



Byen Konte, Mal Kalkile?

Human Rights and Environmental Risks of Gold Mining in Haiti



About the Authors

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Byen Konte, Mal Kalkile? *Human Rights and Environmental Risks of Gold Mining in Haiti*
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Table of Contents

Acknowledgements	i
Executive Summary	1
Methodology	9
Recommendations	18
Chapter I: Haiti's Gold, Past and Present	23
I. Historical, Political, and Environmental Context	24
A. Brief Historical Context	24
1. The Nation's Founding	24
2. Nineteenth Century: Freedom and Exclusion	24
3. Twentieth Century: Occupation and Dictatorship	25
4. Late Twentieth Century Through Present Day: Crisis and Intervention	25
5. Politics in 2015	27
B. Communities at Risk	33
1. Predisposed to Natural Disaster, Unable to Respond Effectively	33
2. Human Factors	33
II. Haiti's Gold: Conquest and Controversy	34
A. History of Gold Mining on Hispaniola	34
B. Modern Gold Mining in Haiti	36
1. Gold Mining in the Late Twentieth Century	37
2. Gold Mining in the Early 2000s	38
3. Disagreement over Exploitation Permits	39
C. Communities Affected By Mining Activity	42
1. The Affected Communities: <i>Moun Andeyò</i>	42
2. Communities' Experiences: Exclusion and a Lack of Access to Information	45
Chapter II: The Modern Gold Mine and Mining in Haiti Today	58
A. The Geology of Gold	59
B. Gold Exploration	61
1. Phases of Exploration	61

2. Permit Holdings and Exploration Activities in Haiti to Date	61
a. VCS Mining LLC	65
b. Majescor-SOMINE	65
c. Newmont-Eurasian Joint Venture and Eurasian Minerals	66
C. The Extraction of Gold	69
D. Gold Processing and Refining	71
Chapter III: The Environmental Risks of Mining	81
A. Environmental Risks of Mineral Exploration	81
1. Test Drilling and Related Construction	81
2. Risks to Soil	82
3. Risks to Water Resources	82
4. The Debated Environmental Impacts of Mineral Exploration in Haiti	83
5. Communities' Experiences with Majescor-SOMINE	83
6. Communities' Experiences with Newmont-Eurasian	85
a. Grand Bois	85
b. La Montagne	86
B. Environmental Risks of Mine Construction and Exploitation	87
1. Dust	87
2. Water Use and Water Contamination	88
C. Mineral Processing and the Environment: Cyanide, Smelting, and Pollution of Water and Air	89
1. Transport	89
2. Cyanide Processing	90
3. Smelting	95
4. Heavy Metals and Metal-Like Elements	95
D. Mine Closure and the Environment: Surface Rehabilitation and the Persistence of Water Pollution and Threats to Public Health	100
E. Haiti's Capacity to Manage the Environmental Risks of Mining	104
F. Conclusion	105
Chapter IV: The Economics of Gold Mining for Haiti	120
A. The Economic Drivers of Mining	120
B. The Financial Terms of Mining	123

1. Taxes and Royalties: A Comparative Analysis of Fiscal Regimes for Mining	123
a. Taxes	124
b. Royalties	124
2. Haiti's Fiscal Policy Options	126
C. Haiti's Financial Stake in Mining	130
1. Tax Limitations and Uncertainties	131
2. Potential Exemptions from Corporate Income Taxes under Haiti's Investment Code	132
3. Corporate Income Taxes: The Risks of Transfer Pricing	134
4. Fiscal Sustainability	136
5. Fiscal Transparency	137
D. Potential Financial Benefits of Mining: A Cautionary Hypothetical	138
E. Conclusion	140
Chapter V: The Legal Framework for Mining in Haiti	153
A. The Haitian Constitution	153
B. The Mining Decree of 1976	155
1. Mining Permits	156
2. Financial Requirements	157
3. Environmental Protection, Land Rights, and Community Interests	158
C. Reform of the Legal Framework	160
D. Governance and the Rule of Law	162
E. The August 2014 Draft Mining Law	164
1. Transparency and Disclosure	165
2. Environmental Review and Oversight	166
3. Particular Environmental Standards and Protections	168
a. Applicable environmental law	169
b. Reserve areas	169
c. Deforestation	169
d. Buffer zones	170
e. Water	170
4. Permitting System	170
5. Financial Requirements	171

a. Royalty rates	172
b. Tax avoidance safeguards	172
c. Surface use fees	174
d. Fiscal stabilization	174
e. Remediation	175
6. Land Use, Compensation, and Dispute Resolution	176
7. Community Development Protocols	178
8. Labor and Local Content Provisions	179
9. Model Mining Convention (" <i>Convention Minière Type</i> ")	180
Chapter VI: Human Rights and Gold Mining in Haiti	199
A. Introduction: Rights Affected by Mining	199
B. Rights Related to Participation and Deliberation	199
1. Relevant International Law: Rights Related to Participation and Deliberation	199
2. The Experience of Mining-Affected Communities: Rights Related to Participation and Deliberation	200
a. Overview	200
b. Residents of Patricko and Roche Plat demand access to information	203
3. Haitian Advocates Testify about Lack of Access to Information	204
C. Social and Environmental Rights	206
1. Relevant International Law: Social and Environmental Rights	206
2. The Experience of Mining-Affected Communities: Social and Environmental Rights	207
a. Overview	207
b. The experience of mining-affected communities: land access agreements	211
c. Case study: land access agreements in La Montagne	212
i. Conclusion of Agreements	217
ii. Signing by Third Parties	220
iii. Refusal	221
iv. Absence of a Grievance Mechanism	221
v. Case Study Conclusion	222
D. Who is Responsible? Duties Corresponding to Rights Affected by Mining	222
1. Introduction	222

2. Human Rights Obligations	223
3. The Responsibility to Respect, Protect, and Fulfill	223
4. Obligations of the Haitian State	225
5. Obligations of Other States	226
a. States' extraterritorial obligations under international human rights law	226
b. States' obligations when acting As members of the international community	226
c. Obligations of mining companies' home states	227
6. Obligations of IFIs	227
7. Responsibilities of mining companies	230
a. Institutional commitments	232
i. Relevant Policies and Standards at IFIs	232
ii. Company Commitments	233
E. Conclusion	234
Appendices: Land Access Agreement Used by Newmont-Eurasian in Haiti	258
Appendix 1: Land Access Agreement	258
Appendix 2: Transcription of Creole Agreement	260
Appendix 3: Translation of Creole Agreement	262

List of Boxes

Box 1-1: United Nations Peacekeeping Force in Haiti	26
Box 1-2: Relevant Haitian Government Actors	29
Box 1-3: Bauxite and Copper Mining in Haiti in the Twentieth Century	35
Box 1-4: Mining Permits Under Haitian Law	37
Box 1-5: International Financial Institution Support	40
Box 1-6: The <i>Kolektif Jistis Min</i> (KJM)	44
Box 2-1: Artisanal Mining in Haiti: Lakwèv	59
Box 2-2: Gold and Copper Permits in Haiti	62
Box 3-1: Green(er) Mining	96
Box 4-1: Comparison of <i>Ad Valorem</i> Mineral Royalty Rates in Select Countries	125
Box 4-2: Questioning the Haitian Government's Capacity and Will to Collect Taxes	129
Box 5-1: Inspection Panel Complaint	139
Box 5-2: Labor Rights in Haiti and the Need for Strong Worker Protections in the Mining Sector	182
Box 6-1: International Human Rights Treaties Ratified by Haiti	200
Box 6-2: Free, Prior, and Informed Consent (FPIC) and Haitian Communities Affected by Mining	205
Box 6-3: Health Conditions in Haiti	208
Box 6-4: Land in Haiti	209
Box 6-5: Text of the Land Access Agreement	213
Box 6-6: Local Officials of an Absent State	224
Box 6-7: Mining, Security, and Human Rights	228
Box 6-8: International Finance Corporation Support for Eurasian Minerals in Haiti	233

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I. Executive Summary

Resident, Gode

Since I was a little kid I have listened to my grandparents talk about the riches that are in the Haitian soil. We don't have the tools we need to exploit them. But the foreigners have recently returned, and we know in history this has caused problems.

Resident, La Mine

The reason we are upset is not because foreigners are mining. We don't know enough about mining to know if it is good for us. We are upset because the foreigners never introduced themselves.

Community leader, La Montagne

We live in a State that has never integrated us into the political life of the country.

Haiti stands at a crossroads: The prospect of gold mining glitters on the horizon, while the reality of an uncertain political future, weak institutions, and widespread impoverishment glares in the foreground. Celebrated as the only nation in the world born of a successful slave revolution, but known today as the poorest country in the Western Hemisphere, Haiti is a fragile, if resilient, place. Rights are precarious, and basic resources are scarce. As of 2014, only 62 percent of all households in Haiti had access to safe drinking water, while less than 50 percent enjoyed such access in rural areas.¹ The cholera epidemic that erupted in 2010, which has taken more than 9,000 lives to date,² has revealed the vulnerability of the Haitian population amid inadequate water, sanitation, and health infrastructure. But it has also highlighted the power of popular protest. Haiti has a longstanding tradition of peasant movements, in which ordinary Haitians have mobilized to challenge and overcome injustice. It is in this context—against the backdrop of the country's complex history with foreign intervention and investment—that efforts to develop a mining industry in Haiti must be understood.

Minerals can be exploited only once. The current moment, before mining has begun, presents a unique opportunity for the Haitian people to engage in a robust public debate about the risks and benefits of mining and for the Haitian State to implement preventive measures to avoid future human rights abuses and environmental harms. Such a debate requires transparency, public education, and active engagement of Haitian communities. Until now, most discussions about mining have occurred behind closed doors among government officials, company stakeholders, and international financial institutions. There is a dearth of information in the public domain about what gold mining entails, what challenges it poses, what opportunities it presents, and what it may mean for communities and the country as a whole. The purpose of this Report is to help fill that gap.

A. Haiti's Emerging Mining Sector

Several factors have combined in recent years to amplify interest in mining in Haiti. Chief among these are the recent history of rising gold prices, the Haitian government's efforts to attract foreign investment, and the demonstrated productivity of the Pueblo Viejo mine in the Dominican Republic. Haiti shares with the Dominican Republic not only the island of Hispaniola but also the rich mineral belt from which the Pueblo Viejo mine is drawing gold and copper—a belt that stretches across Haiti's northern departments. The Pueblo Viejo mine is one of the most productive in the world and has spurred interest in the mineral deposits that may lie beneath Haitian soil. The full extent of Haiti's mineral resources is unknown, but some estimates place the value of the gold alone at \$20 billion.³

There are no active metal mines in Haiti yet, but the government has identified the mineral sector as key to the country's economic growth over the next two decades and has encouraged foreign interest.⁴ Between 2006 and early 2013, two Canadian and two U.S. companies reportedly invested more than \$30 million to explore for gold, copper, silver, and other metals.⁵

Since early 2013, however, mining activity in Haiti has been on hold. In February of that year, the Haitian senate passed a resolution calling for a moratorium on mining, citing concerns about the process for granting permits and the danger mining poses to the environment.⁶ Shortly thereafter, the Haitian government sought assistance from the World Bank and the International Monetary Fund to rewrite its outmoded mining law, which dates to the Duvalier era. The proposed new mining law was drafted with input from mining companies that hold interests in Haiti, but without the participation of the Haitian public. Many communities remain largely unaware of efforts to encourage metal mining in the country.

Although the World Bank has identified “strengthened institutional capacity” and “transparency” as “critical next steps to unblock the exploration of Haiti's gold and copper potential and pave the way for this promising new wealth-generating sector,”⁷ the reform process to date has focused on revision of the legal framework for mining. No World Bank-funded institutional capacity-building measures are underway or planned,⁸ and there has been a marked lack of transparency and meaningful public dialogue about the mineral sector in Haiti.

In August 2014, a task force of Haitian officials and international experts⁹ presented a draft of a proposed mining law to the office of then-Prime Minister Laurent Lamothe. In the months that followed, however, Lamothe resigned and Parliament was dissolved. The progress of mining sector reforms grew even more indeterminate in 2015 as the country entered a period of rule by presidential decree. President Michel Martelly, a pop singer who came to power in the aftermath of the 2010 earthquake, is one of just 11 elected officials in all of Haiti.¹⁰ As this Report goes to press, Haiti is in the midst of election turmoil. Parliamentary, local, and presidential elections occurred in August and October 2015. These elections have been denounced broadly. They were marred by violence, intimidation, and calculated fraud.¹¹ Since first-round presidential election results were announced on November 5, Haitians have organized mounting protests, demanding

that allegations of fraud be investigated and, at times, going so far as to call for the resignation of President Martelly.¹² The political future of Haiti remains uncertain.

Although little information about the plan to develop the mining industry has been made public, the information that has been disclosed has alarmed Haitian social movements and civil society organizations. These groups are concerned about both the lack of transparency surrounding the development of the mineral sector and the environmental and social impacts of mining. Some residents of communities where mining companies have explored for gold and copper have complained of individuals entering their lands, marking their property, taking samples without permission, and failing to provide adequate information about the purposes of these preliminary mining activities. Community members have expressed frustration at being excluded from decisions that affect their lives.

Modern gold mining, wherever it occurs, takes a toll on the environment and on communities. Experience around the world underscores the risks that mining poses to land and water resources, as well as to social structures, livelihoods, and pre-existing economic activities. In Haiti, those risks are heightened by the country's vulnerabilities to natural disaster and environmental harm—vulnerabilities that stem from both the country's physical location in the Caribbean and from human-made factors, including deforestation, inadequate planning of land and water, and lack of regulatory supervision and enforcement. Haiti is also one of the world's most densely populated and economically unequal countries in the hemisphere. These conditions not only elevate the social and environmental risks of mining but also increase the likelihood that adverse impacts will disproportionately affect those Haitians who are already most socioeconomically marginalized and vulnerable to human rights abuses.

The future of mining in Haiti depends on a number of uncertain factors, among them domestic and international politics, the willingness of investors to take a risk on mining in Haiti, and the price of gold and other precious metals. Ultimately, however, decisions about whether, when, and how the industry develops should rest with an informed Haitian public.

B. Report Objectives and Approach

Recognizing the important decisions that Haiti faces, the Global Justice Clinic at New York University School of Law (GJC) and the University of California Hastings College of the Law have prepared this Report concerning the risks and realities of modern gold mining and its implications for human rights and the environment in Haiti. The Report is the fruit of collaboration between environmental law experts and human rights lawyers, informed by the Justice in Mining Collective, a platform of Haitian organizations and individuals committed to promoting the interests of Haiti's rural, northern communities and prompting a national dialogue about the future of Haiti's mineral resources. Consistent with best practice in the field of international human rights, this Report is based on intensive documentary research and review of primary and secondary materials on gold mining in Haiti; interviews with community members, Haitian government officials, and representatives of mining companies and

international organizations operating in Haiti; field investigation; and discussions with members of communities in areas where companies hold permits for activities related to gold mining. The Report is a product of more than 100 days of interviews and participant observation in more than fifty meetings held in communities affected by mining-related activities in Haiti (see *infra*).

All Report-related research in Haiti was undertaken using a human rights-based approach, which supports the power and capacity of people and communities to change their own lives, both independently and through institutions that represent or affect them. This approach takes respect for human rights as its starting point and end objective, emphasizes the informed engagement of rights-holders in both the analysis of factors affecting their own lives and the design of solutions, and stresses accountability, by including evaluation of both the process and outcomes of the research.

The Report addresses four main issues: (1) the process of modern gold mining, through an examination of its mechanics around the world and a history of extractive activity in Haiti; (2) the experiences and concerns of communities in Haiti that have hosted mineral exploration in the past ten years, including community members' allegations that mining companies have failed to respect human rights and the communities' fear of future human rights violations; (3) the environmental and social risks of mining gold in Haiti; and (4) the institutional, legal, and regulatory frameworks that will shape the economic, social, and environmental consequences of mining in Haiti.

C. Chapter-by-Chapter Overview

Chapter I sets the scene, describing the historical backdrop and political context of the current interest in Haiti's mineral wealth. Since its origins as the first Black republic and the only nation in the world born of a successful slave revolt, Haiti has suffered political exclusion and economic subjugation at the hands of France, the United States, and the international community. This opening chapter outlines the challenges that Haiti has faced since its founding, which have led to the poverty, institutional weakness, inequality, and political failures that beset the island nation today. These challenges include the exorbitant debt extorted by France throughout the nineteenth century, the cycles of foreign occupation and dictatorship that dominated the twentieth century, and the international intervention and aid of recent years. The international community's circumvention of the Haitian government in administering post-earthquake relief struck the latest blow to Haitian democracy, further eroding the social contract between the people and the institutions that purportedly represent them. Chapter I also explores the causes of Haiti's heightened vulnerability to environmental and social harms and cautions that, if not properly managed, mining could exacerbate inequality and existing problems related to subsistence agriculture, water supply and quality, deforestation, and destitution in Haiti's northern departments.

Chapter I turns next to the history of mineral extraction on the island of Hispaniola and modern, large-scale gold mining in the late twentieth and twenty-first centuries. It presents the principal

actors promoting mineral development in Haiti today: the Haitian government, international financial institutions, and mining companies. It explains how the political controversy over the mineral exploitation permits issued unilaterally by the *Bureau des Mines et de l'Énergie* (Bureau of Mines and Energy, or BME) in December 2012 prompted the Haitian senate to pass a resolution in February 2013 calling for a moratorium on mining. The chapter concludes with an introduction to the communities affected by gold mining activities and the social movement organizations that strive to help the local populations remain visible and influential in politicized decisionmaking processes that so often fail to take notice of them.

Chapter II explains how modern gold mines operate, presenting the geology of gold and the mechanics of mineral exploration, mine construction, and mineral extraction. It details the open-pit method of extraction likely to be used in Haiti if mining proceeds and provides an overview of common techniques for refining and processing gold. It also discusses the mineral exploration activity conducted in Haiti to date by foreign companies and their Haitian counterparts: VCS Mining LLC and its subsidiaries, Delta Société Minière S.A. and SONO Global Holdings Inc.; Majescor Resources Inc. and its Haitian partner (and now majority owner and operator of the previously jointly held permits), Société Minière du Nord-Est S.A. (SOMINE); and the former joint venture between Newmont Mining Corporation and Eurasian Minerals Inc.¹³ and their respective subsidiaries.

Chapter III presents the environmental risks of gold mining and community concerns about the impacts of mineral exploration in Haiti to date. The construction and operation of a modern gold mine fundamentally alters existing uses of land, water, and other natural resources, often displacing housing and community structures or disrupting farming and other economic activities. Moreover, mining has “spillover” effects beyond the mine’s perimeter, including pollution of air and water, as well as disturbance and depletion of surface and groundwater resources. This chapter discusses how these impacts could affect the communities of Haiti’s Massif du Nord, where most of the areas designated by the mineral permits are located.

The chapter outlines the potential environmental risks posed at each phase of mining operations, from exploration through mine closure and rehabilitation. Although many mining companies around the world have taken steps to reduce these risks and to mitigate environmental harm, modern large-scale mining remains an inherently dangerous activity, particularly with respect to its impacts on water. For example, at Pueblo Viejo, a mine operated by Barrick Gold Corporation in the neighboring Dominican Republic, there have been serious problems with contamination of water sources due to “toxic mine drainage” (TMD), caused when metals and metalloids previously embedded in the rock unearthed during mining are exposed to oxygen and carried by surface runoff into adjacent streams. Studies of the mineral content of rocks and soil in the Massif du Nord suggest the potential for similar TMD in Haiti.

Chapter III also presents perspectives of community residents in the Massif du Nord, who revealed through interviews with GJC that few local people had received any information about the physical scope or risks of gold mining, either from company officials or from the government.

Further, many residents alleged that mineral exploration activities destroyed their crops and have had a long-term impact on their ability to grow food.

In view of the challenges of regulating the mining industry and the serious, unavoidable risks it poses to health and the environment, Chapter III raises questions about the institutional capacity of the Haitian government to control mining operations and ensure health and safety after mine closures. The small budget and limited staff of the BME, the agency responsible for mining, and the apparent lack of familiarity of other ministries with the realities and risks of mining suggest that the Haitian State is ill-prepared to supervise the mining sector in the interests of the Haitian public.

Chapter IV presents the economics of gold mining in Haiti. Mining is an inherently unsustainable activity: The ore that is extracted is not replenished, and over the life of the mine the minerals in the earth are depleted. This chapter cautions against overestimating the economic benefits of gold mining for Haiti, given fluctuations in world gold prices, the relatively low royalty rate likely to be imposed on mining companies, uncertainties in domestic and international tax law, and the costs of mitigating the short- and long-term impacts of mining, such as remediation after mine closure. The Haitian Constitution of 1987 requires that the State (as owner of the gold reserves in trust for the Haitian people), the mining companies (as concessionaires), and the surface owners of the land beneath which minerals lie share equitably in the profits of mining.¹⁴ For this mandate to be fulfilled, Chapter IV explains, the financial terms of the mining law must be improved and the Haitian government must ensure that it will conserve and invest the revenues it receives from royalties and taxes for the benefit of the Haitian people.

The fiscal benefits to Haiti from gold mining are uncertain. Under both the current mining law and proposed new law, the companies would be required to pay a combination of taxes and royalties. The royalty—which is based on the value of the gold rather than on corporate profits—is presently 2.5 percent¹⁵ and would rise to 4 percent under Article 235 of the proposed new law.¹⁶ The companies also would have to pay corporate income and other taxes. Yet, it remains unclear whether they could benefit from Haiti's 2002 Investment Code, which includes a number of tax incentives and exemptions designed to attract investment and new businesses to Haiti.¹⁷ If the Code were to apply, mining companies would receive enormous tax benefits, including a fifteen-year exemption from corporate income taxes.¹⁸

The relatively modest revenues that Haiti is likely to receive from gold mining, given the proposed royalty rates and tax regime, cast doubt on whether the potential economic benefits of mining justify the known risks to public health, the environment, local communities, and human rights. While the benefits of mining may accrue to the nation as a whole, the costs of mining would be borne disproportionately by local communities, including landowners, farmers, and residents displaced by the mines and others who may suffer from downstream or downwind pollution.

By posing questions about fiscal uncertainty, financial sustainability, and fair sharing of revenues from mining, Chapter IV aims to help the Haitian government and the public understand and debate the economic complexities of gold mining before any decision is taken to adopt a new mining law and to allow gold mining to begin.

Chapter V evaluates the legal framework for mining in Haiti. It examines the constitutional parameters for regulation of the mining industry and discusses deficiencies of the current law, the Mining Decree of 1976. The analysis reveals that the Mining Decree is both overly complicated and under-protective of the environment and the populations most at risk from mining. Although there is general agreement that the existing law is outdated, the lack of transparency surrounding the proposed new mining law—which was drafted in collaboration with mining companies that hold permits in Haiti, but without input from civil society—raises significant concerns about whose interests would be represented under the revamped legal framework. Moreover, given the dearth of institutional capacity within the government to monitor the mining sector, passage of a new law designed to usher in investment may be premature. In January 2015, civil society organizations and community members presented these concerns to the World Bank’s accountability mechanism, which found them to be “serious and legitimate.”¹⁹

Chapter V looks in detail at the August 2014 draft of the proposed new mining law and provides a critical analysis of its key provisions.²⁰ The draft text includes some important improvements to the existing regime—notable among them a reorientation from the current convention-based system, in which fiscal terms and other performance requirements are negotiated with each mining company, to a permit-based system, in which essential terms are fixed in the mining law, thereby establishing a uniform regulatory structure from which individual mining conventions may not derogate. The draft law falls short of protecting rights guaranteed in the Haitian Constitution, however, including the right to a healthy environment, the right to property, and the rights to information and participation. It also restricts parliamentary oversight, delegating important legal and policy decisions to a new governmental institution, the *Autorité Minière Nationale* (National Mining Authority, or AMN).²¹ Removing decisions on key regulatory details from the legislative process risks the loss of democratic consultation and diminishes the ability of interested stakeholders to influence the drafting of substantive rules that will be critical to the well-being of communities and the environment.

Chapter V points to other significant shortcomings in the proposed law. One article would require all mining-related information to be kept confidential for a period of ten years, effectively foreclosing meaningful public oversight of mining activities and regulatory compliance.²² The broadly worded provision contains no exception for documents of public interest, such as those that pertain to the environmental and social impacts of mining. Nor does the draft law require mining companies to disclose the revenues they earn or amounts they pay to the Haitian State.²³ Certain articles pertaining to the land use compensation and dispute resolution scheme would facilitate expropriation of land for mining activity while limiting citizen recourse in the event of conflicts, channeling disputes to arbitration rather than to the Haitian courts. Another provision

would allow mining to begin based on a statement of “no objection” from the *Ministère de l’Environnement* (Ministry of the Environment), which may be presumed after a given period of time, rather than affirmative environmental clearance. And many provisions lack sufficient detail to guide rigorous environmental or social review, deferring crucial standards and rules to implementing regulations to be adopted in the future by the AMN, an institution that does not yet exist and whose annual budget, staffing, and professional expertise are not defined.

Ultimately, Chapter V concludes, the strength of the legal regime governing mining in Haiti depends not just on the text of the framework statute and accompanying regulations but also on the technical, institutional, and financial capacity of the State and its political will to implement and enforce those laws. Without deliberate debate, careful planning, and reinforcement of governmental regulatory capacity, there is a risk that mining would begin under a new law before the State is equipped to ensure that mineral extraction benefits and does not harm the Haitian people and their environment.

Chapter VI addresses the human rights implications of gold mining, from the entitlements of individuals and communities affected by mineral exploration and extraction to the domestic and international legal duties of actors responsible for mining, including the Haitian government, private companies, and international organizations supporting the sector’s development. The starting point for this chapter is the recognition that any mining activity in Haiti necessarily occurs in a context already characterized by widespread rights abuses, particularly deprivations of economic and social rights and denials of the right to information and political participation. Given these baseline conditions—and the pre-existing exposure of communities to natural disaster, drought, and disease—Haitians are especially vulnerable to the risk of mining-related violations of the rights to water, health, freedom from forced displacement, and civic participation.

International human rights law protects numerous rights that are predicated on a healthy environment and a safe community. The prospect of large-scale mining creates the potential for violations of the right to water through impacts on both the quantity and quality of water on which adjacent and downstream communities rely.²⁴ Gold mining may also jeopardize public health and diminish agricultural production by polluting the air and soil in communities located downwind of the mines. Poor living conditions, lack of access to healthcare, and weak health infrastructure in Haiti exacerbate these risks.

Domestic and international law guarantee the right of all Haitians to participate fully and equally in deliberations about mining. Meaningful participation requires that complete, accurate, and objective information be provided to the Haitian people—especially those who live in the often remote communities that would be most affected by mining. This information must be made available in a timely manner, in Creole, both in writing and through oral means of communication, such as by radio, so that individuals and communities can make use of it in their deliberations and decisions. The case study in Chapter VI about the administration of land access agreements in Haiti’s Northwest Department shows that the rights to information and

participation have not been respected. Evidence from La Montagne reveals that Haitian government officials were notably absent from the process; they neither informed the local population about mining before Newmont-Eurasian's arrival nor supported rural farmers as they negotiated access to their land. In many instances, agreements appear to have been concluded without the informed consent of the individual landowner.

The Haitian government bears the primary duty to respect, protect, and fulfill the human rights of its people to water, health, food, information, and civic participation, among other rights. But responsibility does not rest solely with the Haitian government. The international community, too, has a vital role to play to ensure respect for the human rights of Haitians and to build the capacity of the State to ensure these rights. And while the scope of the human rights obligations of non-State actors, such as private businesses and intergovernmental organizations (the World Bank, for example) remains contested, there is an emerging consensus that all of these actors have—at a minimum—an obligation to *respect* human rights whenever and wherever they act. When governments lack the resources and/or will to respect those rights, other actors operating in the country must recognize the increased risk of their actions triggering violations for which individuals have no remedy.

With an inherently risky industry such as gold mining, much depends on the capacity and willingness of the Haitian government to regulate and monitor the actions of powerful companies. This supervision is all the more pressing in remote areas populated by communities that have been marginalized by poverty and historical exclusion. The people of Haiti have a full range of rights that must be assiduously protected. Without inclusive and participatory governance, Haiti's apparent bounty of mineral resources could easily transform into a curse.

II. Methodology

A. Rights-Based, Qualitative Approach

Research for this Report was conducted using a rights-based approach (RBA). This approach, often applied in development programming but equally relevant for human rights advocacy, endeavors to place the rights-holder “at the center of those interventions designed to improve access to rights.”²⁵ This focus requires close collaboration with rights-holders in the course of research. The aim of such collaboration is to define the object of inquiry together so that findings are directly relevant to the communities' ability to claim their rights. In cases such as this one, investigation is not aimed at producing “generalizable knowledge” but is instead conducted to understand the experience of rights-holders and to identify the obligations of duty-bearers.²⁶ For these reasons, the focus was not on analyzing trends or specifying the prevalence of rights violations—goals for which quantitative methods are often suitable. Instead, the authors chose qualitative approaches as most appropriate and effective.

Gold mining-affected communities in Haiti expressed concerns about their right to access information concerning mining; to be consulted in decisions related to mining; to make informed and free decisions concerning the use of their land; and to continue to engage in subsistence farming. They also expressed concern about the way some mining-related activities have been conducted to date and feared lasting impacts of even early exploration activities. The investigations carried out for this Report therefore aimed to shed light on these issues by combining desktop legal, technical, and policy research with field studies. The desktop research focused on the processes and risks of gold mining, fiscal options for the gold mining industry in Haiti, the legal framework for mining, and the human rights obligations related to mineral extraction. Field investigations were carried out in Haiti's northern provinces—the North, Northeast, and Northwest Departments. The information collected in the field was obtained in conjunction with legal advocacy and through participant observation, site visits, community meetings, small group interviews, and individual interviews. During the time this research was being conducted, GJC and the U.S.-based nongovernmental organization Accountability Counsel assisted Haitian communities to bring a complaint before the World Bank Inspection Panel concerning the World Bank's activities related to the revision of Haiti's Draft Mining Law. Information from this case was also integrated into this Report where appropriate. As a general matter, GJC staff and students carried out the field components, in collaboration with numerous Haitian colleagues, and UC Hastings and GJC researchers conducted the desktop research (see Acknowledgements).

B. Desktop Study and Legal Analysis

Desktop research for this Report was conducted in English and French, and it combined legal and policy reviews with assessment of economic, scientific, and technical matters. Legal research was conducted by law students, a law firm, and legal staff of GJC. Company documents were widely consulted, and publicly reported information was integrated into the text. Peer reviewers drawn from the relevant technical fields provided in-depth input into the environmental, fiscal, and technical dimensions of the Report. This input was carefully relied upon to revise the Report text.

Maps were created based on shapefiles constructed from a variety of sources. These sources consisted primarily of three types: mining company materials, Haitian government documents, and third party institutional reports. When possible depending on availability, exact coordinates for the perimeters of boundaries depicted in shapefiles were used. Otherwise, the boundaries depicted in the shapefiles were created by consulting available aerial imagery denoting boundaries and cross-referenced against material specifying surface areas (e.g., of the land under permit). Finally, a shapefile was manually “drawn” with the correct surface area, matching as precisely as possible the boundaries as seen from aerial imagery. For some areas known to be under permit, it was not possible to cross-reference against both aerial imagery and surface area information; for others, conflicting information was available from different points in time. The boundaries depicted in the maps contained in this Report are as accurate as possible given the significant data limitations relating to mineral permitting in Haiti.

C. Testimonial and Investigative Methods

Primary information for this Report was collected using a range of qualitative approaches, from participant observation and site visits to community meetings, small group interviews, and individual interviews. The field components were carried out between February 2013 and November 2015. During this period, GJC personnel visited mining-affected communities with Haitian colleagues. UC Hastings personnel also met with members of three communities in Haiti's Massif du Nord in March 2014. Additional individual interviews were conducted in Port-au-Prince and via telephone and Skype by GJC and UC Hastings. Information was gathered on the basis of informed consent.

1. Participant Observation and Site Visits

GJC made four dozen site visits to gold mining-affected communities between February 2013 and August 2014. During these visits, GJC personnel worked alongside Haitian colleagues to learn as much as possible about gold mining-related activities and community members' understanding and experiences of these activities. Through long hikes to communities, visits to land impacted by drilling, and discussions with community members and leaders, GJC learned a great deal about the communities where companies hold gold mining permits. Altogether, GJC visited approximately 18 communities in 10 communes and 3 departments.

2. Community Meetings

In conjunction with Haitian colleagues, GJC held dozens of community meetings. During these meetings, GJC learned about the level of awareness and understanding of community members about gold mining. Discussions during these meetings focused on the legal framework for gold mining in Haiti, human rights related to mining activities, potential health and environmental impacts of gold mining, and the various institutions engaged in mining-related activities in Haiti.

3. Small Group Interviews

GJC conducted a series of small group interviews in May 2014 in Northwest Haiti. These interviews were aimed at understanding the conditions surrounding the signing of land access agreements by some farmers in the region. In all, GJC spoke with 76 individuals during these group interviews. This method was recommended by GJC's Haitian partners as the most culturally appropriate manner to conduct fact-finding into this issue. Land ownership and the transfer of rights is a sensitive topic in (Northwest) Haiti, where many subsistence farmers prefer not to discuss the status of their land use with outsiders. Small group meetings were seen as both more respectful and more probative than individual meetings, which may have inadvertently exerted pressure on subsistence farmers to answer questions in ways they perceived the interviewers to desire. The information gathered during these interviews was cross-checked against documentary evidence such as signed land agreements, as well as company-supplied information (see discussion *infra*).

4. Individual Interviews

GJC carried out dozens of individual interviews during the course of this project. These interviews were aimed at gathering information from those most affected by gold mining-related activities, as well as key participants in the gold mining sector. The vast majority of interviews in Haiti's northern departments were conducted in Kreyòl without the assistance of a translator and focused on the main topics under consideration in this Report. Some interviews in Port-au-Prince were conducted in French and a handful were conducted in English.

A. NATIONAL AND LOCAL GOVERNMENT OFFICIALS

GJC conducted individual interviews with representatives of local and national governmental agencies. Local officials interviewed included members of the local *Conseil d'Administration de la Section Communale* (CASEC), and the *Assemblée de la Section Communale* (ASEC) in various areas. GJC spoke with members of the National Parliament: several *sénateurs* (members of the *Sénat*) and *députés* (members of the *Assemblée Nationale*). GJC also interviewed key representatives (current and former employees) of the *Bureau des Mines et de l'Énergie* (Bureau of Mines and Energy), the *Ministère de l'Environnement* (Ministry of the Environment), the *Ministère de l'Économie et des Finances* (Ministry of the Economy and Finance), the *Conseil de Développement Économique et Social* (Council of Economic and Social Development), and the *Centre National de l'Information Géo-Spatiale* (National Center for Geo-Spatial Information). GJC sought, but was unable to obtain, interviews with the *Ministère des Travaux Publics, Transports et Communication* (Ministry of Public Works, Transport, and Communication).

B. COMPANY REPRESENTATIVES

GJC conducted interviews with Haiti-based representatives of Newmont-Eurasian, Ayiti Gold S.A., and SOMINE, and UC Hastings conducted an interview with a representative of VCS. GJC also held discussions with U.S.- and Canada-based representatives of Newmont, Eurasian, and Majescor.

C. COMMUNITY MEMBERS

GJC conducted dozens of individual interviews with members of communities where mining companies have been active. These interviews ranged in form from structured and semi-structured to unstructured. GJC has elected not to use the names of interviewees in this Report to protect their identities. UC Hastings supplemented these interviews with meetings with members of three communities affected by mining in Haiti's North and Northeast Departments.

D. OTHER INSTITUTIONS

GJC and UC Hastings also conducted interviews and engaged in several informal conversations with personnel from the World Bank.

5. Written Exchanges of Information with Mining Companies

GJC sent detailed information to those companies whose activities are discussed in this Report, seeking their input concerning the factual assertions set out in the Report. Newmont, Eurasian, and SOMINE all provided detailed responses to the information provided, and Majescor provided some information by telephone. In line with best practice, GJC carefully integrated the company responses into the presentation of factual assertions in the Report. Company-supplied information is cited in the body of the Report where relevant.

D. Information-Gathering Conducted Alongside Legal Advocacy

This Report was written as part of a larger effort to work with communities to ensure they can fully exercise their rights as the mining sector develops. GJC, as a law school-based clinic, undertook several legal advocacy initiatives that also produced information useful for this Report. In January 2015, GJC and Accountability Counsel worked with Haitian stakeholders to file a complaint with the World Bank Inspection Panel (see Chapter V, Box 5-1). The complaint alleged that the Haitian populace had been excluded from World Bank-funded efforts by the Haitian government to draft new mining legislation intended to attract foreign investors to exploit Haiti's gold and other minerals. Complainants contended that the World Bank had failed to follow its own social and environmental safeguard policies and ensure that the new legal framework adheres to international best practices. In February 2015, the Inspection Panel released a decision recognizing that the complaint raised "serious and legitimate" concerns and that the mining industry presents significant risks. The Inspection Panel nevertheless declined, on narrow, technical grounds, to investigate the complaint. In the process of advancing the complaint, however, GJC met several times with World Bank officials and conducted in-depth documentary research for the case. These meetings provided background information important in the preparation of this Report.

In March 2015, GJC appeared alongside two Haitian civil society groups, the Justice in Mining Collective and the Megaprojects Observatory, before the Inter-American Commission on Human Rights (IACHR). The participants testified to the social, environmental, and political costs of the lack of transparency surrounding the development of the tourism and mining industries in Haiti. They exposed the failure of the Haitian government to provide basic information about planned projects—even to those directly affected—and criticized proposed legislation that would keep information about the mining sector confidential. The two Haitian groups, a Haitian journalist, and GJC requested the hearing before the IACHR to examine the right of access to information in Haiti. This hearing and the legal research conducted to support the testimony were important background resources for this Report.

E. Limits of the Research and Investigation

The investigation carried out for this Report was limited in time, space, and resources. These limits mean that the information presented here is necessarily incomplete. One of the most significant challenges was the lack of publicly available information concerning mining in Haiti. To our knowledge, no written documents about mining have been released to Haitian communities. Apart from some coverage by the Haitian press, very limited information is available online, and what is available tends to be either outdated or published on company websites and aimed at potential investors or the public in North America. UC Hastings and GJC sought copies of environmental impact assessments and feasibility studies, for example, but these requests were refused on the grounds that such documents are confidential. When UC Hastings and GJC came into possession of a draft version of the proposed mining law, interlocutors referred to it as a “leaked draft.” Information about gold mining permits of all types was difficult to access, and although government officials granted interviews to discuss these matters, UC Hastings and GJC cannot state with confidence that this Report includes information on *all* of the companies active in Haiti. Similarly, in-depth information about the World Bank’s partnership with the government of Haiti to reform its outdated Mining Decree was not publicly available. Apart from a single page of text on the World Bank’s website²⁷ and a few sentences in a 2012 project document,²⁸ GJC was told by World Bank and government officials that the only documents in existence memorializing the specifics of the World Bank’s law reform assistance were in the form of confidential aides-mémoire.

While GJC researchers visited many communities where mining-related activities have taken place in Haiti, investigators could not visit all of these areas—including the important Terre Neuve, Mapou, Grand Savane and La Miel sites, where Newmont holds permits.

Researching facts in low-literacy communities where a significant portion of the population does not routinely record its daily activities and has few written documents presents challenges different from those presented in communities accustomed to data. These challenges lead to heavier reliance on testimonial research methods, which are subject to additional complications such as recall bias, memory failures, and unintentional distortion. GJC worked to minimize errors by seeking advice on the most accurate language and phrasing, using seasonal and lifecycle memory aides where relevant, and by limiting reliance on testimony alone.

The investigators have attempted to corroborate factual assertions concerning public events and other verifiable statements by using secondary sources and to seek multiple independent testimonial sources for assertions that relate to events not publicly reported.

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- ¹ THE GOVERNMENT OF HAITI, THE WORLD BANK GROUP & THE UNITED NATIONS, CLEAN WATER, IMPROVED SANITATION, BETTER HEALTH, HAITI CONFERENCE PAPER (Oct. 9, 2014), http://www.worldbank.org/content/dam/Worldbank/document/book_haiti_6oct_print.pdf.
- ² See MINISTÈRE DE LA SANTÉ PUBLIQUE ET DE LA POPULATION (MSPP), RAPPORT DE CAS (Oct. 30, 2015), http://mspp.gouv.ht/site/downloads/Rapport%20Web%2030.10.2015_Avec_Courbes_departementales.pdf.
- ³ See, e.g., Martha Mendoza, *Gold! Haiti eyes potential \$20 billion Bonanza*, ASSOCIATED PRESS (Sept. 12, 2012) www.nbcnews.com/id/47398045/ns/world_news-americas/t/gold-haiti-eyes-potential-billion-bonanza/#.Uwc540jdVRQ; Shihoko Goto, *Haiti's Gold Mining Potential*, GOLD INVESTING NEWS (Nov. 30, 2011), <http://www.thestreet.com/story/11331598/1/haitis-gold-mining-potential.html>; Keith Slack, *Mining Development in Haiti: A Golden Dream or a Nightmare?*, OXFAM AMERICA BLOG, THE POLITICS OF POVERTY: IDEAS AND ANALYSIS FROM OXFAM'S POVERTY EXPERTS (June 18, 2013), politicsofpoverty.oxfamamerica.org/2013/06/mining-development-in-haiti-a-golden-dream-or-nightmare/.
- ⁴ See generally *Actualités*, LE CONSEIL DE DÉVELOPPEMENT ÉCONOMIQUE ET SOCIAL (CDES) (last visited Nov. 24, 2015), www.cdes.ht/fr/actualites.html (identifying mining as one of the focal areas for the country's development strategy); see also *Haiti: Mining for Economic Growth*, WORLD BANK (July 25, 2013), <http://www.worldbank.org/en/news/feature/2013/07/25/haiti-mining-for-economic-growth> (quoting then-prime minister Lamothe as stating that the mining sector is key to Haiti's "emergence" by 2020).
- ⁵ See, e.g., Tate Watkins, *Curses of Aid and Gold in Haiti*, MEDIUM (June 14, 2013), medium.com/medium-for-haiti/7a99bd074fc4.
- ⁶ *Haïti—Économie: Le Sénat vote la suspension des Permis Miniers en Haïti*, HAÏTI PROGRES (Feb. 21, 2013, 12:30:09), <http://www.haitilibre.com/article-7929-haiti-economie-le-senat-vote-la-suspension-des-permis-miniers-en-haiti.html>. Note that the moratorium does not have the force of law.
- ⁷ *Haiti: Mining for Economic Growth*, *supra* note 4; see also The World Bank, *World Bank Mining Project in Haiti Brief* (Nov. 17, 2014) (unpublished briefing paper provided to GJC by Remi Pelon, Senior Mining Specialist, World Bank), <http://www.accountabilitycounsel.org/wp-content/uploads/2015/01/Haiti-World-Bank-Project-Brief.pdf> (on file with the New York University School of Law Global Justice Clinic).
- ⁸ See GJC Notes of Meeting with World Bank Staff and Representatives of KJM, in Washington, D.C. (March 20, 2015) (on file with the New York University School of Law Global Justice Clinic).
- ⁹ The Task Force included representatives from the Bureau of Mines and Energy, the Ministry of Economy and Finance, and the Ministry of the Environment. See REPUBLIQUE DE HAÏTI, PROJET DE LOI MINIERE, ÉLABORE PAR UN TASKFORCE COMPOSE DE : BUREAU DES MINES ET DE L'ÉNERGIE, MINISTÈRE DE L'ÉCONOMIE ET DES FINANCES, MINISTÈRE DE L'ENVIRONNEMENT, EXPERT INTERNATIONAL (Aug. 2014) [hereinafter Draft Mining Law], <http://www.accountabilitycounsel.org/wp-content/uploads/2015/01/Draft-Mineral-Law.pdf>.
- ¹⁰ See Frances Robles, *Haitian Leader's Power Grows as Scandals Swirl*, N.Y. TIMES (March 16, 2016) http://www.nytimes.com/2015/03/17/world/americas/haitian-president-tightens-grip-as-scandal-engulfs-circle-of-friends.html?_r=0.
- ¹¹ See, e.g., Jacqueline Charles, *Haitian Observers: 'Massive Fraud' in Vote*, MIAMI HERALD (Oct. 29, 2015), <http://www.miamiherald.com/news/nation-world/world/americas/haiti/article41860518.html>.
- ¹² See, e.g., *Thousands Protest in Haiti Over 'Electoral Coup'*, AFP (Nov. 11, 2015), <http://news.yahoo.com/thousands-protest-haiti-over-electoral-coup-231635572.html>; Jacqueline Charles, *Celestin Disputes Haiti Election Results; Supporters Protest*, MIAMI HERALD (Nov. 6, 2015), <http://www.miamiherald.com/news/nation-world/world/americas/haiti/article43531653.html>. For ongoing

news related to elections in Haiti, see HAITI ELECTIONS: A RESOURCES AND NEWS BLOG, <http://haitielection2015.blogspot.com/>.

¹³ In November 2015, Eurasian sold its Haitian assets to Newmont. News Release, Eurasian Minerals Inc., Eurasian Minerals Sells Haiti Joint Venture Interests for US \$4 Million and an NSR Royalty (Nov. 2, 2015), <http://www.eurasianminerals.com/s/news.asp?ReportID=728617>.

¹⁴ CONSTITUTION DE LA RÉPUBLIQUE D'HAÏTI, art. 36-6 (1987), https://www.constituteproject.org/constitution/Haiti_2012.pdf.

¹⁵ The 1997 mining conventions to which VCS Mining/Delta, Majescor-SOMINE and Eurasian Minerals are successors require the companies to pay a royalty of 2.5 percent of the value of the doré gold bars produced from the gold extracted from the mines. *Convention Minière entre L'État Haïtien et La Société Minière Citadelle, S.A., Février 1997*, art. 26, LE MONITEUR: JOURNAL OFFICIEL DE LA REPUBLIQUE D'HAÏTI, no. 3 (May 4, 2005) [hereinafter Citadelle Convention], <http://haitigrassrootswatch.squarespace.com/storage/Mining.Convention-Citadel.pdf>; *Convention Minière entre L'État Haïtien et La Société Minière Ste-Geneviève, S.A., Février 1997*, art. 26, LE MONITEUR: JOURNAL OFFICIEL DE LA REPUBLIQUE D'HAÏTI, no. 3 (May 4, 2005) [hereinafter Ste-Geneviève Convention], <http://haitigrassrootswatch.squarespace.com/storage/Mining.Convention-St.Genevieve.pdf>.

¹⁶ The proposed royalty for copper would be 3.5 percent. See Draft Mining Law, *supra* note 9, art. 235. For further discussion of the economics of mining, see Chapter IV. For further details on the proposed new law, see Chapter V.

¹⁷ BUREAU OF ECON. & BUS. AFFAIRS, U.S. DEP'T. OF STATE, 2013 INVESTMENT CLIMATE STATEMENT – HAITI (2013), <http://www.state.gov/e/eb/rls/othr/ics/2013/204654.htm>. See also INVESTMENT CODE (Haiti), *translated in Information*, AMERICAN CHAMBER OF COMMERCE IN HAITI (2011), <http://amchamhaiti.com/home/haiti-investment-code> [hereinafter INVESTMENT CODE].

¹⁸ INVESTMENT CODE art. 27(1).

¹⁹ The Notice of Non-Registration, in which the World Bank Inspection Panel acknowledged the gravity of the community's concerns even though it declined to register the Request for Inspection on technical grounds, is available online in English. See Inspection Panel, Haiti: Mining Dialogue Technical Assistance (P144931): Notice of Non-Registration and Observations Regarding the Policy Framework Applicable to Technical Assistance ¶ 22 (Feb. 6, 2015),

[webapps.worldbank.org/apps/ip/PanelCases/100-Notice%20of%20Non-Registration\(English\).pdf](http://webapps.worldbank.org/apps/ip/PanelCases/100-Notice%20of%20Non-Registration(English).pdf). In response to the Notice of Non-Registration, 92 organizations, led by KJM, GJC and Accountability Counsel, submitted a letter to the President of the World Bank demanding that the Bank take responsibility for its actions in Haiti. See Open Letter from Civil Society Organizations to Jim Yong King, World Bank President (Mar. 9, 2015), <http://www.accountabilitycounsel.org/wp-content/uploads/2012/05/Haiti-Sign-On-Letter-Non-Registration-final.pdf> (expressing concern about the lack of accountability for World Bank involvement in the development of the Haitian mining sector).

²⁰ Numerous sources confirmed, as late as November 2015, that the August 2014 draft was the latest version of the proposed new law.

²¹ See Draft Mining Law, *supra* note 9, art. 4.

²² See JEN GLEASON & LIZ MITCHELL, ENVIRONMENTAL LAW ALLIANCE WORLDWIDE (ELAW), REVIEW OF HAITI'S DRAFT MINERAL LAW (AOÛT 2014), at 7–9 (Dec. 2014) [hereinafter ELAW Review (Dec. 2014)], http://www.elaw.org/system/files/ELAW.mineral.law_comments.dec14.pdf (on file with the New York University School of Law Global Justice Clinic). This would defy established international standards and best practices. See, e.g., EXTRACTIVE INDUSTRIES TRANSPARENCY INITIATIVE, THE EITI STANDARD (July 11, 2013), https://eiti.org/files/English_EITI%20STANDARD_11July_0.pdf; UNITED NATIONS GLOBAL COMPACT, IMPACT:

TRANSFORMING BUSINESS, CHANGING THE WORLD § 6 (June 26, 2015), <http://globalcompact15.org/report/findings-level-1/6transparency-is-becoming-the-new-norm>; ELAW Review (Dec. 2014)].

²³ See ELAW Review (Dec. 2014), *supra* note 22, at 15–16.

²⁴ See, e.g., SAFE DRINKING WATER FOUNDATION, MINING AND WATER POLLUTION (no date), <http://www.safewater.org/PDFS/resourcesknowthefacts/Mining+and+Water+Pollution.pdf>.

²⁵ Margaret L. Satterthwaite and Amanda Klasing, *Using a Rights-Based Approach to Public Health Research: Assessing the Right to Water in Haiti*, in RIGHTS-BASED APPROACHES TO PUBLIC HEALTH 143 (Beracochea et al, eds., 2010).

²⁶ Research for this report was part of an advocacy project involving legal representation and was not aimed at producing academic findings or “generalizable knowledge” as defined by 45 CFR 46.102.

²⁷ *Haiti: Mining for Economic Growth*, *supra* note 4.

²⁸ THE WORLD BANK, PROJECT PAPER ON A PROPOSED ADDITIONAL GRANT IN THE AMOUNT OF SDR 23.3 MILLION (US\$35 MILLION EQUIVALENT) TO THE REPUBLIC OF HAITI FOR AN INFRASTRUCTURE AND INSTITUTIONS EMERGENCY RECOVERY PROJECT 21 ¶ 5; 45 ¶¶ 15–16 (Sept. 10, 2012), http://www-wds.worldbank.org/external/default/WDSPContentServer/WDSP/IB/2012/09/14/000386194_20120914013953/Rendered/PDF/718820PJPR0P130Official0Use0Only090.pdf.

Recommendations

An Informed Haitian Populace Must Decide the Future of Haiti's Resources

The Haitian people must decide the future of their natural resources. Article 36-5 of the Haitian Constitution stipulates that Haiti's gold deposits and other mineral reserves are "part of the State's public domain." Thus, the government of Haiti owns these resources in trust for the Haitian people. The government must ensure that the Haitian public is well informed about what mining entails, so that it can meaningfully participate in decisions about the future of Haiti's gold.

Minerals can be exploited only once. The Haitian government and an informed Haitian public must decide whether the potential financial benefits of gold mining outweigh the substantial—and in some instances unavoidable—risks and costs of mining. It is their decision when, if ever, to extract Haiti's gold.

If the Haitian people, acting through an elected government, choose to exploit the country's gold reserves, they must determine the appropriate laws and regulations needed to prevent harm to Haiti's environment, protect the human rights of the Haitian people (especially the communities directly affected by mining), and ensure that Haiti receives its fair share of the revenues from mining. And the government must have the capacity and the will to enforce those laws. If mining is to proceed, effective State institutions must proactively monitor and regulate the mining industry, impose sanctions for violations of the law, and ensure that those who are harmed by mining obtain remedies.

The recommendations set out below are those most relevant to the early stages of gold mining. There is a broad range of human rights guarantees relevant to the extraction of mineral resources that are not addressed here. These recommendations focus on steps the government of Haiti should take now to safeguard the right to self-determination of the Haitian people—the very right upon which the nation was founded.

Measures to Prevent Human Rights Violations

Human rights principles should guide all decisions and actions taken in the mining sector. To ensure that the human rights of the Haitian people are respected, protected, and fulfilled, the **government of Haiti should formally pass into law a moratorium on all metal mining activity and prohibit the issuance of new mining permits until comprehensive human rights, environmental, and financial safeguards are in place.** Consistent with the Senate resolution issued in February 2013, such a moratorium would transform the present de facto hiatus in company operations into a de jure prohibition. It would entail the formal suspension of all mineral exploration and exploitation until, at a minimum, the following conditions are met:

1. Right to Participation: Let the Haitian people decide the future of Haitian resources

Given the high stakes, the decision to allow mining must be premised on **transparent, public debate**, and the **prior informed consent** of each of the communities likely to be affected by the proposed mining activities:

- The government of Haiti, with support from international organizations and Haitian civil society, should educate the Haitian people about the processes, potential benefits, and risks of mining, and hold a public national debate on whether and how Haiti should exploit its mineral resources.
- The government of Haiti and the companies active in Haiti should take concerted steps to ensure that affected communities can meaningfully participate in decisions related to the development of the mining sector and potential mining projects.
- The government of Haiti should not approve, and no mining company should pursue, any project without the free, prior, and informed consent of each of the communities directly affected by the planned mining activities.

If Haiti is to enact a new mining law, such a law should be adopted through a duly elected Parliament, not by presidential decree or through an appointed transitional government, and only after open discussion:

- Once Parliament is reinstated, the government should facilitate an extended, open consultation about the content of the law and how its enactment and implementation may affect Haitian communities and the environment.
- The government of Haiti should ensure that communities, even in areas remote from the capital, are included in consultation processes concerning mining law reform and are able to participate on a basis of equality.
- The government of Haiti should design consultation processes that are physically and economically accessible to poor, rural communities.

2. Right to Information: Guarantee transparency in all mining sector activities

To enable meaningful participation of individuals and communities in decisions that affect their lives, as well as effective citizen oversight of the mining industry, **information about the realities and risks of mining and proposed changes to the regulatory regime should be proactively furnished to the public**:

- The government of Haiti should publicly release the Draft Mining Law in Creole and make it available to media, local government, civil society organizations, to ensure broad distribution to the Haitian people.
- Article 115 of the Draft Mining Law, which requires that the government keep confidential for 10 years all reports submitted by mining companies, should be stricken.
- The government of Haiti and its international partners should make available and accessible information concerning the environmental and social impacts of mining,

industry “best practices,” and other prerequisites for effective public oversight and regulation of the mining industry.

- The Haitian government and private actors operating in the mining sector should publicly commit to the disclosure of information regarding mining activities including, at a minimum, information concerning planning and permitting, potential environmental and social impacts, mitigation measures, compliance, negotiation and implementation of community development commitments, and payment and distribution of mining revenues.
- Companies currently holding permits to explore for or to exploit minerals in Haiti should immediately disclose all environmental and social impact studies, including baseline information, so that communities can use the data to anticipate and track impacts and design effective mitigation measures. Those companies should publicly commit to the ongoing disclosure of such information throughout the duration of their operations in Haiti as a prerequisite to engaging in any future mining activity.
- To ensure that its citizens are informed of the risks and benefits of mining, once Parliament is reinstated, the Haitian government should enact a law and accompanying regulations that guarantee public access to the information described above.
 - That legal framework should establish an appropriate and accessible administrative procedure for receiving and processing information requests in a reasonable timeframe.
 - Such legislation should ensure that the procedure for requesting information is free and affordable for all and that information of public interest is made available in an appropriate and accessible format, in Creole, both in writing and through oral modes of communication such as radio.

3. Rights to Food, Water, a Healthy Environment, and Freedom from Forced Displacement: Enact a robust regulatory framework and implement heightened safeguards in view of Haiti’s unique vulnerabilities

If mining does occur, minimizing the social and environmental harms caused by the extraction and processing of gold requires **robust regulation and oversight of the mining industry, regular reporting by mine operators, and active citizen engagement in monitoring** mining activities and impacts on communities and the environment.

- To fulfill its constitutional obligations, as well as its responsibilities under international human rights law, the government of Haiti must adopt, once Parliament is reinstated, a stringent legal framework for mining in Haiti, designed to ensure that:
 - Mines will not poison or degrade the environment;
 - Mining companies will fairly compensate affected communities and individuals for unavoidable harm and disruption to their lives and livelihoods;
 - Mining companies will fully remediate and restore all mining and processing sites after mining concludes, including permanent containment of pollutants on site; and

- Mining companies will contribute to a restoration fund and post other forms of security sufficient to ensure that there will be adequate funding for safe mine closure and compensation for injuries if pollutants migrate off site.
- Crucial details regarding environmental standards must be supplied in the Draft Mining Law, not deferred indefinitely to future regulations. To this end:
 - The *Ministère de l'Environnement* (Ministry of the Environment, or MDE) should be given a greater role in review and approval of mining permit applications; and
 - Requirements regarding identification and protection of water sources and scarce forest cover should be strengthened.
- Given the precarious conditions in which the majority of Haitians live, particularly those in the rural areas where mining is likely to occur, the Haitian government must proactively:
 - Ensure that mining does not exacerbate ongoing violations of economic, social, and cultural rights; and
 - Ensure that if and when mining occurs, public revenues gained by mining are directed toward the progressive realization of those rights.

4. Duty to Protect Against Third-Party Harm: Build Haiti's capacity to oversee the mining industry, fulfill its human rights obligations, and ensure that other actors comply with their responsibilities.

Effective State institutions committed to protecting the interests of the Haitian population are essential to ensuring human rights in the mining context. The strength of the legal regime governing mining in Haiti depends not only on the text of the framework statute and accompanying regulations but ultimately on the technical, institutional, and financial capacity of the State to implement and enforce those laws. Absent a robust legal and regulatory framework, and without sufficient human capacity and material resources within the relevant government agencies, there is no way to ensure that mining in Haiti would benefit and not harm the Haitian people or their environment.

- The Haitian government should undertake a comprehensive assessment of its institutional and technical capacity to regulate the mining industry.
- International organizations and foreign governments should work with the government of Haiti to identify and fill capacity and resource gaps.
- The government of Haiti should undertake a review of existing mining permits to ensure their conformity with best practices in the mining industry.
- If mining proceeds, the government of Haiti should establish an independent mining authority endowed with the capacity to enforce regulatory compliance and rigorously monitor mining activities.
 - This authority should be adequately resourced by the government of Haiti, operate at arm's length from the regulated industry, and zealously guard its independence.

- Other government agencies responsible for protecting natural resources and public welfare, such as the MDE and the *Direction Nationale de l'Eau Potable et de l'Assainissement* (National Directorate of Water Supply and Sanitation), should be trained regarding the implications of mining for their regulatory responsibilities. These agencies should also be adequately resourced and actively involved in oversight of mining in Haiti.

5. Right to an Effective Remedy: Provide appropriate and accessible forums for redress of individual and community grievances

International human rights law guarantees individuals the right to an effective remedy for human rights violations. When allegations of harm related to mining activities arise, **all actors in the sector must fulfill their responsibility** to respond.

- The government of Haiti must ensure that individuals can petition an independent and competent tribunal to enforce their rights.
- Provisions of the proposed mining law that foreclose options for judicial recourse, such as mandatory arbitration of land-related disputes, must be revised to ensure consistency with constitutional and international human rights law.
- The government should ensure that the judiciary is trained and prepared to adjudicate mining-related disputes within its jurisdiction, including claims concerning human rights violations.
- International financial institutions and other members of the international community active in Haiti should support efforts to strengthen the Haitian judicial system and ensure that the Haitian courts fulfill their responsibility to provide meaningful remedies for violations of the law.

I. Haiti's Gold, Past and Present

In the past decade, foreign mining companies have invested tens of millions of dollars in exploration for gold, copper, silver, and other metals in the Massif du Nord, a mountain range that stretches across Haiti's northern departments.¹ Mining companies from the United States and Canada, together with their Haitian subsidiaries or partners, hold prospection, research, and exploitation permits that, combined, cover over 3000 km², nearly 11 percent of Haiti's land mass.² The recent interest in Haiti's mineral sector stems from a variety of factors, including the price of gold in the global market, the Haitian government's efforts to attract foreign investment, and the demonstrated productivity of the Pueblo Viejo mine, located in the neighboring Dominican Republic along the same mineral vein that runs through Haiti's Massif du Nord.

For now, however, mining in Haiti is on hold. Alarmed by the lack of public dialogue about mining and what it viewed as irregularities in the granting of mining permits, the Haitian Senate adopted a resolution in 2013 calling for a moratorium on mining activity. Around the same time, the Haitian executive branch, attuned to company concerns about the country's outdated mining law, recruited the World Bank³ to advise it on the drafting of a new legal framework for mining. Mining companies in Haiti have placed their activities on care and maintenance status, perhaps in response to perceived political risks, fluctuations in commodity prices, and awaiting a more favorable mining regime. But this temporary hiatus could end at any time; the Senate's resolution does not have the force of law. Although the draft mining legislation has not yet been presented to Parliament (which ceased to function in January 2015), the Executive could adopt the draft law by decree. A rise in global gold prices could accelerate these developments. The future of gold mining in Haiti hangs in the balance.

Experience with gold mining around the world provides some insight into what that future may hold, but much depends on Haiti's unique context. The extraction of gold is touted as necessary for economic development in many mineral-rich countries. Faced with the reality of modern mining, however, some communities and governments are challenging this narrative of economic progress. In many countries, mining has left a legacy of unmet promises and lasting environmental harms. The sensitivity of the mining industry to fluctuations in market prices can have a destabilizing effect on economies that rely on mineral revenues. And the "resource curse" remains a pervasive problem in mining-dependent countries.⁴ These factors have contributed in recent years to an increased incidence of community resistance to mining operations,⁵ heightened pressure on companies to prevent and remediate damage caused by mineral extraction, and outright state prohibitions on mining in various areas.⁶ An assessment of how these dynamics may play out in Haiti must begin with an understanding of the country's history, its contemporary political realities, and the particular vulnerabilities to which the Haitian people are exposed.

This chapter consists of two sections. Part I explores the historical, political, and environmental context relevant to the development of the mining sector in Haiti. Part II presents a brief history

of mining on the island of Hispaniola and then introduces the principal actors promoting mineral development in Haiti: the Haitian government, international financial institutions, and mining companies. Part II also introduces the communities affected by gold mining and the social movement organizations accompanying those communities as they strive to remain visible and influential in politicized decision-making processes that so often fail to take notice of them.

Part I: Historical, Political, and Environmental Context

A. Brief Historical Context

1. The Nation's Founding

Ayiti, the Creole name for Haiti, comes from the indigenous Taíno language and means “land of high mountains.” In the seventeenth and eighteenth centuries, French *Saint-Domingue*, as it was called, was the most profitable colony in the world.⁷ By the late 1700s, it grew more than half the world's coffee and was the world's largest producer of sugar.⁸ The wealth generated by the colony was accumulated through backbreaking and inhumane slave labor. Each year, 5 to 10 percent of the slave population died. Deaths outpaced births, and slaves were imported in huge numbers. French colonizers reasoned that it was cheaper to let slaves die and buy more than to improve their living conditions.⁹ The slave revolts of the late eighteenth century began when free Blacks took up arms to challenge their exclusion from the all-white polity.¹⁰ Once the enslaved population formed an alliance with the free Blacks, the revolt turned into a bloody civil war, which extended from 1791 through the end of 1803. The Haitian people prevailed in this struggle and declared the country's independence in 1804. The victors adopted a new Haitian Constitution, grounded in the concept of human rights (*les droits de l'homme*), which permanently outlawed slavery. Haiti thus became the world's first Black republic and the only country to be established by a successful slave revolt. Haiti has inspired liberation movements in many countries in the Americas and around the world.

2. Nineteenth Century: Freedom and Exclusion

Despite the success of the Haitian revolution, U.S. President Thomas Jefferson and many European leaders refused to recognize Haiti as a sovereign nation. They feared that doing so could inspire slave revolts in their own countries. In 1825, France offered Haiti a deal: in return for diplomatic recognition, the Haitian government would pay France a debt equivalent to more than \$20 billion (in present dollars).¹¹ This sum represented the cost of “material losses” suffered by France, including the lost labor of former French slaves who successfully fought for their liberty.¹² The Haitian government agreed to pay, hoping thereby to overcome political and economic marginalization. Instead, the weight of this debt impeded the growth of the Haitian economy, and payment failed to end the nation's isolation. Haiti did not complete its payments

to France until 1947. The repercussions of this enormous “independence debt” continue to reverberate today.

The United States did not formally recognize Haiti until 1862, nearly sixty years after Haitian independence, when President Lincoln named the first U.S. commissioner to Haiti.¹³ Direct U.S. involvement in Haiti began almost immediately after independence, however. By the mid-1820s, an estimated thirteen thousand African Americans had left the United States to settle in Haiti, drawn by offers from Haitian President Jean-Pierre Boyer of land and commercial interests in return for immigrating to the Black republic.¹⁴

In 1889, Frederick Douglass was named the U.S. minister to Haiti.¹⁵ Two years later, Douglass, a renowned abolitionist, resigned in protest against U.S. policy toward Haiti. In 1893, Douglass lectured about Haiti at the Chicago World Fair; before an international audience, he chastised the United States for “not yet forgiving Haiti for being [B]lack.”¹⁶

3. Twentieth Century: Occupation and Dictatorship

Haiti spent more than half of the twentieth century under occupation, dictatorship, or de facto external rule. In 1915, the United States invaded Haiti and began a twenty-year military occupation, which lasted through 1934. In 1957, Dr. François “Papa Doc” Duvalier became president of Haiti. Papa Doc ruled until his death, in 1971, when his son, Jean-Claude “Baby Doc” Duvalier took over. Baby Doc ruled until he was deposed and exiled, in 1986. Most historians consider the rule of Haiti by the Duvaliers to have been an economic, political, social, and moral disaster.¹⁷ Papa Doc and Baby Doc perpetrated disappearances, arbitrary detention, and torture, and severely restricted the freedoms of association, assembly, and expression.¹⁸ In the four years after Baby Doc’s departure, three presidents ruled Haiti, one of whom, Henri Namphy, took and lost power twice.

4. Late Twentieth Century Through Present Day: Crisis and Intervention

The history of Haiti since the mid-1990s has been marred by political instability, natural catastrophe, and foreign intervention. Indeed, Haiti has described as being in “permanent crisis” during this period.¹⁹ In 1990, Jean-Bertrand Aristide became Haiti’s first democratically elected president. Aristide governed for seven months before being driven out of the country by a coup d’état. With U.S. military assistance, he returned in 1994 and served as president through 1996. Aristide was elected again in 2000 but was ousted in a second successful coup four years later.²⁰

The U.S. military’s action to restore Aristide to power in 1994 ushered in an era of international engagement in Haiti characterized by cycles of State failure and emergency.²¹ Quick action has been prioritized over long-term change or justice.²² Aid flows that could otherwise reinforce Haiti’s public infrastructure and government systems have, in large part, been channeled to international nongovernmental organizations (INGOs), Haitian NGOs, and other donor-

influenced entities charged with implementing programs.²³ As a result, foreign aid has arguably sapped the capacity of the already weak and ineffective State instead of strengthening it.²⁴

The aid that foreign donors and other actors sent to Haiti in the months and years after the January 2010 earthquake continued to bypass the Haitian State. Of the \$6.43 billion that bilateral and multilateral donors disbursed in the two years after the earthquake, just 9 percent passed through Haitian government agencies.²⁵ Similarly, of the more than \$1.5 billion that the United States Agency for International Development (USAID) spent in Haiti during the first five years after the earthquake, less than one penny of every dollar went directly to a Haitian organization.²⁶ In the meantime, Haiti has been unable to successfully collect taxes from its citizens. Tax revenue constitutes just 12.9 percent of gross domestic product (GDP). In contrast, tax revenue constitutes 24.3 percent of GDP in the United States and 30.7 percent of GDP in Canada.²⁷

In the context of these dynamics, it is not surprising that the Haitian State does not provide basic services to its people. Haitians cannot count on State institutions to meet their needs and have no effective means to hold accountable the many NGOs and INGOs that have filled the gaps left by the government.

Box 1-1: United Nations Peacekeeping Force in Haiti

For the past 11 years, Haiti has been home to the largest United Nations peacekeeping mission in the Western Hemisphere. The U.N. spends more money on only five other missions in the world: those in the Central African Republic, South Sudan, Democratic Republic of Congo, Darfur, and Mali—all nations or regions that, unlike Haiti, are ravaged by war and conflict.²⁸ The United Nations Mission for the Stabilization of Haiti, known by its French acronym MINUSTAH, occupied the vacuum created by President Aristide's second departure from office.²⁹ At its peak, MINUSTAH had nearly 9000 military personnel in Haiti. In 2015, there are 4577 authorized troops on the ground.³⁰ MINUSTAH's 2014–2015 operating budget is more than \$500 million.³¹

MINUSTAH has faced a variety of criticisms from Haitians, including allegations of misused resources and incidents of sexual violence perpetrated by MINUSTAH troops.³² MINUSTAH is also responsible for introducing cholera to Haiti in 2010.³³ The epidemic has been the most

virulent in modern times. As this Report goes to press, more than 9000 Haitians have died of the disease and more than 750,000 have been infected.³⁴ Efforts to hold the U.N. accountable to the victims of cholera and their surviving family members have faced obstacles at every turn.³⁵ Despite the problems MINUSTAH has created and continuing doubts as to whether its presence represents the best use of U.N. resources, the United Nations Security Council continues to renew its mandate annually.³⁶

Ongoing foreign dominance and the failure of the Haitian State have grave impacts on the Haitian people. First, Haitians have few mechanisms by which to hold international actors accountable, even when those actors cause serious harm. Second, the retention of power in foreign hands perpetuates the weakness of public institutions and prolongs the absence of representative democracy. As the refrain of a popular peasant rights song goes, “*Haiti, you have become a child. You could, once again, make decisions for yourself as an adult. . . . Autonomy is the only way for the State to become an adult again.*”³⁷

5. Politics in 2015

The ability of Haitian politicians to govern effectively is hampered by Haiti’s paltry budget. The country’s operating budget for 2014–2015 was roughly \$2.4 billion.³⁸ By way of comparison, the neighboring Dominican Republic has roughly the same population as Haiti and a budget nearly six times as large, at \$14.3 billion for 2014–2015.³⁹ The lack of financial resources, however, is but one dimension of the problem. Haitian leaders have never effectively addressed the country’s severe socioeconomic inequality or the political exclusion of the poor majority. A small elite continues to exert disproportionate influence over the judicial system, the media, security forces, and the business world.⁴⁰

The 2010 elections brought President Michel Martelly, a popular singer, to power. During the first four years of his term, which expires in May 2016, Haiti failed to hold any legislative or local elections. As a result, the terms of almost all of the country’s senators, deputies, mayors, and other elected officials had expired as of January 2015,⁴¹ leading to the dissolution of Parliament. Thereafter, President Martelly began ruling by decree. In March 2015, the *New York Times* reported that there were only eleven elected officials in office in all of Haiti—including President Martelly himself.⁴²

After much public outcry and international pressure, preliminary legislative elections were held on August 9, 2015. Second-round legislative elections, first-round presidential elections, and elections for local authorities were held October 25, 2015. The August vote was characterized by

low turnout and incidents of violence and intimidation.⁴³ Reports indicate that one in six voting centers was ransacked.⁴⁴ According to the *Conseil Électorale Provisoire* (Provisional Electoral Council, or CEP), only 18 percent of eligible voters nationwide participated in the election and one in four ballots cast was never counted.⁴⁵ Although the October 25th vote was carried out with minimal violence, many Haitian observers claimed that the election was marred by calculated fraud,⁴⁶ some going so far to call it an “electoral coup.”⁴⁷ Official preliminary results showed the chosen successor to President Martelly, *Parti Haitien Tèt Kale* (PHTK) candidate Jovenel Moise, as having earned the most votes in the race for president.⁴⁸ Jude Celestin of the party *Ligue Alternative pour le Progrès et L'Émancipation Haitienne* (LAPEH) earned the second most votes. The two are slated for a run-off election on December 27. However, Jude Celestin has denounced the results, stating that they “do not reflect the vote of the people.”⁴⁹ Celestin has joined seven other candidates for the presidency in calling for the establishment of an independent commission to explore allegations of fraud and to verify the election results.⁵⁰ The electoral council has refused to create such a commission, claiming that doing so would extend beyond its authority.⁵¹ Celestin has not committed to participating in the runoff.

After the election results were announced on November 5, many Haitians responded with protest. As this Report went to press, it remained uncertain whether a presidential runoff would indeed occur on December 27, or whether the consistent and growing protests would force the government or the CEP to revisit the results of the October 25 vote. The political future of Haiti remained uncertain.

The outcomes of the elections in 2015 will likely have a significant impact on the future of the mining sector in Haiti. The incoming government will face important decisions about the adoption of a new legal framework for mining in Haiti and, if gold and copper prices rise, pressure to restart stalled mining activities. Some Haitian authorities have suggested that if mining companies are not given an opportunity to make a return on their exploration and research investments, the country’s ability to attract and keep much-needed foreign capital may soon disappear.⁵² At the same time, concerns remain that the Haitian government lacks the technical capacity, financial and human resources, and institutional strength to regulate and monitor mining in the best interests of the Haitian people.

According to the World Bank, Haitian institutions “need to be substantially strengthened to ensure that poor governance and corruption,” which remain “critical challenges” to development, “do not stand in the way of the achievement of Haiti’s medium-term objectives.”⁵³ In 2015, Haiti was ranked number 11 out of 178 states in the Fund for Peace’s Failed States Index (in which numbers closer to 1 signify greater failings).⁵⁴ According to the U.S. Department of State 2014 Fiscal Transparency Report:

[T]he country’s process for granting natural resource contracts lacks transparency and information on natural resource contracts is not published. Haiti’s budget process does not consistently follow the country’s established timetable and does not include earnings from significant state-owned enterprises.⁵⁵

Box 1-2: Relevant Haitian Government Actors

PRESIDENCY AND PRIMATURE

President Martelly and former prime minister Laurent Lamothe have been at the forefront of efforts to develop the mining industry in Haiti. Under their leadership, the Haitian government issued three mineral exploitation permits; sought bilateral agreements with Chile, Ecuador, and Jamaica to develop the extractive sector;⁵⁶ contracted a South African agency to conduct a survey of Haitian mineral resources;⁵⁷ and obtained World Bank assistance to rewrite the country's framework mining law.⁵⁸ Martelly and Lamothe have made numerous public statements asserting that the revenues mining could generate would reduce poverty and dependence on foreign aid.⁵⁹

BUREAU DES MINES ET DE L'ÉNERGIE

Created in 1986, the *Bureau des Mines et de l'Énergie* (Bureau of Mines and Energy, or BME) is an autonomous agency that operates within the *Ministère des Travaux Publics, Transports et Communications* (Ministry of Public Works, Transportation, and Communication, or MTPTC).⁶⁰ The mission of the BME is to "promote the research and the exploitation of mineral and energy resources in Haiti in an appropriate and relevant manner."⁶¹ As the principal mining authority, the BME is the agency that negotiates, executes, and supervises the permits, contracts, and conventions that govern prospection, research, exploitation, and the general commercialization of minerals.⁶² The BME does not control fiscal dimensions of mining activities; that responsibility rests with the *Ministère de l'Économie et des Finances* (Ministry of Economy and Finance, or MEF).

Ludner Remarais was appointed director of the BME in 2012. Under his leadership, the *École Nationale de Géologie Appliquée* (National School of Applied Geology) and Newmont Mining Corporation (Newmont) are training Haitian geologists.⁶³ Remarais is pursuing close collaboration with the government of Ecuador to obtain advice on developing Haiti's mining sector.⁶⁴

Quick Facts about the BME:

- 110 employees nationwide⁶⁵
- Average salary of 22,068 Haitian Gourdes (\$472⁶⁶) per month

CONSEIL DE DÉVELOPPEMENT ÉCONOMIQUE ET SOCIAL

The *Conseil de Développement Économique et Social* (Council of Economic and Social Development, or CDES), was created in 2012 as a “strategic body” of the Office of the Prime Minister. It has two functions: (1) to harmonize disparate sectoral policies with the National Development Plan in accordance with overall State policy, and (2) to establish an advisory board to “encourage social dialogue between the various sectors of national life and to promote a minimum consensus on issues of major public interest.”⁶⁷ The CDES is tasked with “accompanying the development of the mining sector.”⁶⁸ In June 2013, the CDES cohosted Haiti’s first Mining Forum, in partnership with the World Bank, the MEF, and the MTPTC.⁶⁹

The CDES has outlined a national policy for developing the mining industry.⁷⁰ The policy is composed of three strands: (1) legal, social, and institutional reform; (2) environmental protection; and (3) public policies related to infrastructure. CDES responsibilities include effective community outreach and information-sharing. In a November 2014 conversation with the Global Justice Clinic of New York University School of Law, however, CDES staff stated that it lacks the resources to visit communities affected by mining.⁷¹ To date, research has uncovered no evidence that a single community representative has been invited to any CDES-organized dialogues on mining.

Quick Facts about the CDES:

- No budget or personnel data are publicly available for the CDES.

MINISTÈRE DE L'ENVIRONNEMENT

The *Ministère de l'Environnement* (Ministry of the Environment, or MDE) was created in 1995. Its mission is “to reduce environmental vulnerability, increase the resilience of communities to natural disasters and external economic crises which affect the environment, improve the housing, hygiene, and security conditions of the population, formulate and implement environmental law, and orient public policy in terms of environmental management.”⁷² Since President Martelly took office in 2011, there have been multiple ministers of the environment.

As the sector develops, the MDE is tasked with monitoring environmental impacts, reviewing environmental impact assessments (EIAs),⁷³ overseeing necessary rehabilitation programs, monitoring pollutants, and encouraging corporate social responsibility.⁷⁴

In August 2015, the government announced that it was launching a National System of Environmental Assessments, which had been authorized in a 2005 decree on environmental management but not yet implemented.⁷⁵ The new office “will ensure the consideration of standards and good environmental and social practices; planning and implementation of projects, programs, plans and policies initiated in Haiti.”⁷⁶

Quick Facts about the MDE:

- Add 406 employees nationwide⁷⁷
- Average salary of 25,245 Haitian Gourdes (~\$540⁷⁸) per month

MINISTÈRE DE L'ÉCONOMIE ET DES FINANCES

The *Ministère de l'Économie et des Finances* (Ministry of Economy and Finance, or MEF) has a mission to “create the conditions most conducive to economic recovery and to build a modern state capable of reducing poverty and improving economic growth.”⁷⁹ The ministry, which four different ministers have led during President Martelly's term,⁸⁰ is responsible for fiscal oversight of mining contracts, conventions, and any future revenues. As the

mining industry develops, the MEF will monitor revenues generated by mining and oversee the creation of a development fund for communities.

Quick Facts about the MEF:

- 3877 employees nationwide⁸¹
- Average salary of 26,109 Haitian Gourdes (\$558⁸²) per month

Company executives and Haitian government officials themselves have acknowledged that Haitian institutions lack the capacity and resources to adequately monitor mining activities.⁸³ Indeed, the director of the BME has admitted that the office does not have the needed expertise or funding to adequately monitor company activities, even at this early stage of the industry's development.⁸⁴ A 2012 audit showed that the BME office had only five functioning vehicles.⁸⁵ The audit further revealed that only a quarter of the agency's one hundred employees had university degrees.⁸⁶ Former BME director Deiusel Anglade, who served in that post for more than twenty years, said to reporters, "The government doesn't give us the means we need to be able to supervise the companies."⁸⁷

When Laurent Lamothe became prime minister, he replaced Anglade with the current BME director, Ludner Remarais. It is rumored that Lamothe viewed Anglade as an obstacle to the development of the mining industry.⁸⁸ Remarais has not publicly spoken of the BME's lack of resources and capacity, but he confirmed to GJC that the BME does not have a laboratory capable of testing soil and rock samples and that, more broadly, the agency lacks human and financial resources.⁸⁹ Remarais said that he has implored companies to help the government fill these gaps.⁹⁰

Compounding these regulatory deficiencies at the BME is the fact that officials from the MDE have demonstrated a lack of familiarity with mining sector activities and their potential adverse impacts on land and water resources.⁹¹

B. Communities at Risk

1. Predisposed to Natural Disaster, Unable to Respond Effectively

Haiti's history of debt, occupation, and state failure has not only weakened government institutions and destabilized democracy but also degraded Haiti's natural environment and exacerbated endemic vulnerabilities in the human environment.

Haiti is one of the five countries worldwide most exposed to natural disaster, including earthquakes, hurricanes, drought, flooding, and landslides.⁹² For example, hurricanes Irene and Isaac created severe flooding that destroyed homes, buildings, and farmland during the 2011 and 2012 rainy seasons, respectively. Catastrophic events are particularly disruptive in rural Haiti, where agriculture remains the source of livelihood for the vast majority of people. In 2014, the Northeast Department suffered a drought so severe that the region's agricultural production dropped by 60 to 80 percent.⁹³

The fact that less than 2 percent of Haitian land is forested compounds this vulnerability.⁹⁴ Deforestation contributes to soil erosion, heightens the risk of flooding, and decreases crop yield and productivity, which, in turn, increases the need for arable land and thus requires farmers to clear more trees.⁹⁵ Indeed, the widespread loss of forest cover in Haiti is a principal reason that almost all of the country's 30 major watersheds are prone to flooding.⁹⁶

The causes of deforestation are both historical and ongoing. In the decades following Haiti's founding, many trees were cut down and exported to Europe as timber to pay the country's "independence debt" to France.⁹⁷ Under the dictatorships of François and Jean-Claude Duvalier, Haiti continued to destroy its forests; one particular factor driving deforestation was the dictators' fear that wooded areas could harbor insurgents. In part to rid the land of trees, the Duvaliers granted logging concessions to political allies.⁹⁸ Today, dependence on wood as a source of fuel spurs deforestation: much of the wood Haitians harvest is used to make charcoal.⁹⁹

2. Human Factors

Haiti's vulnerability to natural disasters stems in part from its lack of capacity to anticipate and mitigate relevant risks. The Haitian government does not collect sufficiently reliable data on weather, crop production, or soil conditions and has not developed a flood mitigation plan.¹⁰⁰ Although comparable numbers of storms struck Haiti and the Dominican Republic between 1980 and 2010, Haiti experienced twice as many floods as its neighbor did.¹⁰¹ The 2010 earthquake killed more than 200,000 Haitians, in large part because so many of the buildings and houses in Port-au-Prince had not been constructed to standards permitting them to survive a strong earthquake.

With an estimated 374 people per square kilometer, Haiti is one of the most densely populated countries in the Western Hemisphere. Because Haitians live in such close proximity to one

another, even in rural areas, and are heavily dependent on land for their livelihoods, it is all but inevitable that mining will cause significant physical and economic displacement. And as the cholera epidemic revealed, Haiti's elevated population density increases the speed with which water contamination and disease can spread.

The persistence of cholera since U.N. peacekeeping personnel introduced the disease to Haiti in 2010 reflects the extent to which inadequate water, sanitation, and health infrastructure has made the Haitian population vulnerable. As of 2014, only 62 percent of all households in Haiti had access to safe drinking water, while less than 50 percent enjoyed such access in rural areas.¹⁰² The dire need for investment in institutions and infrastructure is both a driver of the government's interest in developing the mining sector and an impediment to its success.

It is against this backdrop of institutional weakness and infrastructure deficits and of heightened vulnerability to natural disaster, epidemics, and social conflict, that the prospect of developing a mining industry in Haiti must be evaluated.

Part II: Haiti's Gold: Conquest and Controversy

Gold has played a major role in determining the course of Haitian history. Had it not been for the gold that Columbus observed adorning the native people of what is modern-day Haiti, the original Spanish colonists might not have enslaved the population to pan streams for the precious metal. Gold was one of the reasons, nearly 400 years later, that the United States occupied Haiti. Just before the United States invaded, in 1915, U.S. warships transported half a million dollars in gold from Haiti's national reserve to New York.¹⁰³ Today, again, gold looms on the horizon.

A. History of Gold Mining on Hispaniola

In the Cathedral of Seville, in Spain, there is a sign that directs visitors to the "Treasure Room." Inside this series of vaults are scores of gold crowns, crucifixes, jewelry, chalices, monstrances, reliquaries, statues, and altarpieces. All were fashioned by Spanish goldsmiths from ore that generations of conquistadors plundered from the New World. The first gold to reach these artisans came from the northwest part of the island of *Ayiti*, which Columbus renamed *Española* (Hispaniola). The Spanish colonists enslaved the indigenous Taíno population to pan the rivers and dig mines; thousands perished from the brutal working conditions, starvation, and disease.¹⁰⁴ By 1520, the island's alluvial gold deposits were depleted. Following Cortez's conquest of the Aztecs and Pizarro's destruction of the Incas, the Spanish moved on to Central and South America in their quest for greater riches. By the mid-sixteenth century, they had wiped out the Taíno. Except for isolated Spanish and French mining and small-scale Haitian and Dominican artisanal mining, the remnant gold reserves of the island lay untouched for the next 425 years.¹⁰⁵

In 1975, Rosario Resources, a U.S. corporation, began open-pit mining on an abandoned Spanish gold site, Pueblo Viejo de Cotuí, in the Dominican Republic's Cordillera Central. The mine, which the Dominican government acquired in 1995, produced about 155,000 kilograms of gold and silver before it was closed in 1999.¹⁰⁶ In 2006, spurred by an increase in world gold prices, two Canadian companies, Barrick Gold Corporation and Goldcorp Inc., acquired exploitation permits for the closed mine. To conduct mining, the companies formed a joint venture, the Pueblo Viejo Dominicana Corporation, which they estimate will produce more than 700,000 kilograms of gold over the predicted 30-year life of the mine.¹⁰⁷ At current prices, that amount of gold would be worth more than \$32 billion.¹⁰⁸ Commercial production at the new Pueblo Viejo mine began in 2013.¹⁰⁹

Haiti's known and presumed gold reserves rest in the same geological formations that produced the Dominican gold: the subduction zone between the Caribbean Plate and the North American Plate that slices across northern Haiti in the Massif du Nord and the Dominican Republic's Cordillera Central.¹¹⁰ This is the same fault line that produced the January 12, 2010, earthquake.¹¹¹

Box 1-3: Bauxite and Copper Mining in Haiti in the Twentieth Century

Two mines in Haiti produced large quantities of ore during the mid-twentieth century. Both of these mines were controversial, and questions about their net value for Haiti continue to influence the emerging debate over gold mining.

Reynolds Haitian Mines, a subsidiary of Reynolds Metals Company, operated a bauxite mine in the Rochelois Plateau, near Miragoâne, in the Department of Nippes, from 1956 to 1982. Bauxite is an amorphous clay rock that can be processed into aluminum. "During the first 12 years of mining, annual production was in the 250,000 to 450,000 ton range. After this period, production increased to 743,000 tons in 1973, but declined after that year."¹¹² Although the mine accounted for only 1 percent of Haiti's gross national product (and 0.5 percent of employment) during this period, the bauxite ore shipped to Corpus Christi, Texas, for refining represented 11 percent of the value of Haiti's exports.¹¹³

Critics of the mine argue that it displaced thousands of families from more than 1500 square kilometers of land, contributed to the destruction of coffee farming in the region, and employed few Haitians (only about 300, by

one estimate).¹¹⁴ Haiti's decision to increase the export taxes and royalties on bauxite is said to have hastened Reynolds' decision to close the mine in 1982.¹¹⁵

From 1960 to 1972, SEDREN S.A., a Haitian subsidiary of the Canadian company Consolidated Halliwell, operated the Meme copper mine in Terre Neuve, 19 kilometers northwest of Gonaïves, in the Artibonite Department.¹¹⁶ According to one estimate, the mine produced 1.5 million tons of copper ore during its 12-year existence.¹¹⁷ The value of the copper was \$83.5 million, and the Haitian government received \$3 million—or about 3.6 percent—in royalties and taxes.¹¹⁸ Haiti Grassroots Watch also states that the mine employed only about 500 to 600 Haitians, all at minimum wage.¹¹⁹

The Meme mine site and 186 surrounding square kilometers of land are now included in the exploration licenses for gold and copper held by Newmont, discussed further in Chapter II.

In visits to the Massif du Nord, the Global Justice Clinic of New York University School of Law (GJC) found that a number of community members know about the Reynolds and Meme mines and are skeptical, based on their understanding of Haiti's mining history, of contemporary proposals to mine gold and copper.

B. Modern Gold Mining in Haiti

The United Nations Development Programme (UNDP) surveyed Haiti's gold deposits in the 1970s. Starting in 1972, the UNDP undertook "regional mapping, metallogenic studies and mineral exploration" in the northern half of the country.¹²⁰ In 1975, the *Institut National des Ressources Minérales* (National Institute of Mineral Resources, or INAREM) was created to aid the UNDP in the discovery and valuation of Haiti's mineral resources.¹²¹ In 1978, INAREM became the *Ministère des Mines et des Ressources Énergétiques* (Ministry of Mines and Energy Resources), which, in turn, became the BME in 1986. The project with the UNDP continued uninterrupted until 1990. The UNDP-Haiti samples resulted in the discovery of significant amounts of copper, gold, and silver, as well as other less valuable minerals.¹²² The BME subsequently published its own survey of the nation's mineral resources, which confirmed the

UNDP's conclusions and analyzed the infrastructure, energy, and resource capabilities that would be needed to support mining.¹²³ Soon after these results were disclosed, the modern era of mining began in Haiti.

1. Gold Mining in the Late Twentieth Century

Two companies—Société Minière Ste.-Geneviève-Haïti, S.A. (Ste.-Geneviève) and Société Minière Citadelle S.A. (Citadelle), which were Haitian subsidiaries of Canadian mining companies—signed mining conventions with the Haitian government in February 1997.¹²⁴ Mining Conventions are required by Haitian law in order to advance from a prospection permit, which authorizes minimal exploration activities, to a research permit and in turn an exploitation permit and a concession. The two conventions (discussed in more detail in Chapter V) were never submitted to the Haitian Parliament for ratification. Rather, in May 2005, following the dissolution of Parliament, the acting government sent the conventions to the Council of Ministers, which agreed to their terms.¹²⁵ The absence of parliamentary approval of the conventions has prompted claims that they are unlawful.¹²⁶ Article 98-3 of the Haitian Constitution grants the National Assembly (comprised of the House of Deputies and the Senate) the power to “approve or reject international treaties and conventions.”¹²⁷ Some members of Parliament and other observers argue that the conventions, signed only by the Council of Ministers, are void.¹²⁸ Others submit that mining conventions with companies are not “international” as the term is used in the Haitian Constitution and that the 1997 conventions are therefore valid without parliamentary approval.¹²⁹

Box 1-4: Mining Permits Under Haitian Law

The Mining Decree of 1976 is the primary legal instrument governing mining in Haiti today.¹³⁰ The law establishes a permit-based system, through which entities in possession of a mining title must obtain four sequentially issued permits that authorize exploration, mine construction, and extraction activities:

Prospection permits¹³¹ govern the first stage in the mining process, which includes superficial surveying and nonsystematic exploration for metals. Prospection permits can cover an area of up to 100 km² and are valid for a maximum of two years, nonrenewable.

Research permits¹³² are approved automatically following the expiration of

prospection permits, provided that the permit holder has entered into a convention with the government of Haiti that outlines the terms of any future mining activity. Research permits authorize work necessary to prepare for the exploitation and concession phases of mining, including drilling. Research permits are granted for a term of two years; they can be renewed twice and cover a maximum area of 50 km².

Exploitation permits¹³³ are granted automatically following the expiration of research permits. During the exploitation phase, the permit holder is required to complete and submit a feasibility study to the government. This phase includes construction work, development of the mine, and initial mining activity but excludes processing and refinement. The 1976 Mining Decree does not specify the period of validity for exploitation permits but does limit the maximum area that may be covered to 25 km².

Concessions¹³⁴ are automatically granted at the date of commercial production, when mining operations reach a capacity of exportable production. The area covered by the concession must be contained within the 25 km² covered by the exploitation permit. Concessions are valid for 25 years and can be renewed for periods of 10 years.

2. Gold Mining in the Early 2000s

In 2012, the Martelly government named mining one of the four economic pillars necessary to make Haiti an “emerging country” by 2030.¹³⁵ The government recruited the World Bank to assist in the revision of its mining law and obtained support from the International Monetary Fund (IMF) to manage mining contracts and create a national cadaster.¹³⁶

Attracted by dramatic increases in global gold prices (see Chapter IV) and a perception of growing political and economic stability in Haiti,¹³⁷ four foreign companies—with Haitian subsidiaries or partners (together, company groups)—began exploring the prospects of commercially profitable mining in the Massif du Nord. Between 2009 and 2013, these companies invested tens of millions of dollars in gold exploration activities. The mechanics of exploration, research, and exploitation are described in more detail in Chapter II.

As set out in detail in the next chapter, three company groups acquired rights under the 1997 conventions described above, purchasing permits from Ste.-Geneviève and Citadelle. Two of the company groups—VCS Mining LLC (VCS) and its subsidiary Delta Société Minière or Delta (VCS/Delta) and Majescor Resources Inc. (Majescor) and its joint venture partner Société Minière du Nord-Est S.A., or SOMINE (Majescor-SOMINE)—were able to convert their interests in the conventions into exploitation permits. The joint venture between Newmont Mining Corporation (Newmont) and Eurasian Minerals Inc. (Eurasian)—Newmont-Eurasian—sought unsuccessfully to negotiate its own convention with the Haitian government.¹³⁸ Eurasian minerals and its subsidiary Ayiti Gold hold the Grand Bois research permit, which they acquired from Citadelle.

3. Disagreement over Exploitation Permits

In December 2012, the BME awarded gold and copper exploitation permits to two sets of companies: VCS/Delta and Majescor-SOMINE (see Chapter IV, Box 4-1).¹³⁹ These permits authorize the companies to begin mining at three sites in Haiti's North and Northeast departments. In addition, VCS and its subsidiary Sono Global Holdings Inc. and Majescor-SOMINE obtained permits from the BME authorizing them to explore for gold and related minerals across 70 km² in the North and Northeast departments and to conduct other necessary research.¹⁴⁰

Two months after the BME awarded the exploitation permits, the Haitian Senate passed a resolution calling for a moratorium on all permit-related activities, the creation of an expert committee to review contracts that the Haitian government had already signed, and the initiation of a “national dialogue about mining.”¹⁴¹ The resolution further stated that the exploitation permits violate the Haitian Constitution because they were granted pursuant to mining conventions never ratified by Parliament.¹⁴²

Although the resolution does not have the force of law, it created uncertainty among investors and incentivized both the Martelly Administration and the mining companies to pursue revisions to Haiti's legal framework for mining.¹⁴³ Shortly after the adoption of the resolution, the Haitian executive branch sought assistance from the World Bank in drafting a new mining law.¹⁴⁴ The BME subsequently notified Newmont-Eurasian that it would not consider its request for research permits until the new law is in force.¹⁴⁵

As of late 2015, the mining companies' exploration and research activities have been on hold for approximately three years. VCS/Delta and Majescor-SOMINE, which hold exploitation permits, have not yet begun mine construction. VCS/Delta employs just one person, a community relations liaison who lives near one of its properties.¹⁴⁶ Majescor-SOMINE has similarly reduced employment from more than a hundred persons to one single employee, a caretaker of the company's base camp. Newmont-Eurasian placed its projects on care and maintenance status, as did Eurasian with its Grand Bois permit. On November 2nd, 2015, Eurasian Minerals announced that they had signed an agreement to sell their interests in the joint venture projects to Newmont.¹⁴⁷ Newmont reportedly continues its “community relations programs.”¹⁴⁸

Box 1-5: International Financial Institution Support

WORLD BANK GROUP¹⁴⁹ SUPPORT

In March 2013, the World Bank formally agreed to a request from the Haitian government for assistance in rewriting its mining law.¹⁵⁰ In late 2013, a task force comprised of representatives from several Haitian government ministries¹⁵¹ and a World Bank expert began drafting the new law. The task force reportedly submitted a Draft Mining Law, dated July 31, 2014, to the prime minister in late 2014.¹⁵² (See the detailed discussion of the draft law in Chapter V.) It is unknown when, or if, the government will act on this draft text. It remains possible that the Executive may attempt to pass the law by decree while there is no functioning Parliament.

Apart from a short document discussing a mining forum it co-organized in Haiti, the World Bank has not published any information about its role in rewriting Haiti's mining law.¹⁵³ In November 2014, the World Bank provided GJC a single-page document identifying a variety of World Bank activities related to the mining sector but later told GJC that its support was limited to reform of the legal framework for mining.¹⁵⁴ During a subsequent meeting with representatives of GJC and a Haitian civil society coalition, the *Kolektif Jistis Min* (Justice in Mining Collective, or KJM), World Bank staff said that the other activities mentioned in the document, including institutional capacity-building, were merely "permissible activities" under the technical assistance package the World Bank provided the Haitian government and that they were not actually pursued.¹⁵⁵ Because the government did not ask for any support beyond assistance revising the mining law, the World Bank did not plan to provide any.¹⁵⁶

The private sector arm of the World Bank Group, the International Financial Corporation (IFC) has also supported efforts to develop the mining sector in Haiti, by making a \$10.3 million equity investment in Eurasian Minerals to fund exploration activities in Haiti and Turkey.¹⁵⁷ With the sale of all Eurasian assets in the Newmont-Eurasian joint venture, the IFC is now only

involved in Grand Bois, which Eurasian wholly holds.¹⁵⁸

INTERNATIONAL MONETARY FUND (IMF)

In parallel to the World Bank Group, the IMF has assisted in the modernization of Haiti's extractive industry. The IMF is working with the MEF and the *Ministère de la Planification et de la Coopération Externe* (Ministry of Planning and External Cooperation) to support Haiti's efforts to become an "emerging country" by 2030. Specifically, the IMF has committed to supporting the adoption of a new mining code in Haiti and the revision of the tax code.¹⁵⁹ In June 2014, for example, the IMF carried out a technical assistance mission to Haiti focused on mining taxation; in 2015, it committed to put in place a working group that will address the adoption of the mining code as well as various tax law reforms.¹⁶⁰

Haiti's Poverty Reduction Strategy Paper, prepared in consultation with the IMF, lists expected results of the economic reforms supported by the IMF between 2014 and 2016, including "growth of the mining sector," the creation of a mining cadaster in all ten departments, and the development of "measures for control of exploitation of mining sites."¹⁶¹

All actors agree that the current 1976 Mining Decree is outdated and in need of reform.¹⁶² There is less agreement, however, on how that reform process should unfold. The proposed new mining law has been drafted in consultation with the mining industry but without the participation of the Haitian public. The "national debate" on mining that the Senate called for in its 2013 resolution has not been initiated. Haitian communities affected by mining activity have organized to learn more about the industry and to discuss how the development of the sector may affect their futures. It has been more than a year since the draft of the new mining law was reportedly sent to the prime minister's office, yet there have been no public discussions of the draft law with community representatives or other members of civil society.

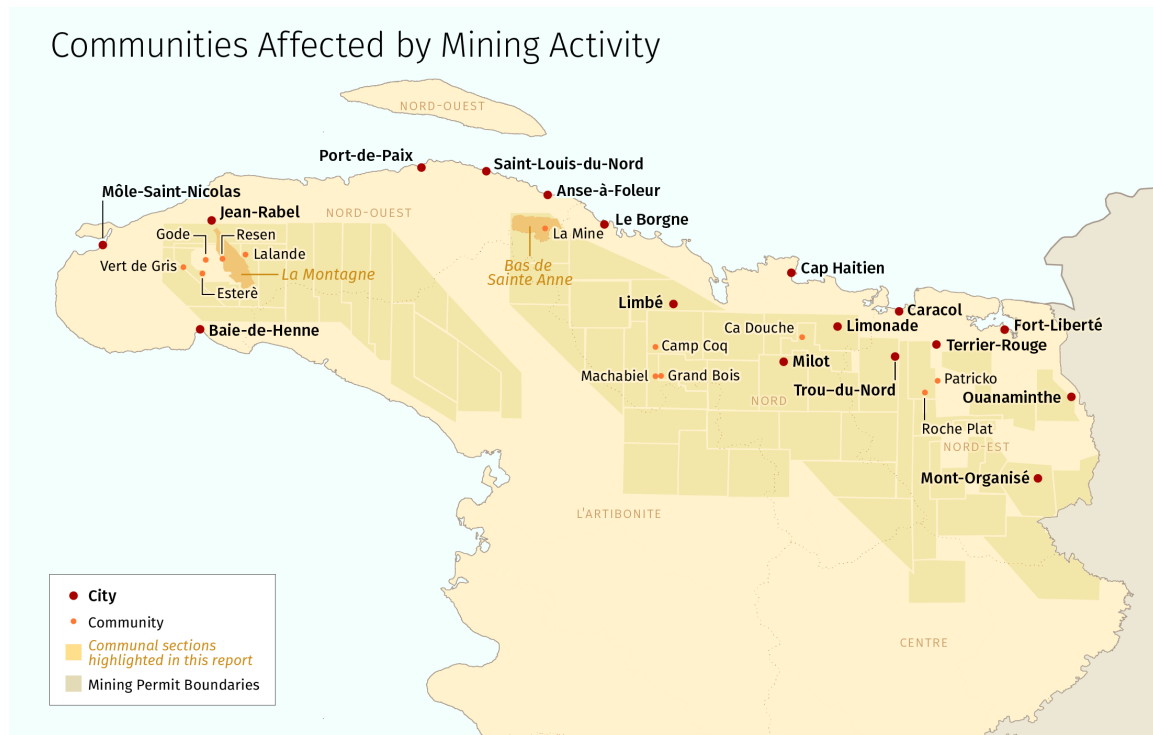


Figure 1-1: © 2015 John Emerson/GJC

C. Communities Affected By Mining Activity

1. The Affected Communities: *Moun Andeyò*

As noted above, Haiti's mineral belt lies in the Massif du Nord, which transverses the predominantly rural Northeast, North, and Northwest departments. More than half of the Haitian population lives in rural areas,¹⁶³ but rural areas are home to more than 80 percent of the extreme poor.¹⁶⁴ These residents, including those in communities where companies are exploring for gold, face greater challenges to survival than their urban counterparts.

The comparative disadvantage in rural areas is particularly apparent with respect to access to food and services such as electricity. Haiti remains largely an agricultural economy.¹⁶⁵ Decades of neglect and damaging trade policies, however, have weakened the agriculture sector on which the majority of rural Haitians rely, leaving Haiti one of the most food-insecure countries in the world.¹⁶⁶ Food security in Haiti today is only slightly better than in the Democratic Republic of Congo.¹⁶⁷ While 88 percent of people in urban areas are able to satisfy their nutritional needs, just 62 percent in rural areas are able to do so. And, as noted earlier, less than 50 percent of rural Haitians have access to potable water.¹⁶⁸ The contrast with respect to electricity is even more stark: only 11 percent of Haitians living in rural areas have access to electricity, whereas 63 percent of city dwellers do.¹⁶⁹

To date, mining exploration and research has occurred mostly in the Northeast and Northwest—two of Haiti’s poorest departments, each with rates of extreme poverty exceeding 40 percent.¹⁷⁰ Both the Northwest¹⁷¹ and Northeast¹⁷² departments are particularly vulnerable to drought in a country that suffers from a lack of rainfall.¹⁷³

The North is home to Haiti’s second biggest city, Cap Haïtien. In late 2014, American Airlines began to offer direct flights from Miami to Cap Haïtien, enhancing the region’s connections with the global economy.¹⁷⁴ In the past five years, the North and Northeast departments have been in the news most often as the recipients of notable foreign investment.¹⁷⁵ Meanwhile, the Northwest remains one of the most isolated parts of Haiti. Its capital, Port-de-Paix, is the only departmental capital without paved-road access to Port-au-Prince. In fact, there are no paved roads in the entire department, apart from short strips of the main streets in a few towns. Although Port-de-Paix is only about 100 kilometers from Cap Haïtien, the poor quality of the roads forces travelers to journey three hours southeast to Gonaïves, then three hours northwest to Port-de-Paix.¹⁷⁶

The communities affected by mining activity in the North, Northeast, and Northwest departments share much in common: they are all, as Haitians say, *moun andeyò*—literally “people outside.” They are outside of Port-au-Prince, outside of Haiti’s secondary cities and, as this Report details, outside of conversations about the development of the mining sector.

👤 **Resident, La Montagne**¹⁷⁷

We live in a State that has never integrated us into the political life of the country.



Figure 1-2: House and garden in La Montagne, © 2014 Ellie Happel

Box 1-6: The *Kolektif Jistis Min* (KJM)

The KJM is a coalition of civil society organizations, community-based groups, and community residents concerned about mining in Haiti. The KJM was founded in 2012 by five civil society organizations,¹⁷⁸ all of which have bases in Port-au-Prince and two of which have constituents in all ten departments. The KJM has taken advantage of the recent lull in mining activity to build its network of community organizers. Together, the KJM and its network share information about mining and human rights with communities; support communities as they organize to define and promote their interests; and advocate at the local, national, and international levels for Haitians' economic, social, political, and cultural rights.

2. Communities' Experiences: Exclusion and a Lack of Access to Information

Although little information about the mining sector has been made public, the information that has been disclosed has caused alarm among Haitian social movements and civil society organizations. These groups are concerned about the lack of transparency surrounding the development of the mineral sector and the potential environmental and social impacts of mining. Some residents of communities where mining companies have explored for gold and copper have complained about individuals entering their lands, marking their property, taking samples without permission, and failing to provide adequate information about the purposes of these preliminary mining-related activities. Community members have expressed frustration at being excluded from decisions that affect their lives.

In a conversation with GJC in early 2014, an elected official¹⁷⁹ from the Northwest explained the situation:

Local Authority for Anse-à-Foleur

The problem is that our State is weak and they let foreigners enter and permit the foreigners to . . . do as they like The people of Anse-à-Foleur know nothing about mining. All decisions are made in Port-au-Prince.

Whether this bleak assessment is accurate is a matter for debate. What is clear, however, is that this elected official spoke for his community when he pointed to its lack of access to quality information. As the chapters that follow show, lack of access to information has been the norm for communities affected by mining in Haiti.

The future of mining in Haiti depends on a number of uncertain factors, among them domestic and international politics, the willingness of investors to take a risk on mining in Haiti, and the price of gold and other precious metals. Ultimately, however, decisions about whether, when, and how the industry develops should rest with an informed Haitian public.

¹ See, e.g., Tate Watkins, *Curses of Aid and Gold in Haiti*, MEDIUM (June 14, 2013), <http://medium.com/medium-for-haiti/7a99bd074fc4>; see also EUGENIO MATIBAG, HAITIAN-DOMINICAN COUNTERPOINT 19 (2003).

² Calculation based on permit table presented in Chapter II. See Notes of GJC Meeting with Director Ludner Remarais of the BME, Port-au-Prince, Haiti (Sept. 23, 2015) (on file with the New York University School of Law Global Justice Clinic). See also Prosperity Raymond, *Haiti's Wealth of Untapped Mining Resources Must Benefit the Poor*, THE GUARDIAN, (Jan. 21, 2014), <http://www.theguardian.com/global-development/poverty-matters/2014/jan/21/haiti-untapped-mining-resources-benefit-poor>. Note that this article estimates 2400 km² are under mining permits, or roughly 8 percent of Haitian land mass.

³ The World Bank refers to the International Bank for Reconstruction and Development (IBRD) and the International Development Association (IDA). The World Bank is distinct from the World Bank Group, which encompasses three other institutions in addition to the IBRD and IDA: the International Financial Corporation (IFC), the Multilateral Investment Guarantee Agency (MIGA), and the International Centre for Settlement of Investment Disputes (ICSID). *About the World Bank*, THE WORLD BANK, <http://www.worldbank.org/en/about> (last visited Nov. 19, 2015).

⁴ The “resource curse” is the “curious phenomenon [whereby] countries with large endowments of natural resources . . . often perform worse in terms of economic development and good governance than do countries with fewer resources. Paradoxically, despite the prospects of wealth and opportunity that accompany discovery and extraction of oil and other natural resources, such endowments all too often impede rather than further balance and sustain development.” MACARTAN HUMPHREYS, JEFFREY SACHS & JOSEPH STIGLITZ, *ESCAPING THE RESOURCE CURSE* 1 (2007).

⁵ Haiti Grassroots Watch, *Haitian Grassroots Groups Wary of “Attractive” Mining Law*, THE HAITI SUPPORT GROUP (Aug. 1, 2013), <http://haitisupportgroup.org/haitian-grassroots-groups-wary-of-attractive-mining-law/> (last visited Nov. 18, 2015).

⁶ The Associated Press, *Mining in Haiti on Hold Amid Uncertainty and Opposition*, N.Y. TIMES (Apr. 13, 2015), <http://www.nytimes.com/aponline/2015/04/13/world/americas/ap-cb-haiti-mining-bust.html>.

⁷ LAURENT DUBOIS, *HAITI: THE AFTERSHOCKS OF HISTORY* 19 (2012).

⁸ *Id.*

⁹ *Id.* at 21.

¹⁰ *Id.* at 35-50.

¹¹ See Isabel Macdonald, *France's Debt of Dishonor to Haiti*, THE GUARDIAN (Aug. 16, 2010 5:00 EDT), <http://www.theguardian.com/commentisfree/cifamerica/2010/aug/16/haiti-france>.

¹² *Id.*

¹³ *A Guide to the United States' History of Recognition, Diplomatic, and Consular Relations, By Country, Since 1776: Haiti*, U.S. DEP'T OF STATE OFFICE OF THE HISTORIAN, <http://history.state.gov/countries/haiti> (last visited Sept. 19, 2015).

¹⁴ See SARAH FANNING, *CARIBBEAN CROSSING: AFRICAN AMERICANS AND THE HAITIAN EMIGRATION MOVEMENT* 1 (2015).

¹⁵ Frederick Douglass, *Lecture on Haiti at the Haitian Pavilion Dedication Ceremonies, 1893 Chicago World Fair* (Jan. 2, 1893), <http://www.canadahaitiaction.ca/sites/default/files/Douglass%201893.pdf>. Among other notable passages, Douglass said: “No other land has purer water, richer soil, or a more happily diversified climate. She has all the natural conditions essential to a noble, prosperous and happy country.” *Id.*

¹⁶ *Id.*

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- ¹⁷ See generally DUBOIS, HAITI: THE AFTERSHOCKS OF HISTORY, *supra* note 7; ROBERT FATTON, HAITI'S PREDATORY REPUBLIC 27–76 (2002).
- ¹⁸ See HUMAN RIGHTS WATCH, HAITI'S RENDEZVOUS WITH HISTORY: THE CASE OF JEAN CLAUDE DUVALIER (Apr. 14, 2011), <http://www.hrw.org/report/2011/04/14/haitis-rendezvous-history/case-jean-claude-duvalier>. See generally DUBOIS, HAITI: THE AFTERSHOCKS OF HISTORY, *supra* note 17.
- ¹⁹ Gregory A. Beckett, The End of Haiti: History Under Conditions of Impossibility 5 (2008) (unpublished Ph.D. dissertation, University of Chicago) (on file with the New York University School of Law Global Justice Clinic).
- ²⁰ In 2004, the United Nations installed its Stabilization Mission in Haiti, known by the acronym, MINUSTAH. MINUSTAH is a peacekeeping force with a mandate to protect and promote human rights. See generally MINUSTAH: United Nations Stabilization Mission in Haiti, UNITED NATIONS, <http://www.un.org/en/peacekeeping/missions/minustah/index.shtml> (last visited Nov. 19, 2015).
- ²¹ See Beckett, *supra* note 19. See also Greg Beckett, *Phantom Power: Notes on Provisionality in Haiti*, in ANTHROPOLOGY AND GLOBAL COUNTERINSURGENCY 39, 46–47 (John D. Kelly et al. eds., 2010) (analyzing the operation of the “twin concepts of state failure and the state of exception” in relation to the forced removal from power of President Jean-Bertrand Aristide in 2004).
- ²² See ERICA CAPLE JAMES, DEMOCRATIC INSECURITIES: VIOLENCE, TRAUMA, AND INTERVENTION IN HAITI 178–222 (2010).
- ²³ See TERRY F. BUSS WITH ADAM GARDNER, HAITI IN THE BALANCE: WHY FOREIGN AID HAS FAILED AND WHAT WE CAN DO ABOUT IT 118–21 (2008).
- ²⁴ Mark Schuller, *Seeing Like a “Failed” NGO: Globalization's Impacts on State and Civil Society in Haiti*, 30 POL. & LEGAL ANTHROPOLOGY REV. 67, 72–73 (2007) (noting that as foreign aid was directed to NGOs, the Haitian state became an “apparent state”).
- ²⁵ Key Statistics, OFFICE OF THE SEC'Y-GEN.'S SPECIAL ADVISER ON CMTY-BASED MEDICINE AND LESSONS FROM HAITI, <http://www.lessonsfromhaiti.org/lessons-from-haiti/key-statistics/> (last visited Sept. 22, 2015); see also Jake Johnston & Alexander Main, *Breaking Open the Black Box: Increasing Aid Transparency and Accountability in Haiti*, CTR. FOR ECON. & POLICY RESEARCH (Apr. 2013), <http://www.cepr.net/documents/publications/haiti-aid-accountability-2013-04.pdf>.
- ²⁶ Richard Knox, *5 Years After Haiti's Earthquake, Where did the \$13.5 Billion Go?*, NAT'L PUBLIC RADIO (Jan. 12, 2015), <http://www.npr.org/sections/goatsandsoda/2015/01/12/376138864/5-years-after-haiti-s-earthquake-why-aren-t-things-better>.
- ²⁷ 2015 Index of Economic Freedom: Explore the Data, HERITAGE FOUNDATION, <http://www.heritage.org/index/explore?view=by-variables> (last visited Sept. 19, 2015).
- ²⁸ U.N. Peacekeeping Operations Factsheet, UNITED NATIONS PEACEKEEPING (June 30, 2015), www.un.org/en/peacekeeping/archive/2015/bnote0615.pdf.
- ²⁹ Depending on whom you ask, President Aristide was “escorted out” or was kidnapped in a second coup, to which the international community acquiesced or which it orchestrated. It is not debated that Aristide left Haiti on an American plane accompanied by U.S. military. See, e.g., Michel Chossudovsky, *US Sponsored Coup d'Etat: The Destabilization of Haiti*, GLOBAL RESEARCH COUNCIL (Feb. 29, 2004), <http://www.globalresearch.ca/us-sponsored-coup-detat-the-destabilization-of-haiti/5323726> (last visited Nov. 19, 2015).
- ³⁰ MINUSTAH Facts and Figures: Current Authorization until 15 October, 2015, UNITED NATIONS PEACEKEEPING <http://www.un.org/en/peacekeeping/missions/minustah/facts.shtml> (last visited Sept. 27, 2015).
- ³¹ Note that if the MINUSTAH budget were distributed equally among 2,092,282 households (presuming a household size of 5 people for an estimated population of 10,461,409), see World Bank Development
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Indicators, THE WORLD BANK (2014),

<http://databank.worldbank.org/data//reports.aspx?source=2&country=HTI&series=&period>, each Haitian household would receive \$239, or about one-seventh of the average GNP per capita for 2014, *see id.*

³² Lisa Armstrong, *United Nations in Haiti: Justice Invisible for Victims of Rape*, BUREAU DES AVOCATS INTERNATIONAUX/INSTITUTE FOR JUSTICE & DEMOCRACY IN HAITI (Jan. 12, 2015), <http://www.ijdh.org/2015/01/topics/womens-issues/united-nations-in-haiti-justice-invisible-for-victims-of-rape/>.

³³ *See* Renaud Piarroux et al., *Understanding the Cholera Epidemic, Haiti*, 17 EMERGING INFECTIOUS DISEASES 1161, 1161–68 (Jul. 2011); *see also* Alejandro Cravioto et al., *Final Report of the Independent Panel of Experts on the Cholera Outbreak in Haiti*, UNITED NATIONS, 12 (2011), <http://www.un.org/News/dh/infocus/haiti/UN-cholera-report-final.pdf>.

³⁴ *See Rapport de Cas*, MINISTÈRE DE LA SANTE PUBLIQUE ET DE LA POPULATION (MSPP) (Oct. 30, 2015), http://mspp.gouv.ht/site/downloads/Rapport%20Web%2030.10.2015_Avec_Courbes_departementales.pdf.

³⁵ *See Cholera Litigation*, BUREAU DES AVOCATS INTERNATIONAUX, <http://www.ijdh.org/cholera/cholera-litigation/> (last visited Sept. 26, 2015).

³⁶ *Adopting Resolution 2180 (2014), Security Council Approves One-Year Renewal for United Nations Stabilization Mission in Haiti*, UNITED NATIONS (Oct. 14, 2014), <http://www.un.org/press/en/2014/sc11599.doc.htm>.

³⁷ AWOZAM, *Ayiti Ka Granmoun Tèt Li* (2005) (recording on file with the New York University School of Law Global Justice Clinic).

³⁸ For the 2014–2015 Haitian government budget, *see Haiti – Economy: Some Key Figures on the Finance Bill 2014-2015*, HAITI LIBRE (July 23, 2014), <http://www.haitilibre.com/en/news-11654-haiti-economy-some-key-figures-on-the-finance-bill-2014-2015.html>. For New York City's operating budget, *see Frequently Asked Questions*, OFFICE OF MGMT. & BUDGET, THE CITY OF NEW YORK, <http://www.nyc.gov/html/omb/html/faq/faq.shtml> (last visited Nov. 19, 2015).

³⁹ *See Dominican Republic Approves 2015 Budget of \$14.3 Billion*, DOMINICAN TODAY (Nov. 11, 2014), <http://www.dominicantoday.com/dr/economy/2014/11/11/53295/Dominican-Republic-approves-2015-budget-of-US14-3B>. By way of comparison with the United States, the state of Georgia has a population comparable to Haiti's, but an operating budget nearly ten times greater, at \$21.8 billion. *See* STATE OF GEORGIA, GOVERNOR'S OFFICE OF BUDGET & PLANNING, THE GOVERNOR'S BUDGET REPORT: FISCAL YEAR 2016, AT 20 (2015), http://opb.georgia.gov/sites/opb.georgia.gov/files/related_files/site_page/FY_2016_GovernorsBudgetReport.pdf.

⁴⁰ *See* PETER HALLWARD, DAMNING THE FLOOD: HAITI, ARISTIDE, AND THE POLITICS OF CONTAINMENT 1–2 (2007).

⁴¹ Amelie Baron, *Haiti Enters Uncertain Political Phase as Parliament Dissolved*, REUTERS (Jan. 13, 2015), <http://www.reuters.com/article/2015/01/13/us-haiti-parliament-idUSKBN0KM2CX20150113>.

⁴² Martelly replaced most of the nation's 120 mayors elected in 2006 with personal appointees. *See Ensuring Fair Elections in Haiti 2014: Legal Analysis of Recent Developments*, BUREAU DES AVOCATS INTERNATIONAUX (Jan. 19, 2015), <http://www.ijdh.org/2015/01/topics/politics-democracy/ensuring-fair-elections-in-haiti-legal-analysis-of-recent-developments/>.

⁴³ *See Full Breakdown of Preliminary Legislative Elections in Haiti*, HAITI ELECTIONS: A RESOURCE AND NEWS BLOG (Aug. 21, 2015), <http://haitielection2015.blogspot.com/2015/08/full-breakdown-of-preliminary.html#more;>

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⁴⁵ *Resultats Preliminaires – Legislatives 2015*, CONSEIL ELECTORAL PROVISOIRE (2015), <http://www.cephaiti.ht/Resultats-Preliminaires-Legislatives-2015.html> (last visited Nov. 19, 2015).

⁴⁶ See, e.g., Jacqueline Charles, *Haitian Observers: 'Massive Fraud' in Vote*, MIAMI HERALD (Oct. 29, 2015), <http://www.miamiherald.com/news/nation-world/world/americas/haiti/article41860518.html>.

⁴⁷ See, e.g., *Thousands Protest in Haiti Over 'Electoral Coup'*, AFP (Nov. 11, 2015), <http://news.yahoo.com/thousands-protest-haiti-over-electoral-coup-231635572.html>.

⁴⁸ *Élections Octobre 2015 : Résultats Préliminaires, Président 1ère Tour*, CONSEIL ELECTORAL PREVISIOIRE (NOV. 5, 2015), https://electionpresidentielle.cephaiti.ht/rapport_PR/resume-presidentielle.pdf.

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⁵⁰ See, e.g., *The CEP Wants to Meet the Candidates of the Opposition Members of the G8*, HAÏTI LIBRE (Nov. 16, 2015), <http://www.haitilibre.com/en/news-15787-haiti-elections-the-cep-wants-to-meet-the-candidates-of-the-opposition-members-of-the-g8.html>.

⁵¹ See, e.g., Jacqueline Charles, *Haiti Elections Officials Refuse Vote Verification*, MIAMI HERALD (Nov. 17, 2015), <http://www.miamiherald.com/news/nation-world/world/americas/haiti/article45281061.html>.

⁵² See GJC Notes of meeting with Director Ludner Remarais of the BME, Port-au-Prince, Haiti (Sept. 23, 2015) (on file with the New York University School of Law Global Justice Clinic).

⁵³ World Bank, *Interim Strategy Note for the Republic of Haiti for FY13-FY14*, Report No. 71885-HT, at 7, 9 (Sept. 27, 2012), http://www-wds.worldbank.org/external/default/WDSPContentServer/WDSP/IB/2012/09/14/000333037_20120914004408/Renders/PDF/718850ISN0P1310Official0Use0Only090.pdf.

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⁵⁹ Prime minister Laurent Lamothe, Opening remarks at Haiti's 1st Mining Forum in Port-au-Prince (June 3, 2013) (on file with the New York University School of Law Global Justice Clinic).

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- ⁶⁰ See BUREAU DES MINES ET DE L'ÉNERGIE D'HAÏTI, <http://www.bme.gouv.ht/> (last visited Sept. 22, 2015).
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- ⁶⁴ *Ecuador y Haití Definen Lineamientos de Cooperación en Materia Minera*, MINISTERIO DE MINERÍA, ECUADOR (July 30, 2015), <http://mineria.gobiernoelectronico.gob.ec/ecuador-y-haiti-definen-lineamientos-de-cooperacion-en-materia-minera/>.
- ⁶⁵ MINISTÈRE DE L'ÉCONOMIE ET DES FINANCES, DOCUMENTS ANNEXES AU BUDGET 2014–2015, at 184 (*Effectif et Masse Salariale de la Fonction Publique 2014-2015*), <http://www.mef.gouv.ht/upload/doc/DocumentsAnnexes201415.pdf>.
- ⁶⁶ Exchange rate of 46.76 Haitian Gourdes to \$1 U.S. Dollars, based on exchange rate for January 1, 2015. See *Exchange Rates*, <http://www.exchange-rates.org/HistoricalRates/A/USD/1-1-2015> (last visited Dec. 3, 2015).
- ⁶⁷ *À Propos*, LE CONSEIL DE DÉVELOPPEMENT ÉCONOMIQUE ET SOCIAL (CDES), <http://www.cdes.ht/fr/Apropos.html> (last visited Nov. 19, 2015).
- ⁶⁸ “The objective of this policy is to achieve the best and most sustainable performance in the mining sector through consultation of all stakeholders (relevant government, the operating company, donors, local communities and civil society) and to develop a legal and fiscal framework for mining investment.” *Activités*, LE CONSEIL DE DÉVELOPPEMENT ÉCONOMIQUE ET SOCIAL (CDES), <http://www.cdes.ht/fr/activites.html> (last visited Nov. 19, 2015) (authors’ translation).
- ⁶⁹ *Haiti: Mining for Economic Growth*, *supra* note 58.
- ⁷⁰ *Fiche Technique de Programme: Politique Nationale de développement de secteur minier*, LE CONSEIL DE DÉVELOPPEMENT ÉCONOMIQUE ET SOCIAL (CDES), http://www.cdes.ht/telech/fichestechniques/PP030-MINES_Fiche%20technique.pdf.
- ⁷¹ See GJC Notes of Meeting with Staff of the Conseil de Développement Économique et Social, in Port-au-Prince, Haiti (Nov. 12, 2014) (on file with the New York University School of Law Global Justice Clinic).
- ⁷² Richener Noel, *Governance and Environmental Degradation in Haiti*, URGENCE RÉHABILITATION, DÉVELOPPEMENT (GROUPE U.R.D.) (Sept. 2013), <http://www.urd.org/Governance-and-environmental,1809?artpage=2-4/>.
- ⁷³ The proposed mining law only requires a statement of non-objection to a company’s EIA, and non-objection is assumed if the Ministry of Environment does not respond within a certain time period. See Chapter V.
- ⁷⁴ GERARDO DUCOS, *supra* note 62.
- ⁷⁵ *Haiti – Environment: Towards the Launch of the National System of Environmental Assessments*, HAÏTI LIBRE (Aug. 24, 2015, 10:50:34), <http://www.haitilibre.com/en/news-14929-haiti-environment-towards-the-launch-of-the-national-system-of-environmental-assessments.html>.
- ⁷⁶ *Id.*
- ⁷⁷ MINISTÈRE DE L'ÉCONOMIE ET DES FINANCES, DOCUMENTS ANNEXES AU BUDGET 2014–2015, at 184 (*Effectif et Masse Salariale de la Fonction Publique 2014-2015*), <http://www.mef.gouv.ht/upload/doc/DocumentsAnnexes201415.pdf>.
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⁷⁸ Exchange rate of 46.76 Haitian Gourdes to \$1 U.S. Dollars, based on exchange rate for January 1, 2015. See *Exchange Rates*, *supra* note 66.

⁷⁹ *Présentation du Ministère de l'Economie et des Finances (MEF)*, MINISTÈRE DE L'ÉCONOMIE ET DES FINANCES, <http://www.mef.gouv.ht/index.php?page=Notre%20mission>.

⁸⁰ See *Liste des Ministres Haïtiens des Finances*, MINISTÈRE DE L'ÉCONOMIE ET DES FINANCES, <http://www.mef.gouv.ht/index.php?page=Liste%20des%20Ministres%20Ha%C3%Aftiens%20des%20Finance>.

⁸¹ MINISTÈRE DE L'ÉCONOMIE ET DES FINANCES, DOCUMENTS ANNEXES AU BUDGET 2014–2015, at 129 (*Effectif et Masse Salariale de la Fonction Publique 2014-2015*), <http://www.mef.gouv.ht/upload/doc/DocumentsAnnexes201415.pdf>.

⁸² Exchange rate of 46.76 Haitian Gourdes to \$1 U.S. Dollars, based on exchange rate for January 1, 2015. See *Exchange Rates*, *supra* note 66.

⁸³ See GJC Notes of Meetings with Director Ludner Remarais of the BME, in Port-au-Prince, Haiti (Feb. 5, 2013 and Nov. 21, 2013) (on file with the New York University School of Law Global Justice Clinic); GJC Notes of Meeting with Ministry of Environment, in Port-au-Prince, Haiti (Nov. 15, 2013) (on file with the New York University School of Law Global Justice Clinic); GJC Notes of Phone Conversation between GJC and Representative of Majescor Resources (Mar. 26, 2015) (on file with the New York University School of Law Global Justice Clinic).

⁸⁴ See GJC Notes of Meetings with Director Ludner Remarais of the BME, in Port-au-Prince, Haiti (Feb. 5, 2013, Nov. 21, 2013, June 26, 2015 and Sept. 23, 2015) (on file with the New York University School of Law Global Justice Clinic). Director Remarais emphasized the Haitian government's lack of monitoring capacity during two meetings.

⁸⁵ *What's in Haiti's Hills?*, HAITI GRASSROOTS WATCH (May 30, 2012), http://haitigrassrootswatch.squarespace.com/18_02_ENG.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ Anglade reportedly refused to sign a waiver that would have allowed the U.S.-Canadian joint venture Newmont-Eurasian to sign an MOU with the Haitian government absent a mining convention, which the law requires. See Jane Regan, *Haiti's Rush for Gold Gives Mining Firms a Free Rein Over the Riches*, THE GUARDIAN (May 30, 2012), <http://www.theguardian.com/global-development/poverty-matters/2012/may/30/haiti-gold-mining>.

⁸⁹ See GJC Notes of Meetings with Director Ludner Remarais of the BME, in Port-au-Prince, Haiti (Apr. 15, 2013) (on file with the New York University School of Law Global Justice Clinic).

⁹⁰ *Id.*

⁹¹ See GJC Notes of Meeting with Ministry of Environment, in Port-au-Prince, Haiti (Nov. 4, 2014) (on file with the New York University School of Law Global Justice Clinic).

⁹² RÉPUBLIQUE D'HAÏTI OBSERVATOIRE NATIONALE DE LA PAUVRETÉ ET DE L'EXCLUSION SOCIALE, WORLD BANK, INVESTING IN PEOPLE TO FIGHT POVERTY IN HAITI: REFLECTIONS FOR EVIDENCE-BASED POLICY MAKING 135 (2014), http://www.worldbank.org/content/dam/Worldbank/document/Poverty%20documents/Haiti_PA_overview_web_EN.pdf.

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- ⁹⁶ BHAWAN SINGH & MARC COHEN, *supra* note 94, at 3.
- ⁹⁷ DUBOIS, HAITI: THE AFTERSHOCKS OF HISTORY, *supra* note 7, at 360–70. Many argue that the burden of the “independence debt” is the principal historic cause of Haiti’s underdevelopment and the ongoing poverty of the twenty-first century. See, e.g., An Open Letter to French President Nicolas Sarkozy (Aug. 16, 2010), <http://www.ijdh.org/2010/08/topics/law-justice/an-open-letter-to-french-president-nicolas-sarkozy-english-and-french>.
- ⁹⁸ MARC COHEN, OXFAM, PLANTING NOW: AGRICULTURAL CHALLENGES AND OPPORTUNITIES FOR HAITI’S RECONSTRUCTION, OXFAM BRIEFING PAPER NO. 140 (Oct. 2010), https://www.oxfam.org/sites/www.oxfam.org/files/bp140-planting-now-agriculture-haiti-051010-en_0.pdf.
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- ¹⁰⁰ *Id.* at 4–5.
- ¹⁰¹ See INVESTING IN PEOPLE TO FIGHT POVERTY IN HAITI, *supra* note 92.
- ¹⁰² THE GOVERNMENT OF HAITI, THE WORLD BANK GROUP & THE UNITED NATIONS, CLEAN WATER, IMPROVED SANITATION, BETTER HEALTH, HAITI CONFERENCE PAPER (Oct. 9, 2014), http://www.worldbank.org/content/dam/Worldbank/document/book_haiti_6oct_print.pdf.
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- ¹¹⁸ *Id.*
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- ¹²⁰ United Nations Development Programme (UNDP), *United Nations Revolving Fund for Natural Resources Exploration Project Recommendation by the Administrator: Precious and Base Metals Exploration in Northern Haiti*, U.N. Doc DP/NRE/Projects/Rec/2 (Feb. 3, 1983), <http://web.undp.org/execbrd/archives/sessions/gc/30th-1983/DP-NRE-PROJECTS-REC-2.pdf>.
- ¹²¹ BUREAU DES MINES ET DE L'ÉNERGIE, INVENTAIRE DES RESSOURCES MINIERE DE LA REPUBLIQUE D'HAÏTI: FASCICULE I : DEPARTEMENT DU NORD-OUEST 4 (1990), <http://www.bme.gouv.ht/mines/fascicule/FNord%20Ouest.pdf>.
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¹²⁷ CONSTITUTION DE LA RÉPUBLIQUE D'HAÏTI, art. 98-3 (1987) [hereinafter Haitian Constitution or CONST. D'HAÏTI] https://www.constituteproject.org/constitution/Haiti_2012.pdf. (all subsequent citations are to this version unless otherwise noted).

¹²⁸ See GJC Notes of Meeting with Senator Jean William Jeanty, in Port-au-Prince, Haiti (Feb. 4, 2013) (on file with the New York University School of Law Global Justice Clinic).

¹²⁹ Jane Regan, *Haitian Senate Calls for Halt to Mining Activities*, INTER PRESS SERVICE NEWS AGENCY (Feb. 15, 2013), <http://www.ipsnews.net/2013/02/haitian-senate-calls-for-halt-to-mining-activities>.

¹³⁰ *Décret encourageant la prospection minière sur toute l'étendue du territoire de la République et adaptant les structures juridiques existantes aux réalités de l'industrie minière*, LE MONITEUR VOL. 19 (March 8, 1976), [hereinafter 1976 Mining Decree], <http://www.bme.gouv.ht/mines/loimin/decminiére.pdf>. Given that this is a decree rather than a law, there may be some question regarding its legal force. If any controversy on this subject exists, however, it is not evident.

¹³¹ *Id.* art. 35.

¹³² *Id.* art. 37.

¹³³ *Id.* art. 39.

¹³⁴ *Id.* art. 41.

¹³⁵ See INTERNATIONAL MONETARY FUND (IMF), HAITI POVERTY REDUCTION STRATEGY PAPER, No. 14/154 (Jun. 2014), <http://www.imf.org/external/pubs/ft/scr/2014/cr14154.pdf>.

¹³⁶ *Id.*

¹³⁷ See *Granted Permits—2 Permits: North-East & South-East Haiti*, VCS MINING, <http://vcsmining.com/Granted-permits.html> (last visited Sept. 18, 2015); see also *Asset Portfolio: Haiti*, EURASIAN MINERALS, <http://www.eurasianminerals.com/s/Haiti.asp> (last visited Sept. 18, 2015).

¹³⁸ See Regan, *Haiti's Rush for Gold Gives Mining Firms a Free Rein Over the Riches*, *supra* note 88.

¹³⁹ See Danica Coto & Evens Sanon, *Haiti Awards Gold, Copper Mining Permits*, ASSOCIATED PRESS (Dec. 21, 2012, 6:27PM EST), <http://news.yahoo.com/haiti-awards-gold-copper-mining-232709627.html>. As of September 2015, Majescor sold its shares of the joint venture to SOMINE, giving the latter full ownership of the permit.

¹⁴⁰ See Majescor Resources, *The SOMINE Project, Haiti: Building Shareholder Value by Participating in the Development of an Emerging and Gold and Base Metal District*, MAJESCOR RESOURCES (2009), [http://www.majescor.com/uploads/somine-projectoutline\[1\].pdf](http://www.majescor.com/uploads/somine-projectoutline[1].pdf); see also *Granted Permits—2 Permits: North-East & South-East Haiti*, VCS MINING, <http://vcsmining.com/Granted-permits.html> (last visited Sept. 18, 2015). As described below, current Haitian law allows only Haitian citizens and domestic corporations to hold exploration and exploitation permits, as well as mining concessions (which confer the right to mine). For this reason, all of the foreign mining companies actively engaged in Haiti have domestic subsidiaries or partners.

¹⁴¹ *Haiti—Économie: Le Sénat vote la suspension des Permis Miniers en Haïti*, HAÏTI LIBRE (Feb. 21, 2013, 12:30:09), <http://www.haitilibre.com/article-7929-haiti-economie-le-senat-vote-la-suspension-des-permis-miniers-en-haiti.html>. The moratorium, passed as a resolution and not a statute, does not have the force of law.

¹⁴² A mining convention is an agreement between the Haitian government and a mining company that sets out detailed provisions governing the mining activities of that specific company. Mining conventions are the primary form of regulation for mining operations under the 1976 mining law. See Regan, *Haitian Senate Calls for Halt to Mining Activities*, *supra* note 129.

¹⁴³ See Chapter V for an explanation of the proposed change from a convention-based system to a permit-based system under the draft new law.

¹⁴⁴ For further discussion of the legal reform process, see Chapter V.

¹⁴⁵ *Eurasian Minerals Provides an Update on the Programs in Haiti*, MARKET WIRED (Aug. 6, 2013, 21:00), <http://www.marketwired.com/press-release/eurasian-minerals-provides-an-update-on-the-programs-in-haiti-tsx-venture-emx-1818338.htm>.

¹⁴⁶ See, e.g., Ben Fox, *Mining in Haiti on Hold Amid Uncertainty and Opposition*, ASSOCIATED PRESS (Apr. 13, 2015, 1:37 PM), <http://news.yahoo.com/mining-haiti-hold-amid-uncertainty-opposition-040334003--finance.html>.

¹⁴⁷ See *Asset Portfolio: Haiti*, EURASIAN MINERALS, <http://www.eurasianminerals.com/s/Haiti.asp> (last visited Sept. 18, 2015). Newmont-Eurasian's prior activities as a joint venture and each company's current interests in Haiti are discussed in detail in Chapter II.

¹⁴⁸ Letter from Nicholas Cotts, External Relations Group Executive for Newmont Mining, and David Cole, President and CEO of Eurasian Minerals, to Margaret Satterthwaite, Director of the NYU Global Justice Clinic (Apr. 1, 2015) (on file with the New York University School of Law Global Justice Clinic).

¹⁴⁹ In addition to the IBRD and IDA, the World Bank Group encompasses three other agencies: the International Financial Corporation (IFC), the Multilateral Investment Guarantee Agency (MIGA), and the International Centre for Settlement of Investment Disputes (ICSID). See *About the World Bank*, *supra* note 3.

¹⁵⁰ The World Bank, *World Bank Mining Project in Haiti Brief* (Nov. 17, 2014) (unpublished briefing paper provided to GJC by Remi Pelon, Senior Mining Specialist), <http://www.accountabilitycounsel.org/wp-content/uploads/2015/01/Haiti-World-Bank-Project-Brief.pdf>.

¹⁵¹ The Task Force included representatives from the Bureau of Mines and Energy, the Ministry of Economy and Finance, and the Ministry of the Environment. See REPUBLIQUE DE HAÏTI, PROJET DE LOI MINIERE, ÉLABORE PAR UN TASKFORCE COMPOSE DE : BUREAU DES MINES ET DE L'ÉNERGIE, MINISTERE DE L'ECONOMIE ET DES FINANCES, MINISTERE DE L' ENVIRONNEMENT, EXPERT INTERNATIONAL (Aug. 2014) [hereinafter Draft Mining Law], <http://www.accountabilitycounsel.org/wp-content/uploads/2015/01/Draft-Mineral-Law.pdf>.

¹⁵² See GJC Notes of Meeting with Ministry of Economy and Finance, in Port-au-Prince, Haiti (Nov. 14 2015) (on file with the New York University School of Law Global Justice Clinic).

¹⁵³ See *Haiti: Mining for Economic Growth*, *supra* note 58.

¹⁵⁴ See *World Bank Mining Project in Haiti Brief*, *supra* note 150.

¹⁵⁵ See GJC Notes of Meeting with World Bank Staff and Representatives of KJM, in Washington, D.C. (March 20, 2015) (on file with the New York University School of Law Global Justice Clinic).

¹⁵⁶ *Id.*

¹⁵⁷ International Finance Corporation, *Eurasian Minerals Inc. Summary of Proposed Investment*, <http://ifcext.ifc.org/ifcext/spiwebsite1.nsf/651aeb16abd09c1f8525797d006976ba/a1c12399545b48e6852576ba000e32d1?opendocument> (last visited Nov. 15, 2015).

¹⁵⁸ See Email from International Financial Corporation staff to GJC (Nov. 2, 2015, 1:58 PM EST) (on file with the New York University School of Law Global Justice Clinic).

¹⁵⁹ See IMF, STAFF REPORT FOR THE 2015 ARTICLE IV CONSULTATION AND REQUEST FOR A THREE-YEAR ARRANGEMENT UNDER THE EXTENDED CREDIT FACILITY 20 (May 6, 2015), <https://www.imf.org/external/pubs/ft/scr/2015/cr15157.pdf> ("Tax policy. A working group in charge of producing a draft of the tax code will be appointed by end-July 2015 (structural benchmark). This group will

also assess the elimination of a number of small taxes with low yield and high costs, and the adoption of a mining code and of a full-fledged VAT system. The IMF will provide technical assistance in analyzing tax expenditures.”).

¹⁶⁰ See also *id.* at 44 (Table 11. Haiti: Structural Reforms to be Implemented During ECF, 2015–17 1), 52 (¶ 26), Informational Annex, at 4.

¹⁶¹ GOVERNMENT OF THE REPUBLIC OF HAITI, MINISTRY OF PLANNING AND EXTERNAL COOPERATION, MINISTRY OF ECONOMY AND FINANCE, 2014-2016 THREE-YEAR INVESTMENT PROGRAM AND ITS FRAMEWORK TO ACHIEVE ACCELERATED, BALANCED ECONOMIC GROWTH AND REDUCE POVERTY TOOL FOR IMPLEMENTING HAITI’S STRATEGIC DEVELOPMENT PLAN: MAKING HAITI AND EMERGING COUNTRY BY 2030, Section 6.2 (Table 12. Matrix of the Expected Results of the Major Area of Economic Reform) at 2 (June 2013), <https://www.imf.org/external/pubs/ft/scr/2014/cr14154.pdf>.

¹⁶² See, e.g., *Haiti: Mining for Economic Growth*, supra note 58; see also Letter from Michel Lamarre, Chief Executive Officer for SOMINE, to Margaret Satterthwaite, Director of the NYU Global Justice Clinic (Aug. 28, 2015) (on file with the New York University School of Law Global Justice Clinic) [hereinafter SOMINE Letter]; GJC Notes of a Meeting with Newmont-Eurasian Representatives in New York, NY (May 5, 2015) (on file with the New York University School of Law Global Justice Clinic).

¹⁶³ See WORLD BANK, INVESTING IN PEOPLE TO FIGHT POVERTY IN HAITI, supra note 92.

¹⁶⁴ *Living Conditions in Haiti’s Capital Improve, But Rural Communities Remain Very Poor*, WORLD BANK (July 11, 2014), <http://www.worldbank.org/en/news/feature/2014/07/11/while-living-conditions-in-port-au-prince-are-improving-haiti-countryside-remains-very-poor>.

¹⁶⁵ CENTER FOR HUMAN RIGHTS AND GLOBAL JUSTICE, GLOBAL JUSTICE CLINIC, PARTNERS IN HEALTH, ROBERT F. KENNEDY CENTER FOR JUSTICE AND HUMAN RIGHTS & ZANMI LASANTE, *SAK VID PA KANPE: THE IMPACT OF U.S. FOOD AID ON HUMAN RIGHTS IN HAITI* (2010), http://parthealth.3cdn.net/3f82f61a3316d7f1a0_pvm6b80f3.pdf. Agricultural labor accounts for 60 percent of the workforce and contributes 25 percent of GDP. See BHAWAN SINGH & MARC COHEN, supra note 94.

¹⁶⁶ Today, fully 60 percent of what Haitians consume is imported. BHAWAN SINGH & MARC COHEN, supra note 94.

¹⁶⁷ Economist Intelligence Unit, *Global Food Security Index: An Annual Measure of the State of Global Security 2015*, GLOBAL FOOD SECURITY INDEX (last visited Sept. 27, 2015), <http://foodsecurityindex.eiu.com/>.

¹⁶⁸ CLEAN WATER, IMPROVED SANITATION, BETTER HEALTH, supra note 102.

¹⁶⁹ *Id.*

¹⁷⁰ WORLD BANK GROUP, POVERTY AND INCLUSION IN HAITI: SOCIAL GAINS AT A TIMID PLACE (2014), http://www-wds.worldbank.org/external/default/WDSPContentServer/WDSP/IB/2014/07/21/000442464_20140721112314/Rendered/PDF/895220BRI00pau00Box385284B00PUBLIC0.pdf. See also BHAWAN SINGH & MARC COHEN, supra note 94.

¹⁷¹ See, e.g., Amelie Baron, *Drought Threatens Population in the Northwest of Haiti*, REUTERS (Apr. 8, 2014, 5:11 AM), <http://uk.reuters.com/article/2014/04/08/uk-haiti-drought-idUKBREA360NE20140408>; see also Marc Cohen, *Haiti’s Current Drought: An Opportunity to Build Climate Change Resilience?*, OXFAM AMERICA BLOG (Apr. 22, 2014), <http://politicsofpoverty.oxfamamerica.org/2014/04/haiti-drought-opportunity-build-climate-change-resilience>.

¹⁷² See, e.g., Evens Sanon & Trenton Daniel, *Official: Haiti Drought Causes “Extreme Emergency,”* ASSOCIATED PRESS (Mar. 18, 2014), <http://bigstory.ap.org/article/official-haiti-drought-causes-extreme-emergency>.

¹⁷³ See, e.g., *Pentadal Rainfall Map*, U.S.G.S., <http://earlywarning.usgs.gov/fews/product/194> (last visited Nov. 15, 2015).

¹⁷⁴ See, e.g., Jacqueline Charles, *American Airlines Adds Cap-Haitien Flights from Miami*, MIAMI HERALD (Oct. 2, 2014), <http://www.miamiherald.com/news/nation-world/world/americas/haiti/article2480121.html>.

¹⁷⁵ See, e.g., Deborah Sontag, *Earthquake Relief Where Haiti Wasn't Broken*, N.Y. TIMES (July 5, 2012), http://www.nytimes.com/2012/07/06/world/americas/earthquake-relief-where-haiti-wasnt-broken.html?_r=0. The Caracol Industrial Park has been the subject of controversy. See GENDER ACTION, CARACOL INDUSTRIAL PARK: SOCIAL AND GENDER IMPACTS OF YEAR ONE OF HAITI'S NEWEST IFI-FUNDED INDUSTRIAL PARK (2013), <http://www.genderaction.org/publications/caracol.pdf>.

¹⁷⁶ The road from Gonaives to Port-de-Paix is so bad that in late 2014, Haiti's most reputable bus company declared that it could no longer "provide the quality service that they wanted" to reach Port-de-Paix, and discontinued service. See *Les routes du Nord-Ouest en piteux état*, *San Souci Tours jette l'éponge*, LE NOUVELLISTE (Aug. 14 2014), <http://lenouvelliste.com/lenouvelliste/article/134588/Les-routes-du-Nord-Ouest-en-piteux-etat-Sans-Souci-Tours-jette-leponge.html>.

¹⁷⁷ La Montagne is a section in the Northwest Department that straddles the communes of Jean Rabel and Bai-de-Henne. Newmont-Eurasian operated in La Montagne from 2009 through 2012. For more information on Newmont-Eurasian activities and communities' experiences, see Chapters III and IV.

¹⁷⁸ Today the Collective comprises six national organizations: *Plateforme Haitienne de Plaidoyer pour un Developpement Alternatif* (Haitian Platform for an Alternative Development, or PAPDA), *Defenseurs des Opprimés/Opprimés* (Defenders of the Oppressed, or DOP), *Mouvman Demokratik Popilè* (The Popular Democracy Movement, or MODEP), *Tèt Kole Ti Peyizan Ayisyen* (Haitian Peasants Heads Together, or Tèt Kole), *Platfòm Òganizasyon Ayisyen Dwa Moun/Plate-forme Haïtienne des Organisations des droits humains* (Platform of Haitian Human Rights Organizations or POHDH), and *Komisyon Episkopal Nasyonal Jistis ak Lapè* (National Episcopal Commission of Justice and Peace, or JILAP). In addition, the Collective consists of dozens of community based organizations in six departments: Artibonite, Central Plateau, North, Northeast, Northwest, and West.

¹⁷⁹ Members of the CASEC (*Conseil d'Administration de la Section Communale* or Advisors to Communal Section Administrators) and ASEC (*Assemblée de la Section Communale* or Advisors to Communal Section Assembly) are local governmental authorities. Their official duties include resolving land disputes, mediating community conflicts, and, in some cases, serving as law enforcement.

II. The Modern Gold Mine and Mining in Haiti Today

The research conducted to date by mining companies operating in Haiti suggests that they would extract gold and other metals in Haiti's Massif du Nord through a surface mining technique called "open-pit mining." Of the various methods of mineral extraction, open-pit mining presents the greatest risks to the environment and to communities in the area. It is difficult to imagine the scale of a modern gold mine, let alone to understand its impacts, without ever having seen a mining site. The purpose of this chapter is to paint a picture of what an open-pit mine looks like and how it operates.¹ After explaining the basic mechanics of mining, this chapter provides an overview of the permit holdings and activities of the mining companies present in Haiti in the twenty-first century. Chapter III discusses the environmental risks of open-pit mining in more detail.

A. The Geology of Gold

Gold originates deep in the earth "and is carried upward by hot fluids and magma that force their way into rock fractures."² As the fluids cool and pressures diminish, the gold crystalizes, usually in quartz veins. Over time, the rock formations that hold these veins degrade from exposure to wind and water, and some of the quartz is "carried downslope and accumulate[s] as gold-bearing sand or gravel in streams."³ This "alluvial gold" is relatively "easy to extract as nuggets or grains by simple gravity concentration"—a fact that "gave impetus to the gold rushes in California in 1848, Australia in 1850, and the Yukon in 1896."⁴

Most of the gold that exists today in Haiti's Massif du Nord, however, is "epithermal" ore (see *infra* notes 86–87 and accompanying text). Epithermal ore exists in minute quantities in almost all rock types but is found especially in igneous and metamorphic rocks.⁵ Such deposits contain economically mineable concentrations of gold (and sometimes other precious and base metals) that are either disseminated through the ore-body or contained in a network of veins.⁶ These deposits "are found near the surface and mineralization occurs at a maximum depth of one [kilometer], but rarely deeper than six hundred [meters]. . . . [Deposits] commonly occur in island arcs and continental arcs associated with subduction."⁷ Subduction is the process by which one tectonic plate moves beneath another, sinking into the earth's mantle.

Some epithermal gold may be present in quartz veins that fill bedrock cracks or fissures ranging from approximately one centimeter thick to hundreds of meters thick or long.⁸ These veins (often called "lodes") can be accessed through hydraulic mining (using high-pressured water to wash away the bedrock and expose the gold), or they can be dug out through trenches and tunnels.⁹

Along with alluvial gold, this relatively accessible ore is the gold that the Taíno slaves mined from Haiti's streams and mountains for the Spanish Crown. The artisanal miners of Lakwèv, a

community in the Northeast Department of Haiti near the border with the Dominican Republic, continue to mine the remnants of that gold today.¹⁰ (See *infra* Box 2-1.)

Box 2-1: Artisanal Mining in Haiti: Lakwèv

Lakwèv is a town of a few thousand people in the hills near the border of the Dominican Republic.¹¹ It was once the site of Haitian government mineral exploration and, later, exploration by the Canadian mining company Ste. Geneviève.¹² Lakwèv sits just south of the town of Mont Organise.¹³ (See *infra* Figure 2-2.)



Figure 2-1: Panning for gold, Lakwèv, © 2013 Ben Depp

For decades, the residents of Lakwèv have dug into the earth to search for gold.¹⁴ Men and women use pickaxes and machetes to dig fifty feet down and connect to a labyrinth of underground tunnels that have been built over years. They collect earth in pans and use water to identify specks of gold. Residents reported to the Global Justice Clinic of New York University School of Law (GJC) that no one uses mercury, a toxic liquid metal commonly used in artisanal mining elsewhere. There are other dangers, however. Tunnels have collapsed, killing those inside. And residents told GJC that they must carefully mind their animals and young children to prevent accidents.¹⁵

In addition to mining, residents of Lakwèv grow food crops, including corn, yams, beans, bananas, and others, for sale.¹⁶ Due to the distance to market, however, residents have said that it is hard to make money from farming. One resident said, “The nice thing about gold is that you find it one day and the next day you sell it.”¹⁷ Although there is no predicting when or where

one will come across enough specks of gold to sell, according to residents, the reward and the lack of alternatives merit the search. Agriculture, on the other hand, takes more time, and when it does not rain, crops fail. Residents told GJC that every year a couple of families get lucky: they find enough gold to leave Lakwèv.¹⁸ Those who remain spoke of the lavish lifestyle they imagine for those who strike gold: cars, electricity, city life.¹⁹

Residents have said that Haitian and Dominican middlemen come to Lakwèv every Thursday to buy gold.²⁰ While the price they receive for the gold varies, most people interviewed agreed that artisanal mining is fundamental to their well-being.²¹ For some, it is their main economic activity. Residents of Lakwèv expressed concern that if a mining company came to the area people would no longer have income. “There is a lot of misery,” said a community leader.²² He explained that artisanal mining is the only hope for residents to generate the money they need to send their children to school.

Epithermal gold also may exist as minute, sometimes microscopic, flecks dispersed in a plume throughout the igneous rock in which the gold was formed. To access this gold, it is usually necessary to construct an open-pit mine, which involves digging out all of the surrounding rock and then extracting the tiny flecks of gold from the rubble.²³ These bits of gold are so small and diffuse that it requires approximately thirty tons of rock to produce one ounce of gold.²⁴ The scale of the open-pit mine required to excavate this ore-bearing rock will vary with the size of the epithermal deposits, but some contemporary gold mines exceed one mile in diameter and are more than five hundred meters deep (see discussion *infra*, notes 90–91, and accompanying text).

The size and complexities of modern gold mining and extraction present many technical challenges, environmental risks, and economic uncertainties. These issues are examined throughout Chapters II, III and IV of this Report. The story begins with twenty-first century prospecting for Haiti’s gold.

B. Gold Exploration

1. Phases of Exploration²⁵

Exploration for epithermal gold comprises four basic phases.²⁶ The first phase involves gathering sufficient information to identify land that is worthy of more careful study. In the case of Haiti, permit holders have relied on the research and exploration undertaken by companies and the United Nations Development Programme. Geologists may also use satellite imagery, aerial photographs, and other information to identify promising terrain. This first stage is typically conducted without any significant impacts on the environment or on populations that live near the potential mining sites.

The second stage of exploration consists of detailed geologic mapping and surface sampling. In this stage, field geologists drive and hike across the land identified for exploration, making maps, taking specific, small-scale technical measurements of rock properties, and collecting small (“hand”) samples. If the initial geologic reconnaissance and sampling show positive results, the company conducting the exploration may decide to proceed to the third stage.

In the third stage of exploration, companies typically conduct surface-based geophysical surveys using hand-held instruments that can identify the likelihood that metallic minerals are present in discernible concentrations. These surveys occur along a precise network of gridded lines. To prepare the grid, surveyors may need to extend roads and paths to bring in equipment, and they often cut existing vegetation close to ground level.

This third stage introduces disturbances to the land surface; for example, a new road may cross streams or a survey line may need to be drawn across village farms or fields. Although the survey line construction happens just once, in some environments, cutting trees and shrubs may adversely affect the ability of the local vegetation to hold soil or to absorb water. As a result, exploration activity during this stage may cause increased topsoil loss, runoff, and sedimentation in streams (see Chapter III).

The fourth and last stage of exploration consists of drilling and core sampling, which are expensive and complicated processes. Companies generally begin test drilling in a broadly defined area. Once they identify promising targets, the companies intensify the drilling and mapping of the potential ore-bearing substrata.

2. Permit Holdings and Exploration Activities in Haiti to Date

Attracted by dramatic increases in global gold prices in the early 2000s and a perception of growing political and economic stability in Haiti,²⁷ four foreign companies and their Haitian partners began intensive exploration and research into the prospects for commercially profitable mining in Haiti’s Massif du Nord. Those four companies—Majescor Resources Inc. (Majescor), VCS Mining LLC (VCS), Newmont Mining Corporation (Newmont), and Eurasian Minerals Inc.

(Eurasian)—have all conducted the four phases of exploration activity described above, including core sampling, in some of their permit areas, as well as other exploration and prospection activities.²⁸

The Canadian company Majescor and its joint venture partner Société Minière du Nord-Est S.A., or SOMINE (Majescor-SOMINE),²⁹ the American-Canadian joint venture Newmont-Eurasian,³⁰ and VCS and its subsidiary Delta Société Minière or Delta (VCS/Delta)³¹ each acquired rights under the 1997 mining conventions that they or their predecessors signed with the *Bureau des Mines et de l'Énergie* (Bureau of Mines and Energy, or BME).³² In late 2015, Majescor reported that it had redeemed the bulk of its shares in SOMINE³³ and Eurasian announced the sale of its interests in the joint venture properties.³⁴ Eurasian retains ownership of the Grand Bois permit (see *infra* Box 2-2 for a description of permits currently held).

The section below provides a brief overview of these companies' holdings in Haiti and their gold exploration activities over the past 15 years. The chapter then turns back to the mechanics of modern mining, to describe what industrial gold mining might look like in Haiti if companies proceed from exploration to exploitation.

Box 2-2: Gold and Copper Permits in Haiti

According to the 1976 Mining Decree, foreign and Haitian companies may hold permits for mineral prospection.³⁵ To receive a research permit, an exploitation permit, or a mining concession, however, the company must be domiciled in and headquartered in Haiti.³⁶ Therefore, the foreign companies that have operated or are currently operating in Haiti—Majescor, Newmont, VCS, and Eurasian—hold or have held research or exploitation permits through their Haitian subsidiaries or partners (see discussion *infra*).

Name of Company (Country of Incorporation)	Haitian Subsidiaries	Permits Held (Date Issued)	Permit Location (Size)	Relevant Convention
Eurasian Minerals, Inc. (Canada)	Ayiti Gold S.A.; Marien Mining S.A.	1 research permit ³⁷ (2009) ³⁸	Grand Bois (50 km ²)	Société Minière Citadelle (signed with government in 1997, ratified by Council of Ministers in 2005)
Newmont Mining Corporation (United States) and	Newmont Ventures Limited (NVL)	4 prospection permits (2006) 1 prospection	La Miel ⁴¹ (4 permits) and La Mine (1 permit) ⁴² Treuil Copper	N/A

Eurasian Minerals, Inc. (Canada) Joint Venture	S.A.; Marien Mining S.A.	permit (2007)	Porphyry ⁴³	
(Note: These permits were acquired by the Newmont-Eurasian joint venture or by Eurasian minerals. In November of 2015, Eurasian sold all of its interests. The permits listed here are now held by Newmont.)		27 prospection permits (2008) ³⁹	Including, among others, Terre Neuve and Mèmè, ⁴⁴ Platone (Vert de Gris) ⁴⁵ , La Montagne	
		19 prospection permits ⁴⁰ (2009)	(Above sites are not exhaustive. See <i>infra</i> Figure 2-2.) (Total = 2818 km ²)	
Société Minière du Nord-Est S.A., or SOMINE (Haiti); minority interest held by Majescor Resources Inc. (Canada)	SIMACT Alliance Copper-Gold Inc.	2 exploitation permits (2012) ⁴⁶	Douvray, Faille B, and Blondin (45 km ²)	St. Geneviève Resources, LTD ⁴⁷ (signed with government in 1997, ratified by Council of Ministers in 2005)
VCS Mining LLC (United States)	Delta Société Minière S.A. SONO Global Holdings Inc.	1 exploitation permit (2012) 3 prospection permits (2012) ⁴⁸	Morne Bossa (bordering the Communes of Milot/Quartier Morin) (25 km ²) Terrier Rouge, Mont Organize, Ouanaminthe (200 km ²)	Citadelle (signed with government in 1997, ratified by Council of Ministers in 2005)
Caribbean General Trading (CGT) (United States)		3 prospection permits (2014)	Northeast Haiti (Size not publicly available)	N/A

BME Director Ludner Remarais confirmed with GJC that the table above shows all metal mining permits currently held by companies in Haiti.⁴⁹ Remarais added that the permits listed here have not expired. Although a prospection permit, for example, is valid only for two years, Remarais explained that the companies have been unable to perform work under such permits due to reasons outside of their control, including, principally: (1) the Senate Resolution calling for a moratorium on mining activity (see discussion in Chapter I), and (2) the government's efforts to rewrite Haitian mining law.⁵⁰ Remarais said that once political and legislative issues have been resolved the companies listed in this table should have the opportunity to continue activities.⁵¹

Permits by Company

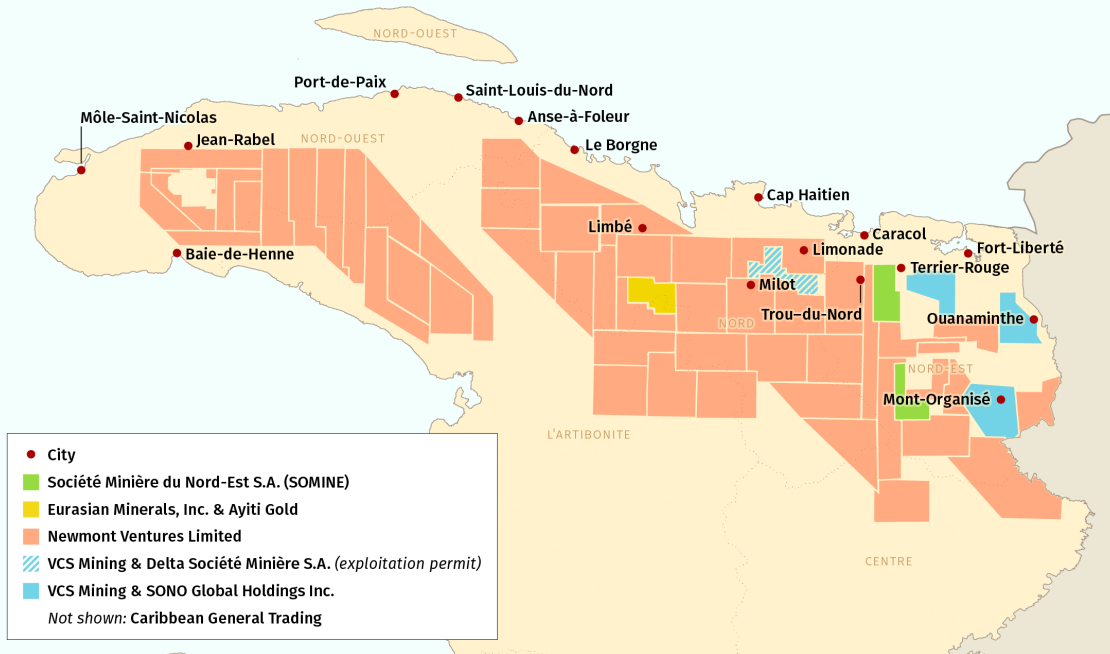


Figure 2-2: © 2015 John Emerson/GJC

Permits by Type

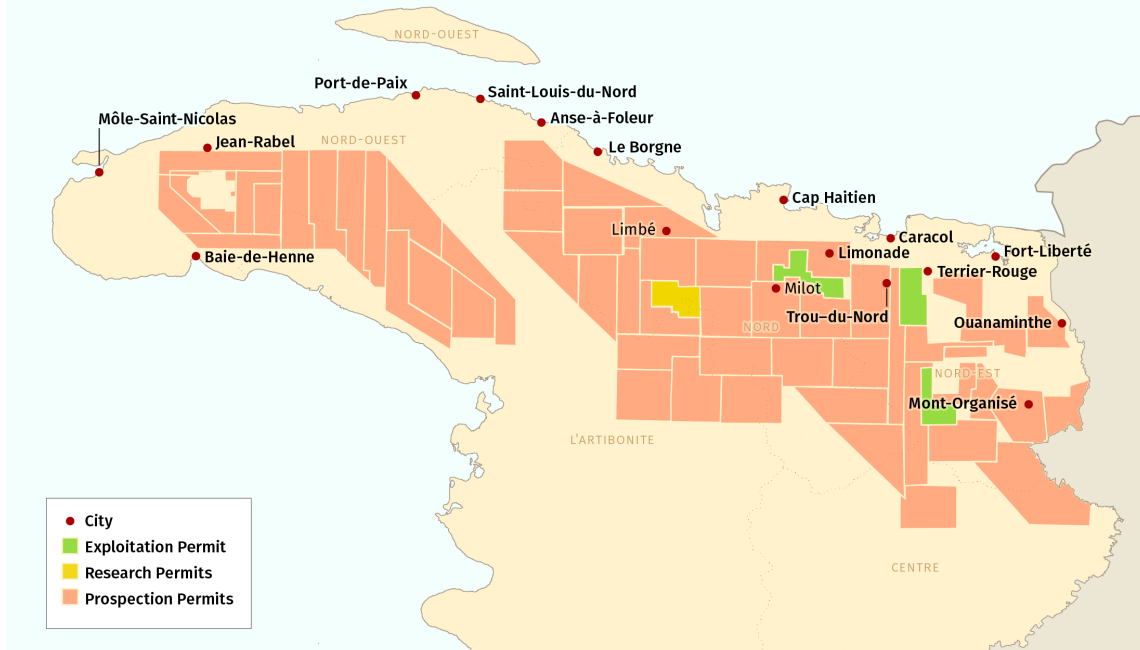


Figure 2-3: © 2015 John Emerson/GJC

A. VCS MINING LLC

VCS Mining LLC was founded in 2009 by a Haitian-American individual and is incorporated in the state of Delaware.⁵² It operates in Haiti through its local subsidiaries, Delta Société Minière S.A. (Delta) and Sono Global Holdings Inc. (Sono). The Haitian government granted Delta—and, by extension, VCS—prospection and research permits for gold, copper, and silver in the Morne Bossa region, located southeast of Cap Haïtien, near the town of Milot.⁵³ In addition to Morne Bossa, VCS and its subsidiary Sono together hold three prospection permits in Northeast Haiti, accounting for 200 km².⁵⁴

In December 2012, the BME granted VCS/Delta an exploitation permit for Morne Bossa.⁵⁵ This permit gives VCS/Delta exclusive rights to minerals within a specified area of 25 km² covered by the permit and authorizes the company to begin mine construction upon completion of a technical report on the ore deposits and a feasibility study of the proposed mine.⁵⁶



Figure 2-4: Morne Bossa, © 2013 Ben Depp

Although VCS/Delta initially stated that the mine could be capable of production within 24 to 32 months, it has placed construction on hold pending revision of Haiti's mining law. In the spring of 2015, journalists who visited the Morne Bossa site and the nearby town of Cadouche reported that the only visible evidence of mining was a few cement blocks and some small pipes marking where VCS/Delta had drilled.⁵⁷ As a relatively small company, VCS is unlikely to have the economic capacity or technical expertise needed to construct and operate a mine.⁵⁸ Thus, if mining proceeds, the company will presumably either sell its convention and permit rights or enter into some sort of joint venture with a larger and more established mining company.⁵⁹

B. MAJESCOR-SOMINE

The rights pursuant to the St. Geneviève Resources convention,⁶⁰ which covers two potential mining locations in the Northeast Department, are held by SOMINE, a Haitian corporation. Majescor Resources, Inc., a Canadian corporation, holds a minority interest in SOMINE through its wholly owned subsidiary, SIMACT Alliance Copper-Gold Inc. In September 2015, Majescor reported that it had redeemed the bulk of its shares in SOMINE, in exchange for a two-percent

royalty on each of SOMINE's mining exploitation permits.⁶¹ SIMACT continues to hold 40,000 (or 15 percent) of the outstanding common shares of SOMINE.⁶²

SOMINE holds prospection and research permits covering approximately 400 km² in the Massif du Nord, south of Fort Liberté in the Northeast Department.⁶³ In December 2012, the BME granted Majescor-SOMINE exploitation permits for two locations: 25 km² surrounding the Douvray porphyry copper and gold prospect (which includes the Blondin prospect), and 20 km² at the Faille B gold vein.⁶⁴ These permits cover land between the towns of Trou du Nord and Terrier Rouge and include the communities of Roche Plate, Patricko, and Labou. Like VCS/Delta, Majescor-SOMINE obtained exclusive rights to mine within its exploitation permit areas.



Figure 2-5: View above Patricko, SOMINE Faille B, © 2014 Ellie Happel

C. NEWMONT-EURASIAN JOINT VENTURE AND EURASIAN MINERALS

Two other companies have recently explored for gold in northern Haiti: Newmont Mining Corporation, a U.S. company that is the world's second largest producer of gold, and Eurasian Minerals, Inc., a Canadian corporation. Newmont, via its subsidiary, Newmont Ventures, Ltd. (NVL), and Eurasian, via its subsidiary Marien Mining,⁶⁵ created a joint venture ("Newmont-Eurasian") to explore for gold, copper, silver, and other minerals along a 130-kilometer stretch of the Massif du Nord. At one point, Newmont-Eurasian held over 50 prospection permits covering

2810 km²—approximately half of the landmass of the Massif du Nord, according to Eurasian.⁶⁶ The joint venture submitted 49 applications for research permits, which are now held by Newmont.

Eurasian began exploring in northern Haiti in 2006.⁶⁷ After receiving 27 prospection permits in 2007, the company partnered with Newmont in 2008 to form the Newmont-Eurasian joint venture.⁶⁸ In 2009, Newmont-Eurasian acquired the research permit for Grand Bois, previously owned by Citadelle.⁶⁹ In March 2010, the private sector arm of the World Bank Group, the

International Financial Corporation, made a \$10.3 million equity investment in Eurasian to fund Newmont-Eurasian’s “prospecting and exploration expenditures in Haiti and for activities in other countries as agreed.”⁷⁰ With the sale of all Eurasian assets in the Newmont-Eurasian joint venture, the IFC is now only involved in Grand Bois, which Eurasian wholly holds.⁷¹



Figure 2-6: Newmont-Eurasian Drill Site, Grand Bois, © 2013 Ben Depp

In 2011, Newmont-Eurasian created six “Joint Venture Designated Projects” within the areas where it had carried out exploration activities. Whereas Eurasian took greater responsibility for the prospection activities from 2006 to 2011, once the sites were declared Designated Projects,⁷² Newmont assumed sole funding and management. The six Joint Venture Designated Projects are shown on the map below: La Miel (including the Savane La Place and Grand Savane prospects), La Mine, the North-Central Haiti Venture (including the Mapou prospect), the Northwest Haiti Venture (including the Terre Neuve and La Montagne prospects), the Northeast Haiti Venture, and the Grand Bois “Surrounding Properties” Venture.⁷³ In 2012, Newmont relinquished its interest in Grand Bois, leaving the area covered by that prospection permit in Eurasian’s sole control.⁷⁴ Eurasian performs activities in Grand Bois with its Haitian subsidiary Ayiti Gold (see *supra* Box 2-2).

In 2012, Newmont-Eurasian signed a Memorandum of Understanding (MOU) with the BME outlining “good faith efforts” to conclude a mining convention, which would permit Newmont-Eurasian to transform its prospection permits into research permits.⁷⁵ Research permits are required to conduct drilling and other more intensive exploration (i.e., pre-mine construction) activities.⁷⁶ The MOU that Newmont-Eurasian signed with the BME, however, expressly allowed the joint venture to drill in certain areas even without a convention.

In August 2013, the BME denied Newmont-Eurasian’s application to convert its prospection permits into research permits and rejected Eurasian’s request for an extension of its research permit for Grand Bois.⁷⁷ The BME noted that it would not consider requests for conversion or

extension of permits until revision of the mining law was complete.⁷⁸ Newmont-Eurasian subsequently suspended all mineral exploration activities and placed its projects on “care and maintenance status”⁷⁹ but reportedly has continued its “community relations programs.”⁸⁰ Eurasian also suspended Grand Bois operations.⁸¹ The joint venture stated, however, that it “remains committed to advancing the mining industry’s contribution to Haiti’s economic development, and looks forward to working with the Government of Haiti in its effort to bring the mining law to current international standards.”⁸²

In November 2015, Newmont-Eurasian terminated the joint venture.⁸³ Eurasian signed an agreement to sell its interests in the joint venture projects to Newmont in exchange for \$4 million cash and a 0.5 percent net smelter return (“NSR”) royalty interest.⁸⁴ BME Director Ludner Remarais explained that the BME considers Newmont’s permits and Eurasian’s Grand Bois permit as non-expired; the companies should be able to continue operation once a new legal framework is in place.⁸⁵



Figure 2-7: Residents walk down from Newmont-Eurasian Drill Site, Grand Bois, © 2013 Ben Depp

None of the companies holding permits in Haiti today has begun extracting gold. Nonetheless, the research they have conducted to date suggests that, should mining proceed, most of the country’s gold would be extracted through open-pit mines. VCS, Majescor-SOMINE, Newmont-Eurasian and Eurasian have all described the gold (and associated copper) deposits that they have detected in the Massif du Nord as epithermal or porphyry deposits similar to those found at the Pueblo Viejo mine, in the Dominican Republic.⁸⁶ The principal exception is Majescor-SOMINE’s Faille B holding, which is a large quartz vein deposit that could be extracted by trench mining.⁸⁷

The open-pit mines likely would vary in size, based on the depth and concentration of mineral deposits in the different locations. For example, test drilling at VCS/Delta’s Morne Bossa site has identified a “principal mineralized oxide zone . . . approximately 350 meters long in an east-north-easterly direction with a width of about 130 meters and an average thickness of about 45 meters.”⁸⁸ Located on a hill, at elevations of 580 to 720 meters, Eurasian’s Grand Bois gold deposit is reportedly well suited for an open-pit operation.⁸⁹ The following section provides a brief overview of what those operations would likely entail.

C. The Extraction of Gold

As described above, to extract epithermal gold, the surrounding bedrock must be dug up and the diffuse flecks of ore separated from the earth in which they rest. An open pit, excavated from the surface downward, is usually the most economical means of extraction. The Pueblo Viejo mine, for example, has two open pits, each of which has a surface area of approximately 1600 meters by 1200 meters.⁹⁰ The ultimate depth and dimensions of the two pits will be determined by the amount of gold, copper, and other valuable minerals that may be economically mined based on mineral prices in the world market and production costs over the life of the project.⁹¹



Figure 2-8: Pueblo Viejo Mine, © 2013 Ben Depp

Surface mines (rather than deep tunnels) “are generally preferred if the ore body is relatively shallow and uniform.”⁹² The mine pit is created “by digging into the Earth’s surface one layer at a time. The final mine is cone-shaped.”⁹³ Construction of an open-pit mine usually requires excavation and removal of large quantities of “overburden”—the rock above the layers that contain economically exploitable concentrations of ore. To accomplish this process, mining companies first drill holes into the ground and fill them with explosives, which are discharged to loosen the earth. Typically, “[a]fter the rock has been broken up by blasting, it is loaded into giant haul trucks using large shovels and front-end loaders.”⁹⁴ Rock containing gold, copper, and other valuable minerals is hauled away for processing, and the overburden and residual waste rock is moved to a separate area for permanent disposal.⁹⁵ These “spoils areas” containing waste rock

are usually quite large. “Open-pit mines produce 8 to 10 times as much waste rubble as underground mines. This waste rubble is generally piled into enormous mounds, some of them reaching heights of 100 meters.”⁹⁶

As the mine is excavated to deeper levels, groundwater naturally fills the pit. It therefore becomes “necessary to dewater the mine to ensure that the water level remains below the pit floor.”⁹⁷ In most cases, tens of thousands of liters of water are pumped from the pit each day. Although “[m]uch of [the water] is reused on site,” for dust control and other purposes, significant quantities of excess water are returned to the surrounding environment, “treated and discharged back into nearby rivers or lakes.”⁹⁸

Several of the world’s largest mature mines show the potential scale of open-pit mining. For example, the Fimiston Super Pit gold mine, which is a joint venture of Barrick Gold Corporation and Newmont Mining Corporation in Western Australia, is approximately 3.5 kilometers long, 1.5 kilometers wide and 600 meters deep.⁹⁹ At the Pueblo Viejo mine, where production began in late 2012, the two main mine pits are each several hundred meters wide and approximately 100 meters deep.¹⁰⁰ Barrick (one of Pueblo Viejo’s co-owners) estimates that by the end of the mine’s predicted 30-year life, each of the pits will be approximately 1.5 to 2 kilometers wide and up to 400 meters deep.¹⁰¹



Figure 2-9: Super Pit gold mine in Kalgoorlie, Western Australia, © 2015 Wikimedia Commons

D. Gold Processing and Refining

Once excavation reaches the zone where ore-grade rock exists, the rock is dug out, and the process of separating the gold from the surrounding raw material begins. The most common means of dissolving and separating the gold particles from the sulfides, metals, and other compounds to which it may be bonded is “cyanide leaching.” The gold-bearing rock is crushed or pulverized in a process called “comminution.” The comminuted rock is then transported to the leaching facilities, where a dilute solution of sodium cyanide (NaCN) or potassium cyanide (KCN) is sprayed onto the rock.¹⁰² The cyanide solution, under mildly oxidizing conditions:

dissolves the gold contained in the ore. The resultant gold-bearing solution is called “pregnant solution.” Either zinc metal or activated carbon is then added to the pregnant solution to recover the gold by removing it from the solution.¹⁰³

There are two common methods for applying cyanide solution. The traditional method is “heap-leaching,” in which crushed ore is “placed in large piles or heaps. A solution of cyanide is trickled through these heaps to dissolve the gold.”¹⁰⁴ Following separation of the gold, the residual solution is then “collected in a pond, from which it is commonly recharged with cyanide and recycled back into the leaching system.”¹⁰⁵

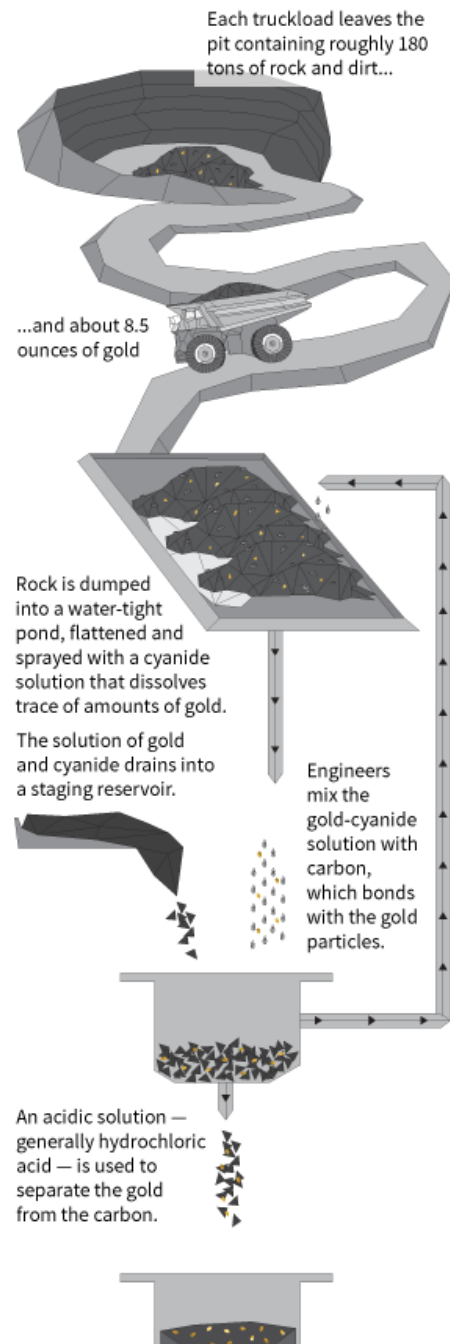
A relatively safer, but more expensive method of using cyanide to separate the gold is “tank leaching.” In this process,

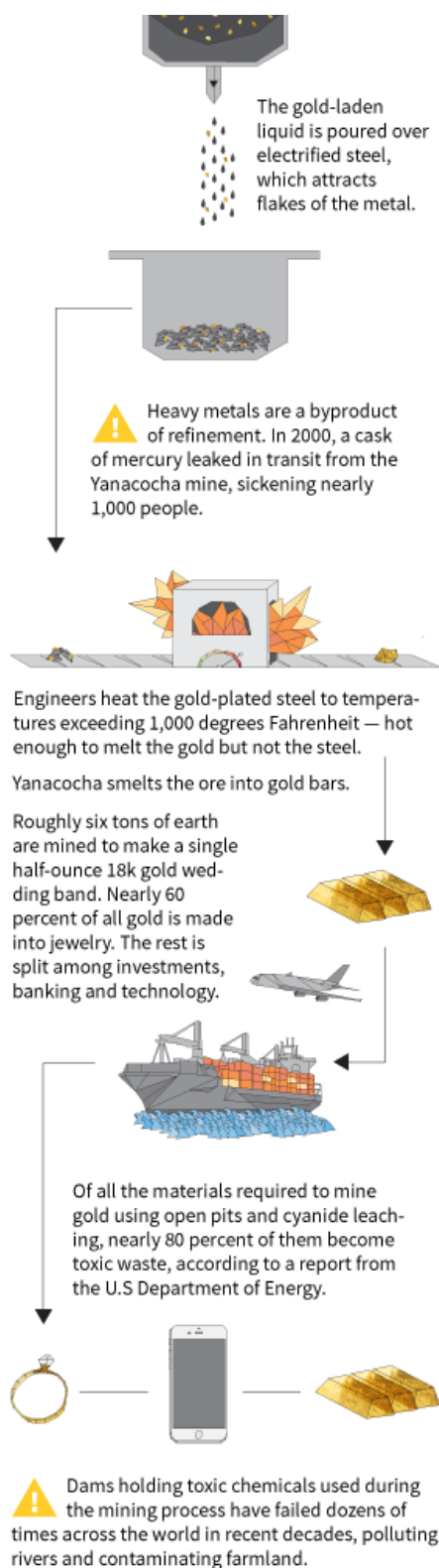
the finely ground ore is directly leached in tanks to dissolve the gold in [the] cyanide solution. When gold is recovered in a conventional plant with leaching in tanks, the barren solution will be collected along with the solid wastes (tailings) in a tailings

The High Cost of Gold

Yanacocha, like most modern gold mines, uses a process called cyanide-heap leaching to extract tiny bits of ore from rock. Mining engineers begin by blasting apart hills and other formations, creating deep pits.

⚠ Nitrates from explosives used in blasting can wash into streams.





impoundment system.¹⁰⁶

Following both leaching methods, the gold-bearing or “pregnant” solution is pumped to a gold recovery plant. There the solution is placed into tanks, and small grains of activated carbon are added to the mix. The gold bonds with the carbon, and the solution is then pushed through micro-screens to isolate the gold-bearing carbon. The cyanide solution is recycled to the extent practicable, while the residual pulverized rock is moved as slurry to “tailings ponds”—usually on or near the mining site—for disposal as hazardous waste.¹⁰⁷

The carbon-gold compound then moves to a “stripping vessel,” where an acidic solution breaks the chemical bond. The solution is forced through another set of micro-screens that separate the carbon grains, which also are recycled. The remaining solution then undergoes the process of “electrowinning” or “electroextraction”: It is poured into a container known as a “cell,” and an electric current is run through the solution, causing the gold to collect on the negative terminals.¹⁰⁸

The recovered gold then is smelted—i.e., the negative terminals are placed in a furnace at approximately 1150 degrees Celsius. A compound known as “flux” is added to the molten material, causing the gold to separate from the metal used to make the terminals. The gold is then poured into molds and cooled into “doré bars,” which are ready for export and additional refining, or, in the rare case that refining happens in the source country, refining and then export.¹⁰⁹

All told, a modern gold mine typically consists of

Figure 2-10: Heap leaching illustration, © 2015 Huffington Post

the mining pit (or pits), the separation and refining facilities, spoils areas (or overburden), tailings ponds (slurry and waste after the chemical leaching process), power plants, water storage reservoirs, cyanide containment ponds, roads, offices, and other buildings. The footprint of an integrated mining operation therefore is vastly larger than the mine pit itself. For example, the Pueblo Viejo site, including tailings reservoirs, spoils areas, and milling and gold separation facilities—as well as the two open pits—occupies approximately 11 km².¹¹⁰

The construction, operation, closure and cleanup of large-scale mines present many challenges, both economic and environmental. The next chapter reviews the environmental risks and socioeconomic externalities of modern gold mining.

¹ Both this chapter and the following chapter focus on open-pit mining because it presents the greatest risks to the environment and to communities located in the vicinity (as well as downwind and downstream) of gold mining. In debates about whether and how gold mining should occur, it is important for both the Haitian government and the Haitian people to understand the potential magnitude of the risks posed by the exploitation of their mineral resources.

² RONALD EISLER, BIOGEOCHEMICAL, HEALTH, AND ECOTOXICOLOGICAL PERSPECTIVES IN GOLD AND GOLD MINING 8 (2004).

³ *Id.*

⁴ *Id.*

⁵ Leia Michele Toovey, *An Overview of Epithermal Gold Deposits*, INVESTING NEWS (Mar. 21, 2011), <http://investingnews.com/daily/resource-investing/precious-metals-investing/gold-investing/an-overview-of-epithermal-gold-deposits/>. Alluvial gold, though small, is usually larger than epithermal gold found in bedrock. The average diameter of alluvial gold particles is the range of 300 microns to 1.5 millimeters. In contrast, the average diameter of epithermal gold particles is less than 100 microns, with some deposits containing microscopic particles less than 3 microns in diameter. *Id.* In 1961, two Newmont employees named John Livermore and J. Alan Coope became the first individuals to identify and assay this “invisible gold” in the Carlin Trend in the state of Nevada. Valerie J. Nelson, *John Livermore Dies; Geologist Who Found “Invisible Gold” was 94*, L.A. TIMES (Mar. 2, 2013), <http://articles.latimes.com/2013/mar/02/local/la-me-john-livermore-20130303>.

⁶ Toovey, *supra* note 5.

⁷ *Id.* Gold also may be present at trace to minor levels in deeper “porphyry” copper deposits. “Porphyry deposits are the world’s most important sources of copper and molybdenum, and can contain major quantities of gold, silver, and tin.” BRUCE ROHRLACH, CHARACTERISTICS OF PORPHYRY COPPER DEPOSITS, SOLGOLD 1 (no date), http://www.solgold.com.au/userfiles/201207_Characteristics%20of%20Porphyry%20Copper%20Deposits.pdf. As with epithermal gold, porphyry deposits are commonly “distributed along ‘convergent’ tectonic margins, where oceanic tectonic plates subduct down into the earth’s mantle.” *Id.* The depth of most porphyry deposits is one to six kilometers, making them inaccessible to artisanal miners. *Id.* “These deposits typically comprise hundreds of millions to billions of metric tonnes of ore and are exploited by bulk mining techniques. Due to their large size, [porphyry] mine lives typically span decades.” *Id.* at 3. Because some of the world’s gold mines are also copper mines (and vice versa), the authors will occasionally refer to copper mining later in this Report where it is relevant to the analysis of gold mining.

⁸ EISLER, *supra* note 2, at 8.

⁹ *Id.* at 8–9.

¹⁰ Jacob Kushner, *In One Haitian Village, a Gold Rush*, PULITZER CENTER (June 7, 2012), <http://pulitzercenter.org/reporting/haiti-gold-rush-lakwev-villagers-mining-hand-tunnels>; Jane Regan, *Haiti’s Rush for Gold Gives Mining Firms a Free Rein Over the Riches*, THE GUARDIAN (May 30, 2012), <http://www.theguardian.com/global-development/poverty-matters/2012/may/30/haiti-gold-mining>.

¹¹ Regan, *supra* note 10.

¹² Kushner, *supra* note 10.

¹³ News Release, Eurasian Minerals Inc., Eurasian Minerals Acquires Two Gold Projects in Haiti (July 31, 2006), <http://www.eurasianminerals.com/s/news.asp?ReportID=619044>; *Granted Permits*, VCS MINING, <http://vcsmining.com/Granted-permits.html> (last visited Oct. 14, 2015).

¹⁴ See GJC Notes of Community Meetings with Residents of Lakwè, in Northeast Department, Haiti (March 4, 2013) [hereinafter Lakwè Community Meeting (March 4, 2013)] (on file with the New York University School of Law Global Justice Clinic).

¹⁵ *Id.*

¹⁶ Regan, *supra* note 10. See also Lakwè Community Meeting (March 4, 2013), *supra* note 14.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Regan, *supra* note 10. See also Lakwè Community Meeting (March 4, 2013), *supra* note 14 (on file with the New York University School of Law Global Justice Clinic).

²¹ Lakwè Community Meeting (March 4, 2013), *supra* note 14.

²² *Id.*

²³ EARTHWORKS & OXFAM AMERICA, DIRTY METALS: MINING, COMMUNITIES AND THE ENVIRONMENT 4 (2004), http://www.earthworksaction.org/files/publications/NDG_DirtyMetalsReport_HR.pdf.

²⁴ See Jane Perlez & Kirk Johnson, *Behind Gold's Glitter: Torn Lands and Pointed Questions*, N.Y. TIMES (June 14, 2010), <http://www.nytimes.com/2005/10/24/world/behind-golds-glitter-torn-lands-and-pointed-questions.html>. In more technical terms, the “average tenor [i.e., percentage content] of gold ore is 0.2 to 0.3 troy ounces per metric ton [of rock].” EISLER, *supra* note 2, at 165.

²⁵ The information in this section is based on MARK LOGSDON, TECHNICAL MEMORANDUM: INTRODUCTION TO MINING EXPLORATION AND ITS POTENTIAL ENVIRONMENTAL IMPACTS (Feb. 2, 2015) (unpublished memorandum) (on file with the New York University School of Law Global Justice Clinic).

²⁶ For a discussion of the four types of mining permits issued in Haiti and a brief description of the activities they authorize, see Chapters I and V.

²⁷ Eurasian Minerals Acquires Two Gold Projects in Haiti, *supra* note 13; *Granted Permits*, VCS MINING, *supra* note 13.

²⁸ See, e.g., NEWMONT MINING CORP., NEWMONT HAITI EXPLORATION FACT SHEET (Aug. 2012), http://207.195.224.31/sites/default/files/Newmont%20Haiti_FACT%20SHEET%20Final.pdf; see generally TUCKER BARRIE, MAJESCOR RESOURCES, TECHNICAL SUMMARY REPORT SOMINE PROPERTY, NORTHEAST HAITI (Oct. 2009), <http://www.majescor.com/uploads/technical%20summary%20report.pdf>; Allison Shelley, *Inside the Clintons' Haiti*, POLITICO (Apr. 26, 2015), <http://www.politico.com/magazine/gallery/2015/04/inside-the-clintons-haiti-000148?slide=9> (photograph of a container with “VCS” on it).

²⁹ Majescor is a Canadian company that holds interest in the Haitian company SOMINE via its wholly owned subsidiary, SIMACT Alliance Copper Gold. Residents in areas where Majescor-SOMINE operated identify the company by the name “SOMINE.”

³⁰ Newmont Mining Corporation was a partner in a joint venture (JV) with Eurasian Minerals. The joint venture operated through subsidiaries Newmont Ventures Limited S.A. and Marien Mining. In 2012, however, Newmont relinquished rights to the Grand Bois property. Eurasian Minerals holds exclusive interest over the Grand Bois research permit and operates through its subsidiary Ayiti Gold. And, as noted below, on November 2, 2015 Eurasian Minerals announced that it had signed an agreement with Newmont to sell its interests in the JV properties. See News Release, Eurasian Minerals Inc., Eurasian Minerals Sells Haiti Joint Venture Interests for US \$4 Million and an NSR Royalty (Nov. 2, 2015), <http://www.eurasianminerals.com/s/news.asp?ReportID=728617>.

³¹ VCS Mining is an American company that operates with its Haitian subsidiary, Delta. Residents in areas where VCS/Delta have explored for gold refer to the company as “Delta.”

³² In addition to Majescor, Newmont, Eurasian, and VCS, as of 2014 the American company Caribbean General Trading (CGT) holds three prospection permits in Northeast Haiti. There is little public information about CGT and, to the authors' knowledge, the company has not conducted any exploration activity. Some have accused CGT of receiving permits unlawfully. See *Mines d'Or et de Cuivre, les « contrats sont illégaux et inconstitutionnels »*, LE NOUVELLISTE (Jan. 22, 2013), <http://lenouvelliste.com/lenouvelliste/article/112782/Mines-dOr-et-de-cuivre-les-contrats-sont-illegaux-et-inconstitutionnels>.

³³ Press Release, Majescor Resources Inc., Majescor Signs Definitive Agreement for Sale of Haitian Assets, (Sept. 2, 2015), <http://www.majescor.com/en/news/current.aspx?listingid=207>.

³⁴ See Eurasian Minerals Sells Haiti Joint Venture Interests for US \$4 Million and an NSR Royalty, *supra* note 30.

³⁵ See *Décret encourageant la prospection minière sur toute l'étendue du territoire de la République et adaptant les structures juridiques existantes aux réalités de l'industrie minière*, LE MONITEUR : JOURNAL OFFICIEL DE LA RÉPUBLIQUE D'HAÏTI, no. 19 (March 8, 1976) [hereinafter 1976 Mining Decree], <http://www.bme.gouv.ht/mines/loimin/decminiére.pdf>.

³⁶ *Id.* art. 16.

³⁷ *Haiti Overview*, EURASIAN MINERALS, <http://www.eurasianminerals.com/s/haiti.asp> (last visited Oct. 5, 2015).

³⁸ News Release, Eurasian Minerals Inc., Eurasian Minerals Inc. Acquires Grand Bois Gold Deposit Property, Haiti (Jan. 26, 2009), <http://www.eurasianminerals.com/s/news.asp?ReportID=619074>.

³⁹ News Release, Eurasian Minerals Inc., Eurasian Minerals Inc. Acquires 27 Exploration Licenses in Haiti and the Historic Meme Copper-Gold Mine (Dec. 17, 2008), http://www.eurasianminerals.com/i/pdf/2008_12_17_NR.pdf.

⁴⁰ News Release, Eurasian Minerals Inc., Eurasian Minerals Identifies New Exploration Targets and Adds to Land Position in Haiti (Nov. 1, 2011), http://www.eurasianminerals.com/i/pdf/2011-11-01_NR.pdf.

⁴¹ News Release, Eurasian Minerals Inc., Savane La Place Gold Zone Extended with 96 meters at 2.5 g/t Au, La Miel Project, Haiti (Nov. 7, 2007), http://www.eurasianminerals.com/i/pdf/2007-11-02_NR.pdf.

⁴² Eurasian Minerals Acquires Two Gold Projects in Haiti, *supra* note 13.

⁴³ News Release, Eurasian Minerals Inc., EMX Acquires Treuil Copper Porphyry Project in Haiti (April 2, 2007), http://www.eurasianminerals.com/i/pdf/2007-04-02_NR.pdf.

⁴⁴ Eurasian Minerals Inc. Acquires 27 Exploration Licenses in Haiti and the Historic Meme Copper-Gold Mine, *supra* at note 39.

⁴⁵ News Release, Eurasian Minerals Inc., EMX Outlines Significant Copper-in-Soil Anomaly at the Vert de Gris Porphyry Copper-Gold Prospect, Haiti (July 20, 2010), http://www.eurasianminerals.com/i/pdf/2010-07-20_NR.pdf.

⁴⁶ Majescor claims to hold four prospection permits in the Douvray and Faille B areas, covering 400 km². News Release, Majescor Resources Inc., Majescor Announces the Closing of the 1st Tranche of a Non-Brokered Private Placement for \$2,585,000 (Mar. 2, 2012), <http://majescor.com/en/news/current.aspx?listingid=147>. This information was confirmed by SOMINE. See Letter from Michel Lamarre, Chief Executive Officer for SOMINE, to Margaret Satterthwaite, Director, Global Justice Clinic (Aug. 28, 2015) [hereinafter SOMINE Letter] (on file with the New York University School of Law Global Justice Clinic). Director of the BME, Ludner Remarais, stated in an interview, however, that SOMINE

never made the required security deposit for the prospection permits, nor demonstrated that it has the fiscal resources to carry out the work required under the permit. For these reasons, Director Remarais said that he considers SOMINE to no longer possess prospection permits. See GJC Notes of Meeting with Ludner Remarais, Director, BME, in Port-au-Prince, Haiti (Sept. 23, 2015) [hereinafter Remarais Meeting Notes] (on file with the New York University School of Law Global Justice Clinic).

⁴⁷ *Convention Minière Entre L'État Haïtien et La Société Minière Ste. Geneviève Haïti S.A.* Février 1997, LE MONITEUR : JOURNAL OFFICIEL DE LA REPUBLIQUE D'HAÏTI, no. 2 (May 3, 2005), <http://haitigrassrootswatch.squarespace.com/storage/Mining.Convention-St.Genevieve.pdf>.

⁴⁸ See Remarais Meeting Notes, *supra* note 46 (providing information regarding VCS permit holdings).

⁴⁹ See *id.*

⁵⁰ See *id.*

⁵¹ See *id.*

⁵² *About Us*, VCS MINING, <http://vcsmining.com/about-us.html> (last visited Oct. 2, 2015).

⁵³ *Morne Bossa*, VCS MINING (Dec. 30, 2012), <http://vcsmining.com/flagship-property.html>. Milot is known for its proximity to Haiti's Citadelle, the largest fortress in the Americas and a UNESCO world heritage site. *National History Park*, WORLD HERITAGE SITE, <http://www.worldheritagesite.org/sites/nationalhistorypark.html> (last visited Oct. 2, 2015). Haitians built the Citadelle in the years after independence to protect their nation from a French incursion. *Id.*

⁵⁴ See *id.*

⁵⁵ *Haiti Economy: Gold Mining Exploitation Permit – Morne Bossa*, HAITI LIBRE (Dec. 26, 2012), <http://www.haitilibre.com/en/news-7491-haiti-economy-gold-mining-exploitation-permit-morne-bossa.html>.

⁵⁶ *Morne Bossa*, VCS MINING, *supra* note 53. VCS states on its website that it submitted these technical and feasibility reports in 2013, but the link to the reports on the website is not functional. See *VCS Mining, Mineral Acquisition & Exploration*, VCS MINING, <http://vcsmining.com/contact-us.html> (last visited Oct 4, 2015). The exploitation permit is valid for a term of 5 years and, under the 1976 Mining Decree, may be renewable (up to a maximum of 25 years) until the commencement of commercial production. If and when production begins, the exploitation permit would be converted automatically into a concession. See 1976 Mining Decree, *supra* note 35; see also Chapter V (discussing the permitting regime under the 1976 Mining Decree).

⁵⁷ The journalists visited Morne Bosse following reports that Tony Rodham, brother of former U.S. Secretary of State Hillary Clinton, was appointed to the VCS board of directors. See Kevin Sullivan & Rosalind S. Helderman, *Role of Hillary Clinton's Brother in Haiti Gold Mine Raises Eyebrows*, WASH. POST (Mar. 20, 2015), http://www.washingtonpost.com/politics/role-of-hillary-clintons-brother-in-haiti-gold-mine-raises-eyebrows/2015/03/20/c8b6e3bc-cc05-11e4-a2a7-9517a3a70506_story.html.

⁵⁸ In its press release responding to media reports about Mr. Rodham and Mr. Jean Max Bellerive, former Prime Minister of Haiti, VCS management was quoted as saying: "We continue to seek partners for the development of this project. We believe we can offer appealing terms to investors interested in developing the natural resource base of Haiti and the additional social and economic benefits that accrue to a sustainable, job creating eco-friendly development of the rich treasures existing in Haiti." See Press Release, VCS Mining, VCS Mining Responds to Recent Media Reports (Mar. 6, 2015), <http://vcsmining.com/assets/files/VCS%20Mining%20Responds%20to%20Recent%20Media%20Reports.pdf>.

⁵⁹ In September 2013, VCS agreed to sell a 15 percent equity interest to Canada Rare Earth Corporation for \$1.1 million. This share purchase agreement is subject to Canadian regulatory approval. See Tracy Moore,

Canada Rare Earth to Acquire 15% of VCS Mining, STOCKWATCH (Sept. 27, 2013), <http://www.stockwatch.com/News/Item.aspx?bid=Z-C:LL-2108932&symbol=LL®ion=C>.

⁶⁰ See *infra* Chapters IV & V (addressing the economics of modern mining and the legal framework for mining in Haiti).

⁶¹ Majescor Signs Definitive Agreement, *supra* note 33.

⁶² *Id.*

⁶³ MAJESCOR RESOURCES, THE SOMINE PROJECT, HAITI: BUILDING SHAREHOLDER VALUE BY PARTICIPATING IN THE DEVELOPMENT OF AN EMERGING AND GOLD AND BASE METAL DISTRICT (no date), [http://www.majescor.com/uploads/somine-projectoutline\[1\].pdf](http://www.majescor.com/uploads/somine-projectoutline[1].pdf).

⁶⁴ Press Release, Majescor Resources Inc., Majescor's Haitian Partner Somine SA Awarded Mining Exploitation Permits For Douvray Porphyry Copper-Gold And Faille B Vein Gold Projects, Northeast Haiti (Dec. 21, 2012), <http://www.majescor.com/en/news/2012news.aspx?listingid=171>.

⁶⁵ Ayiti Gold is also a subsidiary of Eurasian. Ayiti Gold operates in Grand Bois. See Eurasian Minerals Inc. Acquires Grand Bois Gold Deposit Property, *supra* note 38.

⁶⁶ See Eurasian Minerals Inc. Acquires 27 Exploration Licenses in Haiti and the Historic Meme Copper-Gold Mine, *supra* note 39; see also News Release, Eurasian Minerals Inc., Eurasian's Regional Strategic Alliance Lands in Haiti Selected for Designated Project Status (Jan. 18, 2011), http://www.eurasianminerals.com/i/pdf/2011-01-18_NRB.pdf.

⁶⁷ See Eurasian Minerals Acquires Two Gold Projects in Haiti, *supra* note 13.

⁶⁸ Eurasian Minerals Inc. Acquires 27 Exploration Licenses in Haiti and the Historic Meme Copper-Gold Mine, *supra* note 39; see also News Release, Eurasian Minerals Inc., Eurasian Proposes to Carry Out a Private Placement and Form a Haiti Regional Exploration Alliance with Newmont Ventures Limited (Feb. 1, 2008), http://www.eurasianminerals.com/i/pdf/2008-02-01_NR.pdf.

⁶⁹ Eurasian Minerals Inc. Acquires Grand Bois Gold Deposit Property, *supra* note 38.

⁷⁰ *Eurasian Minerals Inc. Summary of Proposed Investment*, INTERNATIONAL FINANCIAL CORPORATION, http://ifcext.ifc.org/ifcext/spiwebsite1.nsf/ProjectDisplay/SPI_DP27409 (last visited Nov. 15, 2015).

⁷¹ See Email from Staff of International Financial Corporation to GJC (Nov. 2, 2015, 1:58 PM EST) (on file with the New York University School of Law Global Justice Clinic).

⁷² News Release, Eurasian Minerals Inc., Eurasian's Regional Strategic Alliance Lands in Haiti Selected for Designated Project Status (Jan. 18, 2011), http://www.eurasianminerals.com/i/pdf/2011-01-18_NRB.pdf.

⁷³ *Id.*

⁷⁴ News Release, Eurasian Minerals Inc., Eurasian Minerals Provides an Update on the Programs in Haiti (Aug. 6, 2013) http://www.eurasianminerals.com/i/pdf/NR_Haiti-update_Aug2013-Final.pdf.

⁷⁵ *Id.*

⁷⁶ 1976 Mining Decree, *supra* note 35, art. 12. See Chapter V for further discussion of the legal framework for mining in Haiti.

⁷⁷ See Chapter V for further discussion of the legal framework for mining in Haiti.

⁷⁸ See Eurasian Minerals Provides an Update on the Programs in Haiti, *supra* note 74 (stating that the government deferred consideration of Eurasian's request for research permits, pending revision of the mining law).

⁷⁹ *Id.*

⁸⁰ Letter from Nicholas Cotts, External Relations Group Executive, Newmont Mining Corp., and David Cole, President and CEO, Eurasian Minerals Inc., to Margaret Satterthwaite, Director, Global Justice Clinic (Apr. 1, 2015) [hereinafter Newmont-Eurasian Letter] (on file with the New York University School of Law Global Justice Clinic).

⁸¹ *Id.*

⁸² *Id.* Newmont was engaged with Barrick in negotiations to merge the two companies, but these negotiations terminated in late April 2014. See Alistair MacDonald & John W. Miller, *Frustration Builds for Newmont Investors*, WALL ST. J. (July 8, 2014), <http://www.wsj.com/articles/frustration-builds-for-newmont-investors-1404863572>.

⁸³ See Eurasian Minerals Sells Haiti Joint Venture Interests for US \$4 Million and an NSR Royalty, *supra* note 30.

⁸⁴ *Id.*

⁸⁵ See Remarais Meeting Notes, *supra* note 47.

⁸⁶ See REMI BOSC & C.T. BARRIE, MAJESCOR RESOURCES, DOUVRAY PORPHYRY COPPER DEPOSIT MINERAL RESOURCE ESTIMATE, NI 43-101 TECHNICAL REPORT (Jan. 30, 2013), [http://www.majescor.com/uploads/43-101%20douvray%20majescor%2020130228%20\(2013-03-01\)-1.pdf](http://www.majescor.com/uploads/43-101%20douvray%20majescor%2020130228%20(2013-03-01)-1.pdf); see also *Asset Portfolio: Haiti*, EURASIAN MINERALS, <http://www.eurasianminerals.com/s/Haiti.asp> (last visited Oct. 2, 2015); *Morne Bossa*, VCS MINING (Dec. 30, 2012), <http://vcsmining.com/flagship-property.html>. As Eurasian Minerals has explained: "The geology of northern Haiti is prospective for epithermal and porphyry type mineral deposits, and consists of the preserved remnants of a Cretaceous island arc assemblage situated along the northern margin of the Caribbean Plate. This geologic environment hosts numerous gold, copper, copper-gold and copper-gold-silver occurrences and prospects in Haiti, as well as the Barrick-Goldcorp Pueblo Viejo gold mine in the adjacent Dominican Republic. Even though Haiti's geology and mineral potential is similar to that found in the Dominican Republic, it has remained relatively underexplored." *Haiti: Overview*, EURASIAN MINERALS, <http://www.eurasianminerals.com/s/Haiti.asp> (last visited Oct. 2, 2015).

⁸⁷ See REMI BOSC & C.T. BARRIE, *supra* note 86. Majescor/SOMINE has stated that its other gold and copper claims appear to be epithermal or porphyry deposits. "Copper is usually found associated with the porphyritic facies, the microtonalitic apophyses, and the silicified zones, filling fissures and fractures, as well as disseminated. Within the quartz vein systems, the copper is contained in the chalcopryite, while the gold appears both as native gold and as a very fine disseminated gold in the sulphide zone. It can also form spectacular concentrations on the oxidized cap. The native gold is usually found associated with chlorite, as well as in grains of pyrite and chalcopryite. A second generation of gold is usually found associated to the quartz and the chlorite. The gold content is extremely variable." THE SOMINE PROJECT, *supra* note 63.

⁸⁸ *Morne Bossa*, VCS MINING, *supra* note 86.

⁸⁹ Eurasian Minerals Inc. Acquires Grand Bois Gold Deposit Property, *supra* note 38.

⁹⁰ ROBERT BORST, CHESTER MOORE & ANDRE VILLENEUVE, ROCK SOLID RESOURCES, TECHNICAL REPORT ON THE PUEBLO VIEJO PROJECT, SANCHEZ RAMIREZ PROVINCE, DOMINICAN REPUBLIC (Mar. 16, 2012), <http://www.sec.gov/Archives/edgar/data/756894/000119312512137641/d325661dex991.htm>.

⁹¹ *Pueblo Viejo Mine Tour*, BARRICK GOLD CORPORATION (Feb. 28, 2013), <http://s1.q4cdn.com/808035602/files/presentation/2013/Barrick-Pueblo-Viejo-Tour.pdf>.

⁹² *The Mining Process: Designing and Constructing a Mine*, NEWMONT, <http://www.newmont.com/operations-and-projects/mining-education/the-mining-process/default.aspx> (last visited Oct. 6, 2015).

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ EARTHWORKS & OXFAM AMERICA, *supra* note 23.

⁹⁶ *Id.*

⁹⁷ *The Mining Process: Designing and Constructing a Mine*, *supra* note 92.

⁹⁸ *Id.*

⁹⁹ *History of the Super Pit*, KCGM, <http://superpit.com.au/about/history/> (last visited Nov. 20, 2015). Kalgoorlie Consolidated Gold Mines (KCGM), which manages the Super Pit for the Barrick-Newmont joint venture, recently announced that when active mining concludes in 2019, “the Pit will reach a depth of around 700 metres.” *Id.*

¹⁰⁰ *Pueblo Viejo Mine Tour*, *supra* note 91.

¹⁰¹ *Id.*

¹⁰² MARK J. LOGSDON ET AL., INTERNATIONAL COUNCIL ON METALS AND THE ENVIRONMENT, THE MANAGEMENT OF CYANIDE IN GOLD EXTRACTION 8 (1999), <http://www.icmm.com/document/124>.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 8–9. A newer method, called “agglomeration,” uses large drums both to pulverize the crushed rock into smaller and more uniform fines. “As the ore fines are agglomerated, the [sodium-cyanide] solution can be sprayed throughout the drum and mixed thoroughly with the ore fines. This creates further increased efficiency benefits, as the solution can begin to concentrate around the ore fine agglomerates, furthering the efficiency of the leach.” Carrie Carlson & Shane Le Capitaine, *Agglomeration Drums in the Heap Leaching Process*, FEECO INTERNATIONAL, <http://feeco.com/2012/04/23/agglomeration-drums-in-the-heap-leaching-process> (last visited Nov. 20, 2015).

¹⁰⁶ LOGSDON ET AL., *supra* note 102.

¹⁰⁷ Eisler, *supra* note 2, at 163–84.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* “Doré bars are unrefined gold bullion bars containing anywhere from 60 to 95 percent gold.” *The Mining Process: Ore Processing*, NEWMONT, <http://www.newmont.com/operations-and-projects/mining-education/the-mining-process/default.aspx?LanguageId=1> (last visited Nov. 20, 2015). Mining companies normally export the doré bars to a specialized facility for further refining and processing into gold bars of at least 99.5% purity that they then sell on the market. See GOLD BARS WORLDWIDE, CATEGORIES OF GOLD BARS 7 (2011), http://www.goldbarsworldwide.com/PDF/BG_10_Categories.pdf.

¹¹⁰ *The Metamorphosis of the Margajita River*, BARRICK BEYOND BORDERS (Nov. 12, 2013), <http://barrickbeyondborders.com/environment/2013/11/the-metamorphosis-of-the-margajita-river>.

III. The Environmental Risks of Mining

Gold mining poses risks to many aspects of the environment. Some of these risks are present even in the earliest phases of exploration. Mineral exploration may interfere with existing surface uses; the construction of roads and other exploration infrastructure can displace farming and livestock grazing. Additionally, the test drilling can pollute both surface waters and groundwater. Although these surface disruptions may occur over a broad swath of potentially mineral-bearing land, their effects are relatively localized and temporary—at least in comparison to the actual mining that may follow.

The construction and operation of a modern mine fundamentally alter existing surface uses and resources. Forests are cut down, farmland is dug up or covered over, residents are forced to relocate, and other incompatible surface uses are either terminated or relocated beyond the perimeter of the mining site.¹ Mining also causes harm beyond the boundaries of the mine. These “spillover” effects include air and water pollution, as well as disruption of surface and groundwater resources. The environmental and socioeconomic impacts of mining usually last for decades—both during mineral production and following closure of the mine.

This chapter reviews some of the most important environmental risks of gold mining over the entire life span of a modern mine.

A. Environmental Risks of Mineral Exploration

Mineral exploration encompasses a broad array of activities, from the initial exploratory examination of an area for potential mineral resources to the beginning phases of mine construction.² Exploration usually begins with aerial surveys to identify potentially mineral-bearing soils, followed by on-site analysis of surface rocks. If the results are promising, the mineral prospectors proceed to test drilling and assay of the subterranean samples.³ This land-based prospecting often requires the construction of access roads, creation of drilling grids,⁴ excavation of trenches, temporary placement of drilling equipment, and establishment of on-site mineral assessment work areas.

1. Test Drilling and Related Construction

Construction and drilling during the exploration phase can cause or exacerbate a variety of environmental problems. Road construction and excavation of trenches can lead to erosion that may cause sedimentation of waterways and contaminate surface and groundwater.⁵ These activities can also release into the environment previously inert toxic substances contained in the underlying bedrock. These releases are a form of toxic mine drainage (TMD), as discussed in more detail below.⁶

As noted in Chapter II, epithermal gold deposits frequently occur in hills and mountains. To facilitate test drilling, the prospecting companies often must build flat, firm areas on which to place their drilling and assay equipment. The waste rock produced by these activities must be well managed. A cautious drilling program would fill boreholes and trenches immediately after drilling, stockpile topsoil to be replaced after the drilling is complete, and include an erosion management and restoration plan for test drilling areas and roads.⁷

2. Risks to Soil

Mineral exploration can also cause harm to the soil and topsoil that support native vegetation and allow for the cultivation of crops. Topsoil contains humus, the organic rich residue of decayed vegetation. In tropical regions with high rainfall, such as Haiti, surface runoff erodes the topsoil, especially on hillsides. The result is that tropical soils are typically thin and poor in humus and other nutrients.⁸

Mineral exploration and road construction often require excavation that removes and sometimes damages the topsoil. Subsequent erosion of the disturbed soil may exacerbate these losses, which are often irreversible. Careful planning and construction management may mitigate the damage, however. If topsoils are properly handled, they can be stockpiled and used during subsequent activities to reclaim the land.

3. Risks to Water Resources

In addition, mineral exploration poses two risks to surface and groundwater: chemical contamination and reduction of water quantity. Exploratory test drilling (of boreholes) can intersect geologic faults and fractures, altering the movement of groundwater and disrupting flows to springs and surface streams. These boreholes can also create flow pathways between previously isolated water-bearing formations, thereby altering subsurface flows, reducing water supplies available to local communities, and potentially diminishing water quality and quantity. In addition, exploration boreholes can degrade groundwater quality by introducing reactive gases and bacteria into adjacent aquifers.⁹

The most serious potential impact of mineral exploration on water quality is TMD.¹⁰ This toxic drainage occurs when long-inert chemical compounds are disturbed during test drilling and related construction and are released into groundwater and surface streams. TMD is acidic and contains high concentrations of solids (such as selenium and other salts), major and minor ions (e.g., sulfates and nitrates), and metals and metal-like elements, including aluminum, arsenic, copper, cadmium, lead, manganese, selenium, and zinc.¹¹ The exact composition of TMD varies depending on the chemical composition of the rock disturbed by the test drilling.

Although the volume of TMD produced by mineral exploration is not as great as that produced during subsequent mine construction or exploitation, TMD released by test drilling and related construction may nonetheless have significant adverse effects on adjacent and downstream water

users. These effects can include pollution of surface and groundwater, with consequent risks to drinking water, bathing and swimming water, and fisheries.

Some release of TMD is an inevitable aspect of test drilling. But the production of TMD can be mitigated by plugging and capping boreholes so that air and water cannot migrate into the holes and so that the boreholes cannot provide a shortcut for TMD to reach aquifers. Regrading drill pads and roads to restore the overburden and topsoil—and thus to facilitate revegetation—is also standard practice in the 21st Century mining industry.

These mitigation measures are most effective when implemented promptly after mineral exploration is completed at the disturbed area. It is therefore essential that the mining companies have approved rehabilitation plans in place before exploration access is granted. Comprehensive databases and geographic information system documentation of exploration areas and status of rehabilitation are important tools that should accompany plans and permits.

4. The Debated Environmental Impacts of Mineral Exploration in Haiti

Many residents of mining-affected communities have complained that mineral exploration activities have hurt agriculture.¹² Some farmers have reported that exploratory activity destroyed their avocado and orange trees, coffee plants, yams, and other crops.¹³ Some of these individuals received financial compensation for their losses; some did not.¹⁴ Numerous residents have reported to the Global Justice Clinic of New York University School of Law (GJC) that their crops have not grown back or have grown back in a depleted state.¹⁵ Many of those who received compensation feel that it was insufficient, given what appear to be lasting effects.¹⁶ They fear that future mining activity may further affect their crop production and, as a consequence, impinge on their economic and social welfare. The authors have not been able to confirm or negate claims related to destruction of land and crops.

5. Communities' Experiences with Majescor-SOMINE

Between 2010 and 2012, Majescor Resources Inc.-Société Minière du Nord-Est S.A. (Majescor-SOMINE) conducted activities permitted under their prospection and research permits.¹⁷ Majescor-SOMINE drilled 18 holes, each of which was 300 to 400 meters deep.¹⁸ Twelve of the 18 drill sites predated Majescor-SOMINE; the United Nations Development Programme had constructed them in the 1970s.¹⁹ To access the six new drill sites, Majescor-SOMINE improved and extended existing roads and built footpaths to the drill pads.²⁰ Majescor-SOMINE noted that it used portable drill rigs to minimize environmental impact.²¹

Majescor and SOMINE have each claimed, independently of one another, that the activities it conducted between 2010 and 2012 had no adverse environmental impacts.²²

Some residents from communities in the area where Majescor-SOMINE operated, however, have complained that mining activity affected their crops and has rendered some land barren.²³

Farmers have reported that the land where the company operated, now more than three years ago, is still “*sèch*”—barren.²⁴ GJC received no evidence that the land is dry because of mineral exploration²⁵ as opposed to climatic conditions, but neither has Majescor-SOMINE disclosed baseline or before-and after-exploration monitoring data to refute these claims.

A number of residents have also told GJC that they have not been fairly compensated for what they have experienced as lasting damage to their farmland.²⁶ Numerous residents of Patricko and Roche Plat also complained that Majescor-SOMINE left gaping holes (see Figure 3-1) in their communities.²⁷ They said that these holes were a safety risk to the community; residents worried that children and animals could fall into them.²⁸ At a forum hosted by Oxfam in June 2013, a community organizer told the audience about the holes.²⁹ An engineer with Majescor-SOMINE also at the forum denied the allegations. The organizer then showed the photo included as Figure 1.



Figure 3-1: Patricko resident and unfilled drill hole, © 2015 Ellie Happel

Residents reported that in the month or so following this event, Majescor-SOMINE employees returned to Patricko and Roche Plat to fill in the holes.³⁰ In an exchange with GJC, SOMINE wrote that some holes “were forgotten to be filled” and added that it filled the holes as soon as it was aware of the situation.³¹

The Technical Summary Report³² for the SOMINE property prepared for Majescor-SOMINE in October 2009 recommended that during year 1 of exploration activities, Majescor-SOMINE implement: “Initial environmental baseline studies for subsurface and surface groundwater, noise and dust levels, and year-round weather conditions.”³³ The Technical Report specified that during year 2 Majescor-SOMINE should initiate “social and cultural studies on the effect of advanced exploration and potential mine development on local communities, in consultation with the Haitian government.”³⁴

A little over three years later, Majescor-SOMINE presented its full NI 43-101 Technical Report for its Douvray property. The report similarly recommended that Majescor implement:

“[E]nvironmental, ecological, and social impact studies which should be comprehensive and include baseline environmental monitoring, preliminary geotechnical assessment and detailed mapping of overburden and soils, acid generation accounting, dust emission,

water balanced and hydrology and community consultations.”³⁵

Majescor-SOMINE has confirmed that none of the aforementioned studies has begun.³⁶ (See Chapter II for a discussion of Majescor-SOMINE activities. Note that in September 2015, Majescor redeemed the bulk of its shares in SOMINE.³⁷)

6. Communities’ Experiences with Newmont-Eurasian³⁸

Between 2009 and 2012, exploration activities by the Newmont Mining Corporation-Eurasian Minerals Inc. joint venture (Newmont-Eurasian) included those conducted under its research permit in Grand Bois³⁹ and under its prospection permits in La Montagne.⁴⁰ In a letter to GJC, Newmont-Eurasian explained that:

At every exploration project, Newmont and Eurasian make a concerted effort to avoid land disturbance. Where disturbance is unavoidable, we provide fair compensation that is mutually agreed upon by both the company and the affected property owner. No crop or tree was damaged without compensation, and we made every effort to minimize cutting of trees.⁴¹

A. GRAND BOIS

Newmont-Eurasian “built a camp, drilled 34 holes, excavated 8 shallow trenches, collected 4,146 surface samples, and conducted 24.3 kilometers of geophysical surveys on a grid pattern⁴² at Grand Bois.”⁴³ Newmont-Eurasian said that it reclaimed drill pads, trenches, and access paths at Grand Bois, in accordance with its environmental standards. Newmont-Eurasian explained that its environmental program “includes extensive procedures for reclamation of exploration disturbances from soil sampling, rock sampling, and drilling.”⁴⁴ In addition, the company stated that it continues to monitor Grand Bois for environmental impacts.⁴⁵ In response to a request by GJC for baseline environmental data, Newmont-Eurasian replied by explaining that while it collected data for more than 26 water quality parameters it would disclose only “indicative results” concerning a subset of parameters to GJC.⁴⁶

Residents of Bojè, a community in Grand Bois, complained that their crops have not grown as well since Newmont-Eurasian operated there. One woman stated that, in the past several years she can no longer grow watercress or bananas.⁴⁷ In written response to community allegations that activities in Grand Bois have affected the fertility of the land, Newmont-Eurasian explained



Figure 3-2: Newmont-Eurasian drill site, Grand Bois, © 2013 Ben Depp

that while it had paid for land disturbance, “[a]ll of our exploration activities have had no measurable impact on the environment.”⁴⁸

Further, Newmont-Eurasian stated that it renovated an existing path to its basecamp, specifically for Kubota four-wheel-drive, all-terrain vehicles. It added: “[C]ommunity members appreciated our improvements and used this path daily with motorcycles, bicycles, and by foot.”⁴⁹ In addition, Newmont-Eurasian constructed a footbridge, which residents use daily, over the Limbe River.

Many residents cited the road as a reason why they are skeptical that Newmont-Eurasian will fulfill their promise to benefit the community. One man said: “They told us they would build a road. But the road they built is only good for the special cars of the company. Motorcycles and trucks can’t use it.”⁵⁰

B. LA MONTAGNE

Newmont-Eurasian operated in La Montagne under a prospection permit, which does not permit drilling. Newmont-Eurasian claims that its activities had “no environmental impact” to the La Montagne area, noting that it did not drill⁵¹ in La Montagne and took only surface samples, an activity that “does not make any disturbance.”⁵² Newmont-Eurasian indicated that its activities in the La Montagne area included:

the construction of a camp, collection of 5,500 surface samples, geological mapping, airborne geophysical surveys, and 34.4 kilometers of geophysical surveys. We also upgraded 21.5 kilometers of existing pathways to allow for ATV access.⁵³

Many residents of communities in the La Montagne area have said that they believe the exploration activity has hurt the land and made farming more difficult. One woman explained that in the area around the Vert de Gris base, the land had changed since exploratory activities began.

Resident of La Montagne Speaks

You see that in the 4th Section of Jean Rabel,⁵⁴ mining has changed the land. There are fewer trees. You can’t grow things. We all live off of the land. If it does not produce for us, we are not good, not good at all.⁵⁵

While many residents reported receiving compensation from Newmont-Eurasian for damaged crops, numerous residents complained that this compensation was inadequate.⁵⁶

Newmont-Eurasian wrote that “the La Montagne project followed a thorough plan for community engagement” that included “formal community meetings to present project updates.”⁵⁷ Further, Newmont-Eurasian stated that it “provide[s] fair compensation that is mutually agreed upon by both the company and the affected property owner.” Newmont-Eurasian noted that other companies drilled in the area in 1957 and from 1972 to 1975.⁵⁸ It added:

[T]he residents who mentioned environmental impacts are referring to historical drilling from the 1970s. Surface sampling does not make any disturbance and laying of wire disturbs a minimal area of about one meter wide from foot traffic.⁵⁹

Newmont-Eurasian stated that, in line with its minimal footprint philosophy, it completed environmental baseline studies “to measure water, air and soil quantity and quality and to identify flora and fauna species of concern” at every project.⁶⁰ The company added that such data can help ensure that it restores the land to a similar or improved state.⁶¹

GJC asked Newmont-Eurasian for baseline and monitoring data concerning areas where Newmont-Eurasian has conducted exploration activities. It provided only a “high level summary of our baseline efforts”—information that was too vague to be useful in assessing the concerns residents shared about possible lasting impacts of the companies’ activities.⁶² As noted above, drilling is not the only activity that can have lasting impacts. Damage to soil resulting from construction and earth removal can be long-lasting if remediation is either incomplete or unsuccessful.

B. Environmental Risks of Mine Construction and Exploitation

No company has yet constructed a mine in Haiti. The risks involved in this phase of mining are provided here to inform discussions about the future of mining in Haiti. There are many risks associated with mine construction and mineral development,⁶³ including air and water pollution, increased competition for water, contamination of property, and exposure to toxic substances. These risks, as well as the magnitude of potential harm, increase as the mining projects proceed from exploration to construction to exploitation. Although many mining companies around the world have taken steps to reduce these risks and to mitigate environmental harm, modern large-scale mining remains an inherently dangerous activity that presents serious and unavoidable risks both to public health and to agriculture, fisheries, and other beneficial uses of the lands and waters adjacent to and downstream or downwind of the mines themselves.

1. Dust

Mine and infrastructure construction creates dust, which may cause respiratory distress for downwind communities. Water may be used to suppress dust during construction of roads and

other mining-related infrastructure, but this usage can strain local surface and groundwater sources.⁶⁴

2. Water Use and Water Contamination

Modern gold and copper mines require large amounts of water for almost all aspects of their operations, including comminuting the ore-bearing rock, leaching, transporting slurry, maintaining tailings ponds, and separating and refining gold.⁶⁵ Gold and copper mining in Chile has created or exacerbated water shortages, provoking protests from local communities and farmers.⁶⁶ In turn, these shortages have diminished the generation of hydroelectricity needed to power the mines, increased energy costs, and led several mining companies to seek alternative water sources, including desalinated ocean water.⁶⁷ Water shortages and water contamination caused by copper mining in water-scarce regions have caused conflicts with domestic and agricultural water users in Peru and the United States, as well.⁶⁸

In addition, the removal of water from a mine may harm neighboring landowners and water users by lowering the groundwater table around the mine and causing existing wells to fail.⁶⁹ In some cases, groundwater extraction can dry up wetlands and cause surface streams to disappear.⁷⁰ The discharge of groundwater from the mine pit may also cause flooding in the receiving water streams, which can impair in-stream uses (such as swimming, bathing, and watering livestock) and destroy farmland downstream.⁷¹

The most enduring harm of mine construction and operation, though, results from the excavation and disposal of the overburden and ore-bearing rock. When such rock is dug out of the earth, sulfides in the rock are exposed to air and water. The sulfur reacts with the water and oxygen to form sulfuric acid (H_2SO_4). Oxidation, weathering, and erosion cause the sulfuric acid “to leach from the source rock until the sulfides are leached out—a process that can last for centuries.”⁷² The exposure of the rock to air and water also causes the release of a variety of heavy metals and other toxic elements. Depending on the geology of the area, these may include copper, cadmium, iron, zinc, aluminum, arsenic, selenium, manganese, chromium, mercury, and lead. As described above, this TMD contaminates the groundwater beneath the mine pit and “is often transported from the mining site by rainwater or surface drainage into nearby watercourses where it severely degrades water quality, killing aquatic life and making water virtually unusable.”⁷³

Majescor-SOMINE, Newmont-Eurasian, Eurasian, and VCS Mining LLC (VCS) with its subsidiary Delta Société Minière S.A. (Delta), have confirmed that the mineral deposits and surrounding rock beneath their permitted areas contain significant concentrations of various sulfides.⁷⁴ These findings are consistent with the gold and copper deposits at Pueblo Viejo, in the Dominican Republic, where TMD has been a serious problem for decades.⁷⁵ As Barrick Gold Corporation (one of the co-owners of Pueblo Viejo) has observed, a high volume of precipitation falls on Hispaniola during the rainy season.⁷⁶ The heavy rainfall makes it especially important to

contain and treat mine pollutants on-site, before they enter adjacent streams and groundwater basins.

TMD may also directly pollute surface waters through discharges of water from the mining site itself. As the mining pit is excavated, it will eventually reach the groundwater table, and the mine operator will have to pump the groundwater from the mine to maintain access to the ore deposits.⁷⁷ This excess water is usually transported by pipeline or canal to adjacent streams, where it is discharged and comingled with the native surface water. Because the groundwater contains acids, metals, salts, and other potentially hazardous substances found in the displaced rock from the mine pit, these discharges can pollute surface waters, poison fish, contaminate drinking water, and imperil agriculture.⁷⁸ Treatment of the TMD before it percolates into the groundwater or is discharged into surface streams can mitigate some of these potential harms.⁷⁹

Finally, the excavation and disposal of millions of tons of rock can cause significant problems of sedimentation in the streams and rivers that flow away from the mining site. If not contained in carefully engineered and monitored impoundments, overburden and tailings from the mine can be eroded by wind and surface water running over the site and carried into surface waterways. As this sediment accumulates over time, it can clog riverbeds and both raise and widen rivers.⁸⁰ Increased sediment levels from mining, deforestation, construction, and other land use activities can kill fish by reducing the oxygen content of the rivers, covering the sand and gravel beds in which they spawn, and fouling their habitat.⁸¹ Sedimentation can also reduce the carrying capacity of the rivers and cause flooding of adjacent lands⁸²—especially when the overburden and mine tailings are placed in upper-valley headwaters of river systems instead of being contained on-site.⁸³

C. Mineral Processing and the Environment: Cyanide, Smelting, and Pollution of Water and Air

Although mineral processing will not begin for some time in Haiti, the risks it entails must be considered as decisions are made about mining. As described in Chapter II, after the ore-bearing rock is excavated, it is crushed and moved to facilities where the gold is separated from the surrounding rock, quartz, and metals to which it is bonded. The processes of transporting, comminuting, chemically separating, and refining the gold into doré bars also present significant environmental risks.

1. Transport

Comminution and transport of gold-bearing rock contribute to air pollution around and downwind of the mine site by generating fine particulates of dust. These particulates—especially those 10 microns in diameter or smaller—present a variety of risks to human health. Known as PM₁₀, they “generally pass through the throat and nose and enter the lungs. Once inhaled, these particles can affect the heart and lungs and cause serious health effects.”⁸⁴ Numerous scientific studies have linked inhalation of particulates to premature death in individuals with heart or lung

disease and to nonfatal heart attacks, irregular heartbeat, aggravated asthma, decreased lung function, and adverse respiratory symptoms, such as irritation of the airways, coughing, and difficulty breathing.⁸⁵ As with dust from mine construction and excavation, this milling dust can be suppressed with constant watering, which may place strains on surface and groundwater sources.

2. Cyanide Processing

The most serious environmental risk of the ore refinement process, however, arises from the use of a cyanide solution to chemically separate the gold from the sulfides and other metals and compounds to which it is bonded. Sodium cyanide (NaCN) and potassium cyanide (KCN) are highly toxic both to humans and to fish and other wildlife.⁸⁶

Cyanide is a very fast-acting poison that is capable of killing a person within minutes if he or she is exposed to a sufficiently high dose. Humans may be exposed to cyanide by inhalation, ingestion or absorption through the skin. Cyanide prevents oxygen from being used by the cells, causing tissue hypoxia and “cyanosis” (a bluish discolouration of the skin). The respiratory system fails to nourish the cells with oxygen, a condition which, if untreated, causes rapid, deep breathing followed by convulsions, loss of consciousness and suffocation.⁸⁷

In addition, cyanide exposure “may lower vitamin B₁₂ levels and hence exacerbate vitamin B₁₂ deficiency. It has also been linked to an increased incidence of goitre (cretinism) in Zaire [the Democratic Republic of the Congo] through effects on iodine uptake by the thyroid. Those with nutritional inadequacy or inborn metabolic errors are particularly vulnerable.”⁸⁸

As described in Chapter II, modern open-pit mines use large quantities of cyanide to recover the gold from low-grade ore deposits.⁸⁹ To separate the gold from the compounds to which it is bonded, “a dilute cyanide solution is sprayed on crushed ore that is placed in piles, commonly called heaps, or mixed with ore in enclosed vats. The cyanide attaches to minute particles of gold to form a water-soluble, gold-cyanide compound from which the gold can later be recovered.”⁹⁰ Following leaching, the residual pulverized ore is transported to storage areas, commonly called “tailings ponds, for disposal as hazardous waste.”⁹¹

Although the tailings ponds are designed to contain the processing waste, they do not eliminate all risks of harm to the environment and public health. The water in the tailings ponds may attract birds and other wildlife; and ingestion of this polluted water can poison them. For example:

Between 1983 and 1992 at least 1018 birds representing 47 species were killed when they drank cyanide-poisoned water from heap leach solution ponds at a gold mine in the Black Hills of South Dakota [in the United States]. In 1995, heap leach ponds from this site overflowed after heavy rains, spilling into a nearby creek with fatal results to all resident

fishes. Many species of migratory birds, including waterfowl, shorebirds, passerines, and raptors, were found dead in the immediate vicinity of gold mine heap leach extraction facilities and tailings ponds, presumably as a result of drinking the cyanide-contaminated waters.⁹²

There can also be unintended releases of polluted water and sediment from tailings ponds. Some of these releases are the result of insufficient storage capacity. Over time, the ponds may fill with water from rainfall and surface runoff, which can cause water contaminated with cyanide, acids, metals, and other pollutants to overflow into surface streams.⁹³ “Major spills occurred . . . in Latvia and Kyrgyzstan in the 1990s. Failure of gold mine tailings ponds killed one child in Zimbabwe in 1978 and 17 people in South Africa in 1994 after a heavy rainfall.”⁹⁴ In Colorado, in the United States:

[O]verflows of 760,000 L of NaCN-contaminated water from storage ponds into natural waterways killed all aquatic life along 28 km of the Alamosa River. In 1990, 40 million [liters] of cyanide wastes from a gold mine spilled into the Lynches River in South Carolina from the breached containment pond after heavy rains, killing an estimated 11,000 fish.⁹⁵

It is also not uncommon for cyanide and other pollutants to escape from the tailings ponds as a result of dam failure, tears and punctures in the plastic lining, or human error. The 1995 cyanide spill from the Omai gold mine, in Guyana, into the Omai and Essequibo Rivers was one of the world’s largest releases of cyanide. As reported by the Guyanese government:

Massive leaks developed in the tailings pond dam of Omai Gold Mines shortly before midnight on Saturday August 19 causing a discharge of tailings pond effluent containing up to 28 ppm cyanide and 1 ppm copper to the environment. Initial flow rates were estimated to be as much as 90,000 cubic meters per hour. By the time the flow was finally stopped on August 24, over 100 hours later, it is estimated that some 4 million cubic meters of effluent entered the Omai River, a stream a few meters wide, and flowed along it for about a mile [1.6 km] before entering the Essequibo River.⁹⁶

The discharges killed fish for about 80 kilometers downstream of the mine and contaminated drinking water and irrigation supplies.⁹⁷ An investigation by the Pan American Health Organization found that “[a]quatic life along the Omai River, and its entry into the Essequibo River was completely destroyed.”⁹⁸ Although the spill “did initially pose some health risk to scattered populations estimated at 100-200 persons for the first 25 miles along the Essequibo River,” there were no reported cases of cyanide poisoning in humans.⁹⁹

Another large spill occurred in 2000, from Esmeralda Exploration’s Aurul gold refining plant, in Baia Mare, Romania, on a tributary of the Danube River. This spill polluted the waters of three nations.

[A] dike holding millions of liters of cyanide-laced wastewater gave way at a gold extraction operation in northwestern Romania . . . , sending a waterborne plume into a stream that flows into the Someș, a Tisza [River] tributary that crosses into Hungary. At least 200 tons of fish were killed, and endangered European otters and white-tailed sea eagles that ate the tainted fish were threatened. After devastating the upper Tisza, the 50-km-long pulse of cyanide and heavy metals spilled into the Danube River in northern Yugoslavia, killing more fish before the now-dilute plume filtered into the Danube delta at the Black Sea, more than 1000 km and 3 weeks after the spill. This entire ecosystem was previously heavily contaminated by heavy metals from mining activities. Villages close to the accident were provided with alternate water sources. Hungarian officials were most concerned that heavy metals in the Tisza River might enter flooded agricultural areas, with subsequent accumulation by crops and entry into the human food chain.¹⁰⁰

Esmeralda Exploration filed for bankruptcy the following year, in advance of litigation seeking damages for the discharges and consequent pollution.¹⁰¹



Figure 3-3: Fish killed by cyanide spill in Tisza River, © 2015 Wikimedia Commons

Although there have been improvements in the use and containment of cyanide and other hazardous substances used in or produced by modern gold mining, the risk of off-site release of pollutants persists.

In August 2014, for example, a waste containment dam at the Imperial Metals Mount Polley gold and copper mine, in Canada, breached, releasing “10.6 million cubic metres of water, 7.3 million cubic metres of tailings and 6.5 million cubic metres of interstitial water laden with toxic arsenic, nickel and lead.”¹⁰² The force of the spill widened Hazeltine Creek below the dam from approximately 1.5 meters to more than 100 meters and deposited the toxic sludge into Quesnel Lake and the surrounding forest.¹⁰³ An independent engineering review panel subsequently concluded that a weak layer in the foundation caused the dam’s failure.¹⁰⁴ Imperial Metals has spent approximately C\$67 million to clean up the spillage, repair the damaged creek bed, and monitor water quality in area lakes. The provincial government has paid an additional C\$6 million in cleanup costs.¹⁰⁵





Figure 3-4: Aerial view of Mount Polley Mine, before and after dam breach, Visible Earth NASA via © 2015 Wikimedia Commons

On August 6, 2014—just two days after the Mount Polley breach—the Buenavista del Cobre copper mine, owned by Grupo Mexico, spilled 40,000 cubic meters of copper sulfate acid into the Sonora and Bacanuchi rivers in northern Mexico.¹⁰⁶

The contamination turned the waterways orange and affected the water supply of 24,000 people in seven communities along the rivers, forcing schools to close for several weeks while environmental authorities clean up the mess; 322 wells were shut down and more than 3 million liters of water have been distributed in trucks and bottles. Authorities place the cost of the total cleanup in the ‘hundreds of millions or billions’ of Mexican pesos.¹⁰⁷

In November 2015, a dam burst at an iron mine in southeastern Brazil, operated by a subsidiary of two mining companies, Vale SA and BHP Billiton Ltd. The breach unleashed “50 million tons of highly toxic mud and mining waste, covering an area the size of 25,000 Olympic pools,” causing extensive damage and injury, and cutting off drinking water for a quarter of a million people.¹⁰⁸ It has been called the worst environmental disaster in Brazil’s history.

Nor are these isolated incidents. A recent report from the Center for Science in Public Participation, which studied mine spills from 1940 to 2010, identified 33 tailings pond failures

around the world from 1990 through 2010 that caused significant environmental harm and in some cases loss of life.¹⁰⁹ According to the authors, the total social cost of just seven of these failures was \$3.8 billion, with an average cost of \$543 million per breach. “These losses, according to dam committee reports and government accounts[,] are almost all the result of failure to follow accepted practice.”¹¹⁰

The report goes on to predict that there will be 23 similar tailings dam failures globally between 2010 and 2020 that will inflict a total of \$7 in social costs.¹¹¹ The authors of the report acknowledge that there “have been some new technologies—e.g., dry stack and paste tailings and the more prevalent use of center line over upstream dam designs which offer the potential for lower consequence in the event of failure, and perhaps a lower overall risk of failure.”¹¹² Nevertheless, they conclude:

[M]any of the same features of modern mining that create economic feasibility in lower grades of ore also pose greater challenges for the management of mine waste and waste water. One of the manifestations of these challenges overall is a greater frequency of Very Serious tailings dam failures with significant levels of social and economic consequence, sometimes non remediable.¹¹³

3. Smelting

The final stage of refinement—the smelting of the raw gold to produce doré bars—presents an additional environmental risk. The smelting of ore at high temperatures removes the remaining impurities in the gold and thus produces toxic air pollution that may harm humans and animals directly via inhalation and indirectly via contamination of croplands and water resources.

Common airborne pollutants from the smelting of base and precious metals include sulfur dioxide, nitrogen oxides, carbon monoxide, carbon dioxide, volatile organic compounds, dioxins, acid mist, and particulate matter.¹¹⁴ All of these pollutants are hazardous to human health and welfare and are strictly regulated in many countries.¹¹⁵ Sulfur dioxide and nitrogen oxides are precursors to acid rain, which can harm crops and forests and cause acidification of lakes and streams.¹¹⁶ Carbon monoxide and dioxins are acute toxins. Carbon dioxide is the principal greenhouse gas.¹¹⁷

4. Heavy Metals and Metal-Like Elements

The metals and metalloids embedded in the fine particulates pose special risks to mine employees and to individuals and communities located downwind of the mine and smelting facilities. These metals and metal-like elements may include aluminum, arsenic, cadmium, chromium, copper, germanium, indium, lead, mercury, nickel, selenium, silver, thallium, tin, and zinc.¹¹⁸ Human poisoning may occur by inhalation, by ingestion of water into which the particulates have settled, or by consumption of fish and domesticated animals that have themselves ingested the pollutants.¹¹⁹

Arsenic is an air pollutant of special concern, because even at small levels of exposure it “has potential human health hazards, including skin cancer, stomach cancer, respiratory tract cancer, hearing and vision impairment, melanosis, leucomelanosis, keratosis, hyperkeratosis, edema, gangrene, and extensive liver damage.”¹²⁰ One of the most severe cases of airborne arsenic deposition was documented in Ghana in the 1970s, where the Obuasi gold smelting facility emitted approximately 17 tons of arsenic daily. Arsenic concentrations in the soil were elevated in the vicinity of the smelter and gradually declined to background levels at distances of “7 to 15 km from the site, depending on wind direction and velocity. Freshwaters in the vicinity of the smelter had grossly elevated concentrations of arsenic, and were considered unfit for aquatic life, irrigation, and . . . human consumption.”¹²¹

To protect public health and to minimize this type of damage, it is essential for contemporary mineral processors to deploy the best technology available to remove the conventional and hazardous pollutants and prevent their release into the air. Smelter emissions “can be controlled effectively using scrubbers, electrostatic precipitators, and baghouses in smelters, which are capable of removing up to 99.7% of the dust and fumes produced during roasting and smelting.”¹²² Although the technology “has improved considerably over the past half century, . . . smelters still produce a great deal of air pollution, especially oxides of nitrogen and sulfur, components of smog and acid rain.”¹²³

As described in the next section, pollution from arsenic and metals and metalloids continues to pose risks to human health and the environment long after mining and processing are completed. These pollutants can continue to leach from the mine pit and waste spoils areas for centuries after the mine is closed.

Box 3-1: Green(er) Mining

Mining is inherently unsustainable: The ore that is extracted cannot be replenished. Unearthing and processing minerals consumes a large amount of energy and water and may contaminate water, air, and soil. As the environmental consequences of mining have been better documented and understood by the public, actors have encouraged more rigorous regulation of the extractive sector aimed at more effectively mitigating its negative impacts. Some companies have responded by researching mining techniques that could have fewer adverse effects on the environment. The term “green mining” has been used to describe new technologies that

enable companies to extract metals while reducing the ecological footprint of mining.¹²⁴

“Green mining” is not a term of art; there is currently no institution that certifies whether any given mining technology or practice is “green.” There are, however, a number of initiatives that draw attention to the environmental impacts of mining. These initiatives, which arguably promote “greener” practices, include efforts to research, monitor, assess, and, in some cases, even certify mining companies based on measures of environmental and social sustainability.¹²⁵

Notable examples include the Mining, Minerals and Sustainable Development (MMSD)¹²⁶ project, which was active between 2000 and 2002; the ongoing Initiative for Responsible Mining Assurance (IRMA),¹²⁷ which was launched in 2006; and the Mining Association of Canada’s Towards a Sustainable Mining (TSM) initiative, which has been active since 2004.¹²⁸ In addition, a number of voluntary frameworks have been created, encouraging compliance with elevated environmental standards.¹²⁹

IRMA participants include mining companies, non-governmental organizations, and individuals representing labor, affected communities, and “downstream users” (companies that purchase the metals to transform them into retail products such as jewelry). IRMA aims to improve the social and environmental performance of the mining sector.¹³⁰ Beginning in 2016, IRMA will certify mine sites via an independent, third-party mechanism that verifies whether a company has implemented IRMA standards, including pollution control, land reclamation after mine closure, and social safeguards.¹³¹

TSM: The Mining Association of Canada (MAC) launched the “Towards a Sustainable Mining” initiative “to enable mining companies to meet society’s needs for minerals, metals and energy products in the most socially, economically and environmentally responsible way.”¹³² Membership in the

TSM is mandatory for all MAC members and requires each company to commit to comply with the guiding principles and report on their performance each year. The performance of every MAC mine site is externally verified every three years.¹³³ Although TSM does not require the implementation of any particular technology, it does require compliance with protocols concerning management of energy use and greenhouse gas emissions¹³⁴ and tailings disposal.¹³⁵

Technologies

If green(er) mining means simply a reduction in environmental impacts, then a number of technologies qualify as “greener.” One example is the portable drilling rig. The portable rig eliminates the need to construct access roads and is smaller than a traditional drilling rig, therefore reducing the impact of the rig pad on flora, fauna, and soil.¹³⁶ Biomining is the use of bacteria in the mineral extraction process. Bioleaching, the use of bacteria to separate metals from ore, is another example of a “greener” technology. Bioleaching has occurred naturally for centuries but only in the 1980s did companies begin to intentionally use microorganisms as an alternative to heap leaching.¹³⁷ Although bioleaching emits less carbon dioxide, requires less water, and does not use cyanide, it can still cause toxic mine drainage including the leakage of sulfuric acid, arsenic, and other heavy metals into water resources.¹³⁸ Biomining may also have economic advantages over traditional leaching methods because it extracts comparatively more minerals from tailings and other waste byproducts. Biomining accounts for approximately 15 percent of worldwide copper mining and 3 percent of gold mining.¹³⁹

Companies have invested in research and development to promote technologies that lessen the environmental impacts of extractive activities. Majescor Resources has indicated that SOMINE has explored the possibility of future collaboration with the Canadian corporation Dundee Sustainable Technologies on a green mining project.¹⁴⁰ Dundee is developing

technologies that reduce cyanide and arsenic use in mineral extraction. The company reportedly has created a “cyanide-free gold extraction process”¹⁴¹ and a process to sequester arsenic by vitrification (the transformation of a substance into a glass).¹⁴² These technologies remain in the development phase, however, and have not yet been used in commercial mining.¹⁴³

Limitations

On their own, technologies that mitigate environmental damage do not guarantee better environmental outcomes. Rigorous regulation and enforcement is often a prerequisite to cleaner mining practices.¹⁴⁴ A ten-year review of the MMSD Project found that government capacity-building was an “ongoing challenge” to maximizing the contribution of mining to sustainable development.¹⁴⁵ In the context of gold exploration and extraction in Haiti, actors cannot count on the Haitian government to enforce rigorous standards (see *infra* for a discussion of the lack of capacity of the Haitian government to effectively manage the environment).

Extractive industry actors claim notable improvements in the past few decades, as governments increasingly regulate mining activity¹⁴⁶ and new methods and technologies permit companies to operate with a lighter footprint.¹⁴⁷ Improvements are scattered and largely voluntary, however, with no clear agreement about what “green” mining is and how it should be measured.¹⁴⁸ So long as mineral extraction continues to cause environmental degradation and disasters—even in countries with strong regulatory frameworks such as the United States,¹⁴⁹ Canada,¹⁵⁰ and Brazil¹⁵¹—“green mining” remains an aspiration.

D. Mine Closure and the Environment: Surface Rehabilitation and the Persistence of Water Pollution and Threats to Public Health

Large open-pit gold mines have long lives, of which the period of extraction or active operations represents but a fraction. The owners of the Pueblo Viejo mine, for example, estimate that it will produce gold and copper for more than 25 years.¹⁵² When the economically mineable ore has been dug out and processed, the mine must be closed, surface resources restored, and remnant pollutants contained to the extent feasible. These actions are expensive, and there is a long, worldwide history of mining companies' failure to rehabilitate abandoned sites and to mitigate the environmental legacies of mining.¹⁵³

If a closed mine is left unrestored, the open pit becomes an attractive nuisance for neighboring residents (especially children) and their livestock.¹⁵⁴ To prevent people and animals from entering or falling into the pit, the area around the mine must be fenced off and guarded in perpetuity. Failure to backfill the mining pit also renders the area unfit for prior (or new) surface uses.

Moreover, as noted above, many open-pit mines are excavated beneath the groundwater table. In such mines, the groundwater must be pumped out of the pit as the minerals and surrounding rock are excavated. When these mines are closed and the water pumps are turned off, the groundwater fills in the pit and forms an artificial lake (see adjacent photographs of the Berkeley Pit). Because the surrounding rock contains sulfides, arsenic, and other heavy metals that leach into the water, the lake water becomes toxic over time. This polluted water may mix with and contaminate other groundwater. Heavy rains may cause the water in the pit to overflow into surface streams below the site, causing additional harm to water used for drinking, bathing, livestock watering, and irrigation.

One of the most documented (and visited) closed mines is the Berkeley Pit—the remnant of the Anaconda copper mine, located in Butte, Montana, in the United States. The Berkeley pit is approximately 1.6 kilometers by 2.4 kilometers in surface area and approximately



Figure 5: The Berkeley Pit, over time, ©2013, <http://pitwatch.org>

542 meters deep. It sits atop a series of deep, underground mine tunnels. When the mine closed, in 1982, and the pumps were shut off, surface and groundwater flooded the pit and tunnels. The water in the pit is more than 300 meters deep, and water continues to flow into the pit at a rate of more than 9.3 million liters per day. “The water in the Berkeley Pit is highly acidic and high in concentrations of arsenic, copper, cadmium, cobalt, iron, manganese, zinc, and sulfate, plus other inorganic constituents.”¹⁵⁵ Indeed, the water is so acidic and toxic that it may have caused the death in 1995 of 342 migrating snow geese that landed on the waters of the pit and died soon after.¹⁵⁶

The Berkeley Pit is located within the city limits of Butte and is adjacent to residential and commercial neighborhoods. To keep people from harm, the pit is closed to public access and managed as a Superfund site under U.S. and Montana law.¹⁵⁷ The water level in the pit is currently about 30 meters below the level at which it would begin to spill into and contaminate aquifers that supply water for drinking and irrigation to the city of Butte and adjacent landowners.¹⁵⁸ To prevent this spillage from occurring, the Montana Bureau of Mines and Geology, ASARCO (the successor to Anaconda Copper), and Montana Resources (which uses water from the Berkeley Pit in its Continental copper and molybdenum mine), have constructed a system of surface water diversion facilities, pumps, water treatment plants, and monitoring stations that prevent surface water from entering the pit and remove and treat excess groundwater from the pit.¹⁵⁹ These water diversion, pumping, and treatment facilities will have to be maintained in perpetuity. The U.S. Department of Justice estimates that the total costs of cleanup and pollution management at the site will be \$110 million.¹⁶⁰

Although it is not possible to restore a closed gold mine to its pre-mining state, the mine owners and operators should be required to rehabilitate the mining site and to contain and monitor the residual waste rock and mine tailings, as well as the tailings ponds and other areas from which pollutants could migrate off-site. The Montana Department of Resources’ mine rehabilitation policies are illustrative:

Commonly, an open pit mine is active for the entire life of the pit, only reclaimed when it becomes dormant. Montana Resources practices concurrent reclamation, reclaiming as soon as possible while mining operations continue. Soil is saved and stockpiled whenever it is available. Completed waste rock dumps undergo surface shaping, being recontoured to prescribed slopes in a layer thickness determined by the slope profile. The result creates grassy rolling hills inhabited by deer and other wildlife.¹⁶¹

Mine rehabilitation is expensive, and the anticipated costs must be included in the planning and permitting for the mining. For example, Kennecott Copper’s Flambeau mine, which operated in Wisconsin, in the United States, from 1993 to 1997, produced more than 181,000 tons of copper, 3.3 million ounces of silver, and 334,000 ounces of gold throughout its lifetime.¹⁶² The minerals generated \$341 million in gross revenues and a net income of \$126 million during the life of the mine.¹⁶³ Reclamation began in 1999; 60 hectares (0.6 km²) have been restored, while approximately 13 hectares (0.13 km²) of former waste and tailings piles remain to be

rehabilitated.¹⁶⁴ The reclaimed area includes 6.4 kilometers of walking trails, an equestrian trail, forests, wetlands, and native grasses.¹⁶⁵ The total costs of the rehabilitation to date are \$20 million.¹⁶⁶

Until recently, mine closure was “a low priority for most countries, as evidenced by the large numbers of abandoned mines that exist in virtually every major mining country.”¹⁶⁷ Thus, few countries have enacted legislation or regulations that provide for comprehensive mine closure. Yet all “mining countries have a major problem with abandoned mines and to date none have devised an appropriate and cost-effective means of dealing with the issue.”¹⁶⁸ As a result, reclamation and rehabilitation measures such as backfilling, recontouring, revegetation, and pollutant stabilization and neutralization are the exception, not the norm.¹⁶⁹ Although mine rehabilitation and surface restoration will not prevent the long-term leaching and escape of toxic pollutants from the site, these actions can help to stabilize and contain the sources of pollution, reduce TMD, minimize dust emissions, prevent erosion, and allow for resumption of some surface uses.

The consequences of mine abandonment and inadequate mine closure are wide-ranging and severe. For example, the waters of California’s Sacramento-San Joaquin River and Delta system, including San Francisco Bay, continue to suffer from sedimentation, mercury pollution, and TMD more than 125 years after most of the gold mines closed.¹⁷⁰ A recent Earthworks study of hardrock mining across the United States found that 40 mines—most of which are closed or abandoned—generate 17 to 27 billion gallons (64,352,000,000 to 102,206,118,000 liters) of TMD each year.¹⁷¹ The report estimates that the aggregate cost of treating this polluted effluent is \$57 billion to \$67 billion annually.¹⁷² Earthworks states that this TMD is “in perpetuity,” which, in context, describes “water pollution that will continue for hundreds or thousands of years, or for which government agencies can’t predict a point at which water quality standards will be met without treatment.”¹⁷³

A large percentage of these long-term containment and treatment costs will be borne by the states and the federal government. In a 2004 study, the U.S. Environmental Protection Agency (USEPA) “identified 156 hardrock mining sites nationwide that have the potential to cost between \$7 billion and \$24 billion total to clean up (at a maximum total cost to EPA of approximately \$15 billion).”¹⁷⁴

This shifting of costs from the mining companies to the public is the result of several factors. The USEPA found that companies and regulators tended to underestimate both the amount of TMD that a site would produce and the costs of containing and treating the pollution.¹⁷⁵ Moreover, many of the companies responsible for the pollution are unable to pay for these costs over the long term. As the USEPA has reported, although a “potentially responsible party has been identified at 83 percent of the hardrock mining sites [in the United States], uncertainties about the complete nature of these parties’ liabilities and their ability to pay for cleanup actions over the extreme long-term counteract the positive news that many [responsible parties] have been identified.”¹⁷⁶

Some companies have declared bankruptcy and have defaulted on their obligations; few were required to post performance and rehabilitation bonds as a condition of mining.¹⁷⁷ Even in those cases where a security was posted, the annual containment and treatment costs often exceed the funds provided by the bond.

For example, at the Zortman-Landusky abandoned gold mine, in the state of Montana, the mining company was required to post an environmental surety bond of \$32 million to ensure long-term compliance with state and federal water quality standards. The company declared bankruptcy in 1998, and heavy metals, cyanide, arsenic, lead, and other pollutants continue to leach into groundwater and surface streams. Although the bond provides \$750,000 (per year to cover the costs of containing and treating these pollutants, the actual annual costs have averaged \$1.5 million. State taxpayers have had to make up for the shortfall.¹⁷⁸

Indeed, the costs of inadequate mine closure and abandonment are sometimes borne by successor corporations. The Pueblo Viejo mine is an example. As noted above, the current owners—Barrick and Goldcorp—acquired the mine in 2006. Barrick has stated that the “previous operator of Pueblo Viejo closed the operation in 1999 without proper environmental remediation, leaving a legacy of polluted soil and water.”¹⁷⁹ What was previously the State-owned Rosario mine had no containment of stormwater runoff, and acids and heavy metals leached out of the pit and the surrounding rubble piles into the Margajita River. This polluted drainage caused the river to turn red in color with acid, rendering its waters unsafe for drinking, bathing, watering of livestock, and other uses.¹⁸⁰

Pueblo Viejo Dominicana Corporation (PVDC), a subsidiary of Barrick and Goldcorp, now operates the mine. PVDC has “assumed responsibility for environmental remediation of areas within the mine development boundary,” while the Dominican government has “retained responsibility for remediation of areas outside the mine development boundary, including the Cumba and Hondo areas and tailings storage facilities built by the previous operator, such as the Mejita and Las Lagunas tailings dams.”¹⁸¹

At the Pueblo Viejo mine site, PVDC has constructed a sophisticated water treatment facility that removes and neutralizes the legacy pollutants before discharging the treated effluent into the Margajita River.¹⁸² The company has also removed 180,000 cubic meters of contaminated soil left by the prior mine owner and has recontoured and replanted 35 square kilometers of land. In addition, PVDC has agreed “to provide \$75 million to fund the clean-up of historical liabilities that are the responsibility of the Dominican government.”¹⁸³

According to Barrick, within a few days of the treatment plant going online, water quality in the Margajita River was restored to safe levels. “Instead of dark red, the water turned clear, reflecting its natural state. The water’s pH level climbed dramatically and, more recently, there are early signs of aquatic life returning to the river.”¹⁸⁴ There have been reports that the new Pueblo Viejo mine is now polluting the Margajita, however, both with TMD and cyanide, and water quality

sampling by the Dominican environmental ministry has “found the water in the Margajita river downstream from the mine to be highly acidic, with copper and other pollutants above legal limits.”¹⁸⁵

Barrick has responded by noting that the Margajita River “is fed by several tributaries, some of which are impacted by naturally occurring ARD [acid rock drainage] due to the presence of sulfide in the rocks, as well as ARD from historic mining operations.”¹⁸⁶ It has also stated that while PVDC “monitors downstream water quality in the Margajita together with local communities, the company is not responsible for treating downstream water or the tributaries that feed this section of the river, as these areas fall well outside the mine development boundary.”¹⁸⁷

Whatever the outcome of this dispute, the Pueblo Viejo mine is a vivid example of the high economic, environmental, and political costs of failing to account for the long-term risks of mining and to put in place a well-funded plan for mine closure, rehabilitation, and permanent containment and treatment of pollutants.

E. Haiti’s Capacity to Manage the Environmental Risks of Mining

For a tropical nation such as Haiti, the risks of TMD, on-site cyanide use, and off-site release of pollutants must not be underestimated. Haiti’s claims are located in the higher elevations of the Massif du Nord, and the gold mines would be buffeted by precipitation during the rainy seasons.¹⁸⁸ The annual risk of surface runoff, flooding, and overflow is compounded by the acute risks of hurricane and earthquake—either of which could cause a sudden overflow or breach in tailings ponds. Depending on the gold mines’ locations, pollution from the tailings ponds, overburden spoils areas, and mine pits could contaminate some of the country’s largest and most important river systems, including Les Trois Rivières and Grande Rivière du Nord, which flow north, as well as Rivière Guayamouc and Rivière Bouyaha, which flow south, into Lake Peligre and the Artibonite River system.

Some of the risks of spillage may be mitigated by construction requirements, including heightened seismic standards, ponding capacity sufficient to account for extreme-event flows, backup sumps, diversion channels and pipes to direct surface water around the site, and emergency water treatment facilities. As discussed in Chapter V, it is essential for the new mining law and regulations to anticipate these risks and to contain clear and enforceable requirements that the mining companies deploy the best available technology to minimize the risks of off-site migration of pollutants and contamination of downstream lands and waterways.

Even with such regulatory standards in place, however, the reality of an under-resourced State, coupled with a history of lax enforcement, makes conditions in this nascent sector ripe for environmental harm. Haiti’s “environmental protection laws are not enforced and have not been integrated into an operational framework,” and “the institutions envisaged by the law are either non-existent or dysfunctional.”¹⁸⁹

A representative from the Haitian *Ministère de l'Environnement* (Ministry of the Environment or MDE) told GJC that although the MDE is tasked with reviewing environmental impact assessments on mining and other development projects, it lacks the capacity to make field visits.¹⁹⁰ The representative added that “companies do the logistics for [any] field visits” that do take place.¹⁹¹ The MDE ostensibly identifies critical habitats and designates them as “no-go” zones—i.e., areas where mining and other industrial activity is prohibited. Yet this official stated that the MDE lacks information on biodiversity and natural habitats and therefore lacks the capacity to ensure that essential natural habitats are protected.¹⁹² Moreover, areas that the MDE has designated for protection have reportedly been the site of sand and gravel mining approved by the *Bureau des Mines et de l'Énergie* (Bureau of Mines and Energy).¹⁹³ In addition, lack of coordination among different government actors and the creation of a number of autonomous agencies with unclear separation of responsibilities pose obstacles to integrated and effective regulation.¹⁹⁴

F. Conclusion

Modern gold mining presents a variety of environmental and community risks. In Haiti, these risks are heightened by the country's fragile environment, poverty, tenuous public health systems, governmental instability, and regulatory incapacities. The next chapter reviews the economics of mining and considers whether the revenues likely to be generated by gold and copper mining outweigh these environmental and community risks.

¹ See ENVIRONMENTAL LAW ALLIANCE WORLDWIDE, GUIDEBOOK FOR EVALUATING MINING PROJECT EIAs (2010) [hereinafter ELAW GUIDEBOOK], <http://www.elaw.org/files/mining-eia-guidebook/Full-Guidebook.pdf>. “Open-pit mining often involves the removal of natively vegetated areas, and is therefore among the most environmentally-destructive types of mining, especially within tropical forests.” *Id.* at 4. “Involuntary relocation is a major social problem ... Another special situation is when areas have little apparent presence of human activity, but are used by local people for hunting ... fishing, and gathering wildlife products necessary for their subsistence and livelihood.” *Id.* at 51.

² The term “exploration” is not found in the 1976 Haitian Mining Decree. As used in this Report, “exploration” encompasses all activities carried out pursuant to two of the four types of mining permits provided for under the Decree: *prospection* (Art. 35) and *research* (Art. 36–38); and some of the activities conducted pursuant to a permit for *exploitation* (Art. 39). See *Décret encourageant la prospection minière sur toute l’étendue du territoire de la République et adaptant les structures juridiques existantes aux réalités de l’industrie minière*, LE MONITEUR : JOURNAL OFFICIEL DE LA REPUBLIQUE D’HAÏTI, no. 19 (March 8, 1976) [hereinafter 1976 Mining Decree], <http://www.bme.gouv.ht/mines/loimin/decminiere.pdf>.

³ EARLE A. RIPLEY, ROBERT E. REDMANN, & ADÈLE A. CROWDER, ENVIRONMENTAL EFFECTS OF MINING 13 (1996).

⁴ Newmont explains, “This is where a grid pattern is laid out to systematically collect samples over an area. Wooden pegs or biodegradable flagging may be used to assist in laying out the grid. In heavily vegetated areas a narrow path may be cleared through undergrowth to allow access to sample sites or rock outcrops.” NEWMONT MINING CORPORATION, EXPLORING FOR GOLD 2 (no date), http://www.newmont.com/files/doc_downloads/australia/waihi/exploration/exploring-for-gold-web.pdf.

⁵ See SAFE DRINKING WATER FOUNDATION, MINING AND WATER POLLUTION 4 (no date), <http://www.safewater.org/PDFS/resourcesknowthefacts/Mining+and+Water+Pollution.pdf>.

⁶ RAVI K. JAIN, ZENGDI CUI & JERMEY K. DOMEN, ENVIRONMENTAL IMPACT OF MINERAL PROCESSING: MANAGEMENT, MONITORING AND AUDITING STRATEGIES 11 (2015).

⁷ Exploration drilling or boreholes are usually filled with concrete or other impermeable cement-like mixtures to prevent movement of groundwater between layers of bedrock and subsequent possible contamination. See Elwood Brehmer, *Industry Unclear What Exploration Permit Ruling Will Mean*, ALASKA J. COMMERCE, no. 4 (July 22, 2015, 1:06PM), <http://www.alaskajournal.com/business-and-finance/2015-07-22/industry-unclear-what-exploration-permit-ruling-will-mean>. “Topsoil stockpiling is a valuable technique, but restoration plans must be guided by research... so that the soil is re-spread back onto the site is productive.” Patti Strohmayer, *Soil Stockpiling for Reclamation and Restoration Activities After Mining and Construction*, 4 RESTORATION & RECLAMATION REV. 5 (1999), <http://conservancy.umn.edu/bitstream/handle/11299/59360/4.7.Strohmayer.pdf?sequence=1>. “The exploratory phase [of mining projects] may involve clearing of wide areas of vegetation...to allow the entry of heavy vehicles mounted with drilling rigs. Many countries require a separate EIA for the exploratory phase of a mining project because the impacts of this phase can be profound.” ELAW GUIDEBOOK, *supra* note 1, at 3. “These high-volume wastes [of overburden and waste rock], sometimes containing significant levels of toxic substances, are usually deposited on-site, either in piles on the surface or as backfill in open pits... [T]he EIA for a proposed mining project must carefully assess the management options and associated impacts of overburden disposal.” *Id.* at 5.

⁸ *Glossary of Geologic Terms*, IOWA STATE UNIVERSITY COLLEGE OF LIBERAL ARTS & SCIENCES, DEPARTMENT OF GEOLOGICAL & ATMOSPHERIC SCIENCES, <http://www.ge-at.iastate.edu/glossary-of-geologic-terms/> (last visited Oct. 2, 2015) (defining “laterite” as “a highly weathered red soil rich in iron and aluminum oxides[;] [t]ypically formed in a tropical to temperate climate where intense chemical weathering is common”).

⁹ See RIPLEY, REDMANN, & CROWDER, *supra* note 3, at 13. “As surface water quality is generally of poorer quality than groundwater, impacts relate to the introduction of bacteria and nutrients principally to the aquifer from

the surface water body.” MINERALS IRELAND, EXPLORATION DRILLING GUIDANCE TO DISCHARGE TO GROUNDWATER DRAFT GUIDANCE 12 (2014) http://www.mineralsireland.ie/NR/rdonlyres/6F281A9E-DB86-41EF-99A8-6EFA64DBFE45/0/Guidance_Exploration_Drilling_FinalDraft.pdf.

¹⁰ Different acronyms and interpretations of the letters TMD are used in different places. As noted in the text, TMD is frequently called “acid mine drainage” or AMD because of its acidic pH. Because not all such drainage is caused by mines (some acidic or toxic drainage is naturally occurring), some companies and consultants prefer to use the term “Acid Rock Drainage.” In some places, such as Australia, AMD is taken to mean “Acidic and Metalliferous Drainage,” again avoiding any necessary connection to mining. See AUSTRALIAN GOVERNMENT DEPARTMENT OF INDUSTRY, TOURISM AND RESOURCES, MANAGING ACID AND METALLIFEROUS DRAINAGE (2007), <http://www.industry.gov.au/resource/Documents/LPSDP/LPSDP-AcidHandbook.pdf>. The authors have chosen to use the term “toxic mine drainage” or TMD, because the drainage usually includes a variety of toxic chemical compounds (in addition to the acidic pH) and the focus of this chapter is on mining and the environmental risks posed by mining.

¹¹ RONALD EISLER, BIOGEOCHEMICAL, HEALTH, AND ECOTOXICOLOGICAL PERSPECTIVES IN GOLD AND GOLD MINING 168 (2004).

¹² See, e.g., GJC Notes of Community Meetings with Residents of La Montagne, in Northwest Department, Haiti (Jan. 15, 2014; Feb. 7, 2014; April 10, 2014; April 24, 2014; May 15, 2014) (on file with the New York University School of Law Global Justice Clinic); GJC Notes of Community Meetings with Residents of Patricko, in Northeast Department, Haiti (May 13, 2013; Feb. 9, 2014; Aug. 19, 2014) (same); GJC Notes of Community Meetings with Residents of Dity, in Northwest Department, Haiti (Nov. 13, 2014; Jan. 16, 2015) (same); GJC Notes of Community Meetings with Residents of Grand Bois, in North Department, Haiti (Feb. 28, 2013; May 10, 2013) (same); GJC Notes of Community Meeting with Residents of Esterè, in Northwest Department, Haiti (April 23, 2014) (same).

¹³ See, e.g., GJC Notes of Community Meeting with Residents of Esterè *supra* note 12; GJC Notes of Community Meeting with Residents of Resen, in Northwest Department, Haiti (July 14, 2014) (on file with the New York University School of Law Global Justice Clinic); GJC Notes of Community Meeting and Interviews with Residents of La Montagne (May 15, 2014), *supra* note 12.

¹⁴ See, e.g., GJC Notes of Community Meeting with Residents of Esterè, *supra* note 12; GJC Notes of Community Meeting with Residents in Resen, *supra* note 13; GJC Notes of Community Meeting with Residents of La Montagne (May 15, 2014), *supra* note 12.

¹⁵ See, e.g., GJC Notes of Community Meeting with Residents of La Montagne (May 15, 2014), *supra* note 12; GJC Notes of Community Meeting with Residents of Patricko (Aug. 19, 2014), *supra* note 12; GJC Notes of Community Meeting with Residents of Dity, in Northwest Department, Haiti (Jan. 16, 2015), *supra* note 12; GJC Notes of Community Meeting with Residents of Grand Bois (May 10, 2013), *supra* note 12.

¹⁶ See, e.g., GJC Notes of Community Meeting with Residents of La Montagne (May 15, 2014), *supra* note 12.

¹⁷ See, e.g., News Release, Majescor Resources Inc., Majescor’s Haitian Partner SOMINE SA Awarded Mining Exploitation Permits for Douvray Porphyry Copper-Gold and Faille B Vein Gold Projects, Northeast Haiti (Dec. 21, 2012), <http://www.majescor.com/en/news/2012news.aspx?listingid=171>. In December 2012, these research permits were converted into exploitation permits, one for copper and one for gold.

¹⁸ Letter from Michel Lamarre, Chief Executive Officer for SOMINE, to Margaret Satterthwaite, Director, Global Justice Clinic (Aug. 28, 2015) [hereinafter SOMINE Letter] (on file with the New York University School of Law Global Justice Clinic).

¹⁹ *Id.*

²⁰ GJC Notes of Phone Conversation with Representative of Majescor Resources Inc. (March 26, 2015) (on file with the New York University School of Law Global Justice Clinic).

²¹ *Id.*

²² See SOMINE Letter, *supra* note 18. GJC asked SOMINE to confirm whether its exploration activities to date have had no adverse environmental impacts, and asked whether SOMINE believes its activities have had any effect on residents' ability to grow crops today (even effects that were subsequently mitigated). The company responded that "SOMINE believe[s] that exploration activities have had no effect on resident ability to grow crops." *Id.* at 1. The company also explained that it did not believe that soil fertility has been affected by its exploration activities. *Id.* at 7.

See also GJC Notes of Phone Conversation with Representative of Majescor Resources Inc., *supra* note 20.

²³ See GJC Notes from Fact-Finding Visits to Patricko, Roche Plat, and Labou, in Northeast Department, Haiti (May 13, 2013) (on file with the New York University School of Law Global Justice Clinic); see also GJC Notes of Community Meeting with Residents of Patricko (Feb. 9, 2014), *supra* note 12; GJC Notes of Community Meeting with Residents of Grand Bois, in North Department, Haiti (Feb. 11, 2014) (on file with the New York University School of Law Global Justice Clinic).

²⁴ *Id.*

²⁵ The mineral exploration activity occurred over 3 years ago. Although there may be techniques to determine the consequences of drilling, trench digging, and other exploration activities, it is likely very difficult to isolate factors of degradation.

²⁶ See GJC Notes from Fact-Finding Visits to Patricko, Roche Plat, and Labou, *supra* note 23.

²⁷ See also Keith Slack, *Mining Development in Haiti: A Golden Dream or a Nightmare?*, Oxfam America: The Politics of Poverty: Ideas and analysis from Oxfam America's policy experts, OXFAM AMERICA (June 18, 2013), <http://politicsofpoverty.oxfamamerica.org/2013/06/mining-development-in-haiti-a-golden-dream-or-nightmare/>. Slack discusses a forum supported by Oxfam and the National University of Haiti in Limonade, where Haitian communities voiced concerns about negative environmental impacts from mining.

²⁸ See GJC Notes from Oxfam Forum, in Limonad, Haiti (June 5, 2013) (on file with the New York University School of Law Global Justice Clinic).

²⁹ *Id.*

³⁰ Email from Haitian Community Leader to Ellie Happel, Haiti Project Attorney, Global Justice Clinic (June 30, 2013) (on file with the New York University School of Law Global Justice Clinic).

³¹ SOMINE Letter, *supra* note 18.

³² National Instrument 43-101 is part of the *Standards of Disclosure for Mineral Projects within Canada*. It is a codified set of rules and guidelines for reporting and displaying information related to mineral properties owned by or explored by companies which report these results on stock exchanges within Canada. See *Standards and Guidelines for Resources and Reserves: National Instrument 43-101*, CANADIAN INSTITUTE OF MINING METALLURGY AND PETROLEUM, <http://web.cim.org/standards/MenuPage.cfm?sections=177,181&menu=229> (last visited Oct. 2, 2015).

³³ C. TUCKER BARRIE, C.T. BARRIE & ASSOCS., INC., MAJESCOR RESOURCES INC., TECHNICAL SUMMARY REPORT: SOMINE PROPERTY, NORTHEAST HAITI 8 (Oct. 31, 2009), <http://www.majescor.com/uploads/technical%20summary%20report.pdf>.

³⁴ *Id.*

³⁵ REMI BOSC & C.T. BARRIE, ARETHUSE GEOLOGY, MAJESCOR RESOURCES INC., DOUVRAY PORPHYRY COPPER DEPOSIT MINERAL RESOURCE ESTIMATE NI 43-101 TECHNICAL REPORT 83 (Jan. 2013) [hereinafter DOUVRAY NI 43-101 TECHNICAL REPORT], [http://www.majescor.com/uploads/43-101%20douvray%20majescor%2020130228%20\(2013-03-01\)-1.pdf](http://www.majescor.com/uploads/43-101%20douvray%20majescor%2020130228%20(2013-03-01)-1.pdf).

³⁶ See SOMINE Letter, *supra* note 18, at 3.

³⁷ News Release, Majescor Resources Inc., Majescor Signs Definitive Agreement for Sale of Haitian Assets (Sept. 2, 2015), <http://www.majescor.com/en/news/current.aspx?listingid=207>.

³⁸ This Report does not discuss all Newmont-Eurasian projects. It focuses on Newmont-Eurasian activities as permitted by their prospection permit in the Northwest areas of La Montagne and La Mine. This Report also details the experiences of communities in the Grand Bois area, once explored by Newmont-Eurasian but solely held by Eurasian at the time of publication. See News Release, Eurasian Minerals Inc., Eurasian Minerals Provides an Update on Haiti Exploration Programs, at 1 (Apr. 23, 2012), http://www.eurasianminerals.com/i/pdf/2012-04-23_NR.pdf. In November 2015, Eurasian signed an agreement to sell its interests in all joint venture properties, including La Montagne and La Mine. See News Release, Eurasian Minerals Inc., Eurasian Minerals Sells Haiti Joint Venture Interests for US \$4 Million and an NSR Royalty (Nov. 2, 2015), <http://www.eurasianminerals.com/s/news.asp?ReportID=728617>.

³⁹ News Release, Eurasian Minerals Inc., Eurasian Minerals Inc. Acquires Grand Bois Gold Deposit Property, Haiti, (Jan. 26 2009), http://www.eurasianminerals.com/i/pdf/2009-01-26_NR.pdf (announcing the company's 2009 acquisition of a 100% interest in the Grand Bois Property from Société Minière Citadelle, as part of a Designated Project under the Newmont-Eurasian strategic venture agreement). See also Eurasian Minerals Provides an Update on Haiti Exploration Programs, *supra* note 38, at 1 (announcing Newmont's decision to relinquish its interest in the Grand Bois Property to Eurasian).

⁴⁰ See Letter from Nicholas Cotts, External Relations Group Executive, Newmont Mining Corp., and David Cole, President and CEO, Eurasian Minerals Inc., to Margaret Satterthwaite, Director, Global Justice Clinic (Apr. 1, 2015) [hereinafter Newmont-Eurasian Letter] (on file with the New York University School of Law Global Justice Clinic). The Haitian Mining Decree of 1976 permits drilling only if a company possesses a research permit; drilling is not permitted under a prospection permit. See 1976 Mining Decree, *supra* note 2, art. 12.

⁴¹ Newmont-Eurasian Letter, *supra* note 40.

⁴² Newmont-Eurasian explained that the geophysical surveys "involved laying a single line of electrical wire over the surface with instruments that measure the earth's natural electromagnetic properties. Such wire was laid out and removed on the same day." Newmont-Eurasian Letter, *supra* note 40, at 2.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Email from Matt King, Senior Manager, Social Responsibility, Sustainability and External Relations, Newmont Mining Corp., to Margaret Satterthwaite, Director, Global Justice Clinic (July 23, 2015) (on file with the New York University School of Law Global Justice Clinic).

⁴⁷ See GJC Notes of Community Meetings with Residents of Grand Bois (Feb. 11, 2014), *supra* note 23.

⁴⁸ Newmont-Eurasian Letter, *supra* note 40, at 2.

⁴⁹ *Id.*

⁵⁰ GJC has made six visits to Grand Bois for fact-finding and to participate in community meetings. See GJC Notes of Community Meetings with Residents of Grand Bois, in North Department, Haiti (Feb. 28, 2013; May 10, 2013; Nov. 21, 2013; Feb. 11, 2014; March 23, 2014; July 31, 2014) (on file with the New York University School of Law Global Justice Clinic). Members of the GJC delegation walked on the path referenced by the residents. GJC observed that the path is too steep for motorcycles or for cars to use. Residents state that only Newmont-Eurasian vehicles could pass on the path.

⁵¹ Newmont pointed out, however, that other companies drilled in the area the late 1950s and early 1970s. Newmont-Eurasian Letter, *supra* note 40, at 6.

⁵² *Id.* at 6.

⁵³ *Id.* at 7.

⁵⁴ This section of Jean Rabel includes many communities where Newmont-Eurasian has explored.

⁵⁵ GJC Notes of Community Meeting and Interviews with Residents of La Montagne (May 15, 2014), *supra* note 12. GJC has not been able to confirm or refute this and other, similar claims related to destruction of land and crops.

⁵⁶ GJC Notes of Community Meetings with Residents of La Montagne, in Northwest Department, Haiti (Jan. 13, 2014; Jan. 15, 2014; Feb. 5, 2014; Feb. 7, 2014; Apr. 10, 2014; Apr. 24, 2014; May 14, 2014; May 15, 2014; July 9, 2014) (on file with the New York University School of Law Global Justice Clinic).

⁵⁷ Newmont-Eurasian Letter, *supra* note 40, at 8.

⁵⁸ *Id.* at 6.

⁵⁹ *Id.* at 7.

⁶⁰ *Id.* at 4.

⁶¹ *Id.* at 9.

⁶² Email from Matt King, *supra* note 46.

⁶³ This section includes activities related to the construction of a mine that would be carried out pursuant to a permit for *exploitation* under the 1976 Mining Decree (Art. 39) or a mining *concession* (Arts. 40–46).

⁶⁴ INT'L FIN. CORP., WORLD BANK GROUP, ENVIRONMENTAL, HEALTH AND SAFETY GUIDELINES FOR MINING 2 (Dec. 10, 2007), <http://www.ifc.org/wps/wcm/connect/1f4dc28048855af4879cd76a6515bb18/Final++Mining.pdf?MOD=AJPERES>.

⁶⁵ See e.g., Will Thomson, *The Growing Political Risk to Miners Posed by Water Shortages*, MINING.COM (July 9, 2013), <http://www.mining.com/web/the-growing-political-risk-to-miners-posed-by-water-shortages>.

⁶⁶ See e.g., Marianella Jarroud, *Mining and Logging Companies "Leaving All of Chile Without Water,"* THE GUARDIAN (Apr. 24, 2013), <http://www.theguardian.com/global-development/2013/apr/24/mining-logging-chile-without-water>.

⁶⁷ Gwen Preston, *Chile's Mining Problems*, THE NORTHERN MINER (June 5, 2013), <http://www.northernminer.com/news/chiles-mining-challenges/1002362476/?&er=NA>.

⁶⁸ See, e.g., Ben Hallman & Roxana Olivera, *Gold Rush: How The World Bank Is Financing Environmental Destruction*, INTERNATIONAL CONSORTIUM FOR INVESTIGATIVE JOURNALISTS & THE HUFFINGTON POST (Apr. 16, 2015), <http://projects.huffingtonpost.com/worldbank-evicted-abandoned/how-worldbank-finances-environmental-destruction-peru?ncid=tweetlnkushpmg00000067>; John Miller, *Miner Freeport Pressured by Water Costs as Copper Prices Slide*, WALL ST. J. (May 20, 2014), <http://online.wsj.com/news/articles/SB10001424052702303873604579493750988122602?KEYWORDS=Copper+Miners+thirst&mg=reno64-wsj> (discussing the pressures of water scarcity on copper mining operations in Chile and Peru, as well as in New Mexico and Arizona, U.S.A.). The authors note that water scarcity in Arizona has drawn mining companies into conflict with other big consumers of waters, such as farmers. *Id.*

⁶⁹ See, e.g., WISCONSIN DEPARTMENT OF NATURAL RESOURCES, MINING INFORMATION SHEET: PROTECTING GROUNDWATER AT METALLIC MINING SITES 4 (Feb. 2003), <http://dnr.wi.gov/topic/Mines/documents/gwa-pro.pdf>.

⁷⁰ *Groundwater Depletion*, U.S. GEOLOGICAL SURVEY WATER SCIENCE SCHOOL, USGS, <http://water.usgs.gov/edu/gwdepletion.html> (last visited Oct. 2, 2015).

⁷¹ Operators of surface mines need to continually dewater the mine to ensure that the water level remains below the pit floor – requiring thousands of gallons of water to be pumped from the pit daily. Excess water is treated and discharged into nearby lakes and rivers. *The Mining Process: Designing and Constructing a Mine*, NEWMONT, <http://www.newmont.com/operations-and-projects/mining-education/the-mining-process/default.aspx> (last visited Oct. 3, 2015).

⁷² EISLER, *supra* note 11, at 168.

⁷³ *Id.* at 169.

⁷⁴ *Asset Portfolio: Haiti*, EURASIAN MINERALS, <http://www.eurasianminerals.com/s/Haiti.asp> (last visited Oct. 3, 2015); see also DOUVRAY NI 43-101 TECHNICAL REPORT, *supra* note 35 (on file with the New York University School of Law Global Justice Clinic).

⁷⁵ Barrick notes the Margajita River that passes through the hills near the mine site had been dubbed the “Coca-Cola river” by locals due to its dark color—the result of having absorbed so much acid rock drainage. We discuss the Rosario mine’s “legacy” pollution in the final section of this chapter. BARRICK, BARRICK GOLD: PUEBLO VIEJO—REVITALIZING A REGION 20 (2014), <http://www.bus-ex.com/sites/default/files/BarrickPV-Americas-Mining-Mar14-Bro-s.pdf>.

⁷⁶ *Id.* at 9.

⁷⁷ *The Mining Process: Designing and Constructing a Mine*, NEWMONT, <http://www.newmont.com/operations-and-projects/mining-education/the-mining-process/default.aspx> (last visited Oct. 3, 2015).

⁷⁸ See generally INT’L FIN. CORP., *supra* note 64.

⁷⁹ See EISLER, *supra* note 11, at 170–72. “The use of chemical additives to prevent acid generation when applied to waste rock or stent or piles is economically feasible. . . . The most common method... is to add lime or other neutralizing materials to acid-generators.” *Id.* at 171. “An alternative to chemical treatment of [TMD] is bioremediation, a set of passive treatment techniques which use bacteria or other organic agents. For example, bactericides to inhibit iron-oxidizing bacteria have been used successfully to reduce the cost of treating acidic runoff from reactive waste rock piles. Another successful technique is the construction of wetlands to route mine effluents through areas stocked with metal-absorbing aquatic plants.” *Id.* at 172.

⁸⁰ Contaminants in waste rock piles can be transported from the mining site into the biosphere by wind, rainfall, snow melt and stream water drainage. *Id.* at 183.

⁸¹ See, e.g., G.A. LARKIN ET AL., SUSPENDED SEDIMENT AND FISH HABITAT SEDIMENTATION IN CENTRAL INTERIOR WATERSHEDS OF BRITISH COLUMBIA, WATERSHED RESTORATION PROGRAM, BRITISH COLUMBIA MINISTRY OF ENVIRONMENT, LANDS & PARKS AND MINISTRY OF FORESTS 1–2 (1998), http://docs.streamnetlibrary.org/BC_MELP/WRMgmtRept-07.pdf.

⁸² See generally PIERRE Y. JULIEN, EROSION AND SEDIMENTATION 1–2 (2d ed. 2010).

⁸³ See PATRICIA TOWNSEND & WILLIAM TOWNSEND, MINERAL POLICY INSTITUTE, ASSESSING AN ASSESSMENT: THE OK TEDI MINE (2004), <http://www.unep.org/maweb/documents/bridging/papers/townsend.patricia.pdf>; see also *Ok Tedi*, MINERAL POLICY INSTITUTE, <http://www.mpi.org.au/our-work/papua-new-guinea/ok-tedi/> (last visited Nov. 15, 2015) (discussing tailings disposal and sedimentation).

⁸⁴ *Particulate matter*, U.S. ENVTL. PROTECTION AGENCY, <http://www3.epa.gov/pm/> (last visited Oct. 2, 2015).

⁸⁵ *Health*, U.S. ENVTL. PROTECTION AGENCY, <http://www3.epa.gov/pm/health.html> (last visited Oct. 2, 2015). A recent report concluded that fugitive dust emissions from Gold Fields Ghana Limited’s Tarkwa mine exceeded the Ghana Environmental Protection Agency’s ambient PM₁₀ limit of 70 µg/m³ within 1.3 km of the

mine 13% of the time and that dust particles in concentrations of 68 $\mu\text{g}/\text{m}^3$ just below the legal limit fell on the Tarkwa Township downwind of the mine. Kenneth Bansah & Newton Amegbey, *Ambient Particulate Matter Monitoring: A Case Study at Tarkwa*, 4 RES. J. OF ENVTL. & EARTH SCIS. 4(4), 419–23 (2012). In a similar situation, a group of downwind residents, doctors, and environmentalists recently sued Rio Tinto alleging violations of ambient PM_{10} standards at its Kennecott Utah copper mine in the United States. Rupert Neate, *Olympic Medal Mining Firm Rio Tinto Faces Air Pollution Lawsuit in US*, THE GUARDIAN (Sept. 23, 2013), <http://www.theguardian.com/business/2013/sep/24/olympic-medal-mining-firm-rio-tinto-air-pollution-lawsuit-us>.

⁸⁶ EISLER, *supra* note 11, at 195–203.

⁸⁷ MARK LOGSDON, KAREN HAGELSTEIN & TERRY MUDDER, INTERNATIONAL COUNCIL ON METALS AND THE ENVIRONMENT, THE MANAGEMENT OF CYANIDE IN GOLD EXTRACTION 26–27 (Apr. 1999), <http://www.icmm.com/document/124>. Cyanide exposure is an acute, rather than a bio-accumulative or genetic, problem. “[C]yanide does not accumulate in tissues because the body transforms such small amounts into a less toxic compound called thiocyanate, which is then excreted. Cyanide is not known to cause cancer or birth defects or adversely affect reproduction.” *Id.* at 27.

⁸⁸ WORLD HEALTH ORG., CYANIDE IN DRINKING-WATER: BACKGROUND DOCUMENT FOR DEVELOPMENT OF WHO GUIDELINES FOR DRINKING-WATER QUALITY 3, WHO Doc. WHO/SDE/WSH/03.04/05 (2003), http://www.who.int/water_sanitation_health/dwq/cyanide.pdf.

⁸⁹ There are several possible alternatives to the use of cyanide as a means of separating gold from the ore to which it is bonded. These include thiosulphate leaching, a less toxic process of chemically dissolving and separating the gold. See SGS MINERALS SERVICES, THIOSULPHATE LEACHING: AN ALTERNATIVE TO CYANIDATION IN GOLD PROCESSING, (Oct. 2008), <http://www.sgs.com/~media/Global/Documents/Flyers%20and%20Leaflets/SGS-MIN-WA018-Thiosulphate-Leaching-Alternative-to-Cyanide-in-Gold-Processing-EN-11.pdf>. Alternative techniques also include the use of “ α -cyclodextrin—an inexpensive and environmentally benign carbohydrate.” Zichang Liu et al., *Selective Isolation of Gold Facilitated by Second-Sphere Coordination with α -cyclodextrin*, NATURE COMM’NS, no. 4, art. 1855, at 7 (May 14, 2013), <http://www.nature.com/ncomms/journal/v4/n5/full/ncomms2891.html>. These methods have not yet been accepted within the industry, however, as viable alternatives to the use of cyanide.

⁹⁰ ROBERT MORAN, MINERAL POLICY CENTER, MPC ISSUE PAPER NO. 1, CYANIDE UNCERTAINTIES: OBSERVATIONS ON THE CHEMISTRY, TOXICITY, AND ANALYSIS OF CYANIDE IN MINING-RELATED WATERS 3 (1998), <https://www.earthworksaction.org/files/publications/cyanideuncertainties.pdf>.

⁹¹ EISLER, *supra* note 11, at 163–84.

⁹² *Id.* at 199.

⁹³ For examples of mining-related cyanide spills over the past 35 years, see ROBERT MORAN, *supra* note 90, at 5.

⁹⁴ EISLER, *supra* note 11, at 190.

⁹⁵ *Id.* at 195.

⁹⁶ *Government of Guyana Update on the Cyanide Spill*, GUYANA NEWS & INFORMATION, http://www.guyana.org/GuyNews/spill_upd2.htm (last visited Aug. 28, 2015).

⁹⁷ EISLER, *supra* note 11, at 196.

⁹⁸ *Government of Guyana Update on the Cyanide Spill*, *supra* note 96.

⁹⁹ *Id.* The Omai mine closed in 2005 but was scheduled to reopen in 2014 under the ownership and operation of Mahdia Gold Corp., a Canadian corporation. *Mining to Restart at Omai Mines*, STABROEK NEWS (Jan. 19, 2014), <http://www.stabroeknews.com/2014/news/stories/01/19/mining-restart-omai-mines>.

¹⁰⁰ EISLER, *supra* note 11, at 196.

¹⁰¹ *One Year On: Romania's Cyanide Spill*, BBC NEWS (Jan. 31, 2001), <http://news.bbc.co.uk/2/hi/europe/1146979.stm>.

¹⁰² *Mount Polley Mine Spill Report Released by B.C. Information and Privacy Commissioner*, CBC NEWS (July 2, 2015, 8:35AM PT), <http://www.cbc.ca/news/canada/british-columbia/mount-polley-mine-spill-report-released-by-b-c-information-and-privacy-commissioner-1.3135555>.

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¹⁰⁵ *Mount Polley Collapse 1-Year Anniversary: Mines Minister Says Industry Still Horrified*, CBC NEWS (Aug. 4, 2015, 11:00PM ET), <http://www.cbc.ca/news/business/mount-polley-collapse-1-year-anniversary-mines-minister-says-industry-still-horrified-1.3179588>.

¹⁰⁶ Dolia Estevez, *No Apology From Mining Tycoon German Larrea For Worst Ecological Disaster In Mexico's History*, FORBES (Sept. 2, 2014, 2:59PM), <http://www.forbes.com/sites/doliaestevez/2014/09/02/no-apology-from-mining-tycoon-german-larrea-for-worst-ecological-disaster-in-mexicos-history>.

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¹⁰⁸ Juliana Jiménez Jaramillo, *A Disaster Prompted by Economic Activity*, SLATE (Dec. 3, 2015), http://www.slate.com/articles/news_and_politics/photography/2015/12/_brazil_mining_dam_disaster_toxic_sludge_and_irreversible_environmental.html.

¹⁰⁹ LINDSAY NEWLAND BOWKER & DAVID M. CHAMBERS, THE RISKS, PUBLIC LIABILITY & ECONOMICS OF TAILINGS STORAGE FACILITY FAILURES 1 (2015), https://www.earthworksaction.org/files/pubs-others/BowkerChambers-RiskPublicLiability_EconomicsOfTailingsStorageFacility%20Failures-23Jul15.pdf.

¹¹⁰ *Id.* at 2.

¹¹¹ *Id.*

¹¹² *Id.* at 1.

¹¹³ *Id.* The authors add that these dam failures and consequent losses also are often uninsurable:

Very few miners can simply absorb a loss at this scale without risking bankruptcy and permanent closure of a resource that has not yet been “mined out.” There is no organized industry attempt to pool these losses in the context of a risk management loss prevention program, and no political jurisdiction issuing permits is large enough to prefund a low frequency high consequence loss of this scale. The inevitable result is either government pays or the damages go unremediated.

Id. at 2.

¹¹⁴ INT'L FIN. CORP., WORLD BANK GROUP, ENVIRONMENTAL, HEALTH, AND SAFETY GUIDELINES: BASE METAL SMELTING AND REFINING (Apr. 30, 2007),

<http://www.ifc.org/wps/wcm/connect/4365de0048855b9e8984db6a6515bb18/Final+-+Smelting+and+Refining.pdf?MOD=AJPERES>.

¹¹⁵ See, e.g., U.S. ENVTL. PROT. AGENCY (EPA), TAKING TOXICS OUT OF THE AIR (2000), <http://pubweb.epa.gov/air/toxicair/takingtoxics/airtox.pdf>; EUROPEAN ENVIRONMENT AGENCY, AIR QUALITY IN EUROPE (2014), <http://www.eea.europa.eu/publications/air-quality-in-europe-2014>.

¹¹⁶ *Acid Rain*, NAT'L ATMOSPHERIC DEPOSITION PROG., <http://nadp.sws.uiuc.edu/educ/acidrain.aspx> (last visited Aug. 28, 2015).

¹¹⁷ See generally INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2013: THE PHYSICAL SCIENCE BASIS (2013), <http://www.climatechange2013.org/>.

¹¹⁸ INT'L FIN. CORP., WORLD BANK GROUP, ENVIRONMENTAL, HEALTH, AND SAFETY GUIDELINES: BASE METAL SMELTING AND REFINING (Apr. 30, 2007), <http://www.ifc.org/wps/wcm/connect/4365de0048855b9e8984db6a6515bb18/Final+-+Smelting+and+Refining.pdf?MOD=AJPERES>.

¹¹⁹ *Id.*

¹²⁰ EISLER, *supra* note 11, at 223.

¹²¹ *Id.* at 229. See also E.H. Amonoo-Neizer & G.L. Busari, *Arsenic Status of Ghana Soils: Contamination of Soils Near Gold Smelters*, 20 GHANA J. SCI. 1-2, 57-62 (1980). More recently, arsenic poisoning among workers—including skin burns and cancer—has been reported at the Tsumeb copper smelter in Namibia. Shasimana Ugulu, *Tsumeb Copper Miners Suffer From Arsenic Effects*, THE VILLAGER (Aug. 22, 2011), http://www.thevillager.com.na/news_article.php?id=93&title=%20Tsumeb%20.

¹²² *Environment: What is the Role of Arsenic in the Mining Industry?*, MININGFACTS.ORG (2012), <http://www.miningfacts.org/Environment/What-is-the-role-of-arsenic-in-the-mining-industry>.

¹²³ EARTHWORKS & OXFAM AMERICA, DIRTY METALS: MINING, COMMUNITIES, AND THE ENVIRONMENT 6 (2004), http://www.earthworksaction.org/files/publications/NDG_DirtyMetalsReport_HR.pdf.

¹²⁴ Researchers at the Massachusetts Institute of Technology describe green mining as a holistic approach to reducing the impacts of mining. *Environmentally Sensitive "Green" Mining*, MIT MISSION 2016: THE FUTURE OF STRATEGIC NATURAL RESOURCES, <http://web.mit.edu/12.000/www/m2016/finalwebsite/solutions/greenmining.html> (last visited Sept. 24, 2015).

¹²⁵ For a list of such initiatives, see *Responsible Mining Links*, CSP2, <http://www.csp2.org/responsible-mining/responsible-mining-links> (last visited Nov. 21, 2015).

¹²⁶ The MMSD Project, one of the first of its kind, conducted research and consultation to review mining and mineral industry performance on sustainable development issues. "MMSD aimed to create a shared idea of the appropriate and necessary roles for each of the major actors in mining and sustainable development – government, civil society, and the private sector – asking 'what is a company's role and what is not a company's role?'. During the two-year project, more than 700 people participated in 20 countries and over 130 reports were published." ABBI BUXTON, INT'L INST. FOR ENV'T & DEV., MMSD+10: REFLECTING ON A DECADE OF MINING AND SUSTAINABLE DEVELOPMENT 5 (2012), <http://pubs.iied.org/pdfs/16041IIED.pdf>.

¹²⁷ IRMA was founded in 2006. In response to the self-posed question, *Why is IRMA important*, IRMA responds: "Mining is a complex and intensive process that causes environmental and social change no matter where it occurs. IRMA's vision is a mining industry that respects human rights and the aspirations of affected communities; provides safe, healthy and respectful workplaces; avoids or minimizes harm to the environment and leaves positive legacies. IRMA seeks to promote this vision by emulating for industrial-scale mining what has been done with independent third-party certification schemes in agriculture, forestry and fisheries." *Frequently Asked Questions about the IRMA Process*, IRMA

<http://www.responsiblemining.net/the-irma-process/faqs/#HISTORYOFIRMA> (last visited Nov. 22, 2015).

¹²⁸ *Mining, Minerals and Sustainable Development* (MMSD), INTERNATIONAL INSTITUTE FOR ENVIRONMENT AND DEVELOPMENT, <http://www.iied.org/mining-minerals-sustainable-development-mmsd> (last visited Nov. 22, 2015).

¹²⁹ See, e.g., the list of initiatives provided in the following publication: ABBI BUXTON, *supra* note 126, at 13.

¹³⁰ *About IRMA*, IRMA, <http://www.responsiblemining.net/about-irma/> (last visited Nov. 19, 2015).

¹³¹ *The IRMA Process*, IRMA, <http://www.responsiblemining.net/the-irma-process/> (last visited Nov. 19, 2015).

¹³² *Towards Sustainable Mining*, THE MINING ASSOCIATION OF CANADA, <http://mining.ca/towards-sustainable-mining> (last visited Oct. 9, 2015).

¹³³ *Id.*

¹³⁴ *Energy and GHG Emissions Management*, THE MINING ASSOCIATION OF CANADA, <http://mining.ca/towards-sustainable-mining/protocols-frameworks/energy-and-ghg-emissions-management> (last visited Nov. 25, 2015).

¹³⁵ *Tailings Management*, THE MINING ASSOCIATION OF CANADA, <http://mining.ca/towards-sustainable-mining/protocols-frameworks/tailings-management> (last visited Oct. 9, 2015).

¹³⁶ Heidi Vella, *Green Technologies: Making Mining More Sustainable and Energy Efficient*, MINING-TECHNOLOGY.COM (July 26, 2013), <http://www.mining-technology.com/features/feature-green-technologies-sustainable-energy-efficient/>.

¹³⁷ See e.g., Katia Moskvitch, *Biomining: How Microbes Help to Mine Copper*, BBC NEWS, (March 21, 2012), <http://www.bbc.com/news/technology-17406375>; see also, *Technology Overview: Bioleaching: A Game Changing Technology in the Tailings Reclamation Industry*, BACTECH, <http://www.bactechgreen.com/s/Overview.asp> (last visited Nov. 20, 2015).

¹³⁸ Katia Moskvitch, *Biomining: How Microbes Help to Mine Copper*, BBC NEWS, (March 21, 2012), <http://www.bbc.com/news/technology-17406375>. Certain bioleaching technologies claim to prevent acid mine drainage through sulphide neutralization. See *Technology Overview: Bioleaching: A Game Changing Technology in the Tailings Reclamation Industry*, BACTECH, <http://www.bactechgreen.com/s/Overview.asp> (last visited Nov. 20, 2015).

¹³⁹ Nils Ehrenberg, *Microscopic Miners*, PICTURES OF THE FUTURE: THE MAGAZINE FOR RESEARCH AND INNOVATION, (Oct. 1, 2014), <http://www.siemens.com/innovation/en/home/pictures-of-the-future/research-and-management/materials-science-and-processing-biomining.html> (last visited Nov. 19, 2015).

¹⁴⁰ See GJC Notes of Phone Conversation with Representative of Majescor Resources Inc., *supra* note 20.

¹⁴¹ *Technology*, DUNDEE SUSTAINABLE TECHNOLOGIES, <http://www.dundeetechnologies.com/en/technology/> (last visited Sept. 24, 2015).

¹⁴² See DUNDEE SUSTAINABLE TECHNOLOGIES, CORPORATE PRESENTATION, at 24 (Apr. 2015), <http://www.dundeetechnologies.com/en/investors/corporate-presentation/>.

¹⁴³ Press Release, Dundee Sustainable Technologies, Dundee Sustainable Technologies Completes Construction of its Demonstration Plant (June 8, 2015), <http://www.marketwatch.com/story/dundee-sustainable-technologies-completes-construction-of-its-demonstration-plant-2015-06-08-101732751>.

¹⁴⁴ *Environmentally Sensitive Green Mining*, MIT MISSION 2016: THE FUTURE OF STRATEGIC NATURAL RESOURCES <http://web.mit.edu/12.000/www/m2016/finalwebsite/solutions/greenmining.html> (last visited Nov. 20, 2015).

¹⁴⁵ See Abbi Buxton, *supra* note 129, at 3, 24.

¹⁴⁶ China is offered as a case study of success. See e.g., *Environmentally Conscious Mining Standards*, MIT MISSION 2016: THE FUTURE OF STRATEGIC NATURAL RESOURCES, <http://web.mit.edu/12.000/www/m2016/finalwebsite/solutions/greenmining.html> (last visited Nov. 20, 2015).

¹⁴⁷ See Abbi Buxton, *supra* note 126, at 20.

¹⁴⁸ See, e.g., *id.* at 29 (discussing the “green economy” as a buzz term that has, to date been neglected in the field of mining).

¹⁴⁹ See, e.g., Julie Turkewitz, *Colorado Spill Heightens Debate Over Future of Old Mines*, N.Y. TIMES (Aug. 16, 2015), <http://www.nytimes.com/2015/08/17/us/animas-river-colorado-mine-spill-epa.html>.

¹⁵⁰ Peter Moskowitz, *Mount Polley Mine Spill: a Hazard of Canada's Industry-Friendly Attitude?*, THE GUARDIAN (Aug. 13, 2014), <http://www.theguardian.com/environment/2014/aug/13/mount-polley-mine-spill-british-columbia-canada>.

¹⁵¹ See e.g., *Brazil Dam Collapse Reignites Debate Over Storing Mining Waste*, REUTERS (Nov. 19, 2015), <http://www.reuters.com/article/2015/11/20/us-brazil-damburst-technology-idUSKCN0T72YZ20151120#08ZMA4bD0fbszKtJ.97>.

¹⁵² *Pueblo Viejo—Overview & Operating Highlights*, GOLDCORP, INC., <http://www.goldcorp.com/English/Unrivaled-Assets/Mines-and-Projects/Latin-America/Operations/Pueblo-Viejo/Overview-and-Development-Highlights/default.aspx> (last visited Oct. 3, 2015).

¹⁵³ See generally EARTHWORKS & OXFAM AMERICA, *supra* note 123.

¹⁵⁴ For example, death by drowning in water storage facilities and dams in Ghana. See, e.g., *15 Killed in Course of Newmont Ahafo Mine Operations*, GHANAWEB (Nov. 8, 2010), <http://www.ghanaweb.com/GhanaHomePage/NewsArchive/15-killed-in-course-of-Newmont-Ahafo-Mine-operations-197006>. See also *Tragedy: Man, 23, Drowns Chasing Grass Cutter*, WEEKEND SUN (April 17, 2015), <http://thesunonlinegh.com/2015/04/tragedy-man-23-drowns-chasing-grass-cutter/> (reporting a death by drowning in unfenced dam).

¹⁵⁵ *Environmental Studies: Berkeley Pit and BMF Operable*, MONT. BUREAU OF MINES AND GEOLOGY, <http://www.mbmng.mtech.edu/env/env-berkeley.asp> (last visited Aug. 28, 2015).

¹⁵⁶ Duncan Adams, *Did Toxic Stew Cook the Goose?*, HIGH COUNTRY NEWS (Dec. 11, 1995), <https://www.hcn.org/issues/49/1520>.

¹⁵⁷ *Environmental Studies: Berkeley Pit and BMF Operable*, *supra* note 155. The United States Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980, 42 U.S.C. §§ 9601–9675, made owners, operators, and disposers of hazardous substances liable for their safe containment, cleanup, and remediation, as well as for damages to individuals or natural resources caused by such hazardous substances. It also created a “Superfund” to pay for these response costs if no responsible party could be identified or if the responsible parties were financially unable to pay such costs. U.S. ENVTL. PROT. AGENCY (EPA), *Superfund: CERCLA Overview*, <http://www2.epa.gov/superfund/superfund-cercla-overview> (last visited Oct. 3, 2015). As a Superfund site, the Berkeley Pit will be managed in perpetuity as an unsafe, hazardous waste facility. Because of its notoriety, however, the state of Montana has established a viewing platform from which visitors may observe the pit for a fee of \$2. *Butte's Berkeley Pit is a Lake of Toxic Waste with Possible Anti-Cancer Properties*, ATLAS OBSCURA, SLATE (Sept. 4, 2013, 8:54AM), http://www.slate.com/blogs/atlas_obscura/2013/09/04/berkeley_pit_in_butte_montana_is_a_lake_of_toxic_waste_with_possible_anti.html; see also James Bolenbaugh, *The Berkeley Pit: New fungal and bacterial species call this deadly lake home*, ATLAS OBSCURA (March 20, 2010), <http://www.atlasobscura.com/places/berkeley-pit>.

¹⁵⁸ *Butte's Berkeley Pit is a Lake of Toxic Waste with Possible Anti-Cancer Properties*, *supra* note 157; see also Bolenbaugh, *supra* note 157.

¹⁵⁹ *Butte's Berkeley Pit is a Lake of Toxic Waste with Possible Anti-Cancer Properties*, *supra* note 157.

¹⁶⁰ Press Release, U.S. Dep't of Justice, United States and Montana Reach Agreement with Mining Companies To Clean Up Berkeley Pit: Settlement Addresses Nation's Largest Body of Contaminated Water (Mar. 25, 2002), http://www.justice.gov/archive/opa/pr/2002/March/02_enrd_180.htm.

¹⁶¹ *Operations: Environmental Stewardship*, MONT. RESOURCES, <http://www.montanaresources.com/environmental.php> (last visited Aug. 28, 2015).

¹⁶² Lee Bergquist, *Tests Find Toxins at Flambeau Mine*, MILWAUKEE WISC. J. SENTINEL (Nov. 1, 2011), <http://www.jsonline.com/news/wisconsin/tests-find-toxins-at-flambeau-mine-133051073.html>.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* For other examples of mine closure and reclamation, see *Responsible Mining: Mine Closure & Reclamation*, GOLDCORP, INC., <http://www.goldcorp.com/English/Responsible-Mining/Partnerships-and-Programs/Mine-Closure-and-Reclamation/default.aspx> (last visited Nov. 25, 2015).

¹⁶⁷ Allen Clark & Jennifer Clark, *An International Overview of Legal Frameworks for Mine Closure*, in POLICIES, REGULATORY REGIMES AND MANAGEMENT PRACTICES FOR INVESTMENT PROMOTION AND SUSTAINABLE DEVELOPMENT OF THE MINERAL RESOURCES SECTOR IN ECONOMIES IN TRANSITION IN DEVELOPING COUNTRIES OF EAST AND SOUTHEAST ASIA, UNITED NATIONS ECON. & SOC. COMM. FOR ASIA & THE PACIFIC 75 (2002).

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ See Michael Singer, Rolf Aaltoc, L. Allan James, Nina Kilhame, John Higsona, & Subhajit Ghoshalf, *Enduring Legacy of a Toxic Fan Via Episodic Redistribution of California Gold Mining Debris*, 110 PROC. NAT'L ACAD. SCIS. 46 (2013); see also ELLEN HANAK ET AL., *MANAGING CALIFORNIA'S WATER: FROM CONFLICT TO RECONCILIATION* 157–58 (2011), http://www.ppic.org/content/pubs/report/R_211EHR.pdf.

¹⁷¹ EARTHWORKS, *POLLUTING THE FUTURE* 6 (May 2013), <https://www.earthworksaction.org/files/publications/PollutingTheFuture-FINAL.pdf>.

¹⁷² *Id.* at 7. The same report also identified 13 other mines that describes as likely to generate perpetual water pollution. It estimates that these mines produce an additional 3.4 billion to 4.0 billion gallons (12,870,400,000 to 15,141,647,000 liters) of acid mine drainage annually, for which the annual treatment costs are between \$1.4 billion and \$2.9 billion (61,000,000,000 HTG to 127,600,000,000 HTG). *Id.*

¹⁷³ *Id.*

¹⁷⁴ U.S. ENVTL. PROTECTION AGENCY (EPA), *NATIONWIDE IDENTIFICATION OF HARDROCK MINING SITES* 49 (2004) <http://nepis.epa.gov/Exe/ZyPDF.cgi/P100474J.PDF?Dockey=P100474J.PDF>.

¹⁷⁵ See *id.* at 37, 49.

¹⁷⁶ *Id.* at 51.

¹⁷⁷ See *id.* at 49.

¹⁷⁸ See *Zortman-Landusky Reclamation, Phillips County, Montana*, MONT. DEPT. OF ENVTL. QUAL., <http://deq.mt.gov/recovery/remediation/zortmanlandusky/default.mcp> (last visited Nov. 15, 2015) (describing how the State of Montana and the U.S. Bureau of Land Management (BLM) have had to make up the reclamation costs that exceed the available bond); see also EARTHWORKS, *POLLUTING THE FUTURE* 4, 10 (2013), <http://www.earthworksaction.org/files/publications/PollutingTheFuture-FINAL.pdf>;

¹⁷⁹ BARRICK GOLD CORP., PUEBLO VIEJO: ENVIRONMENTAL REMEDIATION AND WATER TREATMENT FACT SHEET (no date), <http://www.barrick.com/files/pueblo-viejo/Pueblo-Viejo-Environment-Water-Fact-Sheet.pdf>.

¹⁸⁰ See *id.*; see also *Sickness and Wealth*, THE ECONOMIST (Sept. 21, 2013), <http://www.economist.com/news/americas/21586560-shiny-new-mine-rusty-pollution-problems-sickness-and-wealth>.

¹⁸¹ BARRICK GOLD CORP., *supra* note 179.

¹⁸² The water treatment process is elaborate, as Barrick explains:

Water that comes into contact with ore stockpiles and waste rock on PVDC's facilities is contained on site by a series of canals, channels and sedimentation ponds that funnel the water into two large storage ponds. One of the ponds is lined with high density polyethylene to prevent seepage and can store up to 620,000 cubic meters of water. The other has a clay base that serves as a natural insulant and a storage capacity of 400,000 cubic meters. From the ponds, the water is pumped to the water treatment plant. The three-phase treatment process involves the use of limestone slurry, pure oxygen and limewater to remove trace metals and restore the water's pH level.

Approximately 40,000 cubic meters of water is treated daily at the plant, and the process is closely monitored and controlled using state-of-the-art technology. Water samples are collected every 10 minutes and composites of those samples are analyzed twice daily at an on-site laboratory. Samples are also collected weekly from the discharge point where treated water is released into the Margajita River. The samples are tested for pH level and for the presence of cyanide, as well as five different metals, including copper, iron, mercury, lead and zinc.

Id.

¹⁸³ *Id.*

¹⁸⁴ *The Metamorphosis of the Margajita River*, BARRICK BEYOND BORDERS (Nov. 12, 2013), <http://barrickbeyondborders.com/2013/11/barrick-gold-metamorphosis-of-the-margajita-river>.

¹⁸⁵ *Sickness and Wealth*, THE ECONOMIST (Sept. 21, 2013), <http://www.economist.com/news/americas/21586560-shiny-new-mine-rusty-pollution-problems-sickness-and-wealth>.

¹⁸⁶ BARRICK GOLD CORP., *supra* note 179.

¹⁸⁷ *Id.*

¹⁸⁸ Average annual rainfall in Haiti is 140–200 cm with the highest levels falling “in the southern peninsula and in the northern plains and mountains.” *Haiti: A Country Study*, U.S. LIBRARY OF CONG., <http://countrystudies.us/haiti/19.htm> (last visited Nov. 15, 2015).

¹⁸⁹ Richener Noel, *Governance and Environmental Degradation in Haiti*, URGENCE RÉHABILITATION, DÉVELOPPEMENT OBSERVATOIRE HAÏTI (GROUPE U.R.D.) (Sept. 2013), http://www.urd.org/Governance-and-environmental,1809?artpage=3-4#outil_sommaire_3. For example, a study sponsored by the United Nations Environment Program reported in 2010 that Haiti had not implemented any of the programs outlined in its 1994 Environmental Action Plan. UNITED NATIONS ENVIRONMENT PROGRAM (UNEP), GEO HAITI: STATE OF THE ENVIRONMENT REPORT 2010, at 151 (2010), [http://www.pnuma.org/deat1/pdf/GEO_Haiti2010_IN\(web\).pdf](http://www.pnuma.org/deat1/pdf/GEO_Haiti2010_IN(web).pdf).

¹⁹⁰ GJC Notes of Conversation with Pierre Robenson, Ministry of the Environment, in Port-au-Prince, Haiti (Nov. 20, 2014) (on file with the New York University School of Law Global Justice Clinic).

¹⁹¹ *Id.*

¹⁹² See *id.*; see also Jean Vilmond Hilaire, *Stratégie de Montage de l'Agence Nationale des Aires Protégées: Résumé du Document (ANAP)* (2009), <http://taiguesy.org/forum-ap-haiti/files/Strategie%20de%20montage%20ANAP%20-%20Synth%C3%A8se.pdf>; *Le PNUD en Haiti : Objectifs*, UNDP, http://www.ht.undp.org/content/haiti/fr/home/ourwork/environmentandenergy/in_depth/ (last visited Nov. 15, 2015).

¹⁹³ For example, although Mole St. Nicolas is listed as a protected area. In the past several years, however, a company has been conducting exploration and extraction activities in the area. *See, e.g., Matraco S. A. Valorise nos ressources naturelles*, LE NOUVELLISTE (Mar. 11, 2008), <http://lenouvelliste.com/lenouvelliste/article/55356/Matraco-S-A-valorise-nos-ressources-naturelles>.

¹⁹⁴ *See* Noel, *supra* note 189.

IV. The Economics of Gold Mining for Haiti

Mining is an inherently unsustainable activity. The metal ore that is extracted from the earth is not replenished, and over the life of the mine the minerals in the ground are depleted. As the Haitian government and Haitian communities analyze the potential costs and benefits of gold mining, they must determine whether the economic benefits of mining justify the considerable environmental, public health, and community risks described in Chapter III. Above all, the government must ensure that it has the legal authority and the institutional capacity to protect communities and the environment and to pursue its fiscal and regulatory interests.

At the same time, the mining companies with interests in Haiti face choices, too. In deciding whether to make the large capital investments associated with modern gold mining, the companies will have to determine if the anticipated revenues from mining will provide an attractive enough rate of return to investors and shareholders to justify the high risks of mining and marketing the gold.

Indeed, of all of the factors that influence the twin decisions whether to authorize mining and whether to mine, the price of gold may be the most important. The value of the gold—and the parties' best predictions of future prices and price volatility—will determine not only the companies' willingness to mine and the scope of their activities. It will determine also the amount of revenues that Haiti may gain from the exploitation of its gold reserves.¹

A. The Economic Drivers of Mining

There are many economic factors that mining companies must evaluate before deciding whether (and under what conditions) to mine. These include: the location, quantity, and grade of the anticipated ore deposits; capital costs of mine construction; long-term operating costs of the mine and mineral processing (including fuel and labor costs); the need to create supporting infrastructure; the costs of environmental compliance and remediation (including mine closure and rehabilitation); political and regulatory conditions; financial obligations to the government (including royalties, taxes, fees, and mandatory in-kind contributions); and interest rates, exchange rates, and world gold prices over the life of the mine.²

The costs of modern gold mining are immense. Though larger than any one mine in Haiti is likely to be, the Pueblo Viejo mine in the Dominican Republic provides a useful point of reference.³ At Pueblo Viejo, the capital costs—which typically cover mine excavation, creation of waste treatment ponds and tailings reservoirs, construction of ore refining facilities and a water treatment plant, and establishment of other supporting infrastructure—were \$3.7 billion.⁴ Based on declared reserves of 23.7 million ounces of gold,⁵ the investment costs translate to approximately \$160 per ounce.⁶

Annual costs—which include operating expenses, capital depreciation, debt service, and financial obligations to the host government—are also large. Barrick Gold Corporation reported that 2014 operating costs at Pueblo Viejo were \$403 per ounce of gold produced, royalties and production taxes were \$43 per ounce, and depreciation on capital was \$228 per ounce, for a total cost of \$674 per ounce.⁷ At a production level of 1,108,332 ounces per year, the aggregate annual costs were approximately \$747 million.⁸

To justify costs of this magnitude, a mine must generate substantial revenues that allow the company to operate at a profit and to return those profits to its shareholders in the form of dividends and capital gains. Mining revenues are highly uncertain, however, which means that the companies must engage in a multivariable risk analysis.

Companies assume one important revenue risk inherent in the exploration and research processes—namely, that the actual quantity, concentration, and grade of the gold deposits can be determined only after mining has begun. Test drilling, ore sampling, and metallurgical analysis can sketch only the location, contours, and overall average grade of ore deposits. Thus, there is always a risk that a mine simply will not produce the quantity of gold on which the capital investment was predicated.

A second revenue risk derives from the variability of world gold prices: With the high capital and operating costs of mining, each company will engage in an economic assessment of probable gold prices, price variability, and long-term price trends before deciding whether to mine. In simple terms, the company must decide that predicted gold prices will allow it to operate at a profit over the lifetime of the mine.⁹

Although gold prices have exceeded \$1000 per ounce since September 2009, they have been volatile over the last decade. The price of gold in October 2006 was approximately \$500 per ounce and rose steadily for the next five years. After reaching a historic high of \$1895 per ounce in September 2011, the price of gold fell to a recent low of \$1085.70 in July 2015 and a comparable level in August 2015.¹⁰ (See Figure 4-1.) Prices appear even more volatile when viewed over a longer period. For example, over the last thirty years (the approximate lifespan of an open-pit gold mine of the type that may be developed in Haiti), the price of gold has ranged from just over \$350 per ounce to nearly \$2000 per ounce.¹¹ A downward trend in gold prices would deter companies from opening new mines and could lead them to cut back on existing operations. Indeed, in response to declining gold prices in 2014, the World Gold Council stated that if “gold dips below \$1,200 per ounce for a ‘sustained’ period, serious production cutbacks are likely.”¹²



Figure 4-1: Ten-year price of gold in troy ounces, © 2015 Goldprice.org¹³

The effect of gold price variability on the decision whether to open a particular new mine will depend, of course, on the economics of that specific mine site. It would be conjecture to predict whether the recent decline in gold prices will change the plans of VCS Mining LLC- Delta Société Minière S.A. (VCS/Delta), Majescor Resources Inc.-Société Minière du Nord-Est S.A. (Majescor-SOMINE), Newmont Mining Corporation-Eurasian Minerals Inc. (Newmont-Eurasian), or other ventures to mine in Haiti in the near future. But there is no doubt that the companies' analysis of future gold prices will play an important part in their decision-making calculus.¹⁴

The third revenue risk factor, "cut-off grade selection," is a product of the first two revenue uncertainties. Cut-off grade is the "lowest grade of ore that it is economically feasible to extract, and it in turn depends on forward-looking metal prices, operating parameters and cost assumptions made by mine management."¹⁵ "Cut-off grade selection is arguably the main factor deciding the economics of a mine, as it dictates the tonnage and grade of ore to be mined, and in turn the scale, lifespan and profitability of the operation."¹⁶

Mining companies seek to control as many of the variables affecting cut-off grade as they can.¹⁷ By limiting its financial obligations to the host nation, for example, a company can both reduce its overall costs per ounce (thereby increasing net profits) *and* mine a greater volume of gold as the

cost reductions lower the cut-off grade. Companies contend that this is better for all parties—including the companies, their employees, local communities, and the host government—because a lower cut-off grade means that the mine will be larger, more gold will be processed, and mining will occur over a longer period of time than it would with higher royalties and taxes.¹⁸ Understanding how cut-off grade selection affects mining companies' operational decisions may influence the government's determination of the mix of royalties and taxes that it will impose to maximize its own financial benefits from mining.

B. The Financial Terms of Mining

The financial terms of future gold mining in Haiti constitute one of the critical points of negotiation and debate over the Draft Mining Law. As explained above, for the mining companies, fiscal obligations to the host country are a cost of production that will shape their decisions at each critical point—whether to mine, what type and size of mine to construct, and how long to engage in mining. For Haiti, the financial terms will not only contribute to the decision whether to authorize mining (and, if so, under what conditions); they will also determine the amount of income that the government and the Haitian people will realize from the exploitation of their mineral wealth.

1. Taxes and Royalties: A Comparative Analysis of Fiscal Regimes for Mining

The most important fiscal terms of mining are taxes and royalties. Mining companies, like other businesses, are usually subject to general corporate income taxes on their net profits. In addition, if a company sells its interest in a mine or mining permit, it may have to pay capital gains taxes on the profits from the sale.¹⁹ Some countries also levy general taxes on specific activities that may be involved in mining.²⁰ These may include property taxes, import taxes on equipment and supplies that the company brings into the host nation to construct and operate the mines and related facilities, and sales tax or value-added tax (VAT) imposed at the time of sale or export of the refined gold or other products.²¹

In addition, most countries impose a variety of special taxes or charges on the mining sector. These may include land use taxes, permitting fees, environmental protection and mine rehabilitation fees, ad valorem charges (a fee based on the value of the gold or other metals extracted) or income taxes for the benefit of local communities, and royalties on the value of the gold extracted or refined by the mine.²² Among these the royalty is the most significant, because it is based on the value of the gold itself (or in some countries the profits earned from gold extraction and production). The other special taxes and fees levied on a specific activity or for a specific purpose are usually comparatively modest.

Although most mineral-producing nations charge corporate income taxes, withholding taxes,²³ and royalties, there is wide variation in fiscal regimes. In 2012, PricewaterhouseCoopers (PwC) surveyed the taxation and royalty policies of 22 countries.²⁴ The following summary highlights

some of the key features of different fiscal regimes for mining, which the government of Haiti may wish to consider as it designs the country's new mining law.²⁵

A. TAXES

The average corporate tax rate in the countries surveyed by PwC in 2012 was 34 percent.²⁶ The average global corporate tax rate in 2015 is 23.68 percent.²⁷ The vast majority of nations impose a uniform corporate income tax rate that applies to all businesses. Three of the countries surveyed, however, have special rates for mining. The Democratic Republic of the Congo (DRC), for example, has a corporate income tax rate of 35 percent, which is reduced to 30 percent for income earned from mineral exploitation.²⁸ Similarly, the neighboring Republic of the Congo reduced its corporate income tax rate of 34 percent to 30 percent for income earned from mineral exploitation²⁹—until recent reforms³⁰ lowered the corporate income tax rate for all sectors to 30 percent.³¹ In contrast, Ghana has a general corporate income tax rate of 25 percent but applies a rate of 35 percent to mining income.³² Peru previously had a general corporate tax rate of 30 percent, which it reduced to 28 percent for fiscal year 2015–2016 and plans to lower to 26 percent by 2019.³³ Peru also imposes special taxes on the mineral sector, however, that may add as much as 20 percent to a mining company's total tax liability.³⁴

Most countries surveyed by PwC have special rules that allow mining companies to reduce their tax burdens in the first years of mining, when up-front costs are typically highest.³⁵ For example, in order to attract investment, some countries allow accelerated depreciation of mining assets rather than “straight-line” depreciation, enabling companies to deduct a higher portion of the costs of equipment, construction, and infrastructure early in the mine's life.³⁶ Other countries, such as Tanzania, go even further, allowing mining companies to immediately deduct 100 percent of all capital costs from their taxable income.³⁷ Governments can, however, limit the kinds of company expenditures that may be deducted from taxable income in this way. For example, Peru allows the accelerated amortization and depreciation of investments in infrastructure (such as roads and public utilities) only if the government determines that the infrastructure qualifies as a “public service.”³⁸

Although all countries surveyed by PwC allow mining companies to deduct production expenses from their gross revenues, these countries' policies on deductibility of exploration and research costs vary widely. Some countries do not allow any deductions for exploration investments and expenses. Others permit treatment of exploration and research costs as “losses” that can be carried forward and used to offset income once mineral production and sale begins.³⁹ Many countries that allow such practices either limit the time period within which such pre-operation expenses can be deducted from profits or cap the amount of expenses that can be used to offset income.⁴⁰

B. ROYALTIES

The PwC study from 2012 also revealed an array of approaches to mining royalties. All except one of the 22 surveyed countries impose a royalty on extracted minerals.⁴¹ These royalty charges are in addition to corporate income taxes, though all of the countries surveyed allow mining

companies to deduct their royalty payments from their gross income in calculating taxable income.

The two basic royalty models are an *ad valorem* charge and a surcharge on the companies' profits earned from mining. Within and between these categories, however, there is wide variation.⁴²

Most *ad valorem* royalties are based on the value of gold on first sale or export. In some countries, however, the royalty is based on the value of the mineral extracted at the mine "head" or "mouth."⁴³ On paper, *ad valorem* rates among countries surveyed by PwC were fairly simple, varying from 2 percent for copper in the Democratic Republic of Congo⁴⁴ and for both gold and copper in the Philippines to 5 percent for gold in Ghana and the Republic of the Congo.⁴⁵ In practice, however, rates may be more complex. Sometimes countries reduce the royalty rate or offer companies tax credits for royalty payments when the minerals are first sold for further transformation within the host country, such as in the Democratic Republic of Congo.⁴⁶ In other cases, governments require the company to pay a higher or supplemental royalty rate when the mine is located within a protected area or on indigenous lands, such as in Indonesia and the Philippines.⁴⁷

Box 4-1: Comparison of *Ad Valorem* Mineral Royalty Rates in Select Countries

(Based on value of mineral extracted at first sale or export, unless otherwise noted)

Country	Rate	Metal	Notes
Argentina	Up to 3% ⁴⁸	Gold, copper, and silver	"Mine head" or "mine mouth" royalty, based on the value of metal extracted, collected provincially
The Democratic Republic of Congo	2.5% ⁴⁹ 2%	Gold Copper	Royalty calculated by value of minerals at point of sales, less transportation, analysis, insurance, and marketing costs. ⁵⁰ One third of royalty payment may be claimed as tax credit if minerals are first sold for transformation in DRC.
Ghana	5% ⁵¹	Gold and copper	
The Republic of the Congo	5% ⁵² 3%	Gold Copper	
Tanzania	4% ⁵³	Gold and copper	
Indonesia	3.75% ⁵⁴ 4%	Gold Copper	Royalties levied on mineral production; companies that mine within state reserve areas must pay an additional 10% royalty on net profits

Philippines	2% ⁵⁵	Gold and copper	"Mine head" royalty; companies operating within "mineral reservation areas" must pay a 5% mine head royalty, and those operating in indigenous communities must negotiate separate royalty rates not less than 1% of gross metal production.
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Other countries have royalty schemes that essentially function as tax surcharges. Many of the schemes are too complicated to detail here, but a few examples illustrate the variation in government approaches to capturing natural resource rents for the public benefit. Brazil requires mining companies to pay 2 percent of their net revenue from copper sales and 1 percent of their net revenue from gold sales, minus any taxes levied on the "revenue, insurance and freight costs" for the minerals sold.⁵⁶ Chile has created a Specific Mining Tax, applicable to gold and copper mining that varies based on the volume of production. For example, smaller producers pay between 0.5 percent and 4.5 percent of "operational taxable mining income" while mines producing over 50,000 metric tons annually pay between 5 percent and 34.5 percent.⁵⁷ Peru similarly applies a sliding-scale royalty system, under which the rate charged varies from 1 to 12 percent of "operating profit," based on a mining company's operating margin, but may not be less than 1 percent of the company's gross revenues from mineral sales for that quarter.⁵⁸ This royalty is in addition to a special variable mining tax based on companies' net operating income and a 30 percent corporate tax rate.⁵⁹

2. Haiti's Fiscal Policy Options

As even this brief and simplified survey indicates, governments have diverse models to choose from when structuring (or restructuring) mining tax and royalty systems. Two of the key questions for Haiti will be whether to impose a separate royalty on mining (in addition to applicable taxes) and what tax and royalty rates to set.⁶⁰ The answers to these questions generally turn on how a government: 1) balances the competing objectives of attracting investment and generating sufficient public revenues from mining to offset the environmental costs and the consequences to other economic sectors, and 2) ensures that the mining industry is a net positive for the national economy.

The aggregate level of taxation (including royalties) is significant not only because it determines how the financial benefits of mining will be apportioned between the government and the mining companies. It is significant also because it will influence the quantity of gold and other minerals that will be extracted and sold. As described in the preceding section, taxes and royalties increase the cost of mining and therefore contribute to the companies' determination of cut-off grade for each of their mines.⁶¹ Mining companies prefer a low tax regime, because it both reduces their costs (thereby increasing profits) and creates incentives to extract marginal grade deposits and keep the mines in operation for a longer period of time (thereby maximizing the revenue stream produced by their capital investments). Tax rates that are too low, however, would leave "the state with only the nontax benefits that flow from mining and mineral production."⁶²

Understanding why mining companies typically prefer to meet their financial obligations to the host country in the form of taxes rather than *ad valorem* royalties may shed further light on the decisions facing the Haitian people and their government. There are at least two reasons companies favor taxes.

First, taxes allow mining companies to spread payments over time and over units of production (tons of metal extracted) in a way that inures to the company's benefit, minimizing impacts on cut-off grade selection and often reducing overall payments to the government. Corporate income taxes are assessed on net taxable income (i.e., gross revenues from mining less allowable deductions for operating costs, capital depreciation, carry-forward losses, other taxes, etc.), and mining companies usually do not earn a profit (at least for tax purposes) during the early years of production. In contrast, mining royalties are frequently assessed on the value of minerals at their first sale or export, which happens soon after the mine enters production. By paying more of their financial obligations as corporate income taxes instead of royalties, therefore, mining companies can shift their tax burden to the middle and later years of operations.⁶³

Second, corporate income taxes allow mining companies to shift some of their business risks to governments. Under an *ad valorem* royalty rate like those described above, a mining company has to pay a certain amount per ton of metal produced or sold based on its sale price, regardless of whether the company earned a profit on it. Under a tax regime, however, if prices are depressed and companies are in the red, they pay less (if anything) to the government. For example, "[w]hen before-tax profits are down by 20 percent, both tax revenues flowing to the government and after-tax profits realized by companies are down by more or less the same amount."⁶⁴

Under both the current and proposed new mining law in Haiti, the mining companies would be required to pay a combination of taxes and royalties. Corporate income tax and related taxes total a little more than 40 percent of corporate net taxable revenues, while the royalty—which is based on the value of the gold rather than on corporate profits—is presently 2.5 percent⁶⁵ and would rise to 4 percent under Article 235 of the Draft Mining Law.⁶⁶

Although this mix is within the range of combined taxes and royalties imposed by the countries surveyed by PwC, it is in Haiti's interest for the government to take a close second look at the relative role the *ad valorem* royalty should play. Corporate taxes represent the fair contribution that all companies, in all sectors, must make for the privilege of doing business in Haiti. In contrast, the royalty is the primary means by which the Haitian government and the Haitian people secure a share of their own mineral wealth.⁶⁷

As Article 36-5 of the Haitian Constitution makes clear, Haiti's gold deposits and other mineral reserves are "part of the State's public domain."⁶⁸ The government owns the gold in trust for the Haitian people. It may grant private concessions, essentially engaging the mining companies to help it to exploit these minerals, subject to the terms of the mining law and concession agreements that must provide a sufficient return on investment to entice the companies to undertake mining in the first place. But the gold and other minerals belong to the Haitian State,

on behalf of the population. The royalty represents the Haitian State's ownership share of the minerals extracted by private parties.

More pragmatically, a royalty is a more reliable way of assessing the mining companies for the privilege of mining Haiti's mineral wealth. An *ad valorem* royalty charge offers two significant advantages over corporate taxes. First, royalties are payable immediately upon production and first sale or export of the processed gold. Second, royalties are comparatively easy to calculate and to collect. According to a 2006 report on mining taxation commissioned by the World Bank, "the difficulty of tax administration and the possibilities for evasion"⁶⁹ are an important consideration in determining the appropriate mix of taxes and royalties:

Some taxes, including many types of royalties, are easy to administer and difficult to evade. Government officials simply need to know a company's total sales or production to determine its tax liability. This not only reduces administrative costs, it reduces the incentives firms have to devote resources to tax reduction efforts [such as transfer pricing and other practices discussed below]. Perhaps more importantly, it reduces the opportunities for corruption.⁷⁰

Furthermore, certain unique features of the mining industry mean that special taxes, fees, and royalties may be necessary to ensure that the host government and mining-affected communities receive a fair share of the benefits of their mineral resources. As detailed in Chapter III, gold mining poses serious risks to public health and the environment and typically causes long-lasting environmental damage. Imposing special taxes to fund environmental remediation and restoration can help to ensure that communities and individuals harmed by mining's externalities are not left footing the bill for cleanup or without any avenues to seek remedy or compensation.

While the benefits of mining may accrue to the nation as a whole, the costs of mining are borne disproportionately by local communities. Affected populations include both those who are displaced by or reside in close proximity to a mine and those who may suffer from downstream or downwind pollution. It is therefore often appropriate for governments to levy special taxes or fees on mining to compensate local communities for the harm and inconvenience that they may experience.

Under its existing legal regime for mining, Haiti levies a special tax of \$0.20 per ton of material extracted from the mines, which is designated to fund development projects for the benefit of the communities affected by mining.⁷¹ Other countries specifically designate a share of their mining royalties for local communities or impose a higher rate when mining occurs in certain protected areas. One such example is Brazil, which requires mine concessionaires to contribute to a fund for Compensation for the Exploitation of Mineral Resources (CFEM). The mandatory contributions are 2 percent for copper and 1 percent for gold, based on "the mining company's net revenue, *i.e.*, the mineral sales revenue less taxes levied on revenue, insurance and freight costs," and are taken at the time of first sale or export. The proceeds of the CFEM are divided three ways: 65 percent goes to the municipalities where the mining occurs; 23 percent is allocated

to the state (i.e., the regional government); and 12 percent remains with the federal government.⁷² In addition, the law requires the mining companies to pay the owners of the land on which the mining facilities are located a monthly royalty equal to 50 percent of the CFEM.⁷³

As it revises the legal framework for mining and determines the proper mix of taxes and royalties,⁷⁴ the Haitian government should take into account all of these interests. It should also factor in the risk that corporate taxes are susceptible to manipulation and avoidance, as well as the administrative burden of tax collection. This task will be complex, but an economic analysis of the costs and benefits of various taxation and royalty strategies is essential.

Box 4-2: Questioning the Haitian Government's Capacity and Will to Collect Taxes⁷⁵

The International Monetary Fund has noted that, despite increasing macroeconomic stability in the years since the earthquake in 2010, the Haitian government's fiscal management and tax administration systems are dysfunctional and its budgetary operations lack transparency.⁷⁶ The Haitian government has a record of providing corporate income tax exemptions. For the fiscal year 2010–2011, such exemptions accounted for a loss of 4 percent of the gross domestic product.⁷⁷ Haiti also has a history of failing to collect corporate income tax altogether.⁷⁸ These policies (and policy shortcomings) have a tendency to burden middle-income earners while failing to capture revenue from higher-income earners.⁷⁹

In a 2015 report, *Ready for Gold*, Oxfam America writes that the Haitian government's history of low revenue collection:

raises doubts about the extent to which the government would be able and willing to effectively collect revenues from large-scale industrial mining activities. Strengthening the formal tax regime alone is insufficient. The Haitian government must have the capacities and political will to collect and audit corporate financial reporting. These audits must be publicly available—to increase citizen oversight and to enable independent verification as a safeguard to ensure actual compliance. In 2007, the World Bank identified a series of related limitations in Haiti's statutory framework concerning corporate accountability that raises serious concerns about the government's capacity to take these actions.⁸⁰

There is ample evidence that Haiti is ill prepared to supervise mining companies' accounting methods and to collect corporate taxes owed under Haitian law. A 2013 study by the International Monetary Fund (IMF) concluded that, while Haiti's tax administration has improved in recent years, "tax and customs administrations still suffer from weak technical capacity, and an organizational structure where policy direction, monitoring and operational delivery are not separated and that does not fully reflect taxpayers' diversity."⁸¹ (For a more detailed discussion of the legal framework for mining in Haiti, see Chapter V.)

C. Haiti's Financial Stake in Mining

The taxes, royalties, and other charges that Haiti may collect from gold mining are the means by which the Haitian government could potentially turn natural resources into a stream of revenue. Even if revenues are created, however, sustaining and harnessing such a revenue stream for the public's benefit depends on many variables. If the wealth generated exceeds the costs of preventing, mitigating, and remediating environmental harm and compensating for negative impacts on other industries, and if the revenue is invested well, it has the potential to spur economic development and begin to address the problems described in Chapter I of this report. It is therefore necessary to take a careful look at the details and reliability of these potential sources of public wealth and at several limitations on expected fiscal returns.

Existing Haitian law, outside of the mining law, contains a mix of taxes, royalties, and fees not specific to the mineral sector that would nonetheless apply to mining. The individual income tax rate varies from zero to 30 percent, depending on income level.⁸² All mineworkers, including foreign employees, would be subject to this tax.⁸³ The corporate income tax rate is 30 percent, and companies are required to pay an additional 1 percent tax to support a fund for the management and development of the territorial communes.⁸⁴ Both of these taxes are levied on taxable profit.⁸⁵ Corporations doing business in Haiti must make several other smaller payments, including payroll (i.e., withholding) taxes of 2 percent, health insurance premiums of 3 percent, and contributions to social security of 6 percent—all levied on gross salaries.⁸⁶ Haiti also has a 15 percent property tax, a 10 percent VAT, and a 15 percent capital gains tax.⁸⁷

In addition to the *ad valorem* mineral royalty and the special tax payable to local communities, described above, there are several other special taxes that apply only to the mining sector. The 1997 conventions require the companies to pay a surface use fee of \$10/km² during the research phase and \$50/km² during the exploitation and concession phases for the lands covered by their permits.⁸⁸ The Draft Mining Law includes similar special mining taxes for all mining permit holders but proposes modifications to the applicable rates.⁸⁹ (See Chapter V.)

Although these taxes appear significant in the aggregate, the revenues that Haiti is likely to receive from them are, for a variety of reasons, limited. Express limitations, legal uncertainties, tax incentives or exemptions, and corporate tax avoidance strategies—as well as the demonstrated

weakness of Haiti's tax authorities—all combine to reduce the actual taxes that the mining companies are likely to pay to the Haitian government.

1. Tax Limitations and Uncertainties

Some of Haiti's general and special mining taxes would represent reliable sources of national revenue. For example, the surface use fees and the special raw materials extraction tax would be collected annually. These taxes, however, are small. Individual income taxes could generate more substantial revenues, but the government would have to rely exclusively on payments by the individual mine employees to obtain these taxes. Most countries, including Haiti, use the payroll tax as a means of withholding a portion of their employees' income tax liabilities from their paycheck (which the companies pay directly to the government). As described below, however, if Haiti's Investment Code applied to mining companies, it could exempt them from making payroll tax payments for the first fifteen years of their taxable operations in Haiti.

The other general taxes are nominally larger but are also unlikely to produce significant revenue streams. Although Haiti has a 10 percent VAT,⁹⁰ it will have to decide whether or not to apply this levy to the sale or export of processed gold. As described in the preceding section, all 22 countries surveyed by PwC in 2012 either waive their VAT on the sale or export of processed ore or simply do not apply the VAT to the mining sector.⁹¹ Some countries justify the waiver of (or exemption from) VAT as a means of creating special tax incentives to attract mining;⁹² others do so on the theory that the extraction and processing of gold do not add any value to the raw mineral reserves—the gold mining process simply transforms the raw gold into a commercially marketable form for export, rather than for sale and use within the host country.⁹³

Similarly, although Haiti has a 15 percent land tax,⁹⁴ it is unlikely to apply in any significant way to the lands used for mining. Most countries' property taxes are based on the assessed value of the land. In Haiti, however, the land tax is levied only on the rental value of buildings.⁹⁵ The mining companies might rent housing to some of their workers and could be subject to the land tax for the value of these rentals, but this tax obligation would be tiny. Moreover, the land tax is typically imposed on landowners. Although the mining companies would have surface occupancy and use rights during the terms of their concessions, they would not own the land that they mine, and thus the land tax may not apply to them at all.

Haiti's 15 percent capital gains tax⁹⁶ also may not generate much revenue from mining. The capital gains tax would apply only to the transfer of an ownership interest in a mining company (including a transfer of stock) or to the transfer of an interest in a mining permit or convention that is taxable in Haiti. Such occurrences are likely to be only sporadic.

2. Potential Exemptions from Corporate Income Taxes under Haiti's Investment Code

Haiti's 30 percent corporate income tax rate is the most significant tax applicable to mining.⁹⁷ Because of several tax exemptions provided in Haiti's Investment Code, however, corporate income tax may not generate substantial revenues for many years following the commencement of mining.

Haiti amended its Investment Code in 2002 to add a number of tax incentives designed to attract investment and new businesses to Haiti.⁹⁸ The *Centre de Facilitation des Investissements* (Center for Facilitation of Investments, or CFI), an independent bureau of the *Ministère du Commerce et de l'Industrie* (Ministry of Commerce and Industry), has a mission to "promote investment and help potential investors take advantage of opportunities in Haiti,"⁹⁹ including by overseeing the implementation of the Investment Code. The code applies to both foreign and national investment,¹⁰⁰ specifically export-oriented investments.¹⁰¹ The code does not apply automatically; rather, it requires completion of an application process. An interested investor must create a proposal with the assistance of the government ministry relevant to its area of work and apply to the *Commission Interministérielle des Investissements* (Inter-Departmental Commission on Investments, or CII).¹⁰² CFI staff explained that although no mining company has sought benefits under the code to date, a mining company could apply for such incentives.¹⁰³ To do so, the company would need to create a proposal with the *Bureau des Mines et de l'Énergie* (Bureau of Mines and Energy), which is under the auspices of the *Ministère des Travaux Publics, Transports et Communications* (Ministry of Public Works, Transportation, and Communication), to submit to the CII, which would then determine eligibility for fiscal benefits.¹⁰⁴

The potential tax benefits granted to a mining company could be enormous—and the corresponding loss of public revenue for the Haitian government and people disastrous. According to Article 27 of the Investment Code, qualifying companies are exempt from all corporate income taxes and local taxes for up to 15 years.¹⁰⁵ Following this period, income tax liability is phased in over six years, with the company taxed on 15 percent of its net taxable income the first year, 30 percent the second, 45 percent the third, 60 percent the fourth, 80 percent the fifth, and 100 percent thereafter.¹⁰⁶ If Article 27 applied to mineral extraction, mining companies would not be fully liable for corporate income taxes and local taxes for a period of 21 years following the first production and sale of gold.¹⁰⁷ For most mines, this period would likely include the years of peak production, meaning the State would fail to capture much of these mines' net revenues.¹⁰⁸

Along with these tax exemptions, Article 27 allows qualifying companies to claim accelerated depreciation for a variety of capital costs. This practice would enable qualifying mining companies in Haiti to make greater deductions during their early years of operation and thereby reduce their taxable income when production rates may be highest (see Figure 4-2). Those covered costs most relevant to mining include costs associated with built-up properties (i.e., those with higher property tax value), heavy equipment, light equipment and rolling stock, office

equipment, and software.¹⁰⁹ Article 27 also authorizes the deduction and accelerated depreciation of start-up costs, development costs, and survey and research costs at even more generous rates—fully 100 percent of research costs are deductible.¹¹⁰ Even though qualifying companies would pay no Haitian corporate income taxes during the first 15 years of operations, these tax incentives are still valuable; they allow mining companies to increase their deductible expenses during the early years of production and sale, thereby minimizing any income tax liability that the companies might face in other countries, such as their home States.¹¹²

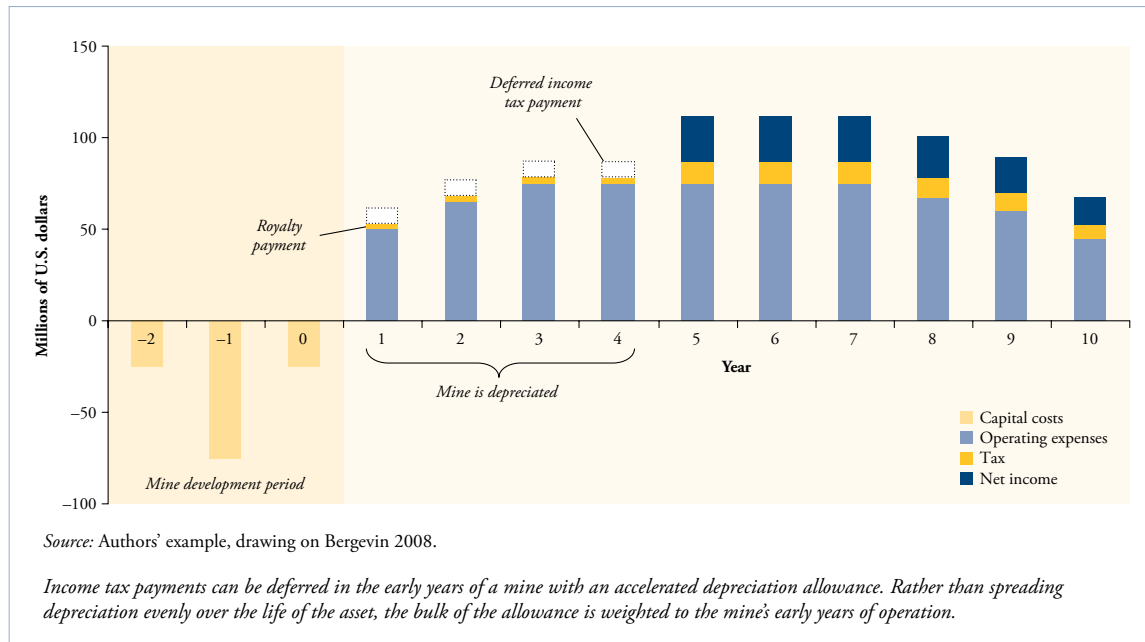


Figure 4-2: Hypothetical showing the effects of accelerated depreciation and loss carry-forward deductions over 10 years of active mining, © 2010 Tادروس & Svensson¹¹¹

The Investment Code contains additional special tax benefits for companies “whose services or production are geared towards export or re-export.”¹¹³ Article 29 exempts from customs duties and income taxes all imported equipment, goods, and other materials “needed in installation, operations and production of the enterprise.”¹¹⁴ The law specifically identifies several categories of equipment required for mining, including “machines and devices intended for prospecting and research.”¹¹⁵ Article 29 also exempts qualifying export companies “from payroll taxes and other direct internal taxes” for a period of up to 15 years, as well as from audit charges.¹¹⁶ Absent an express exemption, these special Investment Code benefits would appear to apply to the mining sector.¹¹⁷

Finally, Article 41 of the Investment Code effectively carves out an exception to the regime relating to investment for businesses that the government deems “of particular interest for the collectivity due to their inherent characteristics, to the size of the investment they require, to the high priority attributed to their realization or to the strategic nature of the field of business.”¹¹⁸ The code does not discuss the process by which such a determination would be made. It provides

that the government may enter into agreements with such businesses, which “will specifically define the special status granted to the business concern, the related special benefits, as well as the obligations in exchange due from the beneficiary/beneficiaries.”¹¹⁹ The vague and open-ended terms of Article 41 appear to allow the government to offer special tax exemptions and privileges that go beyond the already substantial benefits described in this subsection—dependent only on a finding that the business in question would produce general benefits for Haiti. Notably, the code states that its benefits “cover enterprises working towards improving the environment.”¹²⁰

Further, the Code authorizes the *Ministère de l’Environnement* (Ministry of the Environment) “to recommend the annulment of benefits... if the processes of manufacture generate negative externalities exceeding generally accepted levels.”¹²¹ It is unclear, however, whether that provision is applied.¹²²

Because of the high investment costs of constructing a modern gold mine and attendant processing, containment, and treatment facilities, it is common for mines not to have taxable net income during the early years of production.¹²³ Many countries ameliorate some of these costs by temporarily reducing the tax burden on mining—especially during the exploration, research, and start-up phases.

If the Haitian government chooses to offer these tax incentives as a means of attracting investment, prudent fiscal management would necessitate both limiting the scope or duration of the incentives’ application and planning for the contingency that Haiti may not gain significant corporate income tax revenues for at least the first four to six years of active mining. Without such limitations, the tax policies could effectively insure the mining companies against the risk of low future gold prices. Indiscriminately allowing companies to carry forward all operating losses effectively socializes the costs associated with risks inherent to the mining industry while allowing mining companies to privatize the benefits.

3. Corporate Income Taxes: The Risks of Transfer Pricing

While effective administration of a mineral royalty requires adequate government capacity to counter-verify the volume of production and/or sale reported by a company, income tax collection is more dependent on calculations wholly in the company’s control, such as how it books its costs and profits. Thus, corporate income tax liability is susceptible to manipulation that may reduce net taxable income and thus income tax revenues. One such tax accounting practice is known as “transfer pricing,” a topic that is complicated and thus described only briefly below. This simplified overview highlights some of the issues that the Haitian government will have to consider in evaluating the reliability of corporate income taxes as a means of obtaining its fair share of the revenues produced by mining Haiti’s gold reserves.¹²⁴

Transfer pricing is “the pricing of goods, services, capital and technology inputs, managerial skills, financial services, [and] shared/support services... if they are transferred between affiliates

of [multinational corporations].”¹²⁵ Transfer pricing may occur within a multinational corporation or between a multinational corporation and its subsidiaries. Questions about transfer pricing arise because companies can manipulate the internal pricing of goods and services bought and sold by affiliated entities as a means of lowering the companies’ net taxable incomes in both their home countries and in host countries.¹²⁶

Issues involving transfer pricing may arise when a multinational corporation provides debt financing for projects undertaken by a subsidiary or leases capital goods and machinery to the subsidiary, rather than furnishing these goods and services directly through capital investment. In both situations, there is a risk that the parent multinational will charge higher than market interest rates or rental fees for the purpose of inflating the subsidiary’s operating costs and thus diminishing its net taxable revenues. Even without such overpricing, a subsidiary whose operations in a given country are financed primarily through debt rather than capital investment may be able to record its interest payments to the multinational as costs, thereby reducing its taxable income in the host country. This accounting practice is possible because, unlike a third-party lender, such as a bank, the multinational does not need to inquire whether the subsidiary is adequately capitalized to secure debt repayment. If the multinational uses a second subsidiary to lend the money to the mining subsidiary and the lender subsidiary is incorporated in a country that does not tax interest income (or taxes it at low rates), the multinational can reduce its overall corporate income tax liability.¹²⁷

Transfer pricing may also occur when goods produced by a local subsidiary of a multinational corporation “flow downstream for further processing within the boundaries of the MNC (or coordinated by it) before a final sale to third parties.”¹²⁸ In the context of gold mining, a multinational company might operate a mine and process the ore through a subsidiary incorporated and licensed in the host country, then sell the refined gold (in the form of doré bars) at below market prices to another subsidiary registered in a different country; this subsidiary might then resell the refined gold to third-party buyers (perhaps after further refining) at market rates. The purpose of this arrangement might be to reduce the parent corporation’s income tax liability by reducing the sales revenues earned by the subsidiary that mined and processed the gold in the host country, while shifting the balance of the income to the other subsidiary that sells the gold at actual market prices. This scheme is to the parent corporation’s advantage, of course, only if the marginal tax liability in the country to which the tax liability is shifted is less than that in the host nation.

The purpose of this analysis is not to suggest that the multinational corporations that may mine in Haiti (either directly or through subsidiaries or affiliates) would engage in tax avoidance transfer pricing. Nor is it to imply that the risks of transfer pricing for the manipulation of corporate income liabilities are unique to the mining industry; they are not.¹²⁹ Rather, the objective is simply to emphasize that the Haitian government must consider transfer pricing as it evaluates the appropriate taxation regime for mining. As described in more detail in Chapter V, the Draft Mining Law addresses transfer pricing in several ways, reflecting an understanding that it could undermine the corporate income tax structure on which Haiti will rely to ensure that the

State receives substantial economic benefits from mining. Whether those provisions will be strong enough to prevent tax abuses—and whether the Haitian government has the capacity to enforce them—remains to be seen. The Haitian government may wish to refer to the numerous publicly available resources describing best practices to curb transfer-pricing abuses.¹³⁰

The task of auditing a multinational mining corporation's parent-subsidary and inter-subsidary cost accounting records alone would overwhelm even a sophisticated and well-funded tax administration and enforcement office.¹³¹ For example, in response to criticism that it was lagging behind other developed nations in identifying illegal transfer pricing by multinational corporations, the U.S. Internal Revenue Service announced in 2012 that it was creating a special unit of forensic accountants and international tax law experts to investigate and prosecute tax avoidance transfer pricing.¹³² Haiti would need comparable auditing and tax enforcement capabilities if it hopes to ensure that multinational mining companies comply with its (yet to be enacted) transfer pricing rules.

4. Fiscal Sustainability

Effective tax collection is less than half the battle. If mining proceeds in Haiti, ensuring that its benefits outweigh its costs to people and the environment requires using any revenues that the industry may generate to improve the welfare of the Haitian people. Experience worldwide shows that mineral production “can both foster and hinder economic growth,” depending in large part on what governments do with mining revenues.¹³³

The term “resource curse” refers to the:

curious phenomenon [whereby] countries with large endowments of natural resources... often perform worse in terms of economic development and good governance than do countries with fewer resources. Paradoxically, despite the prospects of wealth and opportunity that accompany discovery and extraction of oil and other natural resources, such endowments all too often impede rather than further balance and sustain development.¹³⁴

Development economists usually identify a variety of causes for host countries' mismanagement of their resource wealth. These include: inequality of knowledge and expertise between the host nation and the investing companies; a tendency for the extractive industries to crowd out more sustainable business sectors; volatility of tax revenues dependent on resource extraction; inadequate investment of tax and royalty receipts in infrastructure, education, and other social services; corruption and misappropriation of public funds; grievances from the regions where the resources are extracted; and political instability and threats to democracy as the needs of the extractive industries come to dominate national decision-making.¹³⁵

Avoiding or minimizing the risk of the resource curse requires deliberation and planning. First, a resource-endowed country must determine whether or not it makes sense to develop the

mining industry. Such an assessment should not focus on sheer numbers alone; it should also address—in a participatory manner—questions of equity and distribution and the greater economic and social goals of development. Moreover, a resource-rich country that intends to exploit its gold and other mineral reserves must have a national plan for the investment, use, and distribution of the revenues that the mining industry may generate. Elaborating the details and funding priorities of such a revenue management plan in a transparent manner and with input from the public can help promote efficacy and responsiveness to the needs of the population.

Economists recommend that the host State create a “stabilization fund” to address problems created by the volatility of mineral prices and global economic downturns. Such a fund serves to even out fluctuations in income from resource rents; revenues are deposited in the fund when mineral prices and/or tax payments are high and withdrawn when prices and/or tax payments are low.¹³⁶ The World Bank further recommends that the tax revenues placed in such stabilization funds be invested abroad as a means of protecting against volatility in domestic financial markets.¹³⁷

5. Fiscal Transparency

The experiences of resource-producing countries around the world provide a stark reminder that there is nothing automatic about translating natural resource wealth into public welfare. Realizing the oft-touted promise of mineral revenues for poverty alleviation and economic growth depends first on whether the government earns a fair share of the revenues produced by mining and second on how the government uses those revenues. Transparency regarding the payments made by mining companies and the income collected by the State is necessary—though on its own insufficient—to ensure accountability for natural resource exploitation and, ultimately, to ensure that the public benefits.

In recent years, the importance of fiscal transparency generally and of natural resource revenue transparency specifically has garnered increased attention from governments, corporations, and civil society. In 2002, a group of nongovernmental organizations founded the Publish What You Pay (PWYP) campaign. By calling for companies to disclose their payments to governments, the campaign seeks to enhance accountability for the extraction and use of natural resources, to reduce corruption, and to improve fairness in the distribution of benefits from the oil, mining, and gas sectors. The Extractive Industries Transparency Initiative (EITI),¹³⁸ a largely government-led effort, was launched the following year not only to further encourage corporate transparency but also to elicit commitments from the governments of resource-rich countries to publish their earnings from the extractive sectors. Together with research and policy guidance published by the World Bank,¹³⁹ IMF,¹⁴⁰ and other sources, PWYP and the EITI have spurred changes in government regulations and corporate practices and have shifted the debate beyond revenue transparency to encompass transparency of extractive industry contracts as an essential element of public accountability for the use of natural resources.¹⁴¹

Haiti is not a member of the EITI and has no active PWYP chapter. According to the U.S. Department of State annual fiscal transparency review, which includes an evaluation of “the processes for administering government contracts and licenses for natural resource extraction,” Haiti performs poorly:

Although Haiti’s budget is publicly available, the country’s process for granting natural resource contracts lacks transparency and information on natural resources contracts is not published. Haiti’s budget process does not consistently follow the country’s established timetable and does not include earnings from significant state-owned enterprises. Haiti’s fiscal transparency would be enhanced by improving the transparency of its system governing natural resource contracts, more closely following its budget timetable, and improving reporting for state-owned enterprises.¹⁴²

If gold mining proceeds in Haiti, it will be essential for the government to implement a transparent and accountable system for reporting and reconciling mineral revenue streams. The Haitian government has demonstrated no ability to implement such a system (see *supra* Box 4-2.) In its recent report, Oxfam America identified five performance criteria of public fiscal management that, if implemented before mineral exploitation occurs, could “increase the likelihood that mining revenues will be collected, audited, and invested to meet the basic needs of current and future generations.”¹⁴³ The elements of those criteria include, among other things: institutional capacities, such as contract negotiation and account auditing, to ensure that Haiti receives a fair share of mining revenues and that those earnings are allocated to effective poverty-alleviation strategies; “[p]olicies requiring the full and prior public disclosure of fiscal terms governing the payment and spending of mineral resource revenues”; access to information and open budgeting laws and procedures; and “[m]echanisms to reduce the risks of corruption.”¹⁴⁴ Unfortunately, the Draft Mining Law (discussed in detail in Chapter V) does not reflect best practices for fiscal transparency and accountability. There is no requirement that mining companies publicly disclose their payments to the government nor any commitment on the part of the government to publicly report on either amounts received from companies or disbursement of those revenues.

Haiti has much to learn from other resource-dependent countries around the world. Their experiences reveal both the vital role that fiscal transparency can play in protecting public interests in the development of the extractive industries and the dire consequences for a country’s political and economic health when secrecy is allowed to reign.

D. Potential Financial Benefits of Mining: A Cautionary Hypothetical

Although a thorough analysis of this topic is beyond the scope of this report, one hypothetical example will illustrate the importance of sustainably investing revenues that Haiti receives from mining. This example focuses on the gold mining royalty, which is currently set at 2.5 percent under the mining conventions and which would rise to 4 percent under the Draft Mining Law. It

relies on several assumptions necessary for quantifying (again, only for exemplary purposes) the potential economic benefits to Haiti from mining.

Assume, for purposes of this example, that the current market value of Haiti's gold reserves is \$20 billion. As noted at the beginning of this report, this is the valuation commonly used in news reports, but its source and accuracy are unconfirmed. Further assume that this gold would be mined at a steady rate over 25 years and therefore would produce a linear stream of revenues to the companies and royalties to the government.¹⁴⁵ Finally, assume a royalty of rate of 4 percent as set forth in Article 235 of the Draft Mining Law (see Chapter V). If the value of the gold is lower than \$20 billion or if the royalty remains at its current level of 2.5 percent, the public revenues produced by mining would be even lower than estimated in this example. The opposite is also true, of course.

Under these assumptions—and again, for illustrative purposes only—the exploitation and sale of Haiti's gold would generate \$800 million in royalties over the next quarter of a century. On average, Haiti's annual royalty income from the production and sale of its gold reserves would be \$32 million. This figure represents 0.37 percent of Haiti's current annual gross domestic product or approximately 1.8 percent of the Haitian government's total receipts for 2014.¹⁴⁶ Calculated on a per capita basis, annual revenues from mining (if evenly distributed throughout the population and if the population remained steady) would produce \$3.20 for each Haitian per year of mining, thus augmenting average per capita income by less than one half of one percent.¹⁴⁷

Although the royalty revenues from mining would not be insignificant, this oversimplified, hypothetical fiscal impact analysis highlights five important considerations:

1. Although the royalty is the principal means of securing Haiti's fair share of its mineral wealth, the direct revenues likely to be generated from this source are comparatively modest. Even with the 4 percent royalty proposed by the Draft Mining Law, gold reserves valued at \$20 billion translate into public revenues that would contribute only marginally to Haiti's overall annual economic output and governmental receipts.¹⁴⁸
2. Although corporate income taxes could produce additional revenues during those years in which the mining companies earned net taxable income, the uncertainties of Haitian tax policy, complexity of corporate tax accounting practices, and paucity of governmental capacity for tax administration—combined with the 4 percent royalty rate—make it unlikely that the Haitian government would be able to comply with the mandate in Article 36-6 of the Haitian Constitution that the State (as owner of the gold reserves), the mining companies (as concessionaires), and the surface owners of the land beneath which the mining occurs share equitably in the profits of mining.
3. If the government was to grant mining companies significant corporate income tax exemptions under the Investment Code, the likelihood of compliance with Article 36-6 would be further diminished.

4. Unless the Haitian government prudently conserves and soundly invests the revenues it receives from the gold mining royalty, those revenues will be dissipated without producing substantial and sustainable public benefits.
5. The surprisingly low level of revenues that Haiti is likely to receive from gold mining calls into question whether the potential economic benefits of mining justify the probable risks to public health, the environment, local communities, and human rights.

E. Conclusion

As noted at the outset of this report, the Haitian government, as the representative of the people of Haiti, will have to decide whether the financial benefits of gold mining outweigh the substantial—and in some instances unavoidable—risks and costs that mining poses. Careful analysis of the questions raised in this chapter—concerning regulatory capacity, fiscal uncertainty, financial sustainability, and the equitable distribution of mining revenues—will help to ensure that Haitian authorities and members of the public both understand and are prepared to debate the economic complexities of gold mining before the government revises the mining law and allows gold mining to begin.

¹ In addition to these direct revenues, Haiti also must consider the indirect revenues generated by gold mining—often called the “multiplier effect” of mining. When mining companies purchase goods and services in the host country, they increase revenues and (potentially) employment in other commercial and industrial sectors. This additional corporate and personal income in turn generates taxable income (and perhaps other forms of tax revenues). The host nation therefore benefits both from increased economic activity and employment and from increased tax revenues. For brief analyses of the multiplier effect, see Terry Heyman, *Understanding Who Benefits from Gold Mining*, 3 GREAT INSIGHTS, no. 5, May 2014, <http://ecdpm.org/great-insights/value-chains-industrialisation/understanding-benefits-gold-mining>, and Nick Holland, *Gold Mining and Shared Value: Contributing to Development and Communities*, 3 GREAT INSIGHTS, no. 7, July/Aug. 2014, <http://ecdpm.org/great-insights/extractive-sector-african-perspectives/sharing-benefits-gold-mining>.

² See Mark Fellows, *Gauging the Long-Term Cost of Gold Mine Production*, ALCHEMIST, no. 60, Sept. 2010, at 3, 4, http://www.lbma.org.uk/assets/blog/alchemist_articles/Alch60.pdf.

³ Large mines, such as Pueblo Viejo, achieve a variety of economies of scale that smaller mines cannot. These include access to investment capital, construction and equipment costs, overhead, and labor expenses. Thus, the per unit costs of mining for the likely smaller Haitian gold mines could be significantly higher than the unit costs at Pueblo Viejo described in the text. For an analysis of economies of scale in different-sized gold mines, see Ousman Gajigo & Mouna Ben Dhaou, *Economies of Scale in Gold Mining* (African Development Group, Working Paper No. 222, Apr. 2015), http://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/Working_Paper_222_-_Economies_of_Scale_in_Gold_Mining.pdf.

⁴ See WILL DAYES, BARRICK GOLD: PUEBLO VIEJO—REVITALIZING A REGION 18, 24 (Mar. 3, 2014), <http://www.bus-ex.com/sites/default/files/BarrickPV-Americas-Mining-Mar14-Bro-s.pdf>; see also BARRICK GOLD CORP., PUEBLO VIEJO MINE TOUR, at 3 (Feb. 28, 2013), <http://www.bus-ex.com/sites/default/files/BarrickPV-Americas-Mining-Mar14-Bro-s.pdf>.

⁵ WILL DAYES, *supra* note 4, at 1.

⁶ This does not include interest on capital over the 25 to 30 year projected life of the mine.

⁷ BARRICK GOLD CORPORATION, 2014 Q4 AND YEAR-END MINE STATISTICS 1 (2014), <http://barrick.com/files/quarterly-reports/2014/Barrick-Mine-Stats-2014-Q4.pdf>.

⁸ Barrick reported that its 60 percent share of gold production was 665,000 ounces in 2014. The production level of 1,108,332 in 2014 includes Goldcorp’s 40 percent share. The aggregate annual costs figure is calculated by multiplying the \$674 per ounce operating cost by the 2014 production level of 1,108,332. *Id.* at 1.

⁹ Because of the large capital costs, mines generally operate at a loss during their start-up years, become profitable once the highest concentrations of ore are reached and the mine achieves full production, and then decline in profitability as the highest grade ore is extracted and more marginal reserves are targeted. This pattern varies greatly among individual mines, however, as profitability is the product of myriad factors including mineralization, cost of production, efficiency, capital depreciation schedules, regulatory requirements, royalties and taxation, and gold prices.

¹⁰ Sources differ as to the exact date on which the price of gold peaked in 2011. *Compare Historical Gold Prices – 100 Year Chart*, MACROTRENDS, <http://www.macrotrends.net/1333/historical-gold-prices-100-year-chart> (last visited Nov. 15, 2015), with Bob Stokes, *Here’s What Gold’s Price Trend Showed at the All-Time Peak: 2013 saw gold’s biggest single-year loss in decades*, ELLIOTTWAVE INTERNATIONAL (Jan. 2, 2014), <http://www.elliottwave.com/freeupdates/archives/2014/01/02/Here-s-What-Gold-s-Price-Trend-Showed-at-the-All-Time-Peak.aspx#axzz3pauP4K6G>.

¹¹ See, *Historical Gold Prices – 100 Year Chart*, MACROTRENDS, <http://www.macrotrends.net/1333/historical-gold-prices-100-year-chart> (last visited Nov. 15, 2015).

¹² This is based on the World Gold Council's estimate that the average industry all-in sustaining cost (AISC) of gold production is \$1,200 per ounce. Nat Rudarakanchana, *Gold Prices Below \$1,200 Could Mean Production Cutbacks: World Gold Council*, INT'L BUS. TIMES (Feb. 4, 2014), <http://www.ibtimes.com/gold-prices-below-1200-could-mean-production-cutbacks-world-gold-council-1553008>. The average industry AISC of gold production ranges from \$919 to \$1,410 per ounce. James Wilson and Michael Kavanagh, *Gold Mine Measure 'to reflect true costs'*, FIN. TIMES (Sept. 15, 2013), <http://www.ft.com/intl/cms/s/0/98abc19c-1c8e-11e3-a8a3-00144feab7de.html#axzz31dPZKGPM>. In 2015, gold prices have ranged from a high of approximately \$1,300 per ounce in February to below \$1,100 in November. See GOLDPRICE, <http://goldprice.org/> (last visited Nov. 19, 2015); see also *infra* Figure 4-1: Ten-Year Price of Gold in Troy Ounces.

¹³ Copper prices also have fallen over the past four years, from a high of \$4.58 per pound in late February 2011 to a low of \$2.08 per pound in late November 2015. *Trading Economics: Copper*, <http://www.tradingeconomics.com/commodity/copper> (last visited, November 26, 2015).

¹⁴ As we discuss in the next section, gold prices also will affect the Haitian government's decision whether to authorize mining. The price of gold over the life of each mine will determine the amount of money that Haiti collects from taxes and royalties. Projected gold prices also may influence the choice of royalty rate, as well as other financial conditions placed on mining.

¹⁵ Mark Fellows, *supra* note 2, at 3.

¹⁶ *Id.*

¹⁷ One recent study has concluded that labor is the "most sensitive cost component, by virtue of its large proportion of a typical operating cost base." *Id.* at 4. Of external variables, exchange rates "are usually the largest single determinant of year-on-year global average production cost changes." *Id.* at 4.

¹⁸ A 2006 report commissioned by the World Bank explained the relationship between the fiscal regime and cut-off grade selection as follows: "Mine design is based on fundamental parameters, including cutoff grade, reserves, and mine life, all of which are influenced by costs. The imposition of a royalty in any form, in particular unit- and value-based royalties, is a cost and thus will influence production parameters that are set to optimize mine profitability. These impacts should be of concern to government tax policy makers. If royalties are set at too high a rate, imposing a large cost, net tax revenues may be less than if no royalty was assessed. The royalty is but one tax among several, and all taxes may be affected. If, for example, a royalty causes the mine life to be shortened, then income tax, royalty, dividend withholding, and so forth will be lost for those years that mining would have proceeded given a lower royalty." JAMES OTTO ET AL., WORLD BANK, MINING ROYALTIES: A GLOBAL STUDY OF THEIR IMPACT ON INVESTORS, GOVERNMENT, AND CIVIL SOCIETY 273 (2006).

¹⁹ *Id.* at 34, 267.

²⁰ *Id.* at 30–35. This Report uses the adjective "general taxes" to describe taxes that apply to all businesses or business activities, and the term "special taxes" to describe taxes that apply only to the mining sector.

²¹ *Id.* at 30–34. Most mining countries do not apply their value-added tax to the sale or export of refined gold. The few that do so effectively exempt the products from the VAT by declaring that the extraction and refinement do not add any value to the raw gold. See PRICEWATERHOUSECOOPERS, CORPORATE INCOME TAXES, MINING ROYALTIES AND OTHER MINING TAXES: A SUMMARY OF RATES AND RULES IN SELECTED COUNTRIES, GLOBAL MINING INDUSTRY UPDATE 13 (June 2012), http://www.pwc.com/en_GX/gx/energy-utilities-mining/publications/pdf/pwc-gx-miining-taxes-and-royalties.pdf. Although it is common to levy royalties at the time of export, most countries do not impose general export taxes on minerals. Argentina charges a 5 percent tax on the export of raw and processed ore and a 5 to 10 percent tax on refined and other metals. *Id.* Under a law enacted in

2009 that became effective in January 2014, Indonesia bans the export of unrefined bauxite, nickel, tin, chromium, gold, and silver, and levies an export tax of 20 to 25 percent on certain processed mineral concentrates (including copper, iron, lead, manganese, and zinc). See PRADNYA DESAI, ICRA INDONESIA, LIMITED IMPACT OF THE BAN ON RAW MINERAL EXPORT 1, 4 (Apr. 2014), <http://www.indonesia-investments.com/upload/documenten/icra-indonesia-limited-impact-of-the-ban-on-raw-mineral-export-indonesia-investments.pdf>. Its purpose is to encourage the mining companies to construct new smelters and to conduct most of the processing and refinement of ore in Indonesia. See Deden Sudrajat, *Indonesia May Cut Mineral-Concentrate Export Duty as Standoff With Miners Persists*, WALL ST. J. (Mar. 2, 2014) <http://online.wsj.com/news/articles/SB10001424052702304585004579414360622556686>. The Indonesian government is currently negotiating with several mining companies that have proposed repealing the export ban and lowering the export tax rate to 5 percent or 10 percent. See Trefis Team, *Indonesian Government Relaxes Its Stance In Tax Dispute With Freeport and Newmont*, FORBES (Apr. 16, 2014), <http://www.forbes.com/sites/greatspeculations/2014/04/16/indonesian-government-relaxes-its-stance-in-tax-dispute-with-freeport-and-newmont>. The export tax is scheduled to rise from 25 percent to 60 percent by 2016. See LIMITED IMPACT OF THE BAN ON RAW MINERAL EXPORT, *supra*, at 1.

²² See PRICEWATERHOUSECOOPERS, *supra* note 21, at 12, 13.

²³ Withholding taxes are taxes deducted at the source. They may be applied to dividends, interest, royalties, and other fees.

²⁴ The countries surveyed include a broad spectrum from those with developing to post-industrial economies and long and short histories of large-scale mining: Argentina, Australia, Brazil, Canada, Chile, China, Democratic Republic of Congo, Republic of Congo, Germany, Ghana, India, Indonesia, Kazakhstan, Mexico, Peru, Philippines, the Russian Federation, South Africa, Tanzania, Ukraine, the United Kingdom, and the United States. See PRICEWATERHOUSECOOPERS, *supra* note 21, at 12, 13.

²⁵ The general tax rate data have been updated to 2015 using a recent report from Deloitte. See *Corporate Tax Rates 2015*, DELOITTE (Aug. 30, 2015), <http://www2.deloitte.com/content/dam/Deloitte/global/Documents/Tax/dttl-tax-corporate-tax-rates-2015.pdf>.

²⁶ See PRICEWATERHOUSECOOPERS, *supra* note 21, at 11.

²⁷ *Corporate Tax Rates Table*, KPMG, <https://home.kpmg.com/xx/en/home/services/tax/tax-tools-and-resources/tax-rates-online/corporate-tax-rates-table.html> (last visited Nov. 15, 2015).

²⁸ See *Loi N° 007/2002 du 11 Juillet 2002 Portant Code Minier* art. 247 [Law No. 007/2002 of 11 July 2002 Relating to the Mining Code art. 247], JOURNAL OFFICIEL DE LA RÉPUBLIQUE DÉMOCRATIQUE DU CONGO, July 15, 2008 [hereinafter DRC Mining Code], mines-rdc.cd/fr/documents/codeminier_eng.pdf; see also *Corporate Tax Rates 2015*, *supra* note 25, at 3.

²⁹ See PRICEWATERHOUSECOOPERS, *supra* note 21, at 25 n.95.

³⁰ World Bank Group, *Paying Taxes*, DOING BUSINESS, <http://www.doingbusiness.org/data/exploretopics/paying-taxes/reforms> (last visited Nov. 27, 2015).

³¹ See *Compare Mining Taxes*, PRICEWATERHOUSECOOPERS, <http://www.pwc.com/gx/en/industries/energy-utilities-mining/mining/tax/compare-taxes.html> (last visited on Sep. 27, 2015); see also *Corporate Tax Rates 2015*, *supra* note 25, at 3.

³² *Compare Mining Taxes*, *supra* note 31; *Corporate Tax Rates 2015*, *supra* note 25, at 3.

³³ PRICEWATERHOUSECOOPERS, PERU'S MAJOR TAX REFORM INCLUDES RATE CHANGES AND A NEW TAX RULING REQUEST PROCEDURE 1 (Jan. 19, 2015), <http://www.pwc.com/us/en/tax-services/publications/insights/assets/pwc-peru-major-tax-reform-includes-rate-changes.pdf>.

³⁴ *Id.*

³⁵ See OTTO ET AL., *supra* note 18, at 34, 267.

³⁶ See, e.g., ARGENTINE UNDERSECRETARIAT OF MINING, 10 REASONS TO INVEST IN ARGENTINE MINING 10–11 (2001), <http://www.argentina.org.au/10%20reasons%20to%20invest%20in%20Argentina%20Mining.pdf> (explaining that Argentina allows deductions of “60 percent, 20 percent and 20 percent, respectively,” or for some equipment, one third of the value per year, during the first three years after authorization to operate is granted).

³⁷ See PRICEWATERHOUSECOOPERS, *supra* note 21, at 43 n.267.

³⁸ *General Mining Law Supreme Decree No. 014-92-EM*, PERÚ MINISTERIO DE ENERGÍA Y MINAS (June 13, 2011), <http://www.minem.gob.pe/minem/archivos/file/Mineria/LEGISLACION/TUO%20.pdf>. Peru also allows mining companies to deduct the costs of complying with obligations set forth in environmental and social impact studies and community development agreements. These may include depreciation of capital investments and ordinary expenses. PRICEWATERHOUSECOOPERS, *supra* note 21, at 36 nn.217–18.

³⁹ Mexico is one such country that allows pre-operation expenditures to be deducted from profits for ten years after mining begins. See *Mining Taxes for Mexico*, PRICEWATERHOUSECOOPERS, <http://www.pwc.com/gx/en/industries/energy-utilities-mining/mining/territories/mexico.html> (last visited Oct. 1, 2015).

⁴⁰ Ghana and Tanzania also apply a “ring fencing rule”—*viz.* a mining company may not use losses incurred at one site to offset revenues generated at another site in determining taxable income. PRICEWATERHOUSECOOPERS, *supra* note 21, at 2, 3. For a definition of a ring fencing rule, see OTTO ET AL., *supra* note 18, at 17. The Democratic Republic of Congo, the Republic of Congo, the Philippines, South Africa, and Ukraine take a fundamentally different approach, allowing mining companies to capitalize and amortize exploration and development costs and then to depreciate these costs during production. Both the Democratic Republic of Congo and the Republic of Congo require the mining companies to depreciate pre-production costs during the first two years of exploitation. See PRICEWATERHOUSECOOPERS, *supra* note 21, at 24–25, 37, 41, 45. In the Philippines, exploration and development costs may be capitalized and then amortized during the production stage, but the total deduction for any taxable year may not exceed 25 percent of net income from mining operations. If there is a remainder exceeding 25 percent, it can be carried forward to succeeding years until fully deducted. *Mining Taxes for the Philippines* n.355, PRICEWATERHOUSECOOPERS, <http://www.pwc.com/gx/en/industries/energy-utilities-mining/mining/territories/philippines.html> (last visited Oct. 1, 2015). The mining legislation in the Democratic Republic of the Congo is currently under review. Michael Kavanagh, *Congo Said to Plan Boosting Mine Royalties, Increase Stakes*, BLOOMBERG BUS. (Apr. 4, 2011, 5:00 PM EDT), <http://www.bloomberg.com/news/articles/2015-04-14/congo-said-to-plan-boosting-mine-royalties-increase-stakes>.

⁴¹ In 2012, Mexico was the exception; it did not assess any royalties on mining. PRICEWATERHOUSECOOPERS, *supra* note 21, at 34 n.199. However, 2014 reforms of the Mexican taxation system have established a 7.5 percent special mining tax on profits from the sales of extracting activities. There is also a new extraordinary mining tax equal to 0.5 percent on gross earnings obtained from the sale of gold. *Mining Taxes for Mexico*, *supra* note 39. In the United States, there is no federal (national) royalty for hardrock mining on the public lands. PRICEWATERHOUSECOOPERS, *supra* note 21, at 47 n.315. Most states (departments) charge a royalty or severance tax, however, which averages 2 percent to 5 percent of the value of the extracted minerals. *Id.* at 11–12.

⁴² There are also unit-based royalties, calculated by volume or weight, as well as hybrid royalties, which combine a profit or rent-based system with an *ad valorem* system. See, e.g., PIETRO GUJ, INTERNATIONAL MINING

FOR DEVELOPMENT CENTRE: MINING FOR DEVELOPMENT: GUIDE TO AUSTRALIAN PRACTICE, MINERAL ROYALTIES AND OTHER MINING-SPECIFIC TAXES, 4–5 (2012), http://im4dc.org/wp-content/uploads/2012/01/UWA_1698_Paper-01_-_Mineral-royalties-other-mining-specific-taxes1.pdf. Because of this diversity, there is no fixed definition of royalties; nor is there a clear distinction between royalties and taxes. A 2006 World Bank-commissioned report defines royalties as “any tax type that exhibits one or more of the following attributes:

- the law creating the tax calls that tax a royalty;
- the intent of the tax is to make a payment to the owner of the mineral as compensation for transferring to the tax payer the ownership of that mineral or the right to sell that mineral;
- the intent of the tax is to charge the producer of the mineral for the right to mine the minerals produced;
- the tax is special to mines and is not imposed on other industries.”

OTTO ET AL., *supra* note 18, at 49.

⁴³ Both types of ad valorem royalty are based on the *value* of the metal, calculated by multiplying the amount (weight) of mineral concerned by the applicable market price. With royalties based on the value at first sale or export, however, States sometimes allow deduction of certain costs incurred between the mine and the point of sale, such as transportation or handling fees. No such deductions would apply to a royalty taken at the mine head. *See, e.g.*, the royalty rate applicable in the Democratic Republic of Congo, detailed in the table *supra* Box 4-1.

⁴⁴ The government of the Democratic Republic of Congo has proposed to increase the royalty rate to 3.5 percent for copper and for gold and to impose a 35 percent windfall profits tax on mining. It is currently in negotiations over the terms of the new law. *See* Kavanagh, *supra* note 40; *see also African mining regulations cause industry uncertainty*, MINING REVIEW AFRICA (Sept. 23, 2015), <http://www.miningreview.com/african-mining-regulations-cause-industry-uncertainty/> (confirming that the reforms have not yet gone into effect).

⁴⁵ *Compare Mining Taxes*, *supra* note 31.

⁴⁶ *See* DRC Mining Code, *supra* note 28, art. 241.

⁴⁷ PRICEWATERHOUSECOOPERS, *supra* note 21, at 37, 38 n.237. *See also Mining Taxes for Indonesia*, PRICEWATERHOUSECOOPERS, <http://www.pwc.com/gx/en/industries/energy-utilities-mining/mining/territories/indonesia.html> (last visited Oct. 1, 2015); *Mining Taxes for the Philippines*, *supra* note 40.

⁴⁸ *Ley 24.196 Inversiones Mineras* § 22 [Law 24.196 Mining Investment], ARGENTINE REPUBLIC (May 19, 1993), <http://www.infoleg.gov.ar/infolegInternet/anexos/0-4999/594/texact.htm>. Some members of the Argentine legislature have proposed reforms to the royalty cap. *See* Diego Parravicini, *Mining in Argentina*, PRACTICAL LAW (June 1, 2014), <http://uk.practicallaw.com/7-572-8327>. In addition, to get around the federally-imposed ceiling of 3 percent, the province of Santa Cruz passed a law that raises imposes a 1 percent tax on the mine’s reserves declared by a concessionaire in their region. *Ley 3.318/13, Santa Cruz* [Law No. 3,318/13, Santa Cruz], July 5, 2013, Boletín Oficial, no. 4738 (Arg.), <http://www.santacruz.gov.ar/boletin/13/septiembre13/02septiembre2013EE.pdf>.

⁴⁹ DRC Mining Code, *supra* note 28.

⁵⁰ *Country Views – Mining taxes for Democratic Republic of Congo*, PRICEWATERHOUSECOOPERS, <http://www.pwc.com/gx/en/industries/energy-utilities-mining/mining/territories/congo-democratic-republic-of.html> (last visited Oct. 1, 2015).

⁵¹ See PRICEWATERHOUSECOOPERS, *supra* note 21, at 27; see also Carina Borralho, *Resources Minister on Ghana's Minerals and Mining Act*, MINING WEEKLY (Apr. 11, 2014), <http://www.miningweekly.com/article/resources-minister-on-ghanas-minerals-and-mining-act-2014-04-11>.

⁵² See PRICEWATERHOUSECOOPERS, *supra* note 21, at 25.

⁵³ The Mining Act 2010, § 87, No. 14, The United Republic of Tanzania (April 23, 2010) [http://www.tanzania.go.tz/egov_uploads/documents/The_Mining_Act_2010_\(Act_No_sw.pdf](http://www.tanzania.go.tz/egov_uploads/documents/The_Mining_Act_2010_(Act_No_sw.pdf).

⁵⁴ PRICEWATERHOUSECOOPERS, *supra* note 21, at 30. See also DELOITTE TOUCHE TOHMATSU LTD., *TAXATION AND INVESTMENT IN INDONESIA 2014: REACH, RELEVANCE AND RELIABILITY* 14 (2014), <http://www2.deloitte.com/content/dam/Deloitte/global/Documents/Tax/dttl-tax-indonesiaguide-2014.pdf>, (confirming that no significant reforms have occurred in Indonesia's taxation of mining since 2009).

⁵⁵ *Mining Taxes for the Philippines*, *supra* note 40, at n.355.

⁵⁶ PRICEWATERHOUSECOOPERS, *supra* note 21, at 17. In 2013, reforms to the Brazilian mining laws that would raise the royalty rate on gold and iron ore to four percent of gross revenue, rather than net revenue. However, the proposal has been delayed in national legislature since 2013. For discussion of the proposal in 2013, see *Time to Dig Deep*, ECONOMIST (June 22, 2013), <http://www.economist.com/news/americas/21579872-long-awaited-bill-ends-uncertainty-will-hit-mining-companies-profits-time-dig-deep>; *Brazil Softpedals New Royalty Tax*, RESOURCE INVESTING NEWS (June 25, 2013), <http://investingnews.com/daily/resource-investing/brazil-softpedals-new-royalty-tax/>; see also *Why Brazil Cannot Afford to Stall Its Mining Law Any Longer*, STRATFOR GLOBAL INTELLIGENCE (May 22, 2015, 9:17 GMT), <https://www.stratfor.com/analysis/why-brazil-cannot-afford-stall-its-mining-law-any-longer> (describing the current status of reforms).

⁵⁷ See PFK WORLDWIDE TAX GUIDE 2013, CHILE TAX GUIDE 2013, at 1 (May 2013), <http://www.pkf.com/media/1954335/chile%20pkf%20tax%20guide%202013.pdf>. “Operational taxable income” differs from a company's adjusted taxable income for corporate income taxes in that Chile does not allow certain expenses—including carryover losses and accelerated depreciation of capital—to be included in operational taxable income. *Id.*

⁵⁸ PRICEWATERHOUSECOOPERS, *supra* note 21, at 35 & n.211.

⁵⁹ *Id.* at 35.

⁶⁰ A third important question—whether to offer special tax incentives to the mining industry—will be addressed in the next section.

⁶¹ As one influential study of mining taxation states: “The more the government taxes the mineral sector, the greater the share of wealth created by mining that flows to the government. This means, of course, that less of the wealth is flowing to the companies. Therefore, rising tax rates undermine companies’ incentive to carry out exploration, to develop new mines, and even, if the increases are sufficiently large, to remain in production at existing operations.” OTTO ET AL., *supra* note 18, at 8.

⁶² *Id.*

⁶³ *Id.* at 9.

⁶⁴ *Id.* at 10.

⁶⁵ The 1997 mining conventions to which VCS Mining/Delta, Majescor-SOMINE and Eurasian Minerals are successors require the companies to pay a royalty of 2.5 percent of the value of the doré gold bars produced from the gold extracted from the mines. *Convention Minière entre L'État Haïtien et La Société Minière Citadelle, S.A., Février 1997*, art. 26, LE MONITEUR: JOURNAL OFFICIEL DE LA REPUBLIQUE D'HAÏTI, no. 3 (May 4, 2005) [hereinafter *Citadelle Convention*], <http://haitigrassrootswatch.squarespace.com/storage/Mining.Convention-Citadel.pdf>; *Convention Minière entre L'État Haïtien et La Société Minière Ste-Geneviève, S.A., Février 1997*, art. 26,

LE MONITEUR: JOURNAL OFFICIEL DE LA RÉPUBLIQUE D'HAÏTI, no. 3 (May 4, 2005) [hereinafter Ste-Geneviève Convention], <http://haitigrassrootswatch.squarespace.com/storage/Mining.Convention-St.Genevieve.pdf>.

⁶⁶ The proposed royalty for copper would be 3.5 percent. See RÉPUBLIQUE D'HAÏTI, PROJET DE LOI MINIERE, ÉLABORÉ PAR UN TASKFORCE COMPOSÉ DE: BUREAU DES MINES ET DE L'ÉNERGIE, MINISTÈRE DE L'ÉCONOMIE ET DES FINANCES, MINISTÈRE DE L'ENVIRONNEMENT, EXPERT INTERNATIONAL, art. 235 (Aug. 2014) [hereinafter Draft Mining Law], <http://www.accountabilitycounsel.org/wp-content/uploads/2015/01/Draft-Mineral-Law.pdf>.

⁶⁷ The 2006 World Bank-sponsored study recognizes this essential aspect of the royalty, stating that “a mine differs from other businesses [in] that it exploits a nonrenewable resource that, in most cases, the taxpayer [*i.e.*, the mining company] does not own. In the majority of nations, minerals are owned by the state, by the people generally, or by the crown or ruler.” OTTO ET AL., *supra* note 18, at 11 (2006). But it then mischaracterizes the royalty as just another tax: “The owner of minerals, like the owner of any other form of real property, has an interest in receiving payment for the taking of the property interest. Such a payment, in effect an ownership transfer tax, is often used as the justification for a royalty.” *Id.* at 16. The mining royalty is not an ownership transfer tax, however. Nor is it just another form of corporate taxation. Taxes are imposed for the privilege of doing business within a country and apply to all companies and individuals who earn income. The royalty is unique, because it compensates the owners of the mineral assets—the government and its citizens—for that which is theirs, but which they transfer to the mining companies as part of the bargain for developing the resource.

⁶⁸ CONSTITUTION DE LA REPUBLIQUE D'HAÏTI, art. 36-5 (1987), https://www.constituteproject.org/constitution/Haiti_2012.pdf.

⁶⁹ OTTO ET AL., *supra* note 18, at 11.

⁷⁰ *Id.*

⁷¹ Citadelle Convention, *supra* note 65; Ste-Geneviève Convention, *supra* note 65.

⁷² BAKER & MCKENZIE, LATIN AMERICAN MINING HANDBOOK 17 (2010), http://www.bakermckenzie.com/FILES/UPLOADS/DOCUMENTS/LOCATIONS/DALLAS/4_DALLASGLOBALSEMINAR_MININGHANDBOOK_MAR11.PDF.

⁷³ *Id.*

⁷⁴ We analyze these questions in the specific context of Haiti in the next section.

⁷⁵ This text box was created based on the Oxfam America report, OXFAM AMERICA, READY FOR GOLD? ASSESSING HAITI'S GOVERNANCE AND REGULATORY CAPACITY FOR LARGE-SCALE MINING (2015), http://policy-practice.oxfamamerica.org/static/media/files/Haiti_Backgrounder-8.12.15_non-embargoed.pdf.

⁷⁶ Int'l Monetary Fund (IMF), *Haiti: Ex-Post Assessment of Longer Term Engagement*, ¶¶ 20, 32–33, IMF Country Report 15/4 (Jan. 2015), <https://www.imf.org/external/pubs/ft/scr/2015/cr1504.pdf>.

⁷⁷ Int'l Monetary Fund (IMF), *Haiti: Selected Issues*, ¶ 8, IMF Country Report 13/91 (Mar. 2013), <https://www.imf.org/external/pubs/ft/scr/2013/cr1391.pdf>.

⁷⁸ OXFAM AMERICA, *supra* note 75, at 26. The World Bank found that, in 2007, corporate income tax “accounts for just 0.85% of GDP, as compared with a regional average of 2%, due to numerous exemptions and, presumably, tax evasion.” WORLD BANK, A REVIEW OF ACCOUNTING AND AUDITING PRACTICES IN HAITI: REPORT ON THE OBSERVANCE OF STANDARDS AND CODES ¶ 6 (Nov. 2007), http://www.worldbank.org/ifa/rosc_aa_hti_eng.pdf.

⁷⁹ OXFAM AMERICA, *supra* note 75, at 26.

⁸⁰ *Id.* at 27.

⁸¹ IMF, *Haiti: Selected Issues*, *supra* note 77, at ¶ 3. The report also found that found that Haiti's tax revenues as a percentage of gross domestic product (GDP) rose from 10.7 percent in 2008 to 13.1 percent in 2011. *Id.* "Despite this progress, revenue in Haiti is still low compared to international standards and more needs to be done to reach the authorities' goal of 15 percent of GDP." *Id.* It noted that the Martelly Administration is in the process of reorganizing the Ministry of Finance to create a special collection and enforcement units for large and medium-sized taxpayers. *Id.* ¶ 4.

⁸² BUREAU OF ECON. & BUS. AFFAIRS, U.S. DEP'T. OF STATE, 2015 INVESTMENT CLIMATE STATEMENT – HAITI (2015), <http://www.state.gov/e/eb/rls/othr/ics/2015/241585.htm>. Haiti has a four-step progressive income tax system. The 30% marginal rate is the highest rate and is applicable to annual incomes in excess of one million gourdes, *id.*, which is approximately U.S. \$21,385.80. Exchange rate of 46.76 Haitian Gourdes to \$1 U.S. Dollar, based on exchange rate for January 1, 2015. See Exchange Rates, <http://www.exchange-rates.org/HistoricalRates/A/USD/1-1-2015> (last visited Dec. 3, 2015).

⁸³ World Bank Group, *supra* note 30.

⁸⁴ *Id.*

⁸⁵ *Id.* The 1997 mining conventions (now held by VCS/Delta and Majescor-SOMINE) place a 60 percent limitation, however, on the production costs that the companies may deduct in calculating taxable net income. See Citadelle Convention, *supra* note 65; Ste-Geneviève Convention, *supra* note 65.

⁸⁶ World Bank Group, *supra* note 30. The social security contributions are paid by employers to the National Insurance Office and vary depending on the type of business: 2 percent for commercial enterprises, 3 percent for industrial, agricultural, and real estate companies, and 6 percent for mining companies. OFFICE OF RET. & DISABILITY POLICY, U.S. SOC. SEC. ADMIN., SOCIAL SECURITY PROGRAMS THROUGHOUT AMERICAS, 2013 – HAITI 132 (2013), <http://www.ssa.gov/policy/docs/progdesc/ssptw/2012-2013/americas/haiti.pdf>.

⁸⁷ World Bank Group, *supra* note 30.

⁸⁸ Citadelle Convention, *supra* note 65; Ste-Geneviève Convention, *supra* note 65.

⁸⁹ As discussed *supra* note 65, the 1997 conventions also require the companies to pay a 2.5 percent royalty. Citadelle Convention, *supra* note 65; Ste-Geneviève Convention, *supra* note 65. The Draft Mining Law would increase the royalty to 4 percent for gold and 3.5 percent for copper. See Draft Mining Law, *supra* note 66. The mining royalty is analyzed in section 3 of this Chapter. The Draft Mining Law is discussed in more detail in Chapter V.

⁹⁰ World Bank Group, *Paying Taxes*, *supra* note 30.

⁹¹ See PRICEWATERHOUSECOOPERS, *supra* note 21.

⁹² See, e.g., *Zambia Waives VAT Rule for Mining Firms, Other Exporters*, REUTERS (Feb. 12, 2015), <http://www.cnbcfrica.com/news/mining/2014/09/03/zambia-tax-law-mining/> (last visited Nov. 18, 2015).

⁹³ OTTO ET AL., *supra* note 18, at 36–37.

⁹⁴ World Bank Group, *Paying Taxes*, *supra* note 30.

⁹⁵ See HAITI PROPERTY LAW WORKING GROUP, HAITI LAND TRANSACTION MANUAL, VOL. 1: A HOW-TO GUIDE FOR THE LEGAL SALE OF PROPERTY IN HAITI (June 26, 2012), www.habitat.org/sites/default/files/haiti_english_manual-web.pdf.

⁹⁶ World Bank Group, *supra* note 30.

⁹⁷ *Id.*

⁹⁸ BUREAU OF ECON. & BUS. AFFAIRS, U.S. DEP'T. OF STATE, 2013 INVESTMENT CLIMATE STATEMENT – HAITI (2013), <http://www.state.gov/e/eb/rls/othr/ics/2013/204654.htm>. See also INVESTMENT CODE arts. 1, 2 (Haiti), *translated*

in *Information*, AMERICAN CHAMBER OF COMMERCE IN HAITI (2011) [hereinafter INVESTMENT CODE], <http://amchamhaiti.com/home/haiti-investment-code>.

⁹⁹ *About Us*, CENTER FOR FACILITATION OF INVESTMENTS, <http://cfihaiti.com/index.php/about-us> (last visited Oct. 24, 2015).

¹⁰⁰ INVESTMENT CODE, *supra* note 98, art. 6.

¹⁰¹ *Id.* art. 19(a).

¹⁰² Articles 48–50 explain the application process. The Inter-Departmental Commission on Investments “includes senior technical staff” and representatives from the Ministries responsible for Economy and Finance, Commerce and Industry, Tourism, and “the Ministry Concerned, according to the sector and the investor targeted.” *Id.* art. 45.1

¹⁰³ GJC Notes of Conversation with Staff Member of Centre de Facilitation des Investissements (CFI), in Port-au-Prince, Haiti (Sept. 22, 2015) (on file with the New York University School of Law Global Justice Clinic). The secretary said that she spoke with the Director of the CFI, Radley Joseph, who confirmed that no mining company had requested benefits under the Investment Code yet, but that such benefits were available to mining companies that pursue the application process. *See generally* CENTER FOR FACILITATION OF INVESTMENTS, HAITI INVESTMENT GUIDE (Mar. 2015), http://cfihaiti.com/images/pdf/INVESTMENT_GUIDE_EN.pdf.

¹⁰⁴ INVESTMENT CODE, *supra* note 98, arts. 48–50; *see also* GJC Notes of Conversation with Staff Member of Centre de Facilitation des Investissements, *supra* note 103.

¹⁰⁵ INVESTMENT CODE, *supra* note 98, arts. 27(1), (3).

¹⁰⁶ *Id.* art. 27(1).

¹⁰⁷ *Id.* Although article 27 states that these tax exemptions generally may not be extended beyond 21 years, it also provides that the Haiti Interdepartmental Commission on Investments can grant extension for “fortuitous events.” *Id.* art. 27(1)(f). Article 26 provides that, if the company’s “operations have been suspended because of fortuitous events,” the Commission may extend the tax exemption “proportional to the suspension period.” *Id.* art. 26. The law does not define “fortuitous event,” however.

¹⁰⁸ This risk is compounded by article 242 of the Draft Mining Law, which stipulates that the fiscal and customs regime applicable to exploitation permits is stabilized under the Mining Convention for a period not to exceed 15 years. *See* Draft Mining Law, *supra* note 66, art. 242. This fiscal stabilization promise would require that the tax rates and tax incentives in place at the time the mining conventions are signed must remain unchanged for a period up to 15 years. We address Article 242 in more detail in Chapter V.

¹⁰⁹ Article 27 specifies the following allowable rates of depreciation: built-up properties (10 percent annually), heavy equipment (25 percent), light equipment and rolling stock (50 percent), office equipment (33 percent), and software (100 percent). INVESTMENT CODE, *supra* note 98, art. 27(2).

¹¹⁰ *Id.* (specifying that start-up costs may be depreciated or deducted at 50% annually, development costs at 33% and survey and research costs at 100%).

¹¹¹ FARID TADROS & KRISTINA SVENSSON, WORLD BANK GROUP, USING TAXATION TO ENABLE A FAIR AND THRIVING MINING INDUSTRY 5 (June 2010), <https://www.wbginvestmentclimate.org/uploads/InPractice%20-%20Mining%20Tax.pdf>.

¹¹² Corporate income taxes paid in the host country are usually credited against any income tax liability that a multinational corporation might face in the nation where it has its headquarters (or in other countries). “Absent an income tax in the producing [i.e., host] country, the multinational would be subject to higher tax payments in the home country (unless foreign sourced income is exempt in the home country). Whether or not a tax is creditable depends on the particular tax law in the home country and on any bilateral tax treaties

in place. However, a tax paid in the producing country that in nature resembles a home country tax is most likely to qualify for a tax credit.” Emil M. Sunley & Thomas Baunsgaard, *The Tax Treatment of the Mining Sector: An IMF Perspective 3-4* (Background paper prepared for World Bank workshop on the taxation of the mining sector, Apr. 4–5, 2001), <http://siteresources.worldbank.org/INTOGMC/Resources/sunley-baunsgaard.pdf>.

¹¹³ INVESTMENT CODE, *supra* note 98, art. 29.

¹¹⁴ *Id.* art. 29(1).

¹¹⁵ *Id.*

¹¹⁶ *Id.* art. 29(4–5).

¹¹⁷ Notwithstanding these exemptions, the mining companies would be subject to Haiti’s 57.8% tariff on imported gasoline and other refined fuels. CARIBBEAN EXPORT DEVELOPMENT AGENCY, *DOING BUSINESS WITH HAITI 5* (May 2007), http://www.carib-export.com/obic/documents/Doing_Business_with_Haiti.pdf.

¹¹⁸ INVESTMENT CODE, *supra* note 98, art. 41.

¹¹⁹ *Id.*

¹²⁰ INVESTMENT CODE, *supra* note 98, art. 6.

¹²¹ *Id.*

¹²² For example, although the environmental impacts of the Caracol Industrial Park in North Haiti have been debated, studies indicate that park activities may pose risks of contaminating water resources and destroying mangroves. KYSELLE JEAN-MARY CHÉRESTAL, ACTIONAID, *BUILDING BACK BETTER? THE CARACOL INDUSTRIAL PARK AND POST-EARTHQUAKE AID TO HAITI 11, 13* (Jan. 2015), http://www.actionaidusa.org/sites/files/actionaid/building_back_better_the_caracol_industrial_park_and_post-earthquake_aid_to_haiti.pdf. Nonetheless, the Park continues to receive benefits under the Investment Code. See JEAN PALEME MATHURIN, INTER-AMERICAN DEVELOPMENT BANK: *CARACOL INDUSTRIAL PARK, HAITI, EVALUATION OF THE FINANCIAL AND ECONOMIC VIABILITY PRELIMINARY REPORT 36* (2012), <http://www.iadb.org/Document.cfm?id=37951544>.

¹²³ See OTTO ET AL., *supra* note 18, at 10–11.

¹²⁴ We do not use the term “manipulation” pejoratively. Rather, in this context, manipulation simply refers to the means by which corporations define and assign costs for tax purposes where there exists some discretion under generally accepted accounting principles.

¹²⁵ Markus Brem, *Globalization, Multinationals and Tax Base Allocation: Advance Pricing Agreements as Shifts in International Taxation?*, TAXBLOG (Jan. 20, 2014), <http://taxblog.com/mbrem/globalization-multinationals-and-tax-base-allocation-advance-pricing-agreements-as-shifts-in-international-taxation>.

¹²⁶ See Sunley & Baunsgaard, *supra* note 112, at 4.

¹²⁷ OECD CENTER FOR TAX POLICY & ADMINISTRATION, *THIN CAPITALIZATION LEGISLATION: A BACKGROUND PAPER FOR COUNTRY TAX ADMINISTRATIONS 18* (Aug. 2012), http://www.oecd.org/ctp/tax-global/5.%20Thin_Capitalization_Background.pdf (explaining the potential income tax benefits from using a third-party entity).

¹²⁸ Markus Brem, *Globalization, Multinationals and Tax Base Allocation: Advance Pricing Agreements as Shifts in International Taxation?*, TAXBLOG (Jan. 20, 2014), <http://taxblog.com/mbrem/globalization-multinationals-and-tax-base-allocation-advance-pricing-agreements-as-shifts-in-international-taxation>.

¹²⁹ As a European Union report recently described, because of transfer pricing through a Luxembourg subsidiary, “Amazon paid little or no UK corporate tax between 2009 and 2011, on sales of over £7.6 billion.” LIBRARY BRIEFING, LIBRARY OF THE EUROPEAN PARLIAMENT, CORPORATE TAX AVOIDANCE BY MULTINATIONAL FIRMS 4 (Sept. 23, 2013), [http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2013/130574/LDM_BRI\(2013\)130574_REV1_EN.pdf](http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2013/130574/LDM_BRI(2013)130574_REV1_EN.pdf). “Apple had a reported effective rate of tax of around 2% in recent years on its non-US profits—approximately 60% of the total—with sales routed through its Irish subsidiaries. . . . Google had a reported effective tax rate of 2.4% in 2009 on non-US profits, with the majority of Google’s non-US sales billed in Ireland.” *Id.* And, Starbucks paid UK corporate income taxes of £8.6 million between 1998 and 2011 on sales of over £3 billion. “Taxable profit was reduced through interest payments to other parts of the business and by the 4.7% paid to a Netherlands based company for intellectual property (such as its brand and business processes).” *Id.*

¹³⁰ For example, the Organization for Economic Cooperation and Development (OECD) has issued Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations. See ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD), TRANSFER PRICING GUIDELINES FOR MULTINATIONAL ENTERPRISES AND TAX ADMINISTRATIONS (Aug. 18, 2010), <http://www.oecd.org/ctp/transfer-pricing/transfer-pricing-guidelines.htm>. Furthermore, Article 9 of the 2010 OECD Model Tax Convention articulates the “arms length principle,” an important transfer pricing rule. ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD), MODEL TAX CONVENTION ON INCOME AND ON CAPITAL art. 9 (2010). The 2014 OECD Model Tax Convention addresses the same principle without using the label “arm’s length.” See ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD), MODEL TAX CONVENTION ON INCOME AND ON CAPITAL art. 9 (2014), <http://www.oecd.org/ctp/treaties/2014-model-tax-convention-articles.pdf>. The Legal Information Institute has identified the provisions in the U.S. tax code designed to enforce the arms’ length principle and curtail “thin capitalization.” 26 U.S.C. § 163(j) (2015), <http://www.law.cornell.edu/uscode/text/26/163>.

¹³¹ At least 70 international companies have diverted money from other more sophisticated countries through “Dutch mail-boxes” to move funds from high-tax to low-tax countries. See *Fool’s Gold*, SOMO, <http://read.somo.nl/story/fools-gold/> SOMO (last visited Oct. 2, 2015); see also SOMO, FOOL’S GOLD: HOW CANADIAN MINING COMPANY ELDORADO GOLD DESTROYS THE GREEK ENVIRONMENT AND DODGES TAX THROUGH DUTCH MAILBOX COMPANIES (Mar. 2015), http://somo.nl/publications-en/Publication_4177/at_download/fullfile.

¹³² Patrick Temple-West, *IRS Forms “SWAT Team” for Tax Dodger Crackdown*, REUTERS (Mar. 21, 2012, 9:10 AM EDT), <http://www.reuters.com/article/2012/03/21/us-usa-tax-irs-transfer-idUSBRE82K0QP20120321>. An article in *Forbes* magazine recently described the administrative challenges of U.S. transfer pricing enforcement this way: “The OECD bureaucracy and American multinationals are locked in a codependent relationship that benefits both to the detriment of the federal budget. American tax professionals profit from the present system. The U.S. government throws on ineffectual fixes, while cutting secret deals with multinationals. Occasionally the government drags a multinational into court and loses badly.” Lee Sheppard, *Transfer Pricing as Tax Avoidance*, FORBES (June 25, 2010, 12:00 PM), <http://www.forbes.com/2010/06/24/tax-finance-multinational-economics-opinions-columnists-lee-sheppard.html>.

¹³³ OTTO ET AL., *supra* note 18, at 14.

¹³⁴ MACARTAN HUMPHREYS ET AL., ESCAPING THE RESOURCE CURSE 1 (2007), https://www0.gsb.columbia.edu/faculty/jstiglitz/download/papers/2007_Resource_Curse_Introduction.pdf.

¹³⁵ See generally *id.*

¹³⁶ OTTO ET AL., *supra* note 18, at 14.

¹³⁷ *Id.*

¹³⁸ EXTRACTIVE INDUSTRIES TRANSPARENCY INITIATIVE (EITI), <https://eiti.org/> (last visited Oct. 2, 2015).

¹³⁹ See, e.g., Jonathan Ernst, *The Moves to Greater Transparency*, THE WORLD BANK (May 24, 2013), <http://www.worldbank.org/en/news/feature/2013/05/24/the-moves-to-greater-transparency> (providing links to information regarding the World Bank's support for EITI and country analyses).

¹⁴⁰ See generally INT'L MONETARY FUND (IMF), IMF FACTSHEET: HOW DOES THE IMF ENCOURAGE GREATER FISCAL TRANSPARENCY? (Sept. 2015), <https://www.imf.org/external/np/exr/facts/pdf/fiscal.pdf> (providing links to the IMF's Guide on Resource Revenue Transparency (2007). The Guide is also available in French. See IMF, IMF FACTSHEET: PAR QUELS MOYENS LE FMI ENCOURAGE-T-IL LA TRANSPARENCE DES FINANCES PUBLIQUES? (Mar. 2014), <https://www.imf.org/external/np/exr/facts/fre/pdf/fiscalf.pdf>.

¹⁴¹ See generally F.A.Q.s, PUBLISH WHAT YOU PAY, <http://www.publishwhatyoupay.org/about/f-a-qs> (last visited Oct. 2, 2015); EXTRACTIVE INDUSTRIES TRANSPARENCY INITIATIVE (EITI) INT'L SECRETARIAT, THE EITI STANDARD (Jan. 1, 2015), https://eiti.org/files/English_EITI_STANDARD.pdf.

¹⁴² BUREAU OF ECON. & BUS. AFFAIRS, U.S. DEP'T. OF STATE, FY 2014 FISCAL TRANSPARENCY REPORT, <http://www.state.gov/e/eb/ifa/oma/235938.htm> (last visited Nov. 15, 2015).

¹⁴³ OXFAM AMERICA, *supra* note 75, at 24.

¹⁴⁴ *Id.*

¹⁴⁵ In fact, gold production and revenue streams from mining more closely resemble a bell-shaped curve with relatively small production and sales during the early and late years of mining, with peak production occurring during the middle period. Because aggregate production and revenues are equal under a linear model or more realistic model, we have used the former simply for ease of analysis.

¹⁴⁶ In 2014, Haiti's estimated gross domestic product was \$8.711 billion, and the government collected approximately \$1.786 billion in revenues. *The World Fact Book: Haiti*, U.S. CENTRAL INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/ha.html> (last visited Nov. 20, 2015).

¹⁴⁷ This is based on the most recent World Bank estimate of Haiti's 2014 gross national income per capita of \$820 and Haiti's current population of approximately 10.57 million. *Data: Haiti*, THE WORLD BANK (2015), <http://data.worldbank.org/country/haiti>.

¹⁴⁸ As noted at the outset of this chapter, gold mining would likely generate additional indirect economic benefits by increasing employment and revenues in other sectors. See *supra* note 1. The conclusions set forth in the text focus on the direct economic revenues that could be generated by the most secure fiscal source—the *ad valorem* royalty.

V. The Legal Framework for Mining in Haiti

A robust legal framework for mining in Haiti is important not only to potential investors, who need to know the costs likely involved in the risky and expensive endeavor of gold mining. It is vitally important also to the Haitian people, who need to ensure that mines will not poison or degrade the environment, that mining companies will fairly compensate affected communities and individuals for unavoidable harm and disruption to their lives and livelihoods, and that the State and the public will receive their fair share of the wealth produced by mining. Moreover, the communities and individuals most at risk from mining activities must have confidence both that the law will protect their interests and that they and their government have the capacity and independence to enforce that law in the event of noncompliance by mining companies or unforeseen harm.

This chapter begins with a brief outline of the most important aspects of the existing legal regime governing mining in Haiti, highlighting its strengths, weaknesses, and ambiguities. It then provides an overview of law reform efforts in the mining sector to date and assesses key elements of the draft mining law of August 2014 (Draft Mining Law) in light of the essential goals of protecting the environment, compensating individuals and communities for unavoidable harm and disruption of their lives and livelihoods, and ensuring fair apportionment of any wealth generated through mining. Ultimately, the strength and effectiveness of the legal regime governing mining in Haiti depends not just on the text of the framework statute and accompanying regulations but also on the technical, institutional, and financial capacity of the State to implement and enforce those laws.

A. The Haitian Constitution

The Haitian Constitution of 1987 provides the legal foundation for all statutes and regulations that govern mining and protect the rights of affected communities, individuals, the environment, and the State. The constitution addresses the exploitation of mineral resources, environmental protection, and community rights in several important ways.

Article 36-5 establishes the basic property rights framework for mining. It declares that the “right to own property does not extend to the coasts, springs, rivers, water courses, mines and quarries. They are part of the State’s public domain.”¹ The constitution thus creates a “split estate,” in which landholders neither own nor possess the right to extract the minerals that lie beneath their lands. Rather, the Haitian government owns the mineral wealth and has authority to leave the minerals in place, exploit the minerals itself, or permit private parties to exploit them.

Article 36-6 then provides that the “law shall establish regulations governing freedom to prospect and the right to exploit the subterranean mines, minerals, and quarries”²—the constitutional foundation for the convention and permitting system that currently governs mining in Haiti.

Article 36-6 goes on to state, however, that the law shall “ensur[e] an equitable share of the profits of such exploitation to the owner of the land and to the Haitian State or its concessionaires.”³

Article 36-6 lacks clarity, in part due to the absence of both an official French version of the constitution and an official English translation.⁴ The provision stipulates that *three* groups shall share “equitably” in the profits from the mines—the Haitian government as owner of the mineral wealth, the mining companies as the government’s concessionaires, and the surface owners of the land beneath which the mining occurs. While the meaning of “equitable” is not self-evident under Haitian law, there is no dispute that fairness in the distribution of benefits from mining must be considered. To date, however, express rights of the surface owners to an “equitable” share of the profits from mining have been ignored—both in the existing concessions and exploitation permits and in the debate over reform of mining law.⁵ (For further discussion regarding the implications and mandates of Article 36-6, see Chapter IV.)

The constitution recognizes environmental rights and responsibilities, as well. Article 36-3 declares that land “[o]wnership also entails obligations. Uses of property cannot be contrary to the general interest.”⁶ Article 36-4 then directs that “[l]andowners must cultivate, work, and protect their land, particularly against erosion.”⁷ As described in Chapter III, erosion and the displacement of earth generally, as well as sedimentation and pollution of streams, are major risks of mining. These constitutional provisions supply the legal basis for the enactment of specific laws and regulations to protect against environmental externalities caused by mining.

In addition, the constitution contains several articles that guarantee the right to a healthy environment. Article 253 declares that the “environment is the natural framework of the life of the people, [and] any practices that might disturb the ecological balance are strictly forbidden.”⁸ Article 253-1, which was added to the constitution in 2011, addresses this general directive in the specific context of deforestation: “As long as the forest coverage remains below 10% of the national territory, exceptional measures must be taken with a view of working to the restoration of the ecological equilibrium.”⁹

These articles could be read as barring large-scale surface mining, on the theory that creating vast, open pits in the land, excavating tons of rock and debris, unearthing heavy metals and other toxins, and potentially polluting the surrounding air, waters, and countryside inevitably disturbs the ecological balance.¹⁰ This interpretation is plausible if the articles are considered by themselves. Articles 253 and 253-1, however, must be analyzed in conjunction with the specific provisions of Articles 36-5 and 36-6, which (as just described) expressly authorize the government to create laws that regulate prospecting and exploitation of minerals. To date, the government has not addressed the apparent contradiction between the constitutional duties to limit deforestation and to protect the environment, on the one hand, and the constitutional provisions authorizing mining activity, on the other. At the very least, if mining activity is to proceed, Articles 253 and 253-1 create a constitutional foundation for—and a constitutional obligation to engage in—robust environmental regulation of mining.

Several other provisions of the constitution address the rights of communities and of individuals who work in the mines or who may be affected by mining. Article 36 generally recognizes and guarantees rights to own private property. Article 36-1 then states that “[e]xpropriation for a public purpose may be effected only by payment or deposit ordered by a court in favor of the person entitled thereto of fair compensation established in advance by an expert evaluation.”¹¹ It also directs that if “the initial project is abandoned, the expropriation is canceled” and the property “must be restored to its original owner.”¹² These articles establish two important constitutional protections for landowners and surface occupants who must be removed from, or are precluded from using, their property to make way for mining: (1) entitlement to compensation for the value of their lost land title or use rights, and (2) reversion of the land and use rights and rehabilitation of the land following mine closure. Article 36-2 adds that no one may be divested of a legitimate right to property except by judgment of a court.¹³

The constitution contains other protections, including freedom of expression, speech, assembly, and protest; it also contains the right to petition the government, as well as workers’ rights,¹⁴ which may be of particular importance in the context of mining. As described in Chapter VI, questions regarding free speech and assembly, peaceable community protest, and protections for mine workers, such as fair compensation, safe working conditions, unionization, and strike have arisen at myriad mines around the world.

Finally, several provisions of the constitution that define the relationship between its guarantees and other laws, treaties, and conventions may be relevant in the mining context. Article 276 states that the “National Assembly may not ratify any international treaty, convention or agreement containing clauses contrary to this Constitution.” In addition, Article 276-2 declares that “once international treaties or agreements are approved and ratified in the manner stipulated by the Constitution, they become part of the legislation of the country and abrogate any laws in conflict with them.”¹⁵ Thus, Haiti’s ratification of international treaties and agreements that establish standards on the environment, community protection, and labor would automatically be incorporated into Haitian domestic law.¹⁶ Article 296 stipulates that all “Codes of Law or Handbooks of Justice, all laws, all decree laws and all decrees and orders currently in force shall be maintained in all matters not contrary to this Constitution.”¹⁷ These directives are significant in the mining context, because they expressly require that the terms of the mining law currently in effect (the Mining Decree of 1976), the two existing mining conventions, and all future laws and conventions governing mining conform to the constitutional standards set forth above.

B. The Mining Decree of 1976

Beyond these constitutional directives, the specific terms and conditions of gold mining in Haiti are governed principally by the mining statute currently in force¹⁸—the Mining Decree of 1976.¹⁹ As the following summary of the law’s salient features reveals, the existing legal regime for mining is confusing, outdated, and in need of reform.

1. Mining permits

The Mining Decree establishes a sequential, four-part system of prospection permits, research permits, exploitation permits, and mining concessions.²⁰ These permits are accompanied by a mining convention (i.e., a contract between the mining permit holder and the government of Haiti), which must be executed in conjunction with the granting of the research permit. The predominant feature of this regime is that the mining convention sets forth the terms and conditions of the proposed mining activities.²¹ Those terms and conditions include commitments by the mining company to construct appropriate infrastructure,²² to train and employ Haitian workers,²³ and to use Haitian goods and materials.²⁴ Individual conventions must also establish the financial terms governing the signatory company's mining operations, including royalties and taxation rates,²⁵ as well as the company's obligations regarding environmental protection, rehabilitation, and economic promotion of the affected area.²⁶

This permitting system suffers from several important deficiencies. First, the four sequential permits are duplicative and do not conform to contemporary mining practices.²⁷ Accordingly, as discussed below (see *infra*), the new Draft Mining Law merges prospection and research permits into a single “exploration permit” and collapses the exploitation permit and mining concession into a single “exploitation permit.”

Second, there is an absence of meaningful administrative review as the permittee advances from prospection and research to construction and mineral production. The Mining Decree makes conversion of permits contingent not upon affirmative approval from the government following an environmental review but rather upon the mining authority's non-objection to a permit holder's application. To be sure, the Mining Decree conditions the issuance of a research permit on the signing of a mining convention between the State and the applicant. As described above, that convention must codify the company's environmental commitments. Because conventions must be signed prior to the research phase of mining activities, however, many key details regarding the environmental risks and impacts of mineral exploitation may not yet be known.²⁸ As a result, the requirements set forth in mining conventions may be inadequate to safeguard the integrity of the environment and protect the communities that depend on it against harms resulting from mining operations.

Third, the existing permitting system allows for the automatic conversion of prospection permits to research permits, research permits to exploitation permits, and exploitation permits to mining concessions, upon a permittee's fulfillment of specified requirements at each stage. For example, a prospection permit, which grants the permittee exclusive rights to conduct surface exploration and surface sampling in an area of up to 100 square kilometers for a maximum of two years, is *automatically converted* into a research permit if the permittee finds evidence of valuable minerals and complies with the terms of the law.²⁹ Research permits authorize test drilling and extraction of samples for mineralogical analysis within an area covered by the underlying exploration permit of up to 50 square kilometers for a two-year term, renewable for two additional two-year terms. The Mining Decree states that the “beneficiary of a research permit will be

automatically entitled to an exploitation permit” upon submission to the *Bureau des Mines et de l’Énergie* (Bureau of Mines and Energy, or BME) of “a detailed report on the work performed and the results obtained” at the conclusion of its exploration and research.³⁰ Likewise, exploitation permits, which grant the right to construct a mine and related facilities, to begin extraction of earth, and to commence processing, refining, and marketing of minerals, on an area not to exceed 25 square kilometers, are *automatically converted* into mining concessions when the mine reaches commercial production in exportable quantities.³¹ The permittee must submit a feasibility study to the BME that provides details about the ore deposits, mine construction, and mine operation.³² Under the conventions now in force, the feasibility study must also contain information about the socioeconomic impact of the project, especially on local communities, as well as notice about environmental impacts, including those on land, air, water, flora, fauna, and man-made environments.³³ Finally, mining concessions grant the right to extract, process, refine, and market the valuable minerals, for terms of 25 years, renewable in 10-year increments until the minerals are exhausted.³⁴ As noted above, mining concessions are subject to the terms and conditions of the mining convention signed by the government and the concessionaire at the time the research permit was granted.

The “automatic” issuance of new permits under the Mining Decree diminishes both the government’s authority and its opportunity to evaluate the potential environmental and community effects of mining before it grants the exploitation permit. While other environmental analysis may be included in the feasibility study (and is required under current conventions), the only environmental and community analysis expressly required under the Mining Decree is that which may be provided for under the mining convention, negotiated and signed in conjunction with the issuance of the research permit. According to the conventions now in force, the study is due before the company may request an exploitation permit.³⁵ Yet if this analysis is conducted at the research phase, the information may be inadequate or outdated by the time mining occurs, as the environmental effects and disruption to property use and community life differ significantly between mineral exploration and actual mine construction and operation. The lack of updated information impairs the ability of the BME to place appropriate terms and conditions in the exploitation permits and concession agreements.³⁶

2. Financial requirements

In addition to the above-described weaknesses in the permitting regime, the current mining law suffers from significant shortcomings with respect to its regulation of the fiscal dimensions of mining. The Mining Decree does not set forth the financial terms of mining, leaving vital issues such as the royalty rate and financial assurances (e.g., performance and rehabilitation bonds) to the individual mining conventions negotiated between companies and the State. Those terms that it does specify arguably fail to protect the interests of the Haitian public. For example, the annual surface use fees charged for prospection, research, exploitation, and concession—which range from 10 to 250 Haitian Gourdes (\$0.21 to \$5.35) per square kilometer—are paltry.³⁷ And the Mining Decree does not adequately address the most important financial question of surface use—fair compensation to those landowners and land users who are displaced or adversely

affected by prospecting, test drilling, road construction, water use, and subsequent mine construction and operation.³⁸

On the positive side, however, the existing law does contain an important declaration of the government's retained authority over taxation and royalties. Article 43 states that "[d]uring the term of the Concession, the financial clauses provided for in the mining convention will be subject to periodic revisions." This express reservation of sovereign power is essential, because without it, Haiti would run a significant risk of being barred from making future changes in the royalty rate or taxes set forth in the mining conventions.³⁹ As discussed below, the legal concepts embodied in Article 43 are likely to be a critical point of debate as the government considers revisions to the law.

3. Environmental protection, land rights, and community interests

Although the Mining Decree contains several provisions concerning protection of the environment and community resources that may be affected by mining, those provisions are neither stringent nor specific enough to prevent or mitigate the risks posed by modern mining, particularly in the absence of robust government enforcement. For example, the law states generally that the government may, for reasons of public policy or public interest, designate areas as closed to mineral exploration, research, or exploitation and may reserve certain mineral resources from mining.⁴⁰ Although the Haitian State has issued dozens of laws and decrees establishing "protected areas" since 1926, a 2009 report explained that the government had done little to enforce those laws and that the majority of the sites listed were "completely degraded" as of 2009.⁴¹ This finding raises concerns about the adequacy of such designations and the capacity of the government to monitor such "protected areas." Article 65 of the Mining Decree prohibits any mining activity within 50 meters of dwellings, cultural sites, and infrastructure.⁴² But a 50-meter buffer zone between a modern mine and neighboring farmers and villagers—replicated in the Draft Mining Law—is woefully inadequate to protect against noise and dust pollution during construction and excavation or to provide a margin of safety from the cyanide and other toxins used or unearthed during gold mining and processing (see Chapter III). Likewise, a general requirement that a mining company "repair any damage that its work may cause to third parties"⁴³ is no substitute for rigorous and enforceable pollution control standards designed to prevent such harm from occurring in the first place.

The Mining Decree also addresses the rights of those who own or use the lands beneath which valuable minerals may be located. It states that a mining permittee may not enter or occupy the land without an agreement with the owners *and* occupants that grants consent and provides for compensation for the temporary occupancy and use for exploration, research, or exploitation of minerals.⁴⁴ But the Mining Decree fails to recognize the disparities in both information and relevant experience between the mining companies and the landowners and occupants. It also risks undervaluing the surface rights that it seeks to protect by bundling disparate types of harm to landowners and occupants into a single compensation scheme. Moreover, the law does not create any comparable right to compensation where property is not physically invaded but where

lands, water, or other resources are degraded or damaged during mineral exploration, research, or mine construction and operation. Significantly, Article 68(b) limits individuals' access to the courts for protection of their rights. It provides that disputes concerning land use will be referred to an arbitral commission comprised of three persons—one selected by each of the disputing parties, and one selected by the mining authority—which will be responsible for setting the rate of compensation. As discussed in Chapter VI, there is no evidence that any such arbitral body has been established to date. Nor is it clear that such a provision conforms to Article 36-2 of the constitution, which provides that no one may be divested of a legitimate right to property except by judgment of a court.

Notwithstanding these weaknesses in the Mining Decree, the two mining conventions that the government ratified in 2005—which are nearly identical in content—contain some important safeguards for the environment and for communities affected by mining.⁴⁵ In addition to requiring a detailed feasibility study before a permit for exploitation may be granted,⁴⁶ the conventions include other measures to protect and monitor impacts on the environment. For instance, the mining companies must undertake an ecological study before commencing production.⁴⁷ Regular testing of air, soil, and water is to be conducted with the BME and the *Ministère de l'Environnement* (Ministry of the Environment, or MDE).⁴⁸ The MDE is tasked additionally with reaching an agreement with the companies on the appropriate toxic waste disposal methods to be employed during mining.⁴⁹ Importantly, the conventions make the companies responsible for implementing and financing remediation of any harms directly related to their mining activities.⁵⁰ To finance rehabilitation efforts, each company is required to create an Environmental Rehabilitation Fund, managed jointly by the BME and the company through an account at the *Banque Nationale de Credit*, into which 1 percent of all gross income generated by the properties must be deposited annually.⁵¹

The conventions also provide for various types of information sharing by the companies. During each stage of mining, the company has obligations to provide certain results of its work to the government.⁵² The government also reserves the right to inspect and monitor all mining operations.⁵³ And the conventions require that the companies create and submit a report each trimester detailing their exploitation activities, their finances, and the general situation of their mining sites.⁵⁴ None of these provisions, however, requires disclosure of information to the public. In fact, Article 39-7 of each convention commits the government to treat all information provided by the companies pursuant to the convention as confidential. This provision is consistent with confidentiality provisions in the Mining Decree, Article 17 of which requires that the process of applying for a mineral title remain confidential, limiting the ability of the public to influence decisions about whether and where mining takes place. Further, Article 23 provides that all reports and updates regarding mining activities, which companies must furnish to the government, will remain confidential for a period of 10 years. These sweeping confidentiality clauses in both the Mining Decree and the conventions appear to violate Article 40 of the constitution, which requires the State to publish all information that affects the public life, apart from that which is kept secret to protect national security.⁵⁵

In sum, the Mining Decree is paradoxically both overly complicated and cumbersome *and* under-protective of the environment and the populations most at risk from mining. It leaves the financial terms of mining—including vital matters such as the percentage of the mineral wealth extracted that the companies must pay to the Haitian government, the relationship between that royalty rate and corporate taxes, and the performance and rehabilitation bonding requirements that must precede active mining—poorly defined. And it runs counter to important guarantees set forth in the constitution. These and other deficiencies in the current legal regime should inform ongoing efforts to revise the framework mining law, so that the new statute does not replicate the weaknesses in the old statute. The adoption of a new mining law presents an opportunity for the government to bring the legal and regulatory regime for mining in Haiti into line with the constitution and the Haitian State’s international obligations under human rights law.

C. Reform of the Legal Framework

Cognizant that many features of the Mining Decree are outmoded, the Haitian government sought technical assistance from the World Bank to rewrite the country’s mining law.⁵⁶ In 2013, a multi-sector task force, comprised of representatives of several government ministries and a World Bank expert, began drafting a new law.⁵⁷ The task force did not include any members of civil society or the private sector. Government and mining company officials declared, however, in numerous meetings, that the task force repeatedly consulted representatives of the mining industry and sought their input into the content of the draft law.⁵⁸ In contrast, the task force did not seek civil society input, and members of Parliament, including representatives on the Senate Public Works and Human Rights commissions, complained about their lack of access to information regarding the draft law.⁵⁹

In August 2014, the task force reportedly transmitted a draft of the proposed new law to the prime minister’s office for review by the Council of Ministers.⁶⁰ Since that time, action on the law appears to have ceased. No draft legislation was submitted to Parliament before its dissolution in January 2015. As of October 2015, the status of the Draft Mining Law remains unknown.

Beyond rewriting the mining law, the World Bank and the government of Haiti identified “strengthened institutional capacity” and “transparency” as “critical next steps to unblock the exploration of Haiti’s gold and copper potential and pave the way for this promising new wealth-generating sector.”⁶¹ Nonetheless, the reform process to date has focused exclusively on revision of the legal framework for mining. There is no evidence that World Bank-supported institutional capacity-building measures are underway or planned,⁶² and there has been a marked lack of transparency and meaningful public dialogue about the mineral sector in Haiti. None of the formal events that have been organized regarding mining has been truly open and inclusive of interested members of the public. In June 2013, for example, the *Ministère des Travaux Publics, Transports et Communications* (Ministry of Public Works, Transportation, and Communication)

and the World Bank jointly hosted an invitation-only, two-day forum on mining in Haiti, at which the revision of the mining law was discussed.⁶³ Civil society participation in the event was limited. Invitations were circulated by email, in French, with little advance notice, to select organizations based in Port-au-Prince. No representatives of mining-affected communities were invited. A second, June 2014 meeting regarding the mining sector—also in Port-au-Prince—similarly failed to involve a representative cross-section of civil society actors, let alone any members of mining-affected communities. The Haitian activists who managed to attend both meetings reported that fewer than five members of Haitian civil society—and none from the affected communities—were present at either event. The vast majority of participants were from the Haitian government, the private sector, or international organizations.⁶⁴

Box 5-1: Inspection Panel Complaint

Concerns regarding the mining sector reform process prompted several Haitian communities and the *Kolektif Jistis Min* (Justice in Mining Collective, or KJM) to file a complaint in January 2015 to the World Bank's Inspection Panel.⁶⁵ This independent office investigates allegations by people who claim to have experienced—or fear they will experience—harm from World Bank projects.⁶⁶ With support from the Global Justice Clinic at New York University School of Law and a nongovernmental organization, Accountability Counsel,⁶⁷ the complainants asked the Inspection Panel to investigate alleged violations of their rights to information and participation and risks of human rights abuses and environmental harms related to mining sector reforms. The complaint asserted that the lack of transparency and public participation in the World Bank-backed revision of Haiti's mining law and the failure to evaluate the potential environmental and social risks posed by mining or to include adequate protections in the revised law violated the World Bank's own policies. The complainants argued also that the Haitian government lacks the requisite human, technical, physical, and financial capacity to monitor and control mining activities to the extent necessary to protect and promote the well-being of Haitian communities. In support of that assertion, the complaint cited repeated acknowledgments by officials from the *Bureau des Mines et de l'Énergie* (Bureau of Mines and Energy, or BME) that the department does not have the necessary expertise and resources to adequately monitor mining company activities, even at the

early stages of the industry's development.⁶⁸ Moreover, the complaint noted, there is no evidence that the BME, the *Ministère de l'Environnement* (Ministry of the Environment), or the *Direction Nationale de l'Eau Potable et de l'Assainissement* (National Directorate of Water Supply and Sanitation) has conducted any independent tests of soil or water in mining-affected communities, despite community members' expressed concerns that mining exploration has already adversely affected their land and their ability to grow crops, and despite the importance of gathering baseline data before mining begins.⁶⁹

The Inspection Panel recognized that the complaint raised "serious and legitimate" concerns and that the mining industry presents significant risks.⁷⁰ Nevertheless, the office refused to consider the allegations, on narrow, technical grounds. The Panel issued a "notice of non-registration" on February 17, 2015, explaining its dismissal of the complaint.⁷¹ The concerns underlying the complaint, about both the process and the content of mining sector reforms, continue to this day.

In view of the limited public dialogue to date regarding the reform of the mining law, the next section aims to fuel an open debate among interested parties and decision-makers in Haiti about the design and content of the legal regime for mining. It examines the Draft Mining Law in detail, identifying some of the ways in which it improves upon the existing legal regime and highlighting provisions that raise concerns or need strengthening.

D. Governance and the Rule of Law

Ultimately, the strength of Haiti's mining law and the social, environmental, and fiscal provisions contained therein depends on the State's capacity to enforce them. Thus, the establishment of a robust legal framework for mining in Haiti must be accompanied by measures designed to build the institutional and technical capacity of the State to oversee the mineral sector and enforce the rule of law.

As is widely recognized, “governance weaknesses and corruption remain critical challenges for Haiti’s development.”⁷² According to the World Bank’s World Wide Governance Indicators, Haiti “ranks in the bottom quartile in all measures of governance.”⁷³ In 2015, Haiti was ranked number 11 out of 178 states in the Fund for Peace’s Failed States Index (in which smaller numbers signify greater failings).⁷⁴ The lack of transparency and efficiency in State agencies has undermined trust in the government and led President Martelly to conclude that “all problems [Haiti is] facing today result from the weakness of [the country’s] institutions.”⁷⁵ In his reports and recommendations, Michel Forst, the former United Nations Independent Expert on the situation of human rights in Haiti, frequently addressed dysfunctions of the judiciary, politicization of judicial appointments, and impunity for arbitrary and politically motivated arrests. Upon his resignation, in 2013, Forst expressed dismay at the lack of progress in the fields of the rule of law and human rights in Haiti.⁷⁶

These governance problems acutely affect the natural resource sector. According to the U.S. Department of State 2014 Fiscal Transparency Report, Haiti’s “process for granting natural resource contracts lacks transparency and information on natural resource contracts is not published,” and its public budget does not adhere to the established timetable or include information on State-owned enterprises.⁷⁷ As noted above, the director of the BME has admitted that the office does not have the expertise or resources to adequately monitor mining company activities, even in the exploration phase.⁷⁸ And officials from the MDE and the *Direction Nationale de l’Eau Potable et de l’Assainissement* (National Directorate of Water Supply and Sanitation, or DINEPA) have demonstrated a lack of familiarity with mining sector activities and their potential adverse impacts on land and water resources.⁷⁹

Mining company executives and community members alike have echoed the sentiments of the BME director. One mining company representative expressed doubt that the State has the capacity to “oversee a mining industry” or the resources needed to develop such capacity.⁸⁰ And in the words of one community leader:

🗣️ **Resident of Anse-à-Foleur Speaks:**

The problem is that our State is weak, and they let foreigners enter. They permit the foreigners to do as they like. The people know nothing about mining. All decisions are made in Port-au-Prince.⁸¹

The exclusion of mining-affected communities and interested civil society organizations from the law reform process to date fuels concern about the government’s willingness and ability to engage stakeholders as the sector develops. Meanwhile, the lack of capacity in the Haitian government

means that mining operations may commence under a new law before the government is able to properly draft, implement, and enforce vital regulations.

E. The August 2014 Draft Mining Law⁸²

The Draft Mining Law produced by the task force proposes several significant changes to the structure and governance of the mining sector in Haiti. Chief among those changes is a shift from the current convention-based regime, in which fiscal terms and other performance requirements are negotiated and approved in each agreement between a mining company and the government, to a permit-based regime, in which those essential terms are fixed in the mining law, establishing a uniform floor from which individual mining conventions may not derogate.⁸³ This reorientation represents a positive step, because it minimizes opportunities for corruption and circumvention of regulations in the convention negotiation process. Yet the change also heightens the importance of the requirements that are included in the mining law, increasing the need for comprehensiveness and specificity. Indeed, because Haiti's regulatory process is even more opaque than its legislative one, it is of particular concern that the Draft Mining Law leaves crucial requirements regarding environmental and social protection to be codified in future regulations implementing the law.

Specificity of regulatory requirements takes on increased importance in the context of Haiti's dysfunctional judicial system. Disputes over vague or inartful statutory provisions could lead to a morass of uncertainty, dramatically increasing the risks of corruption. The Haitian government will have to balance the need to minimize risks posed by the chronic weakness of the Haitian courts with the need to respect the right to judicial remedy. As discussed further below, the Draft Mining Law and accompanying Model Mining Convention require disputes over the interpretation of the Draft Mining Law or the impacts of a mining company's activities on third parties to be resolved through arbitration rather than litigation.⁸⁴ But circumventing the Haitian judiciary raises its own concerns: mandatory arbitration may be inconsistent with the constitutional guarantee of judicial remedy,⁸⁵ and it undermines efforts to strengthen the independence and capacity of the judiciary in Haiti, sacrificing long-term judicial improvements on the altar of short-term arbitral safeguards. A more detailed legal framework that preserves alternative modes of dispute resolution, including recourse to the judiciary, could not only avoid short-term risks but also support the long-term goal of ensuring a strong, independent, and functioning judiciary in Haiti.

The Draft Mining Law would also create a new governmental institution, the *Autorité Minière Nationale* (National Mining Authority, or AMN), responsible for regulating the mining industry.⁸⁶ Under the Draft Mining Law, the AMN would be responsible for granting mining permits, overseeing company compliance, and enforcing regulations to implement the mining law. The draft text does not specify the scope and content of these regulations, however, and therefore leaves to the agency's discretion important matters such as water and air pollution control standards, mine design and land use criteria, and environmental remediation

requirements. To be sure, it is not possible for a framework law to detail the content of all regulations applicable to the sector concerned. There is a necessary role for the Executive in explicating how legal rules established in legislation should be applied in practice. Nonetheless, a framework law, such as the Draft Mining Law, must identify with sufficient specificity the areas subject to further regulation and the parameters for that regulation, to ensure that the law's implementation adheres to minimum standards and protections. Removing decisions on key regulatory details from the legislative process risks the loss of democratic consultation and diminishes the ability of interested stakeholders such as KJM to influence the drafting of substantive rules that will be critical to the well-being of communities and the environment.

Moreover, the Draft Mining Law does not expressly recognize existing environmental and labor laws or commitments under international law, which may be relevant to mining activity and which form the background rules for any mining-specific regulations. The first article of the Draft Mining Law posits that mining activities are governed exclusively by the Draft Mining Law and legislative or regulatory texts referred to therein; Article 315 states that the Draft Mining Law abrogates any legal provisions contrary to it. Yet under Article 276-2 of the constitution, all lawfully approved treaties and international agreements “become part of the legislation of the country and abrogate any laws in conflict with them.” On its own, the Draft Mining Law cannot regulate every aspect of the mineral sector, so extant laws governing issues such as land, labor, and the environment necessarily apply to those matters as they arise in and intersect with the mining context.

Whether these changes proposed under the Draft Mining Law will ensure better protection of communities and the environment and enable Haiti to reap benefits from the mining sector depends largely on the strength of the regulatory requirements and protections established in other provisions of the Draft Mining Law. A complete analysis of the Draft Mining Law (which has over 300 articles) is beyond the scope of this Report. What follows below is an overview of some of the key provisions in the law and a summary of the questions and concerns those provisions raise.⁸⁷

1. Transparency and disclosure

As noted above, the World Bank and the government of Haiti have both acknowledged the importance of transparency in the mineral sector. The Draft Mining Law fails to reflect that understanding, however, and falls short of widely accepted international standards regarding transparency and disclosure in the mining industry.

Much like the current legal regime for mining in Haiti,⁸⁸ Article 115 of the Draft Mining Law imposes a sweeping confidentiality requirement that is inconsistent both with international best practice and with specific guarantees of the right to information under the Haitian Constitution and human rights law.⁸⁹ The provision states that all reports, documents, and data relating to the results of work completed under a mining title will remain confidential for a period of 10 years after filing—unless the mining permit holder discloses them or authorizes their disclosure.⁹⁰

The Draft Mining Law includes no exceptions to this confidentiality rule. The broad language of Article 115 could be read to require that documents of public interest, such as those related to the environmental and social impacts of a mining project and proposed measures for avoiding and mitigating harm, be kept confidential. Keeping such information confidential would prevent affected communities from engaging in meaningful consultation about mining projects, despite the Draft Mining Law's requirement (in Article 202) that companies consult with affected communities. It could also foreclose the possibility of any genuine public debate about the short- and long-term impacts of mining. A law consistent with international best practice and the rights to information and participation (see Chapter VI) would instead include an explicit presumption in favor of disclosure, subject only to narrow exceptions for specified types of information that may be legitimately considered confidential.⁹¹

The Draft Mining Law does include some important, affirmative disclosure requirements, such as an article providing for publication of mining conventions in the Haitian government's official journal, *Le Moniteur*.⁹² But there are notable shortcomings in these provisions: The proposed text does not specify the deadline by when such disclosures must be made,⁹³ nor does it require the mineral *cadastre* (a registry of mining permits) or requests for those permits to be made public.⁹⁴ Systematic and timely publication of requests for permits as well as approved licenses and conventions would not only facilitate public comment and review⁹⁵ but also help to minimize potential land use conflicts and enable coordinated planning.

Furthermore, the proposed text does not include robust fiscal transparency requirements or oblige mining companies to disclose the revenues earned or amounts paid to the Haitian State.⁹⁶ Article 234 provides that, each December, the AMN and the fiscal administration are to publish revenues from the mining sector. But the law does not specify which kinds of revenues are included in this reporting requirement, nor does it require the government to publish how it allocates or spends those revenues. Moreover, it does not require that mining companies publish what they pay to the government or otherwise make transparent their accounting practices.⁹⁷ The absence of more comprehensive transparency provisions contrasts starkly with the growing body of international norms and practice regarding disclosure of natural resource revenues. That normative framework is reflected in documents such as the Guide on Resource Revenue Transparency, published by the International Monetary Fund, and the Extractive Industry Transparency Initiative Standard, which has been endorsed by multiple countries and companies and receives support from the World Bank.⁹⁸

2. Environmental review and oversight

The elimination of “automatic” permitting progression and the introduction of administrative review procedures in the Draft Mining Law are significant improvements over the Mining Decree. Nonetheless, the Draft Mining Law's treatment of environmental review and oversight suffers from at least three weaknesses.

First, the absence of essential details in the Draft Mining Law regarding the procedures and standards for environmental review, along with certain internal inconsistencies between different provisions of the law, threatens to undermine the protective power of the review system. As a preliminary matter, the Draft Mining Law lacks clarity regarding the environmental prerequisites for approval of an exploration permit. Title II, chapters I and II, concerning authorization of prospection and exploration, do not address environmental requirements at all.⁹⁹ Title VIII, Chapter II, states that the holder of an exploration permit must present and obtain approval of an environmental analysis of its exploration program before beginning any mining activities.¹⁰⁰ But the Draft Mining Law provides no explanation of what this analysis should entail.

Where the Draft Mining Law obliges permit holders to produce specific environmental studies, it fails to define the required contents of those studies or the standards to which they must adhere.¹⁰¹ For example, although the Draft Mining Law requires all holders of exploitation permits to produce an Environmental and Social Impact Assessment (ESIA), it neither specifies the required components of that study (beyond stating that the ESIA must include an environmental and social management plan and a rehabilitation plan) nor references any existing law that sets forth such requirements.¹⁰² Similarly, the Draft Mining Law is silent on the process by which such studies are to be carried out, including whether there will be any opportunity for public consultation or input. And although the environmental studies must be presented to the AMN for approval, it is unclear what standards the AMN will use to determine the adequacy of those documents.¹⁰³ Moreover, the AMN is required to review the ESIA's compliance only with the company's feasibility study, not with any independent statutory or regulatory benchmarks.¹⁰⁴ The Draft Mining Law makes no mention of whether the process or content of these environmental and social studies is subject to regulation by the AMN or whether there is a role for the judiciary in overseeing the adequacy of the assessments. Even if it is appropriate for the regulatory authority to elaborate details regarding implementation of the Law's requirements, to ensure that regulations do not omit essential elements or vital procedural safeguards, those minimum requirements must be set forth in the Draft Mining Law itself.

In addition, the AMN is tasked with issuing an "environmental discharge" (*le quitus environnemental*) to certify that a company has performed the required environmental rehabilitation before it withdraws from, renounces, or allows the expiration of an exploration permit.¹⁰⁵ For exploitation permits, the responsibility of issuing an environmental discharge falls to the MDE.¹⁰⁶ The Draft Mining Law does not specify what that environmental discharge analysis entails or what procedures the AMN or MDE should follow to ensure adequate restoration of land and resources affected by mining activities, making only vague reference to "modalities specified in the law and environmental regulations."¹⁰⁷ Instead, it defers elaboration of crucial details about the environmental discharge—as well as details about the substance and process for elaboration of ESIAs—to implementing regulations to be adopted at an unspecified time in the future.¹⁰⁸ The absence of statutory compliance standards, coupled with the deferral of important regulatory details to the discretionary judgment of the AMN, threatens the integrity and efficacy of the environmental review system itself.

Second, the timelines for review of environmental documentation specifically and permit applications generally are overly restrictive,¹⁰⁹ compromising the ability of the government to meaningfully oversee the mining industry. For example, the AMN has 30 days to complete its technical appraisal of an application for an exploration permit and 90 days for similar review of an exploitation permit application.¹¹⁰ Article 181 affords the AMN only 30 days to review the environmental analysis and mitigation plan produced by the permit holder at the exploration phase. Article 187 allows the AMN only 45 days to review an ESIA submitted as part of an exploitation permit holder's application for authorization to operate, before transmitting it to the MDE for evaluation. Similarly, the Draft Mining Law requires companies with active permits to give the AMN only one month's notice before commencing new operations or making certain modifications to existing operations,¹¹¹ and it provides the AMN and MDE a maximum of 30 days to review applications for renewal of exploitation permits.¹¹² Such short timelines not only hamstringing the government's ability to thoroughly study the documentation but also limit the opportunity for public participation or comment.¹¹³ And although, as discussed below, the law affords the MDE more time to complete its review of an ESIA, including the accompanying environmental management and rehabilitation plans, 180 days may not be sufficient for the State to carry out an independent, rigorous assessment of the company's analysis and action plans, especially if the MDE is faced with multiple such applications simultaneously.¹¹⁴ Given the Haitian government's limited experience in the mining sector and generalized lack of institutional capacity, the timelines set forth in the Draft Mining Law are unrealistic and are likely to inure to the benefit of applicants, not the State or the Haitian public.

Third, the environmental approval process does not include sufficiently stringent safeguards to ensure that only thoroughly vetted projects proceed to operation. The introduction of a requirement that companies produce an ESIA, for review by the MDE, is a positive development, as there is no such obligation under the current Mining Decree or conventions. Nevertheless, the Draft Mining Law does not require affirmative approval from the MDE. Rather, it requires that a company obtain a statement of "no objection" prior to receiving authorization to begin mining operations.¹¹⁵ Under Article 188, the MDE has 180 days to issue that statement or request changes to the documents.¹¹⁶ If the MDE does not respond within that period, a statement of no objection will be presumed.¹¹⁷ If, however, the MDE does not have the capacity to review documents within the allotted timeframe—as experience to date suggests would be likely—this provision could enable mining operations to begin without substantive, external environmental review. Further, the Draft Mining Law fails to make clear whether either the MDE or the AMN has the power to deny approval of the ESIA outright rather than merely request clarification or amendments to studies.¹¹⁸

3. Particular environmental standards and protections

In addition to the weaknesses in the procedures established for environmental review, some of the specific social and environmental protections included in the Draft Mining Law fall short of international best practice, failing to guarantee community safety, to safeguard against depletion and pollution of water sources by future mining activities, or to protect and preserve scarce forest

cover and fertile agricultural land. While not exhaustive, the list below highlights several shortcomings.

A. APPLICABLE ENVIRONMENTAL LAW

Article 179 provides that Haitian environmental laws and regulations apply to mining activities and that where there are no applicable domestic standards, “technically feasible” international standards will apply. The Draft Mining Law fails to specify, however, who is responsible for determining which domestic or international standards apply, whether particular international standards are “technically feasible,” and what sources will be relied upon in absence of relevant domestic regulations.¹¹⁹ Uncertainty regarding the standards to which mining companies must adhere could give rise to disputes. Although the Draft Mining Law does not specifically address how disputes regarding the definition of applicable standards are to be resolved, it does state that technical disputes between the AMN and permit holders are to be referred to arbitration.¹²⁰ For mining titles with 50 percent or greater ownership by foreign investors, the arbitration must be pursuant to the rules of the International Chamber of Commerce.¹²¹ The Draft Mining Law thus could leave it to arbitrators, rather than the Haitian judiciary, to determine which environmental standards apply to mining permit holders. Outsourcing the responsibility to interpret Haitian law or fill gaps left by the Draft Mining Law could diminish the ability of the Haitian State to control the terms and conditions according to which its own mineral resources are exploited. Such outsourcing could also diminish the protections afforded to the Haitian public and the environment.

B. RESERVE AREAS

While the Draft Mining Law provides for the establishment of “no-go zones” (areas where mining activities will be prohibited), it does not specify how or under what circumstances these zones may be established.¹²² Nor does it provide any guidance regarding land uses that take priority over mineral activities. These failings are particularly concerning, given that many natural habitats in Haiti have not been formally recognized.¹²³ Moreover, Article 174 seems to allow the government to override such prohibitions, subject only to “consultation” with Parliament rather than parliamentary approval or review.¹²⁴

C. DEFORESTATION

Provisions of the Draft Mining Law requiring an environmental analysis and an ESIA do not specify whether or how these documents must address the impacts of a potential mining operation on forests.¹²⁵ The provisions concerning the creation of “no go zones” do not specify whether all critical forest areas will be identified as off-limits for mining.¹²⁶ The Draft Mining Law also contains no other provisions requiring avoidance of forest degradation or minimization and mitigation of damage wherever possible, an omission that may run afoul of the relevant constitutional provision concerning protection of forests.¹²⁷ Haiti’s forest cover has already been severely diminished, so it is essential that mining not contribute to further deforestation.

D. BUFFER ZONES

Like Article 65 of the Mining Decree, discussed above (see *supra* Part B.3), Article 158 of the Draft Mining Law requires a buffer zone of only 50 meters between mining activities and inhabited areas or physical cultural resources such as historic or sacred sites, graves, or works of art.¹²⁸ Given variations in environmental conditions and vulnerabilities between mining sites, adequate buffer zones should be determined on a project-by-project basis, as part of the ESIA process.¹²⁹ But as a minimum standard, a 250-to-500-meter buffer zone would be more appropriate to safeguard physical cultural resources and other attributes of the surrounding land.¹³⁰

E. WATER

Large-scale mining activities present serious dangers to water resources, making a comprehensive framework for water management a critical component of national mining legislation. As discussed in Chapter III, gold mining typically uses large quantities of water and can have significant and lasting impacts on water quality.¹³¹ Haiti has long suffered from a shortage of potable water throughout the country.¹³² In the North of the country, where water resources are especially scarce and where the companies holding mining permits have confirmed that mineral deposits contain significant concentrations of various sulfides,¹³³ the hydrologic risks posed by mining, including risks of toxic mine drainage (TMD), are particularly acute (see Chapter III).

Despite these known dangers, the Draft Mining Law does not establish a strong basis for ensuring responsible management of water resources with respect to future mining projects. Article 116 provides that if work undertaken pursuant to a mining permit endangers the country's water resources—including springs, lakes, or groundwater—or otherwise seriously disrupts the environment, the government will ensure that corrective measures are taken.¹³⁴ This general provision does not, however, establish a framework for assessing and preventing potential adverse impacts on the country's water resources. Similarly, Article 260 grants sweeping permission to mining license holders to use resources (*“les matériaux et éléments”*) found within their permit areas, without requiring that they: (1) record the baseline quality and quantity of those resources (including surface and groundwater resources); (2) document access to such sources by residents in the affected areas; (3) obtain prior approval for such use; or (4) monitor impacts of that use over time. The requirement in Article 261 that the borders of open-pit mining areas be at least 50 meters from canals, lakes, and waterways does not constitute a sufficient safeguard. To *prevent* harm to public drinking water supplies, fisheries, and other beneficial uses—rather than simply to *remediate* environmental damage that has already occurred—the Draft Mining Law must include specific discharge and water quality standards governing cyanide, TMD, and other pollutants.

4. Permitting system

In addition to the above-highlighted procedural and substantive problems of the Draft Mining Law, several aspects of the proposed permitting system raise concerns.

Inconsistencies between different provisions of the Draft Mining Law risk creating confusion or inadvertent regulatory loopholes. For example, Article 40 allows exploration permits to be extended up to a maximum of 12 years. Yet Articles 120 and 121 appear to allow automatic extension of permits while a renewal request from a permit holder is pending, thereby potentially enabling exploration permits to remain in force beyond twelve years.¹³⁵

Similarly, the failure to harmonize provisions regarding environmental prerequisites for receiving permits and conducting mining activities could facilitate the circumvention of safeguards. For example, Articles 31–36 appear to authorize the AMN to grant an exploration permit without requiring any environmental studies. But as discussed above, Articles 180 et seq. provide that an environmental analysis and impact mitigation plan be approved before any mining-related activities are undertaken. Article 25 exempts aerial and underwater mineral prospecting from the environmental review provisions outlined elsewhere in the Draft Mining Law, stating that such activities will be authorized under conditions to be determined by future implementing regulations. But such surveying techniques can have significant environmental impacts, so this apparent carve-out presents unnecessary risks.¹³⁶

Finally, Article 23 of the Draft Mining Law addresses conflicts of interest in permitting by prohibiting public officials from holding an interest in mineral operations.¹³⁷ This article represents an important effort to minimize corruption and promote fairness and transparency in the allocation of mineral rights. Nonetheless, it may not cast a wide enough net because it does not appear to apply to indirect interests in mining activities or interests in subcontractors of mining companies and does not apply either to members of the government or to public agents who are not public servants in the strict sense of the term.¹³⁸ Moreover, Article 23 fails to address the activities of public officials' family members and business associates or to extend the prohibition for any period of time after a public official leaves his or her post (i.e., to impose waiting periods before former public employees may join private sector mining companies, and vice versa). This omission is especially important in Haiti, where allegations of such conflicts have been common.¹³⁹

5. Financial requirements

The fiscal regime established in the Draft Mining Law reflects some significant improvements over that of the Mining Decree. In particular, as noted above, the specification of royalty and tax rates, uniformly applicable to all mineral extraction, helps to reduce the risk that individual mining conventions will be negotiated with fiscal terms unfavorable to the Haitian State and public. Article 236 of the Draft Mining Law also requires holders of exploitation permits to pay a special mining fee, equivalent to \$0.25 per ton of extracted mineral, to be paid exclusively to local authorities in mining-affected areas.

Despite the advance that this provision may represent, the per-ton amount designated for local territories is paltry in comparison to the amounts, generated as a percentage of overall revenues from the mining sector, that other countries' mining laws designate for local communities.¹⁴⁰

Moreover, in provisions designating certain financial benefits from mining to local communities, the Draft Mining Law does not use the official terminology for the repartition of local governmental units in Haiti, such as sections, communes, and departments. References to regional authorities (“*collectivités territoriales*”) could give rise to disputes between different territorial units. Ensuring that Haiti gets its “fair share” of its mineral wealth, however, not only requires a more robust set of legal requirements than those included in the Draft Mining Law. It also demands both that government authorities have the institutional and technical capacity to verify company compliance with these fiscal requirements and that mechanisms exist for public oversight, so that Haitians can hold their own government, as well as the companies exploiting the country’s mineral resources, accountable.

A. ROYALTY RATES

Unlike the Mining Decree, the Draft Mining Law specifies royalty rates rather than leaving them to negotiation with individual mining companies. According to Article 235, the royalty rate for gold would be 4 percent and would be levied on the market value of the gold after its last treatment in Haiti.¹⁴¹ Article 235 states that the price of gold used to calculate the royalty would be indexed to the afternoon London Gold Fix on the date the royalty is levied.¹⁴²

The current mining royalty, as set forth in the existing mining conventions held by VCS Mining LLC with its subsidiary Delta Société Minière S.A. (VCS/Delta), Majescor Resources Inc.-Société Minière du Nord-Est S.A. (Majescor-SOMINE), and Eurasian Minerals Inc. with its subsidiary Ayiti Gold, is 2.5 percent. Although the proposed increase would be an improvement, a 4-percent royalty—combined with the uncertainties of Haiti’s corporate tax system—makes it unlikely that the Haitian government and the Haitian people would receive an equitable share of the value of their mineral wealth as required by Article 36-6 of the constitution (see Chapter IV). Some countries impose higher royalty rates on gold and other precious metals. In Ghana and Guinea, for example, the royalty rate for gold is 5 percent; in Mauritania, it is between 4 and 6.5 percent, depending on world gold prices.¹⁴³

B. TAX AVOIDANCE SAFEGUARDS

In addition to the mining royalty, mining companies would also be subject to Haiti’s general business taxes, including the 30-percent-tax on corporate income, assessed on net revenues (see Chapter IV). Ensuring that the appropriate amount of income tax is collected, however, is no simple task. The Draft Mining Law addresses the risk of corporate tax avoidance through “transfer pricing” and “under-capitalization,” which are internal cost-accounting techniques that can enable multinational corporations to reduce their reported net revenues and hence their income tax liability. (For further discussion of these concepts, see Chapter IV.)

Three provisions of the Draft Mining Law address these risks. As noted above, Article 235 requires the mining companies to pay the 4-percent royalty based on the market value of the gold after its last treatment in Haiti. This early assignment of the royalty and the reference to world gold prices reduce the risk that multinational mining corporations operating through Haitian subsidiaries could transfer the refined gold out of Haiti at artificially low “internal” prices—i.e.,

prices set between the subsidiary and the parent corporation—and thereby reduce the value to which the royalty is assigned.

Article 104 specifies that mineral sales within Haiti and on the international market must reflect the current national and international market prices, respectively, but it does not require that sales between affiliated companies must be conducted at “arm’s length”—that is, as if the companies were not part of the same corporate group.¹⁴⁴ The risk in not requiring respect of the arm’s length principle is that companies could engage in “transfer pricing”—that is, they could circumvent the pricing regime imposed in Article 104 by effecting sales or transfers of mineral assets between two or more entities that are part of the same corporate group, at prices that are either above or below market rates, in order to minimize tax liability on the sales.

Haiti could tighten its transfer pricing rules in specific ways. First, although Haiti is not a member of the Organization for Economic Cooperation and Development (OECD), it could adopt the OECD’s transfer pricing rules—as part of the new mining law, as an amendment to the country’s Investment Code, or in the conventions that it signs with mining companies.¹⁴⁵ Second, Haiti could amend its Investment Code to authorize the government to audit and amend a mining company’s Haitian corporate income tax returns, as needed, to comply with the arm’s length principle. Section 482 of the U.S. Internal Revenue Code, for example, allows the Internal Revenue Service to:

distribute, apportion, or allocate gross income, deductions, credits, or allowances between or among such organizations, trades, or businesses, if [it] determines that such distribution, apportionment, or allocation is necessary in order to prevent evasion of taxes or clearly to reflect the income of any of such organizations, trades, or businesses.¹⁴⁶

But such auditing exercises require significant technical capacity in the field of accounting and substantial resources—neither of which the Haitian government has (see Chapter 1).

Article 238 of the Draft Mining Law does address a second internal cost-accounting technique that companies often use to minimize their tax burdens in the countries where they operate: “under-capitalization.” In simple terms, under-capitalization refers to a practice whereby companies lend money to their own subsidiaries or otherwise finance the operations of those subsidiaries through debt, without regard to whether the subsidiary has sufficient capital (equity) to back up its debts. Companies may elect this approach, rather than direct financing of their subsidiaries’ operations, so that subsidiaries can deduct the interest payments made to the parent companies on the outstanding debts as costs, thereby reducing the amount of revenues on which they are taxed in the countries where they operate. Article 238 attempts to reduce the risk of under-capitalization by stating that the deductible rate of interest paid by a subsidiary to its parent (or other affiliated) corporation may not exceed the rate that the subsidiary could have obtained from an independent financial institution. It also provides that if the subsidiary corporation’s debt is more than 70 percent of its total capital, then the amount of interest paid to affiliated entities that may be deducted from the subsidiary’s Haitian income taxes must be reduced by the

difference between the actual percentage of debt to capital and 70 percent. These are useful limitations, although a 50-percent debt-to-capital limitation would be more protective against under-capitalization tax manipulation.

C. SURFACE USE FEES

Article 232 of the Draft Mining Law sets rates for a “surface royalty” to be paid annually so long as a title is held. The rates appear to represent an improvement over the modest sums charged to mining permit holders under the Mining Decree—just 10 Haitian Gourdes per square kilometer during prospection (Art. 35(c)), 50 Haitian Gourdes per square kilometer during research (Art. 37(c)), and 250 Haitian Gourdes per square kilometer during exploitation (Art. 39(c)).¹⁴⁷ The Draft Mining Law both increases the user fee per square kilometer and changes the pricing from Haitian Gourdes to U.S. dollars: during exploration, the fee is \$25 per square kilometer for the initial permit period; \$50 per square kilometer during the first renewal period; and \$75 per square kilometer during the second renewal period. The holder of an exploitation permit must pay \$100 per square kilometer.¹⁴⁸ The adequacy of these charges, however, cannot be evaluated in isolation from the other fiscal terms and conditions governing mineral activities. It is the interaction of all the applicable taxes, fees, and royalties that will determine whether the Haitian State and its people retain their fair share of the mineral wealth that lies beneath the soil.

D. FISCAL STABILIZATION

Article 242 of the Draft Mining Law states that the mining convention will stabilize the fiscal and customs regime applicable to exploitation permits for a period not to exceed 15 years. This article would significantly change the existing law, which expressly preserves the authority of the Haitian government to revise “the financial clauses provided for in the mining convention[s].”¹⁴⁹

Article 242 presents several risks. First, the fiscal stabilization guarantee would likely prevent the Haitian government from applying any subsequent increases in general corporate income tax rates to mining companies that have signed conventions, which would shift the burden of the increased taxes to other sectors of the Haitian economy. Second, Article 242 would lock in the new royalty rates proposed in the Draft Mining Law for 15 years, even if the government concluded that the royalties were inadequate to fulfill the goal of reserving to the Haitian people their fair share of the proceeds of their mineral wealth. Chile and Peru have both recently increased the royalties and taxes that they charge to mining companies based on their respective determinations that the previous fiscal regimes were insufficient to cover the social costs of mining and provide a fair return to the host nation.¹⁵⁰ Third, mining companies might invoke Article 242 to challenge a host of other laws and regulations—including new environmental protections and labor standards—that increase the cost of mining.

A Columbia University study found that fiscal stabilization clauses “effectively [transform] changes in the relevant governing legal framework [into] a breach of the contract [between the investor, such as a mining company, and the government] that could be remedied by specific performance or compensation.”¹⁵¹ The study also documents a variety of cases from international arbitration tribunals that have relied on these provisions (or other governmental promises of

fiscal stabilization) to “shift the risk of regulatory change from investors to states (and taxpayers), putting greater pressure on governments to refrain from taking action to refine and upgrade their laws and regulations”¹⁵² and reducing investors’ incentives to mitigate the risks associated with potential future regulation by improving their own environmental and social performance.¹⁵³

It is perhaps understandable that mining companies would seek to insulate themselves from changes in tax policy and environmental regulation during the term of active mining. The Mining Decree recognized, however, that the Haitian government must retain its authority to change and improve upon its laws and regulations as needed to protect the interests of the Haitian people. The Draft Mining Law should be no less protective of that essential sovereign power.

E. REMEDIATION

The Draft Mining Law requires mining companies to set aside money to pay for the costs of remediation. This requirement introduces greater certainty than exists under the current regime, which leaves the issue of performance and rehabilitation bonds to individual mining conventions.¹⁵⁴ It is uncertain, however, whether mandated financial requirements for environmental remediation would be sufficient to ensure that adequate funds will be available to effectively rehabilitate those lands, surface streams, estuaries, groundwater stores, and other natural resources that may suffer from the long-term effects of mining.¹⁵⁵ International best practice encourages the internalization of environmental costs and requires that the polluting institution cover all remediation expenses.¹⁵⁶ This practice is especially important in a country facing political instability, since companies may abandon mining projects earlier than expected should conditions deteriorate.¹⁵⁷

Article 177 of the Draft Mining Law sets forth the types of financial guarantees that companies must provide. Yet the Draft Mining Law does not specify minimum amounts for performance and rehabilitation bonds (or other means of securing environmental compliance remediation). Nor does it explain the standards and processes by which the AMN would determine these fiscal requirements. Rather, it states only that the amount will be determined as a function of the size or scope of mining activities and may be adjusted depending on the costs of the rehabilitation work to be done. If Article 177 included more specifics regarding these rehabilitation responsibilities, it would better safeguard the environment and protect the Haitian State from footing the bill for cleanup. It would behoove the government of Haiti to clarify in the Draft Mining Law that the required amount of the performance and rehabilitation bonds (or other forms of security a company is required to provide) may be adjusted over time as mining operations and conditions on the ground evolve and as better information becomes available about the companies’ compliance with environmental standards and about the effects of mining activities on the environment and on adjacent, downstream, or downwind communities.

In addition, several other provisions and omissions in the Draft Mining Law could undermine the principle that the mining companies must carry out rehabilitation or ensure that means are in place to guarantee restoration of the natural habitat before abandoning mining sites. For

example, Article 122 appears to require that a holder of an exploitation permit vacate land in 12 months if a permit is not renewed.¹⁵⁸ While there may be logic to preventing companies from sitting on unused land, the law should require that permit holders immediately undertake rehabilitation and vacate the land only once the Haitian authorities have verified the adequacy of remediation and rehabilitation efforts. Likewise, provisions concerning the renunciation or surrender of mining permits (Articles 136–144) make no specific mention of the permit holders' obligations to rehabilitate the permit area or to remediate damages to land, water, and other resources. Articles 140, 141, and 143 do charge the AMN with reviewing and approving the conditions for surrender of a permit, and they allow the AMN to condition approval on the completion of specified works. But the Draft Mining Law mentions only technical and "cadastral" review, without reference to permit holders' environmental obligations or any specified role for the MDE in review of the application.

Of perhaps greater concern is the Draft Mining Law's omission of any clause expressly providing that the renunciation, abandonment, or expiration of any mining title does not relieve the former titleholder from its environmental obligations or exonerate it from associated liabilities. Similarly, there is no provision stipulating that the obligations of a titleholder, including with respect to environmental remediation, fiscal payments, or community development agreements, remain in force and actionable even after assignment of the title or permit to a new entity. Specifying that a former titleholder or permit holder and an assignee are jointly responsible for fulfillment of obligations predating the transfer of title would better protect against corporate avoidance of environmental liabilities.¹⁵⁹

6. Land use, compensation, and dispute resolution

The attention given in the Draft Mining Law to company-community relations and to individual and community rights to compensation for land use and damages¹⁶⁰ represents a significant improvement over the current legal regime for mining, which makes only a general reference to indemnification. But the proposed language also raises new concerns. As a preliminary matter, the Draft Mining Law's broad declaration that mining is activity of "public utility"¹⁶¹ risks facilitating compulsory acquisition of land through eminent domain. The Draft Mining Law also gives companies the right to seek expropriation of privately held land to conduct mining activities.¹⁶² Together, these articles (Articles 160–63, 167) may make it easier for mining companies to legally seize land from community members without adequate negotiation, consultation, or compensation.

In addition, although the proposed text establishes a process for compensation to be paid to individual landowners, it does not make clear whether landowners and land users have the right to refuse to allow mining companies to enter onto and use their land.¹⁶³ The Draft Mining Law provides that mining companies can acquire private property for mining activities by paying market value compensation to the landowner.¹⁶⁴ It does not describe whether compensation will be negotiated with landowners on an individual basis or collectively, nor does it make clear that compensation must be paid *before* a company enters the land in question. And neither the

Model Mining Convention (discussed further below) nor the Draft Mining Law specifies the minimum requirements with respect to the design or content of any community-wide compensation or resettlement plans, where necessary, to protect the rights of affected populations.

Furthermore, Articles 160–163 do not address who qualifies as an owner or occupant of land. The adequacy of the Draft Mining Law’s rather vague provisions depends greatly on the clarity of land tenure and land rights under other provisions of law. And as discussed in Chapter VI, land tenure in Haiti is anything but clear. The Mining Decree similarly failed to adequately identify who qualifies as an owner or occupant of land. (See the discussion *supra*, about the mandated arbitration procedure if a landowner or occupier resists a company operating on his or her land.) The two mining conventions currently in force provide little additional information about land use. They stipulate that a private landowner must agree with a mining company to an annual leasing fee in the presence of a government representative.¹⁶⁵ If an agreement cannot be reached, the State can intervene to ensure fair compensation, “without which the beginning of work could be delayed.”¹⁶⁶ The conventions appear to be in tension with the Mining Decree, as the Mining Decree does not discuss any role for a government representative and establishes an arbitral system for setting a fair price.¹⁶⁷

The proposed approach to dispute settlement presents several additional concerns. The Draft Mining Law provides that when an amicable agreement cannot be reached regarding compensation for use of land, the dispute should be submitted to an arbitral body that will set a rate. It does not contemplate the involvement of the judiciary, despite the guarantee in Article 36-1 of the constitution that “expropriation [of property] for a public purpose may be effected only by payment, *ordered by a court* in favor of the person entitled thereto, of fair compensation established in advance by an expert evaluation.”¹⁶⁸ Nor does the law clarify how “interested parties” will be defined or whether a party has a right to refuse use of/sale of his or her land. Furthermore, there appear to be inconsistencies between the provisions regarding indemnification and arbitration within a permit area¹⁶⁹ and those allowing expropriation outside the permit area (for permanent installations deemed to be of public utility).¹⁷⁰ Neither provision addresses what kinds of compensation are required. As in the Mining Decree, the land use compensation and dispute resolution scheme envisioned in the Draft Mining Law fails to recognize the information and power differentials between the mining companies and the landowners and occupants.

Article 36-2 confirms that, except for purposes of agrarian reform, “[n]o one may be deprived of his legitimate right of ownership other than by a final judgment *by a court of law*.” (Emphasis added.) Much like the Mining Decree, the Draft Mining Law confers on mining permittees the power to: (1) occupy private land and oust the owners and occupants from their land to the extent that their uses interfere with the permittee’s mining activities; and (2) demand that surface owners and occupants cease their uses if they are inconsistent with the authorized mining uses. When the permittee negotiates with landowners or surface users over compensation for this interference with their property rights—or forces the owners or occupants into binding

arbitration—it does so under the authority of the government. Under these circumstances, the constitutional requirement that a court (not an arbitration panel) decide what is “fair compensation” should apply, and this should be clarified in the Draft Mining Law.

Finally, the reference to “temporary occupancy” (which also appears in the Mining Decree) fails to distinguish between the use of private land during exploration and research and the use of private land for mining itself. The former is short-term (usually a few years) and its interference with surface uses is comparatively minor,¹⁷¹ while the latter is long-term (usually several decades) and may prevent all existing non-mining uses. Indeed, in many cases, even after the mine is closed and surface resources are “rehabilitated,” the land may be permanently unusable because of loss of topsoil, excavation of heavy metals and other toxic substances, and lingering non-remediated pollution from the mine. Replicating the existing law’s bundling of these disparate types of harm to landowners and occupants into a single compensation scheme is likely to undervalue the surface rights that the Draft Mining Law seeks to protect.

These provisions replicate, rather than rectify, shortcomings in the Mining Decree by failing to clarify that individuals or communities have recourse to the courts when their rights have been violated by a mining company or obligations to them have been left unfulfilled.¹⁷² As in the Mining Decree, the land use compensation and dispute resolution scheme envisioned in the Draft Mining Law fails to recognize the information and power differentials between the mining companies and the landowners and occupants. A fair compensation law would require public education about both the realities and risks of mineral exploration and mining processes and the landowners’ and occupants’ legal rights. (See Chapter VI for a discussion of community members’ experiences with the administration of land access agreements during exploration activities to date.)

Perhaps more strikingly, the Draft Mining Law is entirely silent on the rights and treatment of individuals and communities physically or economically displaced by mining activities. Open-pit gold mining of the type expected to occur in Haiti if mining is authorized requires vast areas of land. As discussed in Chapters I and III, because of Haiti’s population density and the predominance of subsistence farming in the areas where mining permits are located, it is nearly inevitable that mineral extraction will result in the physical or economic displacement of those who reside on and live off of the land within permit areas. The silence of the Draft Mining Law regarding the obligations of companies to minimize the need for displacement, and, where not preventable, cover the costs of resettlement and livelihood restoration, is discordant with international standards and best practices.¹⁷³

7. Community development protocols

Article 202 of the Draft Mining Law requires companies to establish and implement a program of consultation with local community representatives. This innovation is a positive step, but it stops short of creating a robust mechanism for the respect and protection of community rights. The proposed law fails to provide any details regarding the timing or manner in which such

consultation must be carried out or how community “representatives” are to be defined and identified. The lack of detail regarding the planning, timing, and execution of such consultation programs undermines the ability of communities to enforce the consultation obligation.

Similarly, Article 203 requires the elaboration of a Community Development Protocol (CDP) but fails to specify any requirements regarding the content or process of arriving at such an agreement. Articles 54 and 204 stipulate that the CDP is a prerequisite for the holder of an exploitation permit to be granted authorization to operate. Article 205 requires that the CDP, which must be signed by “representatives” of the communities likely to be affected by mining operations, be submitted to the AMN; Article 206 requires companies to fulfill their obligations under such CDPs. But the Draft Mining Law says nothing about the need to ensure that those who negotiate and sign the CDPs on behalf of communities are indeed representatives or subject to any kind of deliberative or democratic check. And nowhere does it define the means by which the CDP may be enforced, either by community members or by the government. These important provisions could be significantly strengthened if the law were to clarify that noncompliance with the CDP is a condition for revocation of a permit and that communities have the right to seek enforcement of the CDP in court.

8. Labor and local content provisions

Article 209 of the Draft Mining Law addresses local employment and supply requirements, including the preparation of a recruitment plan. Though important, this provision fails to maximize benefits to local Haitian communities. It is not uncommon for mining laws to require mineral producers to satisfy both certain quotas regarding employment of host country nationals or local personnel and contracts with local businesses and suppliers. For example, the Guinean Mining Code not only requires applicants for mining exploitation permits or concessions to draft a plan for the promotion of Guinean employment but also stipulates the modalities of such a plan as well as minimum quotas. Specifically, it requires that companies hire exclusively Guineans for all unskilled positions and that 30 percent of management positions be filled by Guineans between the first and fifth years after commercial production begins and 90 percent between the eleventh and fifteenth years.¹⁷⁴ The Congolese Mining Code requires that companies holding exploitation permits prioritize employment of Congolese personnel with equal qualifications and experience.¹⁷⁵ And some laws go further, requiring that a specific percentage of the labor force be from the locality or region where a mine is located. The Draft Mining Law also misses an opportunity to impose local content requirements, which are common in countries with high levels of unemployment. For example, the Guinean Mining Code requires holders of exploitation permits to develop plans regarding support of and capacity-building for Guinean enterprises, and both the Congolese and Ivoirian mining laws require mining companies to give priority to local enterprises when selecting subcontractors.¹⁷⁶

9. Model Mining Convention (“*Convention Minière Type*”)

Annexed to the Draft Mining Law is a Model Mining Convention (“*Convention Minière Type*”). Mining conventions are referenced in Article 54 of the Draft Mining Law and described in Articles 62–66, which specify that conventions signed between companies and the Haitian government may not derogate from the provisions of the law.

The promulgation of a Model Mining Convention that sets a floor regarding key terms and performance requirements represents a significant improvement over the existing regime. According to the Draft Mining Law, however, parliamentary approval is not required prior to the State’s signature of a mining convention; instead, the State needs only to “consult” the relevant commissions in the two houses of Parliament before signing a convention.¹⁷⁷ The failure to require parliamentary approval of mining conventions has prompted concern among members of Parliament and Haitian civil society about the absence of legislative oversight and democratic checks on the State’s exercise of authority to grant mineral rights to private actors.¹⁷⁸

Moreover, the Model Mining Convention includes several provisions that pose risks or that could be strengthened to maximize benefits for the government of Haiti and the Haitian people.¹⁷⁹ Article 3, for example, states that the convention applies to mining permit holders as well as their subsidiaries and affiliates. Holding all entities associated with a mining company to the requirements contained in the convention (and the mining law on which it is based) is an important way to close loopholes in fiscal, environmental, and social compliance. Nonetheless, as parties to the convention, those entities will be able to avail themselves of tax and fiscal provisions that waive certain levies and duties.¹⁸⁰ This risk is compounded by the fact that the definition of “affiliate” in Article 7 of the Draft Mining Law¹⁸¹ focuses solely on the shareholder relationship between companies and does not address other relationships, such as those based on contracts between unrelated entities.¹⁸² Unless revised, this overly narrow definition of “affiliate” could enable companies involved in or responsible for mining-related activities in Haiti to circumvent crucial financial, environmental, or social regulations.

The Model Mining Convention also affords the government of Haiti less regulatory flexibility than the current regime. Tellingly, Article 7 of the Draft Mining Law defines the “Mining Convention” as a “Stability Convention” between the State and the beneficiary of an exploitation permit. Although the duration of a convention is limited to fifteen years, the Model Mining Convention contains a stabilization clause, in Article 22, providing that the fiscal terms and other regulatory requirements set forth in the convention would not be subject to change during that period unless both parties to the convention agree. Concession agreements signed under the Mining Decree also contained stabilization clauses. As discussed above, however, Article 43 of the Mining Decree reserved the Haitian government’s sovereign right to revise the financial terms of those agreements.¹⁸³ Because neither the Model Mining Convention nor the Draft Mining Law contains any such reservation, there is a possibility that the Haitian government could be barred from making (or have to compensate for) future changes in the royalty rate or taxes set forth in the mining conventions. Moreover, the broad language in Article 22 of the

Model Mining Convention could be interpreted to apply not only to changes in tax, customs, or foreign exchange provisions but also to any law or regulation enacted in the future that may impose costs on the company. It is imperative that the Haitian government clarify that the stabilization clause does not apply to laws enacted to protect public health, safety, welfare, labor, or the environment, or laws that otherwise implement the government's international human rights and environmental obligations.

Individuals and companies who enter into government contracts prefer, of course, to have their performance and financial obligations clearly defined and locked in. In contrast, governments generally assume that they have the authority to make changes in general tax rates and tax structures applicable to entities with which they do business. Yet there is growing support in international law for the opposite rule—viz., that governments may not alter the terms of contracts to which they are a party (including taxes and other financial terms) unless the government expressly reserves this sovereign power in the contract or in the law that authorizes the contract.¹⁸⁴ These trends underscore the importance of explicitly including in the Draft Mining Law a reservation retaining sovereign power to regulate.

State sovereignty is likewise circumscribed by the overly narrow grounds included in the Draft Mining Law for termination of a convention. On a positive note, Article 27 of the Model Mining Convention authorizes the government to terminate the convention if the mining company breaches the CDP. But Article 27's list of causes for termination is limited; it fails to include, for example, assignment of mining rights to third parties without the government's consent or knowing submission by a company to the government of false or fraudulent information.¹⁸⁵

In addition, although Articles 8–13 of the Model Mining Convention reference several required annexes, which would presumably be binding on the company signatory to the convention, the CDP (outlined in Title IV of the Draft Mining Law) is conspicuously absent from the list. Inclusion of the CDP among the annexes to the convention would ensure that it is a legally binding document, in line with Article 206 of the Draft Mining Law, which requires holders of exploitation permits to abide by the terms of their CDPs. The legal enforceability of the commitments contained in the CDP would be clearer if the CDP were among the instruments annexed to the convention and therefore all of its provisions expressly part of the binding contract between the permit holder and the government. Notably, neither the Model Mining Convention nor the Draft Mining Law makes clear when the agreements to be annexed to a convention must be completed or publicly disclosed.¹⁸⁶

With regard to the mitigation and cleanup of long-term environmental impacts, the convention contains an important clause requiring mining companies to provide a financial guarantee for the cost of rehabilitation work, subject to the limitations established in Article 177 of the Draft Mining Law regarding the types of permissible financial guarantees.¹⁸⁷ Article 177 states that mining titleholders may post their own security rather than a bond or other type of third-party insurance. The law does not specify, however, either the minimum required amount for the security or the terms by which the Haitian government could demand payment for environmental rehabilitation,

instead specifying that the AMN will determine the amount. Including these types of details would better ensure sufficient funds to cover the potentially high costs of rehabilitation work. Furthermore, given that conditions on the ground and mine impacts may change over time, it would be wise to include a provision requiring regular review and updates of a rehabilitation plan.¹⁸⁸

Finally, the Model Mining Convention prioritizes “amicable” resolution of disputes, with recourse only to arbitration in the event that an amicable resolution cannot be found. As discussed above, it is troubling that the convention appears to remove from the purview of the Haitian judiciary the authority to resolve disputes regarding the interpretation of Haitian law. Encouraging resolution of conflicts over the meaning and application of Haitian law in Haitian courts, while instituting measures to enhance the independence and impartiality of the judiciary, would not only be consistent with Article 292 of the Draft Mining Law, which permits parties to seek remedy through Haitian courts and the Haitian Constitution. It would also serve the long-term goal of strengthening the capacity of the Haitian State to safeguard the rights of its citizens and enforce the rule of law.¹⁸⁹

Box 5-2: Labor Rights in Haiti and the Need for Strong Worker Protections in the Mining Sector

Haiti’s efforts to increase foreign investment in mining and other sectors of the economy raise questions about who stands to benefit and at what cost. The government is working to attract overseas companies with a favorable regulatory climate and the cheapest labor in the hemisphere. Companies may also benefit from lax enforcement of labor laws and a large labor pool.

More than two thirds¹⁹⁰ of Haitian workers lack formal employment, and those who have jobs typically earn wages far below the cost of living. Given the dearth of decent employment opportunities and pervasive extreme poverty, workers are highly susceptible to exploitation and rights violations. Building strong labor protections into the emerging regulatory regime for mining is therefore essential to guarantee the rights of Haitian workers.

Haiti’s recent experience with the garment sector suggests that it remains difficult to attract investment and that the Haitian government lacks the capacity to effectively monitor and regulate workers’ rights. Following the

2010 earthquake, the Haitian government prioritized the revitalization of the once-thriving garment sector as a means to generate revenue and employment. With assistance from the Inter-American Development Bank and the U.S. government, Haiti erected a \$300-million factory complex in the northern town of Caracol.¹⁹¹ There was a promise of up to 65,000 low-wage jobs, and families dependent upon subsistence agriculture were displaced from their land to make way for construction.¹⁹² More than two years after the inauguration of the industrial park, however, only an estimated 6200 jobs have been created.¹⁹³ These jobs reportedly pay workers less than \$7 a day¹⁹⁴—an amount insufficient to adequately feed a family, let alone contribute to basic housing, healthcare, and education expenses.

Factory owners enjoy duty-free status on apparel exports to the United States under a program enacted by the U.S. Congress, the Haitian Hemispheric Opportunity through Partnership Encouragement Act (HOPE II).

In theory, trade benefits under that program hinge upon adherence to core labor standards. Despite external scrutiny and international oversight on the garment industry—conditions that do not exist in other sectors—wage theft, forced overtime, health and safety violations, sexual harassment, and repression of freedom of association are routinely reported by Haitian unions, independent monitoring organizations, and Better Work Haiti, a joint program of the International Labor Organization (ILO) and the International Finance Corporation.¹⁹⁵

The mining sector lacks the regulation and transparency of the apparel industry; therefore, mining employers arguably have less incentive to follow sound labor practices. Further, mining tends to be concentrated in isolated regions with few formal jobs—another factor that creates the potential for abuse. The absence of unions in the mining sector in Haiti adds to workers' vulnerability. The most recent large-scale extractive operations in Haiti date back to bauxite and copper mining from the 1950s to the 1970s, when workers were prohibited from exercising freedom of association under the

dictatorship.¹⁹⁶ In this context, it is imperative that the legal regime regulating the mining sector contain strong labor protections that allow workers to exercise their fundamental rights to freedom of association and collective bargaining, earn a safe and dignified livelihood, and benefit equitably from economic development.

To adhere to best practices and protect the rights of Haitian workers, the legal regime regulating the mining industry should, at a minimum, require compliance with the Haitian Labor Code, which serves as an important baseline for worker protections to be incorporated into the Draft Mining Law.

It sets forth, beyond standard protections that apply to workers across various sectors, special safeguards for mine and quarry workers, including provisions for working hours, rest periods, salary differentials, workers' compensation, overtime, and health care benefits.¹⁹⁷ Additionally, Haiti is engaged in a tripartite, ILO-facilitated labor code reform process, in which trade union representatives are advocating for strengthened measures and expanded application of the law.¹⁹⁸

Ongoing improvements in the Labor Code should be incorporated into the emerging legal regime for mining.

¹ CONSTITUTION DE LA RÉPUBLIQUE D'HAÏTI, art. 36-5 (1987) [hereinafter Haitian Constitution or CONST. D'HAÏTI] https://www.constituteproject.org/constitution/Haiti_2012.pdf (all subsequent citations are to this version unless otherwise noted).

² CONST. D'HAÏTI, art. 36-6.

³ *Id.*

⁴ The lack of clarity regarding article 36-6, at least among English speakers, may be the result of mistranslations that appear in the two most widely available English versions of the Haitian Constitution. See *Haiti's Constitution of 1987 with Amendments Through 2012*, CONSTITUTE PROJECT (2012), https://www.constituteproject.org/constitution/Haiti_2012.pdf; *1987 Constitution of Haiti*, POLITICAL DATABASE OF THE AMERICAS, GEORGETOWN UNIVERSITY (2011), <http://pdba.georgetown.edu/Constitutions/Haiti/haiti1987.html>. Both versions translate article 36-6 as: "The law shall establish regulations governing freedom to prospect for and work mines, or bearing earths, and quarries, ensuring an *equal* share of the profits of such exploitation to the owner of the land and to the Haitian State or its concessionaires" (emphasis added). In contrast, the French version reads: "*La loi fixe les règles qui conditionnent la liberté de prospection et le droit d'exploiter les mines, minières et carrières du sous-sol, en assurant au propriétaire de la surface, aux concessionnaires et à l'Etat haïtien une participation équitable au profit que procure la mise en valeur de ces ressources naturelles.*" 1987 *La Constitution De La République d'Haïti* art. 36-6, POLITICAL DATABASE OF THE AMERICAS, GEORGETOWN UNIVERSITY, (2011), <http://pdba.georgetown.edu/Constitutions/Haiti/haiti1987fr.html>. "[U]ne participation équitable" could be translated as "fair share" rather than "equal share."

⁵ As described in detail in Chapter IV, the royalty rate set forth in the 1997 conventions is 2.5 percent of the value of the gold and other minerals that are extracted from the mines. This royalty is payable to the Haitian government. The conventions also impose insignificant surface use fees and a small tax for the benefit of the communities of \$0.20 per ton of rock and rubble dug from the mining sites. *Convention Minière entre L'État Haïtien et La Société Minière Citadelle, S.A., Février 1997*, art. 26, LE MONITEUR: JOURNAL OFFICIEL DE LA RÉPUBLIQUE D'HAÏTI, no. 3 (May 4, 2005) [hereinafter Citadelle Convention], <http://haitigrassrootswatch.squarespace.com/storage/Mining.Convention-Citadel.pdf>; *Convention Minière entre L'État Haïtien et La Société Minière Ste-Geneviève, S.A., Février 1997*, art. 26, LE MONITEUR: JOURNAL OFFICIEL DE LA RÉPUBLIQUE D'HAÏTI, no. 3 (May 4, 2005) [hereinafter Ste. Geneviève Convention], <http://haitigrassrootswatch.squarespace.com/storage/Mining.Convention-St.Genevieve.pdf>. In addition, the mines would have to pay corporate income taxes of 31% of net profits earned in Haiti and several payroll-related taxes that total 11%. World Bank Group, *Ease of Doing Business in Haiti*, DOING BUSINESS: MEASURING BUSINESS REGULATIONS, <http://www.doingbusiness.org/data/exploreeconomies/haiti/#paying-taxes> (last visited Oct. 9, 2015). The mining companies also would be subject to a value-added tax of 10% on refined gold and other minerals exported from Haiti and a 15% land tax. *Id.*

⁶ CONST. D'HAÏTI, art. 36-3.

⁷ *Id.* art. 36-4.

⁸ *Id.* art. 253.

⁹ *Id.* art. 253-1. For the French text of the 2011 amendment, see HAÏTI RÉFÉRENCE, CONSTITUTION DE 1987 AMENDÉE: TEXTE INTÉGRAL, art. 253-1, http://www.haiti-reference.com/histoire/constitutions/const_1987_amendee.php (reflecting amendments enacted through *Loi Constitutionnelle du 9 Mai 2011*, LE MONITEUR: JOURNAL OFFICIEL DE LA RÉPUBLIQUE D'HAÏTI, no. 98 (Jun. 19, 2012)).

¹⁰ See, e.g., *Haiti Morne Bossa Gold Missing!?*, MINING AWARENESS PLUS (Jan. 6 2013), <https://miningawareness.wordpress.com/2013/01/06/haiti-morne-bossa-gold-missing/>.

¹¹ CONST. D'HAÏTI, art. 36-1.

¹² *Id.*

¹³ *Id.* art. 36-2.

¹⁴ *See id.* arts. 28, 29, 31, 35-1, 35-2, 35-3, 35-5.

¹⁵ *Id.* art. 276-2.

¹⁶ The Constitution also contains protections of freedom of expression, speech, assembly, and protest, as well as provisions that define the rights of workers. *See id.* arts. 28, 29, 31, 35-1, 35-2, 35-3, 35-5. Questions of free speech and assembly, peaceable community protest, and workers' rights to fair compensation, safe working conditions, unionization, and strike, have arisen at myriad mines around the world. The constitutional guarantees of these rights therefore may be of particular importance if mining were to proceed in Haiti. These issues are discussed in detail in Chapter VI.

¹⁷ *Id.* art. 296.

¹⁸ As described in Chapter I, the terms and conditions of VCS/Delta's and SOMINE/Majescor's rights to mine are also governed by the 1997 conventions to which they are successors-in-interest.

¹⁹ *Décret encourageant la prospection minière sur toute l'étendue du territoire de la République et adaptant les structures juridiques existantes aux réalités de l'industrie minière*, LE MONITEUR : JOURNAL OFFICIEL DE LA REPUBLIQUE D'HAÏTI, no. 19 (March 8, 1976) [hereinafter 1976 Mining Decree], <http://www.bme.gouv.ht/mines/loimin/decminiére.pdf>. For a partial English translation, see INT'L BUS. PUBL'NS, HAITI MINERAL, MINING SECTOR INVESTMENT AND BUSINESS GUIDE, vol. 1, 115–128 (2013), <https://books.google.ht/books?id=bFYjVVBnILQC&pg=PA115&lpg=PA115&dq#v=onepage&q&f=false>.

²⁰ *See* 1976 Mining Decree, *supra* note 19, arts. 35-46.s., 35-46.

²¹ *See, e.g.*, Citadelle Convention, *supra* note 5.

²² 1976 Mining Decree, *supra* note 19, art. 21(b)(2).

²³ *Id.* art. 21(b)(4).

²⁴ *Id.* art. 21(b)(5).

²⁵ *Id.* art. 21(b)(7).

²⁶ *Id.* art. 21(b)(3).

²⁷ Exploration and research (as defined by the 1976 Mining Decree) are usually integrated processes that feature a combination of surface investigations, aerial surveys, and test drilling and sampling. Similarly, once valuable minerals are located, the processes of exploitation and concession (also as defined in the 1976 Mining Decree) proceed in tandem and include more detailed mineral sampling and design of the mine, construction of roads and other supporting infrastructure, pit excavation (or tunneling), construction of ore processing and refining facilities, and then actual production, processing, refinement, and sale.

²⁸ The requirement that the parties enter into a mining convention before a research permit is granted is a serious flaw in the existing regulatory system. Not enough is known about the range and grade of the ore at that stage, and therefore the size and scope of the mine cannot yet be determined. Yet, the convention must include a variety of terms that will govern mining, ore processing and refining, environmental protection, and mine closure and rehabilitation. It is impossible to define these terms in a meaningful way until the location, design, and estimated duration of both the mine and related production, refinement, containment, and treatment facilities are known. (See Chapters II and III discussing the mechanics and environmental impacts of modern gold mining.) The proposed revisions to the mining law recognize this problem and postpone the

requirement that companies sign a convention with the government to the point at which the mining company seeks an exploitation permit. See REPUBLIQUE DE HAÏTI, PROJET DE LOI MINIERE, ÉLABORE PAR UN TASKFORCE COMPOSE DE : BUREAU DES MINES ET DE L'ÉNERGIE, MINISTÈRE DE L'ÉCONOMIE ET DES FINANCES, MINISTÈRE DE L'ENVIRONNEMENT, EXPERT INTERNATIONAL, art. 54 (2014) [hereinafter Draft Mining Law], <http://www.accountabilitycounsel.org/wp-content/uploads/2015/01/Draft-Mineral-Law.pdf>.

²⁹ 1976 Mining Decree, *supra* note 19, art. 36.

³⁰ *Id.* arts. 37(f), 38 (emphasis added).

³¹ *Id.* art. 40.

³² Article 39(d) of the 1976 Mining Decree requires that holders of exploitation permits submit to the national mining authority a feasibility study (what the Decree calls an “étude de factabilité”). Although there are no express requirements that this feasibility study address environmental or social impacts, such a reading would be reasonable, given that Articles 25 and 26 of the Decree authorize the mining agency to require permit holders to take measures to redress environmental harms caused during operations or after closure. Moreover, Articles 1 of the two Conventions currently in force define in more detail the contents of such feasibility studies, including socioeconomic and environmental impacts. This feasibility study is not a public document, however, and therefore does not ensure that those individuals and communities who are most at risk from mining become aware of the potential for environmental harm.

³³ Both mining conventions currently in force in Haiti define the contents of feasibility studies in some detail. See Citadelle Convention, *supra* note 5, art. 1; Ste. Geneviève Convention, *supra* note 5, art. 1.

³⁴ 1976 Mining Decree, *supra* note 19, art. 45(a).

³⁵ See Citadelle Convention, *supra* note 5, arts. 1, 16, 17; Ste. Geneviève Convention, *supra* note 5, arts. 1, 16, 17.

³⁶ As discussed below, the proposed new law responds to these problems by eliminating automatic permitting progression and by requiring the permittees to submit a variety of planning and regulatory documents to the BME and the Ministry of the Environment for their review and approval at each stage of permitting. These include an Exploration Work Plan, Certificate of Technical and Financial Capability, and Environmental Impact Analysis and Impact Mitigation Plan that must be approved by the BME before exploration and research may begin, and a Feasibility Study, Environmental Management Plan, and Rehabilitation Plan, that the BME must approve before it may issue exploitation permits. In addition, the Ministry of the Environment must approve an Environmental and Social Impact Assessment, and the exploitation permittee must negotiate and sign a Community Development Agreement with all communities potentially affected by the mining. Although these proposed new requirements are not without deficiencies, including the presumption that silence by the Ministry of Environment constitutes non-objection to a given permit application, they represent a significant improvement on the existing law.

³⁷ 1976 Mining Decree, *supra* note 19, arts. 35(c), 37(c), 39(c), 45(b). The currency conversions listed here were based on the exchange rate on January 1, 2015, of 46.76 Haitian Gourdes to \$1 U.S. Dollar. See EXCHANGE RATES, <http://www.exchange-rates.org/HistoricalRates/A/USD/1-1-2015> (last visited Dec. 3, 2015).

³⁸ The 1976 Mining Decree does mention the obligation of mining companies to pay compensation to landowners and occupants for temporary use of land, see Article 68(a), but provides no details regarding the process or standards for deciding upon such compensation, nor contains any discussion of permanent displacement, of compensation for damages to land, crops, or structures, or other impacts resulting from mining activities.

³⁹ Indeed, without the express reservation of authority to make periodic revisions to the financial terms of the conventions contained in Article 43 of the 1976 Mining Decree, the power of the government to change

the royalty rate applicable to the two permittees that are parties to *existing* conventions (VCS/Delta and SOMINE/Majescor) without their consent would be open to question.

⁴⁰ 1976 Mining Decree, *supra* note 19, art. 33.

⁴¹ See MINISTRY OF THE ENVIRONMENT AND UNITED NATIONS DEVELOPMENT PROGRAM, STRATÉGIE DE MONTAGE DE L'AGENCE NATIONALE DES AIRES PROTÉGÉES (ANAP) 21 (2009), <https://www.sheltercluster.org/Americas/Haiti/HaitiEarthquake2010/Documents/MDE-PNUD%20Biodiversite%20Haiti.pdf>.

⁴² 1976 Mining Decree, *supra* note 19, art. 65.

⁴³ *Id.* art. 66.

⁴⁴ *Id.* art. 68(a). This protection of the rights of occupants as well as landowners is critically important, especially because records of land title in Haiti are problematic. For further discussion of land rights in Haiti, see Chapter VI.

⁴⁵ The government signed conventions with Citadelle and Ste. Geneviève in 1997, which were ratified eight years later at a time when the Parliament was not functioning. See Citadelle Convention, *supra* note 5; Ste. Geneviève Convention, *supra* note 5.

⁴⁶ Citadelle Convention, *supra* note 5, arts. 1, 16; Ste. Geneviève Convention, *supra* note 5, arts. 1, 16. Among other things, the feasibility study must contain an evaluation of the exploitable mineral reserves, a plan for mineral exploitation, notice regarding the socioeconomic impacts of the project (particularly on local populations), notice regarding environmental impacts (including effects on land, water, air, fauna, flora, and human settlements) with appropriate recommendations, financial projections and conclusions and recommendations regarding the economic feasibility of the project. Citadelle Convention, *supra* note 5, art. 1; Ste. Geneviève Convention, *supra* note 5, art. 1.

⁴⁷ See Citadelle Convention, *supra* note 5, art. 33.2; Ste. Geneviève Convention, *supra* note 5, art. 33.2.

⁴⁸ See Citadelle Convention, *supra* note 5, art. 33.2; Ste. Geneviève Convention, *supra* note 5, art. 32.2.

⁴⁹ See Citadelle Convention, *supra* note 5, art. 33.2; Ste. Geneviève Convention, *supra* note 5, art. 32.2.

⁵⁰ See Citadelle Convention, *supra* note 5, art. 33.2; Ste. Geneviève Convention, *supra* note 5, art. 32.2.

⁵¹ See Citadelle Convention, *supra* note 5, art. 33.2; Ste. Geneviève Convention, *supra* note 5, art. 32.2.

⁵² See Citadelle Convention, *supra* note 5, arts. 19, 39.2; Ste. Geneviève Convention, *supra* note 5, arts. 19, 39.2.

⁵³ See Citadelle Convention, *supra* note 5, art. 39.4; Ste. Geneviève Convention, *supra* note 5, art. 39.4.

⁵⁴ See Citadelle Convention, *supra* note 5, art. 39; Ste. Geneviève Convention, *supra* note 5, art. 39.

⁵⁵ CONST. D'HAÏTI, art. 40.

⁵⁶ See Trenton Daniel, *Haiti's New PM: Mining Laws Being Drafted*, ASSOCIATED PRESS (May 15, 2012), <http://www.tribune242.com/news/2009/feb/23/haitis-new-pm-mining-laws-being-drafted/>; WORLD BANK, WORLD BANK MINING PROJECT IN HAITI BRIEF (unpublished briefing paper) (Nov. 17, 2014), <http://www.accountabilitycounsel.org/wp-content/uploads/2015/01/Haiti-World-Bank-Project-Brief.pdf> (provided to GJC by Remi Pelon, Senior Mining Specialist).

⁵⁷ The Task Force reportedly included representatives of the Haitian BME, the Ministry of Economy and Finance, and the Ministry of the Environment, as well as an international consultant with expertise in mining legislation, hired by the World Bank. See RÉPUBLIQUE D'HAÏTI, AVANT-PROJET DE LOI MINIÈRE EXPOSÉ DES MOTIFS 6

(2014), <http://www.accountabilitycounsel.org/wp-content/uploads/2015/01/Explanatory-Memorandum.pdf> (an explanatory memorandum released by the Haitian government detailing the Draft Mining Law in French).

⁵⁸ GJC Notes of Meeting with Staff of the Conseil de Développement Économique et Social, in Port-au-Prince, Haiti (Nov. 12, 2014) (on file with the New York University School of Law Global Justice Clinic); GJC Notes of Meeting with Staff of the Ministry of Finance, in Port-au-Prince, Haiti (Nov. 14 2015) (on file with the New York University School of Law Global Justice Clinic); GJC Notes of Meeting with Representative of SOMINE, S.A., in Port-au-Prince, Haiti (July 16, 2015) (on file with the New York University School of Law Global Justice Clinic).

⁵⁹ See GJC Notes of Meeting with Members of Parliament in Port-au-Prince, Haiti (Nov. 18, 2014) (on file with the New York University School of Law Global Justice Clinic).

⁶⁰ The authors obtained a copy of the draft law, dated August 2014.

⁶¹ *Haiti: Mining for Economic Growth*, WORLD BANK (July 25, 2013), <http://www.worldbank.org/en/news/feature/2013/07/25/haiti-mining-for-economic-growth>; WORLD BANK, WORLD BANK MINING PROJECT IN HAITI BRIEF (unpublished briefing paper) (Nov. 17, 2014), <http://www.accountabilitycounsel.org/wp-content/uploads/2015/01/Haiti-World-Bank-Project-Brief.pdf> (provided to GJC by Remi Pelon, Senior Mining Specialist).

⁶² See GJC Notes of Meeting with World Bank Staff and Representatives of the Kolektif Jistis Min (KJM), in Washington, D.C. (March 20, 2015) (on file with the New York University School of Law Global Justice Clinic).

⁶³ *Haiti: Mining for Economic Growth*, WORLD BANK (July 25, 2013), <http://www.worldbank.org/en/news/feature/2013/07/25/haiti-mining-for-economic-growth>.

⁶⁴ See GJC Notes of conversation with KJM members who attended meeting (June 5, 2014) (on file with the New York University School of Law Global Justice Clinic).

⁶⁵ The complaint is available in English, <http://ewebapps.worldbank.org/apps/ip/PanelCases/100-Request%20for%20Inspection.pdf>; and in French, [http://ewebapps.worldbank.org/apps/ip/PanelCases/100-Request%20for%20Inspection%20\(French\).pdf](http://ewebapps.worldbank.org/apps/ip/PanelCases/100-Request%20for%20Inspection%20(French).pdf).

⁶⁶ See *About Us*, WORLD BANK INSPECTION PANEL, <http://ewebapps.worldbank.org/apps/ip/Pages/AboutUs.aspx> (last visited Oct. 12 2015).

⁶⁷ See ACCOUNTABILITY COUNSEL, <http://www.accountabilitycounsel.org/> (last visited Oct. 12, 2015).

⁶⁸ These concerns were based in part on statements made to the KJM and GJC in meetings with Director Ludner Remarais of the BME. See GJC Notes of Meetings with KJM and Ludner Remarais, Director of the BME, in Port-au-Prince, Haiti (Feb. 5, 2013 and Nov. 21, 2013) (on file with the New York University School of Law Global Justice Clinic). In both meetings, Director Remarais emphasized the Haitian government's lack of monitoring capacity.

⁶⁹ For a discussion of community concerns, see GJC Notes of Interviews with Community Members during 20 Community Meetings in three Department(s) (May 9, 2013 – July 9, 2014) (on file with the New York University School of Law Global Justice Clinic). As documented in the Complaint to the Inspection Panel, some community members in Northern Haiti describe negative experiences with companies exploring for minerals on or near their land and claim that companies have worked on their land without seeking proper consent.

⁷⁰ See Inspection Panel, Haiti: Mining Dialogue Technical Assistance (P144931): Notice of Non-Registration and Observations Regarding the Policy Framework Applicable to Technical Assistance 5 (Feb. 6, 2015) [hereinafter Notice of Non-Registration], [http://ewebapps.worldbank.org/apps/ip/PanelCases/100-Notice%20of%20Non-Registration\(English\).pdf](http://ewebapps.worldbank.org/apps/ip/PanelCases/100-Notice%20of%20Non-Registration(English).pdf).

⁷¹ See *generally id.* In response to the Notice of Non-Registration, 92 organizations, led by KJM, GJC and Accountability Counsel, submitted a letter to the President of the World Bank demanding that the Bank take

responsibility for its actions in Haiti. See Open Letter from Civil Society to Jim Yong King World Bank President (Mar. 9, 2015), <http://www.accountabilitycounsel.org/wp-content/uploads/2012/05/Haiti-Sign-On-Letter-Non-Registration-final.pdf> (expressing concern about the lack of accountability for World Bank involvement in the development of the Haitian mining sector).

⁷² INT'L DEV. ASS'N & INT'L FIN. CORP., INTERIM STRATEGY NOTE FOR THE REPUBLIC OF HAITI FOR FY13-FY14, REPORT NO. 71885-HT, at 7 (Sept. 27, 2012), http://www-wds.worldbank.org/external/default/WDSPContentServer/WDSP/IB/2012/09/14/000333037_20120914004408/Rendered/PDF/718850ISN0P1310Official0Use0Only090.pdf.

⁷³ *Id.* at 15.

⁷⁴ FUND FOR PEACE, FRAGILE STATES INDEX 2015, at 7 (2015), <http://library.fundforpeace.org/library/fragilestatesindex-2015.pdf>.

⁷⁵ MAUREEN TAFT-MORALES, CONGRESSIONAL RESEARCH SERVICE, HAITI UNDER PRESIDENT MARTELLY: CURRENT CONDITIONS AND CONGRESSIONAL CONCERNS 7 & n.13 (May 10, 2013), <https://www.fas.org/sgp/crs/row/R42559.pdf> (citing the text of a report by Haitian Radio Vision 2000 on April 30, 2012, "Haitian President Returns, Calls for Unity, Seeks Strengthening of Institutions," BBC MONITORING AMERICAS (May 1, 2012)).

⁷⁶ Trenton Daniel, *Departing UN official blasts Haiti's human rights record in open letter*, ASSOCIATED PRESS (Mar. 28, 2013), http://www.huffingtonpost.com/huff-wires/20130328/cb-haiti-un-human-rights/?utm_hp_ref=green&ir=green; Michel Forst *vide son sac*, LE NOUVELLISTE (Mar. 27, 2013), <http://lenouvelliste.com/lenouvelliste/article/115004/Michel-Forst-vide-son-sac>; Council Holds Interactive Dialogue with Independent Experts on the Situation of Human Rights in Cote d'Ivoire and in Haiti, U.N. HUMAN RIGHTS COUNCIL (Mar. 25, 2015), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14437&LangID=E>.

⁷⁷ U.S. DEP'T OF STATE 2014 Fiscal Transparency Report Pursuant to Section 7031(b)(3) of the Department of State Foreign Operations and Related Programs Appropriations Act (Div. K, P.L. 113-76), U.S. DEP'T OF STATE (2014), <http://www.state.gov/e/eb/ifa/oma/235938.htm> (last visited Nov. 15, 2015).

⁷⁸ The Clinic met with Director Ludner Remarais of the Office of Energy and Mines on Feb. 5, 2013 and Nov. 21, 2013. Director Remarais emphasized the Haitian government's lack of monitoring capacity during both encounters. See GJC Notes of Meetings with KJM and Ludner Remarais, Director of the BME, in Port-au-Prince, Haiti (Feb. 5, 2013 and Nov. 21, 2013) (on file with the New York University School of Law Global Justice Clinic).

⁷⁹ GJC Notes of Conversation with Pierre Robenson, Ministry of the Environment, in Port-au-Prince, Haiti (Nov. 20, 2014) (on file with the New York University School of Law Global Justice Clinic); GJC Notes of Meeting with Staff of DINEPA (April 24, 2015) (on file with the New York University School of Law Global Justice Clinic).

⁸⁰ GJC Notes of Phone Conversation with Representative of Majescor Resources Inc. (Mar. 26, 2015) (on file with the New York University School of Law Global Justice Clinic).

⁸¹ GJC Notes of Interview with Communal Authority, in Anse-à-Foleur, Northwest Department, Haiti (Feb. 3, 2014) (on file with the New York University School of Law Global Justice Clinic).

⁸² See Draft Mining Law, *supra* note 28.

⁸³ See REPUBLIQUE D'HAÏTI, AVANT-PROJET DE LOI MINIERE EXPOSE DES MOTIFS 5-6 (2014), <http://www.accountabilitycounsel.org/wp-content/uploads/2015/01/Explanatory-Memorandum.pdf>.

⁸⁴ See Draft Mining Law, *supra* note 28, arts. 151 (requiring that disputes regarding revocation of mining titles be submitted to arbitration), 161–163 (requiring that disputes regarding compensation for land use or

damages be submitted to arbitration); *see also* RÉPUBLIQUE D'HAÏTI, CONVENTION MINIÈRE TYPE art. 35.2 (2014) [hereinafter Model Mining Convention], <http://www.accountabilitycounsel.org/wp-content/uploads/2015/01/Model-Mining-Convention.pdf> (providing that disputes regarding the interpretation of the mining convention or the interpretation or application of laws and implementing decrees related to mining be submitted to arbitration, when they cannot be resolved amicably). As discussed below, Article 294 of the Draft Mining Law stipulates that for companies with 50 percent or greater foreign ownership, disputes not amicably resolved must be referred to arbitration under International Chamber of Commerce rules. *But see* Draft Mining Law, *supra* note 28, art. 292 (recognizing the rights of mining titleholders and the state to administrative, arbitral, or judicial remedy).

⁸⁵ *See, e.g.*, CONST. D'HAÏTI, arts. 27, 36-2, 42.

⁸⁶ *See* Draft Mining Law, *supra* note 28, art. 4.

⁸⁷ The comments on the Draft Law provided in this chapter draw heavily on analyses produced by attorneys at the Environmental Law Alliance Worldwide (ELAW), *see ELAW Reviews of Haiti's Draft Mining Laws of 2013 and 2014*, <http://www.elaw.org/haiti-draft-mining-law-comments-ELAW> (last visited Nov. 20, 2015), and by a team of lawyers at Orrick Rambaud Martel in Paris, who provided pro-bono assistance, facilitated by the Cyrus R. Vance Center for International Justice, to the KJM and GJC, *see* Memorandum from Orrick Rambaud Martel to the KJM et al. (Aug. 27, 2015) [hereinafter Orrick Memo] (on file with the New York University School of Law Global Justice Clinic).

⁸⁸ *See, e.g.*, 1976 Mining Decree, arts. 17(b), 23; Citadelle Convention, *supra* note 5, art. 39.7; Ste. Geneviève Convention, *supra* note 5, art. 39.7.

⁸⁹ *See generally* INTERNATIONAL FINANCE CORPORATION (IFC), PERFORMANCE STANDARDS ON ENVIRONMENTAL AND SOCIAL SUSTAINABILITY: PERFORMANCE STANDARD 1 (Jan. 1, 2012), www.ifc.org/wps/wcm/connect/3be1a68049a78dc8b7e4f7a8c6a8312a/PS1_English_2012.pdf?MOD=AJPERES; IFC, ACCESS TO INFORMATION POLICY (Jan. 1, 2012), www.ifc.org/wps/wcm/connect/98d8ae004997936f9b7bffb2b4b33c15/IFCPolicyDisclosureInformation.pdf?MOD=AJPERES; EXTRACTIVE INDUSTRIES TRANSPARENCY INITIATIVE (EITI), www.eiti.org (last visited Oct. 13 2015); GLOBAL REPORTING INITIATIVE, www.globalreporting.org (last visited Oct. 13 2015); *Transparency in mining sector is on rise, reveal new figures by the ICMM and GRI*, INT'L COUNCIL OF MINING & METALS (Mar. 22, 2011), www.icmm.com/page/57406/transparency-in-mining-sector-is-on-the-rise-reveal-new-figures-by-icmm-and-gri. *See also* JEN GLEASON & LIZ MITCHELL, ENVIRONMENTAL LAW ALLIANCE WORLDWIDE (ELAW), REVIEW OF HAITI'S DRAFT MINERAL LAW (AOÛT 2014), at 7-9 (Dec. 2014) [hereinafter ELAW Review (Dec. 2014)], http://www.elaw.org/system/files/ELAW.mineral.law_comments.dec14.pdf.

⁹⁰ Draft Mining Law, *supra* note 28, art. 115. In this regard, the provision resembles Article 23(b) of the 1976 Mining Decree.

⁹¹ *See e.g.*, INT'L BAR ASS'N, MMDA 1.0: MODEL MINE DEVELOPMENT AGREEMENT, art 30.2 (Apr. 4, 2011), http://www.mmdaproject.org/presentations/MMDA1_0_110404Bookletv3.pdf.

⁹² *See* Draft Mining Law, *supra* note 28, art. 66.

⁹³ *See* ELAW Review (Dec. 2014), *supra* note 89, at 6.

⁹⁴ *See* Draft Mining Law, arts. 10, 11. The law identifies a unit within the mining authority responsible for maintaining cadastral maps and an updated register of applications for mining titles. *See* Draft Mining Law, *supra* note 28, arts. 7 (defining the Mining Cadaster Unit), 10-11 (describing its functions). But the Draft Mining Law contains no provisions regarding the existence, structure, or contents of the mining cadaster, itself, or the mining title registry, let alone their transparency or accessibility to the public.

⁹⁵ In a meeting with GJC in February 2013, the chair of the Parliamentary Commission with jurisdiction over the BME expressed grave concern about learning of the December 2012 exploitation permits by radio instead of official notice. That example demonstrates the importance of transparency regarding applications for and authorization of mining permits, not both for the public at large and for the Haitian governmental mechanisms tasked with oversight of the mining sector. See GJC Notes of Meeting with Senator Jean William Jeanty, in Port-au-Prince, Haiti (Feb. 4, 2013) (on file with the New York University School of Law Global Justice Clinic); see also RTG Tele Ginen, *Sena Repiblik la, tandè Minis TPTC a Jacques Rousseau ak Direktè biwo min lan Ludner Remarais*, YouTube (Jan. 23, 2013), www.youtube.com/watch?v=Aipim2NOTfU.

⁹⁶ See ELAW Review (Dec. 2014), *supra* note 89, at 15–16.

⁹⁷ See Orrick Memo, *supra* note 87, at 18 (citing as examples of standards regarding accounting transparency several uniform acts promulgated by the Organization for the Harmonization of Business Law in Africa, known by its French acronym, OHADA, including l'Acte Uniforme OHADA sur les Sociétés Commerciales et le Groupement d'Intérêt Économique et l'Acte Uniforme dur le Comptabilité des Entreprises)

⁹⁸ See, e.g., IMF, GUIDE ON RESOURCE REVENUE TRANSPARENCY (2007), <https://www.imf.org/external/np/fad/trans/guide.htm>; IMF, FISCAL TRANSPARENCY CODE (2014), <http://www.imf.org/external/np/fad/trans/>. “Through the [multi-donor trust fund], the World Bank Group supports the EITI by administering the funds to provide technical and financial assistance to countries implementing or considering implementing the EITI.” *The EITI Multi-Donor Trust Fund*, EITI, <https://eiti.org/about/mdtf> (last visited Oct. 13, 2015; see also *EITI: Results Profile*, WORLD BANK, <http://www.worldbank.org/en/results/2013/04/15/extractive-industries-transparency-initiative-results-profile> (last visited Oct. 13, 2015) (describing the Bank's support for country implementation of EITI principles).

⁹⁹ See Draft Mining Law, *supra* note 28, arts. 25–45

¹⁰⁰ See *id.* art. 180.

¹⁰¹ See *id.* art. 19. This lack of defined standards and deferral of key details to implementing regulations applies equally to the evaluation of applications for exploration. For example, Article 19 limits exploration permits to companies with the “necessary technical and financial capacities,” but fails to articulate the standards by which such capacities are to be assessed, or whether they encompass the applicant's environmental management abilities. The draft law specifically leaves it to future implementing regulations to specify the types of proof of capacity that will be required.

¹⁰² *Id.* arts. 7, 180, 186; see also ELAW Review (Dec. 2014), *supra* note 87, at 2. Strikingly, the draft law provides a more detailed description of the components of the feasibility study that is required as part of the application for an exploitation permit, than it does of the ESIA. See Draft Mining Law, *supra* note 28, art. 7.

¹⁰³ See Draft Mining Law, *supra* note 28, art. 116 (specifying that when work undertaken under a Mining Permit is likely to seriously disrupt the environment, the National Mining Authority will take necessary corrective action, without describing what that will be); see also *id.* art. 180 (providing for the preparation of an Environmental Analysis without specifying what information must be included); *id.* art. 179 (stating that internationally-accepted environmental standards that are technically viable will apply to mining activities where there are no applicable national regulations, without specifying which international standards will be used).

¹⁰⁴ *Id.* arts. 52, 186. Article 52 provides that the National Mining Authority will perform the environmental appraisal of requests for exploitation permits, relying on the baseline studies for the ESIA. The stated goal of this review is to ensure the coherence of these studies with the feasibility study accompanying the request for an exploitation permit. The NMA will convey the dossier to the Ministry of Environment for information only, *after* the assessment is done and the requester has been notified. The ESIA will also be reviewed by the

Ministry of the Environment prior to the granting of an exploitation permit, but this assessment is conducted on a no-objection basis and the standard to be applied is again not made clear. *See id.* arts. 55, 186–189.

¹⁰⁵ *See id.* art. 185.

¹⁰⁶ *See id.* art. 193.

¹⁰⁷ *See id.* art. 193.

¹⁰⁸ *See id.* arts. 193, 185. The Draft Mining Law does not specify which entity or entities will have responsibility for elaborating the law's implementing decrees, but presumably that task would fall to the NMA, once it is established.

¹⁰⁹ *See* Orrick Memo, *supra* note 87, at 6–7.

¹¹⁰ *See* Draft Mining Law, *supra* note 28, arts. 35, 51.

¹¹¹ *See id.* arts. 215–16; *see also* ELAW Review (Dec. 2014), *supra* note 89, at 15.

¹¹² *See* Draft Mining Law, *supra* note 28, art. 88.

¹¹³ *See* ELAW Review (Dec. 2014), *supra* note 89, at 13. The Draft Mining Law is silent with regard to the public's right to information and to participation, despite the recognition of those rights in the Haitian Constitution. *See* CONST. D'HAÏTI, pmbl. & art. 40. Other laws, including the Decree of January 26, 2006 regarding environmental management and the regulation of citizen conduct for sustainable development, authorize the Ministry of Environment to organize public hearings when environmental impact studies are submitted for the Ministry's review and non-objection. *See Décret portant sur la Gestion de L'Environnement et de Régulation de la Conduite des Citoyens et Citoyennes pour un Développement Durable* art. 58, LE MONITEUR : JOURNAL OFFICIEL DE LA RÉPUBLIQUE D'HAÏTI, no. 11 (Jan. 26, 2006), <http://faolex.fao.org/docs/pdf/hai65901.pdf>; *see also* Orrick Memo, *supra* note 87, at 18. The Draft Mining Law makes no references to this procedure for public consultation, but neither does it expressly preclude such consultations. Accordingly, it appears the power of the Ministry of Environment to conduct such hearings applies equally to review of environmental studies in the mining sector.

¹¹⁴ *See* Draft Mining Law, *supra* note 28, art. 188.

¹¹⁵ *Id.* art. 186.

¹¹⁶ *Id.* art. 188.

¹¹⁷ *Id.* art. 189.

¹¹⁸ *See* ELAW Review (Dec. 2014), *supra* note 89, at 13.

¹¹⁹ *See id.* at 12–13.

¹²⁰ *See* Draft Mining Law, *supra* note 28, art. 294.

¹²¹ *See id.* ELAW's analysis of the model mining convention (*Convention Minière Type*) appended to the Draft Mining Law raises similar concerns regarding arbitration. *See* LIZ MITCHELL, ENVIRONMENTAL LAW ALLIANCE WORLDWIDE (ELAW), REVIEW OF HAITI'S CONVENTION MINIERE TYPE 5–6 (Dec. 2014) [hereinafter ELAW Model Convention Review], <https://www.elaw.org/system/files/ELAW.miningconvention.comments.pdf>. ELAW points out that Article 35.1 of the model convention, which requires parties to submit disputes that cannot be resolved amicably to a technical expert or binding arbitration, is in tension with Article 292 of the Draft Mining Law, which allows parties recourse to Haitian courts, and would treat disputes with majority-foreign owned mining titleholders differently from those with majority-domestic owners.

¹²² *See* Draft Mining Law, *supra* note 28, art. 172. The Draft Mining Law states that the no-go zones will include all “protected areas” as defined under national environmental law. *Id.* art. 7. Although the Haitian

State has issued dozens of laws and decrees establishing “protected areas” since 1926, a 2009 report explained that the government had done little to enforce the laws, and that the majority of the sites listed were “completely degraded” as of 2009. For example, Mole St. Nicolas is listed as a protected area, one company, Matraco, has been conducting mineral exploration and extraction activities in the area. *See, e.g., Matraco S. A. Valorise nos ressources naturelles*, LE NOUVELLISTE (Mar. 11, 2008), <http://lenouvelliste.com/lenouvelliste/article/55356/Matraco-S-A-valorise-nos-ressources-naturelles>. This raises grave concerns about the adequacy of such designations and the capacity of the government to monitor such “protected areas.” *See* MINISTRY OF THE ENVIRONMENT AND UNITED NATIONS DEVELOPMENT PROGRAM, STRATÉGIE DE MONTAGE DE L’AGENCE NATIONALE DES AIRES PROTÉGÉES (ANAP) 21 (2009), <https://www.sheltercluster.org/Americas/Haiti/HaitiEarthquake2010/Documents/MDE-PNUD%20Biodiversite%20Haiti.pdf>.

¹²³ There is currently a lack of information on biodiversity and natural habitats in Haiti, stemming from insufficient research and monitoring, which presents a significant challenge to ensuring that natural habitats are adequately protected. Jean Vilmond Hilaire, *Résumé de la Stratégie de Montage de l’Agence National des Aires Protegees* (ANAP) (2009), <http://taiguy.org/forum-ap-haiti/files/Strategie%20de%20montage%20ANAP%20-%20Synth%C3%A8se.pdf>.

¹²⁴ *See* Draft Mining Law, *supra* note 28, art. 174.

¹²⁵ *See, e.g., id.* arts. 180, 186–190. Indeed, the word “forest” (“forêt” in French) does not appear at all in the draft text.

¹²⁶ *See id.* art. 172.

¹²⁷ *See* discussion *supra* note 9 and accompanying text.

¹²⁸ Draft Mining Law, *supra* note 28, art. 158.

¹²⁹ *See* ELAW Review (Dec. 2014), *supra* note 89, at 10.

¹³⁰ *See id.*; *see also* *Buffer Zones for New Coal Mines*, BBC NEWS (Jan. 20, 2009), http://news.bbc.co.uk/2/hi/uk_news/wales/7839977.stm (reporting that some have advocated for 1,640ft buffer zones, an increase from the formerly required 130ft).

¹³¹ *See generally* INT’L COUNCIL ON MINING & METALS, WATER MANAGEMENT IN MINING: A SELECTION OF CASE STUDIES (May 2012), <https://www.icmm.com/document/3660>; CARBON DISCLOSURE PROJECT, METALS & MINING A SECTOR UNDER WATER PRESSURE: ANALYSIS FOR INSTITUTIONAL INVESTORS OF CRITICAL ISSUES FACING THE INDUSTRY (2013), <https://www.cdp.net/CDPResults/Metals-Mining-sector-under-water-pressure.pdf>; EARTHWORKS AND MINING WATCH CANADA, TROUBLED WATERS: HOW MINE WASTE DUMPING IS POISONING OUR OCEANS, RIVERS, AND LAKES (2012), https://www.earthworksaction.org/files/publications/Troubled-Waters_FINAL.pdf (discussing contamination of water due to mine waste dumping).

¹³² As of 2014, only 62 percent of all households in Haiti had access to safe drinking water, while fewer than 50 percent enjoyed such access in rural areas. *See* THE GOVERNMENT OF HAITI, THE WORLD BANK GROUP, & THE UNITED NATIONS, CLEAN WATER, IMPROVED SANITATION, BETTER HEALTH: HAITI CONFERENCE PAPER 10 (Oct. 9, 2014), http://www.worldbank.org/content/dam/Worldbank/document/book_haiti_6oct_print.pdf.

¹³³ *See* *Haiti Overview*, EURASIAN MINERALS, <http://www.eurasianminerals.com/s/Haiti.asp> (last visited Oct. 13, 2015); REMI BOSCH & C.T. BARRIE, MAJESCOR RESOURCES INC., DOUVRAY PORPHYRY COPPER DEPOSIT MINERAL RESOURCE ESTIMATE: SOMINE PROJECT, NORTHEAST MINERAL DISTRICT, REPUBLIC OF HAITI, NI 43-101 TECHNICAL REPORT (2013), [http://www.majescor.com/uploads/43-101%20douvray%20majescor%2020130228%20\(2013-03-01\)-1.pdf](http://www.majescor.com/uploads/43-101%20douvray%20majescor%2020130228%20(2013-03-01)-1.pdf); *Morne Bossa*, VCS MINING (Dec. 30, 2012), <http://vcsmining.com/flagship-property.html>. These findings are consistent with the gold and copper deposits at Pueblo Viejo in the Dominican Republic, where acid mine drainage has been a serious problem for decades. Indeed, as Barrick Gold has observed, the high volume of

precipitation that falls on Hispaniola during the rainy season makes it especially important to contain and treat mine pollutants on-site, before they enter adjacent streams and groundwater basins. *Pueblo Viejo Mine Tour*, BARRICK GOLD CORPORATION (Feb. 28, 2013), <http://www.barrick.com/files/presentation/2013/Barrick-Pueblo-Viejo-Tour.pdf>.

¹³⁴ Draft Mining Law, *supra* note 28, art. 116.

¹³⁵ Compare Draft Mining Law, art. 40 with *id.* arts. 120–21; *see also* ELAW Review (Dec. 2014), *supra* note 89, at 9.

¹³⁶ *See* ELAW Review (Dec. 2014), *supra* note 89, at 5; *see also* Michael W. Lodge, *Collaborative Marine Scientific Research on the International Seabed*, 3 J. OCEAN TECH. 30 (2008), <https://www.isa.org.jm/sites/default/files/jot-article.pdf> (discussing research on the environmental impacts of deep sea mining).

¹³⁷ Draft Mining Law, *supra* note 28, art. 23.

¹³⁸ *See* Orrick Memo, *supra* note 87, at 19. Articles 304 and 305 in the Draft Mining Law actually create another potential conflict of interest: they put the NMA in charge of a fund to be used both for promotion and control of mining, which may give rise to conflicts of interest. *See* ELAW Review (Dec. 2014), *supra* note 89, at 16–17.

¹³⁹ *See* Frances Robles, *Haitian Leader's Power Grows as Scandals Swirl*, N.Y. TIMES (Mar. 16, 2015), http://www.nytimes.com/2015/03/17/world/americas/haitian-president-tightens-grip-as-scandal-engulfs-circle-of-friends.html?_r=0.

¹⁴⁰ *See* Draft Mining Law, *supra* note 28, art. 236; *see also* Orrick Memo, *supra* note 87, at 31.

¹⁴¹ For other precious metals and bauxite, the proposed royalty rate is also 4%. For precious stones other than diamonds, it is 5%; and for copper, lead, nickel, zinc, and other non-precious metals, the proposed royalty is 3.5%. Draft Mining Law, *supra* note 28, art. 235.

¹⁴² The London Gold Fix, which is comprised of gold dealers from London's five largest bullion banks, establishes a common transaction price for world gold transactions. The group sets gold prices twice each business day: at 10:30 hours GMT, (the "Morning Fix") and again at 15:00 hours GMT (the Afternoon Fix). *See The London Gold Fix*, BULLION VAULT, <https://www.bullionvault.com/guide/gold/Gold-fix> (last visited Oct. 13, 2015).

¹⁴³ *See* PRICEWATERHOUSECOOPERS, CORPORATE INCOME TAXES, MINING ROYALTIES AND OTHER MINING TAXES: A SUMMARY OF RATES AND RULES IN SELECTED COUNTRIES, GLOBAL MINING INDUSTRY UPDATE 12 (June 2012) [hereinafter PRICEWATERHOUSECOOPERS], www.pwc.com/en_GX/gx/energy-utilities-mining/publications/pdf/pwc-gx-miining-taxes-and-royalties.pdf; *see also* Orrick Memo, *supra* note 87, at 30. Of course, other countries impose lower royalty rates for gold. The Democratic Republic of Congo, for example, charges only a 2.5 percent royalty on gold. *See id.* at 30. To gauge the ultimate tax burden on mining companies in a given country, however, the royalty rate must be viewed in combination with other taxes and fees imposed.

¹⁴⁴ The omission of any "arm's length" requirement from the Draft Mining Law stands in contrast to the text of the 1997 mining conventions currently in force. The Citadel Mining Convention, currently held by SOMINE, includes an arm's length clause. *See* Citadelle Convention, *supra* note 5, art. 28.1.

¹⁴⁵ The most important OECD transfer pricing rule is the "arm's length principle" set forth in Article 9 of the OECD Model Tax Convention. ORG. FOR ECON. COOP. & DEV., MODEL TAX CONVENTION ON INCOME AND ON CAPITAL (2010), http://www.keepeek.com/Digital-Asset-Management/oecd/taxation/model-tax-convention-on-income-and-on-capital-2010_9789264175181-en#page49.

In simple terms, the arm's length principle states that "a transfer price should be the same as if the two companies involved were indeed two independents, not part of the same corporate structure." John

Neighbor, *Keeping It at Arm's Length*, OECD OBSERVER (July 3, 2008), http://www.oecdobserver.org/news/archivestory.php/aid/670/Transfer_pricing:_Keeping_it_at_arms_length.html.

¹⁴⁶ 26 U.S.C. § 482.

¹⁴⁷ Note that the Citadelle and St. Genevieve mining conventions require additional fees of \$10 U.S. per square kilometer for research permits and any permit extension, \$50 U.S. per square kilometer for exploitation and concession permits, including renewed permits. See Citadelle Convention, *supra* note 5, art. 26.1; Ste. Geneviève Convention, *supra* note 5, art. 26.1.

¹⁴⁸ See Draft Mining Law, *supra* note 28, art. 232.

¹⁴⁹ See 1976 Mining Decree, *supra* note 19, art. 43.

¹⁵⁰ See PRICEWATERHOUSE COOPERS, *supra* note 143, at 13-15, 21, 27; see also KPMG INT'L, PERU: COUNTRY MINING GUIDE 13-4 (2013), <http://www.kpmg.com/Ca/en/industry/Mining/Documents/Peru.pdf>.

¹⁵¹ Lise Johnson & Oleksandr Volkov, *Investor-State Contracts, Host-State "Commitments" and the Myth of Stability in International Law*, 23 AM. REV. INT'L ARB. 361, 370 (2013).

¹⁵² *Id.* at 414.

¹⁵³ *Id.* at 415.

¹⁵⁴ As discussed above, both the Citadel and the St. Genevieve mining conventions, signed in 1997 and ratified in 2005, include requirements regarding the establishment of a rehabilitation fund, jointly controlled by the BME and the company through a bank account opened in both the BME and company's names, into which 1 percent of gross exploitation revenues are to be deposited. See Citadelle Convention, *supra* note 5, art. 33.3; Ste. Geneviève Convention, *supra* note 5, art. 33.3.

¹⁵⁵ See ELAW Model Convention Review, *supra* note 121, at 3.

¹⁵⁶ U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, art. 16, U.N. Doc. A/CONF.151/26 (Vol. 1) (June 14, 1992), <http://cil.nus.edu.sg/1992/1992-rio-declaration-on-environment-and-development>.

¹⁵⁷ ELAW Review (Dec. 2014), *supra* note 89, at 9.

¹⁵⁸ See Draft Mining Law, *supra* note 28, art. 122.

¹⁵⁹ See Orrick Memo, *supra* note 87, at 22-24.

¹⁶⁰ See, e.g., Draft Mining Law, *supra* note 28, arts. 54, 203-206 (requiring mining titleholders with exploitation permits to sign, submit to the NMA, and adhere to its obligation under a Community Development Protocol, agreed upon with representatives of affected communities, as a precondition for obtaining authorization to operate); Draft Mining Law, *id.* art. 202 (requiring all mining titleholder to conduct consultations with representatives of communities likely to be affected by mining activities); *id.* arts. 161-164, 259 (setting forth the requirements of just compensation for land use and damage).

¹⁶¹ See *id.* art. 3.

¹⁶² *Id.* art. 167.

¹⁶³ *Id.* art. 161.

¹⁶⁴ *Id.*

¹⁶⁵ Ste. Geneviève Convention, *supra* note 5, art. 26.1.4, *translated in* Haitian Kreyol Translation of Rights Provisions (June 10, 2014) (on file with the New York University School of Law Global Justice Clinic) ("The

usage fee payable to the landowner of the surface land whose depths are to be exploited will be regulated as follows: a) it will be fixed by an amicable agreement between the Company and the private landowner in the presence of qualified Representatives of the State playing, if the case should occur, a role as mediator according to an annual leasing costs for the portion of the surface to be occupied.”); *see also id.* art. 30.2.

¹⁶⁶ Ste. Geneviève Convention, *supra* note 5, art. 30.2.

¹⁶⁷ *See* 1976 Mining Decree, *supra* note 19, art. 68.

¹⁶⁸ CONSTITUTION DE LA RÉPUBLIQUE D’HAÏTI, art. 36-1 (1987) *translated in* GEORGETOWN UNIVERSITY POLITICAL DATABASE OF THE AMERICAS (July 9, 2011), <http://pdba.georgetown.edu/Constitutions/Haiti/haiti1987.html>, emphasis added.

¹⁶⁹ *See* Draft Mining Law, *supra* note 28, art. 162.

¹⁷⁰ *See id.* art. 167.

¹⁷¹ The principal exploration and research activities that encroach on or interfere with surface uses are land surveying, soil and rock sampling, test drilling, and sometimes construction of roads to provide access for vehicles and equipment. Although these are “relatively minor” compared to mine construction and operation, they may nonetheless cause harm to surface uses *see* Chapter III.

¹⁷² *See* ELAW Review (Dec. 2014) *supra* note 89, at 10-11.

¹⁷³ *See, e.g.*, Basic Principles and Guidelines on Development-Based Evictions and Displacement, Annex 1 of the report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, UN Doc. A/HRC/4/18 (2007), http://www.ohchr.org/Documents/Issues/Housing/Guidelines_en.pdf; *see also* International Finance Corporation [IFC], Performance Standard 5: Land Acquisition and Involuntary Resettlement (Jan. 1, 2012), http://www.ifc.org/wps/wcm/connect/3d82c70049a79073b82cfaa8c6a8312a/PS5_English_2012.pdf?MOD=AJPERES.

¹⁷⁴ Guinean Mining Law, arts. 30 II, 108 (cited in Orrick Memo, *supra* note 87, at 27 n.119).

¹⁷⁵ Congolese Mining Law, art. 273 (c), (f) (cited in Orrick Memo, *supra* note 87, at 27 n.118).

¹⁷⁶ *See* Orrick Memo, *supra* note 87, at 28 nn. 124–26.

¹⁷⁷ *See* Draft Mining Law, *supra* note 28, art. 65; *see also id.* art. 174, referencing “consultation” with Parliament, not parliamentary approval, to override the reservation of certain areas or mineral from exploitation, under Article 172.

¹⁷⁸ *Les Mines: Une Nouvelle Loi Renforce Les Inquiétudes*, LE NOUVELLISTE (July 11, 2014), <http://lenouvelliste.com/lenouvelliste/article/133312/Les-mines-une-nouvelle-loi-renforce-les-inquietudes.html>.

¹⁷⁹ The following summary of concerns regarding the Model Convention draws heavily on the analysis produced by ELAW at the request of members of the Mining Justice Collective. *See* ELAW Model Convention Review, *supra* note 121.

¹⁸⁰ *See id.* at 1.

¹⁸¹ *See* Draft Mining Law, *supra* note 28, art. 7 (definition of “Société Affiliée d’une personne morale”).

¹⁸² *See* INTERNATIONAL BAR ASSOCIATION, MODEL MINE DEVELOPMENT AGREEMENT 2 (Apr. 4, 2011), http://www.mmdaproject.org/presentations/MMDA1_0_110404Bookletv3.pdf (defining “affiliate” as: “an entity that directly, or indirectly through one or more intermediaries, controls, is controlled by, or is under common control with the Company. For purposes of this definition, “control” means ownership of greater

than 50% of the share capital of a company and/or the possession, directly or indirectly, of the power to direct or cause the direction of the management or policies of an entity, whether through the ability to exercise voting power, by contract or otherwise”).

¹⁸³ See 1976 Mining Decree, *supra* note 19, art. 43 (Article 43 of the 1976 Mining Decree declares that, “[d]uring the term of the Concession, the financial clauses provided for in the mining convention will be subject to periodic revisions.”)

¹⁸⁴ Johnson and Volkov, at 380, 383, 394.

¹⁸⁵ See ELAW Model Convention Review, *supra* note 121, at 4.

¹⁸⁶ See *id.* at 2.

¹⁸⁷ See Model Mining Convention, *supra* note 84, art. 11.

¹⁸⁸ See ELAW Model Convention Review, *supra* note 121, at 3.

¹⁸⁹ See *id.* at 5–6.

¹⁹⁰ Central Intelligence Agency, *Haiti*, THE WORK FACTBOOK (Mar. 17, 2015), <https://www.cia.gov/library/publications/the-world-factbook/geos/ha.html>.

¹⁹¹ *IDB Hails New Industrial park in Northern Haiti*, INTER-AMERICAN DEVELOPMENT BANK (Mar. 17, 2015), <http://www.iadb.org/en/news/news-releases/2012-10-22/new-industrial-park-in-northern-haiti,10175.html>.

¹⁹² Kysseline Jean-Mary Chérestal, *Building Back Better? The Caracol Industrial Park and Post-earthquake Aid to Haiti*, ACTIONAID 12 (Jan. 2015), http://www.actionaidusa.org/sites/files/actionaid/building_back_better_the_caracol_industrial_park_and_post-earthquake_aid_to_haiti.pdf.

¹⁹³ *Caracol Industrial Park*, U.S. AGENCY FOR INTERNATIONAL DEVELOPMENT (Jan. 28, 2015), <http://www.usaid.gov/haiti/caracol-industrial-park>.

¹⁹⁴ *Annex 3. Presidential Decree on Minimum Wage Increase as of 1st May 2014*, arts. 4–5, LE MONITEUR: JOURNAL OFFICIEL DE LA RÉPUBLIQUE D’HAÏTI, no. 76 (Apr. 23, 2014), *reprinted in* BETTER WORK HAITI, GARMENT INDUSTRY 9TH BIENNIAL SYNTHESIS REPORT UNDER HOPE II LEGISLATION 138 (Oct. 16, 2014), http://betterwork.org/haiti/wp-content/uploads/2014/10/BHW_HOPE-II_EN_October-2014.pdf.

¹⁹⁵ See Better Work Haiti, *supra* note 194.

¹⁹⁶ Sumner Anderson, *The Mineral Industry of Haiti*, MINERALS YEARBOOK (1963), <http://images.library.wisc.edu/EcoNatRes/EFacs2/MineralsYearBk/MinYB1963v4/reference/econatres.minyb1963v4.sanderson5.pdf>.

¹⁹⁷ *Décret du 24 février 1984 actualisant le Code du travail du 12 septembre 1961*, arts. 289–305, *reprinted in* NatLex, International Labor Organisation, <http://www.ilo.org/dyn/natlex/docs/WEBTEXT/135/64790/F61HTI01.htm#D1> (last visited Nov. 24, 2015).

¹⁹⁸ *Haitian Workers Speak Out for Good Jobs*, AFL-CIO SOLIDARITY CENTER (Feb. 26, 2013), <http://www.solidaritycenter.org/haitian-workers-speak-out-for-good-jobs/>; *Haitian labor code reform: some requirements*, LE NOUVELLISTE EN ANGLAIS (Nov. 21, 2014), <http://lenouvelliste.com/lenouvelliste/article/138379/Haitian-labor-code-reform-some-requirements>.

VI. Human Rights and Gold Mining in Haiti

A. Introduction: Rights Affected by Mining

International law provides robust human rights protections to individuals and communities affected by mineral development. It also imposes a wide array of obligations on those responsible for mining in Haiti. Diverse sources of law and corresponding duties together establish vital safeguards that extend to all Haitians. The human rights protections most relevant to mining can be grouped into two broad categories: (1) rights related to participation and democratic deliberation, and (2) social and environmental rights. These legal standards apply most directly to the Haitian State and its agents. Foreign States, international financial institutions (IFIs), and private companies also have human rights responsibilities that stem from a range of sources and carry differing levels of obligation.

The experience of Haitian communities in areas where mining exploration has begun demonstrates that these human rights are not being adequately respected, protected, and fulfilled. This chapter briefly summarizes the human rights standards most relevant to development of the mining sector. It then presents several case studies that illustrate the dimensions of human rights most affected in the early phases of mineral exploration. The chapter concludes by identifying the duties under international human rights law applicable to the various actors involved in the exploration phase of mineral mining in Haiti.

B. Rights Related to Participation and Deliberation

1. Relevant International Law: Rights Related to Participation and Deliberation

People should not be impoverished in the name of development; their rights must take precedence over potential profits. Projects such as these, with such a large potential impact on the rights of people living in poverty, must not go ahead without the meaningful participation, consent and involvement of the communit[ies] affected.¹

- UN Special Rapporteur on Extreme Poverty and Human Rights

Haiti has ratified numerous treaties that protect a range of participation and deliberation rights.² Together, these treaties guarantee:

- *The right to participate in public affairs and cultural life on a basis of equality.*³ All Haitians have the right to take part, without discrimination, in formal political processes, such as elections and hearings before Parliament, as well as in less formal public policy deliberations, including policy decisions related to mining.⁴
- *The right to information.*⁵ All Haitians have the right to information about health and the environment, as well as other government-held information of public interest.⁶

To protect this right, Human Rights Impact Statements⁷ written in an accessible format should precede development activities.⁸

- *The right to freedom of opinion, expression, and assembly.* Haitians have the right—individually and in community with others—to hold opinions without interference, to seek and receive information, and to share ideas and opinions through means of their own choosing.⁹

Box 6-1: International Human Rights Treaties Ratified by Haiti

Haiti has ratified the following international and regional treaties, thereby consenting to be bound by their terms and committing to immediately take positive steps to realize the rights contained therein. The duties stemming from these treaties are discussed more fully below, in Part D, “Who is Responsible.”

- The International Covenant on Civil and Political Rights;¹⁰
- The International Covenant on Economic, Social and Cultural Rights;¹¹
- The Convention on the Elimination of all forms of Discrimination Against Women;¹²
- The Children’s Rights Convention;¹³
- The Charter of the Organization of American States;¹⁴
- The American Convention on Human Rights;¹⁵
- The International Convention on Elimination of All forms of Racial Discrimination;¹⁶
- The Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities¹⁷

2. The Experience of Mining-Affected Communities: Rights Related to Participation and Deliberation

A. OVERVIEW

The right to information is especially crucial in the context of mining. Mining often takes place in rural areas, where communities have limited or no prior exposure to large industrial projects and therefore little basis for understanding the consequences that mining could have on their futures and those of their children. In such settings, the importance of access to adequate, accurate, and timely information cannot be overstated; it is essential to enable communities to meaningfully participate in debates about their own development and to make informed decisions.

In Haiti, however, these rights related to participation and deliberation frequently go unrealized. Many citizens cannot meaningfully participate in the activities of their government, due to lack of access to information and the failure of the government to create accessible mechanisms for citizen input. These conditions are compounded by the inability of the press to obtain ostensibly public information from government officials. Major decisions are often made behind closed doors in Port-au-Prince, in French rather than in Creole (the language spoken by all Haitians), and far removed from the homes and daily realities of the majority of the rural population marginalized by deep inequalities in income, wealth, and power.

 Local Authority for Bas de Saint Anne¹⁸ Speaks

We have no access to information. I learned on the radio that the government has signed contracts with mining companies. But there is no mechanism in place to inform local people or to let them know how we should react to foreigners coming to mine here.¹⁹

In interviews with community members in the North of Haiti, the Global Justice Clinic of New York University School of Law (GJC) repeatedly heard complaints about the lack of available information regarding company activities. In some areas, individuals explained that their local government officials were either uninformed or absent from discussions with company representatives. In other areas, residents recounted that local officials took part in discussions with companies, sometimes appearing alongside company officials in meetings regarding land access for exploration activities. These officials appeared to take no effective steps to ensure wide dissemination of the information they learned from these companies.

 Resident of Camp Coq²⁰ Speaks

Sure, you can find some people who have been invited to meetings but the company has never held a legitimate *community* meeting. The companies may meet with those who are in the area where they are working, but the community affected is bigger than that. We know that the company is here because the

helicopter descends. And the mayor must know, but we, the people, we don't get information.²¹

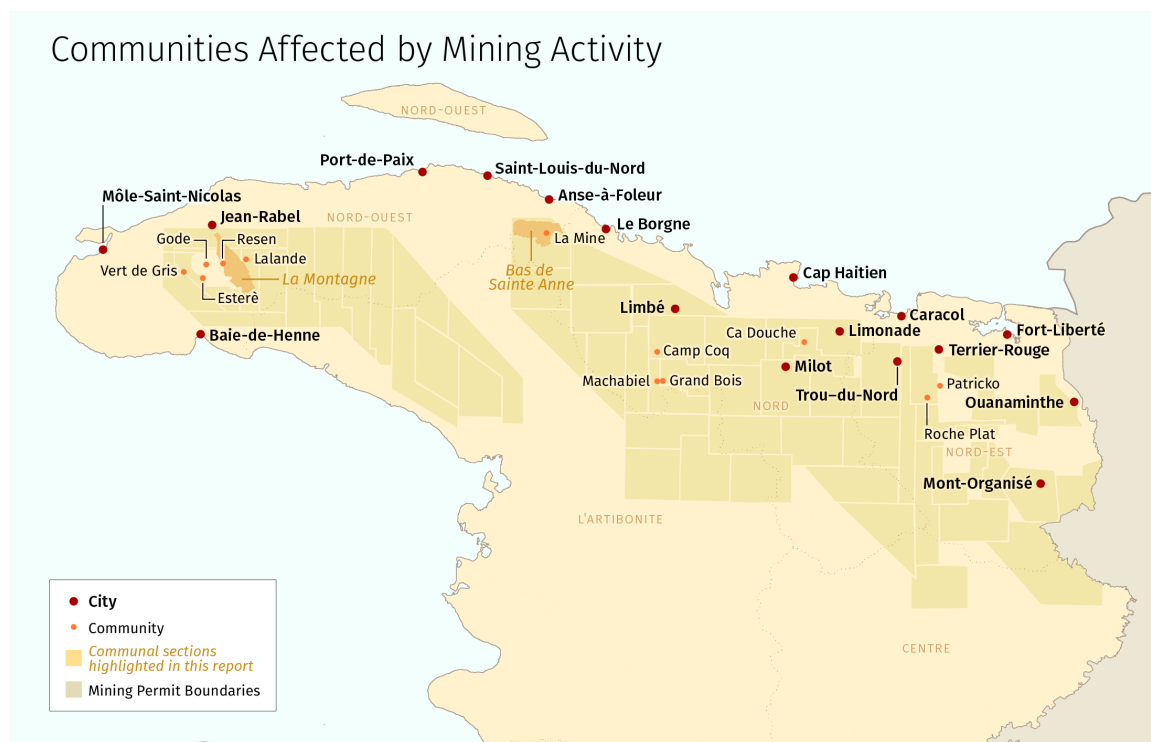


Figure 6-1: © 2015 John Emerson/GJC

According to community members interviewed for this report, neither mining companies nor government officials have provided the public with any written information about the potential environmental and social impacts of mining. The *Bureau des Mines et de l'Énergie* (Bureau of Mines and Energy, or BME) and mining companies operating in Haiti have also been unwilling to share vital environmental and social information with GJC. GJC lodged written requests for baseline data with the International Finance Corporation (IFC), related to activities of the Newmont-Eurasian joint venture (Newmont Mining Corporation (Newmont) and Eurasian Minerals Inc. (Eurasian) (Newmont-Eurasian)); with Newmont-Eurasian, related to its exploration activities; with Majescor and its joint venture partner Société Minière du Nord-Est S.A., or SOMINE (Majescor-SOMINE), related to its two exploitation permits; and with the BME, related to areas covered by existing prospection and exploration permits. The IFC referred GJC to Newmont-Eurasian.²² Newmont-Eurasian, in turn, provided GJC with an informal “summary of baseline efforts” with only “indicative results,” but referred GJC to the BME for further information.²³ Majescor-SOMINE stated that it has not conducted any baseline studies or impact

assessments.²⁴ BME Director Ludner Remarais told GJC that the BME would not disclose any documents that companies had produced.²⁵

The *Kolektif Jistis Min* (Justice in Mining Collective, or KJM) and several journalists who have investigated mining in Haiti have confronted a similar vacuum when conducting research. This lack of transparency regarding matters of public concern is inconsistent with the rights to information and public participation under the Haitian Constitution and international human rights law.

Journalist Lafontaine Orvild Speaks

When I wrote a story about gold mining, I sent emails, made phone calls, and visited the Ministry of Public Works. I wanted to receive information. All of [my] emails and phone calls went unanswered. We journalists don't have access to information, which forces us to provide incomplete information [to the public].²⁶

B. RESIDENTS OF PATRICKO²⁷ AND ROCHE PLAT²⁸ DEMAND ACCESS TO INFORMATION

In discussions with GJC, residents of Patricko recalled that they knew some type of industrial activity had begun once they noticed trucks entering their community. This activity was unusual because Patricko is at the end of a lonely dirt road. Residents reported that from 2010 through 2012, the joint venture Majescor-SOMINE operated without ensuring the population could access essential information about its activities and plans, including information about the use of land (see *infra*).²⁹ Community members reported that Majescor-SOMINE built paths and dug and drilled holes on fallow land that residents used for farming.

Community leaders, including pastors and a member of the *Assemblée de la Section Communale* (Municipal District Assembly, or ASEC), a local government body, stated that they repeatedly asked Majescor-SOMINE to hold an informational meeting. These residents say that Majescor-SOMINE eventually held a meeting to explain to its local employees that if it found valuable material in the soil, residents of Patricko would benefit. Residents said that they heard through rumors that Majescor-SOMINE might be able to build roads, construct a hospital, or provide potable water. In written communication with GJC, Majescor-SOMINE said that it received “a lot of demands from the residents” but added that it was not in a position to build the requested road, bridge, medical clinics, or schools.³⁰ Nor could it provide electricity. Majescor-SOMINE has stated that it cannot fulfill these requests during the current premining phase but explained

that it intends to provide infrastructure and/or services to the area if and when production commences.³¹

In October 2011, residents of Patricko, specifically the *Mouvman Peyizan Patricko* (Patricko Peasant Movement, or MPP), wrote Majescor-SOMINE a letter setting out certain demands. Residents reported that Majescor-SOMINE did not respond.³² Frustrated by the lack of response and because Majescor-SOMINE's continued operation had brought none of the rumored benefits to the community, residents of Patricko organized a protest. One morning, more than 200 community members stood in the dirt road that leads to the village, singing and chanting and blocking Majescor-SOMINE trucks from reaching drill sites. Community members said that the police arrived and temporarily detained some of the protesters. The ASEC member from Patricko and other residents reported that weeks later they received warrants for their arrest.³³ The warrants were never executed, but residents reported that the police subsequently disembarked in Patricko on multiple occasions to warn residents that if they continued to interfere with Majescor-SOMINE activity, they would be imprisoned.

In a letter to GJC, Majescor-SOMINE did not deny that communities organized protests or that residents subsequently received arrest warrants. Instead, it explained:

SOMINE did not have any judiciary conflict with people in the area. But some Haitian employees of SOMINE did receive some threat[s] and they did personally file a complaint at the police station. It was a personal affair, between Haitian people.³⁴

In 2013, Patricko leaders wrote Majescor-SOMINE a second letter³⁵ with concrete demands, including payment for use of land, provision of access to potable water, and road construction.³⁶ Residents said that Majescor-SOMINE never responded to the letter.³⁷

While some of the allegations made by community members refer to disagreements that go beyond the issue of information, these disputes all centrally engage the problem of access to information. Many community members expressed concern about the lack of information regarding the legal basis for and expected progression of mining-related activities in their community, the phases of exploration and development of a mine, and what community members could expect from the company—and the government—at different points in the process.

3. Haitian Advocates Testify about Lack of Access to Information

On March 17, 2015, in Washington, D.C., the KJM, the Megaprojects Observatory,³⁸ and GJC testified at a thematic hearing before the Inter-American Commission on Human Rights (IACHR) about the human rights abuses that occur when communities lack access to information and are excluded from decisions that affect their lives. The advocates addressed: the failure of the Haitian government to ensure public access to information; the inclusion of a confidentiality

clause in the Draft Mining Law that would bar access to all mining-related documentation for ten years;³⁹ and the effects of these actions and inactions on journalists and communities directly affected by the development of mining and tourism projects in Haiti.⁴⁰

The Haitian government failed to appear at the hearing, despite being officially invited by the IACHR.⁴¹ In their testimony and written submissions, the KJM and the Megaprojects Observatory called on the Haitian government to adopt legislation guaranteeing the right to access information; to immediately provide information concerning investment projects to affected communities; and to reject the Draft Mining Law as written. In its report about the session, the IACHR commented on the “troubling information on existing obstacles to the exercise of the right of access to public information, particularly related to foreign investment projects, tourism developments, mining, and exploitation of natural resources.” Based on this information, the Office of the Special Rapporteur for Freedom of Expression called on Haiti to “implement a specific law governing access to information.”⁴²

Box 6-2: Free, Prior, and Informed Consent and Haitian Communities Affected by Mining

The principle of free, prior, and informed consent (FPIC) requires that communities be involved in decision-making processes regarding mining, from a mine’s design phase through its closure. FPIC guarantees communities the opportunity to freely give or withhold their prior and informed consent for a proposed action affecting them or their land and resources. FPIC processes should be:

- *Free.* The process should be free of coercion, intimidation, or manipulation. Participation should occur through representatives and institutions that are freely chosen by communities.⁴³
- *Prior.* Consent should be sought before activities are begun or authorized, as well as throughout the various phases of a project, including assessment, planning, implementation, monitoring, evaluation, and closure.⁴⁴ Respect for FPIC requires that communities have adequate time to carry out their own consensus processes before any new activities are undertaken.
- *Informed.* Accurate information must be provided in a form that is accessible and understandable, including to communities with oral traditions.⁴⁵ The information provided must address multiple aspects of the proposed project activities—such as the nature, reversibility, size, location, duration, and objectives of the project—and an assessment of its likely economic, social, cultural, and environmental impacts.⁴⁶

While international law explicitly establishes the right of indigenous peoples to FPIC regarding projects that will affect their lands and resources, FPIC is also emerging as a best practice for safeguarding the human rights of *all* communities—whether indigenous or not—whose rights are likely to be impacted by projects that affect the use of natural resources.⁴⁷ For example, the Committee on Economic, Social and Cultural Rights (CESCR) has interpreted the International Covenant on Economic, Social and Cultural Rights as entailing a core obligation to obtain the FPIC of communities “when the preservation of their cultural resources, especially those associated with their way of life and cultural expression, are at risk.”⁴⁸ The CESCR has also recognized the importance of FPIC for Afro-Colombian communities,⁴⁹ and the U.N. Special Rapporteur on extreme poverty and human rights has noted that projects with “a large potential impact on the rights of people living in poverty, must not go ahead without the meaningful participation, consent and involvement of the community affected.”⁵⁰ The Special Rapporteur on the right to food advises that “any shifts in land use can only take place with the free, prior and informed consent of the local communities concerned.”⁵¹ These evolving norms form an important part of the background rules and principles that govern the development of the mining sector in Haiti.

C. Social and Environmental Rights

1. Relevant International Law: Social and Environmental Rights

International human rights law protects numerous rights that cannot be fulfilled absent a healthy environment and a safe community, including the rights to clean water and health and rights related to land, such as the right to be free from forced eviction. These rights are a central component of the framework for assessing early mining exploration activities, proposals for development of the mining sector and its legal framework, and the potential and actual impacts of mining operations. Together, the treaties Haiti has ratified include the following rights relevant to mineral exploration:

- *The Right to Water.* All Haitians have a right to sufficient amounts of clean, affordable water close to their homes.⁵² The right to water is one of the most fundamental conditions for survival and is “inextricably related” to the rights to health, life, an adequate standard of living, adequate housing, education, and food.⁵³

- *The Right to Health.* All Haitians have a right to the highest attainable standard of physical and mental health without discrimination.⁵⁴ Implicit in the right to health is a right to the underlying preconditions for health, including a healthy environment, access to safe water and sanitation, adequate food, housing, and access to information related to health.⁵⁵
- *The Right to Own and Use Land Free from Forced Eviction.*⁵⁶ All Haitians have the right to use land⁵⁷ free from forced eviction.⁵⁸ Even those who cannot prove formal title to the land they occupy are protected against forced eviction.⁵⁹ The right to food⁶⁰ protects “people depending on land for their livelihoods,” who often experience hunger and lasting loss of livelihood when land used for subsistence agriculture is expropriated or sold.⁶¹ The right to food is violated if people who depend on land for their livelihood are deprived of access to land without being provided suitable alternatives.⁶²

2. The Experience of Mining-Affected Communities: Social and Environmental Rights

A. OVERVIEW

While the Haitian Constitution, other domestic laws, and international human rights law guarantee social and environmental rights to Haitians, a wide swath of the Haitian population experiences daily violations of the rights to water and health and rights relating to land. In Haiti, water is a scarce resource, and safe water is even scarcer. In 2014, only 62 percent of all households in Haiti had access to safe drinking water, while less than 50 percent enjoyed such access in rural areas.⁶³ Exploration for minerals introduces new risks that could further undermine the right to water. Because the Haitian government does not provide water to most of its citizens, Haitians must instead use surface and/or groundwater or buy their water.⁶⁴ If the supply of available water decreases due to increased industrial uses, such as mining, the natural sources on which families rely may dry up. Consequently, costs for purchased water may rise with increased demand, which would make water—especially potable water—significantly less accessible to many communities. Decreased access to water can exacerbate burdens on women and children, in particular, as they are often the primary water collectors for families, a reality that makes it harder for children to attend school.⁶⁵ As described in the preceding chapters, open-pit gold mining uses substantial quantities of water and can cause grave contamination (see Chapter III), often negatively affecting both the quantity and the quality of water available for adjacent and downstream communities.⁶⁶ Although mineral production is the most water-intensive phase of mining, even exploratory drilling can affect the right to water, as aquifers may be contaminated if drilling is not carried out properly or if drilling sites are not properly closed and rehabilitated (see Chapter III).⁶⁷

Like the right to water, many Haitians’ right to health remains unfulfilled (see *infra* Box 6-3). Gold mining may exacerbate existing obstacles to the right to health by negatively affecting

underlying determinants of health.⁶⁸ Even during exploration, gold mining activities may cause toxic mine drainage (see Chapter III), contaminating the water and causing health problems.⁶⁹ During the extraction phase, open-pit gold mining occupies large tracts of land and involves the use of chemical processing—practices which may cause environmental problems, including water contamination, production of unmanageable amounts of solid waste, loss of tree cover, and landslides or soil erosion (see Chapter III).⁷⁰ These harms can impact health severely.⁷¹ During all phases, mining can decrease agricultural production, threaten food supplies, and deplete water sources, thereby jeopardizing the right to health.

Box 6-3: Health Conditions in Haiti

Poor living conditions, lack of access to healthcare, and weak health infrastructure in Haiti exacerbate the risk that mining could lead to violations of the right to health. Haiti has some of the most dismal health indicators in the world. Haiti's infant mortality rate is 40.2 per 1000 live births⁷²—approximately double the rate in any other Caribbean or Central American nation.⁷³ The under-five mortality rate in Haiti (71 per 1000 live births) is more than three times the regional average (19.2 per 1000 live births).⁷⁴ Nearly a quarter of all children in Haiti are “stunted,” meaning they are significantly smaller than the median height for their age.⁷⁵ One out of 10 children under five years of age is severely malnourished and one out of three is chronically malnourished.⁷⁶ Only 37 percent of births are attended by a skilled health worker⁷⁷ and just 35 percent of Haitian women between ages 15 and 49 use contraception.⁷⁸

The main causes of poor health conditions are poverty and a lack of access to health care. Before the earthquake in 2010, less than half (approximately 47 percent) of the population had access to health care, with significantly lower rates in rural areas than in Port-au-Prince.⁷⁹ As a result, even easily treatable diseases become potentially life-threatening.⁸⁰ The cholera epidemic that broke out in October 2010—the worst in the recent world history—attests to this vulnerability.⁸¹ Cholera has killed nearly 9000 Haitians and infected 738,000,⁸² and the epidemic shows little signs of abating: In the first four months of 2015, Haiti saw a 300-percent increase in rates of infection over the rate for those same months in 2014.⁸³

In addition, health infrastructure is weak, and the limited facilities that do exist are often underfunded and understaffed.⁸⁴ In Haiti, the average annual per capita health expenditure, which includes public and private spending, is \$77 per person per year.⁸⁵ In the neighboring Dominican

Republic, that figure is \$315.⁸⁶ The comparative figures for Canada and the United States are \$5718 and \$9146, respectively.⁸⁷

The Haitian State bears the primary duty to respect, protect, and fulfill the right to health of its people. When governments lack the resources or will to respect the right to health, however, other actors must recognize the increased risk that their actions could trigger violations for which individuals have no remedy. In the context of gold extraction, mining companies, foreign governments, and IFIs providing support to the sector must recognize the weaknesses and limitations of the Haitian government in protecting and fulfilling the human rights of its people. These actors not only must adjust their behavior to avoid further violations but also should help strengthen the capacity of the Haitian State to meet its human rights obligations. For example, in addition to constructing, operating, and closing their mines in a safe manner, companies could also promote public health by constructing hospitals and rural health clinics in coordination with relevant government agencies and in response to the expressed needs of the communities most at risk from mining.

In the predominantly subsistence farming communities in northern Haiti where mining companies hold permits, it is impossible to separate the issue of health from the issue of land. Land use and ownership patterns are complex in Haiti, where many people have lived on land without formal title for generations while depending on that land for their livelihoods (see *infra* Box 6-4). The combination of insecure tenure and dependence on land for survival adds to the risks posed by mineral mining, heightening the vulnerability of Haiti's subsistence farmers to displacement and forced eviction in mining areas. Human rights law is particularly important in this context because it provides protections regardless of formal title.⁸⁸

Box 6-4: Land in Haiti

Since Haiti's founding as a nation, its land has been unequally distributed. Despite the slave uprising that led to the country's founding, upon independence Haitian leaders gifted land to friends and military leaders, thus depriving the majority of Haitians of ownership over the soil they worked.⁸⁹ However, in the first decades of the nineteenth century, Haitians resisted the consolidation of land in the hands of the few and created a "counter-plantation model," demanding that large landowners negotiate with rural farmers.⁹⁰ Eventually, a sharecropping system was born, and it

has remained intact through the present day.⁹¹ An additional complication: under Haitian law, a legally documented child of a property owner is heir to the owner's property, which creates difficult land inheritance patterns in families with more than one child.⁹²

There are three categories of land in Haiti: State-owned private land (i.e., land that the State leases to private individuals or companies), State-owned public land (i.e., land that the State owns and does not lease), and private land, which is passed via private transactions from one owner to the next.⁹³ Approximately 95 percent of the land in Haiti is now private land and State-owned private land.⁹⁴ But there are often competing answers to the question, who owns what?

To this day, the vast majority of Haitian land is not registered or documented by the State.⁹⁵ A 1997 study estimated that 95 percent of land transactions occur without the government's knowledge or any official record.⁹⁶ The informality of land transactions contributes to insecurity of tenure and conflicts over land ownership and usufruct rights.⁹⁷ Since the fall of the Duvalier regime, in 1986, there have been many attempts at land reform in Haiti, inspired, in part, by a desire to curb violence attributed to land disputes.⁹⁸ To date, however, they have been largely unsuccessful.⁹⁹ Haiti still lacks a comprehensive cadastral map (a system that helps the government to identify and regulate land ownership and use patterns), and its title registries are poorly organized and maintained.¹⁰⁰ As the United States Agency for International Development reported in 2010:

Haiti does not have an effective national cadaster and lacks a comprehensive, functional system for recording land ownership. Prior to the earthquake, customary arrangements and knowledge characterized the tenure of Haiti with only 40% of landowners possessing documentation such as a legal title or transaction receipt [T]he veracity and accuracy of land records is suspect, and there is widespread distrust of government institutions, including those responsible for documenting, maintaining, and upholding land claims.¹⁰¹

Haiti's main tax office was damaged in the January 2010 earthquake, and the status of documents held there concerning land ownership is still unknown.¹⁰² In absence of a functioning land title or registry system, Haitians continue to acquire and transfer land as they have for centuries: through verbal agreements, private contracts, and inheritance.¹⁰³ In recent years, however, the government has expropriated land for private use¹⁰⁴

and has failed to provide adequate notice to those displaced.¹⁰⁵ In a country where more than half the population works as farmers,¹⁰⁶ where more than 80 percent of the land is used for farming,¹⁰⁷ and where only 5 percent of land is formally accounted for,¹⁰⁸ residents of rural communities in Haiti have reason to be concerned about how mining companies negotiate use of land for mining-related activities.¹⁰⁹

B. THE EXPERIENCE OF MINING-AFFECTED COMMUNITIES: LAND ACCESS AGREEMENTS

The Mining Decree of 1976 requires that the holder of a mining title reach an agreement with each relevant landowner and/or occupant prior to occupying the land necessary for mining-related work (see detailed discussion, Chapter V).¹¹⁰ If the landowner/occupant and the mining company are unable to reach an agreement, an arbitral body will decide an amount of compensation due to the landowner/occupant.¹¹¹ The Mining Decree also requires that the mining company rehabilitate the land if mining renders it unsuitable for agriculture.¹¹²

Residents of communities where mining companies have conducted exploration activities¹¹³ have explained that some companies, however, have not followed the procedures outlined in the Mining Decree. In some cases, residents stated that companies entered their land without seeking their permission; in others, they said that companies sought their permission only after beginning work. Some companies have used written land access agreements and have paid some landowners for disturbances or damage to their land or crops thereon. Compensation and land rehabilitation are mentioned in some companies' land access agreements.

Companies, however, are not exclusively responsible for the administration of land access agreements. Under both international and domestic law, the Haitian State has the primary duty to inform the Haitian people and to take measures to prevent the violation of their rights. In the context of land agreements, the government should inform communities about their rights under the Mining Decree and other Haitian laws—rights that would allow for arm's-length negotiations capable of bringing landowners/occupants to a meaningful agreement with mining companies. In addition to the government failing to inform communities or to accompany residents as they navigated the agreements with companies, there is no evidence that the Haitian government has set up an arbitral body to resolve differences between landowners/occupants and mining companies, as required by the Mining Decree.

The following case study is the result of more than a dozen fact-finding visits that GJC made to Haiti's Northwest Department to interview residents about their experiences with mining activity to date, and, in particular, to gather information about the use of land access agreements. Newmont-Eurasian was active in this area between 2009 and 2012.¹¹⁴ Evidence demonstrates that Newmont-Eurasian made efforts to obtain residents' consent to use their land for mineral

exploration activities. The testimony of numerous community members, however, indicates that the ways in which Newmont-Eurasian representatives sought to obtain permission to use their land failed to respect residents' rights to participation and information (see *infra*). Evidence also makes clear that the government of Haiti largely abandoned residents in the negotiation process by failing to provide accessible information about mineral mining and the rights of community members under the Mining Decree and by failing to provide access to an arbitral body as envisioned in the law.

It is important to note that GJC has not conducted an exhaustive or comprehensive investigation into the administration of land access agreements in the communities where other companies have explored for gold. However, residents from Roche Plat, Patricko, and Labou—communities in the area where Majescor-SOMINE has explored—told GJC that SOMINE had entered and operated on their land without permission. When presented with these accounts, SOMINE stated that it had concluded a written agreement with every landowner, copies of which are in their archives.¹¹⁵ A Majescor official told GJC that he believed that SOMINE did not always use a document to gain permission for access to land.¹¹⁶ Unlike the Newmont-Eurasian agreement, which many residents displayed to GJC, the authors have not seen the agreement reportedly used by SOMINE.¹¹⁷

C. CASE STUDY: LAND ACCESS AGREEMENTS IN LA MONTAGNE

There are dozens of villages scattered in the barren hills of La Montagne,¹¹⁸ an area in northwest Haiti that straddles the communes of Jean Rabel and Baie de Henne.¹¹⁹ The communities of La Montagne are within a day's walk from where Newmont-Eurasian established a basecamp in Vert de Gris.¹²⁰ Homes in La Montagne are made of cement, thatch, or mud and have thatch or tin roofs. From the hilltops, one can see the Windward Passage—the stretch of sea that separates Cuba and the island of Hispaniola. Families work the land. They grow beans, plantains, bananas, peanuts, and vegetables. Some herd goats and raise chickens.

The road that meanders through the hills of La Montagne is narrow and steep. Some villages have primary schools, but to continue beyond fourth grade children must walk a few hours to the nearest town. There is no public transportation to reach these mountain communities. For the most part, people walk, carrying goods on their heads, up and down the hills. A handful of young men navigate the road as moto-taxi operators, carrying heavy loads and brave passengers.

Newmont-Eurasian operated in the area from late 2009 through 2012.¹²¹ During 2011 and 2012, scores of individuals signed or received paper agreements that include language authorizing Newmont-Eurasian's "Northern Haiti Joint Venture" to use their land ("the land access agreements").¹²² In many instances, agreements appear to have been concluded without the informed consent of the individual landowner. Evidence from La Montagne also reveals that Haitian government officials were notably absent; resident accounts indicate that the government failed to effectively inform the local population about mining prior to Newmont-Eurasian's arrival and failed to support rural farmers as they negotiated access to their land. Community residents were similarly left on their own to negotiate payments for damaged or destroyed crops.

The experience with land access agreements in La Montagne suggests that the Haitian government and Newmont-Eurasian failed to ensure that Haitians' rights were respected and protected in the context of exploratory mining-related activities. In addition, the IFC, which has provided equity financing in support of Newmont-Eurasian's exploration activities in Haiti, does not appear to have taken adequate measures to ensure its client's adherence to the IFC's social and environmental Performance Standards,¹²³ which are designed to protect against investment-related human rights abuses. (See more details about the IFC in Box 1-5).

In written correspondence with GJC and in a subsequent in-person meeting, Newmont-Eurasian strongly rejected the claim that the land access agreements were administered in a way that violated residents' human rights.¹²⁴ It asserted that its agents in the communities were properly trained and always acted appropriately. It suggested that information to the contrary must be based on a misunderstanding.

Box 6-5: Text of the Land Access Agreement¹²⁵

The standard land access agreement used by Newmont Mining Corporation (Newmont) and Eurasian Minerals Inc. (Eurasian) (Newmont-Eurasian) in Haiti, entitled "Authorization to Access Private Land for Mineral Exploration," appears to have been written in an effort to comply with Haitian mining law.¹²⁶ While it is clear that the document is intended to be in Creole, some residents told GJC that they did not understand the language of the agreement. The discussion of the agreement below is based on an English translation of the text completed by GJC and Haitian colleagues.

The text states that the agreement is between Marien Mining Company, a Haitian subsidiary of the Newmont-Eurasian joint venture, and the Haitian signatory referred to as the "landowner." This latter term is used to encompass the formal owner of the land, the person responsible for the land, or the individual who occupies the land.

In correspondence with GJC, Newmont-Eurasian emphasized that the agreement "is not a legal document."¹²⁷ Nonetheless, the company wrote the agreement using legal vocabulary and format, included some clauses that appear aimed at limiting legal rights (see *infra*), and required the signature of a witness. In Article 6, Newmont-Eurasian refers to the agreement as a "contract." Further, Newmont-Eurasian stated that the agreements are limited to the prospecting and exploration activity allowed

under the prospection permit that it obtained from the BME for this area. Newmont-Eurasian wrote that it will be required to negotiate new agreements with residents should it proceed to the next phases of research and mineral operations.¹²⁸

Article 1 of the land access agreement begins:

Together with the company and according to the Mining Law of March 8, 1976, the Ministry of Public Works, Transport, and Communication, through the Office of Mines and Energy, gives the company a permit that authorizes it to carry out some activities that can destroy the explored¹²⁹ land.

The agreement states that, in accordance with the Haitian Mining Decree, the company will indemnify the landowner for all damage to his or her property.¹³⁰

Article 2 grants the company “carte blanche” (“*kat blanch*”) to perform activities relevant to exploration. Article 3 states that the company will pay damages in accordance with the crop compensation schedule set forth in the appendix to the agreement but forbids the signatory from making “any other monetary demands.” Newmont-Eurasian provided GJC a copy of the compensation schedule.

Article 4 reserves the right of the company to hire the landowner/occupant and members of his/her family to perform activities on the land. Article 5 states that the company maintains authority to work on the land

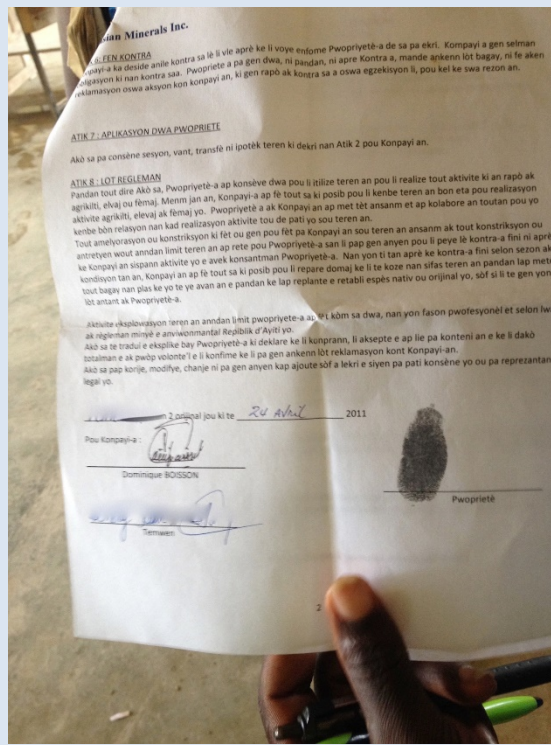


Figure 6-2: Land access agreement,
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indefinitely.¹³¹ Article 6 explains that to terminate the “contract,” the company must provide a note in writing to the landowner/occupant. In contrast, the agreement provides no means for the landowner/occupant to terminate the agreement. Instead, it contains a sweeping limitation of landowner/

occupant rights, stating that the landowner/occupant does not have the right, during or after the life of the agreement, “to ask for anything else, or make any demands or take action against the Company that has to do with this contract or its execution, for whatever reason.” This clause appears calculated to foreclose any future legal claims by landowners/occupants, raising concerns about whether the landowners/occupants who received these land agreements knowingly waived their legal rights.

Article 7 states that this agreement will not apply in the case of concession, sale, transfer, or mortgage of the land. Article 8 states that the company “will do everything in its power” to repair any damage caused to the surface of the property. It also states that improvements or construction on the land belong to the landowner/occupant and that the company will ensure that its activities abide by relevant Haitian law. The second to last sentence reads: “This agreement was translated and explained to the Landowner who declared that he understands, accepts, will read the contents and is in total, voluntary agreement, and that he has no other reclamations against the Company.” Finally, the agreement states that it may not be “corrected, modified, changed, or amended except in writing signed by the parties to the agreement or their legal representatives.” The agreement then requires three signatures: those of the landowner/occupant, the CEO of Marien Mining,¹³² and a witness. This passage and other passages that employ legal language, as well as the formalities of execution of the agreement, undermine Newmont-Eurasian’s stated intention that the agreement not function as a legally binding document. Instead, the document appears, on its face, to be a contract created to permit Newmont-Eurasian to access land while blocking the rights of the landowner/occupant to any remedy outside of specified forms of compensation for damage.

In mid-February 2014, a community organizer stood in a cement schoolhouse in La Montagne and read the terms of the land access agreement aloud to more than a hundred people. There was an audible rumble when the organizer read that mining activity “may destroy your land”;¹³³ that the signatory to the agreement granted “carte blanche”¹³⁴ to the company to realize the work

associated with the mining exploration; and that the signatory had no right “to ask for anything else, or make any demands or take action against the Company.”¹³⁵ Many of the residents of La Montagne—even those who had already signed or received land access agreements—said that they were learning about its contents for the first time.

In subsequent interviews and discussions about the context surrounding the signing of the land access agreement, residents explained that many people thought that the agreement would bring future benefits akin to a development project led by a nongovernmental organization.

🗣️ **Resident of Resen, La Montagne, Speaks**

I thought it was a good thing. You know, we don’t have money. I thought it was a foreign thing. A project. Lots of people wanted to sign the contracts.¹³⁶

During a meeting in early May 2014, one woman took her land access agreement out of her pocket and admitted that she had no idea what it said. When asked why she had signed it, she shook her head.

🗣️ **Resident of Gode, La Montagne, Speaks**

We were in the dark. They took our land and dug on it. They sent a paper to some of us and we did not know what it was. We thought that maybe they sent this paper to people so they could work for the company in the future.¹³⁷

i. Conclusion of Agreements

Interviews and meetings conducted by GJC in the communities of La Montagne suggest that many of the documents signed by the landowners and Newmont-Eurasian representatives fail to reflect a mutual understanding about the material terms of the agreements. As noted above, Newmont-Eurasian denies that the document was intended to be a binding contract and has expressed firm disagreement with GJC's interpretation.

The vast majority of La Montagne residents who reported that they were in possession of land access agreements said that they had received or signed the agreements either at a meeting (referred to by Newmont-Eurasian as a “formal meeting”) or via an informal visit from a Newmont-Eurasian employee. Newmont-Eurasian stated that community relations officers mapped the area and invited landowners and land users to formal meetings.¹³⁸ Numerous residents of La Montagne recalled a meeting at the home of a member of the *Conseil d'Administration de la Section Communale* (Municipal District Board, or CASEC)—another local government body—or a meeting at the home of a local resident.

Interviewees who attended these meetings indicated that an “engineer” working for Newmont-Eurasian presented the land access agreement to them. Many individuals understood that they were invited to the meeting because they owned or occupied land that Newmont-Eurasian wanted to use. Some recalled that Newmont-Eurasian had already worked on their land before they attended a meeting. Some residents stated that the presence of the CASEC member made them think that they did not have the option to refuse to sign the agreement. Others wondered aloud that local authorities may have received money from Newmont-Eurasian or the central government in exchange for hosting the meeting, though they were unable to offer evidence to support these concerns. Newmont-Eurasian told GJC that the presence of the CASEC member “allowed for more transparency.”¹³⁹

🗣️ Resident of Lalan, La Montagne, Speaks

They showed us that this was a great opportunity for us. They said that they were looking for gold in the land. They said if they found gold, then they would sell it in another country and give us American money.¹⁴⁰

Others who attended the same meetings said that they were handed the agreement to sign but did not have time to read it before being asked to sign. Some individuals said that no one mentioned that the agreement warns of potential destruction of land. One woman who attended one of the meetings said, “In my case, no one told me anything. They just told me to sign it. So I did.”¹⁴¹

Newmont-Eurasian told GJC that “[i]t took nearly two weeks to complete each agreement.”¹⁴² The existence of such divergent interpretations of events should be cause for concern to all involved and emphasizes the need for more careful communication—in Creole—and better informed community representation in future land use negotiations.

🗣️ **Resident of Estère¹⁴³ Speaks**

The company read the contract and I had the contract in my hand, but I did not know what it says. If you don’t know how to read it’s hard to know. It all happened so quickly.¹⁴⁴

Some residents said they believed that they were required to sign the agreement in order to receive a benefit or compensation, be it wages for days of labor, money for damaged crops, future days of labor with Newmont-Eurasian,¹⁴⁵ or the right to a portion of any riches found under their soil.

🗣️ **Resident of Gode, La Montagne, Speaks**

The company said that they would place pickets on our land and they would give peasants lots of money. If they found gold on your land they would give you a house if you deserved a house, a car if you deserved a car, you know.¹⁴⁶

One man from Vert de Gris, an area in the commune of Jean Rabel near La Montagne, told GJC that he had affixed his thumbprint to the agreement (in lieu of a signature) because the company had paid him 1000 Haitian Gourdes (approximately \$21.40)¹⁴⁷ to do so. He told GJC that he had no idea what the agreement said.¹⁴⁸

Newmont-Eurasian stated that most of the signatories were illiterate and that it therefore had to read the agreement aloud and explain its contents “in simple terms.”¹⁴⁹

🗣️ **Resident of Gode, La Montagne, Speaks**

I worked for the company for four days and earned 1000 [Haitian] Gourdes [approximately \$21.40]. After two months the company called me. They gave me a piece of paper. They told me to take it. I don't know how to read. I took the paper. They did not read it to us. If they had read it, maybe we would have known that there are risks.¹⁵⁰

Newmont-Eurasian rejected allegations that its agents promised or extended any benefits such as visas and money to those who signed the land access agreement. Newmont-Eurasian wrote:

Nothing was promised outside of the agreement in return for a signature. There was also no anticipation that any resident would be displaced by our exploration activities and thus, nothing was ever promised in that regard.¹⁵¹

🗣️ **Resident of Lalan, La Montagne, Speaks**

The company said if they found gold under our land that we would have to move. But they told us that we could move wherever we wanted—to Mare Rouge,¹⁵² to Port-au-Prince,¹⁵³ even get a visa to leave the country.¹⁵⁴

Some residents said that they understood that they must sign the agreement in order to receive compensation for damaged crops. Numerous residents of La Montagne and nearby areas claim that mining activity destroyed their orange trees, avocado trees, sweet potatoes, and other crops—allegations that GJC was unable to either confirm or disprove (see Chapter III). A resident of Lalan, a village in the area of La Montagne, told GJC that she received the land access agreement at the same moment the company compensated her for what they had already destroyed. “I didn't even read it. I thought I had to sign it if I wanted to take the [compensation] money.”¹⁵⁵

In response to these allegations, Newmont-Eurasian insists that it “communicated in good faith the conditions of each agreement.”¹⁵⁶

ii. Signing by Third Parties

Multiple residents of La Montagne whom GJC interviewed said that they were given land access agreements with their names already signed by someone else. One woman said that she never saw her land access agreement but that neighbors had seen it. An older man who said that he could not read had received the agreement with his name on the signature line. He worried that as a result of this “agreement” he might have sold his land forever.

🗣️ Resident of Gode, La Montagne, Speaks

I can’t sell my land without my kids knowing. I don’t know how to read. When I look at the paper I see that my name is on it. I did not sign it. Someone else put my name on it. I did not know what the contract said. Now I understand that the company can use my land. What will happen in the future?¹⁵⁷

At the same meeting with GJC, an old woman who did not know her birthdate explained the circumstances surrounding her encounter with a company representative.

🗣️ Resident of Lalan, La Montagne, Speaks

A man came to my house and said that a picket had been placed on my land near Vert de Gris where my nephews plant beans and cabbage. I walked to the land. It took about an hour. The engineer from the company came over to me and asked if I owned the land. I said yes. He then asked me if I could read. Ha! I said to him, Look at me. I’m old! Of course I did not go to school. The engineer took my thumb and dipped it in ink. He marked the piece of white paper with it. I had no idea what the paper said. I had no idea what it was. He then paid me 150

[Haitian] Gourdes [approximately \$3.20]¹⁵⁸ and I never saw him again.¹⁵⁹

While Newmont-Eurasian made clear in its communications with GJC that these agreements would not be relied upon in any future mining-related activities, many residents were unaware of this limitation.

iii. Refusal

Of the dozens of individuals interviewed and hundreds of people who attended community meetings, only one told GJC that she had refused to sign the agreement. She explained that when company employees came to mark her land she told them that they could not put up a picket. She recalled that they told her there were riches in the earth and, if she allowed them to use her land, she could become wealthy. The woman refused to let them place a picket. The woman said that a few weeks later, the same people returned and told her that if they found gold under her land they would give her a visa to the United States. She said that she asked what she would do in the United States. She explained:

Resident of La Montagne Speaks

I want to live in Haiti. This is Dessalines' land. He suffered too much for me not to fight for it. I asked the company, if you force me off of my land, would you give me new land in Haiti?¹⁶⁰

The woman refused to sign the agreement. Newmont-Eurasian did not use her land.

iv. Absence of a Grievance Mechanism

Residents of La Montagne said that they were not aware of any grievance mechanism or any way to submit a complaint to Newmont-Eurasian. Newmont-Eurasian explained that it did not prepare for the community any educational or explanatory documents about key issues, such as a grievance mechanism or information about the type of exploration activities Newmont-Eurasian conducted.¹⁶¹ Rather, Newmont-Eurasian said that it shared information only orally.¹⁶² In response to GJC requests for information about its community grievance mechanism, Newmont-Eurasian sent general information, from publicly available reports, about its grievance procedures at other mining sites.¹⁶³

v. Case Study Conclusion

Under both international and domestic law, the Haitian State has the primary duty to inform the Haitian people and to take measures to prevent the violation of their rights. The government has failed to fulfill that duty. Many residents of La Montagne did not understand the rights granted to Newmont-Eurasian through permits allowing it to explore for gold and other metals in their communities. Nor did they know what rights they retained. Many community members were unaware that the Haitian Constitution designates that subsoil resources are owned by the State, for the “public good,” while surface rights are retained by landowners. And they were similarly uninformed about the risks and potential adverse consequences of mining exploration, as well as their rights to seek recourse for harms and to give or withhold consent. Discrepancies between the residents’ and Newmont-Eurasian’s understandings of the land access agreement used in La Montagne make clear that the people of the region were uninformed and unprotected.

The experiences of residents to date with the early phases of mining activity and the missteps made by the government, Newmont-Eurasian, and the international actors involved offer many lessons about how to ensure greater transparency, accountability, and equity in community engagement. These lessons will be critically important if mining advances to the exploitation phase, which has far more lasting impacts on land use and can have significantly more severe repercussions for land-dependent communities than those phases experienced to date.

🗣 Resident of Gode, La Montagne, Speaks

Remember that it is not our fault if we do not understand the contracts. Many of us do not know how to read. And it is not our fault that we do not know how to read. We live in a country that has never integrated us into the political life of the nation.¹⁶⁴

D. Who is Responsible? Duties Corresponding to Rights Affected by Mining

1. Introduction

This section discusses the responsibilities, under human rights law and international standards, of those involved in Haiti’s emerging mining sector. It identifies duties of the Haitian State and private companies engaged in mining-related activities in Haiti. It also examines the duties of IFIs and foreign governments stemming from their participation in the international community

or their status as the home States of companies operating in Haiti. Although the legal status and content of their duties under international law differ, each of these actors has responsibilities germane to all phases of mining, including the early, exploratory stages.

2. Human Rights Obligations

Human rights give rise to obligations. As rights-holders, all Haitians have a particular set of entitlements. Other actors, including principally the Haitian State, are duty-bearers, with a particular set of corresponding obligations. The rights related to deliberation, information, health, and the natural environment create responsibilities for duty-bearers, including the Haitian State, IFIs, mining companies, and other States.

Human rights obligations are based on national, regional, and international law as codified in treaties or reflected in customary international law. Other instruments—including declarations, comments, and principles adopted at the international and regional levels—contribute to the understanding and development of different actors’ rights and obligations.

3. The Responsibility to Respect, Protect, and Fulfill

International law generally frames human rights duties within three categories: the responsibility to respect, the responsibility to protect, and the responsibility to fulfill.

Respect. The obligation to *respect* requires actors to refrain from interfering directly or indirectly with the enjoyment of an individual’s or a community’s rights.

Protect. The obligation to *protect* requires the prevention of human rights violations by others, including taking action to prevent, investigate, and punish individuals, companies, or other entities that harm individuals’ human rights.

Fulfill. The obligation to *fulfill* requires the adoption of whatever measures are necessary to achieve the full realization of human rights for all. This obligation includes the provision of subsidies, services, or other direct assistance to the most vulnerable and needy members of society when they cannot otherwise access their rights.

The State bears primary responsibility for ensuring human rights: governments are obliged to respect, protect, and fulfill the human rights of all individuals within their territory or under their jurisdiction.¹⁶⁵ States also bear human rights obligations toward those whose lives they affect outside of their jurisdiction or territory.¹⁶⁶ The exact contours of these duties are still under development (see *infra*). It is clear, however, that the human rights framework requires States to refrain from harming the human rights of individuals who are directly affected by their actions, regardless of where those people are located.¹⁶⁷ Moreover, the obligation to respect human rights applies in all circumstances, irrespective of whether the violation is committed by one State individually or in concert with others.¹⁶⁸ Finally, international law is increasingly specifying the

human rights obligations of other relevant actors, such as businesses and intergovernmental organizations. There is consensus that—at a minimum—all of these actors have an obligation to *respect* human rights whenever and wherever they act.¹⁶⁹

Box 6-6: Local Officials of an Absent State

La Mine sits high in the hills behind the waterfront town of Anse-à-Foleur, located between the coastal cities of Port-de-Paix in the Northwest and Le Borgne in the North. The roads from each town narrow into dirt paths; to reach La Mine requires hiking over steep terrain for more than four hours from the nearest road. The land is lush, and navigating the area on foot requires frequent stream crossings. The CASEC member for the first section of the commune of Anse-à-Foleur lives about one hour's walk from La Mine. He said that although he is an official in an area affected by mining, the government has provided him no information about mining.

When asked if anyone in his community was well informed, the CASEC member said no.

🗣️ CASEC Member for La Mine Speaks

We hear on the radio that the government has signed permits with companies. But there is no structure in place to inform affected communities or to discuss what it means to have mining in our area.

Companies have entered our area without any intervention or introduction from the government. Mining[-related] activity has happened in our area and yet people are not really aware of what this means or what potential benefits there may be.¹⁷⁰

4. Obligations of the Haitian State

Resident of Grand Bois Speaks

Even if we don't agree with mining, it doesn't matter.
The government decides. We are poor people. The
government is not with us. We just have God.¹⁷¹

When a State consents to be bound by an international human rights treaty, it assumes obligations that govern its actions from that moment forward.¹⁷² Furthermore, even if a State has neither signed nor ratified a human rights treaty, it still has certain obligations stemming from customary international law, which is made up of legal norms widely accepted by the international community as binding law. Customary international law protects the most fundamental human rights and, as a general matter, applies to all States.¹⁷³

Haiti has ratified the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of all forms of Discrimination Against Women, the Children's Rights Convention, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, the Charter of the Organization of American States, and the American Convention on Human Rights. Haiti is thus required to immediately take positive steps to realize the rights contained in these treaties,¹⁷⁴ which means that the Haitian government must respect, protect, and fulfill the rights of Haitians who may be affected by mining activities. It must not only refrain from interfering with the enjoyment of these rights but also prevent the violation of human rights by others and adopt whatever measures are necessary to achieve the full realization of these human rights. While international law sets a high bar for any State, it also recognizes that there may be limits on governments, such as those imposed by poverty. In such cases, it is important to ask whether the government has taken the steps within its ability and whether it is accessing all the assistance it can to improve its own ability to fulfill rights.

Although the Haitian State is chiefly responsible for guaranteeing and fulfilling the human rights of all Haitians, other actors are not without responsibilities. Particularly in a country where the government consistently demonstrates a lack of resources and/or will to advocate for the human rights of its people, international actors must ensure both that their actions do no harm to the rights of Haitians *and* that they strengthen the capacity of the Haitian State as the primary duty-bearer. Further, when a State is not strong enough to regulate and monitor company activities in a robust manner, companies are not relieved of their obligations to meet their own human rights responsibilities.

5. Obligations of Other States

The international community has a vital role to play to ensure respect for the basic rights of all Haitians. The human rights obligations of other States are relevant even at the early stages of mining and should be taken into account particularly when a State acts internationally, including as part of an intergovernmental organization, and in the regulation of mining companies based in the State.

A. STATES' EXTRATERRITORIAL OBLIGATIONS UNDER INTERNATIONAL HUMAN RIGHTS LAW

States' human rights obligations do not end at their borders. Under both treaty and customary international law, States have extraterritorial human rights obligations.¹⁷⁵ Many international human rights instruments refer to a State's "jurisdiction"—in addition to or instead of the State's "territory"—in defining the scope of application of treaty obligations.¹⁷⁶ Even where territory is specified, human rights bodies have found State duties to extend extraterritorially in specific circumstances.¹⁷⁷ A continuum of obligations can be understood to apply to States' extraterritorial and international activities, with greater levels of duty applicable as the State approaches effective control over individuals or spaces.

Customary international law protects a range of rights relevant to the early stages of mining, including rights concerning deliberation and the natural environment, discussed earlier in this chapter. Customary international law guarantees basic civil and political, as well as economic, social and cultural, rights as part of the minimum standards of human rights.¹⁷⁸ Through State practice and developments in international law, the main guarantees set out in the Universal Declaration of Human Rights are now recognized by many as customary international law.¹⁷⁹

B. STATES' OBLIGATIONS WHEN ACTING AS MEMBERS OF THE INTERNATIONAL COMMUNITY

States are bound by their human rights obligations when they act within the international community, including as part of intergovernmental organizations¹⁸⁰ such as IFIs.¹⁸¹ In particular, ICESCR Article 2(1) requires that States "take steps, individually and *through international assistance and cooperation*" to fulfill the rights set out in the ICESCR.¹⁸² Such steps include negotiations with IFIs, during which States must ensure that rights are not undermined.¹⁸³ States should "do all [they] can" to ensure that the "policies and decisions" of the IFIs "are in conformity with the obligations of States parties under the Covenant."¹⁸⁴ Core ICESCR obligations, such as those regarding the rights to food, education, and health, give rise to international responsibilities for developed States; if international antipoverty strategies do not respect these core obligations, they are "inconsistent with the legally binding obligations of the State party."¹⁸⁵

The U.N.-appointed Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly

economic, cultural and social rights has said of States acting collectively through international organizations:

All States, whether acting individually or collectively (including through international and regional organizations of which they are members), have the obligations to respect, protect and fulfill human rights. They should ensure that any and all of their activities concerning their lending and borrowing decisions, those of international or national public or private institutions to which they belong or in which they have an interest, the negotiation and implementation of loan agreements or other debt instruments, the utilization of loan funds, debt repayments, the renegotiation and restructuring of external debt, and the provision of debt relief when appropriate, do not derogate from these obligations.¹⁸⁶

C. OBLIGATIONS OF MINING COMPANIES' HOME STATES

As in most countries where governments lack material and technical resources, in Haiti, the development of the mining industry is being led in part by companies from outside the country—namely, from the United States and Canada. States that are home to powerful multinational companies have responsibilities to protect against human rights abuses by those companies in their operations abroad. Leading experts in international law and human rights have clarified, through the 2011 Maastricht Principles, that the obligations of States where companies are domiciled (“home states”) to protect the economic, social, and cultural human rights of people affected by those companies’ extraterritorial activities include a duty to regulate transnational corporations and business enterprises through administrative, legislative, investigative, adjudicatory, and other measures.¹⁸⁷

6. Obligations of IFIs

IFIs such as the World Bank Group—which includes the IFC, the International Bank for Reconstruction and Development, the International Development Association, the Multilateral Investment Guarantee Agency, and the International Center for the Settlement of Investment Disputes—have human rights obligations. These obligations apply to the actions IFIs take to support the development of the mining industry in Haiti, including through their technical and financial assistance to the Haitian government and private mining companies.

All IFIs have human rights duties because they have “international legal personality,”¹⁸⁸ or rights and obligations under international law. They are bound by general rules of international law,¹⁸⁹ which include a range of human rights obligations.¹⁹⁰ The World Bank Group also has human rights obligations as a specialized U.N. agency. Because international organizations can be bound by obligations under their own constitutions,¹⁹¹ and because the U.N. Charter includes human rights,¹⁹² the World Bank Group is bound by the human rights obligations that emerge from the U.N. Charter. Human rights law is further relevant to IFIs through the human rights obligations of individual Member States under treaties to which they are party and under

customary international law.¹⁹³ As discussed above, those States must take their human rights obligations into account when acting as members of any international organization.

Box 6-7: Mining, Security, and Human Rights

Mining companies in the gold industry in various countries frequently rely on private security personnel and State security forces to protect their mining operations. State security forces in a range of countries have violated the human rights of citizens in communities affected by gold mining, particularly in response to anti-mining protests. Reports indicate that in some cases, State security forces—police, the army, and special forces—have been contracted by, and requested to act by, mining companies. In other cases, mining companies have been aware of, or acquiesced in, violence perpetrated by State security forces.¹⁹⁴

State Security Forces Acting in Concert with Mining Companies

Gold mining operations in various countries provide examples of violations of the human rights of communities by security forces reportedly acting in concert with companies. In Guatemala, police used tear gas and flash bombs to violently evict protesters after a two-year peaceful blockade of the El Tambor gold mine, leaving 23 community members injured in a clash in May 2014.¹⁹⁵ Peru has been the site of a similar government crackdown on social protests and the criminalization of activities defined as “anti-mining.”¹⁹⁶ At the Bogoso Gold Mine, in Prestea, Ghana, local community members have reported that police and military forces have responded to local opposition to mining with violence, intimidation tactics, and aggression.¹⁹⁷ At Freeport-McMoran’s Grasberg gold and copper mine, in Papua, Indonesian national police fired live ammunition at workers, killing one protester and injuring six others during a strike organized by local workers in October 2011.¹⁹⁸

Private Security Arrangements

Gold mining companies’ reliance on private security personnel to protect concession areas has given rise to a spate of security-related human rights abuses in recent years. This state of affairs has relevance in Haiti, where the current mining law framework expressly provides for private security arrangements. The conventions signed between the government of Haiti

and mining companies give companies the right to establish security services to guard their areas of work and to provide security for their products during transport.¹⁹⁹ The articles in these conventions also specify that the government of Haiti will extend licenses to these security personnel to carry firearms.²⁰⁰

At the Aurora gold mine, in Gauteng, South Africa, four “illegal” miners were shot to death underground by private security personnel in 2011.²⁰¹ In Papua New Guinea, private security personnel at the Porgera gold mine, managed by the Canadian company Barrick Gold, were reported to have engaged in a pattern of gender-based violence and other violent abuses against local communities surrounding the gold mine in 2009 and 2010.²⁰² In April 2015, Barrick paid an out-of-court settlement to 11 female victims of assault and rape at the hands of police and security personnel at the Porgera mine.²⁰³

Frameworks for Security-Related Human Rights Violations

Currently, there is no binding international human rights law framework that governs mining companies and their use of security forces. The Voluntary Principles on Security and Human Rights provide a specialized regime to guide companies in the extractive sector in the provision of security for their operations, whether by public or private security forces.²⁰⁴ (See discussion on voluntary principles, *infra*). According to the Voluntary Principles, companies should ensure that their security forces act in a manner consistent with applicable human rights standards and guidelines regarding the use of force.²⁰⁵ In response to a spate of security-related human rights abuses in 2011 at the North Mara mine in Tanzania, African Barrick Gold sought to better implement the Voluntary Principles by hiring a consulting company to train Tanzanian police on international human rights standards.²⁰⁶ Increasingly, gold mining companies are investing in preventive measures and community engagement to reduce security-related human rights abuses, viewing instability and community-company violence as a social risk to be managed.²⁰⁷

Security Issues in Context: A History of Violence in Haiti

It is crucial for mining companies operating and planning to operate in Haiti to be aware of the precarious security context and the long history of State

and non-State violence that continues to permeate the social fabric of Haitian society. The following statement about the role of violence in Haiti was provided by a Haitian community organizer with the *Kolektif Jistis Min* (Justice in Mining Collective).

 Community Organizer in Northwest Haiti Speaks

Violence is a constant theme in the history of the Haitian people. In Haiti, violence often leads to more violence, in part because victims cannot obtain justice or reparations—even if they have all the proof needed to show who committed the criminal act. Our government institutions are weak and this leads to impunity.

We can say that the history of violence on this land began on December 6, 1492, when the Spanish arrived and perpetrated a number of violent acts. Violence increased when the French arrived, notably during the period when the colonists kidnapped Black people in Africa to come to Haiti. It was amidst great violence that Haitians fought for and won their independence in 1804.

Haitian farmers have been victims of a number of massacres in Haiti. For example, the Machatè Massacre in the South, the Rivèl Massacre in the West, the Pyat Massacre in the Artibonite, and the Massacre in Jean Rabel, in the Northwest, on July 23, 1987, that occurred when farmers organized to demand their right to land, and the elite landowners, with the help of Duvalier's rogue army (Macoutes), killed over 139 farmers. Through today, the criminals responsible for the massacre continue to threaten farmers in plain view of the police and the justice system.

It is clear that in Haiti, when people demand respect for their rights, authorities respond with repression. When there are protests, when the Haitian people rise up because they feel like they cannot continue suffering, authorities respond with repression, in ways that are both legal and illegal. For example, look at the way in which authorities forcibly evicted the displaced from places they had settled after the January 12, 2010, earthquake. Authorities operated in concert with the police. There are a number of assassinations that have occurred in Haiti where authorities either committed the murder or facilitated it, for example the killings of Jean Marie Vincent, Jean Léopold Dominique, Walky Calixte, and others. Again, there are no reparations or justice after such criminal acts.²⁰⁸

7. Responsibilities of Mining Companies

While mining companies do not have the full range of obligations that States have to *fulfill* the rights of those with whom they interact, they have a responsibility to *respect* human rights.²⁰⁹ Mining companies are also obligated to comply with national laws that protect Haitians and regulate mining activities. Some entities, including Newmont-Eurasian, have made additional

voluntary commitments related to human rights standards and, most relevant here, to stakeholder engagement.

The obligation to respect human rights²¹⁰ requires mining companies to avoid causing or contributing to violations of human rights and to work to prevent or mitigate adverse human rights impacts of their activities.²¹¹ Considered an authoritative global standard, the U.N. Guiding Principles on Business and Human Rights make clear that the responsibility to respect means all companies should make a meaningful human rights policy commitment, should perform human rights due diligence,²¹² and should engage in remediation of adverse human rights impacts that they cause or to which they contribute.²¹³ The Guiding Principles call for due diligence processes that involve meaningful consultation with affected groups and formal reporting on how the company is addressing human right impacts.²¹⁴ Although not an independently binding legal instrument, the Guiding Principles represent an emerging consensus and have been incorporated into law²¹⁵ and policies of companies and international organizations.²¹⁶

At a minimum, this requirement to respect rights applies to the rights contained in the ICCPR and the ICESCR, as well as core labor rights set out in the International Labour Organization's Declaration on Fundamental Principles and Rights at Work.²¹⁷ Mining companies are thus required to *respect* Haitians' human rights, including the rights to information, participation, freedom of assembly, water, health, food, and freedom from forced eviction, all of which are included in or derived from the ICCPR and the ICESCR.

Resident of Patricko Speaks

The company entered on its own. They were not in touch with anyone, not the ASEC. No one. When they arrived they told us they were here legally.²¹⁸

The Guiding Principles reinforce other international standards of corporate conduct. The Guidelines for Multinationals, put out by the Organisation for Economic Co-operation and Development (OECD), also set standards that establish corporate responsibilities.²¹⁹ An intergovernmental organization comprised of thirty-four economically advanced countries including the United States, Canada, and many European countries, the OECD revised the Guidelines in 2011 to include a human rights chapter.²²⁰ The government-backed Guidelines, while designed as voluntary recommendations, are recognized as soft law, and select guidelines have been formally incorporated into international legal instruments.²²¹ The Guidelines affirm that companies should respect human rights, including by avoiding causing or contributing to adverse human rights impacts and by addressing those impacts with which they are involved.²²² The Guidelines also place responsibility on companies to perform human rights due diligence and remediation processes.²²³

In addition to obeying international standards and the regulations applicable in the countries where they operate, mining companies must follow the national laws of their home states—where they have their center of activity or are registered. For example, U.S. mining companies operating in Haiti must comply with the Foreign Corruption Protection Act, a U.S. law that forbids U.S. companies and their U.S. employees or agents from bribing foreign officials outside the United States.²²⁴

A. INSTITUTIONAL COMMITMENTS

A number of intergovernmental and non-State actors have adopted internal standards that are relevant to determining who is responsible for protecting the rights of Haitians. Companies and IFIs have established voluntary standards that aim to reduce or mitigate the social and environmental impacts of their operations. Often, these standards encompass impacts addressed by international human rights law. To the extent they function to protect and promote Haitians' human rights, they are welcome. But such voluntary institutional commitments are no substitute for human rights law. They are not necessarily aimed at ensuring the respect, protection, or fulfillment of human rights, and they do not give rise to the same duties.

To put such commitments into effect as complements to human rights law, non-State actors should ensure that they are meaningfully accountable for failure to adhere to voluntary standards. To that end, some actors have established processes intended to receive and investigate complaints from affected parties, to provide oversight, and to review compliance with voluntary standards. Such formal processes—often referred to as nonjudicial accountability mechanisms—must be accessible to affected communities and sufficiently empowered to redress violations of companies' or IFIs' internal standards.

i. Relevant Policies and Standards at IFIs

Many IFIs have promulgated internal social and environmental standards.²²⁵ These standards typically establish requirements for both the financial institution and the States or companies that receive IFI financing.

The public sector activities of the World Bank are currently governed by the World Bank's Operational Policies. As of the time when this Report went to press, the World Bank was revising those of its Operational Policies pertaining to social and environmental impacts, often referred to as its "Safeguard Policies."²²⁶ The Safeguard Policies provide standards for borrowing States and for World Bank staff. For example, with respect to projects that are likely to have significant environmental impacts, borrowing States are required to consult with project-affected groups as part of an environmental assessment²²⁷ and World Bank staff are required to consider the nature and adequacy of these consultations when reviewing the environmental assessment.²²⁸ The World Bank has established a mechanism—the Inspection Panel—to receive complaints from people who have been adversely affected by or fear future harms as a result of World Bank projects and to evaluate the World Bank's compliance with its own policies.²²⁹

The private sector arm of the World Bank, the IFC, has established Performance Standards that require clients to take actions intended to identify, avoid, and mitigate the environmental and social risks of projects.²³⁰ The IFC has also established an accountability mechanism—the Compliance Advisor/Ombudsman—to receive complaints from project-affected people and review the IFC’s compliance with the Performance Standards.²³¹

Box 6-8: International Finance Corporation Support for Eurasian Minerals in Haiti

In 2010, the International Financial Corporation (IFC) made a \$10.3 million equity investment in Eurasian Minerals Inc. (Eurasian) to support exploration and prospect in Haiti and other select countries.²³² The IFC’s Environmental and Social Performance Standards²³³ consequently impose on Eurasian (and its joint venture partner in Haiti, Newmont) responsibilities for managing environmental and social risks. The IFC, too, is responsible for adequately monitoring Eurasian operations. IFC clients must comply with eight Performance Standards,²³⁴ which address issues including, among others, community engagement,²³⁵ the existence of a grievance mechanism,²³⁶ and land acquisition.²³⁷ The standards require community consultation early in the life of the project, including disclosure of all relevant information, through a process that is inclusive, free of manipulation, and conducive to “meaningful participation.”

ii. Company Commitments

Some mining entities have publicly articulated the standards of conduct to which they are committed. Newmont-Eurasian, for example, has a standalone policy addressing sustainability and stakeholder engagement and is also a member of numerous external, multi-stakeholder initiatives.²³⁸ These initiatives include, among others:

- The U.N. Global Compact: an initiative through which companies pledge to embrace and operationalize ten principles related to human rights, labor, the environment, and anticorruption, including the principle that businesses should “support and respect the protection of internationally proclaimed human rights”;²³⁹
- The Voluntary Principles on Security and Human Rights: a set of principles designed to address human rights risks posed by public and private security operations in the extractive and energy industries;²⁴⁰ and

- The International Council on Mining and Minerals: a group of mining companies and associations that have committed to integrate ten principles related to sustainable development into corporate policy and to “work to obtain the consent” of Indigenous Peoples for projects on their lands or likely to affect their lands and resources.²⁴¹

Newmont has also made a public commitment to the principle of FPIC (see *supra* Box 6-2), specifically in its standards to “access and acquire land” based on a negotiated agreement.”²⁴²

In its 2010 publication *Beyond the Mine*, Newmont shared its community approach:

[O]ur approach is to consult with local communities in an open and transparent manner. Further, we believe that consultation should occur freely and voluntarily, and be based upon a clear explanation of the intent and scope of the proposed project. To make this engagement as accessible as possible, we strive to present project information in a culturally appropriate manner, form and language. Finally, we believe in starting this process as early as possible.²⁴³

These commitments entail a range of responsibilities to which companies in the early stages of mining should be held accountable.

E. Conclusion

Even at the earliest phases of mineral exploration, Haitian communities have human rights that must be respected, protected, and fulfilled. Powerful actors—including the Haitian State, mining companies, and IFIs—have specific obligations toward communities where exploration activities are undertaken. An investigation into the use of land access agreements in one region uncovered evidence that the rights of community members are vulnerable and that stronger protections should be put in place to safeguard human rights.

Human rights are not respected or fulfilled by nominal commitments or periodic compliance with best practices. Respect for human rights requires that robust and continuous steps be taken to ensure that the rights of Haitians are respected and protected if the mining industry is developed. International law requires such steps, and each key actor has a role to play. The next chapter sets out specific recommended actions for the government of Haiti, mining companies, and international institutions.

¹ Press Release, U.N. Human Rights Council, India: Urgent call to halt Odisha mega-steel project amid serious human rights concerns (Oct. 1, 2013), <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=13805>.

² Haiti has ratified the following multilateral human rights treaties, *inter alia*: International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3; S. Treaty Doc. No. 95-19(1967) (entered into force Jan. 3, 1976) [hereinafter ICESCR]; International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171, S. Treaty Doc. No. 95-20 (1966) (entered into force Mar. 23, 1976) [hereinafter ICCPR]; Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* Dec. 18, 1979, G.A. Res. 34/180, 34 U.N. GAOR, 34th Sess., Supp. No. 46, at 193, U.N. Doc. A/34/46 (entered into force Sep. 3, 1981) [hereinafter CEDAW]; Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, *opened for signature* Mar. 30, 2007, G.A. Res. 61/106, Annex I, U.N. GAOR, 61st Sess., Supp. No. 49, at 65, U.N. Doc. A/61/49 (Dec. 13, 2006) (entered into force May 3, 2008) [hereinafter CRPD]; International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969) [hereinafter CERD]. In many cases, these rights are also guaranteed by the Haitian Constitution.

³ ICCPR, *supra* note 2, arts. 2(1), 3, 25; ICESCR, *supra* note 2, arts. 2(2), 3, 15; U.N. Econ. & Soc. Council, U.N. Comm. on Econ., Soc. & Cultural Rights (CESCR), General Comment No. 21: Right of everyone to take part in cultural life, ¶ 40, U.N. Doc. E/C.12/GC/21 (Dec. 21, 2009) [hereinafter CESCR, General Comment No. 21] (individuals have the right “[t]o take part freely in an active and informed way, and without discrimination, in any important decision-making process that may have an impact on his or her way of life”); U.N. Human Rts. Comm., General Comment No. 25: The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25), ¶ 1, U.N. Doc. CCPR/C/21/Rev.1/Add. 7 (Aug. 27, 1996) [hereinafter HRC, General Comment No. 25] (Governments must proactively take all steps “necessary to ensure that citizens have an effective opportunity to enjoy” the right to participation). The right of all groups to participate fully, free from interference and discrimination, and on a basis of equality, is guaranteed by a range of human rights treaties. See ICCPR, *supra* note 2, arts. 2, 3, 25; ICESCR, *supra* note 2, arts. 2, 3, 15; CEDAW, *supra* note 2, arts. 3, 7; CRPD, *supra* note 2, arts. 3, 29, 30. In addition to this grounding in international law, the right to participation is also implicit in a range of rights set forth in the Haitian Constitution, including the right to vote and the right to equality under the law. See CONSTITUTION DE LA RÉPUBLIQUE D’HAÏTI, arts. 52, 52-1, 18 (1987), https://www.constituteproject.org/constitution/Haiti_2012.pdf [hereinafter Haitian Constitution or CONST. D’HAÏTI].

⁴ The U.N. Special Rapporteur on Extreme Poverty and Human Rights has identified four areas in which human rights law requires community participation: “(a) decision making about policy priorities; (b) formulation of programmes to implement policies; (c) monitoring the process of implementation; and (d) evaluating the outcomes, and then taking corrective actions.” Special Rapporteur on Extreme Poverty and Human Rights, *Rep. of the independent expert on the question of human rights and extreme poverty*, U.N. Human Rights Council, ¶ 75, U.N. Doc. A/HRC/7/15 (Feb. 28, 2008) (by Arjun Sengupta).

⁵ ICCPR, *supra* note 2, art. 19. The International Covenant on Economic and Social Rights has been interpreted to include the right of access to information in relation to specific substantive rights (e.g., the right to health, ICESCR, *supra* note 2, art. 12, and the right to water). See U.N. Econ. & Soc. Council, U.N. Comm. on Econ., Soc. & Cultural Rights (CESCR), General Comment No. 14: The right to the highest attainable standard of health, ¶ 11, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000) [hereinafter CESCR, General Comment No. 14]; U.N. Econ. & Soc. Council, U.N. Comm. on Econ., Soc. & Cultural Rights (CESCR), General Comment No. 15: The right to water, ¶ 48, U.N. Doc. E/C.12/2002/11 (Jan. 20, 2003) [hereinafter CESCR, General Comment

No. 15]. The right to information is also enshrined in the Haitian Constitution, both in the preamble and in Article 40, which articulates the government's duty to publish in oral, written, and televised press, in Creole and French, "all laws, orders, decrees, international agreements, treaties, and conventions on everything affecting the national life, except for information concerning national security." CONST. D'HAÏTI art. 40. The preamble states: "The Haitian people proclaim this Constitution ... [t]o fortify the national unity, eliminating all discrimination between the populations, of the town and of the countryside, by the acceptance of the community of languages and of culture and by the recognition of the right to progress, to information, to education, to health, to work and to leisure for all citizens [masculine] and citizens [feminine]." *Id.* at pmb1.

⁶ U.N. Human Rts. Comm., General Comment No. 34: Freedom of opinion and expression (Art. 19), ¶ 18, U.N. Doc. CCPR/C/GC/34 (Sept. 12, 2011).

⁷ U.N. Econ. & Soc. Council, U.N. Comm. on Econ., Soc. & Cultural Rights (CESCR), General Comment No. 2: International technical assistance measures, ¶ 8, U.N. Doc. E/1990/23, annex III at 86 (Feb. 2, 1990) [hereinafter CESCR, General Comment No. 2].

⁸ Special Rapporteur on Extreme Poverty and Human Rights, *Rep. of the Special Rapporteur on extreme poverty and human rights*, U.N. Human Rights Council, ¶ 61, U.N. Doc. A/HRC/23/36 (Mar. 11, 2013) (by Magdalena Sepúlveda Carmona); CESCR, General Comment No. 14, *supra* note 5, at ¶ 12; CESCR, General Comment No. 15, *supra* note 5, at ¶ 12.

⁹ ICCPR, *supra* note 2, arts. 17, 18, 19, 25, 27; Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, *Rep. of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, ¶ 24, U.N. Doc. A/HRC/14/23 (Apr. 20, 2010) (by Frank La Rue). The Haitian Constitution also protects liberty of opinion and expression, specifying that every Haitian has the right to express her opinions freely and in whatever manner and through whichever means she chooses. CONST. D'HAÏTI art. 28. The right to peaceful freedom of assembly is also explicitly protected by the Constitution. CONST. D'HAÏTI art. 31. The Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression has declared that these rights are crucial to empowering the poor. *See Rep. of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, supra*, at ¶ 56.

¹⁰ ICCPR, *supra* note 2.

¹¹ ICESCR, *supra* note 2.

¹² CEDAW, *supra* note 2.

¹³ Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3, 28 I.L.M. 1456 (1989) [hereinafter CRC].

¹⁴ Charter of the Organization of American States, Apr. 30, 1948, 119 U.N.T.S. 3 (entered into force Dec. 13, 1951).

¹⁵ Organization of American States, American Convention on Human Rights, Nov. 21, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 143 (1969) (entered into force July 18, 1978).

¹⁶ CERD, *supra* note 2.

¹⁷ CRPD, *supra* note 2.

¹⁸ Bas de Saint Anne is a section in the commune of Anse-à-Foleur, Northwest Department.

¹⁹ Interview with Conseil d'Administration de la Section Communale (CASEC) of Bat Sentan (Feb. 21, 2015) (on file with the New York University School of Law Global Justice Clinic).

²⁰ Camp Coq is in the commune of Limbe, North Department.

²¹ Interview with Camp Coq leader (Feb. 11, 2014) (on file with the New York University School of Law Global Justice Clinic).

²² The IFC denied GJC's information disclosure request on April 15, 2015. Email from IFC to student, Global Justice Clinic (Apr 15, 2015, 2:04 PM EST) (on file with the New York University School of Law Global Justice Clinic). GJC appealed the denial and the IFC responded that under its 2006 information disclosure policy, the IFC is not required to disclose the documents that GJC requested. Email from Karen Finkelston to Margaret Satterthwaite, Director, Global Justice Clinic (May 29, 2015, 5:59 PM EDT) (on file with the New York University School of Law Global Justice Clinic).

²³ See Notes of a Meeting between GJC and Newmont-Eurasian Representatives, New York (May 5, 2015) (on file with the New York University School of Law Global Justice Clinic). Newmont-Eurasian later provided a "summary of baseline efforts" for La Montagne and Grand Bois to GJC in email correspondence. Email from Matt King to Margaret Satterthwaite, Director, Global Justice Clinic (July 23, 2015, 3:56 PM EST) (on file with the New York University School of Law Global Justice Clinic).

²⁴ Letter from Michel Lamarre, Chief Executive Officer for SOMINE, to Margaret Satterthwaite, Director, Global Justice Clinic (Aug. 28, 2015) [hereinafter SOMINE Letter] (on file with the New York University School of Law Global Justice Clinic).

²⁵ Mr. Remarais told GJC that according to the Mining Decree, all company-produced documents are confidential. GJC Notes of meeting with Director Ludner Remarais of the BME, Port-au-Prince, Haiti (June 26, 2015) (on file with the New York University School of Law Global Justice Clinic).

²⁶ Interview with Lafontaine Orvild in Port-au-Prince, Haiti (Feb. 26, 2015) (on file with the New York University School of Law Global Justice Clinic).

²⁷ Patricko is a village in the commune of Terrier Rouge. It is approximately 10 km from the larger village of Roche Plate, which is on the other side of the hills where SOMINE has explored for minerals.

²⁸ Roche Plat is the name of a section in the commune of Trou du Nord in the Northeast Department. Roche Plat is also the name of the biggest village in the section.

²⁹ GJC Notes of Community Meetings with residents of Patricko, in Northeast Department, Haiti (Apr. 16, 2013; May 25, 2013; Feb. 9, 2014; Mar. 11, 2014; Aug. 19, 2014; Apr. 29, 2015) (on file with the New York University School of Law Global Justice Clinic).

³⁰ See Somine Letter, *supra* note 24.

³¹ *Id.*

³² Letter from residents of Patricko to SOMINE (Oct. 24, 2011) (on file with the New York University School of Law Global Justice Clinic). The demands in the letter included: improving access roads; drilling a well to help residents access water; and providing workers tools they need to work and rotate workers every 15 days to ensure that most all people in the community have the chance to work; building a community center for the Mouvman Peyizan Patricko (M.P.P.). The letter states that if SOMINE does not respond, the community will "take other steps" to get SOMINE's attention.

³³ GJC Notes of Community Meeting with residents of Patricko, in Northeast Department (Apr. 17, 2013) (on file with the New York University School of Law Global Justice Clinic).

³⁴ See Somine Letter, *supra* note 24.

³⁵ Letter from residents of Patricko to SOMINE (Mar. 12, 2013) (on file with the New York University School of Law Global Justice Clinic).

³⁶ The letter made the following demands: 1) Build a good road; 2) Ensure access fresh water; 3) Pay landowners when the company crosses land they own, particularly land that people farm; 4) Offer local residents jobs.

³⁷ GJC Notes of Community Meetings with residents of Patricko, in Northeast Department, Haiti (Apr. 16, 2013; May 25, 2013; Feb. 9, 2014; Mar. 11, 2014; Aug. 19, 2014; Apr. 29, 2015) (on file with the New York University School of Law Global Justice Clinic).

³⁸ The Megaprojects Observatory is a coalition of Haitian organizations and activists that monitors the development and impact of large-scale investment projects in Haiti. Organizations came together to create the Observatory to lead advocacy efforts related to the tourist development project launched in August 2013 on the small island of Ile-à-Vache. The Observatory also conducts research about tourist projects in other parts of the country, factories and free trade zones, and agribusiness projects.

³⁹ As drafted, this clause applies indiscriminately to all mining-related information, including information pertaining to the public interest, such as environmental and social data. For a complete analysis of the draft mining law, see Chapter V of this Report.

⁴⁰ Brief submitted by Global Justice Clinic, NYU School of Law, Lafontaine Orvild, Independent Journalist, Justice in Mining Collective and the Megaprojects Observatory, *La situation de l'accès à l'information en Haïti*, Inter-Am. Comm'n on H.R., 154th Sess. (Mar. 17, 2015), http://chrgj.org/wp-content/uploads/2015/03/150325HaitianRelease_French.pdf (in French); Inter-Am. Comm'n on H.R., *Rep. on the 154th Sess. of the IACHR* (Mar. 13-27, 2015), at 12, <http://www.oas.org/es/cidh/prensa/docs/Report-154.pdf>.

⁴¹ The Commission expressed its regret at the State's absence. See *Rep. on the 154th Sess. of the IACHR*, *supra* note 40, at 12.

⁴² *Id.*

⁴³ U.N. Econ. & Soc. Council, Permanent Forum on Indigenous Issues, Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples, ¶¶ 46(i), 47, U.N. Doc. E/C.19/2005/3 (Feb. 17, 2005).

⁴⁴ *Id.* ¶ 48(ii).

⁴⁵ *Id.* ¶ 48(iv).

⁴⁶ *Id.* ¶ 46(i).

⁴⁷ EMILY GREENSPAN, OXFAM AMERICA & CENTER FOR PUBLIC INTEREST LAW, *FREE, PRIOR, AND INFORMED CONSENT IN AFRICA: AN EMERGING STANDARD FOR EXTRACTIVE INDUSTRY PROJECTS*, OXFAM AMERICA RESEARCH BACKGROUNDER SERIES (2014), <http://www.oxfamamerica.org/static/media/files/community-consent-in-africa-jan-2014-oxfam-americaAA.PDF> ("More broadly, FPIC is emerging as a best practice for safeguarding the human rights of all communities affected by extractive industry projects. These include, for example, the right to food, development, property, culture, and a healthy environment.").

⁴⁸ CESCR, General Comment No. 21, *supra* note 3, at ¶ 55(e) (interpreting article 15, paragraph 1 (a) of the Covenant to impose a duty on the State of obtaining FPIC in some cases).

⁴⁹ U.N. Econ. & Soc. Council, U.N. Comm. on Econ., Soc. & Cultural Rights, Concluding observations of the Committee on Economic Social and Cultural Rights: Colombia, ¶ 9, U.N. Doc. E/C.12/COL/CO/5 (June 7, 2010). (“The Committee is concerned that infrastructure, development and mining mega-projects are being carried out in the State party without the free, prior and informed consent of the affected indigenous and Afro-Colombian communities. The Committee is also concerned that, according to the Constitutional Court, the legitimate representatives of the Afro-Colombian communities did not participate in the process of consultation and the authorities did not provide accurate information on the scope and the impact of the mining mega-project of Chocò and Antioquia.”).

⁵⁰ Press Release, U.N. Human Rights Council, Working Group on the issue of human rights and transnational corporations and other business enterprises, India: Urgent call to halt Odisha mega-steel project amid serious human rights concerns (Oct. 1, 2013), <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=13805> (“‘People should not be impoverished in the name of development; their rights must take precedence over potential profits,’ stressed the U.N. Special Rapporteur on extreme poverty and human rights, Magdalena Sepúlveda. ‘Projects such as these, with such a large potential impact on the rights of people living in poverty, must not go ahead without the meaningful participation, consent and involvement of the community affected.’”).

⁵¹ Special Rapporteur on the Right to Food, *Rep. of the Special Rapporteur on the right to food*, U.N. Human Rights Council, Annex at 16, U.N. Doc. A/HRC/13/33/Add.2 (Dec. 28, 2009) (by Olivier De Schutter).

⁵² The right to water is explicitly included in CEDAW and the CRC and is implicit in other guarantees set out in the ICESCR, the ICCPR, the ACHR and its Additional Protocol (Protocol of San Salvador). *See* CEDAW, *supra* note 2, art. 14(2); CRC, *supra* note 13, art. 24(2). CESCR General Comment No. 15, *supra* note 5, sets out the key elements of the right, as well as the duties of various actors. In brief, water must be available, accessible, acceptable and of adequate quality.

⁵³ CESCR General Comment 15, *supra* note 5, at ¶ 3. While the right to water is not specifically mentioned in the Haitian Constitution, it is implicitly protected because it is necessary for the achievement of rights that are explicitly enumerated, including the rights to health, decent housing, education, food, social security, and work. *See* CONST. D’HAÏTI arts. 19, 22, 23, 32, 35.

⁵⁴ Several core international human rights treaties protect the right to health, including the ICESCR art. 12, CEDAW art. 12, CERD art. 5, and CRC art. 24. The ICESCR articulates the right to “the enjoyment of the highest attainable standard of physical and mental health,” ICESCR, *supra* note 2, art. 12, and CEDAW emphasizes the importance of equal access to healthcare for women and for rural women in particular, *see* CEDAW, *supra* note 2, arts. 12, 14. The CESCR has explained that “health is a fundamental human right indispensable for the exercise of other human rights.” CESCR, General Comment No. 14, *supra* note 5, at ¶ 1. The Haitian Constitution specifies that the State “has the absolute obligation to guarantee the right to life, health, and respect of the human person for all citizens without distinction.” CONST. D’HAÏTI art. 19. The State’s failure to prevent and remedy violations of the right to health, including harm to the environment that affects a community’s health and well-being, thus violates the Haitian Constitution.

⁵⁵ CESCR, General Comment No. 14, *supra* note 5, at ¶ 11.

⁵⁶ Jérémie Gilbert, *Land Rights as Human Rights: The Case for a Specific Right to Land*, 10 SUR INT’L J. HUM. RTS., no.18, 115, 115–117 (2013). There is no explicit “right to land” in major international human rights treaties.

Numerous rights related to the ownership, use, and transfer of land are recognized, however, as encompassed by existing and emerging human rights law. These rights protections are especially important to poor populations, who often lack access to secure title and tenure. In the face of large-scale appropriation of land in many parts of the world, land rights movements have emerged, organized around the right to land. *Id.*

⁵⁷ Land rights have been recognized as central to the entitlements of indigenous peoples, *see* U.N. Human Rts. Comm., General Comment No. 23: The rights of minorities (Art. 27), ¶ 7, U.N. Doc. CCPR/C/21/Rev.1/Add. 5 (Apr. 26, 1994), and as an important dimension of women's equality, *see* CEDAW, *supra* note 2, art. 14. Emerging from these specific contexts are broader understandings that land rights are often bound up with livelihood strategies such as agriculture, and rights essential to daily life, such as the rights to water, food, and shelter. *See* Gilbert, *Land Rights as Human Rights*, *supra* note 56, at 123–24.

⁵⁸ *See* U.N. Econ. & Soc. Council, U.N. Comm. on Econ., Soc. & Cultural Rights (CESCR), General Comment No. 7: The right to adequate housing (art. 11(1) of the Covenant): Forced evictions, U.N. Doc. E/1998/22, annex IV at 113 (May 20, 1997).

⁵⁹ *See* Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, *Rep. of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living*, U.N. Human Rights Council, ¶ 21, U.N. Doc. A/HRC/4/18 (Feb. 5, 2007) (by Miloon Kothari).

⁶⁰ Article 11 of the ICESCR guarantees the right of everyone to an adequate standard of living, which includes adequate food. ICESCR, *supra* note 2, art. 11; *see also* Additional Protocol To The American Convention On Human Rights in the Area of Economic, Social and Cultural Rights, “Protocol Of San Salvador,” art. 12, Nov. 17, 1988, O.A.S.T.S. No. 69, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 67 (1992) (entered into force Nov. 16, 1990). Haiti signed the Protocol on November 17, 1988, but has yet to ratify it. Consequently, although it is not legally bound by the text, Haiti must refrain from acts that would defeat the object and purpose of the Protocol. *See* Vienna Convention on the Law of Treaties, art. 18, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 (entered into force Jan. 27, 1980) [hereinafter VCLT].

⁶¹ De Schutter, *Rep. of the Special Rapporteur on the right to food* (2009), *supra* note 51, at ¶ 4; *see also* ICESCR, *supra* note 2, art. 11(1). The two core components of the right to adequate food are “the availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals,” and the “accessibility of such food in ways that are sustainable.” U.N. Econ. & Soc. Council, U.N. Comm. on Econ., Soc. & Cultural Rights, General Comment No. 12: The right to adequate food (art. 11), ¶ 8, U.N. Doc. E/C.12/1999/5 (May 12, 1999) [hereinafter CESCR, General Comment No. 12]. Availability includes the possibility of feeding oneself directly from productive land and resources or from market and distribution systems that can move food from where it is produced to where it is needed. *Id.* ¶ 12. Accessibility refers both to a household's ability to obtain food in a way that does not threaten or compromise other basic needs, and to the ability of all households to access food. *Id.* ¶ 13.

⁶² De Schutter, *Rep. of the Special Rapporteur on the right to food* (2009), *supra* note 51, at 16, ¶ 4. Recognizing these risks, the U.N. Special Rapporteur on the Right to Food has proposed a set of principles aimed at ensuring the protection of the right to food in the context of large-scale land acquisitions or leases. *Id.* The Haitian Constitution recognizes that agriculture is “the main source of the Nation's wealth” and “a guarantee of the well-being of the people and the socio-economic progress of the Nation.” For this reason, the government “has the obligation to establish the structures necessary to ensure the maximum productivity of land” in Haiti. CONST. D'HAÏTI art. 249.

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- ⁶³ THE GOVERNMENT OF HAITI, THE WORLD BANK GROUP, & THE UNITED NATIONS, CLEAN WATER, IMPROVED SANITATION, BETTER HEALTH: HAITI CONFERENCE PAPER 10 (Oct. 9, 2014), http://www.worldbank.org/content/dam/Worldbank/document/book_haiti_6oct_print.pdf.
- ⁶⁴ CENTER FOR HUMAN RIGHTS AND GLOBAL JUSTICE, PARTNERS IN HEALTH, ROBERT F. KENNEDY MEMORIAL CENTER FOR HUMAN RIGHTS, & ZAMNI LASANTE, *WÒCH NAN SOLEY: THE DENIAL OF THE RIGHT TO WATER IN HAITI* 16 (2008), http://parthealth.3cdn.net/0badc680352663967e_v6m6b1ayx.pdf.
- ⁶⁵ See *id.* at 35.
- ⁶⁶ See, e.g., SAFE DRINKING WATER FOUNDATION, *Mining and Water Pollution* (undated), <http://www.safewater.org/PDFS/resourcesknowthefacts/Mining+and+Water+Pollution.pdf>.
- ⁶⁷ See, e.g., *id.*
- ⁶⁸ The Inter-American Commission on Human Rights has found that a State's failure to prevent or mitigate the impacts of mining on communities and the environment violates the right to health. In the 1985 case of the Yanomami Indians, the IACHR found that the Government of Brazil had failed to protect the Yanomami from health violations that resulted from exploitation of the rainforest. Coulter et al., Case 7615, Inter-Am. Comm'n H.R. Res. No. 12/85, OAS/Ser.L/V/II.66, doc.10 rev. 1 (1985).
- ⁶⁹ See, e.g., AIMEE BOULANGER & ALEXANDRA GORMAN, WOMEN'S VOICES FOR THE EARTH, *HARDROCK MINING: RISKS TO COMMUNITY HEALTH* (2004), https://www.earthworksaction.org/files/publications/MiningHealthReport_WVE.pdf?pubs/MiningHealthReport_WVE.pdf.
- ⁷⁰ Lyuba Zarsky, *Sustaining Development: Extractive Industries and Local Communities*, WORLD POL. REV. (Aug. 6, 2013), <http://www.worldpoliticsreview.com/articles/13145/sustaining-development-extractive-industries-and-local-communities>. For a discussion of the effects on rural women specifically, see BERNIE WARD WITH JOHN STRONGMAN, WORLD BANK, *GENDER-SENSITIVE APPROACHES FOR THE EXTRACTIVE INDUSTRY IN PERU: IMPROVING THE IMPACT ON WOMEN IN POVERTY AND THEIR FAMILIES* (2011), <https://openknowledge.worldbank.org/handle/10986/2516>.
- ⁷¹ *Dirty Gold's Impacts*, NO DIRTY GOLD, <http://nodirtygold.earthworksaction.org/impacts#.UzzhUfldWet> (last visited Oct. 4, 2015).
- ⁷² Figure for years 2010–2015. See U.N. DEP'T OF ECON. & SOC. AFFAIRS STATISTICS DIVISION, *WORLD STATISTICS POCKETBOOK 2014 EDITION* 89, U.N. Sales No. E.14.XVII.4 (2014), <http://unstats.un.org/unsd/pocketbook/WSPB2014.pdf>.
- ⁷³ See generally *id.* (providing infant mortality rates for each country in the Caribbean and the Central American regions).
- ⁷⁴ *World Bank Development Indicators*, WORLD BANK (2014), <http://databank.worldbank.org/data/reports.aspx?source=world-development-indicators> (select 'World Development Indicators' as Database, select 'Haiti' and, in Aggregates, 'Latin America & Caribbean (developing only)' as Country, select 'Mortality rate, under-5 (per 1,000 live births)' as Series, and select 'View Recent Years 5' as time).
- ⁷⁵ MINISTRY OF PUBLIC HEALTH AND POPULATION, HAITIAN CHILDHOOD INSTITUTE & ICF INTERNATIONAL, *HAITI: 2012 MORTALITY, MORBIDITY, AND SERVICE UTILIZATION SURVEY: KEY FINDINGS* 12 (2013), <http://dhsprogram.com/pubs/pdf/SR199/SR199.eng.pdf>. One way to measure child nutrition is to compare
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height and weight measurements with an international standard. Children who fall below an expected guideline are determined “stunted.”

⁷⁶ CENTER FOR HUMAN RIGHTS AND GLOBAL JUSTICE, PARTNERS IN HEALTH, ROBERT F. KENNEDY MEMORIAL CENTER FOR HUMAN RIGHTS & ZAMNI LASANTE, SAK VID PA KANPE: THE IMPACT OF U.S. FOOD AID ON HUMAN RIGHTS IN HAITI 10 (2011), <http://chrgj.org/wp-content/uploads/2012/07/sakvidpakanpe.pdf>.

⁷⁷ *World Bank Development Indicators*, WORLD BANK (2012), <http://databank.worldbank.org/data//reports.aspx?source=2&country=HTI&series=&period>.

⁷⁸ *Id.*

⁷⁹ Since the earthquake, the government and its donors have articulated an express goal to decentralize services. Most Haitian people, however, continue to rely on national government ministries rather than departmental, communal or municipal governments to provide services. For example, the Ministry of Public Health and Population manages all the public health clinics in Haiti. See, e.g., Melika Edquist, *Overcoming Challenges to Local Development in Haiti*, EARTH INSTITUTE AT COLUMBIA UNIVERSITY (Feb. 26, 2013), <http://blogs.ei.columbia.edu/2013/02/26/haiti-dialogue-series-overcoming-historical-and-structural-challenges-to-local-development/>.

⁸⁰ LIBRARY OF CONGRESS FEDERAL RESEARCH DIVISION, DOMINICAN REPUBLIC AND HAITI: COUNTRY STUDIES 292 (Helen Chapin Metz ed., 2001), <https://www.loc.gov/item/2001023524/>.

⁸¹ Prior to October 2010, there had been no outbreak of cholera in Haiti for over a century. The cholera strain that caused the outbreak was carried to Haiti from Nepal by peacekeeping troops. Inadequate disposal of waste at the MINUSTAH base in Mèyè, Haiti, contaminated a tributary of the Artibonite River. For more on cholera, see Alejandro Cravioto et al., *Final Report of the Independent Panel of Experts on the Cholera Outbreak in Haiti* (2011), <http://www.un.org/News/dh/infocus/haiti/UN-cholera-report-final.pdf> and TRANSNATIONAL DEVELOPMENT CLINIC, JEROME N. FRANK LEGAL SERVICES ORGANIZATION, YALE LAW SCHOOL, GLOBAL HEALTH JUSTICE PARTNERSHIP OF THE YALE LAW SCHOOL AND THE YALE SCHOOL OF PUBLIC HEALTH, AND ASSOCIATION HAÏTIENNE DE DROIT DE L'ENVIRONNEMENT, PEACEKEEPING WITHOUT ACCOUNTABILITY: THE UNITED NATIONS' RESPONSIBILITY FOR THE HAITIAN CHOLERA EPIDEMIC (2013), http://www.law.yale.edu/documents/pdf/Clinics/Haiti_TDC_Final_Report.pdf.

⁸² Anastasia Moloney, *Haiti struggles to stem cholera as rains come early*, REUTERS (May 29, 2015), <http://www.reuters.com/article/2015/05/29/us-haiti-cholera-idUSKBN0OE26K20150529>.

⁸³ *Id.*

⁸⁴ Scott Dowell et al., *Public Health in Haiti—Challenges and Progress*, 364 NEW ENGL. J. MED. 300, 300 (2011).

⁸⁵ *World Bank Development Indicators: Health Expenditure Per Capita*, WORLD BANK (2013), <http://data.worldbank.org/indicator/SH.XPD.PCAP>.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ Numerous human rights, such as those that have developed concerning housing and food, and in relation to women and indigenous peoples, bear on the relationship of rural Haitians to the land that they occupy and use in their daily lives. See, e.g., Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, *Rep. of the Special Rapporteur on adequate housing as a component of the right*

to an adequate standard of living, U.N. Human Rights Council, ¶ 21, U.N. Doc. A/HRC/4/18 (Feb. 5, 2007) (by Miloon Kothari).

⁸⁹ LAURENT DUBOIS, HAITI: THE AFTERSHOCKS OF HISTORY 48 (2012).

⁹⁰ *Id.* at 105.

⁹¹ Note that in 1826, President Boyer implemented a new Code Rural meant to establish control over agricultural production. The code restricted the freedom of movement of rural residents, outlawed farm cooperatives, and prohibited rural residents from selling their crops on their own. This created a two class society and again, rural residents resisted. “In response to Boyer’s attempts to control and constrain them, rural residents perfected techniques of evading government officials, living as much as possible beyond the gaze of the state.” HAITI: THE AFTERSHOCKS OF HISTORY, *supra* note 89, at 106.

⁹² EARTH INSTITUTE AT COLUMBIA UNIVERSITY, OPTIONS FOR LAND TENURE DISPUTE MANAGEMENT IN RURAL HAITI: CHALLENGES AND OPPORTUNITIES IN THE CÔTE SUD 6 (2012), <http://ac4.ei.columbia.edu/files/2011/10/Options-for-Land-Tenure-Dispute-Management-in-Rural-Haiti.pdf>.

⁹³ LAND ALLIANCE, HAITI LAND TENURE AND PROPERTY RIGHTS: BASIC INFORMATION ON LAND TENURE INSECURITY AND LAND ADMINISTRATION IN HAITI 1 (2014), <http://www.usaidltp.com/sites/default/files/Land%20Tenure%20and%20Property%20Rights%20in%20Haiti.pdf>. The report explores the links between property rights and poverty reduction, and argues for the importance of understanding legal pluralism to create interventions and legislation that better protect poor peoples’ assets.

⁹⁴ *Id.* at 1.

⁹⁵ Jacob Kushner, *Who Owns What in Haiti*, THE NEW YORKER (Jan. 18, 2015), <http://www.newyorker.com/business/currency/owns-haiti>.

⁹⁶ *Id.*

⁹⁷ HARLEY F. ETIENNE, OXFAM AMERICA, LAND RIGHTS, LAND TENURE, AND URBAN RECOVERY: REBUILDING POST-EARTHQUAKE PORT-AU-PRINCE AND LÉOGÂNE, OXFAM AMERICA RESEARCH BACKGROUNDER SERIES 13 (2012), www.oxfamamerica.org/publications/haiti-land-rights-land-tenure-and-urban-recovery.

⁹⁸ *Id.* at 10.

⁹⁹ There is a proliferation of offices with overlapping jurisdictions and mandates concerning land reform—including for example: the *Office Nationale du Cadastre* (ONACA) is the government institution tasked with creating a national registry of land ownership and occupation; the *Comité Interministériel d'Aménagement du Territoire* (Inter-Ministry Committee for the Arrangement of Land, CIAT) manages the work of ONACA; and the *Direction Générale des Impôts* (Directorate General of Taxation, DGI) is tasked with recording land sales—yet insufficient political will and resources to make the complex system function. See OPTIONS FOR LAND TENURE DISPUTE MANAGEMENT IN RURAL HAITI, *supra* note 92, at 6, 15–16.

¹⁰⁰ *Id.*

¹⁰¹ PETER GIAMPOLI & MARK FREUDENBERGER, UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT (USAID), LAND TENURE AND PROPERTY RIGHTS IN HAITI: THE IMPORTANCE OF LAND TENURE AND PROPERTY RIGHTS ISSUES AND POST-EARTHQUAKE RECOVERY IN HAITI, USAID ISSUE BRIEF: PROPERTY RIGHTS AND RESOURCE GOVERNANCE BRIEFING PAPER 6, at 2 (2010).

¹⁰² *Id.*

¹⁰³ The U.S. State Department added in a 2013 report that “[r]eal property interests are handicapped by the absence of a comprehensive civil registry. Bona fide property titles are often non-existent. If they do exist, they are often in conflict with other titles for the same property.” BUREAU OF ECONOMIC AND BUSINESS AFFAIRS, U.S. DEP’T OF STATE, 2013 INVESTMENT CLIMATE STATEMENT–HAITI (Feb. 2013), <http://www.state.gov/e/eb/rls/othr/ics/2013/204654.htm>.

¹⁰⁴ See, for example, the case of Ile-a-Vache, which the government declared as land for public utility in May of 2013. For information and relevant documents: *Investigative Report Concerning Tensions on Île à Vache*, PLAT-FORME DES ORGANISATIONS HAÏTIENNES DES DROITS HUMAINS (POHDH), http://pohdh.org/article.php3?id_article=308 (last visited Oct. 4, 2015). See also Mark Schuller, *Île à Vache Haiti ‘Open for Business’*, COUNTERPUNCH (June 6, 2014), <http://www.counterpunch.org/2014/06/06/ile-a-vache-haiti-open-for-business/>.

¹⁰⁵ See Schuller, *Île à Vache Haiti ‘Open for Business’*, *supra* note 104.

¹⁰⁶ *Agriculture and Food Security*, USAID, <https://www.usaid.gov/haiti/agriculture-and-food-security> (last visited Nov. 15, 2015).

¹⁰⁷ OPTIONS FOR LAND TENURE DISPUTE MANAGEMENT IN RURAL HAITI, *supra* note 92, at 1.

¹⁰⁸ *Id.* at 9.

¹⁰⁹ On the other hand, while many Haitian farmers are hurt by the lack of clarity concerning land ownership and the concentration of land in the hands of the political and economic elite, the very murkiness of the land tenure situation may provide some protection against the kind of large-scale land acquisitions by foreign corporations that some countries have seen in recent years.

¹¹⁰ Republic of Haiti, Decree of 8 March, 1976, Encouraging mining exploration over the entire territory of the Republic and Adapting the existing legal structures to the realities of mining industry, *Décret encourageant la prospection minière sur toute l’étendue du territoire de la République et adaptant les structures juridiques existantes aux réalités de l’industrie minière* art. 68, LE MONITEUR VOL. 19 (March 8, 1976) [hereinafter 1976 Mining Decree], <http://www.bme.gouv.ht/mines/loimin/decminiere.pdf>. Article 68 states: “The beneficiary of a mining title may not occupy the land necessary for its work until after reaching an agreement with the landowners and occupants of the land regarding the amount of compensation to the landowner and occupants for the temporary occupation.” *Id.*

¹¹¹ 1976 Mining Decree, *supra* note 110, art. 68. Note that the law also states that while the arbitral body is deciding, the mining company can occupy the land upon deposit of payment.

¹¹² “If, following mining work, the land becomes unsuitable for agriculture, the mining titleholder must rehabilitate the land.” 1976 Mining Decree, *supra* note 110, art. 69.

¹¹³ Note that “exploration activities” refers to all activities conducted under prospection or research permits.

¹¹⁴ In November 2015 Eurasian Minerals signed an agreement to sell its interests in the Newmont-Eurasian joint venture to Newmont, including the permits in the La Montagne area. See News Release, Eurasian Minerals Inc., Eurasian Minerals Sells Haiti Joint Venture Interests for US \$4 Million and an NSR Royalty, (Nov. 2, 2015), <http://www.eurasianminerals.com/s/news.asp?ReportID=728617>.

¹¹⁵ See Somine Letter, *supra* note 24.

¹¹⁶ See Notes from GJC phone conversation with Representative of Majescor Resources (March 26, 2015) (on file with the New York University School of Law Global Justice Clinic).

¹¹⁷ *Id.*

¹¹⁸ La Montagne is a section that straddles the communes of Jean Rabel and Bai-de-Henne. Most residents whom GJC interviewed or with whom GJC spoke identified the general area where they live as “La Montagne.” When residents indicated the name of the village within La Montagne where they live, it is specified. Newmont now refers to this area as “Northwest Project,” but previously referred to it as “Montagne Project.” See News Release, Eurasian’s Regional Strategic Alliance Lands in Haiti Selected for Designated Project Status (Jan. 18, 2011), <http://www.eurasianminerals.com/s/news.asp?ReportID=619128>.

¹¹⁹ To reach Port-au-Prince from the communities of La Montagne, a traveler without a private 4-wheel drive vehicle must hike (at least two hours and perhaps as many as four) into Jean Rabel. From Jean Rabel a traveler can take the midnight bus to Port-au-Prince, arriving at 6 or 7 in the morning or can make the 2 hour trip to Port-de-Paix, from where pickup trucks transport people and their loads to Gonaives and on to the capital. It is, at minimum, a full day’s journey.

¹²⁰ In early June 2015, GJC learned from residents of Vert-de-Gris that Newmont took down its basecamp. GJC has not visited the area to verify. See News Release, Eurasian Minerals Inc., EMX Outlines Significant Copper-in-Soil Anomaly at the Vert de Gris Porphyry Copper-Gold Prospect, Haiti (July 20, 2010), http://www.eurasianminerals.com/i/pdf/2010-07-20_NR.pdf.

¹²¹ Letter from Nicholas Cotts, External Relations Group Executive for Newmont Mining Corporation, and David Cole, President and CEO of Eurasian Minerals Inc., to Margaret Satterthwaite, Director, Global Justice Clinic, at 6 (Apr. 1, 2015) [hereinafter Newmont Letter] (on file with the New York University School of Law Global Justice Clinic).

¹²² GJC was unable to verify, on the record, exactly how many such agreements have been signed. The authors’ best estimation, based on an analysis of the enumerations on the documents themselves and interviews with individuals familiar with the effort to obtain such agreements, is that several hundred have been signed.

¹²³ INT’L FIN. CORP., IFC PERFORMANCE STANDARDS ON ENVIRONMENTAL AND SOCIAL SUSTAINABILITY 4 (2012), http://www.ifc.org/wps/wcm/connect/c8f524004a73daeca09afdf998895a12/IFC_Performance_Standards.pdf?MOD=AJPERES.

¹²⁴ Newmont Letter, *supra* note 121, at 6.

¹²⁵ See the Annex for the full text of the land access agreement in its original Creole and an English translation done by GJC authors and Haitian colleagues. Note that the authors received the text from residents in La Montagne as well as from a representative of Eurasian in Port-au-Prince in November 2013.

¹²⁶ Haiti’s Mining Decree of 1976 provides that permit holders may not occupy land to undertake mining activities except with the agreement of the landowner and occupant. 1976 Mining Decree, *supra* note 110, art. 68. Mining companies must indemnify land owners for damages. *Id.* art. 68. If an agreement cannot be reached between the company and the landowner or land user, recourse is to be made to a commission that the Mining Decree requires the Haitian mining authority to create. *Id.* art. 68. If, as a result of the company’s activities, the land becomes unsuitable for agriculture, soil rehabilitation is required. *Id.* art. 69.

¹²⁷ Newmont Letter, *supra* note 121, at 7.

¹²⁸ *Id.* at 9.

¹²⁹ Note that the Creole text says “teren etid yo.” The literal translation would be “the studied land.” The “explored land” however, seems to make more sense in English.

¹³⁰ The second sentence of Article 1 is a good example of confusing language. The text says: “Nan lwa Minyè-a li ekri ke yap dedomaje pwopriyete teren yo ou moun ki resposna pwopriete yo, kap okipe teren yo, ki gend wa koutimye ou tout moun ki gen yon dwa jwisans kelkon ou pou tout domaj ke aktivite say o kab koze nan pwopriyete yo ou nan jaden yo.” Creole speakers will appreciate that the language is not accessible to someone who does not read French.

¹³¹ As discussed above, Newmont-Eurasian has stated to GJC that this agreement is limited to the *exploration* phase. This means that if Newmont-Eurasian were to receive an Exploitation Permit, they would need to seek new land access agreements with community members.

¹³² The agreement specifies that the signature of Dominique Boisson, CEO of Marien Mining, is required.

¹³³ Article 1 of the Creole version of the agreement reads: “...realize kèk aktivite ki kab detui teren.”

¹³⁴ Article 2 of the Creole version of the agreement reads: “...lap bal kat blanch sou teren pou li realize travay eksplowasyon minyè yo ak tout aktivite ki an rapò avek yo.”

¹³⁵ Article 3 of the Creole version of the agreement reads: “...san li pap gen posibilite pou li fè ankenn lòt reklamasyon lajan.”

¹³⁶ See GJC Notes of Community Meeting with Residents of La Montagne, in Northwest Department, Haiti (Feb. 7, 2014) (on file with the New York University School of Law Global Justice Clinic).

¹³⁷ See GJC Notes of Community Meeting with Residents of La Montagne, in Northwest Department, Haiti (May 15, 2014) (on file with the New York University School of Law Global Justice Clinic).

¹³⁸ Newmont-Eurasian stated that they provided maps of the area, notes from community meetings and attendance lists to the Bureau of Mines and Energy (BME). GJC has requested this material from both the government and the companies, but has not received it to date.

¹³⁹ Newmont Letter, *supra* note 121, at 7.

¹⁴⁰ See GJC Notes of Community Meeting with Residents of La Montagne, in Northwest Department, Haiti (May 15, 2014) (on file with the New York University School of Law Global Justice Clinic).

¹⁴¹ See *id.*

¹⁴² Newmont Letter, *supra* note 121, at 7.

¹⁴³ Esterè is a community in La Montagne.

¹⁴⁴ See GJC Notes of Community Meeting with Residents of La Montagne, in Northwest Department, Haiti (May 15, 2014) (on file with the New York University School of Law Global Justice Clinic).

¹⁴⁵ Indeed, Article 4 of the agreement reserves the right of the company to hire the landowner and members of his or her family as well as other individuals to perform activities on the land. Some residents, however, understood that they must sign the agreement in order to have an opportunity to work for the company.

¹⁴⁶ See GJC Notes of Community Meeting with Residents of La Montagne, in Northwest Department, (May 15, 2014) (on file with the New York University School of Law Global Justice Clinic).

¹⁴⁷ Exchange rate of 46.76 Haitian Gourdes to \$1 U.S. Dollars, based on exchange rate for January 1, 2015. See Exchange Rates, <http://www.exchange-rates.org/HistoricalRates/A/USD/1-1-2015> (last visited Dec. 3, 2015).

¹⁴⁸ See GJC Notes of Community Meeting with Residents of La Montagne, in Northwest Department, (May 15, 2014) (on file with the New York University School of Law Global Justice Clinic).

¹⁴⁹ See *id.*

¹⁵⁰ See *id.*

¹⁵¹ See *id.*

¹⁵² Mare Rouge is the French spelling.

¹⁵³ Port-au-Prince is the French spelling.

¹⁵⁴ See GJC Notes of Community Meeting with Residents of La Montagne, in Northwest Department, Haiti (Feb. 5, 2014) (on file with the New York University School of Law Global Justice Clinic).

¹⁵⁵ See GJC Notes of Community Meeting with Residents of La Montagne, in Northwest Department, Haiti (May 15, 2014) (on file with the New York University School of Law Global Justice Clinic).

¹⁵⁶ Newmont Letter, *supra* note 121, at 7.

¹⁵⁷ See GJC Notes of Community Meeting with Residents of La Montagne, in Northwest Department, Haiti (May 15, 2014) (on file with the New York University School of Law Global Justice Clinic).

¹⁵⁸ Exchange rate of 46.76 Haitian Gourdes to \$1 U.S. Dollars, based on exchange rate for January 1, 2015. See *Exchange Rates*, *supra* note 147.

¹⁵⁹ See GJC Notes of Interviews with Residents of La Montagne, in Northwest Department, Haiti (April 23, 2014) (on file with the New York University School of Law Global Justice Clinic).

¹⁶⁰ See GJC Notes of Interviews with Residents of La Montagne, in Northwest Department, Haiti (Feb 5, 2014) (on file with the New York University School of Law Global Justice Clinic).

¹⁶¹ See Notes of a Meeting between GJC and Newmont-Eurasian Representatives, New York (May 5, 2015) (on file with the New York University School of Law Global Justice Clinic).

¹⁶² *Id.*

¹⁶³ Email from Matt King, Sustainability and External Relations, Newmont Mining Corporation, to Margaret Satterthwaite, Director, Global Justice Clinic (May 7, 2015, 6:54 PM EST) (on file with the New York University School of Law Global Justice Clinic).

¹⁶⁴ See GJC Notes of Interviews with Residents of La Montagne, in Northwest Department, Haiti (April 24, 2014) (on file with the New York University School of Law Global Justice Clinic).

¹⁶⁵ Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights, princs. 3–4 (Sept. 28, 2011) [hereinafter Maastricht Principles], <http://www.maastrichtuniversity.nl/web/Institutes/MaastrichtCentreForHumanRights/MaastrichtETOPrinciples.htm>.

¹⁶⁶ See *id.* princ. 5 (stating the extraterritorial obligations of States with regards to economic, social and cultural rights, without excluding civil and political rights), princs. 9–10 (discussing the definition of

extraterritorial obligations and scope of jurisdiction); see also Olivier De Schutter et al., Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social, and Cultural Rights, 34 HUM. RTS. Q. 1084, 1090–97, 1104–09 (2012).

¹⁶⁷ *Id.*

¹⁶⁸ U.N. Charter art. 55–56 (stating that Member States pledge to take joint and separate action to achieve “universal respect for, and observance of, human rights”).

¹⁶⁹ See Special Representative on the issue of human rights and transnational corporations and other business enterprises, *Rep. of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises*, ¶ 16, delivered to the 11th Session of the Human Rights Council, U.N. Doc. A/HRC/11/12 (Apr. 22, 2009), <http://www2.ohchr.org/english/bodies/hrcouncil/docs/11session/A.HRC.11.13.pdf> (stating that corporations have a duty to respect human rights); see also *Interpretation of the Agreement of 25 March 1951 Between the WHO and Egypt*, 1980 I.C.J. 73, at 89–90, ¶ 37 (Dec. 20) (“International organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law”).

¹⁷⁰ See GJC Notes of Interviews with CASEC of La Mine, in La Mine, Haiti (Feb. 21, 2015) (on file with the New York University School of Law Global Justice Clinic).

¹⁷¹ See GJC Notes of Community Meeting with Residents of Grand Bois, in North Department, Haiti (March 23, 2014) (on file with the New York University School of Law Global Justice Clinic).

¹⁷² See VCLT, *supra* note 60, arts. 11–17, 26. Note that there are other ways for States to consent to be bound, e.g., through accession.

¹⁷³ See generally Jack L. Goldsmith and Eric A. Posner, *A Theory of Customary International Law*, 66 CHI. L. REV. 4 (1999).

¹⁷⁴ While a State may formally reserve to some duties upon ratification, Haiti has entered no reservations relevant to the rights at issue in this report.

¹⁷⁵ The major U.N. human rights treaty bodies have found that human rights obligations extend extraterritorially. See, e.g., U.N. Human Rts. Comm., General Comment No. 31: Nature of the General Legal Obligations Imposed on State Parties to the Covenant, ¶ 10, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004); U.N. Comm. Against Torture, General Comment No. 2: Implementation of Article 2 by States Parties, ¶ 16, U.N. Doc. CAT/C/GC/2/CRP.1/Rev.4 (Nov. 23, 2007); U.N. Econ. & Soc. Council, Comm. on Econ., Soc. & Cultural Rights, Concluding Observations of the Committee of Economic, Social and Cultural Rights: Israel, ¶ 31, U.N. Doc E/C.12/1/Add.90 (May 23, 2003). The International Court of Justice has agreed with this approach. See, e.g., *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, ¶¶ 109–113 (July 9). For scholarly support, see generally SIGRUN I. SKOGLY, BEYOND NATIONAL BOARDERS: STATES’ HUMAN RIGHTS OBLIGATIONS IN INTERNATIONAL COOPERATION (2006).

¹⁷⁶ For example, the ICCPR speaks of “all individuals within [a State’s] territory and subject to its jurisdiction.” ICCPR, *supra* note 2, art. 2(1). The CRC speaks of “each child within [a State’s] jurisdiction.” CRC, *supra* note 13, art. 2(1). The American Convention requires member States to “respect the rights and freedoms recognized herein and [to] ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms.” American Convention on Human Rights, *supra* note 15, art 1(1). While the ICESCR contains no jurisdictional clause, the relevance of the concept of jurisdiction instead of territory has

been confirmed by the ESCR Committee in defining ICESCR obligations. For example, with regard to the right to water, the Committee has noted that “water and water facilities and services have to be accessible to *everyone* without discrimination, within the jurisdiction of the State Party.” CESCR, General Comment No. 15, *supra* note 5, ¶ 12(c). *See also id.* ¶¶ 31, 44(b), 53. The CESCR has consistently used the jurisdiction standard in its comments on rights contained in the ICESCR. *See, e.g.*, CESCR, General Comment No. 12, *supra* note 61, ¶ 14; U.N. Econ. & Soc. Council, U.N. Comm. on Econ., Soc. & Cultural Rights, General Comment No. 4: The right to adequate housing (Art. 11), ¶ 13, U.N. Doc. E/1992/23, (1991); CESCR, General Comment No. 14, *supra* note 5, ¶¶ 12(b).

¹⁷⁷ The Committee Against Torture recently reaffirmed that Article 2 of the Convention Against Torture, which refers to a State’s obligations in “any territory under its jurisdiction,” is not limited to territorial boundaries and includes “all areas where the State party exercises, directly or indirectly, in whole or in part, de jure or de facto effective control, in accordance with international law.” *See* U.N. Comm. Against Torture, Concluding observations on the combined third to fifth periodic reports of the United States of America, at 3, ¶ 16, U.N. Doc. CAT/C/USA/CO/3-5 (Dec. 19, 2014) (citing U.N. Comm. Against Torture, General Comment No. 2: Implementation of article 2 by States parties, ¶ 16, U.N. Doc. CAT/C/GC/2 (Jan. 24, 2008)). This includes peacekeeping operations, military occupations, and places such as military bases and detention centers. *See* Concluding observations on the combined third to fifth periodic reports of the United States of America, *supra*, at 3, ¶ 16 (“[T]he Committee draws attention to its general comment No. 2 (2007), in which it recognizes that ‘any territory’ includes ‘all areas where the State party exercises, directly or indirectly, in whole or in part, de jure or de facto effective control, in accordance with international law. The reference to ‘any territory’ in article 2, like that in articles 5, 11, 12, 13 and 16 [of the Convention], refers to prohibited acts committed not only on board a ship or aircraft registered by a State party, but also during military occupation or peacekeeping operations and in such places as embassies, military bases, detention facilities, or other areas over which a State party exercises factual or effective control.”).

¹⁷⁸ *See, e.g.*, U.N. Econ. & Soc. Council, Comm. on Econ., Soc. & Cultural Rights, Concluding Observations of the Committee of Economic, Social and Cultural Rights: Israel, ¶ 31, U.N. Doc E/C.12/1/Add.90 (May 23, 2003) (“[B]asic economic, social and cultural rights, as part of the minimum standards of human rights, are guaranteed under customary international law.”); Beth Simmons, *Civil rights in international law: Compliance with aspects of the ‘International Bill of Rights’*, 16 IND. J. GLOBAL LEGAL STUD. 437, 440 n.6 (2009) (“Many scholars also hold that at least some of the obligations found in the ICCPR reflect customary international law.”).

¹⁷⁹ “Myanmar...is also obligated to abide by international customary law, which includes the Universal Declaration of Human Rights.” Special Rapporteur on the situation of human rights in Myanmar, *Rep. of the Special Rapporteur on the situation of human rights in Myanmar*, U.N. Human Rights Council, ¶ 12 n.6, U.N. Doc. A/HRC/28/72 (Mar. 23, 2015) (by Yanghee Lee). The former U.N. Special Rapporteur on the right to food stated: “The growing consensus is that most, if not all of the rights enumerated in the [UDHR] have acquired a customary status in international law.” OLIVIER DE SCHUTTER, INTERNATIONAL HUMAN RIGHTS LAW: CASES, MATERIALS, COMMENTARY 63 (2014).

¹⁸⁰ *See* International Law Comm’n, Draft Articles on the Responsibility of International Organizations, Commentary art. 58, ¶ 5 (2011), http://legal.un.org/ilc/texts/instruments/english/commentaries/9_11_2011.pdf (“The fact that a State does not per se incur international responsibility for aiding or assisting an international organization of which it is a member when it acts in accordance with the rules of the organization does not imply that the State would then be free to ignore its international obligations. These obligations may well encompass the conduct of a State when it acts within an international organization.”); Special Representative of the Secretary-General on

the issue of human rights and transnational corporations and other business enterprises, *Rep. of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, princ. 10, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) (by John Ruggie) (endorsed by the U.N. Human Rights Council, Res. 17/4 (July 16, 2011)) [hereinafter *Guiding Principles*], www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.31_en.pdf ("Greater policy coherence is also needed at the international level, including where States participate in multilateral institutions that deal with business related issues, such as international trade and financial institutions. States retain their international human rights law obligations when they participate in such institutions."); Maastricht Principles, *supra* note 165, princ. 15 ("As a member of an international organization, the State remains responsible for its own conduct in relation to its human rights obligations within its territory and extraterritorially. A State that transfers competences to, or participates in, an international organization must take all reasonable steps to ensure that the relevant organization acts consistently with the international human rights obligations of that State."); U.N. Office of the High Commissioner for Human Rights, *Guiding Principles on Extreme Poverty and Human Rights*, ¶ 97, U.N. Doc. A/HRC/21/39 (2012), http://www.ohchr.org/Documents/Publications/OHCHR_ExtremePovertyandHumanRights_EN.pdf ("Even when a member of an international organization, a State remains responsible for its own conduct in relation to its human rights obligations within and outside its territory.").

¹⁸¹ See, e.g., BAHRAM GHAZI, THE IMF, THE WORLD BANK GROUP AND THE QUESTION OF HUMAN RIGHTS 138 (2004).

¹⁸² ICESCR, *supra* note 2, art 2(1) (emphasis added).

¹⁸³ U.N. Econ. & Soc. Council, Comm. on Econ., Soc. & Cultural Rights, Concluding observations of the Committee on Economic, Social and Cultural Rights: Egypt, ¶ 28, U.N. Doc. E/C.12/1/Add.44 (May 23, 2000).

¹⁸⁴ U.N. Econ. & Soc. Council, Comm. on Econ., Soc. & Cultural Rights, Concluding Observations of the Committee on Economic, Social and Cultural Rights: United Kingdom of Great Britain and Northern Ireland, ¶ 26, U.N. Doc. E/C.12/1/Add.79 (June 5, 2002); U.N. Econ. & Soc. Council, Comm. on Econ., Soc. & Cultural Rights, Concluding Observations of the Committee on Economic, Social and Cultural Rights: Belgium, ¶ 31, U.N. Doc. E/C.12/1/Add.54 (Dec. 1, 2000).

¹⁸⁵ See U.N. Econ. & Soc. Council, Comm. on Econ., Soc. & Cultural Rights, *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social, and Cultural Rights: Poverty and the International Covenant on Economic, Social and Cultural Rights*, ¶ 16, U.N. Doc. E/C.12/2001/10 (May 10, 2001), <http://www2.ohchr.org/english/bodies/cescr/docs/statements/E.C.12.2001.10Poverty-2001.pdf> ("More recently, the Committee began to identify the core obligations arising from the 'minimum essential levels' of the rights to food, education and health, and it confirmed that these core obligations are 'non-derogable'. In General Comment No. 14, the Committee emphasizes that it is particularly incumbent on all those in a position to assist, to provide 'international assistance and cooperation, especially economic and technical' to enable developing countries to fulfil their core obligations. In short, core obligations give rise to national responsibilities for all States and international responsibilities for developed States, as well as others that are 'in a position to assist.'"); see also *id.* ¶ 17 ("If a national or international anti-poverty strategy does not reflect this minimum threshold, it is inconsistent with the legally binding obligations of the State party."). Numerous Comments issued by the Committee—which clarify the content and meaning of rights, including the rights to food, health, and water—have espoused similar interpretations of treaty obligations. See, e.g., CESCR, General Comment 15, *supra* note 5, ¶ 12(c) (States parties should ensure that their actions as members of

international organizations take due account of the right to water. Accordingly, States parties that are members of international financial institutions, notably the International Monetary Fund, the World Bank, and regional development banks, should take steps to ensure that the right to water is taken into account in their lending policies, credit agreements and other international measures); CESCR, General Comment No. 2, *supra* note 7; CESCR, General Comment No. 12, *supra* note 61, ¶ 8; and CESCR, General Comment No. 14, *supra* note 5, ¶ 11.

¹⁸⁶ U.N. Human Rights. Council, *Rep. of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights*, Annex at 11, ¶ 6, U.N. Doc. A/HRC/20/23 (April 10, 2011).

¹⁸⁷ Maastricht Principles, *supra* note 165, princ. 23 (“All States must take action, separately, and jointly through international cooperation, to protect economic, social and cultural rights of persons within their territories and extraterritorially, as set out in Principles 24 to 27.”); *id.* princ. 24 (“All States must take necessary measures to ensure that non-State actors which they are in a position to regulate, as set out in Principle 25, such as private individuals and organisations, and transnational corporations and other business enterprises, do not nullify or impair the enjoyment of economic, social and cultural rights. These include administrative, legislative, investigative, adjudicatory and other measures.”); *id.* princ. 25 (“States must adopt and enforce measures to protect economic, social and cultural rights through legal and other means, including diplomatic means, in each of the following circumstances:...(c) as regards business enterprises, where the corporation, or its parent or controlling company, has its centre of activity, is registered or domiciled, or has its main place of business or substantial business activities, in the State concerned.”).

¹⁸⁸ Draft Articles on the Responsibility of International Organizations, Commentary Art. 2(a) (2011) (“For the purposes of the present draft articles, (a) “international organization” means an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality.”).

¹⁸⁹ *Interpretation of the Agreement of 25 March 1951 Between the WHO and Egypt*, 1980 I.C.J. Rep. 73, pp. 89-90 (“International organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties”); Draft Articles on the Responsibility of International Organizations, Commentary Art. 4, ¶ 2 (2011) (discussing what constitutes an international obligation that can give rise to a breach by an international organization, “[t]he obligation may result either from a treaty binding the international organization or from any other source of international law applicable to the organization.”); Draft Articles on the Responsibility of International Organizations, Commentary Art. 10, ¶ 2 (2011) (“As in the case of State responsibility, the term “international obligation” means an obligation under international law “regardless of the origin” of the obligation concerned. As mentioned in the commentary on article 12 on the responsibility of States for internationally wrongful acts, this is intended to convey that the international obligation ‘may be established by a customary rule of international law, by a treaty or by a general principle applicable within the international legal order.’) (internal citations omitted).

¹⁹⁰ Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights, Commentary to princ. 16(1) at 1121, Sept. 28, 2011, <http://www.maastrichtuniversity.nl/web/Institutes/MaastrichtCentreForHumanRights/MaastrichtETOPinciples.htm> (“(1) As subjects of international law, international organizations are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties.

Such obligations may include obligations in the area of human rights. Although stipulated in multilateral treaties that are binding on the states parties, a wide range of human rights has acquired a customary status in international law, and international organizations are therefore bound to exercise the powers they have been delegated in compliance with the requirements that they impose. Human rights may also be considered to form part of the “general principles of law recognized by civilized nations” within the meaning of Article 38 (1) (c) of the Statute of the International Court of Justice.”)

¹⁹¹ Draft Articles on the Responsibility of International Organizations, Commentary Art. 10, ¶¶ 4-5 (2011). (“While it may seem superfluous to state that obligations arising from the constituent instruments or binding acts that are based on those instruments are indeed international obligations, the practical importance of obligations under the rules of the organization makes it preferable to dispel any doubt that breaches of these obligations are also covered by the present articles”; “The legal nature of the rules of the organization is to some extent controversial. Many consider that the rules of treaty based organizations are part of international law. Some authors have held that, although international organizations are established by treaties or other instruments governed by international law, the internal law of the organization, once it has come into existence, does not form part of international law. Another view, which finds support in practice, is that international organizations that have achieved a high degree of integration are a special case.”)

¹⁹² Draft Articles on the Responsibility of International Organizations, Commentary Art. 10, ¶ 1 (2011). (“To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion”. U.N. Charter art. 1 para. 3.; “[T]he United Nations shall promote: ... (c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.”)

¹⁹³ The Committee on Economic, Social and Cultural Rights has repeatedly called on States to comply with their obligations under the ICESCR when acting within international financial institutions. See U.N. Econ. & Soc. Council, U.N. Comm. on Econ., Soc. & Cultural Rights, General Comment 14: The right to the highest attainable standard of health, ¶ 39, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000); U.N. Econ. & Soc. Council, U.N. Comm. on Econ., Soc. & Cultural Rights, General Comment 12: The right to adequate food (art. 11), ¶ 41, U.N. Doc. E/C.12/1999/5 (May 12, 1999); and U.N. Econ. & Soc. Council, U.N. Comm. on Econ., Soc. & Cultural Rights, General Comment 18: The right to Work, ¶ 30, U.N. Doc. E/C.12/GC/18 (2006). See also U.N. Human Rights Council, *Rep. of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights*, Annex ¶ 9 at 12, U.N. Doc. A/HRC/20/23 (April 10, 2011) (“International financial organizations and private corporations have an obligation to respect international human rights.”); *Guiding Principles*, *supra* note 180, princ. ¶ 10 (States retain their international human rights obligations when they participate in IFIs).

¹⁹⁴ Caroline Kaeb, *Emerging Issues of Human Rights Responsibility in the Extractive and Manufacturing Industries: Patterns and Liability Risks*, 6 NW. U. J. INT’L HUM. RTS. 327, 332 (2008).

¹⁹⁵ GUATEMALA HUMAN RIGHTS COMMISSION/USA, THE PEACEFUL ENVIRONMENTAL JUSTICE MOVEMENT AT ‘LA PUJA’: VIOLENCE REPRESSION AND RESISTANCE AT THE EL TAMBOR GOLD MINE IN GUATEMALA’ (2014), <http://www.ghrc-usa.org/wp-content/uploads/2014/11/Puya-report-final.pdf>.

¹⁹⁶ OXFAM AMERICA, MINING CONFLICTS IN PERU: CONDITION CRITICAL 2 (2009), <http://www.oxfamamerica.org/static/media/files/mining-conflicts-in-peru-condition-critical.pdf>. For a comprehensive report on the criminalization of ‘anti-mining’ activities in Peru, see MININGWATCH CANADA AND THE INTERNATIONAL CIVIL LIBERTIES MONITORING GROUP, IN THE NATIONAL INTEREST: CRIMINALIZATION OF LAND AND

ENVIRONMENT DEFENDERS IN THE AMERICAS 37–47 (2015),

http://www.miningwatch.ca/sites/www.miningwatch.ca/files/inthenationalinterest_fullpaper_20sep2015_eng.pdf (describing criminal code reforms to criminalize dissent and protest which have gradually been put in place, beginning with anti-terrorism measures and reforms aimed at stiffening penalties making it more difficult to organize road blockades).

¹⁹⁷ Emily Greenspan, *Community right to decide under threat in Ghana*, OXFAM AMERICA (June 12, 2012), <http://politicsofpoverty.oxfamamerica.org/2012/06/community-right-to-decide-under-threat-in-ghana/>.

¹⁹⁸ *Indonesia Must Investigate Mine Strike Protest Killing*, AMNESTY INTERNATIONAL USA (Oct. 10, 2011), <http://www.amnestyusa.org/news/news-item/indonesia-must-investigate-mine-strike-protest-killing>.

¹⁹⁹ *Convention Minière entre L'État Haïtien et La Société Minière Ste. Geneviève Haïti S.A. (Février 1997)*, art. 25(5), LE MONITEUR, 160ème Année, Spécial No. 2 (May 3, 2005), [hereinafter *Ste. Geneviève Convention*], <http://haitigrassrootswatch.squarespace.com/storage/Mining.Convention-St.Genevieve.pdf>; *Convention Minière entre L'État Haïtien et La Société Minière Citadelle, S.A. (Février 1997)*, art. 25(5), LE MONITEUR, 160ème Année, Spécial No. 2 (May 3, 2005), [hereinafter *Citadelle Convention*], <http://haitigrassrootswatch.squarespace.com/storage/Mining.Convention-Citadel.pdf>.

²⁰⁰ *Ste. Geneviève Convention*, *supra* note 199; *Citadelle Convention*, *supra* note 199.

²⁰¹ David Smith, *South African Security Guards Shoot Dead At Least Four Illegal Miners*, THE GUARDIAN, Aug. 12, 2010, www.guardian.co.uk/world/2010/aug/12/south-africa-illegal-miners-killed.

²⁰² COLUMBIA LAW SCHOOL HUMAN RIGHTS CLINIC AND HARVARD LAW SCHOOL INTERNATIONAL HUMAN RIGHTS CLINIC, RIGHTING WRONGS? BARRICK GOLD'S REMEDY MECHANISM FOR SEXUAL VIOLENCE IN PAPUA NEW GUINEA: KEY CONCERNS AND LESSONS LEARNED (2015), 1-6, <http://static1.squarespace.com/static/562e6123e4b016122951595f/t/564d944be4b0d1596536a257/1447924811478/Righting+Wrongs%3F+2015.pdf>; HUMAN RIGHTS WATCH, GOLD'S COSTLY DIVIDEND: HUMAN RIGHTS IMPACTS OF PAPUA NEW GUINEA'S PORGERA GOLD MINE 5 (2010), <http://www.hrw.org/sites/default/files/reports/png0211webwcover.pdf>.

²⁰³ Press Release, EarthRights International, International, Survivor who Alleged Rape and Killing at Papua New Guinea Mine Pleased with Barrick Gold Settlement (Apr. 3, 2015), <http://www.earthrights.org/media/survivors-who-alleged-rape-and-killing-papua-new-guinea-mine-pleased-barrick-gold-settlement>.

²⁰⁴ VOLUNTARY PRINCIPLES ON SECURITY ON HUMAN RIGHTS (Dec. 20, 2000), http://www.voluntaryprinciples.org/files/voluntary_principles_english.pdf.

²⁰⁵ *Id.* at 5; see also *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, adopted by the Eighth U.N. Congress on Prevention of Crime and Treatment of Offenders, Havana, Cuba, Aug. 27-Sept. 7, 1990, <http://www.ohchr.org/Documents/ProfessionalInterest/firearms.pdf>; U.N. G.A. Res. 34/169, Annex: Code of Conduct for Law Enforcement Officials (Dec. 17, 1979), <http://www.un.org/disarmament/convarms/ATTPrepCom/Background%20documents/CodeofConductforlawEnfOfficials-E.pdf>.

²⁰⁶ Geoffrey York, *Deadly clashes continue at African Barrick Gold Mine*, THE GLOBE AND MAIL, Aug. 26, 2014, <http://www.theglobeandmail.com/report-on-business/international-business/deadly-clashes-continue-at-african-barrick-gold-mine/article20216197/>.

²⁰⁷ JANA HÖNKE, TRANSNATIONAL COMPANIES AND SECURITY GOVERNANCE: HYBRID PRACTICES IN A POSTCOLONIAL WORLD 94 (2013).

²⁰⁸ The community organizer's full account, in Haitian Creole, is on file with the New York University School of Law Global Justice Clinic.

²⁰⁹ See *Guiding Principles*, *supra* note 180, princs. 11–24. See generally THE KENAN INSTITUTE FOR ETHICS AT DUKE UNIVERSITY, THE U.N. GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS: ANALYSIS AND INTERPRETATION 4-6 (2012), <https://kenan.ethics.duke.edu/wp-content/uploads/2012/07/UN-Guiding-Principles-on-Business-and-Human-Rights-Analysis-and-Implementation.pdf> (explaining that the corporate responsibility to respect rights has progressed from a norm to an emerging consensus, albeit not yet a binding obligation).

²¹⁰ Although not yet enshrined in binding legal texts, the corporate responsibility to respect human rights has gained widespread acceptance, as is evidenced by its incorporation in the U.N. Guiding Principles on Business and Human Rights framework, the OECD Guidelines for Multinational Enterprises, additional U.N. Human Rights Council resolutions on business and human rights, the U.N. Global Compact, rules governing multi-stakeholder initiatives, and increasingly, corporate policies.

²¹¹ *Guiding Principles*, *supra* note 180, princ. 13 ("The responsibility to respect human rights requires that business enterprises: (a) avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur; (b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.").

²¹² *Id.* princ. 17 ("The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed.").

²¹³ *Id.* princ. 22 ("Where business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes.").

²¹⁴ *Id.* princ. 18 ("In order to gauge human rights risks, business enterprises should identify and assess any actual or potential adverse human rights impacts with which they may be involved either through their own activities or as a result of their business relationships. This process should:...(b) Involve meaningful consultation with potentially affected groups and other relevant stakeholders, as appropriate to the size of the business enterprise and the nature and context of the operation."); see also *id.* ¶ 21 ("In order to account for how they address their human rights impacts, business enterprises should be prepared to communicate this externally, particularly when concerns are raised by or on behalf of affected stakeholders. Business enterprises whose operations or operating contexts pose risks of severe human rights impacts should report formally on how they address them.").

²¹⁵ For example, the European Council adopted a directive regarding the corporate disclosure of non-financial information related to human rights. The Directive requires reporting on human rights due diligence processes, including steps taken to identify, prevent, and mitigate existing and potential impacts. Directive 2014/95/EU, of the European Parliament and of the Council of 22 October 2014, 2014 O.J. (L 330) 1 ("[C]ertain large undertakings should prepare a non-financial statement containing information relating to at least environmental matters, social and employee-related matters, respect for human rights, anti-corruption and bribery matters. Such statement should include a description of the policies, outcomes and risks related to those matters and should be included in the management report of the undertaking concerned. The non-financial statement should also include information on the due diligence processes implemented by the

undertaking, also regarding, where relevant and proportionate, its supply and subcontracting chains, in order to identify, prevent and mitigate existing and potential adverse impacts.”).

²¹⁶ For example, the OECD Guidelines for Multinational Enterprises were updated in May 2011 to include a new human rights chapter “in line with the Guiding Principles,” including the introduction of a “comprehensive approach” to due diligence. See ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES 2011 EDITION 3–4, 31–34 (2011), <http://www.oecd.org/corporate/mne/48004323.pdf>. Newmont has adopted a Sustainability and Stakeholder Engagement Policy that commits the company to undertake a human rights due diligence process consistent with the Guiding Principles. See Newmont, *Sustainability and Stakeholder Engagement Policy*, at 2 (Apr. 28, 2014), http://s1.q4cdn.com/259923520/files/doc_downloads/newmont_policies/Policy_Sustainability-StakeholderEngagement_28Apr2014.pdf.

²¹⁷ *Guiding Principles*, *supra* note 180, princ. 12 & cmt. (stating that the internationally recognized human rights are “at a minimum,” those deriving from the UDHR and the main instruments through which it has been codified, the ICCPR, the ICESCR, and those set out in the ILO’s Declaration on Fundamental Principles and Rights at Work, and noting that “[d]epending on circumstances, business enterprises may need to consider additional standards” regarding human rights, such as those belonging to specific groups such as women, children, or persons with disabilities). See U.N. Office of the High Comm’r for Human Rts., Fact Sheet No. 2 (Rev. 1): The International Bill of Human Rights (June 1996), <http://www.ohchr.org/Documents/Publications/FactSheet2Rev.1en.pdf>.

²¹⁸ See GJC Notes of Community Meeting with Residents of Patricko, in Northeast Department, Haiti (May 10, 2013) (on file with the New York University School of Law Global Justice Clinic).

²¹⁹ See OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES 2011 EDITION, *supra* note 216.

²²⁰ *Id.* at 31–34.

²²¹ See S.C. Res. 1457, U.N. Doc. S/RES/1457 (Jan. 24, 2003). See Angel Gurría, OECD Sec’y Gen., Remarks at the annual meeting of the American Society of International Law (March 25, 2011), <http://www.oecd.org/unitedstates/harmonyanddissonanceininternationallaw.htm>.

²²² OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES 2011 EDITION, *supra* note 216, at 31, ¶¶ 1–2.

²²³ *Id.* at 31, ¶¶ 5–6.

²²⁴ The Foreign Corrupt Practices Act, 15 U.S.C. § 78dd–1(g)(1) (2004), <http://www.justice.gov/sites/default/files/criminal-fraud/legacy/2012/11/14/fcpa-english.pdf> (“It shall also be unlawful for any issuer organized under the laws of the United States, ...or for any United States person that is an officer, director, employee, or agent of such issuer...to corruptly do any act outside the United States in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to any of the persons or entities set forth in paragraphs (1), (2), and (3) of subsection (a) of this section for the purposes set forth therein, irrespective of whether such issuer or such officer, director, employee, agent, or stockholder makes use of the mails or any means or instrumentality of interstate commerce in furtherance of such offer, gift, payment, promise, or authorization.”).

²²⁵ The World Bank policies include, chiefly, their Operational Policies as well as a Policy on Access to Information, and the IFC has established Environmental and Social Performance Standards. Consistent with the broad adoption of internal standards, the African Development Bank has promulgated Operational

Safeguards and the European Bank of Reconstruction and Development applies their own Performance Requirements.

²²⁶ *Review and Update of the World Bank Safeguard Policies*, WORLD BANK, <http://consultations.worldbank.org/consultation/review-and-update-world-bank-safeguard-policies> (last visited Oct. 4, 2015).

²²⁷ *Operation Manual OP 4.01 – Environmental Assessment* (1999) (Revised 2013), WORLD BANK, <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTOPMANUAL/0,,contentMDK:20064724~menuPK:4564185~pagePK:64709096~piPK:64709108~theSitePK:502184,00.html> (last visited Oct. 4, 2015) (“For all Category A and B projects proposed for IBRD or IDA financing, during the EA process, the borrower consults project-affected groups and local nongovernmental organizations (NGOs) about the project’s environmental aspects and takes their views into account.”).

²²⁸ *Operation Manual OP 4.01 – Environmental Assessment* (1999) (Revised 2013), WORLD BANK, <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTOPMANUAL/0,,contentMDK:20064724~menuPK:4564185~pagePK:64709096~piPK:64709108~theSitePK:502184,00.html> (last visited Oct. 4, 2015) (“For Category A projects, and for Category B projects proposed for IDA funding that have a separate EA report, this review gives special attention to, among other things, the nature of the consultations with affected groups and local NGOs and the extent to which the views of such groups were considered....”).

²²⁹ *About Us*, THE INSPECTION PANEL, WORLD BANK, <http://ewebapps.worldbank.org/apps/ip/Pages/AboutUs.aspx> (last visited Oct. 4, 2015). For a discussion of the Inspection Panel complaint, see Chapter V of this Report on the legal framework of mining in Haiti.

²³⁰ INT’L FIN. CORP., IFC PERFORMANCE STANDARDS ON ENVIRONMENTAL AND SOCIAL SUSTAINABILITY 2, ¶ 1, (Jan. 1, 2012) [hereinafter 2012 IFC PERFORMANCE STANDARDS], http://www.ifc.org/wps/wcm/connect/c8f524004a73daeca09afdf998895a12/IFC_Performance_Standards.pdf?MOD=AJPERES.

²³¹ *About the CAO*, CAO: COMPLIANCE ADVISOR OMBUDSMAN, <http://www.cao-ombudsman.org/about/> (last visited Oct. 4, 2015).

²³² *Eurasian Minerals Inc.: Summary of Proposed Investment*, IFC Projects Database, INT’L FIN. CORP., http://ifcext.ifc.org/ifcext/spiwebsite1.nsf/ProjectDisplay/SPI_DP27409 (last visited Oct. 4, 2015).

²³³ Although IFC’s current Performance Standards date from 2012, IFC’s investment in Eurasian was approved in 2010, so Eurasian is bound by the 2006 Performance Standards that were then in effect. See *Environmental and Social Performance Standards and Guidance Notes*, INT’L FIN. CORP., http://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/ifc+sustainability/our+approach/risk+management/performance+standards/environmental+and+social+performance+standards+and+guidance+notes; see also INT’L FIN. CORP., PERFORMANCE STANDARDS ON SOCIAL & ENVIRONMENTAL SUSTAINABILITY (Apr. 30, 2006), <http://www.ifc.org/wps/wcm/connect/ac3381804886593bb892fa6a6515bb18/IFC%2BPerformance%2BStandards.pdf?MOD=AJPERES&attachment=true&id=1322803957411>

²³⁴ See 2012 IFC PERFORMANCE STANDARDS, *supra* note 230, at 8.

²³⁵ *Id.* at 34, ¶ 10.

²³⁶ *Id.* at 15, ¶ 35.

²³⁷ *Id.* at 31–33.

²³⁸ See *Voluntary Commitments*, NEWMONT, <http://sustainabilityreport.newmont.com/2014/overview/overview-voluntary.php> (last visited Oct. 4, 2015).

²³⁹ *The Ten Principles of UN Global Compact*, U.N. GLOBAL COMPACT, <https://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html> (last visited Oct. 4, 2015).

²⁴⁰ See *What Are the Voluntary Principles*, VOLUNTARY PRINCIPLES ON SECURITY AND HUMAN RIGHTS, <http://www.voluntaryprinciples.org/what-are-the-voluntary-principles/> (last visited Oct. 4, 2015).

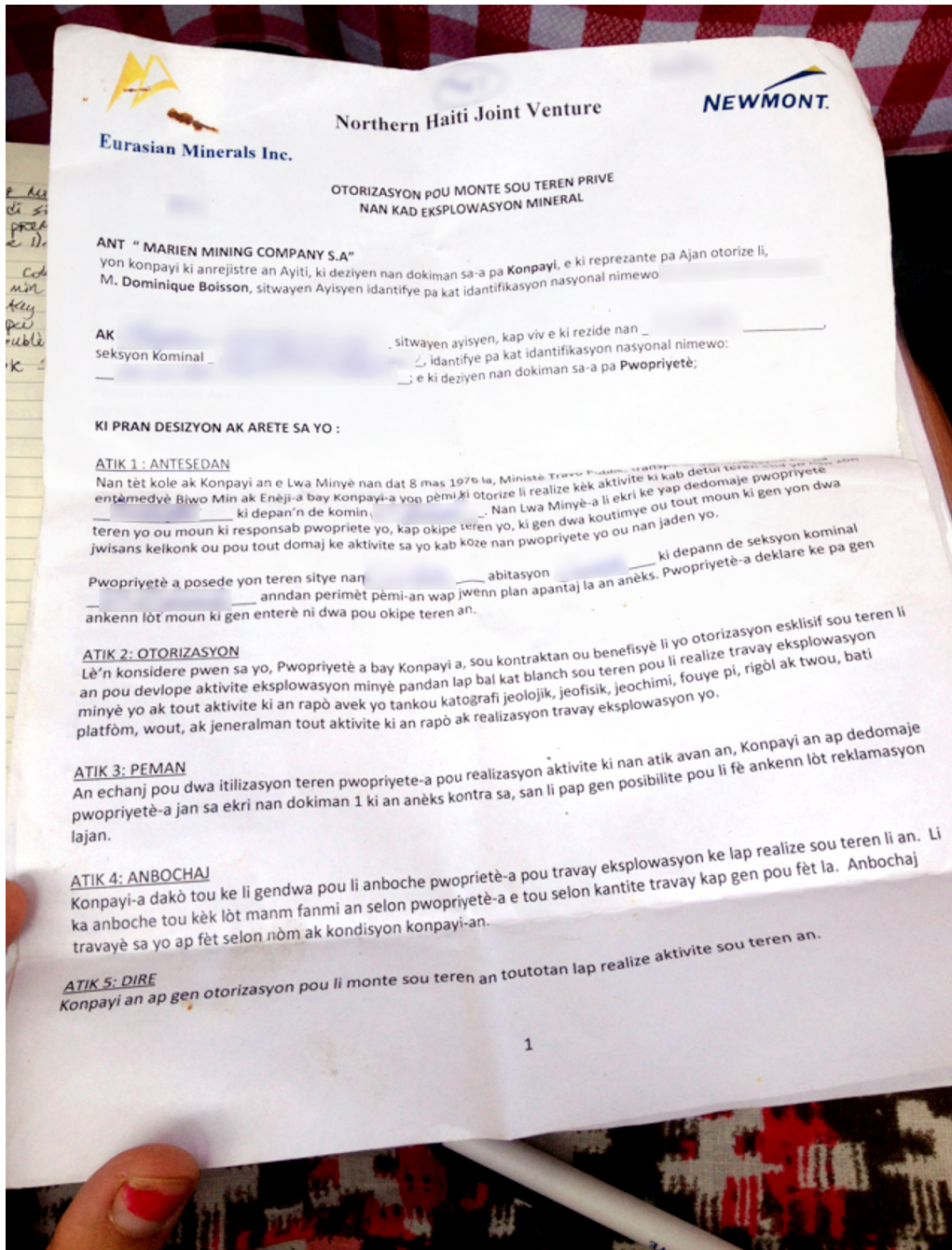
²⁴¹ See *About Us*, INT'L COUNCIL ON MINING & METALS (ICMM), <http://www.icmm.com/about-us/about-us> (last visited Oct. 4, 2015); see also ICMM, *Indigenous Peoples and Mining: Position Statement* (May 2013), <http://www.icmm.com/document/5433>.

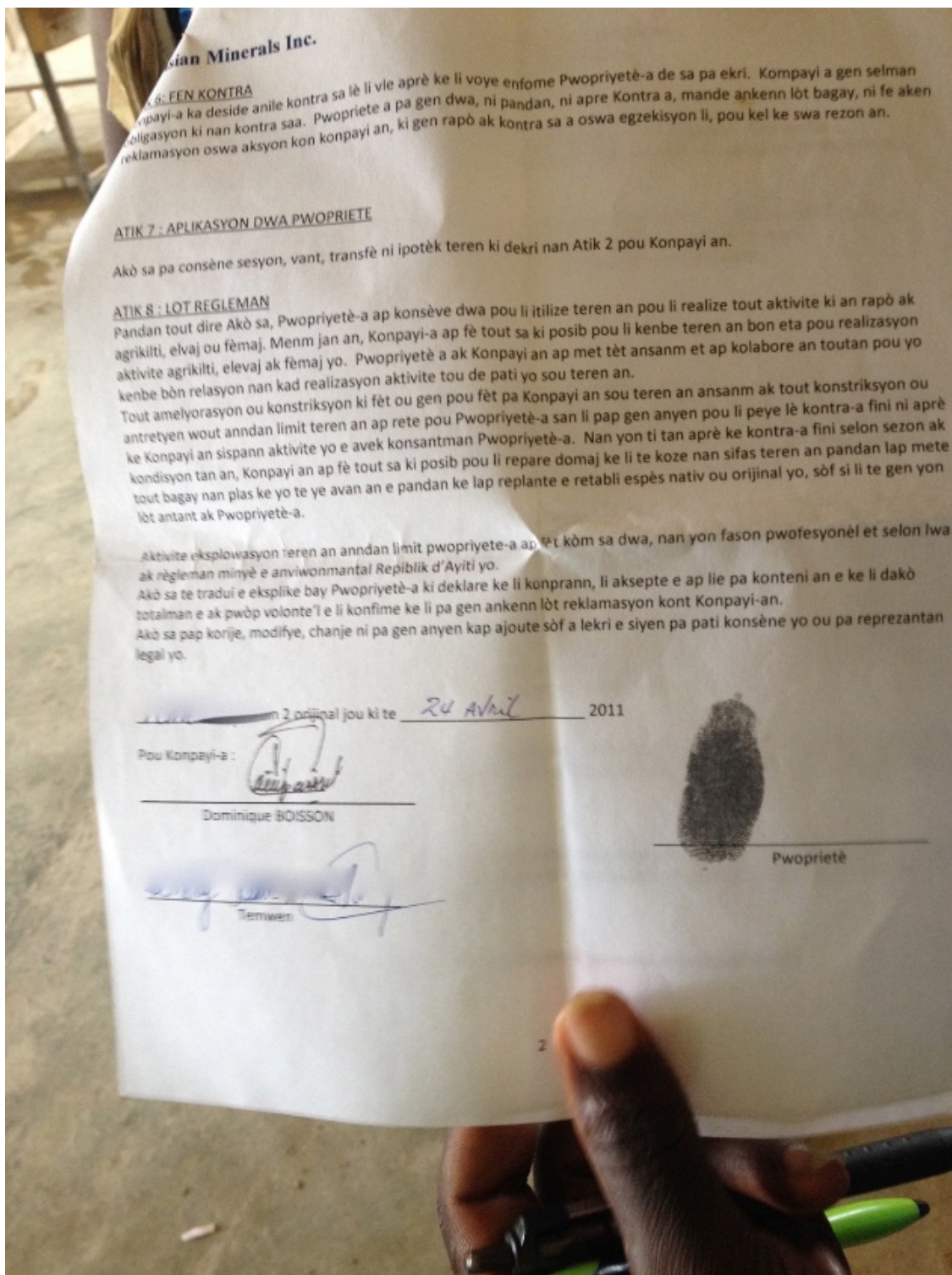
²⁴² GARE A. SMITH & DANIEL FELDMAN, NEWMONT, COMMUNITY RELATIONSHIPS REVIEW GLOBAL SUMMARY REPORT 20 (Mar. 2009), http://www.newmont.com/files/doc_downloads/crr/CRR-Global-Summary-Report-and-Appendices-English.pdf.

²⁴³ MARIANNE VOSS & EMILY GREENSPAN, OXFAM AMERICA, OXFAM AMERICA RESEARCH BACKGROUNDER SERIES, COMMUNITY CONSENT INDEX: OIL, GAS AND MINING COMPANY PUBLIC POSITIONS ON FREE, PRIOR, AND INFORMED CONSENT (FPIC) 76 (2012), www.oxfamamerica.org/publications/community-consent-index (citing the Newmont Sustainability Report “Beyond the Mine” from 2010).

Appendices: Land Access Agreement Used by Newmont-Eurasian in Haiti

Appendix 1: Land Access Agreement





Appendix 2: Transcription of Creole Agreement

Eurasian Minerals, Inc.
Northern Haiti Joint Venture
Newmont

OTORIZASYON POU MONTE SOU TEREN PRIVE NAN KAD EKSPLOWASYON MINERAL

ANT “MARIEN MINING COMPANY S.A”

Yon konpayi ki anrejistre an Ayiti, ki deziyen nan dokiman sa-a pa **Konpayi**, e ki reprezante pa Ajan otorize li, M. **Dominique Boisson**, sitwayen Ayisyen idantifye pa kat idantifikasyon nasyonal nimewo;

AK _____ sitwayen ayisyen, kap viv e ki rezide nan _____, seksyon kominal _____, idantifye pa kat idantifikasyon nasyonal nimewo: _____; e ki deziyen nan dokiman sa-a pa **Pwopriyetè**;

KI PRAN DESIZYON AK ARETE SA YO:

ATIK 1 : ANTESEDAN

Nan tèt kole ak Konpayi an e Lwa Minyè nan dat 8 mas 1976 la, Ministè Travo Piblik, Transpò ak Kominikasyon an, pa entèmedyè Biwo Min ak Enèji-a bay Konpayi-a yon pèmi ki otorize li realize kèk aktivite ki kab detui teren etid yo nan zòn _____ ki depan’n de komin _____ . Nan Lwa Minyè-a li ekri ke yap dedomaje pwopriyetè teren yo ou moun ki responsab pwopriete yo, kap okipe teren yo, ki gen dwa koutimye ou tout moun ki gen yon dwa jwisans kelkonk ou pou tout domaj ke aktivite sa yo kab koze nan pwopriete yo ou nan jaden yo.

Pwopriyetè a posede yon teren sitye nan _____ abitasyon _____ ki depann de seksyon komin _____ anndan perimèt pèmi-an wap jwenn plan apantaj la an anèks. Pwopriyetè-a deklare ke pa gen ankenn lòt moun ki gen enterè ni dwa pou okipe teren an.

ATIK 2: OTORIZASYON

Lè’n konsidere pwen sa yo, Pwopriyetè a bay Konpayi a, sou kontraktan ou benefisyè li yo otorizasyon eskisif sou teren li an pou devlope aktivite eksplwasyon minyè pandan lap bal kat blanch sou teren pou li realize travay eksplwasyon minyè yo ak tout aktivite ki an rapò avek yo tankou katografi jeolojik, jeofisik, jeochimi, fouye pi, rigòl ak twou, bati platfòm, wout, ak jeneralman tout aktivite ki an rapò ak realizasyon travay eksplwasyon yo.

ATIK 3: PEMAN

An echanj pou dwa itilizasyon teren pwopriete-a pou realizasyon aktivite ki nan atik avan an, Konpayi an ap dedomaje pwopriyetè-a jan sa ekri nan dokiman 1 ki an anèks kontra sa, san li pap gen posibilite pou li fè ankenn lòt reklamasyon lajan.

ATIK 4: ANBOCHAJ

Konpayi-a dakò tou ke li gendwa pou li anboche pwopriete-a pou travay eksplwasyon ke lap realize sou teren li an. Li ka anboche tou kèk lòt manm fanmi an selon pwopriyetè-a e tou selon kantite travay kap gen pou fèt la. Anbochaj travayè sa yo ap fèt selon nòm ak kondisyon konpayi-an.

ATIK 5: DIRE

Konpayi an ap gen otorizasyon pou li monte sou teren an toutotan lap realize aktivite sou teren an.

ATIK 6: FEN KONTRA

Konpayi-a ka deside anile kontra sa lè li vle aprè ke li voye enfome Pwopriyetè-a de sa pa ekri. Konpayi a gen selman obligasyon ki nan kontra saa. Pwopriete a pa gen dwa, ni pandan, ni apre Kontra a, mande ankenn lòt bagay, ni fe aken reklamasyon oswa aksyon kon konpayi an, ki gen rapò ak kontra sa a oswa egzekisyon li, pou kel ke swa rezon an.

ATIK 7 : APLIKASYON DWA PWOPRIETE

Akò sa pa konsène sesyon, vant, transfè ni ipotèk teren ki dekri nan Atik 2 pou Konpayi an.

ATIK 8 : LOT REGLEMAN

Pandan tout dire Akò sa, Pwopriyetè-a ap konsève dwa pou li itilize teren an pou li realize tout aktivite ki an rapò ak agrikilti, elvaj ou fèmaj. Menm jan an, Konpayi-a ap fè tout sa ki posib pou li kenbe teren an bon eta pou realizasyon aktivite agrikilti, elevaj ak fèmaj yo. Pwopriyetè a ak konpayi an ap met tèt ansanm et ap kolabore an toutan pou yo kenbe bon relasyon nan kad realizasyon aktivite tou de pati yo sou teren an.

Tout amelyorasyon ou konstriksyon ki fèt ou gen pou fèt pa Konpayi an sou teren an ansanm ak tout konstriksyon ou antretye wout anndan limit teren an ap rete pou Pwopriyetè-a. Nan yon ti tan aprè ke kontra-a fini selon sezon ak kondisyon tan an, Konpayi an ap fè tout sa ki posib pou li repare domaj ke li te koze nan sifas teren an pandan lap mete tout bagay nan plas ke yo te ye avan an e pandan ke lap replante e retabli espès nativ ou orijinal yo, sòf si li te gen yon lòt antant ak Pwopriyetè-a.

Aktivite eksplwayasyon teren an anndan limit pwopriete-a ap fèt kòm sa dwa, nan yon fason pwofesyonèl et selon lwa ak règleman minyè e anviwonmantal Repiblik d'Ayiti yo.

Akò sa te tradui e eksplike bay Pwopriyetè-a ki deklare ke li konprann, li aksepte e ap lie pa konteni an e ke li dakò totalman e ak pwòp volonte'l e li konfime ke li pa gen ankenn lòt reklamasyon kont Konpayi-an.

Akò sa pap korije, modifye, chanje ni pa gen anyen kap ajoute sòf a lekri e siyen pa pati konsène yo ou pa reprezantan legal yo.

_____ an 2 orijinal jou ki te _____ 2011

Pou konpayi-a:

Dominique BOISSON

Pwopriyetè

Temwen

Appendix 3: Translation of Creole Agreement

Eurasian Minerals, Inc.
Northern Haiti Joint Venture
Newmont

AUTHORIZATION TO ACCESS PRIVATE PROPERTY IN THE CONTEXT OF MINERAL EXPLORATION

BETWEEN “MARIEN MINING COMPANY S.A”

A company registered in Haiti, referred to as the **Company** in this document, and is represented by its authorized agent, M. **Dominique Boisson**, a Haitian citizen identified by identification card number;

AND _____ Haitian citizen, who lives and resides in _____,
communal section _____, identified by identification card number: _____; and referred to as **Landowner** in this document;

HAVE TAKEN THESE FOLLOWING DECISIONS:

ARTICLE 1 : HISTORY

In accordance with the Company and the Mining Law of March 8th, 1976, the Secretary of Public Works, Transportation and Communication, through the office of Mining and Energy, has given the Company a permit that gives it express authorization to realize certain activities that may destroy the land that is being studied in _____ dependent on the commune of _____. In the Mining Law, it is written that they will indemnify the Landowner or the person in charge of the properties, taking care of the land(s), who has common rights or all persons who reserve the right of enjoyment on those lands or for all damages on the properties or the fields that may be due to these activities.

The Landowner possesses land located in _____ habitation _____ dependent on the communal section of _____ within the perimeter of the permit you'll find the plan for surveying in the appendix. The Landowner has declared that there is no one else who possesses an interest or rights to the property.

ARTICLE 2: AUTHORIZATION

When we consider these points, the Landowner gives the Company, its contractors or beneficiaries the authorization to develop activities for mining exploration on the property while giving the Company carte blanche to realize the work associated with the exploration of mines and all other activities related to that such as geologic, geophysical and geochemical cartographies, the digging of wells, water channels and holes, building platforms, roads, and generally all activities related to the realization of the work of exploration.

ARTICLE 3: PAYMENT

In return for the right to use the properties of the Landowners in the process of realizing the activities in the preceding article, the Company will indemnify the Landowner this is written in

document 1 in the appendix of this contract, without the ability to make any other monetary demands.

ARTICLE 4: HIRING

The Company has also agreed that it reserves the right to hire the Landowner to work in the exploration that it is realizing on the property. It may also hire certain other members of the family according to the Landowner and the amount of work that needs to be done. The hiring of these workers will be done according to the standards and conditions of the Company.

ARTICLE 5: DURATION

The Company will have the authorization to access the property so long as it's realizing its activities on the land.

ARTICLE 6: END OF THE CONTRACT

The Company can decide to annul the contract when it wants after it has informed the Landowner in writing. The Company is only bound the terms of this contract. The Landowner does not have the right, not during, nor after the contract, to ask for anything else, nor make any demands or take action against the Company, that has to do with this contract or its execution, for whatever reason.

ARTICLE 7: EXECUTION OF LAND RIGHTS

This contract does not concern the cessation, sale, transfer or mortgage of the property described in Article 2 for the Company.

ARTICLE 8: OTHER RULES

For the duration of this contract, the Landowner will retain the right to utilize the property to carry out activities such as agriculture, the raising of livestock or renting of space. In the same way, the Company will do everything in its power to keep the grounds in good conditions for the realization of activities such as agriculture, the raising of livestock or renting of space. The Landowner and the Company will put their heads together and collaborate at all times to keep good relations in the context of realizing the activities of both parties on the property. All improvements or construction that is done or will be done by the Company on the property and all construction and upkeep of roads within the limits of the property will then belong to the Landowner. Shortly after the contract has ended, based on the season and weather conditions, the Company will do everything in its power to repair the damages it caused on the surface of the property and while it works to put everything back in its place, it will replant and reestablish the original or native species, unless it had another agreement with the Landowner.

The exploration activities within the limits of the property will be done as they should be, in a professional manner and according to the law and environmental and mining regulations in the Republic of Haiti.

This contract was translated and explained to the Landowner who declared that he understands, accepts, will read the contents and is totally in agreement voluntarily and confirms that he has no other reclamations against the Company.

This contract will not be corrected, modified, changed nor will anything be added without it being done in writing and signed by the concerned parties or by the legal representatives.

_____ in 2 original copies, dated _____ 2011

For the Company:

Dominique BOISSON

Landowner

Witness

“A man came to my house and said that a picket had been placed on my land near Vert de Gris where my nephews plant beans and cabbage. I walked to the land. It took about an hour. The engineer from the company came over to me and asked if I owned the land. I said yes. He then asked me if I could read. Ha! I said to him, Look at me. I’m old! Of course I did not go to school. The engineer took my thumb and dipped it in ink. He marked the piece of white paper with it. I had no idea what the paper said. I had no idea what it was. He then paid me 150 [Haitian] Gourdes [approximately \$3.20] and I never saw him again.”

– Resident of Lalan, La Montagne

Haiti stands at a crossroads: The prospect of gold mining glitters on the horizon, while the reality of political turmoil, weak institutions, and widespread impoverishment glares in the foreground. Minerals can be exploited only once. This moment, before mining has begun, presents a unique opportunity for Haiti to hold a robust public debate about the risks and benefits of mining for the Haitian people, and to implement preventive measures to avoid future human rights abuses and environmental harms. Such a debate requires transparency, information sharing, and active engagement of Haitian communities. Until now, most discussions about mining have occurred among government officials, company stakeholders, and international financial institutions behind closed doors. There is a dearth of information in the public domain about what gold mining entails, what challenges it poses, what opportunities it presents, and what it may mean for communities and the country as a whole. The purpose of this report is to help fill that gap.



Residents walk down from
Newmont-Eurasian Drill Site,
Grand Bois

Photo © 2013 Ben Depp

Byen Konte, Mal Kalkile? Human Rights and Environmental Risks of Gold Mining in Haiti, is the product of collaboration between environmental law experts and human rights lawyers, and was informed by the Justice in Mining Collective, a platform of Haitian organizations and individuals committed to promoting the interests of Haiti’s rural, northern communities. The title of the report, taken from a Kreyòl proverb meaning “well-counted, poorly calculated,” suggests that Haiti’s apparent bounty of mineral resources could easily transform into a curse.