

Research Summary Brief

Indigenous Rights in Mongolia: Challenges and Opportunities

SUMMARY

Since 2019, Jenny and Pascale have been conducting research into the complaints submitted by the herders of Khanbogd and Tsoggtsetsei to the Compliance Advisor Ombudsman (CAO) of the International Finance Corporation (IFC), which is part of the World Bank Group. A key aspect of these complaints was the claim that Mongolian herders are indigenous peoples and should therefore get more rights according to IFC's own Investment Performance Standards.

Our research is based on analysis of the CAO complaints and agreements, alongside interviews with key stakeholders on the Tripartite Council (TPC) (herders, local government, Oyu Tolgoi (OT) and NGOs) and a focus group with herders. After being delayed by COVID-19, we are grateful to Tseren Byambasuren for assisting us to conduct more interviews in Spring 2022.

This short brief is intended for herders impacted by Oyu Tolgoi mine in the South Gobi. It lays out the main conclusions of our research and suggests long term avenues for herders to advance their objectives.

THE RESEARCH TEAM



Dr Jennifer Lander
School of Law
De Montfort University
United Kingdom



Dr Pascale Hatcher
Political Science &
International Relations
University of Canterbury
Te Whare Wananga o Waitaha
Aotearoa, New Zealand

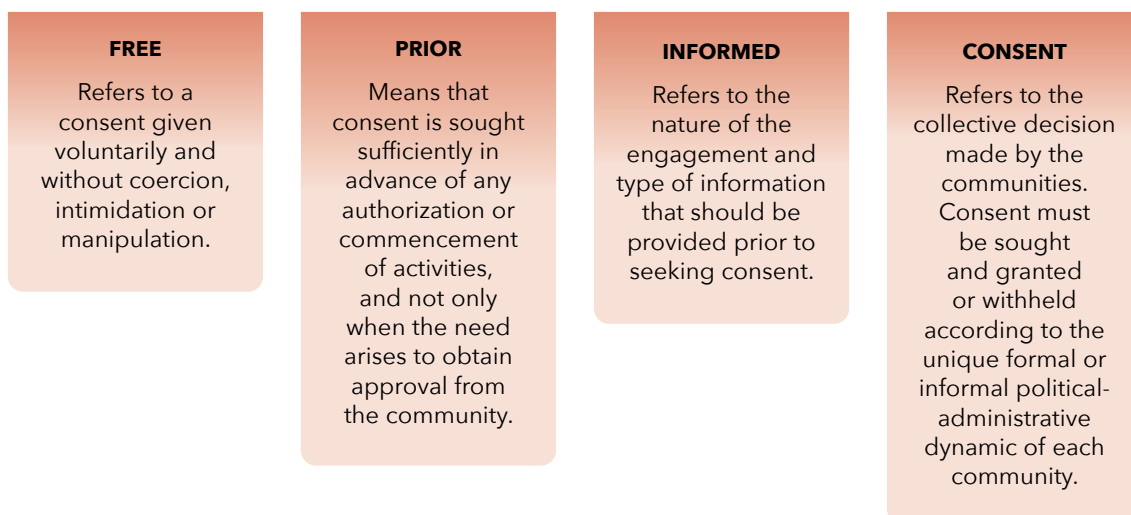


Tseren Byambasuren
Mongolia

THE RESEARCH

Herders impacted by the OT mine were advised to submit claims to the CAO through the framework of indigenous rights. If successful, this would give herders significantly more leverage with OT. If herders were recognised as indigenous peoples, the international legal principle of “Free, Prior and Informed Consent” (FPIC) would automatically apply. Not only would the herders receive compensation packages for the economic impacts of OT, but they would be entitled to consultation and a right of refusal regarding further development of OT.

FREE PRIOR INFORMED CONSENT*



* Source: Adapted from FAO (2016) ‘Free Prior and Informed Consent: An indigenous peoples’ right and a good practice for local communities’, I6190E/1/10.16. www.fao.org

In Mongolia however, the legal situation of herders as indigenous peoples is ambiguous, which is why the IFC and OT managed to avoid recognising herders as such. One of the challenges to being recognised as indigenous peoples through international law is that there is often a difference between the legal interpretations of NGOs and corporations. NGOs rightly expect “best practice” which, in international law, means that indigenous peoples should be able to self-identify as such. Corporations, on the other hand, are economically motivated to read the law in a way that downplays their obligations, which means that they will not generally recognise a people as indigenous unless it is inscribed into the law of that country. Because the Mongolian government does not recognise herders as an indigenous group and they do not have formal legal rights to their land, OT was in a stronger legal position to reject indigenous claims.

Herders were recognised to some extent as a distinct group of stakeholders in the dispute resolution process, as reflected in the constitution of the TPC in 2015. Composed of representatives of local herders, the OT mine, and the Khanbogd provincial government, this TPC is a remarkable achievement in and of itself. Our focus group discussions with the claimants as well as NGO interviews clearly point towards an overwhelming sense of accomplishment on the part of the herders: they now have an arena to voice their concerns. But our interviews also found that stakeholders on the TPC had different perceptions about its benefits and the progress that was being made on agreed issues.



Despite its benefits, there are some persistent challenges for herders in relation to the TPC, which are summarised in the next page.

CHALLENGES

REPRESENTATION

Representation on the TPC for herders became an issue because herders are partially recognised as a “special interest group”, but there is no provision in Mongolian law to facilitate elections among this specific group. Because of this, TPC elections took place using the traditional electoral system at the bagh and soum level, which allowed non-herders to stand for election. While this issue might have been resolved to some extent on the TPC since 2019, it raises the question of how herders’ unique interests in land, water and the environment can be best recognised and enforced when they do not have special legal status.

BALANCE OF POWER

The TPC is supposed to facilitate “equal” representation between all three stakeholder groups, with extra representation from herders to try to balance the power dynamic. But the other two groups of stakeholders on the TPC have significantly more power and access to legal, political and economic resources. While local government are supposed to represent the interests of all citizens, including herders, they do not necessarily function in that representative capacity on the TPC. The local soum government also has significant financial dependencies on OT through the Community Development Agreement, which means they have an economic interest in facilitating a smooth relationship with OT. Furthermore, when it comes to enforcement of the agreements, the costs of a legal battle would be much more significant for herders than OT due to unequal economic resources.



MONITORING

The 2019 concluding report of the CAO mediation stated that the IFC and the Multilateral Investment Guarantee Agency (MIGA) are responsible to ensure implementation of the remaining items. What is the process for notifying them? Does it require consensus from the TPC? Apart from the lack of clarity about the monitoring process, we think there are also significant issues of bias. Both the IFC and MIGA have provided significant loans and investment guarantees for OT (over USD 1 billion). This means that they are not independent, because they have a financial interest in the mining project. This is likely to lead to more favourable outcomes for the company rather than herders.

ENFORCEMENT

What political and legal options do herders have if the agreements are not implemented in a timely manner? The local government may not be able to hold OT to account politically as they are also stakeholders on the TPC mechanism. The agreements state that if disputes cannot be resolved amicably, the parties may seek “court or non-court dispute resolution procedures to settle the complaint” (Article 8.4). But there is a lack of clarity about what happens if the TPC dialogue breaks down. Who triggers the dispute resolution process and how is the method (e.g. court or arbitration) determined? Do all parties need to agree on it? While the best case scenario is that everything can be effectively negotiated through the TPC, it is a good idea for herders to consider their “back up” legal strategy to enforce the agreements if necessary.



OTHER CLAIMS

What happens for those herders whose claims were considered ineligible by the TPC mediation process, or who have been impacted by mining-related infrastructure? What about those who are affected by pollution and economic loss from the road between Tavan Tolgoi and OT, for example? While the TPC is an important vehicle to address herders’ grievances, it should not be seen by herders as the only avenue available. If some claims were considered ineligible by the CAO process or by the European Bank for Reconstruction and Development (EBRD) assessment in 2017, for example, there are other legal strategies that could be used.

PUBLIC VS PRIVATE LAW

The agreements are effectively a private legal contract. It is important that herders know what their rights are in terms of national and international law, particularly if new grievances arise outside of the agreements. These private agreements do not prevent herders from seeking public legal remedies, drawing on their constitutional right to a clean environment, for example. Herders need access to full legal information so that they can decide upon the best strategy to meet their needs.

LONG TERM

The CAO agreements address the historical claims that arose at the beginning of the mine's life cycle, and provides the TPC as a forum for ongoing dialogue around the implementation of those agreements. The strength of the TPC is that it is a forum for negotiation and compromise; its weakness is that the mining company has a significant amount of power in practice to determine how and when it will address issues. It is important for herders to collectively consider what they want from the TPC mechanism in the long-run, and to be aware that it is not designed to address every problem. If environmental rights are violated, for example, the TPC may be a forum to express grievance directly to the mining company but it is not a legal body that can force OT to make changes outside of the parameters of the agreements. OT's advantage in terms of monitoring and enforcement of the agreements alongside the "collaborative" framework of the TPC may discourage herders from taking formal legal action. However, it is important that herders know they do have rights, both within the context of the agreements and outside of them.



RECOMMENDATION: TAKING A TRANSNATIONAL PERSPECTIVE

OT is a "transnational" mining project, which involves a significant amount of foreign investment as well as government involvement. Transnational means that the project cuts across both the national and the international levels of finance and governance, and it involves both public (state) and private (business) organisations and laws. Because of the financial and legal complexity of the OT project, we suggest that a transnational approach would be helpful to herders in the long run, so that domestic and international strategies can be well coordinated and maximise the chance of success.

A TRANSNATIONAL APPROACH CONSIDERS:

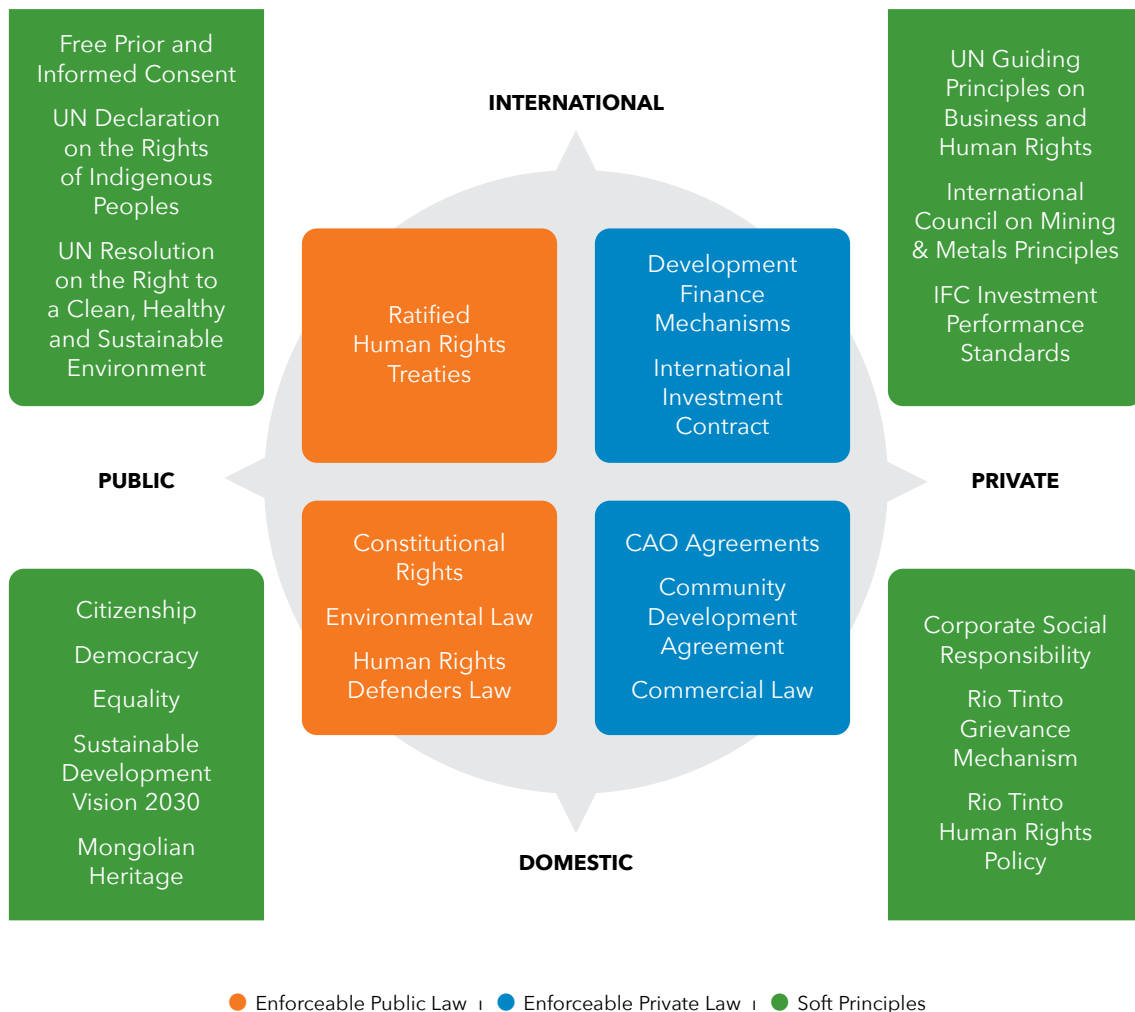
PUBLIC law (national and international) to target state obligations and seek to trigger rights that are available through domestic law and international treaties which the state has ratified.

PRIVATE law (national and international) to target corporate obligations by using provisions in the governance structure of corporations and their activities (e.g. contract-based investment performance standards or Corporate Social Responsibility).

HARD laws that can be enforced (e.g. public legislation or private contract).

SOFT principles that can influence government and corporate behaviour through reputational damage if they do not comply with their commitments.

A TRANSNATIONAL PERSPECTIVE



A combined approach, drawing on public and private law at the domestic and international level, may be needed to achieve the community's objectives in the long-term. While "soft" principles are important to create a strong narrative (highlighted in green), it is important to think about which "hard" laws will realistically lead to the enforcement of herders' rights (highlighted in the orange and blue sections).

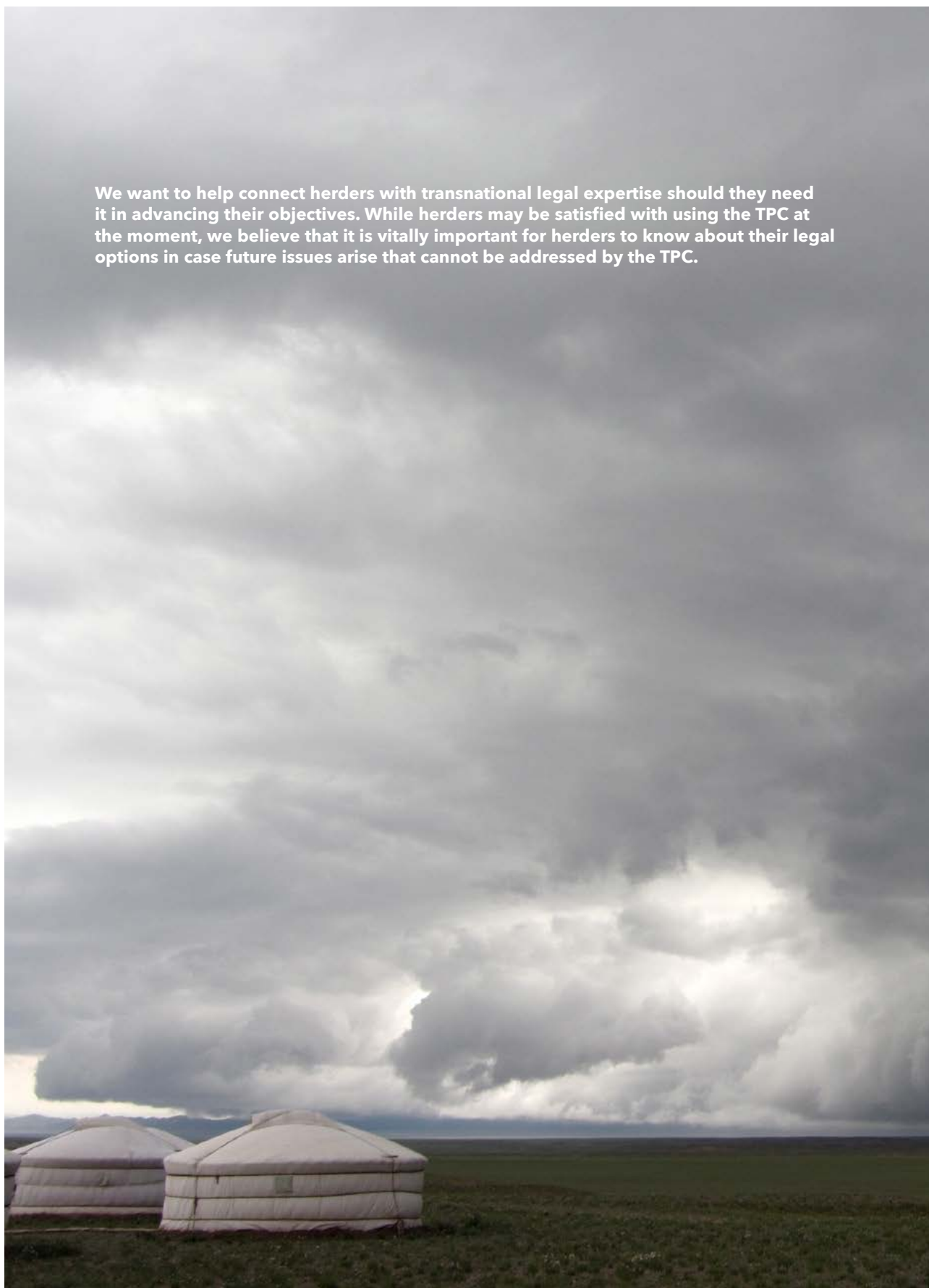
The TPC is an important avenue of communication and ongoing dispute resolution, but using it does not limit herders' rights to access other forms of legal remedy if they need it.

One of the insights from our research is that state-based rights continue to play an important role in influencing the standard of treatment given to a community by a company. If herders had been recognised as indigenous, for example, OT would have had a higher standard of obligation to herders, including FPIC.

One of the insights from our research is that state-based rights continue to play an important role in influencing the standard of treatment given to a community by a company.

As old issues persist and new issues arise from the mining projects around Khanbogd, including but not limited to OT, our recommendation is that herders consider legal and political strategies which prioritise state obligations, on the basis of enforceable legal provisions in the constitution, Mongolian environmental law and international human rights law. Because the Mongolian government has ratified international human rights treaties, for example, human rights has more legally enforceable potential in the Mongolian context rather than indigenous rights. Furthermore, the Mongolian constitution and environmental law, in tandem with international human rights and environmental principles, could also provide a stronger basis for legal claims. Of course, this depends on available legal expertise in the Mongolian context and support from international lawyers.

We want to help connect herders with transnational legal expertise should they need it in advancing their objectives. While herders may be satisfied with using the TPC at the moment, we believe that it is vitally important for herders to know about their legal options in case future issues arise that cannot be addressed by the TPC.



NEXT STEPS

To conclude our research, we want to help connect herders with transnational legal expertise should they need it in advancing their objectives. While herders may be satisfied with using the TPC at the moment, we believe that it is vitally important for herders to know about their legal options in case future issues arise that cannot be addressed by the TPC. We have partnered with **Dr Kinnari Bhatt** to provide a legal education workshop and conduct a legal needs assessment as we close our research project. Dr Kinnari Bhatt is an international legal expert on protecting the land and livelihoods of local communities impacted by large-scale mining and infrastructure projects. Kinnari is the founder of Surya Advisory and provides ethical legal and policy advice focusing on sustainability and human rights.



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Contacts:

Jennifer Lander, De Montfort University:
jenny.lander@dmu.ac.uk

Pascale Hatcher, University of Canterbury:
pascale.hatcher@canterbury.ac.nz

Tseren Byambasuren:
tseren.by@gmail.com



