



Rio Tinto at Oyu Tolgoi in Mongolia

Briefing from Oyu Tolgoi Watch, Mongolia, and SOMO, Netherlands, 9 March 2021

Short Description of the case

The Oyu Tolgoi mine, located in the Southern Gobi region, is Mongolia's flagship copper and gold mine. The region is also home to nomadic herders and houses a large number of endangered animal and plant species. The mine is ultimately owned and operated by Rio Tinto, which controls it through an ownership structure that consists of multiple subsidiaries in tax havens. The Government of Mongolia owns a minority 34% stake. Limited tax income in addition to cost overruns related to the mine's operation deprives Mongolia from revenues while the social and environmental costs are insurmountable. This has inspired repeated calls for greater public control over the country's resources.

In 2009, when the investment agreement for Oyu Tolgoi was signed, the mine was predicted to become a key driver of the Mongolian economy; its copper and gold production would account for a third of Mongolia's GDP by 2021.¹ However, in March 2021 we know this was overly optimistic. The production from the underground mine is not expected until 2022 and massive cost overruns have brought Rio Tinto to renegotiate terms with the Mongolian government².

Rio Tinto's engagement with Mongolia and the Mongolian people is a clear example of corporate priority with short term profit rather than long term cooperation.

- Rio Tinto financed the construction and operation of the mine, and has provided the Government of Mongolia with a loan to finance its 34 per cent ownership of the mine. This loan is subject to a London Interbank Offered Rate (LIBOR) plus 6.5 per cent, and the terms of the loan specify that it needs to be repaid in full before the Government of Mongolia can receive any profits from the Oyu Tolgoi mine.
- The combinations of the interest-bearing loans, very low tax rates using tax treaties and tax havens such as the Netherlands and Luxembourg, and continuing cost overruns and delay of production. This set-up leaves the Government of Mongolia empty-handed, as income is suspended during the repayment of their loans for Oyu Tolgoi.

The Oyu Tolgoi Investment Agreement (OTIA) has been questioned by members of parliament, politicians, and civil society actors since negotiations began in 2003. In November 2019, the Mongolian parliament unanimously passed a resolution that all the agreements related to the Oyu Tolgoi Mine should be reviewed and measures taken for the benefit of the Mongolian

1 IMF, 2009, <https://www.imf.org/external/pubs/ft/scr/2009/cr09311.pdf> (11December 2017, Mining Technology 2017, <https://www.mining-technology.com/features/featuresearching-for-another-oyu-tolgoi-mongolias-big-mining-expansion-5805870/> (07 December 2018).

2 <https://www.ft.com/content/17fd47c8-5fb6-46e8-8292-e6dcacd97361>;

people. In February 2021, the Government of Mongolia and Rio Tinto agreed to revise the 2015 signed Dubai agreement that enabled the financing of the expansion of the underground mine development³.

The megaproject includes an extensive underground operation, an airport, a 70 km water pipeline, paved roads and power lines to the Chinese border. Soon it will be powered by Tavan Tolgoi, a coal-fired power plant to be constructed nearby. The mine, situated in a water scarce area, meets its huge demand for water by drawing it from underground aquifers. Operations for the open pit mine required the diversion of the Undai river, affecting both water and pasture resources. The extraction and transportation activities affect 2 protected areas with endangered species⁴. Along with the construction of infrastructure and mining operations, the inflow of labour has tremendous social and environmental impacts on the fragile ecosystem of the South Gobi Desert⁵. Consequently, local herders successfully filed complaints in 2012 and 2013 to the Compliance Advisor Ombudsman (CAO) of the International Finance Corporation (IFC) because the impacts jeopardize their indigenous culture and livelihood.⁶ After many years of negotiations, an agreement was reached between herders, local government and Oyu Tolgoi LLC to resolve herder complaints. Based on signing of the Complaint Resolution Agreement in May 2017, the CAO closed the mediation phase of the complaint. Its monitoring phase was closed in March 2019 despite remaining doubts by complainants.⁷

The 2020 Oyu Tolgoi Technical Report is a basis for an ESIA (Environmental and Social Impact Assessment) update. An ESIA update is overdue to address the tailing ponds expansion, as shown in maps which Oyu Tolgoi provided the TriPartite Commission, that extend well beyond the Mine Lease Area, require additional permanent diversions of the Dugat Khaliv stream and alluvial system, and should use downstream rather than the upstream dam technology shown in the old ESIA. The ground stability risk assessment should assess the potential impact of block caving but also include an alternative technology assessment.

DEMANDS

1. Socio-ecological Justice:
 - a) Disclose the water recycling and water resource availability for the lifespan of the mine with information based on scientific calculations and measurements. This information is essential for risk assessment as well as establishing compliance/non-compliance with Provisions 6.10, 6.11, 6.12, 6.13.1-3, and 6.19.2 of the OTIA.
 - b) Carry out the environmental and social impacts assessments for its underground mine construction, operations, and the new tailing storage facility section as per the Resolution #92 of the Parliament of Mongolia (November 2019) as well as the recommendations of the Multidisciplinary Team Report (2017 MDT/IEP, p. 26/2289).
 - c) Show respect for Mongolian nomadic cultural heritage and unique ecology and support for its ability to thrive by implementing activities committed under the Complaint Resolution Agreement (2017).

3 <https://asia.nikkei.com/Business/Materials/Rio-and-Mongolia-agree-to-replace-7bn-plan-to-expand-copper-mine>.

4 Tricario, A & R. Regine, 2017, Blessed are the last for they shall be first! Re:Common https://www.bothends.org/uploaded_files/document/Mongolia-biodiversity_offsetting_april_2017.pdf.

5 Jackson, S.L. (2018). Abstracting water to extract minerals in Mongolia's South Gobi Province. *Water Alternatives* 11(2): 336-356; Meesters, M.E. and J.H. Behagel (2017). The Social License to Operate: Ambiguities and the Neutralisation of harm in Mongolia. *Resources Policy* 53: 274-282.

6 CAO, 2013, http://www.cao-ombudsman.org/cases/case_detail.aspx?id=196.

7 Accountabilitycounsel, 2019, <https://www.accountabilitycounsel.org/2019/02/a-long-road-to-remedy/>; see also: <https://www.accountabilitycounsel.org/client-case/mongolia-south-gobi-mining/#case-story>.

2. Economic Justice

- a) Refrain from using mailbox subsidiaries for arbitration or tax purposes – like Oyu Tolgoi Netherlands B.V. in Amsterdam – and work towards abandoning Rio Tinto's presence in tax havens altogether.⁸ Stop shifting profits to tax havens, and instead ensure that taxes are paid where profits are generated and real economic activity takes place.
- b) Provide transparency about all tax related to Oyu Tolgoi, by publishing Oyu Tolgoi LLC's annual accounts in an unconsolidated manner. This would provide the Mongolian public with more detailed information with regard to Oyu Tolgoi's contributions to Mongolia's public revenue;
- c) Commit to a joint review and the renegotiation of the Oyu Tolgoi Investment Agreement (OTIA) together with the Government of Mongolia. In line with Rio Tinto's recent willingness to renegotiate the Oyu Tolgoi Underground Mine Development and Financing Plan,⁹ an admission of the need to renegotiate the OTIA could allow Rio and the Government of Mongolia to reach a fairer division of the mine's revenues, allowing for economic justice for Mongolia and a more stable relationship between the two parties;
- d) Remove the fiscal stabilization clause and tax holidays to develop a more constructive and sustainable relationship between Rio Tinto and the Mongolian Government;
- e) Include stakeholders less influenced by short-term political interests and more by long-term sustainable development such as local civil society, affected herder communities and environmental governance and resource governance experts, to better meet the needs of the Mongolian people and the protection of the Mongolian environment.

3. Abort the UNCITRAL arbitration process because:

- a. The Oyu Tolgoi Investment Agreement includes so-called Investor State Dispute Settlement (ISDS) clauses. An ISDS clause allows investors to sue host governments in the case of investment disputes, and they can do this under the United Nations Commission on International Trade Law (UNCITRAL) rules. Originally intended to stop arbitrary abuse by states singling out foreign investments, ISDS has devolved into a mechanism that allows corporations to interfere with a state's sovereign right to legislate in their people's public interest.
- b. By extension, the arbitration by UNCITRAL is by definition flawed, costly and unlikely to favour Mongolian's public interest.

4. Provide transparency about the energy source and consumption of the Oyu Tolgoi mine.

⁸ Rio Tinto currently controls subsidiaries in a variety of well established tax havens, including Bermuda, Delaware, Hong Kong, Luxembourg, the Netherlands, Singapore, and Switzerland.

<https://www.riotinto.com/-/media/Content/Documents/Invest/Reports/Annual-reports/RT-Annual-report-2020.pdf?rev=6df52113b92840648d05a4ac9e4cc1d8>

⁹ <https://asia.nikkei.com/Business/Materials/Rio-and-Mongolia-agree-to-replace-7bn-plan-to-expand-copper-mine>

