

**Review of Haiti's Convention Miniere Type
Environmental Law Alliance Worldwide (ELAW)
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At the request of lawyers at Défenseurs des Opprimés/Opprimés (DOP) and l'Association Haïtienne de Droit de l'Environnement (AHDEN), ELAW provides the following comments related to Haiti's Convention Miniere Type. The comments are arranged by corresponding article in the Convention.

Article 3 - Activités liées à la Convention

Article 3 states that the Convention applies to all activities of the mining company, as well as its subcontractors and affiliates. While it is beneficial that subcontractors and affiliates will be held responsible for upholding obligations contained in the Convention, they will also be able to take advantage of special tax and fiscal provisions that waive certain taxes and duties. This could give rise to tax avoidance behavior and other abuse of Haiti's financial laws.

As noted in comments on the 2014 Draft Mineral Law, most mining laws or conventions include a definition of "affiliate" for the purpose of deterring transfer price abuse and other tax avoidance behavior. The definition of "affiliate" contained in the Draft Mineral Law is very typical of those found in other mining laws and focuses exclusively on the shareholder relationship between companies. See Draft Mining Law, Article 7 (definition of "Société Affiliée d'une personne morale"). However, "affiliate" relationships can also be created through long-term contracts between non-related companies. We have included a model definition of "affiliate" from the International Bar Association Model Mineral Development Agreement in comments pertaining to Article 7 of the Draft Mineral Law.

It is also appropriate to consider including a provision in the Convention that would require mining companies 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.) Such information will help regulators follow transactions and monitor fiscal behavior.

Article - 4 - Durée

The maximum duration of the Convention will be 15 years. During this period, however, the terms of the agreement are frozen through "stability" language. (Stabilization is discussed in more detail below - Article 22). During the contract term, the government of Haiti will not be able to raise royalty rates, modify income tax provisions or customs

duties, or impose stronger health, safety, and environmental regulations unless both parties agree.

It would be beneficial if the Convention included a renegotiation clause requiring the parties to periodically review the agreement (e.g., every five years) and determine whether it is still meeting the parties' objectives. For example, the government of Liberia has included the following periodic review clause in its mining contracts:

“The Parties agree that the Agreement shall be subject to periodic review once every five years after the commencement of [p]roduction for the purpose of good faith discussions to effect such modifications to the Agreement as may be necessary or desirable in the light of any substantial changes in circumstances which may have occurred in the previous five years.”

Article 7 - Démarches préalables

Article 7 requires the mining company to undertake certain actions before it may begin construction. Specific obligations and implementation plans will be determined on a project-by-project basis and annexed to the Convention. These obligations include presenting the project to local authorities, obtaining land rights and rights of way, and developing a resettlement and compensation program for communities impacted by proposed mining activities. See Article 7.

Among these “pre-construction” steps, the Convention must include provisions requiring the mining company to engage in consultation with impacted communities, not only to explain the project but to receive feedback and consent from community members on aspects of the proposed mining plan that will affect community members - such as rights of way, acquisition of land rights, community development, and local recruitment.

Articles 8-13 - Les plans de Travaux

A considerable amount of detail concerning mining and related activities will be governed by project-specific work plans that will be annexed to the Convention. It is presumed (and recommended) that these plans will be completed prior to executing the Convention, and not after. The government of Haiti is encouraged to involve the public and affected communities as these plans are being developed and to ensure they include specific and measurable objectives that can be monitored during implementation.

A key plan has been omitted from the Annex list - the Community Development Protocol (Protocole de Développement Communautaire), which is outlined in Title IX of the Draft Mineral Law. This protocol must be included in the Convention annex so that there is no question that it is a binding commitment. (Note: This concern is somewhat alleviated by Article 27 in the Convention, which permits the government of Haiti to terminate the Convention if the mining company breaches the Community Development Protocol.)

Article 11 - Travaux de Réhabilitation

Mining activities pose a high risk of causing serious and long-term environmental impacts; therefore, the rehabilitation plan is one of the most important elements of mining regulation.

It is a positive step that the Convention requires the plans for rehabilitation and rehabilitation financing to be prepared prior to negotiation and annexed to the agreement. However, over the course of the mining project, on-the-ground conditions and mine-related activities are likely to change; therefore, it is vital that the rehabilitation plan and financial guarantee are periodically reviewed and updated. This review should be completed at least every five years.

Article 11 requires the mining company to provide a financial guarantee for the cost of rehabilitation work. Article 177 of the draft Mineral Law limits the accepted forms of financial guarantee to: 1) a corporate guarantee (caution d'une entreprise); 2) an insurance policy (engagement d'une société d'assurance); or 3) a bank guarantee (une garantie financière émise par une banque de premier).

The government of Haiti should not allow mining companies to “self-guarantee” (option #1 above) the costs of rehabilitation. A corporate guarantee is considered a “soft” assurance that is only reliable when the rehabilitation plan is technically simple and/or the mining company has the financial strength to support the guarantee. If a company defaults on its financial obligations, there is no recourse to obtain funds for rehabilitation and to clean up pollution without legal action. For this reason, the U.S. Bureau of Land Management revised its financial guarantee regulations in 2000 to discontinue use of corporate guarantees. See 43 C.F.R. § 3809.555 (available at <http://www.gpo.gov/fdsys/pkg/CFR-2008-title43-vol2/pdf/CFR-2008-title43-vol2-sec3809-555.pdf>).

An insurance policy (option #2 above) should be accepted only if the insurer is considered highly rated by a third-party (e.g., A.M. Best), and the policy guarantees performance in the event that the mining company defaults on its regulatory obligations. These conditions should be included in the Convention.

According to the draft Mineral Law (Article 177), once a mining company begins commercial production of minerals, it will be required to establish a rehabilitation fund. This fund will gradually replace the financial guarantee mentioned above. This is an excellent method of ensuring that cash will be readily available for rehabilitation activities. As explained above, the rehabilitation plan and financing plan should be reviewed and updated at least every five years.

Title III - Précisions Fiscales

The fiscal provisions briefly outlined in the Convention appear reasonable, with two caveats. Most of the specific financial details, including procedures for calculating

income taxes and customs duties, will be decided on a project-by-project basis and will be described in an annex to the Convention. See Annexes H&I. The government of Haiti is encouraged to seek expert advice and independent economic modeling as these details are being negotiated with the mining company so as to ensure that the fiscal terms are equitable. This is especially important because fiscal terms are stabilized for the entire duration of the agreement. (See comments below related to Article 22).

Article 22 - Droit de Stabilité

Article 22 is a “stabilization” clause, which prevents the government of Haiti from changing fiscal terms in the Convention or modifying the mining company’s rights under its exploitation permit for the duration of the Convention (up to 15 years). This article could be interpreted to apply only to tax, customs, and foreign exchange provisions; however, the second sentence is very broad and could be invoked by the mining company to avoid complying with any new laws or regulations that may be enacted in the future, including health, safety, labor, and environmental safeguards. To avoid misunderstanding, it would be beneficial to add language to Article 22 clarifying that the provision does not apply to any law or regulation reasonably intended to protect the environment, the safety, health, or welfare of the citizens of Haiti, or to fulfill the government’s international obligations.

Article 27 - Causes de Résiliation

The government of Haiti is permitted to terminate the Convention under very limited circumstances. These circumstances include the mining company’s failure to construct the mine according to the agreed upon work plan, failure to make certain payments to the government, or failure to fulfill community development and employment recruitment plans. See Article 27.

Additional grounds for termination should be added to Article 27, as follows:

- 1) The mining company assigns all or part of its rights under the Convention to a third party without first obtaining written consent from the government of Haiti;
- 2) The mining company knowingly submitted false or fraudulent information/statements to the government of Haiti that were a material consideration for the negotiation, granting, or execution of the Convention; and
- 3) The mining company dissolves, liquidates, becomes insolvent, makes an assignment for the benefit of creditors, or commences any proceedings concerning itself under a law concerning bankruptcy, or insolvency.

It may be worth including a “catch-all” provision allowing the government of Haiti to terminate the Convention if mining company commits a material breach of the agreement; however, determining whether a material breach has occurred will likely give rise to a dispute between the parties and lead to costly arbitration proceedings.

Article 29 - Effet de la Résiliation

In the event that the government of Haiti terminates a Convention, Article 29 states that the Convention will cease to have effect but the mining company will nevertheless be subject to compliance with the Mineral Law. Article 29 should specify that the mining company remains liable for undertaking and completing the mine rehabilitation plan if the Convention is terminated, and that the company is financially responsible for any environmental damage arising out of its activities within and outside of the mine area.

Article 31 - Publication

Article 31 declares that the Convention will be published. The Draft Mineral Law further clarifies that publication will occur in *Le Moniteur*. See Draft Mineral Law, Art. 66. This is a very positive step towards improving transparency in resource extraction; however, the Mineral Law and/or Convention must include a timeframe for publication (e.g., immediately after the Convention takes effect, or within one month of signing). Otherwise there is a risk that Conventions will not be disclosed to the public in a timely manner.

Article 35 - Règlement des Différends

The Convention emphasizes amicable resolution of disputes and establishes a specified time period in which the parties must discuss and attempt to resolve differences that may arise. It is important to point out that the dispute resolution provisions apply not only to any disagreement the parties may have about implementation or interpretation of the Convention, but to the interpretation of laws and regulations that govern the exploitation permit. See Article 35.1. In the event that an amicable resolution cannot be achieved, the parties must submit the dispute to a technical expert (the parties jointly choose the expert) or binding arbitration. There is no recourse to the judicial system should the parties fail to reach an amicable resolution.

It is in the government of Haiti's interest to resolve contract disputes and questions regarding interpretation of domestic laws in its courts, rather than through arbitration. Arbitration proceedings are expensive, lack transparency, and are considered to be biased towards resource extraction companies. The Convention should be amended to require the parties to submit all disputes to Haitian courts or at least those disputes relating to the application of Haitian law to the exploitation permit. Article 292 of the Draft Mineral Law specifically permits the parties to seek remedies through Haitian courts and does not require contract disputes to be referred to arbitration.

If the arbitration provisions remain in the Convention, there will be different procedures based on the ownership structure of the mining company involved in a dispute. If the mining company has 50 percent or less foreign ownership, the arbitration panel will consist of one representative of AMN, one representative of the mining company, and a third party chosen by mutual agreement of the parties. The parties will determine the

arbitration rules. See Draft Mineral Law, Arts. 151, 294. (This type of arbitration is commonly known as an “ad hoc” proceeding.) If the mining company has more than 50 percent foreign ownership, arbitration will be conducted under the rules of the International Court of Arbitration of the International Chamber of Commerce (also known as an “institutional” proceeding). Draft Mineral Law, Art. 294. There is no justification for treating majority-foreign owned mining companies differently than majority domestic-owned companies. Both types of companies should be subject to the same type of arbitration proceeding.

Regardless of the type of proceeding (ad hoc or institutional), the Draft Mineral Law declares that arbitration must occur in Port au Prince and be conducted in French. See Draft Mineral Law, Arts. 151, 294. These are excellent precautions that benefit the government of Haiti. To avoid misunderstanding, it would be helpful if these conditions were expressly reiterated in Article 35 of the Convention.