

January 11, 2011

VIA ELECTRONIC MAIL

The Honourable Peter Van Loan
Minister of International Trade

The Honourable Lawrence Cannon
Minister of Foreign Affairs

The Honourable Diane Ablonczy
Minister of State of Foreign Affairs (Americas and Consular Affairs)

The Honourable Tony Clement
Minister of Industry

The Honourable Diane Finley
Minister of Human Resources and Skills Development Canada

The Honourable Jim Flaherty
Minister of Finance

The Honourable Peter Kent
Minister of Environment

The Honourable Christian Paradis
Minister of Natural Resources

The Honourable Beverley J. Oda
Minister of International Cooperation

Re: Canadian National Contact Point Breaches Principles of Accessibility,
Transparency, and Equity

Dear Ministers:

Over a year ago, two representatives of the Defense Front of San Miguel Ixtahuacán (FREDEMI by its initials in Spanish), a coalition of local organizations in the Maya-Mam community of San Miguel Ixtahuacán, Guatemala, presented a specific instance complaint to the Canadian National Contact Point (NCP) regarding the operations of the Marlin mine in Guatemala. The mine is owned by Vancouver-based Goldcorp, Inc. The complaint requested that the NCP conduct an investigation, including a site visit, and issue its final statement with

recommendations, as appropriate, for compliance with the OECD Guidelines for Multinational Enterprises. Notably, the widespread human rights violations that representatives of FREDEMI reported in its complaint have been subsequently confirmed by Goldcorp's own human rights impact assessment and by international institutions, including the Inter-American Commission on Human Rights, which found their claims sufficiently serious to warrant precautionary measures while the case is reviewed on its merits. The Center for International Environmental Law and MiningWatch Canada have supported FREDEMI throughout this process.

Currently, as the NCP prepares its final statement, we find it necessary to express our concern about the reluctance of the NCP to respond to the complainants in such a way as to ensure transparency and fairness in the process, and ultimately to assure the complainants that their concerns are being taken seriously and without appearance of bias toward the mining company that is the subject of the complaint.

Of most urgent concern, despite having been otherwise requested, the NCP has decided not to produce a Spanish-language translation of the full draft final statement. Instead, the NCP has stated its intention to provide Spanish-language translations of only the executive summary and recommendations section. The NCP will offer both parties the opportunity to review the draft statement for factual changes. However, the NCP's failure to translate the entire document into a language understandable to the petitioners will deny them the ability to equitably participate in the review, thus rendering the process discriminatory, inaccessible, and non-transparent. **As Ministers of the departments that form the Canadian NCP, we respectfully ask that you ensure the integrity and equity of the NCP process by directing the NCP to provide a Spanish-language translation of the entire final statement.**

Additionally, we are concerned that the NCP has not had the either available resources or the will to respond to the complainants request for an investigation, including a site visit. From the outset, FREDEMI explicitly stated that it did not want to have a dialogue with Goldcorp, requesting that the NCP proceed immediately with an investigation. This request was based upon the fact that many community members have been falsely detained and prosecuted in San Miguel Ixtahuacán for defending their rights. There is no trust between the company and the affected communities and, as a result, no conditions for dialogue. Nonetheless, the NCP made repeated offers to mediate a dialogue and did not commence with preparation of its final statement until August 2010, eight months after the complaint was submitted. It is also unclear what fact-finding activities the NCP has conducted to prepare the final statement. The NCP refused petitioners' request for a site visit and has not asked petitioners to clarify or contest information at any point, which is recommended by OECD Watch as a means to properly resolve questions of fact. **In the interest of strengthening one of the few grievance mechanisms available in Canada to affected communities, we respectfully**

ask that you equip the NCP to respond to complaints promptly and to undertake investigations, including site visits, as necessary.¹

With regard to our request for a full translation of the NCP's final statement, we would like to respond to the NCP's arguments that providing only a partial translation is consistent with Canada's approach to consultations with First Nations over the environmental impacts of extractive industry developments and the practices of "some European NCPs." We believe that the NCP's decision not to translate the entire draft final statement is a failure to uphold its commitment to the principle of equity and its own stated core criteria of accessibility and transparency.

The Procedural Guidance attached to the *Decision of the OECD Council on the OECD Guidelines for Multinational Enterprises* in June 2000 states that "NCPs will operate in accordance with core criteria of visibility, accessibility, transparency and accountability." This same language appears in the Canadian NCP's Terms of Reference.² The commentary to the Procedural Guidance also describes the need to ensure easy access to the NCP and the importance of transparency to gain the confidence of the general public.

John Ruggie, Special Representative of the UN Secretary-General on the issue of human rights and transnational corporations and other business enterprises, has also identified criteria for non-judicial grievance mechanisms, a category which includes the NCPs. In his 2008 report, which was unanimously adopted by the United Nations Human Rights Council, Ruggie stated that in order for a grievance mechanism to be accessible, it must "provide adequate assistance for aggrieved parties who may face barriers to access, including **language**, literacy, awareness, finance, distance, or fear of reprisal."³ On transparency, Ruggie notes that a mechanism must ensure "sufficient transparency of process and outcome to meet the public interest concerns at stake."⁴ Also relevant to the analysis, Ruggie identifies equity as a key criterion for grievance mechanisms to "ensure that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair and equitable terms."⁵

¹ This recommendation is consistent with recommendations made by the Standing Committee on Foreign Affairs and International Trade (SCFAIT) made in their Fourteenth Report from the 1st Session of the 38th Parliament, June 2005.

² Canada's National Contact Point for the OECD Guidelines for Multinational Enterprises, Terms of Reference, at 5.1, at http://www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/terms_of_ref-mandat.aspx?menu_id=29&menu=R (last visited Jan. 6, 2011).

³ *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie*, U.N. Human Rights Council, 8th Sess.; Agenda Item 3, at para. 92(b), U.N. Doc. A/HRC/8/5 (2008) (emphasis added).

⁴ *Id.* at para. 92(f).

⁵ *Id.* at para. 92(d).

The NCP's final statement represents the conclusion of the NCP process. Thus, without the ability to understand the final statement in its totality, the petitioners will effectively be denied access to the process. A process in which the petitioners do not understand the facts upon which the NCP has based its conclusions is neither transparent nor fair. A grievance mechanism must treat the parties equally. Publishing the draft final statement in a language not understandable to the petitioners gives Goldcorp the advantage of reviewing the entire draft to suggest factual changes, while the petitioners will only be able to review the translated portions.

As for the NCP's justification for not translating the document, the first example is inapposite. It is important to note that petitioners have not requested that the NCP translate the document into their first language, Mam. Recognizing the limitations of the process, they have asked only that the final statement be translated into Spanish, a language that most, although not all, members of FREDEMI can understand. The final statement is not anticipated to be nearly as lengthy or detailed as an environmental impact assessment, which can be several hundred pages, so the translation burden is not as great. Although we would argue that the entire EIA should be available in a language that is understandable to an affected community, it is a fundamentally different process than a grievance mechanism. The basic objective of a grievance mechanism, such as the NCP process, is to respond to the concerns of an individual who considers his or herself to be injured in some way. Responding in a language that the petitioner does not understand defeats the purpose of having a grievance mechanism.

As for the NCP's consultations with some of its European counterparts, it would be difficult to argue that not translating the final statement is best practice among grievance mechanisms. The Dutch NCP, recognized by Ruggie and others as one of the leading NCPs, does translate its final statements into the language of the petitioner. The Compliance Advisor Ombudsman at the International Finance Corporation, the Inspection Panel at the World Bank, and the Office of Accountability at the U.S. Overseas Private Investment Corporation all translate their final assessments into the language of the petitioner.

Our request that the NCP also be equipped to respond promptly to complaints and to carry out investigations with the capacity for site visits is also a question of best practice and in accord with prior recommendations to the Canadian government. In June 2005, the Standing Committee on Foreign Affairs and International Trade (SCFAIT) recommended that the government "increase the resources available to the NCP to enable it to respond to complaints promptly, to undertake proper investigations, and to recommend appropriate measures against companies found to be acting in violation of the OECD Guidelines."⁶ This

⁶ Standing Committee on Foreign Affairs and International Trade (SCFAIT), Fourteenth Report: Mining in Developing Countries— Corporate Social Responsibility, 38th Parliament, 1st Session, (June 2005), *at*

proposal was echoed by some participants in the National Roundtables on Corporate Social Responsibility and the Canadian Extractive Industry in Developing Countries.⁷ Furthermore, OECD Watch, observing that the NCP process has been widely disappointing, recommends the inclusion of information-gathering and fact-finding visits,⁸ such as has been adopted by the Dutch NCP.⁹

In Canada's case, failure to respect basic principles of fairness and to ensure that its NCP meets best practices calls into question the integrity and seriousness of the NCP process, a process which has been the subject of numerous prior criticisms. Canada, whose mining companies are involved in more than four times as many human rights violations as those in other countries,¹⁰ cannot afford to have its grievance mechanism appear to favour industry at the expense of those whom the mechanism is presumably intended to protect. With the Americas as a foreign policy priority, Canada must demonstrate that it is willing and able to respond in a responsible way to the concerns of the people affected by the actions of its industry in the region.

Sincerely,

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<http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=1961949&Mode=1&Parl=38&Ses=1&Lang=age=E> (last visited Jan. 11, 2011).

⁷ National Roundtables on Corporate Social Responsibility (CSR) and the Canadian Extractive Industry in Developing Countries: Advisory Group Report (Mar. 29, 2007), at

<http://www.pdac.ca/pdac/advocacy/csr/advisory-group-report-0703.pdf> (last visited Jan. 11, 2011).

⁸ OECD WATCH, MODEL NATIONAL CONTACT POINT (2007), at http://oecdwatch.org/publications-en/Publication_2531/?searchterm=model%20national%20contact%20point (last visited Jan. 11, 2011).

⁹ OECD WATCH, REVIEW OF NATIONAL CONTACT POINTS AND THE IMPLEMENTATION OF THE OECD GUIDELINES: SUBMISSION TO THE ANNUAL MEETING OF NCPs (2008), at http://oecdwatch.org/publications-en/Publication_2812/at_download/fullfile (last visited Jan. 11, 2011).

¹⁰ THE CANADIAN CENTRE FOR THE STUDY OF RESOURCE CONFLICT, CORPORATE SOCIAL RESPONSIBILITY: MOVEMENTS AND FOOTPRINTS OF CANADIAN MINING AND EXPLORATION FIRMS IN THE DEVELOPING WORLD 7 (2009).

CC: The Honorable Paul Dewar, NDP Party
The Honorable Jean Dorion, Bloc Québécois
The Honourable Bob Rae, Liberal Party
David Deisley, Executive Vice President, Goldcorp, Inc.
Judith St George, Chair, Canadian National Contact Point