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Review article

Legal and institutional frameworks for community development agreements in the mining sector in Africa

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ABSTRACT

This article critically reviews emerging trends in legislative regimes regulating Community Development Agreements (CDAs) in the mining sector in Africa. It focuses on legal regimes that mandate CDAs as distinct from those that merely require mining companies to engage in community development activities in their areas of operation. The article highlights the divergent approaches various African countries have adopted and critically analyzes key issues in the legislative provisions with a view to identifying gaps and implementation challenges and suggesting alternative approaches. The review focuses on the following issues: the definition of "community", circumstances when CDAs are required, the enforceability of CDAs, compliance monitoring of CDAs, the institutional framework for the implementation of CDAs, and the shortcomings of the various regimes. It makes two key findings, namely: (1) while the regimes share several common characteristics, they differ in some critical respects, such as when CDAs are required and in their recognition of which communities qualify for the negotiation of a CDA; and (2) all the regimes share two key shortcomings: they pay either no or too inadequate attention to the issue of representativity of communities and to the need for community capacity building to enable meaningful community participation in CDA schemes.

Contents

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1. Introduction

Community Development Agreements (CDAs) are becoming increasingly popular within the mining sector around the world. CDAs – which are also known by other names, such as Impact Benefit Agreements, Community Benefit Agreements, Memoranda of Understanding and Local Development Agreements – provide opportunities for ensuring that mining contributes to the sustainable development of local communities that play host to mining activities. According to Odumosu-Ayanu (2014:473), these agreements "exist under different socio-legal conditions but they illustrate that several types of agreements exist within the investment law regime that transcend the prominent state-investor contract and investment treaty models." The popularity of CDAs is due to a litany of factors, including transformations in the relationship between governments and businesses (influenced mainly by the failure of governments to provide basic public welfare services in local areas, compelling businesses to step in to fill the gap to fend off local opposition to their projects) (Muthuri, 2008:177). In this way, CDAs help to take discretion out of corporate social responsibility (O'Faircheallaigh, 2015:92). Other factors include resolution of company-community conflicts (Gathii and Odumosu-Ayanu, 2016:87), increase in stakeholder expectations (prompted by globalization and privatization), demand for accountability from stakeholders, and emphasis on benefit sharing and social equity (Sarka et al., 2010:11–17; Songi, 2015:156). The need for companies to obtain a social licence to operate and minimize their business risks is thus at the heart of companies' willingness to negotiate CDAs. Dupuy (2014:210) argues that "[s]trong regional, organizational, and economic pressures are providing material and normative incentives for states to adopt [laws mandating community development]".

Despite the popularity of CDAs in the mining sector, their inclusion in legislative requirements is very recent and also rare. Most countries' practice of CDAs still rely on voluntary best practices. In 2014, Dupuy (2014:201) found that only 32 out of 124 countries around the world with mining sectors had adopted mining legislation requiring community development (CD) while nine others had proposed similar legislation. Although this number is roughly half of the number of major mining countries in the world – the number of such mining legislation is, however, increasing – legislating CD is different from legislating CDAs. Laws requiring CD simply mandate companies to engage in CD activities in the communities around their projects whereas CDA laws mandate companies to enter into agreements with their host communities for the purpose of CD activities. Not all of the laws found by Dupuy require CDAs, meaning that CDA laws are even rarer. As the World Bank (Sarka et al., 2010) has noted, however, due to divergences in the quality of CDAs that exist, the need for mandatory CDAs is gathering support, especially among NGOs and development agencies, the private sector staunchly in opposition.

In Africa, mining legislation mandating CDAs has been found in a few countries, such as Guinea, Kenya, Mozambique, Nigeria, Sierra Leone and South Sudan. The adoption of CDA legislation represents a novel approach to mining governance and reflects state determination to influence the contributions of businesses to social investments as part of efforts to address the negative impacts of mining development (McNab et al., 2012:3). According to the World Bank (2012:ix), CDAs have played a valuable role in meeting stakeholder expectations in the mining sector and have been a key instrument for defining the relationship between mining companies and impacted communities although lack of a common framework for CDAs has led to different approaches that produce varied outcomes. There have, however, been a number of efforts to analyze existing agreements with a view to identifying best practices in terms of content and the agreement-making process (Loutit et al., 2016). In 2010, the World Bank drafted a model regulation for CDAs that individual countries may consider adopting into legislation as part of their development strategy (Otto, 2010).

Compared to voluntary CDAs, legislatively mandated CDAs have a greater potential to facilitate the redistribution of benefits from mining towards improvements in the conditions of local communities affected by mining and which have historically been neglected in the sharing of the benefits. This is because by virtue of their obligatory and binding nature, there is an assurance not only that CDAs will be established but also that parties will abide by their commitments – voluntary CDAs are generally not binding on the parties. Also, legislatively mandated CDAs are more likely to be successful than voluntary CDAs because mechanisms for resolving disputes during their negotiation and implementation are addressed well beforehand by the enabling legislation whereas conflicts during the negotiation of a voluntary CDA may mark the end of the process. Legislatively mandated CDAs can also help to promote equity and transparency in the creation and implementation of CDAs, for, by establishing a common framework for CDAs in a given country, they help to ensure consistency of standards in companies' approach to CD throughout the country.

This article seeks to contribute to the understanding of CDAs by reviewing emerging trends in legislative regimes regulating CDAs in the mining sector in Africa. The choice of Africa is informed by a heretofore unknown interest among African countries to ensure that communities affected by mining development share in the benefits arising therefrom and spared its negative externalities (see O'Faircheallaigh, 2015), many reviewing their mining laws with a view to giving CDAs legal recognition. Following a comprehensive examination of African mining statutes and the literature on CDAs in Africa, five African countries (Guinea, Mozambique, Nigeria, Sierra Leone and South Sudan) were found to have mining legislation mandating CDAs with some detailed provisions. A sixth country, Kenya, has meagre CDA provisions in its Mining Act, 2016 but a draft regulation to flesh out the provisions is currently under public review. While this list may not be exhaustive due mainly to language barriers in examining statutes not written in or translated to English, it represents countries with some of the most recent mining legislation in Africa.

The article focuses on African legal regimes that mandate CDAs as distinct from those that merely mandate CDs. It highlights the divergent approaches various African countries have adopted and critically analyzes key issues in the legislative provisions with a view to identifying gaps and implementation challenges and suggesting alternative approaches. In reviewing the regimes, the article focuses on the following issues: the definition of "community", circumstances when CDAs are required, the enforceability of CDAs, compliance monitoring of CDAs, the institutional framework for the implementation of CDAs, and the shortcomings of the various regimes. Two key findings of the article are: (1) while the regimes share several common characteristics, they differ in some critical respects, such as when CDAs are required and in their recognition of which communities qualify for the negotiation of a CDA; and (2) all the regimes share two key shortcomings: they pay either no or too inadequate attention to