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A Case Study Dealing with Customary
Landowners' Compensation Claims**



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by

Laurence Kalinoe
Constitutional and Law Reform Commission
of Papua New Guinea

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ACRONYMS

ADI	Australian Doctors International
APCRSR	Active Post-Mine Closure River System Rehabilitation Program
BCL	Bougainville Copper Limited
CEO	Chief Executive Officer
CMCA	Community Mine Continuation Agreement
IFC	International Finance Corporation
MARP	Mine Area Rehabilitation Plan
MCA	Mine Continuation Agreement
MMC	Metal Mining Corporation
MRDC	Mineral Resources Development Company
MWMP	Mine Waste Management Project
NLC	National Land Commission
OTDF	Ok Tedi Development Foundation
OTML	Ok Tedi Mining Limited
PNG	Papua New Guinea
SEDP	Social-Economic Development Plan

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Lawrence Kalinoe

CHAPTER 1: INTRODUCTION

“The Ok Tedi mine in the Western Province of Papua New Guinea is a well-known producer of high quality copper concentrate for its consumers around the world. For most people, the other facet that you will ‘know’ about Ok Tedi is how the mine has polluted the mighty Fly River, one of the largest river systems in the world.....”

Ok Tedi, aside from being a mine, is a representation of the plus and minus elements of development in a developing nation. It would be mostly bad, if we did not work with our communities, as partners in development (Roger Higgins, former Managing Director, Ok Tedi Mining Ltd (2002:40)).

The Context

Compensation claims and/or demands, by customary landowners in Papua New Guinea have reached unprecedented levels in the recent past — ‘Compensation: PNG’s growth industry’ (*The National* [Edit.], 5 March 2004). There have been serious concerns that many of the compensation claims in the recent past have been ‘outrageous and unjustifiable’. These claims continue unabated and can possibly stifle the socioeconomic growth of the nation. ‘Just compensation on just terms’, within the meaning of s. 53 (2) of the Papua New Guinean Constitution, which directs the State to make payments for any loss or damage suffered by property owners, including customary landowners, is clearly not objected to by anyone, including the media.

What is of concern is the ‘excessive and unjustifiable’ compensation demands, particularly by ‘former customary landowners’, over alienated customary land, which has been purchased by the State from the customary landowners for public purpose, such as infrastructure development (mainly roads, bridges, satellite repeater stations, and so on), and state institutions – pursuant to the legal process established under the *National Land Registration Act 1977*.

Given this general uneasiness and conjecture about many compensation claims by customary landowners, it is crucial to isolate ‘outrageous and unjustifiable’ claims from those which have merit. Only then will we be able to identify and better understand the meritorious and legitimate compensation claims. To achieve this outcome, we must place compensation claims into various categories. When considering compensation for natural resources exploitation, the following three main discernable categories are proposed:

- *Category 1:* claims, and demands/threats over alienated land that was previously customary land;
- *Category 2:* claims by customary landowners on whose land natural resource development projects are located; and
- *Category 3:* claims by customary landowners outside the development project licence, permit, or lease area, but within the impact area of the project.

Category 1 concerns compensation claims, and sometimes demands with threats, over what were previous customary lands, but which are now alienated. Such claims are allowed under s. 39 of the *National Land Registration Act 1977*, and go before the National Land Commission, which is a quasi-judicial body established under the same legislation to hear cases and make settlement payments, strictly under Schedule 2 of the Act. However, many of these cases are mistakenly referred to as compensation claims. In reality, they are claims for ‘settlement payments’, to settle outstanding claims of underpayment, mainly during the colonial administration, when the land was purchased for state use.

By and large, most of these claims are considered to be ‘unreasonable’ and ‘unjustifiable’ by many Papua New Guineans, because most of them are made well outside of the statutorily permitted amounts under Schedule 2 of the *National Land Registration Act*. Further, most of the claims are for millions of kina. In some instances, even after settlement payments have been made, the claimants deliberately disregard such payments and proceed to make new claims. Some claimants even make demands with threats to disrupt legitimate government functions and services, such as schools and hospitals. Regrettably, some claimants have proceeded to execute their threats. For example, in the case involving the Mt. Hagen Secondary School, Western Highlands Province, Local Government Councillor, David Maip, and his tribesmen moved into the school to close it down pending their actual receipt of the compensation money (*The National*, 5 March 2004).

Category 2 concerns compensation claims by customary landowners on whose land natural resource development projects are located. In such development situations, the State, through relevant legislation, issues a licence, permit, or lease to facilitate the project. As the land on which the resource development project is located has not been sold, the local people continue to be the landowners. These people are usually given special recognition by the State and the project developers and are usually taken in as ‘partners’ who are accorded special preferences. For example, in the mining and petroleum sector, since the conflict concerning the Bougainville copper mine at Panguna, they have been given, in effect, free equity.

In view of s. 53 (2) of the Papua New Guinean Constitution, which prescribes in mandatory terms, ‘just compensation on just terms’, for any landowner whose proprietary and/or interests in property, including customary rights which may have been abrogated, when the State issued a licence, permit, or lease, it is important, in law, that all claims by customary landowners must be seriously considered and attended to, by the State and the project developer, but even more so by the State.

Category 3 concerns compensation claims by customary landowners outside of the project licence, permit, or lease area, but within the impact area of the project. As these claimants’ land is not within the actual project area, their compensation claims are usually not recognised as legitimate — particularly in the initial stages, when neither the State nor the developer is legally obliged to consider their interest.

In the event of any consequential damage or loss suffered by these people arising from the operations of the project, their recourse is usually under the law of torts – to prove loss or damage and then be entitled to compensation, either in a court of law or through a statutorily mandated quasi-judicial authority, such as the mining warden. The

compensation claim for environmental damage by the customary landowners within the impact area of the Ok Tedi mine falls into this category.

For example, in the case of the Ok Tedi mine, the customary landowners from the mine lease area; that is, mine lease landowners, currently hold 2.5 percent equity in Ok Tedi Mining Limited (OTML). As well as this, they also receive compensation payments such as an occupational fee, a fee for deprivation of possession or use and enjoyment of surface land of a subsistence way of life, a social disruption and relocation fee, and so on.

They are also given preferential treatment, over and above any other person, to all economic and social development opportunities, which the mine presents. Particularly for Ok Tedi, the mine lease landowners have been given business opportunities and have entered into joint venture partnerships with multinational companies to undertake catering businesses, and automobile and road construction and maintenance operations, worth millions of kina. Tabubil Catering, Star West (road building and construction), and Tabubil Automotives, are prominent examples of such joint venture operations. The landowners' equity in OTML is managed by the Mineral Resource Development Company (MRDC), which also provides management services and professional advice to other landowner companies, such as Tabubil Catering.

The MRDC was initially established in 1979 to carry state equity in all mining and petroleum projects. However, it was divested of those responsibilities in 1996, when Origin Minerals Limited was created and vested with state equity, and the management of all related interests, in all mining and petroleum projects. Since then, the MRDC has continued to carry and manage all equity interest by customary landowners and provincial governments in all mining and petroleum projects.

Apart from Ok Tedi, the other mining projects are Pogera, Misima, Lihir, Tolokuma, and the petroleum projects in Kutubu and Gobe. It is fair to state that customary landowners from the mining and petroleum lease areas are significant beneficiaries of these projects (Power 1997: 86-87). They are paid compensation, given 'free' equity in these projects, and receive further preferential treatment in relation to business and employment opportunities.

By comparison, customary landowners outside of the actual project area, but within the impact area, are poor cousins. They are not entitled to any of the different types of compensation or benefits — particularly business opportunities — except perhaps for infrastructure development through tax credit schemes or through provincial government funding of schools, health, and other community projects. In instances where these people are able to show that some damage or loss has been caused by the project, they would be entitled to direct compensation for that specified loss or damage.

Compensation claims for loss or damage of this nature, particularly in mining projects, are first made to the mining warden, who will hear the claim, make an assessment based on evidence, and then make an order for compensation. The values of food crops and economic trees are fixed by the Valuer General, and the mining warden applies those values to determine the appropriate compensation. For example, Burton (1997: 125) records that a person who lost some 5 000 mounds of mature sweet potatoes near Ningerum in the lower Ok Tedi area, as the result of flooding of the lower Ok Tedi

River caused by overburden from tailings disposal by the Ok Tedi mine, was paid K10 000 in compensation by applying the Valuer General's valuation.

To emphasise the level of imbalance between compensation and other benefits payable to Category 2 customary landowners (those within the project licence, permit, or lease area) and Category 3 customary landowners (those outside of the project area, but within the impact area), the following pertinent observation was made by Burton (*ibid.* :135):

'In the Ok Tedi case, imbalance has become so profound it has threatened the viability of the project at a political level. OTML had evidently sensed this by 1990, when it made a decision to extend benefits to villages outside its lease and formed the lower Ok Tedi-Fly River Development Trust, giving it a budget of around K3 million a year to spend on water supplies, aidposts, classrooms, and the like. At Pogera, the logistics of supplying the mine by road were threatened by roadblocks, even before production began, and community relations programs were extended far down the Enga Highway to cope with this'.

The various lawsuits against BHP Minerals Ltd., BHP Billiton, OTML, and the State of Papua New Guinea by the lower Ok Tedi and Fly River people within the impact area, in the Victorian Supreme Court, which have all now been settled out of court, and the resultant Community Mine Continuation Agreements (CMCAs) under the Ok Tedi Ninth Supplemental Agreement, stand as testimony to the deep-seated feeling of inequality amongst those customary landowners outside the project area.

When the lawsuits were filed, and the continuation of the Ok Tedi mine was threatened, there were undoubtedly tensions between Category 2 and Category 3 landowners. The former have so much at stake, while the latter have nothing substantial going for them, except to suffer the resultant damage, and then prove their case, either before the mining warden or the courts, before they are paid any compensation. The high profile lawsuits provided the only opportunity for them to pursue their compensation claims, which were, until then, either ignored or brushed aside by the company and the State.

Compensation for Environmental Damage Caused by Natural Resource Development Projects

Evidence shows that compensation claims for environmental damage in Papua New Guinea are, by and large, made by Category 3 customary landowners in the impact area. When these landowners' compensation claims are made for environmental damages, experience shows that the project developers are initially uncooperative, sometimes become confrontational, and even push to take a highly moral defensive stand. The denial and counterclaim by OTML in both the print and electronic media, often using other Papua New Guineans, concerning claims of environmental damage caused to the Ok Tedi River and Fly River systems, in the early 1990s, are classic examples.

Despite overwhelming evidence from a reputable international institution, such as the Starnberg Institute, in Germany (Kyere and Castel 1991), which stated that the direct riverine tailings disposal system which the company was operating was causing significant damage to the two rivers, with fish stock in the upper reaches of the Ok Tedi

River falling by 50 – 80 percent, OTML continued to deny these claims. In early 2000, faced with strong evidence, which indicated a serious threat of copper and acid rock drainage into the Ok Tedi and Fly River systems, Roger Higgins, the then General Manager of OTML, was rather dismissive. He is quoted as stating:

‘They possibly kill the algae and possibly kill the fish, yes. But it’s all possibly. That’s why we say it’s of concern. That’s why I’ve said that we need to keep monitoring it...The river there is very benign in terms of its acidity because most of the catchment, which we’re in, is limestone, which is the natural counter to acidity and that’s why the river is not being affected by acid rock drainage and why it possibly won’t be. It’s one thing to say possibly it is, but the implication, the flipside of that, is possible it won’t’ (Hyndman 2001:39, quoting Fowler 2000).

The story in Bougainville, preceding the blow-out, is similar. In 1989, Francis Ona, on behalf of the Panguna Landowners’ Association, requested the national government to conduct an independent investigation in order to ascertain the actual levels of environmental damage caused by the Bougainville copper mine. The Panguna Landowners’ Association expressed concern that toxic chemicals which had been discharged from the mine were causing all sorts of unknown diseases to trees and gardens crops. Furthermore, they raised concern that a large number of people were suffering from unknown illnesses (Kirsch 1997: 151), which they suspected were caused by the release of toxic chemicals from the mine.

The preliminary results from this investigation:

‘... found no significantly high level of chemical pollution. They described as unlikely the opinion held by many Bougainvillians that BCL was responsible for the decrease in wildlife and the decline in soil fertility (except in the pit and waste-dump area), for certain illness then prevalent in the lease area village’ (Oliver 1991: 208).

These results angered many landowners, including Francis Ona, and some commentators have suggested that this may well have been the catalyst for the violent uprising on Bougainville, which resulted in the forced closure of the mine, and the consequential all-out civil war that gripped the island for more than a decade (Kirsch 1997: 151; Oliver 1991: 208).

Stuart Kirsch, the anthropologist who was ‘activist’ cum ‘adviser’ cum ‘consultant’ to the Ok Tedi River people in the impact area of the Ok Tedi mine, in the K4 billion lawsuit in the Supreme Court of Victoria, filed by the Melbourne-based ‘class-action’ specialist lawyers, Slater and Gordon, in 1994, on behalf of the affected landowners, makes a point that compensation claims by affected customary landowners for environmental damage should not be approached from a purely economic perspective, particularly with concerns that these claims create ‘... an unstable climate for international investment in resource development projects’ (Kirsch 1997: 143). Kirsch (*ibid.*) offers several convincing reasons, one being:

‘... economic explanations obscure alternative points of view. From an economic perspective, all conflict between landowners and resource developers may be reduced to disputes about compensation. In the case of environmental impact, ... it is assumed that it is possible to provide adequate compensation to landowners for

damages to their natural environment and resource, regardless of the severity of the impact and the resulting disruption of their lives. This allows developers to continue business as usual in the face of landowner complaints about environmental impacts, which are redefined as demands for increased compensation. *Yet, ignoring landowners' concerns about environmental impact inevitably leads to conflict. Framing the problem in economic terms also allows developers to limit their liability to material claims, avoiding questions about moral responsibility to the people whose lives they have adversely affected'* (Kirsch 1997: 143-144; Author's emphasis in italics).

Following this reasoning, it becomes clear that compensation claims for environmental damage by affected customary landowners within the impact area of a natural resource development project are not only for loss of their land and their resources, *but more so, for the loss of the productive capacity of their land and their wider environment, upon which they depend for their survival in their subsistence way of life* (Kirsch 1996; Hyndman 2001: 37-38).

David Hyndman is a leading authority and highly respected commentator on the sociopolitical and environmental impact of the Ok Tedi mine, particularly concerning the Wopkaimin Mountain Ok people, who are within the impact area of the Ok Tedi mine (neighbours to Kirsch's Yunggoms of the Lower Ok Tedi). He supports Kirsch on this account:

'Kirsch is correct in insisting that the environmental rights of indigenous people affected by development are compelling, and must be given appropriate consideration in national and international debate on compensation' (Hyndman 2001: 40).

This 'wise counsel' should not be ignored.

The Ok Tedi Community Mine Continuation Agreements

Neither the definition given in the *Mining (Ok Tedi Mine Continuation (Ninth Supplemental) Agreement) Act 2001* (hereafter, the Act), nor that found under the various and respective community mine continuation agreements (CMCAs) offer any useful understanding and a sense of appreciation of what the CMCAs are. For example, the Act only states under the interpretation clause (s.2(2)), that 'community mine continuation agreement means an agreement between the company and the specified communities' — the residents of the village in one of the six geographical areas within the impact area of the Ok Tedi mine, divided into the following areas: Ok Tedi mine area; Tabubil – Kiunga Highway area; Upper Ok Tedi River area; Lower Ok Tedi River area; Middle Fly River area; and the South Fly River area. There is further allowance made by this legislation for any future agreements to be entered into between any other affected community area and OTML, and for a CMCA to be entered into and then accordingly declared to be such, by publication in the *National Gazette*, by the Minister, under s. 7(1) of the Act.

Currently, there are six CMCAs between the above-stated communities and OTML. The main text of each of these CMCAs is common. The differences are found in the schedules which contain different packages of compensation payments that set out the

amount of compensation to be paid in a given year, commencing 2001 through 2010 when the mine is scheduled to close. The schedules also contain trust deeds that are specific to the six different communities. These trust deeds are corporate vehicles through which the compensation packages are to be managed and accessed by the different communities concerned.

The six existing CMCAs define the CMCAs as agreements between OTML and the affected communities, by which the affected communities ‘give their informed consent to the continuation of operations of the mine’, and includes this CMCA. Roger Higgins, the then managing director of OTML, and perhaps the architect of the CMCA exercise, stated that the CMCAs represent outcomes of formal and informal discussions conducted between the affected communities, through which process, the affected communities gave their consent for the mine to continue in the face of the known environmental damage that its continued operation would cause to their environment, and even to themselves:

‘The CMCAs record the decisions of the communities and provide a mix of cash and development funding for initiatives and programs for the benefit of the whole communities, with an emphasis on long-term community development projects that would help build a local economy, independent of the OTML – incorporating development and compensation packages with a combined value of K180 million (approximately AUD\$90 million)’ (Higgins 2002:44).

Higgins’ amplification conveys a useful understanding and appreciation of what CMCAs are. It is apparent that the CMCAs are not only the vehicle through which the communities gave their consent for the Ok Tedi mine to continue operation, but are also ‘packages of compensation’ to compensate the communities for environmental damages, and perhaps for the loss of the productive capacity of their land and their environment, which they depend on for their subsistence living.

To gain a better understanding of CMCAs, we must also look at the background to the CMCAs – going back to the K4 billion lawsuit by some 600 clans and approximately 30 000 people from the affected communities who sued OTML and its then majority shareholder BHP Billiton, (52 percent). This lawsuit was eventually settled out of court in June 1996 with compensation payments of K40 million to people from the worst affected areas of the Ok Tedi River, and a further K110 million to all other affected persons. In addition to this compensation package, OTML also undertook to build a feasible tailings containment system under the *Terms of Settlement* and *Settlement Agreement*, both dated 7 June 1996, and executed by Rex Dagi and others on behalf of the plaintiffs and OTML (Banks and Ballard 1997).

Although OTML implemented the compensation component of the settlement agreement, it did not move quickly to build a tailings containment system. In 2000, the principal plaintiffs in the settled proceedings, Rex Dagi and Gabi Gagarinabu, returned to the Victorian Supreme Court and filed new proceedings, alleging that OTML and BHP Billiton had failed to honour that part of the agreement which required them to build a tailings containment system.

These renewed court proceedings resulted in OTML embarking on the CMCAs. Clauses 12-16 of the six CMCAs required the communities to opt out of the renewed

lawsuit on or before 7 January 2002, and through their representatives, sign the CMCA's and fully indemnify and release OTML, BHP Billiton, and all its shareholders from any further liability. With this background information, it becomes clear that the CMCA's not only authorise the continuation of the Ok Tedi mine and compensation package in return for consequential environmental damage and make them available to the affected communities, but by executing the CMCA's, the affected communities have fully indemnified OTML and its shareholders from any further or future compensation claims. Recognition of this, means that, in essence:

The CMCA's are mechanisms through which customary leaders of the affected communities are organised, and appropriate compensation packages are stipulated for these affected communities, based on the magnitude of environmental damage in respective communities. The CMCA's are legally binding, contractual agreements through which the affected communities and OTML are bound – with specified duties and responsibilities. On the part of the communities under the CMCA, they undertake not to pursue separate compensation lawsuits outside of the CMCA, and on the part of OTML, it undertakes to pay the agreed compensation payment, as specified under the respective CMCA compensation packages (Kalinoe 2003:iii).

The CMCA's represent a new and innovative way to manage compensation claims for environmental damage in natural resource development projects in Papua New Guinea. The CMCA's represent a departure from existing compensation regimes where the project developer is only obligated to pay general compensation to those communities within the project licence, permit, or lease area, and not those outside, even though they may be within the impact area. The people from outside the licence, permit, or lease area were only paid special and specific compensation, after making and proving their claims. It now appears that the CMCA's blur the distinction between people from within the licence, permit, or lease area, and those from outside of these areas, but within the impact area. Clearly, the CMCA's embrace all these communities.

Undoubtedly, the CMCA's fix and lock in compensation payments for the six communities that signed the agreements, for as long as these agreements remain current. The primary advantage to OTML and its shareholders, when using this model of compensation management, is that it quantifies and fixes the cost of environmental damage, removes all uncertainties, and nullifies threats of future compensation claims. From the affected communities' perspective, these agreements bring advantages and disadvantages.

One of the advantages which these CMCA's bring is that OTML and its shareholders, by entering into the CMCA's with the six affected communities, have admitted liability to having caused environmental damage to the Ok Tedi and Fly River systems. Particularly for those communities outside the worst affected areas, such as the Lower Fly River and the Middle Fly River areas, irrespective of the level or magnitude of the damage to their environments, river systems, and other resources, the compensation is now pre-fixed. Even if the impact of environmental damage turns out to be less than anticipated, OTML is obliged to pay the agreed levels of compensation under the respective CMCA's. Furthermore, the CMCA's remove the necessity for these people in the impact areas, to go to court to prove their cases.

The main disadvantage for the six communities that executed these CMCAs is that, if they suffer severe environmental damage, and higher than anticipated consequential loss, they cannot make any new claims. Under s. 8 (2) of the Act, the CMCAs bind all ‘existing and future members’ of the six CMCA communities.

The CMCAs are, in essence, a ‘packaged’ set of compensation arrangements and agreements between the six affected communities and OTML and its shareholders, in recognition and acknowledgement of environmental damages which the mine has caused to the Ok Tedi and Fly River systems and the wider environment, and will continue to cause, until 2010. When juxtaposed with the earlier attitude and regime under the *Mining (Restated Eighth Supplemental Agreement) Act 1995*, and its accompanying legislation, *Compensation (Prohibition of Foreign Legal Proceedings) Act 1995*, whereby any compensation claims outside of these legislative arrangements were prohibited and criminalised (with a fine not exceeding K10 000, or imprisonment for up to five years), the CMCAs represent a significant turnaround in OTML’s attitude towards the issue of compensation claims by the affected communities within the impact area of the mine. Through the CMCAs, OTML and its shareholders have accepted responsibility and admitted liability for causing environmental damage in areas and communities more than 150 kilometres down the Fly River, and as far as the Kiwai coast.

As a ‘packaged’ set of compensation agreements, the CMCAs represent an attempt to contain and control, through negotiations, any blow-out in the magnitude of compensation claims pursued through the courts. From this vantage point, the CMCAs are undoubtedly more advantageous to OTML and its shareholders, because it is able to control and minimise its liability for environmental damage, at levels which it knows it can afford. However, this may not necessarily represent a ‘just and equitable’ value, or extent of the damage and loss suffered by the affected communities, as a direct or indirect consequence of the environmental damage and resultant loss.

The Ok Tedi Community Mine Continuation Agreements as a Case Study

The Ok Tedi CMCAs present a new approach to dealing with:

- the issue of compensation claims by the communities outside of the project licence, permit, or lease area, but within the impact area; and
- the appropriate level of engagement with all the communities within the project area and within the impact area – where OTML has set up various corporate and community structures to manage the compensation schemes, with the appointment of trustees, to act and take decisions, on behalf of the communities. To obtain a broad-based, decision-making objective, the communities have been organised into wards and village development committees. These committees’ primary function is to obtain community consensus on issues related to the implementation of the various compensation ‘packages’ under their respective CMCAs, and then advise their trustees, who will take their concerns and/or positions, up with the relevant OTML agency.

In reverse, these committees also act as the conduit through which decisions taken by the trustees at the formal level are to be passed to the communities and the villages. The village councillors, who are known as local ward members, have a separate role to play

as well. In order not to confuse matters and issues, every effort is made to avoid appointing village councillors as trustees of these community development foundations, as set up under the CMCAs. The implementation of the CMCAs have now created a whole new structure of community organisation and governance.

On a wider Papua New Guinean level, this raises interesting developments and issues in community and village organisation, and management and governance. All these 'new' developments present an intriguing case study, not only in managing compensation for natural resource development projects, but also in getting down to the community level and finding workable, effective, community-based, decision-making processes and systems.

Background to the Paper

This paper presents the Ok Tedi community mine continuation agreements (CMCAs) as a case study in dealing with compensation claims for natural resource development projects in Papua New Guinea. Chapter 2 begins with a brief background to the Ok Tedi mine and its waste management systems, which resulted in the confession by OTML to environmental and ecological damage to the Ok Tedi and Fly River systems. The intention is to offer background information, and hopefully develop a better understanding of the issues at hand. The subsequent chapters present details of the CMCAs and its regime, concluding with the moves towards the closure of the mine in 2010, and the preparations that OTML must now make to enable the communities to live without the mine, through the Ok Tedi Development Foundation and the PNG Sustainable Development Program Company.

CHAPTER 2: BACKGROUND TO THE OK TEDI MINE, COMPENSATION CLAIMS, AND LEGAL PROCEEDINGS

Ok Tedi Mining Limited (OTML) operates the Ok Tedi copper mine in Western Province, Papua New Guinea. An American transnational, Kennecott Copper Corporation, carried out the initial explorations in the late 1960s, but withdrew from developing the mine in the mid-1970s, just before Papua New Guinea gained Independence. In 1981, amidst soaring gold prices, OTML was created as a truly transnational consortium to operate the mine, with Australia's BHP (30% interest), America's Amoco Minerals Corporation (30%), a German industrial conglomerate (20%), and the Papua New Guinean Government (20%). Under the Restated Eighth Supplemental Agreement in 1995, the ownership of OTML was restructured which resulted in BHP having 52 percent, the Papua New Guinean Government 30 percent, and Metal Mining Corporation (MMC) 18 percent (*Mining (Ok Tedi Restated Eighth Supplemental Agreement) Act 1995*, Recital G).

Since the inception of the mine, BHP (subsequently BHP Billiton) have been the operators of the mine. In late 2001, BHP Billiton wrote off its investment in OTML, transferred its 52 percent shareholding to a holding company that it set up — PNG Sustainable Development Program Limited — and exited OTML in February 2002, pursuant to the *Ok Tedi Mine Continuation Ninth Supplemental Agreement 2001*. This resulted in a further change in the shareholding of the mine. As of 30 April 2003, the current shareholding of the mine comprised PNG Sustainable Development Program Ltd. (52%), Papua New Guinean Government (30%, out of which mine lease landowners hold 2.5%), Fly River Provincial Government (2.5%), Mineral Resources Ok Tedi No. 2, on behalf of the people of Western Province (10%) (consequently diluting the Government's shareholding to 15%), and Inmet Mining Corporation, Canada (18%).

Gold production began in 1984 and ceased in 1989. Gold is now only obtained as a by-product of copper smelting. The extraction of copper ore began in 1987 and is expected to continue until 2010, when the mine is scheduled to close. In 1979, a feasibility study for the Ok Tedi project recommended that a permanent tailing dam should be built for the treatment or disposal of wastes and tailings on the Ok Ma River, and a stable waste dump be constructed in the Ninga and the Ok Gilor Valleys. Construction work began at the Ok Ma dam site, but major landslides in December 1983 and January 1984 forced the company to abandon the construction of a tailing retention dam. Since then, OTML has repeatedly argued that, because the area is subject to frequent landslides, high rainfall, and seismic activity, the storage of tailings and other wastes cannot be guaranteed, and therefore, the building of a retention dam is too big a risk. Initially, the Papua New Guinean Government did not accept this argument. Nevertheless, to allow gold production to commence in May 1984, the government gave OTML approval to use an interim tailings dam system. This involved the retention of the sand fraction at the Ok Ninga Valley and 'the tailings [being] dumped directly into the river system without first being treated' (*Times of PNG*, 17 May 1989, pp. 17, 23).¹

¹ The Ok Tedi gold and copper mine project is governed by a separate Act of Parliament, the *Mining (Ok Tedi Agreement) Act 1976*. This Act regulates all relevant matters, including the conduct of the environmental impact assessment and other environmental monitoring processes

In February 1986, Parliament passed the *Mining (Ok Tedi Sixth Supplemental Agreement) Act* 1986. This legislation legally bound the company to construct and operate a long-term copper mine, whereas the mine partners had initially preferred to mine only the gold cap, without any commitment to mine the copper, until the copper price improved. This legislation (and the Agreement it entailed) allowed for the suspension of the requirement for the construction of permanent tailings disposal facilities and stable waste dumps, pending the outcome of a detailed, three-year environmental study to be carried out by the company. In the meantime, the company was allowed to continue dumping tailings directly into the Fly River system. A spokesperson for the then Wingti Government stated:

‘the government [did this] after giving much thought to the advantages and disadvantages of the project, [believing] at that time that the overall development advantage to the nation outweighed the environmental impact on the Fly River system, as it was not considered permanent’ (*Times of PNG*, 17 May 1989, p. 23).

After a successful vote of no-confidence in the Wingti government, a new government began in 1989, with Rabbie Namaliu as Prime Minister. In mid-1989, the new government was pressured by public opinion to renegotiate the earlier agreement to force OTML to build a tailings dam, and put an immediate stop to the direct discharge of tailings into the Ok Tedi River. In mid-June 1989, the new Minister for Environment and Conservation, Jim Yer Waim, was understood to have taken a firm stand against the pollution of the Fly River and delta areas. He reportedly threatened to advise Cabinet to close the mine, unless OTML was prepared to construct tailings treatment facilities to reduce environmental damage to acceptable levels (*ibid.*: 17). In support of the Minister, the Department of Environment and Conservation released a statement to the effect that:

‘The pollution of the river system and delta has been compounded as the mine moved from the gold to the copper phase and the amounts of mine tailings and waste rock discharged into the river increased two to three times’ (*ibid.*).

In spite of these developments, on 28 September 1989, the Namaliu government decided not to force OTML to build a permanent tailings dam. Instead, it opted to allow the company to dispose of the mine waste directly into the river system, with the Government and the company being committed to compensate the people living along the length of the Fly River (*Post-Courier*, 24 September 1989, p. 1). After the decision was taken, the Minister stated that:

‘Everybody [Ministers] was concerned with the effects on the Fly River, and everybody was concerned with the welfare of the nation. We decided in favour of the people. It was the best decision any responsible government could take under the circumstances. In anything, there has got to be give and take. We risked our environment in favour of the people’ (*ibid.*).

by conducting and submitting periodic supplemental studies to the Government. The Act also allows for amendments to be made to the Agreement, by enacting a Supplemental Agreement. The Ok Tedi Project is exempted from the application of the *Environmental Planning Act* (Ch. 370) (see s.3(2)(b)).

The then Minister for Justice, Bernard Narokobi, stated that:

‘After exhaustive briefings and careful questioning by Ministers, the Government has reached the view that the interest of all persons can be served by allowing the mine to operate without the tailings dam’ (*Post-Courier*, 16 October 1989).

The mine dumps approximately 80 000 tonnes of tailings into the Ok Tedi and Fly River systems every day (*Post-Courier*, 9 September 1992, p.1).² The non-governmental organisation groups, such as the Australian Conservation Foundation and the German-based Starnberg Institute have criticised the mine for polluting the 1 000 kilometre long Ok Tedi and Fly River systems (Kyere and Castel 1991). Two observers from the Starnberg Institute have claimed that:

‘The known effects on the environment so far have been very profound. Not only is the water in the two rivers, the lagoons, and the Fly River delta under strain, but the sedimentary deposits also impose a burden on the river regions. Copper in solution and other heavy metals can make the water in both rivers toxic to fish and undrinkable for humans. According to the mine administration, fish stocks in the upper reaches of the Ok Tedi have already fallen by 50-80 % after only a few years of operation’ (*ibid.*: 33).

David Hyndman, a respected commentator on the Mountain Ok Tedi people (the affected customary landowners) made the following statement:

‘Weak environmental protection plans coupled with a long series of ecological disasters starting in 1984 have endangered natural resources sustaining more than 40 000 indigenous people of the Ok Tedi and Fly River Basins, and the Ok Tedi project has been an ecological catastrophe...

Since the mid-1980s, pollution from suspended sediments and heavy metals has been 10 000 times greater than American Environmental Protection Agency standards and has threatened subsistence staples such as fish, crustaceans, turtles, and crocodiles, and gardens and sago palms growing along the riverbanks and back swamps’ (Hyndman 1991: 78-79).³

BHP, the main owner (then with a 52% interest) and operator of the mine, was sued on 5 May 1994 in the Victorian Supreme Court by some 7 500 villagers of the Mirikipu clan who lived in the vicinity of the river system (*Post-Courier*, 6 May 1994, p. 2; *Australian Financial Review*, 7 September 1994, p. 24). The villagers were claiming AUD\$2 billion compensation and AUD\$2 billion as exemplary damages. The writ alleged that BHP and OTML had ‘negligently and in breach of their duties of care’ discharged poisonous material into the Ok Tedi-Fly River systems and had destroyed the villagers’ subsistence way of life.

² According to the findings of the Starnberg Institute, the mine dumps up to 150 000 tonnes of tailings per day.

³ For detailed studies on the evolution of the Ok Tedi mine, see R. Jackson, 1982. **Ok Tedi: The Pot of Gold**. Port Moresby: Word Publishing, and W. Pintz, 1984. **Ok Tedi: Evolution of a Third World Mining Project**. London: Mining Journal Books.

It was also alleged that the Papua New Guinean Government, as a 30 percent shareholder in OTML, had ‘failed, neglected, and refused’ to enforce environmental agreements and covenants. On 6 September 1994, more than 1 000 new writs were filed in the National Court, in Port Moresby, against BHP and the Papua New Guinean Government (*Australian Financial Review*, 7 September 1994). The Wingti government’s initial response to the lawsuit was to introduce legislation, with retrospective effect, in order to:

- limit the aggregate of claims for damages by landowners;
- establish a compensation tribunal with exclusive power to deal with such claims speedily and competently;
- compel the resource developers either to establish a fund which would accumulate, over time, or to put up a bond from which future claims could be met; and
- give the state power to sue developers for environmental or other damage for unlimited amounts (Callick 1994).

The then Prime Minister, Paias Wingti, also stated that his government, ‘would seriously consider whether to abolish common law claims by landowners for compensation, and instead, give landowners a statutory basis’ (*ibid.*).

On 25 August 1994 the Supreme Court ruled that the snap resignation and purported re-election of Paias Wingti, as Prime Minister, on 23 September 1993, did not comply with s. 142 (3) of the Papua New Guinean Constitution. As a result, a new Prime Minister had to be re-elected in the next sitting of the parliament, and in the process, the Wingti government was defeated. Consequently, the proposed legislation did not live to see the light of today.

The government of the new Prime Minister, Sir Julius Chan, with John Giheno as Minister for Mining and Petroleum, brought a new approach and attitude to the issue. Giheno insisted that the government should pursue a compensation agreement with the Ok Tedi and Fly River landowners (*Times of PNG*, 23 March 1995, p. 9). The Chan government offered a compensation package of AUD\$113 million to the landowners in the hope of persuading the landowners to accept an out-of-court settlement (*Daily Telegraph Mirror*, 19 April 1995, p. 44). At first, the landowners did not accept the compensation package and continued to maintain their court actions in the Victorian Supreme Court and the Papua New Guinea National Court. Later, however, they accepted a settlement package of AUD\$550 million, some six months after the passage of the *Mining (Ok Tedi Restated Eighth Supplemental Agreement) Act 1995*, and the *Compensation (Prohibition of Foreign Legal Proceedings) Act 1995*.

Initially, in an attempt to broker a settlement, the Chan government embarked on the *Mining (Ok Tedi Restated Eighth Supplemental Agreement) Bill 1995*. In response to the widespread criticism that this Bill attracted, coupled with the prevalent view held by many at that time that the proposed legislation did not comply with certain constitutional requirements, the Bill was subsequently ‘rearranged’. In the process, the original proposal became two separate, but related, pieces of legislation — the *Mining (Ok Tedi Restated Eighth Supplement Agreement) Act 1995*, and the *Compensation (Prohibition of Foreign Legal Proceedings) Act 1995*. The former Act came into effect on 2 February 1996, and the latter on 11 April 1996. Soon after the legislation came

into effect, the Ok Tedi customary landowners who had filed the AUD\$4 billion lawsuit accepted the compensation package that was offered, and dropped all legal proceedings on 11 June 1996.

When OTML and its shareholders offered the compensation package under the *Mining (Ok Tedi Restated Eighth Supplemental Agreement) Act 1995*, it did so without accepting full responsibility for the environmental damage it was causing to the Ok Tedi River and the Fly River system. Rather, OTML, through the then Minister for Mining, John Giheno, initiated the compensation package as a carrot to persuade the landowners who had taken out the lawsuits to accept an out-of-court settlement. OTML and its shareholders succeeded, and the compensation package under the *Mining (Ok Tedi Restated Eighth Supplemental Agreement) Act 1995* was accepted. It is now administered by Heduru Trust (Heduru in the Motu language means ‘helping out’), which is managed by the Community Relations section of OTML, in Kiunga, and the North Fly trustees from the affected communities who were parties to the lawsuit.

The *Mining (Ok Tedi Mine Continuation (Ninth Supplemental) Agreement) Act 2001* — in particular with the Community Mine Continuation Agreement (CMCA) regime it establishes under Section 8 — marks a complete turnaround in OTML’s position on the issue of environmental damage that its operations had caused since its inception. Under Schedule 2 of the various CMCA, OTML admits that the mine has caused environmental damage, and if the mine continues, there is bound to be more environmental effects downstream, from the Ok Tedi River down to the mouth of the Fly River:

‘If the mining continues the following expected effects are likely to occur, but there is a risk that more severe or other adverse environmental effects could arise’.

Expected Effects

- **Dirty Water:** The river water will stay dirty because of the suspended sand and silt. This will only change after the mine closes. People will have to continue getting their water from the side streams, or will have to allow sand and silt to settle from river water before using it for drinking or cooking. This effect will continue to be greatest in the Ok Tedi River, and will be significant in the Middle Fly.
 - **Sand Build-Up:** Sand in the water will settle at places along the main river channel and at the mouth of the river channels. It could take 50 years or more for the river levels to go back to what they were like before the mine started. The river will move around more and make travelling and other activities more difficult. This effect will be greatest in the Lower Ok Tedi and in the Middle Fly, above Manda.
 - **Flooding:** The sand build up will cause more flooding than now. The river will flow over the banks and flood low-lying areas for longer periods of time than it does now. Some of the sand carried by the floodwater will be deposited on low-lying areas. The maximum area that could be flooded is expected to be 3 800 sq. km. This will happen from the Lower Ok Tedi, down to Obo. Flooding will continue to affect garden land and walking tracks, until the river levels decrease, after the mine closure. This could take up to 50 years or more.
-

Expected Effects (continued)

- **Trees Losing Leaves and Dying:** The flooding will cause trees and other plants, which are not flood tolerant, to lose their leaves and die. The maximum area that could be affected is expected to be 1 350 sq. km. This will happen mostly in the Lower Ok Tedi and the Middle Fly. If the trees die, they may be replaced naturally by plants, which are better suited to flooding. The forest is expected to recover slowly as the river levels return to normal in the years after the mine closure. The die-back will occur because of flooding and sand deposited from the river.
- **Fish:** Fish stocks will continue to decrease in the Middle Fly. The fish will be safe to eat. Copper has built up in the livers and kidneys of some fish. However, very large quantities of livers and kidneys will have to be eaten everyday to affect human health. When the mine closes and the river water gets cleaner, the fish numbers are expected to slowly return to normal. Some fish species are no longer being caught in the main channels of the Ok Tedi and the Fly Rivers. However, these species are still found in side streams and in other rivers in the region. These species are expected to return to the main channels in the years after the mine closure.
- **Copper:** The sand that comes from the mine contains small amounts of copper. The amount of copper will increase, if the mine continues, but it is not expected to be harmful to the people or fish.
- **Acid Rock Drainage:** Some of the sand from the mine is called pyrite. If it is exposed to air — on sand banks for instance — it can produce some acid. The amounts of acid produced will be small, and will be mixed with very large amounts of water. Any effects are expected to be to a very small area, and are not expected to be a risk to people or fish.
- **Sago:** If sago gardens are flooded for too long, the sago may die. However, the floodwater will not make the sago unsafe to eat. It will be necessary for some people in the Lower Ok Tedi and the Middle Fly to travel further from their villages to harvest sago.

It is in recognition of these kinds of environmental damage, and OTML's admission of liability, that the CMCA's were executed with the affected communities. In essence, the CMCA's are compensation packages to indemnify the affected communities for environmental damage and loss, and nuisance caused to them in their subsistence way of life. It is fair to say that the CMCA is, in effect, a legal device given full legal effect under s.8 of the *Mining (Ok Tedi Mine Continuation (Ninth Supplemental) Agreement) Act 2001*, to lock in and keep all the affected communities away from pursuing individual or separate lawsuits for environmental damage and resultant loss and nuisance. Clause 12 of the various CMCA's — a standard clause for all the CMCA's — ensures this by releasing and discharging OTML, its shareholders, or associated corporations from any liability.

The Rex Dagi Proceedings

On 5 May 1994, the principal plaintiffs, Alex Maun and Rex Dagi, who represent some 7 500 or more villagers of the Ok Tedi River system, commenced proceedings in the Victorian Supreme Court against OTML, and BHP — which was then the majority

shareholder and operator of the mine — for environmental damage and consequential loss. The total damages sought was AUD\$ 2 billion in compensation for environmental damage, and a further AUD\$2 billion for exemplary damages. On 6 September 1994, more than 1 000 new writs were filed in the National Court of Papua New Guinea in related proceedings against BHP and the Papua New Guinean Government, which was then a 30 percent shareholder and regulator.

These proceedings were eventually settled out-of-court with a total compensation package of AUD\$ 550 million under the terms of the Ok Tedi Restated Eight Supplemental Agreement and its enabling legislation, the *Mining (Ok Tedi Restated Eighth Supplemental Agreement) Act* 1995. Under Clause 5 of the Ok Tedi Restated Eight Supplemental Agreement, all landowners, including the plaintiffs, in the various court proceedings, who were affected by the environmental impact of the mine, were given six months from the date of the inception of the Agreement (4 August 1995) to opt out of the compensation scheme, by execution in writing by the clan leader. Failing that, all customary landowners from the affected area, including those who had taken out lawsuits, were deemed to have agreed to abide by the compensation scheme, under the Agreement and the Act. On 11 June 1996, the customary landowner plaintiffs dropped all legal proceedings in Papua New Guinea and Australia, and accepted the compensation scheme under the Ok Tedi Restated Eighth Supplemental Agreement.

Rex Dagi returned to the Victorian Supreme Court in 2000, in proceedings No.5002 of 2000 against OTML and BHP, alleging that OTML had failed to comply with some of the out-of-court settlements conditions — one of which was the construction of an alternate tailings disposal facility. These proceedings are continuing. When the Ok Tedi Mine Continuation (Ninth Supplemental) Agreement and the various CMCA were negotiated, this provided a potential source for internal conflict between family members of the affected communities.

Before the CMCA were concluded, people were given options to either remain with the Dagi proceedings, or opt out and join the CMCA compensation package, under the Ninth Supplemental Agreement. Those who opted out of the lawsuit and became part of the CMCA were the only ones entitled to compensation — either general cash compensation or project assistance. My field notes demonstrate the level of conflict:

‘There is still tension between those members of the affected communities who have opted out of the lawsuit and joined the CMCA compensation package process, and those members of the same communities who have decided to press ahead with the lawsuits.

The principal plaintiffs in the various lawsuits, which continue in the Victorian Supreme Court (Australia) and in the Papua New Guinean National Court, are Rex Dagi in the North Fly/Lower Ok Tedi area, and Mr. Gabia Gagarinabu, in the South Fly area.

These tensions were clearly present when I spoke with people from these respective areas. For example, in the Lower Ok Tedi River, in Iogi Village, Hon. Elizabeth Matit, an elected Ward Member in the Kiunga Urban Local-level Government, and a female leader in the area, stated that she was previously in the lawsuit with Rex Dagi, but when the CMCA compensation package was put

to her people and herself, she decided to opt out of the lawsuit and into the CMCA process because she formed the view that CMCA compensation packages presented real opportunities for her and her people.

However, some of her relatives have decided to stay on with the Rex Dagi-led lawsuit. The general view held by the people who have decided to pursue the lawsuit is that OTML, BHP Billiton, and their partners should be made to fully account for the level of environmental damage that they have admitted to causing. The compensation packages that have been concluded under the CMCA do not represent a true value in terms of environmental damage and loss suffered by the people. This division between these two groups of people, generally identified as the CMCA group and lawsuit group, respectively, has divided families and village communities. The other representative with whom I spoke, from the Middle Fly and South Fly, also confirms this.

In the Middle Fly, Rex Sale, a community representative who was involved in the CMCA negotiation process, and is now a trustee of the Middle Fly Development Foundation, also mentioned that some 3 000 of his people have decided to continue with the lawsuit. As they are not covered under the CMCA compensation package, they do not receive cash compensation payments, whereas the others who have agreed, through their village communities to be party to the CMCA's, do receive cash compensation payments. This has caused some tension in these communities.

In the South Fly region, David Garibah, Vice-Chairman of the Kiwaba Development Trust, and Abio Udu, a trustee of the Kiwaba Development Trust stated that three Kiwai villages — Sepe, Auti, and U'uwo — are not party to the CMCA compensation package, and there is tension between these villages and the other Kiwai villages that are party to the CMCA packages. Gabia Gagarinabu is from Sepe Village, and it is clear that OTML and the government officials who were tasked to secure the CMCA packages found it difficult to penetrate these villages'.

CHAPTER 3: THE OK TEDI MINE CONTINUATION (NINTH SUPPLEMENTAL) AGREEMENT AND THE COMMUNITY MINE CONTINUATION AGREEMENTS

Organisation of the Community Mine Continuation Agreements

The *Ok Tedi Mine Continuation (Ninth Supplemental) Agreement*, which is the first schedule to the *Mining (Ok Tedi Mine Continuation (Ninth Supplemental) Agreement) Act 2001*, is the new legal arrangement under which the Ok Tedi mine currently operates. The Community Mine Continuation Agreements (CMCAs) have been established under the Ok Tedi Mine Continuation (Ninth Supplemental) Agreement and the Act, as a mechanism to organise customary landowners in affected communities, and package compensation for these affected communities, based on the magnitude of the environmental damage in their respective communities.

The CMCAs are the legal instruments through which the affected communities and OTML are bound, with specified duties and responsibilities. On the part of the people under a CMCA, they undertake not to pursue separate compensation lawsuit claims outside of the CMCA, and on the part of OTML, it undertakes to make the agreed compensation payments, as specified under the respective CMCAs.

Given the admission of liability for environmental damage, the CMCAs have to be quickly negotiated with the affected communities to enable the Ok Tedi mine to continue to operate in the face of the high level of environmental damage, and to settle the issue of compensation. By doing this, existing lawsuits have been diffused and future lawsuits have been negated.

Six separate CMCAs were executed with the affected communities, from the mine area through to the impact areas and communities on the entire Ok Tedi River; the Tabubil-Kiunga Highway along which the copper slurry is transported from the mine to Kiunga; the North Fly River area; and all the way down to the South Fly. For purposes of the CMCAs, these communities have been divided into six groups (see Table 3.1):

Table 3.1: CMCAs, by Area, Region, and Village

Area	Region	Village
Mine Area	Ok Tedi Mine	Atemkit, Finalbin, Kavarabip, Mingalsimbip, and Wangbia.
North Ok Tedi	North Fly	Ankit, Boliwogam, Bounkim, Bumbin, Derongo, Digam, Haidowogam, Kawentigin, Kolebon, Konkit, Kumguit, Ningerum Tamaro, Nioksikwi, Ok Teditau, , Walawam, Wogam, Wombon, and Wurikanatko.

Area	Region	Village
Lower Ok Tedi	North Fly	Ambaga, Atkambia, Bige, Birinkamba, Bombubun, Demasuke, Dombre, Ieran, Iogi, Kawok, Komopkin, Konkonda, Kungim, Kwiape, Miamre, Pastmambin, Sarae, Senemrae.
Highway	North Fly	Awin Ramaro, Briompenai, Dande (1), Dande (2), Gii, GreGrengas, Gresohore, Hiorinkia, Hoponai, Hosokumgu, Hosonai, Iankenai, Ipoknai, Kasrenai, Klwilokoai, Matkomnai, Menumsore, Miasomnai, Mimigire, Pampenai, Rarengre, Rudmesuk, Sisimakam, Tapko, Timindemesuk, Tiomnai, Tope, Wangenai.
Middle Fly	Middle Fly	Aiambak, Bosset, Erecta, Karengu, Kasa, Kaviananga Obo, Komovai, Kukujaba, Kwen, Levame, Manda, Menbok, Mepu, Mipan, Moian, Owa, Uluwas, Wangawanga.

The South Fly has been divided into four separate subregions, and the respective villages have been listed (see Table 3.2).

Table 3.2: Villages in the Four Subregions of the South Fly

Suki	North Bank	South Bank	Kiwai Island
Aewe	Aberagerema	Aduru (Somogi)	Abinio
Baidowa	Aroto	Baramura	Agobaro
Dede (Wasua)	Domera	Daware	Dameratamu
Dewara	Doumori	Kadawa	Gesowa
Eniyawa (Daru)	Kabatari (Sagero)	Katatai	Iasa
Gwaku	Kaiapo	Koabu	Ipisia
Kautru Aewe No.3	Kea	Madame	Kubira
Kiru	Kededibi	Mutan	Oromosapu
Lewada	Kename	Parama	Sagopari
Puka Duka No.1	Maduduwo	Sepe/Auti	Saguwame
Puka Duka No.2	Maipani	Severemabu	Samari
Riti Aewe No.2	Paddaeya No.1	Sui	Wapura
Sapuka	Paddaeya No.2	Tirioi No.1	Wapi
Serki	Pagona No.1	(Madiri)	
Sialowa	Pagona No.2/Gai	Tirioi No.2	
Suame	Sagero No.1	U'uwo	
	Tire'ere	Wederehiamo	
	Urio		
	Waliyama		
	Wariobodoro		

From these six CMCAs, nine separate trusts have been created, with at least one trustee from each of the villages to represent them. The various trusts under each of their respective CMCAs are set down in Table 3.3.

Table 3.3: CMCAs, Trusts, and Compensation Packages

CMCA	Trust	Compensation Package
North Ok Tedi	Nupmo	Information not available to the researcher.
Lower Tedi	Ok Waitri	Information not available to the researcher. However, in 1996, a K40 million compensation package as an out-of-court settlement was agreed to be paid under the Alice River Development Trust, as part of the Eighth Supplemental Agreement.
Highway	Tutuwe	K15 million compensation package with direct cash compensation component and a projects component.
Middle Fly	Middle Fly Development Foundation	K57.6 million total compensation package divided into three components: <ul style="list-style-type: none"> • Future Generation Trust; • Development (Projects) Fund; and • Cash compensation (payout) handled and paid out by OTML community relations officials and not the trust created under the CMCA.
South Fly	Suki Flygogo Development Trust (Suki and Gogodala)	Information not available to the researcher.
	Manawete Development Trust (north bank of the Fly – Balimo side)	Information not available to researcher.
	Dudi Development Trust (south bank of the Fly River).	Information not available to the researcher.
	Kiwaba Development Trust (Kiwai and Wabada group of islands)	K9.5 million compensation package divided into three components: <ul style="list-style-type: none"> • Development (Projects) Fund; • Investment; and • Education subsidy (sponsorship).
There is no direct payout component.		

The Middle Fly CMCA has three separate trusts for purposes of implementation of the total compensation package under their CMCA.

At least one trustee is appointed by each village to represent them on the trust created under their respective CMCA's. The trustees meet with the administrator of the trust in Kiunga (OTML Community Affairs Brown House 2) on a quarterly basis to take

decisions on the administration of the trusts. Under the CMCA process, a village development committee comprising elders of the village has been set up for consultation purposes. Immediately after trust meetings in Kiunga, all individual representative trustees are required to go back to their village community and do patrols, possibly with OTML community relations officials, if not by themselves, and then inform their village community of the decision taken at the last trust meeting. Because of the trustees extensive involvement with the OTML community relations officials, some observers in Kiunga have commented that the trustees are now perceived by their communities, as officials of the company rather than their own communities.

The Legal Binding Nature of the CMCAs

The *Ok Tedi Mine Continuation (Ninth Supplemental) Agreement* (MCA) provides for the establishment of the six separate CMCAs, while they are all given statutory status under the *Mining (Ok Tedi Mine Continuation Ninth Supplemental) Agreement) Act 2001*. The MCA is the First Schedule to the Act and the CMCAs are the Second Schedule to the Act.

Section 4, Subsections (1) and (2) give full legal effects to the MCA and the CMCAs and declare that these agreements apply, irrespective of any law to the contrary, and then declares at Section 4 (4) of the Act that:

‘The Community Mine Continuation Agreements represent the final and binding agreement between the parties hereto on compensation and benefits payable to such of them as are affected by the project’.

Section 4 (b) of the Act then ousts the application of the *Fairness of Transaction Act 1993* which came into effect on 25 September 1998, from having any effect or implication on the MCA or the CMCAs.

Section 8 of the *Mining (Ok Tedi Mine Continuation (Ninth Supplemental) Agreement) Act* is particularly interesting. The effect of this provision appears to be that, as long as a community leader, first holds himself or herself out as one, and secondly, adequately demonstrates that he or she is a representative of the community, irrespective of the actual level of the consensus in the community, and signs the CMCAs, that person legally binds all of the members of his or her community. This provision reads:

8. EXECUTION OF COMMUNITY MINE CONTINUATION AGREEMENTS AND OTHER ACTS BINDING

- (1) The signature or other execution of a Community Mine Continuation Agreement by a person representing, or purporting to represent, a community or clan, or that person’s delegate, binds all of the members of that community or clan to that Community Mine Continuation Agreement notwithstanding-
 - (a) that there is no express authority for that person to sign or execute the Community Mine Continuation Agreement on behalf of the members of the community or clan concerned; or

- (b) that not all representatives of the relevant community or clan have signed or otherwise executed the Community Mine Continuation Agreements; or
 - (c) that not all members of the community are parties of the Community Mine Continuation Agreement; or
 - (d) any requirements of the Underlying Law.
- (2) The acts and deeds of a person described in Subsection (1) in respect of any matter referred to in the relevant Community Mine Continuation Agreement bind each person on behalf of whom that person purports to be acting, and where a person purports to be acting on behalf of the whole of that person's acts and deeds bind each existing and future member of that person's community or clan, including, without limitation, children and persons who are subsequently born into, or who subsequently join, that community or clan.

This is further followed through in Clauses 9 – 13 of all the six CMCA's, as commitments by the communities, particularly under Clause 11.2:

'that the persons signing this Agreement for and on behalf of each member of the communities have the power and authority to do so and that this Agreement will be valid and binding on each member of the community'.

This is followed with a specific full indemnity statement under Clause 12 where the communities participating under the six CMCA's fully release and discharge OTML, BHP, the company's shareholders, and their associated corporations, directors, officers, and agents from 'all and any demands and claims arising directly or indirectly from the operation of the mine or any associated works'.

Under Clause 13 of the CMCA, the communities, as parties to the six CMCA's, undertake to:

- 13.1 'take such steps as are necessary to ensure that on or before 7 January 2002, the communities, whether by the authorised representative or otherwise, execute and deliver opt-out notices in the Supreme Court proceedings; and
- 13.2 release and discharge the company (OTML) and BHP from each and every claim made in the Supreme Court proceedings and the Dagi proceedings.'

As of March 2003, not all the members of the affected communities in the villages covered by the six CMCA's had opted out and joined the CMCA's. Elizabeth Matit and Tina Edwards, from Iogi and Atkambia Villages, respectively, Lower Ok Tedi, confirmed that their communities were divided into two groups — the lawsuit camp and the CMCA camp — and the situation remains. Rex Sale from Kivanga/Obo Village, Middle Fly, stated that, of the 10 000 people he represents as a trustee of the Middle Fly Development Foundation, 7 000 have signed up on the CMCA, but 3 000 have not. They are with the Rex Dagi-led lawsuit. In the South Fly Area, Sepe, Auti, and U'uwo Villages have joined the CMCA process, but have decided to pursue legal proceedings with Gabia Gagarinabu as their leader in the Supreme Court proceedings.

Clause 19 of the respective CMCA's (all CMCA's are standard in context, but differ in the schedules which set out the different set of compensation packages) addresses the effect of the payment of compensation under the MCA and the CMCA regimes, and all previous compensation regimes. It is a significant provision, as shown by the relevant parts:

‘...the payments to be made by the Company (OTML) pursuant to this agreement are, and shall be, in full compensation for all loss and damage contemplated by the environmental predictions suffered, or to be suffered, by the communities in respect of disturbance to the environment in the Lower Ok Tedi area of their use or enjoyment of the environment, including, where applicable and without limitation to the generality of the foregoing,

- (a) being deprived of the possession or use of the natural surface of the land area;
- (b) damage to, or contamination of, the natural surface of the land;
- (c) severance of the land or any part of it from other land owned or occupied by the communities;
- (d) any loss or restriction of a right of way, easement, or other right;
- (e) any loss or damage to improvements;
- (f) in the case of land under cultivation, loss of earnings;
- (g) disruption of agriculture activities;
- (h) social disruption;
- (i) garden damage and loss of economic trees;
- (j) loss or damage to any flora and fauna, on the land or in the water; and
- (k) loss of use or contamination of water.’

The intended net effect of Clauses 12, 13, and 19 of the CMCA's is that, by executing the CMCA's, the people in the affected communities, including those who have not agreed to sign the CMCA's, but continue on the legal proceedings, relinquish and extinguish all legal rights which they have had to legal recourse in any court of law for any loss or damage caused by the environmental effects of the operation of the mine. Section 8 (2) of the *Mining (Ok Tedi Mine Continuation (Ninth Supplemental) Agreement) Act 2001* further states that the acts and deeds of the current community representatives in executing the CMCA's ‘bind each person on behalf of whom that person purports to be acting, and where a person purports to be acting on behalf of the whole of that person’s community or clan, that person’s acts and deeds *bind each existing and future member of that person’s community or clan, including without limitation, children and persons who are subsequently born into*, or who subsequently join that community or clan’ (emphasis added in italics).

From the emphasis given in s. 8 (2), it can be seen that the current generation of community leaders has bound the future generations, without having any information available, either to them or the company, of what the future holds for the children and those yet to be born. As long as this provision remains, generations of people in the affected communities will remain bound by the terms of the CMCA and its enabling legislation. In that context, it must also be pointed out that s. 4 (6) of the Act bars the application of the *Fairness of Transaction Act 1993*, hence, shielding the CMCA's from legal challenges, by future generations.

Although s. 5 of the *Mining (Ok Tedi Mine Continuation (Ninth Supplemental Agreement) Act 2001* does not concern customary law holders and those in the affected communities covered in the various CMCA's, it provides 'an absolute bar and defence' for BHP Billiton and its related companies in respect of any claim for environmental damage relating to, or arising out of, the operation of the mine. In this regard, s. 5 (1) of the Act states that:

'neither the State nor any government agency may take, pursue, or in any way support proceedings against a BHP Billiton party in respect of any environmental claim relating to the operation of the project'.

This may mean that the Governor of Western Province, or the Western Provincial Government itself cannot support any proceedings, which the people living in the affected area may wish to bring. Section 5 of the Act offers absolute protection:

'This section may be pleaded by a BHP Billiton Party as an absolute bar and defence to any proceedings taken by the State or any government agency in breach of its terms.'

Under Clause 13 of their respective CMCA's, all the communities within the six CMCA areas are required to release and discharge OTML, BHP Billiton, and its current and past shareholders from all claims for environmental damage outside the CMCA's. Under Clause 13.1, all the communities in the affected areas were obligated to execute and deliver opt-out notices from the renewed court proceedings led by Rex Dagi and Gabia Gagarinabu, on or before 7 January 2002. However, this has not happened, and the lawsuits are current. Some communities in the CMCA areas are divided, with some sections of the communities steadfast and active with their support and participation in the lawsuits.

If either the Victorian Supreme Court or the Papua New Guinea National Court finds for the plaintiffs in any of these proceedings and makes orders for the construction of a tailings storage facility or compensation for environmental damages, then by the operation of Clauses 15 and 16 of the CMCA's, OTML will have no obligation to continue to make the compensation payments under the CMCA's. In particular, Clause 15.2 states that, if the court orders:

'the payment of damages by [OTML] or BHP to the communities or any member of them, then [the clauses on the payment of various compensation packages and cash payments under Clauses 17 and 18] from the date of any judgment or award of damages, and all payments made pursuant to Clauses 17 and 18, before that date, will be taken into account, and will be set off against those damages.'

Clauses 15 and 16 allow OTML and its shareholders to refuse to honour the compensation package schemes set up under the six CMCA's, if the court finds in favour of Rex Dagi and his group, or Gabia Gagarinabu and his group. Ironically, Rex Dagi and Gabia Gagarinabu and their followers are not, and have never been, part of the CMCA process. They have taken a considered position not to be members or parties to the duly executed CMCA's. Therefore, why should their victory in court, affect a contract or agreement to which they are not parties?

Approaching this same concern from the standpoint of the participants to the CMCA process and agreement, why should the victory in court of the people who are not parties to the CMCA vitiate the contractual rights and benefits in the CMCA between OTML and the communities constituted in the six CMCA? During the consultation meetings leading up to the execution of the CMCA, were the people made aware of the effect and consequences of Clauses 15 and 16 of the CMCA?

There is evidence from a field survey conducted from February to March 2003, to suggest that the substantive texts of the CMCA were neither discussed nor negotiated at these consultation meetings. As a result, there is a strong likelihood that Clauses 15 and 16 of the CMCA were never discussed. It is clearly not fair on the participants to the CMCA to subject their contractually concluded compensation packages to the outcome of the court proceedings to which they are not parties.

The foreseeable impacts and implications which the continued operation of the mine poses for the people are clearly set out under Schedule 2 of the CMCA under the heading 'Environmental Predictions'. With the continuation of the mine, more environmental effects and damages are predicted to occur. For example:

- there will be dirty drinking water in the river systems. In the Ok Tedi River and down to the Middle Fly River, water will be unfit for drinking and cooking. People will have to source and access water for domestic consumption from the side streams;
- there will be siltation of the river system in the form of sand build-ups. It is predicted that it may take up to 50 years before the river level returns to its original state. The river systems are likely to change their courses, thereby making travelling and other activities difficult for the river people. It is predicted that this effect will be greatest in the Lower Ok Tedi and the Middle Fly River areas;
- there will be flooding as a result of the sand build-up. There is likely to be more flooding, and low lying areas of the Lower Ok Tedi River and Middle Fly River are likely to be flooded for longer periods of time, thereby affecting gardening land and walking tracks;
- increased flooding will cause trees and plants to die, thereby destroying forest land. This is already evident in the Lower Ok Tedi River, and all the way down the Fly River. However, in its predictions, OTML restricted the affected area to a maximum of 1 350 sq. km concentrated in the Lower Ok Tedi to the Middle Fly;
- there will be dwindling fish catches with some fish species disappearing completely. OTML has predicted that, when the mine eventually ceases operations and the river gets cleaner, fish species and stocks are likely to return to the main Ok Tedi and Fly River systems;
- there will be traces of copper in the river systems. OTML predicts that this is not expected to be harmful to the people or the fish. However, it is essential that the copper level must be closely monitored to ensure the safety of fish life and the people in the affected areas;
- there is bound to be acid rock drainage run off from pyrite – sand from the mine – entering the river system. This must also be closely monitored;
- there will be loss of sago palm trees as a result of flooding, particularly in the Lower Ok Tedi and Middle Fly areas; and

- because of flooding, many economic trees are likely to die; that is, trees and bush material used by the people for making canoes and building houses.

For the people who use the river system extensively, and depend on the resources found in the river system, the impacts which the environmental damage from the mine have caused and are likely to further cause, are undoubtedly severe. For this reason, the people of the Lower Ok Tedi and Middle Fly have insisted on higher levels of compensation packages. Rex Sale, a trustee of the Middle Fly Development Foundation, and one of the signatories to the CMCA between the Middle Fly communities and OTML stated that his people were very concerned about the serious environmental damage and the implications for their livelihood. He further stated that they wanted to secure the best possible deal for the people.

This led to them engaging the services of Posman Kua Aisi Lawyers to represent them and help to negotiate and secure the best possible deal. He stated that his and Posman Kua Aisi's efforts to enter into meaningful negotiations with OTML were always met with the response that 'the CMCAs were pro forma agreements whose specific clauses were not subject to negotiation', and that the specific clauses, except for the schedules setting out the compensation packages, have been settled by OTML and the Government, and therefore were not subject to negotiation. The compensation packages were the only parts of the CMCA which were subject to negotiation.

Involvement of Men and Women from the Sample Communities in the CMCA Consultation Process

The issue here is whether the men and women within the sample communities were formally and fairly informed as to the workings, requirements, implications, and consequences of signing the CMCAs, prior to the execution of these agreements.

Dr. Roger Higgins, the then Managing Director of OTML and the chief architect of the CMCA compensation packages, stated that OTML and the national government had consulted with more than 150 communities and that these consultations took place over a period of more than two years, commencing in 1999, to secure the continuation of the mine under the *Ok Tedi Mine Continuation (Ninth Supplemental) Agreement* and its legislative framework (PNG Resources Magazine, Issue No. 3, 2002: 42-43).

Schedule 1 of the various CMCAs sets out the different level of consultations, which OTML and the government officials held with the affected communities, leading up to the conclusion of the MCA and the CMCAs. For example, Schedule 1 of the CMCA for the Middle Fly communities states:

SCHEDULE 1: CONSULTATION

The first awareness patrols were conducted by company officers in July 1999, after the release of the preliminary findings of the Mine Waste Management Project, in June 1999.

Generators and video players were taken to show the video '*Ting Ting Nau Long Behain Taim*'. Information about the environmental prediction was explained and discussed.

In August 1999, a 'round table' meeting was held in Tabubil, and was attended by leaders of the communities to discuss all of the issues concerning the future of the mine.

Discussions, briefing sessions, and meetings continued until the consultations were formalised with a letter from the Minister for Mining, Sir Michael Somare, to all presidents, councillors, and village leaders in Western Province, dated 15 February 2000 (see Annexure B).

In March 2000, the Minister's letter was distributed by government officers, who visited the communities for that purpose. Awareness patrols were conducted to a total of 80 villages affected by the mine, by four groups, comprising officers of the Department of Mining, Department of Finance and Treasury, Department of Attorney General, Department of National Planning, Department of Provincial and Local Government Affairs, the Office of Environment, and OTML.

In April 2000, meetings were held in Moian and Bosset with representatives of the communities, to determine a process for electing representatives.

In June 2000, at a meeting in Kaviananga, all of the members of the 17 villages elected a '40-person committee' to discuss the continuation of the mine, and empowered the committee to delegate to a 'mine-person working committee', representing the three zones of the Middle Fly. Subsequently, the nine-person committee agreed on a program for further discussions with the company and the State.

In June 2000, the 'Government – Ok Tedi Community Consultation Team' reported to Sir Michael Somare.

In July 2000, Somare visited Western Province and attended public meetings in Bosset and Aiambak to discuss the future of the mine with the communities. Deputy Governor, Fidelis Fili, and Acting Administrator, David Ipasi, both accompanied the Minister and participated in the meetings.

Succeeding Ministers for Mining, Sir John Kaputin and Michael Laimo, also visited Western Province and held public meetings to discuss the future of the mine. The meetings were attended by representatives of the communities. The Deputy Governor, Fidelis Fili, also attended.

The Department of Mining produced a booklet entitled, '*Ok Tedi, the Future*', for wide distribution. The booklet discussed the environment and social issues relevant to the mine's future, in Tok Pisin and English.

Peace Foundation Melanesian was engaged by OTML to conduct people skills and negotiation training courses to assist the Middle Fly villagers to reach conclusions themselves about the course they wished to follow in discussions with OTML.

Wherever possible, independent observers attended the meetings with the communities and OTML, and government officers chaired the meetings.

Representatives of the 17 villages signed a Heads of Agreement with OTML, the provincial government, and the State on or about 29 September 2000.

In January 2001, the discussion leading to this agreement began. The nine-person working group and the 40-person committee reported to the communities, and the communities authorised the execution of this Agreement.

Reactions from Interviews with the Sample Communities

The majority of the people who were interviewed in the sample communities were critical of the level of consultation between their respective communities, OTML, and the government officials. For example, when asked about the length of time which the various consultation meetings took, all interviewees stated, 'up to two hours at the most, and the officials then moved onto the next village, in their waiting helicopter, speedboat, or vehicle'. They were all critical that, under these circumstances, there was no real opportunity for proper dialogue between the parties, to properly discuss issues of concern. In relation to the community consultations in the Middle Fly, interviewees gave the following accounts of how the consultations went (Kalinoe, personal communication):

1. Letter of instruction for the consultations with the communities, dated 15 February 2000, from the then Minister for Mining, Sir Michael Somare – the letter did not reach the bulk of the people. Even then, for those communities which it reached, the letter was not clearly explained to the people in language other than English, in which it was written.
2. Sir Michael Somare's visit following the letter was not given wide publicity. Consequently, not many people were aware of his visit. Sir Michael's visit was only to major centres, such as Tabubil, Kiunga, and Aiambak, and few landowner representatives were handpicked to attend. Generally, there were poor logistical arrangements.
3. Consultations were not carried out in all of the Middle Fly villages. Only three meetings, which lasted for two to three hours, were held:
 - the Upper Middle Fly meeting was held in Moen Village. At this first meeting, the people were told to go back to their villages and select two representatives each;
 - the Central and Lower Middle Fly meeting was held at Bosset; and
 - at Kavianga, all representatives from Upper, Central, and Lower Middle Fly met to confirm two representatives each.

Consultations started some two to three years before 2000.

4. People skills and negotiation training courses that were conducted by Peace Foundation Melanesia in the Middle Fly only lasted for three days. The three days training was insufficient to equip the people.
5. The Heads of Agreement supporting the continuation of the mine was signed at the Tabubil Golf Club, without sufficient time being given to the people to go through the Agreement.
6. Negotiations of the CMCA saw it settled at K57.6 million. The representatives felt that this was a cheap deal, and that they should have been given more to compensate them for the environmental damage and its impact on their livelihood.
7. Signing of the CMCA at Bosset. A draft Agreement was drawn up by OTML and BHP lawyers and was given to the villagers and their lawyers. Through their lawyers, the villagers proposed changes to certain clauses, but those modifications were refused. Any proposed changes were refused and the explanation given was that OTML and the PNG Government had drawn up the pro-forma contract and that it had been agreed to by the Government. In a way, the villagers were forced to sign the Agreement.

In Middle Fly, only seven villagers were able to view and discuss the draft CMCA with their lawyers. Other regions never viewed their CMCA's. They merely signed the papers provided for signature, and to be attached to the Agreement. The villagers were also told that time was pressing, as the Ninth Supplemental Agreement and the legislation must get through the National Parliament in the November sitting, which was the last sitting for the year.

These comments were generally supported by the majority of the other 19 people who were interviewed.

Responses from the Questionnaire

Question 2 concerned the way in which the consultation team conducted meetings in the communities. All of the people who were interviewed stated that the consultation team would arrive in their communities, and they all gathered in one large group, as a community, and were then addressed. Women were not spoken to or consulted separately. Women, men, and children were all spoken to in one gathering.

Question 3 concerned whether the interviewees could recall some of the topics that were discussed and whether they understood the issues. Except for two, they all stated that they did.

Question 4 concerned whether they had been taken through a draft agreement before the signing. They all stated, 'no', so clearly, it is fair to conclude that neither the draft Heads of Agreement (MCA) nor the CMCA and their contents were openly discussed and explained to the communities within the sample area, before they signed them.

The men and women in these sample communities were not formally and fairly informed as to the workings, requirements, implications, and consequences of signing the CMCA's – particularly the effects and operations of s. 8 of the *Mining (Ok Tedi Mine Continuation (Ninth Supplemental) Agreement Act 2001*. If the people understood

that their signatures would bind the next generation (children and those not yet born), would they have proceeded to sign the Agreement?

Methods Used by OTML to Inform Men and Women of the Workings, Requirements, Implications, and Consequences of the CMCAs

The methods of consultation that were employed by OTML to engage and consult with the affected communities for all the six CMCAs are specified under Schedule 1 of their respective CMCAs. OTML sent out various patrol teams to the affected communities, accompanied by relevant government officials. Schedule 1 of the CMCAs shows that:

- the consultation teams also brought generators and video players to show the video '*Ting Ting Nau Long Bihain Taim*', and used that medium to disseminate information about environmental predictions;
- the Department of Mining produced a booklet entitled, '*Ok Tedi, the Future*', which discusses, in Tok Pisin and English, the environmental and social issues relevant to the mine and their future. It was also distributed by the consultation patrol teams;
- Peace Foundation Melanesia — a non-government organisation (NGO) — was engaged by OTML to run negotiation skills training courses to assist the communities to form their own conclusions and make decisions for themselves;
- there was a series of roundtable meetings with OTML, government officials, and village representatives or committees; and
- the letter dated 15 February 2000, from the then Minister for Mining, Sir Michael Somare, urging the communities to enter into consultation with OTML and government officials to negotiate the MCA and the CMCAs, is said to have formally initiated the community consultation process. An OTML community affairs official stated that they had mounted extensive community patrols into as many villages as possible, by all available means of transport, to 'distribute' this letter.

Question 10 asked the interviewees if they had read the booklet, '*Ok Tedi, the Future*'. One interviewee from the South Fly area stated that he had a copy and had read and understood it. However, all of the other interviewees stated that they had never seen a copy and asked for copies. It is clear that the majority of the people from the sample communities had not seen a copy of this important source of information.

Question 11 asked the interviewees whether they had seen the video, '*Ting Ting Nau Long Bihain Taim*'. Only one interviewee from a Kiunga – Tabubil Highway village stated that he had seen it. Everyone else stated that they had not seen it, or even heard of it. Clearly, the majority of the communities did not get to see the video.

In relation to the negotiations skills training courses conducted by Peace Foundation Melanesia, five of the interviewees stated that they attended the course because they were representatives of their people, and that they found the course very interesting. However, their concern was that the course should have been for a longer period – say two weeks, rather than three days. Also, if it had been before the negotiations commenced, they would have applied themselves much better. However, given the situation that the agreements they signed were not open for negotiation, as they were

pro-forma agreements, most of the representatives who participated in the course felt that they did not have the opportunities to put into practice what they learned.

Community Perceptions on Whether the Process Adopted by OTML Informed Them Adequately

This section presents the perceptions of the men and women within the sample communities who were surveyed as to whether they believe the process employed by OTML informed them of the workings, requirements, implications, and consequences of signing the CMCAs.

Question 6 was aimed at soliciting this information, and was framed in a general and impartial manner to allow for a fair and personal response:

‘Are you happy with the way the consultation team (OTML and government officials) were talking to you about?’

Apart from the general ‘yes’ and ‘no’ responses, other comments were:

- Except that we should have been given ample notice and more time to talk things through with them;
- No comments;
- The time was too short. They usually come to tell us what they wanted to do and wanted us to agree with them. We did not propose anything to them.

After the initial Heads of Agreement was first signed — that the villagers wanted the mine to continue, and that they had opted out of the lawsuit — the actual CMCAs were then discussed in five subsequent meetings;

- They just tell us what they want to tell us and they leave. They never seriously listen to us;
- They were talking about their business development, and not me and my peoples’ development;
- The meetings were awareness meetings, not proper consultations;
- One failure of the company which made us upset was that they did not allow us to have any input into the agreement. They should have allowed us time to see and discuss the agreement, and then sign it. It appears that we blindly, through our chairperson, signed the agreement. We all signed; and
- Consultation was okay. We are happy.

These perceptions, including those of two females, speak for themselves and need very little analysis:

- three out of ten stated that they were happy;
- three out of ten stated that they were not happy;
- one offered no comments; and
- three out of ten were generally happy with the consultations, but complained that there was either not enough time given, or that their views were not taken into consideration.

Question 14 requested the interviewees to make general comments about the way in which OTML, and the government officials came to the villages or places and talked about the mine continuation agreements. One respondent from the South Fly area stated that:

‘The meetings were very brief. They never took us through any draft agreements that they had. We were usually told of what they planned to do, and they got us to either agree or disagree with them’.

Another respondent from the South Fly area stated that:

‘They came and usually told us of what they intended to do, and we usually agreed. But at least this is better than previously where we were never heard.’

The majority of the respondents from the Middle-Fly area were happy with the level of consultation. Their only concern was that the meetings were usually too short and that they usually provided the listening ears. There were no negotiations, only consultations.

The respondents from the Lower Ok Tedi were generally happy and expressed much optimism that the CMCA represents a real opportunity for tangible development in their area.

The respondents from the Kiunga-Tabubil Highway areas were generally happy with the CMCA process, but expressed concern that two years passed and no progress has been made in implementing any projects.

The outcomes of interviews from the sample communities indicated that:

- there was awareness and consultation with the communities, but these meetings were too short, resulting in no meaningful two-way dialogue and negotiations;
- the process and methods used by OTML to engage with the communities were more suited for awareness, rather than negotiation. This observation is based on the consistent comments by a majority of the interviewees who stated that the meetings which they had with OTML and government officials were forums at which the officials were seeking endorsement of their positions or even decisions. These meetings were certainly not forums at which a negotiated outcome was being sought; and
- the communities appreciated the real efforts made by OTML and government officials to at least inform them of what they were doing. This level of consultation had never been held before.

From these responses, it can be inferred that the methods used by OTML to inform the communities were generally considered adequate for awareness purposes. However, these methods were not considered adequate for the purposes of establishing dialogue and negotiation with the communities. The meeting times were too short and the village committees, which were established to participate in the negotiations with OTML and the government officials, were not given sufficient time to go back to their communities and have meaningful discussions, and then return to the officials and negotiate on behalf of their constituents.

Level of Informed Consent

Under these circumstances, another issue to consider is whether the methods, processes, and procedures used by OTML and the government officials allowed for a broad-based, fair, and informed consultation and engagement with the communities, in order to obtain their consent to sign the MCA and the CMCA.

The responses from the sample communities show that awareness patrols were conducted, but they were usually short, lasting only two to three hours in each village. On each occasion, all the men, women, and children always gathered at one location and OTML and the government officials usually spoke to them together. The drafts of the MCA, the CMCA, or even the legislation were not discussed with the sample communities during these gatherings. Also, these draft documents were not discussed at the committee levels.

Except for the Middle Fly CMCA, no other CMCA was seen in draft form by their respective representatives, before the documents were signed. Moreover, except for the Middle Fly CMCA, no other CMCA party engaged lawyers to represent them. The Middle Fly draft CMCA was given to the Middle Fly negotiation team and their lawyers 48 hours before it was executed. When their lawyers proposed to negotiate specific clauses of the substantive CMCA, they were told that that was not possible because the substantive CMCA was a pro-forma document settled between the Government and OTML. The only provisions which were open to negotiations were the Schedules concerning the compensation packages.

Under these circumstances, one can only conclude that the methods of consultation used by OTML, were such that it was difficult to establish meaningful dialogue with the communities, discuss draft clauses of the CMCA, and point out the implications of certain clauses. For example, Clauses 8, 11.2, 13, and 19 of the CMCA, and s. 8 of the *Mining (Ok Tedi Mine Continuation (Ninth Supplemental) Agreement) Act 2001* which binds children and future generations of the communities to the CMCA and its processes were concerns.

The other methods, which OTML stated that they had used to consult with the communities, were the showing of a video '*Ting Ting Nau Long Bihain Taim*', and the distribution of a booklet, '*Ok Tedi, the Future*'. Interviews showed that the majority of the people had not seen the movie or read the booklet. Based on the findings from the field research, it appears that these methods of engagement with the communities were not effective.

One interviewee stated that OTML and the government officials should have widely distributed pamphlets to all the communities setting out the main clauses of the CMCA, well before they went out on the village patrols. Also, when the officials went out on the village patrols, they should have stayed in the villages for some days and held a series of small, medium, and large formal and informal gatherings, and then gauged the peoples' views, before moving onto the next village. However, this did not happen.

The negotiation skills training courses that were conducted by Peace Foundation Melanesia were well-received by the people who attended. However, only selected representatives in the communities attended the courses. The interviewees who

attended the courses stated that, if the courses and the negotiations and consultations with OTML had been longer, they would have had time to digest the information and apply themselves well. A major problem was that the courses were conducted too near to the negotiation period.

One interviewee stated that, as the courses conducted by Peace Foundation Melanesia were so successful, perhaps OTML and the Government should have engaged them to conduct the negotiations and consultations with the affected communities, and conclude the CMCAs with OTML and the Government. Peace Foundation Melanesia would have been ideal because it is an independent party, and would not have been pushing a particular agenda. It would have been fair and impartial. This suggestion certainly has a lot of merit, and is one that should be seriously considered in the future.

The final issue concerns the definition of 'informed consent', and how one goes about obtaining informed consent. The *Common Policy Guidelines for Participating Botanic Gardens on Access to Genetic Resources and Benefit Sharing of the Commonwealth of Australia* (Voumard 2000) offers some guidance in terms of obtaining 'prior informed consent' from the people and institutions from whom plants and genetic resources are to be collected. These common policy guidelines require the various participating botanic gardens, when collecting plant material to:

- abide by applicable law and best practice;
- obtain prior informed consent in accordance with applicable legislation; and
- most make reasonable and sincere efforts to make prior informed consent.

Prior informed consent is then defined in its context to mean:

'the consent of.... stakeholders, which must be obtained prior to access to genetic resources and based on full disclosure of information, such as intended use of the resources.'

It is significant to note that prior informed consent or informed consent must be obtained legally, based on **full disclosure of information** — not on partial or selective disclosure of information. The question that must be asked is:

Before OTML secured the communities' signatures on the CMCAs, through their representatives, there was full and frank disclosure of information concerning the level of environmental impacts, to the effects of the various clauses of the agreements (such as Clauses 9-13 and s. 8 of the Act) made to the communities.

In fairness to OTML, it is acknowledged, and the interviewees confirmed, that there were awareness and community consultations.

The field survey interviews also confirm that the OTML and government patrol teams never discussed any draft agreements with the communities before the agreements — particularly the CMCAs — were executed. Clearly, the people in the affected communities, which became signatories to the CMCAs, were not aware that, by

signing the CMCAs, through their representatives, they were, by operation of s. 8 of the Act, binding their children and grandchildren to the CMCAs.

Under these circumstances, the only answer to the earlier question is that there was no full disclosure of information, only partial or selective disclosure. Hence, there may have been very little or no informed consent.

CHAPTER 4: MOVING TOWARDS MINE CLOSURE: THE PNG SUSTAINABLE DEVELOPMENT PROGRAM COMPANY AND THE OK TEDI DEVELOPMENT FOUNDATION

Introduction

In the face of multiple lawsuits taken out against OTML and BHP Billiton, who were then the majority shareholders and operators of the Ok Tedi mine, for environmental damage, OTML commissioned the Mine Waste Management Project in 1996. It brought together a team of engineers, environmental scientists, and social scientists and tasked them to review the waste management system of OTML, report on the actual level of environmental damage, including projections of future effects, if the mine continued, and recommend appropriate waste management systems for the future operation of the mine.

Undoubtedly, the Mine Waste Management Project (MWMP) was, *inter alia*, tasked to assist OTML and its shareholders to, as accurately as possible, ascertain the possible future environmental effects based on current indications and trends, if the Ok Tedi mine was to continue operations, and continue to discharge '30 million tonnes of tailings and 40 million tonnes of waste rock' (Hyndman 2001: 40) into the Ok Tedi and Fly River systems, as well as to enable OTML and its shareholders to make informed decisions. The Mine Waste Management Project report was released in August 1999, and predictably, its major findings did not surprise many people.

The MWMP report stated that, if the mine continued to operate in the manner in which it had been, with its direct reverine waste disposal, future environmental effects were likely to occur. The predicted damage to the environment has been conveniently summarised in Schedule 2 of the respective CMCAs. Generally, the MWMP report predicted that the water in the main Ok Tedi and Fly Rivers will not be safe for human consumption. Therefore, the people in these communities will have to extract drinking and cooking water from side streams.

The report also predicted that there will be sand build-up in the river channels, which will cause low-lying areas to become waterlogged. The maximum area predicted to be affected was reported to be 1 350 sq. km, mostly in the lower Ok Tedi and Middle Fly River areas. The flooding which was already happening, and is visible to anyone flying over the affected areas, is causing a large area of forest trees and other water resistant plants to die. Sago palms, from which sago — the staple food of the people — is extracted, are, and will be, affected as well.

The MWMP report further predicted that fish stocks in the rivers will continue to dwindle, and that there will be copper build-up in the livers and kidneys of fish. The MWMP report confirmed that some fish species are no longer caught in the main Ok Tedi and Fly Rivers. However, these species have been found in the side streams of these two rivers. Copper build-up in the river systems and acid rock drainage were major and serious concerns. The MWMP report stated that, if the mine continues, copper build up will increase. The prediction concerning acid rock was that, if some of the fine sand from tailings (called pyrite) was exposed to the air and water on the sand banks, that will cause acid rock drainage into the environment.

In its 2002 Annual Report, the PNG Sustainable Development Program Company Ltd, which is the current majority shareholder (52 percent) of OTML, reported that the results from the Mine Waste Management Project indicated that:

‘The environmental impacts of the mine were expected to be significantly greater than previously expected. The main reason for this is that new hydrological modelling shows the rise in the river bed, and consequently, overbank flooding is extending beyond the areas currently affected, and is likely to expand the area currently experiencing vegetation dieback into forested zones along the middle rivers’ (PNG Sustainable Development Program Company Ltd. 2002:21).’

The findings in the MWMP report may have caused BHP Billiton to either move towards the early closure of the mine, or accelerate its exit from the mine, because by the mid-1990s, the Ok Tedi mine had developed a reputation around the world, as ‘New Guinea’s Disaster Mine’ (Hyndman 1999). Undoubtedly, BHP Billiton must have also realised that the mine waste management plan it had adopted from the mine’s inception; that is, direct riverine disposal, had caused, and if the mine continues will further cause, severe environmental damage. BHP Billiton, which was OTML’s majority shareholder (52 percent), and one of the main, high profile defendants in the lawsuits filed in the Victorian Supreme Court (Australia) and the Papua New Guinea National Court, ‘expressed its strong preference that the mine will move towards early closure’, even though, at that ‘time, there remained 10 years of reserves of ore, and the mine’s most profitable years were still to come’ (Higgins 2002: 44).

In relation to the recovery of the environment, the early closure of the mine presented the most attractive option. A review of the MWMP report by the World Bank’s environmental watch team concluded that, from a purely environmental perspective, the mine should be moving towards immediate closure, but to do so without a proper mine closure plan, would be to inflict serious social consequences on the communities. In other words, the best environmental option stood to inflict the worst socioeconomic consequences on the communities (*ibid.*). The World Bank review cautioned the PNG Government, in February 2000, not to move to the early closure ‘without a mine closure plan, supported by a comprehensive and participatory mine closure strategy addressing environmental as well as critical social issues’ (PNG Sustainable Development Program Company Limited 2002: 67).

It was under these circumstance that the CMCAs were negotiated to obtain the informed consent of the people from the affected communities, and to plan and move towards a life without the mine in these communities, in terms of socioeconomic services which the mine was providing. The CMCAs, the PNG Sustainable Development Program Company Limited and the Ok Tedi Development Foundation, all represent an effort by OTML — in particular BHP Billiton — to prepare the communities to sustain themselves, when the mine eventually closes in 2010. This chapter discusses these initiatives and others, beginning with a review of the *Ok Tedi Mine Closure and Decommissioning Code* under the *Mining (Ok Tedi Mine Continuation (Ninth Supplemental) Agreement) Act 2001*.

Ok Tedi Mine Closure and Decommissioning

The *Ok Tedi Mine Closure and Decommissioning Code* is the Third Schedule to the *Mining (Ok Tedi Mine Continuation (Ninth Supplemental) Agreement) Act 2001*. In many ways, it sets the pace for a national mine closure regime. At the time of writing, a national mine closure policy and accompanying legislation were being finalised. The current indications are that the proposed national mine closure policy will be worked into the *Mining Act 1992*, which is also being reviewed to fully accommodate the new mine closure regime.

A policy document on the proposed mine closure plan was first released in August 2000 in the form of a green paper on *Mine Closure and Policy Guidelines*. Since then, there have been subsequent revisions of this green paper, but the August 2000 paper has been referred to as the Original Green Paper. That original green paper, which sets out the position of the State of Papua New Guinea in relation to the mine closure plan, undoubtedly has strongly influenced the *Ok Tedi Mine Closure and Decommissioning Code 2001*. In many ways, the *Ok Tedi Mine Closure and Decommissioning Code 2001*, captures the main concerns and thrusts of the Original Green Paper. In essence, the August 2000 *Mine Closure and Policy Guidelines* require a mine closure plan to consider and address all issues and aspects of the decommissioning of a mine, rehabilitation of the environment, and establishing social and sustainable development opportunities and prospects for the future well-being of the communities.

A strong emphasis has been placed by the *Mine Closure Policy and Guidelines* for mine closure plans to thoroughly consider and address the best possible options and approaches for social aspects of mine closure. The policy then requires a specific Social-Economic Development Plan (SEDP) to be prepared as part of the mine closure plan, and focusing on sustainability of the communities, after the mine closure, with particular emphasis on the following aspects or concerns:

- (a) minimising long-term, social disruption caused by the mining operations of the mine concerned;
- (b) maximisation of long-term social benefits from the project;
- (c) a retrenchment policy for the project;
- (d) end land-use implications;
- (e) a medium-term development strategy;
- (f) capacity building of provincial and local-level governments;
- (g) identification and establishment of the socioeconomic benefit streams for the communities, including funds for future generations;
- (h) a workable system to monitor and evaluate the implementation of the SEDP;
- (i) reporting mechanisms to keep all stakeholders fully informed; and
- (j) a timetable for reviewing the SEDP.

The *Mine Closure Policy and Guidelines* state that the SEDP should be incorporated into the planning process and cycle, on a five-year rolling basis, of the local, district, and provincial governments of the province concerned, with a central coordinating body such as a development foundation to implement the SEDP and the overall mine closure plan. It envisages that, if such a foundation is established, it should complement, rather than replace, existing systems of government in the mine closure area concerned.

It is not surprising that OTML set up the Ok Tedi Development Foundation in 2002, as part of its general and overall mine closure strategy, to work towards the closure of the mine in 2010. OTML embarked on capacity building to strengthen the institutional and implementation capacity of the local-level governments in the area, as well as the provincial government, so that they can collectively implement the socioeconomic development projects in their respective local government areas and the province.

The *Ok Tedi Mine Closure and Decommissioning Code 2001* (hereafter, the Code) legally commits and binds OTML to prepare a mine closure plan, and submit a draft plan to the Government, through the responsible authorities — the Minister for Environment and Conservation and the Minister for Mining — within the first year of the coming into effect of the Code. Under the Code, OTML's mine closure plan comprises the following four main components:

- (a) mine area rehabilitation plan;
- (b) a plan/strategy for the decommissioning and/or disposal of all operations infrastructure, including management plans for public infrastructure;
- (c) a report and plans addressing the social and economic impacts of the mine closure, and the status of existing economic programs being undertaken; and
- (d) estimates of, and financial assurance necessary for, implementing the mine closure plan.

Under Clause 3.2 of the Code, OTML is required to develop and submit the draft mine closure plan, after wide consultation with all the relevant local-level governments, the provincial government, and the relevant national government agencies. Clause 3.3 of the Code then dictates, in rather mandatory terms, for the mine closure plan to be 'substantially consistent with the national government's Medium Term Development Strategy and the local-level government planning for medium-term development within the areas affected by the operations of the mine'.

This approach is consistent with the August 2000 *Mine Closure Policy and Guidelines*, where the SEDP component of the mine closure plan is required to be incorporated into, or built around, the planning process and cycle of the national government, and the provincial government and the concerned local-level governments' socioeconomic development plans. To OTML's credit, in 2000, even before it embarked on its mine closure plan, it initiated and funded the Western Province Capacity Building Project. Under this program, it began building and strengthening the capacities of the local, provincial, and national government officers and institutions in the province so that they could draw up and implement relevant and realistic, local-level and provincial plans that were consistent with the national government's Medium Term Development Strategy. OTML has been proactive and facilitative in this regard.

OTML is required to revise and update the initial draft mine closure plan at two-year intervals, commencing 2003, until the projected closure of the mine in 2010. Each updated mine closure plan then applies to the project, and supersedes all previous mine closure plans. It is clear that the mine closure plans are not meant to be fixed. Rather, they are evolving, so that new developments and contingencies can be addressed. Hence, the necessity for incremental development of detailed mine closure plans to be prepared in stages, during the balance of the life of the mine.

Clause 4.3 (b) of the Code is rather instructive, as it requires OTML, in the preparation of its mine closure plan, at the very least, to meet the following milestones:

- produce and submit detailed decommissioning plans, as required under Schedule 1, at least four years prior to the expected date of the mine closure, in 2010; and
- produce and submit detailed rehabilitation measures and plans, as required under Schedule 1, at least four years prior to the expected date of mine closure, in 2010.

As part of the mine closure plan, under Clause 5, OTML is required to provide financial assurance of an amount that is sufficient for the implementation of the mine closure plan. The initial amount of financial assurance has been set under Clause 5.2(c) of the Code, at US\$150 million, and OTML was required, under Clause 5.3(c), to make a first payment into the Ok Tedi Financial Assurance Fund on or before 1 July 2002. However, as of 1 December 2002, no money had been paid into this fund. This is clear from the 2002 *Annual Report of the PNG Sustainable Development Program Company Ltd*, which is the majority shareholder of OTML:

‘In accordance with the *Mining Act (Ok Tedi) Ninth Supplement Agreement* (sic), a separate account must be created for semi-annual payments by Ok Tedi to provide sufficient cash at mine closure for settlement of mine rehabilitation and restoration of liabilities. At year end, no payment has been made to the account...’ (PNG Sustainable Development Program Company Ltd 2002:68).

Schedule 2 of the Code commits and binds OTML to address the following specific areas and concerns in its Mine Area Rehabilitation Plan (MARP), which is a component of the mine closure plan. It is a requirement that the MARP must set out, by way of background, detailed descriptions and identification of the project site, and identify all the affected communities and other stakeholders in Western Province — those who would be directly or indirectly affected by the mining operations and the subsequent closure of the mine. It is important to point out that the category of communities and people targeted is not restricted to those in the project area and within the six CMCA communities. It is much broader, and takes in all the people in Western Province, and perhaps those in the Oksapmin area of West Sepik Province, who have directly or indirectly been affected or impacted (in a positive and negative sense), by the operation, or services provided by OTML.

Second, the rehabilitation measures must provide:

- (a) details of all necessary environmental protection, rehabilitation measures, full costing, and a firm timetable for achieving those measures;
- (b) full details of the agreed objectives following the completion of each phase of the rehabilitation;
- (c) full description of rehabilitation that is pertinent to the project;
- (d) if progressive rehabilitation work is possible prior to closure of the mine, the conditions and phases of completion of such work. This must include the outcomes of the dredging work that is carried out in the Ok Tedi River;
- (e) the conditions and phases of the rehabilitation work to be undertaken following the closure of the mine; and
- (f) the conditions and phases of completion of rehabilitation to be undertaken in the event of temporary cessation of mining activities.

Third, the MARP must provide for a comprehensive monitoring program, which sets out:

- (a) details of monitoring programs and procedures required for each phase of rehabilitation, including the locations, methods, and frequencies of monitoring, and how the results will be recorded and reported to the State;
- (b) details of key biological monitoring programs and procedures to assess the effects of the project on any biological indicators;
- (c) details of measures for monitoring rehabilitation; and
- (d) details of measures for monitoring any adverse, material, environmental impact of the project, after mine closure.

The Ok Tedi Development Foundation

The Ok Tedi Development Foundation (OTDF) has been set up as a limited liability company under the Papua New Guinea *Companies Act* 1997, with its establishment specifically authorised under the *Ok Tedi Mine Continuation (Ninth Supplemental) Agreement* 2001, Clause 6, which itself is Schedule 1 to the *Mining (Ok Tedi Mine Continuation (Ninth Supplemental) Agreement) Act* 2001. The OTDF was established as a vehicle to coordinate, supervise, and in some instances, implement OTML's sustainable community development projects and related investment funds established under the various compensation agreements, including the CMCA's.

Since its inception in 1984, OTML has done this through its community and business development programs, including:

- the promotion and development of rubber as a cash crop;
- taro improvement program;
- promotion of pineapple and other vegetable market gardening;
- fish (barramundi) filleting in Obo; and
- micro-finance initiatives through Village Finance Kiunga.

In recent times, it has become apparent that OTML is 'not a development agency, but a mining company' (Higgins 2002: 45). Hence, the need to establish a specialist community development agency which is separate and independent from OTML and its contingent liabilities.

It was out of this thinking and concern, and as part of the CMCA implementation structure, that the Ok Tedi Development Foundation Limited (OTDF) was set up in 2002. Dr. Roger Higgins, the then managing director of OTML and one of the architects of the *Ok Tedi Mine Continuation (Ninth Supplemental) Agreement* process, that includes the OTDF, elaborates on the rationale behind the OTDF:

'The Ok Tedi Development Foundation will be detached from OTML's current environmental and compensation issues. It will be able to focus on fostering the capacity to manage and sustain the benefits flowing to the communities and the province. The OTDF will play a lead role in building the new economy upon which post-mine Western Province will depend. It will both complement and supplement the development efforts of the communities, the Fly River Provincial Government, and the national government' (Higgins 2002: 45).

The involvement and focus of activities and work programs of the OTDF are restricted to its objectives, as stipulated under Clause 6.4 of the *Ok Tedi Mine Continuation (Ninth Supplemental) Agreement*. Under this clause, the OTDF is authorised to pursue, support, and/or implement ‘authorised programs’ only. ‘Authorised programs’ are defined under Clause 6.1 to mean:

- (a) rural and economic development programs for livelihood and sustenance, opportunities in subsistence or commercial agriculture, sustainable forestry, and small businesses, for people in Western Province and the Telefomin District of West Sepik Province;
- (b) provincial and community development programs for the planning and coordination of economic and social development in Western Province and the Telefomin District of West Sepik Province, such as the provision of assistance towards the development and ongoing review of five-year rolling development plans for local-level and provincial governments;
- (c) infrastructure development programs, such as the construction of roads, bridges, schools, hospitals, aidposts, and other infrastructure in accordance with applicable provincial and community development planning programs within Western Province and the Telefomin District of West Sepik Province; and
- (d) any other programs consistent with the objectives of the OTDF, and as approved by its Board of Directors.

The OTDF has an important role to play, particularly supporting and implementing ‘authorised programs’ concerning rural and economic development, and infrastructure development. As Higgins (*ibid.*: 64) explains:

‘Rural and economic development programs will focus on setting up secure food sources in areas most at risk, developing cash crops in suitable areas, developing livestock and aquaculture, and agriculture marketing infrastructure, micro-enterprises, community capacity building for self-sufficiency, ecotourism, and ecoforestry.... Social infrastructure and planning programs will focus on helping with local-level government and provincial development plans, constructing regional public works planned projects in conjunction with communities and government, and capacity building for provincial and local-level government staff’.

In order to hasten infrastructure development in the province, district, or communities, in which a mining or petroleum development project is located, in the early 1990s, the national government adopted a ‘tax credit scheme’. Under this scheme, a portion of company tax or additional profit tax which would have been paid to the consolidated revenue of the State in a given year is withheld by the company concerned, and the money is then applied by the company to construct or maintain public works programs, or infrastructure development programs, in the province in which the project is located. OTML has been actively involved in managing infrastructure projects under the tax credit scheme for some time. Under these new arrangements, the OTDF will be the management agent through which OTML’s tax credit scheme program will be operated.

The OTDF will be the vehicle through which the various community development trusts and future generation funds that have been set up under the CMCAs will be

administered. The OTDF headquarters and main operations base will not be in Tabubil. They will be based and operate out of Kiunga, which has recently been declared as the seat of government for the Fly River Provincial Government, and the new provincial headquarters of Western Province. This move is undoubtedly in keeping with OTML's vision to separate OTDF from the operations and liabilities of OTML, so that OTDF can conduct and fulfil its 'authorised programs' without interference. It is also a move that will make the community identify with, and closely relate to, OTDF and its programs. In February 2003, the OTML community relations staff were busy trying to set up the OTDF headquarters and operations, and were commencing construction work on the new OTDF office complex.

Under Clause 6.8 of the *Ok Tedi Mine Continuation (Ninth Supplemental) Agreement*, OTML is identified as the primary source of funding for the OTDF and its work programs. This means that the PNG Sustainable Development Program Company Ltd, as 52 percent shareholder of OTML, will also be a significant funding source for the OTDF. The program company is required to spend 11.1 percent of its annual income on sustainable development programs in Western Province, and 22.2 percent of its annual income on PNG national projects, through implementing institutions such as the OTDF and other development agencies, including national and international non-government organisations.

The PNG Sustainable Development Program Company Ltd

By the mid-1990s, OTML was widely known as 'New Guinea's Disaster Mine' (Hyndman 1999). The results from the Mine Waste Management Project (MWMP) confirmed the widespread environmental damage that the mine was causing, particularly to the Ok Tedi and Fly River systems and the surrounding low-lying areas. Rex Dagi and Gabia Gagarinabu went back to the courts and issued legal proceedings, alleging that OTML and BHP Billiton had breached the 1996 settlement agreement relating to earlier claims for damages arising from the environmental impact of the mine. Soon after the MWMP results were released, BHP Billiton, then the majority shareholder through its subsidiary BHP Minerals, opted for the early closure of the mine, as a means of ameliorating the environmental changes. However, the State and the communities within the mine area resisted this, on the realisation that the early closure of the mine, without the formulation of a proper mine closure plan, would cause serious social and economic hardship to the communities, the province, and the nation.

It was in these circumstances that BHP Billiton and its subsidiary, BHP Minerals, took the decision to exit OTML under the *Ok Tedi Mine Continuation (Ninth Supplemental) Agreement* 2001. It was agreed by all parties, under background Clause J, that BHP Billiton would establish the PNG Sustainable Development Program Company Ltd, (hereafter, the program company), and that BHP Minerals would transfer its 52 percent shareholding to the program company, and exit OTML. Under background Clause J(a) of the agreement, the program company was established 'to promote and support sustainable development programs and projects, within Papua New Guinea, and particularly in Western Province...'.

The PNG Sustainable Development Program Company Ltd was incorporated as a company limited by guarantee, in Singapore, on 20 October 2001. In February 2002, BHP Billiton transferred its 52 percent shareholding in OTML to the program company,

and exited OTML amidst ‘international opprobrium’ (Higgins 2002: 44). The program company’s Port Moresby office was opened on 5 November 2002, and it has since commenced operation, with Robert Igara, the former Chief Secretary to the Government of Papua New Guinea, as its chief executive officer. According to Igara, the core purpose of the program company, and some of the arrangements or obligations which the company has to deal with are:

‘The company has only one mission, and that is to support programs which bring about sustainable development which benefits the people of Papua New Guinea, and in particular, the people of Western Province...’

The company is also a party to a number of agreements which were entered into to give effect to BHP Billiton’s exit from Ok Tedi Mining Limited, and which formed the basis of BHP Billiton’s share transfer to the PNG Sustainable Development Program Company Ltd. Some of these agreements also impose an obligation on the company, both actual and contingent, which are secured by a charge over the dividend stream attached to the company’s shares in Ok Tedi Mining Limited. These include the granting of indemnity to the Independent State of Papua New Guinea and BHP Billiton against environmental claims, indemnity to the independent Director of Ok Tedi Mining Limited, and interest subsidy to OTML for increased borrowing costs and charges incurred by OTML as a result of not being a subsidiary of BHP Billiton’ (PNG Sustainable Development Program Company Ltd. 2002:12).

It is now clear that the 52 percent shareholding which BHP Billiton transferred to the program company is not exactly for free. The program company is required to indemnify BHP Billiton for any liability arising out of any claims for environmental damage, for which it may be held liable from its operation of the mine after 7 February 2002. The question to be asked is, ‘why is BHP Billiton seeking continued indemnity after it has exited from OTML?’. Equally, the program company is required to indemnify the State of Papua New Guinea against any liability for mismanagement of the environment in and around the Ok Tedi mine area, but more particularly ‘a claim for environmental damage caused by the operation of the mine before 7 February 2002 resulting from an act or omission by BHP Billiton in breach of its obligations under its management agreement or in breach of environmental laws’ (*ibid.*: 23).

The above notwithstanding, the program company sees itself as a significant player, partner, and participant in working together with OTML and the OTDF in formulating OTML’s mine closure plan and overseeing its implementation through the various work programs they will be supporting (*ibid.*: 15). In this regard, the program company intends to support projects such as oil palm, rubber, cocoa, and so on, in Western Province. The program company makes this clear in its 2002 Annual Report:

‘The Ok Tedi mine closure will have a significant impact on Western Province and the nation. The company is required to give priority under the long-term fund in supporting economic and social services in mitigating the consequence of mine closure within Western Province.’

As of 30 April 2003, the program company had financial reserves of US\$37 328 616, and was beginning to work with the communities, the local-level governments, and the provincial and national governments, and getting on with its mandated programs. For example, in November 2004, the program company provided a K7.5 million to help establish a new micro-finance company with a national focus — PNG Microfinance Limited — mainly to provide financial services to people in the rural areas of Western Province, and then throughout Papua New Guinea. It was envisaged that PNG Microfinance Limited would establish branches in the rural areas, and provide financial services such as a range of savings accounts, and lending to low-income households and small business operations.

In announcing this program support, the CEO, Robert Igara, stated that, ‘the establishment of PNG Microfinance Limited will build on the successful Ok Tedi Development Foundation’s microfinance project in Western Province’. It was reported that the company would establish more branches in Western Province and also extend its network into other areas of Papua New Guinea (*Post-Courier*, 8 November 2004). The program company also entered into partnership with the International Finance Corporation (ICF) of the World Bank, to give itself a strong financial base to provide services in microfinance, utility, and agro-finance, mainly to focus on and contribute to the development of rural communities (*The National*, 8 November 2004).

Earlier, the program company had entered into an agreement and partnership with an international non-government organisation, Australian Doctors International (ADI), and under the program company’s community sustainability development project, provided K247 000 to fund ADI to distribute mosquito nets, under its bed-net distribution scheme. On the execution of the agreement, it was explained that the purpose of the program company’s involvement in the project was to purchase and distribute some 5 000 to 6 000 treated mosquito nets to people in villages in the remote Nomad area of Western Province. It was stated that the program company was increasing its effort to eradicate malaria in the province by going into partnership with ADI, who would coordinate and implement the bed-net project (*The National*, 4 November 2004).

Conclusion

The genesis of, and the rationale behind, the establishment of the OTDF and the program company are rooted in the *Ok Tedi Mine Continuation (Ninth Supplemental) Agreement* 2001, to facilitate the continuation of the Ok Tedi Mine. However, this is under new arrangements, with a strong focus on payment of compensation for environmental damage under the CMCAs. There are very strong indications that the work which the OTDF and program company have embarked on, places OTML in a very strong position to move with confidence to mine closure in 2010. It is reassuring to note that there is strong synergy between the OTDF and the program company in the community development work in which they are involved. Both organisations are also members of a committee that is working on drawing up the Ok Tedi mine closure plan, which OTML is not required to submit until four years prior to the closure of the mine. As the mine is scheduled to close in 2010, OTML was scheduled to submit its mine closure plan in 2006.

With the establishment of the OTDF and the program company, OTML’s aim has been to assist in building the socioeconomic base of the communities, by focusing on

rural economic development programs, capital works, and social infrastructure projects. This is well-articulated by Dr. Roger Higgins, who was one of the main instigators of this process:

‘OTML’s goal is that, at mine closure, mine affected communities are healthy, educated, and economically independent, with secure access to sufficient food. Specific objectives that will enable this goal to be met include a sustainable economic base not dominated by Ok Tedi, maintainable infrastructure, continued access to health and education services, effective governance and sound institutional capacity, a skilled labour force incorporating gender equity, and development integrated closure planning for the Ok Tedi mine operation’ (Higgins 2002: 46).

OTML intends to achieve this by injecting money from dividends derived from the 52 percent shareholding in the program company, through implementation organisations such as the OTDF, amongst others. Higgins (*ibid.*: 44) stated that:

‘Ok Tedi Mining Limited recognises that its legacy to those people touched by the mine must be economic independence, health, education, and an assured supply of food. OTML’s role in this is to provide communities with resources and skills to determine their livelihoods in a manner that sustains their well-being’.

The goals are commendable and should be welcomed by all concerned. On current indications, the start made towards attaining these goals is very encouraging. The decision taken by BHP Billiton to exit OTML and transfer its 52 percent shareholding to the program company is one which, initially, may be viewed with cynicism by critics. However, it has worked out well, and has commenced the mine closure planning process on a strong foundation, with sound financial support.

OTML has commenced the mine closure preparation process on a strong footing concerning the socioeconomic aspects of mine closure, as required under the government’s August 2000 *Mine Closure Policy and Guidelines*, and the *Ok Tedi Mine Closure and Decommissioning Code 2001*. However, what is of concern is OTML’s resolve and commitment to seriously and effectively address rehabilitation of the mine area, and more importantly, rehabilitation of the entire Ok Tedi River, which has been reduced to a silted, muddy creek, without a defined river bed.

Although the dredging work done at Bige offers promise, the condition of the river above Bige remains hopeless. OTML must dredge the entire Ok Tedi River, and the Fly River down to the Middle Fly, as and where necessary, and must also find a lasting solution to the problem of acid rock drainage, by effectively dredging and removing the pyrite from the banks of the Ok Tedi and Fly Rivers. Hopefully, OTML will address these issues in its Mine Area Rehabilitation plan (MARP), as it would not want the legacy of Ok Tedi to be that of ‘New Guinea’s Disaster Mine’, and for that to continue, even after its closure.

On a positive note, OTML intends to institute an ‘Active Post-Mine Closure River System Rehabilitation’ Program (APCRSR). This is defined under Clause 2.2 of the *Ok Tedi Mine Closure and Decommissioning Code 2001* to mean, any rehabilitation of the river system, surrounding systems, or surrounding banks, after cessation of commercial production of the mine. Unfortunately, no details of this program are given in the *Ok*

Ted Mine Closure and Decommissioning Code, the Ok Tedi Mine Continuation (Ninth Supplemental) Agreement, or the Mining (Ok Tedi Mine Continuation (Ninth Supplemental) Agreement) Act 2001.

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