Review of Haiti's Draft Mineral Law (2013)
Environmental Law Alliance Worldwide (ELAW)
Staff Attorneys Liz Mitchell and Jen Gleason
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At the request of lawyers at Défenseurs des Opprimées/Opprimés (DOP) and l'Association Haïtienne de Droit de l'Environnement (AHDEN), ELAW provides the following comments related to Haiti's Draft Mineral Law of 2013. Due to time constraints, we did not closely review other relevant legislation such as the existing General Environmental Law. We know that lawyers at DOP and AHDEN are familiar with those laws and the local situation and will know which of these comments are relevant to their situation.

We first provide some general observations, followed by comments on specific articles of the Draft Mineral Law.

One of the most significant differences between the Draft Mineral Law and the Decree of 1976 is that the Draft Mineral Law eliminates the mineral concession (contracting) system. Under Part E of the Decree of 1976, a party seeking an exploration permit must negotiate a mineral concession with the State. The concession includes all of the terms and requirements that apply to work plans and facility development, environmental protection and rehabilitation, employment, royalties and taxes, and dispute resolution. See Art. 21(b). Every convention and any subsequent amendments must be published in the Moniteur. See Art. 21(d).

The Draft Mineral Law abandons the project-by-project concession system and instead initiates a system whereby all mining projects will be developed and regulated under a standardized and consistent framework. This is a positive step because concession negotiations are conducted between the company and State in secret. Without close public and civil society oversight, the negotiation process is susceptible to corruption and mismanagement. There is often an imbalance of power during negotiations because host country governments lack the technical capacity, experience, and funding to participate effectively. In our experience, most concession agreements include terms and conditions that do not benefit the State and, in some cases, are grossly unfair.

Mineral development can be conducted more transparently when financial, environmental, and human rights standards are clearly proscribed in legislation and implementing regulations. Under this type of system, there are fewer opportunities for regulators to engage in corruption because key provisions are fixed in the law.

Unfortunately, however, the Draft Mineral Law lacks sufficient detail to properly guide mineral development in Haiti. Many important issues will not be addressed until regulations are developed. While it is appropriate to leave some governance details to regulations, a moratorium on mineral development should be imposed until a full and

detailed framework of laws and regulations are adopted after public consultation and participation.

If other laws would not govern pollution from mines, provisions governing pollution must be added to this law before mining permits are issued.

Comments on Specific Articles of the Draft Mining Law

Article 3

The law declares that prospecting, exploration, and exploitation of mineral resources are activities of public utility. It is important to be aware that this declaration will make it easier for mining companies to request that the State use compulsory acquisition to obtain private property. [Compulsory acquisition is addressed specifically in Article 150.]

Article 7

"Etude d'Impact Environnemental et Social"

The definition of Etude d'Impact Environnemental et Social (EIES) simply states that this is the technical study to assess the consequences of any nature, particularly environmental and social, of a project – to try to eliminate, limit, mitigate, or compensate negative impacts – conforming with applicable regulations.

This definition of an EIES is *woefully* inadequate. There needs to be a very specific definition of all of the required components of an EIES, or a reference to an existing law that clearly states the requirements. This could be included here in the definition section or in another part of the law that would make it applicable to all sections requiring an EIES. The law needs to include not only the specific components of a study, but also the process for preparing the study including robust public participation procedures. ELAW would be more than happy to provide more details about what should be included in a strong EIES law, but a brief overview of the process can be found at: http://www.elaw.org/files/mining-eia-guidebook/Chapitre%202.pdf. If these details are left to regulations that will be adopted later, a moratorium on mineral development should be imposed until such regulations are adopted (after public consultation and participation).

"Société Affiliée d'une personne morale"

Most mining laws include a definition of "affiliate" of a corporation for the purpose of deterring transfer price abuse and other tax avoidance behavior. It is not uncommon for mining companies to employ a complicated system of subsidiaries and related companies to hide transactions and gain offshore tax advantages. The definition of "affiliate" contained in the Draft Mineral Law is very typical of those we have seen in other mining laws and focuses exclusively on the shareholder relationship between companies.

However, “affiliate” relationships can also be created through long-term contracts between non-related companies.

The International Bar Association Model Mineral Development Agreements contains an improved definition of “affiliate”:

« Affiliées » désigne toute entité qui directement, ou indirectement à travers un ou plusieurs intermédiaires, contrôle, est contrôlée par ou est sous contrôle commun avec la Société. Étant précisé que le terme « Contrôle » désigne la détention de plus de 50% du capital d’une société et/ou la détention, directe ou indirecte, du pouvoir de diriger ou de faire imposer la direction ou les orientations générales d'une entité, que ce soit par l'exercice de droits de vote, par contrat ou d'une autre manière.

It is also appropriate to consider including a provision in the law that would require mining companies operating in Haiti to disclose their corporate structure, affiliates, and beneficial ownership on an annual basis. (Beneficial owners are the ultimate recipients of profits or other benefits generated by property held in another’s name.)

Article 19

The Draft Mineral Law requires every domestic or foreign company seeking permission to conduct mineral activities to prove that it holds the requisite technical and financial capability.

The State must ensure that only qualified and competent companies undertake mineral development activities in Haiti. The law should require all mineral rights applicants to obtain prior certification of competence before being allowed to seek any type of mining permit. For example, AMN could require prospective applicants to provide a full description of the management and capital structure of the company, financial information (e.g., audited balance sheets and profit and loss statements), a detailed description of prior exploration and development activities, finance plans for exploration and/or development, and a description of the company’s safety, social and environmental track record. After proper vetting, only qualified entities should be permitted to submit applications for prospecting, exploration or exploitation agreements.

Article 20

The Draft Mining Law allows companies to form an association for the purpose of obtaining a prospecting permit. The companies must submit a statement indicating which entity will be the operator and agreeing to be held jointly and severally liable with respect to mining activities. This is a very good provision, however, it should be extended to all types of mining permits, not just prospecting permits. This will ensure that the State can hold offshore companies financially responsible for required capital expenditures or for environmental damage that may occur within Haiti.

Article 24

The mineral sector is rife with opportunities for public officials to engage in unethical conduct and seek personal financial gain. Article 24 prohibits public officials from engaging in or holding a financial interest in mineral activities.

This provision should be strengthened. At a minimum, the scope of individuals subject to conflict of interest prohibitions must be expanded to include family members and business associates of public officials who have a role in permitting and regulating mining activities. It is also appropriate to bar officials from accepting gifts or benefits other than those of nominal value and to impose waiting periods (e.g., 2 years) before officials may accept employment in the mineral industry following government service.

Article 32

Article 32 states that no company or its affiliates may hold more than 20 exploration licenses. Exploration licenses are valid for an area up to 100 square kilometers. In light of the allowable size of each exploration permit, it may be worth considering whether to revise Article 32 to impose a holding limit of 10 exploration licenses.

Article 33

In our interpretation of Article 33, AMN has discretion to decide which exploration licenses will be offered through a bidding process. The law should require <u>all</u> exploration licenses to be awarded through a public bidding process to help prevent corruption and favoritism. Furthermore, competition between competent and qualified mining companies for mineral exploration and development rights in Haiti is likely to deliver maximum benefits to the State.

Article 38

We interpret this article as granting the holder of an exploration permit the right to start operations described in Article 32 (which seems to refer to all exploration operations). In fact, this article *requires* that these activities begin within 6 months of obtaining the permit. This article may be in conflict with other articles that require environmental studies before work can begin.

Articles 50-52

These articles and others require a "certificat de Non-Objection" to the EIES from the Minister of the Environment, but do not include any reference to standards the Minister should use to determine whether to issue the certificate (other than reference to the applicable environmental law). There should be clear standards that include provisions for allowing the Minister to require more information and provisions allowing him to deny the certificate. These standards could be included here or in provisions outlining the EIES process.

This article prohibits "travail d'exploitation" before obtaining the certificat de Non-Objection to the EIES. It is possible that there could be different interpretations of what would be considered travail d'exploitation. It is recommended that the law specifically prohibit any work that might impact the environment or any significant investment before the EIES has been approved.

Article 90

It is good that the article bans the use of mercury for artisinal mining, but the experience in other countries tells us this is difficult to enforce. Consider adding a ban on selling or transporting mercury that is not an integrated component of a product such as a thermometer or battery.

Article 93

Article 93 allows exploitation permit holders to sell marketable minerals to buyers of their choice within Haiti or on the international market, "à condition de respecter les prix en vigueur sur le marché international, en cas d'exportation, ou national, en cas de vente en Haiti." The law should also clearly state that mineral sales conducted with affiliates must be conducted as if between unrelated parties dealing at arm's length. This will help prevent transfer pricing abuse. (See comments above pertaining to the definition of "affiliate.")

Article 104

The confidentiality provisions in the Draft Mineral Law are inconsistent with international best practices. Article 104 prevents public disclosure of reports, documents, and data related to mining activities for a period of 10 years after filing. All information held by AMN is presumed to be confidential and may not be released by agency officials unless the mining permit holder grants permission.

The Draft Mineral Law must be revised so that there is a presumption of public disclosure of non-proprietary information concerning mineral development activities in Haiti. This includes putting the burden on the company to ask for information to be withheld, rather than requiring the State to seek permission before disclosing information to the public.

The law could be improved substantially by clarifying the type of information that is considered confidential. For example, the International Bar Association's Model Mineral Development Agreement defines "confidential information" as follows:

Le terme « Informations Confidentielles » désigne :

a. Toute information considérée comme confidentielle par la Législation en Vigueur;

b. Toute donnée personnelle, tout dossier médical des employés ou tout autre document dont les employés ou toute autre personne pouvaient raisonnablement s'attendre à ce qu'il soit gardé confidentiel et plus généralement tout élément afférent à la vie privée des individus;

c. Les informations techniques ou protégées confidentielles relatives aux équipements, aux innovations techniques ou aux secrets commerciaux;

d. Les éléments juridiques confidentiels, y compris les consultations d'avocats;

e. La propriété intellectuelle de la Société afférente au Projet, y compris les informations géologiques et les gisements ;

f. Les informations (autres que les Informations Confidentielles) obtenues dans le cadre d'un audit conduit en vertu des dispositions de l'Article 11 ci-dessus;

g. Les informations échangées entre les Parties et expressément désignées comme étant « Confidentielles » par Notification au moment de leur échange, étant précisé que la Partie ayant transmis de telles informations à l'autre sera considérée comme ayant seule déterminé après analyse de ces informations que le maintien de leur confidentialité est nécessaire à l'effet de protéger des secrets commerciaux ou des informations protégées.

See International Bar Association, Model Mineral Development Agreement, sec. 30.2) (available at http://www.mmdaproject.org/wp-content/uploads/2010/04/MMDA-1_0_Francaise_Final.pdf).

Article 140

The Draft Mineral Law declares that mining activities may not be conducted within 50 meters of particular buildings and locations (e.g., public buildings, villages, religious buildings, historic and sacred sites). This is far too small of a buffer zone to adequately minimize and prevent impacts on the environment, neighboring lands, and nearby infrastructure from noise, emissions, vibrations, and other nuisances associated with mining activities. Ideally, buffer zones should be determined on a project-by-project basis through the EIES process. At a minimum, however, a 250-meter buffer should be established by law.

Articles 142-146

These articles address compensation to people who hold title to land, have usufruct rights to the land, or occupy the land and will be impacted by mining and related infrastructure development and activities. This section raises two concerns:

1. Will there be problems determining who has rights to compensation? Do other laws adequately address who may be considered an occupier of land and will there be problems demonstrating that a particular individual has rights to compensation?

2. It is not clear that people impacted by mining activity must be compensated *before* the mining permit holder can come onto the land.

Article 150

As mentioned above, the Draft Mineral Law declares that mining is in the public interest. Article 150 allows mining companies to seek expropriation of privately-held land to conduct mining activities. Because the law establishes a presumption that mining is in the public interest, it will be very easy for mining companies to justify use of this extraordinary authority by the State. Expropriation can be controversial when the public is not sufficiently informed about the proper procedure or the remedies available under the law to persons who face the prospect of expropriation. It is also important to consider whether it is appropriate for the State to acquire land that will be used by a private company to its own benefit.

Many mining laws include provisions allowing the State to compulsorily acquire land. We are flagging this issue as one that warrants robust consideration and public debate about the proper scope of the State's expropriation powers.

Article 155

The Draft Mineral Law authorizes the State to ban or restrict mining in specific regions or zones. The State may also reserve access to certain mineral resources.

Although it is a positive step that the Draft Mineral Law authorizes creation of "no-go" (no mining) zones, the law should establish a system that allows for meaningful and inclusive land use planning that considers all land uses - such as customary or subsistence uses, recreation and tourism, and basic ecological services (e.g. drinking water, carbon sequestration) - in advance of allowing mine prospecting activities. This process should include national and local government representatives and communities in mineral resource regions.

Among other things, the following considerations should guide designation of no-mining zones:

1) Protecting important ecosystems;
2) Ensuring food security and access to water;
3) Mitigating risks from natural disasters;
4) Preventing conflict and human rights abuses; and
5) Preserving community culture and social structures.

Article 161

The Draft Mineral Law requires companies to submit financial security (une caution financière) before operations begin, to guarantee the eventual reclamation of the mine site. (*See* Article 167, which allows the State to use the security to clean up a mining site if the company defaults.) This is an excellent requirement because many countries either do not require any security or allow companies to post security well after operations have begun.

Mining has the potential to disturb thousands of hectares of land and pollute water resources with acid drainage and processing chemicals, such as cyanide. According to the U.S. Environmental Protection Agency, the metal mining industry accounted for 46% of all toxic releases to air, water, and land in the United States during 2011 (the latest year for which information is available). See Environmental Protection Agency, "2011 Toxic Release Inventory National Analysis Overview," p. 17 (available at http://www2.epa.gov/sites/production/files/documents/complete_2011_tri_na_overview_document.pdf). For that reason, it is essential that the State obtain adequate financial security from mining companies to ensure that there is a source of funds to conduct reclamation activities at closure or, more importantly, if a mine is abandoned. Detailed bonding procedures must be included in the mining law or future regulations to ensure that financial estimates are accurate and truly reflect anticipated costs.

Furthermore, the mineral law must include language clearly specifying the types of financial guarantees the State will accept and prohibit companies from "self-bonding" or providing corporate guarantees. These particular types of assurances are too unreliable. It is recommended that the mining law require the government to obtain more secure types of financial assurances, including: irrevocable letter of credit; surety bond; trust-fund with pay-in period; insurance policy; cash deposit; or annuities.

Article 163

This article requires approval of an undefined "Analyse Environnmementale" that is "appropriée des activités" and a mitigation plan before exploration activities may begin. The level of environmental analysis required should be defined. In addition, this provision could come into conflict with Article 38, which requires work to begin within six months.

Article 164

Article 164 limits AMN's review of the above environmental analysis to 30 days. AMN may need more time to do a thorough analysis. It is also not clear whether there is opportunity for public comment on the environmental analysis. This short deadline makes it difficult to obtain meaningful public participation.

Article 169

This article states that the EIES will comply with applicable regulations. As far as we know, there are no regulations governing the EIES process for a mine. If these regulations do not exist, the law should include detailed provisions related to the EIES content and process as mentioned above in comments to Article 7. If the law depends on yet to be promulgated regulations, mining permits should not be issued until these regulations are in place.

Article 170

This article requires AMN to review the EIES and feasibility study within 90 days. In some circumstances, the authority may need more time. The law does not appear to allow the authority to extend the review period. In addition, it should be made clear that AMN may deny approval of an EIES.

Articles 177-184

These articles pertain to mining of construction materials and parallels the comments made above related to other mines.

Article 185

This article requires "un programme de consultation" with representatives of local communities that may be impacted by the mining operations but includes no details about how or when these consultations must be done, and what the law might mean by "représentants" and "susceptibles d'être affectés." Without specific standards and clear definitions, this section could be rendered meaningless.

Article 186

Article 186 requires negotiation of a "convention de développement communautaire," but leaves the details of how this will be done and what must be included to future regulations. It is recommended that basic standards for the convention be included in the law and that mining not be permitted until these regulations have been developed.

Article 189

Requiring the company to meet its obligations under the convention is not strong enough. The law should clearly state that the permit would be cancelled if the company does not comply with the convention. The community should have the ability to go to court to seek enforcement of these provisions.

Article 192

Article 192 requires mineral exploitation permit holders to prepare an employment, training and recruitment plan during the first year that the permit is valid. The purpose of the plan is to increase the number of Haitian nationals employed at all levels of the mining sector.

This provision could be strengthened by adding specific requirements to improve accountability. First, it is appropriate for the State to require mining companies to hire Haitian nationals for all unskilled positions. The Mineral Law should ban the use of foreign workers in unskilled positions. Second, recruitment plans must contain specific and measurable goals for increasing the number of Haitian workers in skilled and managerial roles. For example, the plans could include specific benchmarks that gradually increase the percentage of domestic workers in a mine's workforce over a specific period of time. Similarly, training plans must include clear financial commitments to provide training and education to Haitian nationals.

Article 201

It is very common for mining companies to seek special treatment and waivers from domestic tax law requirements. Although the Draft Mining Law states that mineral permit holders are subject to Haiti's income tax law (see Article 200), there are a number of tax compromises in the mining law that warrant close attention.

Article 201, for instance, allows mining companies to deduct all production costs from income, irrespective of limits that may be set forth in Haiti's income tax law. In normal circumstances, tax laws cap or restrict the amount of capital and business-related costs that companies may deduct from their income. Without this cap, mining companies have an incentive to inflate their production costs and engage in transfer pricing abuse in order to avoid paying taxes in the country where a mine is located. Article 201 effectively permits unlimited loss carry forward and depreciation, which will significantly reduce the amount of tax revenue that the State will collect from the mining sector.

Art. 205

The Draft Mining Law imposes an "ad valorum" royalty on the extraction of mineral resources. Ad valorem royalties are very common in mining laws and are assessed as a percentage of the value of the resource that a company produces.

Royalty rates are not specified in the draft law and will be defined in regulations. The law should at least establish base rates for royalties, which could be further adjusted (upward only) in accordance with regulations if a particular project so warrants.

The law or future regulations must also include safeguards to combat transfer pricing abuse. A particularly effective tool is to require all export transactions to be valued according to a specified international reference price or index. If Haiti's tax law does not

already do so, the mining law should authorize State officials to review transactions and to recharacterize them if it appears that transfer pricing abuses have occurred.

Article 206

The Draft Mineral Law imposes a special mining tax, which will be assessed in addition to the royalty set forth in Article 205. This tax is to be paid into a fund managed by the Central Bank for the benefit of mining-affected communities. It will be important to ensure that the law's implementing regulations clearly spell out requirements for managing and disbursing this fund, and that the procedures include close community involvement and input on fund expenditures.

Article 220

It is very common for countries with mineral development activities to allow mining companies wide latitude in converting funds. The Draft Mineral Law follows this trend and does not impose foreign exchange controls. Due to time constraints, we did not have the opportunity to investigate whether Haiti has exchange controls in its domestic laws. If so, it is worth determining whether mining companies are receiving special dispensation.

General Comments Regarding Fiscal Provisions for Mining

There is a growing movement among petroleum- and mineral-producing countries to implement transparent revenue management systems. This movement has been fostered by the Extractive Industry Transparency Initiative (EITI) and the international Publish What You Pay (PWYP) campaign. Together these initiatives promote three basic principles of transparency: 1) resource extraction companies must report payments made to governments; 2) governments must publish the payments received from resource extraction companies; and 3) governments must publish their budget expenditures. Another key part of revenue transparency is ensuring that fiscal systems are rigorously and independently audited and that payments are reconciled.

The Draft Mineral Law does not reflect best practices for fiscal transparency and accountability. The government of Haiti must adopt a transparent and accountable system for reporting and reconciling mineral revenue streams consistent with the best practices identified by the International Monetary Fund (IMF) and EITI. See IMF, "Guide sur la transparence des recettes des ressources naturelles" (2007) (available at http://www.imf.org/external/french/np/pp/2007/101907gf.pdf); "La Norme ITIE" (2013)(available at http://eiti.org/files/French_EITI_STANDARD_11July2013.pdf).

Article 224

Article 224 allows mining license holders to freely use materials and elements found within the designated license area. Large-scale mining projects demand access to large amounts of land, water, and other natural resources to support mining activities. These

ancillary mining activities, such as groundwater pumping, use of sand and gravel, or cutting forests, may cause conflict with and affect the livelihoods of people living in surrounding communities. The mineral law must include provisions that protect vital community rights - particularly access to water for domestic and agricultural needs. If safeguards are not put in place, there is a risk that local communities will lose land and water rights. This can adversely impact local livelihoods and economic activities and potentially lead to unrest and resentment towards the mining company.

Article 247

This article should go further and require employers give workers information about health and safety laws and the rights of workers in a means that is likely to be understood and easily accessible by the workers (for example, it might be conveyed orally as well as providing a written summary in creole in addition to the existing requirements).

Article 267

This section should be reviewed to ensure that it includes all of the protections for children required by the UN Convention on the Rights of the Child and any other child labor conventions to which Haiti is a Party.

Articles 278-279

It is not clear whether comments from all of the visits described in both articles must be reported in writing. If this is not required, it should be.

Article 292

The fund created under this article is intended for both the promotion of mining as well as the control of mining. AMN will manage the fund. Does this section imply that AMN is responsible for both promoting mining and regulating the industry? This is likely to create conflicts of interest for the agency. It should be specified how much of the funds may be used for promoting mining. The authority will need significant funds to adequately regulate the industry.