

Community Development Funds and Agreements in Guinea Under the New Mining Code

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This report forms part of that analysis: specifically looking at how revenues from the mines could support local development plans. At the time of the drafting, in mid-2013, the Government of Guinea was formulating new regulations to govern how resource revenues would fund local development. The purpose of this report is to serve as the basis for discussion and consultation between the Government of Guinea and its development partners in the public and private sector as the regulations are being finalized; the report helps to shed light on relevant aspects of the legal framework to-date, including how they have operated in practice, and shares models and good practices of community development agreements and community development funds from elsewhere in the world.

This is a work product of CCSI and does not necessarily reflect the views of any other organizations or partners in the Northern Guinea projects, including the Government of Guinea and Anglo Gold Ashanti. CCSI takes all responsibilities for the contents of this report.

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Acronyms

AIP (Annual Investment Program)

ALAC (*Asociación Los Andes de Cajamarca*)

CCL (*Code des Collectivités locales*)

CECI (Centre for International Studies and Cooperation)

CDA (Community Development Agreements)

CGA (*Cellule de gestion autonome*)

CL (*Collectivités locales*)

CMD (Committee for Management of disputes relating to tender offers and execution of projects)

CME (Committee for Monitoring of execution of the development projects)

CMFR (Committee for Management of the financial resources)

CMT (Committee for Monitoring of the management of financial resources)

CMTO (Committee for Management of tender offers)

CR (*Commune rurale*)

CU (*Commune urbaine*)

CPD (*Conseil préfectoral de développement de Siguri*)

CRDS (*Commission de réflexion pour le développement de Siguri*)

FODEL (*Fonds de développement économique local*)

LDF (Local Development Fund)

LDP (Local Development Plan)

MATD (*Ministère de l'administration du territoire et de la décentralisation*)

MDG (Millennium Development Goals)

MOA (Memorandum of Understanding)

MoM (*Ministère des Mines et de la Géologie*)

OTML (Ok Tedi Mine)

PACV (*Programme d'Appui aux Communautés Villageoises*)

PNG (Papua New Guinea)

PNGSDP (Papua New Guinea Sustainable Development Program Ltd)

PDSSES (*Projet de Développement Socio-Economique de Siguri*)

RUL (Rio Tinto Rössing Uranium Unlimited)

SAG (*Société AngloGold*)

SMD (*Société Minière de Dinguiraye*)

SPD (*Service Préfectoral de Développement*)

CCSI (Columbia Center on Sustainable Investment, Columbia University)

WB (World Bank)

Introduction:

The 2011 Mining Code introduces specific requirements for the establishment of a Local Development Fund (LDF) and Community Development Agreements (CDA) between mining companies and local communities (see Box 7 for a summary of the relevant legal provisions in the Mining Code). The provisions in the Mining Code on the LDF and the CDA are not very specific, but current drafts of a Presidential Decree and an *Arrêté* (Ministerial Order), issued by the *Ministère des Mines et de la Géologie* (Ministry of Mines, or MoM) and the *Ministère de l'administration du territoire et de la décentralisation* (Ministry of Decentralization, or MATD) respectively, provide more details.¹ This report examines how the LDF and CDA requirements can be implemented effectively, focusing in particular on the *Société AngloGold Ashanti de Guinée* (SAG) mine and its past experiences with local development funding.

The report draws on literature on subnational revenue sharing, community development agreements and local development funds, relying notably on case studies, guidelines and model regulations and agreements. To better understand the LDF and CDA process in the Guinean context, CCSI engaged with stakeholders in the country. At the local level, this included meetings in Siguiri with representatives from the *Préfecture* of Siguiri, the *Communes*, *Conseil préfectoral de développement de Siguiri* (CPD) and nongovernmental organizations (NGOs) (see Box 1 for an overview of the administrative structure of the local government in Guinea). At the central government level, CCSI met with representatives of the MoM and the MATD, as well as with representatives of civil society and the international donor community. These meetings provided insights into the political and institutional context, as well as the ongoing implementation processes of the new local development regime. In addition, CCSI reviewed the draft versions of the Decree and Ministerial Order (June 2013), which provide additional detail on the implementation of the LDF and the CDA respectively.

The first section of the report provides an overview of the prior legal and institutional regime for local development funding in Siguiri, and addresses the main challenges faced in the past to implement projects from those funds. The second section introduces the current legislative regime and the draft Decree and Ministerial Order; explains the challenges that this new

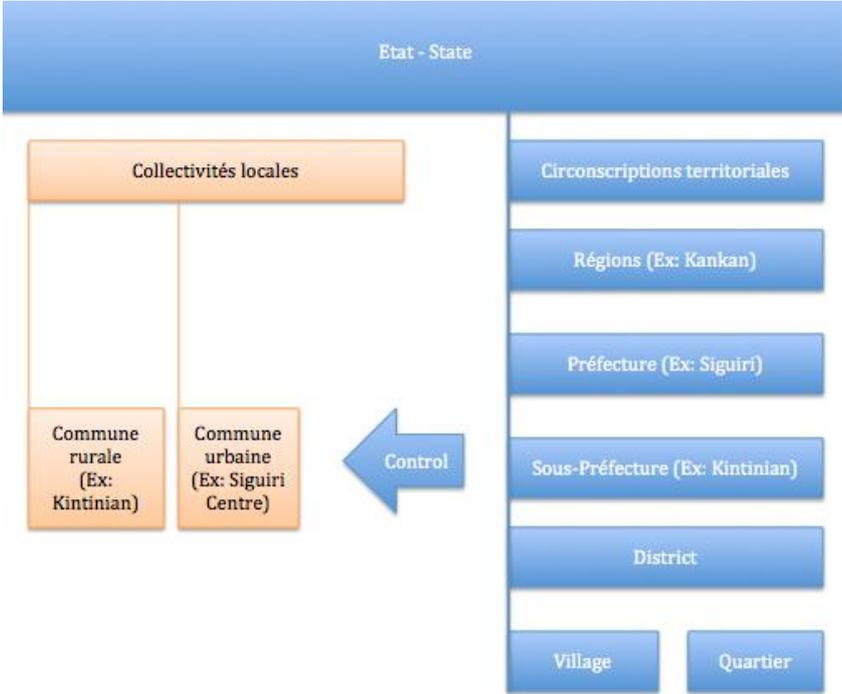
¹ Article 130, Mining Code: “Les modalités d’utilisation de cette contribution et les règles de fonctionnement et

regime poses; and draws on the experiences of other countries in addressing similar challenges. The third section provides suggestions for the draft Decree and Ministerial Order, as well as recommendations for how the Government and mining companies can work together to maximize the benefits of local development funding.

Box 1: The organization of local government in Guinea²

The local government in Guinea is built around two axes³:

- (1) **Circonscriptions territoriales** (administrative sub-divisions) are under the authority of the national government, and composed of the *Régions administratives* (Regions), the *Préfectures* (Prefectures), the *Sous-Préfectures* (Sub-Prefectures, one for each of the *Collectivités locales* (local authorities)) and *Districts*. Under the district level are *Villages* and *Quartiers*.. The *Gouverneurs* (Governors), who run the *Régions*, and the *Préfets*, who run the *Préfectures*, are appointed by presidential decree, while the *Sous-Préfets* are appointed by the MATD.



- (2) **Collectivités locales** (Local authorities, *CL*) are composed of the *Communes rurales* (Rural municipalities, *CR*) and the *Communes urbaines* (Urban municipalities, *CU*). They are administered by elected authorities:
 - the *Conseil local* (Local council): In rural municipalities, the local council is a *Conseil communautaire* (Community council), while in urban municipalities, it is a *Conseil communal* (Communal council).

² For more detailed information on the structure and administration of local government in Guinea, please refer to « Evaluation du contexte institutionnel de la décentralisation et du système administratif en Guinée », MDG Center, March 2012.

³ Articles 134, 135 and 136 of the Constitution.

For both types, members are elected for four years. The *Conseil local* approves the Local Development Plan and budget.

- the *Bureau communal* (Executive council): This council is composed of an elected authority (a *Président* (President) for rural municipalities or a *Maire* (Mayor) for *urban municipalities*, both of which have a four-year mandate), one or several vice-presidents (based on population density) and a treasurer.
- the administrative council: This council is composed of an administrative secretary, a communal general secretary and a tax collector appointed by a decree and sectoral departments.

The CL are under the control of the *Sous-Préfet* (Article 36, Constitution) and were created between 1986 and 1992 to foster the decentralization process. The political climate caused a stalemate of this process in the 1990s and 2000s.⁴ The *Code des collectivités locales* (Local Authorities Code, *CCL*) of 2006, which transferred further responsibilities to the *CL* and defined their rights and obligations, is intended to revive the decentralization process and also plays an important role for the local development regime in Guinea.⁵

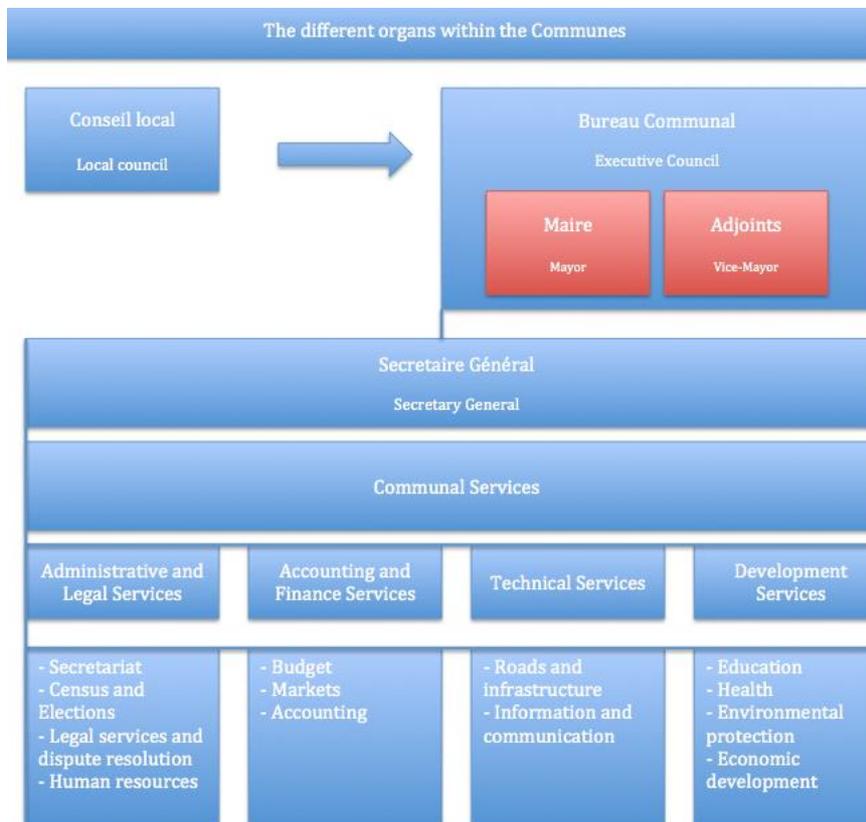


Illustration of the local administration at the Siguiri gold mine

SAG operations are located in the *Région* of Kankan, which is composed of several *Préfectures*, including the *Préfecture* of Siguiri. The *Préfecture* of Siguiri consists of several *Sous-Préfectures*, among which are the *Sous-Préfectures* of Kintinian, Franwalia and Siguri-Centre.

⁴ Lettre de Politique Nationale de Décentralisation et de Développement Local, 2011 (pp. 2-5).

⁵ Lettre de Politique Nationale de Décentralisation et de Développement Local, 2011 (pp. 2-5).

Kintinian, Franwalia and Siguiiri are not only *Sous-Préfectures*, but they are also *Collectivités territoriales* governed each by a *Conseil local*. Kintinan and Franwalia are *Communes rurales*, governed by a *Conseil local* called *Conseil communautaire*. A *Président* is at the head of the Executive council of the *Commune rurale*. Siguiiri-Centre is a *Commune urbaine*, governed by a *Conseil local* called *Conseil communal*. A *Maire* is at the head of the Executive council of the *Commune urbaine*.

1. Local development funding in Siguiiri prior 2011

1.1. Legal and institutional regime prior 2011

1.1.1. Legal basis for the local development tax

The local development regime in Siguiiri dates back to the 11th of November 1993 when SAG signed the *Convention de base* (Convention), which foresaw the payment of a local development tax to support the neighboring communities of the mining projects. This Convention, amended in 2005 and a 1993 amendment made to the convention of another mining company (Societe Miniere de Dinguiraye - SMD) operating in the same area, form the basis for the current local development regime. These documents provide little detail on how the regime should be implemented, enabling large discretion in the elaboration of the local development agenda and the institutions that manage the local development tax.

Box 2: Provisions in the agreements dealing with local development

The *Convention* establishes the development tax paid by SAG to date. Article 13.9 defines the tax as a “prefectural or local development tax” and specifies that the tax be levied “for regional development”.⁶

The 2005 Amendment provides that SAG should “take part in local development” (Avenant, Article 5, 25 July 2005)⁷ and cooperate with the members of the *Conseil local* and the *Préfecture*. However, the term “local development” is not defined and there is no reference to the development tax.

⁶ “La Société devra acquitter un impôt préfectoral ou local pour le développement régional, équivalent à 0,4% des recettes brutes annuelles sur ses ventes. Cet impôt sera acquitté de la même manière et au même moment que la taxe à l’exportation visée à la Clause 13.3.” (Convention de base, Article 13.19, 11 November 1993)

“The Company shall be subject to a prefectural or local development tax equal to 0,4% of gross sales revenues each year. Such tax shall be paid in the same manner and time as the export tax under Clause 13.3.” (SAG, Convention de base, Article 13.19, 11 November 1993)

⁷ “Afin de mieux participer au développement local, la SAG avec l’accord de ses Actionnaires, mettra en oeuvre un plan triennal (2006-2009) de réalisation de 5 forages d’eau potable par un, ou tout autre ouvrage à but social (maternité, crèche, écoles...) dans la limite budgétaire correspondant aux 5 forages. Ces ouvrages seront réalisés en coopération avec les Elus et la Préfecture de Siguiiri.” (SAG, Avenant, Article 5, 25 July 2005).

The 1993 Amendment to SMD's⁸ convention requires payment of a development tax, stipulates that the tax goes to the *budgets préfectoraux* (prefectural budgets) and notes that detailed rules for the use and distribution of the parties' contributions will be defined by the State and the investor (SMD, Avenant, 18(2)h (1993)).⁹ This Amendment does not provide guidance on the administration and use of the tax.

1.1.2. Management and investment of the development tax

To date, the *Conseil préfectoral de développement* (Prefectural Development Council, CPD) and its predecessors have been responsible for the implementation of projects using the development taxes paid by SAG and SMD. The Government and SAG have agreed that SAG's development tax should be paid into an account administered by SAG. The funds must be made available to fund development projects.¹⁰

Box 3: Evolution of the *Conseil Préfectoral de Développement*

1998 to 2005 - *Comité Préfectoral de Développement* (Prefectural Development Committee, *Comité*)

In September 1998, the *Comité* was created to analyze, modify and approve project proposals made by the 13 *Collectivités* of Siguiri (with assistance from CECI) (see Box 4).¹¹ Their approval was contingent on the alignment of the project with the LDPs. The *Comité* also served as a forum for the different stakeholders to discuss local development issues.¹²

2005 to date – *Conseil Préfectoral de Développement* (CPD)

In 2005, the *Comité* was transformed by law into a *Conseil*. CPD's role is similar to the *Comité*: it serves as the consultation, harmonization and evaluation forum for local development projects in Siguiri.¹³

The *Comité* and initially the CPD were presided over by the *Préfet* of Siguiri¹⁴. In November 2011, a Presidential decree (CPD Decree) ordered that the President of the CPD be determined by election; it could be either an elected authority or a member of civil society (Article 5, CPD Decree). According to MATD¹⁵, which directed the changes¹⁶, the pre-2011 CPD was not in line with the *Code des collectivités locales* (CCL), because allowing the *Préfet* to serve as CPD's President and thus decide on local development projects was incompatible with the transfer of local development responsibilities in the decentralization process. MATD has announced that

¹⁰ CGA Report (p. 2)

¹¹ CGA Report (p. 2). The documents do not provide information on the legal documents on the basis of which the *Comité* was set up. The documents also do not indicate how the proposals by the *Collectivités* were elaborated.

¹² CECI Presentation (p. 11).

¹³ CGA Report (p. 3).

¹⁴ The documents reviewed do not specify that the *Préfet* was president of the *Comité*, but the 2011 CPD Decree foresaw the replacement of the *Préfet* by either an elected authority or a member of civil society.

¹⁵ MATD Meeting, 23 April 2013.

¹⁶ According to Fanta Mamadi Conde, the MATD directed the changes that it considered necessary against the background of the *Code des Collectivités locales* (CCL) of 2006.

any remaining contradictions between the provisions of the CCL and the role of the CPD will be taken into account when designing the new regime.

1.2. Past and current challenges of local development funding in Siguiiri

Since the introduction of the local development regime in Siguiiri, several challenges have led to suboptimal allocations of the funds received through the development tax. The MATD sought to commission a study to assess the strengths and weaknesses of the CPD, but it is unclear if this study has gone ahead and if so when the results are to be published.¹⁷ Separately, the MATD has recently approached SAG to finance an evaluation study of the CPD in Siguiiri. As these studies are yet to be completed, they could not be reviewed for this report. Based on in-country consultations and the available literature (see annex 1) the main challenges can be divided up into (a) institutional design, capacity and organization; (2) transparency and accountability; and (c) cooperation between SAG and the Communes. These will be discussed in more detail below.

1.2.1. Institutional design, capacity and organization

The institutional regime of local development funding in Siguiiri has always provided for monitoring mechanisms (see Box 4). Over the years, the monitoring body has been integrated within CPD. Initially, monitoring was run by CECI, an independent Canadian NGO, which was staffed and funded independently from the CPD and its predecessors. In 2005, the CGA was created to undertake the monitoring, funded by the development tax and run by former CECI employees. Eventually, the Technical Support Unit, which is part of the CPD, was put in charge of monitoring.

Box 4: Monitoring mechanisms

In January 1998, Siguiiri Prefecture requested assistance from the Canadian NGO, Centre for International Studies and Cooperation (CECI), to design efficient and transparent mechanisms for the management and investment of the development tax and to help build capacities within the *Préfecture* (the “*Projet de Développement Socio-Economique de Siguiiri*” (Socio-Economic development project of Siguiiri, PDSES), established by SAG and CECI¹⁸). In response to this request, in February 1998, CECI undertook the first socio-

¹⁷ The information that this study had been commissioned was given by MATD (23 April 2013).

¹⁸ In their first agreement in July 1998, SAG and CECI defined their cooperation in setting up the *Projet de Développement Socio-Economique de Siguri* (PDSES) and agreed to provide the necessary human and financial resources for running the PDSES. Thus, no funding for PDSES came from the development tax (CECI Presentation (p. 14)). According to the CECI Presentation, a\the first 6-month Agreement was signed between

economic study to determine the development needs in Siguiiri. Building upon this study, Local Development Plans (LDPs) were elaborated for the 13 *Collectivités* of Siguiiri, i.e., the 12 *Communes rurales (de développement)* and the *Commune urbaine*.¹⁹ CECI also became the implementing agency that executed and monitored the projects approved by the *Comité*.²⁰

With the creation of CPD in 2005, the initial cooperation between CECI, SAG and the *Comité* ended. CECI and SAG had agreed to set up a new body that would take over CECI's role,²¹ and, in line with this, the *Cellule de gestion autonome* (Self Management Unit, CGA) was created in 2005²². CGA was run by former CECI employees and financed directly by the 0.4% development tax. The task of CGA was to assess, execute and monitor the local development projects approved by the CPD, i.e., the tasks that were formerly performed by CECI.²³

The 2011 CPD Decree, however, did not provide a role for CGA, and CPD then determined that maintaining CGA was too expensive. SAG did not agree to provide additional funding for it, on top of its 0.4% development tax commitment (part of which previously funded CGA),²⁴ and the former employees of CGA refused an offer made by CPD to continue funding it with a 66% salary reduction. Instead, a new Technical Support Unit was created within CPD as illustrated in Box 5²⁵.

Although independence does not necessarily lead to better monitoring, the integration of the monitoring body into CPD combined with its decreased financial and institutional independence correlates with an apparent decrease of monitoring effectiveness²⁶. The necessity of the monitoring unit's independence from the CPD was highlighted in CGA's Report.²⁷ A criticism put forward by one stakeholder, for example, was that staff selection for the Technical Support Unit has been politically motivated. This integration has not only led to a lack of competence in carrying out the technical supervision, but it has also undermined the necessary distance that would allow critical oversight and monitoring of CPD activities.

SAG and CECI in February 1998 (p. 7). It is not clear when the subsequent agreements were signed. The information relating to these agreements comes from Fanta Mamadi Conde, who used to work for CECI and later managed CGA (CECIDE Meeting, 26 April 2013).

¹⁹ The documents reviewed for this report do not specify the various roles of the parties in the elaboration of the LDPs, but the CGA Report indicates that they were the result of the work undertaken by CECI and other NGOs (CGA Report (p. 2)).

²⁰ CGA Report (p. 3),

²¹ Here again, the documents reviewed do not provide detailed information. The information relating to these developments comes from Fanta Mamadi Conde.

²² It is not clear on what legal basis this was done other than the initial agreement between CECI and SAG.

²³ CGA Report (p. 4).

²⁴ Interview with Fanta Mamadi Conde

²⁵ CPD Meeting, 19 April 2013.

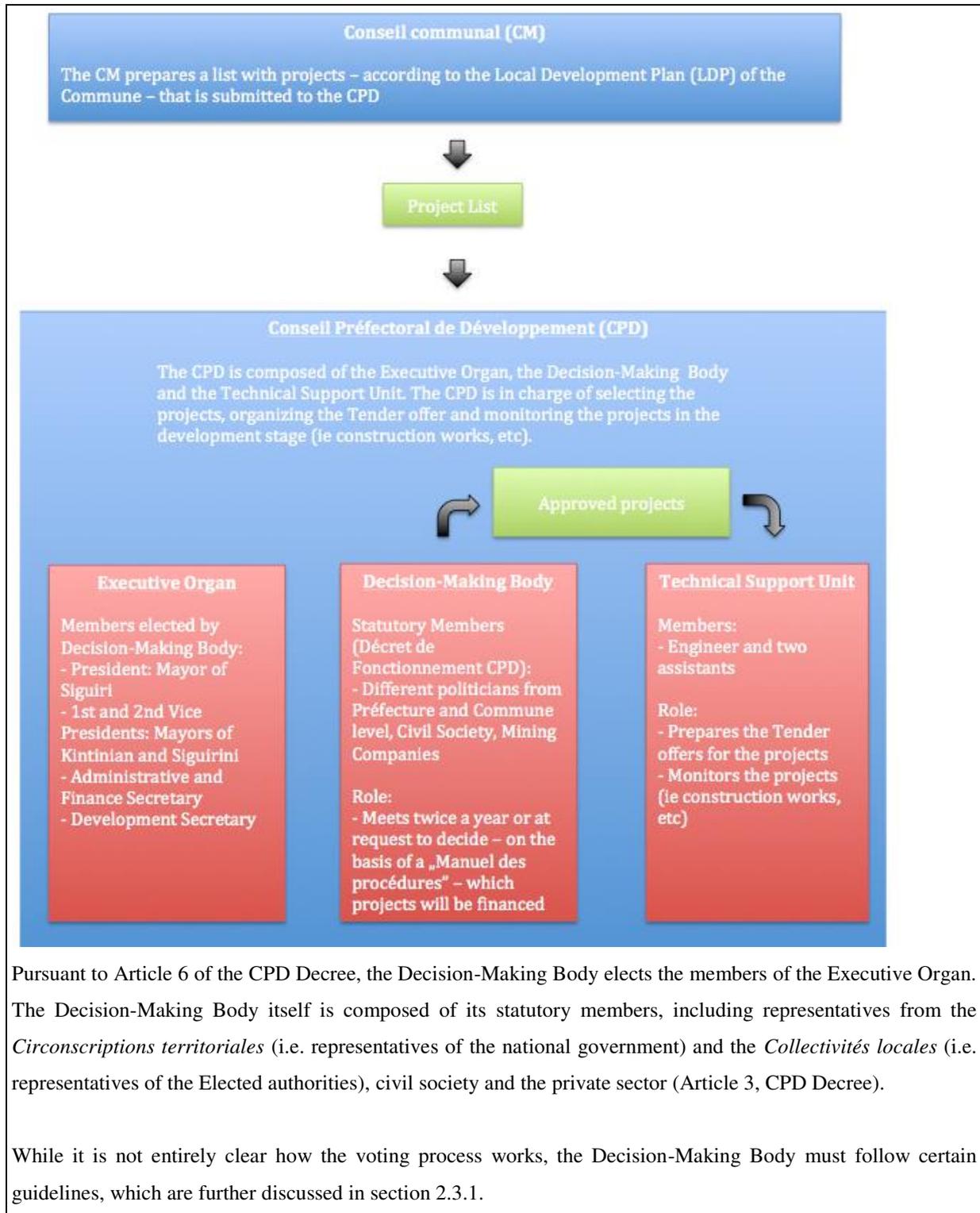
²⁶ Interviews with NGOs

²⁷ CGA Report (p. 23).

Moreover, it is not clear whether the Technical Support Unit has the mandate, capacity and/or financial means to monitor the financial aspects of the development projects. Unlike CECI or CGA, the Technical Support Unit does not have staff responsible for the financial aspects (see Box 5).²⁸ Although the unit organizes the tender offers, its work focuses on the technical aspects of the projects, i.e., organizing and supervising the construction process. There is thus no body in charge of monitoring the financial aspects of the development projects. In comparison, CECI not only supervised technical aspects, but also provided increased transparency and accountability on the financing side of the projects.

²⁸ CPD meeting (19th of April 2013)

Box 5: Current structure of CPD



In addition, the *Communes* have criticized the Technical Support Unit’s supervision of the construction process. The Secretary General of the Mayor of Kintinian provided the example

of the *Préfet* residency's renovation.²⁹ According to the Secretary General, CPD's Technical Support Unit did not properly supervise the construction process and when the construction companies failed to carry out the work according to the tender offer, the CPD declined to intervene. The *Communes* believe they are better positioned to monitor the construction work. The companies that undertake the construction work, however, do not feel accountable to the *Communes* because they are selected and paid by the CPD. To resolve this issue, the Secretary General suggested that the *Communes* should pay the construction companies directly.

The new regime should delineate who is responsible for monitoring and implementing projects, ensuring that the nominated parties are independent from each other and have the necessary expertise. An independent monitoring and evaluation body is recommended. Section 2 explains whether and how the draft Decree/Arrêté addresses these issues.

1.2.2. Transparency and accountability

In theory, the current regime includes mechanisms to ensure that only projects that effectively contribute to local development can be funded by the development tax. Projects need to be aligned with the development approach of the *Préfecture*, be part of the Local Development Plan and/or address the needs of the majority of the population.³⁰ The consultancy firm Arthur Andersen was contracted by the CPD to develop guidelines for the project selection process; these have since been updated. According to these guidelines, a participatory diagnosis and a needs assessment are the basis for the selection process of development projects that seek to be funded by the CPD.³¹ Although the CGA Report states that these guidelines have been applied³² in the past, they are not available for public access and the CPD representatives were unable to provide CCSI with a copy. This inaccessibility clearly limits the possibility of public oversight in the project selection process. Conversely, making the guidelines publicly accessible would contribute to the overall transparency of the local development regime. ***The lack of accessibility of relevant documents is a recurring concern that should be addressed in the new regime.***

²⁹ Although we understand the need to ensure that individuals such as the *Préfet* are adequately housed, it is questionable whether the renovation of the *Préfet's* residency fulfills the criteria to qualify as a project that can be financed by the development tax, as it is unlikely to have a large developmental impact nor does it address the majority of the population, .

³⁰ CGA Report (p. 4).

³¹ Ibid. (p. 5).

³² Ibid. (p. 22).

The CGA report notes that none of the accounting documents of the CPD showed updated costs and expenses of the projects funded by the development tax.³³ The report criticizes the absence of justification for differences between the budgeted costs indicated during the selection process of the projects and the actual costs at the time of their execution.³⁴ In the majority of cases, the cost estimates for the projects were inaccurate and lacked precision³⁵. As CGA was tasked with “evaluating, executing and monitoring the projects”, as well as bookkeeping and accounting of the CPD and its projects³⁶, is therefore partly responsible for these inconsistencies.

1.2.3. Cooperation between SAG and Communes

In meetings with *Commission de réflexion pour le développement de Siguiiri* (Committee on Local Development in Siguiiri, CRDS)³⁷ and the CPD, the representatives voiced concerns about the absence of SAG in the local development process. The CPD, for example, was concerned that SAG has not had a significant presence in most of the bi-annual meetings of the CPD. Further, the CRDS criticized not having a contact person at SAG, which made coordination efforts more difficult. The precise role that CRDS and CPD wish SAG to play is not clear. *Companies’ roles in the process should be addressed in the new regime.*

³³ Ibid. (p. 21).

³⁴ Ibid. (p. 21).

³⁵ Ibid. (pp. 6-8).

³⁶ Ibid. (p. 4).

³⁷ CRDS is a lobby group/interest group based in Conakry. It is composed of high-level representatives of the citizenry from Siguiiri.

2. Local development funding under the new LDF and the CDA

2.1. Political dynamics behind the call for change

The changes to local development funding created by the Mining Code of 2011 are better understood in the context of the political dynamics. An important factor is the decentralization process being carried out in Guinea (see Box 6). According to the MoM³⁸ and MATD³⁹, the Government intends for the local development regime to be fully integrated into the legal and institutional regime of the decentralization process. The current draft decree on “procedures for the establishment and use of the contribution of a rights holder for the development of the local community and rules of operation and management of funds for local economic development (FODEL)” (FODEL Decree) and draft “joint Ministerial Order on model community development agreements” (Ministerial Order) reflect this intention. The *Communes* are in charge of the management of the development tax and the design and implementation of specific development projects pursuant to the Code des Collectivités (CCL)⁴⁰, while the *Préfecture*-level (i.e., CPD, to be re-formed under the FODEL Decree) plays a monitoring role⁴¹ and decides on the allocation of the development tax between and within the *Communes*⁴² (See Box 7 for a summary of the FODEL Decree and the Ministerial Order).

Box 6: Code des Collectivités locales (CCL)

Cooperation between *Communes*

Under Article 59, the *Collectivités* (i.e., *Communes rurales* and *Communes urbaines*) can establish *Conférences inter-collectivités* (Inter-Local authorities conferences) in which at least two *Communes* debate issues that affect them. The recommendations made at these *Conférences* must be approved by each of the *Conseils*⁴³ of the participating *Communes*. The *Préfets* and *Sous-Préfets* are allowed to attend these *Conférences* as observers (Art. 60).

³⁸ Meeting with MoM, 24 April 2013.

³⁹ Meeting with MATD, 23 April 2013.

⁴⁰ Article 7, FODEL Decree

⁴¹ Article 11, FODEL Decree – see Box 7 on the uncertain language provided by Article 11.

⁴² Article 8, FODEL Decree

⁴³ For more detailed information on the *Conseils*, refer to Box 1.

Under Article 62, one or more *Collectivités* can decide to associate in a *Regroupement* (Group) in order to work on or manage non-profit public interest projects.⁴⁴ Under Article 63, other *Collectivités* may at a later stage join the *Regroupement* if allowed under the rules of the *Regroupement*. However, the approval of the *Conseils* of all *Collectivités* that constitute the *Regroupement* is required.

Budget and Accounting requirements

Section 3 of the CCL establishes the *Publicité du budget* (Budget transparency). *Chapter 5* provides a number of requirements for accounting purposes, including the need to make the accounts public (*Section 6*, Art. 508).

Local Development Plan and Annual Investment Program

The CCL sets out requirements for the elaboration of Local Development Plans (LDP) (*Titre I, Chapitre I-III*), as well as Annual Investment Programs (AIPs) -- the annual breakdown of the 5-year LDP (*Titre I, Chapitre IV-V*). The AIP has to specify the following elements (Article 529): (1) planned investment works, (2) cost of these investments, (3) sources of funding for these investments, (4) costs for maintaining the investments, (5) sources of funding of these maintenance expenses. Once the AIP is adopted, the *Communes* must follow it, allowing only a few readjustment exceptions (Article 531). In order to enhance transparency, the *Communes* must prepare a *fiche de projet* (project profile) for each development project. The *fiche de projet* must contain information with respect to funding, execution and management of the development project and be available to the public (Article 534). The *Communes* monitor the fulfillment of the AIPs.

2.2. Defining the beneficiaries of the LDF and CDA

Article 130 of the 2011 Mining Code establishes a local development fund (LDF), as well as a requirement for companies to sign a community development agreement (CDA) with the “local community” living on or in the direct proximity of the mining concession.⁴⁵ However, the LDF is not defined in the Mining Code and neither is its method of allocation. The draft FODEL Decree and Ministerial Order provide some guidance on the application of Article 130.

⁴⁴ “[R]éaliser en commun un projet d’utilité publique, soit de gérer en commun un bien ou un droit indivis, soit de gérer en commun un service administratif ou un service public.” “Les regroupements de collectivités locales sont des groupements d’intérêt public constitués entre deux ou plusieurs collectivités locales en vue d’exercer en commun, dans un but non lucratif, certaines attributions conférées aux collectivités locales”.

⁴⁵ Article 130, Mining code: “[C]ommunauté locale résidant sur ou à proximité immédiate de son titre d’exploitation ou de sa concession minière”

Box 7: Article 130 of the 2011 Mining Code, draft FODEL Decree and draft Ministerial Order

1. Article 130

Article 130 of the Mining Code⁴⁶ requires that 1% of the turnover of gold mining companies is paid into a local development fund. The article also requires the negotiation of CDAs with local communities⁴⁷ that live on or in the proximity of the mine site. The CDAs need to provide for: (1) the transparent and efficient management of the money contributed by the mining companies to the LDFs; (2) capacity building for the local communities; (3) training for the population; and (4) measures for the protection of the environment and health of the communities, as well as processes for the development of social projects.

2. FODEL Decree

FODEL

The FODEL Decree provides for a single Local Economic Development Fund (FODEL). Every mining company must open a bank account - named the "FODEL bank account" - with either the central bank or a commercial bank (Article 4, FODEL Decree). Every *Commune* will also open a bank account; the Decree recommends that this account should be opened with the same bank used by the mining company.

Allocation of the development tax

A new CPD will be set up in every *Préfecture* on the basis of a regulatory text (*Texte réglementaire*), which is yet to be developed. In order to allow for a better harmonization⁴⁸ of the development actions in the *Préfecture*, the CPD decides, through consultations,⁴⁹ on the allocation of the development tax between and within the *Communes* taking into account the concerns of financial equalization. (Article 8, FODEL Decree).

It is not clear to what extent CPD will prescribe how much money is to be spent in specific geographic areas of the *Commune*.

⁴⁶ "Tout titulaire d'un titre d'exploitation doit contracter une Convention de Développement avec la communauté locale résidant sur ou à proximité immédiate de son titre d'exploitation ou de sa concession minière. Les modalités d'élaboration de ces conventions sont définies par arrêté conjoint des ministres en charge des mines et de la décentralisation.

L'objet de cette convention est de créer les conditions favorisant une gestion efficace et transparente de la contribution au développement local payée par le titulaire du titre d'exploitation, et qui tiennent compte du renforcement des capacités des communautés locales à la planification et à la mise en œuvre de leur programme de développement communautaire.

La convention doit inclure, entre autres, les dispositions relatives à la formation des populations locales et plus généralement des guinéens, les mesures à prendre pour la protection de l'environnement et la santé des populations, et les processus pour le développement de projets à vocation sociale. Les principes de transparence et de consultation seront appliqués à la gestion du Fonds de Développement Local ainsi qu'à toute convention de développement de la Communauté locale qui sera publiée et rendue accessible à la population concernée.

Le montant de la contribution du titulaire d'un titre d'exploitation au développement de la communauté locale est fixé à zéro virgule cinq pour cent (0.5%) du chiffre d'affaire de la société pour les substances minières de catégorie 1 et à un pour cent (1%) pour les autres substances minières.

Il est créé un Fonds de Développement Local (FDL) qui sera alimenté par cette contribution du titulaire du titre minier dès la première année d'exploitation. Les modalités d'utilisation de cette contribution et les règles de fonctionnement et de gestion du Fonds de Développement Local sont définies par un Décret du Président de la République."

⁴⁷ We understand that a further version of the Mining Code, presented on June 12, 2013, includes a definition for "local community", to include all communities (collectivités) affected under a mining title or authorisation ("ensemble des collectivités affectées par l'activité minière dans le cadre d'un titre minier ou d'une autorisation"). However, the term "affectées" is not defined.

⁴⁸ "pour une meilleure harmonisation des actions dans la Préfecture" (article 8, FODEL Decree)

⁴⁹ "par voie de concertations" (article 8, FODEL Decree)

It is also not clear whether CPD will have a consultation role, beyond the allocation of the tax.

Management of FODEL

The management of the development tax will be under the authority of each *Commune*, pursuant to CCL (Art. 7, FODEL Decree).

Monitoring and Evaluation

The CPD, together with representatives of the mining company, will be in charge of monitoring and evaluating FODEL (Article 11, FODEL Decree). It is not clear from the current draft of the FODEL Decree whether it is also intended for the CPD to verify that only projects following the selection criteria will be funded. Article 11 of the FODEL Decree provides that the CPD will monitor the actions taken under Article 12. This appears to be an error in reference and should perhaps refer to Article 13, which sets out the selection criteria for development projects.

A Ministerial Order by MoM and MATD will set up a National Committee (*comité technique*) to monitor the development regime. It will be composed of representatives from the MoM and MATD (Article 12, FODEL Decree). The FODEL Decree does not provide more details on this National Committee's specific role, but it appears that it is intended to monitor not only how the *Communes* manage the development tax, but also how the CPDs carry out their monitoring function of the *Communes*.

Criteria for funding of projects

Article 13 of the FODEL Decree states that projects that will “generate revenues” are eligible for FODEL funding, and provides a non-exhaustive list of examples of the types of projects that may qualify.

3. CDA Ministerial Order

The contracting parties

The Ministerial Order does not clarify the definition of “local community”, but it provides that the *Président* of the *Collectivité locale* will sign the CDA (Article 4, Ministerial Order). The Model CDA, in the Annex of the Order, indicates that the CDA will be between the company and the relevant *Commune*. There is, however, no definition provided.

The concluded CDA must be approved by the Minister of Mines and Geology and of the Communities (Article 5), both of whom are also responsible for the implementation of the Ministerial Order (Article 7).

Preamble and obligations of the contracting parties

The Preamble of the Model CDA foresees that the agreement will be for a period of 25 years and is intended to facilitate the dialogue and mutual understanding of the mining companies and the local communities.

The Model CDA also details the obligations of the mining companies and the *Communes* as follows.

Obligations of the company (Article 3.1, Model CDA) include:

- set up a Community Relations Department and elaborate a community communication agenda;
- support local authorities in the conception, execution and monitoring of projects in a range of areas, such as local tourism development, support local economic development, etc.

Obligations of the *Commune* (Article 3.2, Model CDA) include:

- work closely with all stakeholders and hold monthly meetings with the mining company;
- use the resources of the *Commune* (including the development tax) in a transparent and efficient manner to implement projects of LDP, pursuant to CCL;
- use the *Service Préfectoral de Développement* (Prefectural Development Service, SPD) for capacity building measures and cooperate with SPD in monitoring the development projects;

- keep the population informed and involved.

2.2.1. Identification of Communes and allocation of funds amongst them

The Mining Code’s reference to “local community” raises several important issues:

First, the term “local community” (“communauté locale”) does not have a legal meaning in the administrative context of Guinea (unlike *Commune* or *Collectivité locale*). The Decree refers to *Collectivités locales*, i.e., the *Communes*, as the intended beneficiaries⁵⁰ of the LDF, while the Ministerial Order still uses the language of “communauté locale”. The Annex to the Ministerial Order, however, suggests that it is the *Communes* that are intended to enter into the CDAs. A new version of the Mining Code may include a definition.⁵¹ ***The definition of “communauté locale” should be made clear in the Mining Code or the Ministerial Order.***

Box 8 gives two examples of legal texts that have been used in Ghana and Sierra Leone to address the definition of local communities.

Box 8: Defining the local community – Examples from Ghana and Sierra Leone

The beneficiaries of the fund set up by the Ahafo Gold Project in Western **Ghana** are limited to the communities directly affected by the mine and located within the boundaries of the concession. In the Social Responsibility Agreement, local communities are defined as:

- *Community towns that are physically located in the Mining Lease of Newmont Ghana Gold Limited within the current operational area of the Ahafo Mine Project or within the Mining Lease area under active exploration.*
- *Community / traditional areas that have a significant amount of its traditional land covered by the Mining Lease of Newmont Ghana Gold Limited within the current operational area of the Ahafo Mine Project or within the area of the Mining Lease under active exploration.*⁵²

The Social Responsibility Agreement lists the towns considered to be the local community at the time the Agreement was entered into, but provides for annual review of the composition of the local community.

The 2009 Mines and Minerals Act of **Sierra Leone** (section 139) gives more leeway for negotiations in its definition of the community that is to benefit from local development agreements, but restricts the beneficiary

⁵⁰ “Le Fonds de Développement Economique Local vise à promouvoir le développement des collectivités locales abritant les sites d’exploitation minières et celles avoisinantes” (Decree, Article 1).

⁵¹ The “communauté locale” might be defined in the new version of the mining code (see footnote 47) Social Responsibility Agreement between the Ahafo Local Community and Newmont Ghana Gold Limited, dated 29 May 2008.

to a single community:

*The primary host community is the single community of persons mutually agreed by the holder of the small-scale or large-scale mining licence and the local council, but if there is no community of persons residing within thirty kilometres of any boundary defining the large-scale mining licence area, the primary host community shall be the local council.*⁵³

Where the licence holder and the local council cannot agree on which community is the primary host community, then the Minister is to make a determination.

Second, it is not clear which communities will enter into CDAs as the term “proximity” in Article 130 is not defined. Thus it is not clear which *Communes* should be included. The Ministerial Order repeats the language used in Article 130 and does not provide further guidance. In the case of SAG’s operations, all communes within the Siguiiri Prefecture currently benefit from the development tax. ***The Ministerial Order in Guinea should clearly indicate whether it is the role of CPD to determine which Communes will enter into CDAs and will benefit from LDF. The Ministerial Order should also indicate more precise criteria for these decisions or advise CPD to develop such criteria.***

Third, in case more than one community qualifies under Article 130, the allocation of the funds among these *Communes* needs to be decided. While today all *Communes* in Siguiiri benefit from the funds, there is no clear distribution key to determine which *Communes* benefit most from these funds.⁵⁴ The Decree makes it clear that the *Collectivités Locales* will manage the LDF.⁵⁵ However, the distribution amongst *Communes* is not specified in the Decree. Article 8 merely suggests that the allocation amongst the *Communes* - and within, as discussed in 2.2.2. - will be determined by the CPD to harmonize and equalize the financial impacts in the *Préfecture*

The redistribution fund (2011 Mining Code Article 165 – see Box 10) may come into play on this aspect. ***Article 130 (development tax/LDF) could serve to alleviate tensions between the***

⁵³ <http://www.sierra-leone.org/Laws/2009-12.pdf>

⁵⁴ According to the CPD (19 April 2013), Siguiiri-Centre, Kintinian and Franwalia receive most of the money from the development tax .

⁵⁵ “Conformément aux dispositions du Code des Collectivités Locales, la gestion des financements prévus par le FODEL est du strict ressort des collectivités locales, selon les principes de libre administration” (Article 7, Decree)..

*mining companies and the local communities and help them build harmonious relationships, while Article 165 could provide for the sharing of mining revenues more broadly with communities that do not benefit from the LDF.*⁵⁶ This might help to avoid development discrepancies among the different communities in Guinea.⁵⁷ However, the example of Peru (see Box 11) demonstrates that large fluctuations from mining revenues might complicate redistribution efforts.

Fourth, while it appears (based on the Annex to the Ministerial Order) that each *Commune* will enter into an individual CDA with the mining company, there may be a place for a framework agreement at the *Préfecture* level. This could serve as the basis to align development priorities, promote coordination between similar communal programs and harmonize the implementation (see Box 9 on how such an arrangement has been made in the context of the Ok Tedi mine in Papua New Guinea). Such a framework agreement could also address larger infrastructure projects that would affect more than one *Commune* (and which may be financed by funding from the mining company in addition to its development tax contribution). While the MATD highlighted the importance of such framework agreement not undermining the transfer of responsibility to the *Commune* level, which it sees as the main goal of its decentralization efforts, creating a framework agreement at a later stage to the CDA, with a *Conférence Inter-Collectivités*, or *Regroupement*, could be helpful. Furthermore as illustrated in Box 9, this framework agreement could be usefully signed before the individual CDAs.

Box 9: Framework agreements – Ok Tedi and Ahafo mines

Individual CDAs with each *Commune* can address specific local development needs. At the same time, such an approach is very resource-intensive and might lead to inconsistencies in development priorities and their implementation.⁵⁸ Framework agreements between the company and all qualified communities that define binding general principles and objectives are one way to alleviate these concerns. Both, the Ok Tedi and Ahafo mines have signed framework agreements that encompass more than one community.

⁵⁶ Ring fencing regulations for Article 165 funds are not in place. The mechanism described above might therefore be vulnerable if Guinea experiences national budget shortfalls.

⁵⁷ The necessity to take community tensions into account is also addressed in EI SourceBook, Good Practice Note on Community Development Agreements, 2011 (p. 6).

⁵⁸ EI SourceBook, Good Practice Note on Community Development (p. 10)

At the Ok Tedi mine project in Papua New Guinea, the parties set up an umbrella process in which they agreed on broad principles and allocations in a framework agreement. All community-specific agreements then had to be developed within this framework.⁵⁹

A similar approach was taken by Newmont's Ahafo project in Ghana. A Social Responsibility Agreement between the company and all impacted communities in the Districts of Asutifi and Tano outlined the "roles and responsibilities of each party and the overarching framework in which the parties are to work together to implement key community initiatives".⁶⁰

To balance the decentralization goals of the Government with the need to spend mining revenues at the community level efficiently, it is recommended for the mining company to sign individual CDAs with each affected Commune, as well as an umbrella framework agreement that includes all nearby Communes as well as the CPD. While the project decision-making process is kept with the Communes, the umbrella framework agreement could describe how the affected Communes may coordinate their development agendas, as well as the various monitoring and evaluation mechanisms. This framework agreement would provide a platform to discuss and execute cross-Commune border projects.

Box 10: Article 165 of the Mining Code

Article 165 of the Mining Code addresses the allocation of mining revenues⁶¹ other than the development tax. 15% of Government revenues from mining projects will directly support the local budgets of the *Collectivités* locales. According to the MATD, this support will be channeled through a redistribution fund. MoM, MATD and the Ministry of Finance will elaborate the details of this fund in another *Arrêté*.⁶² Article 165 specifically mentions that the relevant mechanisms will be aligned with the provisions of the CCL.

Box 11: Redistributing mining revenues to the local level – The Canon Law in Peru

The redistribution of mining revenues to producing regions is established within the Peruvian Constitution. The administrative setup in Peru includes 25 regions (regional government), which are subdivided into 195 provinces and 1833 districts (municipalities). In 2001 the Canon Law was passed, which requires that all royalty payments and 50% of the income tax payments from mining activities be allocated to the producing regions according to the following distribution:

59 EI SourceBook, Good Practice Note on Community Development (p. 10)

60 EI SourceBook, Good Practice Note on Community Development (p. 10)

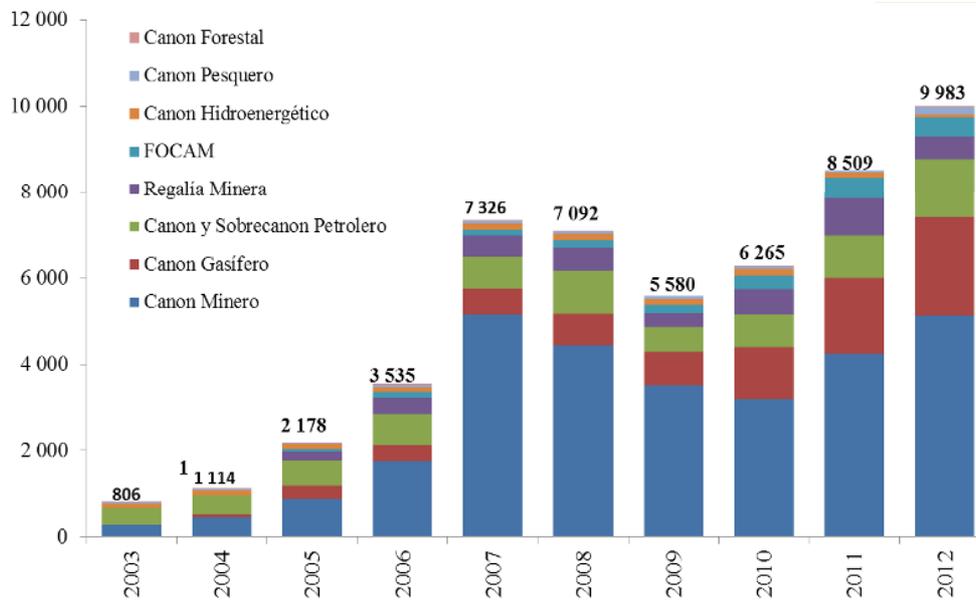
⁶¹ Pursuant to article 165, Mining Code, the revenues are the following: "taxe minière, les droits fixes, la taxe sur les substances de carrières ainsi que la taxe sur la production artisanale de l'Or" (Mining tax, fixed fee, tax on mineral substances and tax on Small-scale gold mining).

⁶² Article 130: "Les modalités d'utilisation, de gestion et de contrôle des quinze pour cent (15%) revenant aux collectivités locales font l'objet d'un arrêté conjoint des Ministres en charge des Mines, de la Décentralisation et des Finances, conformément aux dispositions du Code des collectivités locales."

- 10% to the municipality in the producing district
- 25% to the municipalities in the producing province
- 40% to the municipalities in the producing region
- 20% to the regional government in the producing region
- 5% to the public universities in the producing region⁶³

This distribution mechanism has led to large budget differences among regional and local governments, especially when commodity prices soared. As the producing regions already had lower poverty rates,⁶⁴ the distribution of canon revenues may have further increased regional disparities.⁶⁵ The regional and municipality equalization transfers (FONCOR and FONCOMUN) have not made up for the large differences in canon transfers.⁶⁶

Management challenges arose due to institutional capacity constraints at the local level, as municipalities suddenly had to manage budgets that were significantly higher.⁶⁷ The figure below illustrates the fiscal transfers of canon and royalties to the regional and local governments (millions of Nuevos soles).



Source: Araoz PPT (2013), Fiscal Decentralization in Peru: Achievements and Challenges

2.2.2. Allocation of funds within the Commune

Once it is decided how much each *Commune* will receive from the LDF, there remains the issue as to how to allocate the money within the territory. Article 8 of the FODEL Decree suggests that the allocation within each *Commune* will be determined by the CPD to harmonize and equalize the financial impacts in the *Préfecture*, but the FODEL Decree does

⁶³ Canon Law 27506

⁶⁴ IMF (2006), Fiscal Decentralization and Public Subnational Financial Management in Peru

⁶⁵ IMF (2009), Peru – Selected Issues

⁶⁶ International Center for Public Policy (2012), Sub-national Revenue Mobilization in Peru

⁶⁷ Revenue Watch Institute (2012), Local level resource curse: The “Cholo Disease” in Peru

not provide more guidance as to how CPD should determine this allocation.⁶⁸ It is unclear to what extent the CPD will prescribe how much money is to be spent in specific geographic areas of the *Commune* and how much discretion each individual *Commune* will have in this respect. ***The Decree should clarify whether CPD only determines the allocation of the funds amongst the Communes, or whether it also determines their allocation within each Commune.***

First, uncertainty remains over the geographical scope of where money should be allocated. The main question is whether the money should be spent exclusively on development projects that are in the “direct proximity” to the mine, or whether the money should also be used to fund projects in villages that are farther away but still within the *Commune*. ***In order to allocate funding efficiently and foster sustainable development around the mine more broadly, it is recommended that spending should not be restricted to areas within the Commune that are located close to the mine.***

Second, once the geographic beneficiaries are identified, the question remains of which projects should be funded. To date, investment decisions of the CPD have been closely linked to the LDP. The FODEL Decree provides some guidance, stating that projects that will generate revenues are eligible for FODEL funding, notably those:

- addressing the concerns of the communities neighboring the mines,
- being part of the LDP of the *Commune*,
- having a multiplier effect for other projects, notably post-closure,
- having a positive impact on the quality of life of the neighboring populations of the mine,
- having clear performance and monitoring criteria.⁶⁹

It is not clear what the drafters of the FODEL Decree mean when they refer to “projects creating revenue generating activities”. This may limit any project, even if it otherwise would

⁶⁸ Dans chaque préfecture, un conseil préfectoral de développement (CPD) est mis en place suivant les dispositions d’un texte réglementaire. Il détermine par voie de concertations les modalités de pilotage et de péréquation des financements dans la ou les collectivités locales, pour une meilleure harmonisation des actions dans la Préfecture, en tenant compte des implantations spécifiques des titres miniers concernés (Article 8, Decree).

⁶⁹ Article 13, FODEL Decree

fit within the list of criteria. In other words, it seems that projects within the LDP that are not revenue generating will not be eligible for funding. It is doubtful that schools, for example, could be considered to generate revenues; they may therefore be excluded. The wording of the FODEL Decree should be clearer in defining what sorts of projects fall within the selection criteria.

International best practice suggests that the projects under the CDAs should align with the LDPs to ensure that mines support the development priorities of the communities and complement public interventions. Apart from channeling funds to address the most pressing issues, such an alignment would also allow for better public-private coordination that is paramount to establish sustainable programs for the communities. In order to ensure the alignment of the development agenda with the LDPs of the Communes, the FODEL Decree should specify that the Communes should implement development projects according to the provisions of the CCL, i.e., in line with LDPs and AIPs. The CDA (25 years) could go further than the medium-term (5 year) LDP and set out long-term development objectives for the Communes, covering the life of the mining project and beyond. The CDA objectives could then be incorporated into the medium-term LDPs and short-term AIPs. Box 12 illustrates this point.

Box 12: Local Development Fund aligned with Local Development Programs – Fondo Solidaridad Cajamarca

The Minera Yanacocha, located in Northern Peru, is the second largest gold mine in the world. The company was formed in 1992 with Newmont Mining Corporation (51.35%), Compañía de Minas Buenaventura (43.65%) and the International Finance Corporation (5%) as the shareholders. In 2006, the Government entered into an agreement with the major mining companies on the *Aporte Voluntario*, a voluntary contribution by the mining companies to local and regional development for the following four years (2007-2011). The Minera Yanacocha committed to contributing 3.75% of the mines' net profits to the Fondo Solidaridad Cajamarca (FSC), which amounted to US\$91 million over the four years. Of this total, US\$27 million were channeled to regional projects and US\$64 million to local projects.⁷⁰ The Technical Coordination Commission (CTC) responsible for approving the projects to be financed by this fund was composed of four representatives of the Yanacocha mine, one representative of the Cajamarca Regional Government, one representative of the Provincial Municipality of Cajamarca and one civil society representative. Broad guidelines within the agreement directed the spending priorities. For CTC to approve a project, the following conditions had to be fulfilled: (1) the project had to be

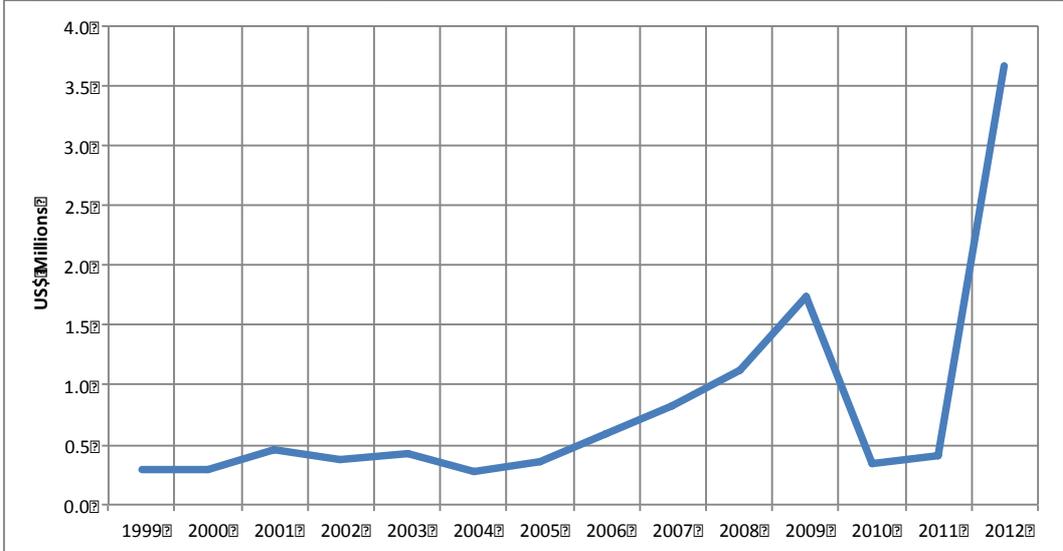
⁷⁰ Fondo Solidaridad Cajamarca (2011), *Aporte Voluntario de Yanacocha (2006-2010)*

aligned with the local and regional development plans, (2) it had to be within the defined local or regional area, (3) there had to be sufficient evidence that it would have a positive impact on the target group, (4) there had to be sufficient evidence that the intervention would be cost-effective, and (5) there had to be sufficient evidence that the intervention would be sustainable. Co-financed projects proposed by the regional government and civil society have been prioritized (for institutional strengthening programs, for example, it partnered with USAID) and it is estimated that by aligning these funds with government priorities and partnering with *canon minero* projects, the FSC has generated an additional investment worth US\$193 million on top of Yanacocha’s contribution.⁷¹ Over the years, project areas have included nutrition, health, education, institutional capacity building, rural development, local and regional infrastructure development and cultural heritage.

2.3. Managing volatility and sustainability

While the LDF is an important source of income for the *Communes*, its management poses significant challenges due to the volatile nature of its contributions. These can largely be traced back to commodity price fluctuations and the phase of the mining project. Figure 1 shows SAG’s contributions to the LDF since 1998. After a sharp fall in 2010 and 2011, contributions peaked in 2012. For 2013 SAG forecasts a contribution worth US\$1.9 million. Such revenue volatility complicates the budgeting process for multi-year projects. This is especially the case when the development tax makes up a large proportion of the total revenues of the communes, as dependence on these funds increases. Under the Mining Code’s new requirement, in which gold mining companies will pay 1% of their turnover into a local development fund, SAG’s forecasted payments in 2013 would amount to US\$4.8 million and hence make up a larger proportion of commune’s budgets.

Figure 1: SAG Local Development Tax Payments

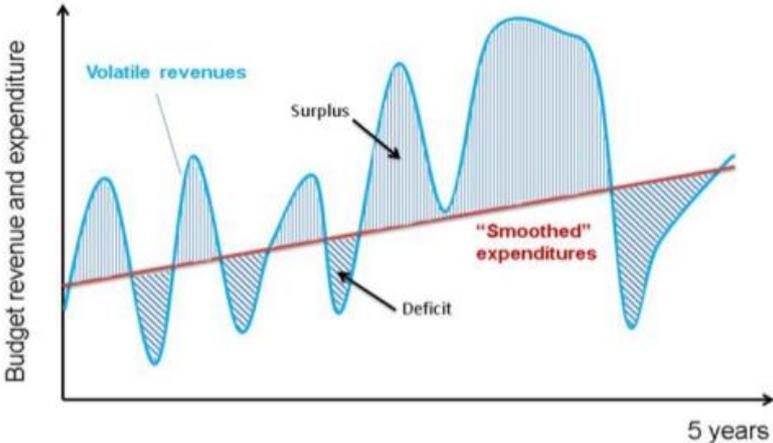


Source: SAG

⁷¹ WB (2010), Mining Foundations, Trusts and Funds: A Sourcebook

One way to address this challenge is to save part of the development tax in years where revenues are high and spend these savings in years where development tax revenues are low. This is illustrated in Figure 2 by the red line.

Figure 2: Smoothing expenditures



Source: RWI (2012), Draft Subnational oil, gas and mineral revenue management

Stabilization and endowment funds are methods used to help with expenditure smoothing and to guarantee the long-term sustainability of projects (see Box 13 on the Rössing Foundation endowment fund in Namibia).

Box 13: Smoothing development fund expenditures - The Rössing Foundation

Rio Tinto Rössing Uranium Limited (RUL) set up the Rössing Foundation in Namibia in 1978 to channel RUL’s corporate social responsibility programs. The Foundation was to be financed by annual contributions of RUL worth 2% of all dividends paid out to shareholders after tax. During the early years of the Foundation, RUL’s contribution was used to finance several education projects. As international uranium prices began to slide below US\$9/pound, RUL began to struggle financially. This had a direct impact on the Foundation, as contributions were based on the profitability of RUL. In 1992, for the first time in its history, the Foundation did not receive any contributions from RUL.⁷² Several smaller projects were discontinued to lower the costs, but without prospects of recovering uranium prices and with savings running out, there were discussions of closing down the Foundation.

The Foundation was fortunate that in the years following Namibia’s independence in 1990, international aid flows increased significantly and donors were looking for local partners to implement development projects. The

⁷² Grobler, J (2008) 30, The Rössing Foundation 1978-2008

Foundation's independence from RUL and its good track record on educational projects attracted third party funding and enabled its continued existence.

After prolonged low uranium prices, which hit rock-bottom in 2001 at US\$7/pound, the market recovered again and prices surged to US\$136/pound in June 2007. Having learned from difficult financial times, the Foundation set up an endowment fund in which it places a proportion of annual contributions from RUL. High uranium prices have increased the endowment fund significantly in recent years, thereby guaranteeing the Foundation's survival even if uranium prices fall in the near future or the mine were to be shut down.

Apart from managing the volatility of the development tax revenues, it is important to prepare for the period after mine closure. Once the mining company stops its operations, the *Communes* will lose the additional source of income for the local development projects. This is particularly risky when a large part of the local economy relies on the mining activities. Projects financed by the LDF can be an appropriate tool to address this challenge. This is explicitly recognized in the FODEL Decree, as it states that projects, that have positive economic spillover effects on other parts of the local economy especially after mine closure, are available for funding under the LDF.⁷³ During our consultations, CRDS mentioned that many young people are attracted by higher salaries not only from mining companies, but also from activities in and associated with artisanal mining at the sites.⁷⁴ Skills that are relevant for the post-mining era are therefore lost. The Papua New Guinea Sustainable Development Program Ltd serves as a good example of how programs can be financed to address long-term development goals that are unrelated to mining activities (see Box 14).

Box 14: Long-term sustainability of local development funds - Papua New Guinea Sustainable Development Program Ltd

The Papua New Guinea Sustainable Development Program Ltd (PNGSDP) was created in 2002 to inherit BHP Billiton's 52 percent share in the Ok Tedi Mine (OTML), which BHP wanted to divest due to environmental concerns and potential socioeconomic repercussions. PNGSDP, a not-for-profit limited liability company, was set up in Singapore with the objective of acting as a development agency to benefit the people of Papua New Guinea and especially those communities affected by the OTML. The dividends from the OTML have been channeled into the Development Fund (one-third), which was set up to finance development projects during the

⁷³ Article 13, Decree: "Sont éligibles au Fonds de Développement Economique Local, les projets visant à créer des activités génératrices de revenus, et notamment ceux (...):ayant un effet d'entraînement sur d'autres activités menées dans les collectivités, notamment après la fermeture de la mine";

⁷⁴ According to SAG, a survey conducted in 2013 in one village close to the mine suggests that only 4% of recent migrants were seeking a job with SAG - whereas 78% have come to the area to mine for gold and/or tap into the services industry that had developed around artisanal mining sites.

operation of the mine, and to the Long Term Fund (two-thirds), which is only accessible after mine closure and will continue to finance projects for a minimum of 40 years after closure. In 2011, one-third of the projects financed through the Development Fund were based in the western province where the OTML is located, and two-thirds of the projects were national.⁷⁵

PNGSDP's setup and financial resources, which are unique due to its historical background, are not easily replicable in other countries. But PNGSDP does provide a good example for how mining revenues can be allocated to guarantee the continuation of community development programs after mine closure. Apart from the funding mechanism, PNGSDP also aims to finance projects that could substitute for OTML as an economic driver in the region. PNGSDP categorizes its projects into five work streams, namely infrastructure investments (road construction and maintenance, upgrading of the airport, port upgrading and electrification projects), industry development (agriculture, forestry, fishery and banking service projects), social investments (water and sanitation, health and education projects), transitional projects and 'preparation for mine impacts'. The latter two in particular focus on the long term. Projects are varied, including prefeasibility studies for making Daru port a potential trading hub in the region, for an industrial park that would service the port, for the commercialization of gas reserves and for undertaking large-scale power generation projects. Apart from providing financing for these studies, PNGSDP will act as a facilitator to support these projects in the future and help identify potential investors. Since 2010, significant effort has been placed on identifying strategic actions that could help the transition of Tabubil from being a mine-dependent village to a mixed residential village of choice. In addition, methods are laid out as to how currently subsidized services can be transferred to third parties and made economically viable.⁷⁶

The central Government should ensure that local communities do not suffer from large revenue/spending volatility by either providing for a local stabilization mechanism or adjusting the national transfers to the Commune level depending on mining revenues. In the case a local stabilization mechanism is adopted, the CPD should cooperate with SAG to assess what reasonable amount should be spent versus saved for the next year. Ideally the portion of the money saved each year should be invested in conservative assets to make sure that at least in real terms the money saved does not lose value. Moreover, the project selection under the CDAs should include long-term sustainability criteria, as suggested in Article 13 of the FODEL Decree.

2.4. Monitoring, evaluation, transparency and accountability mechanisms

The new development regime designed by the draft regulations provides for a system to monitor the spending of the FODEL. As discussed above, the CPD, together with representatives of the mining companies, must ensure that the *Communes* only fund projects

⁷⁵ http://www.pngsdp.com/images/documents/2011_annual_report.pdf

⁷⁶ http://www.pngsdp.com/images/documents/2011_annual_report.pdf

that follow the specified selection criteria⁷⁷ and that the funds are managed according to public accounting requirements. Initial technical support and capacity building should be provided to the CPD. A third party could play this role, as CECI did in Siguri in the past (see box 4 and section 2.7.2.). Monitoring will be based on technical and financial reports by the beneficiaries of the development tax.⁷⁸ In addition, a National Committee will monitor the development regime.⁷⁹ Rio Tinto's project in the Commune of Boke (Box 19) provides a useful example of how external experts can be hired for monitoring and evaluation purposes under the supervision of multi-stakeholder committees. The Decree should also specify the actions that may be taken by the CPD if there is found to be mismanagement of accounts.

The draft regulations provide little guidance on how to monitor the implementation of the development projects. The regulations simply mention the company's obligation to support the *Commune* in monitoring (as well as designing and implementing) long-term development projects,⁸⁰ as well as SPD's role in this context.⁸¹ The transparency, accountability and publicity requirements of the CCL allow for additional monitoring of the local development regime and the draft regulations should be revised to take these into account. Third parties such as NGOs and/or the mining companies could monitor the execution of the development projects and check whether these are in line with the objectives of the LDF. These CCL requirements reflect the suggestions in the World Bank's Community Development Agreement Model Regulations and Example Guidelines to provide for "community development annual expenditure reports" that "shall be open to free inspection by members of the public at the [relevant authorities] during normal Government office hours".⁸²

Further, "tracking funding allocations and disbursements can help alleviate concerns regarding accountability and transparency of payments."⁸³ Pursuant to the FODEL Decree, the company has to make public any payments to the FODEL bank account within 72 hours (Article 5). Any transfer from the company's FODEL account to the *Commune's* FODEL account also has to be signed by the President of the CPD and the company's representative.

⁷⁷ But see Box 7 for the confusion around whether this role is prescribed in the FODEL Decree.

⁷⁸ Article 11, FODEL Decree

⁷⁹ Article 12, FODEL Decree

⁸⁰ Article 3.1.5. Model CDA

⁸¹ Article 3.2.4 Model CDA

⁸² WB (2012) Mining Community Development Agreements: Source book (p. 30)

⁸³ WB (2012) Mining Community Development Agreements: Source book (p. 58)

The CCL and the regime contemplated by the draft regulations thus leaves space for a multi-stakeholder audit committee that could be set up to review the financial activity of the LDF.

Evaluation mechanisms should also be devised to measure the impact of the development projects financed by the LDF. *International best practice suggests that the monitoring should go beyond metrics such as “percentage of mining earnings distributed”, “dollars spent” or “programs initiated”.*⁸⁴ *Monitoring should also include development metrics, such as UNDP’s Human Development Index.*⁸⁵ The results of these monitoring programs should be compiled in reviews that would serve to enhance the quality of future development objectives and projects. Box 15 provides an example in Peru where successful monitoring and evaluation tools have been applied to projects financed by mining revenues.

Box 15: Monitoring and evaluation⁸⁶ - Asociación Los Andes de Cajamarca

After tensions arose between the Minera Yanacocha and the local community due to a mercury spill in 2000 and the announcement of plans to explore Cerro Quillish, which is of spiritual significance to the local population and provides the water supply for Cajamarca city, Yanacocha expanded its community development programs with the launch of the Asociación Los Andes de Cajamarca (ALAC) in 2004; this was separate and prior to the voluntary contribution fund explained in Box 12. To gain the acceptance of the local community, ALAC consulted widely with key stakeholders to determine the operating structure of the organization and the scope of the programs it would implement. Currently its board is composed of four members of the Yanacocha mine, one IFC representative and three civil society members. Furthermore, the advisory panel to the board is made up of ten representatives of the civil society. The work streams of ALAC include institutional strengthening, health and education, entrepreneurship capacity building and infrastructure development.

ALAC has been successful in attracting co-funding for its projects mainly due to its stringent appraisal, monitoring and evaluation mechanisms. The appraisal and evaluation are based on: (1) How the project results coincide with the priorities of the targeted population; (2) the degree to which the objectives of the project are achieved; (3) the cost-efficiency of the project; (4) the socioeconomic valuation of the project (by quantifying the positive and negative impacts); and (5) the sustainability of the project. For its entrepreneurship projects, a common set of fifteen indicators is used to monitor progress over time. These include the number of jobs being created, number of production activities, sales and value of assets.

Today ALAC is considered to have one of the leading monitoring and evaluation systems for development projects in Peru.⁸⁷

⁸⁴ WB (2012) Mining Community Development Agreements: Source book (p. 57)

⁸⁵ WB (2012) Mining Community Development Agreements: Source book (p. 58)

⁸⁶ <http://www.losandes.org.pe/downloads/2007/metodologicasis.pdf>

⁸⁷ http://siteresources.worldbank.org/EXTOGMC/Resources/Sourcebook_Full_Report.pdf

2.5. Cooperation between stakeholders

2.5.1. Ensuring an inclusive consultation process when signing the CDA

The literature suggests that it is crucial to give various stakeholders a voice in the negotiation process of the CDAs.⁸⁸ Within a *Commune*, which is defined by administrative boundaries, different parties might have diverging or contradictory interests. Small-scale miners, for example, might not necessarily have the same perspective on local development needs as representatives from the agricultural sector.

A democratic election process of community leaders is one way to ensure that various stakeholders are represented in the negotiation process; another way is a multi-stakeholder forum, where diverse groups, for example, women, farmers and youth, are represented.⁸⁹ In the case of the *Communes* of Siguiri, the democratically elected⁹⁰ *Conseil local* of each *Commune* is arguably best placed to fill this role.⁹¹ However, it is uncertain whether these existing structures really represent the interests of all stakeholders.⁹²

In this context, it might be useful to draw upon the experience of the MDG Center⁹³ in giving all stakeholders a voice in the elaboration of the Local Development Plans (Box 16).

Box 16: MDG Center experience: cooperation and engagement with stakeholders to elaborate LDPs

The MDG Center's experience in identifying and cooperating with stakeholders in Siguiri to elaborate the LDPs of the *Communes* could serve as a model to drive the CDA process. The aim of the MDG Center was to engage in a process that would "enable the development of a robust MDG-based Local Development Plan that has the buy-in of the Government, is owned by communities and is supported by [SAG], amongst other stakeholders"⁹⁴. The MDG Center proceeded in three steps - stakeholder engagement, co-planning, and validation - to achieve this outcome:

The **Stakeholder engagement** process involved joint priority setting, pooling resources and planning

⁸⁸ WB (2012) Mining Community Development Agreements: Source book (p. 7)

⁸⁹ EI SourceBook, Good Practice Note on Community Development (p. 13).

⁹⁰ The last elections of the *Conseils locaux* in Siguiri were held in 2004.

⁹¹ EI SourceBook, Good Practice Note on Community Development (p. 13), suggests that where power structures are already established, it does not necessarily make sense to run a parallel process.

⁹² WB (2012) Mining Community Development Agreements: Source book (p. 42).

⁹³ The MDG Center for West and Central Africa is part of the Earth Institute at Columbia University and has been primarily responsible for the implementation of the Millennium Villages Project and other national and sub-national level development planning projects.

⁹⁴ Scope of Work (p. 6).

interventions with all stakeholders. These stakeholders included local communities, community-based organizations, government institutions, neighboring communities and focus groups, such as small-scale miners. The Stakeholder engagement was undertaken by both SAG and the MDG Center.

In the **Co-Planning** phase, the MDG Center used the information received during the stakeholder engagement process to facilitate the elaboration of LDPs with the respective local government entities, local community members and SAG.

For the **Validation** phase, the MDG Center engaged with all stakeholders again to ensure that everyone endorsed the outcomes of the co-planning phase. The draft-LDPs were reviewed by all stakeholders and comments/recommendations were taken into account.

All of these steps involved very practical and logistical challenges, such as organizing the venues where the stakeholders could meet and providing food and travel reimbursements to participants living farther away from the meeting place, among others. Moreover, the MDG Center tried to ensure that all stakeholders were represented. For example, the MDG Center ensured that women were represented at these meetings.⁹⁵

2.5.2. *Post-CDA involvement and cooperation*

While the literature suggests that the cooperation between the communities, companies and civil society is an important aspect of any local development regime, there is a lack of specific guidance for how this cooperation should work in practice.⁹⁶ Such cooperation is desirable as it can improve the relationship and understanding among the parties and also increase the expertise available to the development regime. The development processes of the current regime, as defined in the CCL, already provide for cooperation with third parties (Article 520)⁹⁷. The cooperation between the *Communes* and the MDG Center is an example of such cooperation.

⁹⁵ In addition to the Scope of Work document, discussions with the MDG Center provided information about the MDG Center's approach to stakeholder cooperation.

⁹⁶ WB (2012) Mining Community Development Agreements: Source book (p. 26, p. 44).

⁹⁷ Pursuant to Articles 514 and 520, *Code des collectivités locales*, cooperation between the Communes and third parties is encouraged regarding the elaboration of the needs assessment and the LDPs:

Article 514, *Code des collectivités locales*: Le diagnostic socio-économique local est élaboré par les services de l'administration locale, sous la responsabilité de l'exécutif de la collectivité.

L'autorité exécutive locale peut, avec l'autorisation du Conseil, sous-traiter tout ou partie des études de diagnostic socio-économique local, ou conclure des ententes pour la réalisation de ces études avec des organisations d'appui compétentes. L'autorisation du Conseil à cet effet peut être conférée a priori par délégation à l'autorité exécutive locale;

Article 520, *Code des collectivités locales*: L'autorité exécutive locale peut, avec l'autorisation du Conseil, sous-traiter tout ou partie de l'élaboration du plan de développement local, ou conclure des ententes pour son élaboration avec des organisations d'appui compétentes. L'autorisation du Conseil à cet effet peut être conférée a priori par délégation à l'autorité exécutive locale.

While mining companies' expertise and financial resources can contribute to the development regime, there is the risk that mining companies will disproportionately influence the decision making process. This becomes a problem when the mining companies' development/investment agenda does not align with or account for the needs of the local communities. Therefore, the role of the company needs to be carefully determined, relying on the strengths of the company while also ensuring that the company cannot solely determine the projects that will be supported. Mining companies are often more capable in project management and monitoring and evaluation. Thus, even if a company is not given the right to determine the projects that will be financed, it can play a leading role in these areas. In particular, the company could assess what project management skills the CPD and communes lack and on this basis, identify a third party that could provide on-going support and training in project management to the CPD and communes. The third-party could be financed out of the development tax. Once sufficient expertise is developed at the CPD and communes, the support can be scaled back accordingly. Requiring CDA activities to be aligned to the LDPs provides additional safeguards to ensure the process serves the development needs of the community.

Civil society also has a role to play, though it has not been provided for in the draft Ministerial Order. As lack of cooperation between all stakeholders has caused problems in the past, institutionalizing such cooperation is important. Regular meetings of a multi-stakeholder group with a clear agenda could help to ensure more successful cooperation. The organizational setup of the Palabora Foundation (see Box 17) provides a good example of the importance of regular interactions among all stakeholders in CDAs.

The FODEL Decree and the Model CDA contain several provisions that require and enhance the cooperation between the stakeholders. It gives CPD a prominent role in the coordination of the development regime. Even though it is not clear how it will be composed, based on the experience of the current CPD, it can be assumed that the future CPD will also include different stakeholders, such as representatives from the *Communes*, the *Préfecture*, the mining companies and civil society. The stakeholders would therefore have a voice in the allocation of the development tax and could provide their input for the coordination of the development agenda in the *Préfecture*. These stakeholders would also be involved through the CPD in the monitoring of FODEL. As the *Communes* are going to be responsible for the management of FODEL, these should have a restrictive role in the monitoring and evaluation process. Rather

than having the right to veto or influence the outcome of the monitoring and evaluation process, the *Communes* should only be present for consultative purposes.

Regarding stakeholder cooperation in elaborating the development agenda and the execution of development projects, Article 3.1.4 of the Model CDA provides some guidance: the mining company has to support the *Commune* in the “conception, execution and monitoring of the projects”.⁹⁸ Further, Article 3.2.7 of the Model CDA requires the *Commune* to hold a monthly meeting with the mining company.

Beyond the cooperation already provided for in the FODEL Decree and the Model CDA, it would be useful to extend such cooperation requirements to the civil society. The CPD might serve as a forum for the cooperation at the Préfecture-level. A multi-stakeholder committee should serve as a forum to enable cooperation, as well as to support the implementation of the development agenda at the local level.

Box 17: Involvement of mining companies in local development – The Palabora Foundation

The Palabora Foundation (Foundation) was setup in 1986 by the Palabora Mining Company (Palabora), a large-scale copper mine in northeast South Africa in which Rio Tinto owns a 57.7 percent interest, to assist communities within a 50km radius of the mine. The Foundation was financed by a launching grant from Palabora and the commitment of annual contributions worth 3 percent of net profits. To guarantee the long-term financial sustainability of the Foundation, an Administrative Reserve Fund was set up; since 2001, the operational cost of the Foundation has been covered by the interest earned on this fund. The community development programs have evolved over the years and currently focus on three main streams, namely education, health and economic development. The latter includes business development training courses and skill development programs in masonry, carpentry, food preparation and garment production. In 2008, the Global Business Coalition recognized the Foundation for its contribution towards tackling HIV/Aids in the region⁹⁹.

The success of the Foundation can partly be traced back to organizational setup and the involvement of different stakeholders. The Foundation is governed by a Board of Trustees, which meets on a quarterly basis to review the progress of the programs. The Board is composed of three high-ranking Palabora representatives; the director of the Foundation, who manages the day-to-day activities; and four representatives from the

⁹⁸ Article 3.1.4., Model CDA : « Appuyer les autorités locales dans leurs efforts de conception, d’exécution et de suivi des projets à long terme visant à promouvoir l’après mine... »

⁹⁹ <http://www.miningweekly.com/article/global-business-coalition-lauds-palabora-foundationrsquos-hiv-aids-work-2008-06-20>

community, three with backgrounds in relevant work streams (education, health and business development) and one traditional leader to ensure the transfer of information to the traditional authorities. An audit committee composed of Pricewaterhouse Coopers as external and SAB&T as internal auditors ensure good corporate governance of the Foundation¹⁰⁰.

Once a year, the Foundation meets with all relevant stakeholders to discuss its activities and update its strategy. The stakeholders include representatives from the local and provincial government, local communities, the Chamber of Business, the Trade and Tourism Council and traditional councils. During these meetings, future projects are proposed and, if agreed upon, these projects are aligned with municipal and provincial development plans.¹⁰¹

2.5.3. Third-party funding and cross-Commune border cooperation

In discussions with the Government, SAG has indicated that it would appreciate if the LDF included a mechanism that allows for third party funding for large infrastructure cross-*Commune* projects such as main roads. Since these infrastructure projects involve more than one *Commune*, a mechanism should be created that allows for cooperation of the mining companies at the inter-*Commune*-level, such as the *Conférences Inter-Collectivités* or *Regroupements* described above. With mechanisms for third-party funding and cross-*Commune* cooperation, SAG has indicated that it would be willing to contribute additional funding to projects that align with SAG's business interests. By providing for third-party funding, successful projects can be expanded through, for example, donor support, thereby increasing the developmental impact (see an example in Box 12). Alternative funding sources could make up for local development tax contributions when mining revenues are low as demonstrated in the case of the Namibian Rössing Foundation (see Box 13).

2.5.4. Cooperation with newly qualified "local communities"

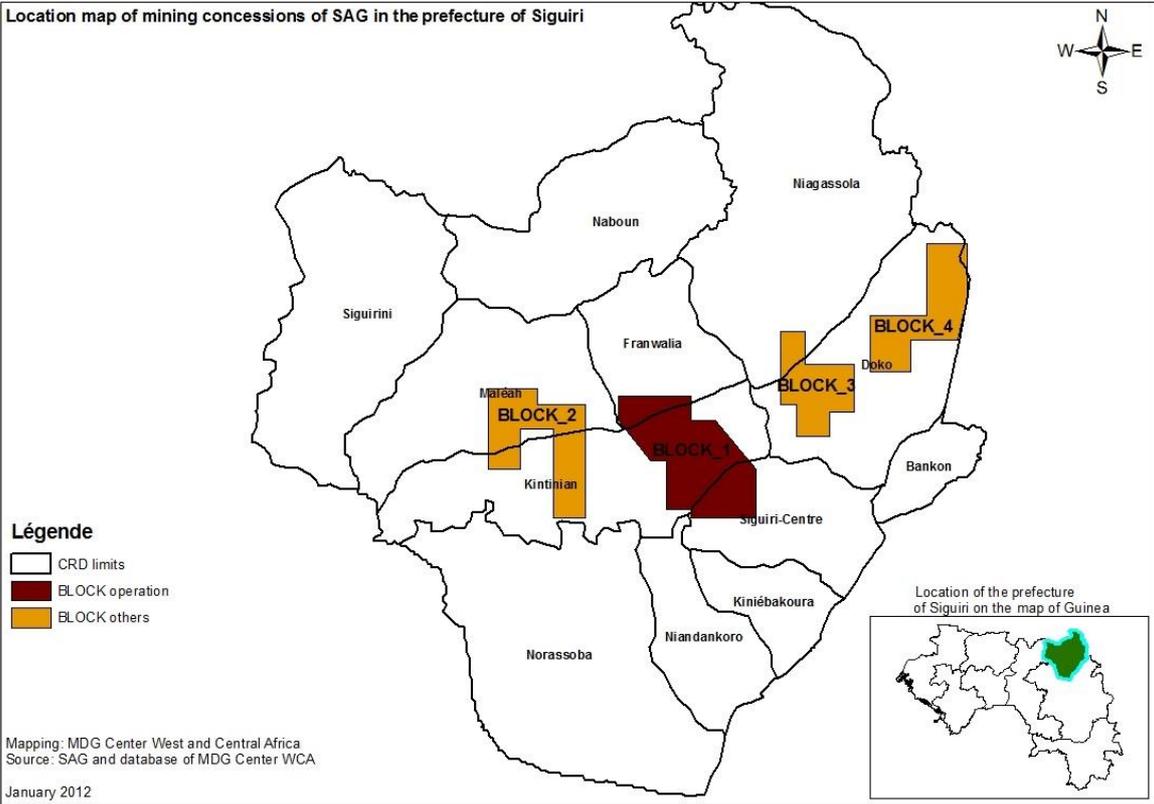
Irrespective of the final definition of "local communities" pursuant to Article 130 of the Mining Code, it will be important to ensure that new communities that qualify as "local communities", for example, those that become impacted at a later stage in the operations, to join the local development regime. These newly impacted *Communes* should be in a position to sign CDAs with the mining company as well. Map 2 shows different mining blocks where SAG might start operations in the future and that are located in areas likely to impact "new" local communities under Article 130. Since the regime will be aligned with the CCL, the cooperation mechanisms of *Regroupement* and *Conférences Inter-Collectivités*, for example, would allow new *Communes* to be integrated into the CPD and any framework agreements.

¹⁰⁰ <http://www.pafound.co.za/>

¹⁰¹ <http://www.pafound.co.za/>

The annual review of the definition of communities under the Ahafo Social Responsibility Agreement, described in Box 9 above, provides an example of a review mechanism that could be contemplated.

Figure 3: Communes affected by potential Siguiri expansion



2.6. Capacity building

Capacity building should be undertaken long before subnational revenue sharing is established and consequently also before the relevant CDAs are signed.¹⁰² In order to prepare for the negotiation of the CDAs and the elaboration and implementation of the development objectives, capacity-building processes should be started as soon as possible. Going forward, the decrees or regulations governing the CDA negotiation process could include capacity building as a first step.

Capacity building should be based on:

¹⁰² WB (2012) Mining Community Development Agreements: Source book

- 1) providing the *Communes* with the necessary expertise to successfully negotiate the CDA;
- 2) providing training on transparency, accountability, project appraisal, monitoring and evaluation principles to ensure that the LDF is managed according to the principles of the mining code; and
- 3) developing mid- and long-term capacity-building programs.

The FODEL Decree and the Ministerial Order only reiterate the broad requirement to provide for capacity building. The Model CDA provides some additional detail: the *Commune* must use the SPD to support and build the capacities of the local elected authorities, the members of the management committees and technical staff (presumably those at the *Commune*-level that implement the development projects, though this is not specified) and provide them with the tools to manage the resources of the *Commune* effectively¹⁰³. The Model CDA specifies that the capacity-building measures should focus on CCL and the mission of the *Communes*, the different organs of the *Conseil local*, the management of the responsibilities transferred to the *Communes*, budget management and planning, development of companies and the protection of the environment and management of natural resources.¹⁰⁴

2.6.1. Capacity building for CDA negotiations

The Model CDA deals with capacity building in respect of management and implementation of development projects. As the *Communes* may not necessarily have the expertise to negotiate the CDA on their own behalf, it is also important to support the *Communes* in this process. Even if mines are legally bound to provide 1% of turnover to FODEL and even if regulations get to a detailed level that limit the scope for negotiations, there is still a need for communities to be equipped with the right negotiation skills to ensure that the funded projects align with communities' development priorities and that the rights and obligations of both the mining companies and the *Communes* contribute to achieving these priorities. Each community will have different development needs and the regulations need to leave scope for the expression of each community's specificity in CDAs.

¹⁰³ Article 3.2.4, Model CDA

¹⁰⁴ Article 3.2.4i-vi, Model CDA

Mining companies are likely to have better knowledge of the technical and economic aspects of the mining operations, which are important to understand in order to develop CDAs.¹⁰⁵ It is difficult for the parties to agree on a sustainable management plan for the fund's resources if the operation plans and prospects of the mining companies are not known or understood. Preparing documentation to inform the stakeholders about production forecasts and potential eventualities could help alleviate this asymmetry. For example, knowing about the probability of revenue volatility would encourage stakeholders to include expenditure-smoothing measures.

Assisting communities with procuring independent expert advice is critical. The question as to who bears the costs for such advice is an issue that should be addressed in the relevant Ministerial Order. The current draft does not contain such a provision. Experience in different countries shows that the companies commonly cover the costs.¹⁰⁶ Even if external experts are hired to assist in defining the CDA requirements, it is important that the *Communes* are truly taking part in the discussions. This has to be seen as an important cornerstone in the cooperation between the mining companies and the *Communes*. The state could appoint an independent mediator to ensure due process.¹⁰⁷

Box 18: Capacity building before entering into CDA - Ahafo consultations¹⁰⁸

The Ahafo CDAs, between Newmont Ghana and local traditional leaders, took approximately 3 years to develop. Before the negotiations even started, there was a period of stakeholder engagement and capacity building, which was aimed at improving the technical skills of the communities in negotiating techniques and land ownership legislation, as well as communicating the aims of the CDAs and information about Newmont. Engagement was also targeted at identifying the individuals who would be responsible for representing the communities in the negotiations. This eventually involved 54 representatives from regional government, community groups and NGOs. The stakeholder engagement process included meetings with individual communities, as well as groups that represented specific stakeholders, such as women and youth. Feedback from stakeholders indicated that this process of capacity building and engagement was key to the issue of prior informed consent, as well as raising general awareness of the CDAs and their intention.¹⁰⁹

¹⁰⁵ The long-term strategy for the CDA, referred to in section 2.4., can only be developed when the parties understand the economic and technical parameters of the mining sector and the specific project.

¹⁰⁶ WB (2012) Mining Community Development Agreements: Source book (p. 18).

¹⁰⁷ WB (2012) Mining Community Development Agreements: Source book

¹⁰⁸ Environmental Resources Management, *Mining Community Development Agreements – Practical Experience and Field Studies* (p.26-27)

¹⁰⁹ Environmental Resources Management, *Mining Community Development Agreements - Practical Experience and Field Studies*

In addition to the capacity building, during the negotiations themselves, a lawyer represented the communities and a neutral professor who was an expert in the area moderated the negotiations. Feedback from both NGOs and Newmont representatives found this moderator important in the process, as they were able to offer suggestions of sustainable solutions to the various stakeholder groups when concerns were raised as to the potential impracticality or unsustainability of certain proposals.¹¹⁰

2.6.2. Long-term capacity-building programs

A dual approach that allows development of expertise while providing continuing support seems to be an appropriate way to achieve the capacity-building goals.¹¹¹ The experience of CECI is an example of such a dual approach: CECI not only helped to build capacities, but also supported the relevant institutions in the execution of the development projects. The support of the *Communes* allows, at least in theory, the execution of projects in a transparent and efficient manner even before the necessary capacities are built for the local institutions to implement the projects themselves. The goal is to support the local institutions while providing training, and then to transfer the responsibilities once the necessary expertise is available. The CECI experience with the CPD in Siguiiri suggests, however, that such transfer and integration of responsibilities into the existing regime is not self-evident.

A concrete example of a capacity-building project in the local development context is the cooperation between Programme d'Appui aux Communautés Villageoises (PACV), Agence Française de Développement (AFD), RioTinto and CECI in the *Commune* of Boké (see Box 19). This case also provides a useful example of a framework in which an external experts is hired for monitoring and evaluation purposes under the supervision of a multi-stakeholder committee.

¹¹⁰ Environmental Resources Management, *Mining Community Development Agreements - Practical Experience and Field Studies*

¹¹¹ The cooperation between MDG Center and the *Communes* to elaborate LDPs, a type of cooperation explicitly provided for in Article 520, CCL, is an example of such support of local capacities.

Box 19: Capacity-building projects – the PACV Rio Tinto Project in the *Commune* of Boké

The project aims to:

(1) Build capacities for the elaboration of a development agenda with concrete development projects. This includes elaborating a Socio-Economic Needs Assessment, a Local Development Plan and an Annual Investment Plan;

(2) The project aims to build capacities for the management and execution of the development agenda. This includes the creation of committees for the following aspects:

- 1) Committee for Management of the financial resources (CMFR);
- 2) Committee for Management of the tender offers (CMTO);
- 3) Committee for Monitoring of the execution of the development projects (CME);
- 4) Committee for Monitoring of the transparency of the management of financial resources (CMT); and
- 5) Committee for Management of disputes relating to tender offers and execution of the projects (CMD).

With the help of CMTO, every *Commune* hired an engineer to monitor the construction works of the development projects. At the end of each AIP, the engineer is evaluated by the CME. The members of the CME received trainings in order to develop the capacities to undertake this evaluation.

Pursuant to the PACV Guidelines on Tender offers, the CMTO is composed of a member of the *Conseil local* of the *Commune*; one elected authority of the *District* where the development project will be implemented; three members of civil society, among whom at least one has to be a one woman; three more representatives of the *Commune*¹¹² and the engineer. These members received training in order to develop the necessary capacities to prepare and evaluate a tender offer.

The members of the CMFR received trainings on the PACV Guidelines on Management, Finance and Accounting.¹¹³

Civil society can play an important role in providing support and capacity building for local stakeholders. With the assistance of an NGO, the commune could put in place a strong

¹¹² *Sécretaire général* (Secretary General) and *receveur communal* (Communal collector) and the *agent de développement local* (Local development agent).

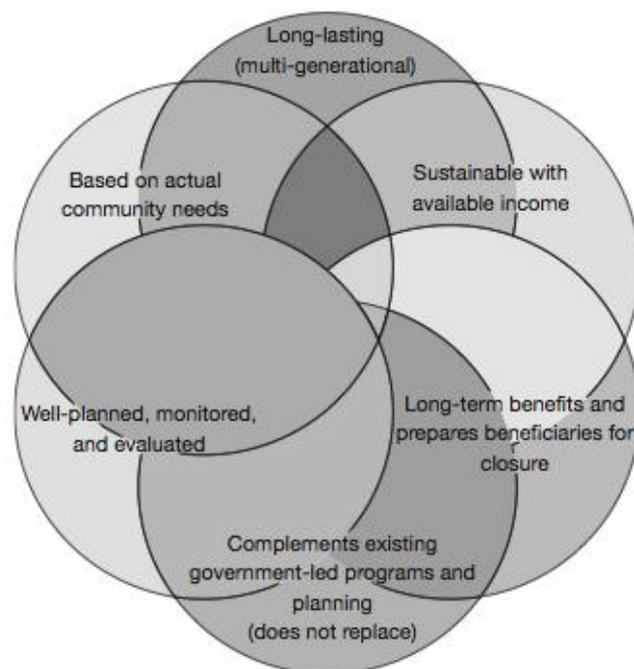
¹¹³ PACV Report (pp. 9-13).

monitoring and evaluation process whereby local experts are hired and are overseen by a multi-stakeholder committee.

2.7. Elements of the CDA process

In Guinea, no guidance currently exists regarding the process for entering into CDAs. The Ministerial Order addresses implementation in more detail, yet it could still be amended to provide further guidance. *The Ministerial Order should prescribe the process that must be followed in order to ensure that: (1) there is stakeholder engagement and capacity building prior CDA negotiations, (2) that representatives of the local communities are negotiating and executing CDAs, (3) that CDAs align with the LDPs, (4) that sustainability is taken into account in the project selection process, (5) that there is multi-stakeholder representation in determining projects to be funded under the CDAs, and (6) that there are appropriate monitoring mechanisms in place.* However, the CDAs should be articulated by the affected *Commune* so that its provisions are appropriate to the circumstances of the particular community. The Ministerial Order should not be too prescriptive in what must be included in a CDA, but should provide overall guidance to achieve the main principles outlined in Figure 4.

Figure 4: The main principles of CDAs



Source: WB (2012) Mining Community Development Agreements: Source book

A key issue to consider is the timing for entering into the CDA – whether this is done before or after the mining license is granted. From the Ministerial Order, it appears that the process of negotiating CDAs will occur immediately after the notification of the grant of rights. In contrast, the Development Forum in Papua New Guinea is an example of a process whereby stakeholders are given an opportunity to discuss the project prior to the granting of the mining license so that the views of affected parties can be taken into account in the decision to grant or not grant the license (see Box 20).

Box 20: Development Forum in Papua New Guinea

The mining legislation in PNG requires that before any mining licence is granted, the Minister must convene a “Development Forum”, in order to consider the views of those who will be affected by the project. The Minister is required to invite individuals to represent the project developer, the landowners, the national government, and the provincial government. While the representatives do not have a right to veto the grant of licence, the Minister may decide to refuse to grant the licence upon hearing their views.

According to commentary¹¹⁴, these Development Forums have created the space for resource development discussions and decision-making, and have ensured transparency in identifying benefits and accountability for mining projects. This has led to increased community support for the mining projects.

The outcome of the Development Forum is usually a Memorandum of Agreement (MOA) between landowners, provincial and national governments and the companies. These define roles and responsibilities of all of the parties, the breakdown of royalty distribution to communities and provincial governments, funding commitments by government and the companies, economic and social development plans (to be aligned with local development plans), environmental management and, more recently, the establishment of trust funds to manage the funding to the communities. Under the mining legislation, MOAs are now required for every project.¹¹⁵

Other issues to be considered include the circumstances in which the parties will be allowed to leave the CDA negotiation process. The limited causes for such withdrawal might be the company’s decision not to pursue its operations or the Government rescinding its support for

¹¹⁴ Environmental Resources Management, *Mining Community Development Agreements – Practical Experience and Field Studies*

¹¹⁵ Environmental Resources Management, *Mining Community Development Agreements - Practical Experience and Field Studies*

the project.¹¹⁶ A related issue is when the parties fail to reach an agreement. The Community Development Agreement Model Regulations and Example Guidelines suggest that the parties be referred to mediation and ultimately to the relevant political authorities.¹¹⁷

Grievance and feedback mechanisms should also be provided in the CDA to facilitate their implementation. While the Model CDA in Ministerial Order provides for ultimate dispute resolution when grievances cannot be settled “amicably”, it does not set out any particular mechanism for dealing with grievances before this point. Including such a mechanism could strengthen the Ministerial Order. This mechanism should be independent from the mining company. The grievance resolution body could be composed of multiple stakeholders, including local and traditional authorities, and should be integrated with existing mechanisms in both the *Communes* and the mining project. Therefore, some preliminary scoping of existing mechanisms is required before one is determined for the particular CDA. The mechanism should also be accessible to all stakeholders, in terms of language, literacy, geography and technology.¹¹⁸ In order to ensure efficiency, the mechanism could provide for assessment of the severity of grievances so that they can be dealt with accordingly. Box 21 provides some of the legal text of the Social Responsibility Agreement between Newmont and the Ahafo Community in Ghana related to the “Complaints Resolution Committee”.

Box 21: Complaints Resolution Committee at Newmont’s Ahafo mine

The Social Responsibility Agreement establishes a Complaints Resolution Committee that is “responsible for resolving any complaints relating to the implementation of this Agreement” (Article 14(1)). This is to be done using “dialogue and negotiation” (Schedule 3(1)).

The Complaints Resolution Committee is chaired by the Co-Moderator of the Agreement Forum¹¹⁹ and composed of four additional members of the Agreement Forum, two from the Company and two from the Community, appointed on an ad-hoc basis for each complaint by the chairman in consultation with the Standing Committee of Forum.¹²⁰

¹¹⁶ WB (2012) Mining Community Development Agreements: Source book

¹¹⁷ WB (2012) Mining Community Development Agreements: Source book

¹¹⁸ WB (2012) Mining Community Development Agreements: Source book

¹¹⁹ The Agreement Forum is composed of Representatives of the Community and the Company and it has the “oversight responsibility for implementing the Agreement” (Article 8). The members of the Forum appoint an external Moderator and Co-Moderator (Article 5).

¹²⁰ The Agreement Forum is seconded by a Standing Committee of Forum, a smaller committee that is composed of the same representatives (Articles 11-13).

The Complaints Resolution Committee “consider[s] and solve[s] any complaint” (Article 15(a)), reports all complaints and their outcome to Standing Committee of Forum (Article 15(b)) and makes recommendations for the review of complaints resolution policies (Article 15(c)). The complaints are lodged with the chairman (Schedule 3(2 a-c)).

The chairman appoints the members of the Committee within 10 days (Schedule 3(3)) and convenes a meeting within 30 days upon receipt of complaint (Schedule 3(4)).

Decisions are made by consensus or majority of the votes; the chairman decides in case of equal votes (Article 17(3)).

If the Complaints Resolution Committee is unable to resolve the complaint, it will be referred to a Standing Committee of Forum (Schedule 3(7)). If Standing Committee of Forum is unable to resolve the complaint, it will be referred to the Agreement Forum, whose decision will be final (Schedule 3(8)).

3. Conclusions and recommendations:

3.1. Issues to be considered for inclusion in the draft FODEL Decree and Ministerial Order

Definition of “local communities”

- The regulations should clearly define the communities that benefit from the LDF and enter into CDAs (i.e., provide a clear definition of “local communities” used in Article 130 of the Mining Code). Although the Annex to the Ministerial Order suggests that each *Commune* will enter into a CDA with the mining company, neither the Order nor the FODEL Decree specifically defines “local community”. A definition of “proximity” should also be included for the purpose of allocation of the LDF and the CDAs.
- Triggers should be defined in order to ensure that new communities that may be affected by an expanding mining project can be included in the development regime.
- To balance the decentralization goals of the Government with the need to spend mining revenues at the community level efficiently, it is suggested that mining companies sign individual CDAs with affected Communes (as required by the Ministerial Order), as well as an umbrella framework agreement with the new CPD. While the project decision-making process is kept with the Communes, the CPD (or another umbrella institution) could serve as a platform to discuss and coordinate the development agendas of the *Communes* in the *Préfecture*.

Allocation of mining revenues

- In order to allocate funding efficiently and foster sustainable development around the mine more broadly, it is recommended that spending should not be restricted to areas within the *Commune* that are close to the mine. The Decree should include a provision to make this allocation issue clear and indicate CPD’s role in determining the allocation of the funds amongst and within the *Communes*.
- While Article 130 (development tax/LDF) could serve to alleviate tensions between the mining companies and the local communities and help to build harmonious relationships, Article 165 could provide for the sharing of mining revenues more broadly, with communities that do not benefit from the LDF. This redistribution mechanism should be clearly defined.

Revenue management of the LDF

- The Decree should contemplate mechanisms to smooth local expenditure. This can be done either through a local stabilization fund or the adjustment of national transfers to the *Commune* level depending on mining revenues.
- Third party funding should be allowed for projects that are aligned to development priorities and proposed by communities

Determining and managing projects under the LDF

- The FODEL Decree should make clear what is meant by “projects creating revenue generating activities” as this sentence might severely limit the project selection even if aligned with the LDPs.
- A multi-stakeholder committee at the *Commune*-level should be established to determine projects to be funded under the LDF, in line with the CDAs and the LDPs. This could include community representatives (including those from diverse groups within the communities), local government representatives, national government representatives, civil society and company representatives. The mining company’s role could be particularly focused on supporting the management of projects that are selected. In particular, the mining company could provide a gap assessment that identifies areas where the local authorities need training to make efficient use of the FODEL funds and help identify external assistance to provide on-the-job capacity building. This assistance should be temporary and aimed at skill transfer. The capacity building costs could be paid out of the development tax. In the current draft, the FODEL Decree does not address this issue and the Model CDA provides only for the participation of the mining companies in supporting the *Commune* in the conception, execution and monitoring of the projects.
- Regular meetings of this multi-stakeholder committee, similar to the monthly meeting by the company and the *Commune* provided for in the model CDA, should be required in order to review and update plans.
- In addition to these regular meetings, there needs to be effective coordination among the *Communes*. Beyond the monitoring function, the FODEL Decree and the regulation that will set up the CPD should emphasize CPD’s coordination role. While the CPD would not necessarily be vested with formal decision-making powers, it could provide inputs to the *Communes*. Tasks could include publishing the budgets,

preparing the LDPs and AIPs of the *Communes*, publishing reviews of the development approaches of the different *Communes*, monitoring the impact of the projects, identifying best practices, identifying qualified third parties that the *Communes* could cooperate with and/or elaborating guidelines for tender offers.

- A participatory negotiation and implementation process is important in order to take into account the views of all stakeholders. Such a process sets the basis for a more productive cooperation with external stakeholders like companies and development partners. This could increase support for the mining project and therefore decrease the likelihood of conflict.
- The LDPs of *Communes* that benefit from the LDF should be adapted to fulfill the objectives of the Article 130 of the Mining Code and include mechanisms that guarantee the long-term sustainability post-mine closure. Even though LDPs are only 5 years long, the concern for post-closure sustainability should be clearly embedded in the CDA and carried from one LDP to the next. The requirement to take the long-term, post-mine closure perspective into account is stated in both in the FODEL Decree and the Model CDA.

CDA process

- The Ministerial Order, in providing a model CDA, provides detailed guidance on the terms of the CDAs. More flexibility is needed to ensure that the particular projects and development objectives can be specific to the circumstances of each *Commune* that enters into a CDA.
- It is recommended that the Ministerial Order be expanded to provide a framework for the process of negotiating the CDA and for its implementation.
- The timing for the negotiation of the CDA is specified to commence after the notification of the award of mineral rights, yet it would be preferable to incorporate the CDA process before the grant of the mining license. This would allow the government and the company to hear the community's views, and could increase the community's support for the project. Of course, for the mining licenses already in existence, this timing is not possible. All other regulations relating to the processes for negotiation of CDAs (outlined below) should, however, be followed for these mining licenses.
- Apart from including the communities, it would be beneficial for representatives of both the local and national government (through the CPD) to be involved in the

discussions leading to the CDAs, in order to ensure that regional and national planning priorities are aligned with the priorities identified in the CDA. The CDA can also assign roles and responsibilities to the local and national government. The Model Convention does assign a role to the *Collectivité locale* (Article 3.2), which is important to ensure that it is also involved in providing programs for community development, which in turn enables sustainability. The responsibilities of the mining company and the *Collectivité locale* should be adaptable, so that the prescribed functions can be tailored to the particular circumstances and requirements of each *Commune* that enters into a CDA.

- The Ministerial Order should be expanded to require stakeholder engagement. This is useful to raise awareness of the project and the need for the CDA.
- It is important that the engagement process includes all groups in the communities. In addition to ensuring that the views of all these groups are taken into account, this can also assist in identifying the individuals who will be responsible for negotiating the CDA as representatives of the community, so that all members of the community will support the CDA and benefit from it. The Ministerial Order provides that the President of the relevant *Collectivité locale* will sign the CDA. It is important that the necessary engagement and consultation with the community occurs before the President signs the CDA, in order for the agreement to represent the interests of the community.
- The Ministerial Order should require capacity building prior negotiations. This capacity building should aim to improve the skills of the communities in negotiating CDAs as well as in articulating development priorities.
- The above processes all take a significant amount of time. The Ministerial Order currently requires CDAs to be signed within six months for existing conventions and three months for those that do not have existing conventions. This time period may not be sufficient. The Ministerial Order should not constrain the period of time required to ensure effective capacity building and engagement.
- An independent mediator should part in the negotiations.

3.2. Institutional arrangements to complement regulations

While both the Mining Code and the CCL contemplate increased transparency, accountability and efficiency, it is important that processes and institutions are put in place that ensure this

goal is met. Capacity building will be needed to ensure that the institutions and relevant stakeholders are able to undertake their roles.

- A monitoring mechanism should be established to monitor the outcomes of the LDF projects and the CDA processes and projects. The party responsible for monitoring should have a degree of independence from the parties involved in determining and implementing the projects.
- Apart from project-specific monitoring tools, broader development indices such as the Millennium Development Goals should be included to measure the effectiveness of the projects under the CDA.
- The regulations should specify a monitoring process for the implementation of the projects. The current draft regulations provide for two levels of monitoring. The first level (CPD in cooperation with companies) monitors how the *Communes* manage the development tax, but only with respect to accounting standards and the project selection; the implementation of the projects is not monitored at this level. The second level (National Committee) monitors the overall development regime.
- MATD and MoM should specify the National Committee's role in the Ministerial Order.¹²¹ It is currently not clear whether the National Committee is intended to monitor specific development projects, or whether it plays a role similar to CPD but at the national level. One role that could be played by the National Committee is to ensure that development projects selected under FODEL and established under CDAs align with national planning priorities.
- While the current drafts provide for cooperation in the monitoring process, this cooperation only includes the mining companies and SPD. The cooperation should be extended to other stakeholders, such as representatives from civil society. Civil society could be represented within the CPD, as is the case in the current CPD. Civil society can play an important role in monitoring the LDF and CDA processes, as well as providing support and capacity building for local authorities.
- Once cooperation mechanisms are established, a multi-stakeholder committee could be set up to oversee the work of local experts hired for specific tasks of the monitoring and evaluation process.

¹²¹ This is a Ministerial Order by MATD and MoM, different from the CDA Ministerial Order.

- In order to foster the cooperation of the companies and the *Communes* with civil society, the CDA should also provide for their presence at the monthly meeting under Article 3.2.7, Model CDA.
- Documents related to the selection, evaluation and monitoring of projects should be made publicly available in a form that can be understood by the local communities. This should be also the case for the CDAs, LDPs and any other documentation related to the development funding. The FODEL Decree currently contemplates publication of the contributions by the mining companies to the LDF, and the Ministerial Order requires that CDAs to be made accessible to the public. This should be expanded to any documentation related to LDF funded projects. A publicly accessible website could be created to act as a repository of this information. The information should also be available for public access within the affected *Communes*. This could be done at the office of the *Maire/Président* or the *Sous-Préfet*.
- The Model Convention requires the company to develop a communications plan to provide information regularly to the community.¹²² This communication plan should be subject to approval by the CPD to ensure that the plan and all communications under it are appropriate for the skill level of the communities. Compliance of the agreed plan should be monitored.

¹²² Article 3.1.2, Model Convention

Annex 1: References and meetings

Documents:

2011 Decree on CPD (CPD Decree);
CPD Bilan activités, 2011-2012;
CPD Discours préfet, 2012;
CPD Discours président conseil préfectoral, 2012;
CPD Rapport d'évaluation, 2011, (CGA Report);
CPD Rapport synthèse, 2012;
DIALLO (CECI)_PDS de Siguiri (2008), (CECI Presentation);
Mbodj_Enjeux de gouvernance territoires et acteurs mines d'or (2010);
PACV Report on capacity building in Boké, 2012 (PACV Report).

Publications:

Assessing Oil, Gas and Mineral Revenue Management: An Advocate's Toolkit, The Revenue Watch Institute, July 2011;
Community Development Agreement Model Regulations & Example Guidelines, World Bank, 2010;
Evaluation du contexte institutionnel de la décentralisation et du système administratif en Guinée, MDG Center, March 2012;
International Experience with Benefit-Sharing Instruments for Extractive Industries, Carolyn Fischer, Resources for the Future, May 2007;
Lettre de Politique Nationale de la Décentralisation et de Développement Local, 2011;
EI SourceBook, Good Practice Note on Community Development, 2011;
Mining Community Development Agreement, Source Book, World Bank, March 2012;
RWI (2012), Draft Subnational oil, gas and mineral revenue management.

Meetings:

Meeting with Representatives of Kintinian 18 April 2013;
Meeting with CPD, 19 April 2013;
Meeting with NGO Hère, 19 April 2013;
Meeting with MATD, 23 April 2013;
Meeting with CRDS, 23 April 2013;
Meeting with MoM, 24 April 2013;

Meeting with Fanta Conde (CECIDE), 26 April 2013;

Meeting with PACV, 26 April 2013;

Meeting with PROJEG, 30 April 2013.

Annex 2: Capacity building methods¹²³

Method	Capacity Issue(s) Addressed	Description
<i>Provide financial and logistical assistance</i>	Time and resources are needed for community members and representatives, and other stakeholder groups, to participate in the discussions, negotiations, and consultations required to develop a CDA. Some may be better able to manage this process than others, but it is likely that at least some will need support.	Companies (and potentially government) should be prepared to underwrite some costs of the agreement-making process. This may need to be discussed and agreed at the start of the engagement process. May include financial contributions to support administrative, travel, staffing costs, etc., to enable participation. May also include logistical support such as the provision of transportation to/from meetings.
<i>Help communities access independent expert advice</i>	Technical skills, knowledge, and expertise may be lacking among qualified communities and other stakeholders, including those skills related to environmental, social, and engineering disciplines. Without this knowledge, these groups are poorly placed to comment on or accept the potential impacts of a project.	Information and conclusions provided by the company and its consultants may be viewed by communities with skepticism or mistrust. Thus, the best approach may be to provide financial resources to communities and stakeholder groups so that they can choose their own experts to verify data and provide recommendations, as well as obtain legal advice.
<i>Provide training related to agreement-making and negotiation processes</i>	Community members and leadership may not have experience with formal negotiation procedures, and will not be able to effectively participate in the negotiation process without these skills. It is important that the principles and procedures that will guide the CDA development process are mutually accepted and understood.	Training can be provided to improve communities' and stakeholders' understanding of interest-based discussions, the importance of negotiating in good faith, the process and requirements of participating in multi-stakeholder dialogue and roundtable discussions.
<i>Ensure a good understanding of the project</i>	The negotiation process will be supported if all participants are informed and have an equal understanding of the project and associated information. This includes knowledge of the extractive processes, impact pathways, and the drivers and constraints of responsible mine development and corporate behavior.	Community awareness and understanding can be facilitated by providing informative materials in the local language(s), using clear and simple terminology, and visual aids and presentations. Other methods may include site visits, and helping communities to connect with other communities that have experience with similar developments. These activities may have more credibility if led by an external organization (e.g., NGO, government, land council).
<i>Appoint independent mediators</i>	If a community has had little or no prior experience dealing with extractive industries and companies, there may be concerns about potential power imbalances in the negotiation process.	Power imbalances (real or perceived) can be addressed by the appointment of independent, skilled mediators. Ideally, the state should take responsibility for appointing and funding mediators, but they may or may not have the capacity (or the trust of the communities) to do so. If the company decides to take on this role, it is important that the mediating party be clearly seen as independent from the company, and accepted by the community.

¹²³ World Bank (2012), Mining Community Development Agreements: Source Book

<i>Fund initiatives to improve local governance capacities</i>	If local governance capacities are lacking, the long-term success and implementation of a CDA, as well as the overall stability of the community, may be affected.	Companies may consider longer-term strategies to develop local governance, such as supporting reputable organizations to work with local communities to strengthen governance processes and representative structures. Specific activities might range from the resolution of long-standing disputes and conflicts within/between communities and groups, to providing practical assistance setting up and resourcing representative bodies.
<i>Networking, partnerships, exchanges, and creation of new entities</i>	Sharing of information and resources can be promoted through networking and potential partnerships among and between communities, civil society, etc., thus enabling all parties to more effectively engage in the CDA negotiation and development process.	Connecting communities, organization, and individuals through formal and informal affiliations can help to expand service delivery, improve information sharing, set performance standards, and empower vulnerable groups. New entities, such as co-ops, councils, and common interest groups can also help achieve these goals.
<i>Training and skills development</i>	Specific capacities and skills which are lacking can be developed through formal or informal training and skills development programs.	Training and skills development can be supported by companies in a variety of ways. Benefits can be as simple as having company staff act as role models, coaches, or mentors to emerging community leaders to help develop local leadership skills. The same can apply to technical expertise, such as human resources, trades, geologists, and researchers. More formal programs may include support for external experts to provide training to local service providers (health, education, social services) to strengthen the quality and number of available services.