights.gov.au/our-work/native-title-report-2006-chapter-5-argyle-participation-agreement> (Accessed 20 October 2022).

the implementation of the agreement. The committee would meet regularly to monitor the implementation. Therefore, the parties were able to create a mechanism to ensure that the agreement was a success. Although this is a single example, there are other examples from Australia of the success of negotiated agreements.¹³⁹

4.3.4. *Lessons?*

The Australian legal framework on CDAs has created a platform for indigenous communities to participate in development in their area by allowing them to negotiate with mining companies. This was done by allowing Native title holders to exercise the right to negotiate over future acts. Future acts included mining leases. The government on the other hand bears the duty to negotiate and consult stakeholders. This has to take place before any mineral extraction process has taken place. The recognition of native title and the subsequent enactment of the NTA were crucial steps in ensuring that aboriginal communities received equitable benefits from resource development projects. IULAs are a flexible mechanism that has allowed parties to negotiate on a broad range of matters. The flexibility has even allowed for the negotiation of a series of agreements as seen in the Argyle mine agreement. The binding nature of these agreements is an incentive for parties to comply with the agreement. Austria managed to create a solution for an Australian context. The creation of two avenues in which communities may safeguard their interest is commendable.

4.4. **Canada**

4.4.1. *Introduction*

In Canada, negotiated binding agreements between mining companies and communities are commonly known as Impact and benefit agreements (IBAs). These agreements serve as a framework for creating formal relationships between mining firms and local communities.¹⁴⁰ The government as an exception may be directly involved in the development and negotiation of IBAs. Their two main goals are to ensure that First Nations get benefits from the exploitation of natural resources and to alleviate the negative consequences of commercial mining activities on local populations and their surroundings.¹⁴¹ Negotiated agreements between Aboriginal groups and resource companies where mineral development is located within or adjacent to traditional Aboriginal or Treaty lands has become

¹³⁹ See for examples Centre for Social Responsibility in Mining 'Why agreements matter, (2016) <https://www.csr.uq.edu.au/publications/why-agreements-matter>

¹⁴⁰ I Sosa & K Keenan 'Impact benefit agreements between aboriginal communities and mining companies: Their use in Canada' (2001) 2 <https://cela.ca/impact-benefit-agreements-between-aboriginal-communities-and-mining-companies-their-use/> (accessed 27 October 2022).

¹⁴¹ Sosa & Keenan (n 140 above) 2.

standard practice in Canada as aboriginal rights have gained judicial and political recognition and more First Nations have resolved land claims in recent decades.¹⁴² It is important to note that IBAs differ from resource revenue-sharing agreements between governments and Aboriginal people, which divide public revenue from resource development, such as royalties and taxes.¹⁴³

The Canadian government supports negotiated agreements because of the practical value of these agreements in fostering community bonds, bringing economic advantages to Aboriginal communities, and fostering some degree of stability between these communities and project proponents.¹⁴⁴ These negotiated agreements deal with matters such as, financial provisions, economic development, business and opportunities, environmental and social impact management, employment opportunities, and institutional and decision-making arrangements.¹⁴⁵

4.4.2. IBA framework

Almost all new significant mining, oil, and gas projects in Canada are the subject of agreements between Indigenous peoples, businesses, and, in certain circumstances, the state, regardless of the legal framework.¹⁴⁶ IBAs provide indigenous people with a formal framework through which they can benefit from natural resource extraction. Legal and policy frameworks allow these communities to enter into these agreements. According to Gogal *et al*, there is no unified legal or policy framework for the negotiation of IBAs.¹⁴⁷ The negotiation of IBAs stems from three main sources; the common law duty to consult and section 35 of the Canadian Constitution Act of 1982, statutory requirements including settlement and land claims agreements, as well as regulatory requirements.¹⁴⁸ Section 35 recognises and affirms the existing treaty rights of the aboriginal peoples of Canada.¹⁴⁹ Gogal *et al* point out that although aboriginal rights are recognised, they are not absolute.¹⁵⁰ The government

¹⁴² Limerick et al (n 124 above) 119.

¹⁴³ N Kielland 'Supporting aboriginal participation in resource development: The role of impact and benefit agreements' (2015) *Library of Parliament Canada* 1 <https://lop.parl.ca/staticfiles/PublicWebsite/Home/ResearchPublications/InBriefs/PDF/2015-29-e.pdf> (accessed 27 October 2022).

¹⁴⁴ C Fidler 'Increasing the sustainability of a resource development: Aboriginal engagement and negotiated agreements' (2010) 12 *Environment, Development and Sustainability* 236.

¹⁴⁵ Limerick (n 124 above) 119.

¹⁴⁶ C O'Faircheallaigh 'Explaining outcomes from negotiated agreements in Australia and Canada' (2021) 70 *Resources Policy* 1.

¹⁴⁷ S Gogal *et al* 'Aboriginal impact and benefit agreements: Practical considerations' (2005) 43 *Alta. L. Rev* 130.

¹⁴⁸ Gogal (n 147 above) 130.

¹⁴⁹ J Onele 'Impact and Benefit Agreements and the Protection of Indigenous Peoples Rights: Any New Lessons from Canada?' (2018) 16 *Oil Gas & Energy Law* 10.

¹⁵⁰ Gogal (n 147 above) 131.

may infringe on these rights provided that the test laid out in *R v Sparrow* is passed.¹⁵¹ As part of the test, the following questions have to be answered; (a) whether the government is acting pursuant to a valid legislative object; (b) whether the government's actions are consistent with its fiduciary duty to the indigenous people; (c) where there is a valid legislative object, whether there has been 'little infringement as possible' in order to achieve the intended result; (d) whether fair compensation has been paid in a case of expropriation and (e) whether the indigenous people concerned were consulted with respect to conservation.¹⁵² It is from this that the duty to consult arises on the part of the Crown fiduciary duty to protect the rights of aboriginals. This is the genesis of the process towards the development and negotiation of IBAs.

In other cases, where IBAs are not requested through First Nation or resource rights, nor are they necessary under a land claim agreement, the government may insist that an IBA be negotiated for a specific project, on an as-needed basis.¹⁵³ An overall social strategy to support Aboriginal communities may include such a requirement, or it may arise as a result of the mine's anticipated major social and/or environmental impacts.¹⁵⁴ To meet their fiduciary obligations to Aboriginal peoples, governments may also require on a case-by-case basis the negotiation of IBAs.¹⁵⁵ This requirement is common in places where land claims are unresolved.

Statutory requirements are a basis for the negotiation of IBAs in Canada. According to Kielland, regulations governing IBAs and how resource benefits are distributed to local communities vary significantly at the provincial and territorial levels.¹⁵⁶ While Saskatchewan requires mining companies doing business in the province's north to sign surface lease agreements, Alberta allows IBA negotiations on a voluntary basis.¹⁵⁷

It is under the above-mentioned circumstances that aboriginal communities and First Nations communities have been able to negotiate agreements in Canada. Although the legal framework of Canada has many moving parts, it has managed to generate benefits for aboriginal communities and First Nations.

¹⁵¹ Onele (n 149 above) 10.

¹⁵² Onele (n 149 above) 10.

¹⁵³ Sosa & Keenan (n 140 above) 7.

¹⁵⁴ Sosa & Keenan (n 140 above) 7.

¹⁵⁵ Sosa & Keenan (n 140 above) 7.

¹⁵⁶ Kielland (n 143 above) 3.

¹⁵⁷ Kielland (n 143 above) 3.

4.4.3. *Lessons learnt?*

IBAs are a common phenomenon in Canada with the government supporting the conclusion of IBAs between First Nations and resource development companies. There is no specific national legislation dealing with IBAs. The standard practice of concluding IBAs stems from section 35 of the Canadian Constitution. The section recognised the treaty rights of aboriginal people. The impact of section 35 is that government has a fiduciary duty to protect those rights. As a measure to protect the rights, government has been supporting and encouraging IBAs. IBAs are considered to be of great value in Canada hence the introduction by some federal / provincial governments of statutory requirements for IBAs.

4.5. **Potential of CDA's in Zimbabwe**

CDAs are a mechanism that can be used to create a formal tripartite relationship between communities, government, and mining communities. CDAs have the potential to produce mutual benefits for the parties if implemented appropriately. One of the main problems with Zimbabwe's CSOTs, as they are now understood, is the lack of legal certainty and community involvement. CDAs can help with this. The success of CDAs depends on fostering local procurement, environmental sustainability, the expansion of small businesses, and the creation of a parallel economy that can endure the closure of mines. CDAs make it possible for local communities to realize the extractive industries' potential for economic growth.

CSOTs in Zimbabwe and mining governance, in general, are currently primarily focused on share transfers and financial handouts. The flexible nature of CDAs allows for a wider scope of benefits and agreements as was the case with the Argyle Mine agreement. CDAs allow for locally determined developmental goals and even scientifically identified community needs. This allows for parties to agree on matters mutually exclusive to that community. Local-level discourse and a priority designation approach will be key elements in unlocking benefits for local communities. This is something that CSOTs in Zimbabwe are struggling to achieve.

CSOT in Zimbabwe is a centralised system with no mention of community engagement in the legal framework. CDAs provide an alternative to the current legal framework as community engagement is at the centre of CDAs. The World Bank sourcebook identifies four phases for in the development of CDAs. These phases are stakeholder engagement; capacity development; stakeholder representation and implementation and feedback mechanisms.¹⁵⁸ All these phases include communities. CDAs

¹⁵⁸ World Bank 'Mining Community Development Agreement: Source Book' <https://openknowledge.worldbank.org/handle/10986/12641> (2012) 14 (accessed 8 August 2022).

present an opportunity for communities not directly affected by mining operations to be included in the process. This is something that CSOTs are unable to provide.

CDAs can be implemented to achieve the goals of the indigenisation policy in the same manner as ILUAs in Australia. Economic empowerment may be achieved through CDAs. CDAs process as identified earlier also allows for civil society groups and other NGOs to play a role in implementing the indigenisation policy. The fourth phase of CDA development and implementation as identified is the implementation and feedback mechanism. This phase allows for the parties involved to monitor the goals and responsibilities of each party. This mechanism is currently unavailable under the current CSOT framework. Monitoring and evaluation are an effective tool to measure progress. This tool can be used as a basis to enforce the rights as contained in a CDA. That is why important for the parties involved to execute their responsibilities. CDAs present an opportunity to address the deficiency in the legal framework.

In terms of section 14(B) (4)(f) of Indigenisation and Economic Empowerment (General) Regulations, 2010 monies accruing to the CSOT must be used for environmental protection.¹⁵⁹ The wording from the law states the following “gully reclamation and other works related to soil conservation and the prevention of soil erosion, and the conservation of the environment generally”.¹⁶⁰ It appears that environmental protection is solely the responsibility of the CSOT. The involvement of the company is paying the money to the trust. The involvement of the company in the process is important and a CDA provides that avenue for all parties to work together on environmental protection. CDAs allow for environmental protection to cover life after the mine. The Zimbabwean Mines and Minerals Act and the laws governing the environment do not mine closure processes. This deficiency makes CDAs an attractive mechanism as parties may agree to matters beyond the regulatory framework. ESG reporting is guiding company activities. As such, the involvement of a company in environmental protection is important. It is beneficial for companies to engage in environmental protection and CDAs allow for the company to fulfil these requirements. This is despite the case that there are deficiencies in the regulatory framework.

4.6. Conclusion

Community benefits from mining activities vary from location to location. CDAs have been deployed as a mechanism to ensure that communities benefit from mineral extraction activities. This chapter

¹⁵⁹ Section 14(B) (4)(f) of Indigenisation and Economic Empowerment (General) Regulations Statutory Instrument 21 of 2010.

¹⁶⁰ Section 14(B) (4)(f) of Indigenisation and Economic Empowerment (General) Regulations Statutory Instrument 21 of 2010.

sought to highlight community development in Australia, South Africa and Canada. The potential of CDAs in Zimbabwe was the other aim of the chapter. The aforementioned countries utilize CDAs as a mechanism to assist communities to attain benefits from resource development projects. In Australia and Canada particularly, CDAs have become standard practice for all new projects in the mining industry as well as the energy industry sector. Australia enacted the NTA which introduced ILUAs. The NTA is the basis for the conclusion of ILUAs. Canada on the other hand does not have a specific national legislation dealing with IBAs. Its IBA legal framework is based on 35 of the Constitution, statutory requirements and industry regulatory requirements. Agreements in South Africa are contained in what is known as a SLP. An SLP is mandated by the law and is submitted prior to a mining licence is granted. The South African legal framework provides for the requirements of an SLP, failure to comply and a reporting mechanism. Lessons for Zimbabwe include the need for legal certainty in the Zimbabwean framework and monitoring and evaluation mechanism. The next chapter will conclude the study.

CHAPTER 5

CONCLUSION

5.1. Introduction

The aim of this study was to examine the potential of CDAs as tool to ensure that mining communities in Zimbabwe to benefit from mining. With the main research question being the feasibility of CDAs as a solution for communities in Zimbabwe. To answer the primary question, secondary questions had to be answered first. These secondary questions were dealt with in chapter 2, 3 and 4. The purpose of this chapter is to conclude the study and address the primary question of the study.

5.2. Summary of Findings

The research revealed that Zimbabwe has community development in its legal framework in the form of CSOT. CSOT were incorporated into the indigenisation framework. Although their incorporation seems to have been an afterthought as they were introduced in a statutory instrument. CSOTs were created to be the vehicle in which local communities would receive benefits from mining operations in their area. CSOTs would acquire a 10% ownership share in the company. These shares were ceded by the companies as per the directive of the indigenisation laws. The cession of shares by companies led some authors to question the legality of CSOT. The authors point out the laws do not provide for such transfer of shares. Despite this, companies ceded 10% ownership shares to CSOTs. The CSOT would receive financing in the form of a pledge from the mining company. The revenue accruing to the CSOT would be used to build schools, hospitals, roads, and other matters as highlighted in the statutory instrument. The framework is, however, silent on how to legally ensure that pledges are fulfilled, and other responsibilities are performed. The challenge with the CSOT is that their legal certainty is up in the air due to the amendments to the IEEA. The primary indigenisation law has changed a few times over the years, and it has left CSOTs in a state of limbo. From the latest amendments, companies elected whether they should cede a 10% ownership share to CSOTs and pledge finances. Companies might only cede due to the need for a social licence to operate. Another issue with CSOT is the sustainability of the trust as the focus is on developing infrastructure, something that the government should do. CSOTs in their current form do not speak to the development of the local economy, the creation of alternative economic activities and the life after the mine. These issues therefore speak to the need for research into alternative options that ensure that communities receive tangible benefits.

The alternative identified in this research is CDAs. CDAs are a growing phenomenon in the extractive industry. CDAs are known by other names depending on the location. In some jurisdictions, they are referred to as IBAs, ILUAs, and participation agreements, to name only a few. They are viewed as powerful mechanisms that ensure that mining communities benefit from mineral extraction in their area. CDAs have grown to the extent that they have become standard practice in some jurisdictions as identified in this research. The working definition adopted in this was that a CDA is a legally binding formal agreement between project developers and communities. CDAs may be entered into voluntarily or maybe legislative mandated. They developed as a solution to the voluntary initiative and public regulation of community development. CDAs have both advantages and disadvantages. With some of the advantages being the creation of a formal relationship between the community and a resource development company, the negotiation process which requires the inclusion of communities, and the flexibility of the agreements to include a variety of issues to mention only a few. The unequal negotiation power between the parties is viewed as a disadvantage.

The research proceeded to look at community development approaches in other jurisdictions. Australia, Canada and South Africa were the jurisdictions discussed in the study. Australia, Canada, and South Africa are utilizing CDAs as a mechanism to ensure that local community benefit. In all these jurisdictions, CDAs are to an extent legislatively mandated. In Australia, CDAs are governed by the Native Title Act. This Act governs instances whereby Aboriginal groups may enter into an agreement. However, companies and federal governments have been entering into these agreements despite legal requirements. Canada is particularly interesting as the Constitutional provision recognising aboriginal groups and First Nations is the basis of most negotiated agreements in Canada. Over the years, the federal government have also adopted policies encouraging agreements. In South Africa, SLPs flow from the provisions of the MRPDA. The main lesson from these jurisdictions is the political will to ensure that communities can attain some benefits. Important to note as well is that the different jurisdictions created solutions that are suitable to the needs of the jurisdictions.

5.3. Addressing the research question

The overarching research question that the study sought to answer was whether CDAs were a feasible solution to the challenge of securing community benefits in Zimbabwe's mining communities. Having identified issues with CSOT in chapter 2, it is worthy while to consider CDAs as a potential avenue to ensure that mining communities receive equitable benefits. For Zimbabwe, it is possible to adopt CDAs as a community development mechanism that will assist the local communities. CDAs do have the potential to ensure the success of the indigenisation and economic empowerment drive by allowing communities to enter into agreements with mining companies and the government. CDAs present an

opportunity for communities to negotiate on matters beyond the legal requirements and they are flexible enough to allow for a package of agreements dealing with different issues. CDAs allow for community-based solutions to community-based problems. This is something that the current CSOTs are unable to achieve as there is a blanket of things that the trust should do. CDAs allow for increased community participation as identified in the four phases of the development and implementation of CDAs.

5.4. Concluding thoughts

The mining sector still has a pivotal role to play in the Zimbabwean economy. As the sector continues to cement its place as one of the major contributors to the GDP, the same impact is expected to be seen in communities. The economic benefits of mining need to be visible in the host communities. CDAs are a tool that host communities might welcome as it gives them the ability to determine their future. Although CDAs have benefits, further research in the Zimbabwean context is still required. This study for example did not deal with whether CDAs should be mandatory or voluntary in Zimbabwe, the relationship between CDAs and SDGs and ESG reporting and how will the judiciary handle disputes related to CDAs.

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