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Legal Challenges Related to the Mining Royalty of Provinces and Territorial Communities in Congolese Law

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Abstract:
The DRC is rich in mineral resources, making it a country of mining interest. However, the management of mining royalties poses several legal challenges, particularly with regard to the distribution of revenue between the central State and the provinces or even decentralized local authorities. The legal framework governing mining royalties in the DRC is established by the 2002 mining code amended in 2008 as well as several other regulations. This code defines the obligations of mining operators as well as the methods for collecting and distributing royalties. Provinces have a crucial role in managing these resources, but their capacity to collect and manage these funds is often limited by legal and administrative shortcomings. This work therefore aims to propose possible solutions to improve the governance of mining revenues and avoid inter- and intra-institutional conflicts. Legislative reforms may be necessary to clarify rights and responsibilities at the central, provincial and ETD levels, while also strengthening their administrative capacity.

Keywords: Mining Royalty, Decentralization, Province, DTE, Superposition, Local Bodies, Mining Law

I. Introduction

The Democratic Republic of Congo (DRC) holds significant mining resources, including nearly half of the world's known cobalt reserves, making it the world's leading producer of cobalt, the leading African producer of copper and also has significant deposits in diamond, gold, coltan, zinc, uranium manganese etc.[1] Despite these immense mineral resources, the Congolese populations remain very poor and the DRC has generally been placed at the bottom of the Human Development Index (HDI) scale in recent years.[2]

The liberalization of the mining sector with the adoption of the Mining Code in 2002 opened the door to private investment with the effect or impact of growth in mining production and exports.[3] Paradoxically, more than ten years after this resumption of activities with the relaunch of mining production and

[1]David Manly et al, *le cobalt : renforcer la gouvernance est une urgence pour la transition énergétique*, center for law, energy and the environment, Mars 2022, p. 22
[2]EricBisil et al, *suivi de la domestication de la vision minière Africaine et partage des bénéfices issus du secteur minier*, retrievedfromhttps://www.cradec-org. (on 17/09/2024)
[3]Justice et Paix, *Mining code in DRCongo, the challenges of reforms*, retrieved onhttps://www.justicepaix.be (on 17/09/2019)

exports, the wealth created has not contributed to the improvement of the living conditions of citizens and the development of mineral-producing areas.[4]

This state of affairs has led to the revision of the Mining Code with a view to providing appropriate responses, to seeing mining contribute effectively to the development not only of decentralized territorial entities, but also and above all of the populations directly affected by mining activities in particular and, of all Congolese in general.

After the enactment of the revised Mining Code in March 2018, it was hoped that the social conditions of communities affected by mining projects would improve. One of the reasons leading to the revision of the 2002 mining law was precisely the reduction of the paroxysm between the exponential exploitation of minerals and the extreme poverty of the surrounding populations. During the work which preceded the revision of the mining code, civil society worked tirelessly by bringing several innovations, notably the withholding at source of 40% of the mining royalty and its breakdown at the local level to boost the development of local entities and strengthen financial decentralization. [5] This is how from now on, Decentralized Territorial Entities affected by mining projects are granted directly in their accounts 15% of the portion of the mining royalty as required by article 242 of the Mining Code.

If the distribution of the mining royalty is made in accordance with the new legislative provisions through direct payment into the bank accounts designated by each beneficiary entity, transparency in the calculations remains a challenge.[6]

The management and allocation of funds from the share of mining royalties paid to the provinces and Decentralized Territorial Entities do not respect the true destination of these, namely the exclusive financing of development infrastructure projects of interest community. The lack of information on the procedure and mechanisms for collecting this quota does not allow citizens and certain civil society organizations to ensure monitoring and demand accountability from managers.[7]

The vast majority of mining companies have not yet complied with the legal requirement which imposes the obligation on those to negotiate and sign the Specifications with the Local Communities and to submit it to the Mining Cadastre within six months. Ignorance of this requirement by the local communities benefiting from the Specifications did not allow them to ask or put pressure on companies to get them to comply with the law.

To understand the challenges and the legal scope of the mining royalty, its role, the method of its calculation and its distribution, it's important to provide answers to these questions. What are the legal bases of mining royalties? Where does the mining royalty come from and what is its distribution key? Why do the provinces and Decentralized Territorial Entity receive part of the royalty and what should the money collected be used for? How is the distribution done in the event of overlap between two or more provinces or Decentralized Territorial Entity? What mechanisms should be implemented so that the portion of the mining royalty belonging to local communities can really be useful to them?

[4]Rafael Aguirre Unceta, *Républiquedémocratique du Congo : revenus miniers et dépenses publiques pour le développement*, n°189, 2020, Pp 55-80

[5]SEFU R, De la gestion de la redevance minière due aux entités territoriales décentralisées du haut Katanga et Lualaba, In *International journal of social sciences and scientificstudies*, vol 3, n°6, 2023, Pp 3419-3431

[6]Bofoe L, *Fiscalité des organisations et des ressources naturelles en Rd Congo* , retrievedfromhttps://www.torrossa.com (on 18/09/2024)

[7]Justice pour tous, *Guide citoyen de suivi de la redevance minière et du cahier des charges*, retrievedfromhttps://afrewatch.org (on18/09/2024)

II. Basis and legal foundation of the mining royalty

The legal foundations of mining royalties are drawn from all formal sources of law, starting from the constitution to the regulations of the executive and administrative authorities, including various international treaties and conventions.

According to article 58 of the Congolese constitution “all Congolese have the right to enjoy national wealth. The State has the duty to redistribute them equitably and guarantee the right to development. "

This constitutional right from which the Congolese population benefits should actually constitute the government's priority. Unfortunately, according to the ranking established by the United Nations, the DRC is currently classified among the least developed countries in the world where one in five children dies before turning five years old.[8] Some regions richest in natural resources are also the most disadvantaged, lacking basic health and education services...[9]

On the international level, article one paragraph two of the international covenant relating to civil and political rights specifies "to achieve their ends, all peoples may freely dispose of their natural resources without prejudice to the obligations which arise from international economic cooperation based on the principle of mutual interest and international law. Under no circumstances can the people be deprived of their own means of substance.[10] It should be mentioned that the international pact relating to economic, social and cultural rights contains the same first article (the right of peoples to self-determination and to freely dispose of their natural resources, as the IPDC).

At the African level, Article 21 of the African Charter on Human and Peoples' Rights states, “peoples have the free disposal of their wealth and natural resources. This right is exercised in the exclusive interest of the populations. Under no circumstances can a people be deprived of it.

These rights to enjoy national wealth imply that natural resources, including minerals, belong to the nation as a whole. This means that citizens have an implicit right to benefit from the wealth generated by the exploitation of these resources. Mining royalties can be used to fund infrastructure, schools, hospitals and other essential services, ensuring that communities directly benefit from the extracted resources.

On a legal level, article 240 of the mining code provides “The holder of the operating permit, the waste exploitation permit, the small mining permit, the permanent quarry operating permit, other than those of construction materials in common use, and the approved processing and/or transformation entity are subject to a mining royalty, the base of which is calculated on the basis of the gross commercial value. The relevant holders are liable for this royalty on any commercial product, from the date of commencement of effective exploitation.[11] The mining royalty is calculated and payable at the time the merchantable product leaves the extraction site or processing facility for shipment.”[12]

The mining royalty rates are: 0% for commonly used construction materials; 1% for industrial minerals, solid hydrocarbons and other substances not mentioned; 1% for iron and ferrous metals; 3.5% for non-ferrous and/or base metals; 3.5% for precious metals; 6% for precious and colored stones; 10% for strategic substances. It is the Mining Regulations which must specify the elements concerned by the

[8]Banque Mondiale, *RépubliqueDémocratique du Congo : diagnostic systématique pays*, Rapport n°112733-Z, Mars 2018, p.71

[9]Global witness, *Programme des reformes proposé dans le secteur des ressources naturelles de la RépubliqueDémocratique du Congo*, retrievedfromhttps://reliefweb.int (on 15/09/2024)

[10]Article 1erdu Pacte international relatif aux droits économiques, sociaux et culturels.

[11]Article 240 of the Mining code

[12]Pater D, Mining engineering handbook, 3rded, SME, USA, 2011, p. 27

above classification.[13]

The mining royalty is paid by the holder of the mining exploitation title at the rate of: 50% acquired from the central government; 25% paid into an account designated by the Administration of the province where the project is located; 15% on an account designated by the decentralized territorial entity within whose jurisdiction the exploitation takes place; 10% to the Mining Fund for Future Generations.[14]Funny thing, in 2023 the Prime Minister issues another decree aimed at the distribution of mining royalties contrary to the requirements of the law, even though the same law did not give him this possibility. Thus in relation to the recovery of the royalty it specifies: The debit note established by the Mines Directorate or the Mines Service of the jurisdiction gives rise to the establishment of the collection note or the payment document, as the case may be, to competition of: 44% for the central Power; 23% for the province where the project is located; 14% for the Decentralized Territorial Entity in whose jurisdiction mining takes place; 11% for the benefit of the National Fund for Reparations for Victims of Sexual Violence Related to Conflicts and Victims of Crimes Against the Peace and Security of Humanity; 8% for the benefit of the Mining Fund for Future Generations.This provision even annoys the general theory of law which recognizes that a law cannot be modified by a regulation, and if this is done, the law itself must be able to provide for it. In this case, how does the mining royalty have a link with the victims of sexual violence? Under what legal basis does the Prime Minister allow himself to deduct the share of the provinces and Decentralized Territorial Entities for the benefit of this famous fund for sexual violence? Simply it is a decree to be withdrawn for illegality.

In application of the provisions of the first paragraph of article 217 of the mining regulations, the Mines Directorate assesses and controls the basis of the mining royalty. To this end, it verifies: a) the sincerity and accuracy of the gross commercial value declared; b) the terms of payment of the sale price in relation to market practice; c) compliance of the quantities and qualities of the market products with the operations of the holder or holder of the processing and/or transformation entity. In the event that the Mines Directorate or the relevant Mines Service issues an objection or contests certain elements of the declaration, it proceeds, through Mines inspectors, to control said elements.[15] The control is carried out a posteriori and does not prevent the shipment of commercial products except in the event of discovery of evidence of a fraudulent sales transaction.[16]

In the event of a duly reasoned dispute, the holder or holder of the processing and/or transformation entity has a right of reply and the common law procedure in matters of administrative, judicial, state revenue and participations applies to the settlement of the dispute. In the absence of a reasoned dispute, the Mines Directorate or the relevant Mines Service establishes a debit note for the holder indicating the shares accruing to the various beneficiaries provided for in Article 242 of the Mining Code.

III. Origin and objectives of the mining royalty

In mining taxation, the mining royalty generally has the role of compensating the owner of the resources when the ore is taken from his/her land.[17] So it's a sort of compensation for the loss of value as extraction evolves. In the Democratic Republic of Congo, the soil and subsoil and therefore mineral

[13]Article 241 of the Mining code
[14]Article 242of the Mining code
[15]Article 217 of the mining regulation
[16]Ibid
[17]Consortium Makutaya Congo, la redevance minière destinée aux entités territoriales décentralisées : un casse tête à résoudre, retrievedfromhttps://congomines.org (on 15/09/2024)

wealth fall under the permanent sovereignty of the State.[18] According to the 2002 Mining Code, the royalty was paid to the State, more specifically to the central authorities who were supposed to retrocede a portion to the provinces and decentralized territorial entities (DTE).[19]

However, these retrocessions were only very partial and, to the extent that they took place, were mainly limited to the provincial level, leaving the decentralized territorial entities (DTEs) deprived of several tens of millions of dollars which should nevertheless return to them. This pushed civil society to demand from 2012, when discussions on the revision of the Mining Code began, that mining companies pay directly to the provinces and decentralized territorial entities (DTE) their respective shares of the royalty.[20] This change actually occurred during the 2018 reform. Since then, the mining royalty has been calculated on the basis of the gross commercial value of the minerals.

The mining royalty stipulated in the Mining Code aims to contribute to the financing of the socio-economic development program at the local level. It contributes to the promotion of the local economy through the financing of grassroots investment projects. Mining royalties also contribute to the fight against poverty and to improving the socio-economic conditions of populations and their environment.[21]

IV. The superposition of several provinces and decentralized territorial entities (DTEs)

Regarding the mining title superimposed on two or more provinces, article 527 of the revised mining regulations stipulates that "in the event of overlap of the quarries of the operating perimeter on two or more provinces, cities or Decentralized Territorial Entities, the distribution of the quotas due to them is made in accordance with the provisions of article 40 of the same mining regulations.

On this subject, said article 40 specifies that “(1) mines which overlap two or more provinces are assigned by decision of the central Mining Cadastre to the province where the center of the quarrie is located. (2) If the center is located exactly on the boundary line between provinces, the quarrie falls under the jurisdiction of the province where the majority of the area of the quarrie located. (3) If the surface area of the quarrie is divided equally between provinces, the Central Mining Cadastre assigns the first to one of the provinces concerned, the second to the other province and so on.

Thus, the logic of distribution based on the center of the mining quarrie or the surface area must be criticized given that this distribution is based solely on the location of the center of the mining quarrie and the surface area covered by said quarrie. So even if the mining area and the processing plant are located in province A, the mining royalty could go to province B simply because the center of the mining quarrie where the exploitation is located or a large part of the surface area of the mining quarrie is located in this province B.

To remedy this problem consisting of clarifying the terms of distribution of said quotas in the event of overlapping operating activities in two or more provinces and/or Decentralized Territorial Entity and superposition of DTE in urban areas, the Prime Minister, under the proposal of the ministries in charge of decentralization, finances and mines, issued Decree No. 22/20 of May 13, 2022 establishing the

[18]Roger T, Financement des groupes armés et gouvernance démocratique en RDC, In Africadevelopment, vol 44, n°2, Pp 77-97, p. 24

[19]Dries B, Decentralization and power in the DRC: An analysis of the relation of power between the DRC’s central, provincial and DTE state levels that drive and are driven by centralization, Master’s thesis in Development evaluation and management, University of Antwerpen, 2014-2015, p.41

[20]Consortium Makutaya Congo, Ibid

[21]Marie M, La reforme des législationsminières en Afrique et le rôle des institutions financières internationales, retrievedfromhttps://medialibrary.uantwerpen.be (on 15/09/2024)

modalities for collection, distribution, management and control of the portions of the mining royalties paid to the provinces and DTEs which "aims to determine the modalities of collection, distribution, management and control of the portions of the mining royalties paid to the provinces and decentralized territorial entities, as set by the provisions of article 242 of the Mining Code ". However, upon reading the said decree, several inadequacies emerge which are likely to make the distribution of mining royalties at the provincial and DTElevel inapplicable if not very difficult.

1. Overlap of two or more provinces

In the event of overlap of a mining project between two or more provinces, the amount subject to distribution of the mining royalty is previously deducted by 10%. This percentage is paid to the assessment and collection services of the main province. [22]

When the different operating sites of a mining project overlap two or more provinces, the sharing of the amount of the mining royalty to be distributed between the provinces is done as follows:

- 80% of the amount is shared between the provinces hosting the extraction sites, in proportion to the value contributed to the gross merchant mining product by each extraction site;
- 20% of the amount is paid to the province hosting the processing or transformation unit.

The issues resulting from this distribution are both legal and practical.

Legal

It should be noted that according to article 3 of the Constitution, the provinces enjoy autonomy in the management of their financial resources. As a result, the Prime Minister, Head of Government of the central power, does not have the authority to decide on the allocation of a provincial resource. Thus, the prior deduction of 10% of the mining royalty for the benefit of the assessment and collection services of the main province appears unconstitutional.

It should be noted that article 9 of the said decree stipulates that "the main province is responsible for ensuring the sharing of the amount to be distributed, resulting from the portion of the mining royalty paid by the mining operator". Thus, taking into account that under article 3 (i) of the said decree defines the "main province" as that where the most important mineral extraction site in terms of value is hosted, it must be concluded that if the mining project overlaps more than two provinces, the province of the most important extraction site in terms of value is the one considered as the "main province".

Consequently, the mining operator will have to pay the provincial share of 80% to this "main province" which will be responsible for sharing it with the provinces with less valued extraction sites. However, this poses a problem because it must be remembered that article 242 of the Mining Code stipulates that "the mining royalty is paid by the holder of the mining exploitation title at the rate in particular... of 25% paid into an account designated by the Administration of the province where the project is located. Thus, the payment of the share of the sums constituting the mining royalty for the benefit of the provinces does not depend on any extraction site, but on the mining project as a whole.

Therefore, the payment of the mining royalty for the benefit of the provinces, even in the event of overlap of the mining project in several provinces, must be made directly into the accounts of the beneficiary provinces with regard to the distribution provided for in the said decree and not via a province in particular which will be responsible for sharing with the other provinces.

According to article 31 of the said decree "the ministers having home affairs, decentralization, finance and mines in their attributions are responsible, each as far as they are concerned, for the execution of this

[22]Article 7 et Article 13

Decree which comes into force on the date of its signature". However, article 16 of the revised Mining Code specifies very clearly that "apart from the ministries in charge of Mines, Environment and Finance, provincial governments, public services which depend on them or which are under their supervision as well than state bodies expressly referred to in the Code or in the Mining Regulations, no other public or state service or body is competent to enforce the provisions of this Code and act directly in the mining sector. »

Therefore, as we are talking here about the distribution of the mining royalty provided for in article 242 of the Mining Code, the Minister of Home affairs and Decentralization is not competent to execute this decree. This decree will have to be amended and the competent minister must be the one responsible for mining or any other minister designated by article 16 of the mining code to avoid all this illegality.

Practices

On a practical level, this distribution by the Prime Minister has a major insufficiency in that it does not provide for the case of an overlap of the processing or transformation unit between two or more provinces. Indeed, this distribution of mining royalties must provide for all forms of overlap in order to avoid all forms of conflict. Still on the same level regarding mining projects overlapping several provinces, it can be noted that nothing is planned in the case where a site or several extraction sites overlap several provinces.

2. Overlap of two or more Decentralized Territorial Entities (Sector and chiefdom)

In the event of overlap of a mining project between two or more DTEs, the amount subject to distribution is previously deducted by 10%. This percentage is paid to the assessment and recovery services of the main DTE.[23]

When the different operating sites of a mining project overlap on two or more DTEs, the sharing of the amount to be distributed between the DTEs is done as follows:

In the event of overlap between two DTEs, 70% of the amount goes to the main DTE, and 30% is paid to the DTE having the processing or transformation unit.[24]

In the event of overlapping operating activities of a mining project on more than two DTEs, the sharing of the amount to be distributed is done as follows: 80% of the amount is shared between the DTE hosting the extraction sites, at pro rata of the value contributed to the gross merchant mining product by each extraction site; 20% of the amount is paid to the DTE hosting the processing or transformation unit.[25]

The issues resulting from this distribution are both practical and legal. For these two aspects, we can repeat the same observations as those concerning the distribution vis-à-vis the provinces while adding three major observations specifically concerning DTEs.

1st observation: Situation in which one DTE is the component of the other

The decree did not consider specifying the situation in which one DTE is a component of the other, even though these are real situations in the DRC. So as mentioned above, municipality and towns are decentralized territorial entities. However, in the urban environment, cities are made up of municipalities. For example, the city of Goma is made up of the municipality of Goma and Karisimbi. The question that has not been addressed is that of knowing, if mining is carried out in the municipality

[23]Article 8 et Article 14

[24] Article 13 of Decree No. 22/20 of May 13, 2022 establishing the terms of collection, distribution, management and control of mining royalties paid to provinces and decentralized territorial entities.

[25]Ibid

and therefore by ricochet it is in the city, which entity will be authorized to receive this royalty due to the DTE?There are several possible solutions. The first is to decide in favor of the smallest entity andmost closely linked to mining isi.e. the municipality. This would mean that cities made up of several municipalities do not receive mining royalties. Some advance in particular that cities are made up of communes andthat they have no geographical space of their ownalone, or even that the impact of the money received frommunicipalities is much more visible and it is therefore necessaryfavor this level closer to the population.

That said, others instead propose carrying out aclear and uniform distribution between the municipality and the city. Indeed, if the geographical space of the citycorresponds to that of all the municipalities whichconstitute it, the city has attributions and domainsjurisdiction distinct from those of the municipalities.

Iffor example, municipalities are responsible for primary schools while cities are responsible for secondary schools, should we not share themining royalty so that the different typesschools can be built? Moreover,since the Mining Code stipulates that it is the Decentralized Territorial Entity which collects the share of thefee, and that both cities and municipalitiesare listed among the DTEs, there is an argumentlegal framework in favor of such sharing.The decree should normally separate these two entities to avoid any confusion or conflict between DTEs but also to inform the operator to which entity he must pay.

2nd Observation: Non-existence of sector and chiefdom limits

Indeed, it must be emphasized that the DTE that can benefit from the mining royalty is the one with legal personality. This concerns exhaustively the city, the commune, the sector and the chiefdom as indicated to us by article 5 al.2 of organic law n° 08/016 of October 7, 2008 relating to the composition, organization and functioning of the Decentralized TerritorialEntities and their relationships with the State and the Provinces. With particular regard to the sector or the chiefdom, article 68 of the said law tells us that "the limits of the sector or the chiefdom are fixed by decree of the Prime Minister taken on the proposal of the Minister of the Republic in charge of Home affairs in its attributions, after assent from the Provincial Assembly.

After careful research on the issue it was noted that this decree has not yet been issued. Thus, there is currently no precise and legal indication of the boundaries of sectors and chiefdoms. The question that then arises would be to know on what basis will we determine the possible overlaps of mining projects? None or in an arbitrary manner, which would be likely to create conflicts. It would, therefore, be important for the Prime Minister to urgently begin to set the different limits of the chiefdoms as well as the communes.

3rd Observation: Non-existence of local bodies

According to article 3 (d) of this decree states: “a Decentralized Territorial Entity (DTE) is an administrative subdivision endowed with legal personality, enjoying free administration and autonomy in its human, economic, financial, and technical managementand which is managed by local bodies. The “local bodies” of the DTE are the following with regard to organic law no. 08/016 of October 7, 2008 relating to the composition, organization and functioning of the Decentralized Territorial Entities and their relationships with the State and the Provinces:

Sector or chieftaincy bodies: Sector or chieftaincy council and sector or chieftaincy executive college.

[26]The sector or chieftaincy council is made up of members called sector or chieftaincy councilors who are elected by direct and secret universal suffrage under the conditions set by the electoral law.[27] The Executive College of the sector is made up of the Head of sector, the Deputy Head of sector and two Aldermen designated by the Head of sector. The executive college of the chiefdom is made up of the head of the chiefdom designated according to custom and three aldermen designated by the head of the chiefdom.[28]

As it can be seen, the local DTE bodies are the result of an electoral process. Unfortunately, every electoral cycle, local elections are not organized. The members who should constitute its local bodies do not currently exist. If the said law provides, in its article 126, that "while awaiting the organization of urban, municipal and local elections by the Independent National Electoral Commission established by the Constitution, the authorities of the various decentralized territorial entities currently in office are managed in accordance with the provisions of Decree-Law No. 0082 of July 2, 1998 establishing the status of the authorities responsible for the administration of territorial districts", it remains silent, however, regarding the deliberative bodies.

There is, therefore, currently no urban council in the towns, sector council or chiefdom in the sectors and chiefdoms. In view of these facts, it must be concluded that the current DTEs are not managed by local bodies as required by the decree subject of this analysis. Thus, they should not benefit from their share of the mining royalties and yet the law did not provide for other alternatives.

As we can see, Decree No. 22/20 of May 13, 2022 setting the terms of collection, distribution, management and control of the portions of the mining royalty paid to the provinces and decentralized territorial entities contains major inadequacies of a nature to make the distribution of the share of the mining royalty for the provinces and for the DTEs extremely difficult. To remedy this, we propose the following measures:

Delete the provision stipulating that the payment of the mining royalty is made to the account of the province or the main DTE which shares it with the other beneficiary provinces or DTEs by stipulating that the payment of the mining royalty is made directly to the beneficiary provinces.

Delete the provision giving the authority to execute this decree to the minister in charge of the interior and decentralization by providing that the ministers of finance and mines are in charge of implementing this decree. Remove the inclusion of the obligation of management of local bodies in the definition of DTE by indicating that while awaiting the decree setting the limits of DTEs, the overlap will be noted by administrative mapping produced and validated by the Geographical Institute of Congo and the Directorate of Mines.

Another problem that undermines the effectiveness of the role played by mining royalties is the lack of transparency. This scourge is seen everywhere in the mining sector but more specifically when it comes to transparency.

V. Transparency mechanisms

With the choice of decentralization as a management method, citizens have the power to fully participate in decision-making in carrying out development actions. Consequently, the central government is not the

[26]Article 69 of the mining law
[27]Article 70 of the mining law
[28]Article 79 of the mining law

only actor in the development and structuring of the national and local space. This structuring of space also becomes the prerogative of local authorities, citizens and civil society organizations through dialogue and consultation leaders.

Citizens' responsibility for their development and their involvement in the choice of development actions materializes through the process of developing the local development plan. This plan then becomes a tool for coordinating development actions at the level of the decentralized territorial entity.

Since the introduction of the new mining code in the DRC, large companies have paid grants to local authorities in order to directly help the regions where they operate. In an RFI article entitled "mining royalties could be better managed in the DRC: civil society indicates that between July 2018 and December 2019, communities received more than $114 million in mining royalties in the Haut Katanga province and Lualaba but this fund has not yet really benefited the development of the local communities concerned. For them, millions of dollars that were supposed to be used for development projects were instead used for operational purposes, salary payments and sharing between certain institutions.

Jean claude MPUTU, representative of the Makutayamaendeleo group "From one year to another, the entities have received lots of money but when we go to the field, most of the achievements that they show us are offices, the purchase of the automobile cart but we do not really know how this money is managed on a daily basis nor how it really benefits the population. Also the provinces have imposed protocols such as 50% to the city, 10% to other services without specifying which ones.

And we learn that even the provincial mining divisions receive money from the communities, that's just unacceptable." [29]

If communities currently have access to enormous sums of money thanks to the application of the new mining code, the challenge that remains is not only the training of their managers on the sustainable management of these funds but also filling the gaps of the mining code.

According to Jean Pierre Okenda, mining expert: "When you take the mining code we simply have "we share the money and we give 15% to the communities" and we stop there. It is important that the government adopts a guideline to specify the objectives of these funds and what should be done with them).

Despite the improvements brought by the 2018 revision, transparency in the management of the funds of this precious sesame poses a problem while this royalty arouses all covetousness. Many ordinary citizens are unaware of the existence of this fee and how the funds are allocated.

Against the accusations of poor management which target her, like other of her colleagues concerned by payments under the renovated mining code, the mayor of Rouachi where the company Rouachi Mining is located, a South African subsidiary exploiting copper and cobalt, proclaims transparency "We have controllers who come from different political institutions for the royalty money," she says without indicating which services these controllers come from. As with all his colleagues, including in Kolwezi in Lualaba, no figures filter through.[30]

The mayor of the commune in Lubumbashi where the mining companies CDM and SOMIKA pay their royalties, refuses to admit that the silence on these funds is suspicious. And while his colleague from

[29]RFI, *La redevance minière pourrait être mieux gérée en RDC,* retrievedfromhttps://www.rfi.fr (on 19/09/2024

[30]Acualité cd, *Rédévanceminière en RDC : Action minière, paiements inconnus du public, opacité suspecte, la gestion laisse à desirer dans les ETDs du grand katanga*, retrievedfromhttps://actualite.cd (on 15/09/2024)

Rouashi clearly says "we were forbidden to talk about mining royalties"[31]. He assures with a disturbed air "I can't tell you precisely. We still perceive them and we remain transparent. For those who doubt, our works speak. We are not here to get rich."[32]

In all the municipalities under examination, no mechanism for information and meaningful participation of the beneficiary populations has been established. In fact, information on the origin of the funds which financed the construction of the works is not available to the population. Documents such as budgets, work contracts and accountability reports are kept secret.[33]

On certain works carried out with mining royalty funds it is common to see mentions which refer to the names of certain political-administrative authorities. This is the case of the fountain placed in the Kampemba Commune where it is written "MAYI YA WA NDANI Jacques KYABULA", thus to make the population believe that the work would be financed by the latter, whereas it is mining royalty funds.[34]

As can be seen above, the expenses incurred by the DTE with the mining royalty fund show a strong predominance of the construction and/or rehabilitation of administrative buildings than of projects of community interest. The purchase of automobile carts for the movement of municipal authorities and the construction or rehabilitation of municipal offices may be needs for the proper functioning of DTE, but do not necessarily meet those of the communities.

This misallocation of funds does not meet the philosophy of the legislator of the 2002 Mining Code by allocating the 15% portion of the funds resulting from the mining royalty to DTEs. In this way there is a risk that the community development process will not be initiated and that it will remain theoretical.

This situation could be the result of the weakness of the revised Mining Code which does not expressly define the objective of the mining royalty or what these funds should primarily be allocated to. However, paragraph 2 of article 242 of the 2002 version of the Mining Code was sufficiently clear on this. It provided that the funds from the mining royalty "are allocated exclusively to the creation of basic infrastructure of community interest".[35] This major clarification provided by paragraph 2 which, we do not know for what reason, was omitted in the current wording of the same article, must be taken up as such to resolve this problem.

Furthermore, the excessively high cost of works carried out with mining royalty funds constitutes another problem. Based solely on community projects carried out in certain municipalities in the province of Katanga, we will see that compared to market prices, the amounts indicated, for example, for drilling and installing standpipes are grossly excessive.

According to the contract signed between the Mayor of this Municipality and the JOBAS company for the execution of drilling work, the price of a single standpipe varies between 20,184 USD and 22,504 USD,[36] while on the market it does not exceed 10,000 USD. Curiously, this contract was awarded over the counter without a call for tenders. While the call for tenders procedure could allow Commune to assess the estimated quotes from several drilling companies and thus conclude the contract with the best bidder.

[31]Ibid
[32]Ibid
[33]Ibid
[34]Ibid
[35]Article 242 du code minier
[36]UMPULA N, Rédevanceminiere, In *Afrewatch, Novembre*, 2020, p 4

The absence of deliberative bodies for these entities poses a problem of control, which means that the leaders of the entities do what they want. There is no control of supervisory authorities which are also organized to avoid any form of corruption and these royalties rarely really benefit the populations.

Conclusions

The adoption of the 2002 mining code aimed to put in place regulations aimed at attracting investors to this sector in the DRC. More than 10 years later, the constant was bitter, given that these natural resources did not benefit the Congolese as they should while they have the constitutional right to enjoy natural resources.

The revision of this code in 2018 made substantial modifications but the constant is still that this law as well as its application measures contain several shortcomings. In this article, it has been demonstrated the shortcomings linked to the mining royalty which is a part of the mining taxation in the DRC but which must have a direct impact on the daily life of the population. It was seen that article 242 of the mining code revised in 2018 proceeds with the distribution of this royalty by allocating 50% to the central government, 25% to the province in which exploitation is carried out, 15% to the Decentralized Territorial Entity and 10% to the mining fund for future generations.

Multiple problems have been demonstrated, particularly at the provincial level and at the DTE level. For example, when there is an overlap of the mining site in two or more provinces or DTEs, the law has said nothing (which can constitute a source of conflicts between provinces). The Prime Minister intervened with a decree to resolve these problems but which in turn (the decree) contains several illegal provisions. It was cited that providing that the main province must receive the entire share due to the provinces and redistribute to other provinces affected by the exploitation is an illegal provision, because the mining code wants the amount of the royalty to be directly deposited by the mining operator into the account of the province, it was suggested that the share of each province be directly deposited by the mining operator into the account of this province without going through the so-called main one.

Also providing that the implementation of this decree is implemented by the Minister of Home affairs is illegal, because the legislator has indeed provided for the only authorities which can intervene in the mining field and the Minister of the home affairs is not affected. This article has provided possible solutions to these multiple problems so that this sector can legally benefit the population.

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