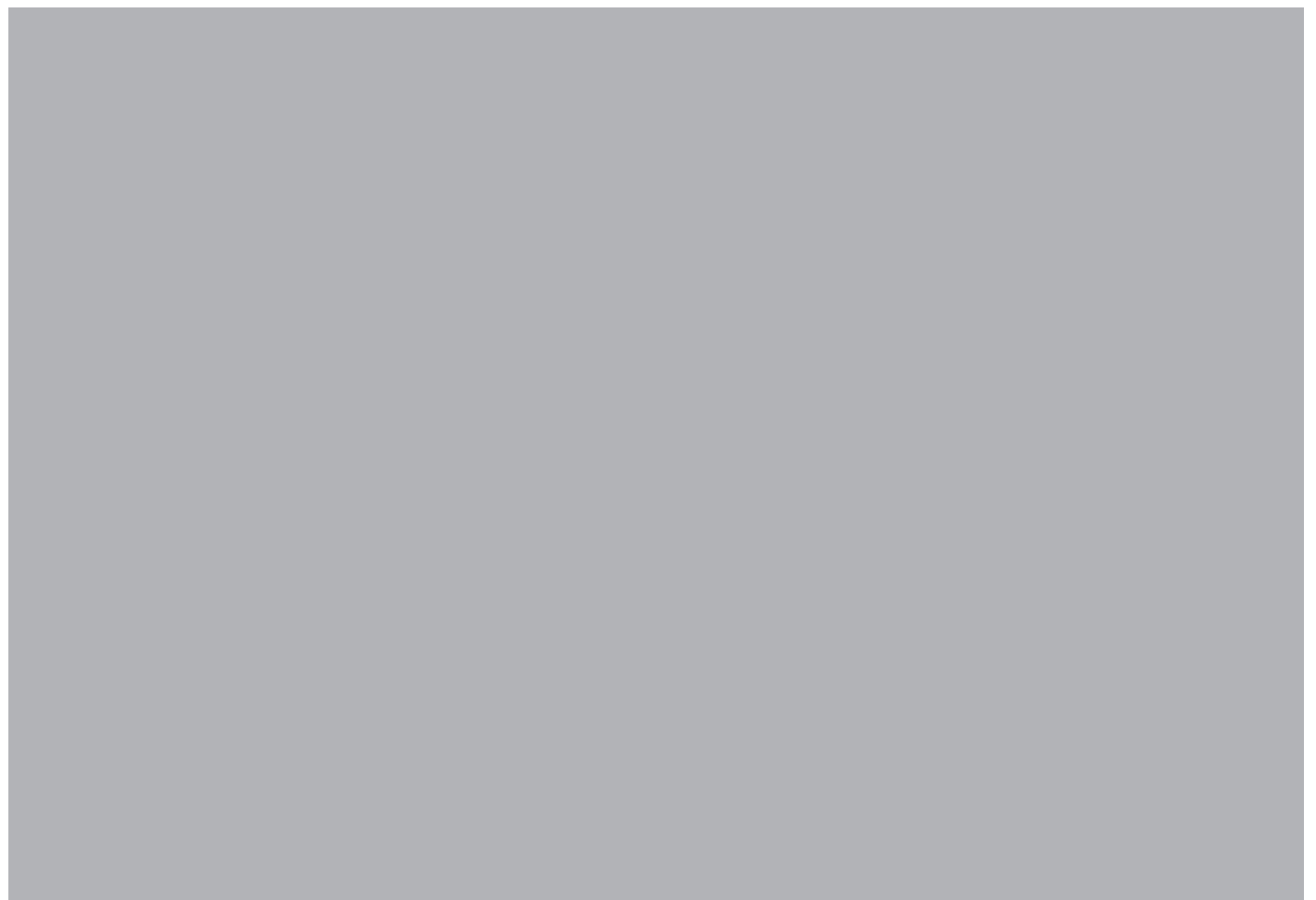


Still at the Crossroads:

An Update on Sierra Leone's Chance to Benefit from Mining



Contents

Introduction	1	This report is published by the National Advocacy Coalition on Extractives (NACE) in Freetown, July 2011.
1. Mining revenues: new figures show Sierra Leone benefits little	2	The following organisations are members of NACE:
2. Positive change: the new minerals act	4	1. Network Movement for Justice and Development
3. Moving backwards: the revised mining agreements	6	2. Talking Drum Studios
4. Greater transparency: progress, but slow and vague	16	3. Action Aid Sierra Leone
References	20	4. WorldVision International
		5. National Forum for Human Rights
		6. Anti-Corruption Commission
		7. Sierra Leone Indigenous Miners Movement (SLIMM)
		8. Green Scenery
		9. Global Rights Partners for Justice
		10. Ministry of Local Government and Community Development
		11. Ministry of Mineral Resources
		12. Campaign for Good Governance
		13. United Miners Union (UMU)
		14. Department of Geology, University of Sierra Leone (Furah Bay College)
		15. Christian Aid
		16. Catholic Relief Services

Introduction

In March 2009, NACE's report *Sierra Leone at the Crossroads: Seizing the Chance to Benefit from Mining* showed that government revenues from mining were minimal and that many people in the mining areas of the country were being made worse off. The report received considerable attention in Sierra Leone, putting pressure on government and donors to improve their policies. Since then, some things have changed, and this report assesses both the positive and negative developments.

On the positive side, a new Minerals Act has been introduced and further steps have been taken to improve transparency in the mining sector.

However, NACE considers that two key negative developments vastly outweigh the positives:

- The government's recently revised mining agreements with both London Mining and African Minerals are inconsistent with significant and important terms of the new Minerals Act and other local legislation and threaten to scupper all the progress that has been achieved so far. Indeed, as we write, we are concerned that the Minerals Act may already be, in effect, dead.
- The government is being very slow in implementing the Extractive Industries Transparency Initiative.

Overall, the country is still at the crossroads and the government is failing to take the right turn.

Research methodology

A draft of this report was sent for comments to the four mining companies mentioned: African Minerals, London Mining, Koidu Holdings and Sierra Rutile. A reply was received only from Sierra Rutile, some of whose comments have been incorporated.

1. Mining revenues: new figures show Sierra Leone benefits little

Income from mining

New figures confirm that Sierra Leone is earning very little from mining. The first 'reconciliation report' produced for the Extractive Industries Transparency Initiative (EITI) process provides the most detailed figures ever published on the country's mining revenues.¹ The reconciliation report does not cover all companies, but six industrial mining companies and three exporters/dealers, thus the major taxpayers in the country. Completed by independent consultants, the report is the most extensive review of company tax payments in the country's history.

It shows that:

- revenues to the government from mining were \$10.18 million in 2007 and \$7.2 million in 2006.

The World Bank estimates that in 2008 mining revenues amounted to \$10.8 million.² These figures are similar to those in NACE's *Crossroads* report, where we estimated income at \$9–10 million in 2006 and 2007.

These revenues are very low by whatever measure one uses:

- As a percentage of the value of all minerals exported, government revenues amounted to just 4 per cent in 2006 and around 7 per cent in 2007. Put another way – although Sierra Leone exported \$145 million worth of minerals in 2007, only \$10 million remained in the country. This is very low and compares to around 10 per cent in countries such as Ghana and Tanzania.
- As a proportion of total government revenue, mining earnings amount to only around 5 per cent.³ This is not much for a country supposedly rich in mineral resources.

Table 1: Breakdown of government revenues from mining, as reported by the government (from the EITI reconciliation report⁴)

	2006 (\$)	2007 (\$)
Total government revenues	7.2 million	10.18 million
<i>Of which:</i>		
Agricultural Development Fund	45,356	62,332
Alluvial diamond exporters licence	83,000	83,000
Corporation tax	71,321	501,792
Customs duties	555,670	1,050,843
Diamond exporter agent	35,000	35,000
Mining leases	652,357	483,863
Mining licences	841,695	737,400
Royalty	3,826,551	5,669,453
Surface rents	393,836	327,750
Taxes from employees	742,730	1,080,144
Withholding tax	8,175	167,114
Other	0	2,833

Table 1 shows that corporation tax payments are very low, since these are paid only when companies make profits and few companies are declaring such profits in Sierra Leone.

Royalty payments are by far the largest source of mining income to the government, amounting to over half of total revenues. Table 2 gives a breakdown of company payments to government.

Table 2: Breakdown of company revenues to government, as reported by the government (from the EITI reconciliation report⁵)

	2006 (\$)	2007 (\$)
Government revenues	7.2 million	10.18 million
<i>Of which:</i>		
African Minerals	1,388,430	1,786,836
Cluff Gold	32,574	48,410
Hisham Mackie	1,593,421	1,716,069
Kassim Basma	734,973	860,661
Koidu Holdings	2,054,111	2,802,250
London Mining	25,000	211,395
Sierra Minerals	771,204	2,004,501
Sierra Rutile*	636,712	736,989
Unspecified	19,267	34,413

Diamond exports and revenues

Sierra Leone's diamond exports amounted to \$125 million in 2006 and \$140 million in 2007, but fell to \$99 million in 2008 and to \$80 million in 2009, according to government figures.⁶

Yet in 2006, the government earned only \$5.3 million from these exports, amounting to just 4 per cent of their value. Most of these earnings come from the 3 per cent exports duty levy.⁷

* Sierra Rutile has queried the accuracy of the EITI figures but no alternative figures have been provided.

'Unresolved discrepancies'

The report for the EITI revealed differences between what mining companies report paying in taxes and royalties to the government and what the government reports receiving. These 'unresolved discrepancies' amounted to \$274,000 in 2007 and \$405,000 in 2006. These are lost revenues that could be used for government spending. According to the figures in the EITI report, they amounted to 2.6 per cent of total company payments to government in 2007 and 5.1 per cent in 2006.⁸

These figures are not the final word on how mining revenues can disappear in Sierra Leone. The report for the EITI looked only at transactions reported by either the government or companies and did not uncover payments not reported by either side or any evidence of under-reporting of mineral production or smuggling.

Table 3: Summary of revenues, payments and discrepancies

	Government revenues	Payments by companies	Unresolved discrepancies
2006	Le 21.5bn (\$7.2m)	Le 22.7bn (\$7.66m)	Le 1.2bn (\$405k)
2007	Le 30.4bn (\$10.18m)	Le 31.3bn (\$10.48m)	Le 818m (\$274k)

Source: Verdi Consulting and Grant Thornton, *First Sierra Leone EITI Reconciliation Report*, March 2010

Potential for increased revenues

Government officials note that with new investments in the mining sector, the country could be exporting \$1.2 billion worth by 2020 and should expect to retain about 7 per cent of the value of these exports. This could see the government earning over Le 100 billion within four years and Le 200 billion by 2020. These earnings could lift 900,000 people out of poverty by 2020.⁹

Indeed, mining could be taking off in Sierra Leone. It has been reported that the country could receive \$3 billion worth of new investment over the next three years by companies developing new or existing mines.¹⁰ Sierra Leone is aiming to become Africa's largest exporter of iron ore, with the opening of African Minerals' new mine at Tonkolili, which was commissioned by President Koroma in January 2010.¹¹

However, if the people of Sierra Leone are genuinely to see these gains, the government needs to get serious about holding companies, and itself, to the legislation.

2. Positive change: the new minerals act

The new Mines and Minerals Act (MMA) was launched in November 2009 after several years of discussion and drafting, and considerable financial and technical support from donors such as the World Bank and the UK's Department for International Development. The new Act addresses several issues not previously covered by the law, including health and safety, environmental protection and community development. From NACE's perspective, the three major positive developments are:

Raising of royalty rates

- The Act raises the royalty on precious stones (such as diamonds) from 5 to 6.5 per cent and on precious metals (such as gold) from 4 to 5 per cent.
- Royalties are to be calculated on the basis of the market value of the minerals rather than the ex-mine price.

Community Development Agreements

- The Act requires all large-scale and some small-scale mining companies to enter into Community Development Agreements (CDAs) with the local community which the minister is required to approve. The CDAs will outline the mining company's obligations to the host community concerning, for example, its social and economic contributions to local development.
- Companies are required to spend a minimum of 0.1 per cent of their gross revenue on community development.

Transparency

- The Act contains a new section requiring the minister to develop a 'framework for transparency' in the reporting and disclosure of revenue paid to the government by mining companies.
- The government notes that the Act 'provides the legal basis to make EITI implementation compulsory'.¹²

There remain problems with the government's approach to transparency, however, as we see in Section 4 of this report.

Other positive developments are:

- The Act introduces a new clause on the right to resettlement for communities affected by mining, clarifying mining companies' responsibilities.
- The Act includes stronger provisions for protection of the environment, requiring all companies to have an environmental impact assessment licence, to carry out an environmental impact assessment and to have in place an environmental management plan.

The two major concerns about these positive steps are:

- first, whether the Ministry of Mineral Resources and other ministries have sufficient capacity to implement these provisions. Currently, internal capacity is lacking and it remains to be seen how quickly this can be built.
- second, whether there is the political will to ensure that agreements signed with companies really are consistent with the Act. Sadly, this is also currently lacking, as we see with the government's recent revised agreements with London Mining and African Minerals.

3. Moving backwards: the revised mining agreements

'This new fiscal regime will apply to all new mining contracts' – the government's commitment to the International Monetary Fund, outlined in its Letter of Intent of May 2010

The London Mining Agreement

Tragically, the new Minerals Act has fallen at the first hurdle. On 4 November 2009, Mines Minister Alpha Kanu, launching the new Act, said that 'today marks a new era for the minerals sector in Sierra Leone'.¹³ The new Act was approved by Parliament on 30 December 2009. But the very next day, the minister and London Mining, a UK-based company, signed the London Mining Agreement (LMA) concerning the mine at Marampa, east of Freetown, which contains a large iron ore deposit. The LMA contains over a dozen clauses and fiscal and other concessions to the company that are inconsistent with the MMA and other Sierra Leonean legislation. Thus the LMA (and the worrying precedent it sets) threatens to make the whole MMA, which took years to pass, meaningless.

Table 4: Timeline –The Mines and Minerals Act and the London Mining Agreement

Minerals Act	London Mining Agreement
	<p>17 September 2009. London Mining states in a media release that it has 'received a new mining lease' and that the government 'has provided London Mining with a series of fiscal incentives that improve the economics of the project for London Mining'. But it also states: 'Once LM [London Mining] has received formal ratification from Parliament of its final mining plan and fiscal incentives, construction will be initiated immediately thereafter with first production anticipated to be within 12–18 months'.¹⁴</p>
<p>Early November 2009. The new Act is approved by Cabinet and is ready to be submitted for approval to Parliament.</p>	
<p>4 November 2009. Mines Minister Alpha Kanu gives a speech announcing that 'a new Mines and Minerals Law has been approved by Cabinet and is about to be submitted to Parliament'.¹⁵</p>	
<p>30 December 2009. The new Mines and Minerals Act is approved by Parliament.¹⁶</p>	
	<p>31 December 2009. The London Mining Agreement is signed by Minister Alpha Kanu and London Mining.</p>
	<p>29 January 2010. London Mining media release states that 'This will be the first comprehensive mining agreement to have been presented in accordance with the new Mines and Minerals Act'.¹⁷</p>
	<p>2 February 2010. Minister Alpha Kanu tables the LMA before Parliament for ratification.¹⁸</p>
	<p>10 February 2010. London Mining Agreement is ratified by Parliament.¹⁹</p>
	<p>11 February 2010. London Mining media release states that the company 'has received the final parliamentary approvals relating to: fiscal incentives...'.²⁰</p>

A selection of discrepancies between the LMA and the new Minerals Act and other Sierra Leonean legislation is provided in Table 5. Four major issues stand out:

- First, the LMA allows the company to pay **royalties** on a percentage of the gross sales price of minerals mined after **deducting** sales tax, value added tax, goods and services tax, export duty and other levies. The MMA makes no such provision and requires companies to pay royalties simply on the **market value** of minerals mined. Thus the payment to the government will be reduced. Also, the LMA allows the company to calculate the gross sales price of its minerals as 'free on board', whereas the MMA requires an 'arm's length' price to be applied.
- Second, the LMA obliges the company to pay only 6 per cent in **income tax** for the first 10 years. Neither the MMA nor the Income Tax Act (ITA) 2000 provides for this reduction in the standard rate (which is 37.5 per cent).

- Third, the LMA contains an extraordinary clause explicitly stating that it takes **precedence** over the provisions of the MMA. This appears to put the agreement above the law, to the extent that the MMA and other enacted Sierra Leonean legislation are the law.*
 - Fourth, the LMA contains a clause stating that if the government enacts different tax or other legislation during the term of the agreement – 25 years – the company will not be liable to pay those higher taxes. No such provision for fiscal or other **stabilisation** exists in the MMA.**
- NACE is not opposed to London Mining operating the mine at Marampa. We are simply opposed to the *terms* of the LMA, which are blatantly and unacceptably inconsistent with Sierra Leonean legislation by providing the company with numerous fiscal concessions.

* The company claims on its website that the LMA is consistent with the MMA (see London Mining press release, 11 February 2010). In NACE's opinion this is incorrect. In fact, the LMA itself recognises that some of its terms are 'inconsistent' with the MMA, and explicitly states that, given this, the terms of the LMA 'shall prevail' over those of the MMA (Section 3 (a)). To secure the LMA, the company has relied on the ability of the president to exercise his 'discretionary authority' – under Section 40 (4) of the constitution – to enter into an agreement, provided that it is ratified by Parliament, which occurred in February 2010. Unfortunately, the parliamentarians did not exercise adequate due diligence in ratifying this agreement; rather, it appears to NACE to have been simply rubber-stamped.

** Section 5 (s) of the LMA provides for a review after five years of its fiscal terms. However, it also makes clear that any fiscal changes have to be agreed by both the company and the government. If the company does not agree, the existing fiscal terms will continue.

Table 5: A selection of provisions in the London Mining Agreement at variance with Sierra Leonean legislation

Provisions in the London Mining Agreement	Requirements of the mines and minerals act and other legislation
<p>Section 3 (a). 'The provisions of the Minerals Act relating to mining leases shall apply to the Mining Leases except to the extent that they are inconsistent with the expressed or any implied terms and conditions of this Agreement and the Mining Lease, <i>in which event the provisions of this Agreement and the Mining Lease will prevail.</i>' (emphasis added)</p>	<p>The MMA applies to all mining leases.</p>
<p>Section 3 (b). 'The Mining Lease granted to London Mining shall initially be for a period of twenty-five years... <i>and shall be renewable for a further period of fifteen years</i> upon an application made in writing at least one year before the expiration of the original term and <i>such renewal shall be upon the same terms and conditions as set out in this Agreement</i>, in accordance with applicable law.' (emphasis added)</p>	<p>Section 111 of the MMA states that the period for granting a mining licence 'shall not exceed twenty-five years'. Section 112 does allow for a renewal but only on submission of application for such at least one year before expiry; there is no automatic renewal. There is no provision in the MMA for the renewal to be on the 'same terms' as the original mining licence.</p>
<p>Section 4 (a) (ii) allows the company to 'remove and sell for export any surplus scrap metal not required for the conduct of normal operations situated within the Mining Lease Area, <i>free of any government charges, levies, duties or royalties.</i>' (emphasis added)</p>	<p>NACE is not aware that any SL legislation provides for this.</p>
<p>Section 4 (d). 'London Mining shall have the <i>exclusive rights</i> to use, construct, repair and operate within the Mining Lease area, any roads, buildings, plants, structures, living quarters, water supply systems, pipelines, conveyor belts, communications systems, ship loading stations, airstrips, barge channels, storage facilities <i>owned or otherwise possessed by GOSL</i> and other similar accessory works and installations which are necessary or useful in carrying out operations under this Agreement.' (emphasis added)</p>	<p>Section 32 (1) (a) of the MMA does not grant such 'exclusive rights'. It states: 'The holder of a mineral right shall not exercise any of his rights under the mineral right in respect of any land dedicated or set apart for any public purpose other than mining including any street, road, highway or aerodrome <i>except with the written consent of the responsible Minister</i> or other authority having control over such land.' (emphasis added)</p>
<p>Section 4 (i). '<i>GOSL will grant any permit and permission</i> for London Mining to export from Sierra Leone any mining machinery, plant equipment, consumable mining stores, goods and surplus equipment of whatever description imported by it for the conduct of its prospecting, mining processing and transport operations contemplated by this Agreement.' (emphasis added)</p>	<p>Section 54 (2) (a) of the MMA states that 'the Director [of Mines] <i>may, if he deems it necessary</i>, certify that specified items of fixed machinery are necessary for the care and maintenance of the areas covered by the mineral right and <i>such items and machinery shall not be removed.</i>' (emphasis added)</p>

<p>Section 4 (j) (iv). <i>'Nothing in this Mining Lease, this Agreement, the Minerals Act, the Environmental Protection Agency Act or other legislation or regulation shall impose any liability whatsoever on London Mining in respect of any pollution or loss or damage to the environment or the risk thereof, or other claim, where such pollution, loss, damage, risk or claim arises from, or in connection with, any acts or omissions in or with respect to the Mining Lease Area prior to the signing of this Agreement.'</i> (emphasis added)</p>	<p>There is no provision for this exemption from liability in the MMA. Section 132 (2) states that 'a holder of a mineral right shall be subject to all laws of the Republic concerning the protection of the environment'.</p>
<p>Section 5(b). 'A royalty at the rate of 3% of the gross sales price, "free on board" the vessel at the Sierra Leone offshore loading facility for the shipment payable by London Mining in respect of such shipment, <i>after deducting any Sales Tax, Value Added Tax, Goods and Services Tax, export duty, levy or excise payable to GOSL...</i> shall be paid to GOSL... .' (emphasis added)</p>	<p>Section 148 (2) of the MMA states that the royalty is payable on the 'market value' of the minerals mined, not after deducting taxes paid.</p>
<p>Section 5(b). 'A royalty at the rate of 3% of the gross sales price, "free on board" the vessel at the Sierra Leone offshore loading facility for the shipment payable by London Mining in respect of such shipment, after deducting any Sales Tax, Value Added Tax, Goods and Services Tax, export duty, levy or excise payable to GOSL... shall be paid to GOSL... .' (emphasis added)</p>	<p>Section 148 (3) of the MMA makes no mention of 'free on board'. Rather, it defines 'market value' as the basis for the royalty calculation, as 'the sale value receivable in an arm's length transaction'.</p>
<p>Section 5 (c) (i) grants London Mining an income tax rate of 6 per cent for a period of 10 years from the date of the agreement and thereafter a rate of 30 per cent.</p>	<p>The Income Tax Act 2000, Schedule 6, which relates to the mining sector, outlines a tax rate for mining companies of 37.5 per cent.</p>
<p>Section 5 (f) (ii). 'Where London Mining is in a cumulative assessable loss position for income tax purposes at the end of any financial year, then <i>it may elect to offset the tax value of such cumulative assessable loss or a part thereof... from the liability arising in respect of royalties</i> on turnover payable in terms of this Agreement during subsequent years until the tax value of such cumulative assessable loss or part thereof has been exhausted.' (emphasis added)</p>	<p>The MMA contains no such provision. Section 149 of the MMA outlines the only exemption to paying royalties – in respect of samples of minerals acquired for testing.</p>
<p>Section 5 (k). 'All imports of fuel and lubricants by London Mining shall be at 20% of the prevailing rate of any import, customs and excise duties, taxes or other levies or charges... .' (emphasis added)</p>	<p>Schedule 6 of the Income Tax Act 2000, which relates to the mining sector, contains no such provision.</p>

<p>Section 6 (c) (iii). 'In the event that GOSL enacts any legislation... which under the laws of Sierra Leone is binding upon London Mining and which results in more onerous obligations being placed upon London Mining than those subsisting at the date of execution of this Agreement, then without prejudice to any other right London Mining may have against it GOSL <i>shall hold London Mining harmless in respect of the increased costs of performing the more onerous obligation.</i>' (emphasis added)</p>	<p>There is no such stabilisation provision in the MMA.</p>
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The agreement with African Minerals

The agreement with African Minerals, which was signed on 6 August 2010 and is the second agreement that has appeared since the Mines and Minerals Act was enacted, is equally concerning. It contains at least 10 clauses that are inconsistent with existing Sierra Leonean legislation such as the Income Tax Act 2000 and the MMA, as outlined in Table 6.

Table 6: A selection of provisions in the African Minerals Ltd Agreement at variance with Sierra Leonean legislation

What the African Minerals Ltd Agreement (AMLA) says	What Sierra Leonean legislation says	Comment
<p>Article 12 states that the company will 'endeavour to pay fair and reasonable compensation' [note use of the word 'endeavour'] for damages payable to lawful occupiers of land but that in its use of 'standard mining equipment and techniques', 'disturbance of the land and property owners... shall not be taken into account or evaluated in the determination of compensation in respect of damages payable to owners of or lawful occupiers of the land'.</p> <p>Then Art 12 (c) states that the government shall 'indemnify' the company against such claims.</p>	<p>AM = African Minerals GOSL = government of Sierra Leone GSA = Goods and Services Act 2009 ITA = Income Tax Act 2000 MMA = Mines and Minerals Act 2009 SL = Sierra Leonean</p> <p>MMA, Section 35 (1): Companies shall pay 'fair and reasonable compensation for any disturbance... and for any damage done to the surface of the land'.</p>	<p>'Endeavour' to pay is unacceptable. It is a lower standard than that required by the MMA.</p>
<p>Art 13 states: '<i>In addition to the rights given to the company under Section 114 of the Act [ie the MMA], the company shall with the approval of the Ministry of Energy and Water Resources have the right to use water from any natural watercourse for domestic and mining operations'.</i> (emphasis added)</p>	<p>The MMA, Section 114 does allow companies to 'utilize the water and timber as necessary for mining operations' but only in their licence area.</p>	<p>The AMLA appears to go beyond SL legislation.</p>
<p>Art 14 (and also Art 19 (j)) exempts AM from 'all duties and taxes in respect of imports of mining machinery, plant and equipment' as defined in Schedule 3 of the AMLA.</p>	<p>There is no provision for this in the ITA, Schedule 6, which deals with the mining sector.</p>	<p>The AMLA provides more exemptions than provided for in SL legislation.</p>
<p>Art 19 (c) states that the company will pay income tax 'at a fixed rate of 25% per annum or at the prevailing rate applicable to companies generally, as set forth in the Income Tax Act 2000'.</p>	<p>ITA, Schedule 6 (specific to mining companies) states that mining companies will pay income tax at 37.5%.</p>	<p>The AMLA is unclear what percentage the company will actually pay. If 25%, this contradicts the ITA.</p>

<p>Art 19 (c) (ii) states that the company 'shall not be liable for any minimum taxation'.</p>	<p>ITA, Schedule 6 (specific to mining companies), Section 4 states that mining companies 'shall pay a minimum income tax of three and one half per cent of turnover where his chargeable business income is below 7 per cent of turnover in any year of assessment'.</p>	<p>The AMLA is inconsistent with the ITA.</p>
<p>Art 19 (k) exempts AM from any goods and services tax on fuel imports.</p>	<p>Neither the ITA nor the MMA provides exemptions from GST on fuel imports. The Finance Act 2010 imposes duty on fuel imports of 12.5%.</p>	<p>The AMLA is inconsistent with SL legislation.</p>
<p>Art 19 (m) states that AM will pay payroll taxes at a rate that 'shall not exceed Le 500,000' and that if the government of Sierra Leone enacts a higher rate, the company will be 'harmless'.</p>	<p>We are not aware that any SL legislation provides for this.</p>	<p>Whatever the legislation, this is a bad deal for the government in that it is a de facto stabilisation clause that protects the company from paying higher taxes.</p>
<p>Art 19 (p) exempts the company and its contractors from paying any goods and services taxes 'as provided for in the Goods and Services Act 2009'.</p>	<p>The GSA, Schedule 2 exempts 'machinery, apparatus and appliances' used in mining from GST (ie not everything).</p>	<p>The exemption provided in the AMLA goes beyond the exemption provided in SL legislation.</p>
<p>Art 19 (q) exempts AM from paying the Sierra Leone Ports Authority all port, harbour, loading and unloading dues or fees.</p>	<p>This is at the discretionary authority of the Ministry of Finance, which can be challenged.</p>	<p>Whatever the legislation, this appears to be a bad deal for the government.</p>
<p>Art 19 (r) states that AM's contributions to the Community Development Fund are 'tax deductible'.</p>	<p>The MMA does not provide for this.</p>	<p>The AMLA's terms go much further than the MMA.</p>
<p>Art 19 (u) exempts expatriate employees of AM and its contractors from paying the National Social Security and Insurance Trust.</p>	<p>We are not aware that any SL legislation provides for this.</p>	<p>The AMLA appears to go further than SL legislation.</p>
<p>Art 19 (v) states that there will be a 'joint review' of the 'fiscal package' of the AMLA every five years. However, 'any resulting change from such joint review will require the mutual consent of the GOSL and the companies'.</p>	<p>There is no provision for fiscal stabilisation in the MMA.</p>	<p>The AMLA goes further than the MMA. This is a bad deal for the government in that it is a stabilisation clause that gives the company a veto over changes in tax rates.</p>

Why the agreements with London Mining and African Minerals are dangerous

The MMA is 'exactly the kind of clarity that investors seek'

'A key principle of the Act in looking to the future is to move away from these special agreements and create a level playing field for all companies'

Government statements²¹

The MMA provides a more transparent and level playing field than existed before for companies to operate in Sierra Leone. It is the law. Crucially, it appeared to mark a break with the past when individual companies received individual concessions from ministers without public scrutiny. Sierra Leone desperately needs a transparent legal regime to ensure that mining company operations benefit Sierra Leoneans. But the agreements with London Mining and African Minerals are a direct threat to this. They open the door for every mining company to negotiate special terms and tax concessions. And they set a precedent that may go beyond the extractives sector – all companies will note the special terms given to mining companies and seek similar concessions.

There are likely to be other repercussions from these agreements. The government's willingness to override the terms of the MMA and other legislation sends a signal internationally that Sierra Leone does not abide by enacted laws. This is likely to discourage reputable foreign investment. Numerous studies suggest that when foreign investors are considering making investments, key factors include predictability of government regulations and transparent decision-making processes. The signal being sent by these agreements is that neither of these is yet in place in Sierra Leone.

Both London Mining and African Minerals have stated that there will be significant revenue benefits to Sierra Leone from their mines. London Mining has stated that the government will receive more than \$200 million in revenues from the Marampa mine over a 10-year period, and that the company needs such fiscal incentives to operate profitably.²² NACE makes three comments in response to this:

- Even if the projected benefits from these mines do materialise, they may well be offset by the concessions that the government will have to offer other companies in special agreements.

- London Mining's argument that it could not operate competitively without these special fiscal and other terms is difficult to accept and irrelevant. The provisions in the MMA are hardly onerous on companies; they are broadly in line with international and west African practice. But even if they were too onerous for companies to bring needed foreign investment to Sierra Leone, the solution would not be to offer companies special treatment but to revise the legislation.
- It should also be said that projections are uncertain and there are no guarantees that the revenue will materialise; projections by many foreign mining companies as to future government revenues have a habit of never materialising in Sierra Leone.

The government is now reassuring donors and others who have (mildly) protested against the LMA that its terms are to be reviewed. But there is no timetable for this and it is unclear whether this is really the government's intention.

The agreement with Koidu Holdings

Koidu Holdings, the largest and only industrial diamond miner in Sierra Leone which operates in Kono district in the east, signed a revised agreement with the government in 2010. It is generally consistent with the MMA.

- The agreement states that Koidu will pay the 6.5 per cent royalty on diamonds as specified in the MMA, but will only pay an 8 per cent royalty on 'special stones' (defined as those valued at more than \$500,000) whereas the MMA states that this should be 15 per cent.
- The agreement also states that Koidu will give 0.25 per cent of the value of all diamonds sold to a community development fund, which will be managed by a committee formed by the company and the community. This contribution is actually higher than that specified in the MMA (0.1% of gross revenues). The Kono community (district and town councils and chiefdoms) will also receive 10 per cent of the company's profits, the same as in the previous agreement with Koidu.

These are, in the main, positive developments, but the agreement does not explicitly state that the company will develop a Community Development Agreement, as the MMA requires. Instead, it states (in Article 15 (13)) that Koidu 'shall consult' with the communities 'to mutually establish plans and programs' to promote the 'continuing economic and social viability of centers of population surrounding the Mining Lease area'. The commitment to 'mutually' establish

plans and programmes might amount to an agreement with the community but it is vague. This omission becomes more serious since the new mining agreement also says nothing about Koidu's policies concerning dynamite blasting and relocation, the two most contentious issues for the local community. Without an explicit commitment to develop a formal agreement with the community, there is a real danger that the basic problem between Koidu and the community will remain – a lack of clarity over who is responsible for what, in terms of local community development.

Recommendations on the revised mining agreements

NACE calls on the government of Sierra Leone to:

- revise the London Mining and African Minerals agreements to ensure that they are entirely consistent with the terms of the MMA and other Sierra Leonean legislation and do not provide exceptions or exemptions from the terms of the MMA
- ensure that the other mining agreements currently being reviewed are also revised consistent with the MMA
- clarify that Koidu Holdings is required to develop a Community Development Agreement, which must address blasting and relocation, among other issues.

In addition, NACE is calling:

- on parliamentarians to demand a recall of the London Mining and African Minerals agreements in order to see them revised
- on the British government and other donors to ensure that all mining agreements are consistent with the new Minerals Act.

4. Greater transparency: progress, but slow and vague

The government continues to express its commitment to implementing the Extractive Industries Transparency Initiative (EITI), and the completion of the first 'validation' report for the EITI in March 2010 marks another step in the right direction. However, progress has been very slow, calling into question precisely how committed the government really is to the EITI.

Sierra Leone needs to speed up implementing the EITI and learn from some other west African countries' experience. It is also unclear precisely what revenue figures and company payments the government will actually make public – its commitment to develop a 'framework for transparency' has not been spelled out.

Lack of transparency

The mining sector in Sierra Leone lacks transparency at all levels:

- Government does not provide comprehensive details, or even an overall figure, on how much it earns from mining, providing only sporadic figures about revenue, taxes and production.
- Most companies provide no figures on their tax and other payments to government and local communities, and little financial information generally.
- Parliament lacks the technical capacity to scrutinise effectively government revenues, company tax payments and mining agreements.

This lack of transparency reduces the resources available to government to promote development. It also reduces the ability of citizens to hold the government and companies to account for their activities, and creates mistrust and tensions between local communities, companies and government.

The EITI criteria

Implementing the EITI requires the following:

- 1 There is regular publication of all oil, gas and mining payments by companies to governments and of all revenues received by governments from oil, gas and mining companies to a wide audience in a publicly accessible, comprehensive and comprehensible manner.
- 2 Where such audits do not already exist, payments and revenues are the subject of a credible, independent audit, applying international auditing standards.
- 3 Payments and revenues are reconciled by a credible, independent administrator, applying international auditing standards and with publication of the administrator's opinion regarding that reconciliation, including discrepancies, should any be identified.
- 4 This approach is extended to all companies, including state-owned enterprises.
- 5 Civil society is actively engaged as a participant in the design, monitoring and evaluation of this process and contributes towards public debate.
- 6 A public, financially sustainable work plan for all the above is developed by the host government, with assistance from the international financial institutions where required, including measurable targets, a timetable for implementation, and an assessment of potential capacity constraints.

Source: EITI website: <http://eititransparency.org>

Progress in Sierra Leone

Implementing the EITI in Sierra Leone has been slow progress. The previous government announced its intention to implement the EITI in the mining sector in June 2006, the official launch of the Sierra Leone EITI was held in June 2007 and the country was accepted as an EITI candidate country in February 2008. However, the first EITI report on revenues and tax payments, written by independent consultants, was produced only in March 2010 – nearly four years after the government committed itself to implementation. By mid-2011, there was still no formalised secretariat for the Sierra Leone EITI (SLEITI).

Part of the problem is the lack of capacity in government to put adequate systems in place. But another problem is political will; there remains the suspicion that the government is reluctant to implement the EITI properly and has been dragging out the process, because of the increased scrutiny over revenues and payments that this will entail.

Another problem is that the government has hitherto made only vague commitments to transparency, an EITI requirement. The section of the new Mines and Minerals Act relating to transparency – provided in the box below – has two main flaws:

- First, the 'framework' for transparency (paragraph 159) outlined in the Act has not yet been spelled out. Neither has the commitment in Section 159 (e), which requires the government to 'disseminate' an annual figure of government revenues but does not specify what figures, which minerals and how.
- Second, paragraph 160 (a) requires mining companies to submit to the minister a quarterly report on their payments to the government, but there is no requirement for the government to make these public.

The Mines and Minerals Act – section on revenue transparency

159. For the purpose of realising its objectives under this Act,

- (a) develop a framework for transparency in the reporting and disclosure by persons engaged in the extractive industry, of revenue due to or paid to Government;
- (b) request, as may be deemed necessary, from any person engaged in the extractive industry, an accurate record of the cost of production and volume of sale of minerals extracted by such person at any period;
- (c) request from any person engaged in the extractive industry, an accurate account of money paid by and received from such person at any period, as revenue accruing to the Government for that period;
- (d) ensure that all payments due to the Government from a person engaged in the extractive industry, including taxes, royalties, dividend, bonuses, penalties, levies and such like, are duly made; and
- (e) disseminate by way of publication or otherwise, records, reports or any information concerning the revenue of the Government from the extractive industry, at least annually.

160. (1) A person engaged in the extractive industry shall submit to the Minister not later than fifteen calendar days after the end of each quarter of a year-

- (a) a general report on his activities and revenue payments made to the Government, including taxes, royalties, dividends, bonuses, penalties, levies and such like for that period; and
- (b) a report on payments made to landowners, lawful occupiers, Paramount Chiefs, or Chieftom Committees, including surface rents, development project contributions, material contributions towards vehicles, buildings or other civil works.

(2) A person engaged in the extractive industry who-

- (a) fails to comply with subsection (1); or
 - (b) gives false or misleading information or report regarding its volume of production, sales and income; or
 - (c) renders a false statement of account resulting in the underpayment of revenue accruable to Government, commits an offence and shall be liable on conviction to a fine not less than ten thousand United States Dollars or its equivalent in leones or to imprisonment for a term not exceeding one year in the case of an individual, to a fine not less than twenty thousand United States Dollars or its equivalent in leones, in the case of a co-operative, and to a fine not less than forty thousand United States Dollars or its equivalent in leones in the case of a body corporate.
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Sierra Leone compared to other states in west Africa

The experience of some other west African states, compared to Sierra Leone's slow progress, is set out below:

Ghana, which was accepted as an EITI candidate country in September 2007, has since produced three reports on payments and receipts (covering the years 2004–05) with a fourth in preparation.²³

Nigeria, which was also accepted as an EITI candidate country in September 2007, passed the Nigerian NEITI Act into law the same year, becoming the first country with a statutory backing for implementing the EITI. Two reports have since been produced; the latest, covering 2005, was released in August 2009.²⁴

Most progress, however, has been made by **Liberia**, which is one of only two countries to have become EITI compliant (the other being Azerbaijan). Liberia's progress has been much quicker than Sierra Leone's – despite the fact that the Liberian government first committed itself to implementing the EITI after Sierra Leone, in October 2006. Liberia's first EITI report was launched in February 2009 by President Sirleaf and in July 2009 the president signed into law the Act establishing the Liberia EITI. The LEITI Act is the second dedicated piece of EITI legislation (following the NEITI Act in Nigeria).²⁵

Liberia's EITI Act

Liberia's EITI Act,²⁶ passed in July 2009, requires:

- all companies to join the LEITI
- the 'regular disclosure... on a disaggregated basis, of all taxes, royalties and other fees paid' to government and revenues received by government from companies
- the conduct, through independent firms, of a reconciliation of all payment data disclosed by companies and all revenues disclosed by government
- the conduct, 'as frequently as may be necessary and through independent firms' of audits and/or investigations of payments and revenues to determine what ought to have been paid
- audits into the process by which mining rights are awarded by the government
- the 'prompt' publishing of these audits
- the government to monitor and reflect in its reports all funds that belong or are due to any community from any mining right.

Liberia's Act covers all mining (including oil companies) and forestry/logging companies. LEITI is an 'autonomous agency' of the government whose governing body is a multi-stakeholder group (MSG). The MSG comprises 'at least 15 members' appointed by the president of whom seven are from government, four from civil society and four from the private sector. They serve for a renewable term of three years.

Recommendations on transparency

NACE wants the government to clarify its commitment to develop a 'framework for transparency' in the Minerals Act. The government should produce a policy paper outlining what revenues, by whom and when, etc, it is going to publish, consistent with the points below.

1 We want the government to provide a detailed disclosure of government revenues from mining.

- The government should provide an annual figure of all earnings disaggregated by type of payment (tax, royalty, etc), by sub-sector (diamonds, rutile, etc) and by company.
- This should be published on the government website and in a printed document.

2 We want mining companies to make their payments to government publicly available.

- All companies not currently doing so should publicly report their basic financial data/accounts and payments to government on an annual basis.*
- This should be published on their websites, if they have them, and/or on the government website (therefore, the government should publish on its website a complete list of company data/payments).

3 We want companies to regularly publish their voluntary payments to mining communities.

- All companies not currently doing so should disclose this information (on their community development spending) in detailed breakdown form, annually.
- This should be published on their websites, if they have them, or in printed form.

4 Where not currently conducted, we want independent audits to be undertaken of mining companies and for these to be made publicly available.

- These audits, to be conducted by independent firms or the Government Audit Service, should cover company payments to government. Audits should also be conducted into the process by which mining rights are awarded by the government. These audits should be promptly published.
- The government should commission the financial audits at the end of a financial year, focusing on one or two different companies each year.

5 We want the Diamond Area Community Development Fund (DACDF) to become fully transparent and accountable.

- The government should reform the DACDF structure and align it with principles of transparency.
- The government should publish all the income and expenditure figures for the DACDF funds.

6 We want EITI principles to be reflected in contracts and agreements signed between the government and mining companies.

- All individual agreements should promote EITI principles and our other transparency demands.
- The EITI validation report recommends that all contractual agreements, including terms and conditions of licences, be made publicly available.²⁷ NACE completely agrees with this recommendation.

Finally, NACE wants the government to pass legislation on transparency, by signing the SLEITI into law.

- This legislation should pass into law the above points regarding transparency. NACE believes that Sierra Leone needs to specify its commitments on revenue transparency and to pass these into law, and not leave it up to individual governments to decide what, and what not, to disclose.

*Currently, the government is saying that semi-annual and annual reports from companies, including financial reports, will be confidential. See GOSL, *Understanding the Mines and Minerals Act 2009: Frequently Asked Questions*, p11, www.slminerals.org

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