

HOW TO USE PUBLIC PARTICIPATION AS A NEGOTIATION TOOL FOR THE ESTABLISHMENT OF SOCIAL LICENSE TO OPERATE?



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ABSTRACT: *The extractive industries' large potential usually collides with local communities' interests because developing an extractive project in an industry such as mining can also cause a detriment on the environment and can affect the development of local economic activities. In this regard, the importance of Social License to Operate ("SLO") has grown important because a project development does not only require the approval of governmental licenses but also and most importantly, it requires to gain approval from local communities. Enhancing SLO is not an easy task, but a helpful measure that can target this issue is a public participation process which provides a set of measures in order that parties can negotiate and conciliate their interests. This Research Paper aims to explain how public participation can be used as a negotiation tool and to assess how effective public participation can be used for enhancing SLO.*

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ABBREVIATIONS

BATNA	Best Alternative to a Negotiated Agreement
DS 28-2008	Supreme Decree N° 28-2008-EM, Rules for Public Participation in the Subsector of Mining
EIA	Environmental Impact Assessment
MEM	Ministry of Energy and Mines
RM 304-2008	Ministerial Resolution N° 304-2008-MEM/DM, Guidelines for Public Participation Process applicable to the Subsector of Mining
SLO	Social License to Operate

1. INTRODUCTION

Extractive industries such as mining can provide a large potential for introducing private investment in developing countries. However, this potential for economic growth collides with the economic activities being conducted by local communities where the extractive project will take place. Deploying a mining project also means that in most cases, local communities are going to be deprived of their lands, water and other natural resources. Likewise, there is also a major concern about environmental hazards than mining activities can pose. Altogether, this has generated widespread conflicts as mining companies mishandled the abovementioned situation or did not have prior experience in developing mining activities in countries with these features.

Throughout the years, governments have gained a better understanding of the importance of social conflicts and its devastating effects not only for the development of the mining industry but also for local communities' activities. Thereto, Social License to Operate (SLO) has become a key concept given that having local communities' approval and gaining their trust is something important for developing a project.

In order to alleviate and tackle social conflicts, one of the most important measures that have been implemented is public participation aiming at involving local communities from areas where extractive activities are going to take place. Public participation seeks to involve communities in the decision-making process. It also allows project owners to become familiar with local communities awareness about the activity to be developed. Public participation also looks forward to building a relationship between the stakeholders involved in the mining

activity, and it aims that a specific project gains social acceptance from local communities. Thereto, public participation can be considered as a negotiation tool aiming to enhance SLO.

This research paper aims to assess the public participation procedure as a negotiation tool for obtaining SLO and to determine whether it represents an accurate measure to engage communities in order for them to give their approval to such projects. In order to assess this question, this paper it is going to analyse the Conga Mining Project, which is a key case within the mining sector in Peru. In this specific case is going to assess how the suspension of the project occurred even though Minera Yanacocha excelled in applying the public participation process and obtained approval of all the licenses it was required to obtain in order to start mining activities.

2. UNDERSTANDING THE IMPORTANCE OF THE CONCEPT OF SOCIAL LICENSE TO OPERATE IN THE MINING INDUSTRY

2.1 Origin of the Concept

The concept of SLO emerged in the mining industry by the end of 1990² as a response to the social risk related to the development of mining activities³. Despite the fact that there is no exact definition for this concept, according to the Mineral Council of Australia, SLO “*[i]s about operating in a manner that is attuned with community expectations and which acknowledge that business have a shared responsibility with government, and more broadly society, to help facilitate the development of strong and sustainable communities*”.⁴

² PRNO, Jason. “An analysis of factors leading to the establishment of Social License to operate in the mining industry” in Resources Policy. Volume 38, Issue 4. December 2013, p., 577

³ MOFFAR, Khier and ZHANG, Airong. “The paths of social license to operate: An integrative model explaining community acceptance of mining” in Resources Policy. Volume 39, Issue 5. March 2014. p., 61.

⁴ MINERAL COUNCIL OF AUSTRALIA. *Enduring Value: The Australian Minerals Framework for sustainable development*. Australia. July 2005. p., 2.

Mining companies realised that obtaining all the authorisations and permits required from the government for commencing operation was not enough in order to pursue extractive activities. Likewise, local communities started to be concerned about the consequences that mining activities can cause. This is due to that fact that, in most cases, the development of extractive industries will mean that communities' land, water and other resources will be harnessed by the mining companies for the development of their activities.⁵

This situation led mining companies to gain a better understating of the importance of getting the approval of local communities before proceeding with any mining activity. Thus, SLO was introduced into the extractive industries as a concept that refers to conciliate the interests being pursued by mining companies with those interests from local communities.⁶

SLO lacks a regulatory framework that sets the rules of how to obtain local consent from inhabitants. Thereto, SLO does not constitute a legal concept itself and does not have a specific recognition in the legal jurisprudence.⁷ Given the absence of a legal background, SLO has been considered as an “*unwritten social contract*” because there are no approvals under a formal document to be issued by any authority. SLO can be deemed to have been gained just by verifying that no opposition has been risen by local communities to the development of a specific project.⁸

⁵ SLACK, Keith. *Corporate Social License and Community Consent* in Policy Innovations Digital Magazine. A publication of Carnegie Council. 21 November 2008. <http://www.policyinnovations.org/ideas/commentary/data/000094> (accessed 15 May 2016).

⁶ PRNO, Jason. Op. cit. p., 577

⁷ BUSINESS COUNCIL OF BRITISH COLUMBIA. “*Rethinking Social License to Operate: A concept in search of Definition and Boundaries*” in Environment and Energy Bulletin. Volume 7, Issue 2, May 2015. p., 5

⁸ *Ibid.* p., 3

2.2 Factors Associated with the Establishment of SLO

Several authors have described a list of requirements that should be fulfilled for enhancing SLO. However, Prno has mentioned a list of guiding principles based on four-case studies that should be taken into consideration for establishing SLO.

These principles are the following⁹:

(i) *Context is Key*

SLO should be shaped specifically for the needs of each community. The context also determines the issues that could arise and the strategies to be applied for tackling those problems. More specifically, it is required that mining companies develop a community relations management strategy according to social, cultural and political dynamics that has shaped the community's background.

(ii) *A SLO is Built on Relationships*

The relationship between the mining company and the community becomes an important driver for the SLO outcomes because it allows mining companies to identify and target the main issues that concern communities. It is also important to identify the stakeholders related to the community in order to determine who communications should be established with.

(iii) *Sustainability is a Dominant Concern for Communities*

⁹ PRNO, Jason. Op. cit. pp., 584-588.

A sustainable approach to mining activities includes social, environmental and economic considerations. However, what matters for SLO is that both the mining companies and local communities have the same idea about what sustainability represents.

(iv) *Local Benefits Provision and Public Participation Play a Key Role*

It is important to assure an equitable distribution of benefits in order to avoid that locals consider that they have the burden of most risks from the project. In addition, it is also important to guarantee that local communities are properly involved in the development of the project.

(v) *Adaptability is Needed to Confront Complexity*

SLO is something that is required during the lifespan of the project. Thereto, SLO should adapt on an on-going basis, considering what the needs of the community are during the different stage of the mining project.

These principles will not only led to enhance SLO but also will enable mining companies to gain trust among the parties which is important for mining companies because it will ultimately cause a positive impact on the relationship to be built with locals.¹⁰

3. ENHANCING SLO: USING PUBLIC PARTICIPATION AS A NEGOTIATION TOOL

As mentioned above, in order to enhance SLO it is required that both the mining companies and local communities acknowledge what interests they both are pursuing. Then, parties need

¹⁰ MOFFAR, Khiere and ZHANG, Airong. Op. cit., 62.

to get involved in negotiations aiming at reaching a common understanding. There to, negotiation is an important tool for SLO.

This section will address the type of negotiation required for obtaining a SLO and will describe how public participation can be considered a negotiation tool.

3.1 Principled Negotiation as a Problem-Solving Approach for SLO

Negotiation is one of the most intrinsic interactions that involve back-and-forth communications seeking to reach an agreement between two or more parties with some common interests and some other interests that can differ in between them.¹¹ As a matter of fact, negotiation can be considered as a tool of communication destined to reach a common understanding and to handle differences among parties involved in the negotiation.¹²

Nonetheless, sometimes negotiation does not have the expected outcome, leaving parties dissatisfied which ultimately can endanger the relationship in between them and hinder them from reaching to a satisfying agreement or not reaching an agreement at all.¹³

Not having a good outcome from a negotiation procedure can be related to the kind of negotiation model that parties decided to apply. Usually, negotiation is based on a positional bargaining strategy, which means that parties assume a position for the negotiation and they aim to defend their own personal position throughout the whole negotiation process. However,

¹¹ PATTON, Bruce. *Negotiation*. Reproduced from the Handbook of Dispute Resolution. Vantage Partners. 2005. p., 2.

¹² LEWIS, Floyd and SPICH, Robert. *Principled Negotiation, Evolutionary Systems Design and Group Support Systems: A Suggested Integration of Three Approaches to Improving Negotiations* in Proceedings of the 29th Annual Hawaii International Conference on System Sciences, 1996. p., 238.

¹³ *Ibíd.* p., 239

positional bargaining can endanger negotiation given that parties will be locked-up in their positions looking to convince the other party to accept and undertake their positions.¹⁴

In order to overcome the issues related to a negotiation based on positional bargaining, the Harvard Negotiation Project proposed an alternative method, called “principled negotiation”. This negotiation method is based on four basic points¹⁵:

(i) *People: Separate the People from the Problem*

Before starting negotiation, parties should set aside the problems from the people involved in the negotiation. This means that parties need to work side-by-side and, in order to do so, they need to separate any personal issues from the real problem underlying negotiations.

(ii) *Interests: Focus on Interests, not Positions*

Negotiation should be driven by discovering and articulating mutual interests. Parties should avoid prioritising personal positions because it may endanger the negotiation process.

(iii) *Options: Generate a Variety of Possibilities Before Deciding What to do*

Parties need to establish a set of alternatives that encompass mutual gain, considering both parties' interests. In order to determine the list of options or alternative to be considered, it might be helpful for parties to consider their Best Alternative to a Negotiated Agreement (BATNA).

¹⁴ FISHER, Roger and URY, William. *Getting to the yes. Negotiating an agreement without giving in*. Second Edition. London, United Kingdom. Random House Business Books. 1999. pp., 7-8.

¹⁵ FISHER, Roger and URY, William. Op. cit. pp., 10-12.

(iv) *Criteria: Insist that the Result Should be Based on Some Objective Criteria*

This point refers to the idea that both parties should select a standard that ultimately can lead to a fair solution.

SLO stands for conciliating mining companies and local communities' interests. Thereto, it is important to embrace a negotiation style that focuses on both parties' interests rather than one that encourages bargaining over each parties' position. Thus, it can be considered that the most appropriate negotiation style for meeting SLO demands is the principled negotiation style proposed by the Harvard Negotiation Project.

3.2 Defining Public Participation and its Application as a Negotiation Tool

Public Participation can be defined as a the process by which citizens are engaged in making and implementing decisions on matters of public concern at a governmental level or in a corporate decision-making situation.¹⁶ The idea underlying a public participation procedure is that governmental entities should provide a tool to the public in their decision-making process, aiming to enable citizens to be involved in matters that can affect them.¹⁷

One of the governmental processes where public participation has been included in order to involve local communities that can be affected by a decision to be taken by a governmental authority is the process of obtaining approval of an environmental impact assessment (EIA).¹⁸

¹⁶ DIETZ, Thomas and STERN, Paul C. *Public Participation in Environmental Assessment and Decision Making*. National Academy Press. Washington D.C. 2008. p., 11.

¹⁷ O'Farchaellaigh, Ciaran. *Public Participation and Environmental Impact Assessment: Purposes, implications and lessons for public policy making* in *Environmental Impact Assessment Review* 30. 2010. p., 22.

¹⁸ DIETZ, Thomas and STERN, Paul C. op. cit. p., 12.

In order to enhance public participation goals, citizens should be provided access to the decision-making process and authorities should encourage the public to give an output and citizens' viewpoints and preferences so later their opinion can be taken in consideration when arriving at a final decision of the procedure itself.¹⁹

Public participation has not been proposed as a negotiation tool itself, however considering what the goals of public participation are, it can be said that involving citizens in the decision-making process may provide them with the adequate tools for being involved in negotiation with mining companies that are pursuing a project in a specific location. The fact that public participation has become part of the EIA approval procedure make citizens able to provide their opinions about how they interpret sustainability and they are also able to propose those situations that represent an issue for them.

When public participation is appropriately conducted, it provides to all of the stakeholders involved in a mining project a better understanding of the issues related to the activity to be performed later on by mining companies. Thereto, mining companies can avoid proceeding with their projects without having performed initial investigations of how to mitigate issues with local communities. Ultimately, this can lead to provide solutions to those issues by discussing both parties concerns.²⁰

3.3 How Public Participation Can be Used as a Negotiation Tool?

¹⁹ Ibid. p. 13

²⁰ Consultive Forum on Mining and the Environment. *Public Participation Guidelines for Stakeholders in the Mining Industry. South Africa*. 2002. p., 2 in www.apfo.org.uk/resource/view.aspx?RID=95111 (accessed 18 May 2016).

As it was mentioned before, public participation is a process that has been included as part of the approval procedure of an EIA in order that governmental authorities can have a better understanding of the concerns and issues that citizens affected by a specific project may have. This also led to involve the project owner, seeking to establish communication channels with citizens in order to know their opinions regarding the project.

Although public participation might be governed by a regulatory framework which will set the rules of the procedure, this cannot be considered as an impediment for all the stakeholders involved in the project to use public participation as a negotiation tool. Despite how the procedure is managed, it is important to consider that public participation aims to provide citizens with a tool for engaging in the project by obtaining proper information about how the project will be performed. Thus, citizens can have an informed opinion of the project and its consequences, so then they can provide an output of their concerns.²¹

On the other hand, mining companies are required to provide citizens with information about the project and to hear citizens' opinion regarding the project. This allows for both parties to get closer and to be engaged in the negotiations in order to work together on the issues and differences that they may find regarding the project's development.

In order to enhance public participation purposes, it is important that mining companies and local communities embrace negotiation under the principled negotiation framework rather than to engage in positional bargaining. Even though public participation is, at times, a governmental procedure, this procedure is composed of several stages, including face-to-face meetings between all the stakeholders involved in the project. Thereto, reaching to a good

²¹ Ibid. p., 4.

outcome out of public participation will be mainly guaranteed on the approach made by the parties involved.

4. ANALYZING THE APPLICATION OF PUBLIC PARTICIPATION IN MINING ACTIVITIES IN PERU

4.1 Defining the Procedure: How is Public Participation Applied in Mining Activities?

Public Participation in mining activities in Peru is governed by Supreme Decree N° 28-2008-EM, Rules for Public Participation in the Subsector of Mining (DS 28-2008) and Ministerial Resolution N° 304-2008-MEM/DM, Guidelines for Public Participation Process applicable to the Subsector of Mining (RM 304-2008). Theses set the principles, rules and process to be followed by the Ministry of Energy and Mines (MEM), mining companies and local communities for the development of public participation as part of the EIA approval process.

According to the regulatory framework, public participation has been defined as a public, dynamic and flexible process to be held through a set of mechanisms in order to make available to affected communities adequate information about the mining activities to be developed. It also aims to promote dialogue and to build a general understanding by channelling opinions, positions, viewpoints, observations and any further comments regarding mining activities for the purpose of contributing in the decision-making process to be pursued by the authorities.²²

²² Cfr. Article 3, DS 28-2008.

Furthermore, it also established that governmental authorities, mining companies and local communities should respect and are obliged to apply the following principles during the public participation process²³:

- Everyone is entitled to unrestrictedly participate in the decision-making process related to mining activities.
- Access to adequate and appropriate information.
- Cultural diversity should be respected.
- No discrimination due to gender, culture, social status, race, ethnic background, political viewpoints affairs, among others.
- It should be promoted dialogue on an on-going basis.
- Local communities are entitled to follow up on the measures and commitments undertaken by mining companies in environmental matters.

According to these principles, the regulatory framework has established a list of measures to be applied for enhancing public participation goals. Such measures are the following:²⁴

- Provide access to local communities to the content of the EIA.
- Advertise on the local gazette the initiation of the EIA process.
- Collect information through surveys, focus groups and interviews.
- Distribution of informative brochures.
- Guided tours to the project site.
- Visits to each inhabitant of the affected area.
- Public hearings.

²³ Cfr. Article 5, DS 28-2008

²⁴ Cfr. Article 2, RM 304-2008

- Submission of comments and opinions.
- Implement an enquiry centre office.
- Follow up of the fulfilment of the obligations undertaken by the mining company.
- Workshops.
- Discussion panels.

Although public participation has been implemented in order to guarantee local stakeholders rights, according to the regulatory framework, most of the measures to be enforced during the public participation process should be fulfilled by the mining companies. Moreover, the regulatory framework has set forth that public participation measures that not only relates to the EIA process, it has also been provided with a set of measures aiming to adapt public participation during the lifespan of a mining project. Accordingly, one of the said measures requires mining companies to create a “public participation plan” where the project owner produces a list of measures that will apply before starting mining activities, during deployment stage, exploitation stage and decommissioning.²⁵

As a formal procedure, a governmental authority will be in charge of assessing and supervising the content and adequate application of public participation. In the mining industry, these obligations are undertaken by MEM, which will approve the public participation plan and will supervise the project on an on-going basis in order to ensure that public participation is being properly applied.²⁶

²⁵ Cfr. Articles 13 to 16, DS 28-2008

²⁶ Cfr. Article 15, RM 304-2008

4.2 Conga Mining Project: Was Public Participation a Negotiating Tool for Enhancing SLO?

Conga Mining Project is one of the largest mining projects proposed in Peru, being owned by Minera Yanacocha S.R.L. whose major stakeholder is Newmont Mining Corporation. Conga Mining Project was supposed to be located in Cajamarca (located in the north region of Peru) with the purpose of extracting copper and gold at the same time and at the same location. This project was supposed to have an investment of US\$ 5 billion dollars.

As a massive project, it was supposed to create among other mine facilities, two (2) massive pits, two (2) waste rock dumps, an expansive mine tailing and a storage facility. However, in order to build the abovementioned mining facilities, the project would have had to dry out four (4) lakes and some other wetlands.²⁷ Considering the major impact that the deployment of this project will cause to local communities, Minera Yanacocha established a set of measures in order to not only mitigate the negative impact on the environment but also looking forward to improving the local economy. One of the measures to be undertaken was to build a sustainable set of dumps that will imitate the natural conditions of the lakes to be dried out.²⁸

Minera Yanacocha also decided to pursue a thoroughly public participation process aiming to provide large information to local communities about the issues related to the project and the strategies to be applied for mitigating damages. Public participation process was held in between years 2008 to 2010, having a successful outcome because, during the Public hearings,

²⁷ Coalition of Social Organizations from the Provinces of Celendin and Hualgayoc in the region of Cajamarca, Perú. *Conga no va: An assessment of the Conga Mining Project in Light of the World Bank Standards*. September 2015. See in: http://business-humanrights.org/sites/default/files/documents/CongaNoVa_Assessment.pdf (accessed 7 April 2016).

²⁸ Minera Yanacocha. Proyecto Conga. See in http://www.conga.pe/images/conga/descargas/modelo_CONGA.pdf (accessed 18 May 2016).

local citizens gave their approval to the project. Finally, in October 2010, the project obtained approval of the EIA, which enabled the company to start construction activities.²⁹

Despite all the company's efforts to comply with the public participation process and to enhance its SLO, by 2011, social issues started. Most of the local communities, NGO'S and even local authorities claimed that the project would cause irreparable damage to those four (4) lakes that the community depends on. Furthermore, it was also said that it would create a hazard to local sustainability. Besides environmental concerns, there was a lack of trust in Minera Yanacocha and its performance on developing mining activities in Cajamarca.

These circumstances led to the suspension of Conga Mining Project because it seemed impossible to mitigate social issues risen by local communities and NGO's that claimed that their lands and natural resources were going to be taken away to their detriment. After four (4) years of having Conga Mining project suspended, one of Minera Yanacocha representative noted that it is very likely that Conga Mining Project will be cancelled due to the fact that so far now it has not been possible to overcome social struggles and also, because of the price drop for copper.³⁰

In this particular case, public participation was not enough to engage local communities with Conga Project and to gain a mutual understanding about this project's development with between local communities, NGOs and any other stakeholder involved in these affairs. According to the information obtained from Minera Yanacocha, it was clear that they invested not only a lot of money in public participation but also the company was absolutely engaged

²⁹ Ibid.

³⁰ RPP Noticias. *Roque Benavides: Minas Conga ya no es un proyecto viable*, dated 26 April 2016 in <http://rpp.pe/economia/economia/roque-benavides-minas-conga-ya-no-es-un-proyecto-viable-noticia-957211> (accessed 18 May 2016)

in providing major benefits to local communities. Minera Yanacocha was very much aware of the importance of enhancing SLO for developing this project. However, despite all the great efforts during the public participation process and that it was considered that the Conga Project did in fact obtain approval from local communities, there was something that went wrong which led to major social issues in Cajamarca.

Although there is not much information about what caused social issues to arise after Conga Project obtained approval of EIA, it is likely that public participation did not target all the stakeholders involved in this project, such as NGOs. In addition, Minera Yanacocha does not have a good reputation in Cajamarca due to prior incidents in other mining projects. Furthermore, Cajamarca is one of the Peruvian regions that has a very high rate of poverty despite the fact of being a location where large mining projects have been developed. All of the described situation strikes on Conga Project because there is a lack of trust not only in Minera Yanacocha but also in the development of mining activities.

Hence, enhancing SLO in such a complicated space cannot only be pursued by using public participation as a negotiation tool. This experience has proven that although public participation can be a helpful tool for gaining approval of local communities it cannot be deemed to be the only negotiation tool applicable.

5. CONCLUSION

SLO is a key element for developing extractive activities such as mining. Project owners have gained awareness that developing a project does not only require a company to obtain all the regulatory licenses and permits but the approval from the local communities involved in the

project. Furthermore, it is important to gain communities' trust aiming to build a strong, long-lasting relationship between mining companies and local communities.

In this research paper has described how important applying an adequate negotiation style is for obtaining a SLO and how SLO can be targeted by using public participation as a tool. Despite the fact that public participation is often a governmental measure governed by specific rules, it provides a space where the parties involved in the project can share what their concerns are and they all can look for a solution that help to conciliate opposed interests.

There to, public participation can be a helpful tool but it cannot be considered the only tool to apply for enhancing SLO. How to tackle SLO should be determined by considering the specific characteristics of the location and the expectations and viewpoints of the local communities. Thus, project owners are required to work on a broader negotiation strategy suitable for a specific case scenario that should not only include public participation as the only negotiation tool.

Notwithstanding with the foregoing, it can be concluded that public participation is setting an initial pace for SLO given that stakeholders are given the opportunity to embrace direct negotiation in a space where parties should respect each other.

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