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SWEDISH ENVIRONMENTAL
PROTECTION AGENCY

The GOXI LEARNING SERIES - SEPTEMBER 2017-APRIL 2018

Environmental Governance Programme (EGP)

***Using Social and Environmental Safeguards and Grievance Mechanisms as Tools
to Prevent Harm in the Extractive Sector***



Parties jointly working in the field at Oyu Tolgoi Copper mine in Mongolia

Knowledge extracted from webinar and Goxi forum Discussions in April 2018

1. Emerging Critical Issues

- Since the 1990s, private-sector investment in the developing world has been an increasingly practiced approach for spurring growth and enhancing development outcomes. Research and practice have demonstrated that some development projects, including in the extractive sector, made the lives and environments of community members worse rather than better. This reality contributed to the development of new standards, safeguard policies and other norms and declarations aimed at ensuring the social and environmental well-being of communities are protected.
- A variety of international human rights laws and compacts have emerged (including the UN Declaration on the Rights of Indigenous Peoples, ILO 169, the UN Global Compact, and others), along with a series of social and environmental standards and safeguards of the multi-lateral and bi-lateral development banks. One important element of these standards is that people have a right to be fully informed about the development decisions that affect them and to be treated with respect and be protected from harm. Therefore, these standards are typically paired with accountability mechanisms, which serve as an avenue for affected communities to file grievances and seek non-judicial remedy for their issues.
- Finally, a number of voluntary principals and initiatives have emerged around social and environmental accountability, including the UN Guiding Principles on Business and Human Rights and the Extractive Industry Transparency Initiative. However, in many places the political will to translate these commitments into compliance is often lacking.
- By taking part in the webinar, participants gained a better understanding of the global landscape of social and environmental standards, and the grievance mechanisms that underlie them; as well as the role of these standards and mechanisms in preventing and addressing conflict in the mining, oil and gas sectors. The webinar included case examples from Asia and Latin America as a basis for discussion and sharing of experiences.

2. Public authorities and other actors sharing experiences

1. UNDP Social Environmental Standards (SES)

- UNDP were the first UN agency to adapt SES in 2015 and represent one of the first safeguard standards in the UN system. In recent years, other UN agencies have been introducing similar standards. SES aim to strengthen the quality of UNDP's programming by ensuring that UNDP is accountable to the standards they stand for. They aim to ensure that harm to the environment and people that might result from the programming activities is avoided or at least minimized.
- The SES are integral to quality assurance and risk management in all UNDP programming. There are 10 key components to the SES. Three cross-cutting principles that apply across all UNDP programs and projects: Human Rights, Gender Equality and Women's Empowerment, and Environmental Sustainability.
- Another key objective of the SES is to strengthen the capacities of both UNDP staff and partners for managing social and environmental risks and to strengthen UNDP's

accountability to stakeholders and project affected people ensuring that they are informed, involved and that a grievance mechanism is in place.

- The emergence of safeguards has been a major step towards protecting people and the environment from harm. But without strategies and mechanisms that hold project developers accountable to these standards the safeguards themselves are mostly meaningless. More info here: www.undp.org/ses

2. The Compliance Advisor Ombudsman (CAO)

- CAO is the independent recourse mechanism for the International Finance Corporation (IFC) and Multilateral Investment Guarantee Agency (MIGA). The CAO responds to complaints from project-affected communities with the goal of enhancing social and environmental outcomes on the ground. CAO's mandate is triggered by complaints from communities. CAO has two main functions: Dispute resolution or Compliance:
- CAO's Dispute Resolution function works with stakeholders to help resolve grievances about the social and environmental impacts of IFC/MIGA projects. Dispute resolution processes typically involve approaches common to alternative dispute resolution (ADR), including mediation, joint fact-finding, information sharing and facilitated dialogue.
- CAO's Compliance function oversees investigations of IFC/MIGA's social and environmental due diligence at the project-level. Investigations aim to enhance project outcomes and strengthen adherence to relevant standards.

Challenges in CAO

CAO has been facing 3 primary challenges in their operations:

- 1) Access and Awareness (*Community must have the ability to approach a mechanism like CAO*).
- 2) The capacity of the party to engage in the process (*The community being able to bring a complaint and work on it together with the company*).
- 3) Issues about representation (*e.g. ensure that women are equally represented*).

3. OYU TOLGOI copper and gold mine in Mongolia

• Context

The Oyu Tolgoi project is a US \$22,337 billion investment to develop a copper and gold mine at Oyu Tolgoi in the Southern Gobi region, Mongolia. Oyu Tolgoi LLC's majority owner (66%) is Turquoise Hills Resources, a Canadian public company listed on the Toronto Stock Exchange. Erdenes Oyu Tolgoi, LLC, a Mongolian state-owned holding company, owns the remaining 34%. IFC's investment is an A Loan for IFC's account of up to US\$ 400 million together with a B Loan of up to US\$ 820,625 million. In addition to IFC financing, MIGA is providing a guarantee against the risks of expropriation, war and civil disturbance, and breach of contract for a parallel debt tranche of up to US\$1 billion. IMF estimated the project will increase Mongolia's GDP by 30% once operational.

• Issue

In February 2013, a complaint was filed by local nomadic herders and community members who reside and conduct livelihood activities close to the project site. The

complainants' main concern was the Undai River diversion component of the project. The complainants contend that the river diversion jeopardized their traditional nomadic lifestyle and livelihood. They were specifically worried that the diversion will lead to several water systems drying up, deteriorated pastureland yields, diminished water supply to forests and a cultural impact on what they view as a sacred river.

- **Process**

CAO found the complaint eligible for further assessment in February 2013. Based on stakeholder discussions conducted as part of the CAO Assessment, the complainants and company agreed to work with CAO's Dispute Resolution function to try to resolve the issues raised in the complaint using a collaborative approach. Given a second complaint was filed in relation to the project, the local herders elected a team to represent them in a single CAO dispute resolution process for both CAO Oyu Tolgoi complaints. A collaborative dispute resolution process with neutral mediation provided by CAO regional mediators was initiated.

- **Outcomes**

Joint Fact-Finding (JFF) with jointly selected independent experts process to generate independent and mutually credible information on changes that are occurring in herder households, the impacts of OT's operations on herders' livelihoods and culture and the adequacy of OT's compensation processes. A training of joint fact finding was conducted to help the parties manage expectations. Parties worked jointly with experts in the field. Convened & facilitated separate and joint meetings with the parties and conducted capacity building training for herders as needed.

Creation of a permanent Tri-Partite Council (TPC) consisting of local herders, local Khanbogd Soum government, and company to address outstanding complaint issues and as a forum for regular dialogue and problem-solving beyond the CAO process. The establishment of TPC was crucial where parties can sit together with company and resolve the issues without mediator. TPC was also used to present JFF findings to the national government so that they could help resolve the issues in the field.

Team of mediators that worked on the case to prepare herders for the process.

Comprehensive agreements reached in May 2017 to resolve both complaints, including a public apology from the company in regard to the Undai River diversion, livelihood support programs, more inclusive participatory water monitoring, delivery of water to herders in need, an artificial/engineered watering site to replace Bor Ovoo spring, and compensation for impacts to local herders.

4. Yanacocha Mina de Oro

- **Context**

Minera Yanacocha S.R.L. operates a large open-pit gold mine located in the Andes mountains in the Department of Cajamarca, Peru. The company is engaged in the exploration and production of gold. Over a period from 1993 to 1999, IFC committed three loans to finance the capital expenditure programs for three of the company's mines, Carachugo, Maqui Maqui and La Quinoa. In parallel, IFC made an equity investment for a 5% ownership stake in the company, which it continues to hold. Between 2000-2017 a total of 11 complaints were received about different issues

including quality of life, land acquisition, compensation process, water, information closure and the environment.

- **Complaint 1: *Mesa de Diálogo y Consenso CAO-Cajamarca***

In June 2000, a contractor to Minera Yanacocha spilled 151 kg of elemental mercury between the mine site and the town of Choropampa. A number of local people were exposed and subsequently experienced adverse health effects. Affected citizens filed a complaint that the adverse impacts being experienced by those exposed to the mercury had worsened and that Yanacocha failed to honor its commitments to affected individuals.

The CAO accepted the complaint and, as part of its assessment, held a series of meetings with various stakeholder groups in the region. During public workshops it was decided to form a roundtable for dialogue (*a Mesa*) and prioritized a list of concerns to be addressed as well as a plan of action for problem-solving and conflict resolution skills.

Mesas became a means to address conflicts between Peru's largest gold mining company and the community of Cajamarca between 2000-2006. The purpose of the *Mesa* was to use dialogue and conflict resolution to prevent and resolve problems between the community and the mine. The *mesas* were tasked with measuring water quality and access to water. In addition, a water study, organized by the *Mesa*, began in January 2002, and the findings of the study were made public in October 2003. Between 2003-2005 a participatory monitoring process of the water was conducted together with the community, company and local government. For the first time, these three parties could work together and find a solution through the *mesas*. This was the first case that CAO has solved.

- **Complaint 11**

The complaint was filed in December 2017 by a former employee of Yanacocha, on behalf of himself and other employees. The complainants raised concerns related to occupational health and safety conditions at the mine during their employment. They contend exposure to toxic gases has led to negative impacts on their health. The complaint also raised issues related to information disclosure and the company's response to these issues.

The complaint met CAO's criteria, and CAO carried out an assessment of the complaint. The parties expressed interest in pursuing a dispute resolution process but were unable to agree on the terms of participation. Given the voluntary nature of CAO's dispute resolution process, the complaint is being referred to CAO's Compliance function for an appraisal of IFC's performance on the environmental and social due diligence of the project. At this moment CAO is in the evaluation phase of this complaint and talking to the different stakeholders to see how this complaint could be solved.

3. Questions from Webinars and GOXI Audience

- What are the key standards and safeguards that exist today, and why is it important for communities, companies and governments to know and understand them?
- What is the role of social and environmental safeguards in ensuring communities benefit from development?

- In the Mongolia and Latin America cases, how did the communities' ability to access an accountability mechanism help prevent the escalation of conflict? What elements of the process contributed to or hindered access to remedy?
- What parts of the system are still problematic and require further effort, collaboration and new solutions?
- Concerning the role of mediation and the compliance aspect, is dispute resolution an appropriate tool to hold institutions accountable? Can dispute resolution achieve outcomes that are beneficial both to the community and to the private sector?
- In the Joint fact-finding methodology in Mongolia, what were the issues? Which methodology was used? What were the challenges? *Important to select experts that all parties can trust. The parties named the JJF experts themselves. Learnings: The company included someone from internal procurement when ToRS were negotiated.*
- What tools are there within the UN System to help governments keep companies accountable?
- UN provided recommendations to the Mongolian government, but the government does not comply to them. What kind of oversight mechanism can be used to push the government to comply to these? What are the commitments that the Mongolian government has made? What are the mechanisms that exist for the community to bring grievances to the government? *Oversight mechanisms could be an interesting future project for the Tripartite Council. There was interest expressed by the Mongolian Mediator Nandia to work on the oversight mechanism with the Tripartite Council.*
- The question of whether the UN systems possesses measures to hold companies accountable for harm is quite complex because extractives agreements between these companies and countries also touches on sovereignty of target countries.
- Which are the good indicators to measure or evaluate the impact of environmental safeguards or environmental schemes in peacebuilding?
- How did you address the issue of cultural impact by the project? Was there a compensation? What kind?

Complaints the CAO has dealt with in Colombia and results of these cases. More info about the Bucaramanga case here: http://www.cao-ombudsman.org/cases/case_detail.aspx?id=187

- How does the CAO develop community engagement methodologies in conflict resolution processes so that the community can sit at the negotiating table?
- How are community dialogues in the CAO designed to resolve conflicts? What happens when the communities have their own ways of carrying out the community dialogue? How can you guarantee that the dialogue is truly intercultural in indigenous communities? How can communities find out about the complaint system at the CAO?
- In Colombia, there have been problems related to the oil spill that affected the Lisama creek. What are the lessons learned from the Peru case that could be applied to Colombia? What recommendations can you make to prevent the exacerbation of conflict and to ensure a timely response to the complaint in Colombia?

- What are CAO performance indicators regarding their interventions in the Yanacocha case with respect to governance related to social capital, effective remedy and social monitoring?
- What does the monitoring process near the Yanacocha mine look like and how is the project being accepted by the community?