



AN ASSESSMENT OF THE NATIONAL MINING LEGAL FRAMEWORKS AND POLICIES OF SADC COUNTRIES AGAINST THE AFRICA MINING VISION

(CLUSTER 1: MINING REVENUES AND MINERAL RENTS MANAGEMENT)



THE CASE OF MALAWI

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A prosperous Africa based on an equitable and sustainable development.

MISSION

To contribute to Africa's inclusive economic growth and sustainable development through influencing policy change on debt management and development finance anchored on a right based approach.

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The overall goal of AFRODAD is 'to influence African Governments to institute and implement policies and practices for sustainable development and eradication of poverty'.

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Thematic Goal: To contribute to the development and implementation of transparent, accountable and efficient mechanisms for mobilization and utilization of domestic resources in Africa.

THEMATIC FOCUS AREA 2: DEBT MANAGEMENT

Thematic Goal: To contribute to the development and implementation of sustainable debt policies and practices in Africa.

THEMATIC FOCUS AREA 3: INTERNATIONAL PUBLIC FINANCE

Thematic Goal: To influence the quality, impact and effectiveness of international public finance, in line with the agreed development cooperation effectiveness principles.

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THE CASE OF MALAWI

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ACRONYMS

AMV	Africa Mining Vision
CSR	Corporate Social Responsibility
MDA	Mining Development Agreements
MGDS	Malawi Growth and Development Strategy
NEAP	National Environmental Action Plan
NRJN	Natural Resources Justice Network
MEJN	Malawi Economic Justice Network
AU	African Union
BIT	Bilateral Investment Treaty
DTA	Double Taxation Agreement
EITI	Extractive Industries Transparency Initiative
GDP	Gross Domestic Product
IFFs	Illicit Financial Flows
MEM	Ministry of Energy and Minerals
MMEWR	Ministry for Mineral, Energy and Water Resources
NGO	Non-Governmental Organisation
SADC	Southern African Development Community
SWF	Sovereign Wealth Fund

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THE CASE STUDY OF MALAWI

This report is an assessment of the extent to which the mining policies and legal frameworks of SADC countries are in line with the aspirations of the 2009 adopted Africa Mining Vision (AMV), whose goal is to promote “transparent, equitable and optimal exploitation of mineral resources to underpin broad-based sustainable growth and socio-economic development”. The study focuses on selected eight SADC countries, i.e. Angola, Botswana, Malawi, Mozambique, South Africa, Tanzania, Zambia and Zimbabwe. Given the significant role of the mining sector in the economies of these countries, particularly mining exports and mining revenue contributions to total government tax revenue, the assessment was solely focused on the fiscal issues of mining as guided by the AMV Action Plan Cluster One on Mining Revenues and Mineral Rents Management.

This cluster aims “to create a sustainable and well-governed mining sector that effectively garners and deploys resource rents”. It identifies a variety of activities and monitoring indicators for promoting two expected outcomes namely an enhanced share of mineral revenue accruing to African mining countries and improved management and use of mineral revenue. It is against these activities and/or monitoring indicators that the countries’ mining policies and legal frameworks are evaluated against in this study. The study used a qualitative analysis approach to address the objectives set out in the Terms of Reference. The main findings of the assessment for Malawi are summarised below.

Mining in Malawi is primarily governed by the Mines and Minerals Act of 1981 and the Mines and Minerals Policy of 2013. The archaic 1981 Act has become irrelevant to the changing national and global economy and has presented Malawi with various structural challenges that manifest in lack of technical capacity coupled with poor administration of the sector. Although the law specifies the royalty and taxes payable, the general fiscal regime in mining remains negotiable, leading to delays in finalising mining development agreements and thus opening opportunities for corruption and unnecessary rent seeking behaviour. A new Mines and Minerals Bill was gazetted in 2016 but has neither been adopted nor discussed in parliament. The goal is to make the mining industry in the country attractive and competitive in the region thereby attracting more investment in the sector.

The fiscal regime in mining is embraced in several provisions in the tax legislation and the royalty regime under the Mines and Minerals Act of 1981. Royalty is paid on gross value and varies with the degree of beneficiation but there is no distinction between the royalty that is paid by large scale and small scale mining operators. Uncut or unprocessed minerals attract higher royalty than polished, cut or processed minerals with the highest royalty of 10 percent levied on rough uncut precious and semiprecious stone. Although the law specifies the royalty and taxes payable, the general fiscal regime in mining is still negotiable, leading to delays in finalizing mining development agreements. The law is even silent on some elements including state equity participation and thin capitalization.

INTRODUCTION AND BACKGROUND

Given the huge mineral resource endowment of Sub-Saharan Africa, it is undisputable that revenue mobilisation from the mining sector is key in the ongoing domestic resource mobilisation efforts aimed at making the continent more self-reliant financing its own development. However, there are concerns that the legal and regulatory frameworks governing the exploitation and management of mineral resources on the Sub Saharan African continent are still poor and weak. They are mainly characterised by lack of independent enforcement and oversight bodies, lack of transparency which results in poorly negotiated mineral concessions with fiscal terms that are sub-optimal and do not maximise the revenues from mineral investments, weak accountability of resource revenue use, inequitable distribution of mineral revenue and neglect of local authorities and communities living near mining areas.

Substantial portions of mining revenue and benefits tend to accrue to privately owned foreign companies and a small subsection of local elites at the expense of broad based benefits such as employment creation, human and physical development, and overall economic transformation. Inevitably, resource wealth has in many cases resulted in increased income inequality and economic distortions, and even triggered social and political instability, a situation that has been widely described as the 'resource curse'.¹

Recognising all these gaps and the need to improve mineral resource policies, legal, regulatory and administrative frameworks so as to maximise the development outcomes of mineral resources exploitation, in 2009, African Union Heads of State and Government adopted the Africa Mining Vision (AMV) whose goal is to promote **“transparent, equitable and optimal exploitation of mineral resources to underpin broad-based sustainable growth and socio-economic development”**.

To enable the attainment of the AMV goal, the African Union Heads of States and governments requested the AU Ministers in charge of mineral resources development to develop a concrete action plan for the realisation of the AMV. This culminated into an AMV Action Plan that was approved in 2011. The Action Plan comprises nine programme clusters of activities and indicators constructed around the following key pillars of the vision: Mining Revenues and Mineral Rents Management; Geological and Mining Information Systems; Building Human and Institutional Capacities; Artisanal and Small Scale Mining; Mineral Sector Governance; Research and Development; Environmental and Social issues; Linkages and Diversification; and Mobilising Mining and Infrastructure Investment.

1. Collier, Paul. 2003. 'Natural Resources, Development and Conflict: Channels of Causation and Policy Interventions'. Washington D.C.:The World Bank

1.1 Cluster 1 - Mining Revenues and Mineral Rents Management

Given that it is now seven years since the adoption of the AMV in 2009, the need to assess the progress that African countries have made in aligning their mining policies and legal frameworks to the AMV is of necessity. This study attempts to do this evaluation by focusing mainly on the “Mining Revenues and Mineral Rents Management” cluster whose main goal is “to create a sustainable and well-governed mining sector that effectively garners and deploys resource rents”. This goal was driven by the vital need to address observed fiscal regime challenges along the entire mineral value chain such as lack of transparent and competitive allocation of concessions for known mineral assets, the spending of mineral revenues disproportionately on current consumption which compromises inter-generational equity, inequitable distribution of mineral revenue and neglect of local authorities and communities living near mining areas and widespread tax evasion and avoidance schemes like transfer pricing (including over-invoicing of inputs costs).

The Mining Revenue and Mineral Rents Management cluster has two main expected accomplishments namely:

1. Enhanced share of mineral revenue accruing to African mining countries; and
2. Improved management and use of mineral revenue.

As shown in Table 1 below, each of the two expected accomplishments has a number of activities and indicators identified for tracking the achievement of the objectives and outcomes respectively. It is against these activities and indicators that the mining policies and legal frameworks of the four selected SADC countries will be assessed so as to determine the extent to which they are in line with the aspirations of the AMV.

Table 1: Mining Revenues and Mineral Rents Management Cluster – Expected Accomplishments, Activities and Monitoring Indicators.

Expected Accomplishment	Activities	Time Frame	Monitoring Indicators	Responsible Bodies and Main Actors	
Enhanced share of mineral revenue accruing to African mining countries	At national level				
	<ul style="list-style-type: none"> Improve national capacity to physically audit mineral production and exports; 	ST	<ul style="list-style-type: none"> Physical audit systems in place and implemented with trained inspectors; 	MS	
	<ul style="list-style-type: none"> Review mineral regimes in terms of optimising revenues, 	ST ST-MT-LT	<ul style="list-style-type: none"> Review of mineral regimes undertaken; Level of improvement in fiscal revenue collected by African mining countries; 	WB NGOs	
	<ul style="list-style-type: none"> Build capacity and enhance skills of officials in negotiating fiscal issues and effectively monitoring compliance with taxation laws; 	ST-MT ST-MT	<ul style="list-style-type: none"> Increase in numbers of policy makers and other stakeholders participating in capacity building initiatives; 	CSOs	
	<ul style="list-style-type: none"> Negotiate or renegotiate contracts to optimize revenues and to ensure fiscal space and responsiveness to windfalls; 	ST-MT	<ul style="list-style-type: none"> Degree of improvement in the design of fiscal terms; 	Bilateral	
	<ul style="list-style-type: none"> Develop systems to evaluate components of tax regimes for leakages, losses and tax avoidance and evasion (e.g. transfer pricing); 	ST	<ul style="list-style-type: none"> Extent to which tax leakages are reduced by evaluation systems as determined by independent audits of tax compliance; 	AfDB	
	<ul style="list-style-type: none"> Review terms of double taxation agreements and BITs with host countries of mining companies including the principle that minerals should be taxed at the point of extraction; and 	ST	<ul style="list-style-type: none"> Number of double taxation agreements signed and implemented by member states; and Extent to which competitive and transparent mineral concession systems are implemented. 	ECA	
	<ul style="list-style-type: none"> Build capacity & systems to auction mineral rights where applicable. 	ST			
	At sub regional and regional levels				
	<ul style="list-style-type: none"> Review the current fiscal environment in African mining countries to develop guidelines & standards for optimizing revenue (e.g. tax & dividends) packages in a manner that does not discourage mining investment; 	ST ST	<ul style="list-style-type: none"> Guidelines, standards and toolkits completed and distributed to RECs & member states; Degree to which guidelines are used by members states; Guidelines, standards and toolkits completed and distributed to RECs and member states; 		
	<ul style="list-style-type: none"> Develop mineral taxation guidelines for implementation at REC and national levels; and 		<ul style="list-style-type: none"> Degree to which guidelines are used by members states; and 		
	<ul style="list-style-type: none"> Develop typical financial models for mineral projects for member states and run training workshops at REC level. 		<ul style="list-style-type: none"> Number of financing models that are developed and used by member states. 		

Table 1 Continued...

Expected Accomplishment	Activities	Time Frame	Monitoring Indicators	Responsible Bodies and Main Actors
Improved management and use of mineral revenue	<p>At national level</p> <ul style="list-style-type: none"> • Explore strategies for investing windfall earnings and mineral rent into sovereign wealth funds including stabilization funds and infrastructure funds; • Develop rent distribution systems for allocating part of mineral revenue to communities near mining areas and local authorities; • Develop mechanisms to facilitate local communities access to jobs, education, transport infrastructure, health services, water and sanitation; • Develop the capacity of local communities to negotiate partnership agreements; and • Develop systems for strengthening capacities for national and sub-national bodies for revenue management. <p>At sub regional and regional levels</p> <ul style="list-style-type: none"> • Compile best practice guidelines on mineral revenue management and deployment for implementation at the REC and national levels. 	<p>ST</p> <p>ST-MT MT</p> <p>MT</p>	<ul style="list-style-type: none"> • Number of SWFs established by African Mining countries; • Degree to which local authorities and communities improve their management of mineral revenues; • Best practice guidelines compiled; and • Extent to which guidelines are used by RECs and member states. 	

1.2 Snapshot of mining in SADC

The SADC region is home to a number of countries with a significant ownership of the world's major mineral resources. In terms of global reserves, over 90 percent of the platinum group of minerals (PGMs) are in South Africa and Zimbabwe, over 50 percent of diamond reserves are in Botswana, South Africa, DRC, Zimbabwe, Angola and Namibia and over 40 percent of chromite is in South Africa and Zimbabwe. Zambia and Mozambique are also known for their huge reserves of coal, with Zambia having rich deposits of copper and emeralds. Consequently, minerals together with other various commodities play a significant role in the economies of these countries.

For instance as of 2014, mining revenue accounted for 37.4 percent of the government of Botswana's total tax revenue while mineral exports accounted for approximately 71.6 percent of total merchandise export receipts. In South Africa, mining also accounted for 26 percent and 20 percent of total merchandise exports and investment respectively. The same applies to Zimbabwe, where as of 2015, mining exports accounted for 50 percent of the total national exports. According to the 2013 and 2014 Mozambican Extractive Industries Transparency Initiative (MEITI) report, the extractive sector was the second sector that contributed most of the GDP growth in the order of 18 percent and 13 percent in 2013 and 2014 respectively.

Despite these high economic contributions, there have been concerns that the mobilisation and utilisation of proceeds from the mining sector have not translated into meaningful and tangible benefits such as poverty eradication and improved livelihoods in these countries. In this regard, the mining policies and legal frameworks for Malawi are assessed against the aspirations of the Mining Revenue and Mineral Management cluster of the AMV to determine the extent to which they are designed to effectively garner and deploy mining revenue for development purposes.

ASSESSMENT OF THE MINING POLICIES AND LEGAL FRAMEWORKS IN MALAWI

2.1 Overview of the mining sector in the economy

Malawi is highly dependent on imports of foreign goods and also relies heavily on agriculture for its generation of foreign exchange. The Malawian economy is predominantly dominated by the agricultural sector which contributes about 30 percent to GDP. The mining sector was insignificant until around 2006 when the government started to look for other alternatives to diversify the economy and identified mining as one of the sectors with great potential for boosting the economy. The mining industry in Malawi is still in its infancy compared to other SADC countries and the regime is still coined in such a way that it prioritises attracting as much foreign investment in the sector as possible. It is worth noting that the government of Malawi is making progress in domesticating the Africa Mining Vision as evidenced by reforms to improve revenue and rents accruing to Malawi. The World Bank is also assisting in this regard through the Malawi Mining Governance and Growth Support Project.

The Mining sector's contribution to the Malawi national fiscus has been very low, despite the country having a variety of mineral resources that include uranium, gemstones, rare earth minerals, bauxite, gypsum, limestone, coal and several others. In 2013, Malawi adopted a Mines and Minerals Policy and one of its main recommendations was the need to enact a new mining legislation that would improve the fiscal regime in replacement of the MMA (1981). The 1981 Act has been widely criticised for being outdated and not responsive to the dynamic economic environment. The Ministry of Natural Resources Energy and Mining drafted the Mines and Minerals Bill in 2015 and was presented to the Ministry of Justice in 2016 but is still to be adopted and implemented.

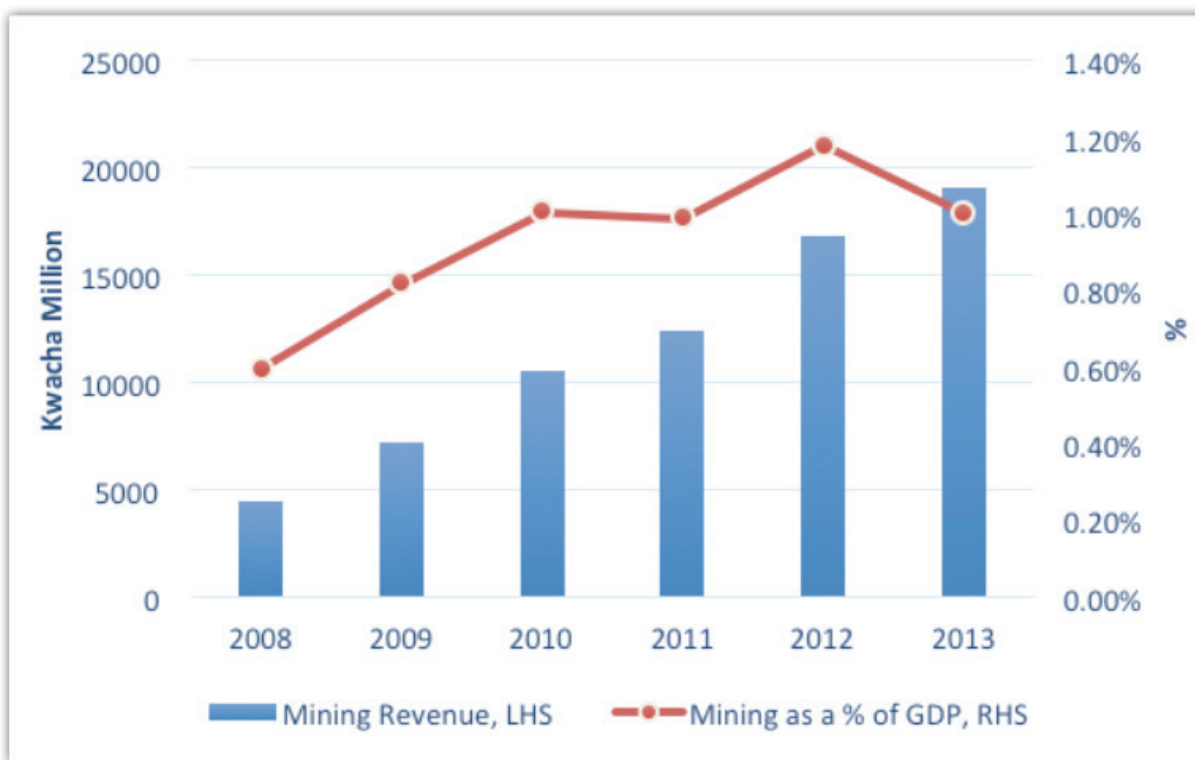
Malawi's fiscal regime is currently determined primarily by the MMA of 1981, the Taxation Act (2006) and terms set out in individual Mining Development Agreements (MDAs) entered into with the rights holders (mining companies). It is however imperative to note that the MDAs undermine the minerals rents, particularly revenues accumulating to the government mainly because of some tax breaks and reduced royalty rates, for instance in the case of Kayelekera Uranium Mine in Karonga District. Several stakeholders especially CSOs have questioned and voiced their concerns over the incentives given to Paladin as well as the lack of transparency in the negotiations and content of the MDA. It is of paramount importance to note that Malawi public finances, including mining, oil and gas sector revenues, are centrally controlled through account number one where all revenue collected are transferred. This means the national budget does not report revenues separately but revenues are largely recorded as departmental receipts from the Department of Mines and through tax revenue estimates per tax category, which makes it difficult to trace and monitor the finances. The Malawi EITI Scoping Study² revealed that the budget books omitted almost 10 percent of mining related revenues that were paid through wire transfers during the 2013/14 fiscal year.

2. Malawi Extractive Industries Transparency Initiative (MWEITI): Scoping Study (Minerals, Oil and Gas, Forestry)

Since the dawn of the new millennium, mining is increasingly becoming an economically appreciated sector in Malawi because of its potential to make significant contribution to economic growth. Estimates show that the contribution of the mining sector to Malawi's GDP grew from as low as 1 percent in 2001, to about 3 percent in 2004 and to 10.8 percent in 2010 owing to the Kayelekera Uranium Mine. Malawi's production of uranium has contributed 1 percent to the global production of this mineral. Since 2009, uranium production from the Kayelekera uranium mine in Karonga District has contributed to an increase of Malawi's GDP from 1 percent to 10 percent as of 2013. It is estimated that with increased emphasis on mineral extraction, the sector's contribution to GDP could increase to 20 percent by 2023.

Figure 2 below shows mining revenue and its contribution to the GDP of Malawi from 2008 to 2013. In the years under review, mining revenue has been on an ascending trajectory reaching a peak of more than 19 billion Malawian Kwacha in 2013 from a mere 4 billion Kwacha in 2008. The contribution of the sector to GDP has also been on an upward trend since 2008 but barely surpassed 1 percent with its peak contribution being 1.18 percent in 2012. Though increasing, the contribution of the mining sector to the Malawian economy is still considerably low compared to other sectors especially agriculture which dominates the economy.

Figure 2 Evolution of Mining Revenue in Malawi



Source: Author's calculations from the Malawi National Statistical Office data

2.2 General challenges in Malawi extractives

A myriad shortfalls in the mining institutional and regulatory frameworks in Malawi have continued to compromise the prospects of the sector. Some of the main challenges include the following:

- Weak and outdated legislative, policy and institutional frameworks (Mines and Minerals Act, 1981; Taxation Act, 2006),
- Lack of robust revenue management and transparency mechanisms,

- Excessive ministerial powers,
- Inconsistent arbitrary deals,
- Slow and inadequate progress in revising the registration.

The mentioned challenges compromise transparency and accountability and they form a reinforcing vicious cycle which continues to undermine the development of the mining sector.

2.3 Laws and policies governing mining and management of mineral revenues

The main laws and policies that govern mining and mining revenue management in Malawi include:

- Mines and Minerals Act 1981

The mining sector in Malawi is principally regulated by the Mines and Minerals Act of 1981. This outdated legislation is the main mining code of the land and is one of the oldest mining codes in the SADC region. The Act articulates rules of business for the sector. Implementation of the Mining Act rests with the Commissioner for Mines and Minerals under the Ministry of Energy and Mining. The MMA defines the rules under which players in the minerals sector conduct business by outlining the rights, duties and obligations of government and of the exploration and mining investors as well as the applicable restrictions. Control over minerals in Malawi are vested in the President on behalf of the people of Malawi. Mineral and mining rights can be conferred to both local and foreign individuals or cooperates who hold a prospecting licence, a claim or a mineral permit.

- Mines and Minerals Policy 2013;

Malawi launched a new Mines and Minerals Policy in April 2013 whose main goal is to enhance the contribution of mineral resources to the economy of the country so as to move from being agro-based to mineral based economy. The 2013 Policy comes as a logical extension of the Malawi Growth and Development Strategy (MGDS) in realisation of the potential of the sector to significantly contribute towards economic growth and development of Malawi through enhancing Malawi's attractiveness as an investment destination. According to the Mines and Minerals Policy blueprint, the document was drawn in light of Malawi's subscription to global and regional initiatives such as the Kimberly Process, Multilateral Investment Guarantee Agency (MIGA) and the Extractive Industries Transparency Initiative (EITI). The cause of concern is whether the policy recognises the Africa Mining Vision or the SADC Protocol on mining, or initiatives aligned to these regional institutions are coincidental.

- Petroleum (Exploration and Production) Act 1983;

This Act regulates the exploration, extraction and production of petroleum, natural gas and related extractives in Malawi. The Petroleum (Exploration and Production) Act is the primary legislation governing the search and producing of petroleum in Malawi. It vests all petroleum rights in the Life President on behalf of the people of Malawi; but individuals and companies seeking to venture into the petroleum extraction, exploration or trading operations will have to acquire a licence.

- National Environmental Action Plan (NEAP);

The NEAP was officially launched in 2016 and makes it mandatory for all mining projects to prepare an environmental impact assessment plan.

2.4 Key institutions in the management of mining revenue

- The Ministry of Mining whose purpose is to ensure sustainable development, management and utilisation of minerals and monitoring geo-hazards for the socio-economic development of Malawi.
- The Malawi Revenue Authority (MRA) collects all tax revenues from the extractive sector. The institution also participates in the process of

transfer of licences as set out in the Petroleum Regulations that transfer of rights requires a clearance by the Malawi Revenue Authority from any tax liabilities.

- The Malawi Chamber of Mines and Energy was registered in 2015 and officially launched in 2016 with the proximate goal to bring sanity in the mining industry through providing a platform for dialogue and transparency in the sector. Some of the major contributions anticipated from the Chamber as it complements the government include:

- i. helping in the processes of licensing, taxation and issues of development agreements;
- ii. scrutinising mining licensees and promoting compliance with EITI; and
- iii. reviewing the laws and fiscal regime to come up with extractive industry specific taxation and fiscal regime that is exclusive to the mining sector.

2.5 Assessment of the mining policies and legal frameworks against the AMV Cluster 1

As highlighted above, the mining sector in Malawi is governed by several laws and policies. A review of existing literature on the mining sector and its regime attests that Malawi is still behind in terms of optimising Mining Revenues and Mineral Rents Management as prescribed by the AMV Cluster One. In this regard, this section analyses the laws and policies against the activities and indicators of the AMV mining revenues and mineral rents management cluster's two expected outcomes namely:

- Enhanced share of mineral revenue accruing to African mining countries; and
- Improved management and use of mineral revenue.

2.5.1 Enhanced share of mineral revenue

Review mineral regimes in terms of optimising revenues

Malawi gazetted a new Mines and Minerals Bill (2015) which was presented to the Ministry of Justice in 2016. Government participation and ownership in large scale mining activities is promoted by the new Bill. According to the new Bill, the Malawi government has the right, but not the obligation, to acquire, directly or through a government nominee, without cost, a free equity ownership interest of up to 10 percent in any mining project qualified as a large-scale mine. Additionally, the holder of a large mining licence shall also be obligated to expend at least 0.45 percent³ of its annual gross sales revenues on community development. This is a snapshot of the proposed Mines and Minerals Bill, but the parliament is taking a really long time to discuss the Bill and this can be interpreted as lack of political will to revitalise the mining sector in Malawi.

Build capacity and enhance skills of officials in negotiating fiscal issues and effectively monitoring compliance with taxation laws

Malawi has very few mining experts and relies mainly on imported expertise in form of expatriates. Though not much has been done to this effect currently, the government assumes the responsibility, through its Mines and Minerals Policy, to facilitate the establishment of research and training institutions and curricula of institutions of higher learning mainstream the capacity needs of the minerals sector so as to enhance the necessary skills and modern technologies in mining.

3. Mines and Minerals Bill, 2015

Malawi requested technical assistance from the British Government for the development of the full mining code. Malawi then received technical support from the Commonwealth Secretariat, out of which came the Petroleum Sharing Agreement setting the framework for sharing of the oil/gas between oil companies and government. Malawi also subscribed to the Extractive Industries Transparency Initiative (EITI) in 2015, a reflection of the government's commitment to transparency of government revenue from the extractive industries.

The other major initiative in this regard, particularly after the adoption of the AMV is through a training workshop on the negotiation of mining contracts convened by the African Legal Support Facility (ALSF), in partnership with the International Senior Project Lawyers (ISLP) and the African Minerals Development Centre (AMDC). The training was designed to equip government officials with the skills to negotiate mining agreements. The training heralded a project "Strengthening the capacity of African governments to negotiate transparent, equitable and sustainable contracts in the Extractive Industries (EI) for broad-based sustainable growth and socio-economic development," which is being implemented in Malawi and four other pilot countries namely: Chad, Congo, Equatorial Guinea and Niger. This is reflective of the global civil society and intergovernmental bodies complementing the national government's responsibility. The project which was launched in 2016 encompasses training programmes for stakeholders to competently negotiate deals with mining investors who are usually mostly technically equipped and are experienced in negotiating such deals unlike government officials.⁴

Negotiate or renegotiate contracts to optimise revenues and to ensure fiscal space and responsiveness to windfalls

Despite criticisms and bombardments from civil society and other stakeholders on the agreement entered into by the Malawian government and Paladin, a uranium production company which solemnly owns the Kayelekera mine located near Karonga at the northern end of Lake Malawi, no efforts have been made by the government of Malawi to renegotiate the contract to optimise revenues accruing to the state. Government's efforts to improve on mining contracts with existing and prospective investors are visible but minimal. In 2016, the government of Malawi in collaboration with the African Minerals Development Centre (AMDC) facilitated the formation of a contract negotiation task team to support Malawi's Minister of Natural Resources, Energy and Mining.

In an effort to enhance revenues in times of price-related windfalls and/or from exceptionally high-quality projects, the Taxation Act, 2006 imposes a Resource Rent Tax (RRT) to capture a portion of the resource rents that arise in the exploitation of mineral resources. Since 2006, the Taxation Act imposes a tax of 10 percent on the after-tax profits of a mining business when a company's rate of return from a mining project exceeds 20 percent. The Taxation Act states that an additional resource rent tax of 10 percent is levied on profits after tax, if the company's rate of return exceeds 20 percent. However in times of economic hardship or in the case of marginally profitable projects, the tax would not be paid. Such flexibility tends to mitigate the need for periodic re-negotiation of fiscal terms and can lend stability to the relationship between investor and government.

In November 2014, the Malawian government suspended oil and gas exploration activities in their process to scrutinise and review every license agreement that was in place. Despite criticism by concerned and affected stakeholders including CSOs, the Malawian government through the Ministry of Natural Resources, Energy and Mining insisted that there is need to review all licenses previous governments gave to companies to explore oil in the country so as to determine and scrutinise the licensing procedures that were followed.

4. <https://mininginmalawi.com/2017/01/30/malawi-tunes-up-on-mining-contracts-negotiations-mining-trade-review-january-2017/>

This is a starting point in evaluating the contracts to ensure they followed the prescribed legal procedures and benefit Malawians. A similar move in the mining sector is long overdue considering the poor agreement entered into with Paladin mining company in 2007 which favours the mining company and continues to undermine the potential revenue that Malawi is supposed to receive.

The new Mines and Minerals Bill (2015) presents some hope for enhanced transparency in the mining industry as it provides for the transparency of the licensing process and the issuance of mandatory guidelines to fiscal payment records by mineral holders to government authorities.

Develop systems to evaluate components of tax regimes for leakages, losses and tax avoidance and evasion.

Malawi continues to be exploited by foreign mining companies and is not gaining much from the extractive industry. Paladin mining company is a typical example which vividly highlights how the current international financial architecture is facilitating for mining companies to rob Malawi of investible capital through IFFs. In a six-year period Malawi lost \$43 million in revenue from Paladin, an Australian mining company which owns the Kayelekera uranium mine.⁵ The company had negotiated for a huge tax break from the government and used complex corporate structures to exploit loopholes in international tax rules. Through this aggressive scheme, the company succeeded in avoiding the payment of millions in tax contribution to the Republic of Malawi, resources which could have been used to improve the welfare of Malawians.

Review terms of double-taxation agreements and BITs with host countries of mining companies including the principle that minerals should be taxed at the point of extraction.

Malawi has DTAs with 10 countries including Botswana, United Kingdom, United States of America, Switzerland and France. Most of Malawi's DTAs with more developed economies limit Malawi's taxing rights in the settlement. The OECD model which has been the primary reference for most tax treaties by Malawi and its partners usually exempt interest, dividends paid to individuals, and copyright and patent royalties and limit the source country to a 15 percent tax rate on rentals from real property and mineral royalties.

However, the government has been making some efforts in trying to renegotiate some DTAs particularly with Norway and Netherlands so as to maximise on the share that Malawi gets in the value chain. For instance, a renegotiated tax treaty with Netherlands includes arrangements on the exchange of tax information and on administrative assistance to combat tax avoidance and evasion. The revised treaty allows for the tax authorities in Malawi and the Netherlands to work together. In accordance with the new treaty, World Tax (2017),⁶ the following withholding taxes apply:

- Dividends: 10 percent if the company paying the dividends is a resident of Malawi; 15 percent if the company paying the dividends is a resident of the Netherlands.
- Interest: 10 percent.
- Royalties: 5 percent.

5. <http://chegepublishing.net/africans-are-robbed-of-benefits-of-mineral-wealth/>

6. <https://www.world.tax/news/netherlands-malawi-tax-treaty-signed.php>

2.5.2 Improved management and use of mineral revenue

Explore strategies for investing windfall earnings and mineral rent into sovereign wealth funds including stabilisation funds and infrastructure funds

Malawi does not have a sovereign wealth fund nor an asset management bureau.

Develop rent distribution systems for allocating part of mineral revenue to communities near mining areas and local authorities

At present, the major hindrance to local communities directly benefiting from mineral revenues from mining activities in their locality is the centrality of a national revenue account, i.e. account number one where all national revenues are transferred to. However, the Mines and Minerals Bill presents some hope for mining communities. There have been calls from the mining communities and CSOs to table and discuss the Bill imminently. According to the gazetted Mines and Minerals Bill 2015, the holder of a large mining licence shall also be obligated to expend at least 0.45 percent of its annual gross sales revenues on community development.

Develop mechanisms to facilitate local communities' access to jobs, education, transport infrastructure, health services, water and sanitation

The new Mines and Minerals Bill embraces the concept of Community Development Agreements (CDA) in which a holder of a large scale mining licence is obligated to have community development agreement and is obliged to implement the agreed developmental initiatives with each community that it operates in and is directly affected by the mining operations. The Bill also stipulates that community contracts will be legally binding, thus either party of the CDA may bring an action before the High Court to enforce terms of the agreement.

The adoption and earnest implementation of the 2015 Bill in harmony with the 2013 Mines and Minerals policy will present an opportunity for Malawians to benefit more from their natural resources particularly through strengthening the role of artisanal and small scale mining in the economy, royalties and local job creation.

Develop the capacity of local communities to negotiate partnership agreements

The previous resource governance in Malawi provided capacity building to communities to negotiate partnership contracts with investors and government, but there is still need to upscale the initiatives especially when the new Mines and Minerals Bill is approved. As provided for in the Mines and Minerals Bill 2015, the holder of an exploration, retention, medium or large-scale mining licence has an obligation to develop a community engagement plan in collaboration with local government authorities, traditional leaders, communities, organizations, women and minority groups in the area in proximity to the mining location. Mining activities shall not commence until the holder of a medium or large-scale mining licence has registered a community engagement plan with the Registrar. Where a community entitled to a CDA believes that it lacks the capacity to effectively negotiate a community development agreement, the community has the liberty to request the holder of the mining licence to collaborate with community or non-governmental organisations or find appropriate expertise in order to build the capacity for the community to effectively negotiate the agreement, including provision of such funds to the qualified community for capacity-building as are reasonable in the circumstances.

Develop systems to strengthening capacities for national and sub-national bodies for revenue management

Both the Mines and Minerals Policy and the proposed Mines and Minerals Bill emphasise the government's intent to establish and capacitate institutions that can revitalise the mining sector and improve on mining revenue management. However, practical efforts are not visible on the ground and there continues to be rampant secrecy especially when it comes to issues concerning revenue from the extractive sector. Some of the institutions that need capacitation in financial and revenue management include the National Auditor General, Anti-corruption Bureau, the Financial Intelligence Unit and CSOs such as Natural Resources Justice Network (NRJN) and the Malawi Economic Justice Network (MEJN).

2.6 Conclusion

As highlighted in this analysis, one of the main challenges facing the Malawian mining industry is the weak and outdated legislation regulating the sector. Since the adoption of the AMV, Malawi has made progress in modernising its mining regulatory framework and optimising mineral revenue. In 2013, Malawi adopted a Mines and Minerals policy which recommended the establishment of mining legislation that is responsive to the dynamic industry and replace the outdated Mines and Minerals Act of 1981. Consequently, The Mines and Minerals Bill was drafted and presented to the Ministry of Justice in year 2016 and now awaits approval by the parliament.

Though the mining sector is still in its infancy in Malawi, the new Bill aims at enhancing the national benefits from the mining sector as prescribed by the AMV. If the Bill passes, there seems to be a light at the end of the tunnel for Malawi mining industry which has long been undermined by an archaic Mines and Minerals Act.

However, Malawi still has a long way to go in terms of aligning its mining policies and legal frameworks to the AMV, particularly Cluster 1. This is mainly because the existing institutions are skewed in favour of the foreign mining firms that dominate the industry. Kayelekera Uranium Mine is one typical example where the mining company benefits at the expense of the nation and at the same time destructing the host communities.

Malawi therefore needs to address structural loopholes focusing mainly on reviewing mining legislation, developing artisanal and small-scale mining policy, embracing and strengthening community development agreements, strengthening mineral audits and reforming the mining tax regime. There is also need to revisit its mining contracts with the mining firms and renegotiate the contracts so that mining activities primarily benefit the Malawian citizens and host communities whilst at the same time upholding the arm's length principle. Malawi also needs to establish a stabilisation fund to enhance economic benefits from the extractive sector and ensure mineral rents are efficiently managed in a transparent manner.

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