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Guatemalan government discriminates against Xinka, puts Escobal mine consultation at risk

One year after the Constitutional Court ordered the Ministry of Energy and Mines to consult with the Xinka, over a thousand people mobilize to denounce illegalities and discrimination in the process.

SUMMARY

- The consultation process led by the Ministry of Energy and Mines (MEM) currently relies on a decision over the company's area of influence that was made before the consultation had officially begun, putting the legality of the current process in question.
- MEM continues exclusionary and discriminatory practices that first led to the Constitutional Court's suspension of the Escobal project, including failing to respect the rights of the Xinka to determine how they will be represented in the process and holding meetings without their participation.
- The Supreme Court has failed to respond to repeat complaints the Xinka Parliament has filed since November 2018 about lack of due process, Indigenous participation and discrimination.
- Complaints also include accusations of influence-peddling against the government, given that the company announced advances in the process before the Xinka Parliament was notified it had begun.
- Concurrently, the Xinka Parliament has faced a sharp increase in threats against its leadership and members of the resistance, undermining their security and the 'free' nature of the process.
- In August 2019, the Xinka Parliament appealed directly to the Constitutional Court due to the Supreme Court's lack of response to their complaints.
- On September 3rd, 2019, the first anniversary of the Constitutional Court decision, over a thousand people marched in Guatemala City to demand that the high court defend Xinka people's rights.
- Continuing the consultation without due process or full respect and inclusion of the Xinka and their representative organization jeopardizes its legality and legitimacy.
- Unless the process is reset to stage one – review of the mine's area of influence – with robust inclusion of and respect for the Xinka people and the Xinka Parliament, it is at risk of losing all social support.

BACKGROUND

On September 3rd, 2018, Guatemala's Constitution Court upheld a lower court decision and ordered the Escobal mine to remain closed while the Ministry of Energy and Mines (MEM) carries out a consultation process with Xinka Indigenous people in the region. Even before this, the mine had been effectively suspended since June 2017 due to the direct action of communities, reinforced a month later in July 2017 by a Supreme Court order citing discrimination and lack of consultation with the Xinka. The Constitutional

Court decision set out a four-stage consultation: 1) definition of the area of influence of the project, 2) a pre-consultation phase to determine the process, 3) the consultation itself, and 4) the presentation of consultation results to the Guatemalan Supreme Court. The sentence states that the Guatemalan State should exhaust all opportunities to include the Xinka Parliament in the consultation process, following measures set out in the International Labor Organization Convention 169 (ILO 169) and the UN Declaration on the Rights of Indigenous People. It calls for a holistic interpretation of the sentence in its application, emphasizing that for the consultation to be effective, it must include legitimate representatives from affected communities and the people and/or organizations that they themselves designate as such. The Constitutional Court decision further states that the Supreme Court is responsible for ensuring the process is carried out in strict accordance with the sentence.

IRREGULARITIES IN THE CONSULTATION PROCESS

The Xinka Parliament - the legitimate authority of the Xinka Indigenous people representing more than 500,000 people in the region surrounding the mine - has filed numerous complaints with the Supreme Court denouncing procedural violations in the consultation process. In response, the Court called on MEM and the Ministry of the Environment and Natural Resources (MARN) to report on their activities, but fell short of ordering the ministries to correct procedural violations, guarantee Xinka rights and uphold international standards.

Xinka authorities also submitted multiple requests to MEM and MARN to correct procedural errors in the first stage of the consultation and to include them in the process. The first of such requests, filed on October 23rd, 2018, asked MARN to grant the Xinka participation in the determination of the area of influence, based on ILO 169 article 7.3 which states that, “Governments shall ensure that, whenever appropriate, studies are carried out, in co-operation with the peoples concerned, to assess the social, spiritual, cultural and environmental impact on them of planned development activities. The results of these studies shall be considered as fundamental criteria for the implementation of these activities.”¹ To date, MARN has not responded to this request.

On November 6th, 2018, Tahoe Resources reported that the first stage of the consultation process, to define the area of influence, was “well advanced” and that “[t]he relevant entities have agreed on the area of influence, which is the same as the original EIS [Environmental Impact Statement] boundary. The proposed boundary has been submitted to MARN for their approval, which is expected soon.”² On November 12th, 2018, MARN issued the resolution determining the new area of influence to be exactly the same as the original parameters, notifying the Xinka Parliament of this decision on November 14th. That same day, MEM tweeted that it was beginning the second stage of the four-stage process.³

On November 21st, 2018, the Supreme Court confirmed that the enforcement order for the entire consultation process had not yet been issued, such that not even stage one had begun.⁴ This resolution clearly indicates that all actions to review and determine the area of influence were carried out before the enforcement order was issued on November 24th, 2018 and were thus illegal.

¹ https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169#A7

² SEDAR, Tahoe Resources, News Release: November 6, 2018, Tahoe Reports Q3 2018 Results; ONTRACK TO MEET FULL-YEAR GUIDANCE, Expansion Projects Near Completion.

³ <https://earthworks.org/blog/pan-american-silver-poised-to-buy-huge-trouble-with-acquisition-of-escobal-mine/>

⁴ https://earthworks.org/cms/assets/uploads/2019/08/CSJ-Resolution-on-Start-of-Consultation_Nov2018.pdf

Upon notification of MARN's November 12th, 2018 resolution, the Xinka Parliament immediately appealed to the Supreme Court and MARN,⁵ and have since filed subsequent requests. In their submissions, the Xinka Parliament argue that the November 2018 resolution must be revoked and stage one of the consultation process repeated given procedural illegalities; the exclusion of Xinka; the failure to provide legal, technical or scientific evidence for MARN's decision; as well as the inadequacy of the Environmental Impact Study used to determine the area of influence with regard to cultural and spiritual impacts in particular, to which it only dedicates half a page.

The Supreme Court's failure to address these fundamental issues, along with MEM's continued reliance on MARN's November 2018 resolution issued prior to the enforcement order, means the consultation process is on unstable legal footing and at risk of losing all social legitimacy.

DESPITE IRREGULARITIES AND WITHOUT XINKA PARTICIPATION, MEM PUSHES AHEAD

Despite the illegality of MARN's November 2018 resolution concerning the area of influence, MEM has proceeded with the consultation process, including to demand in January 2019 that the Xinka Parliament name two representatives and two alternates to participate in the pre-consultation phase. In February 2019, more than 500 Xinka people and members of the resistance from Jutiapa, Jalapa, and Santa Rosa marched in Guatemala City to call on the Supreme Court to resolve their November 2018 complaint over MEM and MARN's violation of due process and restrictions on Xinka participation. They also filed an additional complaint over MEM's continuation of the process while the area of influence remains in dispute, delivering paperwork to MEM requesting that they respect the Xinka's right to determine their own representatives according to traditional decision-making practices and customs.⁶

The Xinka Parliament has proactively engaged ministry officials with support from Guatemalan Congressman, Leocadio Juracán, who convened two congressional hearings about the consultation process. During the hearings, MEM and MARN were asked to report on what they had done to implement the Constitutional Court order and to respond to Xinka complaints.

During the first hearing held March 21, 2019, representatives from MEM and MARN demonstrated their ignorance regarding the specifics of the Court's decision, particularly related to Indigenous participation and international standards, and were unable to adequately report on any advancements.

During the second hearing held on May 22nd, 2019, the Vice-Minister of MARN, Carlos Walberto Ramos Salguero, acting on behalf of the Minister, testified under oath that MARN committed procedural errors, did not involve the Xinka in the process to determine the area of influence and failed to carry out an evaluation of the cultural, spiritual and environmental impacts of the Escobal mine on the Xinka. MARN representatives also expressed a lack of understanding of the consultation process according to ILO 169, specifically article 7.3 regarding Indigenous participation in studies to determine social, spiritual, cultural and environmental impacts. During this hearing, MARN agreed to review and revoke its resolutions on the area of influence and committed to working with the Xinka Parliament to carry out an adequate evaluation

⁵ <https://www.prensalibre.com/economia/caso-mina-san-rafael-pueblo-xinca-denuncia-que-tres-entidades-desobedecen-sentencia-de-la-cc/>

⁶ <https://earthworks.org/blog/xinka-communities-mobilize-to-denounce-non-compliance-with-court-ordered-consultation-over-escobal-mine/>

of the above-mentioned impacts from the Escobal mine on Xinka.⁷ However, MARN later reversed its position, notifying the Xinka Parliament on August 7th, 2019, that it would not alter the November 2018 decision on the area of influence and would not work with the Xinka to ensure their adequate participation and a holistic evaluation of the impacts of the project.⁸

The next day, MEM published a tweet complete with photos, stating that the first meeting of the second pre-consultation phase of the process was underway.⁹ While the tweet was deleted shortly thereafter, it is a further indication that MEM persists with the exclusionary and discriminatory practices that resulted in the Court's suspension of the Escobal project in the first place.

As a result, on August 8th, 2019, the Xinka Parliament lodged criminal complaints with the Attorney General's office against MEM and MARN. The complaint against the environment ministry accuses them of failing to respect due process, perjury and influence peddling in favor of Pan American Silver's Guatemala subsidiary, Minera San Rafael.¹⁰ The complaint against Mines Minister, Luis Alfonso Chang Navarro, accuses him of discrimination, perjury, failure to perform duties and influence peddling. The accusation of perjury against MEM responds to the Minister's statement that his office had not communicated with the Xinka Parliament regarding the pre-consultation despite the existence of four separate written communications from MEM since January 2019 calling on the Parliament to name two representatives and two alternates.¹¹ In the case of both MEM and MARN, influence peddling also refers to the fact that Tahoe reported on MARN's November 2018 resolution on the area of influence even before the Xinka Parliament was notified and before the consultation process had commenced.

The following day, on August 9th, 2019, MEM again ordered the Xinka Parliament to name two representatives and two alternates to participate in the pre-consultation, to which Xinka representatives responded that they could not do so out of respect for their traditional decision-making practices and customs.

While the Supreme Court delays fully resolving Xinka complaints and the ministries barrel ahead with a discriminatory process that defies the Constitutional Court and international law, Xinka leaders are also facing escalating threats, defamation and attempts at criminalization,¹² particularly since November 2018 when the Parliament began filing complaints over the process. In July 2019, the Inter-American Commission on Human Rights granted precautionary measures to Quelvin Jiménez, the Xinka Parliament's attorney, as a result of threats against him from pro-mining actors.¹³ This sharp decline in security for community leaders undermines the 'free' nature of the consultation and further puts the process at risk.

XINKA PARLIAMENT APPEALS TO THE CONSTITUTIONAL COURT

Given the inaction of the Supreme Court to resolve Xinka complaints and the brazenness of MEM and MARN to defy due process and fail to respect Indigenous peoples' rights, the Xinka Parliament also appealed to the Constitutional Court on August 8th, 2019. In their appeal, the Xinka Parliament denounced

⁷ https://earthworks.org/cms/assets/uploads/2019/09/Xinka-complaint-MARN_MP-Aug.08.2019.pdf

⁸ https://earthworks.org/cms/assets/uploads/2019/09/MARN-Notification-on-Aol_Aug.07.2019.pdf

⁹ https://www.facebook.com/search/top/?q=parlamento%20del%20pueblo%20xinka&epa=SEARCH_BOX

¹⁰ https://earthworks.org/cms/assets/uploads/2019/09/Xinka-complaint-MARN_MP-Aug.08.2019.pdf

¹¹ https://earthworks.org/cms/assets/uploads/2019/08/Complaint-Minister MEM_May2019CongressionalHearing.pdf

¹² https://issuu.com/protectioninternationalmeso/docs/informe_de_patrones_de_violencia_a

¹³ <https://rfkhumanrights.org/news/the-inter-american-commission-on-human-rights-iachr-grants-precautionary-measures-for-xinka-parliaments-lawyer-quelvin-jimenez-villalta>

MEM and MARN's violations of the Constitutional Court sentence and requested intervention to order the Supreme Court to ensure due process and protection of Xinka rights.¹⁴

Nonetheless, despite protests and judicial action, MEM held a second pre-consultation meeting without Xinka representatives on August 29th. Local elected representatives of community development committees from San Rafael Las Flores, where the mine is located, were present and confirmed that Pan American Silver also participated in the meetings on August 8th and August 29th.

THOUSAND-STRONG MARCH MARKS ONE YEAR ANNIVERSARY OF CONSTITUTIONAL COURT ORDER

On September 3rd, Xinka and other residents from communities in Santa Rosa, Jalapa and Jutiapa traveled to Guatemala City to demonstrate their dissatisfaction with the process and to present additional complaints to MEM, MARN, and the Supreme Court regarding due process, participation and discrimination. In their press release, the Xinka Parliament explains how the ministries' actions serve the interests of the mining company and violate the order and spirit of the Constitutional Court decision.¹⁵

During the march, Xinka people and the broader resistance movement emphasized that delays in the process are the state's responsibility, not communities' with whom the state is charged with consulting. They also reaffirmed their commitment to continue to continue protests in defense of their rights.¹⁶

In correspondence delivered to MEM and MARN that day, the Xinka Parliament denounced collusion between Pan American Silver and the ministries to limit Xinka participation and reduce the process to an administrative exercise that ignores international standards and the Court decision in the interest of re-opening the mine as soon as possible.¹⁷ In the letter to MEM, the Parliament specifically references the second pre-consultation meeting held on August 29th in which MEM announced a recess in order to decide if the pre-consultation should continue without Xinka participation. Elected representatives from San Rafael Las Flores reported that ministry officials spoke only with company representatives.¹⁸

CONCLUSION

Continued reliance on the November 2018 resolution from MARN concerning the mine's area of influence, together with MEM's ongoing discrimination against the Xinka and their representative organization, the Xinka Parliament, jeopardizes the legality and legitimacy of the consultation process. Unless the process is re-initiated from stage one with the robust inclusion of the Xinka and the Xinka Parliament, and full respect for their rights, the consultation is at risk of losing all social support.

¹⁴ https://earthworks.org/cms/assets/uploads/2019/09/Xinka-Complaint-to-CC_Aug.08.2019.pdf

¹⁵ <https://earthworks.org/cms/assets/uploads/2019/09/Press-Release-ESP-Xinka-Parliament-Sept.03.19.pdf>

¹⁶ <https://nisgua.org/peaceful-resistance-court/>

¹⁷ <https://earthworks.org/cms/assets/uploads/2019/09/Xinka-letter-MARN-Sept.03.2019.pdf>

¹⁸ <https://earthworks.org/cms/assets/uploads/2019/09/Xinka-letter-MEM-Sept.03.2019.pdf>