



SWEPT ASIDE

AN INVESTIGATION INTO
HUMAN RIGHTS ABUSE
AT KINROSS GOLD'S
MORRO DO OURO MINE

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GROUND

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SWEPT ASIDE

An Investigation into Human Rights Abuse at Kinross Gold's Morro do Ouro Mine

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The information in this report is accurate as of March 2017.

Cover photo — Quilombola residents interviewed by the research team. © Karyn Keenan, 2011

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ABOVE GROUND aboveground.ngo

Above Ground works to ensure that companies based in Canada or supported by the Canadian state respect human rights wherever they operate. Through research, analysis, collaboration and outreach, we shed light on the impacts of Canadian business activity abroad and advance solutions for corporate accountability in Canada. Above Ground is a project of Tides Canada, a national charity dedicated to a healthy environment, social equity and economic prosperity.



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Justiça Global is a non-profit Brazilian organization, founded in 1999, that seeks to promote human rights by strengthening civil society, improving access to justice, and encouraging institutional and policy reform in Brazil through monitoring and documentation, advocacy, litigation, and training.

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The Morro do Ouro mine. © Justiça Global, 2014

SUMMARY

On the outskirts of Paracatu, a small city in the eastern Brazilian state of Minas Gerais, lies the country's largest gold mine, known by locals as Morro do Ouro. The mine, which began production in the 1980s, has undergone a dramatic expansion since 2006 under the ownership of Canadian company Kinross Gold.¹

This report,² a joint effort of Above Ground and Justiça Global, documents how the expansion of the Morro do Ouro mine negatively impacted the lives, land and livelihood of local people. It is based on a multi-year study in which our researchers interviewed local residents and public officials, spoke with representatives from Kinross and combed through government reports, news articles and court documents. Their research reveals serious human rights violations linked to the expansion of the mine over the past decade, a period during which Kinross received substantial and repeated financial support from the Canadian government.

The story of Morro do Ouro provides a compelling illustration of the governance gap that often surrounds the overseas operations of Canadian multinational companies. It follows a pattern widely seen throughout the world, in which host-state governments fail to protect people's rights in the context of large-scale resource development projects. Canada, in turn, has no effective laws or policies in place to prevent or remedy harms caused by Canadian companies — including those it directly finances — in their operations abroad.

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1. The mine is operated by Kinross Brasil Mineração (KBM), the wholly-owned Brazilian subsidiary of Kinross Gold Corporation. For simplicity, we use the name "Kinross" throughout this report to refer to either entity.
 2. A companion report, based on the same research and written in Portuguese, has been released by Justiça Global in Brazil.

TRADITIONAL COMMUNITIES EXPELLED FROM THEIR LAND

Those most directly harmed by Kinross's expansion project were the quilombola, people of African descent living in three nearby rural settlements founded by freed slaves in the 19th century.

Quilombola communities hold legal ownership rights over their traditional lands. The three communities — Machadinho, Amaros and São Domingos — had been formally recognized by the federal government as quilombola and were engaged in a land claim process to secure collective title to their territories when Kinross assumed ownership of the mine in 2004.

Kinross's expansion plan included building a tailings facility — a large reservoir that holds a slurry of solid and liquid waste — on land within the territory of Machadinho. The expansion also affected the territories of Amaros and São Domingos. State authorities granted licences and easements for the project with no regard for the communities' outstanding land claims or right to be consulted. The company meanwhile pursued deals with individual quilombola residents to acquire the plots they occupied. Many agreed to vacate their plots, despite the outstanding collective land claim process. Some, like this resident of Machadinho, describe feeling pressured to leave their land: "People will sell, people are forced to sell, but they're unhappy. Everyone sells, but they're upset. How can they stay? There's no way."

State authorities granted licences and easements for the project with no regard for the communities' outstanding land claims or right to be consulted.

The quilombola residents with whom our researchers spoke said they entered into such agreements without legal advice. At least one was illiterate. Some quilombola also claim that Kinross promoted divisions within their communities and isolated leaders who criticized its actions. One community leader reports receiving anonymous death threats that she believes are linked to her criticism of the company.

Kinross asserts that it acquired land within the quilombola territories legally, through fair negotiations with each family, and that quilombola residents who abandoned their traditional land did so voluntarily, renouncing all rights to the area.

The Brazilian federal government put a hold on all three communities' land claims processes in 2009, while the licensing process for Kinross's project sped along. Two public ministries — independent bodies of public prosecutors charged with upholding constitutional rights — filed lawsuits attempting to halt licensing until quilombola rights were addressed. While both succeeded in securing injunctions, these were overturned by higher courts due to the communities' lack of formal title to their lands.

Kinross proceeded with its expansion project, rendering large areas of quilombola land unsuitable for occupation or use. No quilombola remain within the territories of Machadinho and Amaros. The matter of the three communities' land rights has never been settled.

CONFLICT WITH ARTISANAL MINERS AND NEARBY RESIDENTS

Serious conflict and safety concerns have arisen in relation to periodic attempts by locals to extract remnants of gold left in the mine's tailings. Security guards at the mine have reportedly used armed force on people covertly entering the mine site, killing two young men in 1998. People have also died inside the mine's waste effluent pipes, which they enter and sometimes become trapped in. Four men were found dead in the pipes in 2016. Another was found dead at a tailings dam in February 2017.

Disputes have also emerged between the company and nearby residents disturbed by the noise, vibrations and dust from near-daily blasting operations at the mine. Hundreds of homes are located within 500 metres of the open pit. Residents complain of property damage, which they attribute to the blasting. Some say they want to move away but are unable to sell their homes.

ENVIRONMENTAL AND PUBLIC HEALTH CONCERNS

In a series of lawsuits, two public ministries have exposed critical deficiencies in the environmental oversight of the mine. Environmental authorities considered and approved a new high-capacity plant as a separate project from the tailings facility needed to contain the resultant waste. They have allowed Kinross to monitor its own air and water emissions.

Residents of Paracatu have long expressed concern about potential health risks posed by the high arsenic content of the ore processed at Morro do Ouro. Several studies of local arsenic exposure and health risks have been carried out, with researchers coming to a range of disparate conclusions.

A study commissioned by the city determined that although arsenic levels in drinking water sources are well within safe limits, residents face an unacceptable risk of carcinogenic effects once all air- and water-based exposure pathways are taken into account. A second study, commissioned by Kinross, found the bioaccessibility of arsenic in local air and water to be low, and concluded that the overall health risk posed by arsenic exposure to the general population is low. In contrast, a study carried out independently by a local geologist reportedly found arsenic levels exceeding safe limits in waterways downstream of the mine and in the urine of nearby residents.

CANADIAN PUBLIC SUPPORT FOR KINROSS

Since Kinross acquired the Morro do Ouro mine, the Canadian state has provided the company with up to \$850 million in financing through its export credit agency, Export Development Canada (EDC). Kinross received five EDC loans between 2012 and 2017, long after Brazil's federal public ministry had called attention to the violation of quilombola rights in the expansion of the mine.

The Canadian government also supports Kinross financially through the Canada Pension Plan, which holds an equity interest in the company worth \$60 million, and politically through its embassy in Brazil.

The substantial public support lent to Kinross despite the problems documented at Morro do Ouro reveals the need for more effective policies and mechanisms in Canada to assess environmental and human rights risks associated with the operations of companies receiving government support.



The Morro do Ouro mine. © Justiça Global, 2014.

RECOMMENDATIONS FOR REFORM

This report concludes with a series of recommendations aimed at ensuring that both Canada and Brazil meet their international obligation to protect human rights in the context of large-scale extractive projects undertaken within their territory or by companies under their jurisdiction.

We recommend that the Canadian government adopt a legal framework to identify, prevent and mitigate human rights risks in Canadian business activity abroad. Among other elements, such a framework should include measures to

- » afford legal remedy to people harmed by such activity,
- » prohibit public agencies from supporting companies whose operations are associated with human rights abuse, and
- » establish a duty of care on the part of public institutions towards those directly affected by their clients' operations.

Our recommendations to Brazilian authorities include the immediate suspension of Kinross's mining activity at Morro do Ouro until applicable legal norms and constitutional rights are respected.

INTRODUCTION

The Canadian mining industry is well known for its global reach. As of 2014, Canadian mining companies had a presence in more than 100 countries, with overseas assets valued at close to \$170 billion.^{3,4} Significant growth in the industry's overseas operations over the past two decades has been accompanied by continuous reports of harms caused to local communities by such operations, particularly in developing countries.

The frequency and seriousness of these reports has attracted the attention of a number of international authorities, including the UN Human Rights Committee, which has expressed concern about "allegations of human rights abuses by Canadian companies operating abroad, in particular mining corporations."⁵ Similar expressions of concern have been made by the UN committees on economic, social and cultural rights, the elimination of racial discrimination, and the rights of the child, as well as the UN Special Rapporteur on Toxic Waste.

Serious harm related to Canadian mines is widely reported in Latin America, which is by far the region of greatest Canadian mining investment abroad.⁶ In recent submissions before the Inter-American Commission on Human Rights, Latin American⁷ and Canadian⁸ civil society organizations documented the adverse impacts of Canadian mining projects throughout the region. The impacts they recorded include

- » the forced relocation of communities due to land appropriation, loss of livelihood and environmental damage;
- » the persecution, injury, killing or sexual assault of local people who question mining activity;
- » public health problems linked to pollution; and
- » unsafe working conditions, and workplace injury and death.

To date, university-based researchers have documented at least 85 cases of socio-environmental conflict,⁹ the killing of nearly 50 people and the injury of more than 400 in connection with Canadian mines in Latin America and the Caribbean.¹⁰

Serious harm related to Canadian mines is widely reported in Latin America, which is by far the region of greatest Canadian mining investment abroad.

3. Dollar values are expressed in Canadian currency unless noted otherwise.

4. Natural Resources Canada, 2016.

5. United Nations Human Rights Committee, 2015, p. 2.

6. In 2014, over half of Canadian mining companies' total overseas assets (\$90.5 billion) were located in Latin America and the Caribbean. This value surpasses Canadian mining assets within Canada (\$87 billion) and is more than triple the corresponding amount for Africa, the second most important region for Canadian mining investment overseas (Natural Resources Canada, 2016).

7. Working Group on Mining and Human Rights in Latin America, 2014.

8. Canadian Network on Corporate Accountability, 2014.

9. Ibid.

10. The Justice and Corporate Accountability Project (2016) documents 44 deaths and 403 injuries linked to Canadian mines in Latin America.

In many countries throughout the region, laws meant to protect the environment and community rights are notoriously weak or poorly enforced.¹¹ People harmed by mining operations often have difficulty accessing justice in the courts, especially in cases where foreign companies are involved.¹²

These trends clearly point to the need in Canada for mechanisms capable of holding companies to account for the impacts of their activities abroad. The Canadian government in fact has a legal duty to protect against human rights abuse by Canadian multinationals when they operate overseas and to ensure access to effective remedy when such abuse occurs.¹³ Yet Canada lacks the policy and legal instruments necessary to fulfill this duty.

Canada also lacks measures to ensure that government agencies that support Canadian companies operate in a manner consistent with the state duty to protect human rights. In addition to its negotiation of trade and investment treaties that benefit the overseas extractive sector, the government provides companies with a range of services to facilitate their operations abroad, including financing, equity ownership, insurance and political backing through embassies and trade commissions.

Export Development Canada (EDC) is Canada's export credit agency, mandated to facilitate Canadian exports and investment. In 2015, it provided Canadian and foreign companies with \$113 billion in financing and insurance.¹⁴ Yet the Canadian government has no binding regulations in place to ensure that the companies supported by EDC and other public agencies respect human rights in their activities overseas. In fact, the government has continued to support the operations of companies facing credible allegations of serious abuse.

These problems persist despite more than a decade of parliamentary study. Parliament has considered numerous legislative proposals¹⁵ designed to create modest accountability provisions regarding the overseas operations of extractive companies. In each case, the legislative initiative was defeated.

The Canadian government's response has been the adoption of a set of policies it refers to as its "Corporate Social Responsibility (CSR) Strategy." The strategy, adopted in 2009, does not address the deficits in Canada's legal and policy framework. It encourages but does not require extractive companies to respect international human rights standards. Moreover, it does nothing to address what the UN Human Rights Committee recently described as "the inaccessibility to remedies" in Canada for people harmed by Canadian companies operating abroad, "in particular mining corporations".

The Committee regrets the absence of an effective independent mechanism with powers to investigate complaints alleging abuses by such corporations that adversely affect the enjoyment of the human rights of victims, and of a legal framework that would facilitate such complaints (art. 2).¹⁶

In fact, in the face of growing international concern over the conditions of impunity surrounding Canadian mining projects in developing countries, the Canadian government has only intensified its efforts to expand Canadian mining operations abroad, including in Latin America. In 2013 it adopted a "Global

11. Inter-American Commission on Human Rights, 2015.

12. Ibid.

13. The state duty to protect against human rights abuse and the corporate responsibility to respect human rights are examined in detail in the UN Guiding Principles on Business and Human Rights (United Nations Office of the High Commissioner for Human Rights, 2011).

14. Export Development Canada, 2015.

15. Such as Bill C-300. See Canadian Network on Corporate Accountability, 2014.

16. United Nations Human Rights Committee, 2015, p. 2.



Markets Action Plan” that identifies mining as a priority sector and several Latin American countries as priority markets for the promotion of Canadian trade and investment.¹⁷

One of the priority markets identified in the plan is Brazil, an increasingly important destination for Canadian mining investment. Canadian mining assets in this country increased more than six-fold between 2003 and 2013, and in 2014 their value reached \$7.5 billion, making Brazil the seventh most important destination for Canadian mining investment abroad.¹⁸ Export Development Canada, which maintains two offices in the country, provided \$5.2 billion in financing and insurance to support Canadian business in Brazil in 2015, making it the fourth most important market for EDC activity.¹⁹

In 2014, Natural Resources Canada signalled Canada’s intention to strengthen its relationship with Brazil, particularly in the areas of mining and mineral development.²⁰ Diplomatic relations had been strained the previous year by revelations that the Canadian government spied on Brazil’s Ministry of Mines and Energy — activity that then-President Dilma Rousseff condemned as a form of economic espionage.²¹ The two nations remained aligned, however, in their pursuit of expanded mining activity in Brazil despite the systemic environmental and human rights problems associated with natural resource exploitation in that country.

17. Foreign Affairs, Trade and Development Canada, 2013.

18. Natural Resources Canada, 2016; Natural Resources Canada, n.d.

19. Export Development Canada, 2015.

20. Natural Resources Canada, 2014.

21. Associated Press, 2013.

These problems are well illustrated by the case of the Morro do Ouro gold mine. As this report shows, operations at the mine and its dramatic expansion under the ownership of Canadian company Kinross Gold have caused significant harm to local communities. Yet Export Development Canada provided Kinross with loans worth as much as three-quarters of a billion dollars for the expansion and the company's corporate operations.

This report examines the forced displacement of traditional peoples from their lands to make way for the expansion of the mine; the broader social, economic and environmental impacts of the mine on nearby residents; and the failure of the Canadian and Brazilian governments to safeguard human rights and ensure access to justice for those who suffered harm.

The report concludes with recommendations to the Canadian and Brazilian governments, outlining the actions each must take to rectify the problems surrounding this particular mine and to ensure that human rights are protected in similar projects in the future.

The findings in this report are based on interviews, court documents and other research conducted by Above Ground and Justiça Global between 2011 and 2017. Our research team made several visits to Paracatu and interviewed dozens of people living near the Morro do Ouro mine. The team also spoke with representatives of Kinross and interviewed various Brazilian government authorities.

The information in this report is accurate as of March 2017.

I. BACKGROUND AND CONTEXT

The Morro do Ouro mine, also known as the Paracatu mine, is the largest gold mine in Brazil, and one of the largest in the world.²² Located in the state of Minas Gerais in southeastern Brazil, it produced almost 478,000 ounces of gold in 2015.²³ The mine is responsible for 22% of Brazil's national gold production²⁴ and over 18% of Kinross's global output.²⁵

The project includes an open pit mine, processing plants and two tailings dams, large structures that retain water and a mix of solid and liquid waste. Kinross holds mining leases and exploration permits to almost 14,000 hectares at Morro do Ouro.²⁶ Mineral grades at the mine are very low, requiring the processing of large volumes of rock.²⁷ Due to this high throughput and the blasting used to break up the ore, operations at the mine produce large volumes of dust and particulate matter²⁸ as well as tailings waste.²⁹ The latter totalled more than 45 million tonnes in 2015.³⁰

Morro do Ouro is one of the world's few large-scale mines located in a densely populated area, less than a kilometre from the city of Paracatu,³¹ which has a population of approximately 90,000.

An aerial picture of the mine and surrounding areas. The grey area directly above the city of Paracatu is the mine's open pit. The two large bodies of water to the northeast and northwest of the pit are tailings containment areas.

© DigitalGlobe CNS / Airbus, Google Earth, 2017.



22. Kinross Gold Corporation, n.d., "Paracatu, Brazil."

23. Kinross, *Corporate Responsibility Report 2015*.

24. Kinross Gold Corporation, n.d. "Quem Somos."

25. Kinross, *Corporate Responsibility Report 2015*.

26. Kinross Gold Corporation, 2014.

27. CETEM, 2014.

28. Ibid.

29. The Morro do Ouro mine produced 66% of Kinross's global tailings in 2015 but just 18% of the company's worldwide gold output (Kinross, *Corporate Responsibility Report 2015*).

30. Kinross, *Corporate Responsibility Report 2015*.

31. Kinross, *2013 Corporate Responsibility Report*.

HISTORY OF MINING AND SETTLEMENT NEAR PARACATU

Mining activity around present-day Paracatu began in the 18th century. Gold exploration attracted *bandeirantes*, who led expeditions into the Brazilian interior to settle territory, capture slaves and extract minerals. Seeking gold in Paracatu, the *bandeirantes* brought thousands of African slaves to the area. When mining yields began to decline around 1820, the *bandeirantes* abandoned the area, freeing many slaves. A large number of freed slaves remained in the region, engaged in small-scale mining activity. They built settlements in the area known as Morro do Ouro (Golden Hill), forming large rural communities that maintained their culture, customs and traditional land use over generations.³²

As the urban centre of Paracatu grew in population, these communities were recognized as distinct social entities. Today they are known as “quilombola” communities, a term used in Brazil to refer to the self-identified descendants of freed African slaves who formed settlements across the country.

For over two centuries, the economy in Paracatu and nearby rural communities was based on artisanal gold mining and subsistence agriculture. That began to change in the 1970s with the expansion of agribusiness into the area. A second shift took place a decade later, when the region attracted the interest of foreign mining companies such as Billiton, which acquired licences to mine at Morro do Ouro.

In the early 1980s, British–Australian conglomerate Rio Tinto Zinc partnered with Billiton and then bought the company's interest in the mine. Rio Tinto started production at Morro do Ouro in 1987, operating through a subsidiary, Rio Paracatu Mining S.A. (RPM), in association with a succession of companies.³³

During the 15 years in which Rio Tinto oversaw the development and operation of the mine, local quilombola communities — three of which are located in close proximity to the mine — complained about the impacts of the project on their lives and territories, including the loss of land and water sources, environmental damage and the loss of traditional economic activities.³⁴

Many local residents lost their main form of livelihood when, following construction of the Morro do Ouro mine, the state governor outlawed artisanal gold mining in Paracatu in the late 1980s.³⁵

Ownership of the Morro do Ouro Mine

1980 – Rio Tinto enters into joint venture with Billiton

1984 – Rio Tinto, through its Brazilian subsidiary, acquires Billiton's interest in the Morro do Ouro project

1985 – Rio Paracatu Mineração (RPM) is established as a joint venture between Rio Tinto and Autram

1986 - RPM receives a mining licence

1987 – Production at the Morro do Ouro mine begins

2003 – Kinross acquires a 49% interest in RPM through its merger with Autram successor TVX Gold and Echo Bay Mines

2004 - Kinross purchases the remaining 51% interest in RPM from Rio Tinto, becoming the mine's sole owner

2007 – Mine expansion project begins

2010 – RPM renamed Kinross Brasil Mineração (KBM)

32. INCRA, 2009, Relatórios Técnicos de Identificação e Delimitação (RTID) dos territórios quilombola da Família dos Amaros, Machadinho e São Domingos.

33. Kinross Gold Corporation, 2014.

34. INCRA, 2009, Relatórios Técnicos de Identificação e Delimitação (RTID) dos territórios quilombola da Família dos Amaros, Machadinho e São Domingos; MPF, 2007, Parecer Técnico 01/2007.

35. Scott et al., 2005.

ACQUISITION AND EXPANSION OF THE MINE BY KINROSS

Kinross acquired an interest in the Morro do Ouro mine in 2003 following a merger with TVX Gold and Echo Bay Mines. A year later, Kinross became the sole owner of Rio Paracatu Mineração (RPM), the Brazilian company operating the mine, when it acquired Rio Tinto's shares in the company.³⁶

Initially, Kinross estimated that mine reserves would last until 2016. However, geological studies extended the forecast, and by 2005 Kinross had developed a plan to expand operations and triple production at the mine.³⁹ The company now expects the project to last until 2030.⁴⁰

The expansion project included the construction of a new processing plant and a tailings dam that will, at its final height, contain a body of water and waste covering 1,300 hectares.⁴¹ The displacement of local quilombola residents by the expanded operations, particularly the new tailings dam, proved to be highly controversial.

Kinross Gold

Kinross Gold was the world's fifth largest gold producer in 2015.³⁷ Incorporated in 1993 in the province of Ontario, Canada, the company is based in Toronto and is registered on the Toronto and New York stock exchanges. In addition to Brazil, Kinross operates in Chile, Ghana, Mauritania, Russia and the US. In 2015, it ranked seventh among Canadian extractive companies in gross revenue.³⁸

36. Kinross Gold Corporation, 2014.

37. Canadian Mining Journal, 2016, "GOLD: Top 10 producing countries, companies."

38. Canadian Mining Journal, 2016, "Canada's Top 40."

39. Kinross Gold Corporation, 2006.

40. Kinross Gold Corporation, 2014.

41. Ibid.

II. VIOLATION OF LAND RIGHTS

There are five quilombola communities near Paracatu: São Domingos, Machadinho, Família dos Amaros, Cercado and Porto do Pontal. All five had sought formal recognition of their traditional territories by the Brazilian government before Kinross's expansion project began.

The expansion would prove to have a devastating impact on at least three of these communities. According to Brazil's federal public ministry⁴²:

Kinross used its economic power to abusively expel the members of the quilombola communities of Machadinho and [...] Amaros from their land, which is essential to their physical and cultural survival. The new tailings dam was built almost entirely on Machadinho territory, and the disturbances and disruptions caused by the construction resulted in the expulsion of the remaining residents of [...] Amaros from the area. The rights of the community of São Domingos were also under attack, including the right to health and the preservation of its way of life.⁴³

Machadinho is the largest of the three quilombola communities directly affected by the mine expansion. The community was established over 200 years ago. Its traditional territory, once home to as many as 300 families, encompasses 2,217 hectares.⁴⁴ Over 40% of this area is affected by the company's new tailings facility.⁴⁵

The quilombola community of Família dos Amaros (or simply "Amaros") dates back to the 19th century. The community is composed of 171 families, and its territory covers 960 hectares.⁴⁶

São Domingos is the smallest of the three communities. According to the Quilombola Association of São Domingos, this community consists of 87 families and its territory encompasses 665 hectares.⁴⁷

Prior to the expansion of the Morro do Ouro mine, members of the three communities still lived on their traditional territories near Paracatu.

THE QUILOMBOLA COMMUNITIES' RIGHTS

The Brazilian Constitution requires that the state recognize members of quilombola communities as the owners of their land. Until very recently, the federal government recognized quilombola communities and formalized title to their territories following a process described in detail in Appendix A of this report.⁴⁸ In brief, the key steps in that process are as follows:

- » The community requests a certificate of self-recognition from the federal government.
- » The government issues the certificate, then prepares a technical report (RTID) that describes the community, identifies the limits of its territory and provides an opinion on the request for title.

42. A public ministry, which is an independent body of public prosecutors, exists at both the federal and state levels in Brazil. See page 15 of this report for further description of the public ministry's role.

43. MPF, 2014, Recurso de Apelação 2009.38.06.001628-2, p. 9.

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

45. Kinross Gold Corporation, 2010.

46. INCRA, 2009, Relatório Técnico de Identificação e Delimitação (RTID) do território quilombola da Família dos Amaros.

47. INCRA, 2009, Relatório Técnico de Identificação e Delimitação (RTID) do território quilombola de São Domingos.

48. In 2016, the Brazilian government transferred responsibility for the titling of quilombola territory from the federal agency INCRA to the executive branch of the federal government, further politicizing the process. At the time of writing, all quilombola land titling processes were suspended.

- » If the quilombola territory includes private land, the government expropriates that land to ensure clear title.
- » A deed of collective title, which prohibits the land from being sold, let, seized or divided, is granted to the quilombola community.

Quilombola legal protections in Brazil

Over 3,000 quilombola communities — Afro-Brazilian communities founded generations ago by freed slaves — exist in Brazil. The areas occupied by quilombola communities are referred to as quilombos.

Quilombola communities' territorial rights as well as their culture⁴⁹ are protected under the Brazilian Constitution, which states: "The remaining inhabitants of the quilombos who are occupying their lands are recognized as the land owners, and the State must issue them the respective deeds."⁵⁰

Quilombola territorial rights are also protected under International Labour Organization Convention 169, which was incorporated into Brazil's domestic legislative framework in 2002. It includes safeguards for the management of natural resources found on traditional peoples' lands. It states the following:

- » "In cases in which the State retains the ownership of mineral or sub-surface resources" on traditional peoples' lands, "[...] governments shall establish or maintain procedures through which they shall consult these peoples [...] before undertaking or permitting any programs for the exploration or exploitation of such resources pertaining to their lands."⁵¹
- » Traditional communities have the right to be consulted about legislative and administrative measures that affect them directly.⁵² Consultation must take place prior to a proposed undertaking, include a process to inform communities about any associated impacts, and be carried out in a culturally appropriate manner. It should also seek their agreement on the proposed measure.
- » "Persons not belonging to these peoples shall be prevented from taking advantage of their customs or of lack of understanding of the laws on the part of their members to secure the ownership, possession or use of land belonging to them."⁵³
- » When traditional peoples have relocated from their ancestral land and are unable to return, "they shall be provided in all possible cases with lands of quality and legal status at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development. Where the peoples concerned express a preference for compensation in money or kind, they shall be so compensated under appropriate guarantees."⁵⁴

49. Afro-Brazilian culture, expression and modes of life are protected under Articles 215 and 216 of the Federal Constitution.

50. Article 68 of the Ato das Disposições Constitucionais Transitórias (Act of Transitional Constitutional Provisions).

51. International Labour Organization, 1989, Article 15.

52. Ibid., Article 6.

53. Ibid., Article 17.

54. Ibid., Article 16.



A quilombola homestead. © Justiça Global, 2014

Machadinho, Amaros and São Domingos received formal recognition as quilombola communities from the Brazilian government in 2004.⁵⁵ The federal agency responsible for quilombola land titling, the Institute for Colonization and Agrarian Reform (INCRA), then began the territorial titling process for all three communities.⁵⁶ This process was underway when Kinross was granted an initial licence, in 2007, for the tailings dam it proposed to build on Machadinho land.

The quilombola communities' use of their lands had already been heavily compromised by the mine prior to its expansion. The mine's impacts on São Domingos, for instance, are outlined in a 2005 study by the federal public ministry. They include the loss of artisanal mining activity, land degradation and the destruction and contamination of water sources.⁵⁷ These constitute serious impacts for a community whose very existence is tied to its land, and whose members had for generations made their livelihood through small-scale mining and subsistence agriculture.

In 2003 the federal public ministry began to request information from state and federal authorities about the mine's impact on quilombola communities and environmental harm. It called on the authorities to carry out inspections to assess damage reported by the communities.⁵⁸ In 2005, the ministry initiated a formal process to monitor the quilombola titling process and assess environmental damage to quilombola territory caused by the company's activity.⁵⁹

55. Fundação Cultural Palmares, 2004.

56. Administrative procedures 54170.003688/2005-70 (Machadinho), 54170.000059/2004-15 (São Domingos) and 54170.008897/2003-48 (Amaros).

57. MPF, 2005, Parecer Técnico 98/2005.

58. MPF, 2007, Parecer Técnico 01/2007.

59. MPF, 2005, Procedimento Administrativo Cível 1.22.000.003549/2005-56.

INCRA published its Technical Identification and Delimitation Reports (RTIDs) regarding the territorial claims of the communities of Amaros, Machadinho and São Domingos in 2009.⁶⁰ The reports, which recommended the granting of title, documented the extent of each community's territory and the devastating impact the mine had already had on them. They also raised serious concerns over the process by which Kinross had acquired land within quilombola territory — a process which is examined in the next section of this report.

Members of Amaros, Machadinho and São Domingos complain that their communities were not consulted about Kinross's expansion project, despite the devastating impacts it would obviously have on their material and social wellbeing.⁶¹ As described above, the Brazilian state has a legal obligation to consult quilombola communities regarding administrative measures that affect them directly, including permits for the exploration or exploitation of mineral resources.

THE COMPANY'S ACQUISITION OF QUILOMBOLA LANDS

At the outset of its expansion project, Kinross lacked ownership of much of the land it needed for its new tailings containment facility,⁶² including areas within quilombola territory.

Because the quilombola land claim process was underway, the communities had not yet secured collective title to their land. Areas within the quilombola territories lacked any formal title.

Other areas within the territories, however, had been encroached upon by individuals from outside the quilombola communities. In the absence of state protections, these third parties acquired title to the plots of land they occupied by registering them with authorities. Kinross purchased some of the land it needed from these third parties.

The company also gained control of territorial land that was occupied by quilombola residents for which there was no formal title. According to the federal public ministry, Kinross employed intimidation tactics to pressure quilombola residents to leave their land. The ministry argued in 2009 that the mining company

has caused and continues to cause [...] property and moral damage to the quilombola communities of Machadinho, Amaros and São Domingos by means of a subtle and complex process to expel them from their land and to break down their cultural identity.⁶³

Brazil's federal and state public ministries

An independent body of public prosecutors exists at both the federal and state levels in Brazil. These "public ministries" operate independently of the other branches of government. Their mandate is to defend the public interest, collective and individual rights, the legal system and democratic processes. One of their responsibilities is to ensure that public authorities do not violate constitutionally protected rights. They have the power to initiate legal inquiries and civil lawsuits, and to order investigative measures, including police inquiries.

60. INCRA, 2009, Relatórios Técnicos de Identificação e Delimitação (RTID) dos territórios quilombola da Família dos Amaros, Machadinho e São Domingos.

61. Interviews by research team with community members. See also the RTID for Machadinho (INCRA, 2009, Relatório Técnico de Identificação e Delimitação (RTID) do território quilombola de Machadinho) regarding lack of consultation.

62. MPE, 2009, Ação Civil Pública 0470.09.058073-4.

63. MPF, 2009, Ação Civil Pública 2009.38.06.001018-9, p. 14.

The company entered into negotiations with some community members to access the land they occupied and used. Because quilombola residents lacked title to this land, they were unable to transfer any legal interest to the company. Agreements negotiated between Kinross and quilombola residents governed the latter's abandonment of their land, as opposed to its formal purchase.⁶⁴ Some quilombola would later report that they felt intimidated and under pressure to enter into these agreements, and that they did so without the advice of legal counsel or government officials.⁶⁵

Finally, the company gained control of some of the land it needed for its expansion project not through purchase or by negotiating access, but through the acquisition of easements from the state. Easements permit third parties to access private land. Some of Kinross's easements fall within quilombola territory.



A quilombola woman interviewed by the research team.
© Karyn Keenan, 2011

Machadinho

The pressure Kinross placed on residents of Machadinho to abandon their plots is described in INCRA's territorial report (RTID) for the community. The 2009 report questions the legitimacy of the "negotiation" process used by the company and describes how its activities created conditions that compelled residents to leave their territory. Kinross demolished a house, cut down trees, used heavy machinery and limited local residents' movements in the area.⁶⁶

In the words of one local resident: "People will sell, people are forced to sell, but they're unhappy. Everyone sells, but they're upset. How can they stay? There's no way."⁶⁷

The report describes a "scenario of finality, of inevitability"⁶⁸ in Machadinho: "[This place feels] like it's finished and has no future. This is the desolation that we found when we went to talk with residents in Machadinho [...]."⁶⁹

64. See for example the anthropological reports for Machadinho and São Domingos that form part of their respective RTIDs. "São Domingos started in the area where the church and the cemetery are, then expanded as families grew. Most of the residents do not have documents to the area and land possession is justified by kinship [...]." (INCRA, 2009, Relatório Técnico de Identificação e Delimitação (RTID) do território quilombola de São Domingos, Relatório Antropológico São Domingos, p. 94).

65. Interviews by research team, July 2011.

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

67. *Ibid.*, p. 89.

68. *Ibid.*, p. 80.

69. *Ibid.*, p. 85.



A quilombola residence. © Justiça Global, 2014

The report concludes that the company's actions in Machadinho resulted in the elimination of an ethnic community.⁷⁰ It calls for an investigation into the company's practice of "inducing" community members to negotiate their departure, including a number of individuals who withdrew from the collective titling process.⁷¹

All the members of Machadinho have since left their territory⁷² and now live in urban Paracatu.

Amaros

During the mine expansion, Kinross acquired plots inside the Amaros community's territory and used the soil from those plots to raise the height of its existing tailings dam. According to the federal public ministry, the company employed diverse strategies to pressure community members to leave: constructing roads close to quilombola property, undertaking heavy work at night and making daily visits to community members, at times accompanied by security guards.⁷³

The report concludes that the company's actions in Machadinho resulted in the elimination of an ethnic community.

70. Ibid.

71. Ibid.

72. Interview by research team with INCRA officials, 2013.

73. MPF, 2010, Ação Civil Pública 2010.38.06.000610-0.

The experience of the De Melo family, one of the last quilombola families to leave Amaros, is instructive. According to the federal public ministry, the De Melos intended to stay on their land while awaiting the conclusion of the collective land titling process. However, they report that they felt heavy pressure to leave their plot. In an agreement with the ministry, Kinross undertook not to intervene in the community's territory, particularly in the vicinity of the De Melos' land. However, according to the ministry, Kinross soon began work beside the family's small plot,⁷⁴ constructing a road that was later used by heavy trucks.⁷⁵

In 2010, the federal public ministry filed a lawsuit to protect the rights of the Amaros community. The court issued an injunction that prohibited mining operations on Amaros land, within a radius of half a kilometre of the De Melos' home,⁷⁶ but the measure was later overturned. INCRA reports that it became impossible for the De Melos to coexist with the company.⁷⁷ The family left the area and there are no longer any quilombola living in Amaros territory.⁷⁸

São Domingos

Part of São Domingos's territory was sold in 1996 to the mining company (owned by Rio Tinto at the time) by non-quilombola families. According to INCRA, the community's lack of documentation regarding its territory facilitated such incidents of land-grabbing by third parties.⁷⁹

The Cachoeira do Arraial de São Domingos (the waterfall of the village of São Domingos) is one example. Community members identify the area as an essential part of their territory, one that supported diverse community activities. One member, Robson Ferreira Silva, told INCRA:

This part of the waterfall area was used by the whole community. It belonged to São Domingos, but there was no formal owner. It was a communal area. There were never any residents, no houses, no traces.⁸⁰

My grandfather said everybody used it for farming, for hunting, as if it were the town centre. They produced food from that land. Then, later, a fence appeared and it became a property. The people in São Domingos were passive, others came and took it. If someone else claimed the area, they had no way of saying 'this is mine.'⁸¹

The land around the waterfall was sold to the mining company by third parties.⁸² INCRA reports that the source of the falls has since been destroyed, and that the waterfall is almost dry.⁸³ According to INCRA, Kinross has blocked community members from accessing the area.⁸⁴

74. Mr. De Melo described the stressful sensation of being under the constant surveillance of the company (MPF, 2008, Informação Técnica No. 05/2008, PAC No. 1.22.000.003549/2005-56).

75. MPF, 2010, Ação Civil Pública 2010.38.06.000610-0.

76. MPF, 2010, "Mineradora é impedida de construir estrada em terras de comunidade quilombola em MG."

77. Interview by research team with INCRA officials, 2013.

78. Information gathered by research team during July 2014 field visit.

79. INCRA, 2009, Relatório Técnico de Identificação e Delimitação (RTID) do território quilombola de São Domingos.

80. Ibid. (Relatório Antropológico, p. 37).

81. Ibid. (Relatório Antropológico, p. 36).

82. Ibid.

83. Ibid.

84. Ibid.



A Kinross sign prohibiting entry. © Justiça Global, 2014

A 2007 report from the federal public ministry further describes a legacy of community grievances over the impacts of the mine on São Domingos. In 2003, for instance, a community leader complained about the mining company's use of pressure tactics to acquire plots within the community's territory, in addition to deforestation, water pollution, the loss of wild and domesticated animals, and the demolition of important historical buildings and landmarks, including a cemetery.⁸⁵ INCRA recommends that the federal government take steps to protect remaining sites of community heritage in São Domingos.⁸⁶

Several community members report that Kinross's actions led to divisions within São Domingos. They say these actions have also led to disputes within the quilombola community association, impeding its effectiveness and isolating leaders who are critical of the company.⁸⁷

The former president of the Quilombola Association of São Domingos, Evane Lopes, reports having received anonymous death threats and other forms of harassment, which she believes are linked to her criticism of Kinross.⁸⁸ Ms. Lopes felt compelled to enter a government protection program, and ultimately to leave Paracatu.⁸⁹

LICENSING AND INTERVENTION BY PUBLIC MINISTRIES

State environmental authorities responsible for licensing Kinross's expansion project consistently failed to take into account the rights of the quilombola communities. Both the state and federal public ministries intervened repeatedly, launching a series of lawsuits that sought to halt the licensing process.

To complete the expansion, Kinross needed to obtain a series of licences from state authorities. Licensing approval of mining projects in Brazil is granted in three consecutive stages: first in the form of an initial licence, which permits planning and preparatory work; second, an installation licence, which allows for construction; and finally, an operating licence.

85. MPF, 2007, Parecer Técnico 01/2007.

86. INCRA, 2009, Relatório Técnico de Identificação e Delimitação (RTID) do território quilombola de São Domingos.

87. Interviews by research team with residents of São Domingos, April 2013 and July 2014.

88. Interview by research team, July 2011.

89. MPF, 2013, Procuradoria da República, Termo de Representação do Programa de Proteção aos Defensores de Direitos Humanos do Estado de Minas Gerais contra o DNPM e a Kinross.

Tailings waste at the mine was set to increase following the expansion, requiring the construction of a new tailings facility. Despite the obvious link between the company's new higher-capacity processing plant⁹⁰ and a new facility to contain the resultant waste, these components were licensed as separate projects. By August 2006, the company had been granted a licence to build the new plant.⁹¹ It initiated the licensing process for the new tailings dam the following month.⁹² It had also obtained authorization for the expansion from the National Department for Mineral Production.⁹³ Kinross began building the new plant in 2007,⁹⁴ long before it had approval for the dam.

State environmental authorities responsible for licensing Kinross's expansion project consistently failed to take into account the rights of the quilombola communities.

Environmental licensing in Brazil

In most cases, environmental licensing in Brazil is carried out by state governments. In the state of Minas Gerais, a state council administers the licensing process, with input from nine regional superintendencies (SUPRAM) that are responsible for environmental protection and water management.

In the licensing process, a project proponent must comply with all legal conditions imposed in one phase of the process before advancing to the next. Brazilian law provides for public participation in all phases of the licensing process.

The process begins with an agreement between the company and the licensing authority on terms of reference for environmental impact assessments. Following the submission of these assessments by the company and the release of an opinion by the authority, licensing proceeds as follows:

- » An initial licence is granted. It addresses the project's environmental feasibility and establishes the basic requirements and conditions that will guide project development.
- » An installation licence is granted. This licence governs project set-up and requires that the proponent comply with associated plans or programs approved by the environmental authority.
- » An operating licence is granted. This licence authorizes the activity in question and is granted once the environmental authority verifies compliance with the requirements set out in previous licences.

Further information about the Brazilian legal framework for licensing, as well as mining concessions, environmental regulation and enforcement, can be found in Appendix B of this report.

90. Kinross noted in 2006 that "[t]he 61Mt expansion scenario will require a new tailings dam facility" (Kinross Gold Corporation, 2006, p. 22-19).

91. Kinross Gold Corporation, 2006, "Kinross Gold announces 45 percent revenue growth and record earnings of \$65.6 million in second quarter."

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

93. See www.dnpm.gov.br

94. Kinross Gold Corporation, 2010.

In 2007, as licensing bodies at the state level stood poised to grant an initial licence for the new dam, the federal public ministry urged them to evaluate the project's "environmental, social, economic and cultural impacts on the quilombola communities of Machadinho, São Domingos and Amaros."⁹⁵ It warned them that failure to do so could lead to the company's licence being invalidated. The state agencies paid no heed, and granted the licence.

In 2009, both the federal and state public ministries brought lawsuits seeking to block the approval of an installation licence for the dam. They demanded that a number of serious irregularities in the licensing process be resolved and that quilombola rights be addressed before the process be allowed to resume.

The state public ministry's lawsuit called attention to the fact that Kinross lacked legal rights to a significant portion of the land it needed for the expansion project. In its application for the installation licence, the company merely presented state authorities with a plan to purchase the necessary land. A proponent's clear legal rights to the land in question, argued the ministry, are a "fundamental prerequisite" for the granting of an installation licence.⁹⁶ Approving the licence, the ministry warned, would greatly exacerbate the power imbalance between the company and the landowners it sought to remove, placing the latter at great disadvantage in the negotiation process:

The 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 Rio Paracatu Mineração S.A., will want to acquire that property [...]?⁹⁷

The federal public ministry sought in its suit to include the participation of federal government authorities in the licensing process, given federal government responsibility for quilombola communities and their territories. The ministry insisted that the RTIDs for Amaros, Machadinho and São Domingos be analyzed as part of the licensing process. It also raised concerns about the company's failure to provide state authorities with any evaluation of the social and environmental impacts of its project on quilombola communities and sites of historic and cultural importance in the project area.⁹⁸

The federal ministry's lawsuit drew attention to a condition imposed by the Regional Superintendency for Environmental Regulation (SUPRAM) when it recommended approval of the installation licence for the dam: that Kinross resettle the residents of Machadinho. The public ministry described this condition as "absurd," given the inalienability of quilombola land.⁹⁹

Both public ministries' lawsuits raised environmental concerns, including the lack of a closure plan for the new tailings dam. As the federal ministry pointed out, the splitting of the expansion project into discrete pieces — each submitted separately for licensing — prevented the full environmental impact of the project from being considered.¹⁰⁰

The ministries' suits were ultimately unsuccessful. While both succeeded in securing court injunctions to halt the licensing process, the injunctions were overturned by higher courts.

95. MPF, 2007, Recomendação. Procedimento Administrativo n.:1.22.000.003549/2005-56.

96. MPE, 2009, Ação Civil Publico 0470.09.058073-4.

97. Ibid., p. 12.

98. MPF, 2009, Ação Civil Pública 2009.38.06.001018-9.

99. Ibid., p. 26.

100. Ibid.

State authorities granted Kinross an installation licence for the tailings dam in August 2009 — several months after the release of the RTID reports that had clearly established the extent of the three quilombola communities' territories and the questionable practices used by the company to acquire their land.¹⁰¹ Kinross proceeded with construction of the dam, driving quilombola residents off their land and rendering large areas of their territory unsuitable for eventual occupation or use at the conclusion of the titling process.

In 2011, the federal ministry brought another suit, this time to block the granting of an operating licence for the dam.¹⁰² When announcing the action, the public prosecutor asserted that

[t]he company ignores the rights of the quilombola communities and, it can be said, thumbs its nose at Brazilian law with its systematic infringements. What's worse: it does so with the complicity of state environmental agencies.

The most serious part of this situation is that the environmental agency based its assessment solely on the company's claims, without hearing from other interested parties, which include, in addition to the communities, the office of the federal public ministry, INCRA and the Palmares Cultural Foundation.¹⁰³

The ministry criticized the Regional Superintendency for Environmental Regulation (SUPRAM) for recommending the operating licence be approved despite having acknowledged that Kinross failed to comply with prior licence conditions. SUPRAM's recommendation, argued the ministry, amounted to a "total affront" to the due process of law.¹⁰⁴

At several points in the legal proceedings brought by the public ministries, court orders were issued suspending the project. Each was eventually overturned by a higher court. To date, the upper levels of the Brazilian judiciary have declined to intervene in the licensing process because the quilombola communities lack title to their lands.¹⁰⁵ In the words of Kinross, the quilombola communities possessed "the mere expectation" of territorial recognition.¹⁰⁶

Kinross was granted its operating licence for the new dam in 2011, bringing to conclusion the licensing process for the expansion project.¹⁰⁷

That state authorities swiftly granted their approval at each stage of licensing for the dam, despite the serious problems being raised, was not entirely surprising. They were under enormous pressure to do so, having already approved construction of the new plant when the licensing process for the dam began. Before a licence to build the tailings dam was granted, Kinross had already built the new plant and ramped up production.¹⁰⁸

101. The licence was granted August 21, 2009. (Kinross Gold Corporation, 2009, *Third Quarter Report for the Period ended September 30, 2009*).

102. MPF, Ação Cautelar, 2349-20.2011.4.01.3817.

103. MPF, n.d.

104. Ibid.

105. For example, see Federal Court decision 2009.38.06.001628-2, January 28, 2014.

106. Tribunal de Justiça Federal, 2013, p. 8.

107. Kinross Gold Corporation, 2014.

108. Ibid.; see production figures for Paracatu in 2009 compared to 2008 in Kinross Gold Corporation, 2009, p. 4.



One of the two tailings containment areas at the mine. © Justiça Global, 2014

This pressure was no doubt compounded by high-profile public promotion of the project. For instance, in early 2007, months before an initial licence for the dam had been approved, Kinross executives made a joint public statement with the Minas Gerais secretary for economic development, Wilson Nelio Brumer, declaring that the expansion would create jobs and boost the economy of Paracatu and the entire region.¹⁰⁹ “The investment is extremely important both to the company and to the state of Minas Gerais,” asserted the state secretary.¹¹⁰ Mr. Brumer ceased his functions as state secretary later that year and was appointed to Kinross’s board of directors in 2009.¹¹¹

While Kinross’s expansion project is complete, a number of related legal challenges remain in course. The federal public ministry’s lawsuit that sought to block the granting of an installation licence is under appeal. Furthermore, in May 2014 the same ministry opened a criminal investigation¹¹² into allegations by local landowners that Kinross falsified documents in the context of the easement process in relation to the construction of its tailings dam.¹¹³

109. Secretaria de Estado de Desenvolvimento Econômico do estado de Minas Gerais, 2007.

110. Ibid.

111. Kinross Gold Corporation, 2009, “Kinross appoints Wilson N. Brumer to Board of Directors.”

112. MPF, 2014, Inquérito Civil 1.22.021.000052/2014-29.

113. The investigation is ongoing.

Some of the mining easements granted to the company for its expansion had already been challenged by affected property owners. In one such case, a state court blocked possession by the company, citing a number of irregularities associated with the easement,¹¹⁴ but its decision was reversed by a higher court on economic grounds:

[T]he risk of serious damage to the economy and the public interest is [clear], [...] the suspension of mining activity, for any reason, leads to financial loss in the region, [and is detrimental] to job creation and the federal government.¹¹⁵

DERAILMENT OF THE TITLING PROCESS

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 the Federal Chamber of Conciliation and Arbitration (CCAAF), an office of the Attorney General. Kinross reports that the transfer was made at its request.¹¹⁶

The stated purpose of the CCAAF process is to achieve a negotiated settlement to the land conflict in Paracatu. However, the chamber has made negligible progress in the eight years since it assumed the case.¹¹⁷ According to federal state attorney Deborah Duprat, "the chamber never resolves conflicts with communities; it's a place to which conflicts are consigned."¹¹⁸

Among the serious flaws in the negotiation process is a lack of transparency. It consists primarily of Kinross and various government agencies negotiating behind closed doors. Participating public agencies such as INCRA report that they are unauthorized to release related information and documents, expressing concern that the public dissemination of information could prejudice negotiations. The authors of this report were instructed to request information through the law governing access to information.¹¹⁹

The quilombola communities have been relegated to a marginal role in the process. For three years, community representatives were excluded from the negotiation table. They were finally included in negotiation meetings, at the request of community leaders, in June 2012.¹²⁰ They are also excluded from the initial stages of proposal development. Instead, proposals are developed by Kinross and participating public agencies. For example, in 2015 the office of the Attorney General reported that INCRA was evaluating a proposal developed by Kinross regarding São Domingos. The proposal had not been discussed with the community, nor had it been publicly disclosed.¹²¹

The quilombola communities have been relegated to a marginal role in the process. For three years, community representatives were excluded from the negotiation table.

114. The Court of Justice of Minas Gerais (proceeding 1.0470.09.060198-5/001) reversed the decision of Justice Rodrigo Melo de Oliveira to grant a mining easement to Kinross for 274.4 hectares (plots 18.832 and 19.365).

115. Superior Tribunal de Justiça, 2010.

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

117. The company reports that the process is complicated by the dispersed nature of the quilombola communities of Machadinho and Amáros. Kinross representatives, in communication with Above Ground, February 2017.

118. Interview by the research team, April 2013.

119. E-mail correspondence exchanged between the research team and mediators responsible for the CCAAF process, July 6, 2015.

120. Advocacia Geral da União (AGU), 2012, Termo de Reunião Nº 070/2012/CCAF/CGU/AGU-HLC-GHR.

121. AGU, 2015. In February 2017, Kinross informed Above Ground that it had not made a proposal regarding São Domingos.



A quilombola graveyard. © Justiça Global, 2014

The negotiation meetings have failed to address core community demands. For example, communities have complained about the lack of consultation regarding mining operations. The CCAAF has avoided a serious examination of this issue; instead, it reports that government authorities “will try to obtain information regarding the applicable rules and procedures, should a public consultation with the traditional communities take place.”¹²²

In 2013, as part of the CCAAF process, Kinross offered to donate 116 hectares of land to the community of Amaros.¹²³ The land, which was acquired earlier by the company, is part of the community’s traditional territory, as identified by INCRA.¹²⁴ Part of the area’s soil had been removed for the construction of the company’s tailings dam.¹²⁵ INCRA carried out an environmental evaluation of the area in 2013 and concluded that it was inappropriate for the community. The land was degraded and lacked a source of water, making it unsuitable for agriculture.¹²⁶

In response to INCRA’s observations, Kinross drafted a recovery plan for the area,¹²⁷ which was evaluated by INCRA in 2014. The institute made the following observations: the area on offer is smaller than that occupied by the company within the community’s territory; essential technical information is missing from the recovery plan; and the company failed to consult the community about the plan.¹²⁸

In 2015, the Attorney General informed our research team that Amaros would be consulted about the company’s proposal and asked to make a decision.¹²⁹ That consultation has not yet taken place. The communities of Machadinho and São Domingos have yet to receive formal proposals from the company.

122. AGU, 2012, Termo de Reunião Nº 080/2012/CCAF/CGU/AGU-HLC-GHR.

123. Kinross, 2013, Área sugerida pela Kinross – Amaros – Plano de Recuperação de Áreas Degradadas.

124. INCRA, 2014, Parecer Técnico n. 11/2014/SR06/F4.

125. Ibid.

126. INCRA, 2013, Relatório de Análise Ambiental, Território Quilombola Família dos Amaros, César Augusto Afonso Drummond.

127. Kinross Brasil Mineração S/A, 2014, Plano de Recuperação de Áreas Degradadas.

128. INCRA, 2014, Parecer Técnico n. 11/2014/SR06/F4.

129. AGU, 2015.

INCRA reports that the communities have demanded that the CCAAF process continue.¹³⁰ However, quilombola community leaders interviewed by the authors of this report said that their communities perceive the negotiation process as an obligation, one they have never embraced. They describe the process as a dead end.

Given the lack of progress in resolving the conflict in Paracatu, the federal public ministry recommended in 2013 that the CCAAF process be shut down.¹³¹

... the company has taken inconsistent positions regarding the quilombola communities' status as traditional communities with territorial rights.

KINROSS'S POSITION ON THE QUILOMBOLA CONTROVERSY

Kinross reports that it is "committed to the protection and promotion of human rights" wherever it works.¹³² The company explains that human rights are integrated into its operations through its commitment to the UN Global Compact, the Universal Declaration of Human Rights, the Voluntary Principles for Security and Human Rights, the Kinross Code of Business Conduct and Ethics, and the company's internal policies on environment, health and safety, labour, community relations and project permitting/consultation.¹³³

Kinross emphasizes the importance of traditional communities and its commitment to treating them with respect:

We recognize the importance and singularity of traditional communities and consult such communities near our operations to avoid, minimize or mitigate any adverse impacts from our activities.

Our goal is to develop and operate projects in a way that respects and strengthens these communities and that makes long-term, positive contributions to their quality of life.¹³⁴

In the case of the Morro do Ouro mine, the company has taken inconsistent positions regarding the quilombola communities' status as traditional communities with territorial rights. In submissions made to INCRA in 2012 regarding the land titling process, Kinross asserts that Amaros is not a quilombola community¹³⁵ and that the residents of Machadinho and São Domingos who abandoned their traditional land did so voluntarily, renouncing all rights to the area. Kinross further argues that these individuals, who now live elsewhere, are alienated from the traditions and cultural patrimony that the land claim process seeks to protect.¹³⁶

130. E-mail correspondence with research team, July 7, 2015.

131. Interview by research team with INCRA officials, 2013.

132. Kinross Gold Corporation, 2017, "Our Approach."

133. Ibid.

134. Kinross Gold Corporation, 2013, p. 9.

135. Kinross, 2012.

136. Kinross, 2013, Recurso Administrativo ao Conselho Diretor do INCRA no processo de demarcação da comunidade de Machadinho; Kinross, 2013, Recurso Administrativo ao Conselho Diretor do INCRA no processo de demarcação da comunidade de São Domingos.

In its submissions, Kinross goes on to question the constitutionality of the Brazilian law that sets out the process for recognition of quilombola territory and argues that INCRA's technical reports for the three communities should be nullified. The company claims that the members of these communities have never occupied its property.¹³⁷

However, at other times it seems clear that Kinross was aware that the land it sought for its expansion was located in quilombola territory and occupied by quilombola families.

According to staff at INCRA, in 2008 the company's CEO and a representative of the Canadian consulate obtained a meeting with the president of INCRA to address the issue of quilombola lands.¹³⁸ INCRA staff report that Kinross pushed the agency to rapidly resolve the titling process and offered to provide information about the families living on the land in order to expedite the process.

That same year, the company signed a letter of intent with the Machadinho Quilombola Association (AQUIMA). The letter signals the intention of both parties to enter into discussions with the aim of reaching a formal agreement to

protect the rights guaranteed to the Quilombola Community of Machadinho under article 68 of the Act of Transitional Constitutional Provisions and under Convention 169 of the International Labour Organization [...].¹³⁹

The letter includes an offer by Kinross to provide the community with land so that it can recuperate its original way of life and preserve its traditions. The letter sets out Kinross's expectation that in return, the community would renounce all rights to the land it needed for the mine expansion. The letter requires the parties to maintain "absolute secrecy" regarding its contents.¹⁴⁰ The letter was denounced by the federal public ministry as an attempt to circumvent rules regarding the inalienability of quilombola territory.¹⁴¹

In a recent written response to Above Ground, Kinross refers to Machadinho and Amáros as quilombola communities, and acknowledges that

- » there was one quilombola family still living on land the company purchased, within the area "marked as [a] historic quilombola area" of the Amáros community, as late as 2010; and
- » the open pit mine overlaps with part of the land designated by INCRA as the traditional territory of São Domingos.¹⁴²

Regarding Machadinho, Kinross asserts that the federal government's territorial report (RTID) shows no one who self-identified as quilombola was still living there.¹⁴³ This report was published in 2009, after Kinross had, according to the report itself, used questionable negotiation processes and created conditions that compelled residents of Machadinho territory to leave.¹⁴⁴

137. Ibid.; Kinross Brasil Mineração S/A, 2011.

138. Interview by research team with INCRA officials, 2013.

139. Carta de Intenções, December 17, 2008, para 1. As found in court documents for Processo No. 0470.09.056027-2 (MPE, 2009, Ação Cautelar 0470.09.056027-2).

140. Ibid., para 8. The document is publicly available in court filings.

141. MPF, 2009.

142. Information provided by Kinross representatives to Above Ground in February 2017.

143. Ibid. Kinross representatives also cited a statement made in a court ruling that members of Machadinho "could not benefit from the protection of the constitutional article related to quilombola land rights, since they were not living on the land and had no interest in occupying the land." (Ibid.) In the 2014 court decision, which is under appeal by the federal public ministry, the court explicitly notes that the issue of quilombola rights is not the subject of the suit. (Póder Judiciário, 2014).

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

In response to criticism regarding its acquisition of quilombola land, the company asserts that

[a]ny and all properties acquired by Kinross in Paracatu were purchased legally and included detailed negotiations with each affected family in accordance with the International Financial Corporation's guidelines for voluntary resettlement. As a first step, we agreed on the criteria for determining the value of the properties, the procedures for defining the options for relocation, and the method for implementing the relocation. The goal in every case was to offer the residents improved living conditions, and, through a negotiation process, to arrive at a mutually agreed-on location for the new home.¹⁴⁵

It is not clear to which guidelines Kinross refers. The International Finance Corporation (IFC)¹⁴⁶ does not list on its website any guidelines for voluntary resettlement. It does list, as part of its Environmental and Social Performance Standards, guidelines for the *involuntary* resettlement of communities displaced by land acquisition. Among many other requirements, the IFC's performance standards stipulate that companies must undertake good faith consultations with affected communities, and that these consultations must

(i) begin early in the process of identification of environmental and social risks and impacts and continue on an ongoing basis as risks and impacts arise; (ii) be based on the prior disclosure and dissemination of relevant, transparent, objective, meaningful and easily accessible information which is in a culturally appropriate local language(s) and format and is understandable to Affected Communities; [...] (iv) be free of external manipulation, interference, coercion, or intimidation; (v) enable meaningful participation, where applicable; and (vi) be documented.¹⁴⁷

The IFC's guidelines also mandate that "[c]ompensation standards will be transparent and applied consistently to all communities and persons affected by the displacement."¹⁴⁸

Consultations meeting IFC standards clearly did not take place with all affected communities in the case of Kinross's expansion project. Nor did all of Kinross's dealings with quilombola residents comply with the basic conditions required for good faith negotiation. As mentioned earlier in this report and documented by INCRA and the federal public ministry, some quilombola residents expressed feeling great pressure to abandon their plots,¹⁴⁹ and some reported that the company insisted the price it paid for their land be kept confidential.¹⁵⁰ Quilombola community members who signed agreements with the company and were later interviewed by our researchers all said they had done so grudgingly, as they felt they had no alternative. One of these women is illiterate. She reached agreement with the company to hand over her plot without the advice of legal counsel or government officials.¹⁵¹

Consultations meeting IFC standards clearly did not take place with all affected communities in the case of Kinross's expansion project.

145. Kinross Gold Corporation, 2015, "Alegações vs. Fatos – Uma resposta da Kinross."

146. The IFC, a member of the World Bank Group, is "the largest global development institution focused exclusively on the private sector in developing countries." See www.ifc.org.

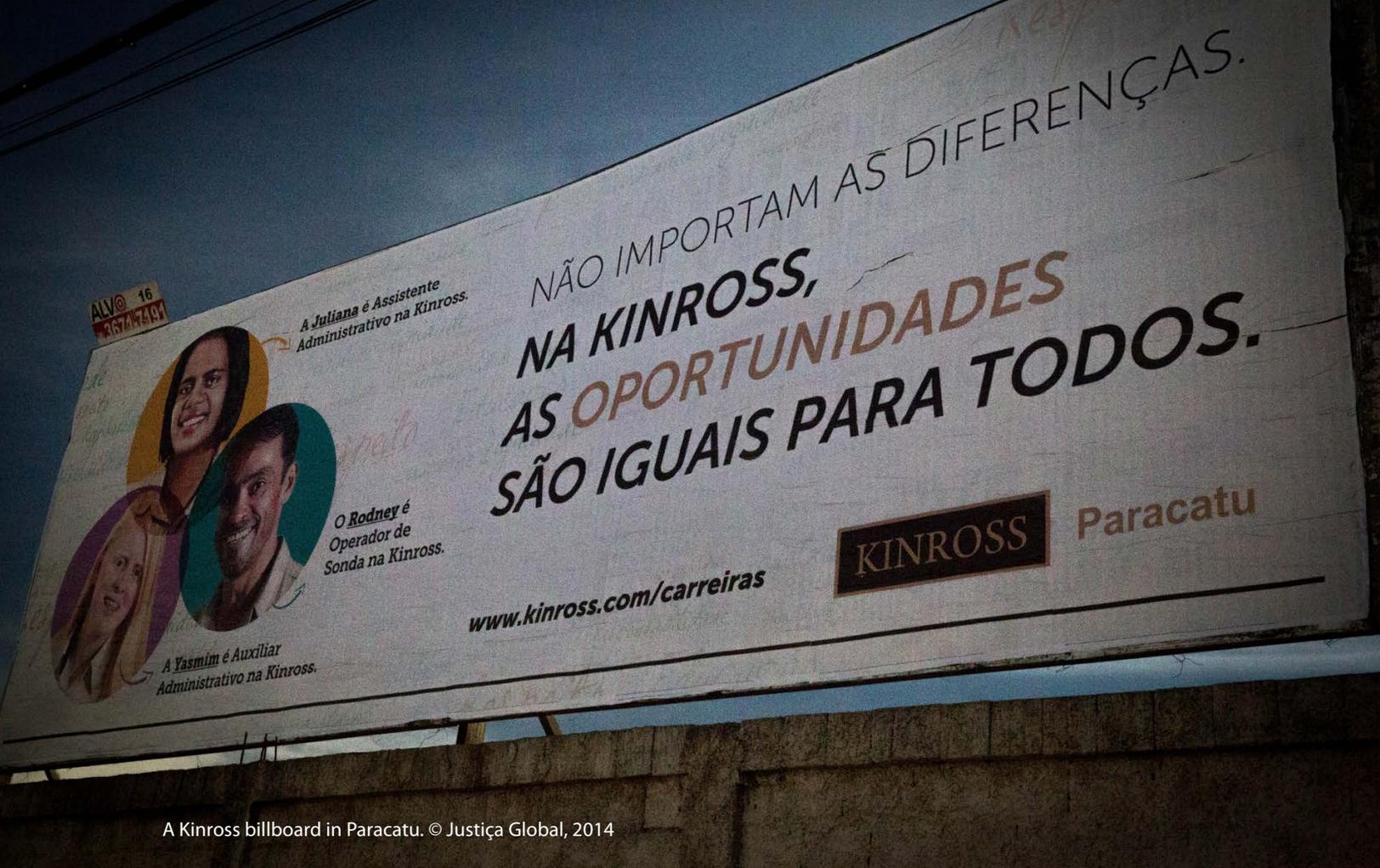
147. IFC Performance Standard 1: Assessment and Management of Environmental and Social Risks and Impacts (International Finance Corporation, 2012, p. 8).

148. IFC Performance Standard 5: Land Acquisition and Involuntary Resettlement (Ibid., p. 3).

149. See for example MPF, 2010, Ação Civil Pública 2010.38.06.000610-0. An earlier report by the federal public ministry documented fears expressed by quilombola residents that they might be duped into acting against their own best interests by "literate" people linked to the company (MPF, 2008, Informação Técnica No. 05/2008).

150. MPF, 2008, Informação Técnica No. 05/2008.

151. Interview by research team with former residents of Amaros on July 28, 2011. The federal public ministry reports that throughout history people have taken advantage of Amaros community members' illiteracy and limited education to obtain their land (Ibid.).



A Kinross billboard in Paracatu. © Justiça Global, 2014

III. BROADER SOCIAL, ECONOMIC AND ENVIRONMENTAL IMPACTS

The development of the Morro do Ouro mine has deeply affected not only the quilombola communities but also the wider population of Paracatu. While the mine has brought benefits for some, it has introduced serious risks and adverse impacts for others.

The mine is located in unusually close proximity to residential neighbourhoods, raising concerns about the effects of blasting and exposure to pollution on the local population. The ore at the mine has a very low concentration of gold, requiring that large volumes be blasted, hauled and processed. Processing consumes water and produces tailings and wastewater in great quantities, driving the conversion of large tracts of land into tailings containment areas. There are also serious security risks associated with locals periodically entering the mine site seeking remnants of gold in the mine tailings.

These factors suggest a need for heightened scrutiny of the mine's social and environment impacts. Strengthened government oversight is needed to ensure a level of protection that is commensurate with the significant risks.

Each of these aspects is examined in detail in the pages that follow.

CONFLICT AND SECURITY ISSUES LINKED TO CLANDESTINE MINING

Informal, small-scale gold mining — commonly referred to as artisanal mining — played a central role in the economies of Paracatu and surrounding rural communities from the time they were founded. According to local residents, near the end of the 1980s, the company then operating the Morro do Ouro mine and authorities in Minas Gerais drew attention to the environmental impact of mercury use in artisanal mining.¹⁵² In 1990, artisanal gold mining was outlawed in Paracatu.¹⁵³ The ban resulted in the deterioration of living conditions for poorer residents, many of whom had relied on artisanal mining and small-scale agriculture as their only sources of income.¹⁵⁴

A number of residents, including community leaders, deny that the use of mercury in local artisanal mining was widespread. They explain that mercury use began in Paracatu only in the 1980s, with the arrival of newcomers to the area. Even then, its use was limited, as it raised production costs in an activity that offered marginal economic gains.¹⁵⁵

Brazil's Institute for Colonization and Agrarian Reform (INCRA) has recommended that the ban on artisanal mining in Paracatu be lifted, and that small-scale gold mining without the use of toxic substances be permitted.¹⁵⁶

Following the ban, some locals continued to mine clandestinely, periodically entering the mine site to extract remnants of gold left in tailings waste from the mine. Locals complained about security operations at the mine and tensions peaked in 1998 when two young quilombola community members were killed by security guards on company property. A local newspaper reported:

Two incidents on company property involving private security guards and unemployed gold miners claimed the lives of two and seriously injured three. It is contradictory, to say the least, that the victims represent the social class that the company seeks to reach with its philanthropy. The desperate citizens that invade company property in search of a few grams of gold to ease their misery certainly see that place as an oasis, full of good manners, good salaries and, above all, generous leftovers of a precious metal. Put another way, a first world multinational company extracting kilos and kilos of gold every day, in a Brazilian municipality with high unemployment rates, no doubt awakens a feeling of resistance among those who, until recently, had relied on the gold in the Morro do Ouro streams for their basic needs.¹⁵⁷

According to media reports, in 2016 four men died inside the mine's waste effluent pipes while trying to extract residual gold, in three separate incidents.¹⁵⁸ A news article describes how one of the men died of asphyxiation when he became stuck in a pipe.¹⁵⁹ More recently, in February 2017, a local man was found dead at one of the mine's tailings dams, with signs of a head injury, after having reportedly entered the property in search of gold.¹⁶⁰

152. Interviews by research team, July 17 to 22, 2014.

153. Santos, 2012.

154. Scott et al., 2005; Interviews by research team, 2014 and 2015.

155. Interviews by research team, July 8, 2015; Souza, 2009.

156. INCRA, 2009, Relatório Técnico de Identificação e Delimitação (RTID) do território quilombola de São Domingos.

157. O Movimento, 2000.

158. Paracatu News, 2017.

159. Paracatu.net, 2016.

160. Paracatu News, 2017.



A waste effluent pipe at the mine, where the bodies of two men were found in 2016. Photographer unknown. Photo shared by Márcio José dos Santos.

Kinross describes the trespassing artisanal miners as “criminal groups” involved in “violent activity.”¹⁶¹ It reports that groups of more than 100 men have on several occasions invaded company property near one of the tailings dams, and that many of them were heavily armed.¹⁶²

The company reports that it addresses the trespassing problem through enhanced surveillance and security measures, and by collaborating with law enforcement authorities, including military police. Kinross also reports that it supports the Voluntary Principles on Security and Human Rights, a voluntary corporate social responsibility initiative, and that it has developed a human rights adherence and verification program to implement this commitment.¹⁶³

THE EFFECTS OF BLASTING AND HEAVY MACHINERY

The open pit mine, in which explosives are used to break apart the hard rock, is located directly beside the town of Paracatu. Hundreds of families live in neighbourhoods located within 500 metres of the pit.¹⁶⁴ Frequent blasting at the mine is felt in several neighbourhoods, including Amoreiras II, Bela Vista II and Alto da Colina, and in nearby rural areas, such as the quilombola community of São Domingos. Residents report that the explosions cause structural damage to their homes and that they are bothered by the noise generated by the blasting and the company’s use of heavy machinery at night. Residents further complain about the large volumes of dust released by blasting, expressing concern that the dust may contain toxins and be linked to serious health problems such as asthma.¹⁶⁵

Some residents wish to leave the area and settle elsewhere. However, they report experiencing difficulty selling their homes. They assert that their proximity to the mine has lowered their property values and that they cannot afford to move.¹⁶⁶

161. Kinross, *Corporate Responsibility Report 2015*, p. 65.

162. Kinross Brasil Mineração S/A, 2014, Letter to the Ministério Público Federal.

163. Kinross, *Corporate Responsibility Report 2015*.

164. Kinross, 2011.

165. See MPF, 2012, Termo de Declarações de Adão Ricardo Neves Honório ao MPMG, PA 1.22.021.000030/2013-88 (in relation to an administrative procedure to investigate structural damage caused to residences as a result of Kinross’s activity); Petition from the neighbourhood of Bairro Amoreiras II (Bairro Amoreiras II, 2011); Interviews by research team, April 23, 2013 and July 19, 2014.

166. Interviews by research team, April 23, 2013, and July 19, 2014.

Formal complaints regarding noise pollution have led to police investigations. However, the police rarely find noise infractions.¹⁶⁷ In the majority of cases examined by the authors of this report, the police applied noise limits for industrial zones in their assessments, despite the fact that the mine abuts on residential areas and that several measurements were taken in residential neighbourhoods.¹⁶⁸ Applying noise standards for mixed-use or residential areas in these cases would have led to different results.¹⁶⁹

Other public authorities with oversight of the mine's environmental impacts have failed to investigate local complaints regarding blasting and the use of heavy machinery. They report that they lack the technology and resources needed to effectively monitor the company. Instead, these agencies, including SUPRAM and the state public ministry, rely on data produced by the company.¹⁷⁰



Local residents report that when they complain to the company about noise, company personnel shuts down its machinery before taking noise measurements.¹⁷¹

167. See for example the following report, associated with Procedimento Administrativo 1.22.021.000030/2013-88 (MPF, 2013), which includes measurements taken in multiple locations: Polícia Militar de Minas Gerais, 2012.

168. Ibid. Measurements on November 22 and 23, 2012 were taken in the neighbourhood of Amoreiras.

169. Ibid. The noise standard for industrial zones (maximum nighttime 60 dB) was applied instead of the standard for residential zones (maximum nighttime 45 dB).

170. MPF, 2010, Ação Civil Pública 2009.38.06.003556-3; MPF, 2014, Nota técnica MPF/PR-MG/SSPER/GEO -14/2014, 2014; MPF, 2014, Procedimento preparatorio 1.22.021.000007/2014-74; Interview by research team with Minas Gerais Public Ministry staff in Patos de Minas, July 20, 2014.

171. MPF, 2012, Termo de Declarações de Adão Ricardo Neves Honório ao MPMG, PA 1.22.021.000030/2013-88; INCRA, 2010.

Kinross reports that it addresses neighbourhood concerns regarding dust, noise and vibration in Paracatu. According to the company's daily monitoring activity, vibration and dust levels are consistently within legal limits. Kinross credits a general decline over the years in the number of complaints concerning dust, noise and vibration to its use of specialized blasting procedures and techniques, and community-based monitoring programs, among other initiatives. The company reports, however, that this trend reversed in 2015 when its mining and blasting operations were carried out in closer proximity to residential areas.¹⁷²

The company relies on a community monitoring program that

invites community members to participate in the daily monitoring of the ore blasting to ensure the Company is meeting its regulatory commitments in terms of noise and vibration levels. Volunteer participants are given training in how to read the monitoring equipment, briefed on what the regulatory requirements are and are brought to see a live blast.¹⁷³

Some residents express skepticism about the community monitoring program. They complain that blasting is reduced during monitoring activities, and that participants lack necessary expertise and are heavily influenced by the company.¹⁷⁴

Kinross hired a company to explore the link between mine blasting and the cracks in local houses. The evaluation found no link between the two, concluding that the cracks are the result of poor construction.¹⁷⁵

In 2013, the federal public ministry began its own investigation into the alleged link between mining activity and damage to local homes.¹⁷⁶ The investigation is ongoing.

PRESSURE ON SCARCE WATER RESOURCES

The water-intensive mining operations at Morro do Ouro take place within a region where pressure on available water resources is high. The Minas Gerais Institute for Water Management (IGAM), a government institute, reported in 2005 that unsustainable water use puts the region at risk of a water crisis, and identified the agricultural and mining sectors as heavy users of local watersheds.¹⁷⁷ Studies published by the state government in 2008 reveal high demand on surface waters in the municipality of Paracatu.¹⁷⁸

Residents of São Domingos complain about the loss of important water sources as a result of mine operations:

We had a lot of water here, good water, that wasn't polluted. We used to put it in a pot. Later, the water started to become contaminated, [after] the mining company came.

Once, people were able to get their water even at the beach. With a bucket, a gourd [...] and the water was very clean. Nowadays, the water here is finished.

172. Kinross, *Corporate Responsibility Report 2015*.

173. Kinross, *2013 Corporate Responsibility Report*, p. 72.

174. INCRA, 2010.

175. Vaz de Mello Consultoria em Avaliações e Perícia, 2009. The company reports that although its operations are not the cause of damage to nearby homes, following the submission of a formal complaint by community leaders it agreed to help fund a municipal project to identify "high-risk homes" and either repair or replace them (Information provided by Kinross representatives to Above Ground in February 2017.)

176. MPF, 2013, Procedimento Administrativo 1.22.021.000030/2013-88.

177. Instituto Mineiro de Gestão das Águas (IGAM), 2006.

178. Estado de Minas Gerais, 2008.



Water pipe in Paracatu. © Justiça Global, 2014

When the mining company used up all the water at the top, the waterfall completely dried up. [...] Now there's very little water in the stream. [...] Today, there is no longer water in the places that used to be community gathering spots.¹⁷⁹

Kinross, which consumed almost 12 million cubic metres of surface water at the Morro do Ouro mine in 2015,¹⁸⁰ reports that all its sites “implement best practices related to water management, including a base level of water conservation practices.”¹⁸¹ It claims to monitor both surface and ground water, and that it has programs in place to improve water quality in Paracatu.¹⁸²

The company emphasizes that it holds up-to-date permits for water use from the state of Minas Gerais.¹⁸³ However, it is unclear whether state water permitting practices follow the National Water Resources Policy. That policy places primacy on water use for human consumption above industrial uses.

The company also reports that it goes

beyond compliance by developing site-specific management strategies based on a broader understanding of the Value of Water. Our water strategy includes engagement with stakeholders, assessment of ecosystem services, continuous improvement of operational systems, and assessment of potential risks related to drought, extreme events, climate change, and operational issues.¹⁸⁴

POLLUTION AND PUBLIC HEALTH CONCERNS

For years, residents of Paracatu have expressed concerns regarding pollution from the Morro do Ouro mine and its effects on public health.¹⁸⁵ They worry that the air, soil and water may be contaminated by dangerous levels of compounds present in the particulate matter, dust and tailings produced at the mine. The contaminants of primary concern are cyanide and arsenic, each of which is examined in detail below.

179. INCRA, 2010, pp. 9, 16.

180. Kinross, *Corporate Responsibility Report 2015*.

181. Kinross, *2013 Corporate Responsibility Report*, p. 100.

182. Kinross, 2014.

183. *Ibid.*

184. Kinross, 2017, “Our Environment.”

185. INCRA, *op. cit.*; Interviews by research team with residents in Paracatu and quilombola communities; Petition from the neighbourhood of Bairro Amoreiras II, March 18, 2011.



The Morro do Ouro mine site. © Justica Global, 2014

Cyanide

Cyanide is used in the gold extraction process at the Morro do Ouro mine. A number of cyanide compounds are highly toxic. Residents of Paracatu¹⁸⁶ and the federal public ministry¹⁸⁷ have expressed concern about exposure to cyanide in connection to mining operations. In 2014, the federal public ministry raised questions about residual cyanide in the company's tailing ponds and the risk of dam failure leading to the release of tailings and subsequent contamination of the water table.¹⁸⁸

Kinross reports that it is vigilant in protecting the environment and that it seeks ways to minimize its environmental footprint wherever it operates. The company explains that it seeks to meet and, where possible, exceed regulatory requirements in its environmental performance.¹⁸⁹

Kinross reports that the tailings in its storage facilities in Paracatu are not toxic.¹⁹⁰ The company explains that it is a signatory to the International Cyanide Management Code, a voluntary industry program for gold mining companies, and that compliance with the code "is a key part of Kinross' commitment to protect our workers, communities, and the environment in which we operate."¹⁹¹

186. INCRA, op. cit.; Interviews by research team with residents in Paracatu.

187. MPF, 2014, "MPF questiona Kinross sobre impactos da produção de ouro em Paracatu/MG."

188. Ibid.

189. Kinross Gold Corporation, 2017, "Our Environment."

190. Kinross Gold Corporation, 2015, "Myths and Facts."

191. Kinross, 2013 *Corporate Responsibility Report*, p. 116.

With regard to the integrity of its tailings dams, Kinross reports:

Following the SAMARCO tailings dam incident in late 2015, Brazil's Senate established a Temporary Commission on the National Policy for Dams Safety. The commission issued its report in June and found no issues with the Paracatu dams. Inspections were conducted by DNPM, SUPRAM, and FEAM; there were no significant findings [...].

[...] we are committed to minimizing environmental impacts and mitigating potential risks associated with tailings facilities over the life of mine through a rigorous and leading tailings management program.¹⁹²

Arsenic

Arsenic is a potent toxin and a human carcinogen. It is naturally present in relatively high concentrations, in the form of arsenopyrite, in the ore mined at Morro do Ouro.¹⁹³ Arsenic is released into the surrounding environment when rock is blasted, transported and ground, and during the gold extraction process.¹⁹⁴

Kinross reports that "almost all the arsenic embedded in the ore remains in a stable, unaltered mineral form"¹⁹⁵ during its mining process at Paracatu, and is therefore not released into the environment.¹⁹⁶ The company asserts that it consistently complies with air, water and soil quality standards at the Morro do Ouro mine.¹⁹⁷

Kinross has been fined at least once, however, for infractions relating to arsenic contamination, according to the former head of the State Foundation for the Environment (FEAM), a key environmental authority in Minas Gerais. In a 2011 interview with the research team, the then-president of FEAM acknowledged that there were problems at the Morro do Ouro mine, and that his agency had fined the company for arsenic-related infractions.¹⁹⁸

In 2010, the municipal government of Paracatu commissioned an epidemiological study of arsenic exposure and associated health risks. It contracted the Centre for Mineral Technology (CETEM), an organization linked to the federal Ministry of Science, Technology and Innovation, to undertake the study.

A final report of the study's findings was produced by CETEM in 2013.¹⁹⁹ It states that researchers found low levels of arsenic in the urine and hair of a sampling of city residents, no cases of arsenic-related skin disease and no evidence of higher-than-normal rates of mortality from the types of cancer associated with arsenic exposure. Levels of arsenic in residents' drinking water supplies were well within safe limits, and on average the levels measured in airborne particulate matter were within ranges expected for urban areas. The report states that "in general the environmental results indicated low human exposure to arsenic."²⁰⁰

Nonetheless, the study found that both children and adults in Paracatu face an unacceptable risk of carcinogenic effects due to environmental exposure to arsenic, and that children may be at risk of non-carcinogenic effects.²⁰¹ It identifies ingestion of water while swimming in local waterways and inhalation

192. Kinross, *Corporate Responsibility Report 2015*, p. 66.

193. CETEM, 2014.

194. Santos, Márcio José dos and Paulo Ricardo da Rocha Araujo, 2010.

195. Kinross Gold Corporation, 2015, "Myths and Facts."

196. Ibid.

197. Kinross Gold Corporation, 2015, "Arsenic in the Paracatu Mining Process."

198. Interview with José Cláudio Junqueira Ribeiro, 2011.

199. CETEM, 2013.

200. Ibid., p. 73.

201. The report notes that the risk assessment "uses extremely conservative approaches, following the principle of precaution" (Ibid., p. 60).



A home in the quilombola community of São Domingos. © Márcio José dos Santos, 2016

of particulates as the primary sources of exposure. This is consistent with the study's findings that levels of arsenic in the creeks of two local river sub-basins often exceeded the safe limit for human consumption and that the levels measured in airborne dust, while within expected ranges for urban areas at most stations, were above the level "recommended for human health protection."²⁰²

The CETEM report further notes that arsenic in airborne dust was highest at sites close to and downwind of the mine, and that the creeks in the two sub-basins mentioned above are within the direct influence of gold mining.²⁰³ Most of the soil samples taken from these waterways showed arsenic levels above the limit considered safe for farming and household use.²⁰⁴

In the report conclusions and recommendations, CETEM notes that "the change in the characteristics of the gold ore exploited in the last years (from oxide to sulfide) may generate impacts on the current arsenic contents."²⁰⁵ (Compared to oxide ores, sulfide ores tend to have higher concentrations of arsenic.²⁰⁶) CETEM recommends ongoing monitoring of airborne arsenic and further studies to assess quantities of arsenic in the mine's tailings settlement basins, exposure among mine workers²⁰⁷ and children, and types and frequency of cancer among youth.

A second study assessing arsenic-related risks for the population of Paracatu was commissioned by Kinross. The study, carried out by the Brazilian National Institute of Science and Technology on Minerals Resources, Water and Biodiversity (INCT-Acqua), examined some but not all of the same factors as the CETEM study.²⁰⁸ Its assessment of risks related to water did not factor in exposure through accidental water

202. CETEM, 2013, p. 72.

203. Ibid.

204. Ibid., p. 40.

205. Ibid., p. 75.

206. David M. Chambers, Ph.D., P. Geop., founder and president of the Center for Science in Public Participation, in communication with Above Ground in March 2017.

207. In communication with Above Ground in February 2017, Kinross reported that the company carries out bi-annual arsenic testing of its employees, with all results falling well within Brazilian occupational exposure guidelines.

208. INCT-Acqua, 2015.

consumption while swimming in local waterways, considering only drinking water sources, in which it found arsenic levels to be very low. It analyzed levels in airborne dust from four air-monitoring stations and found these to be within safety guidelines. Only one of the stations was located southwest and therefore downwind of the mine under the prevailing wind direction.²⁰⁹ Unlike the CETEM study, it took into account arsenic intake from food, which it found to be the largest contributor to exposure. It also examined the bioaccessibility of the arsenic present in soil and surface dust samples used for the study, finding it in both cases to be low.²¹⁰

Based on analysis of the above factors, the INCT-Aqua study concludes that “the overall risk of arsenic exposure to the general population in Paracatu is considered low.”

According to the company, the outcome of both the INCT-Aqua and CETEM studies “confirms that there is no increase in employee or community health risk from arsenic due to Kinross mining activities.”²¹¹ On its website dedicated to the topic of arsenic and mining in Paracatu, Kinross asserts that the CETEM study shows “the concentration of arsenic in Paracatu is within legislated parameters and presents no risk to the population.”²¹² Nowhere on this website, nor in its most recent corporate responsibility report, does the company mention that the study concluded, based on a precautionary approach, that exposure to environmental arsenic in Paracatu poses unacceptable health risks to both children and adults.

In response to queries about the independence of the research institutions that authored the studies, the company explains that “[a]lthough Kinross has retained CETEM in the past to undertake technical work regarding gold recoveries, this should not detract from CETEM’s independence or that of its experts.”²¹³ With respect to the INCT-Acqua study, Kinross states that “[w]hile financed by Kinross, the project’s results are independent and its authors highly respected academics.”²¹⁴

Kinross reports that it continues “extensive monitoring of dust and water quality in neighborhoods near the mine,” and that the higher levels of arsenic found in some local streams are due not to the company’s operations but to historic artisanal mining activities.²¹⁵ The company contends that its own remediation efforts have resulted in a measurable decrease in arsenic levels in two of the most heavily damaged creeks in recent years, and that “arsenic concentrations in streams downstream of streams that drain KBM mine facilities are consistently below the standard.”²¹⁶

In 2015, a local geologist carried out a study of arsenic levels in one of the river sub-basins shown by CETEM’s data to be contaminated, at the request of a farmers’ association in the rural area north of the city. It found arsenic levels above safe limits in waterways downriver of the tailings dams. Samples were taken in proximity to the dams, including from a canal that drains water from one of the mine’s tailings containment areas. The study also reports unsafe arsenic levels in water samples from six wells used for drinking water. Arsenic was also measured in the urine of 37 residents from the area and was found to exceed safe limits in the case of 70% of the people examined, according to the study report.²¹⁷

209. The location of the stations and the mine are shown on pages 4-5 of the INCT-Acqua report (2015). Only one station is southwest of the mine. The prevailing wind direction in the area is northeasterly (i.e. blowing from the northeast), from the mine towards the urban area, according to CETEM, 2013, pp. 55-56, 73. Another difference between the two studies is that most of the air filters sampled in the CETEM study captured particulate matter of all sizes, whereas the INCT-Acqua study used samples containing only those particles that are small enough to reach deep within human lungs, and therefore present the greatest health concern (See CETEM, 2013, pp. 24-25, and INCT-Acqua, 2015, pp. 8, 13.)

210. INCT-Acqua, 2015, p. 20

211. Kinross, *Corporate Responsibility Report 2015*, p. 66.

212. Kinross Gold Corporation, 2015, “Letter by Kinross’s vice-president of corporate communications, Steve Mitchell, to Die Zeit.”

213. Kinross Gold Corporation, 2015, “Cetem.”

214. Kinross Gold Corporation, 2015, “INCT-Acqua Study.”

215. Kinross representatives, in communication with Above Ground, February 2017.

216. The Rico and Rapadura creeks (Ibid.). KBM is Kinross’s Brazilian subsidiary.

217. Santos, 2015.

That such a disparate and seemingly irreconcilable range of findings and conclusions have emerged 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, urban and rural.

GAPS IN PUBLIC ENVIRONMENTAL OVERSIGHT

The need for stronger public environmental oversight was demonstrated early on in the licensing of the mine expansion project, when state authorities granted the company approval to build a new processing plant and dramatically increase production before they had assessed the impacts of the tailings facility that would be needed for disposal of the ensuing waste. Moreover, when the operating licence for the dam was finally issued, the state environmental authority agreed to a system of environmental self-monitoring by the company.²¹⁸ Emissions of contaminants at the mine are therefore measured not by government authorities, but by the company.²¹⁹

The need for more robust government control over environmental impacts of the mine is further underscored by the terms of a formal agreement made between the public ministry of Minas Gerais state and Kinross in 2011. The stated objective of this "conduct adjustment agreement" (CAA) is to address environmental impacts caused by the mine expansion.²²⁰ It was struck following two civil investigations into impacts of the mine by the public ministry.²²¹ Civil investigations are procedures by which the ministry collects information for potential use as evidence in a future lawsuit. In this case, the ministry chose not to bring a suit against Kinross and opted for an agreement instead.

SUPRAM, the main state agency responsible for ensuring corporate compliance with environmental requirements, lacked information about the agreement and wasn't involved in its development.²²² The agreement requires Kinross to carry out epidemiological and environmental studies relating to arsenic levels in the mine's area of influence. When asked in 2017 about the status of the required epidemiological studies, Kinross reported that it is awaiting selection by the state public ministry of researchers to carry out the work.²²³

In 2014, the federal public ministry initiated an investigation to assess the efficacy of the CAA in protecting the environment and public health.²²⁴ In connection with the investigation, the ministry issued a technical report that presents the findings of an expert field visit to the area impacted by the mine. The report

... state authorities granted the company approval to build a new processing plant and dramatically increase production before they had assessed the impacts of the tailings facility that would be needed for disposal of the ensuing waste.

218. MPF, 2014, Recurso de Apelação ACP 2009.38.06.001628-2.

219. Interview by research team with the Minas Gerais Public Ministry, Patos de Minas, July 2014; MPF, 2014, Nota Técnica MPF/PR-MG/SSPER/GEO -14/2014.

220. MPE, 2011.

221. Inquéritos civis 0470.06.000019-2 and 0470.10.000017-8 (MPE, 2011).

222. "As this agency was not included in the cited *Termo de Compromisso* as one of those involved or as an intervenor, this agency does not have any information about the document." (Superintendência Regional de Regularização Ambiental, 2013.)

223. Information provided by Kinross representatives to Above Ground in February 2017.

224. The investigation is ongoing. MPF, 2014, Procedimento Preparatório 1.22.021.000007/2014-74.

draws attention, once again, to the possibility of arsenic contamination of the air, soil and water at the mine site, tailing dams and surrounding areas.²²⁵ It states:

Despite having environmental licences in place, the gold mining activity performed by Kinross Brasil Mineração S/A, in Paracatu / Minas Gerais, has had an enormous environmental impact and will have permanent consequences for the environment and the local population. The mining company has assumed responsibility for monitoring its own impacts, to the detriment of a system of regulatory control by state agencies capable of ensuring that company activities do not cause irreparable harm.²²⁶

The expert concludes:

Considering the size and operational characteristics of the mine, it's essential that the public sector establish systems to monitor environmental and epidemiological risks [...] to ensure that the local population is not at risk of suffering environmental disasters, such as arsenic pollution of the air and water.²²⁷

The expert recommends that regular measurements be taken of arsenic levels around the mine and in the area directly impacted by mining operations, emphasizing that such monitoring is the only way "to show whether or not people are contaminated by arsenic due to the activities of the mining company."²²⁸

Summarizing its serious concerns regarding weak regulatory control by state agencies in relation to the mine, the federal public ministry has written:

All this mess involving omissions and irregularities exposes the deficiencies in the work of the state environmental agency — in the licensing approval process — in all its phases, and in overseeing compliance with licence requirements, most notably the self-monitoring program agreed to in Environmental Operating Licence 028-2011.²²⁹

The federal public ministry has also raised the issue of lapses in environmental oversight relating to silver extraction at the mine. In 2014 the ministry initiated a lawsuit against Kinross for "damage to public property and state assets"²³⁰ as a result of the unauthorized extraction of almost 42 tonnes of silver at the Morro do Ouro mine. The lawsuit claims that Kinross and the previous operator, Rio Tinto subsidiary RPM, extracted over \$24 million²³¹ worth of silver over a period of 22 years without the requisite licence. According to the public ministry, RPM applied to the National Department of Mineral Production for authorization to exploit the silver ore in the 1980s, but the agency failed to examine the application. It did not grant authorization until 2010, at which point, according to the lawsuit, Kinross still lacked the environmental licence required for the activity. The lawsuit demands that Kinross compensate the Brazilian state for the value of silver it extracted.²³²

According to media reports, Kinross released a statement²³³ in response to the lawsuit asserting that it has reported on the presence of silver as a by-product of gold production since it began operating the mine, and that it holds a licence for the mine that includes the production of gold and silver by-product.²³⁴ The suit is ongoing.

225. MPF, 2014, Nota Técnica MPF/PR-MG/SSPER/GEO -14/2014.

226. *Ibid.*, pp. 14/15.

227. *Ibid.*, p. 15.

228. *Ibid.*, p. 15.

229. MPF, 2014, Recurso de Apelação ACP 2009.38.06.001628-2, p. 11.

230. MPF, 2014, Ação Civil Pública 0001123-72.2014.4.01.3817, p. 2.

231. Over R\$57 million Brazilian Real.

232. MPF, *op. cit.*

233. The authors of this report were unable to locate the statement.

234. Estado de Minas, 2014.

IV. GOVERNMENT FAILURE TO PROTECT

The harms suffered by quilombola communities and residents in Paracatu in relation to the operation and expansion of the Morro do Ouro mine constitute violations of internationally recognized human rights. These harms include land appropriation and forced resettlement, loss of cultural heritage, environmental degradation and pollution, and intimidation and threats of violence against people defending their rights.

Under international law, states are required to protect against and provide remedy for such forms of abuse, including human rights violations committed by non-state actors such as companies.²³⁵ The United Nations explains that

[t]his requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.²³⁶

Furthermore:

[a]s part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy.²³⁷

In the case of Paracatu, neither the Brazilian nor Canadian government has fulfilled this legal duty to date.

THE CANADIAN GOVERNMENT

The Morro do Ouro mine calls attention to the lack of a legal framework in Canada to ensure that Canadian companies respect human rights overseas — even in cases where their projects are supported, financially and politically, by the Canadian state.

The Canadian government has provided Kinross with both forms of support for its operations in Brazil, as outlined below.

Export Development Canada financing

Kinross has received loans totalling as much as \$850 million from Export Development Canada (EDC), Canada's export credit agency, since acquiring the Morro do Ouro mine:

- » In August 2006, EDC provided Kinross with a “foreign direct investment” loan valued at between \$50 and \$100 million.²³⁸ The loan was part of a larger financing package to support the expansion program in Paracatu.²³⁹

235. See the United Nations Office of the High Commissioner for Human Rights, 2011.

236. *Ibid.*, p. 3.

237. *Ibid.*, p. 27.

238. Export Development Canada, n.d., “Individual Transaction Information.”

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

- » The following year, EDC provided Kinross with an additional \$50 to \$100 million in direct investment financing for its operations in Brazil.²⁴⁰
- » In August 2012, EDC approved \$50 to \$100 million in financing for Kinross through a “general corporate purposes” loan.²⁴¹
- » In 2014 and 2015, EDC provided the company with two additional loans, each worth \$50 to \$100 million, for general corporate purposes.²⁴²
- » In 2016, the company received an additional \$100 to \$250 million in corporate financing from EDC.²⁴³
- » In 2017, the company received a further \$50 to \$100 million in EDC financing for general corporate purposes.²⁴⁴

EDC’s policies require that the agency assess the environmental and social risks associated with the companies and projects it finances. As discussed in further detail in Appendix C of this report, EDC provides very little public information about these reviews. It is unclear how the Crown corporation assesses the risks it identifies and how it reaches a decision on whether to support a project or company despite these risks.

EDC’s repeated support to Kinross during and after its expansion program at Morro do Ouro reveals the inadequacy of the agency’s policies and review process.

The three communities affected by Kinross’s expansion received formal recognition as quilombola from the Brazilian government two years before EDC provided a loan for the expansion project in 2006. Also prior to the loan, the federal public ministry in Brazil had documented serious environmental damage caused to quilombola territory by the mine.

As early as 2007, the federal public ministry raised concerns with government authorities that their failure to recognize and protect the rights of local quilombola communities could invalidate the licence granted for Kinross’s mine expansion. That same year, EDC granted Kinross a second multi-million-dollar loan for its operations in Brazil.

Export Development Canada

Export Development Canada (EDC) is Canada’s export credit agency, a public entity that provides corporations with government-backed loans, guarantees, credits and insurance to support exports and investment. EDC is a Crown corporation, wholly owned by the Government of Canada. In 2015, EDC provided \$113 billion in support to the private sector.²⁴⁵ The extractive industries were by far the largest beneficiary, receiving over \$31 billion in financing and insurance.²⁴⁶ Brazil was the fourth most important market for EDC, with companies operating in Brazil receiving \$5.2 billion in support in 2015.²⁴⁷

240. Export Development Canada, op. cit.; Export Development Canada, 2008.

241. Export Development Canada, n.d., “Individual Transaction Information.”

242. Ibid.

243. Ibid.

244. Ibid.

245. Export Development Canada, 2015.

246. Ibid.

247. Ibid.

By the time EDC provided Kinross with a general corporate loan in 2012, public attention had been repeatedly called to the serious environmental and human rights problems associated with the company's operations at Morro do Ouro. The extent of the three quilombola communities' territories and their high degree of overlap with the company's area of operation had been clearly laid out in reports from Brazil's federal agency responsible for quilombola land titling. These reports also documented a series of manipulations and abuses suffered by the communities in relation to the mine, as described above in Section II.

Moreover, prior to 2012, the public ministries of Brazil and the state of Minas Gerais initiated multiple lawsuits to protect the land rights of the quilombola communities from the activities of the company. Quilombola community members had spoken publicly about the enormous pressure they felt to abandon their territories. They complained about environmental contamination and the destruction of natural resources. Some expressed fear for their personal security. Residents in Paracatu had openly complained of health impacts, property damage and environmental contamination.

None of these serious grievances had been addressed when EDC provided Kinross with four additional loans between 2014 and 2017. This presents a clear instance in which the Canadian government's legislative and policy framework failed to prevent human rights abuse by a company financed by a government agency, as required under international law.²⁴⁸

Canada Pension Plan investments

The Canada Pension Plan — a public pension fund to which most Canadians are legally obligated to contribute — holds an equity interest worth \$60 million in Kinross Gold.²⁴⁹

Political support

In 2008, as INCRA was preparing documentation for the collective land titling process in the community of Machadinho, it received a request for a meeting with the president of Kinross and a representative of the Canadian embassy in Brazil. At the meeting, the company reportedly expressed impatience with the speed of the titling process and emphasized that a lack of clarity regarding land ownership placed its investment at risk. The company pushed INCRA for a rapid resolution to the question.²⁵⁰

By the time EDC provided Kinross with a general corporate loan in 2012, public attention had been repeatedly called to the serious environmental and human rights problems associated with the company's operations at Morro do Ouro.

248. For an analysis of the relationship between states' international human rights obligations and the operations of export credit agencies, see Keenan, 2008.

249. As of March 31, 2016 (Canadian Pension Plan Investment Board, 2016).

250. Interview by research team with officials at INCRA, April 26, 2013.



The Morro do Ouro mine site. © Justiça Global, 2014

THE BRAZILIAN GOVERNMENT

The Morro do Ouro mine is a powerful illustration of how regulatory and enforcement gaps in Brazil undermine collective rights, exacerbating social conflict.

Top-down planning that prioritizes macro-economic considerations

The displacement of traditional communities near Morro do Ouro and destruction of their territories was facilitated by top-down, centralized public decision-making that gave primacy to macro-economic objectives over environmental, social and local economic concerns. State discourse regarding regional development is at odds with the perception of many locals in Paracatu who report negative impacts of the mine on their living conditions, including the loss of important sources of livelihood.

In this respect, the case fits within a wider pattern of centralized macro-planning observed throughout Minas Gerais, where important planning steps regarding projects in sectors viewed as economically strategic, such as mining and energy, are concluded well before the licensing process begins. This pattern has been documented by researchers who conducted a detailed analysis of the licensing process in Minas Gerais and found that

[f]ederal and state programs define the strategic role of such projects within general planning directions and determine what resources will be made available for their implementation. What is evident is that society's fate is decided by a few planners who hold key positions in politics, administration and the private sector, pre-empting broader discussion regarding these projects with the population in the area where they will be carried out.²⁵¹

Minimal oversight and failure to enforce legal requirements

As seen in the case of Morro do Ouro, the state environmental licensing process repeatedly produces results that favour the interests of the mining industry.²⁵² Companies are permitted to deviate from environmental norms by, for example, failing to comply with licence conditions. Corporate self-monitoring programs have replaced government oversight.

251. Zhouri, 2005.

252. See Moreira Santos, 2014.

A recent analysis from the UN Working Group on Business and Human Rights suggests that this trend of minimal public oversight and failure to enforce regulations is a problem throughout Brazil. The working group described a common scenario in which “the government grants a licence for a large infrastructure project and then provides little oversight or regulation of the project.”²⁵³

Legal provisions regarding consultation with quilombola communities must be enforced, and the quilombola land titling process must be strengthened and respected. Territorial protections are meaningless if land and resources are destroyed while the land claim process is underway. Reforming the quilombola titling process must be part of a broader effort to address the systemic, institutionalized racism that impedes the application of policies designed to protect the Afro-Brazilian population and other traditional cultures in Brazil.

Disconnect between federal and state responsibilities

The assignation of absolute regulatory authority to either federal or state authorities for discrete subject areas is another factor that contributed to the violation of rights at Morro do Ouro. Decision-making at one level of government often affects important interests that are the purview of another level of government. Such is the case with mining activity that encroaches on the traditional territory of quilombola and indigenous communities. Mechanisms are required to ensure that regulatory processes at the state level do not lead to the violation of rights that the federal government is responsible for protecting.

Use of negotiated agreements to sidestep legal obligations

Governments in Brazil act inconsistently when dealing with social conflict related to large-scale development projects, skirting uniform regulatory measures in favour of negotiated settlements. These mechanisms may serve to temporarily dissipate tension but do not necessarily address outstanding legal obligations and rights violations. Moreover, they undermine the regulatory apparatus and diminish the role of the state.

In the Morro do Ouro case, this process was seen in the state public ministry's use of a “conduct adjustment agreement” with Kinross to address concerns over pollution and public health, and in the federal government's decision to suspend the quilombola titling process and move the dispute over quilombola land rights to the Chamber of Conciliation and Arbitration.

The Brazilian judiciary's failure to uphold human rights

Despite sustained efforts in the Morro do Ouro case, the state and federal public ministries have been unsuccessful in addressing the deficiencies described above via the judiciary. Each lower court ruling that protected quilombola rights was overturned by a higher court, in one case on the basis of explicit economic considerations. This outcome reinforces the perception that political and economic interference affects the impartiality of the Brazilian justice system.²⁵⁴ According to the non-governmental organization Freedom House, the Brazilian judiciary, “though largely independent, is overburdened and plagued by corruption. The courts are often subject to intimidation and other external influences, especially in rural areas, and public complaints over inefficiency are common.”²⁵⁵

253. United Nations Working Group on Business and Human Rights, 2015.

254. This perception is widespread, as documented by multiple sources. See World Economic Forum, 2015, and Zimmerman, 2008.

255. Freedom House, 2015.

V. RECOMMENDATIONS

CANADA

As recommended by UN treaty bodies, the Government of Canada must

- » strengthen its legislation governing the overseas activities of corporations under its jurisdiction, including by requiring such companies to conduct human rights impact assessments prior to making investment decisions;
- » establish an independent mechanism with powers to investigate complaints of human rights abuse by such corporations in their activities abroad;
- » develop a legal framework that affords legal remedies to people who have been victims of such abuse; and
- » ensure that trade and investment agreements negotiated by Canada recognize the primacy of Canada's international human rights obligations over investors' interests.²⁵⁶

In addition, we recommend that the Canadian government

- » prohibit public institutions that provide support to the private sector, such as Export Development Canada and Canadian embassies, from supporting companies whose operations are associated with human rights abuse;
- » adopt legal mechanisms that establish an explicit duty of care on the part of such institutions towards the people and communities affected by their clients' operations;
- » direct such institutions to adopt transparent policies requiring that effective due diligence processes be carried out to identify, prevent and mitigate human rights abuse, and to disclose detailed information regarding the application of these policies; and
- » refrain from providing further support to Kinross until the company fulfills its responsibility to respect human rights and provides meaningful remedy to those whose rights have been violated.

BRAZIL

We recommend the immediate suspension of Kinross's operating licences and its activity in Paracatu until the following measures are undertaken:

- » The quilombola land titling process must be expeditiously concluded. Quilombola communities must be given the opportunity to freely choose between fair financial compensation or replacement land for territory that is no longer recoverable.
- » Credible, transparent epidemiological studies assessing public health risks connected to the mine must be carried out under government administration. Studies should include on-going monitoring activity and should examine both mine workers and residents in *all* areas affected by the mine. Those exposed to unsafe levels of contamination should receive treatment and be relocated.

256. The recommendations listed here have been made by the United Nations Economic and Social Council, 2016, and the United Nations Human Rights Committee, 2015.

- » The state and federal public ministries should evaluate local living and housing conditions in neighbourhoods close to the mine. Where proximity to the mine creates unsafe or unhealthy conditions, local residents should be compensated by the company for the costs of remedial measures or relocation. Local residents whose homes and workplaces are unsafe due to their proximity to the mine must be relocated. Fair and just compensation for lost assets must be provided through a transparent process.
- » State environmental authorities must be given the resources necessary to establish an effective system for environmental oversight of mine operations. Information regarding the impact of the Morro do Ouro mine on air and water quality must be publicly disseminated in a timely manner.
- » Kinross's water permits must be re-evaluated, taking into account the current state of local water resources, competing uses and water use priorities as established under the National Water Resource Policy (PNRH).
- » Authorities must legalize and regulate artisanal mining activity in Paracatu, with a regulatory framework that ensures safe working conditions and prohibits environmentally damaging practices such as mercury use.

In addition, we recommend the following:

- » Clear rules must be established to ensure public access to information regarding the environmental licensing process in Brazil. The public should be informed of any conditions that are imposed on a company as part of the licensing process, and the company's compliance with those conditions.
- » Procedures must be established to ensure greater coordination between the government authorities responsible for quilombola land titling and those responsible for granting mining concessions and environmental licences. Existing quilombola titling processes must be given precedence over mining concessions and licences.

APPENDIX A

Brazil's quilombola land titling process²⁵⁷

Brazil is a federal republic comprising 26 states. The federal government has jurisdiction over quilombola communities and their lands. Consequently, the quilombola land titling process is governed by federal legislation.²⁵⁸ This legislation, which is consistent with International Labour Organization (ILO) Convention 169, determines that communities are to be recognized as quilombola based on their self-identification as such. To formalize recognition of their status, communities must request a certificate of self-recognition from the Palmares Cultural Foundation, which is linked to the federal Department of Culture.

Once they have this certificate, communities can initiate the land titling process with the federal Institute for Colonization and Agrarian Reform (INCRA). INCRA produces a Technical Identification and Delimitation Report (RTID) regarding each quilombola territory. The RTID includes an anthropological report, a land survey and description, a registry of inhabitants, information regarding any overlap with other land uses, and an opinion regarding the request for title.

The community in question has the right to participate in the development of the RTID. In addition, INCRA must notify other government agencies of the titling process so that they may present relevant information.

Once finalized, the RTID is transferred to INCRA's Regional Decision Committee for approval. If approved, the report is published and any persons owning or occupying areas within the territory are notified. Government agencies are given 30 days to register objections and third parties have 90 days to contest the territorial claim.

If there is disagreement between INCRA and another government department about the granting of title, the case is referred to the federal Attorney General. In 2007, the Attorney General established the Federal Chamber of Conciliation and Arbitration (CCAFA) to facilitate the resolution of disputes between government agencies. Today, several proceedings involving quilombola communities are before the CCAFA.

If the quilombola territory includes private land, INCRA must expropriate that land to ensure that the community has clear title to its territory.

The process comes to an end when the president of INCRA publishes an order setting out the limits of the community's land. The land deed is then granted by INCRA to the association representing the community or communities that occupy the land in question. The title is collective and prohibits the land from being sold, let, seized or divided.

257. This appendix describes the land claim and titling process that was in place up until 2016, when the Brazilian government transferred responsibility for the titling of quilombola territory to the executive branch of the federal government.

258. Decreto 4887/2003.

APPENDIX B

Concession, licensing and environmental regulation of mining activity in Brazil

Mineral resources in Brazil are controlled by the federal government, which holds sub-surface land rights. Mining concessions are granted by the National Department of Mineral Production (DNPM), an agency of the Ministry of Mines and Energy. Private landowners hold surface land rights. If a landowner does not consent to mining activity, the concession holder can initiate legal proceedings to acquire a mining easement.

Under article 231 of the Brazilian Constitution, mining activity cannot take place on indigenous land without the authorization of National Congress, following hearings with affected communities. Under ILO Convention 169, consultation is also required when other traditional communities, such as quilombola, are affected by resource development in their territories.

Environmental protection is the shared responsibility of federal, state and municipal governments in Brazil. Federal legislation mandates the use of environmental licences to control activities that exploit natural resources, or that have the potential to generate pollution or otherwise degrade the environment.²⁵⁹

The environmental licensing process is complex, involving several phases. A project proponent must comply with all legal conditions imposed in one phase of the process before advancing to subsequent stages. Brazilian law provides for public participation in all phases of the licensing process.

The licensing process includes the following steps:

- » The project proponent and environmental authority develop terms of reference for the environmental impact assessments.
- » The project proponent prepares the assessments. They include an environmental impact assessment (EIA) and an environmental impact report (RIMA). The latter presents the conclusions of the former in an accessible format.
- » The environmental agency releases its opinion on the EIA-RIMA, which is disclosed in public hearings.
- » An initial licence is granted. This licence governs the initial stages of the project including its siting and conceptualization. The licence addresses the project's environmental feasibility and establishes the basic requirements and conditions that will guide project development.
- » An installation licence is granted. This licence governs project set-up and requires that the proponent comply with associated plans or programs approved by the environmental authority. In the mining sector, this phase involves mine construction, the installation of processing plants and the setting up of required environmental controls.
- » An operating licence is granted, authorizing the mineral extraction and processing activity in question, once the environmental authority verifies compliance with the requirements set out in previous licences.

259. Law of National Environmental Policy (n° 6938/81).

The federal government is responsible for licensing activities that generate an impact on more than one state, on border areas, on lands belonging to the federal government and on indigenous lands, and for activities that involve the use of nuclear technology. The Brazilian Institute of Environment and Renewable Natural Resources (IBAMA) administers the licensing process.

In most other circumstances, the licensing process is carried out by state governments.²⁶⁰ In the state of Minas Gerais, the State Environmental System (Sisema) is decentralized in nine regional units, called Regional Superintendencies for Environmental Regulation (SUPRAM). The superintendencies are responsible for state activity involving environmental protection and water management. The State Council for Environmental Policy (COPAM) administers the environmental licensing process, with technical support from the State Foundation for the Environment (FEAM). FEAM's mandate is to prevent and remedy environmental degradation caused by mining, industry and infrastructure projects.

In the state of Minas Gerais, water permits for industrial activity are provided by the Institute for Water Management (IGAM), following approval by the State Council for Water Resources.

As with environmental licensing, environmental enforcement is a responsibility that is shared by all levels of government. Government agencies are mandated to monitor corporate compliance with legal requirements and to apply relevant penalties and sanctions in cases of non-compliance.

260. Complementary Law 140/11 sets out the rules for environmental licensing.

APPENDIX C

Export Development Canada's environmental and social review policies

With some exceptions,²⁶¹ Export Development Canada's (EDC's) direct investment financing — financing provided for specific projects — is subject to review under EDC's Environmental and Social Review Directive.²⁶² The directive requires that EDC categorize projects according to the severity of their anticipated impacts. Depending on project categorization, EDC assesses projects by “benchmarking” them against international standards. It then uses its assessments to decide whether to support projects.

EDC provides virtually no public information about this process. It publishes lists of projects it has opted to support despite assessing them to carry significant or notable risk (“Category A” and “Category B” projects), listing for each project the applicable environmental standards and type of information reviewed. The agency also posts project review summaries for those projects in the highest-risk category financed since late 2010.²⁶³ These summaries provide a cursory description of risks associated with the project and mitigation measures planned by the company. Yet it is unclear how EDC makes decisions about project categorization, how it assesses social, environmental and human rights risks, and how it determines whether the mitigation measures planned are sufficient.

EDC discloses no information about whether it requires modifications or mitigation measures of clients, and if so, how it assesses compliance. Nor does the agency provide public information about whether and how it monitors clients, post-approval, or whether it applies sanctions in cases of non-compliance.

EDC reports that it takes into account a company's overall environmental and social track record in its decisions on general corporate loans,²⁶⁴ which are not tied to specific projects:

Our review of corporate loans focuses on the ability of the company to manage its environmental and social risks. These reviews take into account several factors such as the industry sector being supported, the countries in which the borrower operates, the borrower's environmental and social track record (including compliance with applicable regulations) and the borrower's corporate capacity to manage the environmental and social risks of its operations.²⁶⁵

EDC does not disclose any details about the criteria or methodology it uses to assess these factors. Nor does it disclose its reviews of potential clients. Human rights risks are not necessarily included in the assessment; EDC reports that

261. The directive applies to transactions that have a repayment term or coverage period of two years or more and (A) a value of more than 10 million special drawing rights (SDR) and that is related to a project; or (B) a value of less than SDR 10 million and that is related to a project that is located in or near a sensitive area. Projects that don't meet these criteria are not subject to the directive.

262. Export Development Canada, n.d., Environmental and Social Review Directive.

263. Export Development Canada, 2010.

264. General corporate loans are “typically used to repay debt or for capital and operating expenses” (Export Development Canada, 2013, p. 16.). They are used at the discretion of the client, within the commercial terms and conditions of the credit facility, in the jurisdiction(s) of their choosing (Yolanda Banks, Senior Corporate Social Responsibility Advisor, EDC in personal communication to the Halifax Initiative, September 14, 2010).

265. Export Development Canada, 2013, p. 16.

[i]n 2013, we improved our procedures for human rights risk assessments in [...] lines of business [...] such as insurance, bonding and general corporate loans. This involved bringing greater clarity to our business teams on what factors would trigger the need for a human rights risk assessment for a potential deal.²⁶⁶

Again, EDC provides no public information about what those factors are, the content or process involved in its human rights risk assessments, the potential deals that have been subject to such an assessment, or the results of the assessments.

266. Ibid., p. 14.

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