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Citation: Kirsch, Stuart. "Is Ok Tedi a precedent? Implications of the lawsuit," in *The Ok Tedi Settlement: issues, outcomes and implications*, edited by Glenn Banks and Chris Ballard. Canberra: National Centre for Development Studies and Resource Management in Asia-Pacific, 1997, pp: 118-140.

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The Ok Tedi Settlement: issues, outcomes and implications

edited by Glenn Banks and Chris Ballard

Published jointly by

National Centre for Development Studies
Pacific Policy Paper 27
Research School of Pacific and Asian Studies
The Australian National University
Canberra

and

Resource Management in Asia-Pacific
Research School of Pacific and Asian Studies
The Australian National University
Canberra

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This book is a joint publication of the National Centre for Development Studies (NCDS) and the Resource Management in Asia-Pacific project of the Australian National University. NCDS gratefully acknowledges the contribution made by the Australian Agency for International Development (AusAID) towards the publication of this series. The opinions contained in this book are those of the authors, and not necessarily of NCDS, the Resource Management in Asia-Pacific project or of AusAID.

ISSN 0817-0444

National Library of Australia Cataloguing-in-Publication entry

The Ok Tedi settlement : issues, outcomes and implications

Bibliography.

ISBN 0 7315 2362 8.

1. Ok Tedi Mining Limited - Trials, Litigation, etc. 2. Copper mines and mining - Environmental aspects - Papua New Guinea - Ok Tedi. 3. Mines and mineral resources - Environmental aspects - Papua New Guinea - Ok Tedi. I. Banks, Glenn, 1965- . II. Ballard, Chris, 1963- . III. Australian National University. National Centre for Development Studies.

333.765099549

Series editor: Maree Tait

Editors: Dayaneetha De Silva and Melanie Tully

Pagesetting: Dayaneetha De Silva and Tikka Wilson

Cover design: LujanSheen Design

Cover photograph: John Lamb, *Ok Tedi 24:00*, Ok Tedi Mining Ltd

Printed in Australia by NCP (National Capital Printing), Fyshwick

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Is Ok Tedi a precedent? Implications of the lawsuit

Stuart Kirsch

Does the lawsuit against BHP and the Ok Tedi Mine establish a precedent? Will it prompt future claims against multinational corporations for their environmental impact overseas? What are the advantages and limitations of foreign tort litigation?

My answer to these questions covers three related issues. I begin by discussing the nature of the Ok Tedi crisis. While recent analyses of mining projects in Papua New Guinea have emphasised the social dimensions of conflict between landowners and mining companies, I argue that Ok Tedi was first and foremost an environmental crisis. This claim is based on more than a decade of ethnographic research among the Yonggom people of the lower Ok Tedi River. Second, I consider the effectiveness of foreign tort claims that seek to hold multinational corporations responsible for the environmental impact of their operations overseas. This analysis is based on my participation in the lawsuit against BHP and the Ok Tedi Mine as an advisor to Slater & Gordon, and from discussions with lawyers involved in similar legal actions against the Freeport–McMoRan copper and gold mine in Irian Jaya (Indonesia) and Texaco for its petroleum operations in Ecuador. Third, the litigation must be evaluated in terms of the benefits that it secured for the peoples of the Ok Tedi and Fly rivers, and I consider how the legal process influenced the terms of the settlement. In conclusion, I argue that the case sets a

precedent for the peaceful reconciliation of disputes between landowners and mining companies. Given the limitations of foreign tort law, however, it is preferable to develop alternative strategies for achieving comparable results without resorting to the courts.

The Ok Tedi crisis

Explanations of conflict related to mining projects in Papua New Guinea have generally stressed the social costs of development rather than the environmental consequences of these projects. In his influential 'social time bomb' explanation of the crisis on Bougainville, Colin Filer (1990) argued that mining projects initiate a downward spiral of social disintegration. Compensation payments to communities living in the vicinity of the mine fail to meet expectations as people move away from local resource production and traditional modes of exchange towards the new cash and wage-based economy. The sons inherit the deals that their fathers made with the mine and find them wanting. The cycle of dissatisfaction and renegotiation repeats with increasing frequency, until no credible leaders remain and no deal with the mine will do. At that point, approximately 15 years into the life span of the average mining project, the social time bomb explodes.

Rolf Gerritsen and Martha McIntyre (1991) offered an alternative interpretation of mining and its malcontents, which they referred to as the 'capital logic' model. Like Filer they focused on the problems associated with the distribution of economic benefits from mining companies to local communities. They argued that the capital logic of mining—the dynamics of investment and development—dictates a pattern of expenditure that ultimately frustrates local communities. Like big-men managing their lesser allies, mines hold their local constituencies at arm's length, spending to solve problems as they arise. The process generates an asymptotal curve of dissatisfaction that peaks just below the line separating conflict from calm. Yet maintaining this delicate balance is inherently risky, for events need only nudge the curve slightly to instigate a crisis.

Gerritsen and McIntyre also observed that the government of Papua New Guinea, because of its investment in the mining industry, views local communities as rivals for their share of mining revenues. Expenditure on limiting environmental impact, for example, costs the government twice, once as shareholders and a second time as tax collectors. The resulting conflict of interest for governments charged

with regulatory responsibilities continues to figure significantly in the Ok Tedi case, an issue to which I shall return in my conclusions.

Both models maintain that the most significant problem caused by mining projects is social conflict related to the distribution of economic benefits. Filer argued that compensation payments exacerbate fault lines in communities that are already predisposed to fragmentation, while Gerritsen and McIntyre suggested that unfulfilled expectations for compensation and development are a major source of strife.¹ If both models are correct, it would imply that the mining industry faces a 'no win' situation in Melanesia, for either the corrosive consequences of paying compensation or the frustration over the inadequacy of the compensation received will doom any project.

The shortcoming of these models is that they fail to address the problems caused by the environmental impact of mining projects. Filer (1990:70) observed that the key factor uniting the people of Bougainville was 'nothing less than the hole in the middle of it,' but he nonetheless failed to move beyond the recognition that the rift in the body politic mirrors the underlying transformation of the landscape. He (1997a) later modified his position slightly, recognising that the unequal 'spatial distribution' of environmental impacts and compensatory benefits contributed to the social and economic fragmentation on Bougainville. Nonetheless, by focusing exclusively on social conflict within landowning communities, both models ignore the possibility that mining crises may be the result of social protest movements that object to the high environmental costs of mining.

Consider anthropologist Jill Nash's description of local reactions to the impact of mining on Bougainville:

[t]he destruction of the landscape has enormous power—it is a cataclysmic event—in a subsistence society like Bougainville. For most Bougainvilleans, there is no frontier, no prospects for escape, no endless scenes of other places electronically delivered to give them a fantasy sense of place, as television does with us. Their land is not only for material benefit, which compensation payments reduce it to; it encodes their history and identity and is a major source of security (1993:17–18).

The physical transformation of a large portion of the island and the resulting consequences for daily life contributed as much to the crisis on Bougainville as the problems associated with the distribution of economic compensation intended to redress those losses (Connell 1991:67–74).

Furthermore, neither model adequately addresses the concerns of communities located downstream from mining projects that release

significant volumes of tailings and other waste material into local river systems. The impact of the Ok Tedi Mine has been so catastrophic for the Yonggom living downstream along the Ok Tedi River that 'much of what they once took for granted about their natural environment no longer holds true' (Kirsch 1997b:153). In Papua New Guinea, the mechanisms of compensation have rarely been extended to the communities living downstream from mining projects. In the Ok Tedi case, compensation for much of the affected area along the Ok Tedi River was not paid until after the lawsuit was filed, and these initial payments were worth only a fraction of the full value of their losses (Robin Mokin, pers. comm.).

Finally, in contrast to the predictions of these models, there was no social crisis at Ok Tedi: no conflict within landowning groups, no collapse of local political authority and no intergenerational strife. Conversely, participation in the lawsuit led to increased social solidarity and gave rise to new forms of political leadership among the Yonggom. This is not to say that the environmental problems caused by the mine lacked social consequences (see Kirsch 1997a, 1997b). Rather, my point is that events at Ok Tedi were the result of an environmental protest movement that sought compensation to offset damage to their river, land and other resources, as well as an end to the mine's destructive practice of releasing tailings directly into the river system. The bottom line is that there was—and there continues to be—an ecological crisis along the Ok Tedi.

Environmental problems

Analysis of the Ok Tedi crisis must take the mine's downstream impact into account, along with the resulting hardships for the communities located on the Ok Tedi River and how these conditions have shaped their responses to the mine and their participation in the lawsuit. As a result of mining operations, 30 million tonnes of tailings and an additional 40 million tonnes of waste rock enter the river system annually (Michael Ridd, workshop presentation). In 1992, I was asked by the Ok Tedi Mine to describe the problems this caused for the people living in the villages along the lower Ok Tedi River:

[T]he area has been hit hard by the mine waste. It has been deposited onto forest and garden land, into adjacent wetland areas and upstream into the numerous creeks and streams that flow into the Ok Tedi. This is in stark contrast to the alluvium that once fertilised the river's flood plains, turning them into ideal garden land. The mine wastes have had adverse impact wherever they have been deposited, killing plants and

trees, and disrupting local ecosystems. The damage extends for forty kilometres or so along the river, with areas of dead trees that extend up to two or three kilometres from the main channel. There has been little regrowth to date, and large areas are virtually devoid of life. This land was particularly valuable to villagers because it is located within easy walking or canoe distance, and because it offered resources not readily available in the rain forest interior. Up to the time of fieldwork, little formal assessment of the environmental damage had been made, and no compensation paid. As may well be imagined, the villagers [living in the lower Ok Tedi] are in a state of despair, and despite the work of the Trust in bringing some new facilities, feel frustrated and ignored in their efforts to obtain restitution (Kirsch 1993:27).

During interviews conducted for a social impact study sponsored by the mine (Kirsch 1993), there was a strong consensus among the people of the lower Ok Tedi River that the mine should stop dumping tailings into their river system. Their comments have historical significance given that these discussions occurred two years before legal action was taken against the mine in the Australian courts. In Komokpin village, people told me that:

they want [the mine] to stop releasing mine wastes directly into the river system and they want compensation for the damage already done to the environment. If this does not take place, they think that the mine should be closed because their quality of life is no longer good. They prefer a political rather than a violent solution to the problems caused by the mine (Kirsch 1993:28–9).

In Yogi village, they said that:

if [the mine] does not pay them adequate compensation for the damages that it has already caused to their environment, and if [it] does not stop dumping its mine wastes directly into the river, then the mine should close. They will not resort to violence in order to close the mine, but will enlist the support of their newly-formed 'pressure groups,' ENECO [an environmental organisation established by Rex Dagi, Alex Maun and Moses Oti, who later represented the Yonggom in the suit against BHP] and the Ok Tedi Landowners Association, in order to bring this about (Kirsch 1993:29).

[t]he people from Bige added:

They [the Ok Tedi Mine] do not know what we are feeling down here. We are hungry and we are not happy with the pollution. We do not want to shut down the mine, we just want them to build a tailings dam (Kirsch 1993:31).

In Yeran, they said that:

[the] mine should not have begun production until...the tailings could have been dealt with safely; the pollution has already 'spoiled' their land. They do not want OTML to close down and leave the country, because they want the mine to pay them compensation for damages already incurred (Kirsch 1993:32).

Conditions along the lower Ok Tedi had declined further when I returned to the area four years later, after the lawsuit was settled in 1996. In a series of life history interviews, women from the villages along the river described how they had been affected by the mine. In addition to their practical concerns, they expressed sorrow over the disfigurement of the landscape and the disappearance of wildlife, and asked me about the long-term implications of the settlement for the environment. Bumok Dumanop, a woman from Dome village, told me that:

I'm unhappy with what the company has done.

They have spoiled our way of life.

Before we lived easily: food from the gardens was plentiful, as was wild game.

The river was fine: you could see the fish, the turtles and all the other animals living there.

But now it is all gone and it's hard.

We're suffering, so I'm unhappy about that.

(unpublished fieldnotes, 7 August 1996).

Andok Yang, a woman in her fifties, described some of the changes she has experienced. These included conditions before the mine, early predictions of the mine's impact which she failed to understand, the physical changes in the environment and their practical consequences for her, and the lawsuit. I quote at length from her eloquent description of how the mine has affected her life:

Before the mine started, there was plenty of food.

We fed our families on bananas and taro.

There was plenty of game—wild pig, cassowary and cuscus—and it was easy to find.

Our gardens grew continuously along the riverbank.

We inherited these gardens from our parents.

It was easy to catch fish and prawns from the river.

In 1984, our lives began to change.

Looking at the river, the effects of the mine were obvious—the water became muddy.

Before it was clear, you could see the fish clearly.
We saw the fish and prawns dying [after a cyanide spill at the mine in 1984].
Everything was lying on the sand banks.
People wondered what would happen next.
That was also the start of the sand banks that later covered our gardens on the river.
By 1986, the plants and trees growing along the river began to die.
First their leaves became yellow and then they fell off.
Gradually this spread into the small creeks, into the sago swamps and into the forest.
All the sago swamps were blocked by mud.
The creeks turned into swamps and filled up, killing off the sago palms.
Now it is difficult to find sago.
The sago palms along the river are covered in mud, and it is very hard to work them.
Sometimes when you cut them down, there is only water inside, no starch.
There aren't any sago palms growing along the river anymore, so we have to walk for two or three hours to find sago to make.
The fish disappeared.
Then the animals living along the river banks—the pigs, cassowaries, pigeons, and bandicoots—they all disappeared and we don't know where they are staying.
In the past, when it was time for the turtles [to lay their eggs], people went and sat and waited along the sand banks...

Now the places where the turtles lay their eggs have been covered up.
We don't know where they are now, but they've all gone away.
Before women travelled by canoe on their own,
but today the river is too dangerous...
Before the water was clear and there were no sand banks in the middle of the river,
but now one risks running into a sand bank and overturning the canoe.
It is easy to get stuck in the mud and difficult to get away, especially for small children.
When I was a small girl, we didn't have any contact with the white world.
I never tasted sugar or salt.
Women wore *woyam* [reed skirts], men wore *orom yop* [penis sheaths].
We cooked using *koyap* tree bark.
We had bananas, sago, taro and greens.
The crops grew well along the river...sometimes we didn't even have to plant them.

We never ran out of food.

We raised pigs and my father hunted in the forest and brought back wild pigs, cassowary and other game.

When I was very small, my mother used to carry me to the garden.

When I grew older, she gave me a string bag and a sago knife so that I could cut bananas, too.

I used to go fishing and look for prawns with the other girls; we'd bring them to the house and cook them in tree bark.

We'd put greens and breadfruit seeds inside, tie up the ends and cook them.

Nandun [a village leader] was one of the first to work with Kennecott when they explored for ore [in the Star Mountains] in the 1960s.

At first I didn't understand what they were doing when I saw their jet boat go by.

Nandun was working near Tabubil.

He came down [from the mountains] and told people about the mine...In the future, when they open up the mine, the Ok Tedi River will become bad, he told us.

We knew that something bad was going to happen, but we weren't sure what it would be.

When the mine opened up, we thought: oh, it is a fact that this thing will happen.

We heard that [the river would become polluted], but we didn't do anything about it.

When it came true, we began to get frustrated.

At first, we didn't say anything to the company or to the government officers.

We were worried about our gardens and the river, but we had no idea how to fight against the mine because we are not educated people.

Initially, I questioned [Rex Dagi and Alex Maun, the lead plaintiffs in the lawsuit]:

"What are you going to do about our land and our river?"

I asked them that.

They answered me: "We'll take them to court [and straighten out the problem]."

So we really supported the lawsuit...I was opposed to the government's attempt to make us accept the Eighth Supplemental Agreement because our environment has already been damaged.

We backed the lawsuit instead...I'm very proud of the lawsuit and I praise Rex and Alex for taking the matter to court and winning the case.

(unpublished fieldnotes, 5 August 1996).

Yang told me that while she looked forward to receiving monetary compensation from the mine, it would not settle her concerns for the future. 'Will the river return to the way that it was before?' she asked

me. She envisions very different lives for her grandchildren: 'they won't be able to [do things like] collect sago leaves for roofing material, or hunt wild animals for food.' She worries about them because, 'they won't be following what my life was like.'

Yonggom concerns about the mine's impact on their environment have been consistent over the last decade, although they have continually increased in magnitude, keeping pace with the level of damage from the mine. What has changed has been their ability to communicate their concerns to national and international audiences, their adoption of more effective strategies of political engagement (see Burton, this volume), and the emergence of a new class of political leaders from among their ranks.

Political authority and social solidarity

In traditional contexts, Yonggom leaders are best described as influential men who assert their authority through exemplification and exhortation, rather than big-man style economic leverage (Kirsch 1991:19–21).² Political authority is generally restricted by kin group and context, leaving a political vacuum above the level of the lineage. The environmental protest movement in Western Province gave rise to a new generation of political leaders who were able to transcend the traditional limits on power.

Given that the lower Ok Tedi is the area most heavily affected by the Ok Tedi Mine (Kirsch 1989b), it is not surprising that four of the lead plaintiffs in the suit—Rex Dagi, Alex Maun, Moses Oti and Robin Mokin—came from villages in this region. The four men were also members of the same *kaget won*, or initiation cohort, twenty years ago. Their leadership combines these traditional ties with a wide range of practical experience working for the state, the mine and local businesses. In rural areas, people often refer to the four men as *nup korok*, 'our heads' or leaders. During the course of the lawsuit, difficult decisions—where a consensus was lacking following debate, or where the problems were unfamiliar—were often deferred to Dagi and Maun. These two leaders earned reputations for being steadfast and for their ability to resist being suborned by political power or corruption. For this reason, they also shared the nickname *bot-korok*, for their 'stone-headed' determination.

Dagi and Maun travelled extensively in their campaign against the Ok Tedi Mine. Several years before filing their suit against BHP in

Australia, they brought charges against the mine at the International Water Tribunal in the Netherlands. Dagi attended the 1992 Earth Summit in Rio de Janeiro, then participated in meetings in Washington DC regarding AMOCO's investment in the Ok Tedi Mine. Maun went to Germany for the release of the critical Starnberg report and to discuss German investment in the mine. Dagi was photographed shaking his fist at the BHP tower in Melbourne from the nearby roof of Slater & Gordon's law offices when the suit was filed in 1994, and Maun made newspaper headlines the following year when he spoke sharply and carried a dead fish to BHP's Annual General Meeting. Maun later travelled to Canada's Northwest Territories to testify at public hearings regarding BHP's interest in a diamond concession at Lac de Gras, and to London for a conference on indigenous peoples and mining. During the two years that their case was before the Victorian Supreme Court in Melbourne, Dagi and Maun, along with their colleagues Dair Gabara and Gabia Gagarimabu from the South Fly, shuttled back and forth between Western Province, Port Moresby and Melbourne.

The creation of this new class of political leaders and new forms of political authority among the Yonggom and their neighbours has parallels in similar environmental protest movements in the Amazon. Michael Brown (1993:320) notes that after traditional links between religious and political authority were severed by colonialism, leadership was 'reconceived as a response to the regional and global forces bearing down on Amazonian peoples'. Terence Turner has described the political resistance of the Kayapo of Brazil as

without parallel, in its scope, style, substance and achievements, in the history of Amazonian native societies. Over the past half-dozen years, the Kayapo have staged a series of demonstrations against a variety of threats to their political, social and territorial integrity and their economic subsistence base (1991:302-303).

In the process, the Kayapo have become 'consummate ethnic politicians: fully engaged, defiantly confrontational, articulating traditional notions with the ideas, values and causes of Western environmentalists, human rights and indigenous support groups' (Turner 1991:311). Moreover, Turner argues that their 'creative adaptations, and the bold policies and acts of political resistance and collective cultural assertion of which they formed part, are authentic manifestations of Kayapo culture, even as they take advantage of the resources, cooperation and advice of outsiders' (Turner 1991:311). The

experiences of the Kayapo have become increasingly common as 'native forest peoples' have taken a leading role in the global struggle to protect tropical rain forest environments (Turner 1991:326).

Like the Kayapo, the Yonggom needed assistance from several national and international NGOs to develop the political acumen needed to successfully pursue their claims. Initially their predicament was quite different, as I noted in 1989:

Because the Yonggom living along the Ok Tedi River are numerically small, geographically peripheral, and politically impotent, they have not been able to effectively voice their protests. As a result, the mining company's neglect has largely gone unnoticed (1989b:59).

A few years later, however, the Yonggom had become political activists who had 'begun to confront the mine in ways which would not have been feasible, let alone thinkable until quite recently' (Kirsch 1996a:1). Ultimately, the Yonggom became leaders of a 'global alliance of landowners, ecological activists, anthropologists and lawyers... [who successfully] mounted a worldwide campaign to stop the mine from polluting the Ok Tedi and Fly Rivers' (Kirsch 1996b:14).

The Yonggom also played a pivotal role in the lawsuit by maintaining their collective support for the case in early 1996, when many of the other plaintiffs withdrew from the legal action. Legislation passed by the PNG government offered landowners a financial settlement if they would agree to opt out of the lawsuit against BHP. Many of the Awin landowners from the east bank of the Ok Tedi River elected to accept the terms of the Restated Eighth Supplemental Agreement, as did the majority of the people living in the Middle Fly. They chose to accept a guaranteed compensation package rather than await the uncertain results of the legal proceedings. In the South Fly, where the delta had become another hot spot for environmental impact, support was divided between the lawsuit and the government offer.³ The lawsuit would probably have failed at this juncture were it not for the solidarity of the Yonggom community.

Misreading the Ok Tedi crisis

Despite the severity of the environmental crisis along the Ok Tedi, many observers persist in attributing the origins of the lawsuit to economic motives. One example is Chris Ballard's (1997) essay on the moral economy of resource use in Melanesia, in which he suggested that ownership is locally understood to include the rights to control the flow

of benefits from the land. Ballard then used a critique of the stereotype of the 'ecologically noble savage' to argue that what is commonly translated as environmental concern is more appropriately understood as contestation over the disposition of resource rights. This position led him to conclude that the Ok Tedi case should be read as a 'struggle to gain access to services and economic opportunity,' rather than a response to 'ecological impacts' (Ballard 1997:60).

Similarly, David King (this volume), Glenn Banks (1997a) and Nicole Haley (1996) have used anecdotal evidence to argue that people affected by mine tailings were more concerned about economic opportunity than environmental problems (King on Ok Tedi), that people's concerns about environmental hazards were inversely proportional to their exposure to pollution (Banks on Porgera) and that people's responses to environmental impact were amplified and distorted by NGOs meddling in their affairs (Haley on Porgera). While purporting to analyse local discourse about the environment, these scholars suggested that local concerns about pollution were not significant because they did not appear in the form in which they were expected.⁴

This perspective is most clearly illustrated by King, who claims that the problems of economic underdevelopment provided the motivation for the social/legal protest of the Ok Tedi and Fly rivers. He argued that the lawsuit was little more than the politically correct, fourth world version of the oldest con in the history of liability law—shaking down the party with the deepest pockets, even though they may well be (largely) innocent bystanders.

[P]eople have sought a means of protest whereby they could wrest some resources from the company. Pollution of the rivers has been the channel for achieving that end of resource access, by suing that component of the consortium, BHP, that could be held responsible in law (this volume:111).⁵

King correctly identifies the very real problems of underdevelopment in Western Province.⁶ Yet in many places along the river, the paramount economic problem is that pollution from the mine has impaired subsistence production. Pollution from the mine also prevents people from capitalising on their natural resources in order to participate in the local cash economy (Kirsch 1993). Alex Maun (this volume) points out that the Yonggom are dependent upon their land and the river for their survival. That pollution from the mine has severe economic

consequences does not invalidate their more general concerns about environmental degradation.

King's analysis is problematic for another reason as well. Roy Rappaport (1993:298–9) has warned of the hazards posed by the monetary logic through which environmental impact is reduced to purely economic terms. Like the 'social time bomb' (Filer 1990) and 'capital logic' models (Gerritsen and McIntyre 1991), which explain mining crises in social terms, King's arguments may inadvertently absolve the mine of its fundamental responsibility for its environmental impact by suggesting that the real problem lies elsewhere.

The mining industry is quite pleased to be let off the hook. For example, Murray and Williams of Placer Pacific argue that the key issue in the Ok Tedi case was stakeholder identification and consultation, rather than environmental impact (this volume:200). This strikes me as a convenient position for representatives of the Porgera Joint Venture, operators of a gold mine once described as 'Ok Tedi all over again' (Kennedy 1996) because of its impact downstream along the Strickland and Fly rivers.

There may well be people living in Papua New Guinea who are willing to trade a few feet of mud in their gardens and a few acres of dead trees for a winning lottery ticket, but this hardly relieves mining companies of their responsibility to limit environmental impact. No mining compensation program in the country pays anything approximating the real costs of its downstream environmental impact, nor can the most toxic effects of mining ever be made good with cash. The K150 million settlement package for the peoples of the Ok Tedi and Fly rivers, even with the eventual transfer of a ten per cent equity share in the project, does not even come close to adequate compensation for the mine's impact on their environment and resources. Hence the agreement was to settle, that is, to accept less than full value of their losses, as long as the Ok Tedi Mine honours its commitment to tailings containment.

A final issue is the appropriate level of analysis for these processes. Recent studies of mining in the Pacific (for example, Connell and Howitt 1991; Howard 1991; Filer 1990, 1996, 1997a) adopt a regional approach when analysing the industry's impact on indigenous peoples. Perhaps there should be a logical rule equivalent to Occam's razor, such that the most powerful explanations apply to the broadest context in which the problem regularly occurs. Similar conflicts between indigenous communities, natural resource developers and states have become

increasingly common around the world. Furthermore, many of the factors affecting these projects are global in scope. Rather than restrict analyses to regional boundaries, it is more productive to consider the Ok Tedi case as representative of an international phenomenon.

This approach to the problem raises a different set of questions for analysts, however as I have suggested elsewhere:

[t]he international activism of indigenous peoples suggests that scholars should also adopt a more global approach when analysing environmental problems. How does the globalisation of markets, labor, capital and commodities affect local ecosystems? And what happens to local views of 'nature' as indigenous communities are increasingly encompassed by the world system? Answering these questions requires taking a closer look at the powerful institutions—including states and their legal systems, transnational corporations, the media and international conservation organisations—which mediate the impact of global forces on local communities (Kirsch 1996a:15).

The broader level of comparison also makes it possible to analyse the consequences of particular political strategies.

The category of 'indigenous' has become a political designation as the Yonggom and others have been forced to become players on the global political scene. In contrast to the popular environmental slogan, 'Think globally, act locally,' the Yonggom have been compelled to respond directly to the global causes of environmental degradation. This poses...[a] double-bind for the Yonggom and other indigenous peoples: their autonomy, based on their ability to control their own environment and resources, now depends on their effectiveness as global political activists (Kirsch 1996a:15).

Without neglecting local history or regional dynamics, analyses of conflict related to resource development projects must also consider forces that are operating at a global level. In the remainder of this essay, I focus on one of the international dimensions of the Ok Tedi crisis, foreign tort claims against multinational corporations. Related aspects of the case, such as the role of international NGOs and media representation of events, will have to be addressed elsewhere.

The value of foreign tort cases

Foreign tort cases such as the suit against BHP seek to hold corporations accountable in their home country for their environmental impact overseas. These cases are usually filed against corporations operating in countries in which environmental regulation is less restrictive or not rigorously enforced. As a tool for environmental

activism, foreign tort claims have important limitations, as Moody (1996) has recently argued. They do not challenge the underlying economic system, in which corporations lack financial incentive to limit their environmental impact. The resources required for such cases are rarely available to the communities affected by pollution, or even to environmentalists and other political activists. In addition, the outcome of these cases is based on legal processes and precedents that may have little to do with community standards for right and wrong.

Another constraint on foreign tort cases is the difficulty in establishing jurisdiction. The courts have often been reluctant to rule favourably on the question of jurisdiction and forum in foreign tort cases about environmental impact. Some cases are sent back to the courts in the country in which the offence took place. This was the response of the US District Court in New York to a suit against Texaco regarding their petroleum operations in the Ecuadorian Amazon. In other cases, the courts have rejected environmental claims because international law on the subject is weak. In a ruling on the suit against Freeport-McMoRan's copper and gold mine in Irian Jaya (Indonesia), the judge dismissed environmental claims made by the indigenous plaintiffs, although he agreed to reconsider claims regarding the mine's alleged complicity in human rights violations (Duval 1997). The original plea was subsequently amended to argue in part that environmental destruction is one of the means by which Freeport is alleged to have violated the rights of the Amungme (Martin Regan, pers. comm.). Claims about environmental impact have also been considered in court cases by focusing directly on the health risks they may pose. For instance, the Texas courts have evaluated the impact of harmful pesticides on Costa Rican farm workers.

Finally, other cases are decided out of court before a decision on forum is reached. In the Ok Tedi case, BHP elected not to raise the issue of forum, but did challenge the court's jurisdiction to hear the case (see discussion below). Their challenge was unsuccessful, which ultimately led to the out-of-court settlement. Such agreements tend to be rather moderate in their achievements, because they reflect a series of compromises made between parties, an issue to which I shall return later in the paper.

While foreign tort cases are clearly no panacea, they do wield considerable influence. They can provide an important alternative to violence, stimulate valuable debate about environmental issues, and galvanise global alliances capable of exerting pressure on

multinational corporations, rectifying local imbalances of power. They can also contribute to a growing body of international law on environmental rights. I consider each of these issues in turn, in general and with respect to the Ok Tedi case.

Alternatives to violence

The 1997 'Sandline Affair' in Papua New Guinea, involving Prime Minister Sir Julius Chan's attempt to resolve the stalemate over Bougainville by hiring South African mercenaries, and the subsequent mutiny by Brigadier General Singirok and his troops, put the Ok Tedi settlement in a new light. Studies of social protest movements have demonstrated that when all other avenues of political opposition are exhausted, people are more likely to resort to violence. The Bougainville conflict is a tragic example of this process, demonstrating the need to provide communities with the political resources that they need to peacefully pursue reform. The lead plaintiffs in the Ok Tedi suit have consistently maintained that they hoped to avoid 'another Bougainville' by seeking justice through the courts.

Raising the profile of environmental debate

In Australia, the lawsuit against BHP initiated widespread debate in newspaper editorials, television documentaries and satirical television comedy skits lampooning BHP for its role in the Ok Tedi debacle. Australia's economy has long emphasised resource extraction, and mining has played a pivotal role throughout its history. The assault on one of the nation's leading industries prompted considerable reflection on the subject of appropriate environmental standards at home and abroad. Journalists interviewed environmentalists, scholars and miners on issues such as the 'global lessons' of the Ok Tedi case (Sharp 1996), Australian codes of best practice (Condren 1996) and international codes of conduct for the Australian mining industry (Court 1995). Australia has been critical of the way that Southeast Asian countries exploit their rainforests for timber, so the Ok Tedi case revealed an uncomfortable double standard. How could they wave the green flag with respect to endangered rainforests while their own mining companies were muddying the waters of Papua New Guinea's rivers?

Court cases like the one against BHP expose new audiences to key questions about resource development projects and environmental impact. Legal battles temporarily erase the middle ground, bringing the

underlying moral issues into sharper focus. The seriousness with which the charges were debated in the Victorian Supreme Court vested the case with legitimacy, creating allies that environmental campaigns would not ordinarily influence. Legal struggles may also raise concerns among corporate shareholders; church groups and other investors in BHP have called for increased corporate accountability on environmental issues.

Acting globally

Another advantage of foreign tort claims is that they can hold multinational corporations accountable for their actions on a global level. When BHP planned a diamond concession in Canada's Northwest Territory, the local landowners had the opportunity to hear directly from Alex Maun about BHP's track record in Papua New Guinea (*Mining Monitor* 1996:11). In the three days that it took to travel from the rainforests of Papua New Guinea to the Canadian tundra, BHP's negative exposure became global in scope. When critics of BHP gained the ability to jeopardise lucrative mining prospects and embarrass their new copper subsidiary in the United States, BHP became truly alarmed. The lawsuit provided both the resources and the rationale for the journey across the Pacific, raising the cost of mismanaging the Ok Tedi Mine to a prohibitive level.

BHP's global exposure as a result of the Ok Tedi Mine continues. Their interest in mining prospects on the Caribbean island of Dominica prompted concern that it would become 'another Ok Tedi' (van Leeuwen 1996:6). Mineral exploration in the region was subsequently put on hold. Ralph Nader (1996:19), who was instrumental in putting pressure on BHP's American copper subsidiary, has argued that the legacy of Ok Tedi will continue to haunt BHP until it confronts the underlying moral issues.

The settlement also affected the Australian mining industry. Townsend and Townsend (1997:5) described how the Ok Tedi Mine worked to keep environmental data out of the public domain. The case may help usher in an era of greater public accountability for mining companies, some of which have reluctantly begun to acknowledge the need to make more information about the environmental impacts of their project available to affected communities and other stakeholders (Murray and Williams, this volume).



Better law

A steady accumulation of legal precedents also emerges from these cases. When a court evaluates whether or not there is an international consensus about acceptable environmental practice that rises to the level of enforceable law, it examines the rulings of other jurists in similar cases. Eventually such principles may acquire the weight of law. In a ruling on the case against Texaco regarding its petroleum operations in Ecuador, for example, the judge cited the Rio Declaration on the Environment and Development of 1992, which suggested that 'states have the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or areas beyond the limits of national jurisdiction' (Broderick 1994:16). He also suggested that the Rio Declaration 'may be declaratory of what it treated as pre-existing principles just as was the [United States] Declaration of Independence' (Broderick 1994:16). In other words, he envisioned the legal grounds for a universal human right to a protected natural environment. Furthermore, he foresaw the possibility that this standard could be enforceable internationally through foreign tort claims. Even though this case was later sent back to Ecuador, the argument may be applicable to future debates about the environment in alien tort cases.⁷

In the Ok Tedi case, the court found that it had no jurisdiction to entertain claims relating to the loss of land or damage to land. Accordingly, the claims were reframed to plead loss of amenity, which embraced the subsistence economy of the plaintiffs. This proved to be a novel concept for the court, in that it did not involve economic loss, which forms the foundation for damages in virtually all western legal systems (Nicholas Styant-Browne, pers. comm.). Julian Burnside argued in court that:

[t]hese plaintiffs are people who live a subsistence lifestyle. They live substantially, if not entirely, outside the economic system which uses money as the medium of exchange. But to say that does not alter the fact that if they are deprived of the very things which support their existence, they suffer loss. Of course it is a loss which appears in an uncommon guise because typically the courts have dealt with claims that are rooted in society's adherence to the monetary medium of exchange (Victorian Supreme Court, 14 October 1995:59)

It simply cannot be right that because people exist outside the ordinary economic system, they therefore do not have rights where their lives are damaged by the negligence of others (ibid:59).

Now, the lifestyle of the Papua New Guinea natives in gathering food, fishing and game and the like and using it to eat or sell is no less an economic activity because it is not translated through the medium of money. It is economic loss to be deprived of your source of food...whether measured in money or not (ibid:60).

In response to the Judge's query about the lack of precedent for this claim, Burnside's response was revealing:

For practical reasons, people who don't participate in the money economy have not had the practical ability to vindicate their rights in court, and so it is a relatively rare occurrence, and one which is not welcomed by BHP. That people who operate outside the money system do try to assert their rights, and they should not be less entitled to assert them simply because they don't use money as the medium of exchange or as the foundations of their lives.

Your Honour should ask yourself: On the pleadings, have the plaintiffs suffered damage? In our submission, the answer is a resounding yes...(ibid:63).

The lawyers for the plaintiffs were thus able to establish the precedent that acts which prevent a group of people from pursuing their subsistence practices may result in claims for damages that foreign courts will recognise (see Gordon, this volume).

Despite recent headway, the law supporting foreign tort claims about environmental impact remains in its infancy. In a preliminary judgment about the Freeport case, Judge Duval (1997:38) ruled that 'however destructive' Freeport's impact on the environment, it does not violate international law, because none is applicable. The challenge to legal and environmental activists is to help create precedents that can become law.

The settlement process

In the final analysis, the merit of the lawsuit against BHP and the Ok Tedi Mine must be measured in terms of the benefits that it brought the people of the Ok Tedi and Fly rivers, and to the improvement of environmental conditions. It is up to the landowners and the other stakeholders in the project to pass judgment on the terms of the settlement itself. I focus on how the legal process influenced the settlement's final form, in order to evaluate the strengths and limitations of this mode of resolving conflicts between indigenous communities and multinational corporations.

The terms of the settlement agreement reflect the history of the suit. Initially, the PNG government and BHP attempted to mandate the terms upon which the grievance would be settled by stopping the litigation and usurping landowner rights to a fair hearing. When their initiative was blocked, comparable cash offers were made to the people of the Ok Tedi and Fly rivers, with the provision that they withdraw their support for the lawsuit.

These initial proposals became the starting point for negotiations leading to the final settlement. The K110 million fund for the peoples along the affected river system was originally proposed by BHP in consultation with the PNG government, although no offer of this magnitude had ever been considered prior to the formation of an opposition with the ability to enforce its claims in court. The original proposal also attempted to resolve the crisis without addressing the central problem: the continued dumping of tailings and other waste material directly into the river system.

Slater & Gordon were able to make substantial modifications to the initial offer. They ensured that the compensation package would not be reduced by future spending on environmental programs, cancelling a clause to this effect in the original PNG legislation. Furthermore, the entire compensation package is now guaranteed by BHP, regardless of the fate of the Ok Tedi Mine. An additional K40 million package earmarked for the lower Ok Tedi River villages was added after the Yonggom refused to support the initial government offer. Most significantly, the compensation package is now linked to a program for mitigating environmental impact, and both parties have agreed that any disputes regarding the implementation of the settlement will be heard by the Victorian Supreme Court in Melbourne. While the lawyers forced the initial offer, and subsequently enhanced and secured its terms, they did not design their own program for compensation.⁸

When lawyers take control of the settlement process, their concerns influence the final agreement. In the Ok Tedi case, it became clear that there were numerous aspects of the settlement for which significant differences of opinion existed between the plaintiffs and their lawyers. The presence of this 'interpretive gap', despite the best efforts of the lawyers to avoid confusion, is an artifact of the settlement process, as well as cultural gaps between the lawyers and their clients. Even more significant are the compromises that must be made in order to reach an agreement between previously opposed parties. Describing the

landmark proposal for resolving anti-tobacco litigation in the United States, a representative of the tobacco industry remarked that: 'Negotiations of this size and scope create compromise, not perfection. No one side achieves everything it seeks' (quoted in Widder 1997:8). This is equally true for the Ok Tedi case.

Conclusions

Is Ok Tedi a precedent? In the sense of providing an alternative to violence, to what Filer (1990) described as the explosive nature of mining projects in Melanesia, one would hope so. Bougainville demonstrated that the people of Papua New Guinea retain veto power over development projects in spite of government efforts to limit their protests. The lesson of the Ok Tedi case is that alternative forms of political power must be made available to these communities, so that the tragedy of having to resort to violence in order to achieve political ends can be avoided.

Whether or not the state is able to fulfil its duties as a regulatory body, it must learn to acknowledge and respect the efforts of local communities to protect their land and resources.⁹ Furthermore, if the state cannot provide these communities with the resources and opportunities that they need to safeguard their rights, then it should not oppose the global alliances that can. Mining projects that cause environmental problems will continue to face coordinated opposition from landowners and their allies located in Papua New Guinea and abroad, including environmental NGOs, anthropologists and lawyers. Foreign tort claims, building on the successful precedent established by Slater & Gordon, remain an important resource for rural communities, even though such action is currently prohibited by the *PNG Compensation (Prohibition of Foreign Legal Proceedings) Act 1995*.

The legislative ban on foreign legal proceedings against corporations operating in the country, and the continued political harassment of in-country NGOs, leads Papua New Guinea backwards in terms of its ability to resolve these potentially violent conflicts over mining projects, unwisely setting the stage for another Bougainville. Recognition of these fundamental facts might preclude future crises of the type that have punctuated the last decade of Melanesian history. This would be the ideal precedent for the Ok Tedi case to establish.

There are three additional ways in which this case might set other important precedents. First, Ok Tedi Mining must become the first mine

in Papua New Guinea to stop dumping the tailings and other waste material that it produces directly into local rivers or the sea. Second, the history of the environmental protest movement in the Western Province suggests the value of institutions and strategies for negotiating and resolving conflict that are independent of the state (see Dinnen 1996). Third, there is an urgent need for proper accounting of the environmental costs of resource development projects. Greater investment into building long-term relationships with affected communities is also required, including extensive consultation and the sharing of information at all phases of the project.

Finally, reflecting on the decade of violence on Bougainville and its continuing political aftermath, I offer the following epitaph for the Ok Tedi settlement: that BHP peacefully resolved its dispute with the peoples of the Ok Tedi and Fly rivers. In order to earn this commendation, however, the Ok Tedi Mine must fulfil its commitment to tailings containment.

With this responsibility in mind, Ok Tedi Mining Ltd would do well to remember the story of the 'boy who cried wolf'—after years of study, delay, and unsuccessful effort, they have exhausted all of their excuses. The people living downstream from the mine have very little patience in reserve for yet another tale of engineering woe. I might add that before the PNG government tries to block OTML expenditure on this project, they should recognise the true cost of such action. I urge them not to be *toea*-wise and national security foolish. In words attributed to the CEO of BHP when instructing his lawyers to settle the suit, it is time to 'fucking fix it'.

Notes

I would like to acknowledge research support from the Royal Anthropological Institute for a fellowship in 'Urgent Anthropology' and the Institute for Research on Women and Gender at the University of Michigan. A social impact study carried out in 1992 was sponsored by Unisearch PNG Pty Ltd under contract to Ok Tedi Mining Ltd. Previous research in the lower Ok Tedi was supported by the National Science Foundation, the Fulbright-Hays program and Mount Holyoke College. I am indebted to the faculty and staff of the Resource Management in Asia-Pacific project at the Australian National University and the Anthropology Department at the University of Michigan for their hospitality and collegiality. I would also like to

thank Chris Ballard, Glenn Banks, Crisca Bierwert, Nicholas Styant-Browne, John Burton, Colin Filer, John Gordon, Lawrence Hammar, Alex Maun and Patricia Townsend for their comments on (and arguments against) the positions taken in this chapter. I take full responsibility for any errors of fact or interpretation.

- ¹ Burton (1996) has argued that the inability of the state to make productive use of the economic benefits generated by the Ok Tedi mine contributed significantly to the buildup of local frustration and dissatisfaction.
- ² See Welsch (1991:247) on Ningerum political organisation and Schoorl (1993:24–7) on political roles among the Yonggom (or Muyu) population west of the border.
- ³ The lower Fly is affected by both the Ok Tedi Mine and the Porgera Joint Venture, which releases tailings into the Strickland River, a tributary of the Fly (CSIRO 1996).
- ⁴ I question the value of King's observation that: 'In none of these villages was any mention made of environmental issues until I prompted it.' (this volume:103) This is hardly surprising. Why should they discuss their concerns about the environment with a visiting consultant charged with collecting data on economic and demographic indicators?
- ⁵ See Nader and Smith (1996:263–319) on efforts to discredit litigation against large corporations.
- ⁶ King (this volume) correctly observes that the presence of refugees from Irian Jaya has raised population pressure along the Ok Tedi to precipitous levels, but it is the 'destructive synergism on local resources between refugee consumption of resources and the environmental impact of the mine' (Kirsch 1993:61) that is the issue here. Furthermore, most of the refugee impact occurs away from the immediate river corridor, in the rainforest interior.
- ⁷ Judge Broderick's (1994) argument was cited favorably in Judge Duval's (1997:45–6) opinion on the Freeport case, although it did not sway his final assessment of the claim.
- ⁸ The exception is the structure of the K40 million package Lower Ok Tedi Agreement and Declaration of Trust, which was finalised in May, 1997 after extensive consultation among all parties (Appendix 1).
- ⁹ While mining companies are not likely to regulate themselves, multilateral acceptance of an international system of oversight and review holds the most promise in this regard (Prince and Nelson 1996).