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Complaint relating to contravention of the OECD guidelines for multinational enterprises

The work of Future in Our Hands (FIOH) is focused on environmental responsibility and fair distribution of the world's resources. We are an NGO without any political or religious ties, and the largest environmental and solidarity organization in Norway with 23 000 members.

FIOH wishes to lodge a complaint relating to the contravention by Intex Resources (previously Crew Gold, Crew Minerals, Aglubang Mining Corporation and Mindex, hereinafter called Intex or the company) of the OECD guidelines for multinational companies. We are lodging a complaint against them for violating the General Policies guidelines, Chapter 2, of the OECD's guidelines. We are also asking the Norwegian contact point to assess whether Intex has violated the guidelines relating to disclosure in Chapter 3, bribery in Chapter 6 and the environmental guidelines in Chapter 5.

Background

In 1997, the Philippine Department of Environment and Natural Resources (DENR) issued a prospecting permit to the company. The area covered by the permit amounts to 9720 hectares and lies in Sablayan in the province Oriental Mindoro and Victoria, Occidental Mindoro.

The Philippine Government in power at the time was in favour of facilitating for mining operations. The Department of Environment and Natural Resources issued a Mineral Production Sharing Agreement (MPSA) to the company in December 2000 covering 2290 hectares. This agreement was cancelled by DENR in April 2001, among other things, due to environmental considerations, but it was reinstated in March 2004.

The prospecting agreement overlaps the land of the Mangyan indigenous people, and the affected tribes are the Alangan and Tadyawan. They have a *Certificate of Ancestral Domain Claim* (CADC) for this area, i.e. they have property rights over this area. In February 1996, before the company was granted the prospecting permit, a CADC¹ was issued to SANAMA, which represents the Alangan people. KAMTI, representing the Tadyawan people, also

¹ CADC No. R4-CADC-024 was approved for Samahan ng mga Nagkakaisang Mangyan Alangan, Inc. (SANAMA) and covers the areas Buraboy, Tulalong, Kayakak, Kisloyan, Apawa, Ibulo, Malawag, Lingo, Kalimusan, Datag, Anglo, Daungon, Saruksukan, Liwayen, Lintadoy, Katayawa, Liya Lakoy, Tagay and Mag-asawang Tubig.

applied for a CADC. This was granted in June 1997². In June 1998, an application was submitted for a CADC covering the areas of the Alangan Mangyans in Buraboy (this is still pending).

The basis for the prospecting permit the company has in this area is a disputed agreement (*Memorandum of Agreement*) made in 1999 with an organization of indigenous people, the Kabilogan, which was established after the company came to the island. Before such an agreement can be signed, according to Philippine law, a consultation process has to be carried out to achieve free, prior and informed consent (hereinafter FPIC) from the affected indigenous peoples. This is embedded in the Indigenous Peoples Rights Acts from 1997. The agreement with the Kabilogan was signed by fingerprint on an English-language document in the company's premises. The Sanama and Kamti organizations, which represent peoples from areas directly impacted by the production agreement, were not included in the FPIC process. They were not present when the agreement was signed and did not give consent.

Local resistance against the project is strong, among politicians, NGOs, the Catholic Church³ and sections of the indigenous peoples. The permit area covers approximately one fifth of the remaining wooded area on Mindoro and lies on an important watershed that is the source of water for several rivers and the downstream rice-growing areas of the island. The local population fears that deforestation will cause more and increasingly destructive landslides, water pollution and destruction of food production.

Contravention of OECD General Policies guidelines (Chapter II)

"Enterprises should take fully into account established policies in the countries in which they operate, and consider the views of other stakeholders. In this regard, enterprises should (Item 7) develop and apply effective self-regulatory practices and management systems that foster a relationship of confidence and mutual trust between enterprises and the societies in which they operate."

Representation

A requirement for undertaking mining operations in traditional areas of indigenous peoples, as embedded in Philippine legislation in the *Indigenous Peoples Rights Act* from 1997, is that a consultation process has to be conducted to reach free, prior and informed consent from the concerned parties. The authority established to ensure the rights of indigenous peoples, the *National Commission on Indigenous Peoples* (NCIP), issued an FPIC certification in January 1999 when the company was working to obtain a production agreement without the consultation process being carried out. A number of letters and complaints were submitted from local politicians, Alamin⁴ and indigenous people organizations, and an FPIC process was initiated. During this period the Kabilogan organization was formed, while a large proportion of the concerned indigenous peoples were excluded. The agreement with the Kabilogan was signed in 1999. In its presentation of the project "Facts about Mindoro Nickel" from March 2008 Intex states that the agreement was signed by 25 leaders of indigenous people from the Alangan tribe, represented by the Kabilogan organization. Sanama and Kamti were not represented during the FPIC process or during the signing of the agreement. Kabilogan had, in contrast to Sanama and Kamti, no *Certificate of Ancestral Domain Claim*.

² Kapyon Agpaysarigan Mangyan Tadyawan Inc. (KAMTI) received CADC No. R4-CADC-085.

³ Attachment 1: Public statement of Bishop Warlito I. Cajandig, Apostolic Vicar of Calapan, 19 January 2009.

⁴ Alyansa Laban sa Mindex

Based on this process the Ministry of the Environment and Resources nevertheless issued a *Mineral Production Sharing Agreement*.

For its part, in a letter to FIOH dated 16 January 2009, Intex claims that Sanama and Kamti do not represent indigenous peoples affected by the permit. We believe this is not correct. During the process to expand the company's activities, the Norwegian ambassador to the Philippines, Ståle T. Risa, undertook an official fact-finding trip to the island in October 2007⁵ to form a picture of the situation. He had a meeting with the regional NCIP office. When asked about the organization of the Mangyans, the NCIP stated that particularly the Alangan tribe (organized in Sanama) lives in the mining project area.

Agreement in the local languages

Intex also writes that the agreement was translated into the local tribal languages. However, the agreement that has been signed and previously been mentioned in the media⁶ is in English and signed with fingerprints, as many of the Mangyan people cannot read or write.

Current activities

Intex is thus basing its current activities and its planned activities in the area on a flawed FPIC process and a disputed agreement. Intex is now going to expand its activities on the island, intending to launch mining operations and expand the production area. The company must then again carry out a consultation process to obtain a FPIC from the local communities in the expanded area. This is one of the requirements for carrying out an Environmental Impact Assessment (EIA), which in turn is one of the requirements for the issuance of an Environmental Compliance Certificate (ECC) by the Ministry of the Environment and Resources. An ECC is a requirement for launching mining operations.

Ambassador Risa had many meetings with different indigenous people groups and representatives of the civilian society. He concluded that the majority on Mindoro was against mining operations and that it would be difficult for the company to obtain an ECC due to the massive local resistance⁷.

In July 2008, Intex Resources started work on the consultation process in collaboration with the *National Commission on the Indigenous Peoples*. A consultation meeting was held on 3 July 2008. Fr. Edwin A. Gariguez of the Mangyan Mission submitted a complaint to NCIP based on violations of the guidelines in the *Indigenous Peoples Rights Act* on several points. The complaint addressed the following points:

- The indigenous people organizations Kabilogan and Sadaki, which are pro mining operations, were bussed to the meeting. They were overrepresented in relation to the Mangyan organizations and communities in the affected areas. The indigenous organizations that have taken a stance against the mining project were not invited. Some members of Sanama from Oriental Mindoro and Sasama⁸ from Occidental Mindoro and other Mangyan groups came to the consultation even if they had not been invited.

⁵ Attachment 2: Report from the fact-finding mission, made by Ståle T. Risa. The Philippines – the mining project of Norwegian Crew minerals on the island of Mindoro.

⁶ Attachment 3, Aftenposten (a major Norwegian daily newspaper), 21 September 2006.

⁷ Norwatch, 30 January 2008, <http://www.norwatch.no/2008013061/gruveindustri/intexcrew/ambassador-bekrefter-massiv-crew-motstand.html>, NRK 30 November 2007 <http://www.nrk.no/nyheter/utenriks/1.4186663>

⁸ SASAMA is an organization for indigenous peoples in Occidental Mindoro.

- A list of elders/leaders must be validated in connection with consultation meetings. The NCIP and Intex did not draw up a list of elders/leaders who were present at the meeting. This is in contravention of section 24 and section 26b in the guidelines for the FPIC⁹.
- Incomplete information was given by the mining company that presented the project. The information about the drawbacks of the project and negative impact on the environment was incomplete¹⁰. This is in contravention of section 26b of the IPRA's guidelines for FPIC.

Incomplete information about negative impact on the environment

Intex has published plans for how the mining will be undertaken and how the nickel ore will be transported to the processing plant. The company has nevertheless published little information about the consequences of deforestation and the mining in the permit area which lies on an important watershed. No information has been presented to the local population about how the company intends to handle pollution of water resources caused by the mining in the area and where and how the waste from the processing plant will be deposited. The indigenous peoples have not been given any guarantee that they will not be relocated.

Mining operations moratorium

The Regional Development Council in Oriental Mindoro has issued a moratorium on mining operations, initially issued in January 2002. This was again pointed out to the company in September 2007 in a letter from the Office of the Provincial Legal Officer in Oriental Mindoro¹¹, and was repeated by the Governors of both Occidental and Oriental Mindoro in the middle of 2008¹².

Contravention of guidelines

FIOH points out that Intex is in violation of Chapter II Item 7 of the guidelines by basing its operations on an agreement from 1999 that should have been found invalid. The company has also demonstrated an inability to build loyalty and mutual trust. The company persisted in refusing to communicate the resistance of the local community (local politicians, the church and indigenous people organizations).

Possible contravention of the OECD's guidelines on Disclosure (Chapter III) and Combating Bribery (Chapter VI)

Chapter III of the OECD guidelines, Disclosure, states the following:

2. Enterprises should apply high quality standards for disclosure, accounting, and audit. Enterprises are also encouraged to apply high quality standards for nonfinancial information including environmental and social reporting where they exist. The standards or policies under which both financial and non-financial information are compiled and published should be reported.

⁹ Attachment 4: *The free and prior informed consent guidelines of 2006*. Section 24 of the guidelines states that during consultation meetings the NCIP shall facilitate for convening the elders/leaders from the concerned areas to declare the authenticity and legitimacy of the elders/leaders on the list. (...) participants will be requested to validate the recognized leaders of the local community. The purpose is to ensure genuine representation from the local community during the negotiations.

¹⁰ Manila Times, 16 August 2008

<http://www.manilatimes.net/national/2008/aug/16/yehey/opinion/20080816opi5.html>

¹¹ Attachment 5, 28 September 2007, Legal Office reply to Crew, 28 September 2007

¹² Manila Bulletin Online, 28 June 2008,

<http://www.mb.com.ph/issues/2008/06/28/PROV20080628128460.html>

Chapter VI of the OECD guidelines, Combating Bribery, states the following:

"Enterprises should not, directly or indirectly, offer, promise, give, or demand a bribe or other undue advantage to obtain or retain business or other improper advantage. Nor should enterprises be solicited or expected to render a bribe or other undue advantage. In particular, enterprises should:

2. Ensure that remuneration of agents is appropriate and for legitimate services only. Where relevant, a list of agents employed in connection with transactions with public bodies and state-owned enterprises should be kept and made available to competent authorities."

Determining boundaries between concerned indigenous peoples

Intex has budgeted 2 million pesos (approximately NOK 230 000) to examine where the boundaries between the different forefather areas of the tribes should go. The complaint that was submitted concerning the previously mentioned consultation meeting on 3 July 2008 states that the implementation of a new report has been initiated without the company consulting with the *Special Provincial Task Force*, which is responsible on the provincial level for consulting and making decisions in cases that concern administration and drawing boundaries in relation to forefather areas. Attention is also drawn to the absence of a work plan and a financial plan. Intex responds that it has complete control over these funds. The 900 000 the company states has been used was spent, according to the company, in conjunction with a work plan and financial plan drawn up by the NCIP.

The areas that are examined come under the permit area, and are the same areas for which a *Certificate of Ancestral Domain Claim* was applied for in 1998, but which was left pending. How the boundaries are drawn between the tribes affected by the mining operations is important for deciding which tribes to apply for consent from. It would be a contravention of the IPRA's guidelines if remuneration given to the NCIP could create doubts about the NCIP's role in the process towards free and informed consent. This handling of the issue may be in contravention of section 49b (1)¹³ in the guidelines for the FPIC, which state that the NCIP employees cannot accept money, gifts or other valuables from the applicant if intended to inappropriately influence the outcome of the FPIC process. The NCIP may accept donations to undertake boundary drawing of forefather areas on certain conditions. Throughout this entire process the NCIP has played a doubtful role by first issuing an FPIC certification without first carrying out an FPIC process (in 1999), and by later (in 2008) joining in facilitating for a consultation process and boundary-drawing process that is heavily disputed.

The boundary-drawing process has now led Intex to sign an agreement with Kabilogan and Sadaki. The boundary-drawing process ended with the area defined as theirs is identical to what lies inside the area where Intex is now seeking to expand its activities.

Agreement on building a dike

Intex may also be in violation of the guidelines by donating money to local communities during the application process. The company has entered into an agreement with the Alcate¹⁴ village that the company will spend 10 million pesos on a dike to prevent flooding. Such an agreement made during a process where the company intends to expand its activities may raise doubt as to what conditions are tied to the donation. Pursuant to, mining companies must

¹³ Attachment 3: Section 49 lists actions that are not permitted by the parties during an application process.

¹⁴ Attachment 6, page 1-4, agreement between Intex and Alcate.

grant money for a welfare fund when they have obtained a mining operation permit. In this case this money must be deducted from the future welfare fund the company must establish if mining operations commence. The Alcate village gives its consent to the mining project on page 3, Item 8. In translation this item states as follows: "Because of a number of assistance given by the said company to Alcate and because of our belief that the Mindoro Nickel Project is safe for human community and the environment and it is good for the livelihood of the people in the Barangay and in the Philippines, we decided to freely endorse the Mindoro Nickel Project."

Possible contravention of the guidelines

There is major disagreement between the company and sections of the local population as to whether these processes have been carried out correctly. We therefore urge the Norwegian contact point to examine closely the documentation from our sources and from the company and undertake an assessment to ascertain whether any contravention of the OECD's guidelines has taken place.

Possible contravention of the OECD's guidelines for the Environment (Chapter 5)

Chapter V of the OECD guidelines, Environment (Item 1), states that the enterprises in particular should:

"Establish and maintain a system of environmental management appropriate to the enterprise, including collection and evaluation of adequate and timely information regarding the environmental, health, and safety impacts of their activities, establishment of measurable objectives and, where appropriate, targets for improved environmental performance, including periodically reviewing the continuing relevance of these objectives (...)"

Location of processing plant and residue waste

The company has provided shifting information about how the waste disposal will be carried out, whether it is to be marine or land-based. Initially the company argued for marine waste disposal as land-fill disposal may lead to the risk of leakage, unwanted shifting of the material due to natural events and will occupy large tracts of land. Since marine waste disposal is considered a poor environmental solution, the company has returned to a land-fill solution. Intex now describes their plan to use the HPAL technology (*High-pressure acid-leaching*) which will be localized close to the coast. According to Intex, this process is more environmentally friendly and energy-saving than traditional smelting plants. The residue from the processing will fill an unknown number of square kilometres of land. Localization of the plant and the area for waste disposal is important information for assessing the consequences of the mining operation for Mindoro. Intex has now started to make agreements with local authorities in the area where the waste disposal is planned.

Risk of erosion – landslides due to deforestation

According to Intex, the area subjected to mining operations will continuously be rehabilitated and replanted with indigenous species. The wooded areas will be cleared of trees, and between 4 and 20 meters of soil will be excavated if the mining project is realized. Mindoro is an area that has been subjected to flooding and landslides. In other areas of the island deforestation has caused erosion and landslides, which in turn have caused sedimentation of rivers. Further deforestation of the area can have serious consequences for agriculture. Local politicians are very worried about the long-term impact on agricultural areas and food production on Mindoro of the mining project.

Consequences for the environment

One serious environmental problem is that the mining area lies in the middle of a watershed. When asked verbally how this will be handled Intex responded that only 1 per cent of the mining area will be open at any one time. On its website www.intexresources.com, Intex states that water management is a major component in this type of processing. The bulk of the water to be used will be seawater, but fresh water is also required. Fresh water can be taken from large nearby rivers close to the mouth of the river. Other potential sources include subsoil water and desalination of seawater, and the plan calls for recycling much of the water. The problem is that the watershed is important for four large rivers supplying irrigation water to 70 per cent of the province's rice fields and fruit-tree plantations. Pollution of these will hurt farmers in the low-lying regions.

Arnan Panaligan, Province Governor of Oriental Mindoro, said the following to Norwatch in September 2007: "According to Philippine legislation, mining in the watershed area is prohibited. If we get major mining operations in this area it will amplify the problems of flooding in our province. It will create major problems for the population and for our important agricultural areas here."¹⁵ Extensive irrigated rice fields are situated downstream, ensuring food safety for thousands of people from Mindoro.

The grounds given to withdraw the *Mineral Production Sharing Agreement* in 2001 by Heherson Alvarez, then Minister of the Environment and Resources are as follows¹⁶: The project area lies on a watershed. Mining nickel in open mines will increase the risk that the amount of water is reduced, and the mining operations will cause increased sedimentation even if best-practice mining operations are used.

In "Facts about Mindoro Nickel", Intex states: "Mindoro Nickel is nevertheless in an early phase, where all the consequences so far have not been laid bare." The company has initiated work on an *Environmental Impact Assessment*, but this is not finished. It is crucial that the environmental consequences of any mining operations are brought to light and are verified by an independent third party.

Possible contravention of the guidelines

We ask the Norwegian contact point to assess whether there are violations of the OECD's guidelines in the form of incomplete and misleading information about the environmental consequences of future mining operations.

Complaint

FIOH asks the national contact point to consider whether the company has violated the OECD's guidelines. We contend that the disputed *Memorandum of Agreement* from 1999 is invalid, and that the process to obtain consent from the indigenous population is invalid. We believe this violates the general stipulations in the OECD guidelines. The company may have also violated the rules in the guidelines with respect to disclosure, bribery and environmental considerations.

¹⁵ Norwatch, 23 September 2007, <http://norwatch.no/index.php?back=2&artikkelid=1636>

¹⁶ Norwatch, 15 July 2001, <http://www.norwatch.no/20010715530/gruveindustri/intexcrew/crew-mistet-produksjonsavtalen-pa-mindoro.html>

We believe that Intex Resources must desist from the project if the indigenous population, the concerned local communities and local authorities do not give the required consent. As a minimum the company must:

- Ensure the consent of the indigenous population on an informed basis where all the information, including the consequences for the environment and the impact on their culture, is presented.
- The Environmental Impact Assessment must be carried out, as well as consultations with other concerned parties than the indigenous peoples. The analysis must be verified by an independent third party.
- The company must not donate project funding that may be perceived as intended to influence local communities in any particular direction.

We believe that a review of the issues raised in this complaint will be useful for all stakeholders in this case. We therefore look forward to your processing of this complaint.

Yours sincerely

Framtiden i våre hender (Future In Our Hands)

Gunnell E. G. Sandanger
Officer

Arild Hermstad
General manager

Abbreviations

CADC – Certificate of Ancestral Domain Claim
DENR – Department of Environment and Natural Resources
ECC – Environmental Compliance Certificate
FIVH – "Framtiden i våre hender" (FIOH - Future in our hands)
FPIC – Free, Prior and Informed Consent
IPRA – Indigenous Peoples Rights Act
MoA – Memorandum of Agreement
MPSA – Mineral Production Sharing Agreement
NCIP – National Commission on Indigenous Peoples
OECD – Organisation for Economic Co-operation and Development

Attachments

Attachment 1: Public statement of Bishop Warlito I. Cajandig, Apostolic Vicar of Calapan, 19 January 2009

Attachment 2: Official fact-finding mission report Ståle T. Risa. The Philippines – The mining project of Norwegian Crew minerals on the island of Mindoro, 11 October 2007

Attachment 3: Aftenposten, 21 September 2006

Norwatch, <http://www.norwatch.no/2008013061/gruveindustri/intexcrew/ambassador-bekrefter-massiv-crew-motstand.html>, 30 January 2008

NRK, <http://www.nrk.no/nyheter/utenriks/1.4186663>, 30 November 2007

Attachment 4: The free and prior informed consent guidelines of 2006

Manila Times, <http://www.manilatimes.net/national/2008/aug/16/yehey/opinion/20080816opi5.html>, 16 August 2008

Attachment 5: Legal Office reply to Crew, 28 September 2007

Manila Bulletin Online, <http://www.mb.com.ph/issues/2008/06/28/PROV20080628128460.html>, 28 June 2008

Attachment 6: Agreement between Intex and Alcate, page 1-4

Norwatch, <http://www.norwatch.no/2007092357/gruveindustri/intexcrew/guvernør-vil-stoppe-norsk-gruveprosjekt.html>, 23 September 2007