



Haiti Justice Initiative University of California Hastings College of the Law

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 neighboring Dominican Republic. Haiti not only shares the island of Hispaniola with the Dominican Republic, it also shares the rich mineral belt from which Pueblo Viejo is drawing gold and copper—a belt that stretches across Haiti's northern departments. Pueblo Viejo is one of the world's most productive mines and has spurred interest in the potential deposits that may lay under Haitian soil. The exact quantity of Haiti's mineral resources is not known, but some estimates place the value of the gold alone at \$20 billion.¹

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.² Between 2006 and early 2013, two Canadian and two U.S. companies reportedly invested \$30 million to explore for gold, copper, and other metals.³

Since early 2013, 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 mining permits and the danger mining poses to the environment.⁴ In the meantime, 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 has been drafted in consultation with the mining industry but without input from the Haitian public.

The Draft Mining Law

Although the Draft Law has not been made public, in November 2014 the Global Justice Clinic (GJC) obtained a draft of the text, dated August 2014, which had been prepared by a multi-sector Task Force with support from the World Bank. GJC learned that the draft law was delivered to the Prime Minister's Office but was not presented to Parliament before its dissolution on January 12, 2015. This briefing paper presents some of the August 2014 draft law's most glaring shortcomings. It is not an exhaustive analysis.⁵

NOTE: Publications of the Global Justice Clinic do not purport to represent the views of NYU, if any.

¹ See, e.g., Shihoko Goto, *Haiti's Gold Mining Potential*, GOLD INVESTING NEWS (Nov. 30, 2011), available at <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 (June 18, 2013), politicsofpoverty.oxfamamerica.org/2013/06/mining-development-in-haiti-a-golden-dream-or-nightmare/.

² See generally Conseil de Développement Economique et Social, www.cdes.ht/fr/actualites.html (identifying mining as one of the focal areas for the country's development strategy); see also World Bank, *Haiti: Mining for Economic Growth* (July 25, 2013), 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).

³ See, e.g., Tate Watkins, *Curses of Aid and Gold in Haiti*, MEDIUM (June 14, 2013), medium.com/medium-for-haiti/7a99bd074fc4.

⁴ *Haiti—Économie : Le Sénat vote la suspension des Permis Miniers en Haïti*, HAÏTI PROGRÈS (Feb. 21, 2013), 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.

⁵ The forthcoming report, *Byen Konte, Mal Kalkile? Human Rights and Environmental Impacts of the Mining Sector in Haiti*, will include a more detailed discussion of the proposed mining law. (Expected publication: October 2015).

The Draft Law Would Restrict Parliamentary Oversight

The Mining Decree of 1976, currently in force, establishes a sequential, four-part system of prospection permits, research permits, exploitation permits, and mining concessions. A contract between the mining permit holder and the Government of Haiti, known as a mining convention, 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. The conventions must be ratified by Parliament.

The draft mining law would create a new governmental institution charged with regulating the mining industry, the National Mining Authority (NMA).⁶ The NMA would be responsible for granting mining permits, overseeing company compliance, and implementing regulations addressing an array of important issues, including water and air pollution control standards, mine design and land use criteria, and environmental remediation requirements. Indeed, the draft law leaves many crucial details regarding environmental and social requirements to be addressed through implementing regulations, but does not specify who is responsible for drafting those regulations, when they will be adopted, or whether the regulations will be subject to review and approval by Parliament or the judiciary.

Annexed to the draft mining law is a Model Mining Convention (“Convention Minière Type”). The promulgation of a model mining convention that sets a floor regarding key terms and performance requirements represents a significant improvement over the existing, convention-based regime. According to the draft law, however, parliamentary approval is not required prior to the State’s signature of a mining convention; instead the State need only “consult” the relevant commissions in the two houses of Parliament before signing a convention.⁷ 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.

The Draft Law Favors Secrecy Over Transparency

Article 115 of the draft law 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. This broad language 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 and could foreclose the possibility of any genuine public debate about the short- and long-term impacts of mining. This confidentiality clause replicates rather than rectifies the shortcomings of the existing legal framework for mining in Haiti.⁸ Furthermore, the proposed text does not include robust fiscal transparency requirements or oblige mining companies to disclose the revenues they earn or amounts they pay to the Haitian State.⁹

⁶ See Draft Mining Law, Art. 4.

⁷ See Draft Mining Law, Art. 65; see also Article 174 (allowing the government to override prohibitions on mineral exploitation in certain designated areas based on “consultation” with Parliament rather than parliamentary approval).

⁸ See DECRET ENCOURAGEANT LA PROSPECTION MINIERE SUR TOUTE L’ETENDUE DU TERRITOIRE DE LA REPUBLIQUE ET ADAPTANT LES STRUCTURES JURIDIQUES EXISTANTES AUX REALITES DE L’INDUSTRIE MINIERE, ART. 17, 23 LE MONITEUR VOL. 19 (March 8, 1976) <http://www.bme.gouv.ht/mines/loimin/decminiere.pdf>. See also Le Moniteur, *Convention Minière Entre L’État Haitien et La Société Minière Ste. Geneviève Haiti S.A.*, May 3, 2005 ; Le Moniteur, *Convention Minière Entre L’État Haitien et La Société Minière Citadelle, S.A.*, May 3, 2005.

⁹ Article 234 provides that the NMA and the Fiscal Administration are to publish revenues from the mining sector each December. 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. And it imposes no duties on companies to open their books.

The Draft Law Lacks Sufficient Detail to Adequately Protect the Environment

Although the draft law requires all holders of exploration permits to produce an environmental analysis, and all holders of exploitation permits to produce an Environmental and Social Impact Assessment (ESIA, or EIES in French), it neither specifies the required components of those studies nor references any existing law that sets forth such requirements.¹⁰ Similarly, the draft 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.

Article 185 of the draft law tasks the NMA with issuing an “environmental discharge” (*“le quitus environnementale”*) to certify that a company has performed the required environmental rehabilitation before it withdraws from or renounces an exploration permit, or before the permit expires. Article 193 tasks the Ministry of the Environment with the responsibility of issuing an environmental discharge for exploitation permits. The draft law does not specify what that environmental discharge analysis entails. Instead, it defers elaboration of crucial details to implementing regulations to be adopted at an unspecified time in the future.

Although the draft law requires that companies produce an ESIA for review by the Ministry of the Environment, the draft law does not require affirmative approval of that study. Rather, Article 186 requires that a company obtain a statement of “non-objection” prior to receiving authorization to begin mining operations. The Ministry of the Environment (MOE) has 180 days to issue a statement or request changes to the documents.¹¹ Article 189 states that if the MOE does not respond within that period, a statement of non-objection will be presumed.

The absence of specific compliance standards or requirements of affirmative approval from the MOE, coupled with the deferral of important regulatory details to the discretionary judgment of the NMA, threatens the integrity and efficacy of the environmental review system itself.

The Draft Law Grants Insufficient Time for Effective Environmental Review

Article 35 of the draft law gives the NMA just 30 days to complete its technical appraisal of an application for an exploration permit and Article 51 grants just 90 days for similar review of an exploitation permit application. Article 181 affords the NMA only 30 days to review the environmental analysis and mitigation plan produced by the permit holder at the exploration phase. Article 187 allows the NMA 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 MOE for evaluation. Such short timelines not only restricts the government’s ability to thoroughly study the documentation, but also limit the opportunity for public participation or comment.

The Draft Law Fails to Protect Haiti’s Water Resources

Gold mining typically uses large quantities of water and can have significant and lasting impacts on water quality.¹² Haiti has long suffered from a shortage of potable water throughout the country.¹³ In the North of the country, where water resources are especially scarce and where the companies holding mining permits have

¹⁰ Draft Mining Law, Arts. 7, 180, 186.

¹¹ Draft Mining Law, Art. 188.

¹² See, e.g., <https://www.icmm.com/document/3660>; <https://www.cdp.net/CDPResults/Metals-Mining-sector-under-water-pressure.pdf>; Earthwork, Report on mine waste dumping contamination of water, https://www.earthworksaction.org/files/publications/Troubled-Waters_FINAL.pdf.

¹³ 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 *Clean Water, Improved Sanitation, Better Health*, World Bank Haiti Conference Paper, Washington D.C. (October 9, 2014), available at: http://www.worldbank.org/content/dam/Worldbank/document/book_haiti_6oct_print.pdf.

confirmed that mineral deposits contain significant concentrations of various sulfides,¹⁴ the hydrologic risks posed by mining, including risks of toxic rock drainage, are particularly acute.

Despite these recognized risks and heightened vulnerabilities in Haiti, the draft law does not include adequate safeguards to protect water resources or Haitians' right to water. 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 document the baseline quality and quantity of those resources (including surface and groundwater resources, as well as access to such sources by residents in the affected areas), obtain prior approval for such use, or monitor impacts of that use over time. Although Article 116 generally requires the NMA to ensure that companies redress harms to water sources, the draft law neither establishes a framework for assessing and preventing potential adverse impacts on the country's water resources, nor specifies water quality standards governing waste and chemical pollutants common at mining sites.

The Draft Law Fails to Adequately Protect Communities

As a preliminary matter, the draft law's broad declaration in Article 3 that mining is an activity of “public utility”¹⁵ risks facilitating compulsory acquisition of land through eminent domain. Article 167 also gives companies the right to seek expropriation of privately held land to conduct mining activities. Together, these articles may make it easier for mining companies to legally seize land from community members, without adequate negotiation, consultation or compensation.

Perhaps more strikingly, the draft law is entirely silent on the rights and treatment of individuals and communities physically or economically displaced by mining activities. 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 law regarding the obligations of companies to minimize the need for and, where not preventable, cover the costs of resettlement and livelihood restoration is discordant with international standards and best practices. And although the proposed law requires mining companies to establish and implement a program of consultation with local community representatives,¹⁶ it fails to provide any details regarding the timing or manner in which community consultation must be carried out or how community “representatives” are to be defined and identified. The lack of detail regarding the planning, timing, or execution of such consultation programs undermines the ability of communities to enforce the consultation obligation or to ensure that decisions affecting their lives are not taken without their knowledge or input.

The Draft Law Falls Short of Guarantees in the 1987 Constitution of Haiti

The Draft Law Fails to Protect the Right to a Healthy Environment

The Haitian 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.” 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.”

¹⁴ See Eurasian Minerals, *Haiti Overview* (2014), available at <http://www.eurasianminerals.com/s/Haiti.asp>; Majescor Resources, *Douvray Porphyry Copper Deposit Mineral Resource Estimate: SOMINE Project, Northeast Mineral District, Republic of Haiti* (2013), available at [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); VCS Mining, *Projects: Morne Bossa* (2012), available at <http://vcsmining.com/flagship-property.html>.

¹⁵ See Draft Mining Law, Art. 3.

¹⁶ See Draft Mining Law, Art. 202.

These articles could be read to bar any large-scale surface mining on the theory that such mining inevitably disturbs the ecological balance by creating large 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. This is a plausible interpretation of the environmental protection articles considered in isolation. Articles 253 and 253-1, however, must be analyzed in conjunction with the specific provisions of Articles 36-5 and 36-6, which 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 constitutional provisions authorizing mining activity, on the other. At the very least, if mining activity is to proceed, Articles 253 and 253-1 provide both a constitutional foundation for, and a constitutional obligation to ensure, robust environmental regulation of mining.

The Draft Law Does Not Adequately Respect the Right to Property

Article 36 of the Haitian Constitution guarantees the right to property. Article 36-5 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.” 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. Article 36-6 goes on to state that mining laws shall “ensure the surface owners, concessionaires, and the Haitian State an equitable share of the profits from the value of these natural resources.” The fiscal regime established in the Draft Mining Law, which includes a four percent royalty rate for gold and a modest per-ton fee to be paid to affected local territories, does not guarantee that surface owners enjoy a fair share of the benefits of mining. Moreover, the absence of a clear regime regarding compensation rates to be paid to land owners and occupants for the use of, or damage to, their land as a result of mining further calls into question the constitutionality of the proposed mining regime.¹⁷

The Draft Law Violates the Right to Information and the Right to Participation

The right to information guaranteed by the Haitian Constitution, both in the preamble and in Article 40, which requires the government to publish all information that affects the public life, apart from that which is kept secret to protect national security. Haiti has also ratified numerous international treaties that protect the right to information.¹⁸ As discussed above, Article 115 of the draft law imposes a sweeping confidentiality requirement. In addition, the short timeframes for environmental review and the lack of detail regarding the processes by which environmental and social studies are to be carried out and regulations are to be enacted also (indirectly) undermines the right to information, as it leaves little room for public access to and influence on key documents and decisions.

The Draft Law Purports to Abrogate Other Legal Obligations

Article 276-2 of the Haitian Constitution provides that all lawfully approved treaties and international agreements “become part of the legislation of the country and abrogate any laws in conflict with them.” Yet Article 315 of the law states that the law abrogates any legal provisions contrary to it. This too would be unconstitutional.

Conclusion

If Haiti is to adopt a new mining law, it should be enacted by Parliament, not by presidential decree, and only after open, informed public debate. Once Parliament is reinstated, the government must facilitate an extensive and candid consultation about the content of the draft law and how its passage may affect Haitian communities

¹⁷ See Draft Mining Law, Art. 160-163.

¹⁸ International Covenant on Civil and Political Rights Art. 19. The International Covenant on Economic and Cultural Rights has been interpreted to include the right to access to information in relation to specific substantive rights (e.g., the right to health, Art. 12, CESCR, General Comment 1, para. 11; the right to water, CESR, General Comment 15, para. 48).

and the environment. These discussions must include the communities that would be most at risk from mining, as well as other members of Haiti's civil society.

The strength of the legal regime governing mining in Haiti depends not just on the text of the framework statute and accompanying regulations, but ultimately 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, the chronic lack of capacity in the Haitian government means that mining operations could commence under a new law before the government is able to draft, implement, and enforce vital regulations—and before the government has the human capacity and material resources to ensure that mining in Haiti will benefit and not harm the Haitian people and their environment.

Additional Resources:

The Draft Mining Law

- **Draft law:** <http://www.accountabilitycounsel.org/wp-content/uploads/2015/01/Draft-Mineral-Law.pdf>
- **Model Mining Convention:** <http://www.accountabilitycounsel.org/wp-content/uploads/2015/01/Model-Mining-Convention.pdf>
- **Explanatory Memo:** <http://www.accountabilitycounsel.org/wp-content/uploads/2015/01/Explanatory-Memorandum.pdf>

Legal and Human Rights Analyses of the Draft Law

- **Environmental Law Association Worldwide** analysis of draft law and Mining Convention: http://elaw.org/system/files/ELAW.mineral.law_comments.dec14.pdf and <http://elaw.org/system/files/ELAW.miningconvention.comments.pdf><http://elaw.org/system/files/ELAW.miningconvention.comments.pdf>
- Oxfam publication *Ready for Gold? Assessing Haiti's Governance and Regulatory Capacity for Large Scale Mining*: <http://policy-practice.oxfamamerica.org/publications/ready-for-gold/>
- Global Justice Clinic report *Byen Konte, Mal Kalkile? Human Rights and Environmental Impacts of the Mining Sector in Haiti*. Full report forthcoming, October 2015. **Executive Summary:** <http://chrgj.org/gjc-releases-executive-summary-of-report-on-human-rights-and-environmental-impacts-of-mining-in-haiti/>.

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For More Information, Contact:

Nikki Reisch, Legal Director of the Center for Human Rights and Global Justice; Global Justice Clinical Professor and Supervising Attorney nikki.reisch@nyu.edu

Ellie Happel, Global Justice Clinic Haiti Program Attorney elliehappel@gmail.com

Brian Gray, Professor Emeritus, Hastings College of the Law graybe@icloud.com