

THE IMPACT OF MALI'S REVISED MINING LEGISLATION ON FOREIGN MINING COMPANIES

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Two years after its [military coup](#), Mali has adopted a new mining code and legislation on local content: we examine key aspects of this reform and the implications for foreign mining companies.

The Mali mining reform

On 1 September 2023, the Republic of Mali published a new mining code (the “**New Mining Code**”)¹ and legislation on local content in the mining sector (“**Local Content Law**”), following adoption by the Transitional National Council and promulgation by interim President Assimi Goïta.

This New Mining Code replaces the 2019 Mining Code (the “**2019 Code**”, discussed in a previous [post](#)).

The New Mining Code does not apply to exploration and mining permits granted under previous legislation, but applies to new permits and renewal of existing permits on projects already underway. However, the Local Content Law applies, with immediate effect, to all existing mining projects across the country.

New local content requirements

The purpose of the Local Content Law is to create jobs, support the local economy and improve the competitiveness of Malian companies. However, it also imposes onerous requirements on mining companies, with significant potential to disrupt mining activities.

Notable changes include:

- an obligation on mining companies to gradually reduce the proportion of foreign employees (in all relevant categories) from 10 per cent in the first three years of operations to 5 per cent in the

¹ Law No 2023-040 dated 29 August 2023, available [here](#).

following three years – with an obligation to gradually reach full Malian employment thereafter;

- a requirement that all goods and services procured for mining operations be sourced from Malian subcontractors, with an exception where the service cannot be provided by a local company, or at costs comparable to those of foreign entities, or according to “international standards” applicable in the mining sector. It remains to be seen what margin of appreciation (*e.g.* in assessing the extent to which the local supply meets the relevant safety, quality and efficiency standards) will be left to mining companies wishing to rely on that exception; and
- a requirement to insure all mining activities via locally approved insurers (where the amount of cover exceeds the insurer’s financial capacity, the insurer can (but is not obliged to) seek reinsurance from a foreign company) – something likely to be particularly problematic for large-scale projects, which could potentially threaten their viability.

Consequences for non-compliance range from fines to imprisonment, or possible cancellation of mining permits.

It remains to be seen how strictly Malian authorities will apply the Local Content Law. Given the sensitive political climate, foreign mining companies should carefully consider the changes and keep detailed records of any dealings with authorities over potential compliance issues.

State right to increase stakes in mining concessions

The New Mining Code was adopted following a 2022 audit commissioned by the Malian government into the gold mining sector, with the stated aim of increasing State revenues from mining activities: in the words of Malian authorities, “make gold shine for the Malians”.

One of the means identified to achieve that goal is to increase State interest in locally-incorporated mining companies with a mining permit. Under the 2019 Code, the State already had an automatic “free carried” participation of 10 per cent, with an option to acquire an additional 10 per cent

participation in the operating company for cash. Under the New Mining Code:

- the free carried interest is changed to a “minimum” of 10 per cent, suggesting that the State may seek to negotiate an increase of its free carried interest in certain projects; and
- the optional additional participation the State may acquire is increased to 20 per cent.

Under the 2019 Code, mining companies had to transfer a 5 per cent interest to local Malian investors, although the method and the category of investors remained unspecified. Under the New Mining Code, shares must be transferred to the State, which will oversee their allocation to local investors (albeit with no timeline to do so).

In other words, the State now has an option to acquire a minimum of 35 per cent of the local mining companies operating mines in the country, including a minimum of 10 per cent for free. This sets it apart from countries like Burkina Faso, Gabon, Kenya, Mozambique, Tanzania and Senegal, which have all introduced optional rights to acquire participations in mining projects – but usually up to 25 per cent.

Valuation method

Another significant change concerns the valuation method of shares acquired by the State (in its own right and on behalf of Malian investors). Under the 2019 Code, the share price was determined between parties in accordance with the valuation of the project. The New Mining Code now caps that value to the percentage acquired, multiplied by the exploration costs incurred up to the preparation of the feasibility study, plus interest of 2 per cent above the base rate of the Central Bank of West African States.

A methodology based on adjusted exploration costs is endorsed by many mineral property valuation standards for early-stage projects, but for advanced projects the appropriate valuation method is usually income-based, *i.e.*, based on discounted future cash flows. Indeed, the closer a project gets to production, the more confidence a valuer will have in its economic sustainability. An income-based method typically yields higher

value than a cost-based method, because it takes into account future profits spanning the entire life of the mine.

A capped valuation on projects that are already advanced means that the State will be acquiring interests in mining companies at a potentially significant discount to market value. This means that mining companies may suffer losses equivalent to the difference between the acquisition value of the interest acquired by the State determined in accordance with the New Mining Code, and the market value of those shares.

Relevant considerations for mining companies

As outlined previously,² international and domestic remedies may be available to mining companies facing potentially unlawful measures from Mali, with various ways to access an international forum to litigate such claims.

In its own Investment Code and in bilateral investment treaties (BITs) with other States, Mali has undertaken obligations that include:

- not to expropriate investments made by foreign investors without fair compensation;
- to accord foreign investors fair and equitable treatment;
- not to impair the value of investments made by foreign investors;
- to comply with obligations arising from agreements entered into with foreign investors; and
- not to discriminate against foreign investors.

Mining companies operating in Mali should carefully monitor future implementations of the New Mining Code and consider how their rights under local and international law might be impacted. They should:

- assert such rights so as to preserve them in contemplation of potential litigation or arbitration; or

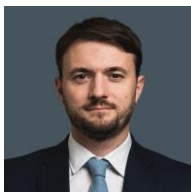
² See <https://www.lalive.law/wp-content/uploads/2022/01/MALI-newsflash.pdf>.

- use them as leverage in potential negotiations with the State, to secure concessions on the price of shares that may need to be transferred to the State, or other advantages in kind (e.g., tax exemptions).

Mining companies should seek legal advice early to ensure that no statement or claim made can affect their rights under any investment treaty, or the amount of any future claim.

Foreign companies should also preserve evidence that may become relevant and material in the context of a dispute, including records of correspondence or negotiations with the State over the potential acquisition by the State of optional shareholding, or other aspects of compliance with the New Mining Code.

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