

## Appraising the Role of the IFC and Its Independent Accountability Mechanism: Community Experiences in Haiti's Mining Sector

Kate Nancy Taylor

Follow this and additional works at: <http://digitalcommons.wcl.american.edu/sdlp>

 Part of the [Agriculture Law Commons](#), [Constitutional Law Commons](#), [Energy and Utilities Law Commons](#), [Environmental Law Commons](#), [Food and Drug Law Commons](#), [Health Law and Policy Commons](#), [Human Rights Law Commons](#), [Intellectual Property Law Commons](#), [International Law Commons](#), [International Trade Law Commons](#), [Land Use Law Commons](#), [Law and Society Commons](#), [Law of the Sea Commons](#), [Litigation Commons](#), [Natural Resources Law Commons](#), [Oil, Gas, and Mineral Law Commons](#), [Public Law and Legal Theory Commons](#), and the [Water Law Commons](#)

---

### Recommended Citation

Taylor, Kate Nancy (2017) "Appraising the Role of the IFC and Its Independent Accountability Mechanism: Community Experiences in Haiti's Mining Sector," *Sustainable Development Law & Policy*: Vol. 17 : Iss. 2 , Article 4.  
Available at: <http://digitalcommons.wcl.american.edu/sdlp/vol17/iss2/4>

# APPRAISING THE ROLE OF THE IFC AND ITS INDEPENDENT ACCOUNTABILITY MECHANISM: COMMUNITY EXPERIENCES IN HAITI'S MINING SECTOR

*Kate Nancy Taylor\**

## I. INTRODUCTION

In 2010, the International Finance Corporation (IFC) purchased an equity stake in Eurasian Minerals Inc., a junior mining company conducting gold and copper exploration activities in Northern Haiti. The investment formed part of the IFC's Early Equity portfolio, which supports private sector investment in nascent mineral markets. This article examines the governance role played by the IFC over the course of the company's exploration activities in 2010 through 2012, after which a de facto moratorium emerged over gold mining operations in Haiti. This article sets out to scrutinize the role played by the IFC during the life of its investment in Haiti, querying the extent to which it was able to enhance the environmental and social outcomes and foster greater public accountability of the project—paying particular attention to the nature of IFC investments in the earliest phases of mining operations and highlighting the importance of obligations regarding community engagement and information disclosure to project-affected communities.

The cornerstone of the IFC's accountability framework is the Compliance Advisor Ombudsman (CAO), which operates as the institution's independent accountability mechanism (IAM). Over the last twenty years, IAMs have emerged as a staple feature of international finance institutions, during a time in which the idea of citizen-led accountability has gained currency in multilateral development finance. Despite the primacy of this idea, this article argues that the CAO was not an accessible or appropriate mode of redress for project-affected communities in Haiti. Drawing on the Haiti case study, this article focuses on how different stages of community mobilization against mining projects can shape and constrain the capacity of the CAO to enhance citizen-led accountability. Given the IFC's recently stated preference for early equity investments in the mining sector, this analysis is necessary to develop a more nuanced understanding of how recourse to the CAO functions for project-affected communities during the earliest phases of a mine's life cycle.

Part II of this article sets out the governance architecture of an IFC-sponsored project, drawing out the applicable norms and standards that apply to such projects and highlighting the role and functions of the CAO in particular. Part III goes on to examine the nature of the IFC's early equity investment in Haiti, and conducts a brief analysis of how Eurasian's conduct over

the course of its exploration activities failed to meet the IFC's Performance Standards with respect to community engagement and the company's administration of land access agreements in La Montagne, in Haiti's Northwest Department. With these deficiencies in mind, Part IV examines why project-affected communities did not have recourse to the CAO to address the company's failures. Part V concludes that the CAO needs better solutions for engaging vulnerable project-affected communities.

## II. ROLE AND FUNCTIONS OF THE IFC AND CAO

### (A) EARLY EQUITY INVESTMENTS IN THE MINING SECTOR

The IFC is the world's largest multilateral institution supporting private sector investment, with investments and advisory services in over 100 developing countries.<sup>1</sup> Given the governance role played by the institution, its potential to redefine accountability relationships and institutionalize environmental and social safeguards in the mining sector could be critical for the people and communities affected by IFC-sponsored projects.<sup>2</sup> While the IFC's largest investments are related to infrastructure, agribusiness, and forestry industries, it has shown an increasing preference for investments in oil, gas, and mining industries in recent years—with investments in the sector rising from approximately \$229 million USD in 2011 to \$514 million USD in 2015.<sup>3</sup> Under the IFC's "Early Equity Program," the IFC intentionally supports nascent mineral markets by targeting projects at the earliest stages of mining activity.<sup>4</sup>

Through its Early Equity Program, the IFC "looks to partner with junior mining companies with good management and help them address environmental and social issues maybe four or five years before they begin developing mines."<sup>5</sup> The program allows the IFC to balance what appears to be two of its key imperatives—first, its commitment to natural resource extraction as an important feature of economic development in the world's poorest countries, and second, its fidelity to projects that maintain

\* B.A., L.L.B. (Hon.), L.L.M. (International Legal Studies). The author has previously worked as an advocate on human rights in Haiti's mining sector as part of the Global Justice Clinic at New York University's School of Law. While the author's observations during the course of that fieldwork have enriched her understanding of the situation analyzed in this paper, the analysis itself is not based on privileged and confidential information, but is instead based on later research using publicly available information. Both the fieldwork and the preparation of this paper were conducted under the supervision of Professor Margaret Satterthwaite, NYU School of Law.

sound environmental and social practices. By investing in the mining sector at the early stages, the IFC tries to limit its exposure to the more complex and invasive environmental and social harms associated with a mine's development and production while maintaining its fundamental support for the industry. With respect to the IFC's investment in Eurasian's operations in Haiti, for example, the IFC noted that its investment in the exploration stage of Eurasian's projects would only yield "limited" development impacts for Haiti, other than generating local employment and the purported "positive impact of attracting additional foreign investments to an underdeveloped but promising sector" of the economy.<sup>6</sup>

Notwithstanding the purported "light footprint" left by mineral exploration, the IFC's Sustainability Framework applies equally to the IFC's early equity investments in the mining sector.<sup>7</sup> The Sustainability Framework consists of the IFCs' Policy on Environmental and Social Sustainability (which defines the nature of the IFC's commitments), the Environmental and Social Performance Standards (which define clients' responsibilities for managing their risks), the Access to Information Policy (which sets the parameters for the IFC's information disclosure), and the procedures for Environmental and Social Categorization (which the IFC uses to categorize the risks of a project).<sup>8</sup> Taken together, these elements are intended to have far-reaching consequences for the governance of a project, both internally and externally. The Framework plays important internal governance functions, by governing how the IFC itself should conduct its due diligence and ensuring the transparency of its involvement. Externally, the Framework (primarily through the Performance Standards) seeks to regulate and influence the behavior of the company that has accepted the IFC's funding through debt or equity.<sup>9</sup> To the extent that the Sustainability Framework fulfills this external governance function, the IFC's Early Equity Program could have beneficial effects for project-affected communities that endure into the later phases of a mine's development. In theory, institutionalizing strong environmental and social practices in the earliest stages of the life cycle of a mine is prudent, as implementing best practice from the outset could help to alleviate the more acute environmental and social issues that are likely to arise as the mine matures. Therefore, even in the early life of projects, the IFC's Sustainability Framework could play an important role in governing how environmental and social risks of a project are managed, and redefining the accountability relationships that exist between the IFC, the company, and project-affected communities. For that role to be fully realized, both the IFC and its clients must strictly adhere to the IFC's Sustainability Framework, and there must be appropriate modes of citizen accountability through which project-affected communities can voice their grievances about non-compliance with the Framework.

## (B) THE ESTABLISHMENT OF THE CAO: ACCOUNTABILITY AS A WATCHWORD IN DEVELOPMENT FINANCE

As the IFC's independent accountability mechanism, the CAO is charged with a mandate to be directly responsive to the concerns of project-affected communities.<sup>10</sup> It plays a critical role in providing a forum for communities to raise claims about a project's environmental and social impacts, and ensuring that the IFC and the company are adhering to their respective obligations under the IFC's Sustainability Framework. Before evaluating whether the CAO functions effectively for communities affected by early equity investments, it is necessary to understand the circumstances that gave rise to the creation of the CAO, and the normative purposes it is designed to achieve. In doing so, it becomes clear how the nature of early equity investments can shape and constrain the capacity of the CAO to achieve its objectives in the context of specific communities and/or countries.

Since the early 1990s, accountability has become a watchword in multilateral development finance.<sup>11</sup> The idea that the legitimacy of an international financial institution is tied to the extent to which it is accountable to the people affected by their projects has increasingly gained currency. The notion of citizen-led accountability—which refers broadly to the capacity of project-affected peoples and communities to demand that their localized grievances be addressed—was first operationalized by the World Bank in 1993, with the establishment of the World Bank Inspection Panel.<sup>12</sup> The Panel takes requests from groups who have harmed by a Bank-financed project, and provides a forum for communities to raise claims that the Bank has failed to follow its operational policies.<sup>13</sup> The creation of the Inspection Panel was spurred by the work of the World Bank's International Bank for Reconstruction and Development (IBRD) and International Development Association (IDA) performing essentially public functions (such as building public development infrastructure) with no capacity for to hear the voices of project-affected peoples.<sup>14</sup> This accountability deficit within the World Bank (and other regional development banks) was exacerbated by the reality that frequently, project-affected communities could not rely on their governments to assert their interests, since those same governments were partners in the operations and did not have strong enough institutional capacity to regulate and manage the environmental and social impacts of Bank-projects. Compounding this accountability gap, project-affected communities are denied recourse to domestic courts in disputes against international finance institutions, which are customarily granted jurisdictional immunity before domestic courts by their constituent member states.<sup>15</sup>

As a private lending institution, the need for the IFC to be responsive to project-affected communities was not a significant issue until well into the 1990s. Between 1956 and 1990, the IFC was primarily engaged in non-recourse financing of industrial and financial projects in emerging markets, rather than large infrastructure projects which were government-led.<sup>16</sup> Beginning in the late 1980s, the IFC began to involve itself in financing private infrastructure projects in developing countries,<sup>17</sup> prompted by the emphasis on the privatization of state enterprises,

including state mining assets, advanced by the Washington Consensus in the 1980s and 1990s. This shift in IFC-investment priorities meant a sudden engagement in projects that entailed more acute environmental and social harms, which took place without a parallel development of accountability mechanisms for project-affected communities. This accountability deficit was brought to the forefront in 1996, in the context of a hydroelectric project on the BioBio River in Chile, which directly affected both indigenous and non-indigenous communities in the region.<sup>18</sup> A Chilean NGO had filed a complaint to the World Bank's Inspection Panel in 1995, which found it had no jurisdiction over IFC-sponsored projects.<sup>19</sup> As a result of significant pressure emanating from international NGOs and domestic pressure within Chile, the World Bank established the CAO in 1999, with a mandate to address complaints from people affected by projects sponsored by the IFC or guaranteed by the World Bank's Multilateral Investment Guarantee Agency (MIGA).<sup>20</sup>

The CAO is intended to operate as a fallback mechanism, to offer recourse to project-affected communities in circumstances where their grievances are not resolved by the company at the operation-level, or through legal and administrative procedures at the state level.<sup>21</sup> This mode of recourse offered by the CAO becomes critically important where a company is not responsive to the community's concerns and where the state's preference for uninterrupted economic development outweighs its desire to assert or otherwise address the rights of project-affected people. In the context of mining operations, the IFC's involvement in a project can potentially add a layer of accountability to the typically vexed tripartite relationship that exists between the state, a mining company and affected communities.

Today, the notion of citizen-led accountability is regarded as the key rationale for the proliferation of IAMs by development finance institutions, and is often represented as the cornerstone of sustainable development.<sup>22</sup> In addition to the World Bank Group, the African, Asian and Inter-American Development Banks, as well as the European Bank have adopted IAMs in various forms for Reconstruction and Development and the European Investment Bank.<sup>23</sup> A 2016 report on the "State of Accountability in Development Finance" identified a total of 758 complaints submitted over the past 21 years to 11 different IAMs.<sup>24</sup>

With over 20 years having passed since the creation of the World Bank's Inspection Panel, most recent commentaries acknowledge that the proliferation of IAMs has resulted in the increased accountability of IFIs to protect affected persons.<sup>25</sup> This is not without qualification. MacDonald and Miller-Dawkins take the view that while the IAMs' accountability practices have been linked to "significant shifts in the norms and power relations underpinning decision-making in contemporary development finance," those shifts have been "modest and context-dependent."<sup>26</sup> With respect to the CAO, Saper takes a more restrictive view of the concept of 'accountability' in this context,<sup>27</sup> though conceding that the CAO has "increased the IFC/MIGA's responsiveness to a variety of project-affected people by providing information disclosure, by creating opportunities for participation in problem solving, and by requiring IFC/MIGA to

publicly give reasons for its action."<sup>28</sup> While there are multiple qualitative case studies that interrogate how the use of IAMs have increased accountability "over the life history of a grievance,"<sup>29</sup> there has not been any parallel interrogation of cases in which IAMs have entirely failed to bring about increased accountability because a complaint was never submitted. By drawing upon the case study of mineral exploration activities in Northern Haiti, where project-affected communities could have had recourse to the CAO but did not, we can see how certain institutional and operational deficiencies in the mechanism, coupled with important contextual factors, undermined its capacity to bring about citizen-led accountability.

### (c) COMPLIANCE, ADVISORY AND OMBUDSMAN FUNCTIONS

The CAO has three complementary roles—its compliance, advisory, and ombudsman functions. Any individual or group who is affected, or potentially affected, by the environmental or social impacts of an IFC or MIGA project may make complaints to the CAO.<sup>30</sup> After the CAO team determines the eligibility of the complaint and conducts an initial assessment of the issues and stakeholders,<sup>31</sup> project-affected communities may then have their claims addressed by the ombudsman or compliance functions.<sup>32</sup>

The CAO ombudsman functions as a dispute resolution body, which is focused on "flexible, collaborative processes, aimed at seeking joint solutions to the issues raised in the complaint."<sup>33</sup> Engaging the ombudsman function therefore requires the voluntary agreement of both the affected community and the company that has received IFC funding or is guaranteed by MIGA. The ombudsman has no power to issue binding decisions against the company for non-compliance with the Performance Standards.<sup>34</sup> However, the CAO actually perceives its lack of binding powers to be its greatest asset, since it takes the parties outside an adversarial setting.<sup>35</sup> It contends that the dispute resolution process can move the dispute "beyond judgment and finding fault to focus on practical, effective, and sustainable solutions for all involved."<sup>36</sup> This can be particularly important in cases where communities are aggrieved that the company has ignored their interests and breached its obligation to conduct adequate stakeholder engagement—a concern that is raised in 60 percent of all CAO complaints.<sup>37</sup> The goal of the process is to walk away with a sustainable agreement between the communities and the companies, and may include proposals for future action. For example, an agreement in the Yanacocha Gold Mine case in Peru resulted in the CAO training community members to conduct participatory water monitoring, together with the company.<sup>38</sup> The ombudsman's emphasis on collaborative problem solving places the company-community relationship at the center of its intervention—adhering to the view that procedural and informational forms of justice may be equally as important as any distributional outcomes arising from the process.<sup>39</sup>

Of all the CAO's functions, the ombudsman function is perhaps best positioned to address some of the concerns of project-affected communities in the context of early equity investments in the mining sector, where the environmental

and social impacts of mineral exploration are relatively non-invasive, but issues of community engagement and information disclosure are of central concern. In these contexts, the potential for recourse to the ombudsman represents an important mode of redress for project-affected people, whose most prominent demand may simply be more information and enhanced consultation from the company (as opposed to communities who oppose the project in its entirety). It is in this way that the ombudsman function can work to re-orient the accountability relationships that typically exist between companies and affected communities in the mining sector, by enhancing communities' ability to demand information, justification, and responsiveness from the company.

Through its compliance function, the CAO scrutinizes the IFC's and MIGA's own due diligence at the project level.<sup>40</sup> The focus at this stage is how the IFC or MIGA assured itself of the environmental and social performance of its investment, both at the initial appraisal stage and during its supervision of the project.<sup>41</sup> Although the center of the inquiry is the conduct of the IFC or MIGA, it is necessary for the CAO to review the actions of the company and verify outcomes in the field while performing this function.<sup>42</sup> The CAO Compliance function has a three-step process involving an initial appraisal, an investigation phase for cases that raise substantial concerns or issues of systemic importance, and monitoring of IFC and MIGA actions to address findings of noncompliance.<sup>43</sup> As noted above, the CAO does not have the power to bind the IFC or MIGA, and the President and management are free to disregard the results of the CAO's compliance investigation.<sup>44</sup> However, the research and production of a compliance investigation (which is publicly released after its completion) has the capacity, at the very least, to put information into the hands of project-affected communities, and can help to correct asymmetries in the informational resources that exists between companies and communities.

The CAO's advisory function operates separately to the compliance and ombudsman functions, in that it does not address the direct complaints of project-affected communities.<sup>45</sup> It provides advice to the President and IFC and MIGA management, highlighting systemic patterns of concern it has noticed occurring within the institutions' projects.<sup>46</sup> Its advice is derived from the insights gained through the operation of its other two functions.<sup>47</sup> The advisory function of the CAO is the least utilized branch of the CAO, though it has recently published an advisory lesson from CAO cases with regard to land related issues, which are raised in over 52 percent of CAO complaints.<sup>48</sup> A discrete focus by the CAO's advisory function on systemic issues in the early equity investment context might help to alleviate some of the generalizable concerns and patterns noted in this paper.

### III. MINERAL EXPLORATION IN NORTHERN HAITI

#### (A) THE IFC'S EQUITY STAKE IN EURASIAN MINERALS INC.

It is not surprising that the IFC had its sights set on supporting private investment in Haiti's nascent mineral sector. The country's profile sits squarely within those targeted by the IFC's Early Equity Program—that is, impoverished states in desperate need of increased economic development that also possess vast unexploited natural resources. For Haiti, both of those conditions are met. The country is frequently referred to as “the poorest country in the Western hemisphere.”<sup>49</sup> With a Gross Domestic Product of just \$846 USD per capita,<sup>50</sup> the vast majority of Haiti's citizens live under severe conditions of socioeconomic deprivation.<sup>51</sup> Both the Haitian Government and the IFC believe that a vital component of reversing the country's economic desititution lies in the mineral belt that spans across Haiti's Northern departments,<sup>52</sup> which is speculated to contain approximately US\$20 billion in unexploited gold.<sup>53</sup>

Gold mining in Haiti is a relatively new endeavor,<sup>54</sup> and companies have not yet moved beyond preliminary research, prospection, and exploration activities.<sup>55</sup> The IFC contends that if the exploration in the country eventually leads to mine development and production, “the development impacts for Haiti could be substantial.”<sup>56</sup> To that end, the IFC invested \$10.3 million USD in equity in Eurasian Minerals Inc. between 2010 and 2015, intended to fund Eurasian's prospecting and exploration activities in Haiti.<sup>57</sup> Notably, the IFC's initial contribution of \$5 million USD received IFC Board Approval on January 13, 2010—just one day after a 7.0 magnitude earthquake struck Haiti's capital Port-au-Prince, killing at least 200,000,<sup>58</sup> internally displacing 1.5 million people, and causing an estimated \$7.8 billion USD in damage.<sup>59</sup> The IFC claimed that the investment came “at a critical time for supporting the country's recovery through private sector participation.”<sup>60</sup> The equity stake in Eurasian added to the IFC's wider investment portfolio in Haiti, which included \$61 million USD in private sector finance to clients in the telecom, energy, textile, and manufacturing sectors.<sup>61</sup>

The IFC's client in Haiti, Eurasian Minerals Inc., is a Canadian company that first initiated a gold and copper exploration program in Haiti in 2006, seeking to take advantage of the first-mover opportunities in Haiti's emerging minerals market.<sup>62</sup> In 2008, the company signed a joint venture agreement with Newmont Ventures Limited, a wholly owned subsidiary of US-based Newmont Mining Corp.<sup>63</sup> Together, the companies' activities covered six “Joint Venture Designated Projects” along the Massif du Nord mineral belt in Haiti's north.<sup>64</sup> The exploration activities continued until 2013, when the Haitian Senate passed a resolution calling for a moratorium on mining, following which the government of Haiti began to work with the World Bank's Extractive Industries Technical Assistance Fund to draft a new mining law to govern the sector.<sup>65</sup> Since that time, gold exploration activities in Haiti have remained in “care and maintenance status”—effectively dormant.<sup>66</sup> In November 2015, Eurasian sold its interests in the Newmont-Eurasian joint venture

to Newmont.<sup>67</sup> Then, in February 2016, Eurasian disposed of its last remaining interest in Haiti (the Grand Bois project) to a subsidiary of Delaware-based VCS Mining LLC.<sup>68</sup> Eurasian has retained only marginal royalty interests in both Newmont's assets in Haiti and the Grand Bois project.<sup>69</sup> In January 2016, the IFC marked its project status in Eurasian as "completed."<sup>70</sup>

Since the IFC's first tranche of funding in early 2010, Eurasian was placed under an obligation to ensure that its exploration activities in Haiti complied with the IFC's Environmental and Social Performance Standards.<sup>71</sup> The company committed to formalizing "existing community engagement activities" and agreed to prepare site specific Stakeholder Engagement Plans in order to meet the requirements laid out in the Performance Standards.<sup>72</sup> Eurasian also covenanted to address the environmental and social aspects on projects managed by its joint venture partner Newmont, "using commercially reasonable efforts to encourage its partners to implement IFC Performance Standards or equivalent practices."<sup>73</sup>

Despite the formal commitments to environmental and social safeguards negotiated in the corridors of power in Washington D.C., the reality on the ground in Haiti was vastly different. The following section endeavors to discuss some of the key ways in which Eurasian (and the Newmont-Eurasian joint venture) may have failed to bring the project into compliance with applicable Performance Standards during the exploration phase of the project, having regard to failures in community engagement and the problematic land access agreements the company acquired.<sup>74</sup>

#### (B) FALLING BELOW THE STANDARDS: EURASIAN'S COMMUNITY ENGAGEMENT AND LAND ACCESS AGREEMENTS

Eurasian conducted a variety of exploration activities in Haiti's Northern Departments between 2009 and 2012.<sup>75</sup> At the outset, the IFC categorized the project's possible impacts as a "Category B" risk, denoting only limited adverse environmental and social impacts which are generally site-specific, largely reversible, and readily addressed through mitigation measures.<sup>76</sup> While it is true that exploration activities in general are significantly less invasive than the construction and operation of a large-scale open-pit gold mine, Eurasian was nevertheless under an enduring obligation to ensure compliance with the IFC Performance Standards, including adequate community engagement (including duties of consultation and information disclosure) and ensuring that its acquisition of any land rights complied with the Performance Standard on Land Acquisition and Involuntary Resettlement.<sup>77</sup> The company's activities during 2009 through 2012 involved early-stage exploration activities such as surface sampling, as well as late-stage exploration activities that involved core drilling and sampling. To conduct its exploration activities on privately owned land,<sup>78</sup> Eurasian concluded a number of land access agreements with landowners and occupants sometime between 2011 and 2012.<sup>79</sup>

The following analysis seeks to highlight the discrepancies between the lived experiences of project-affected communities

in Northern Haiti and the obligations owed by Eurasian under IFC Performance Standard 1 (detailing the requirements for community engagement) and Performance Standard 5 (detailing the requirements for land acquisition). While there may have been other environmental and social impacts brought about by Eurasian's exploration activities, this analysis has been deliberately confined to issues of community engagement and land acquisition due to limitations in available evidence.<sup>80</sup>

Since Eurasian placed its projects in care and maintenance status in 2012, the Global Justice Clinic (GJC) at New York University School of Law has conducted a number of fact-finding visits to Haiti's Northwest Department to interview project-affected communities. The GJC, acting together with local community organizers, has interviewed numerous community members about their interactions with Eurasian, with a particular focus on the land access agreements that were concluded between the company and landowners. Their experiences highlight the ways in which obligations regarding information disclosure and consultation are inextricably linked with processes of acquiring consent for land use and acquisition. Landholders cannot meaningfully agree to land acquisition or use if they are not informed about certain fundamental issues, such as the purpose of preliminary mining activity, their rights and entitlements under law, and the implications of large-scale gold mining if it were to go ahead.

The GJC's fact-finding efforts led researchers to several small communities situated across the hills of La Montagne in Haiti's Northwest department. Newmont-Eurasian conducted exploration activities in this area between 2009 and 2012. The residents of these villages are primarily farmers—growing crops such as beans, plantains and peanuts, and raising small livestock.<sup>81</sup> During their visits to the La Montagne Village, the GJC found steep hills and narrow roads isolate the villages from the larger communes of Jean Rabel and Baie-de-Henne to the north and south of the mountains. Some villages have primary schools, though most children must walk hours to access education beyond fourth grade. Residents speak Haitian Creole, rather than French, which is used by the government and taught in secondary schools in Haiti. While there is no reliable data on the literacy and education levels of the community members in these areas, GJC's research found that they generally have low literacy rates and do not rely on written documents as a method of record-keeping.<sup>82</sup> Prior to Newmont-Eurasian entering the area in 2009, the communities' interactions with external actors and state institutions were extremely limited. These communities face immense socioeconomic disadvantage and political marginalization, which in turn create significant inequalities in bargaining power when they interact with mining companies.

During 2011 and 2012, a number of residents in the villages of La Montagne signed paper agreements that authorized Newmont-Eurasian to use their land for exploration activities.<sup>83</sup> These agreements were concluded between landowners/occupants and Eurasian's Haitian subsidiary, Marien Mining. The GJC was unable to verify the exact number of agreements that were signed, though it estimated that several hundred land access

agreements were signed over the exploration period.<sup>84</sup> In interviews with GJC researchers, the landowners recounted experiences that raised serious questions about the circumstances in which these land access agreements were concluded, and in many cases, indicate that informed consent to the agreement was not given.<sup>85</sup>

The land access agreements, written in Creole, are drafted in terms which are remarkably favorable to the company, leaving the landholders with comparatively few rights, and no benefits whatsoever. The agreement grants the company a ‘carte blanche’ to perform activities relevant to exploration (including permission to conduct activities that may destroy the land), and does not provide the landowner with a right to terminate the agreement. It states that the company will indemnify the landowner for damage to the land and provide compensation for damage to crops, though it specifies that those amounts are to be determined by the company, and forbids the signatory from making “any other monetary demands.”<sup>86</sup> Notably, it provides a sweeping limitation of the landowners’ rights, stating that the landowner does not have the right, during or after the life of the agreement, “to ask for anything else, or make any demands or take action against the Company that has to do with this contract or its execution, for whatever reason.”<sup>87</sup> Read together, the provisions of the agreement appear to foreclose the rights of the landholder to any remedy outside the company’s specified forms of compensation for damage.<sup>88</sup> These agreements were drafted by company, and do not appear to have been open for revision by the landowners at any time—suggesting that no meaningful negotiation took place as to the agreement’s terms.

In correspondence with the GJC, Newmont-Eurasian has contended that the land access agreements were not intended to function as legally binding documents between the company and the landowners.<sup>89</sup> This position is incredibly hard to accept, having regard to the agreement’s use of legal language, the strength of its terms and the formalities of its execution. One of the clauses in the agreement states that the agreement may not be “corrected, modified, changed, or amended except in writing signed by the parties to the agreement or their legal representatives.”<sup>90</sup> Under the terms of the agreement, the document needed to be executed with the signature of the landowner, the CEO of Marien Mining and a witness.<sup>91</sup> It would take a serious exercise of legal sophistry to come to the conclusion that these agreements were not intended to establish a legally binding relationship between the parties. Even if the agreements did not constitute legally binding documents, it is arguable that the formalities in the agreements’ execution were intended to create that impression in the mind of the landowners.

In February 2014, local community organizers, together with the GJC, brought affected communities together to discuss the content and implications of the land access agreements. GJC researchers remarked that many of the residents who had signed the land access agreements appeared to be learning of their true content for the first time.<sup>92</sup> Some landholders thought that signing the agreement meant they were guaranteed jobs with the company.<sup>93</sup> Another explained that she thought the agreement

would bring future development benefits, like those brought by NGOs.<sup>94</sup> Other landholders reported that they were handed the agreement to sign, but did not have time to read or understand it.<sup>95</sup> Many said they had no idea the agreement gave the company the right to damage their land.<sup>96</sup> In other cases, landholders reported that they were offered a sum of 1000 Haitian Gourdes (approximately \$16 USD) in exchange for their signature, but reported that they were not informed of the agreement’s contents.<sup>97</sup> Others confirmed that they understood they needed to sign the Agreement in order to get compensation for damaged crops.<sup>98</sup> One resident recalled that a company engineer asked him if he owned the land, and whether or not he could read. When the resident replied that he could not, the engineer then dipped the man’s thumb in ink, and affixed it to a land access agreement.<sup>99</sup> Newmont-Eurasian, in contrast, made the claim that it “took nearly two weeks to complete each agreement”.<sup>100</sup>

It can be argued that Eurasian’s conduct, in carrying out its exploration activities in La Montagne, fell short of the obligations contained in the IFC Performance Standards.<sup>101</sup> In particular, the administration of land access agreements illustrates Eurasian’s acute failure to comply with Performance Standard 1 (PS1), under which the company was obliged to undertake effective community engagement. The obligation under PS1 is comprised of several elements which, relevant to the instant case, include consultation and information disclosure.<sup>102</sup> These duties must also be read together and cross-referenced with Performance Standard 5 (PS5), which address the company’s obligations regarding land acquisition and resettlement. The key objective of PS5 is to anticipate and minimize adverse social and economic impacts from land acquisition or restrictions on land use, resettlement and displacement. While some landowners raised claims that the company’s exploration activities had caused damage to their crops (and thus, economic displacement in some instances), it is argued here that the company’s central failure related to the process through which the Land Access Agreements were negotiated, and the manner in which the communities were informed and consulted about Eurasian’s exploration activities. It is for this reason that Eurasian’s conduct will be primarily evaluated according to the company’s compliance with PS1, addressing community engagement as the critical concern.

#### *(I) COMMUNITY ENGAGEMENT*

Upon receipt of IFC funding, Eurasian began to formalize its “existing community engagement activities” and prepare site-specific Stakeholder Engagement Plans (“SEPs”) for each exploration property.<sup>103</sup> No SEPs prepared by Eurasian for its projects in Haiti have not been made publicly available, and efforts made by the GJC to obtain them via the IFC Information Disclosure process or from the companies directly were unsuccessful.<sup>104</sup> As such, the full extent of Eurasian’s community engagement is unclear. The extent and adequacy of such stakeholder engagement is not typically revealed or examined unless a complaint is filed to the IFC CAO.<sup>105</sup> Newmont-Eurasian reported to the GJC that they had conducted “formal meetings” with community members at the sites of their exploration activities, and that

Newmont-Eurasian employees had conducted informal visits to individual landowners.<sup>106</sup> However, the efficacy of any such engagement must be questioned in light of the community members' differing understandings about the nature of the company's exploration activities, and the misinformation about the potentiality of gold extraction in the community's future. One resident of Gode, La Montagne, for example, stated "We were in the dark. They took our land and dug on it. They sent a paper to some of us and we did not know what it was."<sup>107</sup> Another resident of Lalan, La Montagne, recalled "[t]hey showed us that this was a great opportunity for us. They said that they were looking for gold . . . and if they found [it], they would sell it in another country and give us American money."<sup>108</sup> While PS1 emphasizes that SEPs form the basis for building "strong, constructive and responsive relationships" between the company and communities, it also recognizes that the "nature, frequency and level of stakeholder engagement may vary considerably and will be commensurate with the project's risks and adverse impacts, and the project's phase of development."<sup>109</sup> In light of this, it might be somewhat understandable if a company formed the view that its obligations regarding community engagement at the exploration phase of mining activity were less onerous, since activities conducted during the exploration phase are typically less invasive than late-stage mining activities.

The communities' differing understandings of the mining activity is, in itself, evidence of the company's failure to comply with the Performance Standards. It must be noted, however, that Eurasian conducted its exploration activities in Northern Haiti between 2009 and 2012, and it is estimated that the majority of Land Access Agreements were administered between 2011 and 2012.<sup>110</sup> Thus, when the GJC interviewed residents in La Montagne in 2014, a minimum of two years had passed since the company had interacted with the communities. It is possible that this passage of time may have led to some level of recall bias and confusion about the precise details that community members were given by company representatives. However, given the importance of the subject matter, it is arguable that Eurasian should have gone to greater lengths to ensure that community members had an unimpeachable understanding of the materials facts, regarding both the content of the Agreements and the nature of Eurasian's interest in the land. In later correspondence with the GJC, in which Newmont-Eurasian were disputing allegations that the Land Access Agreements were administered improperly, the companies stated that "any information to the contrary must be based on a misunderstanding."<sup>111</sup>

## (II) PROJECT CONSULTATION

When a company accepts IFC funding for a project, its obligations under the rubric of 'community engagement' in PS1 includes processes of community consultation and participation.<sup>112</sup> The extent of these obligations are commensurate with the type, scale, location and likely impact of the project,<sup>113</sup> as well as the presence of indigenous groups in the project's vicinity.<sup>114</sup> For example, the obligation on companies to undertake an "Informed Consultation and Participation" (ICP) process only

attaches to projects with *significant* adverse impacts on project-affected communities.<sup>115</sup> For projects with adverse impacts to indigenous peoples, in some cases the company is required to go beyond ICP, and obtain the group's Free Prior and Informed Consent (FPIC).<sup>116</sup> In the instant case, Eurasian was not technically obligated by IFC Standards to undertake either ICP or FPIC processes, because the company's exploration activities were only categorized as potentially causing 'limited' adverse impacts on project-affected communities, and did not affect any indigenous populations.<sup>117</sup> However, even under the weakest applicable requirement for community consultation, Eurasian appears to have fallen below the standards that attached to its project under PS1.

In the instant case, Eurasian was under an obligation to undertake a "a process of consultation in a manner that provides the affected communities with opportunities to express their views on project risks, impacts and mitigation measures, and allows the client to consider and respond to them."<sup>118</sup> PS1 explicitly states that this is a two-way process that should begin early in the life of the project, and must be based on the prior disclosure of easily accessible project information.<sup>119</sup> Despite the 'formal meetings' purportedly held by Newmont-Eurasian, it is arguable that the consultation process was inadequate, having regard to the enormous inconsistencies between the varying degrees of information given to landholders. There also appeared to be a critical community-wide information deficit about the nature of the venture and the possibility of gold mining in the communities' future.<sup>120</sup> These failures are particularly salient in the earliest stages of mining development, recalling that one of the key purposes of the consultation processes is to manage community expectations by clarifying the extent of the company's responsibilities, so that misunderstandings and unrealistic demands can be avoided.<sup>121</sup> Based on the expectations held by many project-affected people in La Montagne, Eurasian's consultation processes failed in this regard. One resident of Gode, La Montagne, stated that "if they found gold on your land they would give you a house if you deserved a house, a car if you deserved a car".<sup>122</sup> Another resident of Lalan, La Montagne recalled the impression that if the company found gold on residents' land, they could "even get a visa to leave the country."<sup>123</sup> Newmont-Eurasian later rejected allegations that residents were promised visas in exchange for signing land access agreements,<sup>124</sup> but the "expectation management" envisioned by the PS1 seems to have failed spectacularly.

The IFC itself recognizes that companies often make 'strategic choices' about community consultation in the early stages of large-scale projects.<sup>125</sup> Outside the Performance Standards, the IFC encourages businesses to 'disclose and consult selectively in the very early stages', because "full public disclosure of information may not always be feasible or prudent, and can lead to unintended consequences such as raised expectations, fears, or speculative behavior, as well as pose business risks vis-à-vis competitors."<sup>126</sup> It notes that some of the particular challenges in the exploration phase include difficulties in explaining the nature of exploration to communities, informing them about the differences between exploration and an actual mining operation,

and trying to manage expectations in the face of uncertain outcomes.<sup>127</sup> This is important in the later phases of exploration activities, as core-drilling equipment can easily be misconstrued as active mining.<sup>128</sup> Although parsing out these complexities to local communities does demand a thorough consultation process, a failure to do so could create long-standing and deep divisions between the company and communities. In the case of exploration activities in northern Haiti, Newmont-Eurasian's consultation with project-affected communities seems to have bred distrust toward mining companies.<sup>129</sup> This is particularly important if gold mining extraction goes ahead in Haiti, since community consultation during the exploration phase can "often set the tone for the remainder of the project's life."<sup>130</sup>

### (III) INFORMATION DISCLOSURE

Eurasian's obligations regarding consultation were inextricably tied to its obligations surrounding information disclosure, since the quality of any consultation efforts should be measured in light of the scope of the information made available to the project-affected community. Information disclosure is a critical part of community engagement, as it allows project-affected communities to understand the risks, impacts and opportunities of a project.<sup>131</sup> As evidenced by the statements made by residents about the purpose and content of the land access agreements, the residents of La Montagne do not seem to have received sufficient information about Eurasian's exploration activities in their communities.

The requirements of IFC's PS1 mandate that the client (here, Eurasian) will provide project-affected communities with access to relevant information on (i) the purpose, nature, and scale of the project; (ii) the duration of proposed project activities; (iii) any risks to and potential impacts on such communities and relevant mitigation measures; (iv) the envisaged stakeholder engagement process; and (v) the company's operational-level grievance mechanism.<sup>132</sup> With respect to the land access agreements, Eurasian was also under an obligation under PS1 and PS5 to ensure that landowners were given sufficient information to understand the nature of the terms and the legal implications of the agreements.<sup>133</sup> The guidance note that accompanies PS5 states that in negotiating agreements for land acquisition (including land use), the company should summarize all relevant information for public disclosure, and ensure that all project-affected people understand the acquisition procedures and know what to expect at the various stages of the transaction (e.g., when an offer will be made to them, how long they will have to respond, grievance mechanism, legal procedures to be followed if negotiations fail).<sup>134</sup> Based on the landowners' various comments and impressions of the Agreements and the mining venture generally, it appears that Eurasian's conduct represented a serious departure from the requirements laid out in PS1 and PS5. Many residents of La Montagne stated that they did not understand that the land access agreements granted the company the right to explore for gold on their land, and were uninformed about the risks and consequences of mineral exploration.<sup>135</sup> Interviews with landowners revealed that very few of them knew they had

the right to refuse to sign the agreement.<sup>136</sup> More generally, the IFC Performance Standards also encourage clients to provide relevant documentation, such as Stakeholder Engagement Plans, Ecosystem Restoration plans, and the company's environmental and social policies.<sup>137</sup> PS1 also encourages the client to provide "easy-to-understand" summaries of key issues and commitments.<sup>138</sup> The information should be in the appropriate language, and accessible and understandable to the various segments of the affected communities.<sup>139</sup> After its exploration activities were completed, Newmont-Eurasian confirmed that it did not prepare any educational or explanatory documents about key issues for the community, and stated that it only shared information with community members orally.<sup>140</sup>

The failures related to information disclosure were not Eurasian's alone. It must be kept in mind that the primary duty to inform project-affected communities about mining activity and to protect their human rights lies with the government of Haiti—which appear not to have materially assisted during Newmont-Eurasian's negotiations with landowners.<sup>141</sup> Correspondence with the companies and interviews with landowners revealed that local members of the *Conseil d'Administration de la Section Communale* (CASEC) were in some cases present during home visits or during meetings conducted by Newmont-Eurasian. While Newmont-Eurasian claimed that the presence of the CASEC member "allowed for more transparency" in the process,<sup>142</sup> some community members reported that the presence of the local authorities made them feel like they did not have the option to reject the Land Access Agreement.<sup>143</sup>

In any case, it does not appear that the presence of CASEC members at various sites of consultation actually improved the quality of information disclosure or enhanced the consultation process—leading one to conclude that the government had violated many of its applicable obligations under domestic Haitian law and human rights law.<sup>144</sup> Both international and regional human rights instruments binding on Haiti guarantee a right of access to information,<sup>145</sup> which is also enshrined in the Haitian Constitution.<sup>146</sup> In the Inter-American context, the right to access information is understood as a positive state duty to "provide the public with the maximum quantity of information proactively, at least in terms of . . . the information required for the exercise of other rights."<sup>147</sup> This is particularly important in the context of mining operations, where project-affected communities require sufficient information to allow them to meaningfully participate in decisions affecting their own lives and to protect their enjoyment of other rights frequently impacted by mining operations, such as the right to water, the right to health, and the right to own and use land free from forced eviction.<sup>148</sup> With respect to the administration of the Land Access Agreements, the positive duty of the Haitian state to provide for access to information under human rights law should also be read together with relevant domestic laws, such as the 1976 Mining Decree, which guarantees arms-length negotiations between landowners and companies, and provides for recourse to an arbitral tribunal in the event of disagreement between the parties.<sup>149</sup> If the state had informed residents of La Montagne with information about their

rights under the Mining Decree, the residents may have been at a better position to assert their rights and interests.

However, it must be recalled that the obligation of the Haitian state in these circumstances does not displace Eurasian's obligation to comply with the IFC Performance Standards, and therefore does not negate any failure by Eurasian's adequately disclose information about the project to affected communities. This is particularly important bearing in mind considering that a key rationale for the Performance Standards is to strengthen the accountability relationships between the company and community in governance contexts where the state is institutionally weak, and cannot be relied upon to protect the rights and interests of its project-affected communities.<sup>150</sup>

#### *(IV) LACK OF GRIEVANCE MECHANISM FOR PROJECT-AFFECTED COMMUNITIES*

One final deficiency in Eurasian's conduct during its exploration activities in La Montagne relates to the company's failure to provide an operational-level grievance mechanism (OGM) for the project-affected communities.<sup>151</sup> PS1 requires companies to establish a grievance mechanism for project affected communities to receive and facilitate resolution of communities' concerns about the client's environmental and social performance.<sup>152</sup> Eurasian was under an obligation, even at the exploration phase, to operationalize such a mechanism and ensure that the procedure was easily accessible and understandable, and to communicate its availability to affected communities.<sup>153</sup> The obligation to establish an OGM also forms a critical component of the UN Guiding Principles on Business and Human Rights, which the IFC clients should respect.<sup>154</sup> Residents of La Montagne said that they were not aware of any grievance mechanism or any way to submit a complaint to Newmont-Eurasian, and the company has not adduced any evidence that a formal mechanism ever existed.<sup>155</sup> While Newmont-Eurasian claimed that it had established "informal" complaint mechanisms for project-affected communities, the GJC's interviews with community members suggest that these informal mechanisms were not sufficiently publicized or accessible.<sup>156</sup> The company's failure to establish an accessible OGM was compounded by the community's lack of effective recourse to the IFC CAO, discussed below.

### **IV. EVALUATING COMMUNITIES' RE COURSE TO THE CAO**

#### **(A) ACCESS TO THE CAO FOR PROJECT-AFFECTED COMMUNITIES IN NORTHERN HAITI**

As the IFC had an equity stake in Eurasian from 2010-2015, project-affected communities in Haiti had the right to access the CAO as a mechanism to assert their grievances against the company.<sup>157</sup> The CAO's function as a "fallback mechanism" is particularly important in countries like Haiti, where communities cannot rely upon the government to protect their rights and in scenarios such as the one described here, where the company has failed to provide operational-level grievance mechanisms or other channels. The CAO, when functioning effectively, has the potential to mitigate disparities in power relations between

companies and communities, put information in the hands of project-affected peoples, and encourage collaborative solutions to localized grievances. For the communities affected by Eurasian's activities in Northern Haiti, invoking the CAO's ombudsman function may have helped to alleviate some of the gross failings of the company's community engagement processes, including both inadequate consultation and information disclosure. At the very least, at the urging of local communities, a CAO mediator could have helped to bring Eurasian to the table and encouraged a meaningful process of consultation.

The CAO was never engaged in Haiti—as project-affected communities, in La Montagne and at Eurasian's other project sites, did not file a complaint with the mechanism. There were a number of factors which may help to explain why the mechanism was not invoked in this case. It is arguable that the communities' position as an 'early equity project-affected community' (EEPAC) played a significant role in determining whether or not the CAO was engaged. For the purpose of the following analysis, EEPACs may be thought of as involving contexts in which there are only nascent levels of community mobilization around mining, limited informational resources, and weak linkages with transnational advocacy networks to help them survey complex accountability landscapes. Arguably, the design and operation of the CAO is not well equipped to respond to these unique dynamics—undermining the capacity of the CAO to achieve its desired normative purpose of enhanced community responsiveness, and leaving the interests of EEPACs vulnerable to disregard in the earliest stages of mining operations.

The following analysis offers two potential explanations why EEPACs in Haiti may not have engaged the CAO mechanism as a forum to assert their grievances. It does not purport to speak for, or on behalf of those communities, but merely seeks to reflect upon certain institutional, operational and contextual factors that may have rendered the CAO effectively inaccessible in the instant case. The first explanation relates primarily to the embryonic nature of community mobilization concerned about mining that exists during the earliest stages of mining operations. From the starting point that EEPACs in Haiti did not even know that the IFC and/or the CAO existed, it reflects that IAMs, like the CAO, are generally the most accessible and are most effective when affected communities have linkages with transnational advocacy networks that open up spaces for raising claims in international fora, and help to unlock accountability landscapes. The second explanation relates to concerns that the CAO does not offer a space for communities to contest development paradigms, and the analysis attempts to dissect the multiple factors which may render EEPACs disinclined to engage with an accountability mechanism that is connected to an international financial institution funding the project. These types of "contested grievances," which question the legitimacy of the CAO as a mediator or reject the need for a mediator at all, arise only after communities have the informational resources to understand the nature of their concerns and form preferences about the ways they should be asserted.

## (B) COMMUNITY MOBILIZATION IN THE EARLY STAGES OF MINING OPERATIONS

Unsurprisingly, the earliest stages of mining activity are accompanied by nascent (or even non-existent) stages of community mobilization around mining in project-affected areas. In fact, they appear to develop in parallel to one another. As mining activity matures, so to does the strength of the community mobilization poised to respond to it. As the case of mineral exploration in Northern Haiti highlights, one clear defect in the CAO's institutional design is that its accessibility and efficacy may turn on the strength of community mobilization around the mining operations (including informational resources to facilitate stakeholder mapping) and their connection to national and perhaps transnational networks. Where community mobilization is only weak, project-affected people are unlikely to bring complaints to the CAO, as they do not possess the informational, human, or financial resources to access the mechanism.

The concept of community mobilization in response to mineral extraction can be understood as a set of processes of collective action, that are sustained across space and time, that reflect grievances about perceived injustices, and may constitute the pursuit of alternative agendas.<sup>158</sup> This mobilization develops in response to the threats presented by particular forms of economic development. In the context of mineral extraction, there is a litany of common concerns that range from environmental and social impacts, such as concerns about interference with local water sources and resettlement, to grievances with the inequitable distribution of the harms and benefits of resource extraction. The extent to which this mobilization is able to modify development practices depends greatly on the relative power of the moments versus the economic actors involved.<sup>159</sup> This means that in circumstances where the community mobilization around mining is weak, their capacity to influence decision-making and development outcomes may be significantly reduced.<sup>160</sup> Understandably, the strength of the movement critically depends on its access to financial, human, informational, social and other resources.<sup>161</sup> In the earliest stages of mining activity, project-affected communities' access to such resources are considerably limited. The fact that these communities have not been previously exposed to mining operations means that they never had the need to accumulate the resources either.

At first glance, submitting a complaint to the CAO does not depend on the strength of the community mobilization in a project-affected area, since the process does not require a great deal of financial or human resources to engage. Its complaint submission process is well designed to maximize accessibility for project-affected communities. It does not have any formal requirements for complaints (other than that it is in writing), and it accepts these in any language.<sup>162</sup> In theory, communities do not need to approach the CAO with complaints that are articulated as legal claims (or refer to the Performance Standards), nor do they need to be substantiated by evidence.<sup>163</sup> As distinct from human rights courts, complainants need not show there has been an exhaustion of domestic remedies prior to approaching the CAO, or establish that it has already attempted to engage

with the company in any way.<sup>164</sup> In contrast to the World Bank Inspection Panel, complaints can be lodged by a representative organization (such as a domestic or international NGO) as long as there is evidence of authority to do so.<sup>165</sup> A complaint may be submitted by one individual alone or group of individuals (although during the CAO's assessment phase, it will gather the viewpoint of other community members). This is an important procedural feature, since it does not demand any community-wide coherence or agreement about the nature of the grievances prior to making a complaint. The cumulative effect of these features is that the CAO does ensure a commendable degree of procedural accessibility.

In the instant case, it appears that the CAO's operational design does not go far enough in ensuring contextual accessibility. The CAO's contextual accessibility should take into account the lack of resources held by a community, which could inhibit the ability of its members to access the CAO. The case of mineral exploration in Haiti demonstrates how a lack of informational resources in particular can constrain the communities' ability to map stakeholders, unlock complex accountability landscapes and access grievance mechanisms such as the CAO. In La Montagne, for example, the accessibility of the CAO must be understood in the context of the isolated terrain in which the residents live. Communities had very little information about the nature of the company's interest in their land and the impacts and opportunities of gold mining that might occur in the communities' future.<sup>166</sup> Residents have only limited access to formal education, and do not possess the informational resources (such as the internet, access to newspapers, radio, etc.) which could have enabled them to begin to grasp the complex nature of the investments and their potential modes of recourse against the company even at the early exploration stages.<sup>167</sup> Crucially, the community members did not know what the IFC is, or that it had an equity interest in Eurasian.<sup>168</sup> They did not have any idea that the CAO existed.

Internally, the CAO is well aware of these shortfalls. It notes that "there is very little knowledge of the existence of IFC and MIGA, and communities and civil society do not know that the investments in their midst have the World Bank Group's involvement."<sup>169</sup> The CAO also claims that it has "persisted in asking IFC and MIGA to enhance efforts to ensure that communities know of their involvement, and are aware of the availability of, and access to, recourse where needed."<sup>170</sup> Of its own volition, the CAO undertakes outreach activities, which generally consist of meetings with domestic civil society organizations (CSOs), rather than undertaking direct outreach to affected or potentially affected communities.<sup>171</sup> The CAO's outreach activities in Haiti were limited to civil society meetings conducted in the U.S., that took place after Eurasian's operations had been placed in care and maintenance status—with the result that communities and mining activists in the Northern departments did not know about the IFC or CAO until after the exploration activities by Eurasian had ceased.<sup>172</sup> While Eurasian's exploration activities were active, information about the CAO was only available online, which is insufficient in the instant case since project-affected

communities in remote areas such as La Montagne tend to lack access to computers or smartphones (even if project-affected communities in Haiti had access to the internet, the CAO website is in French, not creole, and literacy levels are low, to say nothing of technical capacity).<sup>173</sup>

Notably, the IFC does not legally require the company to disclose the existence of the CAO to project-affected people (or the role of IFC funding in the project), although arguably this could be achieved by incorporating disclosure as part of the company's Stakeholder Engagement Plans.<sup>174</sup> The World Bank itself concedes that evidence shows that "IFI and borrower staff are reluctant in sharing information on accountability mechanisms with people in project affected areas."<sup>175</sup> Both the IFI and the company have a vested interest in ensuring that progress is not disrupted by community mediation, which can be timely and expensive. For example, between 2003-2015, Minera Yanacocha—an IFC-sponsored company that operates the Yanacocha gold mine in Peru—has contributed \$3.21 million USD to the CAO to pay for the costs of "extended-term CAO mediation" between the company and project affected communities.<sup>176</sup>

In the absence of a company that engages in meaningful community engagement at the earliest phases of its mining activity, remote communities like those in La Montagne face startling asymmetries in their informational resources compared to the companies encroaching upon their land. The ability of EEPACs to gain such resources (and in turn, unlock channels of redress such as the CAO) appears to depend in large part upon their links with broader networks of community mobilization, as well as domestic and international NGOs. Linkages to transnational advocacy networks become crucial. Keck and Sikkink's seminal work on transnational advocacy networks explains how they function to multiply channels of access to the international system, and help to make international resources available to new actors in domestic political and social struggles.<sup>177</sup> Transnational advocacy networks include "those relevant actors working internationally on an issue, who are bound together by shared values, a common discourse and dense exchanges of information and services."<sup>178</sup> In the case of transnational advocacy networks working on accountability struggles against large-scale mining operations, the shared values may be conceived of as an overarching commitment to the empowerment of project-affected communities to have greater influence in the decisions that affect their lives—whether that entails the power of communities to veto a project in its entirety, to protect themselves against its threatened harms, or to access a greater share of its proposed benefits.<sup>179</sup> Keck and Sikkink argue that at the core of the relationships in transnational advocacy networks is information exchange, which allows actors to mobilize information strategically, gaining leverage over powerful entities.<sup>180</sup>

These linkages to transnational advocacy networks are extraordinarily important in the context of EEPACs, which face complex accountability landscapes they alone do not have the informational resources or experience to unlock. For communities, surveying the multiple actors, understanding their roles and knowing where to access channels of redress is a complex

task. They are gravely burdened by the lack of transparency in modern development finance. The World Bank notes that "[w]hat . . . project-affected people . . . see on the ground is the government, a company, or a subcontractor implementing a project. Where the financing is coming from is generally quite opaque to them."<sup>181</sup> As there is no duty for companies to disclose the fact of IFC funding (and in most cases, obligations around community engagement during mineral exploration tend to be construed loosely), it is difficult to see how CAO could be accessible to EEPACs without help from broader advocacy networks.

At first glance, the CAO's data presents a picture to the contrary. It finds that in the past 15 years, the majority of complaints to the CAO (44 per cent) have been filed solely by individuals and community members, without the assistance of other organizations on their behalf.<sup>182</sup> A further 24 per cent of complaints were filed by local CSOs, 14 per cent by national CSOs, and only 8 per cent by international CSOs.<sup>183</sup> However, this data does not capture the presence or absence of transnational advocacy networks that may be helping to build the communities' informational resources that ultimately facilitates their access to the CAO. It must also be understood in light of the increasing trend that international NGOs 'remain in the background' when communities lodge complaints to IAMs, given the preference held by IAMs for being directly contacted by communities.<sup>184</sup> The data also fails to capture the instances where communities were impacted by IFC-funded projects, but did not know the CAO existed (and so, did not register a complaint). An attempt to gauge the accessibility and efficacy of any accountability mechanism should pay close attention to how well it functioned for the people most-overlooked, whose rights and interests have been disregarded most acutely. During the years that Eurasian's mining exploration activities were underway in Haiti, the CAO was effectively inaccessible. The CAO itself did not conduct outreach activities to the communities,<sup>185</sup> and the communities had not yet forged relationships with transnational advocacy networks that might have helped to open up channels of redress.

The case study in Northern Haiti also illustrates why it is problematic for the accessibility of the CAO to hinge largely on the linkages that communities have with domestic NGOs and transnational advocacy networks. As noted earlier in this paper, the IFC's investment in Eurasian was approved by the IFC Board of Directors just one day after Haiti was struck by the earthquake in 2010.<sup>186</sup> Following the earthquake, NGOs attempting to undertake disaster relief and reconstruction flooded into the country on a scale as massive as the shock itself.<sup>187</sup> This post-earthquake chaos compounded an already problematic NGO landscape in Haiti, which was frequently referred to as a 'Republic of NGOs' even before 2010.<sup>188</sup> As a result of the outpouring of support from the international community, in the form of both charitable donations and grant funding, an immense (and inestimable) amount of funding was received by humanitarian NGOs.<sup>189</sup> Having regard to the mammoth extent of the human rights violations occasioned by the January 2010 earthquake,<sup>190</sup> and the cholera outbreak brought by UN Peacekeepers in October of the same year,<sup>191</sup> it is perhaps not

surprising that isolated communities affected by mining exploration in the country's north were overlooked by advocacy NGOs operating in the country in the aftermath of the earthquake. While in another context, it might be expected that the presence of a transnational mining company would elicit immediate attention from domestic and international advocacy NGOs, the same could simply not be assumed in Haiti, a country caught up in a maelstrom of natural and man-made disasters. As this paper has attempted to show, linkages with domestic and international NGOs play a pivotal role in allowing project-affected communities to build the informational, human and financial resources needed to unlock complex accountability landscapes and access IAMs. Ultimately, these contextual factors must be kept in mind when appraising the true accessibility of IAMs such as the CAO, which critically rely on the presence of engaged civil society networks to facilitate their accessibility and usage.

Although Eurasian's activities in Haiti ceased in 2012, project-affected communities in Haiti's Northern departments continue to mobilize against the future threat of gold mining in their future. The Justice in Mining Collective ('Kolektif Jistis Min' or KJM), a platform of ten CSOs across Haiti, has since been working in mining-affected areas to inform local communities of their rights related to the mining operations and the potential impacts of metal mining. In addition, the KJM made productive partnerships with a number of foreign-based advocacy organizations in Canada, the United States, and in countries in Central and South America and in West and Central Africa.<sup>192</sup> Since 2013, KJM has worked closely with the Global Justice Clinic (GJC) of New York University School of Law. GJC continues to provide advocacy support and technical assistance to monitor the development of the extractive industry.<sup>193</sup> In 2013, the KJM and GJC held a number of community meetings in Northern Haiti to discuss the potential impacts of gold mining if it returned to the region.<sup>194</sup> In an apt illustration of the reach of transnational advocacy networks, GJC advocates also held screenings of 'video postcards' that conveyed advice and shared the experiences from a mining-affected community from the Porgera Valley in Papua New Guinea.<sup>195</sup> The KJM and GJC now work with community members to develop water monitoring practices, so that affected populations are accustomed to carefully tracking changes to their local water sources.<sup>196</sup> Evidently, project-affected communities in Haiti's north are increasingly gathering the type of informational resources necessary to make preferences about mining on their land in the future, as well as the technical and human resources necessary to defend their rights against mining companies if they return to conduct further exploration or extraction activities. There is no doubt that if gold mining does return to the region, the communities will have to grapple with the rapidly changing landscape of actors involved in such projects.<sup>197</sup> However, they will be markedly better equipped to do so in light of the growing strength of their resources and their linkages to transnational advocacy networks across the world.

### (C) THE CAO AS A SPACE FOR CONTESTING AND REJECTING PROJECTS

The second hypothesis as to why EEPACs in Haiti may have been disinclined to file a complaint with the CAO is related to the fact that the mechanism does not offer sufficient space for communities to challenge the project and fundamentally contest the development paradigm that underlies it. This limitation goes beyond questions of accessibility in the strict sense, but goes to the heart of whether or not the mechanism is able to properly fulfill its normative function of enhancing responsiveness to communities in a meaningful sense. The issue arises once communities know about the potential for recourse to the CAO, and have enough information to make strategic decisions about how they wish to frame and assert their grievances against the company, state and IFIs sponsoring the project. It is important to note that by the time communities in Haiti had begun to connect with transnational advocacy networks and mobilize informational resources, the Newmont-Eurasian joint venture had completed its exploration activities and left the region. Technically, communities could have lodged a complaint with the CAO until January 2016, at which time the status of the IFC's investment in Eurasian was marked as 'complete.'<sup>198</sup> Community organizers noted that after 2012, there was a general sense amongst communities that they did not wish to re-engage with companies that had already left.<sup>199</sup> Engaging with the CAO mechanism can be incredibly resource intensive for communities, and the resolutions brokered by the CAO's mediation function often entail protracted, collaborative engagement with the company (such as joint water monitoring).<sup>200</sup> For reasons discussed below, this is not the preferred mode of recourse for communities that reject the project outright; that do not wish to engage further with the company; or for whom it would be a waste of resources to channel energy into an IAM that cannot address their fundamental concerns.

By its institutional design, the CAO is limited to mitigating the environmental and social risks of IFC-sponsored projects. Through its ombudsman function it brings the company and communities together for enhanced dialogue and collaborative problem solving. Therefore, in circumstances in which communities wish to entirely oppose resource extraction on their land, the CAO is an unsuitable venue for raising such claims.<sup>201</sup> Balaton-Chrimes and Haines draw an important distinction, in the field of accountability in development finance, between "imminent complaints" and "contestational grievances."<sup>202</sup> Immanent complaints are those that primarily relate to social and environmental impacts of projects—to which the CAO may provide an appropriate forum for redress. Contestational grievances are those that seek to reject the project entirely, or at the very least demand respect for the communities' right to participate in the decision whether mining should go ahead at all. The problem-solving approach to accountability and focus on impact mitigation, espoused by the CAO, is appropriate for grievances regarding 'how' but not 'whether' a project should proceed.<sup>203</sup>

The distinction between immanent complaints and contestational grievances can be particularly salient during the earliest phases of mining, when the state has not yet made a decision

whether to permit the construction of a mine and the extraction of resources from the land. By engaging with the CAO's ombudsman function to address the environmental and social impacts of the project, communities may risk 'depoliticizing' the accountability struggle, by organizing and legitimating the broader accountability failures related to their contestational grievances.<sup>204</sup> If communities wish to reject the project altogether, it may be more advantageous for them to engage in more adversarial advocacy strategies, asserting their grievances against the state which may still be considering whether to grant permits for mine development and resource extraction, rather than framing immanent complaints against the company by engaging the CAO (and implicitly legitimating the company's 'right' to be there). While it may also be advantageous for communities to assert their opposition directly against the company at the early phases of mining activity, though they may not wish to do so through the depoliticized and disciplining context of the CAO.

The community dynamics that exist in relation to the Amulsar gold project in Armenia, which also falls under the IFC's early equity investment portfolio, are instructive.<sup>205</sup> The IFC currently holds an equity stake in Lydian International Limited, a junior gold mining company, sponsoring exploration activities in Armenia.<sup>206</sup> In July 2014, project-affected communities filed a complaint with the CAO (with the help of nine domestic NGOs), highlighting the inadequacy of Lydian's stakeholder engagement process and raising concerns about the project's potential environmental and social impacts as the mine matures.<sup>207</sup> Before an Agreement to Mediate was signed, community representatives decided they did not wish to participate in mediation with the company after all, fearful that doing so would "compromise their principles" and undermine their broader opposition to the mine.<sup>208</sup> There was a general recognition that the CAO's ombudsman function did not provide an adequate space for the community to contest and reject the project in its entirety.

Although the Armenian communities felt the CAO's ombudsman function was insufficiently suited to accommodate the nature of their accountability struggle, they did elect to have their complaint proceed through the CAO compliance function.<sup>209</sup> As of April 2016, the case is under compliance audit, after an initial appraisal by the CAO found that the project raised "substantial concerns about a range of potential or actual environmental and social impacts of the project,"<sup>210</sup> certain aspects of which relate directly "to its nature as an early equity mining investment."<sup>211</sup> Indeed, the CAO's compliance appraisal identified many concerns that have been highlighted in the context of mineral exploration activities in Northern Haiti.<sup>212</sup> In particular, it identified problems with the company's restricted stakeholder engagement, the lack of information given to project-affected people, the absence of a company grievance mechanism, as well as broader concerns about the company's land acquisition under PSS—including a failure to deal with landholders transparently during the exploration phase.<sup>213</sup>

Importantly, the CAO's compliance investigation, which is currently pending, will go beyond an assessment of the

company's exploration activities and will include a review of the project's potential impacts on the environment and surrounding communities, as the mine moves into the development and construction phase in 2016. Once the report is released publicly, communities will have a significant amount of information at their disposal, such as evaluations of Lydian's environmental and social management systems, which can be used to inform their broader accountability struggles. Thus, although the CAO's ombudsman function did not offer a suitable forum for redress for the communities in Armenia, the products of the compliance function may at least help to partially correct the informational asymmetries between the parties.

It is worth noting, however, that the communities' capacity to use the information generated by the CAO's compliance function may turn on the strength of their linkages with transnational advocacy networks and access to impartial experts. In order to use information such as environmental and social impact assessments (ESIAs) for leverage in accountability struggles, communities often rely on alliances with scientific and technical experts from both domestic and international NGOs and universities.<sup>214</sup> These alliances can help to place communities in a position to engage in dialogue with the government and mining companies about the projects, and may be crucial in facilitating the capacity of communities to thoroughly frame and assert their rights and interests.<sup>215</sup> For isolated communities with low literacy levels and scarce access to formal education—and in the absence of dense linkages and trust within such networks—there is a very real risk that CAO compliance assessments could operate as spaces through which processes of exclusion are reproduced and legitimated. This risk appears to be particularly acute in cases involving the earliest phases of mining activity, where levels of community mobilization in response to mining are nascent, and connections with transnational advocacy networks may be weak or non-existent.

## V. CONCLUSION

At the outset of this paper, it was suggested that the involvement of an IFC in a mining project has the potential to disrupt and re-orient the typically vexed relationships that exist between company, state and project-affected communities. This is of particular importance for projects within the IFC's early equity portfolio, where the IFC's governance functions (such as the Environmental and Social Performance Standards) have the potential to embed responsible practices and establish positive company-community relations that endure as the mine matures. However, as the case study of Eurasian Minerals in Haiti has shown, the ability of the IFC to redefine traditional accountability relationships and enhance project outcomes has been significantly limited.

As the IFC's primary institution for bringing about citizen-led accountability, the availability and efficacy of the CAO plays a critical role in allowing citizens' voices to be heard when the IFC's governance functions are failing, and projects are adversely affecting communities' rights and interests. While the CAO is often heralded for its simple complaints submission

procedure, this is not where an analysis of its accessibility should end. Ultimately, the CAO's accessibility must be viewed in light of important contextual factors within project-affected communities, such as nascent stages of community mobilization and linkages (or lack thereof) to transnational advocacy networks which can help to unlock accountability landscapes. The case study in Northern Haiti is an important one, as it demonstrates the CAO's failings with respect to those communities that are most marginalized. As has been shown, while exploration activities were undertaken, those communities had no capacity to know the nature of the project or the IFC's investment, and had no knowledge of the right of recourse to the CAO. Unless the CAO's functions are to remain as sites of continued exclusion, the CAO's outreach activities directly to project-affected

communities must be enhanced, and companies should be placed under more onerous obligations to disclose the availability of the CAO as part of their stakeholder engagement plans. While some communities in the early equity context may prefer to eschew the CAO's depoliticized and disciplining processes as inappropriate spaces for asserting contestational grievances, at the very least those communities have the right to make fully informed strategic decisions about their accountability struggles. In the end, the lessons drawn from this case study serve as an earnest call to the IFC and CAO to better understand the deeply contextual nature of the CAO's true accessibility, and to devise solutions to ensure that the most vulnerable project-affected communities are not again overlooked.



## ENDNOTES

---

<sup>1</sup> INT'L FIN. CORP., *Where We Work*, [http://www.ifc.org/wps/wcm/connect/corp\\_ext\\_content/ifc\\_external\\_corporate\\_site/about+ifc\\_new/where+we+work/wherework](http://www.ifc.org/wps/wcm/connect/corp_ext_content/ifc_external_corporate_site/about+ifc_new/where+we+work/wherework) (last visited Apr. 17, 2017).

<sup>2</sup> See Kate MacDonald, *The Meaning and Purposes of Transnational Accountability*, 73 AUSTL. J. PUB. ADMIN. 426, 433 (2014) (explaining that accountability relationships establish standards for seeking information, justification and responsiveness from whom and about what).

<sup>3</sup> WORLD BANK GROUP, IFC INVESTMENT BY INDUSTRY—ANNUAL SUMMARY, <https://finances.worldbank.org/Projects/IFC-Investment-By-Industry-Annual-Summary/59dm-bgyg> (last visited Apr. 17, 2017).

<sup>4</sup> See INT'L FIN. CORP., OIL, GAS & MINING, [http://www.ifc.org/wps/wcm/connect/industry\\_ext\\_content/ifc\\_external\\_corporate\\_site/industries/oil,+gas+and+mining/mining/miningcontent](http://www.ifc.org/wps/wcm/connect/industry_ext_content/ifc_external_corporate_site/industries/oil,+gas+and+mining/mining/miningcontent) (last visited Apr. 17, 2017) (“Under our unique Early Equity Program, we support mining projects at the pre-feasibility stage by becoming a shareholder and long-term partner.”); see also INT'L FIN. CORP., EARLY EQUITY FOR LONG-TERM RETURNS, [http://www.ifc.org/wps/wcm/connect/news\\_ext\\_content/ifc\\_external\\_corporate\\_site/news+and+events/news/kiwara\\_early\\_equality](http://www.ifc.org/wps/wcm/connect/news_ext_content/ifc_external_corporate_site/news+and+events/news/kiwara_early_equality) (last visited Apr. 17, 2017) (discussing early equity investments in the mining sector in Sub-Saharan Africa).

<sup>5</sup> See EARLY EQUITY FOR LONG-TERM RETURNS, *supra* note 5.

<sup>6</sup> See INT'L FIN. CORP., PROJECT INFORMATION PORTAL: EURASIAN MINERALS INC., <https://disclosures.ifc.org/#/projectDetail/SPI/27409> (last visited Apr. 17, 2017).

<sup>7</sup> See INT'L FIN. CORP., SUSTAINABILITY FRAMEWORK, [http://www.ifc.org/wps/wcm/connect/Topics\\_Ext\\_Content/IFC\\_External\\_Corporate\\_site/Sustainability+and+Disclosure/Environmental-Social-Governance/Sustainability+Framework](http://www.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_site/Sustainability+and+Disclosure/Environmental-Social-Governance/Sustainability+Framework) (last visited Apr. 17, 2017) (“The 2012 edition of IFC’s Sustainability Framework applies to all investment and advisory clients whose projects go through IFC’s initial credit review process after Jan. 1, 2012.”).

<sup>8</sup> See *id.*

<sup>9</sup> See David Hunter, *International Law and Public Participation in Policy-Making at the International Financial Institutions*, in INTERNATIONAL FINANCIAL INSTITUTIONS AND INTERNATIONAL LAW 199, 206 (Daniel D. Bradlow & David B. Hunter eds., 2010) (explaining that the IFC Performance Standards have an external governance function beyond the IFC’s clients, in that they form the basis of the Equator Principles—to which 86 private lending institutions have also committed—covering over 70 percent of international project finance debt in emerging markets).

<sup>10</sup> OFFICE OF THE COMPLIANCE ADVISOR/OMBUDSMAN (CAO), TERMS OF REFERENCE 2, [http://www.cao-ombudsman.org/about/whoweare/documents/TOR\\_CAO.pdf](http://www.cao-ombudsman.org/about/whoweare/documents/TOR_CAO.pdf) (last visited Apr. 17, 2017).

<sup>11</sup> See Samantha Balaton-Chrimes & Fiona Haines, *The Depoliticisation of Accountability Processes for Land-Based Grievances, and the IFC CAO*, 6 GLOBAL POL'Y 446, 447 (2015) (“Following the 1992 Earth Summit in Rio de Janeiro . . . ‘citizen-driven accountability for sustainable development’ became the norm.”).

<sup>12</sup> See KRISTEN LEWIS, CITIZEN-DRIVEN ACCOUNTABILITY FOR SUSTAINABLE DEVELOPMENT 1 (2012), <https://www.opic.gov/sites/default/files/files/citizen-driven-accountability.pdf> (explaining that the Inspection Panel, as the first IAM, was crucial “in giving citizens a right to recourse” and “was an innovation in both global governance and international law, broadening the concept of accountability and creating a first ever formal avenue for people themselves to challenge the decisions of international institutions and seek redress for harm done”).

<sup>13</sup> WORLD BANK INSPECTION PANEL, HOW TO FILE A REQUEST FOR INSPECTION TO THE WORLD BANK INSPECTION PANEL: GENERAL GUIDELINES, [http://ewebapps.worldbank.org/apps/ip/Documents/Guidelines\\_How%20to%20File\\_for\\_web.pdf](http://ewebapps.worldbank.org/apps/ip/Documents/Guidelines_How%20to%20File_for_web.pdf) (last visited Apr. 3, 2017); accord LINDA C. REIF, THE OMBUDSMAN, GOOD GOVERNANCE AND THE INTERNATIONAL HUMAN RIGHTS SYSTEM 349 (2004).

<sup>14</sup> See LEWIS, *supra* note 13, at 3, 6 (stating that the World Bank itself notes that “IAMs are in many ways ‘children’ of the 1992 Earth Summit—products of a range of social, political, and institutional forces that came to a head in Rio and changed, in fundamental and beneficial ways, development practice”); see also U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I), annex I (Aug. 12, 1992) (calling for the right of citizens to participate in the development process and access information, as well as to be provided with “[e]ffective access to judicial and administrative proceedings, including redress and remedy . . . ”).

<sup>15</sup> See Benjamin M. Saper, Note, *The International Finance Corporation’s Compliance Advisor/Ombudsman (CAO): An Examination of Accountability and Effectiveness from a Global Administrative Law Perspective*, 44 N.Y.U. J. INT'L L. & POL. 1279, 1322 (2012); see also Eusike Suzuki & Suresh Nanwani, *Responsibility of International Organizations: The Accountability Mechanisms of Multilateral Development Banks*, 27 MICH. J. INT'L L. 177, 206 (2006) (noting that “the absence of access to effective remedies stemming from an [international organization’s] immunity from local jurisdiction is the essential reason for the establishment of the [IAMs]”).

<sup>16</sup> See Carol M. Mates, *Project Finance in Emerging Markets—The Role of the International Finance Corporation*, 18 TRANSNAT'L LAW. 165, 166-67 (2004).

<sup>17</sup> See *id.*

<sup>18</sup> U.N. ENVTL. PROGRAMME, PANGUE DAM—THE INTERNATIONAL FINANCE CORPORATION (IFC) AND THE OFFICE OF THE COMPLIANCE ADVISOR OMBUDSMAN (CAO) (2006), [http://new.unep.org/dams/documents/ell.asp?story\\_id=134](http://new.unep.org/dams/documents/ell.asp?story_id=134).

<sup>19</sup> See *id.* (noting that the World Bank Inspection Panel has jurisdiction only over IBRD and IDA).

<sup>20</sup> See Adebola Adeyemi, *Changing the Face of Sustainable Development in Developing Countries: The Role of the International Finance Corporation*, 16 ENVT'L. L. REV. 91, 96 (2014); see also Saper, *supra* note 16, at 1289 (explaining that MIGA provides guarantees to private investors in developing countries

continued on page 44

## ENDNOTES: APPRAISING THE ROLE OF THE IFC AND ITS ACCOUNTABILITY MECHANISM: COMMUNITY EXPERIENCES IN HAITI'S MINING SECTOR

continued from page 25

against non-commercial risks, such as war and civil disturbance and the expropriation of assets).

<sup>21</sup> INT'L FIN. CORP., POLICY ON ENVIRONMENTAL AND SOCIAL SUSTAINABILITY 12 (2012), [http://www.ifc.org/wps/wcm/connect/7540778049a792dcb87efaa8c6a8312a/SP\\_English\\_2012.pdf?MOD=AJPERES](http://www.ifc.org/wps/wcm/connect/7540778049a792dcb87efaa8c6a8312a/SP_English_2012.pdf?MOD=AJPERES).

<sup>22</sup> See LEWIS, *supra* note 13, at 1.

<sup>23</sup> Balaton-Chrimes & Haines, *supra* note 12, at 447.

<sup>24</sup> VIOLET BENNEKER ET AL., GLASS HALF FULL? THE STATE OF ACCOUNTABILITY IN DEVELOPMENT FINANCE 14 (Caitlin Daniel et al. eds., 2016), [http://grievance-mechanisms.org/resources/brochures/IAM\\_DEF\\_WEB.pdf](http://grievance-mechanisms.org/resources/brochures/IAM_DEF_WEB.pdf).

<sup>25</sup> See e.g., Daniel D. Bradlow, *International Law and Public Participation in Policy-Making*, in International Financial Institution and International Law, *supra* note 10, at 1, 29 ("These mechanisms, despite some concerns about their efficacy, have resulted in increased accountability for these institutions."); see also Kate MacDonald & May Miller-Dawkins, *Accountability in Public International Development Finance*, 6 GLOBAL POL'Y 429 (2015) ("Amidst an explosion of new global governance practices during the last quarter century, one of the most striking developments has been the rise of new norms and institutions of accountability."); Balaton-Chrimes & Haines, *supra* note 12 (noting that DFIs sought to "increase accountability to stakeholders while retaining their focus on industrialization and export-led economic growth.").

<sup>26</sup> MacDonald & Miller-Dawkins, *supra* note 26, at 433.

<sup>27</sup> See Saper, *supra* note 16, at 1293 (citing Richard B. Stewart, *Accountability Participation and the Problem of Disregard in Global Regulatory Governance* 2 (Sept. 2, 2009) (discussion draft), available at <http://ilj.org/courses/documents/2008Colloquium.Session4.Stewart.pdf>) (relying on Richard Stewart's global governance analysis, which defines accountability as "institutionalized mechanisms under which an identified account holder has the right to obtain an accounting from an identified accountant for his conduct, evaluate that conduct, and impose a sanction or obtain another appropriate remedy for deficient performance."); *id.* at 1293-94 (adopting this construction of "accountability," Saper indicates that the structure and procedures of the CAO fail to provide complete accountability, and he analyzes whether its functions are able to respond to broader problems of disregard in the absence of an accountability mechanism); see generally Richard B. Stewart, *Remedying Disregard in Global Regulatory Governance: Accountability, Participation and Responsiveness*, 108 AM. J. INT'L L. 211 (2014).

<sup>28</sup> Saper, *supra* note 16, at 1281.

<sup>29</sup> Balaton-Chrimes & Haines, *supra* note 12, at 447.

<sup>30</sup> OFFICE OF THE COMPLIANCE ADVISOR/OMBUDSMAN (CAO), OPERATIONAL GUIDELINES 8 (2013), [http://www.cao-ombudsman.org/documents/CAOOperationalGuidelines\\_2013.pdf](http://www.cao-ombudsman.org/documents/CAOOperationalGuidelines_2013.pdf) [hereinafter CAO OPERATIONAL GUIDELINES].

<sup>31</sup> See *id.* at 11 (examining three criteria in making this determination: (1) whether "[t]he complaint pertains to a project that IFC/MIGA is participating in, or is actively considering"; (2) whether the issues "pertain to CAO's mandate to address environmental and social impacts of IFC/ MIGA projects"; and (3) whether "[t]he complainant is, or may be, affected by the environmental and/or social impacts raised in the complaint." This assessment involves the CAO team visiting the project site, conducting town-hall-style meetings, and surveying relevant stakeholders at the local and national level); see also OFFICE OF THE COMPLIANCE ADVISOR/OMBUDSMAN (CAO), LESSONS FROM CAO CASES: LAND 19 (2015), [http://www.cao-ombudsman.org/howwework/advisor/documents/cao\\_advisoryseries\\_land.pdf](http://www.cao-ombudsman.org/howwework/advisor/documents/cao_advisoryseries_land.pdf) [hereinafter CAO LAND CASE STUDIES] (describing such assessments as they took place in Uganda, the Philippines, and Sumatra).

<sup>32</sup> See CAO OPERATIONAL GUIDELINES, *supra* note 31, at 9 (illustrating the parallels between the Compliance and Ombudsman functions).

<sup>33</sup> CAO, 2015 ANNUAL REPORT 12 (2015), [http://www.cao-ombudsman.org/publications/documents/CAO\\_Annual\\_Report\\_2015.pdf](http://www.cao-ombudsman.org/publications/documents/CAO_Annual_Report_2015.pdf).

<sup>34</sup> CAO OPERATIONAL GUIDELINES, *supra* note 31, at 4 ("[The] CAO has no authority with respect to judicial processes. [The] CAO is not an appeals court or a legal enforcement mechanism, nor is [the] CAO a substitute for international court systems or court systems in host countries.").

<sup>35</sup> See e.g., OFFICE OF THE COMPLIANCE ADVISOR/OMBUDSMAN (CAO), BUILDING HOPE AND HEALTH THROUGH DIALOGUE: A STORY OF COMPANY-COMMUNITY DISPUTE RESOLUTION IN NICARAGUA 1 (2016), [http://www.cao-ombudsman.org/publications/documents/CAO\\_Nicaragua\\_REV\\_ENG.pdf](http://www.cao-ombudsman.org/publications/documents/CAO_Nicaragua_REV_ENG.pdf) (noting that "[t]

hrough the dialogue process, stakeholders were able to focus on local, practical, effective, and sustainable outcomes for all [stakeholders] involved.").

<sup>36</sup> OFFICE OF THE COMPLIANCE ADVISOR/OMBUDSMAN (CAO), A JOURNEY TOWARD SOLUTIONS: A STORY OF COMPANY-COMMUNITY DISPUTE RESOLUTION IN UGANDA 1 (2015), [http://www.cao-ombudsman.org/publications/documents/CAODisputeResolutionSeries\\_JourneytowardSolutions\\_Uganda\\_October2015.pdf](http://www.cao-ombudsman.org/publications/documents/CAODisputeResolutionSeries_JourneytowardSolutions_Uganda_October2015.pdf).

<sup>37</sup> CAO 2015 ANNUAL REPORT, *supra* note 34, at 8 (2015) [http://www.cao-ombudsman.org/publications/documents/CAO\\_Annual\\_Report\\_2015.pdf](http://www.cao-ombudsman.org/publications/documents/CAO_Annual_Report_2015.pdf).

<sup>38</sup> Saper, *supra* note 16, at 1299.

<sup>39</sup> See Deanna Kemp et al., *Just Relations and Company-Community Conflict in Mining*, 101 J. BUS. ETHICS 93, 93 (2011).

<sup>40</sup> CAO OPERATIONAL GUIDELINES, *supra* note 31, at 16.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> CAO 2015 ANNUAL REPORT, *supra* note 34, at 12.

<sup>44</sup> See CAO OPERATIONAL GUIDELINES, *supra* note 31, at 4, 19 (noting that the CAO will "keep the compliance investigation open and monitor the situation until actions taken by [the] IFC/MIGA assure [the] CAO that [the] IFC/MIGA is addressing the noncompliance.").

<sup>45</sup> *Id.* at 20.

<sup>46</sup> *Id.*

<sup>47</sup> See OFFICE OF THE COMPLIANCE ADVISOR/OMBUDSMAN (CAO), HOW WE WORK: ADVISOR, <http://www.cao-ombudsman.org/howwework/advisor/index.html> (last visited Apr. 17, 2017) (noting that the CAO "aims to improve performance in a systemic way and provide guidance to IFC and MIGA on emerging trends and strategic issues" based on its caseload and experience).

<sup>48</sup> See CAO LAND CASE STUDIES, *supra* note 32, at 8-9.

<sup>49</sup> See e.g., THE WORLD BANK, HAITI: THE CHALLENGES OF POVERTY REDUCTION, <http://go.worldbank.org/MZUS4TPRR0> (last visited Apr. 17, 2017).

<sup>50</sup> See THE WORLD BANK, HAITI OVERVIEW, <http://www.worldbank.org/en/country/haiti/overview> (last visited Apr. 17, 2017) (using 2014 data).

<sup>51</sup> See U.S. CIA, THE WORLD FACTBOOK: HAITI, (last updated Jan. 12, 2017), <https://www.cia.gov/library/publications/the-world-factbook/geos/ha.html> (noting 80 percent of the population in Haiti lives below the poverty line, and 54 percent lives in abject poverty).

<sup>52</sup> See N.Y.U. GLOBAL JUSTICE CLINIC & U. CAL. HAITI JUSTICE INITIATIVE, BYEN KONTE, MAL KALKILE, HUMAN RIGHTS & ENVT'L RISKS OF GOLD MINING IN HAITI 2, 40-41 (2016), [http://chrgj.org/wp-content/uploads/2015/12/byen\\_konte\\_malkalkile\\_human\\_rights\\_and\\_environmental\\_risks\\_of\\_gold\\_mining\\_in\\_haiti.pdf](http://chrgj.org/wp-content/uploads/2015/12/byen_konte_malkalkile_human_rights_and_environmental_risks_of_gold_mining_in_haiti.pdf) [hereinafter KONTE], (discussing how exploiting minerals is part of Haiti's Poverty Reduction Strategy).

<sup>53</sup> See Tate Watkins, *Curses of Aid and Gold in Haiti*, MEDIUM (June 14, 2013), <https://medium.com/@tatewatkins/curses-of-aid-and-gold-in-haiti-7a99bd074fc4#.85b5r0k86> (reporting that, in 2013, then-Prime Minister Laurent Lamothe remarked that "[t]he mining sector can help Haiti liberate itself"); *Asset Portfolio: Haiti*, EURASIAN MINERALS, <http://www.eurasianminerals.com/s/haiti.asp> (last visited Apr. 17, 2017) (stating that the Massif du Nord Metallogenic Belt in Haiti "hosts numerous gold, copper, copper-gold, and copper-gold-silver occurrences and prospects.").

<sup>54</sup> See KONTE, *supra* note 52, at 35 (noting that the recent interest in the resources in Haiti's North can be compared to the interest in extracting gold from the same mineral belt in neighboring Dominican Republic).

<sup>55</sup> See *id.* at 2, 61-62 ("Between 2006 and early 2013, two Canadian and two U.S. companies reportedly invested more than \$30 million to explore for gold, copper, silver, and other metals . . . Those four companies—Majescor Resources Inc. (Majescor), VCS Mining LLC (VCS), Newmont Mining Corporation (Newmont), and Eurasian Minerals Inc. (Eurasian)—have all conducted exploration activities, including core sampling, in some of their permit areas, as well as other exploration and prospection activities.").

<sup>56</sup> See INT'L FIN. CORP., IFC PROJECT INFORMATION PORTAL: EURASIAN MINERALS INC. 2, <https://disclosures.ifc.org/#/projectDetailSPL/7389> (last visited Apr. 17, 2017) (stating that the development benefits could include "both revenues/foreign exchange contribution to the national economy and development of vital transportation/energy infrastructure that would improve possibilities for other economic activities").

<sup>57</sup> *Id.* at 1. (noting that the IMF's equity investment in Eurasian was also intended to support Eurasian's Akarca and Sisorta gold exploration projects in Turkey).

<sup>58</sup> See *id.*; see also Maura R. O'Connor, *Two Years Later, Haitian Earthquake Death Toll in Dispute*, COLUMB. JOURNALISM REV. (Jan 12. 2012), [http://www.cjr.org/behind\\_the\\_news/one\\_year\\_later\\_haitian\\_earthqu.php](http://www.cjr.org/behind_the_news/one_year_later_haitian_earthqu.php) (highlighting the discrepancy between the Haitian government's official death toll of 316,000 and the initial death toll report indicating 230,000 deaths).

<sup>59</sup> See THE WORLD FACTBOOK: HAITI, *supra* note 52.

<sup>60</sup> Adriana Gomez & Josef Skoldeberg, *IFC Invests in Eurasian Minerals Supporting Haiti's Recovery and Job Creation*, INT'L FIN. CORP. (Feb. 19, 2010), <http://ifcext.ifc.org/ifcext/pressroom/ifcpressroom.nsf/0/1fd6671e5e82770a852576d200501301?opendocument>.

<sup>61</sup> *Id.*

<sup>62</sup> See *Asset Portfolio: Haiti*, *supra* note 54 ("EMX executed the royalty generator business model in Haiti by recognizing the country's excellent, but under-explored mineral potential and taking advantage of 'early mover' opportunities in 2006.").

<sup>63</sup> See *id.* (describing the joint venture as a "Regional Strategic Alliance" between the two companies).

<sup>64</sup> See KONTE, *supra* note 52, at 67 (reporting that the six Joint Venture Designated Projects include: La Miel, La Mine, the North-Central Haiti Venture, the Northwest Haiti Venture, the Northeast Haiti Venture, and the Grand Bois "Surrounding Properties" Venture, but the Grand Bois project remained outside the scope of the joint venture agreement and was wholly owned and operated by Eurasian until 2016).

<sup>65</sup> *Id.* at 2.

<sup>66</sup> *Id.* at 23.

<sup>67</sup> *Asset Portfolio: Haiti*, *supra* note 54.

<sup>68</sup> *Id.* (Sono Global Holdings Inc.).

<sup>69</sup> *Id.*

<sup>70</sup> IFC PROJECT INFORMATION PORTAL: EURASIAN MINERALS INC., *supra* note 57.

<sup>71</sup> INT'L FIN. CORP., PERFORMANCE STANDARDS ON ENVIRONMENTAL AND SOCIAL SUSTAINABILITY 2 (Jan. 1, 2012), [http://www.ifc.org/wps/wcm/connect/c8f524004a73daeca09afdf998895a12/IFC\\_Performance\\_Standards.pdf?MOD=AJPERES](http://www.ifc.org/wps/wcm/connect/c8f524004a73daeca09afdf998895a12/IFC_Performance_Standards.pdf?MOD=AJPERES) [hereinafter ENVIRONMENTAL AND SOCIAL SUSTAINABILITY STANDARDS] (stating that "in the case of its direct investments, IFC requires its clients to apply the Performance Standards to manage environmental and social risks and impacts so that development opportunities are enhanced" (emphasis added)).

<sup>72</sup> See IFC PROJECT INFORMATION PORTAL: EURASIAN MINERALS INC., *supra* note 57 (defining a Stakeholder Engagement Plan as a plan designed and implemented by the client "that is scaled to the project risks and impacts and development stage" and "tailored to the characteristics and interests of the Affected Communities."); see also ENVT'L & SOCIAL SUSTAINABILITY STANDARDS, *supra* note 72, at 13 (including within the plan strategies to engage the disadvantaged and vulnerable populations).

<sup>73</sup> IFC PROJECT INFORMATION PORTAL: EURASIAN MINERALS INC., *supra* note 57.

<sup>74</sup> See discussion *infra* Part III.b. (referring to "Eurasian's" activities, which includes its participation in the Newmont-Eurasian joint venture as well as the company's activities at the Grand Bois project site, making the distinction only where it is factually and legally relevant).

<sup>75</sup> See KONTE, *supra* note 53 at 37-38 (defining exploration activities as all activities conducted under prospection or research permits granted to Newmont-Eurasian in Haiti. For an explanation of the different types of mining permits under Haiti's Mining Decree of 1976).

<sup>76</sup> See IFC PROJECT INFORMATION PORTAL: EURASIAN MINERALS INC., *supra* note 57 (encompassing Eurasian's exploration activities to include: dust and noise control; water management, including drainage, trenches, drilling pads, and access roads rehabilitation; use of forested and agricultural land for exploration; and, if warranted, development, occupational health and safety, visual impacts and community safety); see generally ENVT'L & SOCIAL SUSTAINABILITY STANDARDS, *supra* note 72 (discussing the IFC's calculation of project risk).

<sup>77</sup> *Id.* at 5-15, 31-39 (highlighting Performance Standard 1, "Assessment and Management of Environmental and Social Risks and Impacts" and Performance Standard 5, "Land Acquisition and Involuntary Resettlement").

<sup>78</sup> See KONTE, *supra* note 53, at 209-11 (explaining the matter of private land ownership in Haiti is not straightforward, as patterns of land use and ownership that exist outside of formal legal title are complex. For a thorough description of land governance in Haiti, For the purpose of this analysis, "landowners" will encompass landowners, landholders, and land users alike).

<sup>79</sup> *Id.* at 212.

<sup>80</sup> *Id.* (drawing the data contained in the report from several fact-finding investigations between 2012 and 2015. Although the author of this article did not accompany researchers on any such investigations in Haiti, she is a contributing author of the report).

<sup>81</sup> *Id.* at 212 (collecting the following data about the communities of La Montagne during numerous GJC fact finding visits).

<sup>82</sup> *Id.* at 14.

<sup>83</sup> *Id.* at 212.

<sup>84</sup> *Id.* at 245 n.125 (noting the Global Justice Clinic was unable to verify exactly how many agreements have been signed. The authors' best estimation, based on an analysis of the enumerations on the documents themselves and interviews with individuals familiar with the effort to obtain such agreements, is that several hundred have been signed).

<sup>85</sup> See *id.* at 212, 205-296 (exploring what "Free, Prior and Informed Consent" might look like in the context of mining-affected communities in Haiti).

<sup>86</sup> *Id.* at 214.

<sup>87</sup> *Id.*

<sup>88</sup> See *id.* at 215.

<sup>89</sup> See *id.* at 213.

<sup>90</sup> *Id.* at 215.

<sup>91</sup> See *id.*

<sup>92</sup> *Id.* at 216; see also GJC Notes of Community Meeting with Residents of La Montagne, in Northwest Department, Haiti (May 15, 2014) (on file with the New York University School of Law Global Justice Clinic).

<sup>93</sup> KONTE, *supra* note 53, at 216. But see *id.* at 263 (noting that the Land Access Agreement reserved the right of the company to hire the landowner to work on the property, but there was no guarantee of such employment).

<sup>94</sup> *Id.* at 216.

<sup>95</sup> *Id.* at 216.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 219.

<sup>98</sup> *Id.* at 218.

<sup>99</sup> *Id.*

<sup>100</sup> Letter from Nicholas Cotts, External Relations Group Executive for Newmont Mining Corporation, and David Cole, President and CEO of Eurasian Minerals Inc., to Margaret Satterthwaite, Director, Global Justice Clinic, at 6 (Apr. 1, 2015) (on file with the New York University School of Law Global Justice Clinic).

<sup>101</sup> ENVIRONMENTAL AND SOCIAL SUSTAINABILITY STANDARDS, *supra* note 72, at 7-9.

<sup>102</sup> *Id.*

<sup>103</sup> IFC PROJECT INFORMATION PORTAL: EURASIAN MINERALS INC., *supra* note 57.

<sup>104</sup> See Email from IFC to student, Global Justice Clinic (Apr 15, 2015, 2:04 PM EST) (on file with the New York University School of Law Global Justice Clinic) (disclosing the GJC lodged information disclosure requests with the IFC related to the Newmont-Eurasian joint venture, which the IFC denied on April 15, 2015. GJC appealed the denial and the IFC responded that under its 2006 information disclosure policy, the IFC is not required to disclose the documents that GJC requested); see also Email from Karen Finkelston to Margaret Satterthwaite, Director, Global Justice Clinic (May 29, 2015, 5:59 PM EDT) (on file with the New York University School of Law Global Justice Clinic) (showing that Newmont-Eurasian provided GJC with an informal summary of baseline efforts, but did not include information related to the joint venture's stakeholder engagement or consultation processes).

<sup>105</sup> See OFFICE OF THE COMPLIANCE ADVISOR/OMBUDSMAN, COMPLIANCE APPRAISAL REPORT: SUMMARY OF RESULTS: IFC INVESTMENT IN LYDIAN INTERNATIONAL LTD. COMPLAINT 02 (PROJECT #27657), ARMENIA 8 (2015), [http://www.caocompliance.org/cases/document-links/documents/CAOCompliance\\_AppraisalReport\\_Armenia\\_Lydiyan-02\\_10222015forweb\\_English.pdf](http://www.caocompliance.org/cases/document-links/documents/CAOCompliance_AppraisalReport_Armenia_Lydiyan-02_10222015forweb_English.pdf). [hereinafter CAO COMPLIANCE APPRAISAL REPORT SUMMARY COMPL. 2] (explaining the CAO's compliance appraisal of Lydian International Ltd.'s stakeholder engagement, triggered after a complaint was submitted to the CAO).

<sup>106</sup> KONTE, *supra* note 53, at 217.

<sup>107</sup> *Id.* at 216.

<sup>108</sup> *Id.* at 217.

<sup>109</sup> ENVT'L & SOCIAL SUSTAINABILITY STANDARDS, *supra* note 72, at 12.

<sup>110</sup> KONTE, *supra* note 53, at 212.

<sup>111</sup> See *id.* at 213; see also Letter from Nicholas Cotts, External Relations Group Exec. for Newmont Mining Corp., and David Cole, President and CEO of Eurasian Minerals Inc., to Margaret Satterthwaite, Dir., Global Justice Clinic, at 6 (Apr. 1, 2015) (on file with the N.Y.U. School of Law Global Justice Clinic).

<sup>112</sup> See ENVIRONMENTAL AND SOCIAL SUSTAINABILITY STANDARDS, *supra* note 72, at 3.

<sup>113</sup> See *id.* at 7.

<sup>114</sup> See *id.* at 14, 47-52 (“For projects with adverse impacts to Indigenous Peoples, the client is required to engage them in a process of ICP and in certain circumstances the client is required to obtain their Free, Prior, and Informed Consent (FPIC). The requirements related to Indigenous Peoples and the definition of the special circumstances requiring FPIC are described in Performance Standard 7.”).

<sup>115</sup> See *id.* at 14 (noting that the ICP process can be distinguished from ordinary consultation requirements under PS1, as it involves a more in-depth exchange of views, and ultimately leads to the company incorporating the views of affected-communities into their decision-making processes).

<sup>116</sup> See *id.* at 48-52 (explaining the requirements for engaging indigenous people and the special circumstances requiring FPIC).

<sup>117</sup> IFC PROJECT INFORMATION PORTAL: EURASIAN MINERALS INC., *supra* note 57.

<sup>118</sup> ENVT'L & SOCIAL SUSTAINABILITY STANDARDS, *supra* note 72, at 13.

<sup>119</sup> See *id.* at 14.

<sup>120</sup> See KONTE, *supra* note 53, at 216-219.

<sup>121</sup> INT'L FIN. CORP., STAKEHOLDER ENGAGEMENT: A GOOD PRACTICE HANDBOOK FOR COMPANIES DOING BUSINESS IN EMERGING MARKETS 111, 115 (2007), [http://www.ifc.org/wps/wcm/connect/938f1a0048855805beacfe6a6515bb18/IFC\\_StakeholderEngagement.pdf?MOD=AJPERES](http://www.ifc.org/wps/wcm/connect/938f1a0048855805beacfe6a6515bb18/IFC_StakeholderEngagement.pdf?MOD=AJPERES) [hereinafter STAKEHOLDER ENGAGEMENT].

<sup>122</sup> See KONTE, *supra* note 53, at 218.

<sup>123</sup> See *id.* at 219.

<sup>124</sup> See *id.* at 219 (“Nothing was promised outside of the agreement in return for a signature. There was also no anticipation that any resident would be displaced by our exploration activities and thus, nothing was ever promised in that regard.”).

<sup>125</sup> STAKEHOLDER ENGAGEMENT, *supra* note 122, at 111.

<sup>126</sup> *Id.* at 113.

<sup>127</sup> See *id.* at 115.

<sup>128</sup> See *id.* at 117.

<sup>129</sup> See KONTE, *supra* note 53, at 228.

<sup>130</sup> *Id.* at 136, 217.

<sup>131</sup> ENVT'L & SOCIAL SUSTAINABILITY STANDARDS, *supra* note 72, at 13.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 10.

<sup>134</sup> INT'L FIN. CORP., GUIDANCE NOTE 5: LAND ACQUISITION AND INVOLUNTARY RESETTLEMENT 16 (Jan. 1, 2012), [http://www.ifc.org/wps/wcm/connect/4b976700498008d3a417f6336b93d75f/Updated\\_GN5-2012.pdf?MOD=AJPERES](http://www.ifc.org/wps/wcm/connect/4b976700498008d3a417f6336b93d75f/Updated_GN5-2012.pdf?MOD=AJPERES).

<sup>135</sup> KONTE, *supra* note 53, at 216-219.

<sup>136</sup> *Id.* at 217.

<sup>137</sup> ENVIRONMENTAL AND SOCIAL SUSTAINABILITY STANDARDS, *supra* note 72, at 13.

<sup>138</sup> *Id.*

<sup>139</sup> INT'L FIN. CORP., GUIDANCE NOTE 1: ASSESSMENT AND MANAGEMENT OF ENVIRONMENTAL AND SOCIAL RISKS AND IMPACTS 32 (2012), [http://www.ifc.org/wps/wcm/connect/b29a4600498009cfa7fcf7336b93d75f/Updated\\_GN1-2012.pdf?MOD=AJPERES](http://www.ifc.org/wps/wcm/connect/b29a4600498009cfa7fcf7336b93d75f/Updated_GN1-2012.pdf?MOD=AJPERES).

<sup>140</sup> KONTE, *supra* note 53, at 221.

<sup>141</sup> *Id.* at 212 (“Evidence from La Montagne also reveals that Haitian government officials were notably absent; resident accounts indicate that the government failed to effectively inform the local population about mining prior to Newmont-Eurasian’s arrival and failed to support rural farmers as they negotiated access to their land.”).

<sup>142</sup> Letter from Nicholas Cotts, External Relations Group Executive for Newmont Mining Corporation, and David Cole, President and CEO of Eurasian Minerals Inc., to Margaret Satterthwaite, Director, Global Justice Clinic, at 6 (Apr. 1, 2015) (on file with the New York University School of Law Global Justice Clinic).

<sup>143</sup> KONTE, *supra* note 53, at 217.

<sup>144</sup> See N.Y.U. Global Justice Clinic et al., *Access to Information in Haiti: Obstacles to the Enjoyment of the Right to Access Information in the Context of the Development and Mining and Tourism Industries and the Practice of Journalism: Executive Summary of Submission to the Inter-American Commission on Human Rights* (Mar. 17, 2015), [http://chrgj.org/wp-content/uploads/2015/03/150316\\_Executive-Summary\\_English\\_Final.pdf](http://chrgj.org/wp-content/uploads/2015/03/150316_Executive-Summary_English_Final.pdf) (highlighting in 2015, the GJC, together with Haitian partners, made a submission to the Inter-American Court of Human Rights explaining the impact of the Haitian government’s failure to guarantee the effective enjoyment of the right of access

to information in the context of the development of mining and tourism industries on project-affected communities); see also KONTE, *supra* note 53, at 205 (noting the Haitian government failed to appear the hearing).

<sup>145</sup> See International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171, 178 (entered into force Mar. 23, 1976); see also KONTE, *supra* note 53, at 235 n.5 (noting that the International Covenant on Economic and Social Rights has been interpreted to include the right of access to information in relation to specific substantive rights, such as the right to health and the right to water).

<sup>146</sup> See Constitution of Haiti, March 10, 1987, tit. 3, ch. 2, § I, art. 40, pmb1. (articulating the government’s duty to publish “all laws, orders, decrees, international agreements, treaties, and conventions” in both Creole and French. and recognizing “the right to progress, information, education, health, employment, and leisure for all citizens.”).

<sup>147</sup> OFFICE OF THE SPECIAL RAPPORTEUR FOR FREEDOM OF EXPRESSION, THE RIGHT OF ACCESS INFORMATION para. 22 (2009), [http://www.oas.org/dil/access\\_to\\_information\\_IACtHR\\_guidelines.pdf](http://www.oas.org/dil/access_to_information_IACtHR_guidelines.pdf).

<sup>148</sup> BYEN KONTE, MAL KALKILE<sup>2</sup>, *supra* note 53, at 200.

<sup>149</sup> *Id.* at 211.

<sup>150</sup> See Saper, *supra* note 16, at 1322 (noting that the CAO was developed in response to a lack of accountability); Bradlow, *supra* note 26, at 28 (“Nevertheless, it would seem that these mechanisms, despite some concern about their efficacy, have resulted in increased responsibility for these institutions.”).

<sup>151</sup> See KONTE, *supra* note 53, at 221.

<sup>152</sup> ENVIRONMENTAL AND SOCIAL SUSTAINABILITY STANDARDS, *supra* note 72, at 35 (“Where there are Affected Communities, the client will establish a grievance mechanism to receive and facilitate resolution of Affected Communities’ concerns and grievances about the client’s environmental and social performance.”).

<sup>153</sup> GUIDANCE NOTE 1, *supra* note 139, at 37.

<sup>154</sup> See *id.* (noting that “businesses should respect human rights, which means to avoid infringing on the human rights of others and address adverse human rights impacts business may cause or contribute to . . .”); see also Special Representative of the Secretary General, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011), [www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.31\\_en.pdf](http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.31_en.pdf) (clarifying that although this does not specifically endorse the United Nation’s Guiding Principles on Business and Human Rights, the principles established by U.N. Special Representative, John Ruggie, is now widely accepted as the authoritative framework for business’ responsibility towards human rights).

<sup>155</sup> See KONTE, *supra* note 53, at 221 (noting that “[i]n response to GJC requests for information about its community grievance mechanism, Newmont-Eurasian sent general information, from publicly available reports, about its grievance procedures at other mining sites.”).

<sup>156</sup> *Id.*

<sup>157</sup> CAO OPERATIONAL GUIDELINES, *supra* note 31, at 11 (explaining that complaints may be made by those who “believe they are, or may be, affected by the social and environmental impacts of IFC/MIGA projects”).

<sup>158</sup> See Anthony Bebbington et al., *Mining and Social Movements: Struggles Over Livelihood and Rural Territorial Development in the Andes*, 36 WORLD DEV. 2888, 2892 (2008).

<sup>159</sup> *Id.* at 2890.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at 2892.

<sup>162</sup> CAO OPERATIONAL GUIDELINES, *supra* note 31, at 10.

<sup>163</sup> See *id.* (requiring complainants need only state the way(s) in which they believe to have been, or are likely to be, affected by environmental and/or social impacts of the project); see also CAO 2015 ANNUAL REPORT, *supra* note 34, at 79 (noting in practice, 52 percent of complaints handled by the CAO have explicitly cited human rights or rights-based issues).

<sup>164</sup> See CAO OPERATIONAL GUIDELINES, *supra* note 31, at 10 (indicating the CAO Operational Guidelines prompt only that a complainant “may wish” to include, inter alia, information as to “What has been done by the complainant to attempt to resolve the problem, including specifically any contact with IFC/MIGA staff, the client, or host government.”).

<sup>165</sup> *Id.*

<sup>166</sup> See KONTE, *supra* note 53, at 216-19 (highlighting the experiences of La Montagne residents).

<sup>167</sup> See generally *id.*

<sup>168</sup> *Id.* (drawing on the GJC's research conducted via roundtable interviews in affected areas to conclude that Haitians have little knowledge of Eurasian and the IFC).

<sup>169</sup> OFFICE OF THE COMPLIANCE ADVISOR/OMBUDSMAN (CAO), 2008-2009 ANNUAL REPORT 37 (2009) [http://www.caombudsman.org/publications/documents/CAO2009AnnualReportEnglish\\_low.pdf](http://www.caombudsman.org/publications/documents/CAO2009AnnualReportEnglish_low.pdf).

<sup>170</sup> *Id.* at 3.

<sup>171</sup> See OFFICE OF THE COMPLIANCE ADVISOR/OMBUDSMAN (CAO), CAO UPDATE (2016), [http://www.cao-ombudsman.org/publications/documents/CAONewsletterIssue2\\_FY2016Q2\\_Web.pdf](http://www.cao-ombudsman.org/publications/documents/CAONewsletterIssue2_FY2016Q2_Web.pdf) ([http://www.cao-ombudsman.org/documents/CAONewsletterIssue2\\_FY2016Q2\\_Web\\_001.pdf](http://www.cao-ombudsman.org/documents/CAONewsletterIssue2_FY2016Q2_Web_001.pdf)) (explaining that in 2015, the CAO undertook an outreach meeting with CSOs from Myanmar via video, and they discussed the role of the CAO and the Inspection Panel for communities affected by the World Bank Group's growing portfolio in Myanmar).

<sup>172</sup> See CAO 2015 ANNUAL REPORT, *supra* note 34, at 50 (explaining that in 2015, CAO met with civil society representatives from Haiti).

<sup>173</sup> See CAO OPERATIONAL GUIDELINES, *supra* note 31, at 10 (listing available languages as English, French, Portuguese, Spanish, Russian, Chinese and Arabic but not including Creole).

<sup>174</sup> See BENNEKER, *supra* note 25, at 56 (advocating requirements for communication with project-affected people); see also Saper, *supra* note 16, at 1318 (arguing that despite increasing costs of borrowing from the IFC due to language, cultural, and geographical barriers, such a policy is "nevertheless absolutely necessary in order for the IFC/MIGA to be more responsive to protect affected communities").

<sup>175</sup> LEWIS, *supra* note 13, at 12.

<sup>176</sup> CAO 2015 Annual Report, *supra* note 34, at 65.

<sup>177</sup> MARGARET E. KECK & KATHERINE SIKKINK, ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS 1 (1998).

<sup>178</sup> *Id.* at 2.

<sup>179</sup> See e.g., Balaton-Chrimes & Haines, *supra* note 12, at 446 (detailing the spectrum of accountability demands which are held by project affected peoples ranging from "immanent complaints" about how projects may proceed to "contestation grievances" as to whether projects should proceed at all).

<sup>180</sup> KECK & SIKKINK, *supra* note 178, at 2.

<sup>181</sup> LEWIS, *supra* note 13, at 10.

<sup>182</sup> CAO 2015 Annual Report, *supra* note 34, at 73.

<sup>183</sup> *Id.*

<sup>184</sup> See David Hunter, *Using the World Bank Inspection Panel to Defend the Interests of Project-Affected People*, 2 CHI. J. INT'L L. 201, 205–06 (2003) (exemplifying the preference by the World Bank Inspection Panel Procedure, which deliberately disallows CSOs from filing complaints on behalf of affected communities); see also ACCOUNTABILITY COUNSEL, COMMUNITIES, <http://www.accountabilitycounsel.org/communities/> (last visited Apr. 17, 2016) (presenting the role of Accountability Counsel, an international NGO that primarily assists project-affected communities to file complaints with IAMs and enhance accountability in development finance, adopts a strong "community-centered" approach which focuses on training local communities about their options for addressing human rights and environmental abuses associated with internationally-financed projects—and ultimately seeks to place communities in a position to defend their own rights. Attorneys from Accountability Counsel also met with Haitian mining justice advocates in the USA, in February 2014, to discuss communities' potential recourse to the CAO, though this was done after the exploration projects had been placed in care and maintenance status).

<sup>185</sup> CAO 2015 Annual Report, *supra* note 34, at 50 (noting that the CAO met with civil society representatives from Haiti in 2015 after the IFC had completed its investment in Eurasian).

<sup>186</sup> IFC PROJECT INFORMATION PORTAL: EURASIAN MINERALS INC., *supra* note 7.

<sup>187</sup> See Brian Concannon Jr. & Beatrice Lindstrom, *Cheaper, Better, Longer-Lasting: A Rights-Based Approach to Disaster Response in Haiti*, 25 EMORY INT'L L. REV. 1145, 1145, 1152 (2011).

<sup>188</sup> *Id.* at 1156; Madeline Kristoff & Liz Panarelli, *Haiti: A Republic of NGOs?*, 23 U.S. INST. OF PEACE 1 (2010), <https://www.usip.org/sites/default/files/PB%202023%20Haiti%20a%20Republic%20of%20NGOs.pdf> ("Estimates of the number of nongovernmental organizations (NGOs) operating in Haiti prior to the earthquake range from 3,000 to as many as 10,000."); see also Mark Schuller, *Invasion or Infusion?: Understanding the Role of NGOs in Contemporary Haiti*, 13 J. HAITIAN STUD. 96, 96 (2007) ("It is impossible to discuss development in Haiti without talking about [NGOs].")

<sup>189</sup> Concannon Jr. & Lindstrom, *supra* note 188, at 1145 (remarking that the vast amount of funding went to international humanitarian NGOs, rather than domestic NGOs).

<sup>190</sup> *Id.*

<sup>191</sup> See Statement by Professor Philip Alston, Special Rapporteur on Extreme Poverty and Human Rights, Seventy-First Session of the U.N. G.A. (Oct. 25, 2016), <http://chrgrj.org/wp-content/uploads/2014/07/Alston-GA-3rd-Cee-statement-25-October-FINAL.pdf>.

<sup>192</sup> See, e.g., Anam Salem, *At UN peer review, Haiti Urged to Ensure Respect for Human Rights as it Considers Development of Mining Sector*, N.Y.U. CTR. FOR HUM. RTS. & GLOBAL JUST. (Dec. 2, 2016), <http://chrgrj.org/at-un-peer-review-haiti-urged-to-ensure-respect-for-human-rights-as-it-considers-development-of-mining-sector/> ("In November 2016, the GJC and its Haitian partner, the Kolektif Jistis Min (KJM), attended Haiti's Universal Periodic Review (UPR) before the United Nations Rights Council in Geneva, to urge states to address the human rights risks of mining in Haiti during the review.").

<sup>193</sup> See, e.g., Anam Salem, *Global Justice Clinic Conducts Survey Planning Trip to Northern Haiti*, N.Y.U. CTR. FOR HUM. RTS. & GLOBAL JUST. (Mar. 1, 2016), <http://chrgrj.org/global-justice-clinic-conducts-survey-planning-trip-to-northern-haiti/>.

<sup>194</sup> BYEN KONTE, MAL KALKILE?, *supra* note 53, at 107 n.12 (citing a number of meetings undertaken by the GJC with residents of La Montagne, Patricko, Dity, Grand Bois and Esterè throughout 2013-2014) (Notes of those community meetings on file with the New York University School of Law Global Justice Clinic).

<sup>195</sup> See *The Human Rights Defenders Series Presents "Understanding Haiti Today: Human Rights, the Resource Curse, and the Plunder of Poverty: A Talk with Nixon Boumba of the Haiti Mining Justice Collective"*, N.Y.U. CTR. FOR HUM. RTS. & GLOBAL JUST. (Feb. 7, 2014), <http://chrgrj.org/event/the-human-rights-defenders-series-presents-understanding-haiti-today-human-rights-the-resource-curse-and-the-plunder-of-poverty-a-talk-with-nixon-boumba-of-the-haiti-mining-justice-collec/> ("In Spring and Fall 2013, the GJC sent teams to visit mining exploration areas near Cap-Haitien in conjunction with the Kolektif Jistis Min. There, they held community meetings to discuss potential rights impacts of mining. These meetings included screenings of a video "postcard" made by GJC students that conveyed advice and shared experiences from a mining-impacted community in Papua New Guinea, the site of another GJC project.").

<sup>196</sup> See *Remedying Violations and Advancing Rights in Haiti's Emerging Mining Sector*, N.Y.U. CTR. FOR HUM. RTS. & GLOBAL JUST., <http://chrgrj.org/clinics/global-justice-clinic/economic-social-and-cultural-rights/preventing-violations-and-advancing-rights-in-haitis-emerging-mining-sector/> (last visited Apr. 17, 2017) (collecting data by Community Water Agents every month since May of 2015 to monitor changes in water quality in six to eight communities where companies have explored for metals in Haiti). Cf. Ellie Happel, *Water is More Valuable than Gold*, NACLA (Apr. 25, 2016), <http://nacla.org/news/2016/04/25/water-more-valuable-gold> (conducting a mixed-methods, GJC rights-based study to produce data about the availability, accessibility, acceptability, affordability, and quality of water in communities likely to be directly impacted by commercial gold mining in Haiti).

<sup>197</sup> See N.Y.U. Ctr. for Hum. Rts. & Global Just. et al., *Human Rights Impacts of Gold Mining in Haiti*, (Nov. 7-9, 2016), <http://chrgrj.org/wp-content/uploads/2016/03/Human-Rights-Impacts-of-Gold-Mining-in-Haiti.pdf> ("Haitian communities affected by mining activity have organized to learn more about the industry and to discuss how the development of the sector may affect their futures."); Inter-Am. Comm'n on H.R., Rep. on the 154th Sess. of the IACHR, at 12 (Mar. 13-27, 2015), <http://www.oas.org/es/cidh/prensa/docs/Report-154.pdf>.

<sup>198</sup> See IFC PROJECT INFORMATION PORTAL: EURASIAN MINERALS INC., *supra* note 7.

<sup>199</sup> These impressions were drawn from discussions with community organizers held by the GJC.

<sup>200</sup> See e.g., ACCOUNTABILITY COUNSEL, AMPLIFYING VOICES DEFENDING RIGHTS 11 (2015), <http://www.accountabilitycounsel.org/wp-content/uploads/2012/05/2012-15-AC-Report.pdf> (noting that various NGOs are helping nomadic goat herders in Mongolia file complaints with both the CAO and the IAM by training the herders on negotiation techniques and preparing the herders for the "intensive dialogue process" facilitated by the CAO); see also OFFICE OF THE COMPLIANCE ADVISOR/OMBUDSMAN (CAO), MEMORANDUM OF UNDERSTANDING RELATING TO THE ESTABLISHMENT OF A TRIPARTITE COUNCIL (June 8, 2015), [http://www.cao-ombudsman.org/cases/document-links/documents/FinalSignedMoUwithAnnexures\\_ENG.pdf](http://www.cao-ombudsman.org/cases/document-links/documents/FinalSignedMoUwithAnnexures_ENG.pdf) (highlighting that representatives from the herder communities are now engaged in an ongoing Tripartite Council, mediated by the CAO, which undertakes compensation working groups, joint fact finding exercises with Rio Tinto, and participatory water monitoring).

<sup>201</sup> While the end result of the CAO's compliance function could be a recommendation, by the CAO to the IFC that it should divest from the project this rarely occurs—and would not necessarily lead to the entire project being halted.

<sup>202</sup> Samantha Balaton-Chrimes & Fiona Haines, *The Depoliticisation of Accountability Processes for Land-Based Grievances, and the IFC CAO*, 6 Global Pol'y 446 (2015).

<sup>203</sup> Balaton-Chrimes & Haines, *supra* note 12, at 446, 448.

<sup>204</sup> See *id.* at 4447

<sup>205</sup> See INT'L FIN. CORP., PROJECT INFORMATION PORTAL: LYDIAN INT'L 3 <https://disclosures.ifc.org/#/projectDetailESRS/384> (last visited Apr. 17, 2017) ("The main driver for IFC equity investment involvement is the support of Lydian's development of the Drazhnje and Amulsar exploration projects, as a basis for setting benchmarks on sustainability in resource development in Kosovo and Armenia. IFC's second equity investment will be used primarily to fund the continued exploration of Lydian's mineral resource properties in Kosovo and Armenia, including feasibility studies, environmental and social impact assessments and other preparatory activities.").

<sup>206</sup> See INT'L FIN. CORP., CASES: ARMENIA/LYDIAN INT'L 3, [http://www.cao-ombudsman.org/cases/case\\_detail.aspx?id=222](http://www.cao-ombudsman.org/cases/case_detail.aspx?id=222) (last visited Apr. 17, 2017) ("[The] IFC is a 7.9% shareholder and has invested over \$16 million in stages since 2007.").

<sup>207</sup> *Id.*

<sup>208</sup> OFFICE OF THE COMPLIANCE ADVISOR/OMBUDSMAN (CAO), DISPUTE RESOLUTION CONCLUSION REPORT IN LYDIAN INT'L 3-02/GNDEVAZ, ARMENIA 2 (Aug. 2015), [http://www.cao-ombudsman.org/cases/document-links/documents/LydiainIntl3-02\\_ConclusionReport\\_ENG.pdf](http://www.cao-ombudsman.org/cases/document-links/documents/LydiainIntl3-02_ConclusionReport_ENG.pdf).

<sup>209</sup> IFC CASES, *supra* note 207.

<sup>210</sup> OFFICE OF THE COMPLIANCE ADVISOR/OMBUDSMAN (CAO), COMPLIANCE APPRAISAL REPORT: IFC INVESTMENT IN LYDIAN INT'L LTD. (PROJECT #27657), ARMENIA, COMPLAINT 01, 12 (2015), [http://www.cao-ombudsman.org/cases/document-links/documents/CAOCompliance\\_AppraisalReport\\_Armenia\\_Lydiyan-01\\_042715-English.pdf](http://www.cao-ombudsman.org/cases/document-links/documents/CAOCompliance_AppraisalReport_Armenia_Lydiyan-01_042715-English.pdf).

<sup>211</sup> OFFICE OF THE COMPLIANCE ADVISOR/OMBUDSMAN (CAO), TERMS OF REFERENCE 2 (Jan. 8, 2016), <http://www.cao-ombudsman.org/cases/document-links/documents/ToRforLydianInvestigation-08-Jan2016.pdf>.

<sup>212</sup> See *supra* notes 40-50 and accompanying text.

<sup>213</sup> See OFFICE OF THE COMPLIANCE ADVISOR/OMBUDSMAN (CAO), COMPLIANCE APPRAISAL: SUMMARY OF RESULTS: IFC INVESTMENT IN LYDIAN INTERNATIONAL LTD. (PROJECT #27657), ARMENIA, COMPLAINT 02 8 (2015), [http://www.cao-ombudsman.org/cases/document-links/documents/CAOCompliance\\_AppraisalReport\\_Armenia\\_Lydiyan-02\\_10222015forweb\\_English.pdf](http://www.cao-ombudsman.org/cases/document-links/documents/CAOCompliance_AppraisalReport_Armenia_Lydiyan-02_10222015forweb_English.pdf) (suggesting that the IFC's supervision of the project was insufficient, particularly in light of the fact that Lydian International was operating through a joint venture agreement with Newmont); see also CAO COMPLIANCE APPRAISAL REPORT LYDIAN INT'L, *supra* note 209 (noting that Newmont's investment in the project "should provide comfort regarding the quality of Lydian's management team and assets as well as assurance that Lydian's assets would be developed in line with industry best practice.").

<sup>214</sup> See e.g., Mariel Aguilar-Stoen & Cecile Hirsch, *Environmental Impact Assessments, Local Power and Self-Determination: The Case of Mining and Hydropower Development in Guatemala*, 2 EXTRACTIVE INDUS. & SOC'Y 472, 478 (2015).

<sup>215</sup> See *id.* at 477.

## ENDNOTES: BATTERIES INCLUDED: INCENTIVIZING ENERGY STORAGE

*continued from page 39*

<sup>36</sup> See *id.* at 54 (defining the problem of "Resource Management" as the "potential for over-generation by variable [renewable] resources during off-peak periods when there is sufficient load to accommodate such generation").

<sup>37</sup> See Johnston, *supra* note 26, at 51-52.

<sup>38</sup> See generally Mathias Aarre Maehlum, *Grid Energy Storage*, ENERGY INFORMATIVE (May 3, 2013), <http://energyinformative.org/grid-energy-storage-caes-pumped-hydro-and-flywheel/>. (discussing how this is already possible with some technologies such as compressed air energy storage (CAES) and pump-storage hydroelectricity. However, these technologies have their limitations, including deployment in locations with certain existing geological features which they require to store the large amounts of air or water which are necessary to generate power at scale).

<sup>39</sup> See Joseph B. Treaster and Kate Zernike, *Hurricane Katrina Slams Into Gulf Coast: Dozens Are Dead*, N.Y. TIMES, (Aug. 30, 2005), <http://www.nytimes.com/2005/08/30/us/hurricane-katrina-slams-into-gulf-coast-dozens-are-dead.html>.

<sup>40</sup> See Jim Polson and Mark Chediak, *Sandy's Blackouts Fall to 1.9 Million, Half in New Jersey*, BLOOMBERG, (Nov. 12, 2012), <http://www.bloomberg.com/news/articles/2012-11-04/sandy-s-blackouts-fall-to-2-5-million-with-new-jersey-worst-off>.

<sup>41</sup> See Hurricane Sandy Boosts Generac Sales, Earnings Power, INVESTOR'S BUS. DAILY (June 28, 2013), <http://www.nasdaq.com/article/hurricane-sandy-boosts-generac-sales-earnings-power-cm256506> (stating that Hurricane Irene and other storms convince people to purchase generators).

<sup>42</sup> Peter Kayode Oniemola, *Integrating Renewable Energy into Nigeria's Energy Mix through the Law: Lessons from Germany*, 2 RENEWABLE ENERGY L. & POL'Y REV. 29, 29 (2011); see Lucy Butler & Karsten Neuhoff, *Comparison of Feed-in Tariff, Quota and Auction Mechanisms to Support Wind Power Development*, 33 RENEWABLE ENERGY 1854, 1858 (2008) (indicating an installed wind energy capacity in Germany of 20,622MW by the end of 2006).

<sup>43</sup> See Butler, *supra* note 43, at 1864 (stating that the strong competition among developers could have led to more share in the profits for landowners).

<sup>44</sup> See *id.* at 1863 (describing German turbine manufacturer presence in the domestic and international market).

<sup>45</sup> See generally TESLA POWERWALL, <https://www.teslamotors.com/powerwall> (last visited Apr. 27, 2017).

<sup>46</sup> See, e.g., U.S. DEPARTMENT OF ENERGY, *U.S. Department of Energy Launches \$40 Million Effort to Improve Materials for Clean Energy Solutions*, U.S. DEP'T OF ENERGY (Feb. 24, 2016), <http://energy.gov/articles/us-department-energy-launches-40-million-effort-improve-materials-clean-energy-solutions> (announcing a new U.S. Department of Energy initiative that aims to bring clean energy materials to market more quickly in order to "give American entrepreneurs and manufacturers a leg up in the global race for clean energy").

<sup>47</sup> See Tesla, *supra* note 46 (showcasing Tesla's Powerwall system).

<sup>48</sup> See, e.g., Ucilia Wang, *12 Energy Storage Startups To Watch in 2015*, GIGAOM, (Jan. 22, 2015, 7:00 AM), <https://gigaom.com/2015/01/22/12-energy-storage-startups-to-watch-in-2015/>

<sup>49</sup> See generally Zachary Shahan, *US Solar + Storage Market to Go Beyond \$1 Billion a Year by 2018*, CLEAN TECHNICA (Dec. 18, 2014), <http://cleantechica.com/2014/12/18/solar-storage-market-go-beyond-1-billion-year-2018/> (discussing a report by GTM Research, predicting that the U.S. "will install 328 MW of behind-the-meter energy storage by 2018").

<sup>50</sup> See Amy L. Stein, *Reconsidering Regulatory Uncertainty: Making a Case for Energy Storage*, 41 FLA. ST. U. L. REV. 697, 698-701 (2014) (indicating technological and financial concerns facing DES).

<sup>51</sup> See Press Kit, TESLA MOTORS (2016), <https://www.teslamotors.com/presskit/teslaenergy>.

<sup>52</sup> See Terry DeVitt, *Lithium Battery Catalyst Found to Harm Key Soil Microorganism*, PHYSORG (Feb. 4, 2016), <http://phys.org/news/2016-02-lithium-battery-catalyst-key-soil.html> (explaining environmental dangers posed by lithium batteries); see also *Airlines Ban Hoverboards over Battery Danger*, 10NEWS (Dec. 11, 2015), <http://www.wtsp.com/story/news/2015/12/10/airlines-ban-hoverboards-over-battery-danger/77123728/>. See generally Monte Whaley, *Vaping Dangers: Reports of Burns, Injuries from Exploding E-cigarettes*, DENVER POST (Jan. 29, 2016), <http://www.thecannabist.co/2016/01/29/vaping-dangers-colorado-reports-exploding-e-cigarettes/47430/>.

<sup>53</sup> See Diane Cardwell, *Energy Storage Industry Gaining Momentum*, N.Y. TIMES, (Oct. 25, 2015), [http://www.nytimes.com/2015/10/26/business/energy-environment/energy-storage-industry-gaining-momentum.html?\\_r=0](http://www.nytimes.com/2015/10/26/business/energy-environment/energy-storage-industry-gaining-momentum.html?_r=0) (stating that only as energy policies and technologies have battery storage systems started to become financially viable).