

Response to Kinross Gold and Export Development Canada regarding our report *Swept Aside*

March 19, 2018



In December 2017, Above Ground and Justiça Global released the report [*Swept Aside: An Investigation into Human Rights Abuse at Kinross Gold's Morro do Ouro Mine*](#). In February 2018, the Business & Human Rights Resource Centre posted the report on its website, along with [responses](#) from Kinross Gold (Kinross) and Export Development Canada (EDC), a Canadian public agency that has repeatedly financed the mining company. With this submission, Above Ground and Justiça Global welcome the opportunity to address points raised in Kinross's and EDC's responses.

Kinross contends that our report presents “numerous unfounded and factually incorrect allegations.” However, the report is based on an extensive body of credible information provided by local residents, community organizations and government authorities in Brazil, including state and federal public prosecutors. It draws on interviews with dozens of local residents and government authorities, and over 50 government publications and court documents. The report also includes extensive information from Kinross, conveying the company's stated viewpoints on the primary issues of concern that we raise. We reference 31 company publications, including 17 direct quotes, and summarize information provided by the company during and following two face-to-face meetings.

A. Response from Kinross Gold

Private dialogue versus public debate

Kinross expresses disappointment that we have not accepted its offer of dialogue regarding the issues raised in our report. Those issues are a matter of public concern and we believe they are best explored in the public domain.

The quilombola communities

Kinross refers to court rulings¹ in Brazil that conclude that the quilombola land claims in the area of the mine operation have no legal basis. In both the 2013 and 2014 rulings, the court supports the company's assertion that Brazilian legislation governing the formal recognition of quilombola communities and their traditional territories is “illegal and unconstitutional.”² However, the Brazilian Supreme Court subsequently issued a ruling in a separate suit³ that upholds the

¹ Tribunal de Justiça Federal (2013) Número do processo 2010 38 06 000610-0 November 21.

Tribunal de Justiça Federal (2014) Número do processo 2009 38 06 001628-2 January 28.

² Both decisions have been appealed. The appeal processes have been paralyzed for several years.

³ Ação Directa de Inconstitucionalidade 3.239. February 8, 2018.

constitutionality of the legislation in question. That decision confirms the legality of the quilombola self-recognition process and the quilombola land titling process.

The communities affected by the mine expansion — Machadinho, Amáros and São Domingos — received formal recognition as quilombola communities in 2004 under that legislation. The territorial titling process for all three communities was already underway when Kinross was granted an initial licence for the tailings dam it subsequently built on Machadinho land. In 2009, before Kinross had final approval to build the dam, the government authority responsible for quilombola land titling recognized the three communities’ traditional territories and recommended the granting of collective title. Despite this recognition, the dam was subsequently licensed and built by Kinross. Only years later did the courts issue the rulings that the company now raises in its defense.

Kinross points out that the communities do not hold title to their territories because their land claim processes have not yet concluded. In 2009, the Brazilian government put the three quilombola communities’ titling processes on hold and transferred responsibility for addressing the dispute over quilombola land to an opaque and ineffectual negotiation process in the office of the federal attorney general.⁴ Kinross reports that the transfer was made at its request.⁵ The derailment of the formal titling process is a central concern identified in our report.

Quilombola residents we interviewed who told us they’d signed deals with the company paying them to vacate their land said they had done so grudgingly, feeling they had no other choice. Approvals granted by state licensing bodies for Kinross to build its tailings dam partly within quilombola territory put community members at a great disadvantage in the negotiations initiated by Kinross. As the state public ministry warned: “[t]he pressure to sell is overwhelming for a landowner whose land has been improperly licensed [. . .]. Who will want to continue living in the dam’s area of influence once it’s been licensed by the state of Minas Gerais? Who else, besides [the company] will want to acquire that property [...]?”⁶

Kinross’s negotiations with families in the community of Machadinho were of such concern to the Brazilian government agency responsible for quilombola land claims that it called for an investigation into the matter. The agency contends that the company carried out work that created conditions “inducing” residents to leave, and that the company’s actions resulted in the “elimination of an ethnic community.”⁷

Environmental and health concerns

As explained in our report, one of the scientific studies regarding arsenic exposure in Paracatu that is referenced by Kinross includes troubling findings not mentioned by the company in its public communications materials. While the study states that “in general the environmental

⁴ See pages 24-26 of *Swept Aside*.

⁵ Information provided by representatives of Kinross during a meeting with the research team, July 19, 2015.

⁶ Ministério Público do Estado de Minas Gerais, 2009, Ação Civil Publico 0470.09.058073-4, p. 12.

⁷ INCRA, 2009, Relatório Técnico de Identificação e Delimitação (RTID) do território quilombola de Machadinho, Relatório Antropológico.

results indicated low human exposure to arsenic,” it also reports that a risk assessment carried out using a precautionary approach found that children and adults in the city face an “unacceptable risk” of carcinogenic effects due to environmental exposure to arsenic, and that children may be at risk of non-carcinogenic effects.⁸

We acknowledge in our report that a second study commissioned by Kinross and carried out by the Brazilian National Institute of Science and Technology on Minerals Resources, Water and Biodiversity concludes that “the overall risk of arsenic exposure to the general population in Paracatu is considered low.”⁹

As we conclude in our report, the disparate range of findings and conclusions from the studies carried out to date underscores the need for robust, independent monitoring by public authorities of pollution and exposure levels in all areas within the mine’s influence. And yet, government authorities in Minas Gerais have charged Kinross with monitoring its own emissions.¹⁰ Furthermore, according to Kinross, as of February 2017 the state public ministry had yet to select researchers to carry out an epidemiological and environmental study agreed upon in 2011 to examine arsenic levels in the mine’s area of influence.¹¹

Deaths of trespassers on the mine site

Kinross notes in its submission that there are “occasional incidents” involving trespassers seeking to steal gold from its tailings, and that its approach to address these incidents includes improved fencing, lighting and patrols in target areas.

The company does not mention that at least five people have died in such incidents in recent years. According to media reports, in 2016 four men died inside the mine’s waste effluent pipes while trying to extract residual gold from the waste, in three separate incidents. A news article describes how one of the men died of asphyxiation when he became stuck in a pipe. More recently, in February 2017, a local man was found dead at one of the mine’s tailings dams.¹² The repeat nature of these incursions and the attendant risks would seem to indicate the need for more robust safety measures at the mine.

Access to remedy

Kinross states that “there is also strong evidence that communities have access to effective remedy in the rare event a situation is not resolved to mutual satisfaction.” This assertion contradicts what we heard in interviews with local residents and public prosecutors. Quilombola people we spoke with told us that they see the negotiation process meant to settle the matter of

⁸ Centro de Tecnologia Mineral (CETEM), 2013, Final Report: Assessment of Environmental Contamination by Arsenic and Epidemiological Study of the Associated Environmental Exposure in Human Population of Paracatu-MG, <http://arsenio.kinross.com.br/wp-content/uploads/2015/06/CETEM-Paracatu-arsenic-study-English.pdf>, p. 60.

⁹ INCT-Acqua, 2015.

¹⁰ See page 39 of *Swept Aside*.

¹¹ Ibid.

¹² See page 30 of *Swept Aside*.

their land rights as a “dead end.” In fact, the process is so ineffective that the federal public ministry recommended in 2013 that it be shut down.¹³ People living near the mine told our research team they want to move to escape the noise, dust and vibrations from daily blasting operations, but that these conditions have lowered their property values such that they cannot afford to move.¹⁴ Local residents expressed fears that they are exposed to unsafe environmental contaminants. The people with whom we spoke reported feeling powerless regarding these and other grievances.

B. Response from Export Development Canada

General corporate financing

EDC explains that it provided financing to Kinross for general corporate purposes and that it is not directly involved in the Morro do Ouro mine. Yet EDC’s public transaction disclosures indicate that it provided Kinross with two loans for its operations in Brazil, and according to Kinross, one of those loans was earmarked for the expansion of Morro do Ouro.¹⁵ In addition, nothing barred Kinross from using some or all of the five subsequent EDC loans for its operations in Brazil.

It is not clear why the agency considers it important to note that its loans to Kinross were for general corporate purposes. EDC’s legal obligation to prevent and mitigate human rights abuse through effective due diligence¹⁶ is not restricted to decisions on project finance. Because a general corporate loan could be used by a company for any of its global operations, EDC’s due diligence must take into account the risks associated with all of the company’s operations.

Engagement with EDC and effective due diligence

EDC notes that it was not approached by Above Ground or Justiça Global to provide comment on the *Swept Aside* report. Over several years, Above Ground has repeatedly approached EDC with concerns about EDC clients either under investigation for or charged with corruption by foreign authorities,¹⁷ or associated with credible or proven allegations of human rights abuse.¹⁸ In each case, EDC declined to explain how it applied its due diligence policies and practices in its initial

¹³ See page 26 of *Swept Aside*.

¹⁴ See page 31 of *Swept Aside*. As recently as February 28, 2018 a local media report describes an explosion at the mine that “shook houses in several neighborhoods of the city, bringing fear and concern to thousands of residents of Paracatu.” *Paracatu News*, 2018. <http://paracatunews.com.br/noticia/6351/detonacao-de-bomba-em-mineradora-assusta-moradores-de-paracatu>

¹⁵ Kinross Gold Corporation, 2006, “Kinross Completes New Credit Facilities Totaling US\$500 Million.”

¹⁶ U.N. General Assembly, 66th Session. *Effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights*. 5 August 2011 (A/66/271).

¹⁷ See, for instance, our correspondence regarding Petrobras, Brookfield Asset Management Inc. and Kinross at <http://aboveground.ngo/edc-clients-investigated-for-corruption>

¹⁸ See, for instance, our correspondence regarding Ecopetrol and Pacific E&P (now Frontera Energy) at <http://aboveground.ngo/edcs-response-alleged-abuse-colombian-oilfields-highlights-deficits-due-diligence>

screening of the company, and any remedial steps it would take in response to the credible or proven allegations of wrongdoing that had emerged.

Similarly, in its response to the *Swept Aside* report, EDC has not clarified whether it considered any of the issues we raise in its assessments of risks associated with Kinross. Nor does it clarify the reasoning by which it has now come to the conclusion that Kinross “has taken appropriate and responsible actions to address issues” and that its “responsive and proactive actions are consistent with international and industry best practices.”

As set out in our report, EDC provided Kinross with seven loans from 2006 to 2017. Throughout that period, local residents, community leaders, a federal government department, and both state and federal public prosecutors raised warnings, expressed grievances and issued reports about the mine’s harmful social and environmental impacts.

EDC issued five loans to Kinross after 2009, when the government department responsible for the quilombola land claim process concluded that the company’s actions in Machadinho resulted in the “elimination of an ethnic community.” It issued its most recent loan to Kinross following three separate incidents in which trespassers died in the mine’s waste effluent pipes. By EDC’s assessment, these outcomes are consistent with “best practice.”

As a government agency, EDC must operate in accordance with Canada’s legal duty to protect against human rights abuse, and it should be accountable to the Canadian public in this regard. To achieve that end, critical gaps regarding transparency and the efficacy of EDC’s due diligence practices must be addressed.