



Compensation Matters

Securing community interests in large-scale investments

Imprint

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Dedication

To make the compensation issue known and comprehensible to a wider audience Group Chad developed the photo exhibition ‘Oil Stories’, which displays testimonies of people and activists living in the oil producing area of Doba.

This publication is dedicated to Joseph Djikolmbaye and Dénémba Kanatou who were portrayed in this exhibition and sadly passed away in 2011 and 2013 respectively.

Joseph, coordinator of the local radio ‘The farmer’s voice’ and an expert on the living conditions of the local population of Doba, died aged 41 in a car crash.

Kanatou was born HIV positive, a phenomenon linked to international migration that surrounds projects like the Chad–Cameroon Oil & Pipeline Project. At the age of 11 she could no longer stand the harassment and stigma and stopped treatment.



Introduction

By Lena Guesnet and Claudia Frank

Extractive resources are a much sought-after commodity and their value has been on the rise over the last decade. Governments of resource-rich countries welcome international companies to extract their natural resources as they are often highly dependent on the income thus generated. Governments' and companies' promise is that the wealth generated from natural resource extraction will benefit the entire country, making expectations for a better future run high amongst the population.

However, those who are first and foremost confronted with changes and consequences of the project are the people who live in the vicinity of extractive projects¹. Benefits to the local communities are often limited, while they directly bear the negative consequences. These impacts range from environmental degradation to asset destruction, to land and cultural heritage loss. Therefore, the focus of this edited volume lies on those who are affected by extractive projects and on ways and means of off-setting damages of various kinds. As this is commonly tried to be achieved via compensation, this volume seeks to shed light on what compensation is and where its pitfalls lie, then offers insights into particular ideas of how to improve the compensation process to obtain better results for those affected. This can also work in favor of the investing company, as their operations can run more smoothly when conflicts with the local population are avoided.

Therefore, in a first contribution, Lena Guesnet and Moremi Zeil, both researching on natural resources and conflict at the Bonn International Center for Conversion (BICC), describe an ideal type of a compensation process and highlight conflictive issues inherent in this process.

The second article outlines recent developments in the area of Community Development Agreements, which is one of the ways of reaching an agreement on compensation between a company and the affected people. It is written by Ciaran O'Faircheallaigh, Professor at Griffith Business School and Director of the Centre for Governance and Public Policy's Program on Indigenous and Environment Governance and Capacity.

Third, negotiation strategies for communities and legal options are presented by Claudia Müller-Hoff. Drawing on her experience working with ECCHR (European Center for Constitutional and Human Rights) on Business and Human Rights, she highlights what communities can learn from strategic litigation processes.

Fourth, Stephanie Booker introduces a specific tool to brace communities for negotiations with a company: Biocultural Community Protocols draw on the inherent capacities of a community and expressly state a community's values, rights and rules in order to strengthen its position. Stephanie Booker is a member of Natural Justice, Lawyers for Communities and the Environment.

The final article draws on lessons from oil exploitation in the Republic of Chad. Analysing the company approach towards compensation, the authors suggest an alternative paradigm in which livelihood restoration for those affected by the extractive project is put to the fore. The main author, Martin Petry, has worked extensively on the effects of oil exploitation in Chad over the past decade. He is a consultant within the Peace Resources Group.

The idea for this edited volume was born at a civil society workshop organized by Group Tchad, the Bonn International Center for Conversion (BICC) and Bread for the World in November 2012, which discussed compensational justice and alternative compensation models to inform ongoing business dialogues and legal actions. Several of the approaches described in this volume have been presented at that workshop. This volume aims to present the workshop contents to a wider audience and offers an additional overview on compensation matters.

¹ Whilst the focus of this publication is on extractive projects, the issues here described can to a large extent be transferred to other large-scale investments, such as plantations or infrastructure projects.

Compensation matters

By Lena Guesnet and Moremi Zeil

Why compensation?

When a government decides to sell licenses and concessions to private or state investors for the exploration and later exploitation of the country's natural resources, this is done on the assumption that this investment will contribute to the greater benefit of society. While the extractive project will bring about benefits, especially in the form of revenue to the state, any large-scale investment also induces costs. Apart from financial expenses that are borne by the investors, costs occur as negative impacts on the lives of those living close to or within the project area. These costs can occur in the shape of environmental damages, health hazards, human rights violations, social effects or others, and tend to be externalized, i.e. not accounted for by the investors. Many of these costs are related to questions of livelihood¹, for a project can have a negative impact on the quality and availability of land, water, pasture and other resources that form the basis of local livelihood options. Whether to proceed with a designated project or not, should be assessed in light of these impacts.

From an economics perspective, the 'pareto improvement' comes into play here. "A 'Pareto improvement' takes place when, compared to the status quo *ex ante*, at least one individual is made better off and no individual is made worse off, as a result of the project" (Kanbur 2003, 1). As such a situation is extremely rare, no projects would be undertaken if this principle had to be followed unmediated. Economists therefore suggest methods of aggregating losses and gains. A project can go ahead when total gains outweigh total losses.

In the case of an extractive project, in which the benefits accrue at the macro-level of the state, while the costs are mostly felt at the micro-level, the question is whether the overall benefits for a society are outweighing the losses/negative effects of some groups or individuals. A further issue is how to deal with the latter as they occur.

In order to reach equity, i.e. to share the costs and benefits as equitably among society as possible, two mechanisms applied respectively are needed:

- At the macro-level, the state is to distribute the benefits of a project through a 'safety net', thereby improving conditions for everyone in society;

At the micro-level, the costs endured by the population affected by the project are to be off-set via compensation. This should be catered for by the project itself, as "project costs should not be externalized" by the company (Cernea 2008, 95).

Compensation thus comes into play wherever extractive industries affect people and the environment.

If not adequately prevented and off-set, these impacts can nurture serious grievances. The challenge for compensation processes is thus to prevent and resolve such grievances. Cases abound around the world, in which the rights of local communities have not been respected and the negative impacts of a project have not been adequately compensated for. In numerous instances, violence has been the result, as communities voice their grievances and governments and/or companies try to repress resistance or protests, often violently.

On the one hand, compensation is a necessary procedure for mitigating negative effects. On the other, it can itself be a source of conflict. As the assessment of these costs involves subjective valuations, they can hardly be objectively calculated. It means that the issue of compensation is necessarily conflictive. Therefore how compensation is done matters just as much as the aim it seeks to fulfill.

Thinking through this conflict potential, one can analytically distinguish between two different sources of tension². One, **conflicts arise from grievances caused by direct impacts** on communities and their environment, as any extractive project brings about massive changes in land cover and use, as well as in the economic, social and cultural relations of the people concerned. Two, **conflicts occur around the compensation process itself**, e.g. around the level of compensation, around the distribution of benefits

1 According to Grawert and Andrä, "the concept of 'livelihood' refers to the total of activities, resources and chances people use to secure individual as well as communal existence. As such, it also includes the approaches taken by a given sub-society to preserve those social relationships and claims that may provide buffers in times of hardship and make sure those individuals and groups are able to generate livelihoods in the future" (2013, 30).

2 When speaking of conflict, i.e. two or more parties holding differing views and interests, we refer to the whole range of conflict manifestations, namely peaceful expressions of discontent, violent clashes or forms of organized violence.

stemming from compensation or development projects, around matters of inclusion and exclusion and others. Thus, every step of a compensation process holds a great deal of challenges, which can foster existing lines of conflict, generate new grievances or spur violent reactions. This highlights the need for conflict sensitivity throughout an extractive project and the accompanying compensation process.

If not properly addressed, the ensuing tensions or outright violent conflicts may bring about more negative impacts for the affected communities but also generate additional costs to the company. The latter can occur in many ways, e.g. as disruption of production, destruction of property, heightened security measures, reputational loss or costs for litigation.

Before examining potentially conflictive issues in more detail, an overview is given of all the possible steps in a compensation process.

What are central steps in a compensation process?

There is no uniform and universally applied way of compensating. To the contrary: Numerous factors come into play determining whether or not a company will compensate the affected people at all, whether this will be done in a coordinated manner or in piecemeal fashion, in which way it will compensate and in how far the people concerned will play a role in determining compensation. The national legislative framework, company guidelines and the organization of the affected people significantly shape the specific mode of reaching compensation in a given situation. The steps sketched out in the following paragraphs are therefore to be seen as a model or ideal type of a complete compensation process, to highlight central steps and key issues.

Compensation is not a singular activity or measure that can be regarded by itself. To identify major issues and challenges, it makes sense to consider compensation as a process, which starts with the notification on project plans by the investor and ends with the implementation of the compensation scheme and grievance mechanisms.

The project plan for any extractive project can be seen as the starting point. Already at the stage of

a project idea, typically manifesting itself in exploration and probing activities, is engagement with people potentially touched upon in the course of implementation warranted. Crucial steps are **information and notification** as well as **participation and consultation** (Lindsay 2012, 8f.). The first pair of terms means that people in the vicinity of a project locale are advised of the measures taken in the proceeding project and are given sufficient information on their impact. Also enough time should be given to those notified to understand possible effects the project might have on them. The terms participation and consultation signify the need to actively engage interested and affected people in project design or at least in the planning of the most relevant issues. These steps are of equal importance for the overall project implementation as for the planning of concrete compensation measures and are crucial to transparently identify people who are legitimized for taking part in concrete negotiations on compensation.

Once concrete impacts of the project can be foreseen – in terms of land take and land use, economic, social or cultural activities, etc. – actual **negotiations** on compensation are due to set in. Who is considered to have a stake in the negotiations and thus be included in the process, is a major issue. The questions of **who is affected, in what way and what needs to be compensated for** are bound to be major themes in the debate. These questions are often one of the main sources of discontent among the affected and between company and affected. The subsequent question to answer after accounting for potential losses is the form in which they can actually be compensated for. A classic distinction here is between cash and in kind compensation. This issue highlights the need for a comprehensive understanding of the way the affected have been making a living in order to be able to – jointly with those concerned – come up with an adequate compensation model.

At the end of a negotiation process, an **agreement** should be reached. This can be between the company and the communities, between the company and the state or between all three stakeholders. While the procedure leading up to this step is equally important, the agreement itself is a fundamental document on which the following implementation will be based. Cases abound where there is no agreement or at least the form it has does not meet the demands of all stakeholders – if these are considered at all.

Subsequently, **implementing** the agreement is of major importance. While it may seem obvious that the document needs to be translated into action, this step often is not taken to full satisfaction. Clear arrangements for the scope and time scales of specific compensation measures are instrumental to the **enforceability** of the agreement reached and give way to follow-up activities and evaluation. **Grievance mechanisms** that are open and accessible throughout the whole process are an important tool for dealing with pressing issues, especially if the agreement is not properly implemented.



These central steps are not always clearly separable. Nonetheless articulating the subsequent measures highlights the process character of compensation and opens this course of action to critical examination.

Conflict issues in the compensation process

1. Power relations

The preceding section has shown that compensation is made up of a plethora of steps and decisions. A crucial issue in the whole process and thus a major source of tension is the question of who is involved in negotiation and decision-making. Defining those that have a stake in the design and implementation of the compensation process necessarily is an act of power. It involves aspects such as the representation of affected interests and making active participation possible. Consequently, if not done in an open and flexible manner, this essential preliminary step can trigger wide reaching grievances. In the following we will take up comments by Marieme S. Lo (2010) on complex power relations, social and political

dynamics, and the like but try to locate them in concrete activities.

As stated above, the answer to the question of who is legitimized to be part of decision-making has its roots in the primary steps of project implementation. Through information and consultation, roles are assigned and duties fixed.

Conventional actors in the process are the state, communities, and the company. However, it often happens that most interaction is actually taking place directly between the company and communities, for the company has to operate on the ground and the state is not present. The power imbalance between multinational companies and local communities is significant. Whilst the state could engage in a negotiation process in support of its citizens and thereby change the power relations in favor of communities, it is often absent from such negotiations or does not represent the perspectives of affected communities.

While a state and a company may designate offices responsible for dealing with all compensation-related matters, finding appropriate representatives for those communities and individuals affected can prove less straightforward. One could take communities' chiefs of elders as the natural representatives or elected officers. Despite of the position these persons occupy, their communities may not feel sufficiently represented by them. This can be the case where representatives pursue their own interests more than those of the community but also in cases where community cohesion has been altered by the activities of an extractive project.

A community may also already show divisions prior to an extractive project starting in their territory and these divisions can easily become more pronounced due to the changes provoked by the project. If a community is divided in such a way, chances are that the point of views of the affected people will not be taken into account when defining who is to participate in negotiations and who is to define subsequently important questions of who is to be compensated for what and in which way. For those taking part in negotiations on behalf of the community to have the legitimacy to do so, the process should be as transparent as possible to all concerned.

2. Defining who will be compensated for what

As compensation sets in where damages or harm occur, these costs need to be defined. But defining whether and in which way a community or an individual is affected by the project is a contested field, as views on which costs need to be compensated for differ. In his definition of compensation Michael Cernea (2003, 38) writes, “Compensation is the usual operational ‘remedy’ employed universally as a means of restitution for project-caused assetdispossession, economic disruption, and income loss”. In this definition, costs to be compensated for are all economic in nature. When using such a definition, arable land taken from people, investments destroyed and other economic activities damaged would be compensated for. Whether or not it would cover compensation for lost fishing grounds, due to water pollution, if the fishing was simply done for subsistence is less clear. Would it be seen as economic disruption or loss of income? For the people concerned, it certainly amounts to economic disruption as they lose one of their livelihood options.

In addition, the loss of spiritual and social values may be completely disregarded. Such valued entities may stem from the social, cultural or religious spheres, in which items like holy trees, holy sites or spaces for initiation ceremonies may disappear or become desecrated due to a project. Social values, like previously existing community structures (e.g. conflict resolution mechanisms) become obsolete. These non-tangibles can be of major importance to the people affected. To account for these elements necessitates going beyond classic economic valuation and consideration of other forms of potential losses (e.g. Martinez-Alier 2001).

Thus, important issues for those affected are not necessarily registered. They may already be precluded through the way damages or costs are identified and accounted for. If entities valued by those affected fall prey to the project but are not object of compensation measures, the chances for feelings of injustice are high.

The compensation approach chosen also has implications for those considered to be entitled to compensation. The most common approach is often only sensitive to costs that can be attributed to individuals. Contrary to this stance, communities, families or social groups can be affected as a whole, especially when it comes to holy sites or other non-tangibles, which can not be referred to an individual.

In addition, adverse effects through projects may touch upon individuals or groups not necessarily in direct neighborhood to a project site. When speaking of those to be compensated, a further question is how the recipients – be they individuals, families or communities – can effectively demonstrate that they are entitled to receive compensation. This opens another field of contestation and possible conflict.

When looking at land taken by a project, what can be observed time and again is that those living and working on the land do not hold legal documents to prove their ownership. Either they are occupying the land in an informal way or there may be a customary system in place which guarantees their continuous presence on and use of the land. Such rights are often overlooked. In negotiations such entitlements have to be taken into account, whether or not they are documented or the national laws of the country recognize such rights. The recognition of customary rights has direct effects: Will there be compensation for the land itself or only for investments on the land?

Having identified those in need of compensation and the object of compensation, the level and kind of compensation best paid are still an open question. There are different approaches to this issue and due to the fact that the effective, material outcomes are thereby defined, this is bound to be a major source of possible tension. The views within a community as well as the views of a community versus those of a company can differ greatly.

3. The level and mode of compensation

How much compensation should be paid? This question is probably the one that directly comes to mind when considering conflict potential of compensation procedures.

To ask about the amount already seems to imply that only money is to be paid as compensation. Yet, above we have stated that there might be matters of concern to the affected that do not fit conventional monetary terms. Apart from aspects that can not be compensated for adequately at all, such as holy sites and other spiritual or social values, in kind restitution is a possibility for compensation, i.e. in the form of trainings, buildings or items like tools, bicycles for the community or for an individual. Acknowledging these options opens up avenues for non-monetary kinds of compensation.

The method of calculating potential compensation thus is becoming complicated by the possibility of different currencies and leads back to the controversial issue of valuation and monetization respectively. Additionally, calculation links up to the overall question of what value measurements are taken into account. There can be significant differences between market values, replacement costs, and beneficial estimates but all seem somewhat viable in light of compensation. Market value is typically considered the price a willing buyer would pay a willing seller in the context of an open market. The term replacement costs tries to capture what it really takes to replace lost assets in a given market that can be significantly different to an open market. With beneficial estimates we try to cover those approaches that attempt to include some form of future value and or add surplus to the original value (Lindsay 2012, 6ff.). The dimension of these differences can merely be estimated when considering the significant rise in the price of land parcels after natural resources are discovered and big corporations show investment interest. Resentment of those who were compensated at agricultural land rates for example is very probable (Lindsay 2012, 8). Another example for the difficulties in calculating compensation could be fruit trees which are felled for a project. To calculate the monetary value of such a tree one needs to assess the value of that tree for the livelihood of those using it. This includes consuming the fruit and selling fruit, but potentially also other uses, like medicinal purposes.

Trying to identify the right amount of compensation is not just a technical issue of choosing the right method of calculation. To decide between equitable or additional compensation payments is also a question of how compensation is considered to be achieved and what is understood thereby. Writing in the context of resettlement, Cernea (2008, 94) states that the assumption that “compensation alone is sufficient for income restoration” is “unconfirmed in practice and mistaken” (ibid, 94). The central question thus is: What is the objective of compensation? With restitutionary compensation or livelihood restoration and improvement, two very different intentions can be identified, having far-reaching implications on the budget being allocated for compensation when planning an extractive project (ibid, 95).³

Another question is that of the time frame covered by compensation. One approach would be a one-off compensation, covering only the damages occurring at one point in time. But as damages can cause further

costs over time, this does not off-set the real costs. A more comprehensive approach therefore takes into account the costs caused over longer time periods. Defining these remains a challenge. Coming back to the example of a fruit tree which could yield fruits for decades to come: Should the value of all of the potential harvests be compensated? Or in the case of land: How to account for the loss of land which would have been handed down from generation to generation? How to account for all the potential harvests and many other uses of that land?

4. Enforceability and implementation

Once a compensation process has led to agreement on all of the above subjects, conflict potential looms where implementation does not live up to the agreement or the expectations of one party to the agreement.

An implementation that does not live up to the agreement could mean that the agreed compensation does not materialize at all. It can also mean that the compensation given does not fulfill the standards required and/or does not yield the promised results. Examples are bad quality of in kind compensation material (houses cracking, water wells running dry, cattle dying), job trainings which do not lead to employment (mostly because of an unfavorable economic environment), land surfaces not yielding crops or only unskilled jobs provided in the project.

Grievances due to unmet expectations can be caused by exaggerated promises by the company, exaggerated expectations of the recipients and certainly by a lack of exchange on these views between the two, yielding an imprecise agreement.

Having outlined overarching and recurrent conflict issues, the following articles will look in greater detail into some of the major topics surrounding compensation. More importantly, they will each provide an avenue of how issues of compensation and company-community relations can be addressed more creatively.

3 Where the allocation of sufficient means for compensation is omitted, funds will be missing not because of “absolute resource scarcity” but because of “inadequate pre-project cost calculations for this component, and of initially unrealistic budgets” (Cernea 2008, 94 based on Pearce and Swanson 2008).

Compensation and benefit-sharing in the mining industry: The role of community development agreements¹

By Ciaran O'Faircheallaigh

Agreements between investors and local communities ('Community Development Agreements' or CDAs) are becoming increasingly common in virtually all parts of the world, from inner city America to remote mining regions. CDAs often include specific measures designed to compensate communities, but CDAs approach compensation within a wider context. They seek to avoid or mitigate negative project impacts that might create a need for compensation in the first place; and they aim not only to deal with negative effects, but to allow affected communities to share in project benefits. In other words, communities affected by projects seek to use CDAs to shift the overall balance of costs and benefits in their favor. This chapter defines CDAs, briefly explains their growing prevalence, and examines their use in the mining industry to identify opportunities and challenges they create. The way in which CDAs are negotiated, the parties to them, the range of activities they cover, their legal status and the extent of government participation in and regulation of agreements vary from project to project and country to country (for a fuller discussion see O'Faircheallaigh 2013). But the key message, regardless of context, is that CDAs can only assist in creating equitable and sustainable outcomes from projects if there is a fundamental equality in bargaining power between communities and investors, and if care and expertise is applied to their negotiation.

Prevalence of CDAs

In recent decades there has been an explosion in the negotiation of agreements between investors and local communities throughout the globe, ranging from agreements between real estate developers and local groups in New York, Los Angeles, Toronto and Dublin to deals between mining and oil and gas companies and local communities in a wide range of settings including Northern Canada and Australia, Peru, Mongolia and Papua New Guinea. CDAs involve formal agreements between investors (private or public) and community

representatives or organizations. They are designed to minimize negative project impacts, compensate local communities for those that cannot be avoided, and ensure that communities obtain benefits from investments they would not enjoy in the absence of agreements. Benefits may take the form of greater access to jobs or business opportunities created by a project; investment in a community's human capital through education and training initiatives; funding of community services or infrastructure; and, especially in mineral industries, a share of project revenues.

This chapter focuses on CDAs in the mining sector, where they are especially prevalent, reflecting the fact that the forces that drive investors and communities to negotiate agreements are particularly strong in mining. CDAs in this sector are exemplary for issues that affect CDAs more generally. Thus a focus on mining provides useful insights into a phenomenon that is also occurring in relation to other forms of commercial development.

The term 'community' in 'Community Development Agreements' generally has two often overlapping meanings. The first refers to people residing in a location adjacent to, or affected by, a mining project. They share a place of residence and an experience of impact, though the nature of that experience may differ between individuals and groups within a community. The second type involves people (frequently indigenous) who share economic, cultural and social ties through their association with an area of land or water affected by mining. They may not reside in one place, and indeed may be widely dispersed. Yet they represent a social and cultural community and, again, an experience of impact, though in this case also the nature of that impact may be diverse.

Use of the term 'community' in either of the two senses just discussed does not imply a single attitude or approach to mining among community members, or a single and shared set of interests in relation to negotiation of CDAs or to distribution of their benefits. Indeed, many communities are divided in relation to mining, and political contests around distribution of benefits can, especially where they result in inequitable outcomes, sharpen existing community divisions or give

¹ This chapter draws on the authors more extensive and detailed discussion of community development agreements in the mining industry (O'Faircheallaigh 2013).

rise to new ones (see O’Faircheallaigh 2013 for a fuller discussion of these issues).

The need for CDAs in the mining industry has existed for decades and has not been met in many parts of the world. The growth of CDAs in mining reflects a number of factors. The first involves a desire to avoid or mitigate community–investor conflicts that have grown increasingly common and costly in recent decades. Such conflicts reflect, in turn, the fact that the economic benefits of large mining projects tend to accrue at the national and sub-national level, in the form of government and export revenues and economic linkages to other industrial sectors, whereas the costs of large mining projects (for example environmental impacts, loss of livelihoods, the social impacts of migration) tend to be felt at the local level (Haselip 2011; Sawyer and Gomez 2012).

CDAs can avoid or minimize the risk of local conflicts if they enhance the benefits local communities derive from projects, help ensure that their negative effects are mitigated or compensated for, and establish lines of communication between communities and investors to provide early warning of emerging problems and mechanisms to resolve them.

The finite nature of mineral resources raises important issues in relation to inter-generational equity, requiring if possible that mining generates long-term benefits that can be shared by later generations who may experience the ongoing environmental impacts of abandoned mines but miss out on mining’s benefits. CDAs can help deal with these issues, for example by including provisions on closure planning and on allocation of part of revenue streams to long-term investment funds to provide an income after mining ends.

The increasing number of CDAs can also be attributed to the growing capacity of local communities to mobilize for action, with modern modes of travel, information gathering and communication crucial in this regard. These allow community members to communicate among themselves, a key issue where they are widely scattered. They also allow communities and local groups to obtain information about companies and projects, including information about agreements negotiated by a project developer in other situations, and to communicate with other communities affected by similar projects and with supportive national and international non-governmental organization (NGOs).

All of this enhances both the capacity of communities to disrupt projects if they believe that their costs will outweigh their benefits, and to negotiate CDAs effectively where they believe engagement with investors can generate positive outcomes (Coumans 2008; Katona 2002; McAteer et al. 2008).

Given that mining is increasingly concentrated in remote regions that are often inhabited by indigenous peoples, the growing national and international recognition of indigenous rights has also been important as it places indigenous people in a stronger position to insist that companies negotiate with them about projects on their ancestral lands (Sawyer and Gomez 2012).

In addition, transnational corporations are under increasing scrutiny in their home countries and in countries where they invest, and under growing pressure to demonstrate that they have a “*social licence to operate*” from affected communities (Harvey and Nish 2005; Coumans 2008). CDAs represent a concrete and transparent mechanism that companies can use to defend themselves against criticism.

Trends in CDAs

One clear trend is an increase in the range of issues addressed in CDAs. Many early agreements dealt only with employment of local residents and, in some cases, with local access to business opportunities (Kennett 1999, 38), which meant that many issues of importance to community members were not dealt with. More recently a wider range of issues have been addressed. These include education opportunities for local people; continued landowner access to mine leases, subject to safety considerations; revenue-sharing, including royalty payments of the type historically made only to the state; and the grant of equity in projects to local interests. Some CDAs set out the way in which revenue streams provided by agreements will be managed and allocated within the community.

There is also a growing emphasis on impact management, which can help avoid negative project effects that could create a need for compensation. These include measures to protect culturally significant sites, and to avoid or minimize negative social effects. The latter include cross-cultural training for mine workers; prohibition on hunting or fishing by workers while on site; and operation of ‘closed access’ accommodation camps

that limit interaction between migrant workers and communities and reduce the risk that workers will be involved in prostitution or the sale of illicit drugs. Many CDAs also provide opportunities for landowner and/or community participation in environmental management and closure planning. Such provisions can create a risk that investors might seek to shift part of the responsibility for environmental compliance to affected communities. To address this risk, some CDAs begin by reiterating that legal responsibility for compliance remains with the investor, while community participation and provision of environmental knowledge is designed to assist the investor fulfill its legal obligations, achieve higher levels of protection than those mandated by law, and ensure that community priorities are reflected in environmental programs and closure planning. This example highlights the need for careful legal drafting of CDAs to ensure that community interests are protected.

There is also a trend for a wider range of developmental activities to be covered by CDAs. Until recently, they have usually been confined to the activity of mining itself, whereas community impacts often arise from the exploration that precedes mining and from facilities and activities associated with mining. A growing number of CDAs are being signed that deal with transport of minerals by road and rail and through ports, electricity generation, water extraction, processing of minerals, and mineral exploration. The last is important, as exploration can affect large areas of land and is experienced by many more communities and landowners than is mining, given that only a small proportion of exploration licences yield a commercially viable mineral deposit.

The scale of benefits offered to communities has increased significantly. One reason for this trend is that whereas in the past cash payments were modest and typically consisted of fixed dollar amounts, royalty-type payments related to the volume or value of minerals or to company profits are now more common. Requirements for local business opportunities and for employment are also increasing, and the economic opportunities this generates for communities can far exceed cash revenues (ERM 2010, 51). While this escalation in the scale of benefits can constitute a quantum shift in the level of compensation being paid to communities, it also highlights two important questions of justice, discussed below. The first involves equity in the distribution of funds under more lucrative agreements. The second is that the trend towards greater benefits in CDAs is

uneven because of the differing bargaining power of individual communities (Sawyer and Gomez 2012).

Another noticeable change in CDAs is the attempt to ensure that the benefits that investors undertake to deliver to communities do materialize. This is done by a more precise definition of the benefits and by including mechanisms for implementation. For example in relation to local employment opportunities, in the past CDAs typically contained only general statements of aspirations or goals, for example committing investors to ‘maximize’ local employment. Recent CDAs are more likely to nominate targets for local employment at different stages of project life and time frames for achieving them, for instance 10 percent at the start of project construction, 20 percent when mining commences, 30 percent by year five of mining, and so on. CDAs may also require specific commitments of resources to local training and employment programs in dollars or staff, and specify consequences for the project operator if targets are not met.

In a number of cases, CDAs have generated large revenues for communities, but their expenditure has failed to contribute to sustainable community development because they were allocated to short-term consumption, used wastefully or fraudulently, appropriated by a small minority of influential people, or invested in capital projects which communities lacked the resources to maintain over time (see for example Filer 1999). In response to this situation, CDAs are now more likely to contain provisions, in some cases extensive and detailed, setting out how revenues are to be utilized and how they are to be allocated within the community. These may include allocation of a portion of revenues to long-term investment funds (analogous to ‘sovereign funds’ at a national level), designed to build a capital base that can continue to generate income for a community during period of depressed mineral prices or after mining ceases.

Issues and Challenges

In principle, CDAs offer communities and landowners the opportunity to share or share more fully in benefits created by projects, and to mitigate or compensate for their negative effects. The trends discussed above are likely to enhance their potential in this regard. But a number of significant challenges and issues arise in

realizing this opportunity and in sustaining the gains potentially available from CDAs.

Unequal bargaining power

CDAs result from negotiation and bargaining between the parties to a proposed agreement. The scale of benefits and the efficacy of compensation and impact mitigation measures reflect the outcome of negotiations and so, largely, the relative bargaining power of communities and landowners, on the one hand, and investors on the other. Relative bargaining power reflects, in turn, a wide variety of factors that include the degree of community cohesion and the strength or weakness of local political organizations; the human, financial and information resources available to local communities and organizations; the quality of political leadership; and a community's prior history of dealing with mining projects. They also include the policies and practices of individual corporations; expected project profitability; the urgency of project time frames; and relevant legislation and government policies and actions (or lack of them). The critical importance of individual negotiation contexts is highlighted by the fact that even where CDAs are negotiated under the same legislative regime, their outcomes can vary dramatically (O'Faircheallaigh 2008; ERM 2010; Sawyer and Gomez 2012).

Where communities effectively exploit a strong bargaining position, CDAs can constitute a basis for redefining the relationship between communities and investors, and for changing the distribution of project benefits and costs in fundamental ways. Where communities are in an inherently weak position or fail to exploit their potential bargaining power, 'win-win' outcomes will not eventuate and, indeed, CDAs can leave communities worse off than the absence of any agreement. This is because signing a CDA often precludes a community from pursuing other avenues (for example litigation or direct action to oppose projects) that might allow it to halt a project which is unlikely to generate net benefits, or to achieve an outcome better than that available from negotiating an agreement.

This discussion has clear implications for communities or landowners faced with the possibility of negotiating a CDA. It is imperative that they pay close attention to each factor that will affect their bargaining position, and before undertaking negotiations or entering a CDA take whatever action is available to try and influence

each factor to their advantage (Barsh and Bastien 1997; CSRSM 2011; Lowe and Morton 2008). Such action takes time, and it will often be necessary for communities to try and delay negotiations until they can complete necessary preparations. If corporate or legislative time frames do not allow the time required, communities will have to consider seriously whether it is preferable to refuse to enter CDAs, forego the immediate benefits associated with signing an agreement, and use alternative strategies to push for better community outcomes, or simply 'live to fight another day'.

Representation, legitimacy and the definition of 'affected' communities

It is nearly always impossible for a whole community to engage in negotiating a CDA, although community plebiscites may be held to decide on whether to accept or reject proposed agreements. Community representatives must act as negotiators and the legitimacy of representatives and their capacity to articulate and promote the full range of community interests is critical to the success of CDA negotiations and the sustainability of agreements. Exclusion of whole communities or of groups within communities affected by a project can create conflict during negotiations, seriously undermine community bargaining power, and result in important issues not being pursued in negotiations. In the longer term, it can generate ongoing social tensions, undermine agreements, and result in a failure to realize the benefits they potentially offer (CSRSM 2011; Lowe and Morton 2008).

An issue closely related to the question of representation, and also to the equitable distribution of CDA benefits (see next section), involves how, and by whom, the 'community' deemed to be affected by a project is defined. Investors and governments may have an interest in defining 'affected community' narrowly, in the hope of minimizing opposition to a project and demands for compensation. For example 'affected community' may be defined in spatial terms, as those people residing within a certain distance of a project or whose land falls within the boundaries of a mining lease. Such definitions can be highly arbitrary, excluding for instance people affected by environmental impacts of a project, which can extend considerable distances, by its effects on cultural sites that are of wider significance, or by the social impacts of job-seekers migrating into towns in the region.

If a community or section of a community is not deemed to be affected by a project, it is unlikely to be represented in negotiations or have its interests effectively protected, leading to internal community tensions and conflicts with investors. Careful and comprehensive analysis is required to establish the extent and identity of the 'impacted community', and methods should be used that afford a central role to people and communities who may be affected, for example 'social mapping' processes or community-controlled social impact assessments (O'Faircheallaigh 2000; CSR 2011).

Equity and distribution of financial benefits

A central issue for all CDAs involves the distribution of financial benefits that accrue under an agreement. A failure to include all affected people in the allocation of benefits, a belief on the part of affected people that benefits are being distributed inequitably, or misappropriation or wasteful use of benefits, can cause serious social conflict. Where this occurs CDAs, rather than helping to mitigate or compensate for the effects of investments on communities, can themselves become a source of negative social impacts, undermining community cohesion and destroying social capital.

In this context, two dimensions of equity are particularly important. The first is inter-generational, which as mentioned earlier is a critical issue where a project involves the exploitation of non-renewable resources. In the absence of appropriate investment strategies, future generations may incur significant costs from mining and enjoy none of its benefits. A second key dimension of equity, raised in the previous section, involves the degree to which benefits are allocated to those individuals and groups that experience the impacts of mining. There may be a poor 'fit' between the allocation of benefits and the burden of impacts, because of illicit appropriation of revenues meant to benefit affected community members, or the failure of an affected group's leaders to share benefits intended for all of its members (Altman 2012; Filer 1999). Transparency in processes used to negotiate CDAs and allocate and manage the benefits they generate is crucial in minimizing such problems. Decision-making processes and institutional arrangements that are clear, simple and readily accessible to community members (both in a physical and cultural sense) are especially important.

Enforceability and implementation

CDAs involve a commitment by the parties to deliver certain outcomes. They do not of themselves make these outcomes occur; in all cases this requires subsequent actions by the parties to an agreement, actions that in some cases may not eventuate or may not have the desired effect (ERM 2010; Lowe and Morton 2008). The extent and complexity of the actions required and the likelihood of them occurring and resulting in achievement of CDA goals vary greatly between different types of agreement provisions. The making of cash payments into a community bank account, for example, is at the less complex and more certain end of the spectrum. Achieving an agreed level of local employment on a project, or ensuring community input into environmental management over a number of decades, are much more complex and more susceptible to inaction, delay or failure to achieve outcomes. Failure to implement CDA may not result from lack of good faith or a deliberate attempt to avoid obligations by one or more of the parties. It may also result from a lack of implementation capacity on the part of the investor or the community; from a failure to correctly foresee what is required for achieving CDA goals; or from changing circumstances which reduce the relevance or effectiveness of CDA provisions (O'Faircheallaigh 2002; CSR 2011).

A related issue involves enforceability, the question of what options are open to a party to a CDA if the agreement fails to deliver an expected benefit or to mitigate a project impact. Some CDAs are not susceptible to enforcement because they explicitly preclude recourse to the courts to address noncompliance; because their terms are sufficiently vague to make it virtually impossible to prove noncompliance; or because they lack mechanisms to monitor performance of commitments or to address specific breaches of agreement terms (as opposed to a fundamental breakdown of the agreement) (Gross 2008).

Critical preconditions for effective implementation include use of clear and unequivocal language and specific goals and commitments in CDAs, also an important requirement for enforceability; allocation of resources to the specific task of implementation; systematic and ongoing monitoring and reporting of outcomes; and review and amendment of agreements to ensure they remain relevant in changing circumstances. Also important for both implementation and enforceability are provisions

that create prompt and if possible automatic redress for the party that suffers loss or fails to receive a benefit.

At a more fundamental level, successful implementation requires a capacity on the part of investor and community representatives to communicate effectively, to build a robust and lasting relationship, and to undertake the multiple tasks involved in putting a CDA into practice over extended periods of time. Recognition of this fact has led to a greater focus on the capacities required by all the parties at each stage of agreement-making and implementation (see for instance CSRM 2011, 21-30), and to the importance of fostering relationships when negotiating CDAs that can provide a sound basis for implementation after agreements are signed (Gibson and O'Faircheallaigh 2010).

Conclusion

CDAs represent an important mechanism in seeking to ensure that communities benefit from projects and are compensated for their negative impacts, while at the same time providing investors with the community support they require if commercial activity is to be sustainable over the long term. The recent proliferation of CDAs in a wide range of geographical and commercial settings points to their potential utility. This potential can only be fully realized if they result from negotiations in which bargaining power is not heavily skewed in favor of investors. Even where communities have substantial bargaining leverage, CDAs create significant challenges for them. Of particular importance is the need to pursue equity in the distribution of benefits created by CDAs; to accurately identify and regularly review the pattern of impacts associated with projects, and adjust the allocation of benefits accordingly; and to ensure that CDAs are enforceable and are implemented, actually delivering the benefits promised in agreements.



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Options for communities: Strategies for negotiation and legal action

By Claudia Müller-Hoff

Struggles for human rights, and specifically strategic human rights litigation can teach us a lot about how to approach compensation claims in a negotiation or dialogue process between the promoters of extractive projects and affected communities.

This article in its first part offers a critical appraisal of the strategies companies typically employ to overcome resistance to their extractive projects from affected local communities. In its second part, it develops recommendations to communities of how to improve their strategies for claiming compensation, by adopting a human rights perspective and drawing from experiences and methodic and strategic elements of strategic human rights litigation.

‘Strategic human rights litigation’ refers to an approach that uses litigation and judicial means in human rights struggles that seek to achieve guarantees for human rights and social justice. Strategic human rights litigation aims to strengthen and support those struggles with legal arguments and legal work. To this end, strategic litigation focusses on exemplary cases, that is, cases that exemplify a typical human rights problem and have a potential to set precedents. It uses innovation in its legal arguments to challenge traditional laws and interpretations of laws and to help make them compatible to human rights. This can also be applied in the setting of an extractive industries project.

With the experience of the European Center for Constitutional and Human Rights (ECCHR) in strategic litigation, some methodic and strategic elements in strategic litigation can be identified, which can also aid in negotiation strategies and serve to build alternative strategies should negotiations not yield satisfactory results. The integration of a litigation perspective into negotiation can not only help to strengthen one’s negotiation positions but also help to develop a Plan B as an exit strategy. Even without a back-up plan, it could still be a relevant option to exit negotiations that are not progressing, given that, besides potential benefits, negotiations can also entail significant risks, such as the

spending of large amounts of time, energy, human and financial resources. Such resources can then not be used for developing alternative strategies to prevent the generation of internal conflicts which might weaken organizational strength and power of resistance which in turn might lead to the company restoring its public image undeservingly. This, finally, could translate into difficulties for the community to mobilize public support.

Frequently observed company approaches

Before describing the options civil society groups or community based organizations have when negotiating with a company or when considering litigation against a company, we take a look at how a company would typically approach its project.

During the development phase of an extraction project, an extractive company might first announce a Memorandum of Understanding with the government. Often enough, the next step is the militarization of the region concerned. Armed conflict—precisely because of these resources—frequently prevails in resource-rich areas. Militarization will establish an atmosphere of terror in the region, by imposing road blocks, security checks, surveillance, arbitrary arrests and abuses as well as violent repression of peaceful expressions of protest against the local population. This prepares the terrain for the company, e.g. by ousting the population or preventing any possible resistance.

Even before the first construction works start, the company might start to advertise in the area, using radio spots and other means, to influence public opinion in its favor. Via these public appearances, the company’s intention is to establish itself as a development ‘missionary’, promising jobs and ‘development projects’. This social or reputational agenda is part of what companies call CSR (Corporate Social Responsibility), or ‘economic growth and development’ programs, or similar, with which they try to show that they ‘give’ something ‘back’ to the communities, whose territory, environment, water, labor or other resources they require for their projects. Within such a program, a company defines a development agenda for the local community, and thereby claims for itself not only the authority to define ‘problems’ of ‘underdevelopment’ but also to resolve them—largely unasked for by the people concerned. It is the company that **sets the agenda**. What remains hidden are the economic interests of the company, the dimen-

sion and impacts of exploitation and the distribution of harm and benefit in the long run.

Thus, a campaign of **disinformation** starts from the onset of a project, with the aim to generate popular support.

At the same time, engagement with the communities in social projects helps the company to identify key persons and local authorities. These can then be offered direct benefits in an attempt to gain their support for the project. Like this, any disputes about the exploitation project will be ‘outsourced’ into the community itself, as opponents have to fight against parts of their own community before they can fight against the company. Such internal disputes in turn weaken the community and its capacity to confront the company collectively – a classical strategy to divide and rule, complemented by a carrot and stick strategy, offering social projects on the one hand and aggressive presence of military, police or security forces on the other.

These strategies of **disinformation** and division continue in public hearings, which are often carried out at the community level. As an example, communities and members of the public frequently complain about ‘smart power point presentations’ by the company that emphasize the benefits of the project but do not disclose information about the direct and indirect environmental, financial and human rights impacts of the project. Questions of the public are not properly answered; critique and discussions are not taken into account.

During negotiations or so-called dialogues, a similar strategy to **dominate the agenda** can be observed. The company tends to give priority to its own proposals of how to ‘benefit’ the community, rather than to listening to what the community needs to discuss and negotiate.

The **imbalance of power** also extends to the process and conditions of negotiation: From questions of who defines the venue, the language, the agenda, the timing, to who distributes information materials, who brings in expert consultants and lawyers, and to who takes speaking time.

Two examples may illustrate the imbalance of power often observed:

In the **case of a European agrofuel company in Sierra Leone**, an agreement was signed between the com-

pany and rural indigenous communities. These communities are in large parts illiterate. The agreement—in English—stipulates that in case of conflict claims must be brought before the High Court in London. This casts doubts on the fairness or balance of powers that have shaped the preceding negotiations.

Similarly, in the **case of a European mining company in the Philippines**, a local notary explains that the 80-page contract with the community—a text full of complicated legal terminology—was translated from English into the local indigenous tribe’s language, agreed by all supposedly relevant community members present, by which they waived their rights to free prior and informed consent, and then signed by their local chief. It is doubtful whether this describes a realistic and truthful scenario that was set up in full compliance with basic standards of fairness.

To sum up, a company can use a set of approaches to foster its position of strength vis-à-vis the affected communities:

- The **divide and rule** paradigm,
- The **domination** of the agenda-setting process
- Politics of **disinformation**
- The generation of **power imbalance**.

What can strategic litigation methodology offer here?

Strategic human rights litigation—as opposed to simple litigation—seeks to generate impacts beyond the individual litigation process and to assess success and failure not only in relation to whether a case is won or lost in court, but to whether and how a litigation process might contribute positively to a broader human rights struggle, be it by winning a case, or by generating public attention, mobilizing public opinion or political actors, by generating pressure and by persuading the opposed party to negotiate, etc. Hence, the strategy and methods of a strategic litigation project include more than the full range of technical legal elements necessary for high quality litigation. Here, some of those elements are presented, as they can gain considerable relevance not only

for litigation but also for negotiation or dialogue processes. In the following, we will discuss:

- The elements of organizational strengthening;
- Community agenda setting;
- Documentation and forensic evidence;
- Working around process and procedure.

1. Strengthening the group by countering the divide and rule tactics

In order to withstand divide and rule tactics, the targeted group has to gain collective strength. This can be done by establishing a common mission, clear participation and representation and by overcoming internal conflicts:

A common mission can provide a collective identity and go beyond the passive identity of those victimized.

Participation: It should be made explicit, for example by way of an inscription list, who is and who is not part of the group involved in the process of organization and for whom negotiation results will be applicable. This will be relevant for the legal validity of any negotiation results and is necessary as a defense strategy, where companies pretend to have negotiated with alleged community members that nobody really knows or has mandated.

The more inclusive this list, the stronger the group and its position can be. As discriminatory structures may exist in communities, they can make it difficult to include names of persons pertaining to specific groups in such a list. However, every person fulfills her or his part within a social and economic structure. Where people's voices are not heard and their concerns ignored, it will be impossible to understand the full impact of a company project. So, it is recommendable to find ways of how to include voices and concerns of as many community members and sectors as possible.

Representation: It is not only decisive to determine who represents the group but also to determine the spokesperson's mandate and obligations with regard to reporting, transparency, consultations and decision-

making during the process, so that the community can actively influence the negotiation process and support their representatives.

Where local chiefs fall under suspicion of collusion with the company, they should still be made accountable to the community.

Conflicts within the group cannot always be avoided—they are strategically provoked and nurtured by the companies. It is important to remember that the greatest opponent is outside the group and that strategic unity is of vital importance.

2. Developing a community 'counter agenda' along the identification of harms

If the agenda set by the company remains unquestioned, it will work to silence and delegitimize important issues left out of that agenda. Furthermore, energies will be expended on topics that do not necessarily address the most pressing problems. For the community, issues that threaten its very existence, such as subsistence, health, land, settlement, social structure, cultural heritage, food, water and security, need to be addressed, as these are the interests that are often threatened or violated by extraction projects. Most of these interests constitute fundamental human rights that companies are obliged to respect and protect.

A company's agenda often follows an agenda of CSR (Corporate Social Responsibility) and focuses on the implementation of measures such as the distribution of water containers, the building of structures for schools, health centers or roads, or the offering of skills training and distribution of tools. While CSR measures can of course generate positive impacts, they are no adequate response to human rights violations, such as—to name but a few—the forced displacement, the desiccation or contamination of natural water sources, the exploitation of laborers, or the destruction of sacred sites. This is for numerous reasons: CSR measures tend to be unilaterally designed—and thus often neither adapted to the needs of the community nor sustainable. They are voluntary in nature and can be revoked by the company at any time. They can never be brought before a court, as they are formulated in too general or vague terms, or are not even spelled out in writing. And even where CSR measures are stipulated by the government and concluded between the government and a company, such contracts

provide for rights and obligations of the signatories only, while those affected are normally not signatories and thus able to derive entitlements from such contracts. In sum, CSR measures do not address the causes of the harm and treat communities as beneficiaries rather than holders of rights.

Therefore, a community should set its own agenda, objectives, demands and priorities.

Objectives should be defined along the lines of identified harm (occurred or expected) and the identification of those affected or at risk. This will be a convincing, legitimizing and reaffirming argument that can build the backbone of the process. Also, such a focus will help to prepare the avenue for a litigation strategy that might be considered as a Plan B.

A community agenda should furthermore include elements that provide some orientation in the process of their rights defense or negotiation strategy: A definition of negotiable and nonnegotiable elements as well as indicators of progress, success and failure will facilitate the process. A **human rights analysis** will show whether human rights are at stake. Under the UN Guiding Principles for Business and Human Rights, companies have a duty to respect human rights; such respect should be considered non-negotiable. As it is their duty to prevent human rights violations, the simple payment of a compensation—through social projects, for instance—when rights are violated is not sufficient. On the contrary, they have to remedy the harm caused, i.e. restore the situation prior to the harm. Such an analysis should guide the definition of objectives and claims.

Not all objectives will be achieved exactly the way they were originally formulated; it is of course a process of give and take. Because of that, it will be important to understand which are the **non-negotiable elements** and use these as **indicators** to measure the quality and the progress of the process. Further indicators can be timelines.

3. Countering disinformation through the documentation and collection of evidence

Information about the company's resource extraction project should be independent, relevant, comprehensive and accessible. Companies normally do not live up to

these standards. Hence, the communities should start to gather information from other, more independent, sources as early as possible.

The collection of evidence should be guided by the **standards that apply in court cases**. Not only will this strengthen the negotiation position of the community, it will also help the community to adopt alternative strategies, such as litigation, in cases where negotiations fail or do not progress over lengthy periods of time during which the extraction project will continue to be implemented and create more and more problems.

The collection of evidence can and should start already with **baseline studies** that document the situation prior to the commencing of operations, through photos, videos, testimonies, etc. As described earlier, the entry of a company will be announced or indicated in advance. **Baseline studies** will be enormously helpful to later assess the extent of harms and damages.

When damages start occurring, a convincing argument will have to be built around the fact that the cause lies with the company's operations. Scientific evidence might have to be found to show, for example, the causality between a polluted river and health damages. Yet, such evidence might be hardly available to the community, and the company's scientific studies are not necessarily independent or reliable. What can be done?

- In national and international support networks, one can often establish connections to distinguished universities, including law clinics, which then agree to undertake research projects pro bono;
- In some cases, creative ways of producing evidence have helped to convince courts. One example: The claim by the Ghanaian **community of Nkwantakrom** with the High Court of Ghana **against an international mining company's local subsidiary** accused of forced displacement. The defendants had argued that the demolished village in fact had never really existed, and the plaintiffs could not offer land titles as proof. Yet on the basis of photographs that showed very old, by now infertile coconut palm trees close to the former village site, and the fact that such trees in the region were cultivated for subsistence purposes only in relation to settlements, and given the old age of the tree, the judge deduced that the demolished village had in fact been long established and found the company guilty.

- If such circumstantial evidence is produced, this might lead the court to invert the burden of proof. So, instead of the claimants having to show that the polluted water caused health damage, it might be up to the defendant company to then show that the pollution was **not** the cause.

In countries, where the **right to information** is established, this can be useful to access sources held in public administration. This right tends to be more developed in countries that follow the Anglo-Saxon law tradition but is increasingly gaining recognition in other settings, especially those that follow the civil law tradition.

Also **investigating the company** can be helpful in order to establish its and its officials' responsibilities for human rights violations. Relevant question include:

- Who is the parent company and what are its interests? Who is it influenced by? Can these actors be possible targets for lobbying activities?
- Who within the parent company is responsible for supervising the actions of the subsidiary? Who is in a position to take decisions at the operative level, in the subsidiary as well as the parent company?
- Has the parent company been informed about the community's concerns? When, by whom and about what exactly?
- Does the parent company subscribe to a Code of Conduct and does that Code contain relevant information for the negotiation process?
- What is the position and interest of the people that are sent to sit at the negotiation table with communities?

4. Countering the imbalance of power by mobilizing sources of power through process

While the power imbalance between large transnational companies and rural communities seems obvious, it is also worth to remember that as long as a company continues to sit at the negotiation table, it still needs to achieve something, or to put it differently, it has still not won the battle. This could mean that the power imbalance is not necessarily a naturally set condition, but it is something created by the company, especially in

the way the process and procedure of the negotiation is designed.

For this reason it is worth to become aware of one's own sources of power. These can be seen in the **terms of the negotiation process**. Whether the company is prepared to negotiate these terms or not can be taken as an indicator for its good faith. Some relevant elements are:

- The **terms of reference** should be mutually agreed and set out in writing.
- Reasonable **time frames** for the community representatives to consult with their communities should be set out in the terms of reference. Time pressure can be an important and unjustified difficulty used in the most decisive moments of negotiations.
- Negotiations should always be **documented** in detail, for example through mutually agreed and signed minutes. Where agreement is not possible, the disagreements should also be documented and copies handed out.
- Often the company will require **confidentiality**. This may be acceptable to allow the parties to speak more openly. On the other hand it might be counterproductive, because the observation by the public might be an important element of ensuring fair negotiations. Therefore, a possible condition for confidentiality could be the inclusion of third party observers. While the process may be kept confidential, the same should not apply to results which should be open to public scrutiny.
- It is also common practice for companies to require the waiver of rights or the **waiver** to seek judicial remedies. There are **four elements** to assess the adequacy of waivers:
 - (1) They should be mutual.
 - (2) They may only extend to the issues that are concretely addressed in negotiations.
 - (3) They should bind parties during negotiations and after, solely when an agreement has been reached. Where negotiations fail and are ended, the waiver no longer has any reasonable justification.

(4) Waivers may not extend to criminal actions, given that the persecution of criminal offences is not subject to private negotiations, it is a legal duty of the state in the public interest.

- When an agreement is reached, it is important to document it in detail and to also include in the agreement
 - the terms and timelines of implementation,
 - the responsibilities for monitoring the implementations, and
 - measures to be taken in case of delays, in compliance or irregularities.

Ideally, communities thus have to react quickly and in a concerted manner towards the announced start of major investments in their vicinity.

Conclusion

This all being said, I would like to emphasize—by way of conclusion—that negotiation or litigation are not mutually exclusive strategies. To the contrary: In practice both approaches are often closely interrelated, as sometimes a company is only persuaded to seriously negotiate after a court action has been initiated against it. Moreover, negotiating parties will be more easily persuaded to work together constructively, if the alternative is that the case may be taken out of their hands and handed over to a third instance, such as a court or tribunal. To build a realistic alternative, such as a potential legal action will strengthen the negotiation position as well as the litigation prospects of a community. This is why this article invites communities to include a strategic litigation perspective into their rights defense strategy from the very beginning.

Biocultural Community Protocols: A useful means of securing community interests in the context of extractive industries

By Stephanie Booker

Communities use a variety of different and innovative tools and methods to advocate for their human and environmental rights. Previous contributions to this volume have demonstrated that power imbalances between companies and communities are often a serious impediment to securing community interests when dealing with an extractives activity or project. This text introduces biocultural community protocols ('community protocols' hereafter)—a useful tool that communities¹ have used to internally mobilize and advocate for their rights around issues caused by extractive industries and/or infrastructure projects. Community protocols, arguably a very important tool, are still relatively unexplored to date.

This contribution discusses community protocols generally, how communities are using their protocols to mobilize around threats to livelihoods, to protect community land and natural resources, or to proactively engage with external parties and articulate their issues and priorities for development. Supporting community mobilization, internal governance, and a community's own prioritization of needs, is an important first step in balancing the uneven playing field between communities and external actors.

The context

As the world becomes smaller and the well-preserved traditional lands, territories and natural resources of indigenous peoples and local communities become an increasing target for national and international investors and developers of mineral resources, communities have to negotiate (if given the opportunity) the use of their traditionally owned or utilized lands and natural resources, and/or use of their traditional knowledge. Typically there are several issues with these engagements:

- Initial engagements by external actors often do not respect a community's own. Protocols about how best

to initially enter a community—laying the foundation for difficulties in future engagements.

- Terms of engagements between communities and external actors are usually initiated and defined by external actors, on their own terms (not taking into consideration challenges such as language barriers, sufficient time for consultations, etc.).
- Communities do not usually have access to sufficient information or resources to make informed inputs into decisions regarding long-term projects.
- Communities are usually not consulted throughout the different stages of the life of a project and genuine, long-term relationships with communities are not often fostered, encouraged or maintained.
- There can be confusion as to who represents a community, whether community members actually represent the interests of a community generally, and whether the views of those marginalized in a community are taken into account.
- Engagements often do not consider the rights afforded to the particular group—such as the right to free, prior and informed consent, consultation and consent.

Indigenous peoples and local communities have been tackling these issues in a number of ways. One method in particular is discussed here.

Biocultural Community Protocols

In an effort to engage with external actors on a more equal footing and on their own terms, many indigenous peoples and local communities are formally articulating their orally-held, customarily developed rules and procedures that have and continue to govern traditional ways of life, in forms that can be understood by external actors. Customary norms govern a range of different aspects of life, including governance structures, decision-making procedures, entry protocols and engagement and regulation of conduct within and between com-

¹ In this respect, the 'community' for the purposes of development of a community protocol are those who come together to form a community, usually around a particular resource or issue. In the past, 'communities' have comprised: Shared ethnicities; those under a particular traditional governance structure; those living or using particular resources in a geographical region, such as traditional health practitioners of different ethnicities in one locality, or different ethnic communities, of different livelihoods, all impacted upon by the same infrastructure project in Kenya.

munities and with other external actors, as well as sustainable natural resource use. The formal articulation of a community's customary rules and procedures often forms part of a community protocol.

A community protocol² is a community-led and developed instrument (taking different forms, depending on the needs and desires of the community) where communities affirm their rights to self-determination by articulating, amongst other things, their values, customary laws, traditional institutions, relationship to natural resources, and development priorities. The development of a community protocol “promotes participatory advocacy for the recognition of and support for ways of life that are based on the customary sustainable use of biodiversity, according to standards and procedures set out in customary, national, and international laws and policies” (Jonas, 2010, 109). The process of developing a community protocol necessarily incorporates endogenous development tools and methodologies to engage and incorporate the views of as many subsections of the community as possible. It seeks to build on a community's own skills and strengths and to support a community's own vision for change, based on an understanding and appreciation of the “material, social and spiritual aspects of their livelihoods but in a constant and dynamic interface with external actors and the world around them” (see Compas, www.compasnet.org/?page_id=36).

Protocols have been used by communities to deal with external threats, emerging opportunities and to support internal mobilization around a community's issues. The process of developing a community protocol is an opportunity for communities to reflect on who they are as a community and to engage with a variety of supporting legal frameworks and rights (Jonas, 2010, 109), linking customary and traditional practices to the laws that support their protection and preservation at a national, regional and international level. Communities have used protocol processes to articulate what constitutes free, prior and informed consent and what constitutes consultation. This can guide external actors and can help convey concerns about a particular project and how communities would like particular issues or challenges to be addressed. Community protocols have the potential to influence law and policy when several protocols addressing similar issues are developed (Shrumm and Jonas 2012, 20).

A community protocol can proactively engage external actors about a community's own plans for development, and set out what compensation and benefit sharing is most appropriate for the community that has formulated the protocol, thus avoiding a situation where only very few community members reap the benefits of a ‘community's’ consent to a project. In addition, community protocols have included a community's mapping of its institutions, its natural resources (and duties and obligations towards these), as well as a community's rights under national, regional and international law. In this way, community protocols attempt to identify and piece together fragmented laws and rights that exist in different national, regional and international legal frameworks and link them with a community's customary laws and rights. When faced with an external threat, a community protocol process can create the space to assess the potential impacts of an extractives or infrastructure project in light of their customary laws, and spiritual and cultural links to their natural resources, lands, territories and waters. In this way, the value of developing a community protocol is not only in its end product—but also in the process that a community undertakes to develop it, the ownership a community has over it, what it represents and the potential that it holds for its future use (Jonas, 2010, 109).

Each process of developing a community protocol is as unique as the actual protocol itself. However, there are several ‘guiding principles’ that encompass a good process. Such a process would ideally possess the following qualities:

- It is endogenous;
- It is not bound by strict time-limits;
- It involves collective participation, and is based on a community's values and procedures;
- It is presented in an appropriate format for the community's, whilst still effectively communicating key points to appropriate bodies and actors, and

2 For examples of community protocols supported by Natural Justice, see: The community protocol of Alto San Juan, Chocó, Colombia (which among other addresses issues of illegal mining): http://naturaljustice.org/wp-content/uploads/pdf/Alto_San_Juan_BCP-English.pdf; and the Raika community protocol in India: http://www.community-protocols.org/wp-content/uploads/documents/India-Raika_Community_Protocol.pdf. Furthermore, the Centre for Indigenous Knowledge and Organisational Development (CIKOD) in Ghana has also recently supported the Tanchara community to develop a biocultural community protocol (BCP)¹ in response to prospecting activities by an Australian mining company. The community protocol is one of several organisational tools CIKOD have assisted the community with in strengthening its organisation, legal empowerment and knowledge of national and international rights such as the right to free, prior and informed consent.

- It takes into account a community's values, challenges, plans for the future and their rights at multiple levels.³

In order to ensure maximum community participation and the views of a wide cross-section of the community, participatory processes have also incorporated a wide variety of community members from different stakeholder groups within the community (for example women, youth, elderly) and involved a number of different methods to engage such groups—for example multi-stakeholder platforms, mapping, participatory video, written documentation and role plays (Shrumm and Jonas 2012, 19). These participatory methods help to ensure that decisions around natural resource development are thoroughly considered, including potential benefits and impacts on all community members and that any benefits that are negotiated include the measured reflections of the needs of the whole community, rather than only certain, well-resourced individuals (Swiderska 2012, 29). Process is vitally important—having a well-presented community protocol that does not incorporate the thoughts, efforts and participation of the community is likely to undermine customary institutions and governance systems (*ibid.*, 29). The very nature of resource extraction often results in division within communities. To avoid this, a robust process ensuring quality inputs from all community members—from most influential to marginalized—is of the utmost importance. Community protocols are not determined or defined by external parties, or documented or developed in a top-down manner that detracts from a community's self-determination. A community protocol process that is characterized in this manner is less likely to be an effective tool for mobilization because of the lack of community ownership of the process and the outcome.

Given the myriad of challenges communities face with respect to extractive industries and infrastructure projects, communities are necessarily developing community protocols alongside a number of different tools and strategies to mobilize, advocate, assert rights, articulate needs, and discern priorities. In addition to community protocols, communities may, for instance, choose to engage in national, regional and/or international advocacy, litigation or international grievance mechanisms. The prioritization of strategies is dependent on a number of factors including capacity and resources within the community, the timing of a project and usefulness of a particular strategy at any given time, the ultimate outcome and remedy required (such as negotiation or

mediation with external actors, stopping a project altogether, raising the profile of a community's concerns of a project), and whether or not an ongoing relationship with an external party is desired. The usefulness of particular strategies will depend on the context and the circumstances, such as the type of resource extracted, the length of time the mine has been operational, the particular external actor and their willingness to engage with community as well as the environmental, social, cultural and spiritual impacts of the particular mining activity.

For example, the timing of the development of a community protocol (with respect to the phase of the project cycle) is likely to have some impact on the development of the protocol as a mobilization tool, but more so regarding its particular effectiveness in using this strategy as a tool of dialogue with external parties. In most instances, community protocols are or have been developed prior to or in the early stages of an extractive industries or infrastructure project. Understandably, the advantage of the early development of a community protocol is that the process and end product can ideally support communities to help set the terms of engagement between company and community, provide a space for communities to access information through appropriate channels, and provide/withhold consent for a project, reflect on any potential issues in a project, encourage discussion of development priorities within the community, and engage with, and help set the terms of any compensation that a community will receive from a project prior to a project taking place. Effectiveness is, of course, dependent on a company's willingness to engage in meaningful interactions with communities, as often mandated in a company's own policies and guidelines for operation, and as set out, to some extent, in international legal frameworks.

Once substantive aspects of the community protocol have been formulated, communities may engage in a rights- and value-based engagement with external actors such as government agencies and the private sector. Such a dialogue process (sometimes called biocultural dialogues) is a 'next step' in the strategic use of community protocols where it serves as a basis for interaction with external parties, rooted in community values and customary norms such as community well-being and stewardship (care, responsibility and protection) of

³ This list is not exhaustive. For more information, please see the guiding principles set out in Natural Justice's toolkit, located at [http://naturaljustice.org/wp-content/uploads/pdf/BCP-Toolkit-final-online-version-\(1\).pdf](http://naturaljustice.org/wp-content/uploads/pdf/BCP-Toolkit-final-online-version-(1).pdf).

their environment. These dialogues can be aspirational, formulated before an extractives project or activity takes place, where a community seeks to proactively engage with the private sector according to its own plan for development, its own natural resource use and so on. On the other hand, dialogues can be defensive, where communities feel that their rights are or have been violated, and seek to obtain redress through discussions with the relevant external actor (perhaps a necessary first step before other advocacy strategies are engaged).



Challenges

Community protocols are not a panacea. When the development of a community protocol is rushed or excessively influenced by external forces or elites within a community, the process and end product is less likely to be effective and even likely to cause conflict within communities, as individuals will not have been given the space to articulate concerns and meaningfully contribute to the formulation of a protocol that is purposefully meant to articulate the views of the broader community. Given the divisiveness of natural resource extraction, a community protocol that is touted as representative of a community but does not sufficiently address the concerns of the broad community can have disastrous consequences.

The imposition of either the process or the outcome on communities by external parties or elites within the community can manipulate and force communities to agree to projects and activities. This may mean that a broad spectrum of community interests with respect to

community development, natural resource use, compensation and/or benefit-sharing will not be considered adequately, or articulated to external parties. It may well mean that a 'community' provides consent for a particular project through its community protocol, though this may not be the general feeling of community members.

In addition, focusing on customary laws and decision-making procedures may, in fact, further exclude or marginalize particular groups within the community (such as women who, in some communities, do not have the opportunity to openly articulate their needs and challenges). Also, the development of a community protocol necessarily involves pulling together fragmented laws and rights that apply to communities. Actively raising and pushing for the rights of communities can and does cause conflict and animosity with external actors such as government officials, companies, the media, particularly where sensitivities exist.

Conclusion

Community protocols are one method that communities use to mobilize and assert rights in the context of extractive industries and infrastructure projects. They are an important, community-focused tool in a commercial sphere which is heavily oriented towards the needs and priorities of governments and private companies. Depending on the quality of the process, community protocols support mobilization and advocacy with respect to decisions, projects and activities that are likely to affect communities, by attempting to 'level the playing field' through the building of capacity of communities around their rights at a national, regional and international level. The potential of community protocols as an effective mobilization and dialogic tool is highly dependent on a community's drive to develop a protocol and engagement with participatory methodologies throughout the process. It is also highly dependent on the openness and willingness of external actors to engage with communities in this form. Despite these variables, supporting communities to mobilize around these issues is likely to have a positive, beneficial impact on other advocacy strategies a community may wish to engage in. Given this, community protocols are becoming a tool increasingly developed by communities worldwide.

A new compensation model for the oil industry in Chad

By Martin Petry and Lena Guesnet

The compensation system implemented by the operating company of the Chad–Cameroon Oil & Pipeline Project was designed as a key instrument for mitigating negative impacts of oil production on the communities living in the oil producing areas. Yet in most cases the compensation given has not reached this objective, but rather added to the problems the project has created.

After identifying the shortcomings of the current compensation scheme, this article outlines options for an alternative compensation plan. These are based on in-depth exchanges between researchers and civil society representatives working on the Chad-Cameroon Oil & Pipeline Project. The aim is to develop a compensation scheme, which could be used in all oil and mining projects in different parts of Chad and which would allow maintaining or restoring livelihood, respecting and fulfilling human rights of affected people and thus achieving greater social justice and contributing to sustainable and self-governed development.

Compensation within the Chad-Cameroon Oil & Pipeline Project

Background

The Chad-Cameroon Oil & Pipeline Project is implemented by a consortium composed of ExxonMobil, Chevron, and Petronas. ExxonMobil's affiliate EEPCL (Esso Exploration and Production Chad, Inc.) is the consortium's operator for the project's oil field development.

The World Bank has been involved in the project, as it has contributed political backing and finances. Throughout the planning phase in the late 1990s, civil society pushed for improvement of the project design. With support by the World Bank, different instruments were elaborated and put in place to mitigate negative impacts and to make sure that this project will achieve its key objectives: To reduce poverty and contribute to development. These instruments include a revenue management bill, a revenue management oversight

committee with civil society participation, a regional development plan, a small project fund meant to bring immediate benefits to the affected communities, a five percent share of direct revenues earmarked for development in the oil producing area, and a detailed resettlement and compensation plan (CRCP).¹ This plan was elaborated and approved by the consortium, the governments of Chad and Cameroon as well as the World Bank prior to the start of the project.

The compensation plan was evaluated in 2006/07 and in 2008 EEPCL elaborated what is called the LUMAP, a Land Use Mitigation Action Plan with additional compensation measures. Yet the situation for affected communities and families has not improved.

When the Independent Evaluation Group at the World Bank evaluated the entire Chad-Cameroon Oil & Pipeline Project it concluded that “the program's fundamental development objective of reducing poverty and improving governance in Chad through the best possible use of oil revenues in an environmentally and socially sustainable manner was not achieved. It therefore rates overall program outcome unsatisfactory despite the technical and financial success of the main pipeline project” (IEG 2009, 5; cf. Horta 2010). This is due on the one hand to poor implementation of the instruments but also to a number of weaknesses in the design of these instruments.

These shortcomings also apply with regard to the compensation system. Rather than contributing to the consolidation or restoration of livelihoods, the compensation practice of EEPCL has added to the negative impacts of the oil project.

General challenges for an adequate compensation system

There are numerous challenges any compensation system has to face. First and foremost, any project needs land and thus reduces the land available to the people living in the affected area. **Taking land from the population bears serious risks for their livelihoods.** It seems to be difficult to estimate the actual impact of the land take and it is likely that land requirements increase

¹ The ‘Chad Resettlement and Compensation Plan’ is part of the Environmental Management Plan (EMP). The initial plan has been modified several times because of shortcomings identified by EEPCL.

during the execution of a project. The **restoration of land** used during exploration and exploitation is often **complicated and expensive**. On the other hand, creating new sources of livelihood apart from land is difficult in rural contexts and **farmers cannot easily convert to other professions to make a living**.

In many developing nations, modern laws and customary regulations with regard to land coexist. With the demand for land by new actors, like the oil business, problems arise because there is **no detailed land law, and knowledge about land and land use rights is insufficient**.² Stakeholders develop different perceptions that are often based on wrong assumptions.

Communities mostly **lack sufficient information and understanding** of the real extent of a project to make an informed decision. “Despite its proximity, a community does not necessarily know the full impact of the company’s operations, and the people may not realize that a large industrial project may have consequences that they cannot foresee, such as impact on their livelihood, which makes any compensation negotiation more difficult” (Institute for Human Rights and Business 2009, 6).

In addition to the above, any project itself brings challenges and dynamics (influx of foreigners; prostitution; HIV/AIDS; inflation; severe security measures), which overwhelm the affected communities. Badly managed, this can lead to **conflict and fragmentation**. A compensation system must be very sensitive to avoid exacerbating these dynamics and needs to work with strong, recognized and organized structures in the affected villages and counties.

Key features of the EEP CI approach and resulting difficulties

EEPCI has approached these general challenges in Chad as follows:

The **compensation plan was elaborated by external experts**. Communities were informed of different aspects but there was no consultation and negotiation with communities that would have allowed their participation in the design of the plan.

In the context of southern Chad, livelihoods are based on agriculture and thus depend on land. The land taken by the oil project therefore bears high risks to livelihoods.³ The original CRCP underestimated the land requirements: “Subsequent successive, incremental land acquisitions for the [oil] well field expansion (which could not have been foreseen by the CRCP) have contributed to a cumulative land impact of a magnitude significantly beyond that envisaged by the CRCP [...]. This has greatly exacerbated pre-existing shortages of land and left villagers practicing agriculture with unsustainably short rotations and too-small areas of fallow” (Barclay et al. 2007, iii). The fragmentation of plots caused by the different oil infrastructures leads to additional land loss, since small plots that remain in-between the infrastructures cannot be used.

To return temporarily used land could, in principle, ease the situation. EEP CI has restored some of the land taken, but its quality is not sufficient for agriculture. In a joint fact-finding mission with civil society representatives in 2012, EEP CI recognized that the restoration practice was inappropriate and did not produce the expected results (Esso-CCDL 2012).

Customarily, land in the counties affected by the oil project, belongs to ethnic groups and extended families. Traditional authorities (*chef de terre* and others) are in charge of land management and access to land. Land is not individually owned, yet families have secure access to more or less clearly demarcated land as long as they use it. This access is passed from parents to children.

The Chadian constitution recognizes customary land regulations, but EEP CI’s compensation scheme did not. As a consequence, land itself was not compensated for (Djeralar 2010, 67). Based on the assumption that all land taken for the project is national domain, EEP CI paid compensation (money) exclusively for ‘investments’ on this land. Such investments include crops, trees, houses, huts, fences, and beehives. A **compensation only for investments on land and not for land itself** is proof of insufficient knowledge of the legal conditions in Chad.

2 Only of late, in 2012, a study commissioned by Association Ngaoubourandi brought some light into the existing legal framework pointing out the recognition of customary land regulations by different Chadian laws including the constitution (Ali-Yom et al. 2012).

3 In addition, many farmers had already been vulnerable before the project started. Taking land from vulnerable households quickly leads to unbearable situations.



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The **compensation plan** is designed around the **individual** and, accordingly, most compensation was paid to individuals. Community and community needs like cohesion, conflict prevention and solidarity were not taken into account. Nor was the potential impact of the compensation practice on community relations. Village compensation (water wells, classrooms, health posts) was only given when EEPCI could not identify an individual to be compensated for, e.g. for holy sites.

EEPCI calculated compensation for investments based on market rates. According to EEPCI “(s)ince the start of the Project in 1998, 11,494 individuals have been impacted and have received compensation. [...] Since data is collected on the subject, the Project has paid out more than 9.4 billion CFAs⁴ in cash” (EEPCI 2013, 11).

The **distribution of money** led to a phenomenon called monetization of social relations, which has had a negative impact on social institutions. For instance, marriage can no longer play its role of creating solidarity and cohesion between families (Hoinathy 2013). In paying compensation money, EEPCI has given “land” a price (monetary value) which has led to the occupation and “selling” of land, conflict and the repeal of customary land allocation mechanisms (cf. Barclay et al. 2007, 2-11).

In some cases, the compensation money was used for investments, more often it was consumed and in most cases it did not help to restore livelihoods sustainably. In an environment where people do not have access to financial services and where there are no opportunities for investment, money cannot replace a livelihood which is based on land. Therefore, money is the least adequate instrument for compensation in the rural context in Chad.

Whilst it was understood that the people affected would need new land, EEPCI did not feel responsible for replacing the land and “the CRCP assumed that access to replacement land would be achieved by affected people through reliance on customary land allocation mechanisms and, as a last resort, self-resettlement.” However “customary mechanisms have failed to provide access to a replacement area for a number of reasons. These include envy and retaliatory withholding of land by those who missed out on compensation, retention of land in the hope of receiving project compensation and, in some villages, a scarcity of available land. No instances of households selfresettling in order to access replacement land were identified during the evaluation” (Barclay et al. 2007, iii).

Although **resettlement** by EEPCI is an option in the plan, in practice it was seen **as last resort** and it looks as if it was systematically avoided by offering other options like off-farm training or training in improved agriculture. “The evaluation study did not encounter any household that could recall being offered the option of resettlement. This is a non-compliance with the CRCP” (Barclay et al. 2007, 9). The skills acquired during the trainings offered are unlikely to provide a living as there is no employment and very little demand for products produced by local craftsmen. Land is the key production factor of farmer communities in Chad. There was and is no livelihood without land in the oil producing area.

4 9.4 billion CFAs is equivalent to 14,330,200 Euro.

5 Based on literature (Hoinathy 2013; Djeralar 2010) and workshops with civil society, religious leaders and traditional authorities in the oil producing region of Doba since 2010.

Paradigm shift for a new compensation model

To avoid the devastating effects of the actual practice the authors⁵ suggest a fundamental shift from the actual minimalist approach of the CRCP to a new model, which is guided by a focus on livelihood, the respect for land rights of the communities, the importance of the community as well as community participation and engagement.

The new compensation model is based on the following principles:

- **Restoration of livelihoods:** The basic principle and objective of the suggested compensation plan is the protection and restoration of livelihoods. The Chad-Cameroon Oil and Pipeline Project is an extreme stress for the communities. It has affected the production system and way of life as a whole, threatening livelihoods and even survival in the oil producing area. The suggested plan seeks to protect and/or restore activities, resources, development opportunities as well as develop approaches to preserve social relationships.
- **Respect for the rights of the affected communities:** The compensation plan recognizes the traditional regulations of access to land and seeks to protect and consolidate these regulations at least until modern law replaces them. “In no circumstances should traditionally or culturally legitimated landowners, or indigenous peoples or groups be subjected to adverse discrimination with respect to their rights or claims to land, property or natural resources” (Brot für die Welt 2007, 21). International treaties and conventions like the Universal Declaration of Human Rights or the ILO Conventions are followed. The compensation plan seeks to contribute to the respect and fulfillment of the economic, social and cultural rights, particularly the right to development.
- **Land for land:** The preferred compensation option is to compensate land with land. The evaluation commissioned by EEPIC already insisted on this principle: “The principal recommendation [...] is that the project needs to revise its livelihood restoration program and make its primary focus, land replacement” (Barclay et al. 2007, 9). The household that loses the land will get it replaced. Should land not be available

in the village or the county, resettlement must be the priority option, as it is impossible to maintain or to reconstruct livelihoods in the affected area. Resettlement—designed as a comprehensive development project—is an adequate option to avoid extreme poverty and loss of all development opportunities.

- **Focus on the community:** The collective responsibility for land and land management is recognized. Compensation is designed at the community level (village or county), not at the level of the individual. The needs and rights of all community members living in the oil project area are assessed to devise a strategy designed to promote sustainable development for all.
- **Participation and consultation:** All consultations are organized so that communities have access to all necessary information allowing an informed decision-making process within the communities. The tools for consultations are designed to reach mutual agreement. Space for participation in the compensation plans implementation is created.

Putting the alternative model into practice

Before any land is taken, consultations will be organized. The timing and steps of the consultation process will be elaborated together. Consultations on compensation are part of a larger consultation process, which covers other aspects like Health and Safety. This larger process also allows the company to learn how the communities live and are organized, while the communities get to understand the functioning of the company. During these consultations trust-building is of utmost importance.

During consultation meetings, all aspects of the compensation system will be discussed and solutions elaborated. It is important to ensure that a common understanding is reached on the impacts of the project and the compensation required. The consultation process is guided by the **free prior and informed consent (FPIC)** concept: A community has the right to give or refuse its consent to proposed projects that may affect the lands they customarily own, occupy or use otherwise (Hill et al. 2010).

Free means free from force, intimidation, manipulation, coercion or pressure by any government or

company. Groups must be given enough **time** to consider all the **information** and make a decision. They also must be given all the relevant information to make an informed decision about whether to agree to the project or not. This information must be in a language that they can easily understand. The groups must have access to independent information (e.g. from experts on legal or technical issues), besides information from the project developers or the government. **Consent** means in principle that the affected people have the right to say 'Yes' or 'No' at each stage of the project, even at its outset. While it might not be realistic to expect that the Chadian government and the oil companies will accept the right to give consent to an extractive project, at least they ought to accept consent with respect to the compensation plan.

During the consultation process a participatory planning process is conducted to enable communities to elaborate development plans for the counties, villages and eventually households.

These plans will guide all interventions and, specifically, compensation measures.

When it comes to the **replacement of land**, the first step is a realistic and honest evaluation of land needs of the project. Fragmented plots, land which will be locked up by infrastructure or for security reasons is considered lost since it cannot be used for agriculture even though the oil company does not directly use it.

There is a need to distinguish between villages that have land and villages, or even counties, that have no land at their disposal.

- If sufficient land is available at village or county level, the replacement will be negotiated and allocated at village or county level respecting customary land regulations. Land must be of same quality. The affected households continue to live in their villages.
- If no land is available at village or county level affected households, preferably groups of households or entire villages, will have to opt for resettlement.

Resettlement: The main reason to opt for resettlement is non-availability of land within the county. A specific consultation process for all resettlement activities is organized until consent is reached. This process in-

volves those to be resettled and those to become host communities.

All resettlement is designed and implemented in the form of development programs. "Thus, resettlement activities should result in measurable improvements in the economic conditions and social well-being of affected people and communities" (IFC 2002, 11). Host communities equally benefit from development projects like water wells or schools. Special attention is given to all action that contributes to maintaining or strengthening social relationships.

Affected people are provided with land of quality at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and, to a certain extent, for future needs. The households resettled receive clear entitlements to land use in the new sites free of any fees or customary tribute payments. Special provisions may have to be made for households headed by women and children and other vulnerable groups in circumstances where local law or custom does not fully recognize their rights to own or register land, assets, or enterprises (IFC 2002, 36). In the absence of clear land registration procedures, temporary land titles are offered to those resettled as well as the household of the host communities.

Preferably, a group of households or an entire village is resettled together, instead of resettling individuals or single households. Holy sites, graveyards or other sites with spiritual and cultural meanings are protected in the village the community leaves. The community is guaranteed access to these sites and decides jointly with the authorities and the company how to use land which is not directly used by the company (locked up plots), e.g. as pasture or for reforestation.

If land take is below a certain level, which leads to a negligible disturbance, manageable by the household, **other forms of compensation** can be possible. The level needs to be defined and depends strongly on existing vulnerability and the surface a household has at its disposal. There are two options:

- (1) in kind compensation with materials, tools, seeds and seedlings to improve agriculture.
- (2) Financial compensation.

To avoid negative impact, the following key features will guide financial compensation:

- No money will be given to an individual, only to households/ families.
- A transparent calculation system for the losses that are compensated is in place. Land and its potential for securing the livelihood as well as the potential risks are factored in.
- Advice on how to use the money productively is given before any money is transferred. An institution or NGO which is trusted by the communities will offer this advice. An investment plan on at least 50 percent of the money is elaborated together with the family and accompaniment is offered during its implementation.

Collective compensation: For communities where land is replaced without resettlement, community projects to improve access to basic services will also improve the resident's livelihood.

All compensation measures (land replacement, resettlement, in kind and monetary compensation) are systematically combined with support to improve agricultural practice by intensification, diversification and land conservation.

Plots that are unsuitable for agriculture (plots in-between the oil production infrastructure as well as reclaimed temporarily used land) can be used for other purposes like pasture or reforestation. Support will be made available for planning (accompaniment) as well as implementation (materials like fences). This support is offered by research and extension services (agricultural advice services) of the state or NGOs.

Monitoring and grievance mechanism

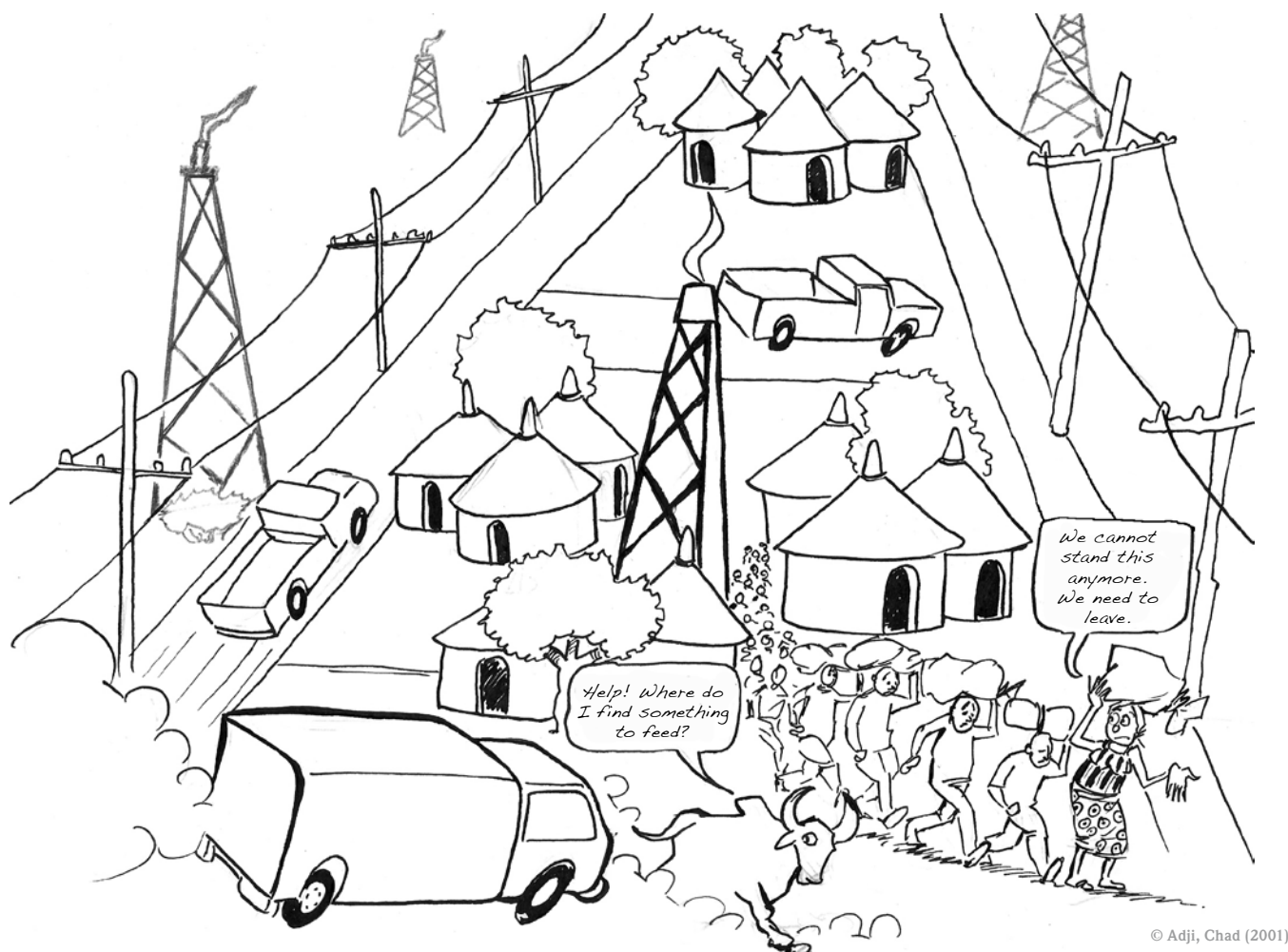
An effective compensation system needs effective monitoring and a possibility for the communities to raise concerns. This is to be guaranteed through a monitoring system and a grievance mechanism at company level. Monitoring and the grievance mechanism are not limited to compensation but can also be used to address other impacts and problems.

The monitoring system is composed of two elements: A monitoring team that collects data, monitors implementation and analyses reports of the company and the government throughout the duration of the oil project and a platform which discusses the monitoring results, takes decisions and discloses reports and decisions. Whilst the monitoring team exclusively consists of experts, community representatives and other civil society members, they are joined at the platform by company and government representatives.

“A company level grievance mechanism is a company-supported, locally based and formalized method, pathway or process to prevent and resolve community concerns with, or grievances about, the performance or behavior of a company, its contractors or employees” (Hill 2010, 7). As monitoring system, it covers all aspects of the oil project but will include the compensation system in particular. “An effective, human rights-compatible grievance mechanism can provide a channel through which communities impacted by company operations can gain recognition for legitimate concerns, engage in a process to secure acceptable solutions, and share in the ownership of that process. A company-level grievance mechanism can help identify, mitigate, and possibly resolve grievances before they escalate and greater harm is done” (ibid., 6).

Following suggestions by Professor John Ruggie (UN Special Representative on Business and Human Rights), the grievance mechanism of the alternative compensation plan will be legitimate, accessible, predictable, equitable, rights-compatible, transparent and based on dialogue and engagement.⁶

⁶ (a) Legitimate: Having a clear, transparent and sufficiently independent governance structure to ensure that no party to a particular grievance process can interfere with the fair conduct of that process; (b) Accessible: Being publicized to those who may wish to access it and providing adequate assistance for aggrieved parties who may face barriers to access, including language, literacy, awareness, finance, distance, or fear of reprisal; (c) Predictable: Providing a clear and known procedure with a time frame for each stage and clarity on the types of process and outcome it can (and cannot) offer, as well as a means of monitoring the implementation of any outcome; (d) Equitable: Ensuring that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair and equitable terms; (e) Rights-compatible: Ensuring that its outcomes and remedies accord with internationally recognized human rights standards; (f) Transparent: Providing sufficient transparency of process and outcome to meet the public interest concerns at stake and presuming transparency wherever possible; non-State mechanisms in particular should be transparent about the receipt of complaints and the key elements of their outcomes; (g) Based on dialogue and engagement: Focusing on processes of direct and/or mediated dialogue to seek agreed solutions, and leaving adjudication to independent third party mechanisms, whether judicial or non-judicial. (UN/HRC, 2011, 6)



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Conclusion

The compensation scheme currently used by EEPIC in southern Chad is not suitable to preserve the livelihoods of the affected communities. A new approach is needed. This article described what such a new model could look like. The main objective of the new model would be the preservation of livelihoods. Its main features would be to compensate land with land, to avoid financial compensation and, if it cannot be avoided, to take into account the community dimension rather than dealing with individuals.

Compensation alone will not solve all the problems caused by oil production. Authorities and companies need to take other measures and have to give particular attention to young people who expect change and benefits from oil production. In collaboration with

state authorities and NGOs, the company should provide programs that help youth obtain access to education, training and jobs. Such programs have to be offered on top of a compensation program. The challenge of an all off-farm training is how to generate sustainable income through employment and self-employment.

The discussions about an alternative compensation plan were started to give direction to the dialogue of stakeholders of the Chad-Cameroon Oil & Pipeline Project but also for new oil and mining projects in different parts of Chad. This article is a summary of the ideas collected during workshops with civil society, religious leaders and traditional authorities in the oil producing region of Doba and is meant to stimulate further discussion.

Concluding remarks

By Lena Guesnet and Marie Müller

This publication has shed light on some conflict issues that arise during large-scale investments and ensuing compensation processes. The presentation of different approaches towards compensation has highlighted how some of the numerous challenges related to compensation can be addressed. The presented approaches encompassed the principles of strategic litigation, Community Development Agreements, Biocultural Community Protocols and livelihood restoration. They offer avenues that communities affected by extractive projects or other large-scale investments can engage in to reach the best possible outcome and to overcome some of the conflict issues identified in the first article of this volume.

Damages and beneficiaries

One of the recurrent themes referred to in several of the contributions is the power of definition: Who has the power to define what damages occur, who is affected and who is to negotiate? As the chapter on Community Development Agreements (CDAs) makes clear, such agreements between investors and concerned communities can only yield benefits for the population, if negotiations take place on an equal footing. This is no minor prerequisite. Empowering a community to be up to the task to negotiate with an extractive company takes time and resources and is in no way easy. In order to avoid conflicts within the communities affected by a project, those taking part in negotiations on behalf of the community should have the legitimacy to do so and the process should be as transparent as possible to those concerned.

The contributions on Biocultural Community Protocols (BCP) and on legal strategies for communities both offer advice as to how a community can be aware of the power relations at stake and how to strengthen their own position. They focus on different, complementary ways a community can prepare for compensation negotiations—one is to reflect upon and expressly communicate a community's values, rights and rules. Another is to pay attention to process and procedural issues as if preparing for litigation (collect evidence, think about mandates of representatives, time frames of negotiation, etc.).

In the case that the negotiation power of the community cannot be built up quickly and substantially enough, all three contributions advise that it might be wiser for the community to withdraw from negotiations and engage in other strategies, such as strategic litigation or advocacy. The same holds true where no tangible outcomes are to be expected from a dialogue or negotiation process or where the company primarily uses the process to improve their image.

The level and mode of compensation

When looking at the question of who will be compensated for what, Chad case gives insights into the pitfalls of individual and monetary compensation—especially when the decision process was not participatory. The authors advocate for an approach to compensation which puts livelihood restoration into focus, for it offers a better understanding of the realities of the people affected and leads to more appropriate compensation, possibly reaching the goal of equity. It has the capacity of giving an insight into the living conditions of the affected with sensibility towards more than economic indications of quality of life. In this way, a livelihoods approach would also cover the social and spiritual sphere in which items like holy trees, holy sites or spaces for initiation ceremonies may disappear or become desecrated due to a project and previously existing community structures may become obsolete. It shares with a rights-based approach such as strategic human rights litigation, the consideration of economic, social and cultural rights. This perspective also clarifies that people who receive compensation are not beneficiaries, but right holders whose rights are being restored.

In order to ensure the restoration and possibly the improvement of livelihoods, a company first needs to understand—based on information from those concerned—how the people affected by its project had been making a living. Only this way is the company able—jointly with those concerned—to come up with an appropriate compensation model. BCPs offer an appropriate and innovative instrument to achieve this kind of understanding.

In the case of land, where the dimension of value over time is difficult to pin down to a monetary value and where monetary compensation has had devastating effects—as exemplified in Chad—it would be best to compensate land with land. This would also work best to restore livelihoods, especially when taking into

account the social dimension as well. Where suitable land is not available close to the original land of an individual, family or village, the option of resettlement has to be offered. In a case like Chad, where livelihoods have been destroyed and cannot be compensated for by money or in kind compensation, resettlement would be the better option—provided it is done in a way that goes beyond mere restitution, fulfilling the aim of restoration and improvement of livelihoods.

Enforceability and implementation, grievance mechanisms

The experience with CDAs suggests that conflicts over implementation of agreements can be avoided by outlining as clearly as possible how implementation is to be done. The agreement should also provide means to enforce implementation, detailing what would happen if the agreement is not fulfilled. Furthermore, mechanisms for stating concerns early need to be installed. Via such grievance mechanisms, the party who sees compensation measures implemented inadequately can address the matter in a timely manner and find a joint solution with the other party. Grievances can also occur during negotiations and it is noteworthy to consider having a mediation option at this early stage of the compensation process as well.

Power imbalances and the state

A recurrent theme in the contributions is the power imbalance between investing companies and communities. In all contributions, the state is notably absent. This is related to the fact that state institutions hardly get involved in company-community relations and often neglect their responsibility to protect the population affected by investments, be it in the developing world or in industrialized countries. At the workshop organized by Group Chad, BICC and Bread for the World in November 2012, the focus has been on civil society organizations involved in business dialogue and the role of the state in compensation processes was merely touched upon in the discussion. Given that the conflict issues surrounding compensation are also closely related to state-community relations, it seems warranted to reconsider what role state institutions could and should play in compensation processes. It would be worthwhile to take this topic further in the debate on just compensation.

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