"Searching for New Political Spaces: Negotiating Citizenship and Transnational Identities on Mongolia's Mining Frontier"

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Abstract: With two of the world's largest mining projects, Mongolia has become one of Asia's key mineral producers in the past twenty years. Mongolian pastoralist communities living in the South Gobi region in the vicinity of large-scale mining operations have recently turned to transnational dispute resolution arenas to lodge their grievances and seek redress. Notably, these groups of pastoralists have sought to trigger international grievance mechanisms on the basis of being indigenous people, even though they are not recognized as such by their own government. This paper situates this contemporary mobilization of pastoralist communities in relation to large-scale mining projects within a longer history of state (de)regulation of the pastoralist economy. It reflects on the role of non-state legal norms and mechanisms in introducing new forms of legal and political subjectivity into the milieu of discourses surrounding Mongolian pastoralist identity and livelihoods. The paper reflects on the potential implications of extractive economy upon transnational identity formation, local/national political space and strategic negotiations with state and corporate power.

Keywords: identity; indigenous peoples; political space; Mongolia; mining; pastoralism.

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Introduction

Mongolia started the new millennium with a mining boom, quickly becoming one of Asia's key mineral producers. The discovery of one of the world's largest deposits of copper and gold in the South Gobi (Oyu Tolgoi) in 2001 captured international interest and sparked a wave of exploration and exploitation activities, largely driven by foreign investment. The boom also focused on Tavan Tolgoi, a neighbouring mine boasting huge untapped reserves of high quality thermal and coking coal. Around these two mega mines, over ten other significant mining projects are underway in the South Gobi region alone. Mining now dominates the economy at 23 per cent of GDP and 86.6 per cent of exports (in 2018), a substantial contribution to the country's economy that is set to increase (EITI 2019). In December 2015, a USD 5.3 billion investment deal was signed, launching the construction of Oyu Tolgoi's (OT) second-phase, the underground phase.

The boom of mining industries has co-existed uneasily with Mongolia's long tradition of semi-nomadic pastoralism ("herding"), with approximately 30 per cent of the population engaged in pastoralism as a "core livelihood" (Upton 2010, 305; Mearns 2004). Semi-nomadic pastoralism is particularly suited to Mongolia due to the grasslands covering approximately 70 per cent of the territory (Fernandez-Gimenez 1999, 317). However, the scale and fast-paced development of mining activities in Mongolia, particularly in the South Gobi region, have become a source of social conflict as local pastoralist communities experience the impacts of extractive industries on their pastureland, water and ability to nomadise with their herds. Attempts by these communities to use local and national dispute resolution mechanisms to

address their grievances have been largely unsuccessful, as state institutions have been either unable or unwilling to comprehensively address the concerns of the claimants. Consequently, pastoralists have engaged in new patterns of claim-making to trigger alternative recognition and redress mechanisms offered by mining corporations and international investment banks.

In October 2012, and again, in 2013, a group of semi-nomadic pastoralists submitted a claim against OT to the Compliance Advisor Ombudsman (CAO) of the World Bank Group, one of the mine's investors. Their claim was made on the basis of the Social and Environmental Performance Standards of the International Finance Corporation (IFC), the World Bank's private arm, as well as the contractual provisions of the OT investment agreement regarding socio-environmental protection. Notably, Mongolian pastoralist communities have been making claims on the specific basis of being indigenous people, despite not being recognised as "indigenous" by their own government.

This paper does not seek to establish whether Mongolian pastoralist communities are or are not indigenous. Rather, it seeks to understand *why* and *how* these communities in are now deploying indigenous rights frameworks despite national non-recognition of their status. The paper further seeks to tease out the broader implications of these emerging rights frameworks for the governance of local political spaces. These questions are highly relevant for Mongolia and other resource-rich countries across the Global South as they invoke the increasing importance of the legal authority and dispute resolution mechanisms of investment banks to mediate distinctly political problems of recognition and redistribution without reference to the national state. In the Mongolian context, they present an entirely new mode of political engagement where historically the state has provided the key locus of governance through a heavily centralised administrative structure. However, the increasing absence of the state in the countryside since the transition to a market economy in the 1990s has created a vacuum whereby new forms of political and legal authority are becoming salient. We argue that it is in

this wider context of economic deregulation and marketisation, which has seen an increasing absent state, that investment banks, mining companies and local communities are actively engaged in shifting the boundaries and substance of political spaces in the country.

This paper has five sections. First, we discuss the literature and elaborate the proposed theoretical framing of the argument which also details the research methodology. In the second part of the paper, we discuss multilateral grievance mechanisms in the context of the OT project. The third section focuses on the growing prominence of pastoralist identity politics in the context of Mongolia's mining boom. The fourth section of the paper explores how pastoralists utilise different frames to dispute the impacts of mining at local, national and international levels, culminating in a discussion of indigenous rights claims around the OT Project.

Literature, Framing and Methods

This paper is situated at the intersection of political economy and socio-legal studies, an emerging interdisciplinary field that seeks to understand how legal, economic, and socio-political relations co-constitute global patterns of distribution, inequality, and conflict (see Gill and Cutler 2014). Within this wider set of analytical interests, extractive industries have become a particularly important site of scholarship in this vein (Szablowski 2007; Campbell 2009; Hatcher 2014; Cotula 2017; Lander 2020a; Bhatt 2020) as the legalities of accessing land, investment, project finance and socio-environmental regulation converge with the unique dynamics of extractive political economy (e.g. rentier states, commodity markets, geographical impact).

Of particular interest within the extractive law and political economy literature is the question of how the norms of resource governance have become an increasingly transnational phenomenon, with the transformation of national states to facilitate global markets since the

1980s. This growing literature has focussed on *interactions* between global, national and local scales of governance and how these interactions affect the lived realities of impacted populations (e.g. Bebbington and Bury 2013; Carroll 2012; Campbell 2004, 2013; Cutler 2011; Hatcher 2014, 2020; Lander 2020a; Li 2014; MacDonald and Nem Sing 2020; Szablowski 2007).

Transnational "governance generation" to sustain global economic activity has been particularly reinforced through the post-war discourses of human rights and sustainable development, with bodies like the United Nations (UN) and development financial institutions such as the World Bank Group (WBG) taking lead roles to devise rules and norms to regulate corporate behaviour in a way that reforms rather than challenges global commerce. Alongside the traditional domain of public international law, global governance standards promulgated by international organisations and voluntary codes adopted by private corporations and international financial institutions (IFIs) have proliferated since the late 1990s to promote "social responsibility" in commercial activities. The "social turn" in international development policy (Rittich 2004) to include not only economic and institutional reform, but also broader social and environmental dimensions, has widened the transnational reach of governance beyond the state *and* empowered non-state actors to become legitimate "governors" to a greater or lesser extent. For example, the UN Guiding Principles on Business and Human Rights explicitly recognise the responsibility of corporations – alongside the state – to uphold human rights. However, despite the global governance boom in the name of reforming the more deleterious aspects of investor and corporate behaviour, it is the property rights of precisely these actors that remain the most enforceable, through the provision of specialised Investor-State Dispute Resolution mechanisms within multi/bilateral treaties and investment agreements (Cotula 2017).

The general recognition of mutuality between market legality and patterns of global political economy as identified in the law and political economy literature leads us to develop a specific mode of enquiry with regard to extractive industries. Here, the framework developed by Campbell's *Groupe de Recherche sur les Activités Minières en Afrique* [Research Group on Mining Activities in Africa] is useful (Campbell 2004, 2009, 2013). It which makes the case for the analysis of the "modes of governance" of extractive industries in a given country, that is the sum of the forms of multi-scalar (local, national, regional, international) regulations and institutional arrangements that determine the conditions of exploitation of mining resources (Campbell 2013; Campbell and Hatcher 2019). This is broader than the concept of "governance", which is often limited to technocratic approaches focussed on institutions, suggesting that in the right bureaucratic environment, the sector may be harnessed for economic development.[2] Rather, the concept of modes of governance is both the expression of and an instrument for reproducing the structural relations of power and influence that shape and govern EIs (Acosta 2013; Bebbington 2012; Campbell 2004, 2009; Gudynas 2010; Hatcher 2014, 2020). Therefore, the concept is useful to bring forth a multi-scalar approach and a focus on the agency of the plurality of actors that shape, promote and challenge the modes of governance that oversee extractive industries in the Global South.

As illustrated by the case of the South Gobi nomadic communities analysed in this paper, these complex scales of governance which impact national and local political spaces alter the range of options available to local communities to contest the impact of extractive industries on their land, livelihoods and culture. The process of "conditioning local political economies and societies" (Cutler 2011, 30) through exposure to transnational governance vis-a-vis extractive industries opens new possibilities as well as dangers for local communities, as they interact with new types of "localised and delocalised social relations, territorialised and deterritorialised systems of rule, and hard and soft forms of regulation" (ibid., 31-32).

Oftentimes local communities find themselves as subjects and objects of plural sources of law; on one hand as citizens within a nation-state with constitutional rights, and also as "stakeholders" within the parameters of an extractive project. The recognition and voice accorded to stakeholders depends upon the nature and effectiveness of a corporation's "social responsibility" commitments, the specific structure of the investment in the project as well as the presence of IFIs which may mediate investment into a project. While some associate more options – "forum-shopping" – with greater degrees of agency, participation and voice (Meinzen-Dick and Pradhan 2001), not all options are equal. Increasingly, contestation options where communities put pressure directly on states to renege or renegotiate the terms of investment (e.g. through public interest litigation) are often not practically viable when the state depends upon foreign direct investment (see Lander 2020a).

Consequently, we argue for a methodological approach that focuses on the *framing* of community claim-making to unpick the nature of the modes of governance active in any given context, in order to assess their impact on political spaces. Due to its emphasis on signification and agency (Benford and Snow 2000), framing is useful to analyse: a) why particular groups of people are mobilised at particular times, and; b) how they seek particular types of legal and political recognition. This method highlights the macro-sociological process by which an "injustice frame" emerges to shape a "collective action frame" (Benford 1997, 416) which interfaces with competing understandings of a given situation. This framing methodology is particularly appropriate given the plurality of governance norms and agents that local communities respectively navigate and negotiate with in the context of extractive industries. Consequently, we examine the extent to which various frames and their strategies of articulation relate to the "contextual constraints" (Benford and Snow 2000, 628) of political and institutional opportunity structures associated with different levels and types of governance. As Johnston and Klandermans (1995, 22) argue, the strength of framing analysis

is its ability to engage with "movement junctures" where "institutional and structural constraints confront the actions of social movement organisations."

Our methodological emphasis on the *construction* of claims dovetails with critical legal studies which trouble the naturalised "subject-status" of indigeneity within international law (Young 2019, 14; see also Fabricant 2009; Povinelli 2002). Following Young (2019, 7), we argue that indigenous recognition requires communities to perform their claim for recognition in ways which register them as legitimate subjects of indigenous rights. If these claims may offer new tools of resistance to extractive industries, they can also "double as tools of subjugation" (ibid. 14; Povinelli 2002) by introducing new private governance authorities to mediate corporate-community conflicts with limited accountability, such as international ombudsmen, private consultants and community relations managers (see Bhatt 2020, 26-39). While the discussion over defining indigenous peoples in international law is beyond the purview of this paper,[3] it is useful to point out that many pastoralist groups globally are not recognised officially as indigenous people, despite their land-based livelihood. As such, there is a need to understand how the political strategies of pastoralists are changing to gain international recognition with an international legal framework that continues to privilege indigeneity as a cultural identity (Upton 2014; Young 2019), rather than the rights of all those dependent on land-based livelihoods. While the 2019 UN Declaration on the Rights of Peasants seeks to address the gap, social responsibility frameworks regulating relationships between companies, investment banks and communities continue to integrate special recognition and rights for indigenous communities (e.g. Free Prior and Informed Consent - FPIC) but not for others. It is within the narrow confines validated by international law and powerful multilateral actors that land-based communities negotiate entitlements (see Bhatt 2020; Young 2019).

With the case of Mongolia in the foreground, the paper sheds theoretical insights into how modes of governance have trickled down to the local level where nomadic communities

are exploring a range of pathways to seek redress for the dire socio-environmental impacts of the fast pace expansion of mining in their immediate environment. Additionally, the paper also provides an empirical perspective to understand how changes in international regulatory regimes influence the platforms – old and new – available for communities to make claims and in turn, how these communities have strategically negotiated new claims for indigenous recognition as they interface with corporate/investment social responsibility mechanisms.

The literature framing this research was complemented with two sets of data, requiring qualitative mixed methods. Our data analysis deploys socio-legal methods which combine doctrinal and thematic analysis of complaints and supporting documents submitted to the grievance mechanisms of the IFC and the EBRD, alongside thematic analysis of community and activist narratives gained from semi-structured interviews and focus groups. This approach enables the examination of the social construction and performance of legal claims alongside community narratives in the context of a specific case study. The first set of data involved the collection and qualitative analysis of the documented claims submitted by local communities through the corporate dispute resolution processes and international ombudsmen in relation to the OT mining project in Mongolia. The research question guiding this paper further pointed towards the need for field research in order to understand *how* and *why* the local communities decided to access these international complaint mechanisms at that particular time and *what* their reflections were about the process. Field research took place in July 2019. In Ulaanbaatar, the authors carried out semi-structured interviews with the director of the non-governmental organisations (NGOs) Oyu Tolgoi Watch, an NGO involved in the claim making process. The questions guiding the interviews were focussed on understanding when, why, and how these NGOs had become involved with the international claim process. In Khanbogd, the South Gobi town near the OT mine, the authors carried out three sets of semi-structured interviews with

Mr. Battsengel, Director of *Gobi Soil*, the local leading NGO responsible for organising a group of local herders to lodge the complaints against OT and Tavan Tolgoi.

Lastly, two focus groups held over two days were organised in Khanbogd, in the offices of Gobi Soil, with 12 herders[4] having participated in one or plural claim against OT and/or Tavan Tolgoi. Strict ethical practices were followed. The protocol around the focus groups was first presented and modified according to the advice of two NGO leaders who had extensive experience working with the local pastoralist communities, including Mr. Battsengel, himself a former herder and signatory to the claims. Consequently, the groups had the opportunity to discuss their involvement prior to the focus groups being carried out. Crucially, free, prior, informed consent was secured from each participant. While focus groups participants agreed to be named in forthcoming publications, the authors opted to anonymise all cited quotes in this paper, given the sensitive nature of the topics discussed. Note that the names of cited community and NGOs representatives have been kept and written consent has been granted.

Multilateral Grievance Mechanisms and the Oyu Tolgoi Mining Project

The scale and the fast pace of the expansion of mining activities across the South Gobi have triggered marked tensions between local nomadic communities and mining operators. Alongside OT, which sits on the largest known copper and gold deposits in the world, several other mining projects are being developed. Tavan Tolgoi, one of the world's largest coal mine, is located only 160km from OT – see Map 1, and Tsagaan Suvraga, a giant copper mine is 230km to the North. And there or five to six other medium-sized mines all within a 500km radius (BIC 2012).

[Map 1. Oyu Tolgoi and Tavan Tolgoi Mines in Mongolia about here]

OT, which has received international financing from multilateral development banks (MDBs), is of particular interest to this paper as it has been the object of several international complaint mechanisms triggered by some of the Gobi's nomadic communities. The "Turquoise Hill" mine, which is the Mongolian meaning of "Oyu Tolgoi" (due to copper's colour when exposed to oxygen), is expected to become the world's third largest copper and gold mine and its lifetime will range from 60 to 120 years (USAID 2011, 11). A Mongolian state-owned company (Erdenes Oyu Tolgoi LLC) holds 34 per cent of the mine's shares while the remaining shares are owned by Turquoise Hill Resources, a company in which Rio Tinto is the majority shareholder. Consequently, the international mining giant is now Mongolia's largest investor and the managing shareholder of the OT mining project. OT has now seen a staggering total of USD 12 billion in investments, including the USD 5.3 billion investment deal which was signed in December 2015 to launch the second phase of the mine. This underground phase of mine development has been significantly supported by the World Bank Group. Of the USD 5.4 billion investment deal, USD 2.2 billion in investments came from the World Bank Group: a USD 400 million loan by the IFC and up to USD1 billion in investment guarantees from the Multilateral Investment Guarantee Agency (MIGA). While OT's investment agreement was only signed in 2009, several complaint mechanisms tied to the mine's international investors have already been triggered, notably the European Bank for Reconstruction and Development (EBRD),[5] the Organisation for Economic Cooperation and Development (OECD),[6] and the IFC.

It should be noted that systems to safeguard public and private sector investments have gradually been adopted by MDBs since the 1990s, following the lead of the WBG. International public outcry about the impact of World Bank financed "development" projects and structural

adjustment programmes in the 1980s led to the initiation of a safeguards policy adopted by the public sector arms of the WBG, notably the International Bank for Reconstruction and Development (IBRD) and the International Development Association (IDA). As Dann and Riegner (2019, 539) argue, the "first generation" of safeguards policies "grew incrementally in response to an increasing perception of serious deficiencies in concrete projects." These safeguards were a set of formal, legalised policies developed within the WBG which sought to address chronic social and environmental impacts from economic development projects supported by the IBRD and the IDA. The safeguards were designed to mitigate "particular risks (e.g. resettlement) and for particular groups (e.g. indigenous) or resources (e.g. forests, natural habitats)" (ibid., 540). These safeguards can be described as a landmark development in terms of shifting the role of MDBs from "lender to norm-setter" (ibid., 538). The safeguards include operational and procedural guidelines, as well as provide an independent complaint mechanism for impacted communities and individuals ("Inspection Panel"). Similar safeguarding systems have been adopted by other MDBs such as the EBRD and the OECD. While these governance mechanisms appear to be "soft" in terms of their legal character, they increasingly began to exert a recognisable, authoritative effect in relation to development projects (Jokubauskaite 2018).

As the role of MDBs in corralling private sector investment grew in the latter 1990s and early 2000s, the private sector branches of the WBG also began to feel the heat in terms of reputational risk as a result of projects invested by the IFC or guaranteed by the Multilateral Investment Guarantee Agency (MIGA) which had no safeguards.[7] In response to increasing and highly mediatised attention paid to the dire socio-environmental consequences of some of the largest projects financed by the World Bank's private arms in the 1990s, the IFC, introduced in 2006, later revised in 2012, Performance Standards on Environmental and Social Sustainability. Today, these standards are probably the most respected and stringent. Mandated

for any project where the IFC is an investor, these standards detail the Organisation's "commitments, roles, and responsibilities related to environmental and social sustainability" (IFC 2012a). The overarching commitment by the IFC relates to the developmental objectives of its projects and to its "do no harm" policy:

> Central to IFC's development mission are its efforts to carry out investment and advisory activities with the intent to "do no harm" to people and the environment, to enhance the sustainability of private sector operations and the markets they work in, and to achieve positive development outcomes. IFC is committed to ensuring that the costs of economic development do not fall disproportionately on those who are poor or vulnerable, that the environment is not degraded in the process, and that renewable natural resources are managed sustainably. (IFC 2012a, 2)

Under the 2012 revisions, there are eight performance standards (PS), as listed in Table 1.

[Table 1. IFC's Performance Standards about here]

In the event "where grievances and complaints from those affected by IFC-supported business activities are not fully resolved at the business activity level or through other established mechanisms", the IFC provides, under its Performance Standards on Environmental and Social Sustainability Policy, for concerns and complaints to be addressed to the Compliance Advisor/Ombudsman (CAO) (IFC 2012a, 12). The latter, which is independent of IFC management, reports directly to the WBG's President:

> The CAO responds to complaints from those affected by IFC-supported business activities with the goal of enhancing environmental and social outcomes on the ground

> and fostering greater public accountability of IFC. The CAO works to resolve complaints using a flexible problem-solving approach through the CAO's dispute resolution arm. Through its compliance arm, the CAO oversees project-level audits of IFC's environmental and social performance in accordance with the CAO's operational guidelines. (IFC 2012a, 12)

In this paper we are particularly interested in the two OT-related claims submitted to the CAO, IFC's independent accountability mechanism. The claims followed a retroactive Environmental and Social Impact Assessment (ESIA) commissioned by Rio Tinto in 2012 which privileged the IFC Standards "over any other source of law" and "unilaterally advise[d] the company that "PS7 on indigenous people does not apply'" to the local community (Bhatt 2020, 131). The claims consequently submitted to the CAO specifically challenged this "almost algorithmic" (ibid) assessment by invoking indigenous rights in order to enhance the stakeholder status of the local community. The initial claim was made in October 2012 by nomadic herders residing and/or raising livestock close to the project site, with the support of NGOs, including one national (OT Watch) and one local (Gobi Soil). The claim focused on the "impacts [of the mine] to land and water, indigenous culture and livelihoods, compensation and relocation, [and] project due diligence" (CAO 2019b). Amidst the development of the second phase of the mine, the underground and OT's largest phase, local community members, again with the support of NGOs, lodged a second complaint (in 2013) specifically in relation to the Undai River diversion component of the project (CAO 2019c). They argued that the diversion of the river, which they view as sacred, would jeopardize their traditional nomadic lifestyle and livelihood (CAO 2019c).

The socio-environmental claims in both complaints were also claims for recognition as "indigenous people". In the 2012 letter to the CAO, the local herders underline that:

> We consider ourselves as indigenous to this area, as well as carriers of the ancient tradition of nomadic herding. We are mobile pastoralists dependent on pasture for our livelihoods. These pastures are ours as recognized under the customary law. The Company, however, does not recognize our rights, justifying their decision only by the fact that we are not an ethnic minority. The compensation does not include mitigation or remedy for the loss of opportunity to carry on with our traditional nomadic herding lifestyle and the related loss of property and cultural heritage to be passed on to our descendants. (Local herders, OT Watch and Gobi Soil 2012, 4)

The following 2013 complaint letter unreservedly states: "We are indigenous people". It reiterates that while the company has denied the existence of such rights, they are the legitimate owners of the pastureland "with historical rights supported by traditional customs" and that failures to protect their pasture rights will "lead to collapse of traditional lifestyle based on pastoral nomadism" (Local community members, OT Watch and Gobi Soil 2013, 4).

In one of the focus group discussions held in July 2019 in Khanbogd[8] with the local NGO Gobi Soil and nine of the herders who have lodged the claims with the CAO, a participant explained why they self-identified as "indigenous": "[we were] trying to make the ombudsman understand that we are indigenous people because we are herders. We are trying to keep the nomadic culture." From the discussions, it appears that the links to indigeneity were deeply anchored in a sense of threat to the nomadic livelihood and identity from the encroaching mining activities across the region. A participant explains:

> As indigenous people, what we see in the future is that it's not about getting compensation from a company, the compensation will not solve the issue, so as indigenous people who have been having the nomadic culture for centuries, we want to have the land, the water, everything so that our kids will inherit the nomadic lifestyle. If we do not fight it now and we accept the compensation, and then change the direction of

> the movement, then it means that there would be no future for the nomadic lifestyle. And our opinion is that we should be united in understanding that actually, we are losing the land centimetre by centimetre and metre by metre because while herders are attending their livestock, the local government has a meeting once in the season, and what they do is that while [herders] are busy with their lives, [the government] makes decisions about governing land; herders are not involved in that. And herders are losing a lot of land, pieces of land and water. They are losing a lot of things. And right now, there are many herders that are not herders anymore. (Respondent from focus group B, 2019)

The indigenous element to the claims is highly relevant because it aimed specifically to trigger PS7 on Indigenous Peoples, whereby the IFC recognises that "indigenous peoples may be particularly vulnerable to the adverse impacts associate with project development, including risk of impoverishment and loss of identity, culture, and natural resource-based livelihoods" (IFC 2012b). PS7 goes above and beyond PS4 on Community, Health Safety and Security, by requiring not only the minimisation of negative impacts but the active recognition and respect of the *human rights, dignity* and *distinct cultural heritage* of indigenous populations. The language of human rights, cultural recognition and protection is distinctly absent from PS4, which focuses largely on health and safety at the project site, community investment, the health impacts of hazardous materials and disease, and relations between the community and private security personnel. Crucially, if a community is recognised as indigenous under PS7, they are entitled to *free, prior and informed consent* (FPIC) with regard to any extractive project within their territory under international law. The UN Declaration on the Rights of Indigenous Peoples (UNDRIP) enshrines this principle under Article 10:

> Indigenous peoples shall not be forcibly removed from their lands and territories. No relocation shall take place without the free, prior and informed consent of the indigenous

peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return. (UN 2007)

Having set out the official narrative around the nature and process of the Khanbogd herders' complaints against OT through the CAO, we turn to analyse the significance of the indigenous "frame" that was used by the local community, first in terms of complainant experiences and subsequently, within the wider political and legal context in Mongolia.

Herding Identity in Times of Global Extractivism

Mongol semi-nomadic pastoralists have been herding in the South Gobi region for at least 800 years, if not longer.[9] Historically, they have been the most mobile group of pastoralists than herders in any other regions of Mongolia because of the desert-steppe environment which requires more frequent rotation of herds to prevent the depletion of pasture and water resources. Pastoralism has always occupied a central place in Mongolia, with the majority of Mongols engaged in herding from the Mongol Empire in the thirteenth century up to the beginning of the socialist Mongolian People's Republic (MPR) (1921-90) (Humphrey 1978, 139). Following its formal declaration of state sovereignty in 1921 and alignment with the Soviet Union in 1924 to resist the territorial expansion of the Peoples' Republic of China, Mongolian state formation was originally shaped by the dilemma of governing a nation of nomads (Humphrey and Sneath 1999). Since the 1920s, Mongolia's history has been defined by a mixture of failed and successful attempts to implement and legitimate state policies to "standardise" (Scott 1998) Mongolian herders as productive modern citizens (Rossabi 2005; Sneath 2003). Under socialism, the MPR gradually collectivised its majority, i.e. more than 75 percent, herding population to harness the productivity of the pastoral economy for national development (Humphreys 1978). The MPR also engaged in various social engineering programmes to modernise the population as an increasingly urban and industrial workforce.

For example, herder children were exposed to modern industrial ideals through compulsory boarding education, which encouraged them to seek work beyond livestock rearing. Gradually, the livestock collectives also introduced Fordist specialisation, whereby herders became specialised in one particular aspect of pastoralist production (ibid). Overall, socialist modernisation processes saw the number of Mongolians engaged in herding declined from the majority of the population in the 1920s to approximately 18 percent by the end of the 1980s (Sneath 2003, 442).

However, the collapse of the Soviet Union, which left Mongolia on the verge of economic ruin, was to once again force an economic restructuration on the country. With an economy that was largely subsidised by economy of the now defunct Soviet Union, and fearing Chinese influence, the country strategically turned to the West through its Third Neighbour Policy (Wachman 2010, 589). Consequently, the World Bank and the International Monetary Fund (IMF) stepped in to guide Mongolia in its transition towards the market-economy. First in 1991 and again in 1994, the country underwent "shock therapy" measures which entailed the liberalization of prices, the removal of trade restrictions and the privatization of state enterprises, including the herding collectives (see Rossabi 2005). The measures severely impaired the country's comprehensive social welfare system (Shagdar 2007; World Bank 1996). For example, social security benefits and pensions dropped in real terms and vulnerable groups received 80 per cent less in social assistance in 1995 than they did in 1994 (World Bank 2006, 74). The painful "transition" to a market-oriented economy precipitated a resurgence in the number of herders to more than 50 percent of the population (Rossabi 2005). While some have since re-urbanised, over a third of Mongolia's population are currently involved in the pastoral economy (Upton 2010, 305).

The figure of the herder has held important symbolic value for the Mongolian nation-state. During the twentieth and twenty-first centuries, pastoralism has been explicitly integrated

into nation-building projects, both as a symbol of national identity and an important means of economic production (see Ahearn 2019; Sneath 2010; Humphrey 1978). During the socialist period, herders were valorised as Pastoral Workers through the social processes of collectivisation, whereby herders were awarded medals and honours for high standards of livestock rearing (Ahearn 2019). The democratic state has adapted socialist practices to reward herders for high levels of livestock production (ibid). Notably, however, since the 1990s the government has focused on market incentives rather than state support to increase herd sizes. In contrast to the "Pastoral Worker of the socialist period", the contemporary herder is treated by the state as the "Pastoral Entrepreneur"; atomised actors competing within the market economy.[10] Since the fall of the Soviet Union, Chinggis Khan has been reinstated as a national hero embodying the free and independent spirit of Mongolia (Kaplonski 2010), which has further promoted the Mongolian herder as an archetype of ideal citizenship and reinstated the nomadic lifestyle as a source of national pride. Importantly, even the promotion of large-scale mining projects like OT have been explicitly framed by "unifying slogans and images of mining workers, technological advancement, happy nomads and cultural tradition" (Jackson 2015, 437).

The centrality of pastoralism to Mongolia as a *national* symbol partly explains why the majority of Mongolian pastoralists do not benefit from recognition as a minority: they are not considered as "historically marginalised or indigenous peoples who live outside of mainstream society" (Tumenbayar 2002, 8). While Mongolia recognises a number of cultural minorities, pastoralists from these or the dominant *Khalkh Mongol* ethnicity have not been recognised as having specific indigenous status. A very small minority of Mongolian pastoralists which herd reindeer in the *taiga* forests along the Russian-Mongolian border are officially recognised – at both national and international levels – as indigenous people but this is specifically because they are part of an internationally recognised transnational group known as the *Dukha.*

However, aside from the *Dukha*, Mongolian herders have not been recognised in these terms. While there has been some effort by Mongolian civil society groups to discursively adopt the 'mobile indigenous identity framings' in global civil society meetings and advocacy (Upton 2014, 212), this framing has not produces new socio-legal relations within Mongolia per se. Consequently, the formal complaints to the CAO by the South Gobi herders – framed in terms of indigeneity – deserve special attention, particularly because of the 'distinctive quasi-judicial structure' (Lander 2020a, 93) of CAO. As Lander argues elsewhere (ibid), CAO's dispute resolution function 'involves recognition of standing (based on impact and identity), creating systems of community representation, evidence gathering and the negotiation and acceptance of new terms for the relationship.'

The use of the indigenous frame to bolster socio-legal claims can only be understood in conjunction to the analysis of the recent influx of foreign investment in Mongolia's mining economy as the latter has brought transnational legal and political norms, as well as new governance mechanisms, which are transforming the scope of local – and national – political spaces. Amidst the transition towards the market economy in the mid-1990s, Mongolia's substantial mining reserves emerged as a leading solution for the country's depleted coffers. Estimated to hold 17 per cent of the world's total mineral reserves, Mongolia's deposits of coking coal, copper, gold, fluorspar, uranium and iron ore have been valued at USD 1.3 trillion (Lander 2020a, 51). While some mining through Soviet-Mongolian joint ventures did historically take place in the country, it is mostly within the last two decades that the sector began to shift gear into large-scale mining. In 1997, with the notable guidance of the World Bank, Mongolia adopted one of Asia's most attractive mining laws for foreign investors (Hatcher 2014; McMahon 2010; USAID 2011; World Bank 2008). The new legal regime and modes of governance that ensued were highly successful in enticing foreign investors in the mining sector, positioning the country as one of the world's key mineral exporters. Between

2002 and 2007, the mineral sector's share of GDP rose from 10 per cent to 33 per cent (Combellick-Bidney 2012, 273), officially putting Mongolia into the category of mineral dependence. Foreign direct investments (FDI) in the mining sector constituted 44 per cent of GDP by 2011 when the commodity boom peaked (Lander 2020a, 55). Approximately 80 per cent of Mongolia's exports are minerals (IMF 2019, 4).

However, the mining boom had profound ramifications in terms of fomenting internal tensions linked to the severe socio-environmental impacts of the scale and fast-paced development of mining activities, especially in the South Gobi. As pointed out earlier in this paper, not only are OT and Tavan Tolgoi some of the world's largest mines, the region is also seeing the development of several other medium-large scale mines. Unsurprisingly therefore, the environmental footprint of mining activities, most acutely on water, air quality and pasturelands, has been increasingly felt by the local nomadic herders (McGrath et al. 2012). For example, during a focus group discussion with herders having taken part in the transnational complaints, the impact of mine-related infrastructures (mostly OT and Tavan Tolgoi) on the livestock was repeatedly emphasised, most notably the new road servicing the mega-mines:

> Before when they [the mining company] were going to start the road construction they came to the local meeting and we were given good promises: "We will build a road, we will make the passing points for the livestock, we will provide the employment for your family members, the livestock will not suffer, […] there will be less dust, etc." That's what we were promised. However, this never happened. The road was partially made by many companies, so […] there was no one specifically responsible. […] So much dust; so much pollution! […] The drivers are drunk. Sometimes they come and they [the trucks] hit the livestock. A lot of accidents have happened for a long time. (Respondent from focus group A, 2019)

A respondent later shared that a 17-year-old boy was riding his horse by the same road and died after falling into one of the road construction holes (Focus group A, 2019). At all times, more than 12,000 trucks are estimated to ferry coal and other goods on the 239 km of road separating Tavan Tolgoi and the Chinese boarder (Battsengel, personal communication, July 2019; Kwong 2019). See Photograph 1.

[Photograph 1. Coal Trucks Queuing on the Mongolia-China Border aorund here]

While Mongolia's legal regime for environmental protection remains quite strong on paper (i.e. requiring environmental impact assessments for all mining projects), the monitoring and enforcement of this regime has been uneven (Hatcher 2014; USAID 2011). Crucially, this dichotomy between legal regime and enforcement, often leaving local communities to fend for themselves, is by no means limited to the case of Mongolia. The gap between paper and practice evidences a common "lacuna" in national social and environmental impact assessment duties, where key aspects of development project due diligence are delegated to private actors through investment contracts (see Bhatt 2020, 79). The accountability gaps inherent in this shift towards the private sector in environmental impact assessment are exacerbated by the fact that states which are highly dependent on FDI to attract investment in extractives are generally reluctant to regulate in more stringent ways. As Szablowski (2007, 44-45) argues, the state faces a "predicament":

> Ignoring or suppressing local claims can entail significant political costs. Yet, cash-strapped and in general retreat under the fiscal and ideological pressures of structural

adjustment, governments in the Global South are highly reluctant to take a visible, assertive role in mediating relations between companies and local communities.

Thus, in order to project an international image of the domestic political and legal environment as accessible, stable and conducive for FDI, states like Mongolia have developed a strategy described by Szablowski (2007) as one of "selective absence". In the presence of heightened local resistance to a given mining project, the state strategically transfers "legal authority to mineral enterprises to manage social mediation" (2007, 27), a process which in turn, further blurres the lines of accountability and legitimacy of the state at the local level (Bhatt 2020; Campbell 2009; Sagebien and Lindsay 2011). Depending on the investment structure of the mining project, the onus on the company to resolve disputes routinely invites transnational governance like the CAO into local political spaces, allowing for direct encounters between the compliance arm of an MDB with impacted local residents (see Bhatt 2020; Szablowski 2007). These encounters between global institutions and local political spaces produce new types of claims as well as new subjectivities which reflects the social governance model of the institution involved. As Jokubauskaite (2018, 703) argues, "there can be no category of "affected people" without a decision-making process that triggers affectedness in the first place." The "affected community" begin to harmonise their resistance with the transnational repertoire of governance norms inserted into local environments through the project's governance infrastructure (see Bhatt 2020; Szablowski 2007; Young 2019).

Strategic Scales in Legal and Political Claims

We argue that the coincidence of a boom in foreign extractive interest in Mongolia and the resurgence in herding as both a livelihood and as a politically potent symbol in the 1990s has signified pastoralists as subjects of a new political, economic and legal order premised on the extraction and global export of natural resources. In response to the state's "strategy of selective

absence" (Szablowski 2007, 45) which led to "the virtual abdication of [rural] public administration" (Mearns 2004, 108; see also Fernandez-Gimenez 1999), Mongolian pastoralists have sought to deploy a multi-scalar strategically differentiated legal and political discursive frames depending on whether they are engaging with local, national or transnational actors.

Local and National Claims

At the local and national levels, not only has the expansion of mining generated landmark levels of political organisation to resist mining activities, particularly demonstrated through the appearance of new NGOs and social movements (Byambajav 2012, 2015), but also sparked direct political actions and protests in both local areas affected directly by mining and in Ulaanbaatar, the capital city. It has also produced greater citizen activism around enforcing and strengthening domestic law to increase the protection of natural resources (Byambajav 2015; Upton 2012). The adoption of the Law with a Long Name in 2010[11] – the product of the activism of the River Movements and local citizen coalitions – particularly has been a rallying point to expand the scope of national environmental protections (See Lander 2020a). However, even within the country, a strategically differentiated legal and political discursive frame has been deployed. At the local level, resistance to expending mining activities has been mobilised through the discursive frame of the *nutag* – homeland – and customary grazing lands (Bumochir 2020; Byambajav 2012; Sneath 2010). At the national level, environmental social movements – "River Movements" – have invoked the unique role of herders as bearing responsibility as citizens engaged in the pastoral livelihood in calling upon the government to protect the environment from the damage caused by rampant mining activities. Some of these environmental movements also became increasingly politicised as nationalist groups which invoke the symbol of the Mongol Herder in direct political actions (Kohn 2011; Branigan 2014; Tolson 2014). The invocation of "traditional" symbols of Mongol nomadic identity can be seen

in the mobilisation of herders from around the country in large-scale demonstrations in Parliament Square in 2009, 2011 and 2013. This type of activism has been linked to landmark public interest litigation through the domestic courts on the basis of constitutional rights to a clean and healthy environment.[12]

Notably, these movements – though small in terms of membership – were able to mobilise significant swathes of the Mongolian public, which put pressure on the government to adopt mining policies that increased state control over foreign investment into natural resources and environmental regulation (see Lander 2020a). One prominent example of the push for legislative reform was the Law on the Prohibition of Mineral Exploration and Mining Operations at Headwaters of Rivers, Protected Zones of Water Reservoirs and Forested Areas, which led to the cancellation of 200 mining projects and affected over 1,800 licences in 2011 (ibid.). In early 2012, the government also introduced a new investment law to increase screening of foreign investment, particularly targeting Chinese state investment, which effectively controlled 90% of Mongolia's total minerals exports (ibid.). These measures, alongside declining global commodity markets, led to a severe "downgrading" of Mongolia's mining sector by foreign investors, development banks and credit ratings agencies. FDI halved between 2012 and 2013, quickly pushing Mongolia towards the brink of a major debt crisis (ibid.), which led to a USD 5.5 billion financial package from the IMF in 2017.

These disastrous and punitive consequences for the economy – in response to the alleged "resource nationalism" of the state (ibid; see also Bumochir 2020; Hatcher 2016) had a distinctive chilling effect on civil society, as the new government under the Democratic Party sought to steer Mongolia back towards "investor-friendly" governance norms. In 2013, a core group of the River Movements protested significant revisions to their environmental law, and five key leaders were sentenced to over twenty-one years in prison on charges of "environmental terrorism" (Lander 2020a, 177). This public criminalisation of prominent civil

society leaders significantly impacted the risks civil society organisations were willing to take, undermining more contentious and litigious strategies to defend the social and environmental interests of herding communities.[13]

It is notable that the narrowing of political spaces at the national level coincided temporally with those adjacent to multinational mining projects turning to transnational governance mechanisms as a "last resort". While there were several factors that contributed to the use of these mechanisms, the sense of futility about overtly "political", direct action approaches and domestic litigation was clearly present. For example, our focus groups and interviews with the herders from Khanbogd and the local NGO Gobi Soil highlighted the way in which their recourse to the CAO mechanism was not one option among many: "when we were raising our voice […] it was never successful" (Focus group A, July 2019). As the Director of the NGO OT Watch emphasised:

> The judicial system in the country is very difficult. It serves the state and the companies; and it serves now companies more than the state. […] the judicial system in this country is not accessible to local communities. For example, we have 340 something *soums*[14] and only 29 courts. So, at *soum* level you don't have courts, you don't have legal aid. In the Mongolia system, to file a claim, you have to have notarised all the documents and everything and there's also a system that *you* have to prove that the violation has been there. And guess who is notary at the local level: it's the local government. So, if I'm going to file something against the local government you can see how it can be neutralised, right? […] That's why for the case of Mongolia, for local communities, grievance mechanisms are an opportunity; the only option […]. (Sukhgerel, personal communications, July 2019)

Part of the difficulty in accessing the courts were logistical and financial, as a result of the distance to the courts and the lack of legal aid available to mount a challenge regarding the social and environmental impacts of OT on the local community.[15]

Interestingly, communities in the vicinity of internationally financed projects are often perceived as having more opportunities than other mining-impacted pastoralist communities in the country. An IFC consultant compared the different approaches of local communities in Khanbogd (near the OT project) and Tsogttsetsii (near the Tavan Tolgoi project) stating that "the reputation is that Khanbogd is spoiled and expects, just, like, entitlements and Tsogttsetsii is thriving, also having more challenges with that growth, but willing to work for it" (Author interview with IFC Consultant A, September 2014). The consultant explained this differentiation in terms of reflecting the corporate social responsibility (CSR) approaches of Rio Tinto with regard to OT, and the Mongolian company Energy Resources which manages Tavan Tolgoi:

> Rio Tinto has a very Western-mindset. Lots of touchy-feely stuff [...] whereas I think Energy Resources has been a lot harsher in more Mongolian form. Depending on who you ask, and I'm not backing either of these, but some people would say Tsogtsetsei is turning into that awful mining town you never wanted to happen. High [levels of] sexually transmitted infections, high alcohol, high domestic abuse, all that other stuff. But when you go to Tsogtsetsei, it's a thriving town […] And they're a pain in the ass, they ask for a lot, they show up and demand things, you know, they demand engagement. If you ask some people, the town is like a shit-hole but other people say it's a town of people who want to work and are working and are taking advantage of the mining. Khanbogd has the reputation of being spoiled by Oyu Tolgoi. (Author interview with IFC Consultant A, September 2014)

While it may be true that Energy Resources interprets its social responsibility obligations in a different way to Rio Tinto, even the consultant acknowledged that the creation of a CSR department at Energy Resources "was largely instigated by the fact that [Tavan Tolgoi] got EBRD funding" (ibid) of USD 400 million. Thus, the organisational culture and CSR commitments of the companies themselves is only one piece of the larger governance puzzle involving the investment performance standards attached to different projects, and the extent of the influence of the MDB in those projects. Furthermore, the alleged reputation of Khanbogd communities and NGOs as "spoiled" fails to consider the fact that resorting to the CAO was *not an additional* mechanism available to these communities on top of a robust system of domestic remedies.

Transnational Claims and the Strategic Discourse of Indigeneity

In light of the strategic absence of the state, local communities impacted by the large mining projects in the South Gobi region turned to international complaint mechanisms. The use of these mechanisms has catalysed Mongolian pastoralists to engage with new governance actors such as IFIs, multinational corporations and NGOs, using explicit discursive frames of environmental and cultural conservation associated with transnational indigenous movements. Of interest to this paper is to understand how such discourse emerged at the local level and what ramifications it had on the specific case against OT. As in countless resource rich countries across the Global South (see Sawyer and Gomez 2012), national and international NGOs were pivotal actors in assisting local civil society of the South Gobi with transnational mechanisms. In the case of the CAO process in Mongolia, this assistance appears to have been logistical but also discursive.

Large-scale mining projects protected by international investment agreements are particularly resilient against domestic legal challenges because of specific clauses which give the investor rights to avail themselves of international arbitration in case of a dispute (see Bhatt

2020). In the face of these kinds of barriers, NGOs have engaged in strategies of their own to help impacted citizens in rural areas gain recognition and benefits. Therefore, drawing on international advocacy discourses, national-level NGOs in Mongolia tend to frame herders as disadvantaged minorities due to their pastoral livelihood and some push for their recognition as indigenous peoples (Sukhgerel, personal communications, July 2019; Namsrai 2013; OT Watch 2011). Consequently, the opportunity to seek redress via the CAO was framed by Gobi Soil as the only meaningful pathway available to challenge the OT project. Battsengel, the Director of Gobi Soil, himself a former herder displaced by OT, credited Sukhgerel Dugersuren, the director of the national-level NGO OT Watch, for making the CAO a realistic option for the local community.

Prior to engaging with OT Watch, the impacted herding community – including Battsengel – described their experience of trying to engage OT in terms of frustration, humiliation and hopelessness (Sukhgerel, personal communications, July 2019). After the 2004 displacement of families, many herders like Battsengel were employed as rubbish collectors, according to the Director. After OT Watch conducted a fact-finding exercise in 2010, national attention began to focus on the challenges faced by the Khanbogd herding community, in particular with regard to the original compensation agreements signed in 2004 and the development of further infrastructure around the OT project which displaced further families (e.g. roads, airport, etc).

Crucially, it was through the support of OT Watch that Gobi Soil formed as an NGO and the community alerted to the existence of the CAO grievance mechanism. Furthermore, the transnational network between OT Watch and other international organisations such as the Bank Information Centre (BIC) and Accountability Counsel supported access to the CAO mechanism specifically. From the first meeting between OT Watch and the Khanbogd herders, a long-term partnership formed. As Battsengel reflected in an interview, "[Sukhgerel] became

like a Gobi person" due to the frequency of her visits and regular attendance at the monthly NGO meetings (Battsengel, personal communications, July 2019). Notably, Sukhgerel's awareness of the power of indigenous rights discourses at the international level strongly shaped the framing of the CAO complaints. Battsengel explained in an interview that before Sukhgerel's arrival the local community had no concept of indigeneity apart from the Mongolian term referring to "the people who have lived here for several generations":

> In Mongolian language [...] "indigenous" people (*uuguul*) means the ones who were originally born, grew up and lived in that place. And there is another word for the people who come, who move in – like temporarily residing [...]. Because we have this word which has exactly the same meaning as "indigenous people", we used it [in the complaints]. It's not something [through] which we have identified ourselves, it's just the word exists in Mongolian language [...] everybody uses it. (Battsengel, personal communications, July 2019)

It was not until Battsengel attended a World Bank conference in Washington D.C. that he learned of other indigenous communities like theirs were impacted in a similar way: "We had no idea. We were just using this word but we had no idea that it had international significance [...] how would we know it?" He added that Sukhgerel explained the power of the indigenous frame in a way they could understand: "She was telling us: 'you as herders are keepers of the culture, the nomadic culture [...] what will you do if you lose the real thing you do for a living, if you will have no land, if you will have no livestock?' She said that nomadic culture itself is very unique" (Battsengel, personal communications, July 2019). Battsengel reflected that Sukhgerel encouraged the communities to continue to use the term indigenous, even though it was resisted by OT: "if we keep it, our complaint has more chances to be successful [...] that's how she explained it to us." Consequently, further explains Battsengel, "the complaint letter to

the CAO referenced the complainants as 'indigenous people who have the nomadic culture' [...] that was the sentence defining us as herders" (personal communications, July 2019).

The CAO Process & the Partial Recognition of Indigenous Claims

Rooted in an indigenous frame, the herders' claims to the CAO were strategic. As discussed in the previous sections of the paper, these claims were a response to the lack of recourses available at the local/national level and an attempt to trigger the FPIC provision in the case of IFC-financed projects (PS7). However, the CAO response points towards an intricate process whereby these claims were also strategically managed by the IFC.

The CAO did find the initial complaint eligible and it conducted multiple field trips to Mongolia in 2012 and 2013. Following the CAO's assessment, the parties agreed to work with the Ombudsman's Dispute Resolution function "to try to resolve the issues raised in the complaint using a collaborative approach" (CAO 2019b). The second claim (2013) was later merged to have an elected team of local herders represent both claims in a single CAO dispute resolution process. However, and as discussed in this final section of the paper, PS7 was at best, loosely acknowledged in the resolution process and FPIC, to our knowledge, was never thoroughly discussed by the CAO. We here argue that the South Gobi claim shows how IFIs, in conjunction with corporations – both private, for-profit actors – actively, and practically, interpret the scope of rights that are made available to impacted communities (see Bhatt 2020) with sizeable consequences on their national and international rights.

On the one hand, the EBRD consultation report on the Khanbogd claims was categorical on the indigenous question: "In Mongolia, herders are neither distinct, nor are they marginalized. The vulnerability of herders is not caused by their distinctiveness, but is linked to their dependency on scarce natural resources. It is clear therefore, that PR7 does not apply as the Mongolian herders are not considered Indigenous Peoples (IPs) as per the definitions in

Performance Requirement 7 (PR7)" (EBRD n.d., 2). On this point, it is illustrative to note that one of the participants in our focus groups observed that during the CAO process, claimants were actively discouraged to frame their claims within an indigenous discourse:

> In the beginning when we were making the complaint, we were specifying ourselves as indigenous people. But OT [OT representatives] stated that: "you cannot classify yourself as indigenous because indigenous people are people who live in the forest or tribes; they are far away from the communication [...]". This was the explanation given to us by OT. They said "don't make yourself to be tribes because it's humiliating". This is what we were told... OT did it because they didn't want to have full responsibility for [herders'] rights. (Focus group B, July 2019)

However, the CAO process in itself also points towards a strategic interpretation of the herder's indigenous claims. Battsengel notes that: "[The] IFC has some requirements which should identify us as indigenous peoples [...] there are seven requirements and [the herders] met five of them [...] Instead of 100 per cent indigenous we are recognised as 75 per cent" (Focus group B, July 2019). Drawing on Bhatt (2020), this clearly shows how a financial institution such as the IFC is interpreting and limiting the scope of rights that are made available to impacted communities, in this case, the Khanbogd herders. Rather than focusing on redressing the impacts of the mining project on herders' *rights*, the CAO process instead sought to reconcile the parties through its alternative dispute resolution approach where they were recapitulated as a "stakeholder" group. A focus group participant noted that:

> The ombudsman didn't explain to us that we, as indigenous people, have a right to give our demands to the company. Instead of that, the ombudsman told [us - the herders] that "we should be leading you to reach mutual understanding, the middle point." [We - The herders] did not understand that our rights were disobeyed. (Respondent from focus group B, July 2019)

The "middle point" in this case became the "Tripartite Council" (TPC). The TPC was established in 2015 as result of the CAO mediation process. Composed of representatives of local herders, OT mine, and the Khanbogd *Soum* Government, this Council meets regularly. It has the ongoing mandate of "discussing and resolving issues related to herders, pasture, water, and other matters raised in the complaints, as well as exchange of information, providing recommendations, ensuring implementation of agreements, and referring matters to relevant competent organizations" (CAO 2019a). The TPC is an achievement in itself and our focus group discussions with the claimants as well as interviews with local and national NGO representatives, clearly point towards an overwhelming sense of accomplishment on the part of the herders; a sense that they now have an arena to voice their concerns.[16]

However, the CAO fell short of acknowledging the indigenous claims enshrined in the initial complaints a process which in turn impacts the extent of the framing of the *rights* of the complainants within resolution mechanisms, including the TPC. The international advocacy organisation Accountability Counsel which has closely monitored the progress of the TPC observes that the members of the Council have made notable progress, although the latter has been "slower than anticipated", leaving some herders struggling to feed their families and keep their herds alive (2019, 1). Participants to the focus groups and NGO representatives interviewed during the field work period (2019) also noted an array of TPC-related issues. For instance, it appears that difficulties in defining exactly who the "herders" are in the tripartite grouping has left nominations for the "herder" representatives exposed to individuals who also represent business interests, here strengthening the "pro-company" side within the TPC as these business owners benefit from mine-related activities.

Created from transnational processes, the TPC emerges as a last recourse for citizens facing narrowing political spaces at the local and national levels, hence suggesting a forced transnationalisation of political spaces. Ultimately, this has ramifications for citizenship – and

the constitutional rights inherent to it – as these transnational legal and political processes occur with the notable absence of the state. In the case of the South Gobi's herders, the TPC offers a tangible space for mediation/negotiation but it is intentionally insulated from a framework of enforceable "rights" that can hold the state as well as corporate and financial actors accountable. The partial recognition of the indigeneity claim has led to inclusion of herders as a distinctive "group" in the TPC framework, yet falls short of delivering the full remit of rights and benefits associated with proper indigenous status.

Conclusion

In this article we have argued that the use of transnational investment safeguards have the potential to redefine pastoralist identities and political subjectivities through new frames of indigeneity. Without any special recognition at the national level, access to multilateral ombudsman like the CAO introduces new linguistics and logics of inclusion through a transnational repertoire of new rights and principles (e.g. FPIC). Where claims are at least partially successful, as in the case of OT, new opportunities to engage in corporate-community negotiation may be created. For example, the TPC represents a tangible arena for Khanbogd's herders to address past and future grievances arising from OT-related activities, an arena that arguably would not exist without CAO involvement and transnational NGO advocacy. In the context of shrinking political spaces at the local and national levels with a state focused on attracting FDI in the mining sector, multilateral recourse mechanisms appear to extend the scope of claim-making opportunities for impacted pastoralist groups.

However, we have also highlighted the contentious nature of indigenous rights at the national level, and the limited prospects for Mongolian pastoralists to be recognised by the government based on the historic fluidity and integration of pastoralists within the wider Mongolian polity. In this context, the type of partial indigenous rights recognition that has

emerged through the CAO-facilitated dispute resolution process around OT could promise more than it will deliver in the long-term. The indigenous frame – without attendant legal rights and enforcement mechanisms – could make local political spaces more brittle in the long-term rather than elastic and spacious. For example, the attractive prospect of indigenous recognition imposes a new boundary of "groupness" on the "herders" which until then, had been largely absent from these discourses. This can be seen in the way that the formerly fluid definition of the "herder" (focusing on the practice of herding) is now being subtly translated into a marker of identity in order to file international claims and participate in new mediation mechanisms.

The tension between opportunity and limit that inheres in this new mode of claim-making and (non-state) recognition is reflected in the narratives of Khanbogd herders themselves. On one hand, the CAO-facilitated dispute resolution has opened up a sense of hope and collective purpose after years of frustration, neglect and a profound sense of loss of control over their livelihoods as a result of the OT Project. On the other hand, they face fresh practical challenges to defend their new "group" from being infiltrated by local business interests, on top of the structural bias towards compromise – "reaching the middle point" – which informs the CAO dispute resolution methodology. The "last resort" use of these mechanisms by the Khanbogd pastoralists required them to accept a framework that has no capacity to adjudicate or ameliorate the *violation* of rights and entitlements through legal sanctions that could enforce remedies from the corporate and investment actors. By focusing on compromise and negotiation, this history has been patched up in the effort to focus the parties on reconciliation, without an attendant emphasis on reparation and justice (see Bhatt 2020). While Oyu Tolgoi LLC – led by Rio Tinto – has taken some steps to address herder concerns through the negotiated agreements, the tacit admission of guilt is reframed as CSR. Furthermore, the IFC's own involvement in harnessing international investment for the OT project without adequate

implementation of their safeguards remains shadowed, as CAO effectively "cleans up" any reputational damage that the IFC could – or should – have suffered.

Where "development" strategies such as Soviet industrialisation in the mid-twentieth century and deregulated markets in the 1990s implied a shift in the status of the herder, we argue that Mongolia's emergence as a new resource frontier introduces a new subjective frame into the lexicon of recognition: the Indigenous Herder. While it is too early to predict the long-term impact of indigenous rights discourse for local political spaces in Mongolia, we argue that these claims are the early signs of a new development of citizenship practice in Mongolia, in response to a new epoch in the country's economic and political history: global extractivism.

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[2] A key example here is the definition of governance championed by the World Bank since the mid-1990s. For the Bank, governance is "the manner in which power is exercised in the management of a country's economic and social resources for development" (World Bank 1994: vii) [authors' emphasis]. This definition, now broadly use by donors, overly focuses on the technocratic management of development - and in our case, of legislations and institutions around extractive industries – paying little attention to politics around the ways policies are conceptualised and implemented. On this topic, see Campbell (2004, 2009, 2013).

[3] On the topic of defining indigenous peoples within the United Nations system, see for instance APF and UNHCR (2013) and ECOSOC (2013).

[4] Participants came in and out of the focus groups at will hence the number of participants in the discussions fluctuated from 8 to 12.

[5] The complaint was submitted to the EBRD's project complaint mechanism in August 2013 regarding the impact of the mine's infrastructure developments on herders' livelihoods.

[6] In April 2010, a group of Mongolian NGOs filed a complaint via the British and Canadian Contact Points for the OECD, on the basis that the relevant companies were not compliant with their obligations under the OECD Guidelines for Multinational Enterprises.

[7] IFC and MIGA are the for-profit organisations of the WBG. They aim to support and promote the private sector in developing countries. MIGA provides political risk insurance.

[8] The OT mine is located 40km from Khanbogd.

[9] Before Chinggis Khan and the rise of the Mongol Empire in the thirteenth century, the steppes of Inner Asia were populated by nomadic groups of varying ethnic and linguistic origins with the majority of Turkish origin (Lattimore 1963, 97). The unification of Mongol peoples under Chinggis Khan in the thirteenth century was the first time that the territories we now know of as Inner and Outer Mongolia were explicitly associated with Mongols as the dominant group (Sneath 2010, 110).

[10] In Mongolia, for example, the introduction of compulsory contractual frameworks governing relations between local residents and the company – Local Development Agreements – are one such strategy (see Lander, 2020b), where the national state simultaneously absents itself from involvement with "local" disputes between communities and mining operators and in doing so empowers private actors to assume public governance functions (see Bhatt 2020).

[11] The *Law to Prohibit Mineral Exploration and Mining Operations at the Headwaters of Rivers, Protected Zones of Water Reservoirs and Forested Areas* was adopted by Parliament in 2009. It was key in the protection of nomadic herders' lands and watersheds from industrial contamination, diversions of rivers and land-grabbing.

[12] Administrative Chamber of the Supreme Court. 2013. *Case on the Burenkhaan Phosphate Deposit Licenses.* Resolution N. 117, June 24. This case has been celebrated as the first decision in Mongolia which protects "the constitutional right of local herders to live in a healthy and safe environment". See ESCR-Net 2013.

[13] For a general account of this shift within civil society priorities, see Chapter 6 of Lander 2020.

[14] *Soums* are small administrative "districts" in Mongolia. There are 331 *soums* in the country.

[15] The challenges which the Khanbogd herding community faced in accessing domestic avenues of redress vis-a-vis the local courts reflect broader issues at the national level regarding levels of legal aid and *pro bono* expertise for civil and administrative cases (see World Justice Project 2019).

[16] See Accountability Council (2019) for a thorough analysis of the TPC's progress.