



Case Study of the CAO's Approach to the PT Weda Nickel Mine Complaint

Barriers to Mediation in a Climate of Fear

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About this report series

This report is part of a series produced by the Non-Judicial Human Rights Redress Mechanisms Project, which draws on the findings of five years of research. The findings are based on over 587 interviews, with 1,100 individuals, across the countries and case studies covered by the research. Non-judicial redress mechanisms are mandated to receive complaints and mediate grievances, but are not empowered to produce legally binding adjudications. The focus of the project is on analysing the effectiveness of these mechanisms in responding to alleged human rights violations associated with transnational business activity. The series presents lessons and recommendations regarding ways that:

- non-judicial mechanisms can provide redress and justice to vulnerable communities and workers
- non-government organisations and worker representatives can more effectively utilise the mechanisms to provide support for and represent vulnerable communities and workers
- redress mechanisms can contribute to long-term and sustainable respect and remedy of human rights by businesses throughout their operations, supply chains and other business relationships.

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This report was authored by Samantha Balaton-Chrimes, Shelley Marshall and Kate Taylor. Research was conducted by Omar Pidani and Sarah Rennie.



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Acronyms

AMAN	Aliansi Masyarakat Adat Nusantara ('Indigenous Peoples' Alliance of the Archipelago')
AMDAL	Analisis Mengenai Dampak Lingkungan ('Environmental Impact Assessment')
BIC	Bank Information Centre
BRIMOB	Korps Brigade Mobil ('Mobile Brigade Corps')
CAO	Compliance Advisor Ombudsman
CSR	Corporate social responsibility
ESHIA	Environmental, Social, and Health Impact Assessment
ESIA	Environmental and Social Impact Assessment
IDR	Indonesian rupiah
IFC	International Finance Corporation
JATAM	Jaringan Advokasi Tambang ('Mining Advocacy Network')
KAU	Koalisi Anti Utang ('Anti-Debt Coalition')
Komnas HAM	Komisi Nasional Hak Asasi Manusia ('National Commission on Human Rights')
KPK	Komisi Pemberantasan Korupsi ('Corruption Eradication Commission')
MIGA	Multilateral Investment Guarantee Agency
NGO	Non-governmental organisation
WBN	Weda Bay Nickel

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Executive Summary

This report studies the human rights impact of the PT Weda Bay Nickel mining company on indigenous and seaside communities in north-west Indonesia, and their attempts to stop the mine or gain fair compensation for loss of their land. It demonstrates the immense barriers to accessing meaningful redress for communities that are remote.

In 1998, a mining license was granted to PT Weda Bay Nickel in respect to land located on Halmahera Island in North Maluku, Indonesia. The mining licence would allow the company to proceed with a nickel mine, with potential for the extraction of 500 million tons of nickel. As of July 2016, the project remained suspended due to weak market conditions and in order to seek new investors, and the project had not yet entered phase one of construction.¹ However, extensive land preparation for the construction project had already begun, as part of the project's feasibility and exploration phase.

The project was embroiled in significant controversy over the disruption of the livelihoods of the affected villages, and the Tobelo Dalam, an indigenous tribe inhabiting part of the mine's concession area. The initial exploration and feasibility phase of the project was marred by the encroachment of the rights of these people — including improper land acquisition and compensation procedures, corruption, intimidation sponsored by state and company, and also raised issues regarding cultural, environmental and health rights.

This report outlines a number of complaints made to transnational, non-judicial grievance processes about this project in Indonesia, focusing on the CAO.

Human rights breaches

Environmental concerns

The PT Weda Bay Nickel project mining concession covers a significant proportion of Halmahera Island in the Indonesian province of North Maluku in the Maluku Islands. Around 21 per cent of the company mining area is within 'protected forest areas' in fragile and ecologically significant areas.

Displacement

Affected ethnic Sawai communities have lost access to forest agricultural land they have cultivated for generations. Loss of access to forest agricultural land has resulted in the loss of their primary source of livelihood.

No Free, Prior and Informed Consent and Consultation

Affected communities have not enjoyed the right to meaningful free, prior and informed consultation and consent in relation to changes to their land rights brought about by the project.

Pressure and Intimidation

The Indonesian National Human Rights Commission (Komnas HAM) found that members of Korps Brigade Mobil (BRIMOB), the paramilitary arm of the Indonesian police, had been in-

¹ Yuka Obayashi, 'Eramet Seeks New Partners for Indonesia's Weda Bay Nickel Project: CEO', *Jakarta Globe* (online), 7 July 2016, <<http://jakartaglobe.com/business/eramet-seeks-new-partners-indonessias-weda-bay-nickel>>.



Cover: Weda Bay.

Source: Samantha Balaton-Chrimes

volved in pressuring and intimidating community members to sign agreements. The Commission further found that a staff member of PT Weda Bay Nickel had threatened a community member if he did not sign an agreement.

Inadequate and Improper Forms of Compensation

PT Weda Bay Nickel has offered communities whose land falls within areas required for imminent construction IDR8000 per square meter (the equivalent of USD 55 cents or EUR 0.55 per square metre) plus compensation for plants. By way of reference, in most parts of Indonesia IDR8000 is only about enough to purchase a single meal. In isolated North Maluku, a meal of rice and fish costs around IDR 15 000.

Allegations of Corruption

The Indonesian National Human Rights Commission (Komnas HAM) found that the process of assessing land allotments in order to compensate per metre of farming land was marred by corruption on behalf of the relevant bureaucracy.

The CAO complaint

The CAO is the recourse mechanism for projects supported by the IFC and MIGA. The CAO has three separate functions:

- 1 Ombudsman/ Dispute Resolution: a problem-solving / dispute resolution function – working with affected communities or workers and the relevant company
- 2 Compliance: conducts audits / investigations of IFC or MIGA's own decision making

- 3 Advisor: provides advice to the IFC and MIGA about their policies in relation to environmental and social sustainability based on lessons learnt from handling cases.

The CAO is available to receive complaints regarding any project in which the IFC or MIGA have financial involvement, including via supply chains. Any individual, group or representative may make a complaint, provided they can demonstrate a connection to affected people.

The CAO accepts complaints in any form, and any language, and assesses eligibility based on IFC / MIGA involvement in the relevant project, the presence of social or environmental risks, and some link to affected communities. If eligible, further assessment takes place to determine feasibility of resolving problems, and this can involve field visits. Dispute resolution experts will talk with all stakeholders and determine amenability to dispute resolution. If everyone is amenable, the dispute resolution team facilitates a process. Various kinds of processes can be used, but this usually takes place through mediation, and sometimes involves fact-finding. The CAO monitors the case until any agreement is implemented. This can take anywhere from months to years.

If parties are not amenable to problem solving, if problem solving fails, or if there are additional concerns about IFC or MIGA's involvement even after an agreement has been reached between stakeholders, a case is transferred to compliance. The compliance team, consisting of CAO and external consultants, will investigate IFC / MIGA's processes in relation to compliance with IFC Performance Standards (see Box 1 below) using desk based research and field trips, and issue a report to IFC / MIGA. It is up to IFC / MIGA how they respond. The CAO will monitor until compliance is achieved. Compliance appraisals can also be triggered by the CAO Vice President, IFC/MIGA Senior management, or the World Bank President if they receive information of concern. There is no possibility of a compliance investigation of the private sector actor with IFC or any other standards, unless that is agreed to by all parties as part of a dispute resolution process.

The advisory function is currently triggered at the discretion of the Compliance Advisor Ombudsman Vice President in response to a request from the IFC / MIGA or the President of the World Bank Group, or as part of regular CAO work. The decision to conduct an advisory project is determined by the extent to which an issue reflects systemic social and environmental issues arising from the CAO caseload. Most advisory work to date has been triggered internally, rather than by IFC, MIGA or World Bank management. At the time of this research, advisory teams were assembled for particular tasks, e.g. to provide input into review of IFC Performance Standards, or IFC Extractive Industries Review (CAO 2003, 2010). Since then, two permanent advisory staff have been appointed, and the CAO continues to draw on the expertise of consultants for this purpose.

In this case, a complaint was made to the CAO in 2010 alleging that PT Weda Bay Nickel was in violation of all eight of the International Finance Corporation's (IFC) required Performance Standards on Environmental and Social Sustainability. The complaint argued that the project will have widespread negative environmental and social consequences that were not fully considered or disclosed in the Environmental Impact Assessment (AMDAL) required by the Indonesian government. Particularly in relation to social risks, the complaint argued that PT Weda Bay Nickel had not taken seriously the risk of displacement of and impacts on the Tobelo Dalam people in their assessments (IFC Compliance Advisor Ombudsman). The complaint was made by a consortium of Indonesian NGOs primarily concerned with the project's environmental impacts. The CAO's jurisdiction over this case is established on the basis that MIGA provides insurance for the project.

The CAO complaint had no tangible effect on human rights outcomes for affected communities. The Ombudsman function was unable to establish a problem-solving process because communities were too fearful for their safety to be identified, and did not adequately understand other options (such as shuttle diplomacy) available to them via the Ombudsman. The Compliance function elected not to conduct an audit.

At the time research for this report was undertaken, the human rights concerns that triggered the CAO complaint remain unaddressed.

Factors influencing access to remedy for affected communities

The persistence of human rights problems for people affected by PT Weda Bay Nickel can be explained by a variety of factors.

Failures of domestic legal and regulatory processes: The CAO was pursued because the Indonesian legal system was perceived to be unable to provide redress due to corruption and the readiness of government to intervene to protect mining interests. The affected communities were unable to rely upon a strong domestic legal framework to adequately protect their rights — meaning that PT Weda Bay Nickel was often acting within the scope of the law in many respects and did follow the existing legal procedures. The lack of formal legal protection for the affected communities in this case has led some stakeholders to pursue a range of non-judicial strategies in addition to the CAO complaint, such as complaints to Indonesia's national human rights commission (Komnas HAM), and various advocacy and media campaigns, though these have also had limited effects in this case.

Environment of fear and intimidation: The case illustrates the difficulties for non-judicial redress mechanisms with engaging with affected communities and holding mediation when affected community members are fearful of being identified following threats and intimidation by those supportive of the development project, including other community members, the company and the government. This research found that even when community members sought genuine negotiation regarding their land rights and compensation, they encountered threats and intimidation throughout the process. This demonstrates that unless redress mechanisms can provide a basic level of security to complainants, their effectiveness is limited in some cases.

Internal community divisions: The attainment of acceptable outcomes in this case has been severely hampered by division within affected communities over demands. This division has been exacerbated by the lack of impartial information about the project and their rights, which may have helped to facilitate a community-based decision making process. Those with economic interests in the project have been able to use this division to their advantage, in order to undermine community-led resistance. This dynamic becomes even more complex where NGOs, who may have strategic interests which differ from the interests of the community, become involved. The lack of a united vision, goals or strategic approach significantly weakens community efforts to seek redress.

Compromised claim-making: Our research found that some community members did not want the mine to go ahead, while others did, but on certain conditions. In all cases, the claims made

to the company demonstrated a lack of awareness and/or a lack of faith in their rights or the alternative claims that could have reasonably been made. These might have included their right to free, prior and informed consent regarding the project and changes to land tenure, higher levels of compensation, requests to retain farming land and assurances of employment and trading opportunities with the mining company, and more robust benefit sharing arrangements. The communities' isolation and the environment of fear and intimidation in which they live led them to make only compromised claims (and even these have not been met).

Lessons for the CAO and its complainants

The CAO's impact on this case was limited by a variety of factors. Not all of these were in the control of the CAO. The most important of these were the low level of understanding by community members who opposed the mine about their options in relation to the CAO's process, or the independence of the CAO relative to the government and the company. Perhaps most determinative was the inability of the CAO to address the concerns of community members about their safety. Our research in this case provides the following lessons for the CAO and its users:

With respect to mediation (**ombudsman** function), an unwillingness on the part of the affected community to engage in mediation was explained by fear for their safety if their identities were to be revealed. Our research suggested other options, such as shuttle diplomacy, were available to complainants but they did not fully understand these. Though the CAO cannot single-handedly guarantee the security of complainants in circumstances such as this, our research suggests that community groups may have taken up an Ombudsman problem-solving function had they better understood their options and how each of them would address the issue of safety, and better understood the independence of the CAO relative to the government and the company. This suggests that in cases where complainants live in an environment of fear and intimidation, the Ombudsman assessment process could potentially be more rigorous and patient to open up space for problem-solving where it might seem there is none. The demands of this work should not be underestimated — the CAO Ombudsman assessment team conducted risky field visits and did demonstrate a commitment to fully communicating the possibilities and the nature of the CAO. The CAO's time in the field was extended considerably to give complainants time to consider their options, but this was not sufficient in this case.

The impact of **compliance** audits on human rights remedy could be enhanced by a greater willingness on the part of the CAO to conduct audits, particularly in the early stages of projects, and particularly where land acquisition is at stake. This could be further enhanced by an expansion of the CAO's mandate to audit not only the IFC/MIGA, but also project proponents. In this case an audit (either of PT Weda Bay Nickel or, depending on its nature, an audit of MIGA) could have been worthwhile insofar as it would have generated a) important information that could be used by community groups to seek redress and b) discussion around how negative social impacts had occurred, and how IFC/MIGA should manage social and environmental risk in the very earliest stages of a project when assessments are not yet complete but business activity

is taking place. The risks in these early phases can be significant, and rights violations were already evident in this case. In fact, in cases where land acquisition takes place, it is these very early stages that are the most significant, and this was arguably the point in the Weda Bay mine development at which an audit could have the most impact on the social and environmental conditions of the project.

Supporting NGOs play an important role in making effective use of the CAO (or any grievance mechanism) in many respects. In this case, many opportunities to make better use of these mechanisms were missed because supporting NGOs lacked a full understanding of how the mechanisms work, advice from other NGOs that had used the mechanism, and a close working relationship with community groups that might have brought about a more rigorous engagement with the CAO Ombudsman assessment team and a greater appreciation for possible options.

Having said that, in this case the supporting NGOs were primarily environmental, and may not have seen much value in pursuing a problem-solving process, while our research suggests community groups may have. This underscores the need for close working relationships between NGOs and community groups. One option not utilised here would have been for the complainant NGOs to hand over the role of supporting communities to, for example, AMAN, a local indigenous NGO that had closer relationships with communities and might have helpfully shepherded a problem-solving process. In such a case, the environmental aspects of the complaint might have been pursued with the CAO by the NGO complainants separately.

Geographic and communicative isolation caused by remote living and poor communication networks make the development of these community–NGO relationships difficult for both sides. Building community–NGO relationships stands out as a potentially productive site for resourcing from donors and larger NGOs, as well as potentially the CAO or other grievance mechanisms.

Distrust in the CAO process in general due to its connection with the World Bank further hampered the CAO's effects in this case, as the NGO complainants were quick to back away from the process when it became apparent that the CAO would not stop the mining project. Our research suggested that many of the NGOs believed that the values of the CAO would be aligned with those of the World Bank as a whole, which the group's hold responsible for many of the problems they engage with in Indonesia, and that this partly explained the inability of the CAO to stop the mine. In some cases this lack of trust constitutes an inherent limitation on the effectiveness of a mechanism to contribute to human rights remedy. In these cases, such NGOs should consider alternative options for addressing human rights harms. A further lesson related to this point is that the CAO is not in a position to stop projects, and should not be used if this is the goal of complainants.

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Introduction

This report studies attempts by communities affected by the PT Weda Bay Nickel mine in North Maluku, Indonesia to access meaningful redress and compensation. The report aims to place this dispute within the wider context of Indonesia's legal framework for the regulation of mining as well as the recognition of customary and indigenous land rights. In doing so, it examines a summary of events, the human rights grievances involved in this case, and the parties and stakeholders involved in the human rights grievance.

The report's primary goal is to analyse the efficacy of the CAO process utilised in this case. Thus, we consider in some detail what features contributed to or hampered redress, placed within the framework of the CAO process. The report concludes with lessons for the CAO, potential NGO strategies, as well as lessons for business and government. These suggestions and recommendations serve to increase the availability and efficacy of redress for the affected communities in relation to further developments of the nickel mine. It is also hoped that these lessons can be transposed in like cases, to ensure similar barriers to redress in similar cases are handled more effectively in the future.



Weda Bay.

Source: Samantha Balaton-Chrimes

Table 1: Summary of Case

<i>Mechanisms/Claim Making Strategies</i>	<ul style="list-style-type: none"> International Finance Corporation, Office of the Compliance Advisor/Ombudsman (CAO).
<i>Human rights issues</i>	<ul style="list-style-type: none"> Failure to acquire free, prior and informed consent for land acquisition from an indigenous group. Failure to acquire informed consent from an affected community. Intimidation sponsored by state and company. Environmental and subsequent health damages.
<i>Companies</i>	<ul style="list-style-type: none"> PT Weda Bay Nickel. Eramet (a French company). Mitsubishi (a Japanese company).
<i>Affected people</i>	<ul style="list-style-type: none"> The seaside Sawai communities, and the Tobelo Dalam (Tugitil), a mainly nomadic community who live within the forest along the Ake Jira River. The total affected village communities comprise approximately 9447 people. The total affected Sawai communities comprise approximately 3229 people. There are an estimated 23 families constituting the Tobelo Dalam community in Halmahera.
<i>Business activity/project</i>	<ul style="list-style-type: none"> PT Weda Bay Nickel (WBN) is proposing to develop an open pit nickel and cobalt mine and a hydrometallurgical processing plant in Central Halmahera and East Halmahera Regencies in the North Maluku Province of eastern Indonesia. The mine has not yet begun extraction. It is currently in the exploration phase.
<i>Connections to the United Kingdom (UK) and Australia</i>	<ul style="list-style-type: none"> Both the UK and Australia provide funding to MIGA, a World Bank investment instrument.

Methodology

This report is part of a series based on the findings of a three-year Australian Research Council Linkage Project analysing the effectiveness of non-judicial redress mechanisms in responding to human rights concerns in which transnational business activity is involved. We adopt a broad definition of non-judicial grievance mechanisms, namely, those that are mandated to receive complaints, but are not empowered to produce legally binding adjudications.

Research has sought to shed light on the range of factors that contribute to greater or lesser effectiveness and legitimacy in the functioning of transnational grievance-handling systems. A key objective of the project is to develop recommendations regarding how non-judicial forms of redress can better support communities who are adversely impacted by business operations to access justice and have their human rights respected. These recommendations are primarily aimed at those who participate in these mechanisms, including businesses, affected communities, and civil society organisations, as well as staff and other members or stakeholders of grievance-handling mechanisms themselves.

Field research for the project as a whole has focused on human rights grievances in the garment and footwear, agribusiness, and extractives sectors, with case studies for each sector drawn from two jurisdictions: India and Indonesia. 10 case study reports examine specific human rights grievances experienced by communities and workers and the strategies employed in their attempts to gain redress in the context of these specific sectors and regulatory environments. Five mechanism reports in this series have been developed to provide a better understanding of the effectiveness of individual non-judicial human rights mechanisms governing transnational business. In addition to these individual case-study and mechanism reports, the project's overall findings are presented in four crosscutting reports which provide broader comparative analysis across the various case studies we examined.

This case study is the companion to three other reports in this series, *Wilmar and Palm Oil Grievances: The Promise and Pitfalls of Problem Solving*, *Case Study of the CAO's Approach to the PT Weda Bay Nickel Mine Complaint: Barriers to Mediation in a Climate of Fear*, and *Human Rights Grievance-Handling in the Indian Tea Sector*, all of which explore the cases in more detail, including the ways in which the CAO complaints interacted with complaints to other mechanisms within broader systems of remedy.

This case study was selected because it provided us with a case of a complaint to the CAO that had recently been concluded at the time of our research. This enabled us to access all stakeholders and draw on their recent memory of the case, as well as to evaluate its early effects on the human rights grievances. It was one of only a small handful of cases in the Indonesian extractives sector that had made complaints to transnational, non-judicial grievance mechanisms. It was also a case in which we were able to gain access to all stakeholders with the assistance, initially, of Walhi, and later of other groups involved in the process, which was crucial for the research.

This report's findings are based on extensive primary and secondary source research gathered through in-country research in Indonesia, as well as ongoing engagement with community leaders, human rights and environmental advocates, and others knowledgeable about the project and its impacts.

This report adopts a mixed methods approach to triangulate data. Three researchers, including one Indonesian research assistant who conducted interpreting and translation, visited Indonesia in May 2013, spending two and a half weeks in North Maluku and a week in Jakarta, supplemented with a further visit to Jakarta by one of the researchers in June. In total, we conducted over 35 interviews or focus groups with over 60 people. This includes staff of PT Weda Bay, affected villagers who have accepted the compensation package, and villagers who are against it, village heads of Lelilef Woebulen, Lelilef Sawai and Gemaf, government officials at the Regency, Provincial and National Levels, and activists and NGO staff who are protesting against the project. During these trips interviews took place in Jakarta, Ternate, Weda, Gemaf, Lelilef Woebulen, and the PT Weda Bay project site; and other interviews took place in Washington DC and over Skype with international experts over 2012 and 2013. Interviews were conducted in English and/or Indonesian, and an interpreter was used when necessary. Interviews were documented using written notes and audio recordings, supplemented by photographs when participants agreed. Members of the research team complied with the highest standards of ethical and professional conduct, including adhering to ethical obligations as laid out by the University of Melbourne Human Research Ethics Committee.

In addition, researchers conducted extensive documentary analysis of as many private and publicly available documents as could be acquired, including newspaper articles, company magazines, the assessments of legal and quasi-legal bodies and so on.

Due to concern for the personal security of some participants, we have refrained from using direct quotes that may identify them. Special measures had to be taken to provide a safe place to interview those who had grievances with PT Weda Bay, as they were fearful of negative consequences from the company, local government or their neighbours if they were seen to speak out against the company.

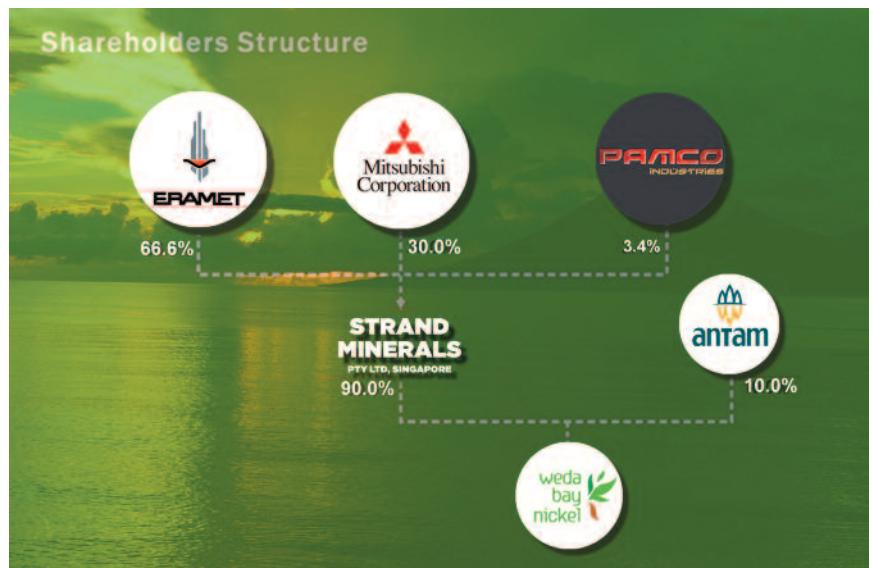
The scope of our research is limited in several ways. Firstly, it is important to recognise that this individual case cannot be interpreted as representative of the diverse array of cases handled by the CAO. This is particularly so given that the CAO's operational guidelines and practices have evolved during and since this time of our research. Nonetheless, our detailed investigation of this case can shed useful light on the processes and mechanisms through which the CAO operates, generating insights and questions of wider significance.

Secondly, the field research for this report was conducted in 2013, and the analysis applies primarily to this period, though we do comment on events since then where possible and appropriate.

Parties To The Grievance

Businesses

PT WBN is owned by Singapore-based company, Strand Minerals (Indonesia) Pte Ltd, and the Indonesian state-owned mining company PT (Persero) Aneka Tambang Tbk (ANTAM). It was originally 100 per cent owned by ANTAM, and further investors were subsequently brought in.



Source: PT Weda Bay

Shareholders

The following information was accurate at the time of this research, in 2012–13.

Strand Minerals

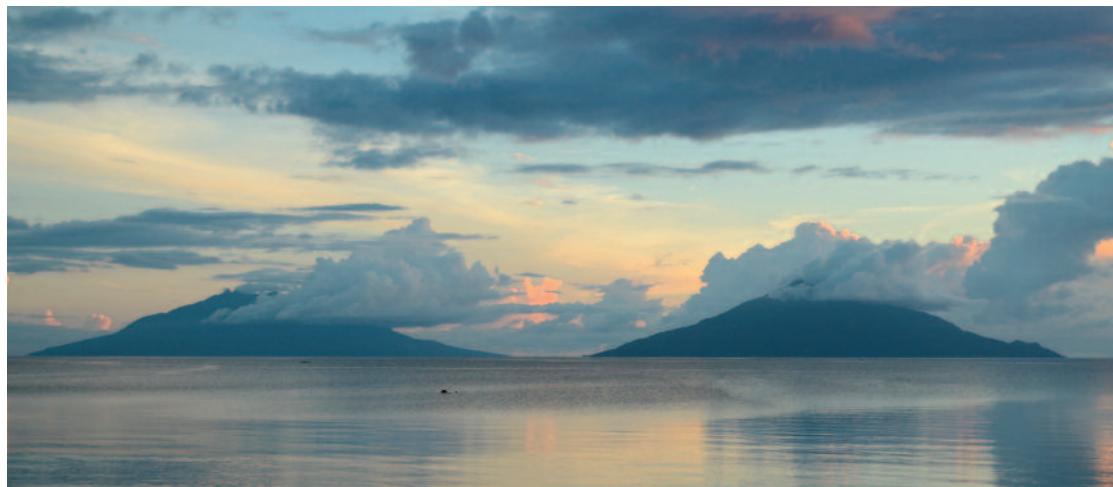
Strand is an incorporated joint venture between ERAMET (66.6 per cent), Mitsubishi Corporation (30 per cent) and Pacific Metals Co Ltd (3.4 per cent). It is incorporated in Singapore. Strand Minerals owns 90 per cent of PT Weda Bay Nickel, with the remaining 10 per cent being held by PT Antam (Aneka Tambang).

PT Antam

PT Antam is Indonesia's state-owned mining and metals company. It has vast licensed exploration areas, and has formed several joint ventures with international partners to develop mineral deposits into profitable mining operations (PT Weda Bay). The Indonesian government owns 65 per cent of PT Antam.

ERAMET

The main shareholder of Strand Minerals, ERAMET Group, is a French corporation that operates mining, processing and metallurgical operations worldwide. ERAMET acquired the majority shareholding in PT Weda Bay Nickel in May 2006. Since that date, ERAMET has financed and developed extensive studies in order to confirm the technical and environmental feasibility of this large-scale project. According to the project website, ERAMET will have invested around USD450 million in this project before a final decision is made by the company whether to invest in the extraction phase of the project (PT Weda Bay Nickel).



Weda Bay.

Source: Samantha Balaton-Chrimes

Mitsubishi Corporation

Mitsubishi, a Japanese company, also holds 30 per cent of Strand Minerals, making it the second largest investor in the project.

Other investors

The exploration and feasibility phase of the project is guaranteed by MIGA for USD207 million. MIGA's mandate is to promote foreign direct investment by providing political risk insurance to investors and lenders against losses caused by non-commercial risks. The guarantee was given to Strand Minerals for its equity investment in the PT Weda Bay Nickel Project.

MIGA's guarantee covers the exploration and feasibility phase of this project, for up to three years, against the risks of transfer restriction, expropriation, breach of contract and war and civil disturbance. MIGA's current board approval and guarantee covers only the exploration and feasibility phase of this project. MIGA's participation in the construction and operational phase is conditional on successful completion of 13 studies addressing social and environmental impacts of the project, further due diligence, underwriting and separate board approval. PT Weda Bay has affirmed that:

Since MIGA granted a guarantee for WBN exploration activities after a thorough due diligence in 2010, WBN provides MIGA with a quarterly reporting on its environmental and social management and an update on its progress of the ESHIA study. Every year, MIGA teams perform an annual audit on site and in neighbouring villages, including random interviews with villagers who can freely voice their opinion on the project and its social performance.²

² Letter from Erry Kuriniwan, PT Weda Bay General Manager Environment, CSR and Communication to Shelley Marshall & Dr. Kate MacDonald (15 April 2014) letter on file with authors.

It is likely that PT Weda Bay Nickel will seek further support from MIGA for the construction and operational phase when the final investment decision is made.

Communities

There are seven main villages/settlements in the District of Weda that are potentially affected by the PT Weda Bay Nickel Mine, consisting of a total population estimated at around 9474 people.

Table 2: Communities potentially affected

<i>Village</i>	<i>Approximate Population Details</i>
<i>Lelilef Woebulen</i>	Population of 752, total administrative village area of 123km ² .
<i>Lelilef Sawai</i>	Population of 689, total administrative village area of 125km ²
<i>Gemaf</i>	Population of 727, total administrative village area of 101km ² .
<i>Sagea</i>	Population of 1131, total administrative village area of 115km ² .
<i>Kobe Kulo</i>	Population of 1863.
<i>Weda</i>	Population of 3382, total administrative village area of 113km ² .
<i>Kobe</i>	Population of 930, total administrative village area of 100km ² .

(PT Weda Bay Nickel, 2009: 211). Figures are taken from 2007.

Sawai Villages

There are three seaside villages of Sawai people within the project concession: Lelilef Woebulen, Lelilef Sawai and Gemaf. The Sawai are a distinct linguistic group (Collins, 2013). Each of the three Sawai villages has approximately 300 or so families. They live in houses located close together in small villages within 50m or less of the coast, and have historically farmed in the nearby forest for their livelihood. The Sawai people are recognised by anthropologists as being indigenous to the area (Topatimasang, 2004). Their indigeneity is within the confines of the conventional understanding of the term, which refers to long-standing association with a given area of land, a traditional way of life and self-identification. Ongoing efforts to officially identify and map Indonesia's indigenous communities have not yet reached North Maluku, so the legal status of the Sawai people and their land rights remains an unresolved issue (Down to Earth, 2013).

The accommodation for mining workers is closest to the town of Gemaf. The plant is around 4km from Lelilef Sawai. Nickel mining will be within 2km of Lelilef Woebulen and Gemaf. Some sources say it will be closer once production begins. Sagea, a fourth seaside village, lies just east of the concession area, and will be significantly affected by the project's impact on water supply and general environmental conditions.

The agricultural lands of the people of Lelilef Woebulen and Lelilef Sawai are required by the company first, as these are located on the site of the proposed plant, the first aspect of the project to be constructed if final financing is approved. Our interviews suggest that the agricultural lands of Gemaf villagers will be required for the employee accommodation and mess not long after the construction phase begins.

Most families support their livelihoods primarily through using the interior forested areas for agricultural purposes. This requires the clearing of only small areas of forest, or none at all, as many agricultural products simply grow between the trees. The agriculture is largely subsistence, with a very small surplus traded within the local area. A small handful of families also fish for subsistence, and on a good day they would sell a small amount of surplus fish. Many families supplement their incomes and food sources with fish — a 2001 survey indicated that people in the studied villages (Leililef Waibulen, Sawai, Gemaf and Sagea) considered fishing as a secondary occupation — a total of 237 families were involved in fishery activities (PT Weda Bay Nickel, 2009: 221). Formal, non-agricultural employment is low, and as a consequence the cash based economy is small and marginal. These populations have little experience with managing large amounts of money and have limited access to banking services. Existing land rights in the Maluku Islands are poorly recorded, and notions of land as private property are thus also relatively new in this area (Zerner, 2013).

Tobelo Dalam

The Tobelo Dalam, sometimes called the Tugutil, are a traditional, indigenous forest community.³ They live a nomadic lifestyle, moving around the forest between Central, East and North Halmahera and living off forest products. They have little to no contact with people outside their own community. Their main channel to outsiders is through members of their community, called simply Tobelo, who have settled and now live within the *desa* (government-mandated village) system. The North Maluku Provincial Social Department aims to settle all isolated, traditional communities in order to better manage their welfare, but a significant number of Tobelo Dalam still remain living in the interior, and it is widely believed that they have no desire to settle.⁴

The Tobelo Dalam can be considered to have pre-existing customary land rights in accordance with Indonesian law. Given the Tobelo Dalam inhabit the concession area, they will be impacted

³ The term 'Tobelo' has several referents. It refers to an ethnic group of approximately 25 000 people living primarily in northern and central Halmahera and to the West Papuan language spoken by those people. It also refers to the name of a former subdistrict in northern Halmahera as well as the aggregation of villages serving as the capital of the district of North Halmahera, see C R Duncan CR. (2009) Reconciliation and Revitalization: The Resurgence of Tradition in Postconflict Tobelo, North Maluku, Eastern Indonesia. *The Journal of Asian Studies* 68: 1077-1104.

⁴ Interview with North Maluku Provincial Social Department (North Maluku, May 2013).

by the project. PT Weda Bay Nickel's main tailings dam is located in the Ake Jira watershed which is the main area where the Ake Jira Tugutil reside. The AMDAL itself finds that the mine will have a 'significant negative impact' on the livelihoods of indigenous people, and concedes that the extent to which the Tugutil people depend on resources within or close to areas to be mined is not known. The AMDAL notes it is possible that the project activities 'may hamper their movements and cause changes to livelihood patterns and distress' (PT Weda Bay Nickel, 2009: 44).

Local and international NGOs

[Friends of the Earth \(WALHI\)](#)

Up until AMAN's recent strong involvement in the case, Wahli was the main NGO coordinating the campaign around the PT Weda Bay Mine. Wahli is Indonesia's first and largest environmental organisation, founded in 1980. In 1989, Wahli joined Friends of the Earth International, an international network of environmental NGOs operating in 74 countries around the world. Wahli is largely funded by grants from foreign aid agencies and international donor organisations such as Oxfam (Nicholson, 2009: 248). Wahli has a head office based in Jakarta, and also has independent offices and grassroots constituencies located in 28 of Indonesia's 31 provinces (Friends of the Earth).

Wahli has been heavily involved with the PT Weda Bay Nickel case, and was the primary organisation that initiated the complaint to the CAO.

[Walhi North Maluku](#)

Walhi North Maluku have the closest contact with Weda Bay's affected communities. Walhi North Maluku began working on the PT Weda Bay Nickel case in 2006, when a first baseline case study was conducted in all of the villages around the mine.⁵ Although Walhi North Maluku works with community members who reject the offer of IDR8000 for land acquisition from PT Weda Bay Nickel, Walhi does not have access to the other villages, which has limited Walhi's knowledge of information about the nature of funding and compensation packages in these villages. Ismet Sulaiman, the head of Wallhi North Maluku, reported that he had received personal threats when he and his colleagues tried to enter the affected villages.⁶

[Mining Advocacy Network \(JATAM\)](#)

JATAM is a network of various Indonesian NGOs and community-based organisations, which advocates for vulnerable groups and social justice issues exclusively in relation to the mining, oil and gas industries. JATAM aims to support Indonesian communities and protect against cultural degradation and environmental destruction, brought on by widespread attraction to Indonesia's natural resources. It has advocated since 2000 for central and regional governments to place a moratorium on granting new mining licences, particularly in protected areas. As

⁵ Interview with Ismet Sulaiman (Ternate, 20 May 2013).

⁶ Ibid.

such, JATAM is of the view that Halmahera Island should not be subjected to extractive activities, and that existing licences should be audited. JATAM is inherently distrustful of the local legal process, and have consequently opted to focus on strengthening public discourse and awareness of the mining sector crisis in North Maluku in the public sphere, in order to influence government actors.⁷ JATAM is also pessimistic about the efficacy of the CAO, viewing the complaint process merely as ‘strategy to buy time so that JATAM can build a stronger network’ in the meantime.⁸

Anti-Debt Coalition (KAU)

Indonesia’s Anti-Debt Coalition (KAU) is a national coalition established in 2000 which consists of approximately 35 member organisations, including NGOs, trade unions and groups representing vulnerable minorities. KAU’s primary mission is to ensure Indonesia is free from public debt and thereby able to provide necessary social services to its citizens. KAU has prolific experience with campaigns and advocacy in relation to the IMF and the World Bank.

KAU works closely with Wahli in joint advocacy campaigns, and first became involved in the PT Weda Bay Nickel project in the middle of 2011. KAU was approached because of its expertise in relation to the World Bank group. KAU generally takes a hostile view of international financial institutions, and was thus reluctant to engage with the IFC complaints procedure. KAU did not wish for the complaint to lead to further mediation, and preferred to view the complaint as an intervention against the project and the World Bank’s involvement.⁹

People’s Coalition for Fisheries Justice (KIARA)

The People’s Coalition for Fisheries Justice (KIARA) is an NGO established in 2003, initiated by a number of civil society organisations including Wahli. KIARA became involved in the PT Weda Bay Nickel project at the time of the CAO complaint in 2011. KIARA largely viewed the CAO process as a ‘stepping stone’ to further and more effective advocacy.¹⁰

AMAN

AMAN (Aliansi Masyarakat Adat Nusantara — Alliance of Indigenous Peoples of the Archipelago) is an NGO formed by and on behalf of indigenous people living in Indonesia. AMAN was formed in 1999 by the Congress of Indigenous Peoples of the Archipelago (KMAN), which comprised over 400 indigenous leaders throughout Indonesia (AMAN). The AMAN branch in North Maluku was established in 2010, and now includes over 55 members from Sawai communities.

AMAN became involved in the PT Weda Bay Nickel case after the CAO complaint was lodged. AMAN has provided advice to the Sawai communities in relation to PT Weda Bay Nickel’s compensation packages and other advocacy issues. It is currently assisting with mapping the customary lands of the Sawai communities and Tobelo Dalam in order to ensure recognition of

⁷ Interview with JATAM personnel (South Jakarta, 15 May 2013).

⁸ Ibid.

⁹ Interview with Dani Setiawan (KAU) (Jakarta, 14 May 2013).

¹⁰ Interview with Riza Damanik (KIARA) (Jakarta, 15 May 2013).

these groups' customary rights. AMAN is emphatic in its position that the Sawai communities and Tobelo Dalam should reserve the right to give free, prior and informed consent over the lifecycle of the entire PT Weda Bay Nickel project.

LBH ProJustitia

LBH ProJustitia is a community legal aid service. There are hundreds of 'LBH' (Lembaga Bantuan Hukum, 'legal aid body') organisations operating throughout Indonesia, each operating as separate organisations. LBH ProJustitia, based in Jakarta, has represented aggrieved members of affected communities in this case, particularly the interests of the '50 000 group' from both GemaF and Lelilef Sawai, who refused to sign the compensation agreement with PT Weda Bay Nickel for IDR8000.

LBH ProJustitia report that 'the local people gave us the authority to run the case in relation to the rights on their land'.¹¹ In doing so, LBH ProJustitia decided to pursue non-judicial avenues of redress, based on its belief that Indonesia's court processes would not do justice in a dispute between a large company and the rights of marginalised people. Thus, LBH ProJustitia sent letters to various government agencies, Komnas HAM, police headquarters and NGOs. By October 2012, LBH ProJustitia had met twice with PT Weda Bay Nickel to negotiate compensation agreements for those who declined the IDR8000 offer, but was not able to reach any agreements with the company.

Key features of the case

Mining license granted

On 19 January 1998, a controversial mining licence was signed by Indonesian President Suharto, titled The PT Weda Bay Nickel Generation VII Contract of Work. This potentially lucrative mining licence was granted in respect to land located on Halmahera Island in the North Maluku Province of eastern Indonesia. According to ERAMET, the company's major shareholder, the deposits located on the island of Halmahera are part of the largest undeveloped deposits of lateritic nickel in the world, with potential for the extraction of 500 million tonnes of nickel (McLatchie, 2006). According to 2006 data, this would rank the PT Weda Bay Nickel resource as one of the largest of its type in the world (Baillie, 2006).

The 30-year Contract of Work expires in 2028, with a possibility of further extension at that time. Following 2009 amendments to Indonesian mining law (*Law 4 of 2009*), the PT Weda Bay Contract of Work required renegotiation. At the end of 2014, when our field research ended, the amendments had not yet been completed (Cahyafitri, 2014), although four of the six points of renegotiation had been agreed upon. We have been unable to find further information about negotiations concerning the Contract of Work. Phase One of construction will commence when a final investment decision is made, however, as of September 2016 this final decision had been further delayed. The future of the mine is considered in further detail below.

¹¹ Interview with Puspa Sari Dewi (Jakarta, 15 May 2013).

Local land acquisition process and displacement

The PT Weda Bay Nickel project requires displacement of Lelilef Woebulen, Lelilef Sawai and Gemaf villagers from their agricultural forest lands. This is termed economic displacement, namely displacement and associated resettlement is not planned for the residential areas of villages.

Under art 136 of the mining law (*Law 4 of 2009*), mining companies must settle land issues with those who possess land rights.¹² If they can achieve this, then, under art 162, the company is able to hold any people who then intrude on that land criminally liable, thereby preventing villagers from interfering with construction activities.¹³ If the company does not achieve this elimination of encumbrances, it runs the risk of encountering future claims against it. PT Weda Bay Nickel's approach has been to provide compensation to villagers to relinquish their rights to their agricultural land, while allowing them to remain on their residential land. In 2009 PT Weda Bay Nickel appointed independent consultants to conduct research into the market price of land in the region. This is in accordance with formal land acquisition laws. Based on this investigation, the company decided to offer IDR7000 per square metre (around USD0.55) of cultivated land in state forest areas to the people whose farming land was inside the concession and required for the construction of project infrastructure. This cash compensation figure was calculated based on present market value, established through a non-transparent system by the company with independent consultants. Crucially, it does not take into account the value of the land to the company, including the value of the nickel deposit, but rather assumes the land is nothing more than remote, forested, semi-agricultural land.

A consultation process then began involving government officials, particularly the Bupati (head of the regency government) and villagers. It should be noted that the then-governor of North Maluku has since been embroiled in allegations of corruption, and was in 2015 convicted of violations of anti-corruption laws (Sidik, 2011). After a failure to reach an agreement at village meetings in the Lelilef villages, in 2010 PT Weda Bay Nickel made an agreement in Jakarta with the village head of Lelilef Sawai. The village head negotiated the price of compensation upward from the IDR7000 initially offered to IDR8000. This amount was then presented to the villagers on a 'take it or leave it' basis. In 2011 the first compensation payments for land began.¹⁴ Since that time, allegations of intimidation and threats have surrounded the compensation process — particularly against residents who refused to accept the IDR8000 settlement. For example, one woman reported to AMAN that two police officers visited her house on a regular basis following her refusal to accept the offer. Similar accounts indicate that police intimidation on behalf of the company appears to have been rife. As of April 2014, PT Weda Bay Nickel stated

¹² The English translation of this law may refer to titleholders but the original refers to those in 'possession of rights' which would then include indigenous people's rights.

¹³ If held criminally liable under this provision, individuals may be imprisoned for up to one year or fined up to IDR100 million (approximately USD9000).

¹⁴ Compensation for productive plants began earlier than that, but compensation for land had to wait until the Ministry of Forestry changed the legal designation of the land to *areal penggunaan lain* (APL, or 'other use areas') forest. Forest areas must be designated as APL in order for private actors to legally hold land title. PT Weda Bay Nickel was not legally permitted to pay compensation for any other category of State Forest Land, as there is no possibility of the company owning such land.

that ‘91% of land claimants have been compensated for their land at the price agreed, and for their plants according to the price matrix provided by the Central Halmahera District’.¹⁵ We received information that the landowners who have accepted the compensation package did not receive a copy of the contract setting out the terms of the transfer and the compensation terms.

In late 2010, ‘negotiation’ processes started with villagers in Gemaf, however by this time PT Weda Bay Nickel was unwilling to negotiate on the price of IDR8000 per metre already agreed with the village head of Lelilef Sawai. Initially, up to 80 per cent of households in these villages rejected the IDR8000 price. This number is now reduced. In interviews with personnel from PT Weda Bay Nickel we were informed that the number was now under a dozen families in each of the Lelilef villages, and only slightly more in Gemaf. In contrast, community representatives account for 47 landowners in the Lelilef villages and up to 107 landowners in Gemaf still refusing to sign agreements.

To date, there have been no land negotiations with the Tobelo Dalam. As stated earlier in the report, PT Weda Bay Nickel has been unclear about the impact of their project, throughout its life, on the Tobelo Dalam. While the company has conducted a number of CSR livelihood studies, these have fallen short of providing sustainable alternative livelihoods. Such projects have suffered from a lack of careful planning and adequate consultation. ERAMET claims on its website that the WBN project supports a development program in the neighbouring villages aimed at improving education, health, local economy and infrastructure. No mention is made of its intentions regarding ongoing consultations with the community.

New constitutional decision may strengthen rights of affected communities

Customary rights to forests have, until recently, been weakly protected under Indonesian law. However, the handing down of the Indonesian Constitutional Court (*Ruling No 35/PUU-X/2012*) in 2012 was heralded as a landmark decision, and opened up space in which to potentially strengthen customary rights to forest areas in the country.

In *Decision No 35/PUU-X/2012*, the Constitutional Court confirmed that customary forests are forests located in indigenous territories, and could no longer be considered as ‘state forests’. The decision curtails the state’s (specifically the Ministry of Forestry’s) ability to unilaterally exercise control over forest lands by affording formal recognition of indigenous forests as a separate category. However, while customary forests are no longer considered to be territory of the state, the legal framework still does not adequately provide for the recognition of indigenous land title. In light of the Constitutional Court decision, indigenous rights groups have proposed a new framework for indigenous land rights at the national level. These reforms have not yet been enacted. It is possible that the adoption of the *Indigenous Peoples’ Law* may alter the legal dynamics of this dispute. The development of this mode of protection of customary rights will be discussed further below.

¹⁵ Letter from Erry Kuriniwan (PT Weda Bay General Manager Environment, CSR and Communication) to Shelley Marshall and Kate MacDonald (15 April 2014).

Future of mine still uncertain

There are a number of factors creating uncertainty about the mine. Firstly, shareholders must decide whether to invest in or otherwise financially support the construction phase. This includes ERAMET and Mitsubishi, the main shareholders, but is also likely to include the IFC and/or MIGA, and possibly COFACE and NEXI, the French and Japanese export credit agencies. On 18 June 2014, Mitsubishi announced that it would invest over USD5 billion into the PT Weda Bay project, and that the nickel mining and smelter development would begin operations at the end of 2014 (Amin, 2014). In February 2014, ERAMET reported it would not make a final investment decision, after benchmark prices of nickel dropped in 2013 due to global oversupply. In 2014, global nickel prices rose 33 per cent (Els, 2014) but since the commodity's highest price in May 2014, the price has dropped again by 54 per cent (as of June 2016).¹⁶ In April 2016 it was reported that Mitsubishi had agreed to sell back to ERAMET its 30 per cent shareholding in Strand (Mitsubishi Corporation, 2016). At the end of 2016, ERAMET was seeking new partners for the project.

Secondly, the Contract of Work must be renegotiated following 2009 amendments to Indonesian mining law (*Law 4 of 2009*). At the end of 2014, the amendments had not yet been completed, although four of the six points of renegotiation have been agreed upon. The two remaining sticking points of negotiation, namely divestment requirements and government revenues (Gandataruna and Haymon, 2011), are still under discussion between PT Weda Bay and the government. (Rambu Energy, 2014). We have been unable to find further updates concerning negotiations over the Contract of Work.

Recent divestment laws also pose a risk to the project. Under Indonesia's 2012 divestment regulations (*No 24 of 2012*), the level of divestment of foreign ownership depends on the type of mine. Companies that conduct mining operations must divest their shareholding gradually, so that Indonesian shareholders must have 51 per cent of its share on the tenth year — meaning foreign shareholding must be reduced to a maximum of 49 per cent after the first 10 years of production, with a staged divestment process beginning after five years (Setiono, 2012). For companies that have an integrated smelter (as the PT Weda Bay Nickel project does), it appears the companies must ensure only 40 per cent divestment of foreign investments in the ten year period (Berita Satu, 2014).

A fourth factor affecting the mine's future is that in addition to negotiations with the central government over the Contract of Work, the company must also negotiate with provincial and regional governments concerning benefit sharing. Ambiguity regarding the nature and extent of the delegation of authority from central to regional governments has encouraged different interpretations as to what authority they hold, resulting in conflict between the various levels of government and with Contract of Work holders (Baillie, 2006). The company has been in negotiations with regional government to agree on how the various benefits from the operation

¹⁶ IFC Compliance Advisor Ombudsman, 'Ombudsman Assessment Report: Complaint Regarding the MIGA PT Weda Bay Nickel Project (#8113) Halmahera Island, North Maluku, Indonesia' (Office of the Compliance Advisor/Ombudsman (CAO), 2011).

should be shared. Lack of institutional capacity at the lower levels of government has prolonged negotiations (Gandataruna and Haymon, 2011).

Finally, PT Weda Bay may also need to submit a revised AMDAL. Pursuant to *Regulation 27 of 2012* (art 50, sub-s 2(e)), it appears that where development of a project does not commence within three years of obtaining an environmental permit the developer must lodge for further approvals, which in some cases require a revised AMDAL. In addition to the AMDAL, additional impact assessments may be required by particular investors. The Environmental, Social and Health Impact Assessment (ESHIA) is a more detailed impact assessment than the AMDAL. ESHIAs are required for projects supported by the IFC, MIGA and financiers that have signed up to the Equator Principles, which is a credit risk management framework for determining, assessing and managing environmental and social risk in project finance transactions. A Bankable Feasibility Study is another form of assessment generally required by investors. It sets out in an objective way the strengths and weaknesses of the proposed project, including risks to the environment, communities, and health.

These factors taken together may have the consequence of delaying further construction and the extraction phase of the project's life cycle.

Table 3: Required Impact Assessments

Study	Required by	Covers	Status
AMDAL	Indonesian government	A limited range of social and environmental impacts	Approved June 2009
Bankable Feasibility Study	Investors	Economic indicators, and project costs and risks, including social, health and environmental costs and risks. The ESHIAs outlined below form part of the Bank Feasibility Study.	Not yet released
ESIA (Environmental and Social Impact Assessment)	Investors that require adherence to IFC Performance Standards or Equator Principles — Prepared for MIGA	Exploration and feasibility phase; and first phase of construction. According to PT Weda Bay Nickel, ‘This ESIA study serves as an advance, abbreviated, and focused version of the BFS Environmental and Social and Health Impact Assessment (ESHIA), for the purposes of pre-testing the ability of the WBPro-	Exploration and Development ESIA released, dated February 2010

		ject to complete the Equator Principles/Performance Standards Environmental and Social Clearance process. It was never intended that the ESIA act as a substitute for the comprehensive ESHIA, which is currently being undertaken and details of which are set out below. ¹⁷	
Bankable Feasibility Study	Investors	Economic indicators, and project costs and risks, including social, health and environmental costs and risks. The ESHIAs outlined below form part of the Bank Feasibility Study.	Not yet released
ESIA (Environmental and Social Impact Assessment)	Investors that require adherence to IFC Performance Standards or Equator Principles — Prepared for MIGA	Exploration and feasibility phase; and first phase of construction. According to PT Weda Bay Nickel, ‘This ESIA study serves as an advance, abbreviated, and focused version of the BFS Environmental and Social and Health Impact Assessment (ESHIA), for the purposes of pre-testing the ability of the WBProject to complete the Equator Principles/Performance Standards Environmental and Social Clearance process. It was never intended that the ESIA act as a substitute for the comprehensive ESHIA, which is currently being undertaken and details of which are set out below. ¹⁷	Exploration and Development ESIA released, dated February 2010
LPC ESHIA (Land Preparation for Construction Project Environmental, Social and Health Impact Assessment)	Investors that require adherence to IFC Performance Standards or Equator Principles	Environmental, Social and Economic Impacts of the Land Preparation for Construction Project up to January 2012.	Completed in November 2011 and available on MIGA website
Full ESHIA (Environmental, Social and Health Impact Assessment)	Investors that require adherence to IFC Performance Standards or Equator Principles	Environmental, Social and Economic Impacts of the project	Begun in 2009, not yet released. MIGA’s Environmental and Social Review Summary (ESRS) of February 2013 says that ‘Weda Bay Nickel are in the process of preparing a complete ESHIA’. Evidently WBN did not meet the 2012 deadline they had put on their website.

¹⁷ PT Weda Bay, *Company Website* (2011) <<http://www.wedabaynickel.com/en/a-world-class-project/history/2009-2011/>>.

Table 4: Summary of Key Dates in the Project's Development

Date	Events
1998	19 January — Signing of the Contract of Work (CoW) by PT Weda Bay Nickel (WBN) based on Presidential Decree No B.53/PRESS/1/1998. CoW area was initially 120 500 hectares. ¹⁸
2004	PT Weda Bay Nickel receives an exemption, by Presidential Decree, from Law No. 41 (1999), enabling PT Weda Bay Nickel to conduct open-cast mining in protected forest until Contract of Work expires. ¹⁹
2006	ERAMET became a major shareholder of WBN.
2008	Preparation of the AMDAL. ²⁰ First environment, health and safety corporate audit conducted with ERAMET at the helm, leading to identification of weaknesses in the AMDAL, and gaps between AMDAL and the ERAMET requirements for an international Bankable Feasibility Study for the World Bank Group. This audit was used as the basis for setting the ESHIA program scope. ²¹
2009	AMDAL approved by Indonesian authorities. ²² Mitsubishi Corporation agrees to acquire 33.4 per cent of Strand Minerals. (Indonesia) Pte Ltd. ²³ Land compensation process begins in consultation with government authorities, involving community consultation and negotiation, land survey, claimant identification, verification and census. ²⁴ Work begins on ESHIA with private company ERM. ²⁵

¹⁸ Ibid.

¹⁹ ERAMET, 'Weda Bay Nickel — Indonesia: One of the Largest Nickel Deposits in the World' (2016) <<http://www.eramet.com/en/projects/weda-bay-nickel-indonesia>>; PT Weda Bay Nickel, above n 19, 22.

²⁰ ERAMET, above n 21; PT Weda Bay, above n 19, 22.

²¹ ERAMET, above n 21; PT Weda Bay, above n 19, 22.

²² ERAMET, above n 19.

²³ PT Weda Bay, above n 19, 22.

²⁴ Ibid.

²⁵ IFC Compliance Advisor Ombudsman, 'Ombudsman Assessment Report: Complaint Regarding the MIGA PT Weda Bay Nickel Project (#8113) Halmahera Island, North Maluku, Indonesia' (Office of the Compliance Advisor/Ombudsman (CAO), 2011).

Date	Events
2010	MIGA issued a guarantee of USD207 million to Strand Minerals for its equity investment in the PT Weda Bay Nickel Project. ²⁶ Land inventory and compensation process launched (PT Weda Bay Nickel: 22).
2011	ESHIA for the Land Preparation for Construction project released. Work begins with Ministry of Forestry to enable commencement of compensation and land titling. ²⁷
2014	Indonesia introduces new regulations regarding mining projects that change the divestment requirement for foreign direct investment firms. There are renegotiations with Weda Bay Nickel to bring its Contract of Work into accordance with the new regulations. Amendments to the contract are expected to be settled by the end of the year.
2016	Mitsubishi sells its entire shareholding in Strand Minerals back to ERAMET. ERAMET seeks new partners to invest in the Weda Bay Nickel project. Meanwhile nickel prices remain low.

Human Rights Grievances

The most serious human rights abuses reported to have been experienced by people affected by the project relate to failure by PT Weda Bay Nickel to attain free, prior and informed consent and conduct meaningful consultation before the relinquishment of land rights, and the inadequacy of compensation packages currently being offered by PT Weda Bay Nickel for the economic displacement of three Sawai villages: Lelilef Woebulen, Lelilef Sawai and Gemaf. The compensation package fails to meet a number of international norms and standards regarding compensation. The concerns raised in this report are reflected in the 2011 findings of Komnas HAM, the Indonesian Human Rights Commission.

In particular, this report raises concerns that PT Weda Bay Nickel has not provided sufficient information to affected communities about the likely social, economic and environmental impacts of the project to allow them to make an informed decision in relation to relinquishment

²⁶ PT Weda Bay, above n 19.

²⁷ Interview with Pak Umar Alting (Ternate, 21 May 2013)

of land rights. Nor have the legal implications of the agreements they have signed in relation to compensation been properly explained.

In preparing this report, we conducted a comprehensive review of the documents already released by PT Weda Bay Nickel at the time of our research, as well as interviews with PT Weda Bay Nickel personnel and members of the communities. However, evidence gaps remain in relation to exactly what consultation has occurred with Sawai communities in order to meet standards in relation to free, prior and informed consent and meaningful consultation. There are also gaps in information about the current or future impact of the project on the Tobelo Dalam. Although PT Weda Bay Nickel purports to have conducted a number of studies on Tobelo Dalam, their findings will not be known until the public release of the company's ESHIA. The *available* evidence suggests that PT Weda Bay Nickel is in breach of free, prior and informed consent, of meaningful consultation and compensation standards. PT Weda Bay Nickel rejects this accusation, but has been unable to demonstrate that it is in full compliance with both international norms and IFC Performance Standards regarding free, prior and informed consent, consultation and compensation.

The following section provides a summary of each of the principle human rights which have been breached in relation to the PT Weda Bay Nickel project to date.

Failure to provide for free, prior and informed consent or consultation

As a consequence of its support from MIGA, PT Weda Bay Nickel is required to adhere to the IFC Performance Standards, which require free, prior and informed *consultation* for communities facing involuntary physical or economic displacement (Performance Standards 1 and 5), and free, prior and informed *consent* from indigenous communities before the project proceeds (Performance Standard 7).

PT Weda Bay Nickel has expressed a commitment to consultation with the Sawai communities, and to the principles and procedures of free, prior and informed consent from the Tobelo Dalam ((ERAMET), 2013). For instance, the company stated to the IFC Compliance Advisor Ombudsman that it will 'continue [the] disclosure of information to Project Affected Communities in a manner that is accessible, understandable and culturally acceptable' : (This was later quoted in the CAO's assessment report on the case: IFC Compliance Advisor Ombudsman, 2011). However, our research found that:

- a) PT Weda Bay Nickel has consulted to a degree with affected Sawai communities, but the consultation process as we understand it suffers serious shortcomings;
- b) PT Weda Bay Nickel has, to our knowledge, conducted almost no consultation with the Tobelo Dalam, and has therefore not acquired their consent for the project's activities in their traditional lands;
- c) PT Weda Bay Nickel has not addressed the indigeneity of the Sawai communities, which would entitle the Sawai communities to the benefit of both free, prior and informed consultation *and* consent, and;
- d) PT Weda Bay Nickels' compensation package for land acquisition is neither adequate nor appropriate.

Failure for negotiations to be conducted or consent to be given freely

International norms explored later in this research report require that consultation and negotiations be conducted freely, meaning that affected communities are able to express concerns and objections about a project. This requires both formal opportunities, *and* an informal environment that is conducive to free expression of concerns and objections (Anaya, 2005; Carino, 2005; Colchester and Ferrari, 2007; Colchester and MacKay, 2004; McGee, 2009). Free, prior and informed consent does allow opportunity for a company to persuade affected communities that the benefits of a project will outweigh negative impacts. However, our research found that actions of PT Weda Bay Nickel and local government officials exceed persuasion, and amount to pressure. In an interview, Pak Umar Alting of the North Maluku legislature raised concerns that the way that information was presented to communities presented the land acquisition as a fait accompli and did not inform them of their rights or entitlements:

Pak Alting: That's right, but from this letter [re: compensation] it seems like WBN only want to intimidate the community, telling them that all their land belongs to the state, and that if there are any communities with investments there now, it doesn't matter — it's just state land. The letter says that because this is entirely state land, the communities basically don't have any entitlements or any rights, and then because the state has given the concession rights to WBN, and now all this land is under company control. This is not for WBN! WBN is from the beginning just intimidating the communities.²⁸

Our research revealed an oppressive environment for those who were resisting signing compensation agreements with PT Weda Bay Nickel. Interviews found that those who continue to speak out against the project fear for their safety. Indeed, those who are opposed to the current compensation package would not consent to being named as respondents to this study, for fear of retribution. At the request of these interviewees, interviews were conducted secretly, at a safe location.

We also found that inappropriate modes of persuasion were deployed by PT Weda Bay Nickel. For example, the company often elicited the support of religious leaders to influence non-co-operating families, and used its understanding of kinship networks within communities to encourage family members to influence each other. Further, in some circumstances PT Weda Bay Nickel chose which village officials to negotiate with on the basis of their willingness to accept and promote compensation, rather than their elected authority in the village. A number of interviewees suggested that people had accepted compensation because they feared if they didn't they would be punished with the move of company-built infrastructure and jobs away from their villages. They worried that they would economically disadvantage the whole village by rejecting compensation agreements.²⁹ Inappropriate incentives have also been offered to resisting families, for example inflated compensation for productive, food-bearing plants, over which the PT Weda Bay Nickel land acquisition officer has some discretion.

²⁸ Though some families demonstrate an appreciation for the value of the infrastructure in terms of providing economic opportunities, this does not excuse PT Weda Bay Nickel from the other obligations outlined in this analysis section.

²⁹ Interview with Gemaf village head (Gemaf, May 2013). The Gemaf village head has thus far managed to reject the Bupati's pressure on the basis of regulations that require democratic election, rather than appointment by the Bupati. Quoting permission granted.

An additional source of pressure has come from government and its agents at various levels. Government officials at all levels and village heads are strongly in favour of the project. Our research suggests that this is largely because they are optimistic about the development benefits it will bring to the area. On 27 May 2011 the PT Weda Bay Nickel project was pronounced as being part of the Master Plan for Acceleration and Expansion of Indonesia Economic Development (MP3EI). This has increased pressure by government officials on local communities to accept compensation agreements. Regardless of the development benefits for the area, this government pressure does not create an environment in which affected people can give or withhold their consent freely. For instance, a village head who rejects the compensation agreement with the company reported that the Bupati had threatened to have him replaced with someone who favoured the agreement with the company.³⁰ The findings by Komnas HAM that BRIMOB, a paramilitary police unit, had intimidated some villagers into signing land compensation agreements against their will, provides further strong evidence that negotiations have not occurred freely. Furthermore, LBH ProJusticia, a community legal service that represented aggrieved community members, have made 14 complaints to the police regarding violence and destruction of property by PT Weda Bay Nickel.

A further source of pressure has occurred between villagers. The process of compensation has led to social divisions between community members. Community members who have accepted compensation agreements and whose livelihoods are now dependent on the project, believe (incorrectly) that those families who have not accepted compensation are delaying the operationalisation of the project and thus the enjoyment of benefits such as more jobs and philanthropic corporate social responsibility programs. This is leading to significant pressure from these villagers on those families who are still resisting, and also raises concern about the circumstances under which the families who signed compensation agreements did so.

Finally, the historical political and social environment of the region may also be contributing to limiting the freedom with which affected families can engage in consultation and give their consent for relinquishment of their land rights. Between 1999 and 2002 there was sectarian violence between Muslims and Christians that is widely seen to be caused by political and economic factors, as well as religious antagonism. Christian interviewees to our study reported hiding in the forest for around six months in 1999, until peace was restored.³¹ More recently, there have been peaceful relations between village members and villages in the project area. However, the authors of this report are gravely concerned that conflict and sectarian violence could be exacerbated by the PT Weda Bay Nickel project. Christian villages have been more likely to resist compensation than Muslim villages, leading to risks of resentment between community members along religious lines.

In addition to various sources and modes of pressure, this report finds that the process of offering compensation falls short of being ‘free’ in other respects. After negotiations with the village head of Lelilef Sawai concluded, compensation agreements were offered to individual land holders on

³⁰ One anthropological study suggests that the company played a positive role in the restoration of peace: John Braithwaite and Leah Dunn, ‘Maluku and North Maluku’, in John Braithwaite (ed), *Anomie and Violence: Non-Truth and Reconciliation in Indonesian Peacebuilding* (ANU E-Press, 2010).

³¹ Interview with Munadi Kilkoda (Jakarta, 31 May 2013).

a ‘take it or leave it basis’, with no scope for broadening the topic of negotiations or amending agreements. There has not been an opportunity for free negotiation. PT Weda Bay Nickel has explicitly rejected the idea of negotiating directly with villagers after its first failed attempt. This may also be a breach of Indonesian contract law. Article 1338 of the *Indonesian Civil Code* provides that parties should agree to terms of contracts voluntarily. Parties to negotiations should have the opportunity to put counter-offers. By offering compensation agreements on a ‘take it or leave it basis’, and in light of the immense pressure placed on affected communities, PT Weda Bay Nickel very clearly failed to honour these obligations. Munadi Kilkoda of AMAN reflected the problems inherent in PT Weda Bay Nickel’s failures in these respects:

It should be FPIC [free, prior and informed consent], not CSR [corporate social responsibility]. It’s my village, my land! It should be a fair division of profits. You have the money for the investment, I have the land. So the land and plants are owned by the Sawai, not by France or Japan or Jakarta. Resources are a basic human right.³²

Failure to provide information prior to the project’s commencement

Under the IFC Performance Standards 1, 5 and 7, PT Weda Bay Nickel is obliged to provide adequate information to affected communities with sufficient time for it to be read, absorbed and discussed, and for communities to seek further information before any activities take place. PT Weda Bay Nickel claims that it is ‘maintaining a transparent process, which is open to the scrutiny of both local stakeholders and the local government representatives’ (Indonesia: xiv). However, our research found that there has been a general lack of information readily available about the impact of the project, a particular lack of relevant information available in forms appropriate for the affected communities, and the information has not been provided well enough in advance of the implementation of the various phases of the project.

The principle of information being delivered *prior* to action has not been respected. Information in the form of an AMDAL, community meetings, and a PT Weda Bay Nickel information centre was only provided to communities after the signing of the Contract of Work with the government of Indonesia, after the construction of site offices, and at broadly *the same time* (in 2009) as the commencement of negotiations regarding compensation.

The ESHIA, the study that will present the most detailed and in-depth assessment of the impact of the project, is particularly important in this respect. PT Weda Bay Nickel states that it is preparing a number of studies and plans for the ESHIA for Phase One of construction. These include an Integrated Social Programme consisting of a Public Consultation and Disclosure Plan (PCDP), a Land Acquisition and Resettlement Action Plan (LARAP), a Community Social Assessment (CSA), a Community and Indigenous Peoples Development Plan (CIPDP) and a Cultural Heritage Preservation Plan (CHPP) (IFC Compliance Advisor Ombudsman, 2011: 5). As such, these studies will provide important information for communities about what to expect as the project proceeds

³² At full capacity after the second phase ramp-up period, the plant is designed to treat approximately 4.5 million tonnes of dry ore each year, producing over 65 000 tons of nickel and 4 000 tonnes of cobalt: PT Weda Bay Nickel, *A Staged Implementation Approach* (2012) <<http://www.wedabaynickel.com/en/a-world-class-project/a-staged-implementation-approach/>>.

through the feasibility stage, and into the first phase of construction. We have not been able to find any commitment to the details or release date for an ESHIA for Phase Two of construction.³³

We have not been able to find any report of the studies or plans undertaken for the ESHIA for Phase One of construction, and we are concerned about the lack of public commitment to a release date for an ESHIA for Phase Two of construction, extraction and production. Although we believe the ESHIA that contains the assessments and mitigation plans for Phase One of construction has been concluded, it has not yet been released for public scrutiny.

With a final investment decision for Phase One of Construction due in 2014,³⁴ release of the ESHIA at this late stage will be meaningless. Affected communities and other interested parties, such as environmental and indigenous support NGOs need adequate time to read and absorb the information in the complex ESHIA prior to the final investment decision so that adequate opportunity is provided to influence that decision. Assessment of the later stages of the project appears not yet to have occurred, making it impossible for the community to make an informed decision based on information about the project's impact throughout its life cycle.

Furthermore, *the form* in which information has been delivered is not appropriate. PT Weda Bay have conducted public consultations on the AMDAL, have opened an information centre in their site offices, and have community liaison officers who have regular communication with affected communities. However, despite these efforts, our research found that communities and other interested parties, such as local NGOs, remain unclear about the full potential impact of the project because these forms of information delivery have not been adequately tailored to the needs of these groups. Different stakeholders in the mine have varying education levels and knowledge of mining. Many of the local villagers and the Tobelo Dalam have never left their local area, and therefore know little of mines.

In our interviews with community members, they raised many concerns about the project and areas of uncertainty. Of most relevance in relation to the issue of the provision of information, they voiced uncertainty about whether or not they will be displaced from their residential land in the future, the impact of the project on water supplies and the river, the impact of the project on fish stocks and access to fishing areas. These concerns relate directly to PT Weda Bay Nickel's failure to provide comprehensive information about the entire lifecycle of the project. Interviews also revealed low levels of understanding about legal implications of the compensation agreements by those affected by the project.

This report also raises doubts about whether official processes, such as the AMDAL process, have occurred in way that have allowed sufficient time for consideration, or been shared with the community in a manner which is comprehensible to them. This was a concern addressed in the Compliance Advisor Ombudsman complaint. So as to better comply with the IFC Per-

³³ Involving construction of a plant with capacity to produce 35 000 tonnes of nickel per year, followed by an expansion of an additional 30 000 tonnes capacity when the first phase plant is operating optimally: *ibid*.

³⁴ Other guidelines which make similar recommendations include those developed by the Food and Agriculture Organization of the United Nations, and the World Bank. See Food and Agriculture Organization of the United Nations, *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security* (2012); World Bank, *Operational Policy 4.12: Involuntary Resettlement* (2001).

formance Standards, the Compliance Advisor Ombudsman proposed that ‘WBN may consider further developing and enhancing its ongoing consultations with local community members and discuss the issues in the original complaint and Section 4.2 above as part of the ESHIA preparation’ (PT Weda Bay Nickel). We remain concerned that these steps have not taken place.

Despite these problems with the provision of information about the total impact of the project, communities have already been asked to agree to compensation. Instead of being fully informed about their decisions, only a *limited* amount of information was provided *concurrently* with the project’s advancement, rather than *prior* to it. Furthermore, that the IFC Compliance Advisor Ombudsman Compliance team declined to address this issue is very concerning.

Failure to adequately and meaningfully consult

PT Weda Bay Nickel has failed to meaningfully and adequately consult with Sawai communities prior to the project’s impact, and prior to agreements being made which result in their economic displacement.

PT Weda Bay Nickel purports to be committed to meaningful consultation with affected communities and ensuring that consultation should take place before any impact is experienced and that there should be no coercion involved. The company states that:

WBN is committed to free, prior and informed consultation with Project Affected Communities. WBN will continue to disclosure of information to Project Affected Communities in a manner that is accessible, understandable and culturally acceptable (PT Weda Bay Nickel: 19).

Further, PT Weda Bay Nickel has implemented several communication and consultation strategies. These are meetings with affected communities and the opening of an information centre to highlight the impact and benefits of the project. The Company described their consultation processes with the Sawai communities (in a response to the IFC Compliance Advisor Ombudsman regarding a complaint discussed further below) in the following manner:

During the exploration and feasibility stage WBN [PT Weda Bay Nickel] consults on a daily basis with those communities directly affected by WB Project activities. In addition WBN holds regular Community Forums (held within villages) in which the status of the WB Project is discussed and details of current activities and potential impacts are disclosed. At the end of each such forum, the floor is opened for discussion on topics of community concern which relate to the WB Project.

In addition, WBN has developed an Information Centre in order to provide further disclosure of the WB Project to Project Affected Communities, Government Officials and interested parties. Since the Information Centre officially opened in December 2010, it has seen over 650 visitors, including local employees, community groups and individuals, school groups and Government Officials (PT Weda Bay Nickel: 19).

However, as a result of the problems related to the freedom of the consultation processes, and the timeliness and quality of information (both described immediately above), our research

found that though PT Weda Bay Nickel has engaged in various forms of consultation, this has not met international norms or the requirements of the IFC Performance Standards.

There is clear guidance available on what constitutes meaningful consultation, when consent (and not just consultation) is required and also what adequate compensation entails. Key elements of this material are discussed below.

IFC Performance Standard 1 provides the most explicit account of what is required in terms of consultation:

Box 1: IFC Performance Standard 1 on Consultation

Paragraph 30 (extract): When Affected Communities are subject to identified risks and adverse impacts from a project, the client will undertake a process of consultation in a manner that provides the Affected Communities with opportunities to express their views on project risks, impacts and mitigation measures, and allows the client to consider and respond to them. ... Effective consultation is a two-way process that should: (i) begin early in the process of identification of environmental and social risks and impacts and continue on an ongoing basis as risks and impacts arise; (ii) be based on the prior disclosure and dissemination of relevant, transparent, objective, meaningful and easily accessible information which is in a culturally appropriate local language(s) and format and is understandable to Affected Communities; (iii) focus inclusive engagement on those directly affected as opposed to those not directly affected; (iv) be free of external manipulation, interference, coercion, or intimidation; (v) enable meaningful participation, where applicable; and (vi) be documented. The client will tailor its consultation process to the language preferences of the Affected Communities, their decision-making process, and the needs of disadvantaged or vulnerable groups. If clients have already engaged in such a process, they will provide adequate documented evidence of such engagement.

Paragraph 31: For projects with potentially significant adverse impacts on Affected Communities, the client will conduct an Informed Consultation and Participation (ICP) process that will build upon the steps outlined above in Consultation, and will result in the Affected Communities' informed participation. ICP involved a more in-depth exchange of views and information, and an organized and iterative consultation leading to the client's incorporating into their decision making process the views of the Affected Communities on matters that affect them directly, such as the proposed mitigation measures, the sharing of development benefits and opportunities, and implementation issues. The consultation process should (i) capture both men's and women's views, if necessary through separate forums or engagement, and (ii) reflect men's and women's different concerns and priorities about impacts, mitigation mechanisms, and benefits, where appropriate. The client will document the process, in particular the measures taken to avoid or minimize risks to and adverse impacts on the Affected Communities, and will inform those affected about how their concerns have been considered.



Weda Bay.

Photo: Samantha Balaton-Chrimes

A large body of research and international standards and guidelines, including IFC Performance Standard 1 in Box 1 above, has established that meaningful consultation requires more than procedural compliance and one-way communication. Rather, meaningful consultation requires the development of a particular quality of relationship between all stakeholders, such that affected communities are able to meaningfully question and contest the existence and terms of a project. (Anaya, 2011; Carino, 2005; Colchester and Ferrari, 2007; McGee, 2009).

In achieving this particular quality of relationship, it must be recognised that there is a significant power imbalance between affected communities and well-resourced corporations, as the communities are likely to be disadvantaged by their relative skills, networks and inexperience in negotiating in legal terms over technical issues.

In addition, the company must genuinely listen, understand *and respond to* the communities' concerns, including by altering their plans and activities where necessary. Meaningful consultations should have documented and agreed outcomes which are revisited and renegotiated as the project evolves and the communities' needs change. Meaningful consultation is much more than the one-way provision of information from the company to the community, and an effort to persuade the community of the benefits of a project, though these can be *part* of a meaningful consultation process.

The World Commission on Dams sums this up when it defines meaningful consultation, which it calls 'Negotiated Decision Making Processes' as

A negotiation process is one in which stakeholders — identified through the Stakeholder Analysis — have an equal opportunity to influence decisions. Negotiations should result in demonstrable public acceptance of binding and implementable agreements and in the necessary institutional arrangements for monitoring compliance and redressing grievances. All stakeholder forum members should share a genuine desire to find an equitable solution and agree to be bound by the consensus reached ((World Commission on Dams, 2000: 280).

In 2000, the World Commission on Dams published guidelines on how to conduct meaningful consultations.³⁵ These are summarised in Box 2:

Box 2: World Commission on Dams 2000 Guideline for Negotiation

Adapted from (World Commission on Dams, 2000).

The following are required during the consultation process:

- Representation of stakeholders, with representatives chosen through a free process of selection, ensuring the effective and legitimate representation of all interests.
- Integrity of internal community processes, such that internal community processes remain free of division and coercion, recognise differences and conflicts, and remain free of external manipulation.
- Adequate time is provided for communities to digest and discuss issues
- Special provisions for prior, informed consent for indigenous groups
- Addressing power imbalances — Authorities (usually governments) should make available adequate financial resources to enable stakeholder groups who are politically or financially weak, or who lack technical expertise or organised representation to participate effectively in the process. These resources may include financial support to representatives for logistics, for income foregone, for capacity building and for requesting specific technical advice.
- Transparency is ensured by jointly defining criteria for public access to information, translation of key documents and by holding discussions in a language local people can understand.
- Negotiations are assisted by a facilitator or mediator, where stakeholders request it, selected with the agreement of the stakeholders.

For this to be a legitimate process, the stakeholders should:

- agree on the appropriate structures and processes for decision-making, the required mechanisms for dispute resolution (including any third party involvement), and the circumstances in which they will be initiated;
- agree that the interests at stake and legitimate community needs are clearly identified, in particular on the basis of relevant rights and risks;

³⁵ Interview with Dani Setiawan (KAU) (Jakarta, 14 May 2013).

- ensure that the available alternatives, their relevant consequences and uncertainties are given full consideration;
- guarantee access to all relevant information to the stakeholder forum in an appropriate language; and
- at the outset, agree on the timeframe for the key milestones within the decision-making process.

Our research found that affected Sawai villagers have not experienced PT Weda Bay Nickel's consultation efforts — including the public meetings, liaison officers and information centres, as consultative in a meaningful manner in relation to their economic displacement. Our research suggests there has not been adequate opportunity for Sawai villagers to voice opinions and raise queries about the nature and impact of the project itself with PT Weda Bay Nickel. Dani Setiawan from the Anti-Debt Coalition gave the following impression of one particular meeting between the CAO, communities, NGOs and government representatives:

The climate of the meeting is not very conducive for the peoples to speak what they want. In Ternate there was one meeting between the community, the government and the NGOs. The people don't want to say anything, or at least not the whole story.³⁶

This is particularly pertinent in relation to changes in land rights and the form and amount of compensation. As recounted in the previous section of this report, those that have voiced concern about the content of agreements with the company have been treated as dissidents and placed under considerable pressure. Yet this process of raising concerns is a crucial aspect of dialogue and thorough consultation.

Failure to Gain Consent

PT Weda Bay Nickel has publicly committed to the principles and procedures of free, prior and informed consent for the Tobelo Dalam,³⁷ and recognises that as a vulnerable group they require special attention in terms of 'consultation and community development' (PT Weda Bay). However, to our knowledge, there has been no systematic consultation with the Tobelo Dalam that could lead to consent in line with IFC Performance Standard 7.

There is some ambiguity over whether consent must also be gained from the Sawai people under IFC Performance Standard 7. This hinges on whether they are considered to be indigenous people. Under conventional definitions of the term, which refer to longstanding association with a given area of land, a traditional way of life, and self-identification, it seems likely that the Sawai

³⁶ Letter from Catherine Tissot-Colle (ERAMET) to Les Amis de la Terre France, 2 July 2013 <http://www.amisde-la-terre.org/IMG/pdf/letter_to_friends_of_the_earth_-_walhi_-_07213.pdf, accessed 20 September 2013>.

³⁷ Interview with Munadi Kilkoda (Jakarta, 31 May 2013).

are indigenous. Until ongoing efforts to identify and map Indonesia's indigenous communities reach North Maluku (and are engaged in by local authorities in the province), this remains an important unresolved issue for PT Weda Bay Nickel (Down to Earth Indonesia). Munadi Kilkoda, director of AMAN North Maluku and a member of the Sawai community 'Desa Mesa', noted that the local identity and local wisdom of the Sawai is gradually changing because of modernisation.³⁸ As a result, the forms in which the Sawai community connects socially and how they manage natural resources is becoming increasingly less traditional.

IFC Performance Standard 7 and the UN Declaration on the Rights of Indigenous Peoples, to which Indonesia is a signatory, require that developments such as the PT Weda Bay Nickel project require free, prior and informed consent from any indigenous people affected by the project. Consent, as opposed to consultation, requires that indigenous peoples be able to veto a project (Anaya, 2005; Carino, 2005;

Colchester and Ferrari, 2007; Colchester and MacKay, 2004; McGee, 2009). The leading guideline in this area, from the World Commission of Dams, is explicit about what is required in this regard. These guidelines reinforce the notion that consent requires the development of an equal and meaningful, communicative relationship between parties, like that required for consultation. See Box 3 for further details.

Box 3: Key excerpts from the World Commission on Dams Guideline for Free, Prior and Informed Consent

(World Commission on Dams, 2000: 281–282).

- Free, prior and informed consent is 'more than a one-time contractual event — it involves a continuous, iterative process of communication and negotiation spanning the entire planning and project cycles'.

'Effective participation requires an appropriate choice of community representatives and a process of discussion and negotiation within the community that runs parallel to the discussion and negotiation between the community and external actors.'

- 'It is inappropriate to set rigid guidelines or frameworks, as these must be negotiated as the process proceeds.'

In October 2010, PT Weda Bay Nickel made the following statement, explaining its attempts to engage with the Tobelo Dalam, in its response to the Compliance Advisor Ombudsman complaint:

³⁸ World Bank, above n 36.

As part of exploration activities, WBN has had intermittent and irregular interaction with the Tobelo Forest Community. These interactions have generally been of a peaceful nature and typically led to the exchange of food such as processed rice, for the forest produce of the Tobelo Forest Community, such as bananas and cassava. Currently WBN recognises the Tobelo Forest Community as a vulnerable group within the WB Project Affected Communities. As such they require special attention in terms of consultation and community development. Assessment of potential impacts on their lifestyle and livelihood, along with plans for on-going consultation and community development relating to the Tobelo Forest Community will be documented as part of the ESHIA (PT Weda Bay Nickel: 18).

This account by PT Weda Bay Nickel of its actions in relation to the Tobelo Dalam falls short of international standards in important ways in relation to acquiring free, prior and informed consent. The discussion in the preceding section of PT Weda Bay Nickel's consultation practices with Sawai communities suggests the same conclusion for them.

Inadequate compensation

The process of negotiating compensation, and the final agreements offered to affected Sawai families by PT Weda Bay Nickel are described earlier in this report, under the 'land negotiations' section. In this section, we explain the serious shortcomings of both the process and the final compensation package on offer.

It is well acknowledged that economic displacement and a rapid shift to a cash economy and wage labour livelihood can have negative consequences for communities (Cernea, 1997; Wet, 2006; Bisht, 2009; Tan et al., 2005; Thukral, 1996) and indigenous people (Anaya, 2011; Anaya, 2012b; Anaya, 2012a), particularly for women. These include a significantly increased risk of impoverishment as production systems are dismantled, and productive livelihood resources are lost. Further, people find their environment altered in ways that render their livelihood skills less applicable, while competition for resources increases. Community institutions and social networks are weakened as a result of this economic upheaval and the introduction of new sources of authority and power in communities, and 'cultural identity, traditional authority and the traditions of mutual help' are weakened (World Bank; World Bank, 2001).

To address these risks, international norms and standards around compensation for economic displacement require that any such compensation be both adequate and appropriate to ensure that affected communities are not only able to sustain their current living standards, but improve them. These include requirements outlined in IFC Performance Standard 5. While some of these standards relate to the actions of states (Food and Agriculture Organization of the United Nations, 2008; Food and Agriculture Organization of the United Nations, 2012) and some relate to resettlement,³⁹ they are nevertheless appropriate guiding principles for corporations when

³⁹ Ian G Baird, *Best Practices in Compensation and Resettlement for Large Dams: The Case of the Planned Lower Sesan 2 Hydropower Project in Northeastern Cambodia* (Rivers Coalition in Cambodia, 2009); World Bank, above n 36; World Commission on Dams, *Dams and Development: A New Framework for Decision-Making* (Earthscan, 2000), 298 and Guideline 19 on Implementation of the Mitigation, Resettlement and Development Action Plan, in addition to Guideline 2 on Negotiated Decision Making Processes; Organisation of Economic Co-operation and Development, *OECD Development Assistance Committee: Guidelines on Aid and Environment No 3 — Guidelines for Aid Agencies on Involuntary Displacement and Resettlement in Development Projects* (1992) 7; Food and Agriculture Organization of the United Nations, *Compulsory Acquisition of Land and Compensation* (2009) 7.

negotiating compensation with economically displaced people, who suffer many of the negative consequences of residential displacement and resettlement.

Box 4: Process-Related Standards

- Compensation must be agreed through a meaningful participatory processes

Negotiations around compensation must meet all the standards outlined above under ‘Consultation’.⁴⁰

- Processes and agreements must be transparent.

This requires full disclosure of all background calculations, processes and final agreements, including those related to market transactions, where applicable.⁴¹

- Choices and alternatives must be made available.⁴²
- Vulnerable groups require special procedural measures

Vulnerable groups among those displaced may include those below the poverty line, the landless, the elderly, women and children, indigenous peoples, ethnic minorities or other displaced persons who may not be protected through national land compensation legislation.⁴³

- The special needs of women must be taken into account in process and agreements

As described in the OECD Development Assistance Committee Guidelines on displacement, ‘Since women are to a great extent responsible for making the natural resource base productive (with their knowledge, skills and labour) and thereby contribute significantly to the well-being of their families, communities and national economies, planning for relocation should consider their preferences and should address their specific needs and constraints’.⁴⁴

⁴⁰ Baird, above n 41; Food and Agriculture Organization of the United Nations, *Voluntary Guidelines*, above n 36, especially Guidelines 12.11 and 16.6.

⁴¹ World Bank, above n 36, item 6 (ii); International Finance Corporation, *Performance Standards on Environmental and Social Sustainability* (World Bank Group, 2012), para 10.

⁴² Baird, above n 41; World Bank, above n 36, item 8; Food and Agriculture Organization of the United Nations, *Voluntary Guidelines*, above n 36, Guideline 12.7.

⁴³ For example Organisation of Economic Co-operation and Development, above n 41, 7; Food and Agriculture Organization of the United Nations, *Voluntary Guidelines*, above n 36, Guideline 14.4.

⁴⁴ Baird, above n 41 121; World Commission on Dams, above n 41.

- Compensation should cover the entire life of a project

Compensation processes and agreements must take into account the cumulative effects of displacement on peoples lands and livelihoods over the life of the project, even if that is inter-generational.⁴⁵

- Compensation negotiations should begin with guiding principles

By starting negotiations with an agreement on guiding principles, the big picture can remain in view, and the risk of getting bogged down in technical details related to, for example, land measurement and valuation, can be mitigated.⁴⁶

- Compensation should be measured by results or outcomes

In-keeping with an emphasis on guiding principles, monitoring of agreements should focus on the achievement of targeted results or outcomes, rather than actions. This mitigates the risk of premature completion of compensation arrangements because budgets have been spent, for example.⁴⁷

- Agreements must be formalised and monitored

Plans for ongoing consultation and review of agreements, livelihood restoration and other elements of compensation should be formalised and monitored.⁴⁸

- Advocacy and assistance must be provided for

Governments and/or project proponents must proactively provide for legal and other advice and assistance for affected communities in order to make the negotiation process meaningful. It is unreasonable to expect that affected communities will have skills and resources that equal those of the company in negotiations.⁴⁹

- Right to appeal must be available

An independent appeal mechanism should be available to affected communities should they be dissatisfied with the process or outcome of compensation negotiations.⁵⁰

⁴⁵ Baird, above n 41, 119.

⁴⁶ Ibid 120; World Commission on Dams, above n 41, in line with Guideline 19 on Implementation of the Mitigation, Resettlement and Development Action Plan (at 298) which requires a Performance Contract.

⁴⁷ Baird, above n 41, World Commission on Dams, above n 41, in line with Guideline 19 on Implementation of the Mitigation, Resettlement and Development Action Plan (at 298) which requires a Performance Contract and Guideline 21 on Compliance; Food and Agriculture Organization of the United Nations, *Voluntary Guidelines*, above n 36, Guideline 12.14.

⁴⁸ Food and Agriculture Organization of the United Nations, *Compulsory Acquisition*, above n 41, Guideline 6.5, 50.

⁴⁹ Ibid..

⁵⁰ Interview with Puspa Sari (Jakarta, 15 May 2013). Permission to quote granted.

The key elements of these standards relevant to the PT Weda Bay Nickel case are described here.

The process through which a compensation package was decided is not in keeping with these standards. Many community members reportedly felt the price of land offered for compensation was arbitrary, since ‘the company set the price in consultation with the head of the village’ and did not engage the families directly.⁵¹ As the compensation negotiations were part and parcel of the broader consultations about the project, the shortcomings of this process are analysed in the preceding sections on consultation and consent.

Box 4: Compensation Package Related Standards

- Livelihoods need to be fully assessed, and restored

Livelihoods need to be assessed in a holistic way that takes into account the inter-generational sustainability of existing land-based livelihoods, and the full, long-term value of livelihoods must be, at a minimum, fully restored through the compensation package. The IFC Performance Standards require a Livelihoods Restoration Plan for this purpose.⁵²

- Affected communities should share in opportunities for development and be better off in the long run

Compensation should go beyond the restoration of livelihoods, and should seek to improve the development prospects for affected communities.⁵³

- Benefit sharing should be considered

This may include benefits related to

- Project revenues
- Project benefits (eg irrigated land, provision of electricity)
- Project construction and operation (eg employment, financial training and support for self-employed contractors)
- Resources (eg preferential access to or custodianship of forest)

⁵¹ Baird, above n 41, 120; World Commission on Dams, above n 41, 297; Organisation of Economic Co-operation and Development, above n 41, 6; International Finance Corporation, above n 43, paras 12–16.

⁵² Baird, above n 41, 120; World Commission on Dams, above n 41, 297; Organisation of Economic Co-operation and Development, above n 41, 6; International Finance Corporation, above n 43, para 9.

⁵³ World Commission on Dams, above n 41, 300–1, Guideline 20 on Benefit Sharing: Potential Types of Benefits.

- Community services (eg health, education, roads, public transport, drainage, income support, agricultural support such as planting materials, community forests, markets and meeting spaces)
- Household (eg skills training and interim family support; interest-free loans for economic activities, housing improvements, provision of start-up livestock, access to public works or work for wages, free or subsidised labour-saving devices or productive machinery, access to preferential electricity rates, tax rates, water and service charges).⁵⁴
- Cash compensation alone is never adequate compensation.
- It is no longer acceptable to propose one-time lump sum payments in lieu of addressing long-term social and environmental problems. It typically leads to impoverishment.⁵⁵ As explained in the OECD Development Assistance Committee Guidelines:

'Some types of loss — eg loss of access to i) public services; ii) customers and suppliers; and iii) fishing, grazing, or forest areas etc — cannot easily be compensated for in monetary terms and access must be sought to equivalent and culturally acceptable resources or earning opportunities. Customary land ownership and usufruct rights must be recognised for compensation purposes to avoid the destitution of former users'.⁵⁶

- Where a transition to a cash economy is unavoidable, it must be managed and risks mitigated.
- Sustainable employment, including training and skills development for those employed by the industrial development project, and the self-employed, along with training in cash management is essential to avoid the unintentional wasting of both cash compensation payments and wages in communities unaccustomed to handling large amounts of cash.⁵⁷
- Land for land compensation is always preferable

⁵⁴ Paragraph 60 of the *Basic Principles and Guidelines on Development-Based Evictions and Displacement* developed by the UN Special Rapporteur on adequate housing: Miloon Kothari, *Basic Principles and Guidelines on Development-Based Evictions And Displacement: Annex 1 of the Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living*, UN Doc A/HRC/4/18 (5 February 2007); World Bank, above n 36, 12; Organisation of Economic Co-operation and Development, above n 41, 11; International Finance Corporation, above n 43, para 28.

⁵⁵ Organisation of Economic Co-operation and Development, above n 41, 11.

⁵⁶ *Ibid* 7, 11.

⁵⁷ Baird, above n 41, 123; Food and Agriculture Organization of the United Nations, *Voluntary Guidelines*, above n 37, Guidelines 12–14; International Finance Corporation, above n 43, para 9; Organisation of Economic Co-operation and Development, above n 41, 11; World Bank, above n 36, Guidelines 9.9, 11; M Q Zaman, 'Land Acquisition and Compensation in Involuntary Resettlement' (1990) 14(4) *Cultural Survival Quarterly*. 63.

- Landlessness, because it destroys long-term sustainable livelihoods, leads to impoverishment and particularly food insecurity and should be avoided at all costs. Provision of land for land as part of compensation packages also mitigates risks associated with rapid transitions from traditional community approaches to land tenure, which are typically better at providing for landless labourers and other vulnerable groups. Provision of alternative land must identify several possible locations and offer these to communities. The quality of soil, access to water, proximity to residential housing and sites of cultural significance, and host community dynamics must all be taken into account when identifying alternative lands. The relocation sites must be at least equivalent in quality on all these fronts, and preferably better. Security of land tenure in relocation sites must be guaranteed.⁵⁸
- Post-project land tenure should be considered where possible

Wherever there is a possibility that after the life of a project, rehabilitated land can be returned to its original owners or their descendants, this should be made part of compensation agreements.⁵⁹

- Support should be provided during transitional period:

In recognition of the serious inconvenience and the challenges associated with dramatic changes in livelihood and local environment, extra support should be provided for communities during a transitional period to ensure their smooth transition to alternative livelihoods.⁶⁰

The compensation offered by PT Weda Bay Nickel to the Sawai communities is not in keeping with these international norms and standards. Although PT Weda Bay Nickel is conducting a number of studies related to livelihood evaluation, and assessment of the cost of replacement of agricultural livelihoods that are relinquished through the compensation agreements, we have been unable to acquire these studies. In their absence, our research suggests that despite such studies, the compensation agreement does not adequately replace the livelihoods of the community, nor compensate them for the social and economic upheaval associated with the entire life of the project. Furthermore, the process through which compensation agreements have been made is not compliant with these international standards. Indonesian public land acquisition laws also reflect such principles, stipulating that compensation to indigenous land owners should be in the form of replacement lands, resettlement or other forms agreed to by the relevant indigenous community (*Law No 2 of 2012*). The most important problems with the current arrangement are as follows.

⁵⁸ Food and Agriculture Organization of the United Nations, *Voluntary Guidelines*, above n 36, Guidelines 14.2 and 16.5.

⁵⁹ World Bank, above n 36, item 6 (c) (i).

⁶⁰ The training in cash management is being provided by the bank which is receiving all the cash compensation deposits. It has been arranged by PT Weda Bay Nickel.

First, the cash price offered to the communities in exchange for the relinquishment of their rights to their agricultural lands is not a fair evaluation of the value of that land. The cash compensation figure was calculated based on present market value, established through a non-transparent system by the company with independent consultants. It does not take into account the value of the land to the company, including the value of the nickel deposit, but rather assumes the land is nothing more than remote, forested, semi-agricultural land. This sets the price of compensation low, even when we add the compensation for the mature plants.

Second, even if the cash price were set higher, say at IDR50 000 per square metre, as requested by the families who have not yet accepted compensation, it would not adequately compensate for the value of the land as a long term source of agricultural livelihoods for current and future generations. As such it is not a form of 'compensation' for losses, and should more accurately be referred to as a mere purchasing price.

Third, in violation of the well accepted standard of compensating land with land, rather than cash, there has been no meaningful offer of specific, alternative, accessible and productive land with proximity to sites of ancestral significance, to replace that lost by communities in the compensation arrangement.

Fourth, the transition to a cash economy has not been adequately managed. Though PT Weda Bay Nickel is encouraging compensated families to establish businesses, and is providing some training, for example in cake baking, this is inadequate for a number of reasons: the small local economies cannot sustain an independent business run by every family; the training that has been given so far has been poorly targeted in terms of the kinds of businesses it is promoting; and the training in cash management has been provided by a bank with a vested interest in the compensation package, rather than independent consultants experienced in helping communities adjust to a cash economy.⁶¹ There has been no serious consideration of alternative benefit sharing mechanisms such as community governed trusts or foundations for education or development programs. The community has not been provided with adequate information or the space to make their own decisions about how they might individually or jointly invest their funds in a sustainable way. JATAM (Mining Advocacy Network) is of the view that indigenous people do not have the ability to live in this new cash economy.⁶²

Fifth, the employment opportunities offered with PT Weda Bay Nickel do not go far enough to restore livelihoods. It is not clear how long term the employment positions available to communities are. There is a significant risk that low-skilled labour will be required early in the life of a project, but if the project uses highly developed technology for the extraction phase the use of low-skilled labour will decrease and displaced communities will lose access to employment.

Sixth, to our knowledge, no efforts have been made to minimise the negative impact of cash payments on women. It is well acknowledged that cash compensation in traditional societies

⁶¹ Interview with JATAM personnel (South Jakarta, 15 May 2013).

⁶² Komnas HAM, 'National Inquiry on the Rights of Customary Law Abiding Communities over Their Land in Forest Areas' (Report, March 2016) <http://rightsandresources.org/wp-content/uploads/2016/04/Komnas-HAM-National-Inquiry-on-the-Rights-of-Customary-Law-Abiding-Communities-Over-Their-Land-in-Forest-Areas_April-2016.pdf>



Weda Bay nickel mine.

Source: Reuters

such as these often has negative impacts on women's lives, as they lose control over the household economy and their own livelihood, while simultaneously maintaining a large proportion of the burden for caring for the young, the old and the sick, and suffering disproportionately from social problems that often emerge in this circumstances, such as domestic violence associated with increased incidence of alcoholism. Women are also rarely offered prized employment opportunities in the industrial developments which displaced their traditional livelihoods (Bisht, 2009; Tan et al., 2005; Thukral, 1996).

Seventh, there is a concern about the undesirable level of dependence on PT Weda Bay Nickel, representing loss of the self-sufficiency that communities have enjoyed for generations, along with the loss of tradition and culture.

Potential Breaches of Human Rights in the Future

In addition to the human rights breaches which are alleged to have already occurred, the total life of the project gives rise to significant concerns surrounding environmental degradation and encroachments on the human right to health and a healthy environment. The project involves potential adverse pollution, and presents risks to human health related to spills, dust and traffic. Under art 12 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), all citizens have a right to the enjoyment of the highest attainable standard of health.

There are also concerns about the survival of the cultural minorities affected by the project. Community institutions and social networks are weakened as a result of this kind of economic upheaval and the introduction of new sources of authority and power in communities, and 'cultural identity, traditional authority and the traditions of mutual help' are weakened (World Bank). IFC Performance Standard 8 recognises the importance of cultural heritage for current and future generations. IFC Performance Standard 7 deals expressly with these issues in relation to Indigenous peoples.

Grievance Avenues

The CAO

Recourse to the CAO was made available to the affected community due to the involvement of the World Bank's Multilateral Investment Guarantee Agency (MIGA). On 11 August 2010, MIGA's Board of Directors signed a contract of guarantee with Strand Minerals (Indonesia) Pte Ltd of Singapore (jointly owned by ERAMET of France and Mitsubishi of Japan). MIGA's guarantee included coverage of USD207 million, for a period of three years against the risks of transfer restriction, expropriation, breach of contract and war and civil disturbance (Multilateral Investment Guarantee Agency, 2010). The guarantee acted as an important point of security in order to attract foreign direct investment in the project.

Given the relative importance of the MIGA guarantee to the project, the CAO's oversight provided a point of considerable leverage in relation to the project. The mechanism was engaged in October 2010, when a number of civil society complainants, comprising Wahli, Mining Advocacy Network (JATAM), Anti-Debt Coalition (KAU), and the Peoples' Coalition for Fisheries Justice (KIARA), lodged a complaint to the CAO on behalf of affected communities. This complaint alleged that PT Weda Bay Nickel was in violation of all eight of the International Finance Corporation's (IFC) required Performance Standards on Environmental and Social Sustainability. The complaint argued that the project will have widespread negative environmental and social consequences that were not fully considered or disclosed in the Environmental Impact Assessment (AMDAL) required by the Indonesian government. Particularly in relation to social risks, the complaint argued that PT Weda Bay Nickel had not taken seriously the risk of displacement of and impacts on the Tobelo Dalam people in their assessments (IFC Compliance Advisor Ombudsman).

Not only was the complaint extensive, in that it raised a large number of breaches, but it was also quite radical, in that the aim of the groups was to prevent the project from going ahead. The CAO's mandate is to facilitate problem-solving processes between project proponents and affected people, and/or audit IFC/MIGA's own processes, but it does not have the mandate to make recommendations that IFC/MIGA support be withdrawn from a project (recommendations are limited to how projects can be brought into compliance with the Performance Standards). Furthermore, even if it did have the mandate to recommend a withdrawal, it does not have the authority within the IFC/MIGA to compel that.

The IFC Compliance Advisor Ombudsman team made three assessment visits to the area between October 2010 and January 2011. Their visits determined that the affected communities were not willing to engage in mediation. Our research found that the main reason for this was that community members who were against the project and/or the compensation package feared for their safety if their identities were to be revealed, as would be necessary for a mediation. The Ombudsman assessment team report that other possible problem-solving processes were offered, such as shuttle diplomacy, public stakeholder meetings, electing community representatives, including outside observers and so on which CAO has used in other cases.⁶³ Indeed, the CAO had to extend its 120-day assessment period to allow the complainants sufficient time to consider various options and make an informed decision on how they wished to proceed. However, our research suggested communities either did not recall or did not understand these options. Further, civil society complainants were in principle against a negotiation with the company, preferring the project to be stopped altogether.

Table 5: Summary of Grievance Options

Mechanism	Barriers	Use	Impact
<i>PT Weda Bay Redressal Unit</i>		<p>No major complaints to the PT Weda Bay Nickel Grievance Redressal Unit regarding lack of free, prior and informed consent and meaningful consultation, and inadequate and inappropriate compensation arrangements.</p> <p>A number of small complaints about particular families' access to compensation funds may have been made, but to our knowledge these have not triggered any holistic reconsideration of consultation, consent and compensation procedures in PT Weda Bay Nickel</p>	The Grievance Redressal Unit processes have had no impact on the issue of a lack of free, prior and informed consent and meaningful consultation, and inadequate and inappropriate compensation
<i>KOMNAS HAM</i>	<p>Not binding.</p> <p>Insufficient political support.</p>	<p>Civil society organisation LBH ProJusticia made a complaint to Komnas HAM in 2011 about inadequate compensation processes and arrangements, and about police intimidation of villagers.</p> <p>A further complaint was made by the NGO Walhi in 2010 regarding breaches of human rights of the Tobelo Dalam, but this has not been investigated by Komnas HAM.</p>	<p>Komnas HAM commissioner Johny Simanjuntak and a team of Komnas HAM officials conducted an investigation in North Maluku in June 2011 and made damning findings. None of these findings are binding. Limited changes resulted.</p>
<i>CAO</i>	<p>Not binding.</p> <p>Fear on behalf of communities means that unwilling to participate in mediation</p>	<p>A complaint was made by Walhi, Mining Advocacy Network (JATAM), Anti-Debt Coalition (KAU), and Peoples' Coalition for Fisheries Justice (KIARA), on behalf of affected communities in 2010. This complaint alleged that PT Weda Bay Nickel was in violation of all eight IFC Performance Standards.</p>	None.

⁶³ United Nations Declaration on the Rights of Indigenous Peoples, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007).

The decision to proceed with CAO dispute resolution is voluntary. CAO respects the right of self-determination and informed decision-making of affected communities and does not push or recommend any particular option.

The Compliance function declined to conduct an audit of MIGA's procedures in deciding to support PT Weda Bay Nickel on the basis that the project was only in the exploration phase, and assessments of the kind requested in the complaint were still under way by the company. This is despite the fact that compensation agreements resulting in the relinquishment of land rights were already being agreed at this time, and associated social impacts on the community were already evident.

Human rights commission

Investigations into PT Weda Bay Nicke's human rights impacts have been undertaken by Indonesia's National Commission on Human Rights. The National Commission on Human Rights (Komisi Nasional Hak Asasi Manusia, usually abbreviated to Komnas HAM) is the national human rights institution of Indonesia. As with other national human rights Commissions, its principal functions are the protection and promotion of human rights. In 2011, the commission made numerous findings of human rights breaches and possible breaches of Indonesian law. However, Komnas HAM is an inquisitorial/investigatory institution, and presently lacks any formal powers of enforcement. Instead, Komnas HAM relies upon non-judicial methods, 'employing persuasion, publicity and moral authority to highlight abuses and to recommend legal and regulatory changes, and to encourage corrective action' (US Department of State, 2000). However, in this case, there has been demonstrably little public outcry generated as a result of Komnas HAM's findings in 2011. The commission's findings did not attract any attention in international press, and gained only some traction in domestic press. As a consequence, its recommendations have been largely ignored by those to whom they were directed.

In 2014, Komnas HAM exhibited a renewed focus on the issue of human rights violations related to land conflicts involving the nation's indigenous people. On 20 May 2014, Komnas HAM launched a national inquiry into the issue, consisting of public hearings in seven contentious regions and one national hearing (Satriastanti, 2014). In March 2016 it released its report, which identifies five 'root causes' of customary land disputes in Indonesia.⁶⁴ First, the lack of formal recognition of indigenous land rights on the part of the state means that the legal status of claims is uncertain. Secondly, the government has simplified customary land claims to the point where they are viewed merely as administrative or legal problems. Thirdly, the emphasis on economic growth in Indonesia's development policy is a significant contributor, leading to a bias towards the interests of corporations over those of indigenous communities. Fourthly, the report points to the unequal rights of indigenous women as a significant contributor to customary land disputes. Lastly, agencies that might have the authority to resolve disputes and human rights violations are understaffed, and courts are often difficult to access.

The report makes a great number of recommendations to various government offices, ministries, and agencies. For example, in order to remedy the lack of formal State recognition of indigenous

⁶⁴ Interview with Ismet Sulaiman (Ternate, 20 May 2013).

land rights, the report recommends the House of Representatives urgently ratify the Bill on the Recognition and Protection of Indigenous Peoples Rights. The President is urged to establish an independent institution with the authority to resolve conflicts, offer remedies, review mining permits and create policies on indigenous land rights. The report also recommends that the National Police establish a set of guidelines that takes a human rights perspective on the management of conflicts between indigenous peoples, the government and corporations. District and provincial governments are urged to involve experts and academics in detailed studies of indigenous communities and customary lands, and to establish as a matter of urgency local regulations on the recognition of indigenous communities and their land rights. The report recommends that the Ministry of Energy and Mineral Resources revise regulations at all levels of government that relate to mining activities that affect the land of indigenous communities. These revised regulations should include a method for handling corporations that fail to comply with the regulations or that violate indigenous land rights.

Legal and regulatory avenues

Indonesian law regarding forest land, customary land rights and mining is complex and often ambiguous. Customary rights over forests, have, until recently, been weakly protected under Indonesian law. To date, mining and forestry laws have operated as barriers to meaningful involvement in decision making about the project by Sawai and Tobelo Dalam communities. The national priority given to mining is reflected in strong protection of resource extraction interests compared with other interests, including those of local communities affected by mines. The low accord given to community interests in forests in Indonesian law is also a consequence of the strong powers given to the forestry department. This makes it difficult to contest the terms of consultation, consent or compensation by invoking Indonesian law. A recent decision of the Constitutional Court (see below) has the potential to strengthen the position of Sawai and Tobelo Dalam communities vis-a-vis the mining company and forestry department. However, the decision is unlikely to be implemented without the introduction of a stronger legislative framework for the recognition of indigenous rights.

Barriers to recognition of community land rights in mining law

The PT Weda Bay Nickel project was granted a Contract of Work near the end of the Suharto Era. The Contract of Work system was created in 1967 after the Sukarno era, in order to open up Indonesia to foreign direct investment. Once a Contract of Work is granted, it is difficult to have it revoked, regardless of community opposition, social conflict resulting from the project or concerns regarding environmental damage.⁶⁵ The role of mining in the development of the national economy has been given such high priority in the past that the *Mining Law*, or *Law 11 of 1967* stipulates, ‘a mining permit issued by the Minister of Mines has the capacity to overrule land ownership issued by other government agencies’. In contrast, traditional or customary land ownership, which is weakly regulated, attains the lowest level of recognition by the mining departments at the central and provincial levels.

A new mining law introduced in 2009 (*Law 4 of 2009*) requires mining companies to clear any encumbrances on their land before mining (arts 135 and 136), and if they can achieve that, they

⁶⁵ Interview with Pius Ginting (Jakarta, 14 May 2013).

can hold intruders criminally liable for trespass.⁶⁶ Though these articles imply that incumbent land holders can refuse to relinquish their land rights, nothing in the *Law 4 of 2009* details the grounds upon which titleholders can refuse to allow mining on their land (Gandataruna and Haymon, 2011). Combined with the relatively weak recognition of customary land rights in practice (at least until very recently), this means that mining laws generally operate as a barrier to opposing the relinquishment of land rights and the compensation package offered by PT Weda Bay Nickel.

Barriers to recognition of community land tenure in forestry laws

Forestry laws also play an important role in the legal recognition of land rights in Contract of Work or Mining Permit areas. Parliament has also been willing to intervene to weaken forestry laws in favour of the mining companies. On 15 July 2004 the Parliament of Indonesia passed an addendum to *Law 41* which stated that all permits and contracts in the mining section within forest regions which were issued before the promulgation of *Law 41* of 1999 on forestry are declared to remain valid until the expiration date of the respective permit or contract.

Another factor that has greatly reduced the potential of forestry laws to protect the environment and customary land rights is the high level of discretion granted to the Ministry of Forestry to define forest areas and regulate the use of these areas (art 4(2)(b) for defining, and arts 4(2)(a) and 10 for regulating}. The 60–90 million people who live in areas classed as state forests enjoy few rights, despite having lived in and cultivated forests for generations (Colchester et al, 2006).

Weak Indigenous and Customary Legal Rights

A significant problem for the Sawai villagers and the Tobelo Dalam in asserting their rights over land against the department of forestry and PT Weda Bay Nickel is the weak recognition of indigenous and customary rights in practice in Indonesia. Though Indonesia has ratified the *UN Declaration on the Rights of Indigenous Peoples*,⁶⁷ the Indonesian state, until recently, claimed it has no such indigenous peoples, or rather that most Indonesian people are indigenous, making the provision of special protections for indigenous people untenable. Rather, parts of Indonesian law recognise some ‘customary’ or *adat*, rather than ‘indigenous’ communities, institutions, lands and rights.

Article 18b of the 1945 *Constitution of the Republic of Indonesia* recognises the existence of *adat* or customary rights and institutions. It does so, however, through entrusting the State with a controlling power over all lands and natural resources, to be used for the benefit of the people. Up until a recent Constitutional Court decision (*Ruling No 35 of 2012*), overturned the provision, the Ministry of Forestry classified customary forests as a subcategory of ‘state forest’. The application of relevant laws to date has meant that local communities, especially indigenous peoples, are weakly protected when companies seek to exploit natural resources within their forests and lands. For peoples such as the Tobelo Dalam and Sawai, this means that although they may have

⁶⁶ Interview with Pak Arnold Mainase (PT Weda Bay Nickel Office, 27 May 2013).

⁶⁷ Letter from Erry Kuriniwan (PT Weda Bay General Manager Environment, CSR and Communication) to Shelley Marshall and Kate MacDonald (15 April 2014).

customary rights over land, these rights have to date not been formally recognised. This leaves the Tobelo Dalam and the Sawai in a weak negotiating position vis-a-vis PT Weda Bay Nickel.

The recent decision by the Indonesian Constitutional Court regarding the *Forestry Law 1999* ('*Forestry Law*') may mitigate this problem for indigenous and customary communities. The decision curtails the state's (specifically the Ministry of Forestry's) ability to unilaterally exercise control over forested lands by affording formal recognition of indigenous forests as a separate category. The decision separates customary forests from their previous classification as a sub-category of State forests. Indonesia's *Forestry Law* previously stated that 'customary forests are state forests located in the areas of custom-based communities'. The Constitutional Court's ruling deletes the word 'state' from that sentence, thereby revising the *Law* so that customary forests are no longer considered state forests (UNORCID, 2013; Down to Earth, 2013). This groundbreaking decision is yet to be applied to the Sawai villages or the Tobelo Dalam, who are likely to enjoy strong customary rights over the land given their long tenure in the area.

Existing land titling systems are weak and underdeveloped, particularly for collective/communal land rights. Under the existing system regional governments (via subordinate regulations) need to first recognise the existence of particular indigenous people and their customary rights to formalise land title. However very few local governments have issued regulations providing such recognition.

In light of the Constitutional Court decision, indigenous rights groups have proposed a new framework for indigenous land rights at the national level, however the legislature is yet to enact these reforms. NGOs such as AMAN have made a concerted effort to see that the landmark Constitutional Ruling is implemented, urging the National Parliament to adopt the draft *Indigenous Peoples' Law* (RUU PRHMA), which would be a major step towards the recognition and protection of land rights for indigenous groups. The Ministry of Forestry, unwilling to relinquish its grip on Indonesia's wealth of natural resources, has been reportedly delaying the passage of the law through Parliament (AMAN, 2014). It is unclear what effect the change of government will have on the development of this new legal framework. During his election campaign, Indonesia's President-elect Joko Widodo made a pledge to continue the discussion on the enactment of such a bill, and expressed a commitment to the advancement of rights of indigenous peoples (AMAN, 2014). It is yet to be seen whether this commitment will be honoured. It is possible that the adoption of the *Indigenous Peoples' Law* may alter the legal dynamic of the land situation in the Sawai villages.

AMAN reports that there has been no significant progress in effecting the decision of the Constitutional Court (Indigenous Voices in Asia, 2016; Vinding and Mikkelsen, 2016). The government has not made progress in recognising indigenous land rights, despite the NGO having spent years lobbying for the cause. The promises made by the President-elect Widodo have not been fulfilled (Vinding and Mikkelsen, 2016). The government is yet to form a Task Force on Indigenous Peoples, and has continuously failed to include the Bill on Recognition and Protection of the Rights of Indigenous Peoples in the National Legislation Program.

Company-level grievance mechanism

PT Weda Bay has a company-level grievance mechanism that was efficiently and effectively run by extremely competent staff at the time that we conducted our fieldwork. The grievance mechanism used a variety of methods to gather complaints, including letterboxes in the centre of each village surrounding the mine, into which aggrieved community members could drop complaints. The grievance mechanism resolved disagreements between staff members and community members, addressed concerns about expectations of employment from community members.

It is our view that the PT Weda Bay Nickel's Grievance Redressal Unit is not an appropriate forum for handling major grievances of the kind discussed here. Fundamental conflicts of interests between the company and affected community members about compensation amounts, corruption and displacement are the proper jurisdiction of independent grievance mechanisms.

Barriers To Access To Remedy

Compound barriers to access to redress are evident in this case. Primary amongst these are the great inequalities in power between the parties. That Indonesian law favours the rights of mines over communities makes redress via the Indonesian legal system particularly difficult.

Inequalities in power between the parties

There are vast inequalities in power between the affected Sawai and Tobelo Dalam communities and the mining company and government which impact in various ways on the capacity of the communities to access redress.

The affected communities are geographically isolated on Halmahera Island. Sawai communities live in small seaside villages. Mining companies are the only large employers in the area. The communities do not have access to the internet or reliable access to other telecommunications. Our research shows that this remoteness and isolation has meant that affected communities have not received consistent assistance and advice by independent advisors. They have received sporadic support from two NGOs, Walhi and Aliansi Masyarakat Adat Nusantara (AMAN), environmental and indigenous rights organisations, respectively. It is difficult for such NGOs to reach the communities, and such groups have only limited means to reach the communities regularly. They also received legal advice from an under-resourced community legal service called LBH ProJusticia, but this advice came only after most community members had already accepted the inadequate compensation packages.

In contrast to the isolated nature of the communities, PT Weda Bay Nickel is supported by national and local government, and provided financial and technical support by two of the largest companies in France and Japan — ERAMET and the Mitsubishi Corporation and the World Bank Group's MIGA. The mining venture has the advice of top Indonesian law firms and international consultants. The project has also drawn high-level government support, particularly since the project was announced as being part of Master Plan for Acceleration and Expansion of Indonesian Economic Development (MP3EI). High-level French diplomats have visited the

PT Weda Bay Nickel site. In September 2014, President Widodo met with the directors of Mitsubishi — it was reported that the meeting involved discussions about the nickel mine in Halmahera, with Widodo responding positively to the investment (Kuwado, 2014). This has resulted in a severe imbalance in negotiating power.

The power of the communities has been further diminished by social conflict. Shortly after the Contract of Work was issued, Indonesia's reform process — *Reformasi* — occurred. Though this ultimately led to greater democratisation, it was also associated with social upheaval throughout much of Indonesia, expressed in the Maluku Islands in sectarian violence between Muslims and Christians in between 1999 and 2002 (Bertrand, 2002; Abbott and Snidal, 2009; Duncan, 2005). Interviewees for our research reported that they spent six months hiding in the forest during this time. News of the Contract of Work did not reach them until sometime afterwards. It is arguable that the most important stage of consultation with the local communities should have occurred prior to the Contract of Work being signed with the company, yet this did not occur.

PT Weda Bay Nickel has run a particularly strong campaign to gain local and national support for the mine. Most local and provincial politicians we interviewed were strongly in favour of the mine. This seemed to be primarily due to three factors. The first was the strong belief that the mine would provide employment. The second was the CSR activities conducted by the company in the area of education — through the funding of local universities and fostering exchange with French universities — and through building local infrastructure. Even in the village of Gemaf, where community members have been most resistant to the mine, the company has installed electric street lights and was in the process of dredging the local river to make it wider when the research team visited the village.

Ismet Sulaiman of Wahli explained that in his opinion, PT Weda Bay Nickel had run a particularly strong publicity campaign to gain local support:

So the point is that the WBN always focus on in their campaigns is the provision of jobs to the locals, and that this will accelerate economic growth. But the fact is, the major contributors to the economy comes from the agricultural sector, rather than mining. But also, WBN has media support and because the WBN actually kind of controls the local media, so that becomes very difficult for NGOs advocating against them to try to publicise things.⁶⁸

These power differentials have been exacerbated by the use of intimidation and threats employed by the company, and sponsored by the state. As noted above, the findings of Komnas HAM's 2011 report documented the fact that BRIMOB (a paramilitary police unit) had been used to intimidate villagers in the course of negotiations.

⁶⁸ Interview with Ismet Sulaiman (Ternate, 20 May 2013).

What features of the campaign to stop the mine and bring it to international attention contributed to or hampered redress in this case?

The CAO complaint would never have been lodged without the intervention of a number of Jakarta-based NGOs with many years of campaigning and running legal cases to promote environmental justice for communities. However, there are a number of features of the campaign that hampered access to redress in this case.

Low levels of engagement by representative NGOs with affected communities

Limited contact with affected communities reduced the extent to which the communities were able to effectively engage with the CAO and take full advantage of the processes offered by the redress mechanism. A number of factors contributed to this lack of contact with the community. The remoteness of the affected communities makes visits difficult and costly. In addition, the geographical location of the mining company close to affected villages, coupled with the looming presence of BRIMOB (the Indonesian military police) within the mining area, made visiting the communities dangerous. Representatives of the NGOs were threatened when they visited the communities.

Further, the complaint was lodged with the World Bank's CAO by a group of organisations who knew little of the process themselves. The initial letter of complaint was sent to the President of the World Bank Group and forwarded to the CAO. The NGOs were not aware of the CAO process until they were contacted by the redress mechanism requesting more information. This meant that the NGOs did not have time to prepare or train community members before the process was initiated, or learn from the experiences of other Indonesian NGOs that had used the CAO.

Diverging perspectives of NGOs and community members

There were many NGOs involved in lodging the original complaint with the NGOs. These include Wahli, the Bank Information Centre (BIC), JATAM and the Anti-Debt Coalition (KAU). These NGOs broadly opposed the mine and hoped to use the process to bring international attention to the problems with the nickel mine and with the over-mining of the region. The complaint was an experiment in engaging with this facet of the World Bank Group after many years of pursuing a policy of non-engagement and opposition to the Bank's policies in Indonesia. The evidence collected for this study suggests that the communities did not know about the complaint before it was lodged — although the IFC Ombudsman noted that the initial complaint was signed by both national and local NGOs and 'five directly-affected people living on Halmahera Island' (IFC Compliance Advisor Ombudsman, 2011: 7). The aim of the NGOs was to stop the mine, rather than to negotiate better terms for the community. In contrast, our interviews suggested that community members were most concerned with attaining higher levels of compensation, better trading relations with the company and more opportunities for employment. Some interviewees from villages, when pressed, said that they would prefer that the mine did not go ahead. However, they did not feel that this was a real option given the extent of the progress of the mine. These different views made engaging with the CAO more complex.

Pius Ginting, National Executive of WALHI based in Jakarta, who coordinated the complaint to the CAO explained these different points of view to us during an interview in 2013:

There were different opinions amongst communities. Some thought that this mechanism helped to get a better price of land, some thought it would stop the mine. We discussed that the problem is quite big — and it may not be possible to find a solution through mediation.

The people who want compensation — both 8000 and 50 000 — think they cannot stop the mine because it is a foreign company that is too powerful. They think they won't live in the forest as they did, collecting nutmeg as they once did, because of the intervention of the company. So they should just get good compensation.

We respect the community's standpoint. Some of them seem pessimistic to stop the mine. But we express our concern — after you accept 50 000, where are you going to live after you get the money? You may live with that money for five years, but after that what kind of living will you make? They are in rural life, so they cannot live as traders. It is quite difficult to start a new life. It is difficult for the community.

They think that with that money, we have the capital to move to another area. But we are not as optimistic as that.

They have been there for generations. The way they live there should be supported. If there is a problem of poverty or education or health, the government should support that, not to invite the mining companies. They have the resources to live close to nature.⁶⁹

Conflict and division within the community

People within the Sawai villages are divided into those who have accepted the existing compensation arrangement of IDR8000, and those who are demanding IDR50 000. These people are known as the 8000 group and the 50 000 group. There is an evident tension between the 8000 group and the 50 000 group, as explained by the village head of Lililef Sawai:

Village head: No. It is not fair. The 8000 is based on the regulations, and the majority have been compensated for 8000. How come they [the 50 000 group] can be compensated more?⁷⁰

The remaining division between the 8000 group and the 50 000 group has resulted in considerable social pressure being placed on the 50 000 group to accept lower compensation offers. Community members in favour of the mine believe that the group that is resisting compensation are holding up the development of the mine, and thus hampering employment opportunities. Pak Syahrut Partawijaya, PT Weda Bay Nickel's Land Acquisition Superintendent, highlighted this division:

⁶⁹ Interview with Ismet Sulaiman (Ternate, 20 May 2013).

⁷⁰ Interview with Pak Abujan Latif (North Maluku Mining Department, 21 May 2013).

Only 1 per cent is still rejecting. These people who have been receiving and supporting the company keep asking me is it okay if they take action and they dispel these, you know, put these people who are still rejecting ... they ask is it okay if I push them out from the village, because if you cannot construct the plant, then it will be impossible for WBN to continue the project.

As of April 2014, PT Weda Bay reported more accurately that 91 per cent of land claimants have been compensated for their land at the price agreed, and for their plants according to the price matrix provided by the Central Halmahera District.⁷¹

Prior to PT Weda Bay Nickel's establishment in the area, there had been good relations between the village heads of the four Sawai villages closest to the mining area. Our research showed that there had been a breakdown in relations due to different views regarding the mine, contributing to a breakdown in relations between community members. Ismet Sulaiman (North Maluku WALHI) described the way that village heads negotiated favourable compensation packages for the company were given preferential treatment:

So with regard to incentives, for example, the WBN gave compensation more to Lililef Sawai villagers, especially the head of the village (Lililef Sawai), and the sub-district head of Weda Utara (North Weda). [This] can be seen by, for example, the sorts of buildings that these people have — they're more luxurious than others. They have more facilities, like cars, which are not common. Also, in terms of recruiting labourers, they privileged certain people. The head of Lililef Sawai ... he coordinated that. So Lililef Sawai village head recruits his closest family and friends — people who he knew, and gave them priority to be recruited.⁷²

These accusations of bias were confirmed in other interviews with villagers, and corroborated by Komnas HAM's findings.

One community member from Gemaf, who had accepted the compensation package, intimated he felt bound to accept the compensation offer on the same terms which had already been accepted by the villagers in Lililef. Other villagers suggested they did not care about the compensation price, but were primarily concerned with how the company could guarantee their livelihoods as long as the company is there. Others suggested the environmental effects were most important, worrying that each spoonful of rice would be garnished by half a spoonful of dust. Given the wide range of concerns which were articulated during the interviews, it is not surprising that the community members were not able to devise a homogenous set of demands which could be put before the company in mediation.

Some interviewees observed that kinship bonds had been weakened by the strong presence of the mining venture. Ismet Sulaiman (North Maluku WALHI) reported that the surveys con-

⁷¹ Interview with Puspa Sari (Jakarta, 15 May 2013).

⁷² Email from Scott T Adams (Specialist Ombudsman at the Office of the Compliance Advisor Ombudsman (CAO) for IFC & MIGA) to the authors, 30 September 2013.

ducted by Walhi North Maluku found a loosening of social ties, and that there had been an encroachment on the village of Gemaf, the village that has resisted resettlement:

So in regard to tradition and culture, when the WBN came, the family bonding and relations between villages became looser. Conflicts happen within and between villages, and the WBN seems like doing this intentionally. For example, with regard to moving the border between Lilief Sawai and Gemaf ... The border was moved further into Gemaf, giving Lilief Sawai more territory. The bottom line is that they wanted to make Gemaf smaller. Because Gemaf are still refusing to let go of their land to the company.⁷³

Low levels of perceived legitimacy of NGOs in the local area

A number of company and government interviewees believed that the desire for high levels of compensation by the 50 000 group had been raised by 'outsiders' from Jakarta who were causing unnecessary problems. For example, a mining department officer even believed that lawyers were taking a cut of any increases in compensation negotiated:

Some people think that this situation, this conflict was not caused by the mining but rather by NGOs who come from Jakarta. ... For example the communities want IDR 10 000 but in negotiation it increased to IDR 25 000, so the difference is divided between communities and the NGOs. That even includes LBH, the community lawyers. There are only a few villages that made these complaints.⁷⁴

Interviews with Jakarta-based NGOs and LBH Pro-Justitia, the legal aid group, suggest that this (that they would receive a cut of compensation negotiated) is untrue. However, this view nevertheless has a powerful influence locally.

Lack of familiarity with cash economy

A further barrier to accessing redress in this case was the lack of familiarity with the cash economy. The Sawai communities are mainly subsistence farmers. In interviews and focus groups conducted with community members, they expressed uncertainty about whether the amount of compensation they had been offered was fair. Some villagers from Gemaf and Leililef Sawai indicated that they were concerned with poverty flowing from the loss of their land, and were aware of the difficulty of managing the money carefully to provide for the future. Puspa Sari, the lawyer from LBH ProJusticia who represented the sections of the communities, explained: 'People are willing to accept compensation because they never have money. So when they see money in front of their eyes, they become short-sighted'.⁷⁵

Not only has this led to people accepting low levels of compensation, it has meant that they

⁷³ In later correspondence, Pius Ginting pointed out differences between the two complaints. He wrote: 'We were aware of Sawit Watch complaint on Wilmar. But the case is different. It is easy to spot fatality on Wilmar case, as in that case IFC made investment on plantation that must be do EIA (fall in category A). IFC put Wilmar project in category B and C. In the Weda Bay case, MIGA has categorized the project as category A'. Letter from Pius Ginting to Shelley Marshall, 5 October 2016.

⁷⁴ Interview with Ismet Sulaiman (Ternate, 20 May 2013).

⁷⁵ Interview with Pak Abujan Latif (North Maluku Mining Department, 21 May 2013).

⁷⁶ Interview with Puspa Sari (Jakarta, 15 May 2013).

have not sought greater compensation or further redress, as they have not been informed of comparative compensation packages or the idea that they might have a right to compensation for lost livelihoods as well as lost land.

What features of redress mechanisms contributed to or hampered redress in this case?

Ease of access to CAO

This case study demonstrates that the CAO is highly accessible for communities and that the investigative function is easily triggered. In this case a letter of complaint was written to the head of the World Bank which was then passed onto the CAO. The low evidence thresholds of the CAO allowed the process to be triggered by receipt of a short letter. The complaints can be made in any form and in any language.

Exemplary assessment function of the CAO

Our research suggests that the Ombudsman Assessment function of the CAO is extremely important and yields a deep and complex understanding of the nature of the problems faced by communities within the CAO. The Ombudsman team made three visits to the affected area between October 2010 and January 2011. Individual interviews and small group discussions were held with approximately 16 representatives (12 local and four national) from all the complainant organisations and approximately 36 community members from Lelilef Sawai, Lelilef Waibulen, Gemaf and Sagea through three separate meetings with community groups (IFC Compliance Advisor Ombudsman, 2011: 7). Community members voiced respect for the CAO representatives who visited not only the seaside villages but also went to the inland land forest areas to interview members of the Tobelo Dalam. The CAO members spent some time interviewing Tobelo Dalam members and gaining a first-hand understanding there concerned in relation to the nickel mine. Few mechanisms conduct research of this type.

Difficulties entailed in providing redress in a site of conflict

Having faced repression under the Suharto regime and recent intimidation by BRIMOB (the Indonesian paramilitary police) the Sawai community members that we interviewed were understandably mistrusting of ‘officials’. Initially, the CAO staff were perceived to be linked with the company in some way — like an investor — as MIGA guarantees the project and the CAO were not perceived to be separate from MIGA.

The Ombudsman process is mandated to offer problem-solving processes to complainants or project affected people, and the project proponent. Often these processes are mediations, but other options are available. Because the community members who opposed the compensation/land acquisition package did not want to be made known to the company or the government, they were extremely wary of engaging in mediation. The CAO discussed and ex-

plored various options for community members to engage in a collaborative dispute resolution process in a manner that would be safe and protect the confidentiality of any aggrieved individuals. For example, the Ombudsman team considered options it had used in other cases, such as shuttle diplomacy, public stakeholder meetings, electing community representatives, and the use of outside observers.⁷⁶ The discussion of various alternatives with stakeholders indicated a mutual interest in learning and building capacity for improved conflict prevention and resolution related to the Weda Bay Nickel project. Therefore, in response to parties' needs, CAO convened two workshops:

- (1) Workshop on Better Governance and Dispute Prevention in IFC/MIGA Sponsored Extractive Industries Projects in Indonesia (Bogor, Indonesia, 23–26 October 2011) for company and government stakeholders; and
- (2) Workshop on Community and Local Culture-based Conflict Prevention in Halmahera, North Maluku, Indonesia (Ternate, Indonesia, 15–18 December 2011) for local communities and NGOs.

Nevertheless, the CAO was unable to find a means of conducting the mediation and maintaining the safety of the community members. It is worth noting that none of the participants in our research mentioned these alternatives, suggesting they were not meaningful or feasible problem solving avenues, or that they did not fully understand how they would work, and how they would be protected in such processes.

In interviews, affected community members and NGOs that had been involved in the process told us that in hindsight they would have trusted the CAO personnel more, and that the process had been a good one. They discussed the possibility of initiating a further complaint sometime in the future. Some said they said that they would even be willing to go ahead with mediation, now that they know that the people from the CAO are independent from government and the company. At the time that they were engaging with the CAO, however, they were extremely wary. This suggests that perhaps, if the CAO personnel had made greater efforts to explain their distinct role and offered further options to the community members, such as shuttle diplomacy, the process may have been more successful.

Lessons For CAO And Other Redress Mechanisms

Problem-solving in conflict-ridden communities is complex

The CAO recognises that community safety is a major problem in some cases, and in 2016 conducted a public consultation on this issue, in which it committed to doing all it can to protect safety (such as keeping identities confidential) but also acknowledged the limitations of its capacity to physically protect complainants, and affirmed it would, in consultation with complainants, refer a case to Compliance if an Ombudsman process would be too dangerous (CAO, 2016). In some cases, the CAO may indeed be limited to being transparent about the constraints

on its capacity to protect complainants, and refer cases to Compliance, and this would be preferable to putting complainants at further risk. However, in other cases, such as Weda Bay, a stronger commitment to balancing power, another factor identified in its 2016 consultation, could enable a problems-solving process.

Our research suggested three key reasons that safety risks precluded an Ombudsman process in this case:

The CAO was unable to guarantee community safety. In this respect, the CAO's transparency on this point is commendable and it is not clear that any more steps could have been taken by the CAO to physically protect complainants.

However, communities did not understand the options available to them. It is not possible to determine why this was the case, but our research suggested that if communities had better understood both mediation and the other possible options (such as shuttle diplomacy), they would have more seriously considered these options. In the absence of protective powers, more could perhaps have been done by the CAO to ensure communities fully understood their options.

Communities did not trust the CAO. In the environment of fear and intimidation in which this case took place, it is understandable that communities would be suspicious of foreigners. The CAO should consider what additional steps it could take to make clear to communities that Ombudsman staff are independent of the company, government and the IFC/MIGA.

Compliance audits should be used as 'backup' to mediation and other conflict resolution processes

When the CAO Ombudsman function cannot resolve a problem, such as in this case when the complainants refused their further involvement, the CAO can send the complaint to their compliance function to conduct an appraisal to determine whether or not to conduct an audit. In this case, such an audit would be of MIGA's own administration in the decision to support PT WBN, not of PT WBN itself. It is also CAO practice to refer a case to Compliance if it is too dangerous to conduct an Ombudsman process.

This case was referred to Compliance for these reasons, however the Compliance function assessed that there would be no value in an audit on the grounds that PT WBN was still undertaking its own due diligence and an audit would not shed any new light on anything at that stage. It is our conclusion that this was a flawed decision and the Compliance function should have conducted an audit.

An audit of MIGA's decision to support the project would have been worthwhile insofar as it would have generated a) important information that could be used by community groups to seek redress through an Ombudsman process or other channels, and b) discussion around how negative social impacts had occurred, and how IFC/MIGA should manage social and environmental risk in the very earliest stages of a project when assessments are not yet complete but business activity is taking place.

IFC Performance Standard 5 on land acquisition and involuntary resettlement indicates that these standards are applicable in the early stages of the project. This standard states: ‘The applicability of this Performance Standard is established during the environmental and social risks and impacts identification process’. The CAO should have expected PT Weda Bay Nickel to be compliant with the IFC Performance Standards during the exploration phase of mining, and not only at the beginning of the construction and production phase.

The risks in these early phases can be significant. In fact, in cases where land acquisition takes place, it is these very early stages that are the most significant, and this was arguably the point in the Weda Bay mine development at which an audit could have the most impact on the social and environmental conditions of the project. Although the mine was only in the ‘exploration’ phase under Indonesian law, the majority of the land needed for operations has been acquired by the company, resulting in the dispossession of the traditional lands of the local community’s prior to the production phase. If the CAO were to wait until the construction of production phase, the act of dispossession which the affected communities are most concerned about will already have taken place, and the impact of this dispossession will already have taken its toll on the community. In similar cases across Indonesia and around world, such loss of land had resulted in migration to cities in search of unskilled labouring work and the dispersion of previously closely connected communities, both of which have particularly negative effects for women.

This case strongly suggests that the CAO should take a more proactive approach to compliance audits in the early stages of projects.

Furthermore, a number of additional steps could be taken to strengthen the impact of the Compliance function on human rights outcomes. These include:

In order to identify non-compliances in the business activity of project proponents, we suggest that compliance audits (triggered in the usual ways) should apply not only to IFC/MIGA but also to project proponents, as a contractual condition. This would mean IFC/MIGA clients could be audited by the CAO directly for their Compliance with the IFC Performance Standards. This could have led to an audit of PT Weda Bay Nickel that would have generated perhaps more detailed information on their problematic land acquisition procedures and their effects.

A recent initiative by the CAO to encourage participatory project-level action plans as a result of compliance audits could strengthen the impact of audits not just on IFC/MIGA internal procedures, but also at the project level and with respect to remedy for the grievances that triggered the audit in the first place. Should the CAO expand its mandate to include auditing of project proponents, those project proponents could also be required to establish participatory project-level action plans: see the CAO report in this series for further detail on this point. In this case, such a plan might have led to changes in the land acquisition process and significantly improved outcomes for complainants.

Though it is not the norm, it is possible for the CAO to conduct a compliance audit alongside, rather than after an Ombudsman process (eg this took place in the Wilmar case, also studied for this project), and our research suggests this parallel approach to problem-solving and compliance could potentially have positive effects on human rights outcomes. If the Ombudsman process is ongoing, the compliance audit could provide additional information to feed into that

process. The CAO should consider more frequent use of the two functions in parallel.

In cases where complainant safety is a concern, or the primary reason an Ombudsman process fails or doesn't get started, a Compliance appraisal is automatically triggered to provide a 'backup' option for addressing the concerns raised in the initial complaint. However, this 'backup' option is only useful if the appraisal confirms the need for an audit. We propose that when Ombudsman processes are unsuccessful because of safety concerns, an audit, and not just an appraisal, should be automatically triggered.

Lessons For NGO Strategies

Establish clear methods of communication and representation with communities

- 1 There has been a failure to establish clear communication and decision-making structures within communities, between communities and NGOs, and between NGOs. One of the reasons for divisions between community members was the lack of accurate information that might have formed the basis of decisions about whether to accept compensation. Instead, decisions were based on rumour or inaccurate information from corrupt sources. This case study suggests that before a complaint is lodged with a mechanism such as the CAO, it is desirable to:
 - 2 Support the establishment of clear communication and decision-making structures within communities, viewed as legitimate by the majority of community members.
 - 3 Assist communities in understanding the potential impacts of the mine, particularly drawing from experiences of other communities, using appropriate communication styles, and demanding additional information from the company if necessary.
 - 4 Support affected communities to engage in open discussions about their priorities before reaching a decision on joint goals.
 - 5 Advise community of a variety of strategies and approaches that can be used to achieve more beneficial outcomes.
 - 6 Develop relationships between communities and NGOs so they can understand each other's objectives and engage in dialogue on what claims to make, and through which avenues.
 - 7 Develop relationships and clear and regular lines of communication among NGOs so that each NGO might work to its strength on a case, and work in line with its mandate (eg AMAN could have shepherded communities through a CAO process while Walhi and others stepped away from the process).

Alternative sources of livelihood

All the community members we interviewed feared for their future livelihood. Those who had signed the compensation forms did so due to the promise of employment with the mine. For

community members who were part of the 50 000 group and were refusing to sign compensation agreements in the hope of bargaining for a better deal, there existed considerable fear about their future livelihoods.

Limiting people's access to their traditional livelihoods increases dependency on the company. The negative impact of this kind of strategy can be limited by NGOs who are supporting the community by making effort to help families secure a livelihood.

Ideas for doing this include:

- 1 Make alliances with development NGOs who are independent, and whose expertise is in sustainable livelihoods. Invite them to visit the communities and see what they can do to help. (Make sure they stay independent and do not become part of the PT WBN CSR program!)
- 2 In all complaints, add to the list of the demands a guarantee from the company that communities can continue to use their agricultural lands until a final agreement is reached.
- 3 Ask the company to publicly guarantee that they will not call the police, or any others to punish families who are accessing their agricultural lands.
- 4 Ask the company to publicly promise they will not destroy any agricultural lands until agreements have been reached.

Seek advice from other NGOs and organisations with expertise in making complaints before lodging a complaint

Many of the shortcomings of the CAO case in relation to the Sawai and Tobelo Dalam communities arose because of lack of knowledge and preparation on behalf of the NGOs who lodged the initial complaint. Had Walhi and the other Jakarta-based NGOs who made the complaint sought advice from groups such as Forest Peoples' Programme or SawitWatch, who had recently used the CAO in the Wilmar case, they may have been better prepared for the process that ensued and had more idea of how to engage strategically with the non-judicial human rights mechanism.⁷⁷

Conduct preparation within the community before lodging a complaint

It is likely that the CAO process would have proceeded far more smoothly, and would have gone further, had the communities been prepared and received training about the CAO process by trusted NGOs. Had the communities received training about the CAO from friendly NGOs, who they already trusted, they might have been more prepared to engage with the process and to find creative ways to overcome fears regarding mediation.

Even if the community gained the opportunity to freely and fairly negotiate with the company, they have very little support to establish what a 'better outcome' might look like.

Build an international alliance

PT Weda Bay Nickel Mine's two biggest shareholders are ERAMET, a French mining giant, and Mitsubishi, one of Japan's biggest companies. Although Walhi has now made better contact with its French equivalent, Friends of the Earth France and the legal group Sherpa, there is not a well-established campaign in France. No campaign exists against Mitsubishi that we know of in Japan or elsewhere that the Japanese giant operates. This represents a missed opportunity to make use of the failures of the CAO complaint to generate alternative forms of leverage for the affected communities.

Lessons For Business And Government

Go beyond minimum legal requirements

One of the main lessons for business arising from this case study is that it may at times be necessary to go beyond minimum domestic legal requirements in order to uphold international norms. In the case of the acquisition of the agro-forestry land of the Sawai communities affected by the PT Weda Bay nickel mine, there were a number of breaches of Indonesian law found by the community legal advice group Pro Justitia and also Komnas HAM. Procedurally, much of the company's behaviour with regard to land acquisition was in keeping with the law, though as documented in this report, the land acquisition process and compensation have been marred by allegations of intimidation and threats.

The amount of compensation offered is well below what would be expected in keeping with various international norms. As noted above, the IDR8000 offer was calculated based on present market value, and it failed to take into account the value of the land to the company, including the value of the nickel deposit and the profit it would generate for the company. Our research suggests that the compensation agreement does not adequately replace the livelihoods of the community, nor compensate them for the social and economic upheaval associated with the entire life of the project. Businesses contemplating land acquisition and compensation packages should ensure their proposals are in keeping with the IFC Performance Standards, rather than exploiting the low legal literacy of isolated communities and taking advantage of their comparatively weak bargaining power.

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