



Country Report: Papua New Guinea

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Introduction

2010 was not an auspicious year for environmental law and governance in Papua New Guinea (PNG). While the balancing of environmental and economic development priorities has always been a complex and contentious process in PNG, in recent decades the country's environmental governance systems have incrementally improved, on paper if not always in practice. Yet 2010 witnessed an abrupt end to that trend. Amendments were passed in May last year to the *Environment Act* (2000), which remove many safeguards against environmental damage caused by pre-2004 mining and other development projects.

This report commences by briefly introducing the context of environmental management and regulation in PNG. It proceeds by describing recent developments in environmental litigation and legislative amendment, and concludes by providing a critical assessment of these developments.

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Background to Papua New Guinea

Papua New Guinea has 'one of the most diverse repositories of geographic, biological, linguistic and cultural wealth on earth'.¹ PNG's current estimated population of 6.8 million people inhabit 463,000 square kilometres of land spread over 600 separate islands. PNG is the most linguistically diverse country in the world, with more than 840 languages spoken.² The positive nexus between biological and cultural diversity is widely acknowledged and it is thus not surprising that PNG also harbours five per cent of the world's biodiversity.³

Industrial logging, mining and land conversion for agriculture are the primary threats to PNG's environmental sustainability. Corruption and unsustainable practices in PNG's logging industry are well documented. Justice Barnett stated in the conclusions of an inquiry he chaired in the late 1980's that the logging 'companies are now roaming the countryside with the self-assurance of robber barons; bribing politicians and leaders, creating social disharmony and ignoring laws in order to gain access to, rip out and export the last remnants of the province's valuable timber'.⁴ The response to the Barnett Inquiry was the passage of the *Forestry Act* (1991). Despite the revised law, the PNG logging industry remains dogged by allegations of illegality, corruption, unsustainable practices and human rights abuses.⁵

PNG's economy is increasingly reliant upon mining revenues, but the history of the mining industry in PNG is one of conflict and controversy. Contamination from tailings at the Panguna copper mine in Bougainville was a significant catalyst contributing to the secessionist movement and bloody civil war that occurred in

¹ *AusAID Papua New Guinea Summary* (available at http://www.usaid.gov/country/png/png_intro.cfm).

² *Ethnologue: Languages of Papua New Guinea* (available at http://www.ethnologue.com/show_country.asp?name=PG).

³ N. Sekhran and S. Miller, *Papua New Guinea Country Study on Biodiversity* (1996) PNG Department of Environment and Conservation, at 67 (available at http://sipddr.si.edu/dspace/bitstream/10088/3533/1/Sekhran_and_Miller_1996_PNG_partial.pdf).

⁴ T. Barnett, *Commission of Inquiry into Aspects of the Forestry Industry Final Report* (PNG Government Commission of Inquiry Report Vol. 1) at 85.

⁵ A. Schloenhardt, *Illegal Trade in Timber and Timber Products in the Asia Pacific Region* (2008) Australian Institute of Criminology Research and Public Policy Series Report No. 89, at 70-71 (available at < <http://www.aic.gov.au/documents/B/D/4/%7BBD4B2E50-33B4-47F1-815E-901C0ACC7A43%7Drpp89.pdf>).

Bougainville Province during the late 1980s and 1990s.⁶ The Ok Tedi gold and copper mine in Western Province has caused massive environmental degradation to the surrounding area. The Ok Tedi mine, which in 2005 contributed 25 per cent of PNG's export earnings, has since the mid-1980s been discharging around 80 million tonnes of tailings and overburden into the Ok Tedi River each year, thereby severely degrading between 1600 and 2500 km² belonging to the 50,000 people living in 120 villages downstream of the mine.⁷ The Porgera gold mine in Enga Province has caused severe pollution problems along the Strickland River, which has been observed turning to crimson as a result of pollution by mine tailings containing significant quantities of cyanide, mercury and other heavy elements.⁸ Canadian company Nautilus Minerals is soon to commence the world's first deep-sea bed mining operation off the coast of New Ireland and East New Britain Provinces, the environmental consequences of which are largely unknown.⁹

Recent Litigation: Ramu NiCo

Kurumbukari, located in the foothills of the Bismark Ranges approximately 75km south west of the provincial capital of Madang, is the location of a massive nickel and cobalt mine currently in the final stages of construction. The mine, known as Ramu NiCo, is owned by a joint venture including a syndicate of four Chinese companies (85 per cent) a subsidiary of Australian company Highlands Pacific (8.5 per cent), the Mineral Resources Development Corporation of PNG (4 per cent) and the local landowner corporation (2.5 per cent). Ramu NiCo's mining operation (including the Kurumbukari mine, a 135km slurry pipeline and a processing facility at Basamuk Bay on the coast) is the largest Chinese greenfield mining investment outside of China.¹⁰

⁶ J. Linnett 'Grievances in Bougainville: Analysing the Impact of Natural Resources in Conflict' (2009) *POLIS Journal* (available at <http://www.polis.leeds.ac.uk/assets/files/students/student-journal/ma-winter-09/jack-linnett-winter-09.pdf>).

⁷ J. Marychurch and N. Stoianoff, 'Blurring the Lines Of Environmental Responsibility: How Corporate And Public Governance Was Circumvented In The Ok Tedi Mining Limited Disaster' Unpublished paper presented at the Australasian Law Teachers Association Conference, Melbourne, 2006, at 10-11 (available at http://www.alta.edu.au/pdf/conference/published_papers/marychurch_j_stoianoff_n_2006_alta_conference_paper_blurring_lines_of_environmental_responsibility.pdf).

⁸ A. Biersack, 'Red River, Green War: The Politics of Place Along the Porgera River' in A. Biersack and J. Greenberg, *Reimagining Political Ecology* (2006) Duke University Press, at 233-234.

⁹ For further information about the plans of the company, see: <http://www.nautilusminerals.com/s/Home.asp>.

¹⁰ See further: <http://www.ramunico.com/plus/view.php?aid=699>.

It is predicted to yield 31,150 tonnes of nickel and 3,300 tonnes of cobalt annually during the next 40 years.¹¹

Appropriate tailings management is difficult in much of PNG due to high precipitation and steep and inaccessible landscapes. Ramu NiCo is no exception in this regard. The intended method of tailings management for Ramu NiCo is a deep-sea tailings placement system (DSTP) via a pipeline that carries wastes from the processing facility to discharge them 150m below the ocean surface. Concerns and uncertainties relating to the DSTP plan are at the centre of recent litigation initiated by local landowners aiming to prevent Ramu NiCo mine wastes being disposed in this manner.

Ramu NiCo obtained approval in 1999 under the *Environmental Planning Act* (repealed)¹² to deposit approximately 100,000,000 tonnes of tailings plus other waste material into Basamuk and Astrolabe Bays over the life of the mine. The repealed legislation was replaced by the *Environment Act* (2000) that contains a saving provision (section 136) for approvals granted prior to that Act coming into force. As detailed below, the interpretation of the savings provision is central to litigation now before PNG's courts.

On 4 March 2010, a group of four individuals representing local governments and landowning groups initiated proceedings in the PNG National Court.¹³ The plaintiff's statement of claim suggests that if the DSTP goes ahead, enormous damage will be done to the marine environment in and around Astrolabe Bay causing severe negative effects to their livelihood. The plaintiff's statement of claim lists the following environmental impacts that may result from the DSTP:

- Ore slurry deposits and turbidity in shallow habitats
- Condition suitable to Tsunamis
- Shallow water habitat change and burial of fauna
- Toxic effects from tailings
- Tailings brought onshore from upwelling and currents

¹¹ Ibid.

¹² Available at http://www.paclii.org/pg/legis/consol_act/epa1978249/.

¹³ *Tarsie v Ramu Nico Management (MCC) Ltd* [2010] PGNC 75 (available at <http://www.paclii.org/cgi-bin/disp.pl/pg/cases/PGNC/2010/75.html?query=Ramu>).

- Turbidity Plumes of sediment, both toxic and otherwise, spreading out horizontally over hundreds of kilometres
- Adverse biological impacts on the Goldband Snapper and the Ruby Snapper.
- Mortality of Benthic Fauna over a large area
- Increased bio concentration of trace metals and eco-toxicological risks to the food web.
- Elevated levels of chromium, iron, manganese, nickel and mercury in the marine environment as well as extremely high levels of ammonia which will:
 - be ingested by benthic fauna,
 - be acutely and chronically toxic to fish,
 - create sub-lethal affects as well, reduced growth and gill damage.

The causes of action pleaded are private nuisance, public nuisance, and breach of the *Environment Act (2000)*. The defendants were the mining company and the PNG Government regulatory agencies (Ramu NiCo Management Ltd, the Mineral Resources Authority, the Department of Environment and Conservation and its Director, and the PNG Government).

The plaintiff's sought orders for: (i) an interim injunction preventing construction and operation of the tailings disposal system pending full consideration of the matter at trial; (ii) an independent environmental impact assessment (EIA) to be funded by the company; and (iii) the company and other defendants to provide the plaintiffs with all environmental plans and approvals related to the mine's tailings disposal.

This claim provided the catalyst for a series of court proceedings, as well as the amendment of the PNG *Environment Act (2000)*. Present constraints allow only an outline of the various stages of litigation, provided below:

PNG National Court (19 March 2010) – The court dismissed a request for the EIA and release of documents, but granted an interim injunction preventing further work on construction of the DSTP that would involve directly or indirectly damaging or disturbing the offshore environment, pending determination of the substantive proceedings.¹⁴

¹⁴ Ibid.

PNG National Court (14 April 2010) – The court refused to set aside the interim injunction granted on 19 March.¹⁵

PNG National Court (22 April 2010) – The court refused an application for leave to seek judicial review of the decision of the Minister for Mining of 11 October 2000 to grant a lease for mining purposes to Ramu NiCo under the PNG *Mining Act*.¹⁶

PNG National Court (27 May 2010) – The court refused an application for leave to seek judicial review of the decision of the Director of Environment in November 2007 to grant an amendment to Ramu NiCo's environment permit. The grounds for refusal were the undue delay in bringing the application.¹⁷

PNG Supreme Court (16 July 2010) – The court, by 2-1 majority decision, upheld the interim injunction granted on 19 March.¹⁸ Davani J in the majority stated, '... there are very serious issues raised in relation to the law of nuisance and whether serious environmental damage will be caused, more particularly where the trial judge had extensive affidavit material from environmental scientists who are saying quite clearly that the proposed deep sea tailings placement system will have substantial negative effects on the marine environment'.

PNG National Court (2 September 2010) – The court made an order requiring the defendants to produce the mine development contract, the memorandum of agreement (between the PNG Government, the Madang Provincial Government and Ramu NiCo), and the compensation agreement between Ramu NiCo and local landowners, for inspection by the plaintiffs.¹⁹

PNG National Court (24 September 2010) – The court, on the date set for the trial, granted leave allowing the plaintiffs to discontinue the proceedings commenced on

¹⁵ *Tarsie v Ramu Nico Management (MCC) Ltd* [2010] PGNC 77 (available at <http://www.paclii.org/cgi-bin/disp.pl/pg/cases/PGNC/2010/77.html?query=Ramu>).

¹⁶ *Medaing v Mulung* [2010] PGNC 164 (available at <http://www.paclii.org/cgi-bin/disp.pl/pg/cases/PGNC/2010/164.html?query=Ramu>)

¹⁷ *Tarsie v Dr Iamo* [2010] PGNC 39 (available at <http://www.paclii.org/cgi-bin/disp.pl/pg/cases/PGNC/2010/39.html?query=Ramu>).

¹⁸ *Ramu Nico Management (MCC) Ltd v Tarsie* [2010] PGSC 22 (available at <http://www.paclii.org/cgi-bin/disp.pl/pg/cases/PGSC/2010/22.html?query=Ramu>).

¹⁹ *Tarsie v Ramu Nico Management (MCC) Ltd* [2010] PGNC 134 (available at <http://www.paclii.org/cgi-bin/disp.pl/pg/cases/PGNC/2010/134.html?query=Ramu>).

19 March.²⁰ In granting leave, Cannings J observed, 'The present circumstances are unusual, special, exceptional and, to a degree, suspicious (what really has led to the plaintiffs sacking their lawyers on the eve of the trial and seeking leave to discontinue on the day of the trial – have they been intimidated? threatened? paid off? – these being the sorts of questions reasonable people will legitimately ask) but they are not sufficiently extreme to warrant the court forcing the plaintiffs to continue their case'.

PNG National Court (22 October 2010) – 38 new plaintiffs sought to reinitiate the proceedings commenced by the original plaintiffs on 19 March 2008, who had discontinued their application on 24 September 2010.²¹ They commenced proceedings seeking a permanent injunction to restrain Ramu NiCo from committing an alleged nuisance arising from its mining activities, in particular constructing and operating a DSTP. The plaintiffs also applied for an interim order preventing Ramu NiCo from any preparatory or construction work on the proposed DSTP that involves damage or disturbance to the offshore environment. The National Court granted an interim injunction, but not on the terms sought by the plaintiff. The 22 October 2010 injunction allows construction of the DSTP to proceed but prevents its operation, thus prohibiting the placement of any tailings in the marine environment until after the matter is decided at trial.

PNG National Court (17 December 2010) – David Tigavu was convicted of three counts of contempt of court for threatening and abusing parties, lawyers and witnesses involved in the proceedings summarized above on 24 September 2010.²² He was subsequently sentenced to 12 months imprisonment.

The various proceedings noted above are preliminary to the full hearing of the matter currently scheduled to commence on 8 February 2011. At the trial, the central issue to be determined is, in essence, whether the DSTP is sanctioned under the permit issued in 1999 under the *Environmental Planning Act* (repealed). This will require interpretation by the Court of Section 136(3) of the *Environment Act* (2000), which provides:

²⁰ *Tarsie v Ramu Nico Management (MCC) Ltd* [2010] PGNC 144 (available at <http://www.paclii.org/cgi-bin/disp.pl/pg/cases/PGNC/2010/144.html?query=Ramu>).

²¹ *Medaing v Ramu Nico Management (MCC) Ltd* [2010] PGNC 149 (available at <http://www.paclii.org/cgi-bin/disp.pl/pg/cases/PGNC/2010/149.html?query=Ramu>).

²² *Registrar of the National Court v Tigavu* [2010] PGNC OS 582 (available at <http://ramumine.files.wordpress.com/2010/12/full-verdict.pdf>).

Where, immediately before the coming into operation of this Act—

(a) a person was lawfully carrying on an activity pursuant to a permit, licence or approval under the repealed Acts which is deemed to be a permit by virtue of Subsection (1); and

(b) the activity would constitute an offence under this Act, the person is entitled, subject to this section and to the permit, to carry on the activities and the carrying on of the activity does not constitute an offence.

The plaintiff's statement of claim suggests that the DSTP is not saved because the company was not lawfully carrying on that activity when the *Environment Act* came into operation.

2010 Amendments to the *Environment Act* (2000)

The *Environment Act* (2000) is similar in format and construction to comparable laws in force in the Australian States of Queensland, South Australia and Tasmania. It creates a 'general environmental duty' (section 7) and the offences of causing 'serious environmental harm' (section 11) and 'material environmental harm' (section 12). The primary regulatory mechanism in the Act is the environmental impact assessment and permitting procedure established under Part 5 (sections 41-73). The Act regulates activities that result, or are likely to result, in a change to the environment. These are divided into three categories – level 1, level 2 and level 3 activities (section 2 read with section 42). The *Environment (Prescribed Activities) Regulation* (2002) defines these categories by specifying activities in levels 2 and 3, with level 1 being a residual category. Section 44 of the Act requires persons undertaking level 2 or 3 activities to obtain a permit under the Act prior to doing so. Level 3 is the category of activities most likely to cause serious environmental harm and includes most mining activities.

As a direct response to the litigation summarized in the previous section, the PNG Parliament passed an Act amending the *Environment Act* (2000) on 27 May 2010.²³

²³ Available at http://www.fiapng.com/PDF_files/Environment%20Act%20&%20Regs%202010.pdf.

The Explanatory Notes of the *Environment (Amendment) Act (2010)* (the *Amending Act*) make the connection between the litigation and the amendments clear: 'A recent court decision against the State has exposed resource projects to the risk that environment permits granted by the State in satisfaction of legal and scientific requirements may not be valid and enforceable'.²⁴

The *Amending Act* provides wide powers to the Director of the Department of Environment and Conservation to grant an 'exemption certificate' (new section 87A), 'best practice certificate' (new section 87B), 'certificate of necessary consequence' (new section 87C) or 'certificate of compliance' (new section 87D) to holders of environmental permits. Each of these certificates is a form of special permission certifying that an act, work or activity undertaken by the holder of the certificate is in compliance with the law. Furthermore, in each case, the Director's decision is 'final and may not be challenged in any court or tribunal, except at the instigation of an aggrieved holder of an authorisation instrument'.

The term 'authorisation instrument' is central to the operation the *Amending Act*, being defined as 'any approval, consent, lease, licence, permission, permit or authorisation issued or granted under the [repealed] *Environmental Planning Act*' (section 3). All of the new provisions inserted into the *Environment Act (2000)* as a result of the 2010 amendments are limited to holders of authorisation instruments and do not apply to environment permits issued under the Act subsequent to its coming into operation in 2004. Thus, while the provisions of the *Amending Act* provide an absolute and unchallengeable discretion to the Director to authorize activities that may otherwise be unlawful, this discretion only applies with respect to activities that were approved prior to 2004.

Critique of Recent Environmental Law Developments in PNG

The 2010 amendments to the *Environment Act (2000)* are a backward step for environmental law in PNG. They create a series of mechanisms whereby a single decision-maker may determine that activities causing severe environmental harm are legal, and these decisions may not be challenged, are not subject to review or appeal

²⁴ Ibid.

of any kind, and any harm resulting from those activities is shielded from being the subject of civil action of any kind. This gives rise to the potential for substantial abuses of power. The *Amending Act* seems to have been drafted specifically to ensure that the challenge against Ramu NiCo fails. The essence of the arguments in the Ramu NiCo case relate to the specific terms saving the operation of activities permitted under the repealed *Environmental Planning Act*. That the PNG Government is willing to re-write the country's central environmental statute for the benefit of a single mining company is regrettable and concerning for those who wish for environmentally sustainable development in PNG.

The amendments are not as far-reaching or detrimental in their effect as has been widely reported.²⁵ The amendments have been widely misunderstood to apply to all environmental permits, including those issued recently and those yet to be issued. This confusion is shared not only by the public and the media but also by those responsible for its passage. The following is a quote from the amendments' Explanatory Notes, referring to the impact of the Ramu NiCo litigation: 'All major mining and petroleum projects are particularly at risk whether they are already operating, in construction or proposed.'²⁶ This indicates that the officer drafting the Explanatory Notes believed the amendments would apply to all existing and future permits granted under the *Environment Act* (2000). If that were in fact the situation, then the amendments would indeed severely undermine the Act rendering PNG's environmental impact assessment procedures farcical.

Concern and confusion over the impact of the amendments resulted in public and media outrage in PNG, including street demonstrations and severe criticism of the government from many quarters. This criticism and disquiet was fuelled by the circumstances surrounding the passage of the amendments - a rushed process on a single Friday afternoon wherein normal parliamentary timetables for debate and review were suspended. In response to the public concern, the PNG Government not only failed to properly explain the amendments, but in fact actively sought to

²⁵ See for example: R. Callick, 'PNG Law to Shield Resource Giants from Litigation' *The Australian*, 2 June 2010 (available at <http://www.theaustralian.com.au/business/png-law-to-shield-resource-giants-from-litigation/story-e6frg8zx-1225874201579>); and Ramu Nickel Mine Watch, *Environment Act Changes have Destabilised* (available at <http://ramumine.wordpress.com/2010/10/31/environment-act-changes-have-destabilised-png/>).

²⁶ Supra note 23.

suppress public discussion of it by claiming that it was *sub judice* and thus could not be discussed in public. This attempt to suppress public debate over a recently enacted law was an absurd and acutely counterproductive response. It is not surprising that the amendments are the subject of a constitutional challenge that will be heard by the Supreme Court in 2011.²⁷

PNG needs to balance the often conflicting priorities of economic development of natural resources and the need to protect its natural environment from pollution from mining. Importantly, where mines are allowed to proceed there is also a need to maximize the economic returns of these developments for the benefit of Papua New Guineans. Given this, there are also serious questions being asked regarding why the PNG Government has entered into an agreement that both exempts Ramu NiCo from taxation on its revenue for the first 10 years of operation and allows transfer pricing to occur in relation to its exported product.²⁸ These issues are equally concerning as those relating to the potential impacts of the DSTP on the marine environment.

The case against the Ramu NiCo DSTP will be heard in full in the PNG National Court in February 2011 but the decision is likely to be appealed, particularly if it is adverse to the interests of Ramu NiCo. This is merely the first installment of another chapter in PNG's long and complex story of its struggles towards sustainable development.

²⁷ Attorney-General's Order, available at <http://ramumine.files.wordpress.com/2010/06/ministers-edict.pdf>.

²⁸ See Advertisement in *PNG Post Courier* by Belden Namah MP, 11 October 2010, at 41 (available at <http://ramumine.files.wordpress.com/2010/10/belden-statm-pc1.jpg>). Also E. Narokobi, *The Pato that Laid the Golden Eggs* (available at <http://masalai.wordpress.com/2010/10/28/the-pato-that-laid-the-golden-eggs/>.)