



## SPECIFIC INSTANCE OF SOMADDEX – BOUYGUES CONSTRUCTION GROUP IN MALI

13 June 2016

Statement by France's National Contact Point (NCP)

The NCP closes the referral after completing its initial assessment

*On 4 May 2015, a specific instance was referred to the NCP via its website concerning the July 2005 decision by Somadex, a Mali-based subsidiary of the Bouygues Construction Group, to dismiss workers. The referral was filed by a Collective of 216 former Somadex workers represented by a spokesman, Mr Yacouba Traoré, who was also the General Secretary of the Mining Federation of Mali. The initial referral reported “a flagrant breach of the OECD Guidelines” and asked the NCP to implement “measures to repair the prejudice caused” by “wrongful dismissals due to participation in labour strikes.” Reformulated in July 2015, the referral referred to recommendations 1 and 2 of the General Policies set forth in Chapter II of the Guidelines (2000 edition). In fact, the NCP determined that the referral related mainly to Chapter IV on Employment and Industrial Relations.*

*After completing its assessment based on a due examination of both parties' arguments, and in view of the facts that the NCP was able to confirm with regard to the serious labour dispute that took place at Somadex in 2005, the NCP did not find any breach of the Guidelines by the enterprise and deemed that the circumstances did not meet the criteria for the NCP to make an offer of good offices to the parties. The NCP took note of the lessons that the Bouygues Construction Group learned from the conflict regarding the conduct of its corporate social responsibility policy, and encouraged the Group to supplement its corporate code of ethics with an explicit reference to other pertinent guidelines developed under the aegis of the OECD and the ILO.*

### Recommendations of the 2000 Guidelines targeted by the referral

**Chapter II: General Policies:** Enterprises should take fully into account established policies in the countries in which they operate, and consider the views of other stakeholders. In this regard, enterprises should:

1. Contribute to economic, environmental and social progress with a view to achieving sustainable development.
2. Respect the human rights of those affected by their activities, consistent with the host government's international obligations and commitments.

**Chapter IV: Employment and Industrial Relations:** Enterprises should, within the framework of applicable law, regulations and prevailing labour relations and employment practices:

1. a) Respect the right of their employees to be represented by trade unions and other bona fide representatives of employees, and engage in constructive negotiations, either individually or through employers' associations, with such representatives with a view to reaching agreements on employment conditions.
2. a) Provide facilities to employee representatives as may be necessary to assist in the development of effective collective agreements.
- 2.c) Promote consultation and co-operation between employers and employees and their representatives on matters of mutual concern.
4. b) Take adequate steps to ensure occupational health and safety in their operations.

### 1. Presentation of the facts mentioned in the referral and of parallel proceedings

Somadex was tasked with excavating and transporting ore from the Morila open-pit gold mine under a subcontracting agreement on behalf of Morila SA, the mining company that owned and operated the mine and which began its activities in 2000. Morila SA is a Malian entity held jointly by two multinational enterprises based in South Africa, Randgold (40%) and AngloGold Ashanti (40%), and the Malian government (20%). Somadex's last subcontracting agreement expired at the end of 2009, at which time Somadex was replaced by another Group subsidiary.

Against the backdrop of recurring tensions in Mali's mining sector concerning the productivity bonus to which mining operators (including Morila SA) were opposed, a very harsh labour dispute erupted at Somadex, as a subcontractor of Morila SA, in July 2005. The dispute arose as a result of the rapid deterioration in labour-management dialogue (social dialogue) that had occurred since the election of new leadership of the enterprise's trade union committee in December 2004. Personal conflicts and accusations of poor governance aggravated the situation. In late June 2005, the trade union committee called for a 72-hour strike on 6-7-8 July 2005, for reasons that were deemed ill-explained and unfounded. During the consultations in late June 2005, the local government and the enterprise declared the strike unlawful on the grounds that the strike notice period had not been respected. A mediation committee was set up, with the participation of the enterprise, but the strike took place nevertheless. On 9 July, the enterprise requested that some thirty workers be dismissed for having deserted their jobs. A new work stoppage was then launched. The work stoppage drew a strong following in a context of rising tensions and pressure between the trade union committee and the management, as well as between workers on site and in the village where they and their families were being housed. As a result, operations came to a halt during that month of July, despite the negotiations under way between the enterprise, the social partners and the political and administrative authorities. In mid-July, the national trade unions confirmed that the strike was unlawful and expelled the leaders of the trade union committee. The return to work was eventually scheduled for 31 July, 2015. On that day, 311 workers – amounting to two-thirds of the workforce – were dismissed for deserting their jobs. Over the ensuing weeks, about a hundred workers were re-hired by Somadex under their former wage conditions. Normal labour-management dialogue resumed (negotiations over wages and productivity bonuses, sanitary improvements).

Two Somadex buses caught fire in early September 2005 in front of the village police station. Thirty-two former Somadex employees were arrested and held – some for six weeks (23 people) and others for 14 months (9 people). The International Federation for Human Rights (FIDH) decided to conduct an international fact-finding mission, which led in September 2007 to the publication of a report on gold mining and the governance of the sector in Mali<sup>1</sup>. The report mentioned the Morila SA mine, which was the largest in the country at the time, but glossed over the details of the Somadex labour dispute. *“The climax of the dispute was a 72-hour strike early in July 2005. During the whole of the summer, the dialogue was at a standstill, despite attempts at mediation by the central trade union organisations and the Malian political and administrative authorities. 311 out of the 500-odd employees refused to go back to work, and the tension between strikers, non-strikers and the management spread to the nearby village of Sanso, where the mineworkers live (see page 25).*

## 2. Procedure followed by the National Contact Point

According to its bylaws, the NCP must endeavour to conclude an initial evaluation within three months of acknowledging receipt of the referral, although additional time may be granted, if need be, in order to collect essential information necessary for an informed decision (see article 26 in appendix).

### ◆ Formal conditions for admissibility (June 2015 to September 2015)

The complainant's Collective confirmed on 6 May 2015 that it was referring a specific instance (a letter containing 20 lines) to the NCP and handed over documents. The NCP Secretariat informed the NCP members, who began to examine the admissibility of the referral. **On 24 June 2015, the NCP acknowledged receipt of the referral and declared it to be inadmissible.**

**The formal conditions for admissibility were not met** (see article 16): The referral did not specify the identity of the enterprises in question, making it impossible to determine the competence of the French NCP. The referral contained no details; it did not cite references to the OECD Guidelines; it did not request the good offices of the NCP but requested reparation of the prejudice caused. The NCP proposed that the plaintiffs reformulate their referral by 10 September 2015. The NCP informed the plaintiff of elements that required additional information, and reminded the plaintiffs that the mandate of NCPs is remediation, not granting compensation. The Collective reformulated its referral in July and submitted a four-page complaint along with additional information.

**On 18 September 2015, the NCP declared that the referral met the formal conditions for admissibility but remained tenuous. In view of its admissibility, the referral was forwarded to the Bouygues Construction Group.**

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<sup>1</sup><https://www.fidh.org/IMG/pdf/mali477ang2007.pdf>

#### ◆ Initial assessment (September 2015 to February 2016):

On 24 September 2015, the NCP observed that despite the additional clarifications provided, the referral was still far from complete: it provided neither an understanding of the sequence of events that had led to the labour dispute of July 2005 nor did it point the way to remediation. The NCP drew the plaintiffs' attention to the fact that the NCP's action might therefore be confined to an analysis of conformity, and reminded the plaintiffs that in any case, NCPs do not have the decision authority to grant compensation. To gain a better understanding of the case, the NCP decided to prolong its initial assessment. It met with a very high-level representative of the Bouygues Construction Group on 6 November 2015. It organised a conference call with the Collective on 15 December 2015 at the Economic Section of the French Embassy in Mali. In accordance with its bylaw<sup>2</sup>, the NCP decided to meet with the FIDH in the role of expert, given the latter's involvement in the case since 2007. The meeting with the FIDH took place on 26 January 2016. The NCP had further interchanges with the Collective. On 3 February 2016, the NCP finalised its initial evaluation and decided to close the referral. It informed the parties of its decision and of the preparation of its statement.

#### ◆ Conclusion of the referral (March to May 2016):

New discussions took place with the parties, including another meeting with the Group. On 3 May 2016, the NCP confirmed the closure of the referral and adopted its decision on the questions raised by the Collective. It tasked the Secretariat with drawing up a statement on this basis. The draft statement was adopted on 3 June 2016 by the NCP and was then submitted to the parties for opinion. The final statement was adopted on 13 June 2016 by the NCP and forwarded to the parties and to the FIDH for information, before being published on the NCP website.

#### ◆ Coordination of NCPs during the initial assessment:

Two NCPs were contacted: one from a country in which one of the owners of Morila SA is listed and the other from a country in which an enterprise was involved in a complaint concerning the same sector in Mali.

### 3. Decision of the National Contact Point on the initial assessment of the Somadex-Bouygues Construction referral

The NCP conducted a thorough examination of the criteria for admissibility and initial assessment as set forth in its bylaw, notably to determine the significance of the issue, the supporting items provided, and the parallel proceedings (article 23) and article 25, which stipulates that *"the NCP shall strive to ascertain whether, in making an offer of good offices, it could make a positive contribution to the resolution of the issues raised and if this would not create serious prejudice for either of the parties involved in other proceedings, or cause a contempt-of-court situation. It may then decide either to pursue or to renounce its consideration of the specific instance."*

#### ● After completing its initial assessment, the NCP deemed that the criteria were not met for making an offer of good offices to the parties

The referral filed by the Collective remained incomplete and was unable to provide conclusive supporting elements despite the explicit and repeated requests of the NCP to do so. The NCP was not in a position to offer its good offices on this basis. Moreover, remediation was no longer possible and NCPs do not grant compensation. The July 2005 dispute had been judged in Mali: both the Malian lower court (2010) and its court of appeals (2011) had found the dismissals to be lawful. In the appeals proceeding moreover, the judge deemed that a collective action was not applicable. The plaintiffs had not provided evidence concerning any individual suits potentially brought in Mali or elsewhere. The NCP examined similar cases that had been submitted to the ILO concerning Mali. Although the 2005 Somadex dispute had not been referred to the ILO, which would have been the appropriate body to ascertain whether Malian law conformed to ILO standards, the ILO had dealt with other disputes, including mass dismissals that took place at several mines in 2012<sup>3</sup>. The spokesman for the Collective took part in these complaints. The FIDH did not pursue its action after publishing its report in 2007.

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<sup>2</sup> Art 7. From time to time, outside experts known for their technical expertise (e.g. in the realms of corporate social accountability, human rights or the environment) may be called on. Any such additional participation must be approved by the NCP members.

<sup>3</sup> On 15 May, 2013, the trade union Confederation of Workers of Mali had filed a complaint with the ILO Committee on Freedom of Association regarding the mass dismissal of 531 mine workers in 2012 following strikes organised in several enterprises (Case

Although the criteria were not met for the NCP to make an offer of good offices, the referral nevertheless related to a serious issue: the dismissal of two-thirds of the enterprise's workforce for deserting their jobs. This is why the NCP deemed it important to examine the merits of the case, to resolve the issues raised by implementing the Guidelines in this particular instance.

- **On the merits and in consideration of the elements that it was able to prove, the NCP observed that Somadex was involved in a particularly hard-line management of a serious labour dispute, during which Somadex did not violate the OECD Guidelines.**

After having established dialogue with the Collective and with the Bouygues Construction Group, which responded in detail to the NCP's questions by providing its documents from 2005, as well as with the FIDH as an expert witness, the NCP drew up a four-point analysis. First, in 2004/2005, the mining sector in Mali was under tension notably on the topic of the mining companies' payment of productivity bonuses. This sector was prone to human rights violations, including at the Morila mine, which is symbolic due to its size. Second, labour-management dialogue (or social dialogue) had deteriorated sharply at Somadex between January 2005 and July 2005. Third, stakeholders were unable to control the labour-management dialogue sufficiently to halt the aggravation of the dispute, which led Somadex to adopt a hard-line approach to managing the strike and ultimately to dismiss 311 workers, one-third of whom were later re-hired on identical terms. Fourth, as a contextual factor ancillary to the referral, the NCP noted that the FIDH, in its 2007 report, had criticised the arrests and detention of several workers involved in the dispute and mentioned human rights violations. However, the alleged involvement of Somadex and its parent company in these violations was never proven. The NCP underscores that these acts fell within the competence of the Malian authorities and that in any case, the concepts of "due diligence" and "business relationships" were not applicable under the terms of the time, as they were introduced into the Guidelines with the revision of 2011.

**Somadex was not in breach of the Guidelines but found itself confronted with the deteriorating labour-management dialogue (or social dialogue) that led to a massive walk-out, declared to be unlawful before the strike began and judged as such after the fact, and which led to the dismissal of 311 workers for deserting their jobs:**

- The NCP recognises the severe nature of the conflict and the suffering that it caused to the workers. Nevertheless, it notes that the allegations formulated in the Collective's referral concerning a failure to respect the Guidelines in the dismissals of July 2005 and Somadex's management of human resources during the preceding weeks have not been proven;
- Somadex was within the law. The strike was declared unlawful both by the labour inspectorate and by the social partners (national trade unions), and subsequently judged to be unlawful by the Malian courts, as the matter had not been referred to the ILO;
- Legal issues aside, the enterprise, as a subcontractor bound to meet demanding performance obligations with respect to its principal, Morila SA, sought to remain constructive as the labour crisis erupted and then suddenly evolved into a very acute and hard-line situation. Somadex and the Group tried to make use of the means at their disposal to manage the conflict and maintain dialogue with their stakeholders. Somadex subsequently re-hired one-third of the dismissed workers, per their request. They returned to work under the same wage conditions as prior to the crisis;
- Contrary to the allegations set forth in the referral, the NCP noted that at the time, Somadex had both a Health-Safety-Environment Strategy and an HSE committee in place, which is consistent with the Guidelines. Improvement actions had been decided at the end of 2004 and implemented over the course of 2005/2006;
- In accordance with the Guidelines, Somadex allowed its employees to be represented by trade unions or other organisations (in this case, the trade union committee) and supported their activities. However, the NCP did note that the governance of the mechanism for the enterprise's financing of trade union activities (making resources-in-kind available to the trade union committee without any traceability of the committee's monetisation of said activities) did not sufficiently comply with best practices for accounting transparency. Greater transparency might have avoided accusations of embezzlement of funds intended for workers, and those accusations contributed to the deterioration of social dialogue and collective bargaining.

- **Conclusion**

It is the opinion of the NCP that although Somadex, the Bouygues Construction Group and their social partners at the Morila mine became caught up in a serious labour dispute that erupted on questionable legal grounds and were unable to maintain constructive negotiations as recommended by the OECD, this does not mean that the enterprise breached the Guidelines by the way it managed the dispute. The NCP points out that in the Group's history of activities in this sector, the Morila dispute has remained an isolated case. It notes the lessons that the Group says it learned from the Somadex conflict.

In May 2016, more than ten years after the fact, the NCP reported that the Bouygues Construction Group has for the past several years deployed internal policies demonstrating the lessons it learned from the Morila crisis: in the course of its discussions with the NCP, the Group stated that it places great importance on labour-management dialogue, social dialogue and on personnel training, particularly in Africa; that it has a social and environmental policy in place and that its code of ethics is currently being revised.

The NCP thanks the Group for its full cooperation. However, it points out that the 2014 version of the Group's code of ethics makes no explicit mention of the OECD Guidelines, but mainly to the fundamental conventions of the ILO concerning forced labour and child labour.

**For the future, the NCP recommends that the Bouygues Construction Group:**

- Supplement its code of ethics by including the OECD Guidelines for Multinational Enterprises, particularly Chapter V of the Guidelines concerning Employment and Industrial Relations, which reflects the provisions of the 1998 ILO Declaration of 1998 on Fundamental Principles and Rights at Work, the 1977 Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy and the fundamental conventions of the ILO.
- Take into account the OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector, which the OECD launched on 10 May 2016 with respect to mining activities.

🔗 <http://mneguidelines.oecd.org/stakeholder-engagement-extractive-industries.htm>

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### *Excerpt of the French NCP By-Laws<sup>4</sup>*

#### **IV– Referrals to the NCP – Initial evaluation**

##### **Form of referrals**

**Art. 16.** A referral to the NCP must be precise. In this regard, it must stipulate: the identity of the enterprise in question; the identity and contact details of the plaintiff; details of the facts of which the enterprise is accused; elements of the OECD Guidelines for Multinational Enterprises in respect of which the referral to the NCP is being made.

##### **Processing referrals: evaluation of admissibility**

**Art. 17.** Upon receiving a referral, the NCP Secretariat shall send the referring party an acknowledgement of receipt, through the post or electronically, and shall forward copies of any items submitted in support of the referral to NCP members.

**Art 18.** In examining the admissibility of a referral, the NCP shall begin by assessing the importance of the issues raised to ascertain whether they merit further examination.

**Art 19.** Following its initial evaluation, the NCP conveys its response to the parties involved. The NCP shall issue a statement announcing the admissibility of the specific instance, which shall stipulate the identity of the parties, the country or countries concerned by the referral and a summary of its initial evaluation. With due regard to the confidentiality incumbent on the NCP, the plaintiff may inform its principal(s) of the decision taken by the NCP with regard to admissibility.

**Art 20.** Should it decide that the issue does not merit further examination, the NCP shall inform the parties of its reasons and issue a statement. In this statement, the NCP shall outline the issues raised and set forth the reasons for its decision. The statement shall not disclose the identity of the enterprise in question.

##### **Admissibility criteria**

**Art. 21.** A referral shall be declared admissible if it fulfils the formal conditions stated in paragraph 16.

**Art 22.** The NCP shall also ascertain whether the issue in question has been raised in good faith and in accordance with the Guidelines.

**Art 23.** In assessing the admissibility of a referral to it, the NCP shall consider: the identity of the party concerned and its interest in the case; the significance of the issue and the supporting items provided; the apparent connection between the enterprise's activities and the issue raised in the specific instance; the relevance of the applicable laws and procedures, notably jurisdictional proceedings; how similar issues are being (or have been) examined at the national or international level.

**Art 24.** A referral submitted by any NCP member shall be presumed admissible if it meets the above conditions. [This article is not applicable to this referral.]

**Art 25.** The NCP shall strive to ascertain whether, in making an offer of good offices, it could make a positive contribution to the resolution of the issues raised and if this would not create serious prejudice for either of the parties involved in other proceedings, or cause a contempt-of-court situation. It may then decide either to pursue or to renounce its consideration of the specific instance.

**Art. 26.** The NCP shall endeavour to conclude an initial evaluation within three months of acknowledging receipt of the referral, although additional time may be granted, if need be, in order to collect essential information necessary for an informed decision.

<sup>4</sup> The by-laws of the French NCP are available on its website in both French and English language versions:

☞ <http://www.tresor.economie.gouv.fr/File/404283> (FR) <http://www.tresor.economie.gouv.fr/File/404282> (EN)