



Assessment Report

Complaint regarding COMSUR/Don Mario Mine Bolivia

(November 2003)

Office of the Compliance Advisor/Ombudsman
of the International Finance Corporation and the
Multilateral Investment Guarantee Agency

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1. Introduction

The CAO and its mandate

The Office of the Compliance Advisor/Ombudsman (CAO) is an independent accountability mechanism for the International Finance Corporation (IFC) and the Multilateral Investment Guarantee Agency (MIGA), established by the World Bank Group in 1999. The office became operational in May 2000.

The CAO's mandate is to assist IFC and MIGA to address complaints of people affected by projects in a manner that is fair, objective and constructive and to enhance the social and environmental outcomes of projects in which these institutions play a role.

The CAO has three roles. As Ombudsman, the CAO responds to complaints by persons who are affected by IFC/MIGA sponsored projects and attempting to resolve the issues raised by using a flexible problem solving approach. As Advisor, the CAO provides a source of independent advice to the President of the World Bank Group and to management of IFC/MIGA. The CAO provides advice in relation to broader environmental and social policies, guidelines, procedures, resources and systems. As Compliance Auditor, the CAO oversees audits of the social and environmental performance of IFC and MIGA, in relation to sensitive projects, to ensure compliance with policies, guidelines, procedures and systems. The Ombudsman role clearly takes precedence when it is invoked.

It is important to note that the mandate of the CAO does not allow it to cancel or stop projects of IFC/MIGA. In the case of a fear of immediate harm the CAO may advise the President of that fear of harm. It would be for the President to instruct IFC to take any action. In the same vein, the CAO may not instruct COMSUR to cease or undertake any action, it is only through IFC that the CAO may hope that its recommendations have an impact. Furthermore, as an accountability mechanism of IFC/MIGA, the CAO may not opine on the quality or intent of national laws or regulations, their enforcement or matters of violation except where that may be implied from a judgment that a project is not in compliance with IFC/MIGA standards.

The CAO as Ombudsman

As Ombudsman the CAO provides an accessible and effective mechanism for handling complaints so as to help resolve issues raised about the environmental and social impacts of IFC or MIGA projects. When a complaint is received, by one or more persons who are directly affected, or believe that they may be directly affected, by an IFC/MIGA project, the complaint is appraised against basic criteria including whether the complaint and the complainant are genuine, whether the project in question is sponsored by IFC/MIGA and whether the complaint is substantive and specific.

The appraisal leads to a decision to accept the complaint for assessment, a more fulsome process of investigation and consideration of the utility of mediation and/or other conflict resolution processes. Assessment includes interviews with all parties (the complainants, the company, the IFC/MIGA, and other stakeholders or interested parties as the case demands, including local and central government authorities, NGOs and

other civil authorities). Interviews are complemented by document review. An assessment site visit is an important part of the assessment process. The assessment period concludes with an assessment report.

The assessment report

The assessment report is a critical point in the Ombudsman process. The report is intended both to act as a finding of fact by the CAO in relation to the allegations contained in a complaint and the concerns raised by the complainant, and as an assessment of the ripeness of any conflict or tension to resolution or management. The assessment report's primary audience is the complainant, the CAO's client. The assessment report is shared with the parties to the dispute – normally IFC/MIGA, the sponsor(s), and the complainant. The President is also supplied with a copy of the report.

The assessment report is forward focused, containing recommendations on a future path that seeks to assist the complainants to resolve their complaint, but also for IFC to consider its actions and its leverage with its sponsor to take corrective action, where warranted.

As the result of an assessment process an assessment report may also indicate that the CAO should consider taking up issues raised in the complaint or uncovered in the assessment process through its Compliance Audit and Advisor roles. The Ombudsman team responsible for the assessment may recommend to the Compliance Advisor/Ombudsman that she instruct a Compliance Audit to be undertaken. Similarly, if policy issues for IFC/MIGA are raised in the complaint, that cannot be resolved at project level, as Advisor the CAO may take these issues up with IFC/MIGA and the President.

Use of terms

The World Bank Group has a policy on Indigenous Peoples. This policy addresses the specific characteristics, vulnerability, culture, tradition, resource dependency, respect and needs of indigenous peoples. In Bolivia the more common terminology for people whom the Bank Group may be asked to consider or may consider indigenous, is *pueblos originales*, or original or native peoples. This report refers to these communities in this way, though the report uses the term Indigenous Peoples in reference to the policy of the World Bank Group as implemented by IFC.

Acknowledgements

The CAO would like to thank Adolfo Serrano, the leaders of the communities in Taperas, Ipias, Ramada, Entre Rios, Buenavista and San Juan for their help and for their hospitality; the community of San Jose, the members of CPESC, OICH, CEADES, Jorge Cortez in particular our many and extremely helpful traveling companions, the staff and management of COMSUR, the mayor of San Jose, Wilma Pena, the staff of the Defensoria del Pueblo, Carmen Beatriz Ruiz, Arturo D. Villanueva and Nancy Sonia Soto Rios, and in the Directorate General of Environment in the Ministry of Sustainable Development, Maria Cristina Avellano.

The CAO is also grateful to the IFC and World Bank representatives in La Paz for their support and to the IFC staff in La Paz for their cooperation and helpfulness. The project team and IFC management cooperated fully in the assessment.

2. The Complaint

The substance of the complaint

The full text of the complaint is attached in Annex 1.

The complaint is concerned with a number of issues. Principally:

- That during the implementation and development phases of the Don Mario mining project, consideration was not given to the great ecological value and the sensitive nature of the ecosystems described above. For this reason, the Environmental Impact Study of the project is flawed.
- That indigenous organizations and populations living in the area affected by the project were not consulted and provided with information in a timely and adequate manner, there were no Indigenous People's Development Plans (IPDPs), and there were no compensation measures for the profound social and environmental impact of the project, despite the objections in the social and environmental spheres that have been raised thus far by the government authorities and indigenous communities and organizations.
- That these very serious irregularities violate not only the rights of indigenous peoples, as established in ILO Convention No. 169 and the Environmental Law of Bolivia, but also the operational guidelines of the World Bank itself, as outlined in OD 4.20 (Indigenous Peoples), OD 4.00 (Environmental Policy for Dam and Reservoir Projects), and OD 13.05 (Project Supervision).

The written complaint does not mention the complainant's concerns around the legality and impacts of a valve on the Cuiaba gas pipeline that provided a connection to the pipeline for Don Mario allowing Don Mario, a relatively cheap and clean source of energy for the mine's operations. However, the induced development that the valve and a 5 km pipeline to the mine represents and issues around equitable access to Bolivia's gas resources, were in the forefront of many people's minds in the area and the assessment did look at the actions of Don Mario in connecting to and constructing a pipeline.

The complainants

The complaint was filed by CPESC (Coordinating Entity for the Ethnic Peoples of Santa Cruz) an NGO formed by some representatives of the communities in the Bosque Chiquitano and which forms a platform for interacting with industrial and government interests in the area over the rights of local people and the sustainable development of the region and its resources.

The complainants work closely with other associations in the area and we met many other NGO and community groups who shared some, if not all, of the concerns as expressed by CPESC.

The communities of the area, all of whom consider themselves affected, though some more than others, had relationships with CPESC, and again concurred with some if not all of the emphasis in the complaint. However, as can be expected, in each community, practical concerns were raised and women in particular, when they were able to participate and felt comfortable to do so were able to express in very clear terms the challenges each community faced.

The limits of the CAO's jurisdiction in relation to this complaint

As noted in the introduction to this assessment report, the mandate of the CAO does not allow it to cancel or stop projects of IFC/MIGA. In the case of a fear of immediate harm the CAO may advise the President of that fear of harm. It would be for the President to instruct IFC to take any action. In the same vein, the CAO may not instruct COMSUR to cease or undertake any action, it is only through IFC that the CAO may hope that its recommendations have an impact. Furthermore, as an accountability mechanism of IFC/MIGA, the CAO may not opine on the quality or intent of national laws or regulations, their enforcement or matters of violation except where that may be implied from a judgment that a project is not in compliance with IFC/MIGA standards.

3. The Complaint Assessment Process

The assessment mission took place from August 24 – September 3.

The assessment mission began in Santa Cruz de la Sierra with meetings with the complainants, CPESC, then moving by car to San Jose. The mission met with the Chiquitano Indigenous Organization (OICH) and other community leaders in San Jose and the traveled via Taperas for meetings in Ipias, Ramada, Entre Rios, Buena Vista and San Juan. The mission met with the staff and management of the mine. The mission generated a joint visit by community leaders and the complainants with mine management to the connecting valve between the gas pipeline and the mine and to the tailings dam for the mine.

The mission also conducted meetings in Santa Cruz and La Paz with CEADES, the Defensoria del Pueblo, the ministry of sustainable development, directorate general for the environment and with the IFC representative in Bolivia.

August 25, 2003	Santa Cruz. Meetings with CPESC Travel to San Jose
August 26, 2003	Meetings with OICH. Meetings with communities of Ipias, Ramada
August 27, 2003	Meetings with communities of Entre Rios, Buenavista and San Juan
August 28, 2003	Meetings with COMSUR/Dona Mario and community leaders at mine site
August 29, 2003	Exit meeting with Minera del Sur (COMSUR). Meetings with NGOs
August 30, 2003	Exit meeting with CPESC Travel to La Paz
September 1, 2003	Meeting with Defensoria del Pueblo Conference call with Mayor of San Jose Meeting with IFC office – La Paz
September 2, 2003	Meeting with Ministry of Sustainable Development

In addition to the assessment mission, in Washington, DC, the CAO interviewed members of the project team, reviewed project documents, and spoke with other NGOs, companies and others with an interest in and knowledge of the project and the region.

The production of the final written report was planned for early October. Its finalization was delayed due to difficulty in verifying aspects of the findings in Bolivia and to logistical problems. The CAO was at no time influenced by any authority to delay the report.

4. The Project

The mine

Don Mario is an operation of Empresa Minera Paititi, S.A. a subsidiary of Orvana Minerals Corporation, in which COMSUR holds shares and has invested.

Don Mario is located in the Canton of San Juan, in the municipality of San Jose de Chiquitos and the Province Chiquitos of Santa Cruz. It is 333 km north east of Santa Cruz, though by road the journey is 460 km. The closest community, San Juan, is some 76 km from the mine on the only road access. San Jose, the municipal seat is some 180 km away. Other communities mentioned in this report and whose representatives were involved in the complaint are respectively, Taperas, Ipias, Ramada, Entre Rios and Buena Vista. Taperas and San Juan are located on the road leading to the mine. The closest of these communities to the mine, San Juan, is 76km away.

The mine is a small mine (600 tons/day) combining an underground and open air pit. The projected mine life is between 6 and 10 years.

The mine brings all its supplies in by truck along the one access road, which existed before the mine was developed, having been first constructed by logging interests. The mine traffic totals 30 trucks a month, or an average of one a day.

The mine is located in the Bosque Chiquitano a tropical dry forest. It is some 12 km west of the San Matias Management Area and 7km west of the management area's 5km buffer zone. Beyond the Management Area, the Pantanal was recognized and listed by the Ramsar Convention on Wetlands in 2001.

The relationship between IFC and COMSUR

IFC has made a succession of loans and took an equity interest in COMSUR resulting in a relationship that dates back more than 17 years. IFC regards its investment in COMSUR as a critical one in the development of a Bolivian private sector and in the development of capacity for environmental and social management within the Bolivian minerals sector, important for Bolivia's economic growth. IFC holds 11% equity in COMSUR, a partner and investor in a subsidiary of Orvana Minerals Corporation, Empresa Minera Paititi S.A., the operator of the Don Mario mine.

COMSUR was founded un 1962 by Gonzalo Sanchez de Lozada, former two time President of Bolivia (and President at the time of the assessment mission). Sanchez de Lozada no longer maintained an interest in the mine following his accession to the Presidency in August 2002.

In 2001, IFC was approached by COMSUR to invest in its plans to develop the Don Mario mine. The environment and social department appraised the project and concluded that there were no reasons why the investment could not go ahead, but acknowledged that there were a number of sensitive issues surrounding the mine's development, including natural habitats and indigenous peoples. Eventually, the mining department, fearing that IFC would become embroiled in controversy for the investment, declined to invest. The 11% equity interest in COMSUR remains.

In correspondence between the environment and social department (CES) and the mining department, CES noted that if IFC made an investment then IFC would have more significant opportunity for leverage over the mine in this case and would be able to be more engaged in ensuring compliance and best practice at the mine. IFC's equity in COMSUR did not necessarily contain any covenanted agreements on environment and social standards and policies that should be met and followed as was practice at the time¹.

At the same time, when the decision not to invest was made by the mining department, the CES team decided to treat the project as any other project of COMSUR and to expect its compliance with the policies and procedures of IFC. However, limited supervision and specific explanation of what compliance or good practice would be in the case of Don Mario was provided to COMSUR's management. There was little direct engagement with the Don Mario management.

¹ Traditionally, environment and social conditions of IFC's investments are contained in covenants to investment agreements. As IFC has increasingly used equity as an investment vehicle, IFC's exposure on its equity portfolio, leaving it with little leverage, has been remarked upon by the Operational Evaluation Group (OEG) and the CAO.

Prior to and during the development of COMSUR within IFC and within COMSUR it was widely acknowledged that COMSUR, despite significant strengthening in the recent past, still lacked sufficient social development capacity.

Equity partner

It would appear that there is a difference in approach and understanding between the mining and CES departments over what equity relationships demand of IFC in terms of compliance supervision, capacity building, reputational and business risk.

The CAO has found no other reason in review of the files and correspondence, nor in discussions with key staff, for the decision not to invest, except for fear that IFC would attract negative publicity to the project. However, this judgment call would seem to belie IFC's pre-existing and continuing relationship as a partner in COMSUR and therefore its implication and engagement in Don Mario, no matter that there was no new injection of funds.

CES has pointed out, with some justification, that the size and nature of the challenges facing COMSUR in Don Mario are lesser than those at other mine sites in COMSUR's mine portfolio. This may be the case and it is clear that IFC has had a strong positive impact on COMSUR's practices over recent years and at other mine sites as well as in building its corporate capacity on environmental and social management.

However, no one in IFC claims, nor do the files support an interpretation of IFC's actions as a deliberate decision to concentrate all its efforts on other mines, nor to waive compliance at Don Mario. It would therefore appear, that in this case, where IFC maintained an equity position no specific attention was paid to ensuring that the company was in compliance with the policies of IFC, nor was there any interchange with the company on what policies it would need to comply with.

While the mining department may have hoped that this would keep IFC out of the spotlight it betrayed the commitment that comes with IFC partnership.

The question of implementation and supervision of Safeguard Policies where IFC maintains only an equity position has been raised by the CAO in the Safeguard Policy Review, in briefings to Senior Management of IFC in two previous cases before the Ombudsman. The issue has also been raised systematically by the Operations Evaluation Group of the World Bank Group for the past 5 years.

“The (Safeguard Policy) review found that IFC does need to signal clearly to stakeholders what they can expect by its taking an equity position if IFC is not willing or able to use that position to promote more environmental and social outcomes.”

The application of the Safeguard Policies in ambiguous national legal contexts is always challenging. While on technical questions the application of the Policies insists that the higher standard be met, whether in national law or in the guidelines used by IFC, in matters of identity (who may be considered indigenous), title, definitions of “impacted” related to title to and use of resources the situation becomes less clear.

In this case the lack of due diligence by IFC meant that the confusions that would automatically arise around the interpretation of conflicting laws in the Bolivian constitution, environmental law, indigenous peoples law and the mining code, were not interpreted nor incorporated into the development of social development plans, community development or consultation plans. It remains unclear to the CAO why, given the longevity of the corporate relationship, why IFC seemed not to have greater understanding of this jeopardy facing any private sector investor in Bolivia, nor why IFC did not use World Bank resources on such questions.

5. The Context

The following chapter attempts to place the development of the Don Mario mine, the concerns of the communities and the complainants, and the activities of COMSUR, one of the most significant Bolivian owned private enterprises in their legal, economic, social, political and environmental context. This context is important for understanding the disputes that have arisen and for determining what actions could be taken and by whom to reach long lasting and sustainable solutions to any disputes.

Legal

The development of the Don Mario mine, its concession, the company's right to exploit resources, the process of land title for pueblos originales, involve a reading of the Bolivian constitution, its indigenous law that is based on ILO Convention 169, the environment law and the mining code. These laws are ambiguous and contradictory.

Disputes of indigenous peoples claims to land can only be resolved through a national process. This will require political will to complete a process that has been underway for many years. The potential for conflict and contradiction between interpretation of ILO 169, the environment law and the mining code, in terms of rights to free and informed consent and consultation and participation in decision making, will need to be addressed by the relevant Bolivian authorities.

These issues have been raised not only in this complaint, but in the context of the Extractive Industries Review, an independent process examining the role of the World Bank Group in Extractive Industries. Although at the time of writing the final report is not completed, the process has consistently raised questions around the potential role of the Bank in helping bring clarity to the legal conditions necessary for sustainable exploitation of mineral resources while protecting the rights, in particular of indigenous peoples.

Having rights enshrined in statutes or legislation is a first and important step. Of equal importance is the need to have laws enforced so that rights may be realized. The role of the Bank Group in building capacity for clarity and consistency is an important pre-condition for the success of any investments in projects.

IFC investments must conform to national law and to the policies and procedures of IFC. In this case, the interpretation of the indigenous peoples policy (OD4.20) was such that the policy was not invoked. It was not invoked as IFC would not be making a specific investment in the mine. In addition in the pre-appraisal by IFC, which was subsequently

not used following the decision not to invest, noted that the policy would not apply as there were no people, indigenous or otherwise, close to the mine and likely to be impacted by the mine. The indirect impacts along the road access to the mine were not considered sufficient enough to invoke the policy. There is no evidence that IFC considered or knew about land title issues for the indigenous communities in the Bosque Chiquitano for the land close to the mine which they consider makes them impacted. Issues of indigenous rights, recognition, title and free, prior and informed consent have become central in the political events of recent months in Bolivia.

Economic

The story of gas in Bolivia is one of historical and present day tensions around its exploitation and who benefits from it. The Bosque Chiquitano has been crossed by gas pipelines for export in the last decade and while some ancillary social benefits have been derived from the pipelines, such as water towers in communities close by, local people do not have access to affordable gas. The resentment that this provokes is deep seated and is the origin of much of the political unrest in Bolivia today as Bolivians consider developing other gas fields in the south of the country.

Don Mario is considered by many of the complainants as an induced development of the private sector constructed gas pipeline built to Cuiaba. Access to gas through a connection to the pipeline has meant that the mine can develop with a clean source of energy. This is an obvious inequity when local villages have neither the means, nor they believe, the right, to be connected.

In and of itself the impact of the mine may be managed, but the stresses and strains on local populations and the environment, will develop as the result of the cumulative impacts of the mine, the pipeline and the forest products industries developing in the area. The lack of a more comprehensive planning process, with the goal of sustainable development at its core, poses real dangers for the future of the forest while the economic and employment needs of the local communities, the region and the country are met.

Political

At the time the complaint was filed, the relationship between COMSUR and the President, Gonzalo Sanchez de Lozado, was mentioned by many members of the community and NGOs, alleging that the privileged position of the company and its ties to government had allowed it to either avoid statutory procedures, such as environmental permits, or had meant that the pipeline route had been altered to favor the future development of the Don Mario mine.

The President maintained no direct interest in COMSUR upon assuming the Presidency. The CAO had no mandate to investigate the activities of the pipeline's operators. From examination of the environment permits, the environment assessment and the timeline of Don Mario's development, it would appear that Don Mario complied with the regulations and with IFC's requirements. The decision to use gas rather than transporting fuel by tanker was notified to the appropriate authorities. It is for the authorities to ensure that the pipeline operators complied with regulations. The CAO did not consider this.

The demands on the private sector in the absence of strong enforcement by the state of environmental regulations or where the state's role in development planning is weak through lack of resources becomes greater. Managing expectations, delivering on the clear responsibilities of a company and then assuming a leadership role in partnership with communities on local development are challenges for many companies. Communities desire for partnership is also tempered by the different accountabilities that exist for a company than for an elected authority. The engagement is different and demands and expectations different too.

In this case COMSUR has become the lightning rod for development angst in the area, the target of both legitimate concerns around Don Mario's operations and their potential impact on the environment and the social development of the area, and general concerns for the development future, beyond the direct responsibility of the government. Don Mario is therefore building community relations in a fragile and at times explosive dynamic or resentment towards central government for its perceived failure to deliver more sustainable livelihoods and economic development, and for its success in being able to exploit resources, that communities have not been able to and on land that communities consider that have a claim on.

Social

The communities of the Bosque Chiquitano have had experience with large scale extractives development and have participated to different degrees in consultations around the Cuiaba gas pipeline and the development of a social fund. Delays and uncertainties in the operation of that social fund have sown seeds of mistrust and skepticism within the communities concerning promises made by government or large industrial concerns. This impacts the climate within which Don Mario operates. Some people have called for a similar type of social fund from the mine. The specific capital and revenue structures of a gas pipeline as opposed to a gold mine, may mean that Don Mario might want to choose a different mechanism for social investment, but the concept could be considered by COMSUR company wide.

Beyond the specific social context of the gas pipeline in the area, the mining industry plays an important and controversial, role in Bolivian history and current developments. Mining has been an important economic activity in the Bolivian economy for many, many years, but at terrible social and cultural costs, in times where human health and safety, the dignity and respect of indigenous peoples and new constitutional arrangements for recognition and sharing of benefits were not in place. The in auspicious social history of the mining industry means that many find it easy to doubt the changes that the mining industry has undergone globally and the new best practice approaches of mining companies. COMSUR as a domestic mining company may not always have easy access to international best practice, but it is proud that it reinvests and retains its earnings in Bolivia and is committed to future investment in the country.

One of the greatest social scourges that has marked the mining industry, but which is even more widespread, is that of racism and the xenophobia displayed against indigenous peoples. This fault line in Bolivia must be a faced by the private sector and must influence social development and community relations efforts as well as broader issues of company principles and business ethics.

Environmental

The Bosque Seco Chiquitano is a rare ecosystem providing an important ecosystem and biodiversity corridor, together with the Pantanal, in the region. It requires participatory sustainable development visioning and planning engaging local communities, local and regional authorities as well as the central government, and of course, the private sector. The Bosque borders the Pantanal, a managed area with sites of global importance as shown by its listing as a RAMSAR site in 2001.

Mining in and around protected areas has been a subject of debate for many years, especially in Bolivia in relation to the exploitation of the natural gas reserves. The mine falls outside the 7km buffer for the Management Area of the Pantanal. The ecological value of the area is treasured by local people for its cultural, economic and social value. While the mine has a small footprint, its proximity to areas that are managed for their ecological specificity and value and the risks perceived in the processes the mine uses for mining are of deep concern to local people.

6. Findings

The findings are organized to respond to the specific issues raised in the complaint.

The complaint alleges that during the implementation and development phases of the Don Mario mining project, consideration was not given to the great ecological value and the sensitive nature of the ecosystems described above. For this reason, the Environmental Impact Study of the project is flawed.

Each of the findings is shaped by the approach IFC took to this project. While IFC maintains an equity interest in COMSUR and regards COMSUR as a corporate partner, IFC decided not to invest in Don Mario. The reasons stated were that the IFC feared there would be reputational risks through such an investment and conversely, that an investment by IFC would attract undue international attention to the mine. This decision was reached against the advice of the environment and social specialists who considered that there were no reasons why the investment could not be made, according to their interpretation of the relevant Safeguard Policies, and that investment by IFC would allow IFC the leverage to ensure that the Safeguards were complied with and that the mine was developed using best practice.

After the decision was taken not to invest in Don Mario, IFC took no significant steps to advise COMSUR how to develop the mine, how to interpret the Safeguards in this case, and undertook no significant due diligence past the appraisal stage. The CES specialists assigned to COMSUR visited the site in the context of their more general supervision of COMSUR's other operations, as required by IFC's equity position, but no more.

In this case, the equity position of IFC seems to have been interpreted by the department as a reason not to be involved, rather than as a reason to be more involved. Presumably, as a longstanding partner of COMSUR's, IFC was more aware than a new investor might be, of COMSUR's social and environmental capacity, as well as its financial health, which could have an impact on investments in building capacity in these areas. Yet, these do not have appeared to have been factored in to IFC's decision

making, rather, IFC declined to help COMSUR through its decision not to invest and its subsequent approach.

IFC accepted that the Safeguard Policies should apply to the mine, as it is a facility of a company where IFC holds an equity interest. IFC conducts regular supervision of COMSUR mines, and requires reporting, that includes Don Mario. However, the Safeguards were not insisted upon in project preparation and were not explicitly used by COMSUR as the basis for planning the development and operation of the mine. Missing most was the dedication of specialist expertise and experience to the project and the utility that the mine's management may have drawn from that.

In IFC's environment and social appraisal of the mine, carried out before IFC decided not to invest, the environment and social department decided that the Natural Habitats Policy would not apply as there would be no significant habitat conversion, the area was outside the managed and protected areas and any impacts would be able to be managed by the systems to be put in place by the company.

While the judgment of the specialists in this case can be accommodated by their interpretation of the Natural Habitats Policy, the lack of clarity for communities and companies of how the Natural Habitats Policy can be interpreted, as well as what has become its effective policy through emerging practice, is something which has been highlighted for IFC through the recent Safeguard Policy Review and the Extractive Industries Review. **The scope of the Natural Habitats Policy will need to be examined together with the practice that has developed through interpretation and together with recent understanding of biodiversity and other habitats issues in the upcoming update of the policy.**

The potential impacts of the mine on the surrounding habitat and the nearby managed and areas are the cause of great concern to the local communities. In particular the communities fear contamination of surface and ground water through the cyanide heap leach process used to extract the gold and potential failure in the tailings dam as well as impacts on wildlife if they come into contact with the pregnant solution (the solution that drains from the heap leach pads containing gold and cyanide before it is treated and processed) or contaminated water from waste dumps or other aspects of the mine's operations.

The mine has installed state of the art technology to meet international standards for the tailings dam as well as a number of measures to keep wildlife away from the ponds. The mine is confident of its ability to manage its facility with little or no impact on the environment. Local people and community leaders judge the risks from a different vantage point, and consider the introduction of human chemical and mineral manipulation in the middle of a remote habitat as an inherently risky and dangerous undertaking.

The different appreciations of risk and how risks are managed is something that Don Mario has a responsibility to place at the core of its community dialogue, outreach and consultation. This will form the basis for any partnership in future between the mine and communities and local leaders.

The mine needs to comply with national regulation and IFC's policies and procedures in relation to environment impact assessment. The CAO cannot comment on the national

process. In relation to IFC's policies, it is unfortunate that IFC did not consider that it should work more closely with COMSUR on Don Mario, having understood the environment and social issues that would arise. In particular, direct IFC support may have given COMSUR more direction in ensuring that the consultation of the EIA was adequate and that it took into account local peoples concerns and fears. The consultations on the EIA did not meet a standard that the CAO considers should be acceptable to IFC.

The significance of the EIA process lies not only in the decision making around permitting, proceeding with the project and financing, but also in the development of environmental and social management plans that should stem from the EIA and benefit from consultation at the EIA stage. **In this case, with a failure to consult more widely, the development of these plans took place in a vacuum and without sufficient knowledge and local input.**

One constraint on the EIA process is the scope of the assessment around a project, which as is discussed above, is part of a cumulative series of impacts. **In this case many of the concerns of local people which they feel have not been reflected in the EIA for Don Mario are legitimate concerns of strategic importance to the whole area and the region and would best be discussed in strategic assessment that should inform development plans that would encompass all extractives in the area as well as forest products and other industrial concerns entering the area.** This would normally be the province of government.

The complaint alleges that indigenous organizations and populations living in the area affected by the project were not consulted and provided with information in a timely and adequate manner, there were no Indigenous People's Development Plans (IPDPs), and there were no compensation measures for the profound social and environmental impact of the project, despite the objections in the social and environmental spheres that have been raised thus far by the government authorities and indigenous communities and organizations.

IFC in its appraisal, undertaken before IFC decided not to invest in the project directly, decided that the Indigenous Peoples policy would not apply as no people, indigenous or otherwise, were directly impacted by the mine. The closest community to the mine is some 76km away and the impacts are felt mainly through light traffic use on the road (one truck per day and a few passenger vehicles). Neither IFC nor COMSUR appears to have taken into account the disputed land claims of local communities though the Public Defender's office in Santa Cruz and La Paz have files open.

IFC's appraisal decision is consistent with current interpretation and practice in applying and implementing the Indigenous Peoples Policy, but this interpretation is opaque to the outside world. However, the decision by IFC not to directly involve itself in the preparation of the project meant that their experience in working with indigenous communities and communities was not shared with the Don Mario staff.

The current debate within the World Bank Group on the use and usefulness of the Indigenous Peoples policy is extensive and long running. Disagreements on the intent of the policy in situations where the majority of the population self-identify as indigenous have surfaced in a number of projects. **IFC thinking has focused on the use of the**

policy to ensure that indigenous peoples, with their particular vulnerabilities due to discriminations, have their specific needs met. In situations where they form the majority, IFC has often considered the use of enhanced community development plans as an adequate approach. This approach is hampered by a lack of information on how these interpretations and decisions are reached.

The question in this case of who, if anyone, was impacted, could have been addressed through consultation. The issues around land claims that would mean that indigenous peoples land if not their daily lives were impacted should have been identified as a risk if not at social issue and should form the basis of IFC/World Bank work with government authorities if IFC wishes to continue investing in extractive industries sustainably in Bolivia.

The current community consultations that are ongoing are the beginning of what should be the right track. However, the uncertainties that have characterized the beginning of the relationship and the lack of communication will need to be overcome. Don Mario has somehow conveyed the impression that work with these communities is a “favor” while communities regard this as their right and a fundamental part of respect. These tensions should be resolved through bolstered participatory community development plans and activities.

The present relationship is also undermined by small incidents, which in the absence of more permanent, constructive dialogue, assume great importance. While the mine has endeavored to support local businesses by procuring locally, its attempts to secure competitive prices, have left frustration and resentment. Similarly, while some people have found employment with the mine, the numbers are few, due to lack of mining skills in this area.

These issues can be dealt with by experienced social development staff working with the support of the management of the mine and the company. IFC’s commitment to sustainability and bringing value added, especially to a company with a corporate relationship, demands that support for this type of capacity building be prioritized.

These very serious irregularities are violating not only the rights of indigenous peoples, as established in ILO Convention No. 169 and the Environmental Law of Bolivia, but also the operational guidelines of the World Bank itself, as outlined in OD 4.20 (Indigenous Peoples), OD 4.00 (Environmental Policy for Dam and Reservoir Projects), and OD 13.05 (Project Supervision).

At present the Safeguard Policies of IFC, except in the area of labor rights, make no explicit mention of human rights. The indigenous peoples policy does not refer to international human rights law as it applies specifically to indigenous peoples and does not refer specifically to ILO Convention 169.

IFC through its investment agreements and subscription agreements expects that its sponsors adhere to national laws, except where IFC’s policies demand a higher standard and in these cases covenants to investment agreements will stipulate the standards to which the sponsor must work.

In this case as Convention 169 is ratified and part of Bolivian law it is to be enforced by the Bolivian authorities and forms the legal context for all activities in Bolivia. However, as has been noted earlier, there is ambiguity in the different stipulations of rights, consultation and informed consent between the mining code, interpretation and enforcement of ILO Convention 169 as found in the indigenous peoples law and the environmental law.

This ambiguity must be resolved at the level of the Bolivian state and IFC could work with the World Bank to offer support to Bolivia to do this. Providing predictability and transparency of regulatory frameworks is an essential part of any countries effort to develop a private sector and attract investment, domestic or foreign.

IFC has no existing guidance in this area. Best practice within the mining industry and within IFC is moving towards an effective recognition of the rights of indigenous peoples to free and informed consent through the need to achieve social licenses to operate and through new approaches to consultation, dispute resolution and participation.

In this case IFC was unable to bring any of these tools to Don Mario through its decision not to directly invest.

In hindsight the decision not to invest in Don Mario may be seen as misguided in that with constraints on supervision time and resources, the decision not to invest de facto meant that IFC lost the opportunity, at a critical juncture in the development of the mine, to influence its environmental and social practice, but also to ensure compliance.

The decision did not diminish the legal and reputational risks for IFC. That IFC is a partner of COMSUR is a matter of public record. Public expectations of IFC when it is a partner include assurances on environmental, social and legal practice.

7. Conclusions and Recommendations

Conclusions

As explained in the introduction to this report the CAO has no power to withdraw IFC from a project. It may, if it concludes that IFC's engagement in a project is in violation of its policies and mission ask the President to take action. It may take up issues arising from the complaint under either or both of its Compliance Audit or Advisor roles.

The relationship between IFC and COMSUR is an important one for both parties. For COMSUR the injections of financing in the past have been a critical and lone signal of confidence in the ability of Bolivians to build a responsible private sector in the face of extremely difficult conditions, a sector which may create wealth in a country that knows poverty too well.

For IFC, in the midst of a storm over the role of the World Bank Group in the extractive industries, COMSUR provides an important example of a domestic company, reinvesting in its home market, with significant legacy issues, but with a record of gradual, if slow, improvement in environment and social management capacity. On the one hand some

may argue that this a project that IFC should shy away from, but IFC management is clear that this is precisely the kind of project that IFC should do, for development reasons.

The ambiguity that exists within and between departments in IFC on how to translate the development and sustainability commitment of the corporation, is on show in the decision not to invest in Don Mario. The decision may have meant that the mining department could avoid criticism, but under the present configuration of resources spent in working with equity partners, it meant that Don Mario would be developed without the detailed appraisal and interaction between IFC and COMSUR that would have come with a new investment, including the necessary Board approval of the due diligence. Neither IFC, nor COMSUR, nor local communities and people have been well served by that decision.

However, the CAO does not agree that IFC's divestment from COMSUR would be an appropriate response. There is evidence that the IFC relationship works, although in a limited fashion. The health of COMSUR is important for the Bolivian economy and for social and political foundations of future private sector development in Bolivia and Bolivia's ability to capture its enormous potential mineral wealth.

From a development perspective the CAO believes that all parties would be better served by IFC staying in its relationship with COMSUR, augmenting the relationship and guaranteeing a better and more productive interaction between COMSUR and local communities. This will require more creative approaches and significant injections of support, financial and technical, to COMSUR to build their capacity on social and environmental management, more rapidly.

The CAO's mandate does not allow it to enter into complaints about amounts of compensation – these are to be agreed between local authorities, the mine and the communities.

During the course of the investigation and the site visit the complainants made representations to the CAO about conditions at Puqueo Norte a now abandoned facility of COMSUR's from where many members of the Don Mario work force have been drawn.

The CAO mission did not visit Puqueo Norte and this was not part of the complaint and cannot therefore opine on the situation there nor on the conditions of the site in relation to IFC's policies and procedures. However, this is taken into account in the recommendations section.

Recommendations

Social capacity. The IFC CES is fully aware of the lack of capacity within COMSUR on social development and community relations aspects of their business. This includes skills and capacity in community engagement, participatory forms of consultation and development of community development plans. In the recent past IFC has encouraged COMSUR to develop this capacity and has at times guided the company as it seeks, through Corrective Action Plans and annual reporting to ensure that COMSUR is in compliance with IFC policies.

Following five loans and a relationship that goes back more than a decade and with 11% of the shares, the CAO believes that IFC's assistance and technical support to COMSUR to rapidly develop the social capacity should be augmented considerably and that creative approaches be deployed. The CAO considers this urgent, specific to Don Mario, but also company wide. Therefore, ***the CAO believes that IFC should think creatively about the structure of future proposed project financing to allow for investment in this management capacity and to ensure that COMSUR has adequate working capital to make necessary and overdue investments in its social infrastructure.***

In addition IFC should marshal available facilities and trust funds to provide staff on secondment, training, staff exchange, or other ways to inject expertise to support COMSUR staff and management.

Further the CAO believes, that given IFC's analysis of the critical role its relationship with COMSUR plays in the development of a Bolivian private sector that can act as a motor to the country's sustainable development, social investment should be a condition upon which any future investment in COMSUR is approved. COMSUR is a test case of the ingenuity IFC must deploy to meet its corporate commitment to sustainability.

Part of COMSUR's social capacity building must also address COMSUR's capacity and willingness to engage with social partners, including NGOs, in undertaking and maintaining consultation and community relationships and in some of the broader environment and social development planning processes to which COMSUR should be a party and may at times instigate.

In the last ten years COMSUR has received annual supervision visits by CES. These supervision visits have involved visits by one or more specialist to each mine site. COMSUR has welcomed these visits and regarded them as useful. They have provided much of the impetus for improvements in environmental management and social development planning.

However, the case of Don Mario has revealed that there are systemic problems of social management capacity and it is not unreasonable to imagine that these issues are company wide. With IFC's partnership stretching back 17 years, and the potential for future investments IFC and COMSUR need to have a thorough understanding of the present state of COMSUR's environment and social development capacity and activities across all its operations. It is essential for future investment in environment and social management that both COMSUR, IFC and the Bolivian authorities and other stakeholders have an accurate sense of where priority investment needs to be made.

Therefore, with an eye to strengthening COMSUR and with no desire to imply sanction, the CAO recommends that an independent baseline audit be carried out and that its results inform future planning and investment by IFC and COMSUR. The audit may also provide IFC with an opportunity to reassess the best way in which supervision and monitoring can be undertaken given the resource constraints compounded in recent months with reorganizations in CES that leave fewer specialists available for large and intricate supervision tasks.

As has been mentioned elsewhere, where IFC holds equity, IFC must satisfy itself that it is sufficiently informed of a company's activities and more, that it can be alerted ahead of time to impending crisis or difficulties.

Both the Natural Habitats Policy and the Indigenous Peoples policies were interpreted in line with current thinking in IFC, though the decision not to invest meant that whether or not they should have conditioned the mine's development was moot as IFC did not insist on project compliance. However, Safeguard Policies must be readily intelligible to communities who seek protection from their minimum standard. ***Therefore IFC should consider the scope, application and interpretation of the policies in the upcoming process in response to the Safeguard Policy Review.***

In the case of the Indigenous Peoples policy, IFC, following the revision process ongoing at the World Bank, must make clear how it will interpret and meet the intent of ILO Convention 169 in an Indigenous Peoples policy in IFC and in other approaches within the Sustainability Framework that refer to human rights and indigenous peoples.

In the case of the Natural Habitats Policy, this should be examined in light of best practice in biodiversity assessments.

Annex 1

CPESC
COORDINADORA DE PUEBLOS ETNICOS DE SANTA CRUZ
[COORDINATING ENTITY FOR THE ETHNIC PEOPLES OF SANTA CRUZ]

AN AUTONOMOUS INDIGENOUS ORGANIZATION
"United in Cultural Diversity in Defense of Our Rights"
Legal Identification No. R.P. No. 9896 – RUC No. 8806527

Ms. Rachel Kyte
Principal Specialist
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Santa Cruz, June 27, 2003

Subject: Non-compliance with World Bank's operational guidelines in the Don Mario Mining Project in Bolivia

Ms. Kyte:

As you are aware, the World Bank is providing financing for and, through the International Finance Corporation, is a shareholder in the Don Mario Mining Project. This mine is owned by COMSUR and Orvana Minerals Company, and is located in the San Juan District of Chiquitos Province in the Department of Santa Cruz, Bolivia.

The project in question involves a total surface area of 5,300 hectares, and has a direct and indirect impact on 7,557 indigenous Chiquitano communities living in sensitive areas of the Chiquitano dry forest and Bolivian Pantanal, home to unique ecosystems, which have been declared world heritage sites and, in the case of the Pantanal, designated as a RAMSAR site on September 17, 2001.

"The Bolivian Pantanal is a mosaic of lakes, lagoons, marshes, rivers, flooded savannahs, palms, dry forests, and cerrado. It provides a large volume of water to the Paraguayan river, thereby regulating floods and droughts in a vast area of Eastern Bolivia. It has a major impact on the regional climate and retains the sediment and nutrients necessary to maintain the food chain of the region and thus its biodiversity and human population. The Bolivian Pantanal is of great biological importance because of

its proximity to very big areas of the Chiquitano forest and cerrado. It sustains a wide variety of animals including at least 197 species of fish, more than 70 species of amphibians and reptiles, more than 300 species of birds, and more than 50 species of large mammals. For this reason, it is an ecological and genetic corridor." This ecosystem is home to different species that are at risk of extinction, such as the jaguar, the elk, the giant otter (*Iondra*), the Pantanal stag, the maned wolf, the pejichi, the blue macaw, and others.

During the implementation and development phases of the Don Mario mining project, consideration was not given to the great ecological value and the sensitive nature of the ecosystems described above. For this reason, the Environmental Impact Study of the project is flawed. Also, indigenous organizations and populations living in the area affected by the project were not consulted and provided with information in a timely and adequate manner, there were no Indigenous People's Development Plans (IPDPs), and there were no compensation measures for the profound social and environmental impact of the project, despite the objections in the social and environmental spheres that have been raised thus far by the government authorities and indigenous communities and organizations.

These very serious irregularities are violating not only the rights of indigenous peoples, as established in ILO Convention No. 169 and the Environmental Law of Bolivia, but also the operational guidelines of the World Bank itself, as outlined in OD 4.20 (Indigenous Peoples), OD 4.00 (Environmental Policy for Dam and Reservoir Projects), and OD 13.05 (Project Supervision).

In light of the foregoing, the *Coordinadora de Pueblos Etnicos de Santa Cruz*, (CPESC), an indigenous organization that represents all the indigenous peoples of Santa Cruz, Bolivia, including those affected by the Don Mario mine, is informing you of these very serious irregularities, is requesting your intervention with a view to the termination of World Bank financing for the project in question, and is asking the World Bank, including its partner COMSUR, to provide compensation and to sanction the violation of Bolivian law, an international convention, and the policies of the World Bank itself.

Very truly yours,
/s/ Manuel Dosapey
Chairman, *Coordinadora de Pueblos Etnicos de Santa Cruz*, (CPESC)

/s/ Próspero Cabrera
Chairman, *Central Indígena Reivindicativa de la Provincia Ángel Sandoval*, (CIRPAS)

/s/ Daniel Picaneray
Chairman, *Central Ayoreo Nativo del Oriente Boliviano* (CANOB)

/s/ Anacleto Spayable
Secretary, Land and Territory
CPESC

/s/ Alejandro Alegre
Secretary, Education
Organización Indígena Chiquitano
(OICH)

[Official stamps]