

Grant Manuge
Director General
Trade Commissioner Service
125 Sussex Drive
Ottawa, Ontario K1A 0G2

April 23, 2010

Re: Response from FREDEMI to the NCP's Letter of March 24, 2010

Dear Mr. Manuge:

We would like to express our appreciation to the Canadian National Contact Point (NCP) for its consideration of our complaint, submitted December 9, 2009, and welcome the NCP's decision that the complaint merits further examination. In our complaint, we explicitly stated that we were not requesting that the NCP facilitate access to alternative dispute settlement because the conditions did not exist for open, constructive dialogue with Goldcorp. We reiterated this position during our meeting with you on December 9, 2009. Although we discussed the NCP's offer, nothing has changed in the interim that would persuade us to reconsider our position. Indeed, events of the last four months have only reinforced our belief that our rights, especially our right to free, prior, and informed consent, have been and continue to be violated by the operations of Goldcorp at the Marlin mine. Furthermore, accepting NCP's proposed terms for a closed-door meeting in Canada with Goldcorp would create further tensions and division within our community. For these reasons, we respectfully decline the NCP's offer to facilitate a dialogue with Goldcorp. Instead, we urge the NCP to conduct a thorough examination of the facts, including a field visit to San Miguel Ixtahuacán, and issue a robust final statement with recommendations, as appropriate, to ensure Goldcorp's compliance with the OECD's Guidelines for Multinational Enterprises (Guidelines).

We made it clear in our complaint and in our actions that we want Goldcorp to close the Marlin mine. In contrast, Goldcorp in its response to the complaint and in its public statements has asserted its intention to continue operating the Marlin mine and further develop its licenses in San Marcos and elsewhere in Guatemala. At no time has Goldcorp recognized the validity of any of our concerns. Our experience over the last five years has led us to doubt that Goldcorp would act in good faith. Further, we object to the terms proposed by the NCP for such a meeting. The divisions within our community that the Marlin mine has generated make it critical that any and all activities are conducted in a transparent, accountable and participatory manner. We could not agree to a confidential meeting with Goldcorp held in Ottawa. Under these conditions, there is little that could result from a dialogue with Goldcorp.

The OECD's procedural guidance on the implementation of specific instances does not provide much detail to national contact points for the preparation of a final statement. The procedures for the Canadian NCP provide it with enough discretion to prepare a final statement in a manner that best responds to the needs of the parties. We believe the procedures used by the National Contact Point of the United Kingdom represent best practice and ensure fair treatment for both parties. The resulting final statements, found on its website,¹ contain a summary of the complaint, the company's response, an analysis of whether the Guidelines were violated, including an *argued rationale* for each conclusion,

¹ <http://www.bis.gov.uk/policies/business-sectors/low-carbon-business-opportunities/corporate-responsibility/uk-ncp-oecd-guidelines/cases>

and recommendations to the company for compliance with the Guidelines. The final statements also provide for a date by which both parties are to submit an update to the NCP on the company's progress in meeting the NCP's recommendations. The final statements issued by the National Contact Point of the Netherlands similarly contain a detailed examination of the facts and an analysis of whether the Guidelines have been violated.² We urge the NCP to follow the UK's procedures, enclosed, in the development of its final statement for our complaint.

As the NCP prepares its final statement, we request that it consider several developments in the last few months. Recent recommendations made by international human rights bodies reaffirm our belief that we were not adequately consulted prior to the development of the Marlin mine. In March, the International Labor Organization's Committee of Experts on the Application of Conventions and Recommendations released a report in which it addressed Guatemala's compliance with the ILO conventions it had ratified.³ The Committee concluded that the cases of San Juan Sacatepequez and the Marlin mine in San Marcos raised serious concerns with regard to Guatemala's compliance with ILO Convention 169. In the context of the Marlin mine, the report states:

The Committee drew the Government's attention to the fact that these risks should be subject to prior consultation under Article 15(2) of the Convention, as well as the studies provided for in Article 7(3) of the Convention. Consequently, the Committee, noting that the Government's report reiterates the information provided previously, expresses its concern regarding the lack of progress in the case under examination and urges the Government to suspend the exploitation in question until the studies provided for in Article 7(3) of the Convention and the prior consultation provided for in Article 15(2) of the Convention can be carried out, and to provide detailed information in this regard. Furthermore, the Committee asks the Government to take the measures necessary to shed light on the incident in which a villager died in the course of a demonstration against the installation of a cylinder for the mine and requests it to provide detailed information in this respect.

Communities affected by the Marlin mine, as well as the Indigenous Mayor's Council of San Miguel Ixtahuacán have filed a petition, with support from the Coordination for Pluricultural Democracy, to President Colom, requesting that he implement the recommendations of the ILO and suspend mining operations in Guatemala.⁴

Additionally, the Committee on the Elimination of Racial Discrimination of the UN released a report on Guatemala on March 16, 2010 in which it evaluates Guatemala's implementation of the Convention on the Elimination of All Forms of Racial Discrimination.⁵ The report expresses great concern for the application of the UN Declaration on the Rights of Indigenous Peoples as it relates to free, prior, and informed consent around mining and other development projects on indigenous lands. The following statement is included in the report:

² <http://www.oecdguidelines.nl/ncp/closedcomplaints/>

³ http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_123424.pdf

⁴ <http://pluriculturalidadjuridica.blogspot.com/2010/03/oit-pide-suspender-operaciones-mineras.html>

⁵ http://www2.ohchr.org/english/bodies/cerd/docs/co/AdvanceUnedited_Guatemala.doc

11. El Comité, a pesar de la ratificación del Estado parte de el Convenio No. 169 de la OIT y el apoyo del Estado parte a la Declaración de las Naciones Unidas sobre los derechos de los Pueblos Indígenas, expresa seria preocupación ante las crecientes tensiones entre los pueblos indígenas relacionados con la explotación de recursos naturales destacando la grave situación que se vive con ocasión de la instalación de una mina de cemento en San Juan Sacatepéquez. El Comité reitera su preocupación porque el Estado parte sigue permitiendo el despojo de las tierras históricamente propiedad de los pueblos indígenas aunque éstas se encuentren debidamente inscritas en los registros públicos correspondientes y porque, en la práctica, el derecho de los pueblos indígenas a ser consultados antes de que se proceda a la explotación de los recursos naturales en sus territorios, no se respeta plenamente. Preocupa igualmente al Comité, que el Estado parte no reconoce en la legislación interna las formas tradicionales de tenencia y posesión de la tierra, ni toma las medidas administrativas necesarias para garantizar estas formas de tenencia (artículo 5 (d) (v)).

El Comité recomienda al Estado parte:

(a) que instaure mecanismos adecuados, de conformidad con la Declaración de las Naciones Unidas sobre los derechos de los Pueblos Indígenas y el Convenio N° 169 de la OIT, para llevar a cabo consultas efectivas con las comunidades que puedan verse afectadas por proyectos de desarrollo y explotación de recursos naturales con el objetivo de obtener su consentimiento libre, previo e informado. En ese sentido el Comité recuerda al Estado parte que la ausencia de reglamentación del Convenio N° 169 no es impedimento para que se lleven a cabo procesos de consulta previa. El Comité a la luz de su Recomendación general N° 23 (1997) (párr. 4, inc. d) recomienda que el Estado parte consulte a la población indígena interesada en cada etapa del proceso y que obtenga su consentimiento antes de la ejecución de los proyectos de extracción de recursos naturales.

We urge the NCP to include in its final statement that Goldcorp complies with the recommendations of the ILO Committee of Experts and the CERD and any subsequent request made by the Government of Guatemala.

We also continue to be concerned by the retaliation against community members who work to defend the rights of their communities in the face of pressure by development projects. In February, the Inter-American Commission on Human Rights condemned the murder of human rights defenders in Guatemala, including members of the Resistance Front for the Defense of Natural Resources who were murdered in San Marcos.⁶

Reports of a spill in December at the Marlin mine, which may have contaminated the Quivichil River, have heightened our concern about the quality of our drinking water.⁷

We expect that the NCP will require further information to prepare a final statement. In order to develop a comprehensive understanding of the issues in this case, we believe a field visit is necessary.

⁶ <http://www.cidh.oas.org/Comunicados/English/2010/21-10eng.htm>

⁷ <http://www.conflictosmineros.net/contenidos/15-guatemala/5263-denuncian-derrame-de-desechos-industriales-en-mina-marlin>; http://www.ceg.org.gt/noticiacompleta.php?id_noticia=1684

We would be happy to assist you in arranging a trip and to provide you with any additional information you need. We request that you notify us in writing, with a Spanish translation, of your plans to develop a final statement, which, when published, should also be available in Spanish.

If you have any questions, please do not hesitate to contact Maudilia Lopez (itzamna48@hotmail.com) and Carmen Mejia (carmenmejiaa@gmail.com), with a copy to Kristen Genovese (kgenovese@ciel.org) and Beth Gaglia (bgegaglia@gmail.com).

Sincerely,

Frente de Defensa San Miguelense (FREDEMI)

CC: Hon. John McKay, P.C., M.P.

EXCERPT FROM UK NATIONAL CONTACT POINT'S PROCEDURES FOR DEALING WITH COMPLAINTS BROUGHT UNDER THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES⁸

4.5 The Examination Process

4.5.1 If mediation is refused or fails to achieve agreement, the complaint will return to the NCP for examination. The objective of the examination is for the NCP to investigate the complaint in order to assess whether the complaint is justified.

4.5.2 At the outset of the investigation the NCP will identify the steps it intends to take in order to proceed with the investigation and will notify both parties in writing. The NCP will inform both parties in writing of any amendments it considers necessary to these steps. If, as a result of the investigation, the NCP decides that additional steps are required in order to complete the investigation, it will notify both parties of the additional steps it intends to take.

4.5.3 The examination is likely to involve the NCP collecting further information or statements from the complainant or the company. It may also seek advice from other relevant government departments, UK diplomatic missions or overseas DFID offices, business associations, NGOs or other agencies. If appropriate it will seek informed independent opinion.

4.5.4 The examination may also involve further meetings between the NCP and the parties. In each case the meeting will have an agenda and be minuted.

4.5.5 In exceptional cases the NCP may consider it necessary to undertake a field visit. The NCP will seek to agree terms of reference for the field visit with both parties in advance of the visit. The NCP will share a report of the visit with both parties for their comment.

4.5.6 Unless a good case is made out for information to be withheld, all the information and evidence received by the NCP will be shared with the parties.

4.5.7 The NCP will then review all the information it has gathered and make a decision as to whether the Guidelines have been breached.

5. Stage 3: drafting and publication of Final Statement

5.1. The NCP's Final Statement will include the following:

- details of allegation and those chapters/paragraphs of the Guidelines that it is alleged have been breached;
- details of the parties involved i.e. complainant and the company;
- a summary of the process the NCP has followed;
- the outcomes of any mediation, or a summary, in a statement agreed between the parties;
- the results of examination (if any), which will include an argued rationale behind each conclusion including:
 - a clear statement as to whether or not the company is in breach of the Guidelines; and
 - details of any frivolous or vexatious aspects of the complaint not identified in the Initial Assessment;

⁸ <http://www.bis.gov.uk/files/file53070.pdf>

- where appropriate, the NCP will make specific recommendations to the company so that its conduct may be brought into line with the Guidelines;
- a date by which both parties will be asked to submit to the NCP an update on progress towards meeting the recommendations (if any); and
- where the NCP has found examples of good company practice consistent with the Guidelines this information will also be included.

5.2. Once the NCP has drafted its Final Statement, it will be passed, to the Minister at the same time as it is sent to the parties. Upon finalisation the Minister will be asked by the NCP to inform the Chairman of the BIS Select Committee that the NCP's statement is to be lodged with the House of Commons and House of Lords libraries. At the same time the NCP's statement will be sent to the parties for factual checking, with a deadline of 10 working days for comments. The NCP will, in its discretion, then incorporate any necessary factual changes before sending the finalised statement to the parties, together with information of how they can seek a review if they consider that the process set out in this note has not been properly followed. The Review Procedure is explained in separately and appears on the NCP website: <http://www.bis.gov.uk/nationalcontactpoint>.

5.3 Any request for review will have to be made within 10 working days of the date the Final Statement is sent to the parties. This also applies for request by a complainant for review of a case where the NCP does not accept the case as a Specific Instance. At the end of this period the statement will be published on the NCP website (<http://www.bis.gov.uk/nationalcontactpoint>) and lodged with House of Commons and House of Lords libraries.

5.4 Where the Final Statement includes recommendations to the company, it will also specify a date by which both parties are asked to provide the NCP with an update on the company's progress towards meeting these recommendations. The NCP will then publish a further statement reflecting the parties' response.