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A NEW MINING LAW: SUMMARY OF KEY POLICY RECOMMENDATIONS

The current mining law reform process presents an important opportunity for the Ministry of Mines and Mineral Resources to update and improve regulation of the mining sector in Sierra Leone. To support the review of the mining law, at the request of Oxfam, the Columbia Center on Sustainable Investment undertook a review of key sections of the Mines and Minerals Act 2009 in order to provide recommendations to inform and support drafting of an improved mining law. What follows is a brief summary of the headline recommendations relating to the topics reviewed: the fiscal regime, climate change, access to and use of land, community development agreements, and human rights. The full list of policy recommendations and analysis is set out in "Review of Sierra Leone's Mines and Minerals Act 2009."[1]

This review is based on desk-top research and interviews with Sierra Leone-based practitioners. It is critical, however, that the Ministry of Mines and Mineral Resources and other relevant ministries, departments, and agencies consult with those impacted by mining and its operations, including communities in producing regions, and the wider population. These consultations should inform and influence the review exercise so that the new law is responsive to existing and anticipated challenges.

FISCAL

Sierra Leone's fiscal regime is known for being particularly advantageous for mining companies. It has, in the past, failed to strike an equitable balance between the country's interest and companies' interests.[2] This stems from a series of problems, mainly related to the issues of transfer pricing, thin capitalization, ring fencing, head office expenses, and incentives granted on a negotiated basis through mining development agreements.

a. **Alignment of laws.** The new mining law should align with existing laws relevant to the fiscal regime to strengthen and reinforce regulation that already reflects good practice. This includes aligning the new mining law with the Extractive Industry Revenue Act 2018 (EIRA), relevant provisions in the Income Tax Act and Financial Acts (ITA/FA) and upcoming transfer pricing regulations. In order to incentivize adherence to laws, the new mining law should impose penalties for derogation that are severe enough to influence

[1] Tehtena Mebratu-Tsegaye, Perrine Toledano, Sophie Thomashausen, "A Review of the Mines and Minerals Act 2009," Columbia Center on Sustainable Investment (March 2020).

[2] See for e.g.: http://curtisresearch.org/wp-content/uploads/Losing-Out.-Final-report.-April-2014.pdf; Full exemption from import duty and withholding tax on interest for the duration of a project is provided for in the AML MLA for instance.

practice. In the same vein, we recommend that the new mining law clearly and unequivocally forbids contractual provisions that derogate from applicable laws.

b. **Incentives.**
    - We recommend that any tax incentives are codified in the tax law and administered by the national tax administration. It has been shown internationally that shifting tax incentives from other laws into the tax laws is a critical first step in better managing the use of tax incentives.
    - If tax incentives are to be granted in tax laws, they should be granted in exchange for clearly outlined contributions toward the realization of long-term objectives, and only apply when long-term objectives have been achieved (i.e. they should be back-loaded and regularly scrutinized). Sierra Leone may learn from the experience of Singapore, which requires companies that benefit from the incentives to submit progress reports to the government; and where progress is deemed insufficient, companies run the risk of seeing incentives revoked.
    - In order to mitigate the risk of the ITA's corporate income tax holidays, we recommend that a mining company's taxable income is required to be calculated normally during the tax holiday period and disallow (as seen in Mali's mining code), the tax holiday above a threshold of tonnage-of-ore extracted basis to avoid high grading.[3]
    - In order to ensure that incentive packages achieve their aim, we recommend that such packages are carefully scrutinized, including through use of fiscal models, cost-benefit analyses and by parliamentary oversight. A fiscal model to analyze the effectiveness, usefulness, fairness and competitiveness of the incentive package is critical. As is the performance of regular tax expenditure analyses that reveals the revenue cost of incentives and exemptions. Such analyses should be made public and subject to Parliamentary oversight. And more generally, we recommend that the Government closely follows and contributes to regional debates on regional tax harmonization and actively collaborates with regional partners to avoid a race to the bottom.

c. **Transfer pricing** regulations should include safeguards that require the application of the arm's length principle for sales, costs, and for all capital expenditure; define "affiliates" and "related party" (as these terms are not defined in the ITA); address the issue of head office expenses, deductibility of offshore services, mandate private ruling or advanced pricing agreements for all transactions that do not have a reference price; and address thin capitalization rules.
d. **Beneficial ownership.** We recommend that the new mining law requires compliance with the EITI's latest standard, which includes declaration of beneficial ownership. The current law (EIRA) only requires reporting of changes of ownership equal or higher than 25%. This threshold is too high to maintain standards of accountability. In Ghana the threshold is 5%.
e. **State equity.** The percentage of state equity should be prescribed by law, and in setting the percentage of state equity, the related risks should be carefully considered. For example, the

[3] High grading is the practice of strategically extracting high-grade ore during the tax holiday period to reduce the revenues available to tax after the expiry of the tax holiday).

possibility that the State will not benefit significantly from dividends should be considered, because dividends never have priority in payments. Moreover, with tax planning, the payment of dividends can be pushed off considerably. Additional risks to consider include the fact that paid up equity can be very costly for the government, carried interest by the investor can be accompanied by above market interest, and free equity is most often accompanied by a tax concession.

f. **Derivative instruments.** We recommend that even when derivative instruments are used, all payments to the Government remain determined as if the minerals were sold at the market reference price, i.e.: the effects of hedging should be ignored as recommended by the IMF. Currently the EIRA provision leaves room for interpretation, and does not necessarily reduce the risk or impact of the use of hedging.

ENVIRONMENT AND CLIMATE CHANGE

Sierra Leone is one of the world's ten most vulnerable countries to climate change.[4] With temperatures set to rise by 1-2.5°C by 2060 and increasing climate variability, Sierra Leone is particularly vulnerable to the impact that this will have on its economy, its environment and its people.[5] Mining exacerbates Sierra Leone's climatic vulnerabilities to the extent mining activities compete for fresh water sources with local communities, contaminate clean water sources with waste effluents and tailings, and contribute to deforestation which exacerbates soil erosion, landslides and flooding in the rainy season.

The Mines and Minerals Act 2009 contains no provisions to mitigate or manage the effects of climate change. In light of the increased climate change-related risks, the new mining law should considerably increase the stringency of its environmental clauses.

a. **Mining plan submissions** should include requirements for mining companies to demonstrate that the proposed mine design and equipment:
    - is the most energy efficient design to minimize energy consumption on the mine site;
    - is the most water efficient design to minimize the use of fresh water and maximizes the use of dewatered, recycled and treated water;
    - includes an effluent waste and management system that minimizes the risk of spillages and tailings storage failures, following the latest best practices and standards;
    - includes details on how a mining company intends to source energy from renewable energy sources to minimize its carbon footprint;
    - gives local communities access to renewable energy sources with arrangements for compensation.
b. The new mining law should require **Environmental Impact Assessments** to include the following:

[4] David Eckstein, Marie-Lena Hutfils and Maik Winges: "Global Climate Risk Index 2019" available at: https://germanwatch.org/sites/germanwatch.org/files/Global%20Climate%20Risk%20Index%202019_2.pdf.
[5] USAID Fact Sheet: "Climate Change Risk Profile: Sierra Leone" (August 2016). Available at: https://www.climatelinks.org/resources/climate-change-risk-profile-sierra-leone

- An assessment of the impact of the proposed mining activity on the following, along with the proposed strategy to minimize the impact[6]:
  - Water use and waste water discharge;
  - Greenhouse gas ("GHG") emissions, along with the projected quantity of emissions in accordance with the Greenhouse Gas Protocol[7];
  - Mining-project related waste such as acid mine drainage, overburden and tailings storage and disposal, with the goal of achieving zero tailings storage failures; and
  - Vegetation, forests and already cleared mining areas (from existing operations) and soil erosion.

- A model to assess the impact of climate-related risks on the proposed mining activity (increased flooding, heavier rainfall, drought), including the risk of tailings spillages and storage failures during the life of the mine and post closure. This will help to inform decisions around the design and placement of infrastructure and operations.[8]

- An obligation to demonstrate adequate monitoring capacity of tailings dam failure risk is in place as is done in Ghana; it should include both internal and external monitoring systems with the goal of achieving zero tailings dam failure. External inspection systems should involve the latest technologies such as satellite based remote sensing, include report disclosure, and involve citizen monitoring.

LAND AND HUMAN RIGHTS

The Minerals Policy 2018 helpfully recognizes that the National Land Policy should guide land rights-related matters in mining. The simultaneous reform of land laws and the mining law presents an important opportunity to align land-related provisions in the new mining law with the anticipated land laws to avoid one instrument undermining the other. The Ministry of Mines and Minerals Resources should coordinate closely with the Ministry of Lands, Country Planning & the Environment in this regard, and recommendations in the section that follow should be read with this in mind.

a. **Consultation and consent.** The current law requires license applicants or license holders to inform, consult, or seek the consent of land owners and users to varying degrees, depending on the type of license the company seeks or already holds. The Mining Policy 2018 foresees the harmonization of the consultation and consent standards. This is positive. We recommend that the new law sets the consultation/consent requirement in line with the more robust standard of "free, prior and informed consent" to measure up to international standards and emerging norms.[9] We also recommend that the new law is drafted to require all companies that seek any type of exploration or mining license to seek and obtain the free, prior and informed consent of all communities and peoples who stand to be affected by proposed operations in advance of a license being granted. It is critical that the consultation and consent processes are inclusive, so it is strongly recommended that the new law avoids granting the

[6] Extractive Industries Source Book, Chapter 9, section 9.4.5, available at: http://www.eisourcebook.org.
[7] http://ghgprotocol.org/
[8] https://conferences.iaia.org/2014/IAIA14-final-papers/Capstick,%20Sean.%20%20Incorporating%20climate%20change%20impacts%20into%20EA.pdf
[9] Oxfam, "Free, prior and informed consent in the extractive industries in southern Africa," (2018).

Chiefdom Mining Allocation Committee or relevant Chiefdom authorities' considerable discretion or final or sole decision making power in these matters. In a similar vein, we recommend that the new mining law removes the considerable discretionary power that allows the Minister of Mines to decide whether license applicants need to obtain the consent of rights holders at all if, in her view, consent is unreasonably withheld.[10]

b. **Tax on surface rental income.** The current law requires the holder of large-scale licenses to enter into lease agreements with land owners or occupiers, and pay surface rent, which is divided up between various entities. Landowners receive only 50% of the surface rent owed. This effectively amounts to a 50% tax on rental income. The drafting of a new mining law presents an opportunity to reconsider whether a 50% tax on rental income strikes an appropriate balance.

c. **Resettlement.** New regulations on the topic of mining induced resettlement should take as the starting point that resettlement should only be considered in exceptional circumstances, and in accordance with the State's human rights obligations. Where resettlement is strictly necessary and fulfills the legal criteria, fair, and adequate compensation must be paid to restore the resettled individual or community to enjoy the same or better quality of land and living standards as was enjoyed before the resettlement. The Minerals Policy 2018 helpfully identifies livelihood restoration as the principal goal of resettlement compensation.[11] Livelihood restoration necessarily requires replacement land of equal or better quality, *and* monetary compensation, *and* other types of support to restore access to natural resources, services, and livelihood activities. The new mining law should avoid taking the either/or approach to compensation (either monetary compensation or replacement land) that is found in the Mines and Minerals Act 2009.

d. **Human rights.** The Government has the obligation to respect, protect, and fulfill the human rights of its people.[12] In the context of a mining project this requires the enactment and implementation of laws that prevent human rights abuses and provide redress in the case of violations. The Government must proactively monitor company activity in order to protect against human rights violations. In addition to the human rights related protections referred to in earlier sections, the UN Guiding Principles and Human Rights should be incorporated as binding obligations in the new mining law, with appropriate penalties for non-compliance. For example, we recommend that the new mining law obliges companies to respect human rights including rights as established in the laws of Sierra Leone and the regional and international conventions to which Sierra Leone is a party.[13] We also recommend that the new mining law requires companies to undertake human rights due diligence to "identify, prevent, mitigate and account for how they address their impacts on

[10] Mines and Minerals Act 2009, section 32
[11] Mining Policy 2018 section 3.13
[12] Companies too have human rights obligations but Government obligations to regulate the mining sector is the focus of this section because of the context of this review.
[13] UN Guiding Principles on Business and Human Rights, Foundational Principles

human rights," and put in place processes to remedy any violations.[14] This includes tracking and publicly reporting on human rights impacts.[15]

COMMUNITY DEVELOPMENT AGREEMENTS (CDA)

a. **Parties to CDA.** The current law requires holders of small-scale and/or large-scale mining licenses to enter into a CDA with the 'primary host community.' This means that if there are multiple communities affected by a mine's operations, only the community identified as the 'primary host community' will benefit from the implementation of a community development agreement. We recommend that all communities affected by a mine's operations have the option to enter into a CDA if they so wish to better reflect the realities on the ground. In order to identify communities who are impacted by a company's operations, we recommend that the new law require license applicants to conduct a human rights impact assessment (in addition to an environmental and social impact assessment to inform identification of affected communities). We also recommend that the new law require continual monitoring of project impacts to identify whether, as project operations change, new communities are impacted so that newly identified communities have the option to enter into a CDA if they so wish.
b. **Legal and technical assistance.** Sierra Leone's National Land Policy helpfully recognizes the need to address the power imbalances that are inherent in a negotiation process between an investor and a community in the context of land-based investments, and commits to setting up a legal assistance fund to finance legal and paralegal assistance to communities, landowners, and land users to support such negotiations.[16] Legal and other technical support should be made available during initial CDA negotiations, to monitor the implementation of CDAs, to review the CDAs on a periodic basis, and to represent communities in resolving disputes as they arise. This is critical to achieving equitable CDAs that properly reflect the priorities of affected communities, and that are successfully implemented in practice. The Ministry of Mines and Mineral Resources has an important opportunity to improve the CDA negotiation and implementation process by collaborating with the Ministry of Lands, Country Planning & the Environment and other interested entities (e.g. Legal Aid Board) on the implementation of the financing commitment in the National Land Policy.
c. **Contributions to CDAs.** As is indicated by the MMA Reform Proposal Memo (July 2019), it was originally intended that license holders contribute 1% of gross revenue earned per year to funding community development rather than 'one percent of one percent' as is set out in the Mines and Minerals Act 2009. Indeed, some companies have already entered into CDAs that set their contributions above the 0.01% set by the Mines and Minerals Act 2009. The new mining law is an important opportunity to revise section 139(4) of the Mines and Minerals Act 2009 to reflect original intentions. In addition, in order to facilitate increased transparency, all mining companies that are required to enter CDAs should be required to publish their gross revenue on an annual basis in ways that are culturally appropriate and accessible to the public and specifically the community parties to the CDA.

[14] UN Guiding Principles on Business and Human Rights, section 15, 17, 18.
[15] UN Guiding Principles on Business and Human Rights, section 20-21
[16] Tehtena Mebratu-Tsegaye, "Statutory recognition of customary land rights: lessons for Sierra Leone," Columbia Center on Sustainable Investment, (FAO unpublished 2018). This section is equally applicable to the negotiation of land lease agreements.

d. **Spending.** We recommend that the new mining law include mechanisms for communities to meaningfully influence spending of community development funds in representative ways that include and give sufficient weight to the priorities of traditionally marginalized peoples including women and youth. For example, the transparency and accountability provisions set out in the Model CDA should also be reflected in the new mining law. The Model CDA contains many provisions on the management of funds, with various committees to oversee activities; it is important to understand why there are still challenges in implementing inclusive decision making in spite of these provisions. This is important so that the new mining law and community development regulations can properly account for and mitigate the practical and political challenges faced.

e. **CDA implementation.** The current law requires companies to 'substantially comply' with CDA commitments. This language weakens the obligation to implement CDA commitments. We strongly recommend that the new law requires license holders to comply with *all* provisions set out in community development agreements entered into. In addition, in order to incentivize compliance and implementation of CDAs, the new mining law could explicitly state that compliance with the terms of a CDA is a condition of any small or large-scale license issued, and therefore a breach of a CDA is a breach of the license terms.[17] More generally it would be desirable to include the Model CDA in the new mining law.

f. **Grievance mechanisms.** For circumstances where license holders fall short of fulfilling CDA obligations (and indeed in the case of all project-related disputes), an independent grievance mechanism that is accessible and appropriate for the needs of potential users (including women), to hear complaints should be identified (and strengthened), or established. The new mining law should mandate that any CDA entered into shall not include dispute resolution mechanisms that restrict or preclude access to the courts.

17 See for example James Otto, "Annotated Community Development Agreement Model Regulations," World Bank, (2010), section 22. This section could be used as an example, but as noted, the word 'substantially' should be omitted.