

**RESOLVING CONFLICTS IN CUSTOMARY LAW AND  
WESTERN LAW IN NATURAL RESOURCE DEVELOPMENTS IN  
PAPUA NEW GUINEA\***

**DR JOHN NONGGORR\*\***

The most traumatic events that have happened to Papua New Guinea in its 15 year existence as an independent nation have been the events leading to, and following, the closure of the giant Bougainville Copper mine on the island of Bougainville, North Solomons Province. These have been traumatic in economic as well as political and social terms.<sup>1</sup> The underlying causes of the Bougainville

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\*\* Senior Lecturer of Law, University of Papua New Guinea.

1 The closure of the mine that, from independence, contributed one-third of government revenue dealt a substantial blow to the Papua New Guinea economy. It rekindled demands by Bougainvillians to secede from Papua New Guinea, demands first made during the month the country was preparing for independence - September 1975. The succession demands have come to the forefront with the formation of the Bougainville Revolutionary Army (BRA). Members of the Papua New Guinea security force sent in by the government to quell the 'rebellion' has resulted in hundreds of people being killed on both sides and turning thousands of Bougainvillians into refugees.

problem have been attributed to historical, cultural and political reasons.<sup>2</sup> While there is some credibility in these explanations,<sup>3</sup> the main causes of the Bougainville problems fall squarely on the Bougainville mine.

The Bougainville problem has exposed the conflict of values and norms - those of the western cultures and the Melanesian cultures - concerning property rights, distribution of such rights, the relationship of people to their environment, the existence and functioning of political units, etc. These conflicts are surfacing in a most crucial area for Papua New Guinea - that of natural resource developments.

Papua New Guinea's economy is very weak. It has very little manufacturing base and a large illiterate rural-based population. Law and order is a big problem due to an education system, again based on western values, that produces people who can fit neither into their villages nor the urban societies as the education system creates expectations that cannot be realised in the rural areas. The urban population that manages the country is fed on imported food. The country has an inefficient bureaucracy and an adopted system of government that sees politicians being bought and sold on the floor of Parliament. This leads to ineffective governments and political instability.

The area of some strength for Papua New Guinea is in the abundance of natural resources, particularly in copper, gold and oil. But this hope for the country is fading as problems constantly arise concerning their development. Apart from the Bougainville mine which, until its closure, was operated by Bougainville Copper Limited (BCL),<sup>4</sup> there are in existence four other mining projects (with the fifth at the negotiation stage for eventual development) and one petroleum project. The second project, developed in 1984, is the Ok Tedi gold and copper mine found in the Star Mountains of the Northern Province and operated by Ok Tedi Mining Limited (OTML).<sup>5</sup> The third, the Misima Gold mine on Misima Island in the Milne Bay Province, that commenced commercial production in 1989 is being developed by Misima Mines Pty Limited.<sup>6</sup> The fourth mine - the Porgera gold

2 It has been said that Bougainvillians have always felt that they are different from other Papua New Guineans, that the British and the Germans trading of colonies, arbitrarily made them a part of Papua New Guinea.

3 Bougainvillians are not really a different race of people. They are Melanesians. Their skin colour is much darker than other Papua New Guineans but culturally, they are not any different from the people of the New Britains or New Ireland. It is true that Bougainvillians speak different languages from other Papua New Guineans but this is true of all the tribes that make up Papua New Guinea that, between them, speak over 740 different languages.

4 The shareholding in BCL is held by Conzinc Rio Tinto, Australia (53.6 per cent); the Papua New Guinea government (20 per cent) and the public (26.4 per cent).

5 The shareholding in OTML is: Broken Hill Proprietary Limited (30 per cent); Amoco Minerals Company (30 per cent); a German consortium comprising of Kupfer explorations gesellschaft (7.5 per cent), Degussa (7.5 per cent), Deutsche Entwicklungsgesellschaft - 5 per cent; and the Papua New Guinea government (20 per cent).

6 Misima Mines is owned by the Placer Pacific Ltd of Australia (in turn owned by Placer Dome Inc of Canada) (80 per cent) and the government of Papua New Guinea (20 per cent).

mine - located in the Porgera sub-district of the Enga Province in the Highlands of Papua New Guinea, began commercial production in 1990 and is being developed under a joint venture arrangement.<sup>7</sup> Negotiations for the development of the gold deposit on Lihir Island, New Ireland Province, are presently (1993) in progress with the London based Rio Tinto Zinc (RTZ). The first and only petroleum project so far developed is the Kutubu Petroleum project. Involving a joint venture of six entities led by Chevron Niugini,<sup>8</sup> it is developing three oil fields - Iagifu, Hedinia and Agogo - near Lake Kutubu in the Southern Highlands Province.

The five operating projects have all faced problems which can be traced to one source - the people who are owners of land on which these resource developments are taking place (hereafter 'customary landowners'). All the projects have been developed under laws that Papua New Guinea adopted from either England or Australia. These are laws on land ownership and their acquisition; payment of compensation; the protection of the environment and the instruments used to allocate rights and duties such as project development agreements. All these laws and instruments, based on western values to a large extent, conflict with the values and norms of the indigenous people. These conflicts give rise to misunderstandings, suspicions and lead to physical confrontations and disruption of project activities.

The main area of conflict relates to land ownership and land rights. First, the outright acquisition of land from customary owners is inconsistent with their concepts of land ownership. Second, the separation by the western based laws, of mineral ownership from the surface land is alien to indigenous people. Third, the payment of a purchase price for land so acquired creates problems. Fourth, the instruments used such as agreements, in transactions with customary groups under which the interested parties share rights and duties, do not really solve the problems. Attempts made to involve landowners in the development of the projects must be meaningful. Otherwise, failed or half-hearted attempts will create further suspicions and misunderstandings. This paper proposes a number of ways to avoid conflicts, especially in dealing with landowners on these issues with the object of ensuring that the projects that are important to Papua New Guinea's economy are developed without the sort of disruptions now rampant in the country.

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7 There are four partners in the joint venture - MIM Holdings of Australia through Highlands Gold Limited (30 per cent); CRA (30 per cent); Placer Pacific (30 per cent); and the Papua New Guinea government (10 per cent). In March 1993, the national government demanded and the other joint venturers sold to it 5 per cent each of their shares, bringing all four joint venturer partners' interests to 25 per cent each.

8 The joint venture comprises the Papua New Guinea government (22.5 per cent); Chevron Niugini Pty Limited, subsidiary of Chevron Corporation of USA (19.375 per cent); British Petroleum Development Pty Ltd owned by British Petroleum (19.375 per cent); Ampol Exploration Ltd of Australia (16.46 per cent); BHP (9.69 per cent); and Oil Search, a public company incorporated in Papua New Guinea (7.76 per cent).

## I. CUSTOMARY LAND OWNERSHIP

Western concepts of land ownership differ from many customary rules on land ownership in societies, with different customs and traditions. This is especially true in the island states of the South Pacific. The main difference lies in what constitutes 'land' and the norms relating to its 'ownership'. In Melanesian societies for example, land is not regarded as an economic asset as it is in Western societies. Land, according to a Melanesian, "is part of ... [the people's] culture".<sup>9</sup> There is a special attachment of a Melanesian person to land. The relationship of a Melanesian person to land has spiritual significance and is all intertwined with the culture and the whole existence of the person in that society. This relationship influences land ownership rules. No one individual owns land. Land belongs to a clan, tribe or other land owning group. Individuals have rights to use land. The right is derived from membership of the group. Membership of a group could occur by birth or by adoption.<sup>10</sup> A Solomon Islander described the significance of land to a Melanesian and his relationship to it, thus:

A person's right to use land comes from his membership of a line, tribe or clan that is descended from these first people to settle the land. The names of the Solomon Islanders are inherited by the elders and chiefs among their descendants. The names of the tribes, and the authority they gave, were passed from generation to generation by word of mouth, illustrated by symbols, from elders to youngsters. In this way, members of the same tribe know their land rights with simplicity, and without confusion.

The right to use land is the entitlement of the member of the same tribe. Members of different lines, clans and tribes have no rights over other tribal land except through special arrangements such as compensation, marriage, welfare, or gifts. Use of the land include: cultivation, hunting, building of houses, burying of the dead, collection of firewood, feeding of pigs, worshipping of forefathers, making of sacrifices, foretelling, collection of medicine, growing of nali nuts and sago palms, knowledge of valuable trees, and knowledge about natural phenomena such as caves, rivers, rocks, harbours, reefs, and fish as sources of spiritual benefit...land was an ancestral trust committed to the living for the benefit of themselves and generations yet unborn. Land thus was the most valuable heritage of the whole community, and could not be lightly parted with. This is based on the belief that the departed ancestors superintended the earthly affairs of their living descendants, protecting them from disasters and ensuring their welfare, but demanding in return strict compliance with time-honoured ethical prescriptions. Reverence of ancestral

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9 B Sope Islands Business Magazine (September 1988) p 16.

10 PG Sack *Land Between Two Laws* (1973) p 47.

spirits was a cardinal point of traditional faith and such reverence dictated the preservation of land which the living shared with the dead.<sup>11</sup>

These norms of land and land ownership mean that land cannot be transferred freely. This follows from the fact that land is not 'owned' by any individual. Customary land is owned by a political grouping such as a clan or a tribe. But such an entity could not freely dispose of it. The land is held in trust by those living for future generations. No one generation has title (and power) to sell the land. This is often expressed by the statement that 'customary land is owned by the dead, the living and the unborn'.

Land could be transferred to another group but the circumstances where this may be done are limited to situations where certain types of customary obligations are owed. An example is where land is transferred by a clan or tribe to another as part of a compensation payment for death resulting in assistance in tribal welfare or as payment to make peace between warring tribes. These are transactions between groups and not between individuals. Land is not transferred for profit. In other words, land is not a marketable commodity. Further, where land is forcibly taken from a group, this often leads to tribal warfare. No compensation payment can redress such loss. There is therefore no custom for accepting compensation for land taken or transferred outside these limited cases.

Land issues in Papua New Guinea raise very high emotions. The close attachment of people to their land is illustrated by a statement of a Bougainvillian made when remonstrating against the Australian Administration's attempts at taking customary land for the Bougainville mine:

Land is our life. Land is our physical life - food and sustenance. Land is our social life; it is marriage; it is our only world. When you [the Administration] take our land, you cut away the very heart of our existence. We have little or no experience of social survival detached from land. For us to be landless is a nightmare which no dollar in the pocket or dollar in the bank will allay; we are a threatened people.<sup>12</sup>

Land is seen by these Melanesian societies as a whole entity. There is no distinction drawn between the soil and the rocks, the sand or the air. A Solomon Islander, witness to a Land Commission hearing, is reported to have told the hearing that:

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11 G Zoleveke "Traditional Ownership and Land Policy" in Larmour (ed) *Land in Solomon Islands*, Institute of Pacific Studies, University of South Pacific, Fiji (1979) 1-2. Aboriginals of Australia have a similar relationship to land; see Justice Toohey "Aboriginal Land" (1985) 15 *Federal Law Review* 159 at 161-4.

12 Quoted in J Dove, T Miriung and M Togolo 'Mining Bitterness' in PG Sack (ed) *Problems of Choice: Land in Papua New Guinea's Future* (1974) p 182.

his land was not like the land of the white man, in that it had a name only and did not have four sides like a box.<sup>13</sup>

This, as commented by Sack,<sup>14</sup> not only explains that the Melanesian people have no land boundaries, but it also expressed a contempt for the western notion of land, under which land is treated like a box to be used and freely transferred.

## II. LAND ACQUISITIONS, PURCHASE PRICE AND COMPENSATION PAYMENTS

Customary concepts of land ownership are therefore different from western land ownership concepts. No individual owns land. Land belongs to a political grouping for use by its members - those living with remembrance of the dead and to be held in trust for those unborn. It follows that no person can transfer or sell land for no individual has power (or 'title' in the Western sense) to transfer land to another except within the accepted situations where customary obligations are owed.

These values have not been considered, or if considered, have been ignored in the land dealings relating to mining and petroleum developments in Papua New Guinea.

The mineral and petroleum hydrocarbon deposits of all the development projects are found on customary land.<sup>15</sup> The *Land Act* c.185<sup>16</sup> forbids the transfer of, or interests in, customary land otherwise than in accordance with custom.<sup>17</sup> The only exception relates to transactions with the State. Hence, where the State requires customary land for mining or other purposes, it may lease or purchase these from customary owners. In the mining and petroleum projects, the State purchases land from customary owners and later leases these to developers.

There are major problems in the purchase of customary land for mining and petroleum development purposes. First, as indicated earlier, in the great majority of Papua New Guinea societies, the situations in which land can be transferred are limited. Land cannot be transferred for commercial gain.

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13 PG Sack note 10 *supra* p 33.

14 *Id.*

15 Land in Papua New Guinea is divided into two categories - customary land and State (ie government) land. Freehold titles held by non-citizens before independence were converted into 99 year State leases after independence, while citizens may continue to hold freehold land acquired before independence.

16 The Papua New Guinea statute law is now contained in a Revised Edition. The revision was made in 1975. The 'c' means 'chapter' and the number following it is the legislation's chapter number of the Revised Edition.

17 *Land Act* c185, s 15.

Second, the non-recognition of land transactions for commercial gain is not the only problem relating to the transfer of land; land cannot also be transferred by the living members of the land-owning group. Under custom, land is treated as "an ancestral trust committed to the living for the benefit of themselves and generations yet unborn".<sup>18</sup> Hence, the living generation cannot deprive future generations of the land. Land transfers in the limited circumstances stated earlier can be explained in that those transactions between groups benefit future generations as well. This near-sacred nature of land is an important factor that requires proper consideration. Failure to recognise it can create problems like those that have led to the closure of the Bougainville mine.

Third, the other problem on the existing practice of outright acquisition of customary land relates to payments made for land so acquired. Landowners are paid a lump sum purchase price where there is an agreed sale, or compensation payment in the case of land acquired by compulsory process. Compensation is also paid for other losses, such as, hunting rights, fishing rights, etc, arising from the activities of the investment project. Additional land may be made waste through pollution and squatter settlements; the latter created by people attracted to the project. Compensation may be paid for loss of rights such as fishing, hunting and recreational rights.

A number of problems are apparent in the prevailing practice in dealing with customary land. Once land is acquired out-right by the State, landowners almost always feel the loss. It is a big loss to them because they see it as a loss of their only means of livelihood and existence. Payments made for loss of land and other rights may initially be accepted but these will not totally ease the landowner's feelings of loss. As they are not accustomed to being permanently divested of land, their grievances are likely to remain. As Professor Knetsch observes:

Encroachments on rights of landowners in Papua New Guinea seem clearly to be viewed as losses by the owners and are treated accordingly. For various reasons the reference position of the owners seems to be that of exclusive and total control and any erosion from this is taken to be in the domain of loss.<sup>19</sup>

Further, compensation payments received are normally used on consumer goods<sup>20</sup> as landowners have very little knowledge of business and the modern economic systems in general. Compensation monies are therefore used within a short time. After spending them, landowners have come up with 'novel' claims for

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18 G Zoleveke note 11 *supra*. See also Justice Toohy note 11 *supra*.

19 JL Knetsch "Gains, Losses, Fairness and Policy Choices" (1980) *INA Working Party* No 14, Port Moresby, p 9.

20 R Bedford and A Mamak *Compensation for Development: The Bougainville Case* (1977) Bougainville Special Publication 2, Christchurch, p 58-80.

compensation or arguments are advanced that compensation payments<sup>21</sup> made previously were insufficient with demands for further payments to be made. Where such demands are not met, physical disruption to investment projects may follow.

A further problem on the price paid for land acquisitions and compensation payments for loss of other rights is that these payments are made to the adult population present at the time of the land acquisition. Because customary rules do not identify individual landowners, as no individuals own land, it is often difficult to identify owners. Therefore, payments may be made to the wrong people. A more serious problem relates to the claim of subsequent generations. They have, under custom, equal rights to the land. They receive none of the payments. The problems in Bougainville highlight this problem clearly. Payments made for land acquisitions and loss of other rights were made to the then adult members of the land owning groups of the mine area when the project commenced in the late sixties. The monies so paid were spent by that generation mostly on consumer goods. No investment was made. The younger generation, fifteen years later, demanded that further payments be made to them. When these demands were not met, members of that generation replaced the older generation on the Landowner Association in 1988 and pressed their demands through physical disruptions and later armed rebellion.

The mechanisms used to compute these payments also create problems. First, the sale of land, as stated earlier, does not accord with custom. Under custom, land is not transferred for economic gain. The western values for assessing the sale price also do not fit these values of the people. In western societies, the value of land is measured in terms of its market value. The market value is determined in accordance with established principles: the price at which a person is willing to part with the land (or other property) or the price at which such a person is prepared to pay to acquire it.

There are several problems apparent in this market value concept in its application to land transactions in Papua New Guinea. First, in customary societies, land is not, as mentioned earlier, a marketable commodity. Second, often, and as in the Bougainville case, landowners may not be willing to part with the land. In such instances, they are not willing sellers. Third, there are other values to land that are often not taken into account in the market valuation. These include sentimental values. Land is 'an ancestral trust' given by the dead to be held by the living for future generations. It also has religious significance which includes "the burying of the dead.. worshipping of forefathers, making of sacrifices, foretelling, collection of medicine...knowledge of valuable trees, and

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21 AG Corren "Compensation for Damage to Land as a Result of Mining Operations" paper presented at the Papua New Guinea Law Society International Conference, Port Moresby, 6-8 November, 1989.



knowledge about natural phenomena such as caves, rivers, rocks, harbours, reefs, and fish as sources of spiritual benefit...".<sup>22</sup> There is also the close physical and religious attachment of the people to their land in regarding it as part of their 'physical life - food and sustenance' and 'social life' which, if taken, "is a nightmare which no dollar in the pocket or dollar in the bank will allay".<sup>23</sup> These non-economic values are often ignored in determining the market value.

Fourth, the market value concept assumes that people feel the same about losses as about gains of equivalent value. This assumption has been demonstrated to be incorrect. From many studies in behavioural economics,<sup>24</sup> it has been concluded that "people...value losses much more than gains" that "the pain of loss simply is greater than the pleasure of a like gain".<sup>25</sup> People will therefore still feel the loss where their loss is measured by reference to their gains. Where the underlying object of compensation payments is to compensate feelings of loss and in so doing to obtain co-operation (a matter of particular importance in investment projects on customary land in Papua New Guinea), the measure of compensation calculated in accordance with these orthodox principles does not achieve the objective.

If consideration is given to the lease arrangements suggested, in addition to it reducing the feelings of deprivation and loss, when periodic rentals replace lump-sum compensation payments, future generations becoming entitled to the land in accordance with custom can then receive such rental payments.

Instead of acquiring land outright from customary owners, land dealings with them should involve mechanisms that accord with custom or, if not, that at least can be understood by them. It is suggested that the leasing of land from customary owners by the State for development purposes is more acceptable to landowners than outright acquisitions. The lease arrangement will accord more with custom since under custom land is often temporarily released to outsiders for use for particular purposes like harvesting of fruits or the felling of trees. The State can in turn sub-lease them to resource developers. This will leave land ownership in the customary owners. With proper explanation of the lease arrangement (ie the retention of ownership) the feelings of deprivation and loss will be overcome. If customary owners are made partners to such developments as suggested below, their equity contribution could include the use of the land and the minerals or petroleum hydrocarbons.

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22 G Zoleveke note 11 *supra* at 1-2.

23 J Dove *et al* above note 12 *supra*.

24 RH Thaler "Towards a Positive Theory of Consumer Choice" (1980) *Journal of Economic Behaviour and Organisation*, 36; JL Knetsch and JA Sniden JA "Willingness to Pay and Compensation Demanded: Experimental Evidence of an Unexpected Disparity in Measures of Value" (1984) *The Quarterly Journal of Economics* p 507.

25 J Knetsch note 19 *supra* at 5.

### III. OWNERSHIP OF MINERALS AND PETROLEUM HYDROCARBONS

Under the common law, the maxim *cujus est solum, ejus est usque ad coelum et ad inferos*,<sup>26</sup> meaning that the owner of the soil is presumed to own everything 'up to the sky and down to the centre of the earth', applies.<sup>27</sup> The fee simple owner of land owns the land as well as minerals and petroleum hydrocarbons found on or under it.<sup>28</sup> Therefore, in the sale or other transaction in land, unless there is an express reservation of mineral rights, these would also be transferred.<sup>29</sup> The common law has however excepted gold and silver as royal minerals that are vested in the Crown by prerogative right.<sup>30</sup> The common law forms part of the law of Papua New Guinea<sup>31</sup> and further these principles are given statutory force by the *Mining Act* 1953<sup>32</sup> and the *Petroleum Act* 198.<sup>33</sup>

It has been argued that, since there was no use for minerals in the traditional Papua New Guinea society, there were no customary ownership rules in existence in respect of them and so the State's claim to minerals and petroleum hydrocarbons did not conflict with customary rules concerning their ownership. These suggestions arise from a failure to understand the creation, existence and exercise of rights over land and other objects under customary law.<sup>34</sup>

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26 *Michel v Mosley* [1914] 1 Ch 438, 450.

27 On the application of this maxim in Australia, see AJ Bradbrook "The Relevance of the Cujus est solum Doctrine to the Surface Landowners Claims to Natural Resources Located Above and Beneath the Land" (1988) 11 *Adelaide Law Review* 462.

28 *Wilkinson v Proud* (1843) 11 M & W 33; 152 ER 704; *Wade v NSW Rutile Mining Co Pty Ltd* (1969) 121 CLR 177.

29 *Cox v Glue* (1848) 5 CB 533; 136 ER 987; *Baxendale v Instow Parish Council* [1982] Ch 14; *Kelsen v Imperial Tobacco Co (of Great Britain and Ireland) Ltd* [1957] 2 QB 334; *Grigsby v Melville* [1974] 1 WLR 80.

30 The case that established this is *The Case of Mines* (1568) 1 Plow 310 (Ex Ch), 336; 75 ER 472: "that by the law all mines of gold and silver within the realm, whether they be in the lands of the Queen, or of subjects, belong to the Queen by prerogative right, with liberty to dig and carry away the ores thereof, and with other such incidents thereto as are necessary to be used for the getting of the ore."

31 *Constitution*, Sch 2.2.

32 *Mining Act*, s 2: "All gold and minerals in or on any land in the country are the property of the State". Under the new *Mining Act* 1992 (not yet in force), it is s 5. 'Mineral' is defined to include silver, copper, tin, metals, ores, and other substances containing metals, gems, precious stones, coal, shale, mineral oils and valuable earths and substances: s 7. Section 2 of the *Mining Act* 1992 defines "minerals" as meaning "all valuable non-living substances excluding petroleum obtained or obtainable from land".

33 'All petroleum and helium at or below the surface of any land is, and shall be deemed at all times to have been, the property of the State': *Petroleum Act*, s 5.

34 In addition to the observation made below, for a full account of the background to the mineral ownership issue in Papua New Guinea and the policy implications, see K Ongwamuhana and A Regan "Ownership of Minerals and Petroleum in Papua New Guinea: The Genesis and Nature of Legal Controversy" (1991) *QUTLJ* 109.

Under customary law, the use of land and other objects on land was practical. Those things on land which were useful to the people were treated as being theirs that they had rights over. In the case of any thing or object on land that was of no practical use, though treated as part of the land, no specific rules existed to say who had rights of use over them. Thus, when a Papua New Guinean was asked by an anthropologist about rights to rock outcrops and patches of poor soil, the reaction to the question is reported to have been laughter with a counter-question:

Do you ever say that the ash that's fallen from a cigarette is yours, that no one else may touch it. ...Yes, you may laugh at me when I say that. Now, do you understand why I laugh at your asking about bare rocks and clay where nothing will grow.<sup>35</sup>

This brings out one of the basic differences between the western concept of land and traditional customary concepts, that the latter is more practical and does not provide answers to all theoretical possibilities whereas the former has norms from which the question could be answered without difficulty. Sack, after citing the above communication, explains:

Primitive law is a pragmatic and open system, oriented to reality and not to theoretical possibilities. Its norms reach only as far as necessary for practical reasons; it is not interested in theoretical cases. But primitive law can provide an answer as soon as such a case becomes practical. Primitive law being an open system, it cannot be argued that no rights to rock outcrops and patches of poor soil exist because traditional law says nothing about them (as could probably be argued in Western law). Although not yet defined, these rights will be defined when their existence becomes a practical issue. This definition does not create new rights; they existed all the time, only in latent form. Primitive law is all-embracing as Western law, but whereas Western law is all active law, primitive law comprises active as well as dormant law. It needs neither legislation nor the help of judges to activate dormant areas, though it pays for this flexibility with a - for Western lawyers - confusing lack of definiteness.<sup>36</sup>

In relation to the ownership of minerals and petroleum hydrocarbons found on or under customary land, rules may not be found saying who the owner is or who has rights over them because there is no practical need for such definition. This, as Sack points out, does not mean that they are 'ownerless'. They are part of the land and if any practical use were to arise, the members of the land owning group have rights to their use. Nothing to the Melanesian is 'ownerless' and, at the same time, no individual owns any land. Individuals only have usufructuary rights, rights that may be exercised to the exclusion of persons outside the land owning group. To Papua New Guineans, the existence of different interests in land such as licences, easements, leases and the separation of minerals from the surface soil contradict

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35 HI Hogbin and Lawrence *Studies in New Guinean Land Tenure* (1967) p 8.

36 PG Sack note 10 *supra* p 20.

their ideas of land ownership. They cannot comprehend, let alone accept, why land which has always been theirs upon which their livelihood and existence depend, can be divided in such fictions.

Third, there are no rules as to rights over rocks, poor soil or minerals for there was no practical use for these. Once the practical use arises, the 'dormant laws' would provide the rules. Under customary rules therefore, in relation to minerals and petroleum hydrocarbons, once their use and economic value was made apparent, members of the group have rights to their use whether for trade or otherwise as these belong to their group. They are neither ownerless nor are they separated from land for some other person or entity to own leaving them with rights over the surface soil only.

The mineral ownership issue has been a controversial one in Papua New Guinea. Mr Peter Donigi, a prominent Papua New Guinea lawyer<sup>37</sup> has argued that the common law rules and legislative provisions vesting ownership of minerals and petroleum hydrocarbons in the State are unconstitutional as they offend the provision of the Papua New Guinea Constitution that protects property rights.<sup>38</sup>

37 Peter Donigi first argued this in a newspaper article - *The Times of Papua New Guinea*, 7-13 July and 14-20 July, 1988.

38 The provision is section 54 which, in part, is in the following terms:

- (1) Subject to Section 53 [not relevant here] and except as permitted by this section, possession may not be compulsorily taken of any property, and no interest in or right over property may be compulsorily acquired, except in accordance with an Organic Law or an Act of the Parliament, and unless -
  - (a) the property is required for -
    - (i) a public purpose; or
    - (ii) a reason that is reasonably justifiable in a democratic society that has a proper regard for the rights and dignity of mankind, that is so declared and so described, for the purposes of this section, in an Organic Law or an Act of Parliament; and
  - (b) the necessity for the taking of possession or acquisition for the attainment of that purpose or for that reason is such as to afford reasonable justification for the causing of any resultant hardship to any person affected.
- ...
- (4) In this section, a reference to the taking of possession of property, or the acquisition of an interest in or right over property, includes a reference to -
  - ...
  - (b) the extinction or determination (otherwise than by way of a reasonable provision for the limitation of actions or a reasonable law in the nature of prescription or adverse possession), of any right or interest in property.
- (5) Nothing in the preceding provisions of this section prevents -
  - (a) the taking of possession of property, or the acquisition of an interest in or right over property, that is authorised by any other provision of this Constitution; or
  - ...
  - (c) any taking of possession or acquisition that was an incident of the grant or acceptance of, or of any interest in or right over, that property or any other property by the holder or any of his predecessors in title; or

Others have rejected this argument on the basis that the Constitution in fact protects property interests acquired before the Constitution itself came into existence.<sup>39</sup> Donigi has taken the matter to the National Court but the case was dismissed on his *locus standi*.<sup>40</sup>

Assuming that the present legal position is that mineral and petroleum hydrocarbons are vested in the State, the question that must be answered is whether this is sound policy? On closer examination, it should make no significant difference whether ownership of these resources is vested in the State or landowners. If ownership is vested in landowners, legislation may regulate their development just as legislation regulates the use of the surface soil as land. Landowners would not develop these resources on their own. They do not have the capital, first, to determine the existence of minerals; and second, to develop them. Outside investors will still be required to develop the resources just as is the case now when their ownership is vested in the State.

For landowners however, the issue of ownership of mineral or petroleum hydrocarbons is important. Any legal principle vesting these resources in any person other than landowners will be seen by the latter as an attempt to deprive them of their land. This is because, they will see this law for what it is - a legal fiction. Very few, if any Papua New Guineans will accept the idea that while they own the surface soil, somebody else owns resources found on, under or above it. Even educated Papua New Guineans including lawyers find this difficult to grasp. For example, a Papua New Guinean Attorney-General, a former judge of the National Court, when referring to the question of mineral ownership in Papua New Guinea, after stating the government position that minerals on customary land in the country are owned by the State, said:

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- (d) any taking of possession or acquisition that is in accordance with custom; or
  - (e) any taking of possession or acquisition of ownerless or abandoned property (other than customary land); or
  - (f) any restriction on the use of or on dealing with property or any interest in or right over any property that is reasonably necessary for the preservation of the environment or the national cultural inheritance.

39 This argument is based on a transitional provision in the Constitution s 248 - which provides:

All property that was, immediately before Independence Day, vested in the body corporate at that time known as 'the Government of Papua New Guinea' is, on that day, vested in Papua New Guinea, and all rights and liabilities (actual or contingent) of that body immediately before that day are, on that day, rights and liabilities of Papua New Guinea.

40 Another argument that Donigi made raises interesting constitutional and international law questions. Donigi has argued that in relation to the part formerly known as 'New Guinea', the United Nations conferred a trustee over it to Australia and that required Australia to protect the people and their property and not to acquire such property as it did in relation to minerals and petroleum hydrocarbons under colonial legislation.

As a Minister of State and the Attorney-General, the law is correct, but as a 'native' or as a villager, that is not correct; I will never agree with it.<sup>41</sup>

The majority rural-based population do not know of the existence of this legal principle. After mineral or petroleum hydrocarbons are discovered on their land and they are told that these are owned by the State, they can neither comprehend nor accept how this is possible. From the beginning, this creates distrust between landowners on the one hand and the State and investors on the other. It is suggested that mineral ownership be vested in landowners. Once extracted, investors will pay normal royalty payments to the resource owners - the landowners. Or, where landowners desire to become partners in the projects, as suggested below, they may use the resources as their equity contribution. This will remove any feelings of deprivation and loss and assist in creating a better climate for the exploitation of these resources. Where landowners refuse mining or petroleum developments on their land where these resources are found, as a last resort, the State may, for the public interest, acquire these using its compulsory process powers in the same way as it presently acquires land.

#### IV. CONTRACTING WITH LANDOWNERS

Landowner claims are the most serious as they pose real threats to the operation of investment projects and in turn the economy of the country. The closure of the Bougainville mine and demands by Bougainvillians to secede from Papua New Guinea, as stated earlier, stemmed from land related grievances. Landowners in the Ok Tedi mine area have once blocked the mine access road and have threatened to do the same on a number of other occasions. In the Porgera and Misima projects, similar threats have been made by landowners to disrupt mining activities.

The resort to self-help means like tribal warfare or physical disruption of investment projects, when grievances expressed by landowners in demands for meaningful participation in investment projects, for example, are not met, are entrenched in the culture of the people. Prior to outside contact, there was no central authority maintaining order over the whole or any major part of the country. In many parts, there were no traditional chiefs to exercise control. Many small communities were scattered and isolated from each other by mountains and rugged terrain. There were therefore many small tribes speaking over 740 different languages in a population of three and one half million. Over seventy percent of

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<sup>41</sup> The then Attorney-General, Bernard Narakobi, speaking at a seminar (which the writer attended) organised by the New South Wales Branch of the Australian Council for the National Interest (CNI) at the Australian Institute of International Affairs, Sydney on 2 December 1989.

this population is still rural based and their lives continue to be regulated by custom. The government system with central authority has had limited impact on the majority of the people. Self-help therefore is still a predominant means of righting wrongs. It means, in relation to investment projects, physical disruptions as a way of airing grievances and this will continue unless effective ways and means are identified to deal with them.

In 1988, the government made a number of significant policy changes to involve landowners in decision-making and participation in major mining and petroleum development projects. In relation to landowner participation in decision-making, a 'development forum' process was established, a procedure that now has statutory backing under the new *Mining Act* 1992.<sup>42</sup> Essentially, this is a consultation forum where all parties interested in a project (the national government, provincial governments, project developers and landowners) convene to discuss all issues relating to the proposed development. The discussions culminate in a network of agreements which define the relationship as well as stating the rights and obligations of the parties to each other concerning the project.

The development forum involves the following procedure,<sup>43</sup> which begins after the project developer has completed and submitted to the Minister for Minerals and Energy feasibility studies together with proposals to develop a mineral or petroleum reserve:

1. The Minister tables the documents submitted by the developer in the National Executive Council.
2. The Prime Minister then distributes the studies and proposals to relevant ministers with a request to them and their departments to provide position papers. The provincial government concerned is also forwarded the relevant documents.
3. After position papers are prepared, the Prime Minister convenes the "development forum". Participants consist of relevant ministers, parliamentary representatives, the provincial premier, representatives of landowners of the project area, and a representative of the developers.
4. Under the chairmanship of the Prime Minister (the Deputy Prime Minister is deputy chairman with the Minister for Minerals and Energy acting as forum secretary), the forum considers the position papers presented by ministers. The developer is then requested to present an over-all brief.

The objective is for the forum to establish agreement on all aspects of the project. To ensure this, the developer may be requested to modify its

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42 *Mining Act* 1992, s 3 (this Act has not been brought into force yet.)

43 Papua New Guinea, National Executive Council (Cabinet) decision no NG83/88 of 18 November 1988.

development proposals. The discussion ends when agreement is reached on all issues.

5. The Attorney-General's Department is then instructed to incorporate the agreed proposals in a development contract. A draft of the contract is first considered by the forum for approval. The final contract is submitted to the National Executive Council for approval and execution by the Head of State (on behalf of the government) and the project developers.

The procedure has been used in the Poregera, Misima and Kutubu projects.<sup>44</sup> Three sets of agreements were made in each of these projects after the forum discussions. The first are the agreements between the State (the national government) and project developers. These have come to be called 'development contracts' because they set out the terms and conditions as well as the rights and obligations of the State and project developers regarding the development of a project. They comprise the main contracts. The second are agreements between the State and provincial governments which define their rights and obligations to each other regarding the projects.<sup>45</sup> The third agreements are made between the State and landowners under which their rights and obligations to each other are found.

In the Misima project for example, there is a main development contract between the national government (the State) and Misima Mines Pty Limited. The second is between the national government and the Milne Bay Provincial Government and the third between the national government and Misima Landowners. In the Poregera project, in addition to the development contract between the national government and the project developers, there are three other contracts; one between the national government and Enga Provincial Government; another between the national government and Poregera landowners and a third between the provincial government and landowners. In the Kutubu project, apart from the development contract between the national government and the project developers, there are four other agreements. Two are between the national government, on the one hand, and the Southern Highlands and Gulf Provincial Governments, respectively, on the other.

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44 In the Kutubu project, because the petroleum development agreement had been made when the Petroleum Prospecting Licence (PPL) was issued some years earlier, the forum discussions were conducted before the Petroleum Development Licence (PDL) and the pipeline licence were granted. The objectives of the discussions were to resolve differences between the participants, especially those between the national government and the developers on the one hand and the provincial government and landowners on the other. Any obligations on developers arising out of these discussions form conditions precedent for the granting of the PDL and the pipeline licence.

45 For a discussion of provincial government participation in resource development projects, see J Nonggorr "Provincial Government Participation in Mining and Petroleum Developments" (1991, Special Issue) *Melanesian Law Journal* 91.



The other two are between the national government and the Southern Highlands landowners and Kikori landowners of the Gulf Province, respectively. The Gulf Provincial Government and the Kikori landowners participated because the project involves an oil pipeline that runs through their territory to the Gulf of Papua where the oil is loaded onto tankers.

The provincial government and landowner agreements provide for their participation in equity and royalties, preferential terms on employment of local people, and on local business participation. Obligations are also imposed. For example, provincial government cooperation is required in the development of the projects. The developers are not parties to the agreements between the national government, provincial government and landowners. Obligations are also imposed on landowners under the agreements between the landowners and the national government. Part C of the agreement between the national government and the Southern Highlands landowners<sup>46</sup> in respect of the Kutubu project is an example:

#### PART C. LANDOWNER UNDERTAKINGS

##### 18. LANDOWNERS TO CO-OPERATE

The Landowners undertake to:

- (a) Work in full consultation with the National Government, the Provincial Government and KJV [Kutubu Joint Venture] to ensure the smooth and efficient operation of the Project.
- (b) Explore all avenues to resolve disputes and difficulties connected with the Project.

##### 19. LANDOWNERS TO CONSULT

The Landowners hereby undertake:

- (a) Not to disrupt the operation of the Project at any time during the life time of the Project should any problems arise which is connected with the Project.
- (b) To explore all avenues of consultation with the KJV, the Provincial Government and the National Government to resolve any problems or difficulties emanating from the Project.

Apart from the imprecise nature of these obligations on landowners, the other problems relate to their enforcement. The agreements with landowners are made in almost all cases, with illiterate landowners. Although there may be one or two young men from the area who may be educated and who may explain things, the signing of the agreements involve illiterate and very elderly men who cannot speak English or the other official languages - pidgin and motu. They are asked to use a

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46 "Memorandum of Agreement Relating to the Kutubu Petroleum Development Project between the Independent State of Papua New Guinea and Southern Highlands Landowners" (1990).

pen, which they cannot grasp properly, and which is as foreign as the paper and the 'x' mark they are asked to make on it. In western societies, the making of a contract, the signing of an agreement shows a commitment to be bound. It is backed up not only by legal enforcement but also involves more personal commitments that, if not performed, reflects negatively on the signors personal reputation.

These are all foreign to a Papua New Guinean landowner. Since no writing existed, the physical objects used including the act of putting a signature, means very little to them. The most serious problems, however, relate to the enforcement of the contractual obligations against landowners. In relation to the obligation imposed on landowners not to cause physical disruptions to investment projects for example, the existence of this obligation under the agreements without any mechanisms in place to practically affect landowners where they contemplate breach, they will not feel inhibited by such obligations. Papua New Guineans are, traditionally, used to getting answers to queries or demands promptly and when there are delays in the government bureaucracy, they will resort to violence more quickly. To actually claim damages for breach of contract where for example, a blockade stops the operations of a mine causing millions of kina loss, it is unrealistic to expect landowners to pay damages for such losses. It is already a problem in identifying individuals in such cases for the criminal law to deal with them as people are not prepared to cooperate with police when it comes to this type of violence.

The only way to make landowners respect resource developments is to involve them as partners in the projects. They must have a stake in them to feel affected if they contemplate disrupting mine operations. In a small scale alluvial mine - the Mt Kare gold mine - in the Enga Province, landowners have been allowed to take a 49 per cent stake (as shareholders) in the project. Due to disagreements between landowners themselves - ie, disputes by some landowners that they were not included in the project - the mine facilities were damaged and its operations were suspended. However, the members of the landowning group suffered the loss as well and were anxious to have the mine resume operations as they had personal stakes in the project. Recently (March 1993), through negotiations with the government, Conzinc Rio Tinto (Australia) - CRA - which holds the 51 per cent equity agreed to relinquish these to the landowners. The landowners will now own the entire alluvial mine.

## V. LANDOWNER PARTICIPATION IN DEVELOPMENT PROJECTS

Traditionally, in large investment ventures involving foreign investment in developing countries, host governments gave investors exclusive rights under concessions to exploit mineral or petroleum resources. The host countries looked to these projects to create opportunities for employment and training, the provision of social services and the development of infrastructure and income sources through taxation. The modern trend in investments established under what are now called 'economic development agreements' is for host country equity participation or participation through production sharing or joint ventures with different and higher tax obligations. Hence, modern investments involve foreign investors and host countries as partners.

In the Papua New Guinea mining and petroleum developments, investors and the national government have been the main actors. The agreements make detailed provisions on their respective rights and obligations. More specifically, they provide for the way revenue generated by the project is to be shared through taxation and royalties to the State, the provision of social services and infrastructural developments for the benefit of both the project and the host country including the people living in the vicinity of the project and revenue to be treated as profits for the investors.

Apart from receiving compensation payments for losses suffered as a consequence of the investment projects, landowners derive no direct benefits. In many developing (as well as developed) countries, once land is acquired for development purposes, those who sell the land have no special interest in the projects established later on such land. Therefore, unless they become investors in the projects by taking equity for example, no special consideration is given to them. In the Papua New Guinea projects, this principle cannot apply. Even if their land is acquired outright by the State with appropriate payments, landowners still feel that they have some (though undefined) rights to the land and the investments. These feelings stem from a lack of a full appreciation of the significance of the outright disposal of land, since under custom the sale of land was not recognised. Because of these factors, customary landowners feel aggrieved when they are treated as outsiders in investment projects and these feelings have led to numerous demands for exorbitant compensation payments and the blockade, and in some cases sabotage, of project operations.

There are criminal and civil remedies available to investors and the State against landowners for such unlawful behaviour but these have, for various reasons, proved ineffective and may be counter-productive. The way forward is, because of Papua New Guinea's special circumstances, to allow landowners some form of

direct participation in the investment projects. Such participation can occur in at least three ways - sharing project profits through equity participation; payment of royalties; employment and training; and participation in spin-off business ventures and participation in decision-making processes relating to particular investment projects.

Mining and petroleum ventures involve large capital investment and most rural-based landowners cannot raise any significant capital to participate in such projects in any meaningful way. Monies received for land acquisitions, compensation payments, and share of royalties may not even be sufficient to enable such participation. Furthermore, these investments involve risks such as fluctuations in metal or petroleum prices on the world market which may lead to insufficient or no profits or even loss of capital investments by landowners. As most landowners are illiterate and understand little about investments, such consequences may lead to suspicions that they are being cheated by project developers and the government and can create problems for the projects.

The recently initiated national government policy of giving landowners options to acquire part of the equity held by the government in investment projects is a move in the right direction but more needs to be done. This policy has been used in the Porgera, Misima and Kutubu projects. In Porgera, where the government is a 10 per cent joint venture partner (increased to 25 per cent in March 1993), landowners have been offered<sup>47</sup> and have accepted, 5 per cent shares through a company incorporated by the State-owned corporation - Mineral Resources Development Company (MIRDC).<sup>48</sup> The purchase price for the shares will be paid out of future dividends.<sup>49</sup> The same arrangement was made in the Misima project where landowners were offered 10 per cent of the State's 20 per cent equity<sup>50</sup> but the former (and the Milne Bay Provincial Government) have opted to receive assistance from the State in establishing spin-off business ventures and infrastructural development instead. Following this trend, similar arrangements have recently been made in the Ok Tedi project, while Bougainville landowners were offered similar arrangements as part of a government package to resolve the dispute there.<sup>51</sup> In the Kutubu petroleum project, the State offered to Southern Highlands landowners of the oil field areas and Kikori landowners of the Gulf

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47 Memorandum of Agreement Relating to the Porgera Gold Mining Project between the Independent State of Papua New Guinea and Porgera Landowners 1988 (hereafter 'Porgera Landowner Agreement'), cl 6.1.

48 The other 5 per cent was offered to the Enga Provincial Government.

49 Porgera Landowner Agreement, cl 6.2.

50 Memorandum of Agreement Relating to the Misima Gold Mining Project between the Independent State of Papua New Guinea and the Misima Landowners (hereafter 'Misima Landowner Agreement') cl 4.

51 No provision was made for landowner (and provincial government) participation in the Bougainville and Ok Tedi projects when these projects were established.

Province - owners of land on which the pipeline now runs to the Gulf of Papua - 7 per cent and 5 per cent, respectively, of its 22.5 per cent joint venture interest held by MIRDC.<sup>52</sup>

The *Mining and Petroleum Act* provide for royalty payments to be made to the State. The applicable royalty rate for minerals is 1.25 per cent f.o.b. revenue<sup>53</sup> while that for petroleum is 1.25 per cent of the well head value.<sup>54</sup> In response to calls made by the people of Bougainville in the 1970s for part of royalty payments to be paid over to them, the government approved the payment of 5 per cent of royalties received by it to landowners. The member of the pre-independence House of Assembly representing the Bougainville mine area, Mr Paul Lapun moved a motion in the House requiring 20 per cent of royalties to be paid to landowners but this was defeated and the reduced 5 per cent motion was passed.<sup>55</sup> Since the introduction of the provincial government system, the royalties received by the State are paid over to the provincial governments in whose area the mineral or petroleum resources are extracted.<sup>56</sup> In the Porgera, Misima and Kutubu projects, the national government has undertaken, under its agreements with landowners of the project areas, to cause provincial governments, which now receive the whole of the 95 per cent of the State's share of royalties, to pay specified percentages of these 95 per cent royalties they receive over to landowners. In Porgera, it is 23 per cent, while in Misima, it is 30 per cent distributed as follows: 10 per cent to landowners and 20 per cent to an investment fund established for future generations by the national government but administered by a Board with landowner representatives.<sup>57</sup> In Kutubu, 20 per cent of royalties received by the provincial government is payable to the Southern Highlands landowners.<sup>58</sup>

With mineral ownership vested in landowners as suggested, they will be entitled to all royalties paid. Provincial governments who are currently advocating the

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52 Memorandum of Agreement Relating to the Kutubu Petroleum Project between the Independent State of Papua New Guinea and the Southern Highlands Landowners (hereafter 'Southern Highlands Landowners Agreement'), cl 5. Memorandum of Agreement Relating to the Kutubu Petroleum Project between the Independent State of Papua New Guinea and the Kikori Landowner (hereafter 'Kikori Landowner Agreement'), cl 5. Under its separate agreements with the Southern Highlands and Gulf Provincial governments, the State offered these provincial governments options to take 7 per cent and 5 per cent, respectively, of its 22.5 per cent equity.

53 *Mining Act* c 195, s 105. (Under s 148 of the new *Mining Act* 1992, a new Mining Royalties Act is contemplated to make provisions on these matters).

54 *Petroleum Act* c 198, s 118.

55 The provision is now found in s 105 of the *Mining Act*.

56 *Organic Law on Provincial Governments* cl 1, s 67.

57 Porgera Landowner Agreement, cl 8; Mimisma Landowner Agreement, cl 15.

58 Southern Highlands Landowner Agreement, cl 6. The Kikori Landowners receive no royalties since no oil is extracted from their land. They receive grants and infrastructural developments for land taken up by the pipeline.

doubling of the royalty rate<sup>59</sup> will give up the share of royalties paid to them. They can however take a share of this revenue by imposing higher taxes on the royalty payments made to landowners.

It is true that landowners indirectly benefit from large-scale mining and petroleum projects in several ways. First, these projects provide improved infrastructure like roads, bridges, wharf facilities and airstrips. These can facilitate the movement of goods and services from urban areas to rural areas and the movement of produce such as vegetables and other cash crops from rural areas to urban areas as has occurred in Bougainville<sup>60</sup> and was expected in Ok Tedi.<sup>61</sup> Second, other services like the provision of water supply, electricity, and telecommunication facilities may be established for the investment project workforce that landowners may also have access to. Third, social services such as schools and health facilities may also be improved. In investment projects in Papua New Guinea, such services provided are of standards superior to similar services available elsewhere in the country. With the exception of Bougainville, landowners in other projects have welcomed and, in some cases, demanded the construction of towns at project sites.<sup>62</sup>

Landowners can also benefit from employment and training opportunities created by the investment projects. Mining and petroleum operations are low labour intensive<sup>63</sup> and therefore do not in themselves solve unemployment problems in developing countries.<sup>64</sup> But landowners and provincial governments in Papua New Guinea have sought to localise the limited opportunities created, to their members or people of their provinces. In the agreements made with the national government, landowners in the Porgera, Misima and Kutubu projects have obtained undertakings from the national government that their members, people of the province and Papua New Guineans will, in that order, be given employment

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59 Papua New Guinea National Premiers Council, *Mining and Working Committee Report*, September 1988, Port Moresby.

60 C O'Faircheallaigh *Mining and Development: Foreign-Financed Mines in Australia, Ireland, Papua New Guinea and Zambia* (1984).

61 WS Pintz *Ok Tedi: Evolution of a Third World Mining Project* (1984).

62 RT Jackson *Ok Tedi: The Pot of Gold* (1982) University of Papua New Guinea: Port Moresby; Pacific Agribusiness (1987); *Social and Economic Impact Study: Porgera Gold Mine* (1986) Vol 1, Report to the Minerals and Energy Department, Government of Papua New Guinea; Institute of Applied Social and Economic Research (IASER) (PNG) 1986, *Social Impact Study of the Misima Gold Mine*, Vol 1, IASER Report: Port Moresby.

63 DN Smith and LT Wells *Negotiating Third World Mineral Agreements: Promises as Prologue* (1975).

64 E Schanze *et al Mining Ventures in Developing Countries, Part II: Analysis of Agreements* (1981).

preferences.<sup>65</sup> The project development agreements between the State and the developers also impose training obligations but these are rather general.<sup>66</sup>

Just as in other developing countries, opportunities for the integration of mining and petroleum economies into the wider economy of Papua New Guinea is limited due to the lack of manufacturing and industrial base. Hence, the supply of goods and services and sub-contracting works requiring large project expenditure, though required by the project agreements to be given to Papua New Guinea nationals,<sup>67</sup> are undertaken by foreign interests because of the lack of capital and expertise within the country. Landowners and provincial governments, like the case of employment and training opportunities, seek also to localise manageable spin-off businesses.<sup>68</sup> The domination of major spin-off business ventures by foreign interests and a handful of Papua New Guineans upsets landowners. These feelings often lead to landowner instigated disruptions such as blockade of roads and sabotage of other project facilities. In a few cases, outside interests have involved landowners in joint venture projects to exploit spin-off business opportunities. In such cases, relations between project developers, sub-contractors and landowners are, where the joint venture terms and management are fair, favourable thus demonstrating the desirability of landowner involvement in these ways.

Landowners receiving rental or lease fees, royalties and compensation payments, will have a sizeable income to invest in spin-off business ventures or other investment projects. Because they lack managerial and business expertise, the government and project developers must give the necessary financial and management assistance to enable them to do so. These will create favourable conditions for the investment project as a whole to operate smoothly for the benefit of all concerned. Where there is dissatisfaction among landowners, as demonstrated by the Bougainville problems and other incidents in other projects, this can lead to the obstruction or even destruction of project activities and property. In a number of the projects, formal arrangements have been made requiring project developers to lend assistance to landowners to establish and run

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65 Misima Landowner Agreement, cl 10; Porgera Landowner Agreement, cl 14; Southern Highlands Landowner Agreement, cl 7.

66 The Bougainville Copper Agreement of 6 June 1967 (scheduled to the *Mining (Bougainville Copper Agreement) Act 1967*), for example, provides that 'the company shall so far as is reasonably and economically practicable use and train in new skills labour available in Papua New Guinea (cl 10(a))

67 Project developers are required to use local suppliers and sub-contractors but the obligations contain qualifications such as where these 'meet the standard of the manufacture specified' by the developer or are 'competitive in cost with international sources' (Misima Development Contract, cl 15.1; Porgera Development Contract, cl 3.2).

68 Misima Landowner Agreement, cl 9; Porgera Landowner Agreement, cl 13; Southern Highlands Landowner Agreement, cl 9.

business ventures.<sup>69</sup> In the Porgera project, the Joint Venture Company, for example, has established an office to assist landowners in this way.

The State and project developers must ensure that any assistance given and any business ventures established benefit the majority of landowners. It is becoming a common occurrence that a few educated and influential individuals of landowner groups use funding and other assistance, given by the state, to promote their individual interests by assuming managerial or directorship positions in landowner companies, leaving the majority of landowners without any benefit, bewildered and confused. The latter resort to physical obstruction of investment project activities when they do not derive any tangible benefit.

While measures already taken and some suggested here for more meaningful participation by landowners will create favourable conditions for the operation of investment projects for the benefit of all concerned, the Papua New Guinea Government and investors must give serious consideration to making landowners partners in investment projects. As mentioned earlier, landowners do not have the necessary capital to invest in multi-million dollar projects. But if resources ownership is vested in them, their contribution to the investment will be the resources. Instead of receiving compensation payments, royalties and other payments, they may forgo these and look to profits only as equity holders. Risks may still exist, for example, by the use of business mechanisms in transfer pricing by multinational investors but if all are concerned about investment security, they must be honest with each other.

## VI. CONCLUSION

Landowner related problems in resource development projects in Papua New Guinea are new and governments and investors must identify new approaches to deal with them. Apart from the Bougainville project in which landowners did object to the project development, in all the other projects, all parties including landowners, wish to see the projects operating successfully. Hence, all of them must make genuine attempts to try and come up with solutions to the problems.

It is often felt by many people in the industry that some of the demands made by landowners are unreasonable. These judgments are almost always made by

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69 The Ok Tedi Agreement, for example, provides: 'The Company shall promote, support, encourage and lend assistance to Papua New Guineans desirous of establishing enterprises and business providing goods and services for the Project and for the town constructed by the Company and the residents thereof, and shall generally promote, support, encourage and assist the establishment and operation of local enterprises in the Mining Area' (cl 32.1). Similar provisions are made in the Porgera and Misima Agreements (Porgera Development Contract, cl 14; Misima Development Contract, cl 15.2 and cl 16).



comparisons with similar projects in other countries. Such opinions even from so-called experts need to be kept in check because the context in which they arise should not be ignored. Papua New Guinea is not those 'other countries'. It has a people and cultures that are different.

The suggestions made here on the various issues raised are intended to deal with some of the problems that are now prevalent in the industry. They are to secure the investment projects for all interested in them. In summary, the suggestions are in a sense two alternatives. The first relate to changes that need to be made to improve the arrangements as they exist now. These include the vesting of resource ownership in landowners and thus doing away with the payment of royalties to the national and provincial governments. Instead of acquiring land outright from customary owners, these must be leased. The second alternative requires a major policy change to involve landowners as equity partners in investment ventures. At present, the State is assisting by paying for their equity participation which has to be repaid. This will be unnecessary if it is accepted that landowners own the resources. Their contribution to the project will be the resources.