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Revising Mali's mining code: three key areas for improvement

Policy pointers

To derive greater revenue from mining, Mali should revise its fiscal policy and substantially reduce the scope and duration of fiscal stability guarantees, while protecting legitimate investor interests. Policymakers should consider ending tax exemptions and legislate to redress the imbalance in how mining profits are shared.

The government should establish a mining fund to improve local development around mining sites. Local people should have decision-making power to ensure the fund is run effectively and transparently.

Policymakers should revise Mali's mining legislation to bolster the rights of artisanal miners and incentivise legal compliance. The government will need to mobilise national income and grants from international donor agencies to effectively 'formalise' artisanal mining.

The government should reform mining legislation via open and inclusive political processes to secure broad societal buy-in. This will be as important as including specialised technical solutions in legislation.

Mining is critical to Mali's economy and post-conflict rebuilding, yet the sector faces huge challenges that impact both the environment and the economy. To address these issues, in 2014 the government announced plans to reform its 2012 mining code, though progress has been slow. This policy briefing sets out key technical recommendations for the ongoing reform programme that would enable Mali to overcome obstacles to derive greater revenue from mining, to improve local development around mining sites and to strengthen the rights of artisanal gold miners.

Why Mali's mining code needs reform

Mining in Mali is a key driver of local and regional economic development and is the chief economic activity for many Malians (Box 1). Yet Mali's mining sector faces significant difficulties, including an imbalance in profit sharing between government and mining companies,[1] poor local development at mining sites,[2] land and water pollution,[3] the use of dangerous chemicals and a poorly regulated artisanal mining sector.

In 2014, these factors led the Malian government to announce further reforms of its mining code. The government's main objectives are to boost state revenue by establishing a legal and fiscal framework designed to attract national and international mining investment, while taking into account the need for local development and better regulation of artisanal mining. If these objectives are met, clear progress will be made. Yet Malian civil society organisations' (CSOs') vision for the future diverges from that of mining companies and the government on key issues.

This briefing sets out recommendations in three key areas, namely fiscal reform, local development funds and artisanal mining 'formalisation'. Many questions relating to the environment, national revenue management, the downstream mineral sector and greater accountability are central to the reform, but remain outside the scope of this briefing.

Fiscal stability, equity and mining tax reform

In Mali, certain mining projects generate an internal rate of return of over 200% for some mining companies, according to the Fiscal Analysis of Resource Industries (FARI) model used by the International Monetary Fund (IMF).[1] This is due to over-generous tax exemptions for investors, tax reductions on company profits, the regressive mining sector tax regime and the stabilisation of unfair tax arrangements. CSOs such as the Malian Publish What You Pay Coalition denounce the imbalance in the fiscal relationship between the government of Mali and mining companies.[4]

The problem is that in Mali, mining investment is complex. It involves heavy expenditure and financial risks. Most mining areas in the country lack roads and energy infrastructure. As a result, mining companies demand tax exemptions and fiscal stability to better forecast the risk-return profile and improve profitability.

Stabilisation has become a common international practice enshrined in mining legislation. It also appears in clauses inserted into mining contracts. These clauses make it possible to freeze — broadly or in specific contractual terms — the fiscal and/or legal provisions applicable to a mining investor for a set period of time, often until a mining title expires.

Mining investment in Mali is complex, involving heavy expenditure and financial risks. As a result, mining companies demand tax exemptions and fiscal stability

Malian law has guaranteed the stability of the mineral tax regime since 1991. Under the 2012 mining code, this guarantee lasts for the duration of the mining permit: a period of 30 years. However, stabilisation clauses in force in Mali no longer serve simply to protect legitimate investor interests. Instead, due to the super-profitability of many projects, they freeze an imbalanced fiscal relationship negotiated years ago, in favour of private companies and to the detriment of the government.[1] But mining reform offers the opportunity to tackle this situation. A new generation of stabilisation clauses can now be developed — clauses which are better adapted to the future needs of the Malian government.

What mining stabilisation and tax reforms are needed? At present, the draft code would substantially reduce the tax stabilisation guarantee duration to 15 years. But this still vastly exceeds the payback period for most mining projects in Mali. Recent research shows how the terms of stabilisation clauses can be improved, by trimming down their scope and limiting their duration still further.[5,6]

Box 1. Mining and economic development in Mali

Mali is now the fourth largest gold producer in Africa, having recently lost third place to Sudan. Yet despite the drop in production caused by the 2012 political crisis, mining — of gold and other materials — remains a key sector in Mali's economic development. Its contribution to GDP grew by 7% in 2014 and mining revenue represents about a quarter of the national budget — a total of 1,200 billion CFA. Revenue comes from corporate income tax (62%), customs duties (18%), and dividends, ad valorem royalties and surface fees (21%).[15]

In 2015, an economic analysis by the Ministry for the Environment showed that industrial mining has directly created 12,000 jobs and a further 8,000 jobs via subcontractors.[15] The figures for artisanal mining indicate that 200,000 jobs have been created. Clearly, artisanal mining is a driver of economic development in Mali, providing an important source of income for a large proportion of the population.

In terms of scope, Mali should consider restricting stabilisation clauses to certain categories of tax applicable to mining companies. This would preserve the government's prerogative to introduce new taxes based on environmental priorities (a carbon tax, for example) or new policies to tackle tax evasion. On the duration of fiscal stability, given the short payback period for investment in most of Mali's mining projects, it is advisable for the government to cut the duration of stability to well under ten years. Mali could also consider adopting a stabilisation regime similar to Chile's (see Box 2).

The mining windfall tax. It is worth noting that the revision of stabilisation policies in Mali would only affect mining companies which obtain their mining licence *after* reforms take place. The updated arrangements would not apply to mining companies already extracting minerals or with a mining licence due to the fiscal stability guarantee.[7]

In an attempt to offset this problem, the reform process proposes an innovative solution: a mining windfall tax. This allows government to increase its revenue according to the profitability of the project, applying the principle of progressive taxation recommended in the sector. When the net flow of income received by a mining company exceeds a certain level, the government would then apply a 20% tax on mining profits.

Because it is a fiscal instrument, the mining windfall tax might be unacceptable to mining companies already in operation, given the fiscal stability guarantee they were granted. This could lead to a power struggle between the government and the mining companies. An amicable solution would be needed to allow the windfall tax to be applied, such as a grace period after the entry into force of the proposed legislation, following which this tax would be applied to all mining companies. Dialogue between the government and mining companies will be necessary to resolve this issue.

Lastly, to address this issue of fiscal inequity in the future, the Malian authorities should revise the mining tax exemption policies by narrowing or eliminating them entirely.

Mining funds for local development

Mining legislation reform could also greatly improve efforts for local development. Mali's current mining code requires mining companies to make plans for community development. But these ad hoc measures have failed to bring

Box 2. Learning from Chile's experiences

In the 1970s (in a very different political economy context from Mali today), Chile developed a system allowing companies to choose between two different fiscal regimes: one with a higher than normal tax burden combined with a stabilisation guarantee for a set period of time, or one aligned with the general tax code but with no stabilisation guarantee. Investors could switch from the stabilised regime to the general tax regime at their discretion, but not vice versa.[16]

about expected results. This is partly due to lack of funds dedicated to projects and partly because mining has such major socio-environmental impacts.[3] Some mining companies have made an effort, but much more needs to be done. Local development programmes must ensure the affected community has sources of sustainable income during and after mining has taken place.

To achieve this, Mali's current draft mining law follows the example of Burkina Faso, Senegal and many other African countries. According to the draft law, a mining fund should be established for local development and bankrolled by royalties collected by the government and payments made by mining companies. Discussions are ongoing over the precise percentages which should be allocated to the mining fund.

Mining funds: factors for success. Many countries have mining legislation that sets out mechanisms for delivery and management of mining revenue at the local level.[8,9] There are, however, considerable differences in how these instruments are financed and governed. From experiences elsewhere, including Burkina Faso where delays in establishing the local development fund is causing frustration, several factors are decisive to the success of local development funds:[9]

- Mechanisms for managing local development funds need a straightforward legal definition. This should be based on the government's policy of decentralisation, to avoid bureaucratic 'turf battles'
- The funds transferred to local communities must be sufficient for tangible development impact, but not exceed a locality's ability to manage and spend
- Community representatives must be fully integrated into decision-making bodies. This is essential for the fund to achieve its mission as the management of such funds are often captured by elites and/or politicians[10]
- Transparent, rapid and effective systems for collecting tax and deploying funds at the local level through participatory budgeting and by monitoring expenditure are essential.

'Formalising' artisanal mining

Artisanal mining is Mali's archetypal informal sector, with over 350 gold-panning sites and nearly 200,000 artisanal gold miners.[11] It makes a considerable economic contribution in rural areas, creating numerous jobs. But the sector is typified by socio-environmental challenges: conflicts between mining companies and artisanal miners, child labour at gold-panning sites, landscape destruction and the uncontrolled use of mercury.[12]

In response, the government is trying to 'formalise' the sector. It has organised dialogue forums to discuss artisanal mining and is drafting a National Artisanal Gold Mining Strategy. But without meaningful financial backing, how will the recommendations made be implemented?

Supporting artisanal mining. 'Formalising' artisanal mining clearly needs a suitable legal and institutional framework to improve the lives of artisanal miners and reduce environmental impacts. But this is not just a legislative issue; a socio-political transition must occur through dialogue. Artisanal miners are a diverse group with varying motivations, abilities to mobilise funds and technical capacity. Policymakers should focus on collecting reliable data on Mali's artisanal miners during the process of mining reform. Meanwhile, in exchange for greater legal recognition of their rights and the concrete advantages that should come with respecting the law, artisanal miners must increasingly accept the government's authority,[13] especially relating to the use of mercury and the impacts on landscapes and waterways. But artisanal miners may need assistance to acquire new equipment and reduce their environmental footprint. Government could provide incentives for miners to comply with environmental, tax and licensing rules, such as support to acquire machinery.

Special mining corridors for artisanal miners have been established. But miners have no exclusive right of occupation that would allow them to oppose any grant of mining titles for industrial exploration or extraction where they work. Instead, they are displaced when an industrial mining permit overlaps an artisanal mining corridor. This causes conflict between mining companies and artisanal gold panners, and distrust between artisanal miners and the government. Policymakers should adapt legislation to protect the rights of artisans to access mineral resources.

How will 'formalisation' be funded? Mali must mobilise domestic revenue to invest in the support and regulation of the artisanal sector. One approach is to allocate a fixed percentage of the government's total mining revenue to supporting and monitoring artisanal mining.

In addition, international donor organisations should back the Malian government's efforts to 'formalise' the sector. Donors should fund the Ministry of Mines and the Ministry of Environment to open offices in areas where artisanal mines are concentrated, in line with government decentralisation. They should also provide direct funding to mining cooperatives, so they can improve their mining practices and fully conform to legal requirements, paying specific attention to the promotion of women's rights and legal empowerment.[14]

Conclusion

The recommendations in this policy briefing aim to enable Mali to derive greater revenue from mining, improve efforts at local development around mining sites and boost the contribution of artisanal mining to the economy. Despite growing recognition that the mining sector needs to be reformed to optimise its role in post-conflict reconstruction, we must not forget the political-economy context of mining in Mali. Mining companies and central government will need to cooperate with all stakeholders to convert the country's mineral wealth into a true public good. Achieving this will require both inclusive political processes and specialised technical solutions in legislation.

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Mining Lawyers Partners, a consulting company based in Mali, assists actors in the mining sector with legal and tax structuring of investments and in the development of mining policy.

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Notes

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