

Complaint Submitted to the Canadian National Contact Point Pursuant to the OECD
Guidelines for Multinational Enterprises

Concerning:

**The Operations of Excellon Resources Inc. at the La Platosa Mine in the Ejido “La
Sierrita”, Durango State, México**

May 29, 2012

Submitted By:

Sindicato Nacional de Trabajadores Mineros, Metalúrgicos, Siderúrgicos y Similares de
la República Mexicana (SNTMMSSRM), Local 309 of the SNTMMSSRM, Proyecto de
Derechos Económicos Sociales y Culturales, A.C., Canadian Labour Congress, United
Steelworkers, MiningWatch Canada

Submitted to:

Canadian National Contact Point
Room S5-192
International Trade Canada
111 Sussex Drive
Ottawa, Ontario K1A 0G2

And

Punto de Contacto Nacional de México
Secretaría de Economía
Dirección General de Inversión Extranjera
Av. Insurgentes Sur #1940 Piso 8
Col. Florida
México, DF, CP 01030

Contact:

Proyecto de Derechos Económicos Sociales y Culturales, Zamora 169 Desp B-2, Col.
Condesa, México, Distrito Federal, México CP 06140

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I. INTRODUCTION

In Mexico, Excellon Resources, Inc. has dealt with its workers and local communities with little respect for their rights. Excellon has used several tactics to avoid its obligations to both the community where it works and its workers under local, national, and international law. Excellon has also failed to disclose and misrepresented key facts regarding the various disputes it has in Mexico. As a result, Excellon has failed to effectively implement multiple provisions of the OECD Guidelines on Multinational Enterprises and has put its shareholders' investment at risk.

The complainants request that the NCPs conduct an investigation into Excellon's activities in and around the La Platosa Mine, including its exploration and expansion of the mining concessions, in order to make an initial assessment of whether the issues raised merit further examination and respond to the parties involved. Further, complainants request that the NCP offer its good offices to help the parties involved to resolve the issues, including consultation with the parties and between the NCPs, and make appropriate recommendations to Excellon, which ensure the respect for the human rights of the residents of the Ejido La Sierrita and the Section 309 of the SNTMMSSRM.

II. ADMISSIBILITY

This complaint meets the admissibility requirements established by the 2000 OECD Council Decision and the Canadian NCP.

a. *Excellon Resources, Inc.: Corporate Structure, Operations, and Transnational Investments*

Excellon Resources Inc. ("Excellon") was incorporated under the Company Act (British Columbia) on March 4, 1987. Excellon is a mineral resources company engaged in the acquisition, exploration, development and mining of mineral properties.¹ Excellon's wholly-owned subsidiary, Minera Excellon de Mexico S.A. de C.V., operates a poly-metallic (silver, lead and zinc) mine on the Platosa properties, exploiting a series of high-grade silver mantles located five kilometers north of the village of Bermejillo, northeastern Durango State, Mexico, approximately 45 km outside of the major city of Torreon.² Another subsidiary, Servicios Mineros San Pedro, S.A. de C.V., is also present

¹ Excellon Resources Inc., *Annual Information Form*, p.4 (March 22, 2011), available at <http://www.sedar.com/GetFile.do?lang=EN&docClass=1&issuerNo=00003353&fileName=/csfsprod/data15/filings/01716588/00000001/C%3A%5CSedarFilings%5C2011%5CExcellon%5CAIF.pdf> (last accessed May 23, 2012).

² Roscoe Postle Associates, *Technical Report on the Platosa Property, Bermejillo Durango State, North Central Mexico*, NI43.101 Report, p. 1-1 (November 25, 2011) available at www.sedar.comhttp://www.sedar.com/GetFile.do?lang=EN&docClass=24&issuerNo=00003353&fileName=/csfsprod/data124/filings/01830638/00000001/C%3A%5CSEDARfilings%5C2011%5CExcellon%5C43101_112211.pdf (last accessed May 23, 2012).

at the La Platosa facility and is responsible for payment of workers.³ The Platosa property comprises 79 mining concessions covering a total area of approximately 58,054.2558 ha. In addition, the Company employs several outside contractors on a fee-for-service basis for conducting exploration and mining activities.⁴

As of December 31, 2010, the company and its wholly-owned subsidiaries employed 231 individuals. Apart from the La Platosa facilities, Excellon and its wholly-owned Mexican subsidiary also owns the Miguel Auza mining site in Mexico. Nonetheless, La Platosa remains Excellon's only operational extractive mine in the country.⁵ Excellon trades on the Toronto Stock Exchange (TSX:EXN) and currently has major shareholders from Canada, the United States, Luxembourg, Switzerland, and Bavaria.

b. *Complainants*

Sindicato Nacional de Trabajadores Mineros, Metalúrgicos, Siderúrgicos y Similares de la República Mexicana (SNTMMSSRM)

The SNTMMSSRM is a national industrial union representing workers in the mining, metal and related industries in Mexico. The SNTMMSSRM has collective bargaining agreements with several Canadian mining companies in Mexico. Its Secretary General is Napoleón Gómez Urrutia.

Section 309 of the SNTMMSSRM

Section 309 of the SNTMMSSRM represents approximately 120 mining workers laboring in the La Platosa mine in the State of Durango, Mexico. The current Secretary General of Section 309 is Jorge Luis Mora.

Ejido “La Sierrita de Galeana”

The Ejido “La Sierrita de Galeana” (La Sierrita) is located in the municipality of Tlahualilo, Durango and was created by presidential decree on December 9, 1980 with an area of 2,038 hectares. In 1987, that area was expanded to the current total of 6,436 hectares in total, with 2,691 hectares designated as communal land. Under Mexican law, ejidos are communally owned land structures. Decisions made in regards to ejidal land,

³ It is common for Mexican employers to create various sub-contractors in the same workplace in order to create obstacles for workers to organize a union. Because Mexican law requires workers to organize unions for each subsidiary, workers have to undertake the process of union recognition, elections, and collective bargaining for each sub-contracting entity on the premises. During talks between the SNTMMSSRM and Excellon in August of 2011, both Excellon de México, S.A. de C.V. and Servicios Mineros San Pedro, S.A. de C.V. signed the meeting contract on behalf of Excellon. For more information, see, *infra*, Sec. III, (b), (i).

⁴ Excellon Resources Inc., *Annual Information Form*, p. 9 (March 29, 2012), available at http://www.sedar.com/CheckCode.do;jsessionid=0000i5n-__nrLzC3g3ufCA1ON0v:-1 (last accessed May 23, 2012)

⁵ *Supra* note 1 at p.7 .

including rental and sale of the land, must be made under agrarian law by majority vote of a General Assembly.⁶ The General Assembly of La Sierrita consists of 127 official communal landowners (*ejidatarios*) and their families. The General Assembly of La Sierrita meets at least once a month. For day to day operational decisions, the General Assembly votes for a “comisariado”, or board of directors. The current President of the board of directors is Daniel Espinoza Rentería.

ProDESC

The Project of Economic, Social and Cultural Rights (ProDESC) is a non-governmental organization founded in 2005 whose mission is to defend the economic, social, and cultural rights of Mexican workers and communities. ProDESC utilizes strategic litigation, organizing, and political advocacy to better the living conditions of communities where it works. ProDESC focuses on three critical areas: labor rights, land and natural resources rights, and corporate accountability and human rights. ProDESC represents both the Executive Committee of Section 309 of the SNTMMSSRM and the Ejido “La Sierrita” in these proceedings.

Canadian Labour Congress

The Canadian Labour Congress represents the interests of more than three million affiliated workers in every imaginable occupation from coast to coast to coast.

The CLC is the umbrella organization for dozens of affiliated Canadian and international unions, as well as provincial federation of labour and regional labour councils.

It advocates on behalf of all working people in many different ways -- from organizing campaigns and rallies to lobbying federal politicians in Parliament to speaking out in the media and to the business on key issues to representing Canada's labour movement internationally to developing partnerships with the community and other supportive groups.

United Steelworkers

The USW is the largest private sector union in both Canada and North America with more than 225,000 members in Canada and more than 800,000 members continent-wide. The USW is Canada's most diverse union, representing men and women working in every sector of the economy. Its members work in nearly every industry and in every job imaginable, in all regions of the country.

Its members work in call centres and credit unions, mines and manufacturing plants, offices and oil refineries, restaurants and rubber plants, sawmills and steel mills and security companies. They also work in nursing homes, legal clinics, social agencies and universities. The USW stands for unity and strength for workers.

MiningWatch Canada

MiningWatch Canada is a pan-Canadian initiative that opened in 1999 and is supported by environmental, social justice, Aboriginal and labour organisations from

⁶ Art. 14, Mexican Agrarian Law. (Ejido landholders shall have use and enjoyment rights to their parcels, along with the rights their bylaws grant to them and such other rights as may legally correspond to them.)

across the country. It addresses the urgent need for a co-ordinated public interest response to the threats to public health, water and air quality, fish and wildlife habitat and community interests posed by irresponsible mineral policies and practices in Canada and around the world. With technical and strategic expertise from across Canada, MiningWatch Canada carries out and/or supports the monitoring, analysis and advocacy necessary to affect the behaviour of industry and public decision-makers.

c. *Jurisdiction*

By virtue of the fact that Excellon is incorporated in Canada and is publicly-traded on the Toronto Stock Exchange, Excellon is subject to the principles and standards in the OECD Guidelines. The Canadian NCP allows for consideration of multi-jurisdictional specific instances.⁷ The complainants acknowledge that “[g]enerally, issues will be dealt with by the NCP of the country in which the issues have arisen.”⁸ However, several factors argue that the Canadian NCP should function as the lead NCP in this Specific Instance. It is appropriate for the Canadian NCP to take a lead role in this matter because: (1) the Mexican government, and its NCP, has publicly defended the very human rights violations that complainants raise in this Specific Instance; and (2) this Specific Instance involves aggrieved parties both in Canada and Mexico.

First, this complaint raises questions regarding the Mexican government’s biased labor system. Despite the Mexican government’s defense of its labor system abroad, several international bodies have found that Mexico’s application of labor laws violates human rights norms.⁹ The Guidelines require NCPs to “contribute to the resolution of issues that arise relating to implementation of the *Guidelines* in specific instances in a manner that is impartial, predictable, equitable and compatible with the principles and standards of the *Guidelines*.” The Mexican NCP, however, is advised by government agencies that have instigated hostile attacks on the SNTMMSSRM over the last six years. This posture makes the NCP unfit to take the lead on an investigation or mediation of this conflict. Mexico’s Labor and Social Welfare Ministry is part of the NCP structure.¹⁰ For six years, this Ministry has vehemently attacked the SNTMMSSRM. The Ministry has used its resources to deny official recognition of the SNTMMSSRM leader, Napoleón Gómez Urrutia. In May of 2012, the Mexican Supreme Court finally overturned the Labor Ministry’s decision to deny the union official leadership. The Court recognized

⁷ Foreign Affairs and International Trade, Government of Canada, *Procedure Guide for Canada's National Contact Point for OECD Guidelines for MNEs*, para. 7.4, (May 2011), available at http://www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/procedures_guide_de_procedure.aspx?lang=eng&view=d.

⁸ *Id.* at para. 7.1

⁹ *See, infra*, Sec. III (b).

¹⁰ Trade Union Advisory Committee to the OECD, *Mexico NCP*, available at <http://www.tuacoecdmnecguidelines.org/companydetails3.asp?organisationID=22899> (last accessed May 22, 2012).

Mr. Gómez Urrutia as the official leader of the Union under Mexican labor law.¹¹ The Mexican Supreme Court's decision noted that the Labor Ministry was improperly interfering in the Union's affairs.¹² Nonetheless, the former Labor Secretary, currently a Senate candidate for the ruling party, publicly denounced the Supreme Court decision and insisted in the continued persecution of the mining union.¹³

Finally, this Specific Instance involves misconduct by a Canadian mining company that has not only affected a broad spectrum of victims in Mexico, but also involves blatant failures to disclose material facts to investors that resulted in a significant loss for shareholders in Canada. As mentioned below, this may also violate several Canadian securities laws regarding non-disclosure.

Therefore, because the Mexican government has already defended labor practices that violate international human rights norms, the complainants ask that the Canadian NCP take the lead role in an unbiased investigation and mediation of this Specific Instance.

d. *Parallel Proceedings*

The existence of parallel proceedings is not a barrier to action by an NCP. "When assessing the significance for the specific instance procedure of other domestic or international proceedings addressing similar issues in parallel, NCPs should not decide that issues do not merit further consideration solely because parallel proceedings have been conducted, are under way or are available to the parties concerned."¹⁴ This complaint outlines a broad pattern of Excellon's corporate misconduct that has affected investors, the Ejido La Sierrita, and workers in Excellon's La Platosa mine facility. Some aspects of this misconduct are the subject of administrative proceedings in Mexico; specifically, before the Federal and Durango Conciliation and Arbitration Boards (CABs). However, as noted above, this complaint alleges not on the failure of the Mexican government to apply international labor rights norms to Excellon's misconduct but in some cases active collusion of government officials with the company to violate the rights of Excellon's workers. Therefore, the existence of parallel proceedings should not prevent either the Canadian or Mexican NCP from responding to the complainants' broad range of complaints of corporate misconduct on the part of Excellon Resources, Inc.¹⁵

¹¹ María del Pilar Martínez, *El Economista*, *STPS debe dar "toma de nota" a Napo: SCJN*, May 2, 2012, available at <http://eleconomista.com.mx/industrias/2012/05/02/stps-debe-dar-toma-nota-napo-scjn> (last accessed May 22, 2012) (Also noting that workers within the SNTMMSSRM have voted overwhelmingly for Mr. Gómez Urrutia as their union leader on more than three separate occasions).

¹² Milenio, "*Me muero de la risa*", *responde Lozano a Napo*, *Política*, May 3, 2012, available at <http://www.milenio.com/cdb/doc/noticias2011/1472005d2d93788edef2f9d9063def4>. (last accessed May 23, 2012).

¹³ *Id.*

¹⁴ *Supra* note 8 at para. 26.

III. FACTUAL BACKGROUND

a. Failure of Excellon Resources, Inc. to Honor Local Land Rental Contracts and Failure to Negotiate in Good Faith with Local Landowners

i. *Original Land Rental Contract with Ejido “La Sierrita”*

On May 2, 2004, the Ejido “La Sierrita de Galeana,” located in the municipality of Bermejillo, Durango agreed in its General Assembly to a land rental contract with Excellon’s Mexican subsidiary in which the company would have rental rights to four hectares of communal land for 300,000 pesos per hectare for 30 years (a total of 1,200,000 pesos.). Nonetheless, when the Ejido leadership signed the contract, the contract provided for rental of 27 acres of communal land for the same price. Given that the General Assembly never approved for this increase in land usage thereby rendering it invalid under Mexican Agrarian law. This rental agreement provided for very little money in exchange for the company’s unbridled use of the land. The General Assembly voted out the leader responsible for this contract and the Ejido approached Excellon leadership again in 2007 to renegotiate a more just contract.

In 2008, after intense negotiations and a blockade of the mine, La Sierrita renegotiated a contract with the company that included the following:¹⁶

- *Clause 1 and 2:* Temporary rental of 1,100 hectares of communal land by Excellon for a price of 5,000.00 pesos. per hectare for a total annual payment of 5,500,000.00 pesos to La Sierrita. Noncompliance with this clause will be grounds for rescission of the present contract.
- *Clause 4(A-B):* Social Development Fund: Initial Payment of 3,000,000.00 pesos for use by the ejido for social development projects. Starting in the second year of the contract, the company will pay an annual rate of 500,000.00 pesos for social development projects. Noncompliance with this clause will be grounds for rescission of the present contract.
- *Clause 4(C-E):* Concessions: The mining company agrees to provide a concession to the ejido to transport: (1) minerals from the mine to the smelter, and (2) personnel to the mine. The mining company agrees to

¹⁵ The union complainants brought a complaint against Excellon Resources, Inc. to the Canadian Counsellor for Corporate Social Responsibility in the Extractive Sector (CSR Counsellor) in May of 2011. Nonetheless, the CSR complaint, which ended without resolution, should not have any preclusive effect on the current NCP Specific Instance because: (1) this Specific Instance deals with a broader range of offensive activity on the part of Excellon that goes well beyond the union conflict; and (2) nothing in the Canadian NCP Procedures or Protocol precludes a separate OECD complaint regarding the same offending company. Most importantly, the company itself withdrew from the CSR process thereby preventing any successful resolution or mediation through the CSR process as it was designed.

¹⁶ App. A, Land rental contract signed by La Sierrita and Minera Excellon de México, S.A. de C.V. (April 6, 2008).

provide a concession to the ejido to provide food services in the mine's cafeteria.

- *Clause 4(G): Water Treatment Plant:* Excellon will construct and install a water treatment plant that will treat water extracted from the mine so that it is suitable for agricultural use by La Sierrita. It will do so in accordance with the necessary local and national permits. Noncompliance with this clause will be grounds for rescission of the present contract.
- *Clause 6: Prior Consent for Further Mining Activities:* If Excellon finds it necessary to conduct mining exploration on communal land but outside the 1,100 hectares covered by the contract, it will do so only with the express authorization of the General Assembly of La Sierrita. Noncompliance with this clause will be grounds for rescission of the present contract.
- *Clause 7: Hiring Preferences:* Excellon will extend first hiring preferences for vacant positions for qualified persons in the community La Sierrita. The company will also provide training for workers from La Sierrita so that they can move up to more specialized jobs. Noncompliance with this clause will be grounds for rescission of the present contract.
- *Clause 4(F): Scholarships:* Excellon will provide 15,000 pesos . monthly for scholarships for students in the ejido.

ii. *Non-Compliance with the Land Rental Contract*

In the three years following the signing of the contract, Excellon has violated most of the non-monetary provisions in the contract.

1. Unauthorized Exploration on Ejido Lands

On March 15, 2011, Excellon sent a notice to the Ejido president that the company would enter onto the ejido's land to conduct exploration activities.¹⁷ Without waiting for a response for the ejido, Excellon then entered communal land outside the area prescribed in the Land Rental Contract on March 22, 2011. Between March 22 and March 24, ejido members witnessed several vehicles pass through fragile desert terrain. The company had to destroy vegetation to create dirt roads to each of about 3-5 testing site. Each testing site was about 50 meters in diameter and required full cleaning of each site. Then, once a testing site was established, vehicles would continually pass over these roads to deliver the water necessary for perforation and exploration activities. These activities destroyed communal land without permission from the Ejido.¹⁸

The Ejido leadership contacted La Platosa general manager, Ing. Pablo Gurrola, and asked him why the company was on communal land. Mr. Gurrola informed them

¹⁷ App. B, Letter of "notice" of exploration from Excellon to Ejido La Sierrita (March 15, 2011).

¹⁸ App. D, Photographs of Excellon exploration activities outside the rental contract region (March 22-23, 2011).

that a farmer had told him that the company could enter the land. Nonetheless, after five years of working with La Sierrita, Mr. Gurrola had full knowledge that the ejido is only legally permitted to make decisions by General Assembly. Furthermore, his letter of March 15, 2011 never asks the ejido for permission. It merely states that it will be conducting the illicit activities.

The land rental contract clearly states that the company may only conduct such activities with express authorization from the General Assembly of La Sierrita.¹⁹ A violation of this clause in the Land Rental Contract is grounds for rescission of the entire contract.²⁰

2. Failure to Build a Water Treatment Plant

Following the signing of the land rental contract, the company agreed to build a water treatment plant to treat the water that Excellon must continually pump out of its mine as part of its daily operation. The mine is located in an extremely arid region that is currently suffering from an extended drought making this clause integral for the Ejido.

The contract does not stipulate *who* will pursue the permits for the treatment plant.²¹ The company has taken the position that it is the responsibility of the Ejido to obtain the permits. However, under local law, La Sierrita only needs to seek a permit for a new well, not for water that has already been extracted.²²

In fact, under Federal Mining, Water, and Environmental Law, and Durango State Environmental and Water Law, Excellon is required to treat all extracted and disposed water.²³ Excellon has a right to take water out of the mine under mining law but must treat it before releasing it onto other lands.²⁴ Therefore, the land rental contract with La Sierrita merely reiterates the company's obligation under state and federal law.

The Ejido made good faith attempts to assist with the permitting process. Any method of pursuing a permit will require the company's active involvement. In 2011, the President of the General Assembly at that time, Daniel Pacheco, visited the federal water agency who told him that that the agency needed to talk with Mr. Gurrola. Mr. Pacheco

¹⁹ *Supra* note 17 at Clause 6; Interview with Daniel Pacheco, March 24, 2012.

²⁰ *Supra* note 17 at Clause 6; Interview with Daniel Pacheco, March 24, 2012.

²¹ *Supra* note 17 at Clause 4g; Interview with Daniel Pacheco, March 24, 2012.

²² Several moratoriums prevent the federal water agency from granting new concessions of water. Nonetheless, because this water is actually the waste water of a mining concession, the community does not need a new concession to utilize the mine's residual water.

²³ *See* Art. 27 Ley Federal de Minera (LM); Art. 124 Reglamento de la Ley de Aguas Nacionales (RLAN); Art. 416 Código Penal Federal; Art. 86, 88, 90, and 94 Ley de Gestión Ambiental Sustentable para el Estado de Durango (LGASED); Art. 146, Ch. III LGASED.

²⁴ Art. 27, LM.

advised Mr. Gurrola of the agency's request, Mr. Gurrola never visited.²⁵ In its January 2012 meeting with the ejido, Excellon denied any obligation to help obtain a permit and denied any obligation to provide treated water to the ejido. Excellon has taken no steps to build the water treatment plant.

In the meantime, Excellon continues to extract and dispose of its untreated wastewater on communal land, private property, and even onto areas surrounding the federal highway that borders ejido property.²⁶ The mine has actually directed some of the water to land owned by the company. On this company-owned land, the mine has hired external farmers to farm the land and to use the water, all the while ignoring its obligation to La Sierrita. This has caused extensive problems within the ejido and the surrounding area that are explained further in this complaint, *infra*, Sec. III (b)(iv)(2).

3. Failure to Provide the Ejido Concession for the Mine's Cafeteria

The contract requires the company to provide a concession to La Sierrita to provide food services for the mine's cafeteria, thus providing more employment opportunity for ejido members.²⁷ While the mine has contracted for food concessions for many of its workers for over one year, it has never contacted nor offered to the Ejido the concession for food services.²⁸

4. Failure to Implement Hiring Preferences

Finally, it appears that the company has not sent notices of all job vacancies to the ejido as required by the contract. Furthermore, the company has rejected the job applications of several qualified ejido members for illegal reasons. For example, at one point, the company rejected the application of an otherwise eligible ejido member for a desk position in the mine because she was pregnant.²⁹

iii. *Refusal to Dialogue with the Ejido "La Sierrita"*

The Ejido La Sierrita communicated with Excellon several times throughout 2011 to commence a dialogue to resolve the company's various breaches of the land rental contract.³⁰ The two sides sat down in a negotiation on January 29, 2012 but the company

²⁵ Interview with Daniel Pacheco (March 24, 2012).

²⁶ In fact, some local farmers have placed criminal complaints against Excellon because its water is entering uncontrollably into their land. *Id.*

²⁷ *Supra* note 17.

²⁸ Interview with Daniel Pacheco (March 24, 2012); Interview of César Basurto (March 22, 2012).

²⁹ Interview with Daniel Pacheco (March 24, 2012).

³⁰ See App. F, Invitation letter from Ejido La Sierrita to Excellon to meet and discuss the rental contract (August 5, 2011); App. G, Proposal from Ejido La Sierrita to Jeremy Wyeth and Excellon regarding the noncompliance of the rental contract (November 2011).

representatives left the table after less than an hour and refused to discuss their failure to comply with the contract. Excellon has failed to reapproach the community to resolve the matter but never disclosed any information regarding this negotiation to its shareholders.

Ejido members have expressed strongly that the Company's failure to consult with the ejido before conducting exploration and testing on their land is a sign of bad faith. The ejido has little faith that Excellon will ask again for permission to explore beyond the land. Such blatant noncompliance with the land rental contract puts into question Excellon's commitment to the terms of the contract in general.

*iv. Effects of Non-Compliance of Land Rental Contract on the Ejido
"La Sierrita"*

1. Bad Faith Compliance and Social Development

Finally, although unemployment in the Ejido is a rampant problem, the company's failure to respect the hiring preference and concession clauses of the land rental contract denies ejidal members the opportunity to their rightful employment opportunities.

2. Water Contamination and Community Discord Resulting From Excellon's Use of Water

The mine's residual water has five times more arsenic than it should for human consumption and is at a level that is not suitable for agricultural use. The water also has high levels of salt.³¹ Water with this level of salinity can permanently damage the soil rendering it unusable for agriculture.³²

The unsuitability of the water for agricultural use and the company's failure to build a water treatment plant is causing both environmental damage and conflict within the ejido. Because Excellon must constantly pump water out of the mine to continue operations, it has disposed of water on communal land, private property, and even onto areas surrounding the federal highway that borders ejido property. Signs surrounding the mine warn farmers that the water flowing from the mine is not suitable for either agricultural or human consumption.³³

³¹ App. H, Analysis of Water Tests by Universidad Autónoma Agraria "Antonio Narro" Unidad Laguna (June 13, 2011); App. I, Water Tests by Agropecuario Regional (June 4, 2011).

³² App. H, Analysis of Water Tests by Universidad Autónoma Agraria "Antonio Narro" Unidad Laguna (June 13, 2011); App. I, Water Tests by Agropecuario Regional p.4 (June 4, 2011) (stating that, due to high salt content, Excellon's wastewater is only appropriate for irrigation in special circumstances).

³³ App. J, Photograph of warning sign on company land stating "Not apt for agricultural or human use" (March 2011); Interview with Daniel Pacheco, March 24, 2012; Interview with Current President of General Assembly of La Sierrita, David Espinoza, March 24, 2012.

Nonetheless, the general manager at La Platosa has approached La Sierrita's leadership along with individual farmers to let them know that they should feel free to use the water for agricultural use. He has insisted that there is no need for a water treatment plant.³⁴ Farmers not from the Ejido planting crops on Excellon's private property are using the company's untreated water for agricultural uses.

As a result of these various factors, ejido members are put in a bind: (1) despite their need to farm their land parcels, they can't use water on their own land because they don't want to use untreated water; (2) they feel pressure from the company to use the untreated water even though it could render their lands unusable for agricultural use in several years; and (3) they are threatened by third-party farmers to not use the company's water. By sending mixed messages and failing to build a water treatment plant as required under law, Excellon is generating an environmental conflict and taking advantage of technicalities while contaminated water flows unabated from the mine in a region that is suffering from a multi-year drought.

3. Impact on employment

Although unemployment in the Ejido is a rampant problem, the company's failure to respect the hiring preference and concession clauses of the land rental contract denies ejidal members the opportunity to their rightful employment opportunities.

b. Union Intimidation and Violations of Workers' Right to Freedom of Association

Chapter 5 of the OECD Guidelines states that:

Enterprises should, within the framework of applicable law, regulations and prevailing labour relations and employment practices and applicable international labour standards:

1. a) Respect the right of workers employed by the multinational enterprise to establish or join trade unions and representative organisations of their own choosing.

b) Respect the right of workers employed by the multinational enterprise to have trade unions and representative organisations of their own choosing recognised for the purpose of collective bargaining, and engage in constructive negotiations, either individually or through employers' associations, with such representatives with a view to reaching agreements on terms and conditions of employment.³⁵

³⁴ Interview with Daniel Pacheco (March 24, 2012); Interview with Current President of General Assembly of La Sierrita, David Espinoza, March 24, 2012.

³⁵ OECD, *Guidelines for Multinational Enterprises*, p 34, available at <http://www.oecd.org/dataoecd/43/29/48004323.pdf> (last accessed May 23, 2012).

The International Labor Organization gives further definition to these standards.³⁶ ILO Convention 87, Article 2, states that “Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation.”³⁷

In addition, ILO Convention 98, Article 2, states that: “1. Workers' and employers' organisations shall enjoy adequate protection against any acts of interference by each other or each other's agents or members in their establishment, functioning or administration; 2. In particular, acts which are designed to promote the establishment of workers' organisations under the domination of employers or employers' organisations, or to support workers' organisations by financial or other means, with the object of placing such organisations under the control of employers or employers' organisations, shall be deemed to constitute acts of interference within the meaning of this Article.”³⁸

i. *Mexican Labor Law and Violations of International Human Rights Norms*

Before explaining the specifics of the labor conflict in La Platosa, it is necessary to explain how the application of Mexican labor law, in its current form, violates concrete international human rights norms. Mexico has a complex system of trade union registration and bargaining laws. Nonetheless, the ILO, other international bodies, and the Canadian government, have documented systematic cooperation among employers, employer-dominated unions, and Mexican federal and state authorities to prevent workers from exercising their fundamental rights to freedom of association and collective bargaining.

In Mexico, the practice of “protection contracts” – contracts imposed by employers in collaboration with employer-dominated labor organizations (known as “protection unions”) to prevent workers from exercising their rights – is well documented.³⁹ The systematic suppression of the right to organize and bargain through

³⁶ See *Id.* at ch. 1, para. 48 (The International Labour Organisation (ILO) is the competent body to set and deal with international labour standards, and to promote fundamental rights at work as recognised in its 1998 Declaration on Fundamental Principles and Rights at Work”).

³⁷ International Labor Organisation, Convention 87, *Freedom of Association and Protection of the Right to Organise*, (1948) available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C087>. (last accessed May 23, 2012).

³⁸ International Labor Organisation, Covention 98, *Right to Organise and Collective Bargaining* (1949), available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C098>. (last accessed Maay 23, 2012).

³⁹ Carlos de Buen Unna, Friedrich Ebert Foundation, *Collective Bargaining Agreements for Employer Protection (“Protection Contracts”) in Mexico* (December 2011) , available at http://www.democraciaylibertadsindical.org.mx/media_files/Paper_Charles_De_Buen.pdf (last accessed May 23, 2012); José Alfonso Bouzas Ortíz, Friedrich Ebert Foundation, *Evaluación de la contratación colectiva en el Distrito Federal* (June 2009) available at

the mechanism of protection contracts has drawn wide attention and was recently addressed by the ILO Committee on Freedom of Association in response to a complaint filed by the International Metalworkers' Federation (IMF).⁴⁰ The problem of protection contracts in Mexico has also drawn the attention of corporate social responsibility advocates. For example, the Fair Labor Association recently issued guidance to its members detailing specific monitoring provisions to avoid protection contracts.⁴¹

The core of this system is the practice of signing “protection contracts” between an employer and an employer-dominated labor organization. These contracts are generally signed without workers’ knowledge or consent; often even before the workers are hired.⁴² They typically contain only the minimum protections for workers required by law. Generally workers are not given a copy of their contract, and often they do not even know that a union “represents” them.⁴³

The legal effect of a protection contract is to prevent workers from exercising their right to organize or join a union and bargain with their employer. These contracts typically contain an “exclusion clause” which requires the employer to dismiss any worker who is not a member of the employer-dominated union at that union’s request.⁴⁴ These clauses empower the company union and the company to retaliate against workers

http://www.democraciaylibertadsindical.org.mx/media_files/LIBRO_BOUZAS.pdf (last accessed May 23, 2012); Maria Xelhuantzi López, *La democracia pendiente: La libertad de asociación sindical y los contratos de protección en México*, Sindicato de Telefonistas de la República Mexicana (2000).

⁴⁰ Committee on Freedom of Association of the International Labor Organization, Case No. 2694, Report No. 359 (2011), para. 903.

⁴¹ Fair Labor Association, *Op Memo: Freedom of Association: Monitoring Against Protection Contracts in Mexico* (14 February 2012) available at http://www.fairlabor.org/sites/default/files/freedom_of_association_mexico.pdf (last accessed May 23, 2012); see also Maquila Solidarity Network, *Freedom of Association in Mexico Tool Kit 2010* (September 27, 2010) available at <http://en.maquilasolidarity.org/node/969>. (last accessed May 23, 2012).

⁴² As observed by the the International Metalworkers Federation (IMF) in Case No. 2694 filed with the CFA, “In general, workers join a trade union not because they have freely chosen to join that union, but because they have started work in a company where there is already an active trade union.” See International Labour Office, *359th Report of the Committee on Freedom of Association*, para. 769 (March 2011) available at http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_153533.pdf (last accessed May 23, 2012). In this case, the ILO called for the government to create a dialogue regarding protection contracts, lack of representation of trade unions in Mexico, obstacles to collective bargaining, and the lack of impartiality of the JCAs. *Id* at para. 901.

⁴³ The Federal Labor Secretariat and the Local Labor Board in the Federal District make copies of collective bargaining agreements available via the Internet, although few workers know how to access them. The rest of Mexico's 32 states do not make contracts available.

⁴⁴ Art. 395 Ley Federal del Trabajo (LFT) (“The employer may exclusively admit only those workers who are members of the contracting union... The employer may also separate from the workplace those members who quit or are removed from the contracting union.”). Article 371 of the LFT contains a number of procedural safeguards for union members facing expulsion, including a hearing and the right to present evidence, but these are rarely if ever implemented.

wishing to form an independent union. Though the Mexican Supreme Court has ruled that these clauses violate Mexican law, its decision is not binding precedent.⁴⁵ Exclusion clauses continue to be used by employer-dominated unions and employers to suppress freedom of association.

Even if the workers manage to form a representative union, the existing collective bargaining agreement (the protection contract) blocks any bargaining demand or strike by another union, thereby protecting the employer.⁴⁶

Under Mexican labor law, the only way to overcome a protection contract is for the representative union to file a legal demand for control (*titularidad*) of the collective bargaining agreement with the appropriate Labor Board. If the Labor Board accepts this demand, it will then organize an election (*recuento*) in which workers can choose between the two organizations.⁴⁷

Mexican Labor Boards “consist mainly of the employers’ representative body and the dominant trade union in the area . . .”⁴⁸ These actors have a clear vested interest in excluding democratic and independent unions from winning labor disputes in the JCAs. Enforcement tends to be selective in the variety of matters that the JCAs address including retaliation, union recognition fights, and collective bargaining agreement disputes. Furthermore, international entities such as the ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR), the ILO Committee on Freedom of Association (CFA), the United Nations High Commission for Human Rights, and the Special Rapporteur on the Independence of Judges and Lawyers of the United Nations Commission on Human Rights have expressed their concern regarding the “lack of impartiality and lack of autonomy” of the JCAs, particularly as it relates to *recuento* procedures.⁴⁹ The Canadian National Administrative Office (NAO), which receives and provides analysis of labor rights violations under the North American Agreement on Labour Cooperation, has also stated that “it is uncertain that the current provisions of the

⁴⁵ Supreme Court of Justice of the Nation, Communication Number 385, *Inconstitucional, La Cláusula de Exclusión en Los Contratos Colectivos de Trabajo*: SCJN, México, D.F. (April 7, 2001). It is important to note that this decision will not be obligatory in other courts until a minimum of four decisions are made on the same legal issue. See Art. 192-197 Ley Federal de Amparo and Art. 177-183 Ley Orgánica del Poder Judicial.

⁴⁶ Art. 923 LFT (prohibiting strikes to demand a collective bargaining agreement if a collective bargaining agreement has already been filed with the appropriate authority).

⁴⁷ LFT 931.

⁴⁸ International Labour Office, *359th Report of the Committee on Freedom of Association*, GB. 310/8, para. 769 (March 2011) available at http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_153533.pdf (last accessed May 23, 2012). Because of this bias in the JCAs, “it is necessary to obtain consent from [government and corrupt unions] who may be prejudiced by the result of the decision.” *Id.*

⁴⁹ *Id.* at para. 767.

LFT can ensure that the JLCA is impartial and independent and does not have any substantial interest in the outcome of the proceeding as required . . .”⁵⁰

As a result of this systemic bias, *recuentos* are marked by widespread fraud and intimidation of workers seeking to exercise freedom of association. Historically, workers were required to vote publicly, in front of their employer and the company union. While the Mexican Supreme Court recently imposed a requirement that *recuentos* be conducted by secret ballot, ⁵¹ continued intimidation of workers who seek to remove employer-dominated unions is well-documented.⁵²

As a result of the protection contract system, genuine exercise of freedom of association and the right to collective bargaining in Mexico is severely restricted.⁵³

ii. *Union Intimidation and Human Rights Abuses in La Platosa Mine: 2005-2010*

As is common in Mexico, Excellon signed a protection contract with the Sindicato Nacional de Industria ‘Vicente Guerrero’ de los Trabajadores de la Extracción, Fundición, Transformación, Distribución, Montaje y Transportación de Productos de Metal, Minerales, Conexos, Derivados y Similares (“Vicente Guerrero” Union”) in 2005. The bargaining agreement included only ten workers, most of whom do not work in the mine.⁵⁴ In fact, the union has never had a presence in the mine: it does not hold meetings, has no elected or appointed delegates, has never allowed workers to participate in contract negotiations, ratify an agreement or even obtain a copy of their contract. Indeed, most workers in the mine were not aware of the collective bargaining agreement until the

⁵⁰ Canadian National Administrative Office, *Report of Public Communication 2003-1 (SITEMAG-SUITAR)*, Sec. 5.1.2, available at http://www.hrsdc.gc.ca/eng/labour/labour_globalization/ila/ialc/pnaalc/06table_of_contents.shtml. (last accessed May 23, 2012).

⁵¹ Supreme Court of Justice of the Nation, Second Chamber, 2^a./J. 150/2008 *Recuento para determinar la titularidad del contrato colectivo de trabajo previsto en el artículo 931 de la Ley Federal del Trabajo. Las Juntas de Conciliación y Arbitraje Deben Ordenar y Garantizar que en su desahogo los trabajadores emitan voto personal, libre, directo y secreto*, México, D.F. (October 2008).

⁵² See Solidarity Center, *Mexican Telephone Workers Union Election Suspended* (2011), <http://www.solidaritycenter.org/content.asp?contentid=1320>

⁵³ As a result of this manipulated application of Mexico’s labor code, over 90 per cent of collective agreements registered in Mexico City are “dead or moribund. In other words, they are not revised, not bargained and are maintained at the legal minimum . . . Obviously, in this environment, all the workers supposedly covered by these collective agreements which they do not know and do not bargain are the victims of a violation of their fundamental right to establish and to join organizations of their choosing.” See International Labour Office *supra* note 49 at para. 789 (Allegations).

⁵⁴ App.K, Collective Bargaining Agreement signed by Sindicato Nacional de Industria “Vicente Guerrero” de los Trabajadores de la Extracción Fundición, Transformación, Distribución, Montaje y Transportación de Metal, Minerales, Conexos, Derivados y Similares and Minera Excellon de México, S.A. de C.V., November 24, 2005.

Canadian Corporate Social Responsibility Counsellor informed them in mid-2011.⁵⁵ The company merely created the protection contract to prevent labor disputes in the mine.

In early 2010, a worker, José Paulin Contreras Romero died inside the mine. A large rock fell on him while he was underground.⁵⁶ Many workers believe this death resulted because of staffing inadequacy and poor communication by management. When the death occurred, a lawyer from the company accompanied the deceased's wife, Paula Isela Alba Rubio, to Social Security to establish the pension. The company paid her a one-time payment of \$38,000 pesos M.N. (approximately \$2,850 Canadian dollars), which was spent almost entirely for his funeral. The worker's widow now receives a monthly pension from the government Social Security office of \$2,200 pesos M.N. (approximately \$160 Canadian dollars). This has not been enough to support Ms. Alba and her two young children.⁵⁷ Not one person from management ever met with the widow nor apologized for the incident.⁵⁸

In August of 2010, three workers were illegally detained within the mine facilities by mine security guards and municipal police who accused them of robbing several items. During the interrogation, which took place inside the mine, the municipal police officers physically attacked the three workers, suffocating several with a plastic bag and threatening them with beatings if they didn't confess.⁵⁹ They were then severely beaten to the point where one worker fainted. Afterwards, the three continually denied the allegation and were let go. La Platosa general manager Pablo Gurrola acknowledged this incident in writing through an apology letter sent to one of the workers.⁶⁰ The workers have insisted on avoiding a formal complaint to the Public Prosecutor because they fear retaliation by the police officers against them and their families.

As a result of the increasingly deteriorating conditions in the mine, the incident of torture, and the death of Mr. Contreras, workers started realizing that they couldn't continue defending themselves individually and they needed a representative union. On November 21, 2010, 101 of approximately 135 miners at the La Platosa mine held an assembly at which they democratically decided to affiliate to the National Union of Mine,

⁵⁵ App.P, Canadian Counsellor on Corporate Social Responsibility Final Report (October 2011).

⁵⁶ Interviews with Former and Current Employees of Excellon, Jorge Luis Mora, Cesar Basurto, Jose Luis Rodriguez, and Juan Rodriguez, March 22, 2012 (for example, Jose Luis Rodriguez stated that "We also started because a friend died in the mine in 2010. From that point on, we wanted to better secure ourselves from the company. We wanted dignified benefits for our hard work."); Interview with Paula Isela Alba Rubio, March 23, 2012.

⁵⁷ Interview with Paula Isela Alba Rubio, March 23, 2012.

⁵⁸ *Id.*

⁵⁹ Interview with [Name Withheld for Security Purposes], March 22, 2012.

⁶⁰ App.O, Apology letter from Pablo Gurrola to Eduardo Maciel for the incident of torture by municipal police (August 31, 2010).

Metal, Steel and Allied Workers of the Mexican Republic, forming as the Section 309 of the SNTMMSSRM. That same day, the workers elected a Local Executive Committee.

The company acted quickly to protect itself from the unionizing effort and to intimidate workers. First, on November 24, 2010, in response to the formation of Section 309, and outside of the knowledge of any of the workers in the mine, Excellon's subsidiary responsible for paying workers, Servicios Mineros San Pedro, S.A. de C.V., signed another protection contract with the "Presidente Adolfo López Mateos" Union.⁶¹

Soon thereafter, management at La Platosa mine started vehemently intimidating the leadership of the new Union and the workers at the mine.⁶² On December 15, 2010, Excellon Assistant Manager sanctioned the Secretary General of the new Local Executive Committee, Mr. Jorge Luis Mora, for "sleeping on the job." The Director of Human Resources shut him in her office along with a security manager and tried to intimidate him to sign a "voluntary" resignation. He refused to do so and the company subsequently fired him.⁶³ On December 16, another member of the Local Executive Committee, José Castrejon, was assigned to menial work and separated from the rest of the workers.

Throughout December of 2010 and early 2011, an employee named Juan Jose Gonzalez (known as "El Pipo") was witnessed meeting regularly with Pablo Gurrola. Gonzalez repeatedly confronted workers in the mine to dissuade them from joining the SNTMMSSRM and asked them to sign a blank document that he insisted would show that they were not interested in joining the union.⁶⁴

⁶¹ App.L, Collective Bargaining Agreement signed by Sindicato Nacional "Presidente Adolfo López Mateos" de Trabajadores y Empleados del Comercio en General y Escuelas Particulares, Similares y Conexos de la República Mexicana and Servicios Mineros San Pedro, S.A. de C.V., November 24, 2010. Note that the existence of both protection contracts was unknown to workers in the mine until the Canadian CSR Counsellor presented them to ProDESC in the summer of 2011. As mentioned above, these sub-contracting arrangements are common methods by which companies can delay any organizing process. For example, in this case, one of the protection contracts was filed in the State Labor Board and another in the Federal Labor Board. This forces workers to fight labor recognition in two different forums.

⁶² The Company knew who comprised the new Local Executive Committee because several people present at the election to form the union are now known to be close with the employer-dominated union and company management. Workers are aware that these informants spoke with company management shortly after the union formation. The Company was also aware of the Section's leadership throughout 2011 because Excellon was in touch with union leadership regarding the signing of a collective bargaining agreement.

⁶³ Mora acknowledged that he dozed off after finishing a task while waiting for his supervisors to arrive and provide him with further direction. This was the result of working several consecutive shifts without time for sleep. Moreover, other workers found under the same circumstances have not been fired. See Interview with Jorge Luis Mora, March 22, 2012 (stating that other workers, including Aurelio Castañeda, have fallen asleep on the job and were not fired).

⁶⁴ Interview with Cesar Basurto, March 22, 2012; Interview with Juan Luis Rodriguez, March 22, 2012 (stating that El Pipo approached him in January of 2011 with a blank paper with a statement that he didn't want to join the union. El Pipo told him that the company would give Mr. Rodriguez benefits but said that Mr. Rodriguez should sign the document stating that he didn't want a union); Interview with Martin Pacheco, Jr., March 23, 2012 (Mr. Pacheco "witnessed supervisor Abel Irunguraya provide documents to

In December 2010 and January 2011, Pablo Gurrola held several meetings with all shifts of workers to dissuade them from joining a union.⁶⁵ Other supervisors also met directly with workers telling them not to join the SNTMMSSRM union.⁶⁶

iii. *Union Intimidation and Human Rights Abuses in La Platosa Mine: 2011-2012*

On August 18, 2011, in response to continuing intimidation by the company, between forty to fifty members of the Section 309 and workers from other SNTMMSSRM locals held a legal work stoppage at the mine. Their objective was to bring the Company to the negotiation table to sign a collective bargaining agreement. Because the striking workers did not want to damage the operations inside the mine through their work stoppage, they allowed emergency workers and pump operators to enter the mine.⁶⁷ During this work stoppage, neither management nor supervisors appeared at the site of the blockade and never entered the mine through the front entrance.⁶⁸

After three days, however, management finally met with the striking workers in the city of Gómez Palacio. The meeting was attended by SNTMMSSRM members from Mexico city, leaders of the Section 309, and officials from the state of Durango. Excellon de Mexico and Servicios Mineros San Pedro signed an agreement that, upon approval by the Local Labor Board, the subsidiaries would negotiate and sign a collective bargaining agreement with the SNTMMSSRM. The agreement also obliged the company to pay 100% of salaries of the striking workers for work missed while they were on strike, and to not take any retaliation against any of the workers.

The Company's goodwill, however, was shortlived. Excellon held several meetings with ProDESC, the government of Durango, and SNTMMSSRM union leaders to discuss negotiations. In these meetings, the government of Durango recognized that the law clearly allowed for the company to terminate its protection contracts and bargain

El Pipo in December of 2010. El Pipo asked workers to sign the documents to show that they weren't interested in joining the union . . . El Pipo told me that the documents came from management.”)

⁶⁵ Interview with Excellon employee Martin Pacheco, Jr., March 23, 2012; Interview with Excellon employee Jose Luis Rodriguez, March 22, 2012 (in meeting in early 2011, Mr. Gurrola informed him that the company would provide them with benefits in order to dissuade them from joining a union).

⁶⁶ Interview with Eduardo Maciel, March 22, 2012 (stating that “Abel” told him not to join the union); Interview with Jose Luis Rodriguez, March 22, 2012 (stating that his supervisors Juan Francisco Rodriguez and “Abel” told him not to get involved in the union and threatened him with retaliation if he tried to organize).

⁶⁷ Interviews with Jorge Luis Mora, Cesar Basurto, Gerardo Pacheco, Eduardo Maciel, Jose Luis Rodriguez, Juan Rodriguez, Sergio Facio, March 22, 2012; Interview with Martin Pacheco, Jr., March 23, 2012.

⁶⁸ *Id.*

with the Section 309 as promised.⁶⁹ In September, Section 309 leaders went to Mexico City to provide Excellon with their proposal for a collective bargaining agreement.⁷⁰ The parties were to meet again in late September of 2011 to negotiate an agreement.

As a result of the imminent negotiation, Excellon changed tactics. Throughout the summer and fall of 2011, Excellon started actively supporting a rogue union named the National Mining and Metallurgic Union Don Napoleón Gómez Sada (SNMMNGS) lead by Carlos Pavón Campos, a former member of the SNTMMSSRM who had been expelled for corruption and treason. On September 28, 2011, only days before the company was to meet with Section 309 members in Mexico City, Excellon manager Pablo Gurrola organized a work stoppage with the assistance of the SNMMNGS. Employees arrived to work at 7am on that day to find Pablo Gurrola along with El Pipo, about seven other workers, and twenty other people who do not work in the mine.⁷¹ A company truck was blocking the entrance to the mine.⁷² Soon thereafter, federal police and army officials arrived to intimidate the arriving workers who were kept out of the mine. Mr. Gurrola informed workers that they couldn't enter the mine because the SNMMNGS union was conducting a work stoppage.⁷³ Workers witnessed Gurrola telling some employees that they couldn't enter the mine while permitting emergency workers into the mine.⁷⁴ The SNTMMSSRM members waited at the entrance of the mine for several hours. Realizing nothing could be done, and fearing the presence of army officials and federal police, the workers left and did not return to the site of the blockade.⁷⁵ The company-directed work stoppage continued for several more days before ending. Excellon officials never met with the Section 309 or the SNTMMSSRM as planned. Soon thereafter, the company made a public statement that the union conflict was local and that the company had no involvement in dispute.⁷⁶

⁶⁹ Art. 401, LFT(stating that the company may disavow a collective bargaining agreement upon mutual agreement).

⁷⁰ See App.M, Section 309 Collective Bargaining Agreement Proposal (September 2011); Interview with Cesar Basurto, March 22, 2012.

⁷¹ Interview with Jose Luis Rodriguez, March 22, 2012.

⁷² Interview with Jorge Luis Mora, March 22, 2012.

⁷³ *Id.*

⁷⁴ App.S, Audio recording of Pablo Gurrola during the Pavón strike (September of 2011).

⁷⁵ Interview with Gerardo Pacheco, March 22, 2012; Interview with ProDESC community organizer, Darío Maldonado Cardeño, April 16, 2012 (Mr. Maldonado, who was present at the mine during both work stoppages, states that no federal police or army personnel were present at the mine during the Section 309 work stoppage in August of 2011).

⁷⁶ Press Release, *Power Struggle Between Competing Labour Unions at Excellon's La Platosa Mine*, Excellon Resources, Inc. (October 11, 2011), available at <http://www.excellonresources.com/Investors/Press-Releases.aspx> (last accessed May 23, 2012).

Excellon management has continued to support the SNMMNGS openly throughout 2011 and 2012. First, the alleged leader of the SNMMNGS in the La Platosa mine is El Pipo, the same employee who was asking workers to sign documents against unionization in December of 2010. Currently, workers witness El Pipo going to Excellon management's offices to meet with Pablo Gurrola at least three to four times per week.⁷⁷ Second, one witness has overheard management secretary's directing payment from the company to Carlos Pavón.⁷⁸ As a result of these common meetings and suspected payments, it is believed that Excellon management has coordinated worker barbeques and parties organized by El Pipo on behalf of the SNMMNGS. Third, Excellon management has also discriminated against SNTMMSSRM members while favoring other employees who have sided with the company.⁷⁹ Finally, Excellon management informed Section 309 members that the company strictly prohibited the handing out of union materials in the mine. Nonetheless, the SNMMNGS regularly hands out leaflets inside the mine without consequence.⁸⁰ El Pipo has even held meetings inside the mine promoting the SNMMNGS.⁸¹

Excellon's public statements regarding the above incidents have distorted the facts. The Company bluntly stated in June that its (1) workers have been represented by the "Vicente Guerrero Union" since 2005 and (2) that SNTMMSSRM is not a legal union.⁸² In fact, no members of the "Vicente Guerrero Union" have ever met with

⁷⁷ Interviews with Cesar Basurto, Gerardo Pacheco, Juan Rodriguez, Eduardo Maciel, Sergio Facio, March 22, 2012; Interview with Jose Luis Rodriguez, March 22, 2012 (stating that El Pipo meets with Pablo Gurrola on almost a daily basis while Section 309 leaders have never been able to meet with Mr. Gurrola even if they ask); Interview with Martin Pacheco, Jr., March 23, 2012.

⁷⁸ Interview with Martin Pacheco, Jr., March 23, 2012 ("Around October of 2011, I was in management's office getting a ticket for gasoline for a company vehicle. As I waited, I heard the secretary tell the accountant that "Pavon is asking for his check.").

⁷⁹ Interview with Martin Pacheco, Jr., March 23, 2012 (stating that a topographer, Eduardo Orona, was demoted and told that the demotion was the result of his involvement in the union); Interview with Juan Rodriguez, March 22, 2012 (stating that he was promoted to supervisor in the middle of 2011 but demoted shortly thereafter because of his open support for workers' rights and the union); Interview with Jose Luis Rodriguez, March 22, 2012 (stating that after the August 2011 work stoppage he was demoted and told to go back into the mine); Interviews with Jorge Luis Mora *and* Gerardo Pacheco, March 22, 2012 (stating that several union leaders have been demoted or fired as a result of their union activity); Interview with Cesar Basurto (stating that his supervisor, Tomás Rivera, demoted him in early 2012. When Mr. Basurto asked Mr. Rivera why he was being demoted, he was told that it was an order "from above" and the Mr. Basurto knew why he was being demoted. Mr. Basurto has no prior disciplinary encounters with the company but has been openly involved in the Section 309. At the same time, several workers related to the Pavon union with little experience have received promotions in 2011 and early 2012.).

⁸⁰ App. R, Video of Pavón union contact, Juan José Gonzalez "El Pipo", handing out union propaganda inside the mine (January 2012).

⁸¹ Interview with Martin Pacheco, Jr., March 23, 2012.

⁸² See App.Q, Letter from Peter A. Crossgrove to Mr. Jyrki Raina, International Metalworkers' Federation, June 6, 2011.

workers and most workers were unaware that they were represented by a Union until the SNTMMSSRM recently informed them of the matter in 2011. Furthermore, its statement that the SNTMMSSRM is an illegal union is false.⁸³ The SNTMMSSRM is a legally registered union representing thousands of workers Mexico. In fact, the SNTMMSSRM Section 309 in La Platosa recently received its legal acknowledgement (*toma de nota*) from the Federal Labor Secretariat recognizing it as a valid union local with rights to negotiate.^{84 85}

iv. *Refusal of Excellon Resources, Inc. To Cooperate With the Canadian Extractive Sector Corporate Social Responsibility Counsellor in 2011*

In April of 2011, ProDESC and the SNTMMSSRM sought help from the Canadian Extractive Sector Corporate Social Responsibility (CSR) Counsellor to engage in a meaningful mediation.⁸⁶ After conducting a site visit and meeting with dozens of stakeholders, the Counsellor confirmed that workers were not aware of health and safety procedures in the mine, had little faith in the safety of the mine, and had few mechanisms of dialogue with the Company. The Counsellor also heard stories of abuse by local police on Excellon property and the failure of Excellon to make policy changes following this incident. The Counsellor stated that workers were not even aware that a collective bargaining agreement existed on the property; thereby confirming that the “Vicente Guerrero Union” is an employer-dominated organization in violation of international norms.⁸⁷

⁸³ See App.N, Section 309 *Toma de Nota*: recognition by the Mexican Federal Labor Secretary (April 2012).

⁸⁴ *Id.* Under Article 20 of the Internal Regulations (*Reglamento*) of the Federal Labor Secretariat (STPS), the actions of labor union assemblies, including elections of officers, do not have legal effect until the labor authorities have been able to compare (*cotejar*) the minutes of the assembly with the union statutes to ensure conformity. Once this verification is completed, the STPS issues an acknowledgement, known as *toma de nota*. The Mexican Supreme Court recently clarified that this comparison is limited to verifying that the minutes report compliance with the statutory requirements, and that the labor authorities have no power to withhold *toma de nota* based on their interpretation of the statutes. See Mexico, Supreme Court of Justice of the Nation, TESIS JURISPRUDENCIAL Num. 32/2011, <http://www.scjn.gob.mx/PLENO/Tesis%20Jurisprudenciales/TJ%2032-2011.pdf>

⁸⁵ It should be noted that the Mexican government took nearly a year and a half to conduct its simple administrative duty to accept and register the Section 309's *toma de nota*. This is an example of the partial manner in which government labor authorities apply Mexican labor law.

⁸⁶ In 2009, the Canadian government established the Office of the Extractive Sector Corporate Social Responsibility Counsellor in order to respond to The Office was created to facilitate resolutions to conflicts between persons and communities affected by Canadian mining corporation misconduct. The process, however, has been criticized for its lack of teeth and its voluntary nature. Corporate participation in the process is completely voluntary and there are no sanctions available to the Counsellor for failure of Canadian companies to participate or to resolve serious human rights violations abroad.

⁸⁷ App.P, Canadian Counsellor on Corporate Social Responsibility Final Report (October 2011).

The Company rejected the Counsellor's Final Report and left the mediation process before it terminated. The Company continued to refuse to engage in a dialogue regarding its human rights abuses.

Instead, Excellon leadership engaged in a series of public statements that included inconsistencies and misleading statements. For example, October 11, 2011, the Company made three misleading and untrue statements in a press release filed with the Ontario Securities Commission:

- A) The Company alludes to the fact that, at this point in the Union struggle, "the employer has no involvement in the process. Only once a union is voted in by employees does the employer become involved to negotiate..."
- B) The Company states that these demonstrations are merely a "small part of the larger ongoing union battle for influence across Mexico..."
- C) "The Company continues to respect its employees' right to organize and will continue to work with the Mexican Labour Authorities to facilitate resolution of the current situation in compliance with Mexican law."⁸⁸

The Company also stated in its press release of October 18, 2011 that:

- A) In explaining why the CSR process is invalid and why the Company's hands are tied, it states that, "the Labour Laws in Durango State and the implementation by the Durango State Government are not dissimilar to Canadian Labour Laws."
- B) The Company again states that the labor problems are merely the result of "illegal blockades by two rival unions that are engaged in a national battle for dominance in Mexico."⁸⁹

On the contrary, the company has actively supported one union over the other, has broken its own agreement to recognize one union, and fails to recognize the black and white difference between Mexican Labour Law and Canadian Labour Law.

IV. EXCELLON'S FAILURE TO IMPLEMENT THE OECD MNE GUIDELINES

a. Section III: Disclosure

Regarding Disclosure, under Section III of the Guidelines states that, enterprises must:

1. Provide timely and accurate information on all material matters regarding their activities, structure . . . performance, ownership and governance.

⁸⁸ Press Release, *Power Struggle Between Competing Labour Unions at Excellon's La Platosa Mine*, Excellon Resources, Inc. (October 11, 2011), available at <http://www.excellonresources.com/Investors/Press-Releases.aspx> (last accessed May 23, 2012)

⁸⁹ Press Release, *Excellon Resources Expresses Disappointment with CSR Counsellor's Closing Report Issued Today and Claims Social Responsibility Process is Flawed*, Excellon Resources, Inc., (October 19, 2011), available at <http://www.excellonresources.com/Investors/Press-Releases.aspx> (last accessed May 23, 2012).

2. Disclosure policies should include . . . issues regarding workers and other stakeholders.

Excellon failed to provide key information to its shareholders regarding the nature and duration of the labor strike at the La Platosa facility and its failure to comply with the rental contract with La Sierrita.

First, the company has failed to reveal material facts related to its failure to comply with the ejido land rental agreement. Failure to comply with the exploration clause of the contract and request permission from the ejido to conduct activities outside the 1,100 rented lands is grounds for rescission of the entire rental contract. Furthermore, the company has failed to build a water treatment facility for the ejido's agricultural use and failed to provide concessions to the ejido as stipulated in the contract and has failed to comply with the hiring preferences clause of the contract.

The ejido has attempted to address contract non-compliance issues with the company in July and in the fall of 2011. The ejido has used these issues as grounds to revisit aspects of the contract that are not working, and the ejido has repeated its stance to Excellon leaders that the ejido is within its right to rescind the land rental contract. On January 29, 2012, rather than face this threat and negotiate, the company chose to end dialogue with the ejido. As a result of the company's failure to take seriously any dialogue with the ejido, members of La Sierrita have informed the company that they may rescind the contract which would significantly put at risk Excellon's production levels.

Second, in regards to the labor dispute, Excellon has aggressively represented to its investors that it is merely victim to a local labor conflict over which it has no control and which should resolve shortly. In fact, this complaint shows that the company has: (1) perpetuated and stimulated the labor conflict, including orchestrating the work shutdown of September 2011; (2) actively discriminated against the SNTMMSSRM through signing protection contracts, firing and intimidating SNTMMSSRM supporters, breaking its agreement to recognize the SNTMMSSRM as the representative of the workers, and making false and inflammatory statements about the SNTMMSSRM to both workers and the public.

As a result of the company's perpetuation of the labor and ejido conflict, the ejido is conducting a blockade that will further hurt Excellon's shareholder price and investors. Because the company failed to accurately represent the nature of the disputes, investors have lost money and the company has violated Section III of the OECD MNE guidelines.⁹⁰

⁹⁰ This also appears to violate Canadian Securities Law. The Ontario Securities Commission has recognized that risks must be disclosed if they are material, such that they could reasonably be expected to have a significant effect on the market price or value of the securities. *See Re YBM Magnex International Inc.*, 2003 LNONOSC 337 at paragraph 87; *see also Ontario Securities Act*, R.S.O. 1990, c. S.5, Section 1(1). The National Instruments require Excellon to disclose material facts in its Annual Information Form and MD&A reports. *See* NI 51-102F2, Part 5, 5.2; NI 51-102, Part 5, 5.8; NI 51-102F1. However,

b. Section IV: Human Rights

Under Section IV of the Guidelines, Human Rights, enterprises should:

1. Respect human rights, which means they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.

2. Within the context of their own activities, avoid causing or contributing to adverse human rights impacts and address such impacts when they occur.

6. Provide for or co-operate through legitimate processes in the remediation of adverse human rights impacts where they identify that they have caused or contribute to these impacts;

The company has failed to respect basic human rights of both the workers at the mine who have formed the Section 309 and the members of La Sierrita. The company continues to violate the workers' right to freedom of association and collective bargaining as mentioned in the next section.

Furthermore, Articles 6 and 9 of the International Covenant on Civil and Political Rights and Articles 4 and 7 of the American Convention on Human Rights, both instruments ratified by Mexico, protect the right to life and security of person. The company has violated this fundamental right as it applies to both workers and the ejido. In August of 2010, municipal agents engaged in torture of workers on company property, thereby threatening the lives and physical integrity of these workers.

In regards to the rights of the members of La Sierrita, Article 21 of the American Convention on Human Rights protects the right to property and the protection of property.⁹¹ In the case at hand, the company agreed to a fair social development agreement in exchange for rental of the land. But, four years later, the company has engaged in exploration activities in violation of their agreement, without permission of the Ejido, and without due compensation. Furthermore, the company has disposed of contaminated wastewater that affects agricultural land of members of La Sierrita, jeopardizing the life and health of ejido members, their economic livelihood, and the value of their property.

Therefore, Excellon has failed to implement Section IV of the OECD MNE Guidelines because: (1) it has engaged in a campaign to deny workers' rights to freedom of association, (2) it has fostered an environment in which both workers and ejido members have been subject to threats against their life and liberty in the last three years;

Excellon has failed to disclose in any of these documents that there is a significant risk that it will lose access to the Ejido's lands as a result of the breakdown in its negotiations with the community.

⁹¹ American Convention on Human Rights 1969, Art. 21, Nov. 22, 1969, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123; International Covenant on the Elimination of All Forms of Racial Discrimination, March 7, 1966, 660 U.N.T.S. 195.

and (3) the company has failed to respect its obligations to the Ejido enumerated in the land rental contract.

c. Section V: Employment and Industrial Relations

In Section V, Employment and Industrial Relations, the Guidelines underline that enterprises should:

1(a): Respect the rights of workers employed by the multinational enterprise to establish or join trade unions . . . of their own choosing;

1(b): Respect the right of workers employed by the multinational enterprise to have trade unions and representative organisations of their own choosing recognised for the purpose of collective bargaining, and engage in constructive negotiations, either individually or through employers' associations, with such representatives with a view to reaching agreements on terms and conditions of employment;

2(b): Provide information to workers and their representatives which enables them to obtain a true and fair view of the performance of the entity or when appropriate, the enterprise as a whole.

4(c): Take adequate steps to ensure occupational health and safety in their operations.

8: In their operations, to the greatest extent practicable, employ local workers and provide training with a view to improve skill levels, in co-operation with worker representatives . . .”

As noted in the Commentary on the Guidelines, “The International Labour Organisation (ILO) is the competent body to set and deal with international labour standards, and to promote fundamental rights at work as recognised in its 1998 Declaration on Fundamental Principles and Rights at Work.”⁹²

Under the ILO Conventions 87 and 98 and articles 6, 7, 8, 8.1a, 8.1b of the Additional Protocol to the American Convention on Economic Social and Cultural Rights⁹³, the Mexican state must guarantee workers’ right to work, right to satisfactory labor conditions, and right to freedom of association and to collectively bargain.

Excellon has violated international norms through its continual efforts to keep workers from forming a union. As discussed above, the company is using two protection contracts which have no significant worker representation to prevent workers from forming an independent union. The company also appear to be using various subsidiaries to increase the effect that these protection contracts have on workers’ ability to organize and efficiently navigate union recognition proceedings.

In the case at hand, workers had no knowledge of the existence of a union contract from 2005, when the contract was first signed, until August 2011, when they were

⁹² OECD, *Commentary on OECD Guidelines for Multinational Enterprises*, para. 48 available at <http://www.oecd.org/dataoecd/43/29/48004323.pdf> (last accessed May 23, 2012).

⁹³ Ratified by the Mexican state in 1996.

informed of its existence by the Canadian Counsellor for Corporate Social Responsibility. The workers never had an opportunity to vote on union representation, to elect union officers or delegates, or to participate in contract negotiations, or even to see a copy of the contract.

Second, the company has engaged in continuous acts of intimidation and interference with the union formation process ever since workers in La Platosa mine chose to affiliate to the SNTMMSSRM. Only three days after the formation of Section 309, the company signed a second protection contract with an employer-dominated labor organization. Soon thereafter, the company forced workers into antiunion meetings and pushed them to sign documents stating that they rejected union affiliation (presumably, the company meant to a union other than the company-controlled union). Excellon has selectively targeted known SNTMMSSRM supporters for demotions, harassment, and unlawful discharge. When Section 309 held a work stoppage to force the company to the negotiation table in August of 2011, the company stated that it would recognize the SNTMMSSRM but then reneged and engaged in a campaign of support for a rogue rival union.

Though the company has the ability to disavow its protection contracts and enter into collective bargaining with the SNTMMSSRM, it refuses to do so.⁹⁴ Instead, Excellon supports the employer-dominated SNMMNGS union, while falsely asserting to its shareholders and the public that it is a neutral and aggrieved party in an inter-union conflict.

By imposing a labor organization selected by itself, without allowing its employees the right to freely and democratically choose their collective bargaining representative – and indeed without any form of consultation or advance notice to its employees – Excellon unequivocally violated the their employees’ freedom of association under ILO Convention 87. In addition, by imposing an employer-dominated labor organization, Excellon violated the prohibition in ILO Convention 98 on “acts which are designed to promote the establishment of workers' organisations under the domination of employers”⁹⁵

⁹⁴ See Art. 401 LFT (stating that the company may disavow a collective bargaining agreement upon mutual agreement).

⁹⁵ The ILO Committee on Freedom of Association (CFA) recently explained this prohibition in some detail in a case from India where an independent union sought to represent workers but was blocked by an employer –dominated “puppet union.”

“903. Firstly, with reference to the above principles concerning the protection against acts of anti-union discrimination and interference in trade union internal affairs, the Committee recalls the importance of the independence of the parties in collective bargaining and stresses that negotiations should not be conducted on behalf of employees or their organizations by bargaining representatives appointed by, or under the domination of, employers or their organizations. Participation in collective bargaining and in signing the resulting agreements necessarily implies independence of the signatories from the employer or employers' organizations. It is only when their independence is established that trade union organizations may have access to bargaining (see Digest, op. cit., paras 868 and 966).

Finally, as noted in the Canadian CSR Counsellor Report, workers raise credible and real fears regarding safety and security in the mine.⁹⁶ Excellon has failed to conduct a thorough dialogue with worker representatives regarding satisfactory safety conditions in the mine.

Therefore, Excellon has failed to implement the provisions of Section V of the OECD MNE Guidelines.

d. Section VI: Environment

In Section VI, Environment, the Guidelines state that enterprises should:

2(a): Provide the public and workers with adequate, measureable and verifiable (where applicable) and timely information on potential environment, health and safety impacts of the activities of the enterprise, which could include reporting on progress in improving environmental performance;

2(b): Engage in adequate and timely communication and consultation with the communities directly affected by the environmental, health and safety policies of the enterprise and by their implementation.

5: Maintain contingency plans for preventing, mitigating, and controlling serious environmental and health damage from their operations, including accidents and emergencies; and mechanisms for immediate reporting to the competent authorities.

Articles 11 and 12 of the International Covenant on Economic, Social, and Cultural Rights, ratified by Mexico, protects the right to water, which includes ensuring a supply of water adequate for personal and domestic uses.⁹⁷

904. It further considers that employers should recognize for collective bargaining purposes the organizations representative of the workers employed by them (see Digest, op. cit., paras 952 and 953). In order to encourage the harmonious development of collective bargaining and to avoid disputes, it should always be the practice to follow, where they exist, the procedures laid down for the designation of the most representative unions for collective bargaining purposes when it is not clear by which unions the workers wish to be represented. In the absence of such procedures, the authorities, where appropriate, should examine the possibility of laying down objective rules in this respect (see Digest, op. cit., para. 971). In this respect, the Committee considers that, in order to determine whether an organization has the capacity to be the sole signatory to collective agreements, two criteria should be applied: representativeness and independence. The determination of which organizations meet these criteria should be carried out by a body offering every guarantee of independence and objectivity (see Digest, op. cit., para. 967).”

CFA, Case No. 2512, Report No. 348 (2007), available at <http://www.ilo.org/ilolex/cgi-lex/pdconv.pl?host=status01&textbase=iloeng&document=4753&chapter=3&query=%28india%29+%40ref&highlight=&querytype=bool&context=0> (last accessed May 23, 2012).

⁹⁶ App.P, Canada Office of the Counsellor of CSR in the Extractive Sector, *Final Report of Complaint No. 2011-01-MEX*, pp. 15, 19.

⁹⁷ U.N. Committee on Economic, Social, and Cultural Rights, General Comment No. 15 (2002) The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), ¶2, U.N. Doc. E/C.12/2002/11 (Jan. 20, 2003).

The company has failed to comply with several key provisions of its agreement with the ejido, which has resulted in a reduction of potable water supply and contamination of ejidal lands. Because the company continues to block construction of the water treatment plant promised in its contract with the La Sierrita, the ejido continues to suffer from a serious water shortage worsened by the company's intensive use of local water sources. Furthermore, evidence indicates that contaminated water from the mine is finding its way into agricultural areas used by the ejidos threatening to salinate and destroy those lands for many years to come.

Additionally, the company has walked away from efforts by the ejido to have a dialogue on these issues and has failed to make a contingency plan for the prevention and mitigation of this environmental damage as required under Mexican law. Finally, the company has engaged in further exploration onto the ejido's lands beyond the terms of its rental agreement without permission, causing unanticipated damage to the flora and fauna of La Sierrita. Therefore, Excellon is failing to implement Section VI of the OECD MNE Guidelines.

V. DESIRED OUTCOMES

The complainants request that the NCP conduct an investigation into Excellon's activities in and around the La Platosa Mine, including its exploration and expansion of the mining concessions, as part of the process of making its initial assessment of whether the issues raised in this complaint merit further examination. Further, complainants request that the NCP offer its good offices to help the parties involved to resolve the issues raised in the complaint. Specifically, complainants seek Excellon's commitment to the following:

- Recognize the SNTMMSSRM as the representative of its workers and enter and enter into good faith negotiations to sign a collective bargaining agreement;
- Cease its intimidation and persecution of employees who are members of the Section 309 of the SNTMMSSRM;
- Reinstate all Section 309 workers who have been fired as a result of their union involvement, including the General Secretary of the Section 309, Jorge Luis Mora;
- Cease all financing and connection with the SNGMMNGS;
- Cease any and all exploration or exploitation activities on the land of the Ejido La Sierrita without the express consent of the Ejido General Assembly;
- Build a water treatment plant so that the Ejido may use all residual water from the mine for agricultural use without fear that the water will ruin the Ejido's land;
- Provide all concessions to the Ejido La Sierrita as provided in the contract, including the concession for food services in all worker cafeterias;
- Ensure compliance with hiring preferences clause of the land rental contract and cease discriminating against Ejido applicants for employment at Excellon;

- Engage in in-depth dialogue with the Ejido La Sierrita to revise the land rental contract and to include a clause allowing for periodic review of the contract;
- Compensate the Ejido La Sierrita for damages done to communal land as a result of Excellon's illicit exploration activities and the continual contamination of water; and submit to ongoing, third-party monitoring of water contamination.