



# Recovering From COVID-19 In the Mining Sector:

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## Can Community Engagement be a Catalyst for Growth?

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## Abstract

The COVID-19 oil crash put Nigeria in an economic bind as demand plummeted and the country, one of the world's largest oil producers, slashed production. At the same time, the process of building back in the aftermath of COVID-19, provides the government of Nigeria with new opportunities to diversify and transition towards a more resilient economy. The mining industry, as stated in the Economic Recovery and Growth Plan has the ability to play a catalytic role in boosting up the economy. In achieving this growth, specific attention must be paid to the rights and opportunities of local communities.

Issues of conflict and insecurity arise when the prosperity fueled by the extraction of minerals and fossil fuels is not shared with the communities impacted by the operations. Such communities are often worse off as a result of environmental degradation and pollution and loss of livelihoods; to name a few. This report looks specifically at the implementation of Community Development Agreements (CDAs), and to what extent successful community engagement can attract increased private sector investment.

CDAs can be a vital mechanism for ensuring that local communities' benefit from mining investment projects. Under the Nigerian Minerals and Mining Act of 2007, CDAs attempt to ensure these benefits, but there is currently little adherence or oversight. The following report seeks to inform the Solid Minerals Development Fund (SMDF) about international practices and provide a set of recommendations to help mining companies successfully secure community acceptance and partnership for their projects.

## Acknowledgments

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Any errors and omissions are solely the responsibility of the Capstone team.

## Abbreviations

|                 |  |
|-----------------|--|
| <b>1999 Act</b> | <b>1999 Minerals and Mining Act</b>                      |
| <b>2007 Act</b> | 2007 Minerals and Mining Act                             |
| <b>AfDB</b>     | The African Development Bank                             |
| <b>ASM</b>      | Artisanal and small-scale mining                         |
| <b>CDA</b>      | Community development agreement                          |
| <b>EIA</b>      | Environmental impact assessment                          |
| <b>EITI</b>     | Extractive Industries Transparency Initiative            |
| <b>EPA</b>      | Environmental Protection Agency of Ghana                 |
| <b>ERGP</b>     | Economic Recovery and Growth Plan                        |
| <b>ESG</b>      | Environmental Social Governance                          |
| <b>FDI</b>      | Foreign Direct Investment                                |
| <b>GMDA</b>     | Ghana Minerals Development Fund Act                      |
| <b>GMMA</b>     | Ghana Minerals and Mining Act Law                        |
| <b>GMOU</b>     | Global Memorandum of Understanding                       |
| <b>IFC</b>      | International Finance Corporation                        |
| <b>MCO</b>      | Mining Cadastre Office                                   |
| <b>MIREMCO</b>  | Mineral Resources and Environmental Management Committee |
| <b>MMSD</b>     | Ministry of Mines and Steel Development                  |
| <b>MOU</b>      | Memorandum of Understanding                              |
| <b>NDDC</b>     | Niger Delta Development Commission                       |
| <b>NEITI</b>    | Nigerian Extractive Industries Transparency Initiative   |
| <b>NGO</b>      | Non-governmental organization                            |
| <b>NMC</b>      | Nigerian Mining Corporation                              |
| <b>NRGI</b>     | Natural Resource Governance Institute                    |
| <b>PWYP</b>     | Publish What You Pay                                     |
| <b>SMDF</b>     | Solid Minerals Development Fund                          |
| <b>SRA</b>      | Social Responsibility Agreement                          |
| <b>SSML</b>     | Small Scale Mining Lease                                 |
| <b>TRIMs</b>    | Trade-Related Investment Measures                        |
| <b>WTO</b>      | The World Trade Organization                             |
| <b>IMCIM</b>    | Inter-ministerial Committee on Illegal Mining            |
| <b>CBA</b>      | Cost Benefit Analysis                                    |

## Definitions

**Community Development Agreement (CDA):** A Legal agreement that sets out how the benefits of an investment project will be shared with local communities. CDAs can be helpful in formalizing relations between a local community and an investor, and establishing a mechanism by which local communities can receive social and economic benefits from large-scale investment projects.<sup>1</sup>

**Environmental, Social, and Corporate Governance (ESG):** ESG is a term that integrates the concept of sustainable, socially responsible activities. The term is usually used in investment field, but in this report is it referred to sustainable development and company's social responsibility.<sup>2</sup>

**Foreign Direct Investment(FDI):** Foreign Direct Investment describes investments made by non-domestic company, who usually holds more than 10% shareholding rights<sup>3</sup>. FDI Investments can be classified into greenfield investment or brownfield investment, meaning company build facilities by their own or lease facilities specifically.

**Local:** It can be defined narrowly, to focus only on the geographic area and population living around a specific mine site. In this context, “local employment” refers only to jobs available for people originating in that particular area. Similarly, only suppliers originating from the impacted community would qualify as “local suppliers.”<sup>4</sup>

The term “local” can also have a broader definition, where the latter is associated with (a) nationality or citizenship, in the case of employment; (b) business registration and/or headquarters, ownership and/or control of capital, in the case of firms. This gives rise to various scenarios where firms may be considered “local” if they are locally based but foreign owned, locally based and locally owned or locally owned but foreign-based; and (c) value addition, when a percentage of locally sourced inputs are used in the manufacturing process or when the raw material is used as an input for further transformation by local industries. Value addition is sometimes used as a proxy for “locally based” and/or “locally owned.”<sup>5</sup>

**Ownership:** Requiring foreign firms to enter into joint ventures with local firms or to open equity to local partners to obtain licences. The aim is to ensure that sectors of national interests are

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<sup>1</sup> Kendra E. Dupuy, “Community Development Requirements in Mining Laws,” *The Extractive Industries and Society* 1, no. 2 (November 1, 2014): 200–215, <https://doi.org/10.1016/j.exis.2014.04.007>.

<sup>2</sup> MSCI, “What is ESG”, <https://www.msci.com/our-solutions/esg-investing/what-is-esg>

<sup>3</sup> OECD Library, “FDI Definition”, [https://www.oecd-ilibrary.org/finance-and-investment/foreign-direct-investment-fdi/indicator-group/english\\_9a523b18-en](https://www.oecd-ilibrary.org/finance-and-investment/foreign-direct-investment-fdi/indicator-group/english_9a523b18-en)

<sup>4</sup> Dupuy.

<sup>5</sup> Dupuy.

not entirely foreign owned or to help the development of “national champions” through transfer of skills, know-how, or technology.<sup>6</sup>

**Artisanal Mining:** There is no universally applicable definition of artisanal mining. Countries vary in their legal and local definitions of artisanal mining. For the purposes of this report, the paper draws from the vocabulary used by Pact, an international nonprofit development organization that has done extensive work related to formalization of artisanal and small-scale mining. The report uses four factors to distinguish artisanal from small-scale mining: size, production technique, professionalism, and financing. Artisanal mining is typically performed on small, shallow mineral resources and miners use rudimentary techniques, generally manual, to access the ore. Artisanal miners do not necessarily view mining as a professional business: mining may be an occasional, supplementary, seasonal, or full-time activity. Capital investments in artisanal mining are negligible.

**Small-scale mining:** As above, there is no single definition of small-scale mining. For the purposes of this report, the report defines small-scale mining as follows. Small-scale mining is typically performed on mineral resources that require some degree of mechanization to make it cost-efficient to access them.<sup>7</sup> Small-scale miners employ machinery, generally view mining as a business activity to be performed full-time, and are more likely to receive some degree of financing to support their activities.<sup>8</sup>

**Illegal mining:** Mining activities that violate national law or do not operate according to national regulations. Individual countries define what constitutes “illegal” mining in various ways and, in many cases, there may be a blurred line between illegal and informal mining (for example, when miners operating outside the legal system trespass on valid and active licenses).<sup>9</sup>

**Informal mining:** can be both legal or illegal. Informal mining activities are outside of the formal economy and hence “are not organized in or effectively represented by a legal entity; do not receive governmental support; or do not benefit from enforcement of policies that enable them to understand and comply with the requirements set in national regulations”.<sup>10</sup>

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<sup>6</sup> “Designing Local Content Policies in Mineral-Rich Countries,” n.d., 57.

<sup>7</sup> Ciaran O’Faircheallaigh, “Community Development Agreements in the Mining Industry: An Emerging Global Phenomenon,” *Community Development* 44, no. 2 (May 1, 2013): 222–38, <https://doi.org/10.1080/15575330.2012.705872>.

<sup>8</sup> O’Faircheallaigh.

<sup>9</sup> Jennifer Loutit, Jacqueline Mandelbaum, and Sam Szoke-Burke, “Emerging Practices in Community Development Agreements,” *Journal of Sustainable Development Law and Policy (The)* 7, no. 1 (July 26, 2016): 64–96, <https://doi.org/10.4314/jsdlp.v7i1.4>.

<sup>10</sup> Dupuy, “Community Development Requirements in Mining Laws.”

**Middlemen:** Middlemen buy minerals from artisanal miners and bring it to market by selling the mineral to a buyer. They often engage in other activities as well. It is, for example, common for middlemen to provide small loans to miners.<sup>11</sup> It is important to note that the term middlemen encompass a wide range of actors. While many middlemen around the world are from the same community as miners, others are foreign nationals. Some middlemen, moreover, operate formally within national legal systems while many other operate informally and some engage in criminal activity.<sup>12</sup>

**Affected/Host Community:** A community that is directly affected by a mining project, usually referencing the social, economic, and environmental effects of a project. This definition is not narrowly tailored or limited to a specific geographic location, but rather refers to the proximate cause of specific acts or actions associated with the entire mining chain.<sup>13</sup>

**Free, Prior, and Informed Consent:** The right of accepting (agreeing to or rejecting) the implementation of a project that has more than an insignificant impact on the affected communities that is:

1. Free: given without coercion, intimidation, manipulation or corruption;<sup>14</sup>
2. Prior: sought before every significant stage of the project;<sup>15</sup> and
3. Informed: all parties share information, have ready and easy access to information in a form that is understandable, and have enough information, including on all impacts of the project on the parties, and capacity to make informed decisions.<sup>16</sup>

**Social License to Operate:** The concept of social acceptance and approval between an affected community and a mining company, where the company has the requisite legitimacy, credibility, and trust to begin or continue operations.<sup>17</sup>

**Mining Project:** lawful set of undertakings to be carried out involving the extraction of valuable minerals or other geological materials from the Earth.<sup>18</sup>

**Mineral Resources and Environmental Management Committee (MIREMCO):** To apply the regulatory frameworks that are essential for proper functioning in the sector and for the

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<sup>11</sup> Dupuy.

<sup>12</sup> Dupuy.

<sup>13</sup> James M. Otto, *Community Development Agreement*, Mining, Oil and Gas (World Bank, 2010), <https://doi.org/10.1596/27729>.

<sup>14</sup> Otto.

<sup>15</sup> Otto.

<sup>16</sup> Otto.

<sup>17</sup> Kristi Disney Bruckner, "Community Development Agreements in Mining Projects," *Denver Journal of International Law and Policy* 44 (2016 2015): 413.

<sup>18</sup> Dupuy, "Community Development Requirements in Mining Laws."



realization of the mandate of the committee and the major responsibility for the direction and regulation of the mining the Nigeria.

## I.Executive Summary

This report is the academic product of a Spring 2021 Capstone Workshop (Capstone) at the School of International Public Affairs at Columbia University (SIPA). The Capstone team, the authors of this report, consisted of 5 students from SIPA and two students from Columbia Law School. It reflects research and analysis conducted between January and April 2021. The Capstone is supervised by SIPA faculty advisors Christine Capilouto and Jenik Radon.

The Government of Nigeria, as detailed in the Economic Recovery and Growth Plan (ERGP), has decided to place a strategic focus on solid minerals in an effort to diversify the economy. As part of this effort, the government instituted the SMDF.<sup>19</sup> The SMDF is a fund that was created in the 2007 Minerals and Mining Act (the 2007 Act) to catalyze growth in the solid minerals sector. The 2007 Act tasks the SMDF with developing the human and physical capacity of the sector; funding geo-scientific data gathering, storage, and retrieval; equipping mining institutions to perform their statutory functions; funding extension services to artisanal and small-scale mining (ASM) operators; and providing mining infrastructure.<sup>20</sup>

The initial scope of work for the Capstone team was to assist the SMDF with promoting international investment in the mining sector as well as research possibilities of using the industry as a post COVID-19 development tool. The SMDF specifically indicated its efforts and policy objectives to attract foreign direct investment (FDI) and international mining companies to the Nigerian mining sector. Through a process of extensive interviews and internal discussion, we determined that local community development was one of the key barriers differentiating the Nigerian mining industry from other successful industries. We especially focus on community development agreements (CDAs) as this is the primary legal tool governing community engagement in the mining sector. Notably, a lack of clearly defined community objectives and engagement strategy contributes to the risky investment environment which is keeping FDI and large mining companies away from Nigeria.<sup>21</sup> Therefore, formalizing CDAs is a necessary step for the SMDF, and the government as a whole, to achieve their objectives.

Since successful community development programs tend to strengthen the social license for the investor to operate, a correct appraisal of CDAs' functioning, best practices and limits is pivotal in the proper fulfillment of the Client's mandate. Accordingly, this report seeks to inform the Solid Minerals Development Fund (SMDF) about international best practices and provide a set of

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<sup>19</sup> "Economic-Recovery-Growth-Plan-2017-2020.Pdf," accessed April 22, 2021, [https://nigeriaembassygermany.org/mosaic/\\_M\\_userfiles/Economic-Recovery-Growth-Plan-2017-2020.pdf](https://nigeriaembassygermany.org/mosaic/_M_userfiles/Economic-Recovery-Growth-Plan-2017-2020.pdf).

<sup>20</sup> "Economic-Recovery-Growth-Plan-2017-2020.Pdf."

<sup>21</sup> Chilenye Nwapi, "Legal and Institutional Frameworks for Community Development Agreements in the Mining Sector in Africa," *The Extractive Industries and Society* 4, no. 1 (January 1, 2017): 202–15, <https://doi.org/10.1016/j.exis.2016.11.010>.

recommendations to help mining companies successfully secure community acceptance for their projects.

Building on previous Columbia Capstone projects, the team has been able to conduct interviews remotely and marshal primary as well as secondary sources to yield a comprehensive set of findings regarding Community Development Agreements' best practices and standards, as well as to tailor a number of recommendations on their optimal implementation in the specific context of Nigeria's mining sector. Despite the obvious logistical challenges posed by the COVID-19 pandemic and corresponding travel restrictions, the 2021 Capstone team has developed a number of recommendations on how to best regulate, implement and monitor Community Development Agreements in Nigeria's mining industry. Although the present report's natural recipient is Nigeria's SMDF, the Capstone team hopes that its informative value would transcend the boundaries of the Fund's mandate to advise Nigeria's government at large, including the competent regulatory bodies.

The qualitative insights incorporated in the recommendations draw from a comprehensive research approach, with a deep-dive study of the applicable legal framework, an intuitive stakeholders mapping, and an analysis of potential barriers to success. Moreover, these findings are complemented by two case studies, dealing with Nigeria's oil and gas ESG practices and the Ghanaian mining sector's community development practices, respectively.

The key findings arising from this analysis inform a number of recommendations for the Client to consider implementing in the pursuit of its mandate.

At last, this report would like to highlight the unfavorable COVID-19 circumstance that the team is facing. Due to the a severely insufficient client's response<sup>22</sup> and traffic restriction, the team has information barrier larger than other Capstone teams. Nevertheless, the team tries to input more effort on international analysis as well as stakeholder interviews to bridge the gap.

## **1.1 Main findings and barriers**

As a result of this analysis, the report presents several key findings and barriers to the successful implementation of the recommendations offered below. Due to their very nature, the following insights beg for more comprehensive solutions, involving actors, competences and time that the present report cannot claim to be able to summon. These limitations notwithstanding, their mere indication can provide a useful - albeit tentative - basis for future research and policy-making.

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<sup>22</sup> The Leader of our client was tested Covid-positive at the start of the semester

- 1) Mining industry's sunk costs makes negotiation hard to perform. Due to mining companies' built-in preference for stockholders' profit maximization, a convergence of interests between companies and local communities on the appropriate provision of social goods - both in terms of their nature and quantity - often proves hard, if not impossible.
- 2) Managing expectations. The main challenges in addressing the social and development needs of communities is that the expectations of communities are often greater than the ability of the investor to fund programs. Community expectations tend to be unspoken at the outset of a project and fluid over time. Investors usually can commit to provide a fixed level of support at the outset but find it difficult to respond to changed needs, especially if they imply an additional financial burden that has not been included in the budget.
- 3) From a comparative perspective, the most successful programs responded directly to local needs as ascertained through consultation; were fully funded and not dependent on the project-based profitability of the investor; and were carried out in collaboration with nongovernmental or other organizations.
- 4) COVID-19 as a barrier to Nigeria, to the world, to us. The pandemic influenced world economy, and Nigeria, as an oil-reliant country suffered a lot as well. While it might boost Nigeria's economy transformation, the issue made our investigation much harder than before.

## **I.2 Recommendations**

Based on these findings, the report offers the following recommendations that the Fund can implement or contribute to implementing in the short and medium term:

- 1) Create mandatory requirements on engaging within local communities. For example, how to ensure financial benefits, education and technological spillover, as well as the sharing of best practices;
- 2) To compensate for the structural asymmetries between the parties to a CDA, as well as to provide mining companies with an edge with ESG-attentive investors and purchasers, promote the circulation and adoption of sustainability certification standards as blueprints for the negotiation of the agreements' terms and conditions. Internationally recognized standards (such as the Initiative for Responsible Mining Assurance (IRMA) and Equitable Origin) afford all parties - and especially local communities and their representatives - a level playing field from which to negotiate bona fide CDAs and implement state-of-the-art ESG practices.
- 3) Conduct research and consult widely to identify relevant communities, as well as the individuals who will represent them in the CDA negotiation process. Communities who have a recognized legal right to land within or near the proposed project area may also be able to enforce a right to consultation or consent, or to benefit sharing, based on the

country's laws. Another category of potential parties to a CDA includes any other adjacent community and/or individual that, while not formally recognized as having legal title over the land, may also stand to be adversely affected by the project. A third category concerns communities who are not located on or near the project but who may be affected by the project's 'downstream' impacts.

- 4) The creation of an Independent Committee is crucial for the objective opinion on related CDA matters. Professionals with experience that are not related to the project should give their insights to enhance growth and development in the community and in the industry.
- 5) To ensure maximization of local content, as well as to set a minimum threshold of local communities' engagement, Nigerian regulatory authorities shall mandate measurable parameters of local engagement. These shall include, but not be limited to, quotas on local sourcing, employment, technology and know-how transfer.
- 6) Due Diligence for the project by an independent third party expert is necessary to assure all aspects of the implications of the project in the host community are analyzed.

## 2. Introduction

The COVID-19 oil crash put Nigeria in an economic bind as demand plummeted and the country, one of the world's largest oil producers, slashed production. At the same time, the process of *building back better* in the aftermath of COVID-19, provides the government of Nigeria with new opportunities to diversify and transition towards a more resilient economy.<sup>23</sup> Notwithstanding, the development of the mineral sector has been hampered by several constraints such as the dearth of proven mineral reserves, illegal mining, the lack of infrastructure, the lack of mineral production and processing capacity, the smuggling of minerals out of the country, the uncompetitive legal and regulatory structure, and unfavorable domestic fiscal policies.<sup>24</sup> Issues of conflict and insecurity arise when the prosperity fueled by the extraction of minerals and fossil fuels is not shared with the communities impacted by the operations. Such communities are often worse off as a result of environmental degradation and pollution, and loss of livelihoods; to name a few.

In light of rising social and fiscal challenges associated with COVID-19, the Government of Nigeria has increased its focus on the solid minerals sector as a potential catalyst for economic development.<sup>25</sup> Recently, government agencies are making the strategic choice to look inwards and prioritize domestic sources of capital and investment -- a strategy also promoted by the World Bank. An increased focus on domestic mining is a central part of this strategic realignment. The government and more specifically the SMDF hopes that a formalized and thriving domestic mining sector will be a proof of concept, showing investors the sector's profit potential.

Despite the widespread economic impacts of the pandemic, the Mining Sector exceeded budgeted revenue of the Federal Government in 2020 by about 10% on a year-to-year basis (N 2.09 billion as against N1.9 billion) and increased its contribution to the Nation's Gross Domestic Product (GDP) by about 23% (N369.00 billion to N656.18 billion).<sup>26</sup> Official publications similarly establish that the government wishes to develop the solid minerals sector to diversify the economy by increasing its contribution to GDP, exports, and foreign reserve.

To facilitate growth in the sector, the government has tried to attract foreign direct investment (FDI) and multinational corporations into the Nigerian mining sector through, among other actions, the enactment of statutes, acts, and regulations under the legal framework of the country. These bodies of law include and emphasis on CDAs that, if construed and applied correctly by

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<sup>23</sup> Andam S Kwaw et al., *Estimating the Economic Costs of COVID-19 in Nigeria* (Intl Food Policy Res Inst, 2020).

<sup>24</sup> Moses Olade, *Solid Mineral Deposits and Mining in Nigeria: -A Sector in Transitional Change*, 2019, <https://doi.org/10.13140/RG.2.2.14157.28648>.

<sup>25</sup> Simon M. Jowitt, "COVID-19 and the Global Mining Industry," *SEG Discovery*, no. 122 (July 1, 2020): 33–41, <https://doi.org/10.5382/SEGnews.2020-122.fea-02>.

<sup>26</sup> S et al., *Estimating the Economic Costs of COVID-19 in Nigeria*.

the related parties, can be useful to achieve a successful comeback of the mining industry from the crisis provoked by COVID-19.

## 2.1 Legal Framework of the Mining Industry

The primary legal framework administered by the Ministry of Mines and Steel Development (MMSD) derives from the Nigerian Constitution of 1999 with Amendments through 2011, the country's highest ranked legal statute. The Constitution sets forth an "Exclusive Legislative List" in Part I of its second schedule.<sup>27</sup> Items and topics in the list are solely legislated by the National Assembly. This list includes in subsection 39 "Mines and minerals, including oil fields, oil mining, geological surveys and natural gas."<sup>28</sup>

The 2007 Minerals and Mining Act and the 2011 Minerals and Mining Regulations derived from such constitutional provision and three policy documents – the 2008 National Minerals and Metals Policy, the 2009 Vision 2020 National Technical Working Group on Minerals and Metals Development Report, and the 2012 Road Map for the Development of the Solid Minerals and Metals Sector – provide further guidance.

The 2007 Act, which repealed the Minerals and Mining Decree of 1999, vested title in all mineral resources to the federal government and prioritized mining over other land uses. The Act established a Mining Cadastre Office (MCO) to administer mineral titles and maintain registers of mining leases. It also created the Inspectorate Department and the Environmental Compliance Department, established a mine permitting system, and set forth requirements relating to environmental protection and community benefits.

With the passage of the 2007 Act and the 2011 Regulations -- a couple of years later to establish how the provisions of the Act are applied, the government put into place mining laws aimed at making the sector more competitive. The 2007 Act established the federal government's ownership of all mineral resources, the offices in charge of overseeing the mining sector, the procedures for acquiring the rights to search for and produce mineral resources, and the rights and obligations of holders of mineral titles. Also of note, was the creation of the SMDF, a fund tasked with catalyzing growth in the mining sector.<sup>29</sup>

The 2007 Act empowers the MMSD to issue six types of permits, licenses, and leases, as described below. Permits generally convey non-exclusive use rights, while licenses provide exclusive rights for a limited purpose and leases provide exclusive ownership rights for a broader purpose.

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<sup>27</sup> Nigeria's Constitution of 1999, Schedule II: Legislative Powers, Part I: Exclusive Legislative List

<sup>28</sup> Depuy

<sup>29</sup> Azobu, C. (2015). Developing the solid minerals sector Quick wins for the new government. PricewaterhouseCoopers Limited. <https://www.pwc.com/ng/en/assets/pdf/developing-the-solid-minerals-sector-v2.pdf>

- (1) Reconnaissance permits: right to access land to search for mineral resources on a nonexclusive basis
- (2) Exploration licenses: right to explore mineral resources on an exclusive basis, including right to erect machinery and plants, along with the right to conduct bulk sampling and sell samples
- (3) Mining leases: right to exclusively use, occupy, and carry out mineral exploitation in the area covered by the lease, not to exceed 50 km
- (4) Small-scale mining leases: right to exploit minerals in area between 5 acres and 3 square km, using low level technology or application of methods not requiring substantial expenditure
- (5) Water use permits: right to use water for exploration, mining, or quarrying
- (6) Quarry leases: right to remove and dispose of any quarriable minerals, including necessary excavation and construction.

In an effort to set up fair provisions that helped the communities affected by the mining projects, the government established the “Community Development Agreement” (CDA), as one of the many requirements to obtain some of the permits mentioned.

## **2.2 CDA in 2007 Act and 2011 Regulations**

In one of its most innovative provisions, the 2007 Minerals and Mining Act (the 2007 Act) requires the licensee to negotiate and conclude, “prior to the commencement of any development activity,” an agreement with the relevant “host community,” referred to as a “Community Development Agreement, or other such agreement that will ensure the transfer of social and economic benefits to the community.”<sup>30</sup> By virtue of this provision, the concept and practice of Community Development Agreements (CDAs) has become a pivotal element of Nigeria’s mining sector’s legal framework. However, the lack of legislative experience from the government in similar sectors/industries where CDAs or similar institutions can be crucial for the development and growth of projects (such as the oil and gas industry) was noted in the provisions of the 2007 Act and the 2011 Regulations, where the framework for CDAs is limited to a few sections with general and broad language that leave a lot of space for interpretation and generate problems for their enforcement. As such, CDAs need to be correctly understood and properly implemented.

In principle, CDAs are arrangements to ensure that communities share the added value created by local large-scale investments.<sup>31</sup> The 2007 Act provides that prior to the commencement of any

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<sup>30</sup> Nigerian Minerals and Mining Act (NMMA), §116, 1.

<sup>31</sup> The World Bank Group’s Responsible Agricultural Investment (RAI) Knowledge into Action, Community Development Agreements, available at:



development activity within the lease area, the holder of a mining lease (as defined pursuant to the 2007 Act) shall enter into a binding agreement with the host community where the operations are to be conducted or any other such agreement that would ensure the transfer of social and economic benefit to the community.<sup>32</sup> This provision is applicable to holders of Mining Lease, Small-Scale Mining Lease, or Quarry Lease. It is a condition precedent that must be fulfilled by any of these mineral title-holders before they commence development activity on the mining site. The 2007 Act mandates mining companies to consultatively reach CDAs with their prospective host community towards the provision of social and economic benefits that will enhance the sustainability of the host community. CDAs must address specific issues that are relevant for the preservation of communities: education goals, employment opportunities for indigenes of the communities, financial forms of contributory support for infrastructural development (health, services, roads, water, and power), assistance with the creation, development and support to small scale and micro enterprises, agricultural product marketing, and methods and procedures of environment and socio-economic management and local governance enhancement.<sup>33</sup> This provision is novel as it is absent in previous mining legislation.

The objective for the legislative imposition of CDAs on the mineral title holder is to allow for an interface between the host communities and the mining companies for shared commitment to the mining enterprise between the host communities and the mineral title holders. This is also to avoid a disconnect between the host community and the reality of an invasive activity brought on their community by the mining industry as it allows for mutual dialogue between the parties before the commencement of the mining activities. The CDA, in fact, is a pre-license requirement but many communities in Nigeria are often unaware of this requirement.<sup>34</sup> Consequently, the mining companies exploit this ignorance to their advantage, denying host communities this statutory right. While the NMMA 2007 does not explicitly define the term CDA, the Act's wording and spirit requires the agreement to perform the transfer of "social" and "economic" benefits from the mineral title holder to the relevant host community or communities. Implicitly, the Act presumes that the mineral title holder has or is endowed with a reasonable amount of social and economic benefits which the Act now obliges the mineral title holder to share with the community.

In addition to this, CDAs shall specify appropriate consultative and monitoring frameworks between the title holder and the host community, and the means by which the community may participate in the planning, implementation, management and monitoring of activities carried out

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<https://olc.worldbank.org/system/files/Community%20Development%20Agreements%20%2818%29.pdf>

<sup>32</sup> Nigerian Minerals and Mining Act (NMMA), §116, 1.

<sup>33</sup> Nigerian Minerals and Mining Act (NMMA), §116, 3.

<sup>34</sup> Adedoyin Akinsulore, "The Effects of Legislation on Corporate Social Responsibility in the Minerals and Mines Sector of Nigeria," *Journal of Sustainable Development Law and Policy (The)* 7, no. 1 (July 26, 2016): 97–115, <https://doi.org/10.4314/jsdlp.v7i1.5>.

under the CDA. In other words, in spirit, it is all about engaging the host community to avoid negative affectation (to the extent possible) and achieve true and measurable development.

## 2.3 The Project: Community Engagement as a Catalyst for Growth

Within the context of the COVID-19 crisis and the desire of the government to generate prosperity in an underdeveloped, high-potential industry, solutions should stem from innovation. And innovation should come from available resources and existing tools. But where to start? We believe that the answer to this question for Nigeria begins in community engagement and CDAs. Mining has historically been linked with people and workers.<sup>35</sup> Without their correct and fair engagement, it is unfeasible to develop projects.

The present work analyzes CDAs as a pivotal instrument to promote local communities' equitable participation in the value created by large-scale investments in the Nigerian mining sector. After discussing relevant provisions in Nigeria's federal statutes and situating the regulatory framework in a wide and comparative context, it then moves to two case studies, dealing with ESG practices in Ghana's mining sector and Nigeria's oil & gas industry, respectively. In the light of the ensuing findings, the present work finally spells out a comprehensive set of recommendations intended to (i) address the main challenges these institutions face for their successful enforcement, and (ii) propose materializable changes to the existing framework.

## 2.4 Stakeholders

Identifying the main stakeholders is key to ensuring the success of the SMDF in attracting investment and carrying out sustainable and equitable projects. Stakeholder engagement is particularly important in the extractives sector given the direct impact it has on local communities' socioeconomic well-being, the environment as well as the use of water, energy, and land. Engaging with the right stakeholders can mean the difference between a successful mining project with community support and a project met with conflict and tension and threatening delays. Engaging with the right civic organizations can give governments and companies insight into good governance practices, while building relationships with community members can foster local trust and support for projects.

### Public Sector:

National government entities such as the Ministry of Mines and Steel Development (MMSD) and National Environmental Standards and Regulations Enforcement Agency play a pivotal role in

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<sup>35</sup> Eklund, E. (2016). Coal and industrial relations: how miners secured workers' rights. Federation University Australia. <https://theconversation.com/coal-and-industrial-relations-how-miners-secured-workers-rights-53371>

providing a blueprint for mining development standards and requirements to be implemented by the private sector.<sup>36</sup> They are vested with the authority to guide and direct the SMDF, investors, and companies to comply with relevant laws and hold official execution power to require the stakeholder to follow regulations.

**Mineral Resources and Environmental Management Committee (MIREMCO)** has been charged by the MMSD with developing effective synergies between the federal and state governments and mining operations as well as ensuring social and environmental management and safety through authorities such as the Mines Environmental Compliance department.<sup>37</sup>

**Local Government Leaders:** Local government authorities also need to be taken into account when drafting and implementing CDAs, since they often have deeper understanding and ties to the local community, are charged with enforcing certain laws and regulations, and can help ensure the successful implementation of CDAs that take into account community demands and how mining companies can positively contribute towards local socioeconomic development.<sup>38</sup>

#### **Private sector:**

**Nigerian Mining Corporation (NMC):** The NMC is a state-owned mining corporation, which acts as a catalyst towards further developing Nigeria's mining industry.<sup>39</sup> It operates under the provision of the Bureau of Public Enterprises, which is charged with privatizing public enterprises and carrying out sector reforms.<sup>40</sup> It is therefore well-positioned to set an example of sustainable and responsible CDAs for other mining companies.

**Thor Exploration Ltd.:** Thor is a publicly-traded Canadian mining company engaged in the acquisition, exploration and development of mineral properties located in Nigeria, Senegal and Burkina Faso, being the largest gold mining company in first one.<sup>41</sup> Its main focus is currently on its 100% owned Segilola Gold Project located in Osun State, Nigeria approximately 120km northeast of Lagos.

Due to its expertise, experience, large investment and expected annual gold extraction, considering the Segilola Gold Project and future ones to come, it will be crucial to have Thor partake in sustainable and responsible CDAs.

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<sup>36</sup> Ministry of Mines and Steel Development. "E-Services." IAISMP Portal, [portal.minesandsteel.gov.ng/](http://portal.minesandsteel.gov.ng/).

<sup>37</sup> Onehi, Victoria. "Nigeria: Minister Tasks Solid Minerals Committee Chairmen On Sector's Devt." AllAfrica.com, 31 Jan. 2020, [allafrica.com/stories/202001310720.html](http://allafrica.com/stories/202001310720.html).

<sup>38</sup> Herskovits, Jean. "Democracy in Nigeria." Foreign Affairs, vol. 58, no. 2, 1979, p. 314., doi:10.2307/20040417.

<sup>39</sup> NorthWindProject.com. "Nigerian Mining Corporation - Bureau of Public Enterprises." BPE, 21 Oct. 2018, [bpe.gov.ng/nigerian-mining-corporation/](http://bpe.gov.ng/nigerian-mining-corporation/).

<sup>40</sup> NorthWindProject.com. "Nigerian Mining Corporation - Bureau of Public Enterprises." BPE, 21 Oct. 2018, [bpe.gov.ng/nigerian-mining-corporation/](http://bpe.gov.ng/nigerian-mining-corporation/).

<sup>41</sup> "Corporate Overview." *Thor Explorations Ltd.*, 2016, [www.thorexpl.com/corporate/overview/](http://www.thorexpl.com/corporate/overview/).

### Affected Communities:

The communities within which projects are developed and implemented are arguably the most important yet vulnerable stakeholder. For affected communities to accept mining projects, the project's potential benefits need to be greater than its risks. When governments and companies engage community members from the onset, concerns can be proactively addressed and a shared vision for the community's long-term future beyond the project's life cycle can cause affected communities to embrace mining projects. Furthermore, when communities have equal say at the table, it can lead to more sustainable and stable projects through the use of local and indigenous knowledge during social and environmental risk assessments.<sup>42</sup>

### Organized Labor:

**Miners Association of Nigeria (MAN)** is the main stakeholder protecting the interests of workers by lobbying for better working conditions and trade union rights for its members. Mine workers are often involved in high-risk conditions, where natural hazards and explosive accidents are not completely out of the question.<sup>43</sup> The Association therefore is charged with setting terms and agreements with mining companies in order to ensure that workers will be protected to the highest degree possible. Developing a shared understanding between mining companies and workers at an early stage by taking workers' needs into account avoids potential conflicts to erupt in the future. Workers are oftentimes part of the local community in which a mine is operating and should be treated as a primary stakeholder when drafting and implementing CDAs.

### Independent Assessment Agencies/Standards Certifiers:

Mining companies and affected communities stand to benefit greatly from environmental monitoring and audit services from independent assessment agencies throughout the lifecycle of a project. Such agencies provide environmental impact assessments (EIA), environmental and social management planning, community consultation, as well as permitting and closure planning.<sup>44</sup> Contracting an independent assessment agency to provide an EIA, which is required by the current governmental agency already, in order to evaluate the socio-economic and environmental consequences of a project can provide decision makers and stakeholders the information they need prior to drafting CDAs.<sup>45</sup> This better prepares local communities in communicating and negotiating their demands.

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<sup>42</sup> Contributor, Guest. "An in-Depth Look at the Current State of Mining in Nigeria." Miningreview.com, 26 Oct. 2020, [www.miningreview.com/gold/an-in-depth-look-at-the-current-state-of-mining-in-nigeria/](http://www.miningreview.com/gold/an-in-depth-look-at-the-current-state-of-mining-in-nigeria/).

<sup>43</sup> Mining Review Africa. "Exclusive interview with Alhaji Sani Shehu, President of Miners Association of Nigeria." 10 Oct. 2016, <https://www.miningreview.com/interviews/exclusive-interview-with-alhaji-sani-shehu-president-miners-association-of-nigeria/>

<sup>44</sup> "About IDA." IDA, 1985, [www.ida.org/about-ida](http://www.ida.org/about-ida).

<sup>45</sup> Ingelson, Allan. "ENVIRONMENTAL IMPACT ASSESSMENT PROCESS FOR OIL, GAS AND MINING PROJECTS IN NIGERIA: A CRITICAL ANALYSIS." School of Law, School of Oriental and African Studies (SOAS) - University of London, 2014.

Investors and downstream purchasers are increasingly demanding third-party sustainability certification such as those provided by the Rainforest Alliance and Forest Stewardship Council. The extractive industry is moving in that direction as well, with the Initiative for Responsible Mining Assurance (IRMA) leading the charge. The IRMA is a coalition of non-governmental organizations, mining companies, downstream purchasers, affected communities, and trade unions. It serves as an independently-verified responsible mining assurance system with a certification program for industrial-scale mine sites. Its requirements include elements such as health and safety for workers, human rights, community engagement, pollution control, mining in conflict-affected areas, rights of indigenous peoples, transparency in revenue payments from companies to governments, and land reclamation once mining is done.<sup>46</sup> The IRMA standards can serve as a blueprint for governments, mining companies, and communities for what responsible and sustainable mining looks like. Such a blueprint could further serve as a guideline for communities when negotiating terms and conditions with companies, as well as giving mining companies an edge with investors and purchasers that are increasingly asking for third-party certification.<sup>47</sup>

### **Civic Organizations:**

The following organizations are particularly well-placed to convene reform-oriented dialogue and to engage in constructive policy advocacy among various stakeholders. Such independent organizations provide expertise on contractual transparency, strengthening government accountability to local communities, and promote open and accountable resource management throughout the extractive industry value chain. The SMDF would benefit from engaging with these organizations throughout the different stages of developing and implementing CDAs.<sup>48</sup> Not only can they offer expertise on good governance, but also help attract investors through having the support of independent multi-stakeholder organizations.

**Natural Resource Governance Institute (NRGI)** is an independent organization that provides policy advice to resource-rich governments in order to improve international norms around resource extraction. The NRGI works towards strengthening local accountability actors such as civil society, in order to hold governments accountable and contribute to positive policy reforms. The NRGI currently engages with several African countries, including Nigeria, and can be tapped as a policy expert on how to best develop mining projects that will benefit the affected communities.<sup>49</sup>

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<sup>46</sup> Initiative for Responsible Mining Assurance. <https://responsiblemining.net/what-we-do/standard/>

<sup>47</sup> "Our Mission." Earthworks, 5 Feb. 2018, [www.earthworks.org/about/our-mission/](http://www.earthworks.org/about/our-mission/).

<sup>48</sup> "Civil Society and Fight against Corruption in Nigeria." Daily Independent, Nigerian Newspaper, 6 Jan. 2014, [web.archive.org/web/20150801032459/dailyindependentnig.com/2014/01/civil-society-fight-corruption-nigeria/](http://web.archive.org/web/20150801032459/dailyindependentnig.com/2014/01/civil-society-fight-corruption-nigeria/).

<sup>49</sup> "Country Prioritization." *Natural Resource Governance Institute*, 22 Jan. 2020, [resourcegovernance.org/about-us/what-we-do/country-prioritization](http://resourcegovernance.org/about-us/what-we-do/country-prioritization).

**Publish What You Pay (PWYP)** is another organization working at the forefront of accountability and transparency in extractives sector development. It works to ensure that revenues from projects help improve communities' lives through pushing for governments to regulate natural resource extraction in an open and accountable way, and for companies to operate within an effective governance framework.<sup>50</sup>

**Extractive Industries Transparency Initiative (EITI)** provides global standards that member countries can use to improve the management of their extractive sector. It seeks to strengthen public and corporate governance by requiring the disclosure of information along the extractive industry value chain, from point of extraction to how revenues make their way to benefitting the public.<sup>51</sup> Nigeria is a member country and has made satisfactory progress towards the EITI standards in the oil sector, and could benefit from implementing the EITI standards in its mining sector as well.

### **Non-governmental Organizations:**

NGOs serve an important and often loud voice in extractives development, with the aim of protecting the environment and communities from the adverse impacts of mineral and energy development.<sup>52</sup> Some major NGOs to consider as stakeholders include Earthworks, Human Rights Watch, Oxfam International, and Fauna and Flora International. Such NGOs have a broad international presence and often work with communities and grassroots groups to reform government policies, improve corporate practices, and influence investment decisions that encourage responsible materials sourcing.

### **Multilaterals:**

Multilateral institutions, consisting of international financial and development institutions, have a long history of engagement in the extractives sector. Since their mission is poverty reduction and sustainable growth, they have a vested interest in aiding the sustainable development of their member states' natural resources and believe that investments in the industry are closely linked to economic development, job creation, and poverty reduction in many of their member states.

<sup>53</sup>

**The African Development Bank (ADB)** aids member states in attracting foreign investments through policy recommendations on mining legislation, strengthening local private sector capacity, and financing infrastructure. The AfDB co-finances mining projects with the goal of catalyzing

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<sup>50</sup> "About." Publish What You Pay, 27 Jan. 2021, [www.pwyp.org/about/](http://www.pwyp.org/about/).

<sup>51</sup> "How We Work." Extractive Industries Transparency Initiative, 2019, [eiti.org/about/how-we-work](http://eiti.org/about/how-we-work).

<sup>52</sup> Folger, Jean. "What Is an NGO (Non-Governmental Organization)?" Investopedia, Investopedia, 4 Mar. 2021, [www.investopedia.com/ask/answers/13/what-is-non-government-organization.asp](http://www.investopedia.com/ask/answers/13/what-is-non-government-organization.asp).

<sup>53</sup> "Multilateral Organizations." Open Government Partnership, 18 July 2019, [www.opengovpartnership.org/multilateral-organizations/](http://www.opengovpartnership.org/multilateral-organizations/).

additional commercial investment. The AfDB also supports member states in their efforts to develop the mining sector through the African Legal Support Facility, whose main objective is to strengthen governments' legal expertise and negotiating capacity in structuring mutually beneficial agreements with mining companies. The AfDB's close ties to African governments, decades of operational experience across the continent, and knowledge of various stakeholders involved in the mining sector make it the most important multilateral for the SMDF to collaborate with.<sup>54</sup>

The World Trade Organization (WTO) has expertise in trade related research and developmental practice. It will be unquestionably helpful for shaping the Nigeria CDAs with local residents. One well-known agreement can be applied in this context: Trade-Related Investment Measures (TRIMs). Generally, it only associates with trade effects and measures whether it produces positive reinforcers for the community.<sup>55</sup> It is useful to recognize if CDAs are placed properly, while there is no quantitative method to collect large amounts of samples for further improvement. As the WTO can help Nigeria to conduct the CDAs review and see if there is a chance to make the build-in TRIM. Thereby, the additional quality ensured process will guarantee the fairness of the private investment and the host community benefits.<sup>56</sup>

The World Bank recently established the Climate Smart Mining Facility, which is charged with helping emerging economies implement sustainable and responsible strategies and practices across the mineral value chain.<sup>57</sup> Its partners include major players such as Rio Tinto and Anglo American, which can potentially open a pathway for attracting investing in Nigeria. The Facility also assists governments to build a robust policy, regulatory and legal framework that promotes an enabling environment for private capital while following ESG principles.

The World Bank Group's International Finance Corporation (IFC) has decades of experience providing finance and sustainable business solutions in the mining sector.<sup>58</sup> It finances mining projects across the development stage, including construction, production, and expansion, with a focus on sustainable economic growth. It can advise governments and companies on supply chain linkages and stakeholder development, as well as mitigating social and environmental risks.

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<sup>54</sup> "Supporting the Development of the Mineral Resources Industry in Africa." African Development Bank Group, <https://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/Supporting%20the%20Development%20of%20the%20Mineral%20Resources%20Industry%20in%20Africa.pdf>

<sup>55</sup> Uruguay Round of trade negotiations. "WORLD TRADE ORGANIZATION." WTO, 1994, [www.wto.org/english/docs\\_e/legal\\_e/ursum\\_e.htm#eAgreement](http://www.wto.org/english/docs_e/legal_e/ursum_e.htm#eAgreement).

<sup>56</sup> Uruguay Round of trade negotiations. "WORLD TRADE ORGANIZATION." WTO, 1994, [www.wto.org/english/docs\\_e/legal\\_e/ursum\\_e.htm#eAgreement](http://www.wto.org/english/docs_e/legal_e/ursum_e.htm#eAgreement).

<sup>57</sup> "World Bank Launches Sovereign ESG Data Portal." World Bank, [www.worldbank.org/en/news/press-release/2019/10/29/world-bank-launches-sovereign-esg-data-portal](http://www.worldbank.org/en/news/press-release/2019/10/29/world-bank-launches-sovereign-esg-data-portal).

<sup>58</sup> "Partnerships and Multilateral Engagement." *Ifc.org*, [www.ifc.org/wps/wcm/connect/CORP\\_EXT\\_Content/IFC\\_External\\_Corporate\\_Site/About+IFC\\_New/Partnerships](http://www.ifc.org/wps/wcm/connect/CORP_EXT_Content/IFC_External_Corporate_Site/About+IFC_New/Partnerships).

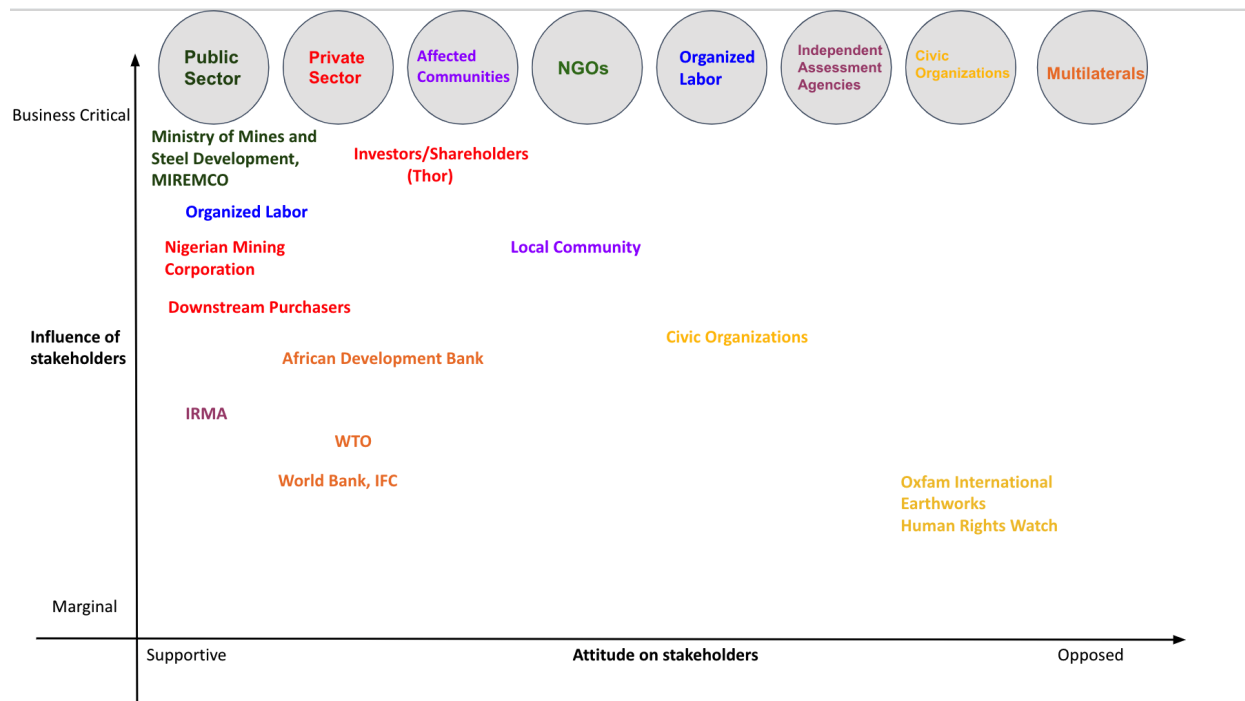


Figure 1: Stakeholders Map in the Nigeria's mining industry



### 3. Recommendations

Nigeria has not yet succeeded in sufficiently using its mining sector as a stepping stone for broader economic transformation. As a result, although the industry is a significant revenue contributor, its linkages with the rest of the economy remain rather weak. To address this, and under mounting pressure to deliver more inclusive outcomes for a sustainable post COVID recovery, the government must continue to take regulatory measures with the objective to increase the use of domestic factors of production in the mining sector, and provide more prospects for the local economy to benefit from the mining industry.

The following section of the report lays out a set of recommendations necessary to promote community development within the mining sector. These recommendations abide by two key principles of a successful and viable agreement:

*Rights of Local Community, Government and Private Companies:* The rights of local populations must be clearly defined in the mining license contract, and must take into account the legal obligations that the government has to the people.

*Specific and Accountable Responsibilities related to certain rights:* Once certain rights are determined, the party should be accountable for related responsibility. If the right is transferred from community to government, then the government should shoulder certain responsibilities of supervision and enforcement.

*Inclusive Process:* Any engagement with the local community must be equitable and involve stakeholders and minority group representatives as much as possible to promote freely expressed demand from the community and reduce the institutional obstacles for community demand.

Both Civil Rights and Inclusive Process are present in all the stages and key items related with the CDAs, which we found convenient to use for purposes of better illustrating this part of the report as follows:

#### Pre-Negotiation

As part of the pre-negotiation phase of the CDA, it is important to attend several key items to assure the engagement of the host community:

#### Recommendation I:

*Research and Consultation:* Conduct research and consult widely to identify all communities, and the individuals who will represent them in the CDA negotiation process.

1. Prior or during the local consultation phase of a project, it is important to identify the best way of preserving and developing rights in the host community due to the impact of the project, in addition to any issue or item being requested by the host community pursuant to the local consultation. In addition to direct consultation with the host community, a good approach for such purpose is to perform an objective assessment and a thorough due diligence in this regard. In some countries in the Americas such as Peru, Canada and Mexico third party companies are commonly hired to carry out this (must of the time paid by the mining company). By doing this, the mining company shows its commitment to the host community and the government takes a step forward towards the identification of the rights of such community and its preservation and development. This prior assessment and due diligence should intend to cover and review all aspects and related areas of the rights of the host community involved with the project: environmental, social, economic, political and most importantly, human rights. This would be required prior to the approval of the mining project to determine its feasibility in all areas. If a mining project is overall not feasible it should not be approved.
2. Determining which communities ought to be engaged with is a complex but crucial aspect of the negotiating process. Communities who have a recognized legal right to land within or near the proposed project area may also be able to enforce a right to consultation or consent, or to benefit sharing, based on the country's laws. Another category of potential parties to a CDA includes any other adjacent community and/or individual that, while not formally recognized as having legal title over the land, may also stand to be adversely affected by the project. A third category concerns communities who are not located on or near the project but who may be affected by the project's 'downstream' impacts.
3. Take into account local communities' unique perspectives and special connection to the lands and waters where mining projects are located. Use local knowledge and expertise during environmental impact assessments.

#### **Implementation Resource for Recommendation# I:**

- Require in the Act, the Regulations, or in an additional normative body a prior due diligence process with respect to the project to analyze its feasibility in all areas related with the host community per se that can and should involve the participation of its members (cultural, social, economic, political, educational, labor, financial, infrastructure, health, agricultural, human rights, and any other that the host community or the government may consider appropriate in a given context). This due diligence should be

paid by the investor and it should be done by a government-approved third-party expert. The final product coming out of the due diligence process should be an executive report with positive and negative aspects of the project in all community-related areas involving the project.

### **Recommendation 2:**

*Environmental Impact Assessment:* Conduct an EIA that takes into account both current and future environmental impacts, with specific emphasis on ESG criteria.

- I. EIAs should be dynamic, rather than static, documents that are continually evaluated and assessed throughout the lifetime of the project. A more dynamic approach is needed to consider that the mining project is an active and continuous process subject to contingencies and as such these contingencies should be included in the evaluation.

### **Implementation Resource for Recommendation#2:**

- Establish in the Act, the Regulations, or in an additional normative body ESG metrics that comply with international good practices for purposes of the EIA approval process. In any case, the EIA should and must be treated separately from or even within the CDA in a way that even considering the environmental impact of the project is something that affects the host community, such community should not be in charge of handling the issue.
- Require in the Act, the Regulations, or in an additional normative body the direct involvement of additional stakeholders in a determined project depending on its characteristics. Considering the problem that the involvement of additional parties would mean, this requirement could be optional and only for purposes of having additional opinions on the CDA's.

### **Recommendation 3:**

*Framework Agreement:* Develop a pre-negotiation agreement, such as a memorandum of understanding, that establishes among other things the negotiation framework, and funding for each stage.

### **Implementation Resource for Recommendation#3:**

- Establish in the Act, the Regulations, or in an additional normative body, that upon approval of the project once the report mentioned above in I., the report should be used for purposes of drafting and negotiating a memorandum of understanding that should be

the base for the CDA. This memorandum of understanding should set the most important and crucial areas the CDA should cover and it should be prepared by the investor but agreed by both the government and the host community. In case there is any disagreement between such 2 parties, the Independent Committee (as such term is defined for purposes of this Recommendations chapter of the report below) should decide on the case. The memorandum of understanding will not be binding for the parties.

#### **Recommendation 4:**

*Cultural Sensitivity:* Commence culturally sensitive orientation programs and/or negotiations training to ensure meaningful negotiations and approval of the final agreement.

#### **Implementation Resource for Recommendation#4:**

- Initiate a campaign in the media to spread the word about CDAs and educate people on the subject matter. Given the potential difficulties that this might entail, an alternative would be to implement trainee programs for CDAs in each new host community.

#### **Recommendation 5:**

*Local Consultation:* It is imperative that any new mining company consult local or indigenous communities within Nigeria before starting a project. In Latin American countries such as Peru, community consultations on large-scale mining activities have been institutionalized, in an effort to avoid conflicts. Most of those consultations have to be made by governments before giving licences. Similarly, in Canada federal and provincial governments have a duty to consult indigenous groups whose treaty rights may be affected by a government decision, including the grant of permits or licences relating to mining activity. The recommendation for Nigeria given the context is for the new mining company to carry out the consultation through the government.

#### **Implementation Resource for Recommendation#5:**

- As part of the report mentioned above in Recommendation I, the investor should be required to identify the key people of the host community in connection with the community-related areas involving the project. It is vital that the parties involved in the project know who is who within the host community to understand the needs and requirements related with the project. The only way to achieve real local consultation is to do it with the people that know the host community.

- Report mentioned in I. above should be analyzed and reviewed by the government in consultation with the host community to determine if the project should be greenlighted. In case there is any disagreement between such 2 parties, the Independent Committee (as such term is defined for purposes of this Recommendations chapter of the report below) should decide on the case.

### **Recommendation 6:**

*Potential to Withdraw Clause:* Potential to withdraw clauses allow qualified communities and other stakeholder groups to step away from the agreement at any stage in their negotiation, prior to signing the agreement. While the stipulation of such clauses shall not impinge on the negotiating process' good faith, it is crucial in providing to any and all parties and stakeholders the option to withdraw from negotiations which, after all, is a requirement of truly free participation within the agreement development process. Naturally, the stipulation of a potential to withdraw clause in no way affects the bindingness of the final agreement, as negotiated and agreed upon by the parties.

### **Implementation Resource for Recommendation#6:**

- Set forth in the Act, the Regulations or in an additional normative body a provision mandating a "Potential to Withdraw Clause" in specific, predetermined cases. This would afford both parties both flexibility and certainty in the negotiation and implementation phases.

## **Mandatory Local Requirements**

These compulsory requirements can take the form of numerical targets, expressed in volume, in value terms or by product categories. The non-application of those quotas can lead to strict penalties, such as prohibitive fines or suspension of licences.

### **Recommendation 7:**

*Local sourcing:* To ensure that mining firms source their inputs from domestic suppliers to the fullest extent possible, legal frameworks require that mining firms and their subcontractors develop local procurement opportunities and initiatives that benefit a broad spectrum of the community and local businesses.

### **Implementation Resource for Recommendation#7:**

- Require in the Act, the Regulations, or in an additional normative body a minimum % of: a) local subcontractor companies, b) local employees, and c) local equity ownership of the project, that the investor or mining company should comply with in order to carry out the project. The CDAs should include a specific section that establishes the %s and how the investor or mining company is complying with them.

### **Recommendation 8:**

*Domestic employment:* mining firms and their subcontractors are required to employ specific percentages of local workforce, at various levels of competencies (e.g., engineers, managers, technicians etc.) and in various categories of jobs (such as at various management levels, or as board directors etc.).

#### **Implementation Resource for Recommendation#8:**

- Same as in Recommendation 7, require in the Act, the Regulations, or in an additional normative body a minimum % of: a) local subcontractor companies, b) local employees, and c) local equity ownership of the project, that the investor or mining company should comply with in order to carry out the project. The CDAs should include a specific section that establishes the %s and how the investor or mining company is complying with them.

### **Recommendation 9:**

*Local presence/ownership:* Mining companies should enter into joint ventures or partnerships with local firms and make sure to engage in public private partnerships with the state. This can take several forms, ranging from equity participation to service contracts.

#### **Implementation Resource for Recommendation#9:**

- Same as in Recommendation 7, require in the Act, the Regulations, or in an additional normative body a minimum % of: a) local subcontractor companies, b) local employees, and c) local equity ownership of the project, that the investor or mining company should comply with in order to carry out the project. The CDAs should include a specific section that establishes the %s and how the investor or mining company is complying with them.

### **Recommendation 10:**

*Technology/knowledge transfer:* Compulsory spending of a percentage of direct profits must go to enabling research and development within the country. This R&D should be combined with training of local staff to foster the transfer of know-how and technology.

- I. To address the community's lack of information and understanding, provide them with learning tools on their rights, development and sustainability, environmental monitoring and social monitoring. The government must institute a method for providing access to multidisciplinary expertise for communities in order to address the asymmetry among stakeholders.

### **Implementation Resource for Recommendation#10:**

- Establish in the Act, the Regulations, or in an additional normative body the obligation of separating a % of the direct profits of the project (during all of its effective lifetime) in trust owned by the government but handled by the Independent Committee (as such term is defined for purposes of this Recommendations chapter of the report below) to invest the money in the development of the host community. The investment goals, targets and procedures should be established in the CDA. The creation of the trust should be an obligation of the government. There should be a trust for each project.

### **Recommendation 11:**

*Foundation for Community:* Encourage the private company to set aside x% of their total revenue from mining activities in the particular district for a foundation that invests into infrastructure and education. Local Government and community could commit a certain amount voluntarily and should supervise the investments of the foundation.

### **Implementation Resource for Recommendation#11:**

- Same as in Recommendation 10, establish in the Act, the Regulations, or in an additional normative body the obligation of separating a % of the direct profits of the project (during all of its effective lifetime) in trust owned by the government but handled by the Independent Committee (as such term is defined for purposes of this Recommendations chapter of the report below) to invest the money in the development of the host community. The investment goals, targets and procedures should be established in the CDA. The creation of the trust should be an obligation of the government. There should be a trust for each project.

## **Contract Negotiations**

## **Implementation Resource for Recommendation# I2:**

*Due Representation of Interests:* While negotiating the CDA, the government and the investor or mining company should make sure they are dealing with the people that, in accordance with the applicable law, duly represent the interests of the host community to ensure that its interests will be protected. While it is difficult to establish a method that ensures the right election or appointment of the representatives of the host community, an achievable thing to do is to establish a third independent organism or body that can approve this.

### **Implementation Resources:**

- Require in the Act, the Regulations, or in an additional normative body the creation of an independent committee that will be composed of 5 to 7 mining and or Nigeria experts that will be consulted for the purposes established in the applicable law related with CDAs (the “Independent Committee”). The members of the Independent Committee shall be elected by the Fund and shall receive a salary. They should be experts either in the mining sector or in Nigeria in order to qualify.
- The Independent Committee will be in charge of, among other things, investing the money of the trust created with the profits of the project, approving the representatives of the host communities and resolving (like an arbitrator) disputes between parties of the CDA.

## **Recommendation I3:**

*Bi-lingual Agreement in Plain Language:* The CDA should be signed using bi-lingual language, and the agreement language should avoid using abstruse legal terms as much as possible.

## **Implementation Resource for Recommendation# I3:**

- Establish in the Act, the Regulations, or in an additional normative body the obligation to execute the agreement in using bi-lingual language.
- The Independent Committee shall ensure that, to the extent possible, no abstruse legal terms are used in the CDA and that it contains plain understandable language.

## **Recommendation I4:**



*Legal Service:* If necessary, third-party legal consultancy should be provided for local communities.

#### **Implementation Resource for Recommendation#14:**

- The Independent Committee shall be in charge of deciding if third-party legal consultancy for the host community of a project is required. The host community shall also be entitled to request it at any time.

## **Governance**

### **Recommendation 15:**

*Accountable Governance:* There must be strong, accountable governance arrangements in the agreement to facilitate effective implementation, including after mine closure. This should also involve a system of ongoing monitoring and review with mechanisms that allow for adjustment of the terms of the agreement when necessary.

#### **Implementation Resource for Recommendation#15:**

- Establish in the Act, the Regulations, or in an additional normative body the provisions that require the government and the investor or mining company to implement internal compliance and reporting mechanisms with respect to the project and before the Independent Committee.
- 
- Establish in the Act, the Regulations, or in an additional normative body specific sanctions related to the accountability of the project and its management and administration.

### **Recommendation 16:**

*Trade Agreement Compliance:* The government should take into account, and incorporate, international regimes when designing new policies and legislation on mining activities and social conflict prevention between the mining company and the host community. More specifically, the government should, abide by international treaties and conventions signed by Nigeria in order to comply with international law and remain consistent with the principles endorsed in cases where the relevant international instrument does not have binding character.

#### **Implementation Resource for Recommendation#16:**

- While negotiating the CDA and monitoring its compliance, the government should make sure that there are no provisions that breach international treaties and conventions signed by Nigeria (in ANY aspect or matter).

### **Recommendation 17:**

*Effective Communication:* Ensure continued communication amongst governmental agencies by creating a platform where all ministries can share and update relevant information associated with communities and mining projects.

#### **Implementation Resource for Recommendation#17:**

- Establish an effective communication system that permits the flow and monitoring of information, updates, reports and requirements from all parties in the CDA and the Independent Committee.

### **Recommendation 18:**

*Local Monitoring:* The Government must monitor any agreements reached with impacted communities and ensure compliance of agreements between communities, local governments and mining companies. It must also assist communities that are suffering from lack of compliance with reached agreements on the part of the local government and/or mining company. This assistance should include but is not limited to: interpreters in their local language, legal aid, administrative tools, linking them with nonprofits, and opening channels of communication with the mining companies.

#### **Implementation Resource for Recommendation#18:**

- Same as in Recommendation 17, establish an effective communication system that permits the flow and monitoring of information, updates, reports and requirements from all parties in the CDA and the Independent Committee.

## **Successful Implementation**

### **Recommendation 19:**

*Capacity Building:* Build community capacity by ensuring sustainable benefits and opportunities through education and skills development.

### **Implementation Resource for Recommendation#19:**

- Given the nature of the recommendations in this last section of the chapter, the resource to implement them would be to include relevant “implementation” sections and provisions in the Act, the Regulations, or in an additional normative body. If this is not possible, a policy would work for purposes of setting the best practices recommended for CDAs in the mining industry in Nigeria.

### **Recommendation 20:**

*Universally Respected Standards:* Use industry sustainability certification standards (such as The Initiative for Responsible Mining Assurance (IRMA) and Equitable Origin) as a blueprint for developing effective CDAs. IRMA standards can serve as a blueprint for governments, mining companies, and communities for what responsible and sustainable mining looks like. Such a blueprint could further serve as a guideline for communities when negotiating terms and conditions with companies, as well as giving mining companies an edge with investors and purchasers that are increasingly asking for third-party certification.

### **Implementation Resource for Recommendation#20:**

- Given the nature of the recommendations in this last section of the chapter, the resource to implement them would be to include relevant “implementation” sections and provisions in the Act, the Regulations, or in an additional normative body. If this is not possible, a policy would work for purposes of setting the best practices recommended for CDAs in the mining industry in Nigeria.

### **Recommendation 21:**

*External Mediation:* Require the opinion of an expert third party to assess the feasibility of the mining project and the terms and conditions of the CDAs.

On the one hand, it must protect the interests of local residents through CDA. On the other hand, it needs to consider how to protect the interests of private investors to promote their investment due to economic growth.

### **Implementation Resource for Recommendation#21:**

- Given the nature of the recommendations in this last section of the chapter, the resource to implement them would be to include relevant “implementation” sections and

provisions in the Act, the Regulations, or in an additional normative body. If this is not possible, a policy would work for purposes of setting the best practices recommended for CDAs in the mining industry in Nigeria.

## **Recommendation 22:**

### *Grievance and Dispute Resolution Mechanisms*

Create effective grievance and enforcement mechanisms to incentivize the parties to a CDA to implement the agreement effectively or, when this is not possible, to raise and negotiate any comments or disputes related to the proposed development, the CDA, or the negotiating process itself. This can be done by establishing a dispute resolution framework that emphasizes amicable resolution through dialogue and mediation before either party moves on to judicial enforcement.

## **Implementation Resource for Recommendation#22:**

- Given the nature of the recommendations in this last section of the chapter, the resource to implement them would be to include relevant “implementation” sections and provisions in the Act, the Regulations, or in an additional normative body. If this is not possible, a policy would work for purposes of setting the best practices recommended for CDAs in the mining industry in Nigeria.

## **Recommendation 23:**

### *Judicial and extrajudicial enforcement*

Given CDAs’ controversial legal nature, which may impair direct judicial enforceability, Nigeria’s legislative authorities can resort to a menu of alternative options, short of explicitly mandating CDAs’ enforceability before Nigerian courts (which, again, would not resolve CDAs’ contractarian *vulnus per se*):

- I. Embedding CDAs into the investment contract. By integrating enforceable CDAs into the overall investment contract, governments can help ensure that investors deliver on community development commitments. The contract can define the parameters for a separate agreement between the investor and the community that is annexed to the contract. Failure to subsequently set up a community agreement and comply with the terms should then amount to a material breach of the investment contract, allowing for smooth actionability of judicial oversight.

2. Incentivize (or even mandate) the negotiation of dispute resolution mechanisms, e.g. non-binding mediation, arbitration and/or recourse to courts for “interim judicial relief in the nature of an injunction or other equitable relief” pending arbitration.
3. Cross-default - Mandate, on the regulatory level, the automatic cessation of license to operate in case of material breaches of ESG responsibilities (as defined by law and further detailed by the Community Development Agreement).

### **Implementation Resource for Recommendation#23:**

- Given the nature of the recommendations in this last section of the chapter, the resource to implement them would be to include relevant “implementation” sections and provisions in the Act, the Regulations, or in an additional normative body. If this is not possible, a policy would work for purposes of setting the best practices recommended for CDAs in the mining industry in Nigeria.

## **4.Barriers to Success**

As an agreement, CDA needs to coordinate the interests of parties including local communities, private companies, and government authorities. In this part we will analyze the potential barriers that CDAs will encounter in their negotiations and implementations, which hinders their success:

### **1. COVID-19 impact at all levels**

The outbreak of the pandemic has affected the world at so many levels it is difficult to brief the barriers we have encountered for this project because of this reason. Besides the obvious economic crisis created by COVID-19 in Nigeria and its mining industry, we were also not able to communicate directly with the client nor travel to Nigeria to perform fieldwork.

### **2. The sunk cost of the mining industry makes negotiation hard to proceed**

Despite the prospective vision of cooperating with both the mining companies and the host community, they represent different interest groups. Thus, the group's communication could be hindered by the profit conflict. In the mining sector, the firms always have to satisfy their shareholders and it is the priority, while they are the profit-seeking entity. Thus, even though the mining sector has a wish to add more social welfare to the industry, the reality is not allowed due to the cost of the mining and marginal benefits not matching. For instance, social welfare, the school, are more likely to be a sunk cost to a business. If the school or other basic infrastructure is required to be built at the initial stage, then the barrier of beginning mining raising. The fewer business activities and the plan would actually be executed.

### **3. Host communities' expectations are often too high for the mining companies to afford**

The working experience of mining can certainly bring benefits to society, yet the local community is likely to meet more standards to take advantage of the mining development. Once the residents pin their hopes on the mining companies, the local people may seek education, job opportunities, daily life compensation, and more. However, due to the beginning stage and the companies' sizes, those businesses do not have much power to settle the agreements. Moreover, community expectations tend to be unspoken at the outset of a project and fluid over time. Also, due to Nigeria being a developing country, providing the developed countries' standard of living is hard. The daily necessity, like water, food, and housing, is basic for the local residents, even the mining workers. Nevertheless, to have a clean drinking water planet, the companies may spend more than twice the cost of building in the developed countries. Therefore, in spite of the goodwill of the mining companies, the activity would be impeded by Nigeria's situation.

### **4. A lack of strong and fair law enforcement measures from the government**

In the regulation of mining rights, the Nigerian government has gone further than many countries. Indeed, Nigeria is one of the few countries (others include Mongolia, Papua New Guinea, Sierra Leone, and South Africa) that legally require CDA implementation, as opposed to, for instance, Ghana or Australia, where CDAs are commonly employed, albeit voluntarily. However, in actual progress, the corruption problem in developing countries often becomes a stumbling block to the CDA's true function.

On the one hand, the central government and mining departments often exchange interests with private companies, which ignores the interests of local communities. On the other hand, is a powerful community, the chiefs who have a strong power will also have corruption problems with the government and private enterprises, which hinders the promotion of the interests of minorities.

## **5. The CDA lacks clear and measurable goals, plainly understandable legal terms and good implementation, making the CDA actually exist in name only**

Although Nigeria is already the most developed country in West Africa, the education level of Nigeria's existing residents is still very low, which makes private companies participating in legal agreement negotiations have an unfair advantage. For example, in the real practice of Ahafo Responsibility Agreement, legal terms in the agreement are often described to be "in best efforts" instead of "should/must", and that makes the agreement vague and the company unaccountable. At the same time, if the community fails to reach a CDA with quantifiable standards, such as the proportion of local employees in the total recruitments, and the company's compensation to farmers, the actual demands from the community may often get ignored.

## **6. Confidentiality**

In many cases, CDA's are confidential and only available to the mining company and signing community. This leaves little room for external oversight and for the monitoring of results and restricts sharing of best practices. Nonetheless, the Agreements, Treaties and Negotiated Settlement Project, the IBA Research Network, as well as Columbia University's Center on Sustainable Investment, among others, are working to make CDAs more easily available to the public. In addition, the World Bank and other institutions have published helpful guidance documents on CDAs, providing useful blueprints for their prospective content and negotiation stages.

## **7. Diversification:**

CDAs are often beneficial to the local community but may not be sufficient to respond to the wider macroeconomic aspiration of diversification. For example, domestic suppliers living outside the community cannot access procurement markets or employment contracts. As such, while

CDAs ensure a social license to operate and create community-level benefits, their overall economic impact may be limited.

## **8. Asymmetry of Resources**

The ability to negotiate and enforce these agreements hinges on the community and their networks. This can leave many communities vulnerable, where they lack critical insights and data required to formulate and successfully negotiate the provisions included in such negotiations. On the other hand, private companies, and especially chiefs in each community have far stronger power in accessing resources. These unfair advantages usually lead to corruption.

## **9. Representation of the community**

When negotiating the terms of CDAs between the mining company and the community, the community's interests must be properly reflected in the negotiations. However, it is sometimes the case that the community is represented by the chief of the village or someone in power, engaging in corruption, and they conclude CDAs that little benefit the community as a whole.

## **10. Quotas**

Quotas only work well when there are sufficient numbers of skilled workers within the national labor force to satisfy the requirements of both the government and the project as a whole. Unless specific quotas are established for high-level or skilled positions, companies may employ local people, particularly women, for unskilled positions and create few or no pathways for employee progression and skill development. High quotas can create unrealistic expectations, leading mining companies to add more unproductive positions and, in the worst cases, reduce or relocate investment. If the domestic labor supply is unable to meet the demand of the mining industry, high quotas can create suboptimal outcomes and run the risk of deterring investment.

## **11. Adverse Effects on Local Government**

Local governments are more familiar with the immediate terrain, culture, people, and businesses of communities located near mining sites. Local knowledge about how to best resolve conflicts remains a tool that the central government can utilize to prevent the mismanagement of mining projects throughout rural Nigeria. However, the shortcomings in the process of decentralization have negative effects on local governments. A consequential effect in the more remote parts of Nigeria is the lack of project management and implementation.

Many regional and local governments do not exhaust their annual capital budgets due to a lack of well-trained staff to plan and carry out development projects. Many local governments have issues with legal comprehension that contribute to a misunderstanding on how mining procedures work, their exact responsibilities, potential impacts, and how best to utilize the allocated budget. Therefore, local governments often cannot successfully bargain with mining companies, a result



that often leads to dissatisfaction about governmental services in rural areas. This puts regional and local governments at a significant disadvantage to create and implement development plans and resolve social conflicts.

Governmental workers at the local level have no institutional capabilities to negotiate with mining companies, create legal mechanisms to resolve conflict, and are left to compete with neighboring localities for resources. Mining companies can exploit such disunity among local governments, and take advantage of the lack of standards that exist throughout rural Nigeria's mining sector. If regional governments are unable to produce sustainable independent budgets, control local police forces in cases of large-scale protests, or be able to manage state emergencies, then reliance on the central government will only increase in the decades to come.

## **12. Corruption**

The ineffective implementation of decentralized enforcement and accountability has led to the exploitation of public funds by lower-level officials and the private sector, which operate in the political vacuum left by the central government. This allows endemic corruption to exist among the three branches of regional and local governments. Corruption at the regional and local levels of government increases the cost for innovation, hampers the productivity of human capital, and undermines public confidence in the ability of investments to produce tangible benefits, among a host of other negative ramifications.

## **13. Lack of Clear Objectives**

When faced with limited industrial or human resource capabilities, CDAs can compromise firms' productivity if regulations fail to adopt a phased approach to allow for domestic factors of production to adjust to the targets set. High targets with immediate applicability will necessarily lead to sourcing challenges with negative implications for mining projects.

## **14. Ineffective Incentives**

Incentives given to local firms may lead to inefficient allocation of resources and market distortions if they are not time-bound because domestic firms, encouraged by incentives and support measures, maybe wrongly tempted to invest in sectors where they would only be profitable if they benefit from those forms of protection, but would not be sustainable in the long run should the government withdraw support. Wrongly targeted incentives may create rent-seeking behaviors that are difficult to remove, in particular in countries with strong vested interests, a high propensity for rent capture, and with weak institutions.

## **15. Technological Advancement**

Advances in technology in mining production processes are likely to pose new challenges for the future demand in labor and procurement. Mining processes and practices may radically change as

will the nature of tasks to be performed by workers (if any). Technological changes may therefore render current CDAs ineffective, in particular, if governments are unable to foresee those changes, adjust their skills-related and industrial policies, and adapt their instruments to foster local value addition accordingly.

## **16. Competing Interests**

Concluding CDAs that benefit the community will enable the mining company to ensure the stable operation in harmony with the community, in turn benefiting the company as well. However, too stringent and inflexible regulations on CDAs by the government might discourage the mining company to invest in that country at least in the short run, incentivizing it to go out to other countries with less harsh regulations. In addition, strong and uniform government regulations ensure CDAs are implemented as the terms provide, while the inflexibility of the government regulations are not suitable given the differences of the communities in many aspects, including population size, environmental conditions, and configuration of the ground.

## **17. Defining the Nature of the Institution**

CDAs and their equivalents around the world have a common objective: protect the interests of the host community. They do have different approaches to achieve this but the most problematic difference they have and what makes it difficult to enforce them correctly in Nigeria is their nature as a legal institution. They do not purely belong to the basic definition of a contract given the interests at stake and the problem with establishing who represents the host community negotiating and agreeing, but they also do not fit within the concept of governmental mandate due to the space that the parties have to negotiate. A similar problem with the definition of the nature of CDAs comes when a consequential or remedial approach is tried: a breach of contract cannot ever be claimed against the investor or mining company to enforce the agreement or obtain compensation (and thus is it tough to call it one), and a failure to perform might entail sanctions from the authorities, but not a direct project suspension (thus it is not technically a mandate from the government). A clear definition of their nature is required to understand the actual remedies available for the host community.

## **18. Lack of International Best Practices**

Although many countries have or require CDAs or similar instruments for the development of communities that are affected by projects in several industries, as of today, there are no official best practices agreed by the international community.<sup>59</sup> When local regulators fail to provide the framework for a specific topic or theme, international standards and guidelines become important even when they are not mandatory. Unfortunately, considering the different industries, countries,

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<sup>59</sup> Loutit, J., Mandelbaum, J., & Szoke-Burke, S. (2016). Emerging Practices in Community Development Agreements. Columbia Center on Sustainable Investment.  
<http://ccsi.columbia.edu/files/2016/02/Emerging-practices-in-CDAs-Feb-2016-sml.pdf>

and interests that CDAs are involved with, it is hard to think a set of internationally agreed rules will be coming any time soon.

## 5. Case Studies

In order to create a set of insights that can be used across the discipline, we propose a regional and sectoral analysis that looks at two purposefully chosen CDAs from Nigeria and Ghana. These CDAs were chosen to provide diversity in, not only locale, but in structure, history, industry, and development motive. Analyzing CDAs from this perspective will allow us to better understand and represent the entire ecosystem and provide insight into the growth opportunity of the CDAs in the mining sector.

In this section, we evaluate the CDAs of the Nigerian Petroleum Sector and the Ghanaian Mining Sector in order to identify the potential risks and benefits of each model and determine the effectiveness of each case study.

When analyzing each case, we also looked at their historical significance as well as stated objective, to determine to what extent the CDA plays a development role within the local community. This step is important, as the development or social nature of the CDA is one of the chief differentiators between CDAs and other legal requirements.

Each assessment concludes with a set of key takeaways that can be used for the Nigerian Mining sector, also seen in our recommendations stated above.

### 5.1 Ghana Case Study

#### 5.1.1 Highlights

- Ghana is one of the few countries that have not adopted strict CDA laws but still have good CDA practices (e.g., the Ahafo Social Responsibility Agreement).
- Ghana is similar to Nigeria in many aspects (e.g., same economic structure that relies on NX and similar culture) ,while Ghana's economic and social development in the mining sector can provide Nigeria with a valuable reference.
- CDA advancement in Ghana is bottom-up, not top-down. The Ahafo SRA was signed after the demands of the community groups were fully expressed through protests, and thus the government and enterprises jointly promoted the transfer of interests to the community groups.
- A must-agreed CDA is not the most important law in the status quo. However, the most valuable law terms are those that can clearly define the rights of the government, enterprises, and communities, which are what Nigerian current laws are lacking.
- In the short-run, we recommend that the policymakers of Nigerian could learn from Ghana on how they regulate and “force” the private companies to sign up CDA contracts voluntarily. In the long-run, we recommend years of education to not only promote a harmonious relationship, but also the transformation of Nigeria’s economy, one of the mandates that our client SMDF holds.



Figure 2: The Experience of the Newmont Ahafo Development Foundation

### 5.1.2 Introduction

Ghana is the second largest economy in West Africa, with one place after Nigeria. Although the economy is smaller, Ghana's economy is much more resilient in the context of Covid-19. According to statistics from the African Development Bank (ADB), Ghana is expected to record a real GDP growth of 4.8% in 2021, while Nigeria's only 3.3%. The core reason for the economic disparity is that the epidemic has caused oil prices to plummet, which has slowed down the economic growth of countries whose economic structure is highly dependent on oil. On the other side, although Ghana discovered a large amount of oil reserves around 2007<sup>60</sup>, Ghanaian economy is more dependent on gold exports and service industry, which accounts for half of the GDP.<sup>61</sup>

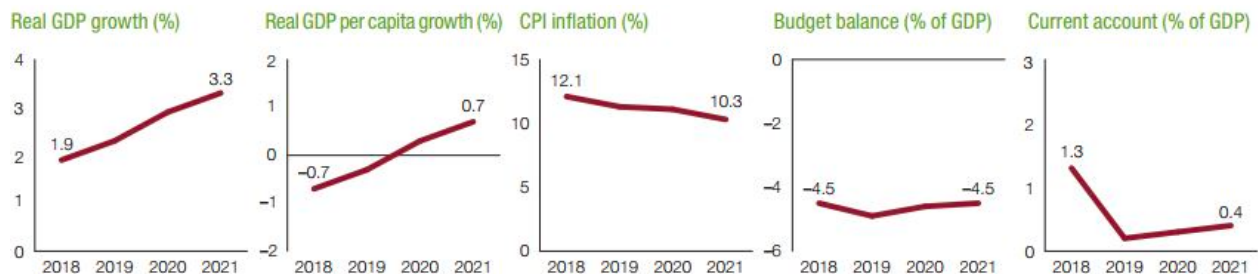


Figure 3: Ghana Economic History and Forecast

<sup>60</sup> Ghana Mining Week, Business Monitor International, 2007

<sup>61</sup> African Economy Outlook, African Development Bank. Data from domestic authorities: figures for 2019 are estimates; figures for 2020 and 2021 are projections by the African Economic Outlook Team

Unlike the relevant provisions in the Nigeria Mining Act, the Ghana Mining Act does not impose strict legal requirements on the CDA. However, through separate regulations in the Mining Act and a separate well-known Social Responsibility Agreement (SRA)<sup>62</sup> (signed by Newmont Gold Ltd and 10 local communities in Ghana), the study of the Ghanaian case is still of great significance. The above reasons have made Ghana a more mature market and law in Solid Mineral mining, and made Ghana a key Case Study object for this Capstone.

This Case Study hopes to guide this Capstone's recommendations to Nigeria's CDA by analyzing the characteristics, advantages and existing criticisms of the relevant legal system for Ghana mining.

### 5.1.3 Overview: Legal Schemes in Ghana

The legal system of mining in Ghana is divided into three parts, the Constitution, the Ghana Minerals and Mining Act Law (GMMA)<sup>63</sup> together with its amendments, and the Ghana Minerals Development Fund Act (GMDA)<sup>64</sup>. The National Constitution<sup>65</sup> defines the ownership of minerals as national ownership, and the president has the power to authorize mining. The Ghana Minerals and Mining Act Law (GMMA) promulgated by Ghana in 2006 weighed the interests of the government, the public and private enterprises, and stipulated regulations on concession rights, development agreements, and landowner subsidies. The GMDA (Act 912) established the Mining Community Development Scheme, a Fund established to directly sponsor socio-economic development in communities in which mining operations take place or which are affected by mining activities. The Act provides that the Scheme be managed by certain government officials and leaders of the respective communities. The Act lists donations from Mining companies as one of its sources of funds but mining companies are under no obligation to make donations to the scheme.

#### GMMA's Key Terms related to Community-Company Relationship Summary

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<sup>62</sup> Ghana-Ahafo-Mine-Local-Community-Newmont-Ghana-Gold-Ltd-2008-Social-Responsibility-Agreement, available at <http://ccsi.columbia.edu/files/2016/11/Ghana-Ahafo-Mine-Local-Community-Newmont-Ghana-Gold-Ltd-2008-Social-Responsibility-Agreement.pdf>

<sup>63</sup> Ghana Mining Act Law 2006, available at <https://resourcegovernance.org/sites/default/files/Minerals%20and%20Mining%20Act%20703%20Ghana.pdf>

<sup>64</sup> Ghana Minerals Development Fund Act, available at <http://mlnr.gov.gh/wp-content/uploads/2019/06/Mineral-Development-Fund-Act-2016-Act-912-1.pdf>

<sup>65</sup> Ghana Constitution, 1992, available at [https://www.constituteproject.org/constitution/Ghana\\_1996.pdf?lang=en](https://www.constituteproject.org/constitution/Ghana_1996.pdf?lang=en)

|                                       |  |
|---------------------------------------|--|
| Before the Provision of mining rights | Obliges the Minister to notify a chief or allodial owner and the relevant District Assembly of a received application for the grant of a mineral right in respect of the land prior to making a division over the application. However, this does not oblige the Minister to actually consult with the host community. |
| Section 13(2)                         |  |
| Provision of mining rights            | The Minister shall, not less than 45 days prior to making a decision under subsection (1), give a notice in writing of a pending application for the grant of a mineral right in respect of the land to a chief or allodial owner and the relevant District Assembly.  |
| Section 13(2)                         |  |
| Dispute Resolution                    | If the disputes arise between a holder of mineral rights(usually a private company)/a citizen between the government, then they could either seek local or international arbitration, or follow the UNCTRAL rule.  |
| Section 27                            |  |
|                                       | Each agreement granting a mineral right shall contain provisions on the method of resolution of disputes that may arise under the agreement.   |
|                                       | The holder of mineral rights could notify the government Minister in writing that the holder wishes to refer a dispute for resolution and, but for this subsection, its mining right might expire or reduced   |
| The surface right protection          | The holder of the mining right is required to respect the surface right of the land owner(usually community residence). The private company should also provide compensation based on government-supervised evaluation procedure.  |
| Section 72                            |  |
| Tax and Royalties                     | The royalties required by the government should be no more than 6% and no less than 3% of the total revenue. And the Commission has the rights of discretion.  |
| Section 25                            |  |
| The stability agreement               | The government provides a period that is no more than 15 years, when they promise that certain changes in regulations (including royalties) will not have effect on the holders of mining rights.  |
| Section 48                            |  |
| Development Agreement                 | If the investment exceeds 500 million USD, a development agreement(DA) is required to be ratified by the parliament, in which the DA needs to deal with the settlement of disputes, environmental issues etc.  |
| Section 49                            | The GMMA does not legally require mining companies to make   |



CDAs with the host community, but several mining companies have entered into CDAs on a voluntary basis in Ghana.<sup>66</sup>

|   |  |
|---|--|
| Forestry & Environment Protection Section 18 & 27 | The private company is required to obtain permission from the Environmental Protection Agency (EPA) for the protection of natural resources, public health and the environment.<br>The EPA can suspend the mining rights of private companies. |
|---|--|

As shown in Table above, Ghana currently lacks a statute explicitly mandating mining companies to negotiate and conclude CDAs prior to commencement of operations. Although this case study does not analyze Ghana's socio-economic features, it is worth investigating why Ghana has a few voluntarily signed CDA that functioned well.

#### 5.1.4 The balance of Power: How the CDA is reached voluntarily

##### (I) Ahafo SRA, the history, and the achievements

The Ahafo Social Responsibility Agreement (SRA) is one of the most well-known classic cases in CDA development. It is studied by Canadian International Resources<sup>67</sup> and Development Institute, Leibniz Information Centre for Economics etc. The Ahafo SRA was jointly signed by 10 communities in the 2 districts with Newmont Ghana, one of the world largest gold mining companies.

Before 2006, Ghana's mining sector was accused of low-level management<sup>68</sup>, inadequate and one-fit-for all sustainability protection mechanism. Protests<sup>69</sup> and disputes have happened between the local communities and the private companies. This was when the government stepped inside and promoted reform, for a more sustainable growth.

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<sup>66</sup> Evaristus Oshionebo, *Mineral Mining in Africa : Legal and Fiscal Regimes*, 300. London : Routledge, 2021.

<sup>67</sup> Implementing the Ahafo Benefit Agreements: Seeking Meaningful Community Participation At Newmont's Ahafo Gold Mine In Ghana, Canadian International Resources

<sup>68</sup> Canadian International Resources & Interview Notes with Ayisha Malik(former 2019 Capstone student, residence of Ghana)

<sup>69</sup> Corporate Social Responsibility and the Gold Mining Industry : The Ghana Experience, Montclair State University Aimann Sadik, p30-31, available at <https://core.ac.uk/download/pdf/234620991.pdf>





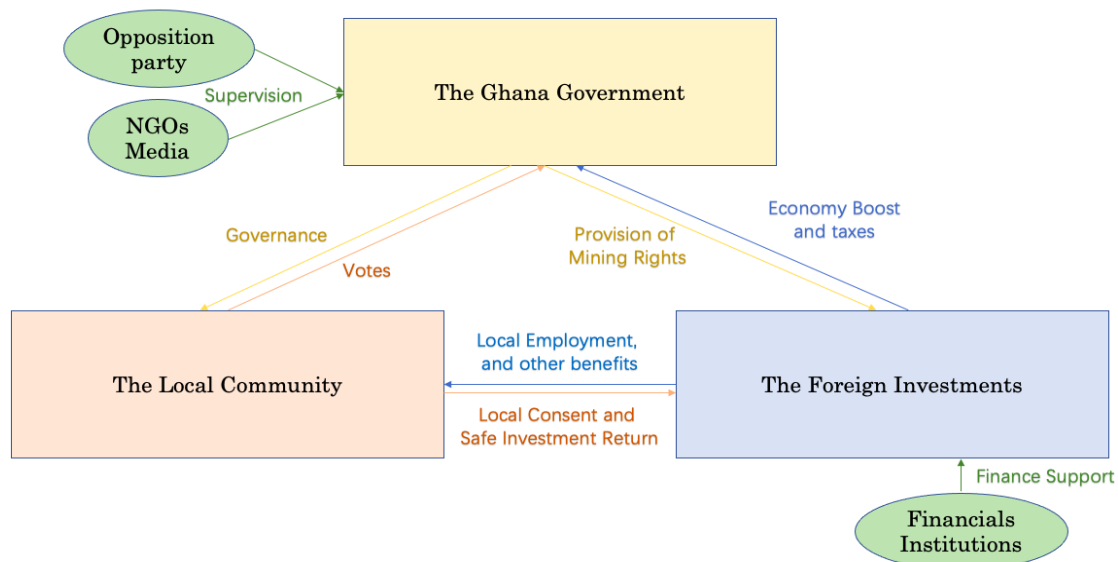
70

Figure 4: Community Protests against Mining Companies

The Ahafo SRA came along under the background. It was signed in an important mining area in Ghana, and the concept of corporate social responsibility gradually became more and more important in terms of successful mining operations<sup>7172</sup>.

(2) The key question: how did the government and communities get it done?

The SRA was made bottom up, instead of upside down. The balance of power is the key that made the agreement work, which could be summarized as the graph below.



73

Figure 5: Stakeholder Power

<sup>70</sup> Source: Graphic online

<sup>71</sup> Cheshire, L. (2010). A corporate responsibility? The constitution of fly-in, fly-out mining companies as governance partners in remote, mine-affected localities. *Rural Studies*, 26(1), 12-20. doi:10.1016/j.jrurstud.2009.06.005

<sup>72</sup> Kapelus, P. (2002). Mining, corporate social responsibility and the community: The case of Rio Tinto, Richards Bay Minerals and the Mbonambi. *Business Ethics*, 39(3), 275-296. doi: 10.1023/A:1016570929359

<sup>73</sup> Source: the 2021 Capstone Team

### (3) The Ghana Government: Stakes at hand

- ① The stability agreement.<sup>74</sup> Some mining companies have entered into a Stability Agreement with the government, which seeks to stabilize the regulatory regime and provides the mining companies with fiscal concessions for a period. Government in turn requests the mining companies to invest a certain percentage of profits or an amount commensurate with each ounce of Gold produced, in Community Development activities. In this regard, mining companies are obliged to comply with the provisions of these agreements as failure to do so amounts to a breach of the agreement and risks the possibility of losing the concessions granted by the government.
- ② Tax and Royalties. The government has the rights in royalty's discretion, and that is a tool that they could use to negotiate with the private companies.
- ③ Suspend, and even withdraw of the permission of mining. The potential suspension and withdrawal of mining rights is the ultimate tool that the government could use. However, the tool is also a two-edged sword since the community relies on the private investment as well.

### (4) The Community: Stakes at hand

The discontent. Discontent itself from the local community is actually a powerful tool in the bargaining process. Mining companies generally take steps to carry out community development activities as they need the social license to operate. However, in Ghana, the mines are located very close to the communities unlike other jurisdictions like Australia where mines are very far away from human settlements.<sup>75</sup> Residents of communities can go as far as disrupting mining activities if they make complaints/demands and these complaints are not catered for. About 2 years ago, residents shut down a mine in Guinea<sup>76</sup> because residents from a nearby community made demands that were not met. The cost of disruption of mining processes may run into millions of dollars in some circumstances. Hence, mining companies are reluctant to get into such situations.

### (5) Other stakeholders: Stakes at hand

- ① Public Media. For international or local private companies, the importance of PR tends to grow with their size. Some of the mining companies are listed on various stock exchanges. Having such bad publicity may have an adverse effect on these companies' stock price. Further, major shareholders may threaten to cut ties with a company due to negative reports of such companies failing to be socially responsible.
- ② Industry Organizations. With respect to Gold mining companies, most of the leading gold mining companies are members of the World Gold Council which has policies requiring members to mine in a responsible way. In Ghana, the Chamber of Mines and Inter-ministerial Committee on Illegal Mining are key industry stakeholders as well. The Inter-ministerial Committee on Illegal

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<sup>74</sup> GMMA Section 48; And Interview Notes with Ayisha Malik

<sup>75</sup> Interview Notes with Ayisha Malik(former 2019 Capstone student, residence of Ghana)

<sup>76</sup> Interview Notes with Ayisha Malik(former 2019 Capstone student, residence of Ghana)

Mining (IMCIM)<sup>77</sup> has a responsibility to take an action on their behalf. The committee has powerful tools that could affect law enforcement and rules revision. Moreover, the committee could cooperate with the Natural Resource Department and act as a middle man to protect the local community interests and residents' benefits or to extend potential mining locations for more economic rewards.

#### (6) The Content: Ahafo SRA, how to achieve community consent

The Ahafo SRA consists of three parts. The first is the transfer and distribution of interests, the second is the settlement of disputes, and the third is the supervision and democratization mechanism.

##### i. Transfer of Interest

Through the SRA, local benefits are transferred from Newmont Ghana to the community, where the concept of sustainable development was taken care of.<sup>78</sup>

| Transfer of Interest from Private Sector to the Community <sup>79</sup> |   |   |
|---|---|---|
| Description   | Detailed Agreements   | Challenges Ahead  |
| Compensation for the Landowners   | Provide economy subsidy that could compensate for the lost due to the mining activities                                     | Inequality problem for people without farmland and not cultivating their homeland |
| Resettlement  | Newmont Ghana bears the resettlement costs of the people who are homeless due to mining and builds settlements for them     | Criticism that resettlement doesn't include locals to decide                      |
| Employment  | Newmont Ghana signed a local employment / agreement to regulate to hire unskilled and/or skilled workers from the community |   |

<sup>77</sup> <https://www.myjoyonline.com/inter-ministerial-committee-on-illegal-mining-dissolved/#:~:text=IMCIM%20was%20established%20government%20to,Kwabena%20Frimpong%20Boateng>.

<sup>78</sup> Corporate Social Responsibility and the Gold Mining Industry : The Ghana Experience, Montclair State University Aimann Sadik, p30-31, available at <https://core.ac.uk/download/pdf/234620991.pdf>

<sup>79</sup> Ghana-Ahafo-Mine-Local-Community-Newmont-Ghana-Gold-Ltd-2008-Social-Responsibility-Agreement, available at <http://ccsi.columbia.edu/files/2016/11/Ghana-Ahafo-Mine-Local-Community-Newmont-Ghana-Gold-Ltd-2008-Social-Responsibility-Agreement.pdf>

|           |  |
|-----------|--|
| Education | Newmont Ghana promises to improve the local / education level by building schools and providing training. Newmont also actively cooperates with the local government to build a vocational training center |
|-----------|--|

|                    |   |                               |
|--------------------|---|-------------------------------|
| Disease Protection | Malaria, AIDS prevention and control, construction of sanitations, etc. | How to include Covid concerns |
|--------------------|---|-------------------------------|

## ii. Settlement of disputes

The SRAs have their limitations in terms of dispute settlement because the SRAs were concluded between the two parties as a non-legally enforceable document. The SRAs unequivocally state that “this document does not create any legally enforceable rights to the benefit of either of them” and “[t]he parties hereby renounce their rights to enter into any form of litigation or arbitration on any dispute or grievances arising out of this Agreement.”<sup>80</sup>

## iii. The Supervision Mechanism

The SRA requires the establishment of a forum with a monitoring mechanism. The delegate representatives in the forum include companies, community members, female groups, farmers, and government representatives. These delegates have the right to represent each other's interest teams, monitor the enforcement of the agreement, and have the right to amend the agreement if necessary. These delegates total about 40-50 people. In addition, the forum will also include independent monitors for unbiased supervision.

## 5.1.5 Key Takeaways: a learning from Coase Theorem<sup>81</sup>

Ghana's dependence on the mining industry is higher than that of Nigeria, which on the one hand means that Ghana has a more mature system in terms of mining industry-related regulations, while on the other hand, it also means that Ghana's space of institutional reform is relatively smaller. Nevertheless, we believe that many practices in Ghana are of great significance to the development of Nigeria's mining industry.

According to the classic Coase theory, it is proved that to promote a mutually beneficial, socially desirable solution, there are three conditions to meet: ①the property right must be clearly defined ②the transaction cost must be setting as low as possible ③there must not be any wealth effect, so as the negotiation result will not change due to the different in property rights.

<sup>80</sup> Ahafo Social Responsibility Agreement note 152, s. 4.2

<sup>81</sup> Coase, 1960. R.H. Coase. The problem of social cost. Journal of Law and Economics (1960), pp. 1-44.

The practice of Coase Theorem could be studied in the Ghana Case study. One could clearly see how Ghana achieved voluntarily signed agreement even without a mandatory law, under a clearly defined stakes for different stakeholders, and an efficient negotiation process.

To promote Nigeria's sustainable mining and investment, it is recommended as follows:

| The Theory                              | The Recommendation  |
|---|---|
| Property right must be clearly defined  | <p>Setting a clear definition of responsibilities and rights for government, community and private companies. It is true that it will often lead to criticism from both sides (private companies and the public), since the formulation of powers and responsibilities cannot be completely fair.</p> <p>Taking Ghana as an example, the government's 15-year stability agreement for companies has always been the focus of public criticism. On the other hand, the government has also been criticized for defining in the law that uncultivated land does not require crop compensation. However, if the government cannot clearly define it, the negotiation will not proceed smoothly.</p>  |
| Transaction cost must be setting low    | <p>Set up a mechanism that could promote dispute negotiation and the expression from minorities.</p> <p>Promote communication between groups rather than individuals, encourage community groups rather than individual chiefs to negotiate with companies, and encourage industry associations rather than independent companies to communicate with the government.</p>   |
| Reduce the influence from wealth effect | <p>Fight against corruption, which might be a decade-long battle.</p> <p>In the short-run, a supervision mechanism that is as transparent as possible should be established to promote the publicity of information. For example, in the Ahafo case study, companies are required to provide a portion of their revenue to fund the foundation for regional development, and when corruption occurs, these funds are often used to build the chief's residence. Without the intervention of external forces or under the lack of expression of minority groups, actual political and religious rights will evolve into a wealth effect, which will affect the Pareto effect of the final agreement.</p> <p>In the long run, corruption factors can only be reduced through the long-term evolution of the political system and the improvement of the education level of the residence. The government could consider working with companies in the form of PPP to promote the improvement of local</p> |

education levels. And importantly, those focus should not only be on vocational training, but also basic education and political education for the people.

## 5.2 Nigeria Case Study

### 5.2.1 Highlights

- Comprehensive local content framework for the oil and gas sector
- Nigeria is one of the few countries having enacted a piece of legislation dedicated to local content (the “Act”). It came into effect in 2010.<sup>82</sup>
- A key objective is to increase the “Nigerian content” meaning “the quantum of composite value added to or created in the Nigerian economy by a systematic development of capacity and capabilities through the deliberate utilization of Nigerian human, material resources and services in the Nigerian oil and gas industry”.<sup>83</sup>
- A schedule to the Act sets the minimum level of “Nigerian Content” to be achieved for each category of goods and services (with no timeframe)<sup>84</sup>
- A Board is established and its role is to guide, effectively monitor, coordinate and implement the provisions of the Act.<sup>85</sup>

### 5.2.2 Legal Background of CDAs

Community Development Agreements (“CDAs”) are legal requirements contained in the Nigerian Minerals and Mining Act of 2007 (the “Act”) that mining companies require to initiate and operate a project in the country. Companies must implement a CDA with the approval of the government and the affected community as part of the approval process.

The main purpose of the CDAs is to ensure the transfer of social and economic benefits to the community affected by the project, going from education to financial. CDAs were regulated by the legislative branch of the Nigerian government in an attempt to preserve the rights of the people while developing the growth of the industry.

However, while the Act provides certain provisions regarding the characteristics of CDAs, the content of such Act is vague and it leaves room for interpretation. The available regulatory framework of CDAs is limited and fails to provide provisions that completely cover their application and enforceability. For purpose of this legal background analysis, it is necessary to take

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<sup>82</sup> Temitayo Bello, “Local Content in the Nigerian Oil and Gas Sector: A Classical Model for Indigenization,” SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, May 19, 2017), <https://doi.org/10.2139/ssrn.2971001>.

<sup>83</sup> Uchenna Orji, “The Nigerian Oil and Gas Local Content Regime and Its (Non) Compliance with the Trims Agreement,” *Journal of Sustainable Development Law and Policy (The)* 9 (December 20, 2018): 152, <https://doi.org/10.4314/jsdlp.v9i2.9>.

<sup>84</sup> Orji.

<sup>85</sup> Pereowei Subai, *Local Content Oil and Gas Law in Africa: Lessons from Nigeria and Beyond* (Routledge, 2019).

a look at the applicable framework:

### Constitutional Right to Regulate Mining Activities

The Nigerian Constitution of 1999 with Amendments through 2011 (the “Constitution”), is the country’s highest ranked legal statute. As such, it sets forth an “Exclusive Legislative List” in Part I of its second schedule. Items and topics in the list shall be solely legislated by the National Assembly. This list includes in subsection 39 “Mines and minerals, including oil fields, oil mining, geological surveys and natural gas.” Besides from this section and the faculty granted to the Federal High Court to exercise jurisdiction to the exclusion of any other court in civil cases and matters related to mines and minerals, there are no other provisions in this regard in the Constitution.

### General Regulation of Mining and CDAs: the Act

Pursuant to the Act a CDA must be in place prior to the operation of the mining project. They must address specific issues that are relevant for the preservation of communities: education goals, employment opportunities for indigenes of the communities, financial forms of contributory support for infrastructural development (health, services, roads, water and power), assistance with the creation, development and support to small scale and micro enterprises, agricultural product marketing, and methods and procedures of environment and socio-economic management and local governance enhancement.

In addition to this, CDAs shall specify appropriate consultative and monitoring frameworks between the title holder and the host community, and the means by which the community may participate in the planning, implementation, management and monitoring of activities carried out under the CDA.

### Specific Regulation of CDAs: The Regulations

Pursuant to the general terms of the Regulations: (i) the Minister has the power to establish procedures to monitor compliance with CDAs, (ii) title holders shall give biannual reports on the CDAs, (iii) title holders have to comply and submit a copy of their CDAs before the Mining Cadastre Office, (iv) title holders can only begin operations once the Mines Environmental Compliance Department approved the CDA, (v) CDAs shall, among other things, address the implementation plan of all the social concerns raised in the Environmental Impact Assessment Study in sub-regulation 6 of the Regulations, (vi) “host community” is defined as the community where the mineral title area is located or the closest one (when difficult to determine, the Minister, in consultation of other agencies shall decide), (vii) signatories on behalf of the host community shall be people freely chosen by the generality of the relevant community to represent them (not less than 3 not more than 7); the list shall be submitted to the Minister and verified by



it, and (viii) the CDA shall be reviewed every 5 years.

### 5.2.3 Introduction and Background for the Case Study<sup>86</sup>:

| Time | History Milestones  |
|------|---|
| 1930 | Royal/Dutch Shell starts exploration in Nigeria Delta   |
| 1971 | Nigeria creates Nigerian Oil Corp. and becomes a member of OPEC   |
| 1995 | Shell discovers Bonga field, resulting in shift from onshore to offshore operations in Nigeria  |
| 1997 | Establishment of One Oil and Gas Free Zone (job creation and expertise development)   |
| 1999 | Establishment of the Local Business Development/Global Procurement Unit to pursue the following activities: <ul style="list-style-type: none"><li>- Actual award of contracts to Nigerian firms</li><li>- Farming out of oil fields to local Nigerian oil companies</li><li>- Facilitating technology transfer, and</li><li>- Holding Local Content Development fairs</li></ul> |
| 2010 | Introduction of the Nigerian Oil and Gas Content Development Act  |

Nigeria's oil and gas industry was established in the 1930s when Royal/Dutch Shell launched its explorations in Nigeria's onshore areas. In 1971, Nigeria created its national oil company, Nigerian National Oil Corporation (NNOC) (which became the Nigerian National Petroleum Corporation – NNPC in 1977) and joined OPEC. Only one year later, Nigeria's onshore and shallow waters oil production already reached 2 million barrels per day. With the oil price shock of 1973, OPEC gained more influence and Nigeria introduced its programs of nationalization and indigenization, leading to government ownership of Shell Nigeria and of 60 percent of the other international oil companies operating in Nigeria. The government also acquired equities in subsidiaries of multinational oil service companies.

Local content in the Nigerian Oil and Gas sector, as a policy has been entrenched in a statute known as the Nigerian Oil and Gas Industry Content Development Act 2010. Through this, the law defines local content as: "the quantum of composite value added to or created in the Nigerian economy by a systematic development of capacity and capabilities through the deliberate utilization of Nigerian human, material resources and services in the Nigerian oil and gas industry".

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<sup>86</sup> Subai.

The practice of imbining local content in the Nigerian oil and gas sector is inserted in salient provisions of the Petroleum Act. Prior to the enactment of the Local Content Act in 2010, local content was a policy that had no statutory backing. International Oil Companies usually put local participation clauses but these clauses were rarely honored. The Act makes it mandatory for any category of person willing to engage in any business related to oil and gas to consider “local content.” Section 2 states that all regulatory authorities, operators, contractors, subcontractors, alliance partners and other entities involved in any project, operation, activity, or transaction in the Nigerian oil and gas industry shall consider Nigerian content as an important element of their overall project development and management philosophy for project execution.

Invariably, local content seeks to increase the participation of nationals in the oil and gas sector without regard to a particular level. It is viewed as the categorization of companies, identification of areas of local competency, preferential treatment for indigenously owned companies, institutional measures, and the creation of a national economic framework for conditions for value addition. It is a value that is created in-country, through deliberate utilization of its human, material resources (imported & local), and services for the purpose of increasing participation in the operations of oil and gas.

## **5.2.4 What’s the Law from a deductive perspective**

### **Nigerian Constitution of 1999 with Amendments through 2011 (the “Constitution”)**

The country’s most important and relevant statute sets forth an “Exclusive Legislative List”. When included in the list, only the National Assembly shall have power to make laws for that matter or topic. This list attached to the Constitution includes in subsection 39 “Mines and minerals, including oil fields, oil mining, geological surveys and natural gas.

The only additional relevant section of the Constitution relating to oil & gas is article 215 (1) that establishes the following: “Notwithstanding anything to the contrary contained in this Constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly, the Federal High Court shall have and exercise jurisdiction to the exclusion of any other court in civil causes and matters (...) n. mines and minerals (including oil fields, oil mining, geological surveys and natural gas);”

### **Petroleum Act**

Enacted on November 27, 1969, the act/law serves the purpose of regulating requirements to engage in the oil and gas industry in Nigeria. It has been outdated and it does not include any relevant section or article on the development of communities affected by or involved in oil and gas exploration projects.

## Petroleum Regulations

Enacted along and after the Petroleum Act, the Petroleum Drilling and Production Regulations, the Petroleum Regulations and the Petroleum Refining Regulations, govern oil and gas activities and operations in the country such as exploration, development, production, storage, transportation, refining and marketing.

## Other related laws & regulations

| The Act  | Relevant to purpose of CDA / ESG   |
|--|--|
| The Petroleum Profits Tax Act  |  |
| The Deep Offshore and Inland Basin Production Sharing Contracts Act  |  |
| The Nigerian National Petroleum Corporation Act                      |  |
| The Environmental Impact Assessment (EIA) Act                        | It provides the framework for assessing the impact of projects on the environment  |
| The Federal Inland Revenue Service (FIRS) Establishment Act 2007     |  |
| The Education Tax Act  |  |
| Land Use Act (1979)  |  |
| The Niger Delta Development Commission (Establishment) Act           | It mandates the payment by oil and gas companies of a percentage of their annual budgets for the development of the Niger Delta areas where oil and gas are exploited; [chronically underfunded] |
| The Nigerian Oil and Gas Industry Content Development Act 2010       | It provides a framework for promoting the participation of Nigerians in the industry and laying down the minimum thresholds for local contents utilized in the sector                            |
| The Nigerian Extractive Industries Transparency Initiative Act 2007  |  |
| National Oil Spill Detection and Response Agency (Establishment) Act |  |
| The Oil Pipelines Act  |  |

## Corporate Social Responsibility (CSR) roles and government agencies

| Public Sector Roles | Principal Nigerian Government Agencies |
|---------------------|--|
| Mandating           | Department of Petroleum Resources(DPR) |

|              |  |
|--------------|--|
|              | Federal Ministry of Environment                                      |
| Facilitating | Nigeria Extractive Industry Transparency Initiatives(NEITI)          |
| Partnering   | Niger Delta Development Commission(NDDC)<br>Ministry for Niger Delta |
| Endorsing    | Federal, state and local government officers                         |

### The New Beginning

The new developments and reality in the country have resulted in the passing of the Petroleum Industry Governance Bill (PIGB) by the Senate of Nigeria in 2017. This new legal package is aimed to reorganize the legal and fiscal terms governing the oil and gas industry. The bill was passed by the House of Representatives and only needs to be asserted by the President before it becomes enacted as a law.

One of the key features of the package appears to be to seek to, among other things, increase the level of accountability and transparency by strengthening the governing institutions to attract local and foreign investment in the industry.

The package has been in the making for more than a decade and it is only a matter of time before it to become the new reality of the most important industry in Nigeria.

### 5.2.5 Background behind the Law

The Petroleum Act was passed and enacted during the Nigerian Civil War (also known as the Biafran War) that lasted from 1967 to 1970. It was a national armed conflict between the sitting government of General Yakubu Gowon and the secessionist state of Biafra led by Lt. Colonel Ojukwu. Under such context the oil and gas industry played an important role during the civil war given its economic relevance and importance for the parties trying to gain control of the country.

Ever since 1937, Shell-BP Petroleum Development Company had been in charge of handling the exploitation of oil and gas in Nigeria in a monopolistic manner. This was something that the Biafran party did not want to tolerate and thus fought for and gain total control over the company.

The Petroleum Act was then enacted towards the end of the war and hence it limited the participation of private parties to some extent. Such law was compatible with the context back then, but it is not anymore.

### 5.2.6 Other means

As mentioned, there are no CDAs in the oil and gas industry. Oil and gas companies operating in the Niger Delta executed memoranda of understanding (MOU) whenever they deem it necessary to define their engagement with a community by an agreement.

MOUs existing in the oil and gas industry are voluntary non-binding understanding between communities and the companies. There have been disputes and claims of non-implementation of the MOUs signed in relation to oil and gas exploration and production in the Niger Delta.

The flurry of regulation notwithstanding, a combination of limited technical and human capacity, corruption, and institutional decay has severely impaired the enforcement of existing regulation. For instance, the 2007 Nigeria Extractive Industry Transparency Initiative (NEITI), set up to address issues of corruption and mismanagement, has fallen victim to the Federal government's inability – or unwillingness - to extend the initiative to state and local government levels. This has in turn impeded the efficient allocation of resources according to a subsidiarity criterium, depriving sub-national institutions of both voice and capacity in the expenditure process.

Additionally, the Niger Delta Development Commission (NDDC), an institutional mechanism aimed at facilitating the partnership between government and oil multinationals to promote development and reduce conflict in the Delta, has suffered from chronic underfunding.

Moreover, the unconstrained ability of foreign oil & gas multinationals to pass onto the government significant chunks of “social responsibility” costs often translates into a cascade effect, whereby the government, instead of incurring the cost passed on by the companies, passes on such costs to local communities in the form of poor regulation of the oil industry.

This aberration, combined with a dearth of incentives for “corporate social responsibility” initiatives, suggests that oil companies are more or less left to their own devices regarding setting standards of operation. The absence of a minimum control mechanism has meant that oil companies are often tempted to break the law, at a low cost and with little or no associated risk for doing so. This condition in turn makes it more economically rational for the oil companies operating in the region to break environmental and civil laws, which are deemed costly, as opposed to abiding by them.

The absence of a conducive regulatory and judicial environment, marred by government failures and chronic lack of access to justice, further aggravated by regulatory agencies' apathy in seeking “effective remedy” on behalf of local constituencies, has *de facto* produced a distorted community engagement scenario. Indeed, given these circumstances, local community engagement rests upon semi-spontaneous “corporate social responsibility” initiatives put in place by the oil companies.

While the aforementioned corporate social responsibility practices underwent significant changes since the dawn of Nigeria's oil industry, going through phases of pure philanthropy (S.C. “pay-as-you-go” strategy) and more sophisticated understandings of corporate-community involvement, they have largely settled on three, distinct partnership models:

- ◆ the S.C. Global Memorandum of Understanding (GMOU), recently enacted by Shell and Chevron, among others;
- ◆ corporate-community “Foundation model”, adopted by Statoil and Total;
- ◆ a “mixed” model, such as the one elected by Exxon, which resorts to a combination of philanthropy and corporate-community agreements.

## 5.2.7 Comparison with the Nigerian Mining Law

Mining and Oil and Gas industries share the same constitutional basis, which is Nigerian Constitution of 1999 with Amendments through 2011 (the “Constitution”).

### Nigerian Minerals and Mining Act of 2007 (the “NMMA”)

Enacted on March 16, 2007 to regulate the exploration and exploitation of solid materials in Nigeria, repealing the Minerals and Mining Act, No. 34 of 1999 in the process, the 2007 Nigerian Minerals and Mining Act (NMMA) touches upon social matters related with the industry and sets forth the legal basis of our subject matter (community development agreements, or “CDAs”).

With specific respect to CDAs, 4 articles come to the fore:

- ◆ “4. Subject to the provision of this Act, the Minister shall (...) (c) monitor compliance with Community Development Agreements by industry operators ;”
- ◆ “71.(1).The holder of a mining lease shall not commence any-development work or extraction of Mineral Resources 'on the Mining Lease Area until after (...) (c) the conclusion of a Community Development Agreement approved by the Mines Environmental Compliance Department; and”
- ◆ “116.(1) Subject to the provisions of this section, the Holder of a Mining Lease, Small Scale Mining Lease or Quarry Lease shall prior to the commencement of any development activity within the lease area, conclude with the host community where the operations are to be conducted an agreement referred to as a Community Development Agreement or other such agreement that will ensure the transfer of social and economic benefits to the community.  
 (2) The Community Development Agreement shall contain undertakings with respect to the social and economic contributions that the project will make to the sustainability of such community.  
 (3) The Community Development Agreement shall address all or some of the following issues when relevant to the host community:  
 (a) educational scholarship, apprenticeship, technical training and employment opportunities for indigenes of the communities;

- (b) financial or other forms of contributory support for infrastructural development and maintenance such as education, health or other community services, roads, water and power;
  - (c) assistance with the creation, development and support to small scale and micro enterprises;
  - (d) agricultural product marketing; and
  - (e) methods and procedures of environment and socio-economic management and local governance enhancement.
- (4) In the event of the failure of the host community and the lessee after several attempts to conclude the Community Development Agreement by the time the Title Holder is ready to commence development work on the lease area, the matter shall be referred to the Minister for resolution.”
- ◆ “117. The Community Development Agreement shall specify appropriate consultative and monitoring frameworks between: the Mineral title Holder and the host community, and the means by which the community may participate in the planning, implementation, management and monitoring of activities carried out under the agreement.”

### Nigerian Minerals and Mining Regulations of 2011 (the “Regulations”).

On May 13, 2011, pursuant to the powers conferred upon by section 21 of the Law, the Minister of Mines and Steel Development passed the Regulations with the purpose of regulating in detail the general principles established by the Law. Unlike the various regulations existing as secondary legislation of the Petroleum Act, the Regulations are aimed to be comprehensive to cover each and every major topic and issue related with the Law.

The Regulations build more on CDAs but fail to provide a complete and effective regulatory framework that is both enforceable at the judicial and extrajudicial levels. There are 9 articles that mention CDA’s, which are 5 (1) (e), 18 (1) (c), 22 (vii), 61 (1) (e), 105 (d) (xi), 114 (c), 118 (iii), 154, and 193.

Most of the provisions mentioned above refer to CDAs compliance, with the exception of a few provisions mandating the relevant parties to periodically report to the authorities.

What should come next from a legal deductive analysis? The specific policy of CDAs. Where a constitution and a law fail to provide enough legal ground explanation on a topic that is supposedly “regulated”, regulations and policies should build upon them.

Although national or subnational legislation providing a list of broad areas to be covered in the CDA is in abstract desirable, there should always be room for legitimate negotiations between the company and the community or the communities affected.

From a comparative perspective, even when the Oil and Gas industry in Nigeria does not have a CDA regulatory obligation, the fact that it is poorly included in the legislative bodies related with the Mining industry in Nigeria leaves both of them at the same place: room to improve and a lot of space to create and enact actual laws that are both updated and useful to protect the interests of the communities surrounding the projects.

### 5.2.8 Key takeaways

A patchy and often ineffectual regulatory framework precludes the effective protection and enforcement of local communities' claim to oil & gas extraction proceeds. In fact, the combination of Government's apathy, scarce judicial remedy and structural bargaining asymmetries between the parties involved produce an environment where local community engagement rests upon semi-spontaneous "corporate social responsibility" initiatives put in place by the oil companies. This, in turn, leads to obviously sub-optimal scenarios, with the Niger Delta scourged by endemic violence and local communities suffering from intolerable pollution and marginalization.

The importance of the Oil and Gas industry in Nigeria should never be underestimated. Even when the tendency of the world seems to indicate renewable energy is going to overtake fossil fuels in the long term, not all countries will be able to make the transition in a short term. The Oil and Gas industry in Nigeria should be constantly analyzed and considered as the starting point for other upcoming sectors, industries and potential pipelines for the country. By doing so, the regulatory framework related with it will be enhanced and tailor-made for the actual needs of the people and not only the interests of the private sector. Why is this needed? Because of the shortcomings it has:

**Less is more.** The common misconception that regulating in detail a specific topic is the way to make it work has led many countries to the creation of many laws, acts, regulations and policies that pretend to build a strong regulatory framework and ultimately fail to make it work. Nigeria is no exception when it comes to the Oil and Gas industry. With more than a dozen legislative bodies that regulate the industry and its sectors, it becomes burdensome and complicated to find specific topics and themes and their connection within the legal system built. Before considering regulating new institutions like CDAs in the industry, it is important to take a step back and analyze which legislative bodies can be merged, combined, eliminated or even superseded.

**Update and optimize.** Even when the Nigerian Oil and Gas Industry Content Development Act 2010 sets forth crucial provisions to protect local communities, the fact that the "main" law regulating the industry (the Petroleum Act) has not been integrally updated creates implementation problems. Provisions have to be cross referenced to be optimized and functional.

**Consideration of customs and habits.** MOUs existing in the Oil and Gas industry of Nigeria



are voluntary and non-binding between communities and the involved companies. And while some of them have worked to some extent in the past, there have been disputes and claims of non-implementation. These extralegal means (along with some others that can be considered from time to time) that come from the overall customs and habits from the industry have to be implemented in the regulatory framework to make them enforceable.

**Enactment of the new regulatory framework.** The Oil and Gas Industry in Nigeria has long been waiting for a regulatory package that will include, among others, provisions related to transparency and accountability to eliminate corruption and develop growth within the industry. The expedite enactment of the reform is crucial to avoid unnecessary updates and revisions to the legislative bodies due to the passing of time.

These structural flaws notwithstanding, Nigeria's oil & gas industry's size, age and affinity still affords plenty of lessons for the country's infant mining sector.

## 6. Conclusion

Nigeria faces a challenge in diversifying its economic activity and promoting sustainable growth in a post-COVID-19 environment. The mining sector, more specifically The SMDF, has a unique role to play in this endeavor and can serve as a catalyst for growth and change. To realize the many potential benefits of the mining sector, it is clear that an emphasis must be played on community engagement and development at both a local and regional level.

This report shows that CDAs have a particularly important role to play in achieving this level of sustainable development. However, if this development is to take hold, the Nigerian government will have to address many existing challenges and barriers. Among them, a current lack of government coordination, inefficient incentives, weak enforcement mechanisms, limited contextual specificity and best practices, and difficulties associated with a reliance on the private sector are the most significant.

Given the importance of community development in fostering sustainable growth, the study recommends several comprehensive solutions to incorporate CDAs within the mining industry. Although a standard model CDA may not be appropriate for every community, the broad practices described throughout the study should be applicable across the country. A key point is to ensure meaningful community involvement in the agreement-making process and in decision-making. Doing this from the beginning will help to ensure that the CDA, and the agreement-making process, are responsive to the needs, aspirations and local conditions of the community.

Community involvement must be meaningful and should be facilitated by identifying all impacted stakeholders, providing information, resources and capacity-building to help foster an even playing field, and implementing structures that involve community members in the governance and oversight of the agreement's implementation. This must involve developing the physical and human capacity of the sector, providing funding extension services as well as providing mining infrastructure.

Despite leading practices described in Nigeria's mining law, it is difficult to find many CDAs that exhibit them. There is therefore a great need for all stakeholders to work to establish more effective CDAs. Ensuring that these CDAs are effective and enforceable will go a long way in promoting Nigeria's mining sector on an international scale and provide the country with the economic diversification it is looking for in a post-COVID-19 world.

## 7. Next Steps and Areas of Future Research

**CDA Framework:** Future analysis should be conducted to determine the feasibility of streamlining a CDA across the entire mining sector within Nigeria. Particular emphasis should be paid to the ability of creating standard agreements across the industry.

**Development Mapping:** Further research is needed to map Nigeria's mining sector to the Sustainable Development Goals as well as specific Nationally Determined Contributions, to determine the long-term sustainability implications of the industry within the country.

**Cost Benefit Analysis (CBA):** We advise on conducting a CBA to determine the financial feasibility of enacting CDA's in a local context within Nigeria. Specific emphasis should be placed on environmental, social, and governance considerations in local communities to determine the impacts that increased mining may have.

**Spillover Effects:** Future research should be done to determine the extent that there are any positive or negative economic spillover effects that increased mining activity may have on bordering communities.

**Gender Impact Assessments:** To avoid negative impacts on the livelihoods of local women an assessment on the mining industries effect on women must be done. This assessment can either be a stand-alone exercise or part of the Environmental and Social Impact Assessments or Human Rights Impact Assessments.

**New Legislation Review:** In terms of the case study of Nigeria's oil and gas industry, a further analysis on the new legislation coming into effect in the following years needs to be conducted to understand the implications for CBAs.

**Post-COVID-19 World Context Follow-up:** A further analysis in the context of the world (and Nigeria) post-COVID-19 has to be carried out to understand the permanent consequences of the pandemic in the mining industry and CDAs.