

Gonzalo Castro de la Mata
Chairman

IPN REQUEST RQ 15/01

February 6, 2015

**MEMORANDUM TO THE EXECUTIVE DIRECTORS
INTERNATIONAL DEVELOPMENT ASSOCIATION**

Request for Inspection

Haiti: Mining Dialogue Technical Assistance (P144931)

**NOTICE OF NON-REGISTRATION AND OBSERVATIONS REGARDING THE POLICY
FRAMEWORK APPLICABLE TO TECHNICAL ASSISTANCE**

Introduction

1. In accordance with paragraph 17 of the Resolution¹ establishing the Inspection Panel, I hereby inform you that on January 7, 2015, the Inspection Panel (the "Panel") received a Request for Inspection of the Haiti Mining Dialogue Technical Assistance (P144931) supported by the World Bank through a Extractive Industries Technical Advisory Facility (EI-TAF) trust fund. The Request for Inspection is included as Attachment 1 to this Memorandum.

Request for Inspection

2. The Request was submitted by Kolektif Jistis Min an Ayiti (the Haiti Mining Justice Collective), a "Collective" of Haitian civil society organizations, with both national and local constituencies, as well as communities that allege to have been, and continue to be, directly affected by the development and reform of the Haitian mining sector.²

¹ The World Bank Inspection Panel, International Bank for Reconstruction and Development and International Development Association, Resolution No. IBRD 93-10 and Resolution No. IDA 93-6, dated September 22, 1993.

² The Requesters are supported by the New York University School of Law Global Justice Clinic and an international non-governmental organization, Accountability Counsel, who were appointed as contact reference for communications related to the Request.

3. The Requesters consider that the Bank's support for reforms in the Haitian mining sector "*will result in serious social and environmental harms, including contamination of vital waterways, impacts on the agriculture sector, and involuntary displacement of communities.*" They state that the Bank was not following its Social and Environmental Safeguard Policies in the context of this operation, which includes: "*assistance with the drafting of new national mining legislation; capacity building for the Office of Energy and Mines (Bureau des Mines et de l'Énergie); assistance with the development of a mining cadaster; support for stakeholder engagement; and other activities related to the development of the mining sector.*" The Requesters asked the Panel to keep the annexes to the Request confidential.

The Mining Dialogue Technical Assistance

4. The Mining Dialogue is a technical assistance (TA) operation, for which Management approved the concept note on April 30, 2014. The total amount of the technical assistance is US\$ 650,000 of which about 76.61% has been disbursed. The completion of the TA is expected on December 31, 2015.

5. According to the Concept Note, the objective of the TA is "*to share international experience and best practices with the Government and key stakeholders in Haiti in the process of modernizing the legal and policy framework for mining in a way that attracts investment while at the same time protecting the benefit to the public and ensuring adequate social and environmental safeguards.*" The TA is composed of the following activities: (i) advisory services for reviewing the mining legal and policy framework; (ii) diagnosis of mining title management; (iii) organization of a mining conference; and (iv) training and advisory services related to mining negotiations.

6. The Request focuses on the first activity under the TA, i.e., to support a Government Task Force responsible for drafting the mining law, with consultations with stakeholders and submission to the Parliament. Under this activity, an international lawyer was hired to produce an initial analysis of the mining law, a proposed matrix to organize discussions, and advice based on lessons from international experience. A local lawyer was also hired to provide the Task Force with sufficient knowledge on the general legal environment in Haiti and feedback from the application of the existing mining law.

7. The Concept Note states that Haiti has a history of mining but no current operations since the end of the 1970s. Most recently, the sector has attracted high level national and international attention for several reasons: (i) development of a world-class gold mine in neighboring Dominican Republic that raised both hope for major discoveries and concerns towards environmental and social impacts; (ii) lack of transparency in the negotiation with companies, which spread misunderstandings and misperceptions about the sector; and (iii) the allocation of three mining permits in December 2012 that was contested by the opposition. At the same time, the Government of Haiti has put forward mining as a key priority. Major obstacles, however, prevent further developments, including the fact that Haiti's Mining Law is largely out of date. The Concept Note adds that following a request by the Ministry of Finance, the Bank has prepared the technical assistance project financed by the EI-TAF.

8. According to its Annual Report,³ the EI-TAF, which was launched in 2009, has mobilized commitments from a number of donors, including the IFC Funding Mechanism for Technical

³ EI-TAF Annual Report as of December 31, 2012, EI-TAF Donors Meeting Offices of NORAD, Oslo, Norway March 1, 2013.

Assistance and the World Bank Development Grant Facility.⁴ The EI-TAF has two components: (i) rapid response advisory services; and (ii) knowledge management.

Concerns Raised in the Request

9. The Requesters raise several concerns related to the impacts that will be generated by a mining operation approved under the draft Mining Law which, according to them, is not “*consistent with the World Bank’s own minimum social and environmental standards.*” The Requesters state that in effect, this will lead to an increase in the frequency and severity of negative impacts from mining activities, some of which have already been experienced by communities in Haiti. They consider that “*many of the provisions of the Draft Mining Law are at odds with the World Bank’s policies.*”

10. The Requesters argue that no “*analysis of the capacity of the Haitian government to regulate and monitor mining company activities*” was undertaken to assess whether the human rights of the Haitian people in the context of mining activities would be met. The Requesters state that mining-affected communities and Government officials agree that Haiti severely lacks relevant technical and institutional capacity. They add that this lack of capacity means that mining operations may be initiated before the government is able to properly implement and enforce its regulations. They also add that Haiti does not have the capacity to test for metals and other contaminants in soil and water during and after any mining operations. According to the Requesters, “*in exchanges with the World Bank,*” the Bank conceded that the Government of Haiti lacks capacity, yet emphasized that core decisions are left to the Government without stating “*any precautionary measures to ensure that the rights of the Haitian people are protected.*” They report that Haiti’s weak capacity is also acknowledged in the Bank’s Interim Strategy Note for Haiti for 2013-2014.

11. The main concerns listed in the Request are summarized below:

Failure to Adequately Consult

12. The Requesters state that, with the exception of two meetings, the draft Mining Law was drafted and developed “*by a small Task Force made up of World Bank experts and Haitian government officials*” without adequate consultation with Haitian CSOs and communities directly affected by mining activity. They add that the Draft Mining Law still needs to be translated into Haitian Creole. They further add that they are “*frustrated that the Haitian people have not had the opportunity to participate in meaningful conversations or deliberations with decision-makers about the development of the Draft Mining Law.*” They state that they are “*particularly eager*” to provide input to protect Haiti’s fragile ecosystem, including its water resources, or the social and economic rights of community members and guarantee access to information and transparency in the mining sector.

Failure to Safeguard the Environment

13. The Requesters consider that the draft Law fails to protect “*Haiti’s fragile environment [that] cannot withstand a mining strategy that is undertaken without strong environmental protections.*” They also state that “*mining activity – particularly open pit mining – should be undertaken only in a context with adequate safeguards and rigorous governmental monitoring.*” They consider that Bank support for mining-related activities, including legislative reforms, “*is likely to have significant,*

⁴ Other donors include Australia (AusAID), Belgium (Ministry of Development Cooperation), Canada (Canadian International Development Agency), Norway (Oil for Development), and Switzerland (State Secretariat for Economic Affairs).

irreversible environmental impacts,” and “*should be classified as Category A.*” The Requesters add that a Sectoral Environmental Assessment should have been required to assess impacts “*on water and land resources and how these will be balanced against individual and community needs and the needs of other industries,*” including an analysis of alternatives to the development of the mining sector, and that the draft Mining Law’s standards for future mining projects in Haiti are inconsistent with the requirements of OP 4.01. While the draft Law does require an Environmental Analysis and an Environmental and Social Impact Assessment (“ESIA”) for all mining projects, it does not specify any components or information that must be included in these documents.

Failure to Protect Critical Natural Habitats

14. The Requesters consider that the draft Mining Law fails to ensure that mining operations “*will not endanger critical natural habitats,*” as required in Bank Policy, and that it fails to require that environmental costs is internalized by mining companies, as per international best practice. They also add that the draft Law’s provision on “*no go*” zones is inadequate as it does not include critical natural habitats or guidance for the types of land where no-go zones will be established. They also argue that the government agency tasked with managing protected areas is still in development, yet it is unclear what steps the Bank is taking to ensure that it is fully functional and has the capacity to protect important natural habitats prior to the passage of the Law.

Failure to Protect Forests & Water Resources

15. The Requesters state that the draft Mining Law is not in line with the Bank’s Policy on Forests, adding that in Haiti “*the forest cover has been subject to severe degradation and is currently estimated at 1.5%.*” They state that a Project EA “*must address the potential impacts on forests and on the rights and welfare of local communities.*” The draft Law, however, is not sufficiently specific in order to ensure that impacts on forest areas are subject to analysis and that forest degradation is avoided or mitigated wherever possible. The draft Law also lacks provision as to whether all critical forest areas would be categorized as off-limits for mining.

16. The Requesters also state that residents are already concerned with the lack of access to water for drinking and irrigation, and that mining could worsen access to water. They add that according to the Bank itself, only half of rural Haitians have access to an improved water source. According to the Requesters, mining activity, particularly gold mining, requires massive amounts of water and poses serious risks to water quality, but the draft Mining Law does not establish a strong legal framework to manage Haiti’s water resources and fails short of guarding them from identified risks.

Land Rights, Crops, and Involuntary Resettlement

17. The Requesters claim that companies in the past have used private lands for exploration and drilling without seeking the consent of landowners or users. Even when permission was granted, the rights of the landowners or users were not respected. Community members are often misinformed about the benefit they would receive. Members of mining-affected communities have complained that mining activities damaged their lands or their crops, without adequate compensation.

18. The Requesters also state that mining-affected communities have already experienced problems related to: (i) use of community lands by mining companies; (ii) restrictions to landowners’ access to their land or their use for agricultural purposes without the company’s consent; and (iii) landowners experiencing economic displacement, including crop failure. Community members fear

that future mining activities may further affect their crop production and as a consequence, impinge on their economic and social welfare.

19. The Requesters state that the draft Mining Law describes mining activities as “*public utility*” (public interest), facilitating acquisition of private land for large-scale mining projects, and that it “*gives companies the right to seek expropriation of privately held land to conduct mining activities.*” They also state that the law “*provides that mining companies can acquire private property for mining activities by paying market value compensation to the landowner. It does not discuss whether compensation will be negotiated with landowners on an individual basis or collectively. Nor does the law address the need to deal with community resettlement issues holistically through a community-wide resettlement plan,*” as per Bank policy. According to the Requesters, the draft provisions “*are not aligned with the norms set out in OP 4.12, which requires that involuntary resettlement be avoided or mitigated wherever possible.*” The Requesters conclude that the draft Mining Law, “*falls short of what the Bank itself requires under OP 4.12.*”

Failure to Protect Physical Cultural Resources

20. The Requesters state that the draft Mining Law fails to adequately protect physical cultural resources (historic or sacred sites, graves or works of art) because buffer zones are best determined on a project-by-project basis, taking into consideration the type of mining operations and the surrounding site that may be affected. They argue that a 250 meter buffer zone would have been more appropriate (than a 50 meter buffer zone) to safeguard physical cultural resources and other attributes of the surrounding land. They add that draft provisions regarding “*no go*” zones fail to provide “*adequate protection for Haiti’s physical cultural resources*” stating that “*it is unclear whether valuable physical cultural resources within the country, such as the Citadelle Laferrière and the buildings at Ramiers, will be adequately protected if mining activity continues.*”

Violations of the Constitution and Impediments for Haiti to Meet its International Obligations

21. Finally, the Requesters consider that the draft Mining Law would violate clauses of the 1987 Haitian Constitution concerning environmental protection, adding that the right to participate in decision-making processes, including in relation to development, is protected by the International Covenant on Civil and Political Rights and the International Convention on Economic, Social and Cultural Rights, both of which Haiti has ratified.

Panel’s Observations Regarding the Request

22. The Panel considers that the concerns raised in the Request are of great importance. The Panel agrees with the Requesters that a mining law can have significant and considerable adverse environmental and social consequences, unless consideration is given to the highest possible environmental and social standards. The Panel, therefore, notes that the issues presented in the Request are serious and legitimate. The nature of this TA, to provide advisory services that inform the development of Haiti’s legal framework in mining operations presents *de facto* potential environmental and social implications and related risks and impacts especially in a fragile environment, as comprehensively described in the Request. The same concerns are acknowledged in the Concept Note of this TA which notes “*the risks associated with the sector can be significant especially regarding environmental and social impacts.*”

23. The Panel confirms that the Request was submitted by at least two people in relation to a project supported by the World Bank. The Bank's financing is neither closed, nor has it reached 95% disbursement. The Request is not related to procurement issues, and it deals with a subject matter on which the Panel has not made a previous recommendation. Furthermore, the Panel has verified that the Requesters' concerns were brought to the Bank's attention on different occasions prior to filing the Request.

24. The Haiti Mining Dialogue TA is financed through a Bank-Executed Trust Fund (BETF). According to the Bank Policy on Trust Funds (OP 14.40) the Bank categorizes trust funds into three types: (i) Recipient-Executed Trust Funds (RETFs), where funds are provided to a third party and the Bank plays an operational role; (ii) Bank-Executed Trust Funds (BETFs), where funds "*support the Bank's work program,*" and (iii) Financial Intermediary Funds (FIFs), which involve complex financial schemes and the Bank may provide administrative, financial or operational services. The policy states that "*the policies and procedures that apply to trust funds vary, depending on the trust fund type.*" With respect to the applicable policies, OP 14.40 provides that "*activities financed from RETFs are administered under the Operational Policies and Procedures that apply to IBRD and IDA financing (...) and activities funded by BETFs are administered in accordance with the Bank's Planning, Budgeting and Performance Management Manual and the Bank's Administrative Manual, both of which apply to the Bank's administrative budget.*"

25. The Panel notes that under OP 14.40, and given that the operation was financed through a BETF, Bank operational policies and procedures applicable to design, appraisal and implementation of a project, including the safeguard policies, were not applied to the Haiti Mining Dialogue TA. Furthermore, the Bank's Planning, Budgeting, and Performance Management Manual, and the Administrative Manual applicable to BETFs, are not Operational Policies and Procedures as referenced in the Panel Operating Procedures.⁵

26. As a result, the Panel notes that the issues of harm alleged in the Request may not be the subject of a Panel's investigation, which is intended to present Panel's findings on whether the Bank has complied with all relevant policies and procedures and whether the harms alleged in the Request have totally or partially resulted from Bank failure to follow such policies and procedures. Although in a previous case,⁶ the Panel ruled that under some conditions BETF can be covered under the Panel's

⁵ The Panel's Operating Procedures, dated April 2014, defines operational policies and procedures as "*Bank's Operational Policies, Bank Procedures, and Operational Directives, and similar documents issued before these series were started, and do not include Guidelines and Best Practices and similar documents or statements. Operational policies and procedures include not only the Bank's safeguard policies, but also all other policies and procedures applicable to the design, appraisal and implementation of a Bank-financed project. The Bank's operational policies and procedures are subject to revisions, and new types of documents may be considered relevant for the Panel process.*"

⁶ In October 2011, the Panel registered a Request for Inspection of a multi-donor funded study program to assess the feasibility of conveying water from the Red Sea to the Dead Sea (RSDS). In its Response, Management argued that the RSDS Water Conveyance Study Program was funded by a multi-donor "effort managed by the World Bank" and could not be considered either a project or a project preparation phase. The Panel emphasizes that the RSDS Water Conveyance Study Program was financed under a BETF but also that a joint letter of the State of Israel, the Hashemite Kingdom of Jordan and the Palestinian Authority, dated May 9, 2005, requesting the Bank to coordinate donor financing and to manage implementation, reflected the understanding of the three Beneficiary Parties that "World Bank Policies and Guidelines regarding the Safeguards, financial, and procurement aspects of conducting the Feasibility Study and Environmental and Social Assessment will apply." In its analysis, the Panel reiterated the interpretation of the 1996 Clarification of the Panel Resolution, stating that "the Board agreed that the term "project" as used in the Resolution has the same meaning as it generally has in the Bank's practice" and that the intent of the

Resolution and thus become eligible for an investigation, the subject of this particular Request is not eligible.

Policy Framework Applicable to Technical Assistance

27. The Panel wishes to highlight the following important additional observations regarding the policy framework applicable to technical assistance that involve potential environmental and social risks.

28. First, the Bank's "Interim Guidelines on the Application of Safeguard Policies to Technical Assistance (TA) Activities in Bank-Financed Projects and Trust Funds Administered by the Bank"⁷ and the "Guidelines for Environmental Screening and Classification"⁸ state that TA activities, "*irrespective of their sources of financing and whether they are stand-alone or as part of an investment operation,*" may have "*significant environmental and social implications going forward, entailing risks and potentially inducing adverse impacts.*"

29. Second, the Haiti Mining Dialogue falls under the "Rapid Response Advisory Services" activities supported by the EI-TAF. The Panel notes that financing provided under the EI-TAF may be either Recipient or Bank executed. The Annual Report of the EI-TAF states that for "*most cases, rapid-response advisory services are recipient executed as such services are channeled primarily to individual countries*" but adds that "*recipient execution of rapid response activities has proven difficult in many of our client countries, due to weak capacity and lack of experience with World Bank trust fund procedures on the part of the ministries usually involved. By contrast, those activities that have been executed by the Bank on behalf of the client were relatively more responsive to filling the capacity needed for a successful transaction, with quicker implementation on the ground.*"⁹ Therefore, the Panel notes that Management's decision to execute a complex TA such as this one under a BETF as opposed to a RETF automatically excludes it from the application of the Bank's policies, even though this decision does not seem to be proportional to the level of environmental and social risks involved in the TA.

30. Third, advisory services provided by the Bank also include "Reimbursable Advisory Services (RASs)." RASs allow the Bank to provide advisory services requested by the client which the Bank is not able to finance in full within the existing Bank budget envelope. A 2012 Operational Memorandum on the Provision for RASs states that they are "*subject to all applicable Bank policies and procedures and to the same quality assurance practices as analytic and advisory services handled through the administrative budget. Bank staff ensure that the client's rules and procedures are consistent with the Bank's operational policies, not just for the reimbursable advisory service itself, but also for the underlying projects on which the client is seeking the Bank's advice. The applicable safeguards policies*

Resolution and its Clarifications "is not to restrict the Panel's jurisdiction by reference to specific administrative procedures, which themselves can be delayed or violated, but rather to allow the Panel to exercise its judgment in specific cases with respect to the modality and purpose of the Bank's engagement." The Panel noted that the Study Program could be considered part and parcel of project preparation and thus "shortcomings in the Study Program, if not corrected, can potentially lead to shortcomings in the design of the RSDS Project. Therefore, in principle, potential harms that may result from the RSDS Project may plausibly be linked back to non-compliance in the Study Program."

⁷ Interim Guidelines on the Application of Safeguard Policies to Technical Assistance (TA) Activities in Bank-Financed Projects and Trust Funds Administered by the Bank, dated January 2014.

⁸ 2007 Guidelines for Environmental Screening and Classification.

⁹ EI-TAF Annual Report as of December 31, 2012, EI-TAF Donors Meeting Offices of NORAD, Oslo, Norway, March 1, 2013.

and procedures provide guidance to Bank staff involved in providing Reimbursable Advisory Services. If the recipient of Bank advice fails to respect important safeguards, the Bank reserves the right to terminate the agreement."¹⁰ The Panel understands that BETFs are implemented in a similar way to RASs although in the latter case the Bank is reimbursed for the services provided; yet RASs, unlike BETFs, are subject to all applicable Bank operational policies and procedures, and safeguard policies provide guidance to staff.

31. Fourth, the Panel notes that the Bank provides technical assistance support similar to the Haiti Mining Dialog TA, including advisory services for natural resource management under stand-alone technical assistance operations or as a part of investment lending operations. In such cases Bank operational policies and procedures, including safeguard policies, also apply. The Panel has thus far reviewed several technical assistance operations involving Bank's compliance with operational policies and procedures and related harm.¹¹

32. As noted above, the Panel understands that under EI-TAF, BETFs are preferred to ensure rapid implementation of the technical assistance activities when member countries have weak capacity and lack experience with World Bank trust fund procedures. However, the Panel notes that a policy framework mitigating environmental and social risks is equally important in such contexts.

33. The Panel notes that there is an observed inconsistency and gap in the application of operational policies and procedures in the provision of technical assistance support depending on the instrument through which it is financed. While safeguard policies do not apply to technical assistance supported with a BETF, they provide guidance to staff under RASs, and they are applicable to TA provided through Investment Lending. The Bank policy on Technical Assistance (OP 8.40) defines it in general as complementing investment lending to "*(a) properly design, prepare, and implement lending operations; (b) undertake analytical work necessary to underpin reform or policy development; and (c) strengthen their human and institutional capacity for policy reform and sustainable development.*" The Panel is of the view that the application of the policy framework should be based on a robust risk assessment of the potential environmental and social impacts of the technical assistance activities, rather than the financing instrument used, or who is responsible for its execution.

34. As per the Panel's Operational Procedures, and in order to better understand the background of the Project, the Panel met with Bank Management after the receipt of the Request. Subsequently, Bank Management provided a note to the Panel stating that "*a BETF does not involve a contractual relationship between the Bank and the recipient of the advisory services. As such, operational policies that govern the relationship between a borrower and the Bank including on environmental and social impacts of borrower activities do not apply in the BETF context.*" Management however acknowledged "*the important role of advisory services and the need to clarify the policy framework. To this end, we are in the process of undertaking a review of the policy framework with a view to update/clarify as needed. Our plan is to have this work completed by next FY.*"

¹⁰ OpMemo on the Provision for Reimbursable Advisory Services, dated October 3, 2012, para.9.

¹¹ See Inspection Panel Investigation Report Cambodia: Forest Concession Management and Control Pilot Project (Credit No. 3365-KH and Trust Fund. 26419- JPN) March 30, 2006; Inspection Panel Report and Recommendation Liberia: Development Forestry Sector Management Project (Trust Funds Nos. TF057090-LR; TF096154-LR; and, TF096170-LR) December 8, 2010, and Inspection Panel Report and Recommendation On Request for Inspection Re: Islamic Republic of Pakistan: Tax Administration Reforms Project (IBRD Loan No. 72640-PAK; IDA Credit No. 4007-PAK). The Panel Reports are available at www.inspectionpanel.org

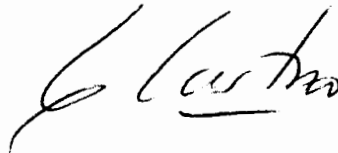
35. The Panel thus notes that both Management and the Panel are of the view that going forward a clarification of the policy framework is needed in providing TA involving significant potential environmental and social risks.

Conclusion

36. In light of the foregoing, and in accordance with the Panel Resolution, its Clarifications, and its Operating Procedures, the Panel is not registering this Request for Inspection because the issues of harm raised in the Request may not plausibly result from potential non-compliance with Bank's operational policies and procedures, since the latter are not being applied for BETFs.

37. Considering the importance of transparency and accountability in extractive industries, as noted in the Extractive Industry Sourcebook developed under EI-TAF, the Panel emphasizes the importance of comprehensive consultations and consideration of environmental and social standards in developing the legal framework for mining in Haiti.

Yours sincerely,



Gonzalo Castro de la Mata
Chairman

Attachments

Mr. Jim Yong Kim, President
International Development Association

The Executive Directors and Alternates
International Development Association

Kolekitf Jistis Min, Haiti
Nixon Boumba, Haiti
Antonal Mortimé, Haiti
Elizabeth Happel, Haiti
NYU School of Law Global Justice Clinic
Accountability Counsel

ANNEX I

January 7, 2015

Dilek Barlas
Executive Secretary, The Inspection Panel
1818 H Street NW, MSN 10-1007
Washington, DC 20433
USA
Email: ipanel@worldbank.org

Dear Ms. Barlas,

We are Haitian civil society organizations, with both national and local constituencies, and communities that have been, and will continue to be, directly affected by the development and reform of the Haitian mining sector (“Complainants”).¹ We hereby submit this Request for Inspection to the Inspection Panel regarding violations of the World Bank’s Social and Environmental Safeguard Policies resulting from the World Bank’s support to the Government of Haiti for activities related to the Haitian mining sector. This Request represents the joint concerns of Complainants, who have experienced harm and fear future harm as a result of the World Bank’s involvement in the mining sector in Haiti. We understand that World Bank support has been provided through the Extractive Industries Technical Advisory Facility (“EI-TAF”),² and we believe that support may have been provided through other projects as well.

I. Introduction

It is our understanding that the World Bank’s support for the Haitian mining sector was approved to include: assistance with the drafting of new national mining legislation; capacity building for the Office of Energy and Mines (*Bureau des Mines et de l’Énergie*); assistance with the development of a mining cadaster; support for stakeholder engagement; and other activities related to the development of the mining sector.³ This support for the Haitian mining sector has resulted in and may result in further violations of World Bank policy, Haitian and international

¹ For a detailed description of the *Kolektif Jistis Min an Ayiti* (the Haiti Mining Justice Collective or the “Collective,” made up of communities, social movement organizations, and human rights organizations) and the mining-affected communities that submit this Request, please see Annex 1. The NYU School of Law Global Justice Clinic (“Clinic”) and Accountability Counsel represent numerous affected communities, as memorialized in signed representation agreements with Coordinating Committees set up by the Collective (*See* Representation Agreements, attached as Annex 2). We request that the Inspection Panel keep the Complainants and their representatives updated on all steps of the Inspection Panel process through correspondence with members of the Collective, the Clinic and Accountability Counsel, whose contact information is included at the end of this complaint. We also request that the Inspection Panel keep all annexes attached to this Request confidential. Only the Request itself may be posted and shared publicly.

² The EI-TAF is a multi-donor trust fund, managed by the World Bank, which assists resource-rich developing countries to develop extractive industry sector policies and to structure extractive industry transactions. In Haiti, the EI-TAF is providing assistance to update the extractive industries legal and regulatory framework, build capacity for policy and negotiation of mining agreements, and provide transaction advice during negotiations of mining conventions. Annual Report as of December 31, 2012, Annex Table 3, 6-7, Extractive Industries Technical Advisory Facility (Mar. 1, 2013) [hereinafter “EI-TAF Annual Report 2012”].

³ *See* EI-TAF Annual Report 2012 at 6-7; Letter from Charles M. Feinstein, Director, Energy and Extractives Global Practice, The World Bank, to Members of the *Kolektif Jistis Min* and the Clinic, 2 (Nov. 26, 2014) [hereinafter “Letter from World Bank”], attached as Annex 3.

law, and human rights. As discussed in more detail below, harms involve violations of the following World Bank policies, among others:

- Operational Policy 4.01 on Environmental Assessment, including violations regarding classification, environmental screening, public consultation and disclosure;
- Operational Policy 4.04 on Natural Habitats, including violations regarding the protection of critical natural habitats and the assessment of the Haitian government’s capacity;
- Operational Policy 4.36 on Forests;
- Operational Policy 4.07 on Water Resources Management;
- Operational Policy 4.11 on Physical Cultural Resources; and
- Operational Policy 4.12 on Involuntary Resettlement.

We are concerned that the proposed mining legislation (“Draft Mining Law”),⁴ developed with World Bank support: has been drafted by a small Task Force made up of World Bank experts and Haitian government officials without adequate consultation with civil society organizations and communities directly affected by mining activity; fails to protect the environmental and human rights of the Haitian people; violates the Haitian Constitution of 1987; and impedes the ability of the Haitian government to meet its human rights obligations under international law.

This Request is being filed by communities directly affected by mining-related activity (“mining-affected communities”) in Haiti⁵ and the *Kolektif Jistis Min an Ayiti* (the Haiti Mining Justice Collective or the “Collective”). The Collective is comprised of communities and community-based groups and social organizations from the Artibonite, Center, North, Northeast, and Northwest Departments, many of which have been directly affected by mining, as well as six human rights and social movement organizations that are concerned about mining in Haiti. Several of the organizations that comprise the Collective are themselves made up of thousands of individual members, many of whom live in mining-affected areas. Between April 2013 and November 2014, the Collective and its community network conducted dozens of community meetings in mining-affected areas, often in collaboration with the Clinic.⁶

The World Bank’s involvement in developing the Draft Mining Law lends the law credibility, which is likely to encourage investment in the Haitian mining sector. Complainants fear that, due to the government’s weak capacity and the law’s inadequacies, this increased investment in the mining sector will result in serious social and environmental harms, including contamination of vital waterways, impacts on the agriculture sector, and involuntary displacement of communities. Complainants are also concerned about the exclusion of Haitian people from the law reform process, particularly when contrasted with the reported regular participation of the private sector in drafting the new law. Further, Complainants fear that the government of Haiti lacks the capacity to regulate and monitor mining company activity.

⁴ The July 31, 2014 version of the Draft Mining Law is attached as Annex 4.

⁵ See Annex 1 for more information about these communities.

⁶ The Clinic and the Collective have jointly conducted more than 40 meetings in areas where gold mining activities have taken place. Most meetings included participants from multiple communities in any given area. See Annex 5 for details about these meetings. In addition to this list, the Collective has independently conducted dozens of meetings with communities where gold mining activity has occurred or may occur in the future.

Complainants are not alone in these fears: to date, more than 400 individuals have signed a petition echoing many of the concerns set out in this Request.⁷

The Complainants ask that the World Bank and the Haitian government conduct a searching and transparent analysis of the capacity of the Haitian government to regulate and monitor mining company activities and to meet its obligations to protect the human rights of the Haitian people in the context of mining activities. This analysis should be made public and subject to discussion and debate before the Bank makes any further decisions regarding capacity-building activities or support for the mining sector. In addition, Complainants believe that the Haitian government may be poised to adopt the Draft Mining Law by decree, outside the democratic process. We request that the World Bank take all possible steps to ensure that the Haitian government suspends passage of the law in the absence of a democratic decision-making process.⁸ Additionally, Complainants ask that the Draft Mining Law be translated into Haitian Creole, subjected to a serious public consultation process, and revised to include stronger social and environmental protections.

This Request is structured as follows: Section II: Context and Factual Background, which includes a description of the experiences of mining-affected communities, problems with the law reform process, and relevant information about the Haitian socioeconomic and political context; Section III: Violations of World Bank Policy; Section IV: Violations of the Haitian Constitution; Section V: Violations of International Human Rights Law; Section VI: Prior Attempts to Resolve the Problems With the World Bank; and Section VII: Next Steps.

II. Context and Factual Background

Following a state of relative dormancy, the Haitian metal mining industry has experienced a surge of activity in recent years. In the past five years, companies have invested a reported \$30 million to explore for gold, copper, silver and other metals in Haitian soil.⁹ Between 2010 and 2013, foreign mining companies began drilling and conducting other exploration activities in Haiti's North, Northwest, Northeast, Artibonite, and Center Departments. Together, foreign mining companies are reported to hold prospection, research, and exploitation permits to at least 2,400 square kilometers of Haitian land, which amounts to 8% of Haiti's land mass.¹⁰

⁷ The signatories to the petition call for: a national consultation on mining in Haiti; the translation of the Draft Mining Law into Creole; an analysis of the capacity of the Haitian government to monitor the mining industry and defend the interests of the Haitian populace; adequate training for government officials charged with undertaking independent evaluations of company activities; a rigorous assessment of the environmental, social, economic, cultural, and political impacts of mining; and a geology school to train geologists capable of protecting the interests of the country and a laboratory well equipped to analyze the mineral resources of the country. A copy of the petition is available from the Collective upon request.

⁸ The current political situation in Haiti is discussed in more detail below.

⁹ See, e.g., Tate Watkins, *Curses of Aid and Gold in Haiti*, Medium (June 2013), available at <https://medium.com/medium-for-haiti/7a99bd074fc4>.

¹⁰ Prosperity Raymond, *Haiti's Wealth of Untapped Mining Resources Must Benefit the Poor*, The Guardian (Jan. 21, 2014), available at <http://www.theguardian.com/global-development/poverty-matters/2014/jan/21/haiti-untapped-mining-resources-benefit-poor>.

In December 2012, the Office of Energy and Mines awarded the first exploitation permits for companies to move beyond the exploration phase and begin full-fledged gold mining operations in Haiti.¹¹ Two months later, the Haitian Parliament reacted by passing a resolution calling for a moratorium on all activities related to the permits granted in December 2012.¹² The resolution states that these exploitation permits violate the Haitian Constitution because they were granted pursuant to mining conventions that were never ratified by Parliament.¹³

In March 2013, the World Bank formally agreed to a request by the Haitian government for assistance in rewriting its mining laws.¹⁴ In late 2013, a Task Force made up of representatives of several Haitian government ministries and World Bank experts began drafting a new mining law. A few Complainants obtained a copy of the Draft Mining Law dated July 31, 2014, and have learned from government officials that this version was submitted to the Prime Minister's Office, but has not yet been presented to Parliament.¹⁵ To our knowledge, this version of the law has not been made public; it has neither been translated into Creole, the language of all Haitians, nor shared or discussed with mining-affected communities.

a. Communities' Experiences with Mining Companies and Fear of Future Harms

In recent years, companies holding permits for exploratory work have undertaken a variety of activities in rural communities, from surveying and path construction to drilling and sampling. These activities have in some instances had significant negative impacts, which have raised concerns about the potential for future negative impacts from mining activity. Many mining-affected communities feel abandoned by the Haitian government, left on their own to interact with companies. Complainants fear that if the mining sector continues to develop and if companies proceed with more serious mining activity, the negative environmental and social impacts likewise may become more severe.

i. Lack of Information and Inadequate Consultation

Many members of mining-affected communities have experienced companies operating in their areas without providing meaningful information about who they were or why they were there. For example, one company reportedly dug holes and drilled extensively on community land without the permission of some landowners and land users.¹⁶ Residents explained that

¹¹ Evens Sanon & Danica Coto, *Haiti Awards Gold, Copper Mining Permits*, Associated Press (Dec. 21, 2012), available at <http://news.yahoo.com/haiti-awards-gold-copper-mining-232709627.html>.

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

¹³ 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. Jane Reagan, *Haitian Senate Calls for Halt to Mining Activities*, Inter Press Service (Feb. 14, 2013), available at: <http://www.ipsnews.net/2013/02/haitian-senate-calls-for-halt-to-mining-activities/>.

¹⁴ *World Bank Mining Project in Haiti Brief*, provided by Remi Pelon, Senior Mining Specialist (Nov. 17, 2014).

¹⁵ Conversation with the Ministry of Economy and Finance, Port-au-Prince (Nov. 15, 2014).

¹⁶ Interview by the Clinic with community residents 1. Please note that we have intentionally omitted identifying details from all stories regarding the actions of specific companies due to fear of reprisal. Additional information and interview records are available upon request.

when they asked the company to provide an explanation, company staff said they had received the permission of the Haitian government to operate.¹⁷

Neither company nor government officials have provided adequate information to or adequately consulted with residents of mining-affected communities. These communities seek information about the impacts of mining activities, companies' authorization to conduct those activities, and the rights of landowners and users when companies seek to use their land. Some local authorities have stated that they too lack information in the same manner as the rest of the population.¹⁸ Communities report that no information has been shared about the risks of mining activity, and that they have had no contact with the Office of Energy and Mines or other government officials concerning mining. Based on these past experiences, Complainants fear that future mining operations will be conducted with the same disregard for communities' right to information and/or without adequate consultation.

ii. Problems Related to Land Use and Land Access

As mentioned above, in some cases, companies have used private land for exploration activities without first seeking the permission of the landowner or land user. In many communities, the first indication of a company's presence in their area was a picket marking their land. In two neighboring communities, for example, numerous residents complained that a mining company did not seek permission before drilling in certain areas and failed to fill in all of the holes it had dug, leaving hazards for animals and children and inhibiting a return to farming activity.¹⁹

Hundreds of mining-affected community members signed, fingerprinted, or, in some cases received already-signed land access agreements on company letterhead purporting to provide companies with permission to use the designated land for exploration.²⁰ However, the rights of many of the signatories were not respected in executing these agreements. Many people have reported that they were unaware of the terms contained in the agreement and were at times made to believe that they were signing in exchange for a benefit such as a right to a portion of the riches under their soil, or an American visa.²¹ These misunderstandings were made worse by the fact that many residents were unable to read the agreement,²² did not have it read to them, and signed using a thumbprint.²³ In addition, residents have reported alarming irregularities, including agreements being signed by unauthorized third parties and attempts to conclude agreements only after the company had worked on the individual's land.²⁴ One elderly man who cannot read received an agreement with his name already on the signature line. He is worried that as a result of this "agreement," he might have lost rights to his land forever:

¹⁷ *Id.*

¹⁸ Interviews by the Clinic with community members during community meetings 1, 3, and 7 (see Annex 5 for a list of Community Meetings).

¹⁹ Interviews by the Clinic with individual community residents 4, 5, 6, 7, and 8. February 2013.

²⁰ Interviews by the Clinic with community members during community meetings 13, 21, 24, 25, 26 (see Annex 5).

²¹ Interviews by the Clinic with community members during community meetings 25 and 26 (see Annex 5).

²² Residents stated that although it is clear that the agreement is intended to be in Creole, the language is not clear. This is not the Creole that they are familiar with and able to understand. *Id.*

²³ The land access agreement in its original language and translated into English are attached as Annex 7.

²⁴ Interviews by the Clinic with community members during community meetings 25 and 26 (see Annex 5).

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?²⁵

iii. Damaged Crops and Damaged Land

Many residents of mining-affected communities have complained that mining activity, including drilling/sampling, path construction, and creation of helicopter landings, have damaged their crops. Farmers have reported that company activity destroyed their avocado and orange trees, coffee plants, and other crops.²⁶ Some of these individuals received financial compensation; some did not.²⁷ Many community members are troubled that their crops have not grown back, or have grown back in a depleted state.²⁸ Many of those who received compensation feel that it was insufficient given these lasting effects.²⁹ They fear that future mining activity may further affect their crop production and, as a consequence, impinge on their economic and social welfare.

For example, one man said that he had a farm of about 72 square meters where he grew sweet potatoes and beans. He explained that he found a picket on his land one day. A few months later, when he arrived to tend his crops, he found that his garden was destroyed. The man said that a neighbor later delivered an envelope from the mining company active in the area: it contained 12,000 gourdes (about \$265). “It’s not enough,” he said, given that there was lasting damage to his garden.³⁰

Many community members are concerned because their crops have not grown back or have been less productive since the company worked on their land. Over three years later, such residents complain that the land where the company drilled is still “sèch”—barren. “We did not know that [the land] had died forever,” one resident said.³¹ Community members fear that future mining activity may further impact their crops and their land. In addition, residents have stated that they already lack access to water, both for drinking and to irrigate their gardens.³² Residents fear that mining activity could make access to water even worse and could affect the quality of water as well.

iv. Absence of Grievance Mechanisms

Residents from communities where the Collective and the Clinic have held meetings report that they are not aware of any grievance mechanism to resolve disputes about mining

²⁵ Interview by the Clinic with individual community resident 1.

²⁶ Interviews by the Clinic with community members during community meetings 1, 3, 5, 6, 7, 10, 11, 13, 14, 15, 16, 18-20, 23-28 (see Annex 5).

²⁷ *Id.*

²⁸ *Id.*

²⁹ Interviews by the Clinic with community members during community meetings 25 and 26 (see Annex 5).

³⁰ Interview by the Clinic with individual community resident 2.

³¹ Interview by the Clinic with individual community resident 3.

³² Interviews by the Clinic with community members during community meetings 1, 3, 5, 6, 7, 10, 11, 13, 14, 15, 16, 18-20, 23-28 (see Annex 5).

activities. Community members emphasize that they have no one to whom to address their complaints and that there are no government authorities to provide support. Local leaders from one community said that they repeatedly requested an informational meeting with the company operating in their area, including through at least two formal written letters, but received no response.³³

b. The Law Reform Process

The Draft Mining Law has been developed in consultation with private mining companies,³⁴ but without the participation of the Haitian people, despite the fact that the Haitian Constitution declares mineral resources to be part of the public domain.³⁵ Complainants are frustrated that the Haitian people have not had the opportunity to participate in meaningful conversations or deliberations with decision-makers about the development of the Draft Mining Law.

The Haitian government and the World Bank have shared information about the Draft Mining Law primarily with a small circle of Haitian government officials. To our knowledge, they have made only two attempts to share some minimal information with a broader group. These two attempts consisted of meetings held in French³⁶ in Port-au-Prince by the World Bank in partnership with the joint Government of Haiti-World Bank Mining Law Task Force and the Council on Economic and Social Development. The first meeting was a Mining Forum held in June 2013,³⁷ attended by companies, international stakeholders speaking in favor of mining, and international non-governmental organizations (“NGOs”), and the second was a Round Table discussion on the development of the mining sector held in June 2014. Both events were by invitation only and, to our knowledge, not a single member of a mining-affected community was invited to either meeting. The meetings were held in hotels in Port-au-Prince, many hours by car or bus away from mining-affected communities. Neither hotel is accessible by public transit. Invitations to attend the Forum and the Round Table discussion were distributed via email in French.³⁸ Based on our information, fewer than five Haitian people representing civil society attended either event. The vast majority of participants at both events represented the Haitian government, the private sector, or certain international NGOs.

³³ Copies of these letters are available by request.

³⁴ See, e.g., *Management’s Discussion and Analysis for Three and Nine Months Ended September 30, 2014*, at 7, Eurasian Minerals Inc. (Nov. 15, 2014), available at http://www.eurasianminerals.com/i/pdf/fs/2014-09-30_EMX_MDA.pdf. The involvement of mining companies in the mining law reform process was confirmed during meetings conducted by the Clinic with the Ministry of Economy and Finance and the Council on Economic and Social Development in November 2014, and with the Office of Energy and Mines in November 2013.

³⁵ CONSTITUTION DE LA REPUBLIQUE D’HAÏTI, Art. 36-5 (1987) [hereinafter “Haiti Constitution”].

³⁶ In Haiti, French is spoken and written only by the small minority of individuals who have benefited from many years of education. The Haitian majority speaks Creole.

³⁷ See *Haiti: Mining for Economic Growth*, World Bank (Jul. 25, 2013), available at <http://www.worldbank.org/en/news/feature/2013/07/25/haiti-mining-for-economic-growth>.

³⁸ World Bank data shows 10.6% of the Haitian population has access to the Internet. See <http://search.worldbank.org/data?qterm=internet+user&language=&format=>. Although statistics about rural and urban Internet access were not available, given the socio-economic conditions prevailing in rural Haiti, it is fair to assume that an extremely small percentage of rural Haitians benefit from Internet access.

Complainants have been particularly eager to obtain information about and provide input on the Draft Mining Law because of initial indications that the law does not adequately protect Haiti's fragile ecosystem, including its water resources, or the social and economic rights of community members. They fear that the Draft Mining Law may facilitate expropriation of community land, leaving residents more vulnerable to involuntary displacement. Further, they are concerned that the law does not guarantee access to information about mining projects or require transparency in the mineral sector.

c. Fragile Environmental Context and Lack of Government Capacity

Complainants are concerned that the Haitian government may lack the capacity to enforce the Draft Mining Law and to monitor mining activities. As the Bank itself states in its Interim Strategy Note for Haiti for 2013-2014: "Governance weaknesses and corruption remain critical challenges for Haiti's development."³⁹ The Bank explains that barriers to development extend beyond poverty,⁴⁰ extreme inequality,⁴¹ and vulnerability to natural disaster.⁴² "Institutions need to be substantially strengthened to ensure that poor governance and corruption do not stand in the way of the achievement of Haiti's medium-term objectives."⁴³ The Bank later adds:

Lack of transparency and inefficiency in the Public sector, including in service delivery, have undermined the credibility of the State leading to a deep-seated lack of trust in Government. The Bank's *World Wide Governance Indicators* rank Haiti in the bottom quartile in all measures of governance.⁴⁴

There are indications that the Haitian government lacks the requisite human, technical, physical and financial resources to adequately monitor mining activities. The head of the Office of Energy and Mines has repeatedly admitted that the office does not have the needed expertise or resources to adequately monitor company activities, even at this early

³⁹ Interim Strategy Note for the Republic of Haiti for FY13-FY14, Report No. 71885-HT, 7, World Bank Group (Sept. 27, 2012), available at http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2012/09/14/000333037_20120914004408/Rend ered/PDF/718850ISNOP1310Official0Use0Only090.pdf.

⁴⁰ Over 76% of Haitian people live on less than \$2 per day. *Poverty and Inclusion in Haiti: Social gains at a timid pace*, World Bank (2014), available at http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2014/07/21/000442464_20140721112314/Rend ered/PDF/895220BRI00pau00Box385284B00PUBLIC0.pdf.

⁴¹ Haiti has a Gini coefficient of .61, making it one of the most unequal countries in the world. (*Id.*) Gini coefficient is a measure of distribution of wealth, used to measure inequality. See *Measuring Inequality*, World Bank, available at <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTPOVERTY/EXTPA/0,,contentMDK:20238991~menuPK:492138~pagePK:148956~piPK:216618~theSitePK:430367,00.html>.

⁴² 96% of Haitian people live at risk to natural disasters, including earthquake, hurricanes, flooding and landslides. World Bank Group, *supra* note 39, at 14.

⁴³ *Id.* at 9.

⁴⁴ *Id.* at 15.

stage of the development of the industry.⁴⁵ To our knowledge, the Office of Energy and Mines has not conducted any tests of soil or water in mining-affected communities, despite community members' concerns that exploration activity has impacted their land and their ability to grow crops.⁴⁶ Officials from the Ministry of the Environment and the Haitian water authority (DINEPA) have demonstrated a lack of familiarity with mining sector activities and their potential adverse impacts on land and water resources.

Mining-affected communities have expressed a fear of the gold mining sector as a whole given the manifest lack of capacity on the part of the Haitian government to monitor the impacts of mining activities and enforce existing legal requirements. As a community leader said:

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.⁴⁷

Haiti's fragile environment cannot withstand a mining strategy that is undertaken without strong environmental protections that are strictly enforced. Haiti's territory is more than 98% deforested.⁴⁸ The country is at constant risk of natural disasters, including earthquakes, hurricanes, and flooding.⁴⁹ According to the World Bank, only half of rural Haitians have access to an improved water source.⁵⁰ Meanwhile, mining activity, particularly gold mining, requires massive amounts of water and poses serious risks to water quality.⁵¹ Complainants believe that mining activity – particularly open pit mining – should be undertaken only in a context with adequate safeguards and rigorous governmental monitoring.⁵²

d. Political, Social and Economic Context

The current political situation in Haiti presents a unique challenge to the democratic passage and responsible implementation of the Draft Mining Law. Elections for many municipal

⁴⁵ The Clinic met with Director Ludner Remarais of the Office of Energy and Mines on February 5, 2013 and November 21, 2013. Director Remarais emphasized the Haitian government's lack of monitoring capacity during both encounters.

⁴⁶ Interviews by the Clinic with community members during community meetings 1, 3, 5, 6, 7, 10, 11, 13, 14, 15, 16, 18-20, 23-28 (See Annex 5).

⁴⁷ *Id.*

⁴⁸ See Bhawan Singh & Marc Cohen, *Climate Change Resilience: The Case of Haiti*, Oxfam America (March 2014), available at http://www.oxfam.org/sites/www.oxfam.org/files/file_attachments/rr-climate-change-resilience-haiti-260314-en_2.pdf.

⁴⁹ *Id.*

⁵⁰ *Poverty and Inclusion in Haiti: Social gains at a timid pace*, *supra* note 40.

⁵¹ See, e.g., *Mining Water Use*, USGS available at <http://water.usgs.gov/edu/wumi.html> and *Mining and Water Pollution*, Safe Drinking Water Foundation, available at <http://www.safewater.org/PDFS/resourcesknowthefacts/Mining+and+Water+Pollution.pdf>.

⁵² As the Inspection Panel itself has recognized: "any mining activities involving the extraction of deposits of gold, copper, lead and zinc can lead to environmental degradation if proper safeguards are not taken. While modern mining methods can minimize the environmental impact, their use often depends on laws and how they are enforced. Lax standards and poor oversight can lead to serious environmental problems." *Investigation Report on Ecuador Mining Development and Environmental Control Technical Assistance Project*, ¶80, The World Bank Inspection Panel (Feb. 23, 2001), available at [http://ewebapps.worldbank.org/apps/ip/PanelCases/20-Investigation%20Report%20\(English\).pdf](http://ewebapps.worldbank.org/apps/ip/PanelCases/20-Investigation%20Report%20(English).pdf).

and legislative positions in the Haitian government have been continually postponed for the past three years. In the last six months, Parliament and the Executive have not agreed on an electoral law.⁵³ The terms of ten senators and of all the deputies expire in January 2015, at which point Parliament will become non-functional,⁵⁴ throwing the country into further political discord.⁵⁵ President Michel Martelly most likely will begin then to rule by decree. This scenario only heightens the danger that the Draft Mining Law will be adopted without public review or debate, and will result in future mining activities that are carried out irresponsibly and irregularly, leading to severe social and environmental harm.

Advancing the democratic reform of a law with significant implications for Haiti's future is difficult in the best of times, as it takes concerted efforts to create a national dialogue that is accessible to the whole population. If the Haitian political process does break down, and especially if the Executive begins to rule by decree, such a dialogue will be impossible.

The World Bank has previously acknowledged "Haiti's history of political instability," which "has weakened its institutions and governance mechanisms."⁵⁶ When it made those observations in 2012, the Bank assessed the political situation as steadily improving, and presented the newly elected President and Prime Minister as functioning in an increasingly stable government.⁵⁷ The current political situation calls this into question.

III. Violations of World Bank Policy

The EI-TAF is a multi-donor trust fund administered by the World Bank Sustainable Energy, Oil, Gas and Mining Unit. It has received funding from a number of donor institutions, including the World Bank Development Grant Facility.⁵⁸ In Haiti, the objectives of the EI-TAF include providing technical assistance⁵⁹ to update the country's legal and regulatory framework for extractive industries, in part by developing a new national mining law, and providing advice

⁵³ See, e.g., *Haitian Protests Over Delayed Elections in Port-au-Prince*, BBC News (Oct. 27, 2014), available at <http://www.bbc.com/news/world-latin-america-29785846>.

⁵⁴ The terms of two-thirds of the Senate and all 99 deputies will have expired by early 2015. See Frequently Asked Questions Released About Haiti's Upcoming Elections, The Institute for Justice and Democracy in Haiti (Jul. 8, 2014), available at <http://www.ijdh.org/2014/07/topics/politics-democracy/frequently-asked-questions-about-haitis-upcoming-elections/>.

⁵⁵ See, e.g., David Adams and Amelie Baron, *Tension Mounts in Haiti as Clock Ticks on Electoral Impasse*, Reuters (Dec. 9, 2014), available at <http://www.reuters.com/article/2014/12/09/us-haiti-elections-idUSKBN0JN2EL20141209>. See also Clement Doleac, *Elections on Hold in Haiti: Stability Versus Democracy*, Council on Hemispheric Affairs (Dec. 8, 2014), available at <http://www.coha.org/elections-on-hold-in-haiti-stability-versus-democracy/>.

⁵⁶ *Haiti—Project Paper on a Proposed Additional Grant in the Amount of SDR 23.3 Million to the Republic of Haiti for an Infrastructure and Institutions Emergency Recovery Project*, 10, World Bank (2012), available at http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2012/09/14/000386194_20120914013953/Rend ered/PDF/718820PJPR0P130Official0Use0Only090.pdf.

⁵⁷ *Id.* at 9-10.

⁵⁸ EI-TAF Annual Report 2012, *supra* note 2, at 6.

⁵⁹ See *World Bank Mining Project in Haiti Project Brief*, *supra* note 14.

and building capacity for the negotiation of mining contracts and conventions.⁶⁰ It is our understanding that the EI-TAF activities in Haiti are being executed by the World Bank.⁶¹

The development of a new national mining law and the attendant development of the mining sector at this time are likely to have significant impacts on Haiti's fragile environment and on communities located on or near future mining sites. The Draft Mining Law developed with EI-TAF support will determine the social and environmental regulations to be applied to future mining projects throughout the country.⁶² Where these regulations lack strength, they may enable serious harms to communities and the environment in Haiti.⁶³

The exclusion of mining-affected communities and interested civil society organizations from the law reform process raises concerns about the government's interest and ability to engage stakeholders as the sector develops. Meanwhile, the current lack of capacity in the Haitian government means that mining operations may be initiated under the new law before the government is able to properly implement and enforce its regulations. Complainants fear that this will lead to an increase in the frequency and severity of negative impacts from mining activities, some of which, as discussed above, have already been experienced by communities in Haiti. As such, it is critical that the World Bank apply its Safeguard Policies to its activities in the Haitian mining sector.

The Safeguard Policies are not only applicable to the process by which the mining law is reformed; they are also relevant in assessing the substantive provisions of the Draft Mining Law. Given its involvement in the drafting of the new law, the World Bank should ensure that the regulatory framework established by the Draft Mining Law is consistent with the World Bank's own minimum social and environmental standards. To do otherwise puts the Bank in the position of intentionally supporting a regulatory framework that promotes high-risk projects in the absence of proper environmental assessments and mitigation plans. This would contradict the objectives of the EI-TAF,⁶⁴ as well as the Bank's poverty alleviation mandate.

⁶⁰ EI-TAF Annual Report 2012, *supra* note 2, Annex Table 2 at 6-7.

⁶¹ Letter from World Bank at 2. The World Bank also intended to focus on mining sector activities in the context of its Infrastructure and Institutions Emergency Recovery Project Additional Financing operation, as reflected in the project paper approved by the Bank's Board. *See Haiti – Project Paper on a Proposed Additional Grant*, *supra* note 56, at 21, 45. We have since been informed, however, that “no investments or other activities related to mining have ever been designed, undertaken, or financed under [that] operation,” and that no such activities are planned. Letter from World Bank at 1.

⁶² Operational Policy 8.40 Technical Assistance defines Technical Assistance as: “the transfer, adaptation, mobilization, and utilization of services, skills, knowledge, technology, and engineering to build national capacity on a sustainable basis.” Operational Policy 8.40, ¶1, World Bank (Oct. 1994). As implemented to date, World Bank Technical Assistance to the mining sector in Haiti has not contributed to building “national capacity on a sustainable basis.” These activities therefore contradict the very definition of Technical Assistance.

⁶³ Complainants acknowledge that one of the stated rationales for developing new national mining legislation is to integrate modern international standards for social and environmental practices and sustainable development principles. *See Draft Mineral Law Explanatory Memorandum*, 3, Republic of Haiti, attached in Annex 4. However, while the Draft Mining Law does include some positive provisions, many provisions are not strong enough to ensure adequate social and environmental protections.

⁶⁴ *See What is the EI-TAF*, World Bank Website, Oil, Gas, and Mining Unit, World Bank, available at <http://go.worldbank.org/8ALSJBAQE0> (“The objective of the EI-TAF is to assist resource-rich, developing countries – on a demand-driven basis – to structure correctly extractive industry development projects and related policies, thereby reducing the risk of costly or politically difficult remediation at later stages.”).

a. Operational Policy 4.01 Environmental Assessment (“EA”)

i. Classification

The World Bank has provided very little publicly available information about EI-TAF activities in Haiti. It is therefore unclear how these activities have been categorized. Considering that the development of a new legal framework for the Haitian mining sector will have sweeping implications for the conduct of mining activities throughout Haiti, with attendant impacts on communities and the environment in mining-affected areas, any Bank support for mining-related activities, including for legislative reforms, should be classified as Category A.

According to OP 4.01, Category A is the appropriate classification for projects that are “likely to have significant adverse environmental impacts that are sensitive, diverse, or unprecedented.”⁶⁵ A potential impact is “sensitive” if it may be irreversible or raise issues covered by the World Bank policies regarding natural habitats, indigenous peoples, physical cultural resources or involuntary resettlement.⁶⁶

World Bank support for the Draft Mining Law is likely to have significant, irreversible environmental impacts throughout the country in any areas where future mining activities are initiated. Given the unwillingness of companies to invest heavily in the mineral sector until the legal regime is clarified, the adoption of a new mining law is a lynchpin for, and a gateway to, future mining activity. For example, Eurasian Minerals, a Canadian junior mining company that works in a Joint Venture with Newmont Mining, has stated that the Joint Venture is waiting for the adoption of the Draft Mining Law to continue activity.⁶⁷ Eurasian and Newmont together possess 27 exploration permits, covering over 177,000 kilometers of Haitian land.⁶⁸ Eurasian has also received financial support from the International Finance Corporation (“IFC”) for its exploration activities in Haiti.⁶⁹

Mining projects typically receive Category A classification because their environmental impacts are both sensitive and diverse. In the Haitian context in particular, there are fears that the nature of the country’s gold deposits will require any future mining operations to use open pit extraction. This type of mining is particularly likely to cause a diverse range of environmental impacts due to its displacement of large areas of earth, use of vast amounts of water, and creation of significant quantities of toxic waste. Further, as described below, many of the provisions of the Draft Mining Law are at odds with the World Bank’s policies on natural habitats, physical cultural resources and involuntary resettlement. Any World Bank support for the development of the Haitian mining sector should therefore be classified as Category A.

⁶⁵ Operational Policy 4.01, ¶8(a), World Bank (Jan. 1999, revised Apr. 2013) [hereinafter “OP 4.01”].

⁶⁶ *Id.* at n12.

⁶⁷ See *Haiti Overview*, Eurasian Minerals, available at <http://www.eurasianminerals.com/s/haiti.asp>.

⁶⁸ *Eurasian Minerals Inc. Acquires 27 Exploration Licenses in Haiti and the Historic Meme Copper-Gold Mine*, Eurasian Minerals (Dec. 17, 2008), available at <http://www.eurasianminerals.com/s/news.asp?ReportID=619072>.

⁶⁹ In 2010, Eurasian received a \$10.5 million equity investment from the IFC for its activities in Haiti and Turkey. *Summary of Proposed Investment*, IFC Projects Database, available at <http://ifcext.ifc.org/ifcext/spiwebsite1.nsf/651aeb16abd09c1f8525797d006976ba/a1c12399545b48e6852576ba00e32d1?opendocument>.

ii. Environmental Screening

According to OP 4.01, for Category A projects, the borrower is required to prepare a suitably comprehensive environmental assessment (“EA”) detailing the potential negative and positive environmental impacts of a project and recommending measures to prevent, mitigate or compensate for adverse impacts.⁷⁰ When a project is likely to impact an entire sector, a Sectoral EA must be prepared to evaluate the impacts of a given strategy against alternative options, assess legal and institutional implications, and recommend broad measures to strengthen environmental management in the sector.⁷¹

The World Bank’s support for the Haitian mining sector is aimed at attracting investment throughout the country, and the Draft Mining Law will apply to all mineral mining projects and activities in Haiti.⁷² Because of the sweeping scope of the potential impacts associated with these activities, in an industry in which initial exploration activities have already been linked to social and environmental harms, a Sectoral EA should have been required prior to the World Bank providing assistance to any activities intended to develop Haiti’s mining sector. A Sectoral EA should have evaluated the likely impacts of the development of the mining industry in Haiti, including projected impacts on water and land resources and how these will be balanced against individual and community needs and the needs of other industries. A Sectoral EA for these activities also should have included an analysis of the development of the mining sector against alternative development strategies. Such an analysis could assess whether mining is truly the best use of Haiti’s land and resources, or whether there are other activities that may provide greater long-term benefits, including economic benefits, that outweigh the short-term benefits and long-term costs of mining.

In addition, the Draft Mining Law’s EA standards for future mining projects in Haiti are inconsistent with the requirements of OP 4.01. While the Law does require an Environmental Analysis and an Environmental and Social Impact Assessment (“ESIA”) for all mining projects, it does not specify any components or information that must be included in these documents.⁷³ Similarly, although the Environmental Analysis and the ESIA must be presented to the National Mining Authority (“NMA”) for approval, it is unclear what standard the NMA will use to determine the adequacy of the Environmental Analysis. Moreover, the NMA is only required to review the ESIA’s compliance with the company’s Feasibility Study, not with any independent benchmarks.⁷⁴ Without defining the standards and requirements applicable to the Environmental Analysis and ESIA, these provisions of the Draft Mining Law are rendered meaningless. These provisions fall far short of the World Bank’s own requirements for EAs, suggesting that they are plainly inadequate.

⁷⁰ OP 4.01 at ¶8(a).

⁷¹ *Id.* at ¶7; *id.*, Annex A at ¶9.

⁷² The aim of the Bank’s support is to “unblock the exploration of Haiti’s gold and copper potential and pave the way for this promising new wealth-generating sector.” *See* World Bank, *supra* note 37.

⁷³ Draft Mining Law, Arts. 7, 180, Republic of Haiti (Jul. 31, 2014) [hereinafter “Draft Mineral Law”]. Note that a copy of this document is attached at Annex 4. *See also* Review of Haiti’s Draft Mineral Law (Aout 2014), 10, Environmental Law Alliance Worldwide (December 2014) [hereinafter “ELAW Review”], attached as Annex 8.

⁷⁴ Draft Mining Law, Art. 181. The ESIA will also be reviewed by the Ministry of the Environment, but this assessment is conducted on a no objection basis and the standard to be applied is again not made clear. *See* section III.b.i below.

iii. Public Consultation

For projects that are likely to have serious adverse environmental impacts, the borrower country is required to consult as early as possible with locally affected people and non-governmental organizations about the project's environmental impacts and to take their views into account.⁷⁵ Yet in this case, only minimal attempts have been made to share information about the revisions to Haiti's mining law, and these efforts were not adequate to satisfy the Bank's consultation requirements (see discussion above). To our knowledge, not a single member of a mining-affected community was invited to any consultation or meeting about the Draft Mining Law. The Draft Mining Law is intended to regulate a burgeoning national industry, which has already caused conflict with and harm to communities living on and near the sites of mining activities. Without proper consultations, affected people are deprived of an opportunity to express their views and have those views taken into account.

iv. Disclosure

To enable meaningful consultations between borrower countries, like Haiti, and project-affected groups and NGOs, OP 4.01 requires borrowers to provide relevant materials in a form and manner that are understandable to affected people before holding consultations.⁷⁶ After the initial EA has been prepared, it must be made publicly available in a place accessible to project-affected groups and NGOs, and in an accessible language and format.⁷⁷

Conversations with communities and groups around the country indicate that information has not been provided to the public regarding the Draft Mining Law or the development of the mining sector in general.⁷⁸ The Clinic received a copy of the July 2014 version of the Draft Mining Law only after organizing a private meeting with government officials in November 2014. To our knowledge, the Draft Mining Law has not been translated into Haitian Creole, the language spoken by a majority of Haitians, and has not been made publicly available in any language. This complete lack of information regarding mining sector activities receiving World Bank support is contrary to the Bank's stated commitments to transparency and public participation and violates the disclosure requirement of OP 4.01. The absence of publicly available information prevents affected people from meaningfully participating in any decision-making related to the mining sector and its potential social and environmental impacts.

Additionally, the language of the Draft Mining Law itself does not align with the minimum standard set out in OP 4.01 related to disclosure of project information. The 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.⁷⁹ This provision may be read to

⁷⁵ OP 4.01 at ¶14 (“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.”).

⁷⁶ *Id.* at ¶15.

⁷⁷ *Id.* at ¶ 15-17.

⁷⁸ Conversations were held with communities around Haiti to gather information regarding their concerns with the mining sector. See Annex 5 for a list of meetings.

⁷⁹ Draft Mining Law at Art. 115.

require documents related to the environmental impacts of a project and proposed measures for avoiding and mitigating harm to be kept confidential, which would prevent affected people from engaging in informed consultation about mining projects. Moreover, this type of blanket confidentiality rule contravenes the World Bank's commitment to transparency. Best practice, as embodied in the World Bank's own Access to Information policy, requires that there be a presumption in favor of disclosure, subject to a narrow list of clearly reasoned exceptions for which confidentiality is required.⁸⁰

b. OP 4.04 Natural Habitats

i. Protection of Critical Natural Habitats

The World Bank's support for the Draft Mining Law violates Bank policies regarding natural habitats and natural resource management. According to OP 4.04, the Bank does not support projects that will significantly degrade or convert critical natural habitats.⁸¹ The Bank will only support projects that involve significant conversion of natural habitats if there are no feasible alternatives for the project or project site and "a comprehensive analysis establishes that the project's benefits will significantly outweigh the environmental costs."⁸² Additionally, the World Bank promotes the rehabilitation of degraded natural habitats.⁸³ Projects that will significantly convert or degrade natural habitats must include appropriate mitigation measures, including habitat retention and post-development restoration measures.⁸⁴

The Draft Mining Law is inadequate to ensure that future mining projects will not endanger critical natural habitats and that proper steps will be taken to protect other natural habitats.⁸⁵ First, as discussed above, the provisions regarding Environmental Analysis and ESIA's are exceedingly vague and fail to establish meaningful standards and requirements to be implemented.⁸⁶ These provisions of the Draft Mining Law should be further developed to include specific standards and clear definitions, to ensure that the Law as implemented will protect critical habitats.

⁸⁰ See The World Bank Policy on Access to Information, 1-2, World Bank (Jul. 1, 2013).

⁸¹ Operational Policy 4.04, ¶4, World Bank (June 2001, revised Apr. 2013) [hereinafter "OP 4.04"].

⁸² *Id.* at ¶5.

⁸³ *Id.* at ¶3.

⁸⁴ *Id.* at ¶5.

⁸⁵ 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. See Ministry of the Environment and United Nations Development Program, *Stratégie de Montage de l'Agence Nationale des Aires Protégées (ANAP)* (2009), available at: <https://www.sheltercluster.org/Americas/Haiti/HaitiEarthquake2010/Documents/MDE-PNUD%20Biodiversite%20Haiti.pdf>.

⁸⁶ See Draft Mining Law at 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 Art. 180 (providing for the preparation of an Environmental Analysis without specifying what information must be included); 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).

Second, the Draft Mining Law provides for approval of environmental assessments and management plans on a “no objection” basis. Under the Draft Mining Law, companies must present an ESIA to the Ministry of Environment (“MOE”) and receive a statement of “no objection” prior to receiving authorization to begin mining operations.⁸⁷ The MOE has 180 days to issue that statement or request changes to the documents.⁸⁸ If the MOE does not respond after 180 days, a statement of no objection will be assumed.⁸⁹ If the MOE does not have the capacity to review documents within the allotted timeframe, this provision will enable mining operations to begin without any environmental review being carried out, likely resulting in the implementation of mining projects with negative impacts on critical natural habitats, in contravention of OP 4.04. Further, the Draft Mining Law fails to make clear whether either the MOE or the NMA has the power to deny approval of the ESIA outright.

These provisions should be revised to require the MOE to issue an affirmative decision on an ESIA before mining operations may move forward, even if this takes longer than the allotted 180 days. A provision should be added specifying that approval may be denied as necessary where a project endangers critical natural habitats or has other serious environmental impacts.

Third, while the Draft Mining Law provides for “no go” zones, or areas where mining activities will be prohibited, it does not specify how or under what circumstances these zones may be established.⁹⁰ Simply allowing for the future development of no go zones without further elaboration does not satisfy the need to protect critical natural habitats.⁹¹ This is particularly true in the Haitian context, where many natural habitats have not been formally recognized. Consistent with the spirit of OP 4.04, this provision of the Draft Mining Law should be expanded to include guidance for the types of land on which no go zones will be established, in order to ensure that all critical natural habitats are included on the list of areas where mining operations are prohibited.

Fourth, it is not clear that the Draft Mining Law provisions regarding financing for environmental remediation suffice to ensure that adequate funds will be available to effectively rehabilitate natural habitats that have suffered from the long-term effects of mining.⁹² International best practice encourages the internalization of environmental costs and requires that

⁸⁷ Draft Mining Law at Art. 186.

⁸⁸ *Id.* at Art. 188.

⁸⁹ *Id.* at Art. 189.

⁹⁰ *See Id.* at Art. 172. The Draft Mining Law states that the no go zones will include all “protected areas” as defined under national environmental law. Draft Mining Law at 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. 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, *supra* note 85, at 21.

⁹¹ For example, Mole St. Nicolas is listed as a protected area. However, in the past couple years, Matraco has been conducting exploration and extraction activities in the area. *See, e.g.,* Le Nouvelliste, *Matraco S. A. Valorise nos ressources naturelles* (Mar. 11, 2008), available at <http://lenouvelliste.com/lenouvelliste/article/55356/Matraco-S-A-valorise-nos-ressources-naturelles>.

⁹² *See* Review of Haiti’s Convention Minière Type, 3, Environmental Law Alliance Worldwide (December 2014) (referencing Article 11 of the Model Mining Convention).

the polluting institution cover the cost.⁹³ This practice is especially important in a country facing political instability, since companies may abandon mining projects earlier than expected should conditions deteriorate.

ii. Government Capacity

OP 4.04 also provides that in deciding whether to support a project that may affect natural habitats, the World Bank should consider the capacity of the borrowing country to implement appropriate conservation and mitigation measures and, where capacity is lacking, ensure the project includes measures to develop governmental capacity for environmental planning and management.⁹⁴ As discussed above, the Haitian government is severely lacking in technical and institutional capacity, which is likely to affect its ability to regulate the environmental impacts of the mining sector. Based on publicly available information, it is unclear what steps, if any, the Bank is taking to increase governmental capacity for environmental planning and management.

For example, to ensure that the development of the mining sector does not cause significant harm to natural habitats, the Haitian government must have the capacity to independently monitor environmental compliance by, among other things, testing for metals and other contaminants in soil and water during and after any mining operations—even at the earliest stages. It is unclear whether the World Bank has taken any steps to ensure that the government possesses such capacity or to increase this capacity. The fact that relevant government agencies have apparently not assessed the environmental impacts of recent mining activities raises serious concerns in this context. Additionally, it appears that the government agency tasked with managing environmentally protected areas is still in development,⁹⁵ yet it is unclear what steps the World Bank is taking to ensure that it is fully functional and capable of protecting important natural habitats prior to the passage of the Draft Mining Law.

c. *OP 4.36 Forests*

According to OP 4.36, the World Bank does not finance projects that involve significant conversion or degradation of critical forest areas.⁹⁶ It may finance a project that involves significant conversion or degradation of *non-critical* forests only if there are no feasible alternatives to the project or its siting, and if a comprehensive analysis demonstrates that the project's benefits outweigh its environmental costs.⁹⁷ The EA for a project must address the potential impacts on forests and on the rights and welfare of local communities.⁹⁸

⁹³ U.N. Environment Programme, 1992 Rio Declaration on Environment and Development, Art. 16, U.N. Doc. A/CONF.151/26 (vol. 1), available at <http://cil.nus.edu.sg/1992/1992-rio-declaration-on-environment-and-development/>.

⁹⁴ OP 4.04 at ¶6.

⁹⁵ See The UNDP in Haiti, Protection of the Environment: Objectives (Dec. 12, 2014), available at http://www.ht.undp.org/content/haiti/fr/home/ourwork/environmentandenergy/in_depth/.

⁹⁶ Operational Policy 4.36, ¶5, World Bank (Nov. 2002, revised Apr. 2013) [hereinafter "OP 4.36"].

⁹⁷ *Id.*

⁹⁸ *Id.* at ¶13.

OP 4.36 is particularly important in Haiti, where the forest cover has been subject to severe degradation and is currently estimated at 1.5%.⁹⁹ However, the Draft Mining Law is not sufficiently specific to ensure that mining activities adhere to the World Bank's safeguards concerning forest areas. Provisions of the law requiring an Environmental Analysis and an ESIA do not specify that these documents must address the impacts of a potential mining operation on forests.¹⁰⁰ Moreover, as discussed above, the process for reviewing and authorizing the ESIA allows for the document to be waived through without any review if the Ministry of Environment is unable to review the document in a timely manner,¹⁰¹ and provisions for the creation of "no go" zones do not specify whether all critical forest areas will be identified and categorized as off-limits for mining.¹⁰² The Draft Mining Law also lacks any other provisions to ensure that impacts on forest areas are subject to sufficient analysis and that degradation of forests is avoided or mitigated wherever possible.

d. OP 4.07 Water Resources Management

OP 4.07 provides that the World Bank assist borrowers with water resource management in the following areas, among others: guarding against overexploitation of groundwater resources; giving priority to providing adequate water and sanitation services to the poor; and establishing strong legal and regulatory frameworks that address social concerns and protect environmental resources.¹⁰³

The Draft Mining Law does not establish a strong legal framework to address the management of water resources with respect to future mining projects. Article 116 provides a vague assurance 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.¹⁰⁴ This provision does not establish a framework for addressing and remediating negative impacts on the country's water resources. Large-scale mining activities present serious dangers to water resources, making a comprehensive framework for water management a critical component of national mining legislation.

This is particularly true in the Haitian context, where the companies that hold mining claims have confirmed that the mineral deposits beneath their claims contain significant concentrations of various sulfides.¹⁰⁵ In addition, the Northwest¹⁰⁶ and Northeast¹⁰⁷ departments

⁹⁹ Singh & Cohen, *supra* note 48.

¹⁰⁰ See Draft Mining Law at Art. 180.

¹⁰¹ *Id.* at Art. 186-189.

¹⁰² *Id.* at Art. 172.

¹⁰³ Operational Policy 4.07, ¶2(d) and 2(f), World Bank (Feb. 2000).

¹⁰⁴ Draft Mining Law at Art. 116.

¹⁰⁵ 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>. This is 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

are particularly vulnerable to drought. Even beyond these drought-prone areas, Haiti has long suffered from a shortage of potable water throughout the country.¹⁰⁸ The many challenges of managing Haiti's limited water resources only heighten the need for a strong framework for addressing water resources management; the Draft Mining Law falls short of meeting that need.

e. OP 4.11 Physical Cultural Resources

According to OP 4.11, the World Bank assists borrowing countries to avoid or mitigate harm to physical cultural resources from projects that it finances.¹⁰⁹ Where a project is likely to have adverse impacts on physical cultural resources, the borrower must identify appropriate measures for avoiding or mitigating these impacts.¹¹⁰

The Draft Mining Law requires a buffer zone of only 50 meters between mining activities and physical cultural resources such as historic or sacred sites, graves or works of art.¹¹¹ This buffer zone is too small to adequately protect physical cultural resources from adverse impacts due to mining operations. The size of buffer zones is best determined on a project-by-project basis, taking into consideration the type of mining operations to be conducted and the surrounding buildings, infrastructure, or environmental characteristics that may be affected.¹¹² As a minimum standard, a 250 meter buffer zone would be more appropriate to safeguard physical cultural resources and other attributes of the surrounding land.¹¹³

Further, the Draft Mining Law provisions regarding “no go” zones fail to provide adequate protection for Haiti's physical cultural resources.¹¹⁴ As noted above, while these provisions provide a basis for excluding certain areas from mining activities, they do not take the important step of clarifying which areas will be declared as “no go” zones, or even how these zones will be defined. Without further explanation, it is unclear whether valuable physical

groundwater basins. Barrick Gold Corporation, *Pueblo Viejo Mine Tour* (Feb. 28, 2013), available at <http://www.barrick.com/files/presentation/2013/Barrick-Pueblo-Viejo-Tour.pdf>.

¹⁰⁶ See, e.g., Amelie Baron, *Drought Threatens Population in the Northwest of Haiti*, Reuters (Apr. 8, 2014), available at <http://uk.reuters.com/article/2014/04/08/uk-haiti-drought-idUKBRE360NE20140408>. See also Marc Cohen, *Haiti's Current Drought: An Opportunity to Build Climate Change Resilience?* (Apr. 22, 2014), Oxfam America, available at <http://politicsofpoverty.oxfamamerica.org/2014/04/haiti-drought-opportunity-build-climate-change-resilience/>.

¹⁰⁷ See, e.g., Evens Sanon and Trenton Daniel, *Official: Haiti Drought Causes 'Extreme' Emergency*, Associated Press (Mar. 18, 2014), available at <http://bigstory.ap.org/article/official-haiti-drought-causes-extreme-emergency>.

¹⁰⁸ See, e.g., *Pentadal Rainfall Estimate Map*, U.S.G.S., available at <http://earlywarning.usgs.gov/fews/ccm/haiti/web/imgbrowse2.php?extent=hap4>; see also *Pentadal Water Requirement Satisfaction Index*, U.S.G.S., available at <http://earlywarning.usgs.gov/fews/ccm/haiti/web/imgbrowse2.php?extent=h1p1>.

¹⁰⁹ Operational Policy 4.11, ¶8, World Bank (July 2006, revised Apr. 2013).

¹¹⁰ *Id.*

¹¹¹ Draft Mining Law at Art. 158.

¹¹² See ELAW Review, *supra* note 73, at 10.

¹¹³ *Id.*

¹¹⁴ See Draft Mining Law at Art. 172.

cultural resources within the country, such as the Citadelle Laferrière and the buildings at Ramiers, will be adequately protected if mining activity continues.¹¹⁵

f. OP 4.12 Involuntary Resettlement

According to OP 4.12, involuntary resettlement should be avoided or minimized wherever possible by exploring alternative project designs.¹¹⁶ Where resettlement is unavoidable, the borrowing country must: meaningfully consult with displaced persons; provide them with opportunities to participate in the planning and implementation of resettlement programs; and provide resources to ensure that they are able to share in the project's benefits.¹¹⁷ Displaced persons should receive compensation for any assets lost as a result of the project and assistance in improving their livelihoods or at least restoring them to their pre-displacement standard of living.¹¹⁸ In any project that requires resettlement, the borrowing country should pay particular attention to the needs of vulnerable groups.¹¹⁹

As discussed above, mining-affected communities have already experienced problems related to mining companies' use of community lands. For example, the use of community lands for mining exploration and prospecting activities has, in some cases, already restricted landowners' access to their land or their ability to use it for agricultural purposes, without companies having obtained proper consent. In other cases, landowners have experienced economic displacement when their land has been negatively impacted by exploratory activities that have caused crop failures. Complainants are concerned that the Draft Mining Law is not strong enough to protect against similar problems in the future.

In describing mining activities as being "of public utility," the Draft Mining Law facilitates the Haitian government's use of compulsory acquisition to take away private land for the purpose of large-scale mining projects.¹²⁰ The Draft Mining Law also gives companies the right to seek expropriation of privately held land to conduct mining activities.¹²¹ Together, these articles make it easier for mining companies and the Haitian government to seize land from community members. In addition, the Draft Mining Law provides a process for compensation to be paid to individual landowners, but 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.¹²² These provisions are not aligned with the norms set out in OP 4.12, which requires that involuntary resettlement be avoided or mitigated wherever possible.

Moreover, should the Haitian government use compulsory acquisition to seize private property for mining activities, the Draft Mining Law does not include adequate protections for

¹¹⁵ These monuments are all listed as World Heritage Sites. See UNESCO World Heritage List, available at <http://whc.unesco.org/en/list/180>. Note that one mining company holds an exploitation permit within 15 kilometers of the Citadelle.

¹¹⁶ Operational Policy 4.12, ¶2(a), World Bank (Dec. 2001, revised Apr. 2013) [hereinafter "OP 4.12"].

¹¹⁷ *Id.* at ¶2(b).

¹¹⁸ *Id.* at ¶2(c).

¹¹⁹ *Id.* at ¶8.

¹²⁰ See Draft Mining Law at Art. 3; see also ELAW Review at 2.

¹²¹ Draft Mining Law at Art. 167.

¹²² *Id.* at Art. 161.

individuals who lose their land or their land-use rights through this process. World Bank policy requires the preparation of a resettlement plan or resettlement policy framework whenever individuals are involuntarily resettled because of a project.¹²³ It requires at minimum that displaced persons be informed of their rights, consulted on their resettlement options and provided full, prompt compensation for any assets lost as a result of a project.¹²⁴ The resettlement plan must also provide displaced persons with relocation assistance and new land or housing that is at least equivalent to the land or housing that they lost.¹²⁵

The Draft Mining Law does not create any such framework for the resettlement of individuals who are involuntarily displaced by mining projects. It provides that mining companies can acquire private property for mining activities by paying market value compensation to the landowner.¹²⁶ It does not discuss whether compensation will be negotiated with landowners on an individual basis or collectively. Nor does the law address the need to deal with community resettlement issues holistically through a community-wide resettlement plan, as envisioned in World Bank policy. It also fails to provide for any relocation or livelihood assistance to displaced persons or otherwise ensure that they will be able to return to their pre-displacement standard of living.

It is our understanding that under the Draft Mining Law, companies will be required to enter into individual mining conventions with the Haitian government before mining operations can proceed past the exploration phase.¹²⁷ We understand that the Model Mining Convention, annexed to the Draft Mining Law, will serve as a minimum standard for any future conventions. The Model Convention requires companies to establish a plan for addressing potential displacement and compensation issues before they initiate mining operations.¹²⁸ While this appears to provide for a more holistic approach to these issues, to be determined on a case-by-case basis, neither the Model Convention nor the Draft Mining Law specifies the minimum requirements with respect to the design or content of such plans, necessary to protect the rights of affected populations. Thus the legal framework supported by the World Bank still falls short of what the Bank itself requires under OP 4.12. The Draft Mining Law and Model Mining Convention should be revised to require that any plan to address displacement and compensation issues must be developed in cooperation with local communities and must include the provision of relocation and livelihood assistance.¹²⁹

IV. Violations of the Haitian Constitution of 1987

The Draft Mining Law, if enacted, would violate clauses of the Haitian Constitution concerning environmental protection. Article 253 of the Haitian Constitution declares that “since the environment is the natural framework of the life of the people, any practices that

¹²³ OP 4.12 at ¶6.

¹²⁴ *Id.* at ¶6(a).

¹²⁵ *Id.* at ¶6(b).

¹²⁶ Draft Mining Law at Art. 161.

¹²⁷ *See id.* at Art. 54.

¹²⁸ Model Mining Convention, Art. 7, Republic of Haiti (Jul. 25, 2014) [hereinafter “Model Mining Convention”], attached in Annex 4.

¹²⁹ The Model Mining Convention indicates that such plans must accord with the provisions of “Annex A,” but the document that we were provided does not include an Annex A. Model Mining Convention at Art. 7.

might disturb the ecological balance are strictly forbidden.”¹³⁰ Article 253-1 states that “[a]s 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.”¹³¹ As noted above, Haiti’s forest cover is estimated at 1.5%.¹³²

Mining activities present significant risks to the environment and, without sufficient regulation, could easily disturb Haiti’s ecological balance. Under the requirements of the Haitian Constitution, environmental regulations for the mining sector must be strong enough to prohibit any such harmful mining activities and must include exceptional measures to protect forests and restore the ecological equilibrium. The Draft Mining Law accomplishes neither of these objectives. As discussed above, the law’s environmental protections are not strong enough to adequately safeguard the country’s environment: it fails to include any specific provisions to address Haiti’s severe deforestation, and even those provisions in the law that permit the creation of “no go” zones for mining activities do not require that forest areas be declared off-limits for mining activities.¹³³

V. Violations of International Human Rights Law

The former Chairman of the World Bank Inspection Panel recognized in his statement to the Board regarding the Chad-Cameroon Pipeline Project that “human rights [are] implicitly embedded in various policies of the Bank” and therefore the subject of human rights “is within the boundaries of the Panel’s jurisdiction.”¹³⁴ The right to participate in decision-making processes, including in relation to development, is protected by the International Covenant on Civil and Political Rights¹³⁵ and the International Convention on Economic, Social and Cultural Rights,¹³⁶ both of which Haiti has ratified. The right to participation is explicitly guaranteed to

¹³⁰ Haiti Constitution at Art. 253.

¹³¹ *Id.* Art. 253-1.

¹³² See, e.g., Singh & Cohen, *supra* note 48; see also U.S.G.S. map, available at http://earlywarning.usgs.gov/fews/ccm/haiti/images/Hisp_forests.pdf.

¹³³ See Draft Mining Law at Art. 172.

¹³⁴ Edward S. Ayensu, *Remarks of the Chairman of the Inspection Panel to the Board of the Executive Directors on the Chad-Cameroon Pipeline Projects – Inspection Panel Investigation Report* (Sept. 12, 2002), available at: <http://ewebapps.worldbank.org/apps/ip/Lists/NewsFromThePanel/NewsFromThePanelDisp.aspx?ID=85&source=http://ewebapps.worldbank.org/apps/ip/Pages/News-fom-the-panel.aspx>.

¹³⁵ Article 25 of the International Covenant on Civil and Political Rights (“ICCPR”) recognizes the right of everyone to participate in the “conduct of public affairs.” ICCPR, adopted Dec. 16, 1966, 999 U.N.T.S. 171 (1967), ratified by Haiti on Feb. 6, 1991. The UN Human Rights Committee has interpreted this article to place an obligation on States to “ensure that citizens have an effective opportunity to enjoy” this right of participation. General Comment 25: The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access in Public Services, Hum. Rts. Comm., U.N. Doc. CCPR/C/21/Rev.1/Add.7, ¶1 (1996).

¹³⁶ International Covenant on Economic, Social and Cultural Rights, adopted Dec. 16, 1966, 993 U.N.T.S. 3 (1967), ratified by Haiti on Oct. 8, 2013. The Committee on Economic, Social and Cultural Rights has found that Article 3 of the Covenant, on participation in cultural life, recognizes the “right of individuals and groups to participate in decision-making processes that may affect their development.” General Comment 16: The Equal Right of Men and Women to the Enjoyment of all Economic, Social and Cultural Rights, Comm. on Econ. Soc. & Cult. Rts., U.N. Doc. E/C.12/2005/4, ¶37 (2005).

communities in the context of mining activities, to allow them to play an active role in mining development through a continuous process of dialogue, consultation and negotiation.¹³⁷

Yet, to date, the practices of the World Bank and the Haitian government in drafting the new mining law and developing the mining sector have failed to protect the rights of the Haitian people to participate in decisions that affect their lives. Recent steps to develop the Haitian mining sector, and specifically the process by which the Draft Mining Law has been developed, have not involved adequate public participation or consultation. The development of a major nation-wide industry falls squarely within the category of projects that require participation by all stakeholders, including affected people, in decision-making processes. Yet, as discussed above, attempts to inform or consult with the public about the Draft Mining Law have been almost entirely lacking.

Moreover, the Bank failed to adequately assess how the institutional capacity and governance situation in Haiti would impede the country's ability to guarantee its population the right to participation in decisions affecting their lives. The Office of Energy and Mines, the Ministry of the Environment, and the Council on Economic and Social Development have demonstrated that they lack the capacity to effectively consult with and provide information to affected communities. We believe that the World Bank erred in deciding to proceed with its support for the development of the mining sector in Haiti, without at minimum conducting a Sectoral EA as discussed above. This error is particularly grave given that the mechanisms and resources necessary to ensure consultation and participation do not exist and the potential risks of the given industry are great. If the Bank and the government continue to exclude mining-affected communities, and if the Draft Mining Law is implemented in its current form, the Haitian government will stand in breach of its international human rights commitments.

VI. Prior Attempts to Resolve the Problems With the World Bank

On November 17, 2014, representatives of the Collective, the Clinic and Accountability Counsel met with two representatives of the World Bank: Remi Pelon, Senior Mining Specialist, and Michelle Keane, Lead Country Officer for Haiti. During the meeting, the Complainants' primary concerns were raised and discussed. With respect to the primary and immediate concerns of lack of information and consultation regarding the Draft Mining Law, the World Bank representatives indicated that there is little that they can do to convince the Haitian government to disclose information publicly or hold public consultations about the Draft Mining Law and the development of the mining industry. They also said that it would not be possible for them to ensure that the Government organize broad consultations and that they have no way to identify which members of civil society are interested in or affected by the Draft Mining Law.

¹³⁷ See, e.g., United Nations, Report of the World Summit on Sustainable Development, U.N. Doc. A/CONF. 199/20, ¶46 (b) (2002) ("Enhancing the contribution of mining, minerals and metals to sustainable development includes actions at all levels to: Enhance the participation of stakeholders, including local and indigenous communities and women, to play an active role in minerals, metals and mining development throughout the life cycles of mining operations, including after closure for rehabilitation purposes, in accordance with national regulations and taking into account significant transboundary impacts.").

At the November 17 meeting, representatives of the Collective, the Clinic and Accountability Counsel also presented a letter to the World Bank representatives detailing Complainants' concerns in writing.¹³⁸ The letter was submitted in English and Haitian Creole. The following day, an electronic version of this letter was also sent to President Kim's office. On December 5, 2014, Michelle Keane replied via email to Professor Margaret Satterthwaite, Director of the Clinic, and to five representatives from the Collective. The email conveyed a three-page letter signed by Charles M. Feinstein, Director of the World Bank's Energy and Extractives Global Practice. The email and the letter were written in English only, making them inaccessible to the five Collective representatives. Professor Satterthwaite replied to Ms. Keane, asking for a copy of the letter in French. On December 17, 2014, Gloria Jean Whitaker, Program Assistant for Energy and Extractives Global Practice, provided a copy of the letter in French to the Clinic and the Collective representatives.

Mr. Feinstein's letter does not constitute a satisfactory response to Complainants' concerns. In fact, Mr. Feinstein's letter exacerbates Complainants' concerns. Mr. Feinstein concedes the Haitian government's lack of capacity, yet simultaneously emphasizes that core decisions regarding the degree of consultation are ultimately left up to the government, without any precautionary measures to ensure that the rights of the Haitian people are protected. In his letter, Mr. Feinstein emphasizes that it is up to the Haitian government to make decisions and to consult all stakeholders. The World Bank will continue to encourage the government to do so, he explains, but "[u]ltimately, domestic and political and legislative processes determine the options that Governments select or Parliaments adopt or ratify."¹³⁹ However, Mr. Feinstein fails to address the Complainants' concern that in Haiti, the legislative and democratic processes may soon be gravely interrupted.

Mr. Feinstein also fails to address Complainants' fear of environmental and social harms, stating only that he believes that the most recent version of the law contains "improvements in this regard."¹⁴⁰ Nor does he address the concern that the Draft Mining Law does not require transparency. Finally, Mr. Feinstein does not respond to any of Complainants' five requests to the World Bank made in the letter.

Based on this response, and the in-person meeting on November 17, 2014, Complainants believe that their attempts to contact the Bank directly will not lead to any change in the Bank's approach to its activities in Haiti. In addition, Complainants are concerned that, should the Haitian Parliament be dissolved in January 2015 as predicted, the Draft Mining Law may be passed into law through a non-democratic presidential decree process in early 2015. Complainants file this Request for Inspection with the hope that the Inspection Panel will begin to look into this matter as soon as possible, before the Draft Mining Law is adopted by decree.

¹³⁸ A copy of this letter is attached at Annex 6.

¹³⁹ Letter from World Bank at 2.

¹⁴⁰ *Id.* Note that Complainants have now reviewed the updated draft to which Mr. Feinstein refers. All references to the Draft Mining Law in this Request for Inspection refer to this updated draft.

VII. Requested Next Steps

Complainants request that the Inspection Panel conduct an investigation of the violations of World Bank policy described above. We are confident that an Inspection Panel investigation will lead to changes in the World Bank's approach to its activities in Haiti to remedy these violations, address the underlying concerns, and prevent potential future violations. The World Bank should halt work on the Draft Mining Law and any other support for the development of the Haitian mining sector, and request that the Haitian government suspend passage of the law until the Government returns to an inclusive, democratic decision-making process.

Before any legislative changes are enacted, mining-affected and potentially mining-affected communities should be informed and consulted about the plan to revise the national mining law and to develop the mining sector. These consultations should include providing, in Creole and in an accessible format, accurate information about the potential impacts of mining on communities and mitigation measures. The Draft Mining Law should be publicly released in Creole and made available to NGOs, local government, and the media, to ensure that it is distributed broadly and reaches communities affected or likely to be affected by mining. Conversations must also address concerns that the Haitian government lacks the capacity to enforce the law and monitor mining companies' compliance with environmental and social standards and fiscal requirements. A Sectoral EA examining the environmental issues and impacts associated with developing the mining sector should also be prepared and made publicly available.

Public consultations should then be held, targeting communities that are likely to be affected by future mining activities, to discuss the Draft Mining Law and the development of the mining sector, including potential impacts on communities. These consultations should be focused on ensuring that communities understand the social and environmental regulations of the Draft Mining Law, especially those that implicate natural habitats, forests, water resources, physical cultural resources and involuntary resettlement. As one part of the public consultation process, the Government should hold a public comment period of at least six months before the Draft Mining Law is finalized and passed into law. Decision-makers should take the views expressed during public consultations (including the public comment period) into account in revising and finalizing the Draft Mining Law and the national mining sector strategy, and should explain the decision not to include particular recommendations or to address particular concerns in the law.

The Draft Mining Law must also be revised to include stronger environmental and social regulations that are in line with the World Bank's Safeguard Policies and that comply with the Haitian Constitution and Haiti's international human rights commitments. Further, a comprehensive analysis should be conducted to determine the capacity of the Haitian government to regulate and monitor company activity and to meet its obligations to protect the human rights of the Haitian people in the context of mining activities. This analysis should be made public and subject to discussion and debate before the Bank, or the Haitian government, makes any further decisions regarding capacity-building activities or support for the mining sector.

Please do not hesitate to contact us with any questions you may have regarding this Request for Inspection. Please send correspondence in English and French to *Kolektif Jistis Min* (kolektif_ayiti@yahoo.fr), [REDACTED]

[REDACTED]. We look forward to hearing from you about this important matter.

Sincerely,

[signatures appear on the following page]