



Access to Justice for Communities Affected by the PT Weda Bay Nickel Mine – Interim Report

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Non-Judicial Human Rights Redress Mechanisms Project

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About this Interim Report

The Non-Judicial Human Rights Redress Mechanisms Project

This interim report presents findings from a major study investigating access to justice for communities affected by the PT Weda Bay Nickel project in Central Halmahera, North Maluku, Indonesia. It is the first public report of research conducted by the Non-Judicial Human Rights Mechanisms Project, and will be followed by a final report in late 2014. This interim report offers an important opportunity to present initial findings and gather feedback from those who were interviewed and have a stake in the matters reported herein. It is hoped that this report will bring the story of the injustices relating to land issues which attend the PT Weda Bay Nickel project to a wider audience.

The PT Weda Bay Nickel study is one of twelve case studies being conducted by this academic research project. The central aim of this project is to evaluate the effectiveness of non-judicial, transnational human rights redress mechanisms such as the International Finance Corporation (IFC) Compliance Advisor Ombudsman, the OECD National Contact Points, and other similar mechanisms. As such, this project seeks to contribute to meeting the urgent need to provide vulnerable workers and communities with more effective means of defending their human rights when these are violated by transnational businesses, that is, businesses operating outside their home country.

The Non-Judicial Human Rights Redress Mechanisms Project will present its final findings in late 2014.

Organisations Involved

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Executive Summary

Our interim report finds that the ethnic Sawai and Tobelo Dalam communities affected by the PT Weda Bay Nickel project have not, to date, had their right to meaningful, free, prior and informed consultation and consent respected, as required by international human rights standards, and the IFC Performance Standards. The compensation they have been offered for the relinquishment of their land rights is inadequate, inappropriate and not in line with international norms; and they have not had adequate access to redress through judicial or non-judicial review of these grievances. Their customary rights over land have not been adequately respected. Urgent action is required to remedy these breaches of international norms before the extraction phase begins.

Profile of the Project

- The PT Weda Bay Nickel Generation VII Contract of Work was signed on January 19, 1998, giving the company a 30 year contract.
- Deposits located on the island of Halmahera are part of the largest undeveloped deposits of lateritic nickel in the world, with potential for 500 million tonnes of nickel to be extracted.
- The main shareholder of Strand Minerals, ERAMET Group, is a French corporation that operates mining, processing and metallurgical operations worldwide. ERAMET play a large role in the day-to-day operation of the PT Weda Bay Nickel project.

Economic Displacement

- Affected ethnic Sawai communities have lost access to forest agricultural land they have cultivated for generations. Loss of access to forest agricultural land has resulted in the loss of their primary source of livelihood.
- The PT Weda Bay Nickel project will not entail displacement of Sawai families from their homes, but this does not diminish the significance of their economic displacement.
- This loss of land is not voluntary. Rather PT Weda Bay Nickel and local government have exerted such pressure that families feel they have no choice but to relinquish their land rights, and it is possible that the company has recourse to legal means to forcibly acquire the land should any families continue to resist.
- This constitutes economic displacement, and therefore, under the IFC Performance Standards 5 and 7, robust consultation processes, and substantial compensation in an appropriate form are required.
- Recent changes in Indonesian law may provide opportunities for protection of customary rights to land that could avoid economic displacement.

Right to Free, Prior and Informed Consent and Consultation

- Affected communities should enjoy the right to meaningful free, prior and informed consultation and consent in relation to changes to their land rights brought about by the project. Free, prior and informed consent is a principle upheld for indigenous people by the International Finance Corporation's Performance Standard 7, which applies to the project because the World Bank Group's Multilateral Investment Guarantee Agency (MIGA) is guaranteeing the project. Performance Standard 5 further requires that though a company may have the legal means to acquire land without consent, the company should engage in *meaningful* negotiations with those who have existing land rights. Furthermore, PT Weda Bay Nickel have themselves committed to the principle of free, prior and informed consent.

Inadequate Information and Consultation Over Agreements for Compensation

- Our study found that the process presented to communities as 'land acquisition' has been communicated to affected communities as a *fait accompli*. Limited negotiations occurred concerning the amount of compensation, but not whether the community consented to relinquish their land rights to make way for the project.
- The level of compensation has been presented to community members on a 'take it or leave it' basis.
- Community members have not been given sufficient information about the nature of the agreements they have signed or the impact of the project, to allow them to give informed consent.

Pressure and Intimidation

- The Indonesian National Human Rights Commission (Komnas HAM) found that members of Korps Brigade Mobil (BRIMOB), the paramilitary arm of the Indonesian police, had been involved in pressuring and intimidating community members to sign agreements.
- The Commission further found that a staff member of PT Weda Bay Nickel had threatened a community member if he did not sign an agreement.
- Our research found that at least some families who signed agreements with the company simply felt that they had no other alternative.

Inadequate and Improper Forms of Compensation

- PT Weda Bay Nickel has offered communities whose land falls within areas required for imminent construction IDR 8000 per square meter (the equivalent of USD 0.79 or EUR 0.6 per square metre) plus compensation for plants.

- Not only is this amount extremely low, provision of cash compensation is not in line with international norms because it does not adequately protect the communities from the negative impacts of the project, including the requirement that compensation will restore and improve upon lost livelihoods.

Allegations of Corruption

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

Limited Access to Justice within Indonesia

- Some aggrieved community members made a complaint to Komnas HAM resulting in a number of damning findings and recommendations being made to relevant parties. Only one of these recommendations has been acted on.
- PT Weda Bay Nickel’s internal Grievance Redressal Unit, while well equipped for dealing with minor complaints, is not an appropriate avenue for complaints regarding major issues to do with land and compensation agreements.

Limited Access to Justice Outside Indonesia

- Outside Indonesia, a complaint was made to the IFC Compliance Advisor Ombudsman in July 2010.
- The Compliance Advisor Ombudsman (ombudsman section) conducted an assessment visit in 2011 to evaluate possibilities for resolving the complaint through mediation and other alternative dispute resolution means, but community members were too concerned about their personal security to voluntarily take up this opportunity.
- The Compliance Advisor Ombudsman’s Compliance section declined to conduct a compliance audit of MIGA’s decision to support PT Weda Bay Nickel, stating that it was too early in the project.
- We conclude that if a further complaint was lodged today, the IFC Compliance Advisor Ombudsman should consider conducting an audit on the grounds of violations of the IFC Performance Standards in relation to land acquisition, compensation and indigenous rights.

Recommendations

- The report makes recommendations to PT Weda Bay, the Indonesian government at different levels, and civil society organisations about how to ensure that the customary rights of the affected communities are respected, and free, prior and informed consent and consultation occur before the extraction phase begins.

- It concludes that it is not too late for the problems identified in this report to be remedied. This is a vital period for renewed action on behalf of all parties to ensure that grave and irreparable injustices are avoided.

Methodology

This interim report is the outcome of systematic research and analysis over the course of more than a year by the researchers in this project. The report's findings are based on extensive primary and secondary source research gathered through in-country research in Indonesia, as well as on-going engagement with community leaders, human rights and environmental advocates, and others knowledgeable about the project and its impacts. This interim report will be publicly released and circulated for comment amongst those we interviewed, and those with knowledge about the social impacts of mines in Indonesia. Releasing an interim report is an important step in verifying data collected so far. By sharing our initial findings, we invite comment from all stakeholders. Where appropriate, comments will be incorporated into a final report to be released in late 2014.

This report focuses on the impact of the PT Weda Bay Nickel project in three villages of ethnically Sawai communities: Lelilef Sawai, Lelilef Woebulen and Gemaf, all within the PT Weda Bay Nickel concession. It also pertains to the Tobelo Dalam, an isolated indigenous community dwelling nomadically in the interior forest of Halmahera, including within the concession area. Although it is not the focus of the report, it is important to acknowledge that other communities are also affected by PT Weda Bay Nickel, in particular Sagea, a Sawai village lying just outside the concession area.

This interim report has been released before the extraction phase of the mine has begun in the hope that providing stakeholders with crucial information at this stage may prevent irreversible damage. The thematic focus of this report is access to justice. Our intention is not to prove or disprove human rights abuses, but rather to demonstrate that there are serious concerns about human rights abuses that have not been adequately addressed either by PT Weda Bay Nickel or through various avenues for redress. In particular, this report focuses on concerns regarding failures of free, prior and informed consultation and consent for relinquishment of land rights by Sawai villagers in Lelilef Woebulen, Lelilef Sawai, Gemaf, and the Tobelo Dalam; and inadequate and inappropriate compensation for economically displaced Sawai villagers.

This report adopts a mixed methods approach to triangulate data. Three researchers, including one Indonesian research assistant who conducted interpreting and translation, visited Indonesia in May 2013, spending two and a half weeks in North Maluku and a week in Jakarta, supplemented with a further visit to Jakarta by one of the researchers in June. In total we conducted over 35 interviews or focus groups with over 60 people. This includes staff of PT Weda Bay Nickel, affected villagers who have accepted the compensation package, and villagers who are against it, village heads of Lelilef Woebulen, Lelilef Sawai and Gemaf, government officials at the Regency, Provincial and National Levels, and activists and NGO staff who are protesting against the project. During these trips interviews took place in Jakarta, Ternate, Weda, Gemaf, Lelilef Woebulen, and the PT Weda Bay project site; and other interviews took place in Washington D.C and over Skype with international experts

over 2012 and 2013. Interviews were conducted in English and/or Indonesian, and an interpreter was used when necessary. Interviews were documented using written notes and audio recordings, supplemented by photographs when participants agreed. Members of the research team complied with the highest standards of ethical and professional conduct, including adhering to ethical obligations as laid out by the University of Melbourne Human Research Ethics Committee.

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

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

The research and writing for this report have been conducted with complete academic independence, and no financial support has been received from any party that would influence its findings.

Introduction

This is a crucial moment in the progress of the PT Weda Bay Nickel mine. Although this report raises significant concerns regarding breaches of international norms, it also finds that it is not too late to limit the impact of these breaches before irreparable damage likely occurs. Because final investment decisions have not been made, and the main extraction phase has not yet begun, there is still time for action to be taken to respect the land rights of the communities who will be economically displaced by the mine according to current plans and agreements.

This interim report provides an account of the social and human rights impact of the PT Weda Bay Nickel project, a mining concession that covers a significant proportion of Halmahera Island in the Indonesian province of North Maluku in the Maluku islands. Halmahera Island sits in Eastern Indonesia, some 3000 km from Jakarta, about 600 km South of the Philippines and 1200 km North of Darwin. Extensive blocks of habitat still cover all the islands, and around 80 percent of its 3.1 million hectares is still covered with primary forest. The natural beauty of the Maluku islands is such that it features on Indonesia's IDR 1000 note and its unique fauna inspired a young biologist called Wallace to develop a theory of evolution at the same time as Darwin. Halmahera Island is one of the original "Spice Islands" which were once pursued for their mace, nutmeg, cloves and pepper, leading to the Spice Wars. At the end of these wars, in 1667, the Dutch and British came to an agreement, called the Treaty of Breda. Under its terms, the Netherlands relinquished the far-off and comparatively useless island of Manhattan, New York, in return for the British handing over Halmahera's neighbour, the tiny island of Run, which gave the Dutch full control over the archipelago's nutmeg production.

Today, the Maluku islands are pursued for their minerals, rather than their spices. On January 19, 1998, a controversial mining license was signed by President Suharto, titled The PT. Weda Bay Nickel Generation VII Contract of Work. According to ERAMET, the company's major shareholder, the deposits located on the island of Halmahera are part of the largest undeveloped deposits of lateritic nickel in the world, with potential for the extraction of 500 million tonnes of nickel.¹ This project has already caused, and will continue to cause, a number of negative social impacts for affected communities, including four seaside villages of settled Sawai people, and the Tobelo Dalam indigenous people who live nomadically in the forest area that falls in the PT Weda Bay Nickel concession. Communities closest to the mine's planned infrastructure are losing access to their farming land, and thus their major source of livelihood. This report considers whether or not the people affected by this project have had adequate access to justice, understood as meaningful opportunities to express their concerns about the project freely and have them addressed adequately.

¹ Peter McLatchie, "Weda Bay Minerals Inc. Emerging Nickel Producer – Presentation to Potential Investors," (Sydney: Sydney Mining Club, 2006).

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

In particular, this report raises concerns that the company has not provided sufficient information to affected communities about the likely social, economic and environmental impacts of the project to allow them to make an informed decision in relation to relinquishment of land rights. Nor have the legal implications of the agreements they have signed in relation to compensation been properly explained. A thorough review of reports released by the company was conducted in the research for this report, as well as interviews with PT Weda Bay Nickel personnel and members of the communities. A full explanation of the research methodology can be found in the preceding section. Evidence gaps remain in relation to exactly what consultation has occurred with Sawai communities in order to meet standards in relation to free, prior and informed consent and meaningful consultation. There are also gaps in information about the current or future impact of the project on the Tobelo Dalam. The *available* evidence suggests that PT Weda Bay Nickel are in breach of free, prior and informed consent, or meaningful consultation standards, and compensation standards. PT Weda Bay Nickel rejects this accusation, but has been unable to demonstrate that it is in full compliance with both international norms and IFC Performance Standards regarding free, prior and informed consent, consultation and compensation.

PT Weda Bay Nickel presents itself as a progressive, socially and environmentally responsible company making a vital contribution to Eastern Indonesia's development. Yet, this report finds compelling evidence that the company has failed to meet its obligations in relation to land issues. This is the most important of all areas of community relations. Though it has sought to bring attention to its corporate social responsibility programs and environmental and/or social impact assessments, these are not a substitute for meeting obligations to fairly consult with, gain consent from and compensate affected communities. This report recommends that PT Weda Bay Nickel publish and fully report on the history of its actions in relation to communities' lands. Publication of the Analisis Mengenai Dampak Lingkungan (AMDAL, the impact assessment required by the Indonesian government) and documentation of associated consultations, and the ESHIA (impact assessment required by MIGA) should occur in English and Bahasa Indonesia, and the key points relevant to the Sawai and Tobelo Dalam people should be communicated in plain language, in a manner comprehensible to these affected communities. More crucially, this report also recommends that the company re-open negotiations over compensation and the transfer of land rights.

The mining industry in Indonesia is confronted with numerous uncertainties in relation to the renegotiation of Contracts of Work and decentralization of political authority. Ongoing conflict and unrest around compensation is harmful for the company's operation and its reputation. There are numerous examples in Indonesia where conflict of this type has exacerbated uncertainty around political support for mines at local, regional and national levels.² PT Weda Bay Nickel has an opportunity to show greater leadership in relation to upholding international human rights standards by ensuring that free and prior consent is gained, consultation is meaningful and compensation is fair before operations begin.

In well-functioning legal systems, when individuals or communities believe their rights have been breached by companies or government decisions, they are able to appeal such decisions through court or administrative systems, or quasi-judicial systems of review, arbitration or mediation. For various reasons, to date aggrieved community members have been unable to pursue legal claims of this nature. This report tracks complaints to and investigations made by Komnas HAM, the IFC Compliance Advisor Ombudsman, and PT Weda Bay Nickel's internal Grievance Redressal Unit. The report concludes that these avenues have failed to provide access to justice for people affected by PT Weda Bay Nickel's activities.

Despite numerous findings of human rights breaches and possible breaches of Indonesian law, Komnas HAM lacks any formal powers of enforcement. As a consequence, its recommendations have been largely ignored by those to whom they were directed. The IFC Compliance Advisor Ombudsman also conducted an assessment. However, because the Ombudsman team was unable to address the security concerns of community members if they were to engage in mediation with the company, and unable to find feasible, creative alternatives to mediation, their activities did not constitute a positive intervention to address human rights concerns. The Compliance team chose not to conduct a compliance review, instead hoping that impact assessments would address breaches of IFC Performance Standards. Weaknesses in the protection of indigenous peoples' rights in Indonesia, compounded by failure to uphold the rule of law through an independent judiciary have made it impossible for local communities to seek redress through local courts. PT Weda Bay Nickel's Grievance Redressal Unit is not an appropriate forum for handling major grievances of the kind discussed here. This report is therefore also a call to redress mechanisms, and in particular the IFC Compliance Advisor Ombudsman, to review their procedures so that they go further towards protecting the rights of vulnerable project-affected people.

This interim report is structured as follows. It begins with the provision of background information on the project, the timeline for the project's development and a description of the affected communities. It then provides a narrative of the various processes entailed in

² See the case studies in Chris Ballard, "Human Rights and the Mining Sector in Indonesia: A Baseline Study," in *Mining, Minerals and Sustainable Development Working Paper No 182* (London: International Institute for Environment and Development, 2001).

the transfer of land rights and provision of compensation to affected communities. This is followed by an analysis of PT Weda Bay Nickel's apparent failure to comply with appropriate standards of free, prior and informed consent, consultation and compensation. Finally, the report provides an analysis of the various redress avenues pursued by aggrieved community members. The report concludes with a set of recommendations for PT Weda Bay Nickel and other relevant actors.

Background

PT Weda Bay Nickel Project

Shareholders

Strand Minerals owns 90 percent of PT Weda Bay Nickel, with the remaining 10 percent being held by PT Antam (Aneka Tambang). The Indonesian government owns 65 per cent of PT Antam.

The main shareholder of Strand Minerals, ERAMET Group, is a French corporation that operates mining, processing and metallurgical operations worldwide. ERAMET acquired the majority shareholding in PT Weda Bay Nickel in May 2006. Since that date, ERAMET has financed and developed extensive studies in order to confirm the technical and environmental feasibility of this large-scale project. According to the project website, ERAMET will have invested around USD 450 million in this project before a final decision is made by the company whether to invest in the extraction phase of the project.³

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

Indonesia's new divestment laws for foreign extractives industries have created uncertainty for foreign shareholders. If under the renegotiations that have been occurring throughout 2013, PT Weda Bay Nickel's Contract of Work is amended to comply with current divestment laws, then foreign shareholding must be reduced to a maximum of 49% after the first 10 years of production, with a staged divestment process beginning after 5 years.

World Bank Involvement

The exploration and feasibility phase of the project is guaranteed by MIGA for USD 207 million. MIGA's mandate is to promote foreign direct investment by providing political risk insurance to investors and lenders against losses caused by non-commercial risks. The guarantee was given to Strand Minerals for its equity investment in the PT Weda Bay Nickel Project.

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

³ PT Weda Bay Nickel company website, <http://www.wedabaynickel.com/en/a-world-class-project/shareholders/>, accessed 15 September 2013.

It is likely that PT Weda Bay Nickel will seek further support from MIGA for the construction and operational phase in 2014.

Production Estimates and Mine Life

The Contract of Work area contains extensive occurrences of ultramafic rock, which is the source of the nickel and cobalt laterite discovered by the company. Shareholders in PT Weda Bay Nickel expect that with a nickel content of more than 7 million tons, the mine can satisfy extraction requirements for more than 50 years. After an initial extraction phase totalling 35,000 tonnes of nickel and 1,300 tons of cobalt, the eventual aim is to increase production to 65,000 tons of nickel and 4,000 tonnes of cobalt. Much of the prospective area has not yet been drilled and it is expected that the ultimate resource size will exceed 500 million tonnes. This will rank the PT Weda Bay Nickel resource as one of the largest of its type in the world.⁴

The 30-year Contract of Work expires in 2028, with a possibility of further extension at that time, however as noted above the entire contract is currently subject to uncertainty due to renegotiations.

Employment

Under its Contract of Work, PT Weda Bay Nickel has obligations regarding the employment and training of Indonesian nationals. The company has provided different estimates for employment numbers. Numbers in public documents vary from 2,300⁵ to 3,500.⁶ The company has estimated that 65 per cent of these employees will be locals.⁷

Affected Communities

Sawai Villages

There are five main communities affected by the PT Weda Bay Nickel Mine. There are three seaside villages of Sawai people within the project concession: Lelilef Woebulen, Lelilef Sawai and Gemaf. The Sawai are a distinct linguistic group.⁸ Each of the three Sawai villages has approximately 300 or so families. They live in houses located close together in small villages within 50 metres or less of the coast, and have historically farmed in the nearby forest for their livelihood. The Sawai people may be considered indigenous under conventional definitions of the term which refer to long-standing association with a given

⁴ Malcom G Baillie, "Developing a World Class Nickel and Cobalt Resource in Indonesia," *Asia Miner* July, (2006).

⁵ PT Weda Bay Nickel website: <http://www.wedabaynickel.com/en/commitment-to-people-and-nature/employment-and-training/>, accessed 2 October 2013.

⁶ Eramet website: <http://www.eramet.com/en/projects/weda-bay-nickel-indonesia>, accessed 2 October 2013.

⁷ PT Weda Bay Nickel company website, <http://www.wedabaynickel.com/en/commitment-to-people-and-nature/employment-and-training/>, accessed 15 September 2013.

⁸ James T. Collins, "Linguistic Research in Maluku : A Report of Recent Field Work," *Oceanic Linguistics* 21, no. 1 (2013).

area of land, a traditional way of life, and self-identification. Ongoing efforts to identify and map Indonesia's indigenous communities have not yet reached North Maluku, so this remains an unresolved issue.⁹

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

The PT Weda Bay Nickel project requires displacement of Lelilef Woebulen, Lelilef Sawai and Gemaf villagers from their agricultural forest lands. This is what is called economic displacement (displacement and associated resettlement is not planned for the residential areas of villages). The IFC Performance Standards state that economic displacement is manifest when loss of livelihood, especially when land-based, is involuntary. This is the case here, as the company may have the option of recourse to legal means to forcibly restrict access to the land should people refuse to relinquish their rights to it, on the grounds that it has been granted formal exploitation rights by the State. In practice residents of these villages believe they have no choice but to relinquish their land rights because their lands fall within the concession area.

⁹ Down to Earth Indonesia website, <http://www.downtoearth-indonesia.org/story/turning-point-indonesia-s-indigenous-peoples>, accessed 1 October 2013.

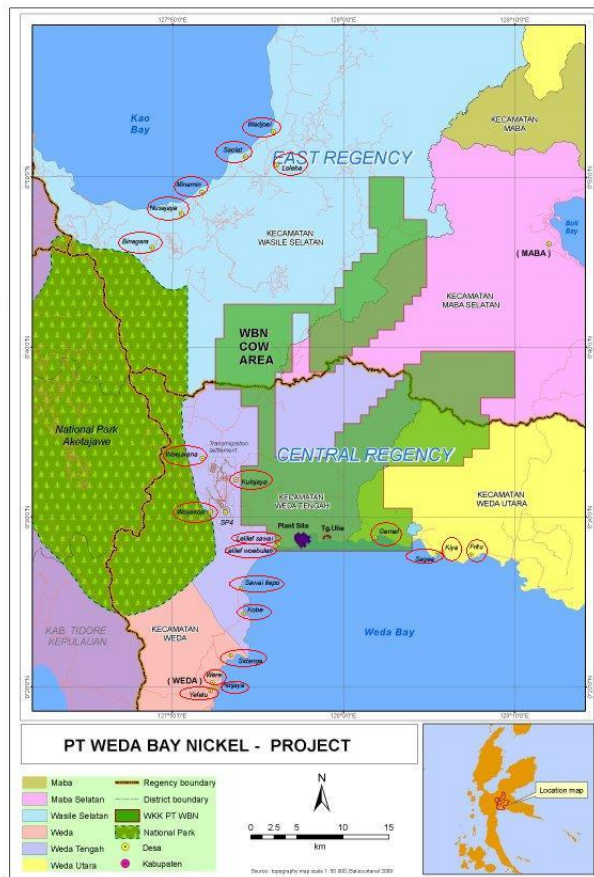


Figure 1: PT Weda Bay Nickel concession area.¹⁰

The agricultural lands of the people of Lelilef Woebulen and Lelilef Sawai are required by the company first, as these are located on the site of the proposed plant, the first aspect of the project to be constructed if final financing is approved. Our interviews suggest that the agricultural lands of Gemaf villagers will be required for the employee accommodation and mess not long after the construction phase begins. PT Weda Bay Nickel argues that this geographical distribution of project infrastructure will enable greater distribution of employment opportunities across the three villages. However, though people will not lose their homes, not only will they lose their agricultural livelihoods and lands, but their local environment will change significantly. Where currently they are surrounded by forest, they will soon be living within kilometres of a large industrial nickel and cobalt processing plant, and mine. Interviewees voiced concern that the proximity of production to villages will cause air and noise pollution and considerable disruption to traditional ways of life. This disruption was already occurring during the early stages of exploration and construction when this study was conducted in May 2013.

¹⁰ PT Weda Bay Nickel company website, <http://www.wedabaynickel.com/en/a-world-class-project/location/>, accessed 15 September 2013.

Most families support their livelihoods primarily through using the interior forested areas for agricultural purposes. This requires the clearing of only small areas of forest, or none at all, as many agricultural products simply grow between the trees. The agriculture is largely subsistence, with a very small surplus traded within the local area. A small handful of families also fish for subsistence, and on a good day they would sell a small amount of surplus fish. Formal, non-agricultural employment is low, and as a consequence the cash based economy is small and marginal. These populations have little experience with managing large amounts of money. Existing land rights in the Maluku Islands are poorly recorded, and notions of land as private property are thus also relatively new in this area.¹¹

These communities are also relatively isolated. They do not have access to the internet or reliable access to other telecommunications. Our research shows that this remoteness and isolation has meant that affected communities have not been assisted by independent advisors. They have received sporadic support from two NGOs, Walhi and Aliansi Masyarakat Adat Nusantara (AMAN), environmental and indigenous rights organisations, respectively. They also received legal advice from an under-resourced community legal service called LBH ProJusticia, but this advice came only after most community members had already accepted the inadequate compensation packages. In contrast, the mining venture has the advice of top Indonesian law firms, international consultants and the backing of the World Bank's MIGA. This has resulted in a severe imbalance in negotiating power.

The majority of families have accepted a compensation arrangement of IDR 8000 per square metre of land, plus further cash compensation for each mature, productive plant. By way of reference, in most parts of Indonesia IDR 8000 is only about enough to purchase a single meal. In isolated North Maluku, a meal of rice and fish costs around IDR 15,000. As we will discuss further below, this compensation package was agreed in a non-transparent manner with one village head, and families have agreed to it reluctantly, under pressure from the company and the village head, and because they believe they have no other choice. A remaining handful of families in each village continues to resist the pressure to accept compensation in the hope that they will be able to push for a more adequate arrangement. They have given up hope that they will have any meaningful say over whether or not the project goes ahead.

Tobelo Dalam

The Tobelo Dalam, sometimes called Forest Tobelo are a traditional, indigenous forest community.¹² They live a nomadic lifestyle, moving around the forest between Central, East

¹¹ Charles Zerner, "Through a Green Lens: The Construction of Customary Environmental Law and Community in Indonesia's Maluku Islands," *Law and Society Review* 28, no. 5 (2013).

¹² The term "Tobelo" has several referents. It refers to an ethnic group of approximately 25,000 people living primarily in northern and central Halmahera and to the West Papuan language spoken by the those people. It also refers to the name of a former subdistrict in northern Halmahera as well as the aggregation of villages serving as the capital of the district of North Halmahera, see Christopher R Duncan, "Reconciliation and Revitalization: The Resurgence of Tradition in Postconflict Tobelo, North Maluku, Eastern Indonesia,"

and North Halmahera and living off forest products. They have little to no contact with people outside their own community. Their main channel to outsiders is through members of their community, called simply Tobelo, who have settled and now live within the *desa* (government-mandated village) system. The North Maluku Provincial Social Department aims to settle all isolated, traditional communities in order to better manage their welfare, but a significant number of Tobelo Dalam still remain living in the interior, and it is widely believed that they have no desire to settle.¹³

The Tobelo Dalam can be considered to have pre-existing customary land rights, as described under the IFC Performance Standard 7, which states that,

Indigenous Peoples are often closely tied to their lands and related natural resources. Frequently, these lands are traditionally owned or under customary use. While Indigenous Peoples may not possess legal title to these lands as defined by national law, their use of these lands, including seasonal or cyclical use, for their livelihoods, or cultural, ceremonial, and spiritual purposes that define their identity and community, can often be substantiated and documented.

Given the Tobelo Dalam inhabit the concession area, they will be impacted by the project. PT Weda Bay Nickel claims that the impact of the project on the Tobelo Dalam is being assessed as part of the ESHIA required by MIGA, and that numerous ethnographic studies have already been conducted.¹⁴ However, there is no information about the Tobelo Dalam available in the ESHIA for the 'Land preparation for Construction project' (the only ESHIA publicly released to date, which is only for a sub-project in the exploration and feasibility phase involving some excavation), and researchers could not acquire any ethnographic studies from the company. No other information is available about how this vulnerable community will be impacted or consulted in relation to this project.

The details of consultation, consent and compensation arrangements with both the Sawai and Tobelo Dalam communities are discussed in more detail in subsequent sections.

The Journal of Asian Studies 68, no. 4 (2009), p. 1078. We use the term Tobelo Dalam to refer only to the people described in this paragraph.

¹³ Interview with North Maluku Provincial Social Department, North Maluku, May 2013.

¹⁴ PT Weda Bay Nickel company website, <http://www.wedabaynickel.com/en/commitment-to-people-and-nature/forest-tobelo-people/>, 15 September 2013.

Losing the Land

The development of the PT Weda Bay Nickel project will be a staged process, with different stages resulting in different impacts on affected communities. The PT Weda Bay Nickel project is currently in the feasibility phase, with a final investment decision to commence the construction phase expected in 2014.

This section of the report outlines the different phases of the project and describes the consultation and consent processes with local communities which pertain to each of these phases. The purpose of outlining this process in such detail is to provide the necessary background for making sense of what the company is referring to as the 'land acquisition' process. This understanding will assist in assessing its impacts on the communities and point to areas of concern relating to the way in which this process has been undertaken. In order to fully comprehend the consequences of the PT Weda Bay Nickel project on communities, it is necessary to view the project from beginning to end.

Phases of the PT Weda Bay Nickel Project

PT Weda Bay Nickel first began working in Halmahera in 1996, with preliminary mineral surveys. The government issued Contract of Work was signed in 1998, the development of ore reserves began in 2001, a pre-feasibility stage lasted from September 2007 to March 2009, and the company is now in the full 'bank feasibility stage'.¹⁵ Key phases of the PT Weda Bay Nickel project into the future are as follows:

Bank Feasibility and Exploration Phase

This phase of the project involves geological exploration and other pre-construction and pre-production activities associated with the project. This includes acquisition of necessary permits, and acquisition of necessary land.¹⁶ It also includes the Land Preparation for Construction Project. It is designed to provide information to banks to assist in decision making regarding investment.

Land Preparation for Construction Project

This project is part of the feasibility and exploration phase. As some of the land on which PT Weda Bay Nickel intends to build infrastructure contains nickel and cobalt, PT Weda Bay Nickel have excavated this land to retain the ore for future use once the processing plant is constructed and operational. This project involves extraction of the ore, an ore stockpiling facility, ore export activities, construction and operation of roads and transportation of heavy machinery, and limestone and aggregate quarry mining at two locations. PT Weda Bay Nickel claims it has conducted this project during the exploration and feasibility phase in order to meet the demands of local government and stakeholders for the commencement

¹⁵ PT AECOM Indonesia, "The Land Preparation for Construction (LPC) Project: Environmental Social and Health Impact Assessment" (Jakarta: PT Weda Bay Nickel, 2013), p. 15; PT Weda Bay Nickel company website, <http://www.wedabaynickel.com/en/a-world-class-project/history/>, accessed 15 September 2013.

¹⁶ PT Weda Bay Nickel company website, <http://www.wedabaynickel.com/en/a-world-class-project/history/>, accessed 17 September 2013.

of the project.¹⁷ The Land Preparation for Construction project has already had tangible impacts on the environments of the Sawai villages by excavating within a few kilometres of residential areas, increases in movement of heavy machinery on the roads and so on. It is also as part of this project that compensation agreements have been made with villagers for their agricultural forest lands.

Phase I of Construction

The construction phase of the project will commence when a final investment decision is made, and will take an estimated four years. The first phase of construction will entail the construction of a processing plant, and extraction and processing of ore. This phase will entail production of 35,000 tonnes of nickel per year.¹⁸

Phase II of Construction

This phase of construction will lead to an additional 30,000 tonnes capacity after the first phase of construction, when the plant is operating optimally. According to PT Weda Bay Nickel, “[a]t full capacity after the second phase ramp-up period, the plant is designed to treat approximately 4.5 million tonnes of dry ore each year, producing over 65,000 tons of nickel and 4,000 tonnes of cobalt.”¹⁹

As the ESHIA has not yet been released for the construction phase of the project, it is not possible to anticipate the exact impact of this phase on communities. However, we can assume it may involve further land acquisition, particularly of areas over which the Tobelo Dalam have traditional land rights, and further environmental damage caused by deforestation and excavation. Though PT Weda Bay Nickel has pledged to reforest any cleared areas, the period in which deforestation and mining occur will nevertheless have significant impact.

Studies and Assessments

In order to comply with regulations from both the Indonesian government and important financiers, in particular MIGA, PT Weda Bay Nickel is required to complete and publicly release a number of studies. These are outlined in Table 1. As we discuss later in this report, these studies and assessments are an important aspect of assessing the impact of the project on affected communities.

¹⁷ PT AECOM Indonesia, "The Land Preparation for Construction (LPC) Project: Environmental Social and Health Impact Assessment".

¹⁸ PT Weda Bay Nickel company website, <http://www.wedabaynickel.com/en/a-world-class-project/a-staged-implementation-approach/>, accessed 15 September 2013.

¹⁹ PT Weda Bay Nickel company website, <http://www.wedabaynickel.com/en/a-world-class-project/a-staged-implementation-approach/>, accessed 15 September 2013.

Table 1: Required impact assessments.

STUDY	REQUIRED BY	COVERS	STATUS
AMDAL	Indonesian government	A limited range of social and environmental impacts	Approved June 2009
Bank Feasibility Study	Investors	Economic indicators, and project costs and risks, including social, health and environmental costs and risks. The ESHIAs outlined below form part of the Bank Feasibility Study.	Not yet released
ESIA (Environmental and Social Impact Assessment)	Investors that require adherence to IFC Performance Standards or Equator Principles – Prepared for MIGA	Exploration and feasibility phase; and first phase of construction. According to PT Weda Bay Nickel, "This ESIA study serves as an advance, abbreviated, and focused version of the BFS Environmental and Social and Health Impact Assessment ("ESHIA"), for the purposes of pre-testing the ability of the WBProject to complete the Equator Principles/Performance Standards Environmental and Social Clearance process. It was never intended that the ESIA act as a substitute for the comprehensive ESHIA, which is currently being undertaken and details of which are set out below." ²⁰	
LPC ESHIA (Land Preparation for Construction Project Environmental, Social and Health Impact Assessment) ²¹	Investors that require adherence to IFC Performance Standards or Equator Principles	Environmental, Social and Economic Impacts of the Land Preparation for Construction Project up to January 2012.	Completed in November 2011 and available on MIGA website
Full ESHIA (Environmental, Social and Health Impact Assessment)	Investors that require adherence to IFC Performance Standards or Equator Principles	Environmental, Social and Economic Impacts of the project	Begun in 2009, not yet released. PT Weda Bay Nickel stated that it would be ready by early 2012. ²²

²⁰ Compliance Advisor Ombudsman, "Ombudsman Assessment Report, Complaint Regarding the MIGA PT Weda Bay Nickel Project (#8113), Halmahera Island, North Maluku, Indonesia," (Washington, DC: Office of the Compliance Advisor/Ombudsman (CAO), 2011), p 9.

²¹ The ESHIA is a more detailed impact assessment than the AMDAL. ESHIAs are required for projects supported by the IFC, MIGA and financiers that have signed up to the Equator Principles, a credit risk management framework for determining, assessing and managing environmental and social risk in project finance transactions.

²² PT Weda Bay Nickel company website, <http://www.wedabaynickel.com/en/commitment-to-people-and-nature/impact-assessments/the-eshia/>, accessed 20 September 2013.

Table 2: Summary of key dates in the project's development.

DATE	EVENTS
1998	<ul style="list-style-type: none"> 19 January - Signing of the Contract of Work (CoW) by PT Weda Bay Nickel (WBN) based on Presidential Decree No. B.53/PRESS/1/1998. CoW area was initially 120,500 hectares.²³
2004	<ul style="list-style-type: none"> PT Weda Bay Nickel receives an exemption, by Presidential Decree, from Law No. 41 (1999), enabling PT Weda Bay Nickel to conduct open-cast mining in protected forest until Contract of Work expires.²⁴
2006	<ul style="list-style-type: none"> ERAMET became a major shareholder of WBN.²⁵
2008	<ul style="list-style-type: none"> Preparation of the AMDAL²⁶ First environment, health and safety corporate audit conducted with ERAMET at the helm, leading to identification of weaknesses in the AMDAL, and gaps between AMDAL and the ERAMET requirements for an international Bankable Feasibility Study for the World Bank Group. This audit was used as the basis for setting the ESHIA program scope.²⁷
2009	<ul style="list-style-type: none"> AMDAL approved by Indonesian authorities.²⁸ Mitsubishi Corporation agrees to acquire 33.4% of Strand Minerals (Indonesia) Pte Ltd from ERAMET.²⁹ Land compensation process begins in consultation with government authorities, involving community consultation and negotiation, land survey, claimant identification, verification and census.³⁰ Work begins on ESHIA with private company ERM.³¹
2010	<ul style="list-style-type: none"> MIGA issued a guarantee of \$207 million to Strand Minerals for its equity investment in the PT Weda Bay Nickel Project.³² Land inventory and compensation process launched.³³
2011	<ul style="list-style-type: none"> ESHIA for the Land Preparation for Construction project released Work begins with Ministry of Forestry to enable commencement of compensation and land titling.³⁴
2012–2013	<ul style="list-style-type: none"> Project awaits final investment decisions by MIGA and major shareholders. ESHIA for overall project still not released.

²³ PT Weda Bay Nickel company website, <http://www.wedabaynickel.com/en/a-world-class-project/history/1996-1999/>, accessed 15 September 2013.

²⁴ PT Weda Bay Nickel company website, <http://www.wedabaynickel.com/en/a-world-class-project/history/2004-2005/>, accessed 15 September 2013.

²⁵ ERAMET company website, <http://www.eramet.com/en/projects/weda-bay-nickel-indonesia>, accessed 20 September 2013; PT Weda Bay Nickel, "Response of Pt Weda Bay Nickel to the Cao Complaint," in *Ombudsman Assessment Report, Complaint Regarding the MIGA PT Weda Bay Nickel Project (#8113), Halmahera Island, North Maluku, Indonesia* (Washington, DC: Office of the Compliance Advisor/Ombudsman (CAO), 2011), p.22.

²⁶ Ibid., p.22.

²⁷ Ibid., p.22.

²⁸ Ibid., p.22.

²⁹ Mitsubishi Corporation company website, <http://www.mitsubishicorp.com/jp/en/pr/archive/2009/html/0000002859.html>, accessed 20 September 2013.

³⁰ PT Weda Bay Nickel company website, <http://www.wedabaynickel.com/en/a-world-class-project/history/2009-2011/>, 15 September 2013; PT Weda Bay Nickel, "Response of Pt Weda Bay Nickel to the Cao Complaint," p.15.

³¹ Ibid., p.22.

³² Compliance Advisor Ombudsman, 'Case Summary Indonesia / PT Weda Bay Nickel-01/Weda Bay', http://www.cao-ombudsman.org/cases/case_detail.aspx?id=158, accessed 12 June 2012.

³³ PT Weda Bay Nickel company website, <http://www.wedabaynickel.com/en/a-world-class-project/history/2009-2011/>, accessed 15 September 2013.

³⁴ PT Weda Bay Nickel company website, <http://www.wedabaynickel.com/en/a-world-class-project/history/2009-2011/>, accessed 21 September 2013.

Official Permissions and Approvals

There are two main permissions and approvals required by a mining project such as this in Indonesia. The first is the Contract of Work, and the second is a business license in accordance with environmental regulations..

Contract of Work

Initial geological exploration was undertaken by the company beginning in 1996 to form an initial estimate of the size of nickel deposits. In 1997 the company purchased the land of an existing logging company to build the site offices in Tanjung Ulie, where they stand today. The Contract of Work (a type of mining license) for the PT Weda Bay Nickel Project was then signed by President Soeharto in 1998, as part of the 7th Generation of Contracts of Work under Mining Law, No. 11, of 1967.³⁵

Contracts of Work include obligations concerning expenditure; import and export facilities; marketing; fiscal obligations; reporting; records, inspection, and work program; employment and training of Indonesian nationals; environmental management and protection; regional cooperation in regard to infrastructure; and local business development.³⁶ The 7th Generation Contracts of Work did not require royalties to be paid to local communities, and only limited royalties to local regency governments. Most royalties were paid to the central government. There was no obligation to include local communities in decision making around mine locations or compensation in Contracts of Work.

At the time of publishing, PT Weda Bay Nickel is in the process of renegotiating their Contract of Work with the Indonesian government. The present and future state of official permissions is discussed further below.

AMDAL

The AMDAL is an environmental and social impact assessment required by the Indonesian government. The government requires that this study be prepared and publicised for consultation. The studies require assessment by the Environmental Impact Assessment evaluator commission. The relevant government agency, in this case the Environmental Monitoring Agency of North Maluku, then makes a decision on the suitability of the project for a license based on the recommendations of the commission. PT Weda Bay Nickel

³⁵ The Contract of Work (CoW) scheme allowed foreign investors to operate mines under the status of contractor to the Indonesian government. Over time, the details of the scheme were revised to ensure that it remained responsive to the international investment climate and prevailing market conditions. Each revision was referred to as a 'generation', see Kosim Gandataruna and Kirsty Haymon, "A Dream Denied? Mining Legislation and the Constitution in Indonesia," *Bulletin of Indonesian Economic Studies* 47, no. 2 (2011).

³⁶ PricewaterhouseCoopers, 'Mining in Indonesia: Investment and Taxation Guide', http://www.pwc.com/en_ID/id/publications/assets/MiningInIndonesia-InvestmentAndTaxation.pdf, accessed 19 September 2013.

acquired in June 2009. It is a much more limited study than the ESHIA required by World Bank Group and Equator Principle financiers.

Land Compensation Negotiations

In Indonesia, land law and practices of documenting the many different kinds of rights people and corporations can have over land is a complex and sometimes contradictory matter. Under Indonesian law, local people can use certain kinds of state forest for limited cultivation with a permit from the Forestry department. Informally, however, across Indonesia, land that is purportedly state forest is used extensively by those who have lived in it and farmed it for generations in accordance with their customary practices, without any formal permits. The land negotiations involving PT Weda Bay Nickel and Sawai villagers have been complicated by these legal ambiguities.

Initial consultations around the project were held in relation to the AMDAL. Interviews conducted for this report suggest that these consultations did not deal adequately with the prospect of economic displacement in a way that Sawai communities could understand and raise concerns about, though it may have been thorough in other respects. A small selection of village representatives were invited to meetings as part of the consultation process for the AMDAL. Members of communities who were invited to the AMDAL evaluation meeting in Ternate were given opportunities to raise questions. According to PT Weda Bay Nickel, the AMDAL process was rushed due to delays resulting from ambiguities in forestry laws after 2009 changes. PT Weda Bay Nickel explained that, "These disruptions and delays led to a situation in which the submission of studies required by the Contract of Work could be made, but there was insufficient time for them to meet international standards."³⁷ According to informants for this report, because they were provided with hundreds of pages of documents only shortly before the meeting, and therefore did not have sufficient time to familiarise themselves with the documents, only a few concerns were raised.³⁸ An interview with one Head of Village in the affected villages showed that at the time of AMDAL consultations, village representatives did not know that the mining concession would impact on the access to farming land within protected state forest. That Village Head said that if he had understood that they would lose access to the land they had cultivated for generations, he would not have agreed to the AMDAL.³⁹

Once the AMDAL was agreed, negotiations around land began in earnest. Although PT Weda Bay Nickel's concession is large, the company only requires land title for the areas on which it will build significant investments, such as the plant area. At present, these areas – for the plant and the accommodation for staff – are located close to the three Sawai villages. PT

³⁷ PT Weda Bay Nickel, "Response of Pt Weda Bay Nickel to the Cao Complaint.", p. 8.

³⁸ In an interview with Pak Abujan Latif, Mining Inspector, North Maluku Mining Department, May 2013, he confirmed that the AMDAL was provided to attendees of the AMDAL consultation workshop a week before the meeting

³⁹ Interview with Gemaf Village Head, Germaf, May 2013.

Weda Bay needs to secure its land rights for two reasons. Firstly, the company wants to secure its investments. Secondly, under Article 136 of the new mining law (Law 4/2009) mining companies must settle land issues with those who possess land rights.⁴⁰ If they can achieve this, then, under Article 162, the company is able to hold any people who then intrude on that land criminally liable, thereby preventing villagers from interfering with construction activities.⁴¹ If the company does not achieve this elimination of encumbrances, it runs the risk of encountering future claims against it.

PT Weda Bay Nickel's approach has therefore been to provide compensation to villagers to relinquish their rights to their agricultural land, while allowing them to remain on their residential land. In 2009 PT Weda Bay Nickel appointed independent consultants to conduct research into the market price of land in the region. Based on this investigation, the company decided to offer IDR 7000 per square metre of cultivated land in state forest areas to the people whose farming land was inside the concession and required for the construction of project infrastructure.

A consultation process then began involving government officials, particularly the Bupati (head of the Regency government), and villagers. After failure to make an agreement at village meetings in the Lelilef villages, in 2010 PT Weda Bay Nickel made an agreement in Jakarta with the Village Head of Lelilef Sawai. The Village Head negotiated the price of compensation upward from the IDR 7000 initially offered to IDR 8000. This amount was then presented to the villagers on a 'take it or leave it' basis. In 2011 the first compensation payments for land began.⁴²

In late 2010, 'negotiation' processes started with villagers in Gemaf, however by this time PT Weda Bay Nickel was unwilling to negotiate on the price of IDR 8000 already agreed with the Village Head of Lelilef Sawai. Initially, up to 80% of households in these villages rejected the IDR 8000 price. This number is now reduced, with the company accounting for under a dozen families in each of the Lelilef villages, and only slightly more in Gemaf. In contrast, community representatives account for 47 land owners in the Lelilef villages and up to 107 land owners in Gemaf still refusing to sign agreements.

At the time of publication of this report, the authors had not been able to access a copy of any agreements made between PT Weda Bay Nickel and families who have accepted compensation. Of greater concern, according to several sources many of those who have

⁴⁰ The English translation of this law may refer to title holders but the original refers to those in 'possession of rights' which would then include indigenous people's rights.

⁴¹ If held criminally liable under this provision, individuals may be imprisoned for up to 1 year or fined up to IDR 100 million, approximately USD 9000.

⁴² Compensation for productive plants began earlier than that, but compensation for land had to wait until the Ministry of Forestry changed the legal designation of the land to *areal penggunaan lain* (APL, or 'other use areas') forest. Forest areas must be designated as APL in order for private actors to legally hold land title. PT Weda Bay Nickel was not legally permitted to pay compensation for any other category of State Forest Land, as there is no possibility of the company owning such land.

signed compensation contracts with PT Weda Bay Nikel have not been provided with complete copies of the contracts and are unaware of the exact contents of the agreement and its impact on their rights. The authors are therefore unable to establish the exact legal status of these agreements, or their ramifications in relation to ownership of legal rights over the land. We believe that the compensation amounts to relinquishment of all land rights in order to enable PT Weda Bay Nickel to apply for private land title, with no encumbrances.

To date, there have been no land negotiations with the Tobelo Dalam. As stated earlier in the report, PT Weda Bay Nickel has been unclear about the impact of their project, throughout its life, on the Tobelo Dalam, claiming that this will be made clear when the ESHIA is published.

As is clear from this discussion, customary rights to forests have, until recently, been weakly protected under Indonesian law. However, in 2012 a constitutional Decision (Number 35/PUU-X/2012) was made that may change all of this. This is explained later in this report, in the section on Indonesian law relating to indigenous rights. Indonesia's President Susilo Bambang Yudhoyono has also recently made a public commitment to map and formally acknowledge indigenous land rights, and indigenous rights organisations are doing the same.⁴³ Such a process may alter the legal dynamic of the land situation in the Sawai villages. It is therefore unclear at this stage whether PT Weda Bay Nickel could legally force communities to relinquish their land rights if some of them continue to refuse, though in practice it is likely that high levels of government support from the project will continue to make it difficult for communities to resist compensation.

Future Construction

ERAMET has invested considerable funds – USD 450 million by early 2013 – in the exploration and feasibility phase of this project.⁴⁴ As well as going through lengthy and no doubt costly administrative procedures to acquire all the necessary permits from the Indonesian government, including the AMDAL process, the company has also made compensation arrangements with most of the affected families in the concession area to ensure there are no encumbrances on the land, have set up an expansive site office, including an airplane runway, and have set up an impressive philanthropic corporate social responsibility program. The progression to the construction phase of the project depends on a number of factors.

First, shareholders must decide whether to invest in or otherwise financially support the construction phase. This includes ERAMET and Mitsubishi, the main shareholders, but is also

⁴³ Aliansi Masyarakat Adat Nusantara, <http://www.aman.or.id/2013/06/28/sby-berkomitmen-untuk-pendaftaran-dan-pengakuan-wilayah-adat/#.UjITkBaWWpF>, accessed 18 September 2013.; see also Down to Earth Indonesia website, <http://www.downtoearth-indonesia.org/story/turning-point-indonesia-s-indigenous-peoples>, accessed 1 October 2013.

⁴⁴ PT Weda Bay Nickel company website, <http://www.wedabaynickel.com/en/a-world-class-project/shareholders/>, accessed 15 September 2013.

likely to include the IFC and/or MIGA, and possibly Coface and Nexi, the French and Japanese export credit agencies.

A second factor is more significant in determining the future of the project: the Contract of Work must be renegotiated following 2009 changes to mining law (Law 4/2009). In February 2013, PT Weda Bay Nickel agreed to four of the six points in a government review of the company's mining contract. Two points still remain to be negotiated. The sticking points in negotiations have occurred over state revenue and divestment. A new regulation signed by President Susilo Bambang Yudhoyono on 21 February 2012 requires that foreign companies sell down stakes in mining projects and increase domestic ownership to at least 51 per cent by the 10th year of production. Shareholders may be drawn from the central government, the provincial and district governments of the jurisdiction where the project is located, state-owned companies, regional government-owned companies and privately owned Indonesian companies, with the divestment to take place through a tender process.⁴⁵ An interview with representatives of provincial government suggested that the provincial government is seeking finance to invest in the project.⁴⁶

A third factor is that in addition to negotiations with the *national* government over the Contract of Work, the company must also negotiate with provincial and regional government over other points. Ambiguity regarding the nature and extent of the delegation of authority from Central to Regional Governments has encouraged different interpretations as to what authority they hold, resulting in conflict between the various levels of Government and with Contract of Work holders.⁴⁷ The company has been in negotiations with regional government to agree on how the various benefits from the operation should be shared. Lack of institutional capacity at the lower levels of government has prolonged negotiations.⁴⁸

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

⁴⁵ Gandataruna and Haymon, "A Dream Denied? Mining Legislation and the Constitution in Indonesia."

⁴⁶ Interview with Syaiful Rurai, Ternate, May 2013.

⁴⁷ Baillie, "Developing a World Class Nickel and Cobalt Resource in Indonesia."

⁴⁸ Gandataruna and Haymon, "A Dream Denied? Mining Legislation and the Constitution in Indonesia."

Analysis

Support and Opposition to the Project

Relations between PT Weda Bay Nickel and the people in the three Sawai villages vary. A majority of families have accepted compensation, and now look forward to employment opportunities and corporate social responsibility programs with PT Weda Bay Nickel. This support, and widespread backing of the project at Regency, Provincial and Central levels, has led to considerable pressure being placed on village members to sign compensation agreements with PT Weda Bay Nickel and support the project. Our interviews suggest that despite the fact that most families have signed agreements, under the surface, important tensions between the company and communities persist.

As mentioned above, a small handful of families in each village continue to resist the pressure to accept the current compensation offer. In interviews, they told us that they do not know how they will survive without access to farming land. They are anxious about the economic future of their families, as they have little experience managing in a cash economy, and see few prospects for long-term economic security. They are concerned that there will not be enough jobs with PT Weda Bay Nickel, worried about what will happen when the mine closes, and reluctant to make such a rapid shift to a different way of life. These families, known as the 50,000 group have demanded higher levels of financial compensation (INR 50,000 per square metre). We believe that with further education on their rights, they would also demand other benefits, as described further below in the analysis of the compensation package. They have sought the support of local organisations such as community legal services (LBH ProJusticia), environmental organisations (Walhi) and indigenous rights organisations (AMAN), as well as lobbying sympathetic provincial politicians. However, their remoteness acts as a significant barrier to garnering greater support. In such a minority, these families expressed feeling hopeless and powerless about their prospects of negotiating with the company in a meaningful way.

The number of families refusing to make an agreement with the company is contested, with the company stating it is much lower than some community members understand it to be. In any event, there are many fewer families resisting compensation than was originally the case. It is the contention of this report, for reasons outlined below, that this small number of families who have not accepted compensation represent the underlying views of many more families who accepted compensation only very reluctantly, and ultimately desire more adequate and appropriate compensation.

Relations between PT Weda Bay Nickel and the Tobelo Dalam differ from those with people in the Sawai villages. Although there have been a number of encounters between PT Weda Bay and the Tobelo Dalam, our research suggested that the responsible PT Weda Bay Nickel personnel are unsure how to proceed in adequately consulting with, gaining consent from and possibly compensating project-affected Tobelo Dalam people. This remains a serious and urgent social responsibility problem for PT Weda Bay Nickel.

Failure to Provide for Free, Prior and Informed Consent or Consultation

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

PT Weda Bay Nickel has expressed a commitment to consultation for the Sawai communities, and to the principles and procedures of free, prior and informed consent for the Tobelo Dalam.⁴⁹ For instance, the company stated to the IFC Compliance Advisor Ombudsman that it will “continue [the] disclosure of information to Project Affected Communities in a manner that is accessible, understandable and culturally acceptable.”⁵⁰ However, our research found that:

- a) PT Weda Bay Nickel has consulted to a degree with affected Sawai communities, but the consultation process as we understand it suffers serious shortcomings;
- b) PT Weda Bay Nickel has, to our knowledge, conducted almost no consultation with the Tobelo Dalam, and has therefore not acquired their consent for the project’s activities in their traditional lands;
- c) PT Weda Bay Nickel has not established that the Sawai are not also indigenous, and therefore entitled to not only free, prior and informed consultation, but also consent, and;
- d) PT Weda Bay Nickels’ compensation package is neither adequate nor appropriate.

Appendix Two provides a detailed analysis of the company’s actions in relations to the free, prior and informed consent and consultation standards in IFC Performance Standards 1, 5 and 7. The following sections summarise and comment on those findings.

Failure for Negotiations to be Conducted or Consent Given Freely

International norms require that consultation and negotiations be conducted freely, meaning that affected communities are able to express concerns and objections about a project. This requires both formal opportunities, *and* an informal environment that is conducive to free expression of concerns and objections.⁵¹ Free, prior and informed consent does allow opportunity for a company to persuade affected communities that benefits will

⁴⁹ Catherine Tissot-Colle (ERAMET), "Letter to Les Amis De La Terre France," (July 2, 2013).

⁵⁰ Compliance Advisor Ombudsman, "Ombudsman Assessment Report, Complaint Regarding the MIGA PT Weda Bay Nickel Project (#8113), Halmahera Island, North Maluku, Indonesia."

⁵¹ Joji Carino, "Indigenous Peoples' Right to Free, Prior, Informed Consent: Reflections on Concepts and Practice," *Arizona Journal of International and Comparative Law* 22(2005); Marcus Colchester and Fergus MacKay, "In Search of Middle Ground: Indigenous Peoples, Collective Representation and the Right to Free, Prior and Informed Consent," in *10th Conference of the International Association for the Study of Common Property* (Oaxaca, Mexico 2004); Marcus Colchester and Maurizio Farhan Ferrari, "Making Fpic Work: Challenges and Prospects for Indigenous Peoples," (Moreton-in-Marsh: Forest Peoples' Programme, 2007).

outweigh negative impacts. However, our research found that actions of PT Weda Bay Nickel and local government officials exceed persuasion, and amount to pressure.

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

We also found that inappropriate modes of persuasion were deployed by PT Weda Bay Nickel. For example, the company often elicited the support of religious leaders to influence non-cooperating families, and used its understanding of kinship networks within communities to encourage family members to influence each-other. Further, in some circumstances PT Weda Bay Nickel chose which village officials to negotiate with on the basis of their willingness to accept and promote compensation, rather than their elected authority in the village. A number of interviewees suggested that people had accepted compensation because they feared if they didn't they would be punished with the move of company-built infrastructure and jobs away from their villages. They worried that they would economically disadvantage the whole village by rejecting compensation agreements.⁵² Inappropriate incentives have also been offered to resisting families, for example inflated compensation for productive, food bearing plants, over which the PT Weda Bay Nickel land acquisition officer has some discretion.

An additional source of pressure has come from government and its agents at various levels. Government officials at all levels and village heads are strongly in favour of the project. Our research suggests that this is largely because they are optimistic about the development benefits it will bring to the area. On 27 May 2011 the PT Weda Bay Nickel project was pronounced as being part of the Master plan for Acceleration and Expansion of Indonesia Economic Development (MP3EI). This has increased pressure by government officials on local communities to accept compensation agreements. Regardless of the development benefits for the area, this government pressure does not create an environment in which affected people can give or withhold their consent freely. For instance, a Village Head who rejects the compensation agreement with the company reported that the Bupati had threatened to have him replaced with someone who favoured the agreement with the company.⁵³ The findings by Komnas HAM that BRIMOB, a paramilitary police unit, had intimidated some villagers into signing land compensation agreements against their will,

⁵² Though some families demonstrate an appreciation for the value of the infrastructure in terms of providing economic opportunities, this does not excuse PT Weda Bay Nickel from the other obligations outlined in this analysis section.

⁵³ Interview with Gemaf Village Head, Gemaf, May 2013. The Gemaf Village head has thus far managed to reject the Bupati's pressure on the basis of regulations that require democratic election, rather than appointment by the Bupati.

provides further strong evidence that negotiations have not occurred freely. Furthermore, LBH ProJusticia, a community legal service that represented aggrieved community members, have made 14 complaints to the police regarding violence and destruction of property by PT Weda Bay Nickel.

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

Finally, the historical political and social environment of the region may also be contributing to limiting the freedom with which affected families can engage in consultation and give their consent for relinquishment of their land rights. Between 1999 and 2002 there was sectarian violence between Muslims and Christians that is widely seen to be caused by political and economic factors, as well as religious antagonism. Christian interviewees to our study reported hiding in the forest for around 6 months in 1999, until peace was restored.⁵⁴ More recently, there have been peaceful relations between village members and villages in the project area. The authors of this report are gravely concerned that conflict and sectarian violence will be exacerbated by the PT Weda Bay Nickel project. Christian villages have been more likely to resist compensation than Muslim villages, leading to risks of resentment between community members along religious lines.

In addition to various sources and modes of pressure, this report finds that the process of offering compensation falls short of being 'free' in other respects. After negotiations with the Head of Lelilef Sawai concluded, compensation agreements were offered to individual land holders on a 'take it or leave it basis', with no scope for broadening the topic of negotiations or amending agreements. There has not been an opportunity for free negotiation. The company has explicitly rejected the idea of negotiating directly with villagers after its first failed attempt. This may also be a breach of Indonesian contract law. Article 1338 of the Indonesian Civil Code provides that parties should agree to terms of contracts voluntarily. Parties to negotiations should have the opportunity to put counter-offers.

⁵⁴ One anthropological study suggests that the company played a positive role in the restoration of peace: John Braithwaite and Leah Dunn, "Maluku and North Maluku," in *Anomie and Violence: Non-Truth and Reconciliation in Indonesian Peacebuilding*, ed. John Braithwaite, et al. (Acton, ACT: ANU E-Press, 2010).

Failure to Provide Information Prior to the Project's Commencement

Under the IFC Performance Standards 1, 5 and 7, PT Weda Bay Nickel is obliged to provide adequate information to affected communities with sufficient time for it to be read, absorbed, and discussed, and for communities to seek further information before any activities take place. PT Weda Bay Nickel claims that it is “maintaining a transparent process, which is open to the scrutiny of both local stakeholders and the local government representatives.”⁵⁵ However, our research found that there has been a general lack of information readily available about the impact of the project, a particular lack of relevant information available in forms appropriate for the affected communities, and the information has not been provided well enough in advance of the implementation of the various phases of the project.

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

The ESHIA, the study that will present the most detailed and in-depth assessment of the impact of the project, is particularly important in this respect. PT Weda Bay Nickel states that it is preparing a number of studies and plans for the ESHIA for Phase I of construction. These include an Integrated Social Programme consisting of a Public Consultation and Disclosure Plan (PCDP), a Land Acquisition and Resettlement Action Plan (LARAP), a Community Social Assessment (CSA), a Community and Indigenous Peoples Development Plan (CIPDP) and a Cultural Heritage Preservation Plan (CHPP).⁵⁶ As such, these studies will provide important information for communities about what to expect as the project proceeds through the feasibility stage, and into the first phase of construction. We have not been able to find any commitment to the details or release date for an ESHIA for Phase II of construction.⁵⁷

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

⁵⁵ PT AECOM Indonesia, "The Land Preparation for Construction (LPC) Project: Environmental Social and Health Impact Assessment," p. xiv.

⁵⁶ Compliance Advisor Ombudsman, "Ombudsman Assessment Report, Complaint Regarding the MIGA PT Weda Bay Nickel Project (#8113), Halmahera Island, North Maluku, Indonesia," p. 5.

⁵⁷ At full capacity after the second phase ramp-up period, the plant is designed to treat approximately 4.5 million tonnes of dry ore each year, producing over 65,000 tons of nickel and 4,000 tonnes of cobalt, *ibid.*, p. 5; PT Weda Bay Nickel company website, <http://www.wedabaynickel.com/en/a-world-class-project/a-staged-implementation-approach/>, accessed 15 September 2013.

With a final investment decision for Phase I of Construction⁵⁸ due in 2014, release of the ESHIA at this late stage will be meaningless. Affected communities and other interested parties, such as environmental and indigenous support NGOs need adequate time to read and absorb the information in the complex ESHIA prior to the final investment decision so that adequate opportunity is provided to influence that decision. Assessment of the later stages of the project appears not yet to have occurred, making it impossible for the community to make an informed decision based on information about the project's impact throughout its life cycle.

Furthermore, *the form* in which information has been delivered is not appropriate. PT Weda Bay have conducted public consultations on the AMDAL, have opened an information centre in their site offices, and have community liaison officers who have regular communication with affected communities. However, despite these efforts, our research found that communities and other interested parties, such as local NGOs, remain unclear about the full potential impact of the project because these forms of information delivery have not been adequately tailored to the needs of these groups.

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

This report also raises doubts about whether official processes, such as the AMDAL process, have occurred in way that have allowed sufficient time for consideration, or been shared with the community in a manner which is comprehensible to them. This was a concern addressed in the Compliance Advisor Ombudsman complaint. So as to better comply with the IFC Performance Standards, the Compliance Advisor Ombudsman proposed that "WBN may consider further developing and enhancing its ongoing consultations with local community members and discuss the issues in the original complaint and Section 4.2 above as part of the ESHIA preparation".⁵⁹ We remain concerned that these steps have not taken place.

Despite these problems with the provision of information about the total impact of the project, communities have already been asked to agree to compensation. Instead of being fully informed about their decisions, only a *limited* amount of information was provided

⁵⁸ Involving construction of a plant with capacity to produce 35,000 tonnes of nickel per year, followed by an expansion of an additional 30,000 tonnes capacity when the first phase plant is operating optimally, see PT Weda Bay company website, <http://www.wedabaynickel.com/en/a-world-class-project/a-staged-implementation-approach/>, accessed 20 September 2013.

⁵⁹ PT Weda Bay Nickel, "Response of PT Weda Bay Nickel to the CAO Complaint," p. 8.

concurrently with the project's advancement, rather than *prior* to it. Furthermore, that the IFC Compliance Advisor Ombudsman Compliance team declined to address this issue is very concerning.

Failure to Adequately and Meaningfully Consult

This report raises strong concerns that PT Weda Bay Nickel has failed to meaningfully and adequately consult with Sawai communities prior to the project's impact, and prior to agreements being made which result in their economic displacement.

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

WBN is committed to free, prior and informed consultation with Project Affected Communities. WBN will continue to disclosure of information to Project Affected Communities in a manner that is accessible, understandable and culturally acceptable.”⁵⁷

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

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

In addition, WBN has developed an Information Centre in order to provide further disclosure of the WB Project to Project Affected Communities, Government Officials and interested parties. Since the Information Centre officially opened in December 2010, it has seen over 650 visitors, including local employees, community groups and individuals, school groups and Government Officials.”⁶⁰

However, as a result of the problems related to the freedom of the consultation processes, and the timeliness and quality of information (both described immediately above), our research found that though PT Weda Bay Nickel has engaged in various forms of consultation, this has not met international norms or the requirements of the IFC Performance Standards (refer to **Appendix 2**).

⁶⁰ PT Weda Bay Nickel, "Response of PT Weda Bay Nickel to the CAO Complaint," p. 19

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

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

Box 1: IFC Performance Standard 1 on Consultation.

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

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

A large body of research and international standards and guidelines, including IFC Performance Standard 1 in Box 1 above, has established that meaningful consultation requires more than procedural compliance and one-way communication. Rather, meaningful consultation requires the development of a particular quality of relationship between all stakeholders such that affected communities, who suffer from a very significant power imbalance related to their skills, networks and experience in negotiating in often legal terms over technical issues with well-resourced corporations, are able to meaningfully question

and contest the existence and terms of a project.⁶¹ In addition, the company must genuinely listen, understand *and respond to* the community's concerns, including by altering their plans and activities where necessary. Meaningful consultations have documented and agreed outcomes which are revisited and renegotiated as the project evolves and the communities' needs change. Meaningful consultation is much more than the one-way provision of information from the company to the community, and an effort to persuade the community of the benefits of a project, though these can be *part* of a meaningful consultation process.

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

"A negotiation process is one in which stakeholders – identified through the Stakeholder Analysis – have an equal opportunity to influence decisions. Negotiations should result in demonstrable public acceptance of binding and implementable agreements and in the necessary institutional arrangements for monitoring compliance and redressing grievances. All stakeholder forum members should share a genuine desire to find an equitable solution and agree to be bound by the consensus reached."⁶²

In 2000, the World Commission on Dams published guidelines on how to conduct meaningful consultations.⁶³ These are summarised in Box 2.

Box 2: World Commission on Dams 2000 Guideline for negotiation.⁶⁴

The following are required during the consultation process:

- **Representation of Stakeholders**, with representatives chosen through a free process of selection, ensuring the effective and legitimate representation of all

⁶¹ James Anaya, "Indigenous Peoples' Participatory Rights in Relation to Decisions About Natural Resource Extraction: The More Fundamental Issue of What Rights Indigenous Peoples Have in Lands and Resources," *Arizona Journal of International and Comparative Law* 22, no. 1 (2005); Carino, "Indigenous Peoples' Right to Free, Prior, Informed Consent: Reflections on Concepts and Practice."; Colchester and Ferrari, "Making Epic Work: Challenges and Prospects for Indigenous Peoples."; Brant McGee, "The Community Referendum: Participatory Democracy and the Right to Free, Prior and Informed Consent to Development," *Berkely Journal of International Law* 27, no. 570 (2009).

⁶² World Commission on Dams, "Dams and Development: A New Framework for Decision-Making," in *The Report for the World Commission on Dams* (London: Earthscan Publications, 2000), p.280.

⁶³ Other guidelines which make similar recommendations include those developed by the Food and Agriculture Organization of the United Nations, and the World Bank. See Food and Agriculture Organization of the United Nations, "Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security," (Rome: Food and Agriculture Organization of the United Nations, 2012); World Bank, "Operational Policy 4.12 – Involuntary Resettlement," (Washington, DC: World Bank, 2001).

⁶⁴ Adapted from World Commission on Dams, "Dams and Development: A New Framework for Decision-Making," in *The Report for the World Commission on Dams* (London: Earthscan Publications, 2000).

interests.

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

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

- **agree on the appropriate structures and processes for decision-making**, the required mechanisms for **dispute resolution** (including any third party involvement), and the circumstances in which they will be initiated;
- agree that **the interests at stake and legitimate community needs are clearly identified**, in particular on the basis of relevant rights and risks;
- ensure that the available **alternatives**, their relevant consequences and uncertainties are given full consideration;
- guarantee **access to all relevant information** to the stakeholder forum in an appropriate language; and
- at the outset, agree on the **timeframe for the key milestones** within the decision-making process.

Our research found that affected Sawai villagers have not experienced PT Weda Bay Nickel's consultation efforts – including the public meetings, liaison officers and information centre, as consultative in a meaningful manner in relation to their economic displacement. Our

research suggests there has not been adequate opportunity for Sawai villagers to voice opinions and raise queries about the nature and impact of the project itself with PT Weda Bay Nickel. This is particularly pertinent in relation to changes in land rights and the form and amount of compensation. As recounted in the previous section of this report, those that have voiced concern about the content of agreements with the company have been treated as dissidents and placed under considerable pressure. Yet this process of raising concerns is a crucial aspect of dialogue and thorough consultation.

Failure to Gain Consent

PT Weda Bay Nickel has publicly committed to the principles and procedures of free, prior and informed consent for the Tobelo Dalam.⁶⁵ However, to our knowledge, there has been no systematic consultation with the Tobelo Dalam that could lead to consent.

There is some ambiguity over whether consent must be gained from the Sawai people under IFC Performance Standard 7. This hinges on whether they are considered to be indigenous people. Under conventional definitions of the term, which refer to long-standing association with a given area of land, a traditional way of life, and self-identification, it seems likely that the Sawai are indigenous. Until ongoing efforts to identify and map Indonesia's indigenous communities reach North Maluku (and are engaged in by local authorities in the province), this remains an important unresolved issue for PT Weda Bay Nickel.⁶⁶

IFC Performance Standard 7 and the UN Declaration on the Rights of Indigenous Peoples, to which Indonesia is a signatory, require that developments such as the PT Weda Bay Nickel project require free, prior and informed consent from any indigenous people affected by the project. Consent, as opposed to consultation, requires that indigenous peoples be able to veto a project.⁶⁷ The leading guideline in this area, from the World Commission of Dams, is explicit about what is required in this regard. These guidelines reinforce the notion that consent requires the development of an equal and meaningful, communicative relationship between parties, like that required for consultation. See Box 3 for further details.

⁶⁵ Letter from Catherine Tissot-Colle, Eramet, to Les Amis de la Terre France, 2 July 2013. Available at http://www.amisdelaterre.org/IMG/pdf/letter_to_friends_of_the_earth_-_walhi_-_07213.pdf, accessed 20 September 2013.

⁶⁶ Down to Earth Indonesia website, <http://www.downtoearth-indonesia.org/story/turning-point-indonesia-s-indigenous-peoples>, accessed 1 October 2013.

⁶⁷ Anaya, "Indigenous Peoples' Participatory Rights in Relation to Decisions About Natural Resource Extraction: The More Fundamental Issue of What Rights Indigenous Peoples Have in Lands and Resources."; Carino, "Indigenous Peoples' Right to Free, Prior, Informed Consent: Reflections on Concepts and Practice."; Colchester and Ferrari, "Making Fpic Work: Challenges and Prospects for Indigenous Peoples."; Colchester and MacKay, "In Search of Middle Ground: Indigenous Peoples, Collective Representation and the Right to Free, Prior and Informed Consent."; McGee, "The Community Referendum: Participatory Democracy and the Right to Free, Prior and Informed Consent to Development."

Box 3: Key excerpts from the World Commission on Dams 2000 Guideline for free, prior and informed consent.⁶⁸

- Free, prior and informed consent is “more than a one-time contractual event – it involves a continuous, iterative process of communication and negotiation spanning the entire planning and project cycles”
- “Effective participation requires an appropriate choice of community representatives and a process of discussion and negotiation within the community that runs parallel to the discussion and negotiation between the community and external actors.”
- “It is inappropriate to set rigid guidelines or frameworks, as these must be negotiated as the process proceeds.”

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

“As part of exploration activities, WBN has had intermittent and irregular interaction with the Tobelo Forest Community. These interactions have generally been of a peaceful nature and typically led to the exchange of food such as processed rice, for the forest produce of the Tobelo Forest Community, such as bananas and cassava. Currently WBN recognises the Tobelo Forest Community as a vulnerable group within the WB Project Affected Communities. As such they require special attention in terms of consultation and community development. Assessment of potential impacts on their lifestyle and livelihood, along with plans for on-going consultation and community development relating to the Tobelo Forest Community will be documented as part of the ESHIA.”⁶⁹

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

Inadequate Compensation

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

⁶⁸ World Commission on Dams, “Dams and Development: A New Framework for Decision-Making,” p. 281–282.

⁶⁹ PT Weda Bay Nickel, “Response of PT Weda Bay Nickel to the CAO Complaint,” p. 18.

It is well acknowledged that economic displacement and a rapid shift to a cash economy and wage labour livelihood can have negative consequences for communities,⁷⁰ in particular women⁷¹ and indigenous people.⁷² These include a significantly increased risk of impoverishment as production systems are dismantled, and productive livelihood resources are lost, people find their environment altered in ways that render their livelihood skills less applicable, while competition for resources increases, community institutions and social networks are weakened as a result of this economic upheaval and the introduction of new sources of authority and power in communities, and “cultural identity, traditional authority and the potential for mutual help” are weakened.⁷³

To address these risks, international norms and standards around compensation for economic displacement require that any such compensation be both adequate and appropriate to ensure that affected communities are able not only to sustain their current living standards, but improve them. These include requirements outlined in IFC Performance Standard 5. While some of these standards relate to the actions of States,⁷⁴ and some relate to resettlement,⁷⁵ they are nevertheless appropriate guiding principles for corporations when negotiating compensation with economically displaced people, who suffer many of the negative consequences of residential displacement and resettlement.

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

Box 4: Process-related standards.

- **Compensation must be agreed through a meaningful participatory processes**
Negotiations around compensation must meet all the standards outlined above under ‘Consultation’.⁷⁶

⁷⁰ Michael Cernea, "The Risks and Reconstruction Model for Resettling Displaced Populations," *World Development* 25, no. 10 (1997); Chris de Wet, ed. *Development-Induced Displacement: Problems, Policies and People* (New York, NY: Berghen Books, 2006).

⁷¹ Tuisi Charan Bisht, "Development-Induced Displacement and Women: The Case of the Tehri Dam, India," *The Asia Pacific Journal of Anthropology* 10, no. 4 (2009); Y Tan, G Hugo, and L Potter, "Rural Women, Displacement and the Three Gorges Project," *Development and Change* 36(2005); E G Thukral, "Development, Displacement and Rehabilitation: Locating Gender," *Economic and Political Weekly* 31, no. 24 (1996).

⁷² Anaya, "Indigenous Peoples' Participatory Rights in Relation to Decisions About Natural Resource Extraction: The More Fundamental Issue of What Rights Indigenous Peoples Have in Lands and Resources."; James Anaya, "Report of the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya: Extractive Industries Operating within or near Indigenous Territories," (United Nations Human Rights Council, 2010).

⁷³ World Bank, "Operational Policy 4.12 – Involuntary Resettlement."

⁷⁴ For example, Food and Agriculture Organization of the United Nations, "Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security, "

⁷⁵ World Bank, "Operational Policy 4.12 – Involuntary Resettlement."

⁷⁶ Ian G Baird, "Best Practices in Compensation and Resettlement for Large Dams: The Case of the Planned Lower Sesan 2 Hydropower Project in Northeastern Cambodia," (Phnom Penh: The Rivers Coalition in Cambodia, 2009); World Bank, "Operational Policy 4.12 – Involuntary Resettlement."; World Commission on

- **Processes and agreements must be transparent**

This requires full disclosure of all background calculations, processes and final agreements, including those related to market transactions, where applicable.⁷⁷

- **Choices and alternatives must be made available⁷⁸**

- **Vulnerable groups require special procedural measures**

Vulnerable groups among those displaced may include those below the poverty line, the landless, the elderly, women and children, indigenous peoples, ethnic minorities, or other displaced persons who may not be protected through national land compensation legislation.⁷⁹

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

As described in the OECD Development Assistance Committee Guidelines on displacement, "Since women are to a great extent responsible for making the natural resource base productive (with their knowledge, skills and labour) and thereby contribute significantly to the well-being of their families, communities and national economies, planning for relocation should consider their preferences and should address their specific needs and constraints."⁸⁰

Dams, "Dams and Development: A New Framework for Decision-Making," p. 298 and Guideline 19 on Implementation of the Mitigation, Resettlement and Development Action Plan, in addition to Guideline 2 on Negotiated Decision Making Processes; Organisation of Economic Cooperation and Development, "OECD Development Assistance Committee: Guidelines on Aid and Environment No 3 – Guidelines for Aid Agencies on Involuntary Displacement and Resettlement in Development Projects," (Paris: Organisation of Economic Cooperation and Development, 1992), p 7; Food and Agriculture Organization of the United Nations, "Compulsory, Acquisition of Land and Compensation," in *Land Tenure Series 10* (Rome: Food and Agriculture Organization of the United Nations,, 2008), p 7.

⁷⁷ Baird, "Best Practices in Compensation and Resettlement for Large Dams: The Case of the Planned Lower Sesan 2 Hydropower Project in Northeastern Cambodia.,"; Food and Agriculture Organization of the United Nations, "Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security," especially Guidelines 12.11 and 16.6.

⁷⁸ World Bank, "Operational Policy 4.12 – Involuntary Resettlement," Item 6 (ii); International Finance Corporation, "Performance Standards on Environmental and Social Sustainability," (Washington, DC: World Bank Group, 2012), para. 10.

⁷⁹ Baird, "Best Practices in Compensation and Resettlement for Large Dams: The Case of the Planned Lower Sesan 2 Hydropower Project in Northeastern Cambodia.,"; World Bank, "Operational Policy 4.12 – Involuntary Resettlement," Item 8; Food and Agriculture Organization of the United Nations, "Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security," Guideline 12.7.

⁸⁰ For example Organisation of Economic Cooperation and Development, "OECD Development Assistance Committee: Guidelines on Aid and Environment No 3 – Guidelines for Aid Agencies on Involuntary Displacement and Resettlement in Development Projects," p. 7; Food and Agriculture Organization of the United Nations, "Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security," Guideline 14.4.

- **Compensation should cover the entire life of a project**
 Compensation processes and agreements must take into account the cumulative effects of displacement on peoples lands and livelihoods over the life of the project, even if that is inter-generational.⁸¹
- **Compensation negotiations should begin with guiding-principles**
 By starting negotiations with an agreement on guiding principles, the big picture can remain in view, and the risk of getting bogged down in technical details related to, for example, land measurement and valuation, can be mitigated.⁸²
- **Compensation should be measured by results or outcomes**
 In-keeping with an emphasis on guiding principles, monitoring of agreements should focus on the achievement of targeted results or outcomes, rather than actions. This mitigates the risk of premature completion of compensation arrangements because budgets have been spent, for example.⁸³
- **Agreements must be formalised and monitored**
 Plans for ongoing consultation and review of agreements, livelihood restoration and other elements of compensation should be formalised and monitored.⁸⁴
- **Advocacy and assistance must be provided for**
 Governments and/or project proponents must proactively provide for legal and other advice and assistance for affected communities in order to make the negotiation process meaningful. It is unreasonable to expect that affected communities will have skills and resources that equal those of the company in negotiations.⁸⁵

⁸¹ Baird, "Best Practices in Compensation and Resettlement for Large Dams: The Case of the Planned Lower Sesan 2 Hydropower Project in Northeastern Cambodia," p. 121; World Commission on Dams, "Dams and Development: A New Framework for Decision-Making."

⁸² Baird, "Best Practices in Compensation and Resettlement for Large Dams: The Case of the Planned Lower Sesan 2 Hydropower Project in Northeastern Cambodia," p.119.

⁸³ Ibid. p. 120; World Commission on Dams, "Dams and Development: A New Framework for Decision-Making," in line with Guideline 19 on Implementation of the Mitigation, Resettlement and Development Action Plan (p.298) which requires a Performance Contract.

⁸⁴ Baird, "Best Practices in Compensation and Resettlement for Large Dams: The Case of the Planned Lower Sesan 2 Hydropower Project in Northeastern Cambodia."; World Commission on Dams, "Dams and Development: A New Framework for Decision-Making." in line with Guideline 19 on Implementation of the Mitigation, Resettlement and Development Action Plan (p.298) which requires a Performance Contract and Guideline 21 on Compliance; Food and Agriculture Organization of the United Nations, "Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security," Guideline 12.14.

⁸⁵ Food and Agriculture Organization of the United Nations, "Compulsory, Acquisition of Land and Compensation," Guideline 6.5, p. 50.

- **Right to appeal must be available**

An independent appeal mechanism should be available to affected communities should they be dissatisfied with the process or outcome of compensation negotiations.⁸⁶

The process through which a compensation package was decided is not in keeping with these standards. As the compensation negotiations were part and parcel of the broader consultations about the project, the shortcomings of this process are analysed in the preceding sections on consultation and consent.

Box 5: Compensation package related standards.

- **Livelihoods need to be fully assessed, and restored**

Livelihoods need to be assessed in a holistic way that takes into account the inter-generational sustainability of existing land-based livelihoods, and the full, long-term value of livelihoods must be, at a minimum, fully restored through the compensation package. The IFC Performance Standards require a Livelihoods Restoration Plan for this purpose.⁸⁷

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

Compensation should go beyond the restoration of livelihoods, and should seek to improve the development prospects for affected communities.⁸⁸

- **Benefit sharing should be considered**

This may include benefits related to

- Project revenues
- Project benefits (e.g. irrigated land, provision of electricity)
- Project construction and operation (e.g. employment, financial training and support for self-employed contractors)

⁸⁶ Ibid., p. 50.

⁸⁷ Baird, "Best Practices in Compensation and Resettlement for Large Dams: The Case of the Planned Lower Sesan 2 Hydropower Project in Northeastern Cambodia," p. 120; World Commission on Dams, "Dams and Development: A New Framework for Decision-Making," Guideline 18 on Impoverishment Risk Analysis, p. 297; Organisation of Economic Cooperation and Development, "OECD Development Assistance Committee: Guidelines on Aid and Environment No 3 – Guidelines for Aid Agencies on Involuntary Displacement and Resettlement in Development Projects," p. 6; International Finance Corporation, "Performance Standards on Environmental and Social Sustainability," para. 12–16.

⁸⁸ Baird, "Best Practices in Compensation and Resettlement for Large Dams: The Case of the Planned Lower Sesan 2 Hydropower Project in Northeastern Cambodia," p. 120; World Commission on Dams, "Dams and Development: A New Framework for Decision-Making," Guideline 18 on Impoverishment Risk Analysis, p. 297; Organisation of Economic Cooperation and Development, "OECD Development Assistance Committee: Guidelines on Aid and Environment No 3 – Guidelines for Aid Agencies on Involuntary Displacement and Resettlement in Development Projects," p. 6; International Finance Corporation, "Performance Standards on Environmental and Social Sustainability," para 9.

- Resources (e.g. preferential access to or custodianship of forest)
- Community services (e.g. health, education, roads, public transport, drainage, income support, agricultural support such as planting materials, community forests, markets and meeting spaces)
- Household (e.g. skills training and interim family support; interest-free loans for economic activities, housing improvements, provision of start-up livestock, access to public works or work for wages, free or subsidised labour-saving devices or productive machinery, access to preferential electricity rates, tax rates, water and service charges)⁸⁹

- **Cash compensation alone is never adequate compensation.**

It is no longer acceptable to propose one-time lump sum payments in lieu of addressing long-term social and environmental problems. It typically leads to impoverishment.⁹⁰ As explained in the OECD Development Assistance Committee Guidelines:

“Some types of loss -- e.g. loss of access to i) public services; ii) customers and suppliers; and iii) fishing, grazing, or forest areas etc. - cannot easily be compensated for in monetary terms and access must be sought to equivalent and culturally acceptable resources or earning opportunities. Customary land ownership and usufruct rights must be recognised for compensation purposes to avoid the destitution of former users.”⁹¹

- **Where a transition to a cash economy is unavoidable, it must be managed and risks mitigated.**

Sustainable employment, including training and skills development for those employed by the industrial development project, and the self-employed, along with training in cash management is essential to avoid the unintentional wasting of both cash compensation payments and wages in communities unaccustomed to handling large amounts of cash.⁹²

- **Land for land compensation is always preferable**

⁸⁹ World Commission on Dams, “Dams and Development: A New Framework for Decision-Making,” p. 300–301, Guideline 20 on Benefit Sharing: Potential Types of Benefits.

⁹⁰ Paragraph 60 of the Basic Principles and Guidelines on Development-Based Evictions and Displacement developed by the UN Special Rapporteur on adequate housing - Annex 1 of the report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, A/HRC/4/18; World Bank, “Operational Policy 4.12 – Involuntary Resettlement,” p. 12; Organisation of Economic Cooperation and Development, “OECD Development Assistance Committee: Guidelines on Aid and Environment No 3 – Guidelines for Aid Agencies on Involuntary Displacement and Resettlement in Development Projects,” p. 11; International Finance Corporation, “Performance Standards on Environmental and Social Sustainability,” para. 28.

⁹¹ Organisation of Economic Cooperation and Development, “OECD Development Assistance Committee: Guidelines on Aid and Environment No 3 – Guidelines for Aid Agencies on Involuntary Displacement and Resettlement in Development Projects,” p. 11.

⁹² *Ibid.*, p. 7, 11.

Landlessness, because it destroys long-term sustainable livelihoods, leads to impoverishment and particularly food insecurity and should be avoided at all costs. Provision of land for land as part of compensation packages also mitigates risks associated with rapid transitions from traditional community approaches to land tenure, which are typically better at providing for landless labourers and other vulnerable groups. Provision of alternative land must identify several possible locations and offer these to communities. The quality of soil, access to water, proximity to residential housing and sites of cultural significance, and host community dynamics must all be taken into account when identifying alternative lands. The relocation sites must be at least equivalent in quality on all these fronts, and preferably better. Security of land tenure in relocation sites must be guaranteed.⁹³

- **Post-project land tenure should be considered where possible**
Wherever there is a possibility that after the life of a project, rehabilitated land can be returned to its original owners or their descendants, this should be made part of compensation agreements.⁹⁴
- **Support should be provided during transitional period:**
In recognition of the serious inconvenience and the challenges associated with dramatic changes in livelihood and local environment, extra support should be provided for communities during a transitional period to ensure their smooth transition to alternative livelihoods.⁹⁵

The compensation offered by PT Weda Bay Nickel to the Sawai Villagers is not in keeping with these international norms and standards. Although PT Weda Bay Nickel is conducting a number of studies related to livelihood evaluation, and assessment of the cost of replacement of agricultural livelihoods that are relinquished through the compensation agreements, we have been unable to acquire these studies. In their absence, our research suggests that despite such studies, the compensation agreement does not adequately replace the livelihoods of the community, nor compensate them for the social and economic upheaval associated with the entire life of the project. Furthermore, the process through

⁹³ Baird, "Best Practices in Compensation and Resettlement for Large Dams: The Case of the Planned Lower Sesan 2 Hydropower Project in Northeastern Cambodia," p. 123; Food and Agriculture Organization of the United Nations, "Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security," Guidelines 12-14; ; International Finance Corporation, "Performance Standards on Environmental and Social Sustainability," para. 9; Organisation of Economic Cooperation and Development, "OECD Development Assistance Committee: Guidelines on Aid and Environment No 3 – Guidelines for Aid Agencies on Involuntary Displacement and Resettlement in Development Projects," p. 11; World Bank, "Operational Policy 4.12 – Involuntary Resettlement," Guidelines 9.9, 11; M Q Zaman, "Land Acquisition and Compensation in Involuntary Resettlement," *Cultural Survival Quarterly* 14, no. 4 (1990).

⁹⁴ Food and Agriculture Organization of the United Nations, "Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security," Guidelines 14.2 and 16.5.

⁹⁵ World Bank, "Operational Policy 4.12 – Involuntary Resettlement," Item 6 (c) (i).

which compensation agreements have been made is not compliant with these international standards. Indonesian public land acquisition laws also reflect such principles, stipulating that compensation to indigenous land owners should be in the form of replacement lands, resettlement or other forms agreed to by the relevant indigenous community (Law no 2/2012). The most important problems with the current arrangement are discussed further below.

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

Second, even if the cash price were set higher, say at IDR 50,000 per square metre, as requested by the families who have not yet accepted compensation, it would not adequately compensate for the value of the land as a long term source of agricultural livelihoods for current and future generations. As such it is not a form of 'compensation' for losses, and should more accurately be referred to as a purchasing price.

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

Fourth, the transition to a cash economy has not been adequately managed. Though PT Weda Bay Nickel is encouraging compensated families to establish businesses, and is providing some training, for example in cake baking, this is inadequate for a number of reasons: the small local economies cannot sustain an independent business run by every family; the training that has been given so far has been poorly targeted in terms of the kinds of businesses it is promoting; and the training in cash management has been provided by a bank with a vested interest in the compensation package, rather than independent consultants experienced in helping communities adjust to a cash economy.⁹⁶ There has been no serious consideration of alternative benefit sharing mechanisms such as community governed trusts or foundations for education or development programs. The community has not been provided with adequate information or the space to make their own decisions about how they might individually or jointly invest their funds in a sustainable way.

⁹⁶ The training in cash management is being provided by the bank which is receiving all the cash compensation deposits. It has been arranged by PT Weda Bay Nickel.

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

Sixth, to our knowledge, no efforts have been made to minimise the negative impact of cash payments on women. It is well acknowledged that cash compensation in traditional societies such as these often has negative impacts on women's lives, as they lose control over the household economy and their own livelihood, while simultaneously maintaining a large proportion of the burden for caring for the young, the old and the sick, and suffering disproportionately from social problems that often emerge in this circumstances, such as domestic violence associated with increased incidence of alcoholism. Women are also rarely offered prized employment opportunities in the industrial developments which displaced their traditional livelihoods.⁹⁷

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

Appendix Three provides a more detailed analysis of the extent of adherence to the IFC Performance Standards requirements regarding compensation, which PT Weda Bay Nickel is obligated to adhere to as a result of its financial support from MIGA.

⁹⁷ Bisht, "Development-Induced Displacement and Women: The Case of the Tehri Dam, India."; Tan, Hugo, and Potter, "Rural Women, Displacement and the Three Gorges Project."; Thukral, "Development, Displacement and Rehabilitation: Locating Gender."

Access to Justice

Given these serious shortcomings in the areas of free, prior and informed consent and consultation, and meaningful compensation, it is essential that affected communities who have grievances with these issues be able to take their grievances to a body or bodies who are able to bring about meaningful redress. To date, this has not happened. Though PT Weda Bay Nickel has an internal Grievance Redressal Unit, it is not an appropriate forum for grievances as grave as those related to land. The ambiguities and shifts in Indonesian law relating to customary land rights have so far rendered legal avenues unlikely to provide redress. Komnas HAM, though making recommendations for improvements in these areas, has been so far unable to enforce them. Finally, the IFC Compliance Advisor Ombudsman is yet to properly address the concerns of aggrieved community members in accordance with the means available to it.

Though PT Weda Bay Nickel has responded to all complaints made against it, it has failed to adequately improve its consultation procedures, or bring a more reasonable compensation offer to the negotiating table. It has stated on various occasions that its environmental and social impact assessments will address the communities' concerns. To date, most of these impact assessments, with the exception of the full-length multi-volume AMDAL, remain unpublished, and the underlying issues remain unresolved. As a consequence of these various factors taken together, there has been no meaningful resolution of the communities' reasonable concerns about their future.

PT Weda Bay Nickel's Approach

The recent UN Guiding Principles on Business and Human Rights, based on the 'respect, protect, remedy' framework, highlight the importance of internal grievance mechanisms so that companies can handle complaints early, and in the most efficient way possible. PT Weda Bay Nickel has such an internal Grievance Redressal Unit, which is available to anyone who wishes to make a complaint about the company, is well constituted with a variety of complaint avenues, and well-staffed. Community members may make complaints over the phone, through a letterbox stationed in every village, or to a number of Grievance Redressal Unit officers who are well known to the community, and who actively make themselves available by mingling with the communities on a very regular basis. However, this avenue has not provided access to justice for aggrieved families in relation to land issues and economic displacement, and is ill equipped to act on issues of such significance.

Table 3: Summary of PT Weda Bay Nickel's approach.

Complaints made:	To our knowledge, there have been no major complaints to the PT Weda Bay Nickel Grievance Redressal Unit in relation to the 'big picture' issues of a lack of free, prior and informed consent and meaningful consultation, and inadequate and inappropriate compensation arrangements.
	A number of small complaints about particular families' access to compensation

	<p>funds may have been made, but to our knowledge these have not triggered any holistic reconsideration of consultation, consent and compensation procedures in PT Weda Bay Nickel.</p>
Outcome:	<p>The Grievance Redressal Unit processes have had no impact on the ‘big picture’ issue of a lack of free, prior and informed consent and meaningful consultation, and inadequate and inappropriate compensation.</p>
Our assessment	<p>The PT Weda Bay Nickel Grievance Redressal Unit is an excellent model of an internal company grievance mechanism capable of handling low level, <i>ad hoc</i> complaints related to the company, for example regarding non-payment of agreed compensation, or inequitable allocation of philanthropic corporate social responsibility benefits. The staff of the Grievance Redressal Unit appear to be competent and approachable.</p> <p>However, an internal grievance mechanism of this sort is inadequate and inappropriate for handling ‘big picture’ complaints of the kind raised in this report, related to free, prior and informed consent and meaningful consultation regarding land, and the overall negotiation process about compensation. The Grievance Redressal Unit operates on the assumption that all required land will be acquired eventually, and that the compensation package agreed with the Village Head of Lelilef Sawai is acceptable to everyone.</p> <p>The Grievance Redressal Unit is not accessible to people who object to the relinquishment of their land rights in principle, and/or to the compensation package on offer. These people fear for their safety if they approach the Grievance Redressal Unit, and have no faith that their concerns will be meaningfully addressed. In an interview with the Head of Gemaf Village, for instance, he said he had not considered making a complaint to the GRU regarding land or compensation issues.</p> <p>While the UN Guiding Principles are right to promote the importance of internal grievance handling processes for addressing smaller grievances, our research across this and 11 other cases of communities making complaints about companies confirms that internal company processes are not appropriate or effective for handling grievances related to major issues such as land.</p>

Indonesian Law

Indonesian law regarding forest land, customary land rights and mining is complex and often ambiguous. Customary rights over forests, have, until recently, been weakly protected under Indonesian law. To date, mining and forestry laws have operated as barriers to meaningful involvement in decision making about the project by Sawai and Tobelo Dalam communities. The national priority given to mining is reflected in strong protection of resource extraction

interests compared with other interests, including those of local communities affected by mines. The low accord given to community interests in forests in Indonesian law is also a consequence of the strong powers given to the forestry department. This makes it difficult to contest the terms of consultation, consent or compensation by invoking Indonesian law. A recent constitutional decision may strengthen the position of Sawai and Tobelo Dalam communities *vis-à-vis* the mining company and forestry department, but this decision has yet to be properly tested.

Barriers in Mining Law

The PT Weda Bay Nickel project was granted a Contract of Work near the end of the Soeharto Era. The Contract of Work system was created in 1967 after the Sukarno era, in order to open up Indonesia to foreign direct investment. It is a mechanism for granting concessions and mining rights to foreign companies, providing security of tenure through what is called a 'conjunctive title' which allows the investor to proceed from General Survey, to Exploration, and onto Mine Development, Production, Processing and Marketing. Importantly for our analysis, the system aims to ensure that investment is not subject to changes in government laws or policies after signing, for the entire period of the Contract of Work. It is for this reason that once a Contract of Work is granted, it is difficult to have it revoked, regardless of community opposition, social conflict resulting from the project or concerns regarding environmental damage.⁹⁸

Shortly after the Contract of Work was issued, *Reformasi* occurred. Though this ultimately led to a process of democratisation, it was also associated with social upheaval throughout much of Indonesia, expressed in the Maluku Islands in sectarian violence between Muslims and Christians in between 1999 and 2002.⁹⁹ Interviewees for our research reported that they spent six months hiding in the forest during this time. News of the Contract of Work did not reach them until sometime afterwards.

As a consequence of the centralized decision making in the early life of the project, and the tense political environment, local communities were largely unaware that government permission had been given for exploration, and, even if they had known, significant social and political barriers stood in the way of objecting to the project in its early stages.¹⁰⁰ It is arguable that the most important stage of consultation with the local communities should have occurred prior to the Contract of Work being signed with the company, yet this did not occur.

⁹⁸ Although, as per the earlier explanation, under the 2009 mining law existing Contracts of Work must be revised to comply with the law. This should not have any impact on the compensation process.

⁹⁹ Jacques Bertrand, "Legacies of the Authoritarian Past: Religious Violence in Indonesia's Moluccan Islands," *Pacific Affairs* 75, no. 1 (2013); Duncan, "Reconciliation and Revitalization: The Resurgence of Tradition in Postconflict Tobelo, North Maluku, Eastern Indonesia."; Christopher R Duncan, "The Other Maluku: Chronologies of Conflict in North Maluku," *Indonesia* 80, no. October (2013).

¹⁰⁰ Elizabeth F Drexler, "Conflict, Violence, and Displacement in Indonesia," *The Journal of Asian Studies* 68, no. 3 (2009).

The role of mining in the development of the national economy has been given such high priority in the past that the Mining Law, or Law No. 11, of 1967 stipulates, “a mining permit issued by the Minister of Mines has the capacity to overrule land ownership issued by other government agencies”. In contrast, traditional or customary land ownership, which is weakly regulated, attains the lowest level of recognition by the mining departments at the central and provincial levels.

This is in part due to the fact that Mining Law No. 11 of 1967, which was derived from the colonial mining law of 1930 (*mijn ordonantie* 1930), regulates the interests of mineral development without referring to surface interests. Similarly, the Agrarian Law No. 5 of 1960, regulates land surface ownership without referring to sub-surface interests. Current land law thus remains ill-equipped to deal with the layering of multiple land-use rights within a singular area, or the potential disjuncture between these separate land-use regimes. The absence of a coherent system for the administration and registration of land use rights has led to many situations where the same plots of land have been allocated for two or more incompatible uses by two or more government agencies.

In the current case, there is a conflict between the customary rights of the Sawai and the Tobelo Dalam over the surface and PT Weda Bay Nickel’s rights to surface and sub-surface use. To date, this conflict has been interpreted in the mining company’s favour. A new mining law introduced in 2009 (Law 4/2009) requires mining companies to clear any encumbrances on their land before mining (Articles 135 and 136), and if they can achieve that, they can hold intruders criminally liable.¹⁰¹ Though these articles imply that incumbent land holders can refuse to relinquish their land rights, nothing in the Law 4/2009 details the grounds upon which title holders can refuse to allow mining on their land.¹⁰² Combined with the relatively weak recognition of customary land rights in practice (at least until very recently), this means that mining laws generally operate as a barrier to opposing the relinquishment of land rights and the compensation package offered by PT Weda Bay Nickel.

Barriers in Forestry Law

Forestry laws also play an important role in the legal recognition of land rights in Contract of Work or Mining Permit areas. Mining laws and forestry laws are interlocking, and the strength of the application of mining laws is dependent on the manner in which forestry laws are applied. As this section shows, the discretionary power of the Ministry of Forestry to define forest areas and regulate the use of these areas has limited the capacity of the Sawai and Tobelo Dalam to exercise their customary rights to use forest resources or insist on being part of decision making about the mining project.

¹⁰¹ Article 135 of Law 4/2009 stipulates that ‘Mining Exploration Licence holders or Special Mining Exploration Licence holders may carry out their activities upon approval of land title holders’. Article 136 goes on to say that ‘Mining Licence holders or Special Mining Licence holders, before carrying out production operation activities, must resolve land titles with title holders under provisions of [the current] laws and regulations’.

¹⁰² Gandataruna and Haymon, "A Dream Denied? Mining Legislation and the Constitution in Indonesia."

In many respects forestry laws provide strong protections for the environmental value of forests, at the expense of mining rights. The management of forests is regulated by Law No.41/1999 (which replaced Law No.5/1967). Passed by the *reformasi* President Abdurrachman Wahid, the law was seen to be a departure from New Order Soeharto era laws when there was little protection of areas of environmental worth. Most mining concessions in Indonesia are on state-owned forestry land, which according to Forestry Law No. 41/1999 falls under the control of the Ministry of Forestry. Forestry land is divided into three categories: production forests, protected forest areas and conservation areas. The Law does not allow any mining operations to be conducted in protected or conservation areas. Further, it provides quite strong safeguards for protected forests: Article 15.1 is designed to protect forest areas needed to provide sustainability of its functions, and Article 15.2 reaffirms that prevention and mitigation of any damage to the forest and its products caused by human activities is needed.

These provisions are valuable for those who rely on the protection and maintenance of the biodiversity of forests for their livelihoods, such as the Sawai and Tobelo Dalam people. However, a number of factors have diminished the protection of this vital resource for these people and weakened the security of access of the Sawai and Tobelo Dalam to the forests.

Fearful that their mining rights might be affected by the increased protection of forests under Forestry Law No. 41/1999, 13 mining companies whose mining permits¹⁰³ included protected forest areas lodged complaints, requesting an exception to the Forestry law on the basis that the concessions had been granted prior to the passing of the Forestry law. The law would have restricted the areas in which the PT Weda Bay Nickel Mine could mine, and, according to some reports, effectively put a halt to exploration and development activities for two years.¹⁰⁴ On July 15, 2004 the Parliament of Indonesia, by a majority vote, passed an addendum to Law 41 which stated that all permits and contracts in the mining section within forest regions which were issued before the promulgation of Law 41 of 1999 on forestry are declared to remain valid until the expiration date of the respective permit or contract. As a consequence, the 1999 Forestry Law did not curtail PT Weda Bay Nickel's access to land, and 25,118 ha of PT Weda Bay Nickel's Contract of Work area is in protected forest.¹⁰⁵

Another factor that has greatly reduced the potential of forestry laws to protect the environment and customary land rights is the supreme authority of the Ministry of Forestry over these lands. Although the 1999 Forestry law took a significant step in the direction of environmental protection, it nevertheless inherited many of the characteristics of the Sukarno and Soeharto era laws, which gave central government extreme amounts of authority. The 1999 law provides a high level of discretion to the Ministry of Forestry to

¹⁰³ Not all were Contracts of Work.

¹⁰⁴ Baillie, "Developing a World Class Nickel and Cobalt Resource in Indonesia."

¹⁰⁵ PT Weda Bay Nickel, "Response of PT Weda Bay Nickel to the CAO Complaint," p. 10.

define forest areas and regulate the use of these areas.¹⁰⁶ Until recently, the Ministry of Forestry claimed jurisdiction over 70% of the country by virtue of it being classed as forest area.¹⁰⁷ Only approximately 12% of these forests have been officially gazetted, a process which should confirm if areas classed as forests are encumbered with other rights or not. The remaining areas – 58% of Indonesia – remain State Forest despite there having been no effort to identify or recognise any other land rights, including customary rights. According to one estimate, this means that the 60–90 million people who live in areas classed as state forests enjoy few rights, despite having lived in and cultivated forests for generations.¹⁰⁸

Weak Indigenous and Customary Legal Rights

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

The 1945 Constitution of the Republic of Indonesia, in Article 18b recognises the existence of *adat* or customary rights and institutions. It does so, however, through entrusting the State with a controlling power over all lands and natural resources, to be used for the benefit of the people. Article 28I of the Constitution also specifically protects the right of customary communities. Similarly, the Basic Agrarian Law (No. 5/1960) explicitly states that customary laws will be recognised, as long as they do not contradict national interests. This law also grants powers to the state to control land, water and resources, and make decisions on how natural resources are allocated and used. Law No. 41/1999 on Forestry recognises traditional forests which are under the jurisdiction of customary communities.¹⁰⁹ However, up until a recent Constitutional Court decision (35/PUU-X/2012) overturned the provision, the Ministry of Forestry classified such customary forests as a subcategory of ‘state forest’. This approach enabled customary communities to manage and use customary forest ‘as long as they are evidently in place and their presence is acknowledged’, and in practice, only

¹⁰⁶ Article 4, (2)(b) for defining, and Article 4 (2)(a) and Article 10 for regulating.

¹⁰⁷ Giorgio Budi Indrarto et al., "The Context of Redd+ in Indonesia: Drivers, Agents and Institutions (Working Paper 92)," (Bogor: Center for International Forestry Research, 2012).

¹⁰⁸ Marcus Colchester et al., "Promised Land; Palm Oil and Land Acquisition in Indonesia: Implications for Local Communities and Indigenous Peoples," (Moreton-in-Marsh: Forest Peoples Programme, Perkumpulan Sawit Watch, HuMA and the World Agroforestry Centre, 2006), p. 11.

¹⁰⁹ The law notes a number of criteria required for the recognition of hutan adat: the adat community must be formed as a community (*rechtsgemeenschap* or *aguyuban*); it must have a structured adat institution; the territory must clearly exist; there must be existing and still operative adat law, and forest products must still be in daily use.

when permitted to do so by the Ministry of Forestry, or where their land was not required for industrial or monoculture agricultural development such as palm oil.¹¹⁰

The application of relevant laws to date has meant that local communities, especially indigenous peoples, are weakly protected when companies seek to exploit natural resources within their forests and lands. For peoples such as the Tobelo Dalam and Sawai, this means that although they may have customary rights over land, these rights have to date not been formally recognised. This leaves the Tobelo Dalam and the Sawai in a weak negotiating position *vis-à-vis* PT Weda Bay Nickel.

The recent decision by the Indonesian Constitutional Court regarding the 1999 Forestry Law may mitigate this problem for indigenous and customary communities. Decision Number 35/PUU-X/2012 appears to curtail the state's (specifically the Ministry of Forestry's) ability to unilaterally exercise control over forested lands by affording formal recognition of indigenous forests as a separate category. Ruling No. 35/PUU-X/2012 separates customary forests from their previous classification as State forests. Indonesia's 1999 Forestry Law previously stated that "customary forests are state forests located in the areas of custom-based communities". The Constitutional Court's ruling deletes the word "state" from that sentence, thereby revising the Law so that customary forests are no longer considered state forests.¹¹¹ This groundbreaking decision is yet to be applied to the Sawai villages or the Tobelo Dalam, who are likely to enjoy strong customary rights over the land given their long tenure in the area.

Low Legal Literacy

For Sawai and especially Tobelo Dalam people, low levels of experience in dealing with legal systems and state bureaucracy stand as a further significant barrier to accessing judicial redress. Like most rural, isolated communities, these communities have had very little or no experience with formal legal institutions, lawyers or courts. At most, community members have dealt with the officials from the Bupati's office, but even that would be a rare occurrence. For the Sawai communities, contentious issues, including related to land, were traditionally addressed through customary community traditions – village councils. The Tobelo Dalam are even more isolated from formal bureaucratic and legal structures, having contact only with settled Tobelo people in villages in or on the fringes of the forest. As such, any attempt to mount a legal complaint against PT Weda Bay Nickel would require considerable *pro bono* support from legal professionals. So far, the only legal NGO to have engaged in a supportive relationship of this kind is the under-resourced LBH ProJusticia, which has only made complaints to Komnas HAM and to local police.

¹¹⁰ Colchester et al., "Promised Land; Palm Oil and Land Acquisition in Indonesia: Implications for Local Communities and Indigenous Peoples," p. 49.

¹¹¹ UNORCID website, <http://www.unorcid.org/index.php/about-redd/redd-in-the-news/sustainable-development/129-landmark-verdict-by-the-indonesian-constitutional-court-separates-customary-forest-from-state-forest>, accessed 20 September 2013. See also Down to Earth Indonesia website, <http://www.downtoearth-indonesia.org/story/turning-point-indonesia-s-indigenous-peoples>, accessed 1 October 2013.

Table 4: Summary of legal access to justice.

Complaints made:	No legal claims made by affected community members.
Outcome:	-
Our assessment	Given the weaknesses in Indonesian law, and lack of legal literacy in affected communities, legal routes cannot be relied upon to provide access to justice for affected communities. If positive changes do take place as a result of Constitutional Court Decision Number 35/PUU-X/2012, which strengthens indigenous and customary land rights, for both administrative and political reasons it is likely to be too far in the future to address the urgent needs of the Sawai and the Tobelo Dalam in relation to PT Weda Bay Nickel. Further, considerable legal support for the communities would be required to take advantage of this new law.

Komnas HAM

Komnas HAM is the Indonesian Human Rights Commission. As an independent government body, Komnas HAM has the power to conduct investigations, mediations and make recommendations in response to complaints from citizens about human rights abuses. However, it has no powers of enforcement.

Table 5: Summary of Komnas HAM's approach.

Complaints made:	<p>Civil society organisation LBH ProJusticia made a complaint to Komnas HAM in 2011 about inadequate compensation processes and arrangements, and about police intimidation of villagers.</p> <p>A further complaint was made by the NGO Walhi in 2010 regarding breaches of human rights of the Tobelo Dalam, but this has not been investigated by Komnas HAM.</p>
Outcome:	<p>Komnas HAM commissioner Johnny Simanjuntak and a team of Komnas HAM officials conducted an investigation in North Maluku in June 2011. Key findings and recommendations from this investigation are as follows:</p> <ul style="list-style-type: none"> • There were a number of irregularities in the preparation of the inventory for compensation, including fictitious names listed to receive compensation, replacement of some names with others to divert compensation, removal of some names from the list for compensation, and false listing of a large piece of completely unused land as 'village land'. The personnel at the Central Halmahera branch of the National Lands Agency (BPN) who was found to be responsible for these

	<p>irregularities was dismissed, but no other collaborators have been held accountable.</p> <ul style="list-style-type: none"> • Complaints from community members that BRIMOB, a paramilitary police unit, had intimidated some villagers into signing land acquisition agreements against their will were noted. Komnas HAM called for a full investigation into police involvement in compensation negotiations. No such investigation has taken place. The Komnas HAM recommendations pointed out that the police should be neutral in relation to the negotiations, and ensure security, peace and comfort of all parties as stated in Article 4 of Law No.2/2002 pertaining to the Police. • As a result of these procedural irregularities Komnas HAM recommended that fresh and genuine negotiations occur over the compensation arrangement. No such new process has taken place. • Finally, the Commission noted that the land acquisition by PT Weda Bay Nickel results in a civil contract under the provisions of Article 1338 of the Civil Code between the parties. Article 1338 of the Indonesian Civil Code provides that contract validity depends upon satisfying the requirements of Article 1320 which include, among other things, that the parties must be legally competent to enter into an agreement; the contractual terms must be clear and certain; the parties have agreed to such terms voluntarily and the contract may not be for a purpose contrary to law or public policy. A clear arbitration clause in a valid underlying commercial agreement should be binding upon the parties. In addition, Civil Code Article 1338 also requires execution of agreements in good faith.
Our assessment	A lack of political will on the part of local government and PT Weda Bay Nickel has limited the capacity of Komnas HAM to act as an avenue of justice or redress in this case. Without any powers of enforcement, Komnas HAM's recommendations have so far had no impact.

IFC Compliance Advisor Ombudsman

The IFC Compliance Advisor Ombudsman is the independent accountability mechanism responsible for handling complaints from people affected by IFC or MIGA supported projects around the world. The Compliance Advisor Ombudsman has three separate functions:

- **Ombudsman** This is a problem-solving function; the Ombudsman tries to reach resolution between complainant(s) and the company through collaboration, usually mediation. Parties enter any problem solving process on a voluntary basis.
- **Compliance** This is an audit function. The Compliance Advisor Ombudsman Compliance team assess whether IFC / MIGA followed their own policies and

standards when deciding on giving financial support. It cannot assess the compliance of a project or company.

- Advisor The Compliance Advisor Ombudsman Advisory function provides advice to the IFC and MIGA about their policies based on lessons learnt from handling cases. In that advice it does not refer to any specific cases.

Table 6: Summary IFC Advisor Ombudsman’s approach.

Complaints made:	A complaint was made by Walhi, Mining Advocacy Network (JATAM), Anti-Debt Coalition (KAU), and Peoples’ Coalition for Fisheries Justice (KIARA), on behalf of affected communities in 2010. This complaint alleged that PT Weda Bay Nickel was in violation of all 8 IFC Performance Standards. The complaint argued that the project will have widespread negative environmental and social consequences that were not fully considered or disclosed in the government-required AMDAL assessment of social and environmental risks. In particular, in relation to social risks, the complaint argues that PT Weda Bay Nickel had not taken seriously the risk of displacement of and impacts on the Tobelo Dalam people in their assessments. ¹¹²
Outcome:	<p>The IFC Compliance Advisor Ombudsman Ombudsman team made three assessment visits to the area between October 2010 and January 2011. Their visits determined that the affected communities were not willing to engage in mediation. Our research found that the main reason for this was that community members who were against the project and/or the compensation package feared for their safety if their identities were to be revealed, as would be necessary for a mediation. Though the Ombudsman function of the Compliance Advisor Ombudsman offered some other alternatives, such as shuttle diplomacy, none of the participants in our research mentioned these options, suggesting they were not meaningful or feasible problem solving avenues. Without voluntary agreement to participate in problem solving, the case was referred to the Compliance function.</p> <p>The Compliance function declined to conduct an audit of MIGA’s procedures in deciding to support PT Weda Bay Nickel on the basis that the project was only in the exploration phase, and assessments of the kind requested in the complaint were still under way by the company. This is despite the fact that compensation agreements resulting in the relinquishment of land rights were</p>

¹¹² All details of this case, including the initial complaint, assessment report, and PT Weda Bay’s response can be found at Compliance Advisor Ombudsman, ‘Case Summary Indonesia / PT Weda Bay Nickel-01/Weda Bay’, http://www.cao-ombudsman.org/cases/case_detail.aspx?id=158, accessed 12 June 2012.

	<p>already being agreed at this time, and associated social impacts on the community were already evident.</p>
<p>Our assessment</p>	<p>The Ombudsman team of the Compliance Advisor Ombudsman, though going to good lengths to gauge the willingness of the affected communities to engage in mediation, unfortunately was unable to provide the physical protection necessary to ensure a successful and safe mediation. Furthermore, our research found that it is not clear that the affected communities fully understood what mediation, or any other problem solving options offered, could do for them, and therefore did not necessarily make a fully informed decision when rejecting it.</p> <p>Though the project was still in the exploration phase, social and environmental impacts were already evident, and therefore an audit of MIGA’s decision to support the project would have been worthwhile insofar as it would have required PT Weda Bay Nickel to improve their land acquisition procedures and compensation arrangements in line with the IFC Performance Standards to secure ongoing support from MIGA. IFC Performance Standard 5 on land acquisition and involuntary resettlement indicates that these standards are applicable in the early stages of the project. This standard states that “The applicability of this Performance Standard is established during the environmental and social risks and impacts identification process.” The IFC Compliance Advisor Ombudsman should have expected PT Weda Bay Nickel to be compliant with the IFC Performance Standards during the exploration phase of mining, and not only at the beginning of the construction and production phase.</p> <p>Though the Compliance Advisor Ombudsman is a generally a good model of a redress mechanism, by failing to address negative social and environmental impacts in this case until they are already evident, the Compliance Advisor Ombudsman failed to realise its full potential in protecting the rights of the affected communities to free, prior and informed consultation and consent and adequate and appropriate compensation.</p> <p>Nevertheless, we believe that should communities and civil society decide to submit a second complaint to the IFC Compliance Advisor Ombudsman, there is still opportunity for the Compliance Advisor Ombudsman to address this issue. We believe the Compliance Advisor Ombudsman could have a significant influence on this case were it to conduct a compliance audit and offer mediation a second time.</p>

Conclusion

This interim report has tracked the social impact of the PT Weda Bay Nickel mine in its pre-extraction phase as various administrative, legal and financial hurdles are being overcome in order to move to the extraction phase. One hurdle that has particularly stark impacts on local communities is the agreements with local community members for the relinquishment of rights over land. The key finding of this report is that families affected by the PT Weda Bay Nickel project who do not wish to relinquish their farming land, and/or who do not wish to accept the inadequate and inappropriate compensation package currently on offer have had no access to justice for a number of reasons.

This report has shown that these people have had no recourse to redress through Indonesian law, though new opportunities for legal assertion of indigenous land rights have recently become available. Aside from the fact that the affected communities do not have the resources to pursue civil action through the courts, it is not clear that they would have any grounds on which to do so because, though PT Weda Bay Nickel is in violation of international norms and standards, including the IFC Performance Standards to which it is beholden, Indonesian laws make judicial redress very difficult. It remains to be seen how much the new Constitutional Court decision (35/PUU-X/2012) will impact affected community's capacity to demand recognition of their customary rights to the land, and thus more thorough consultation.

Other available mechanisms have failed these communities. The IFC Compliance Advisor Ombudsman was unable to offer the necessary support for communities to engage in mediation in a way that made them feel sufficiently safe and secure, and did not conduct an audit that could have pressured PT Weda Bay Nickel to bring its land acquisition practices up to compliance with the IFC Performance Standards. Komnas HAM's recommendations were damning of the company's land acquisition and compensation procedures and arrangements. However, it has so far been similarly unable to offer redress to these communities because of its inability to enforce those recommendations.

In addition to the failings of the Indonesian legal order and other non-judicial redress mechanisms, three particular factors are at the centre of the inadequate access to justice for these communities. The first is that the IFC Compliance Advisor Ombudsman, and the company demonstrate an **unwillingness to recognize that the negative social impacts of changes to land rights are occurring before the project is constructed**. The IFC Compliance Advisor Ombudsman and the company both suggest that it is sufficient to address these negative impacts after the construction phase begins, and therefore after negative social impacts related to land are already entrenched.

The second factor is that **PT Weda Bay Nickel has extremely strong support from government officials** at all levels. These officials see the project as a facilitator of local economic development, and possibly as a source of personal financial benefits. The

pervasiveness of this attitude is significant. Our research found that citizens and government officials at all levels maintain a belief that PT Weda Bay Nickel will only bring great benefits to the local community and the region. This attitude generates an oppressive environment that makes it very difficult for objectors to voice their concerns. The overly optimistic belief that the company will only bring *benefits* to the local community means that those who are more skeptical about that possibility do not feel safe to raise their concerns, or in a best-case-scenario have no faith that they will be taken seriously. This is despite the evidence that negative social impacts in the forms of social divisions and loss of sustainable livelihoods are already evident in Weda Bay.

The third factor is that **local civil society is ill-equipped to deal with these problems**, having a low awareness of the international standards with which PT Weda Bay Nickel must comply. Local civil society groups who have the best knowledge of the local situation are under resourced to tackle a company the size of PT Weda Bay Nickel, which frequently invokes its impressive corporate social responsibility program in defense of its land policies and procedures, and defers questions about its impact until it publishes the ESHIA, even though, as we have argued, the ESHIA is being published too close to the extraction phase to allow meaningful decision making to occur on the basis of its findings.

This report urges positive and urgent action on the part of all parties with decision making powers over the PT Weda Bay Nickel mine, and those with capacity to assist affected communities. First, the communities' customary rights over land should be restored in keeping with international norms and the recent Indonesian constitutional court decision which strengthens recognition of customary rights over forests. Meaningful consultation and free, prior and informed consent should occur regarding the impact of the mine and any relinquishment of land rights. If affected communities agree to the project and its impacts, compensation should be just and in keeping with international norms and Indonesian laws that require the provision of non-cash forms of compensation. Agreements should assist the ethnic Sawai and Tobelo Dalam to realise futures in which they continue to enjoy strong cultural and economic links with the land, if they choose. The PT Weda Bay Nickel mine has not yet begun extraction. It is not too late for affected communities to achieve meaningful redress.

Recommendations

This report makes the following recommendations:

To PT Weda Bay Nickel:

- Place a moratorium on compensation agreements until the concerns raised in this report have been adequately addressed. No further land negotiations should take place until the remaining steps in these recommendations have been taken.
- In accordance with international norms, recognise and respect the customary rights of the ethnic Sawai and the Tobelo Dalam in all actions taken and agreements made.
- Immediately publish the ESHIA studies conducted so far. These should be published in full, in English and Indonesian. Brief but sufficiently detailed summaries should also be prepared in English, Indonesian and Sawai, for communication with local communities.
- Commit to a date for the publication (in all the same formats) of an ESHIA for the entire life of the project. This date should be a minimum of 6 months prior to the commencement of the first phase of construction, to allow adequate time for communities and civil society organisations to digest the information, and ask further questions.
- After the publication of these ESHIAs, begin a fresh consultation process for the Sawai communities. The process itself should be agreed in advance with all the communities, and not only the village heads. Revise the standard operating procedure for land acquisition to include internationally recognized standards of free, prior and informed consultation and consent, in line with those outlined in the analysis section of this report.
- As part of consultations around the overall impact of the project, any compensation should be negotiated according to the standards outlined earlier in this report. The negotiations and the new, agreed compensation package should be made available to all affected community members, including those who have already accepted the inadequate compensation package.
- In consultation with internationally recognized and local experts, such as anthropologists, develop a consultation plan for the Tobelo Dalam that allows for their free, prior and informed consent to land acquisition. The anthropologists should be chosen in consultation with international experts on indigenous rights.

To IFC Compliance Advisor Ombudsman:

- Conduct an outreach program to reach all communities affected by PT Weda Bay Nickel. This program should focus on educating them about their rights to free, prior and informed consultation and consent under the IFC Performance Standards, and the mediation or other problem solving options available to them through the Ombudsman function.
- If communities make a further complaint, consider conducting a simultaneous audit of MIGA's assessment of PT Weda Bay Nickel's land acquisition process and compensation offer, at the same time as an ombudsman assessment and possible mediation.

- If communities opt for mediation, conduct a robust capacity building exercise that specifically addresses ways in which compensated and non-compensated families can participate in the process.
- If communities opt for mediation, develop a robust plan to ensure the safety and security of families who have not accepted compensation so they can participate in the mediation in a meaningful way on an equitable basis.

To Civil Society Organisations Supporting Communities:

- With the support and involvement of affected communities, supportive civil society organisations should make a further complaint to the IFC Compliance Advisor Ombudsman and the French and Japanese OECD National Contact Points seeking support to compel PT Weda Bay Nickel to engage in more robust processes of free, prior and informed consultation and consent, and if communities agree, to negotiate an adequate and appropriate compensation package with the communities.
- These groups should also assist the communities to obtain adequate and accessible information concerning impacts and risks associated with the mine. Examples of more equitable and sustainable benefit sharing arrangements that support community governance and cultural empowerment will be particularly helpful. This information will put community members in a better position to anticipate changes, make their own decisions regarding their own futures, as well as negotiate with the company to try to limit harmful impacts and maximise community benefit.
- Groups with the appropriate resources and skills, including AMAN, should continue to support affected ethnic Sawai and Tobelo Dalam communities to map customary lands and ensure recognition of customary rights in keeping with Constitutional Court decision number 35/PUU-X/2012.
- Legal organisations and those with experience in negotiations of this type should work with the communities to ensure that families who have reluctantly accepted the inadequate compensation package understand their rights, and have access to participation in new negotiations with PT Weda Bay Nickel without having to pay back the IND 8000 per square metre already received.
- Development organisations should work with the families who have resisted accepting compensation to bolster both physical and livelihood security.
- Support should be provided to facilitate the community to come together, obtain and share information and jointly discuss their values, priorities and vision for the future as a community. This will help to strengthen and unite the community so that they are stronger when engaging in possible negotiations with the mine.
- Efforts should be made to develop relations with the Tobelo Dalam and work towards finding ways of ensuring they are adequately consulted and they understand their right to free, prior and informed consent. Work of this type would be enhanced by consultation with internationally recognized and local experts, such as anthropologists.

To Indonesian Government:

- All levels of government addressed by Komnas HAM in relation to the PT Weda Bay complaint should ensure that all recommendations are swiftly and thoroughly acted on.
- The responsible agency should mandate an investigation into the actions of BRIMOB and other security agencies in the area by the relevant authority. Ensure prosecution of any officers found to be intimidating citizens into signing compensation agreements.
- The Governments of Central Halmahera Regency and North Maluku Province should support PT Weda Bay Nickel to uphold international standards of free, prior and informed consultation and consent, and compensation, for example by permitting more open and transparent negotiations about land compensation.
- The Government of Central Halmahera Regency should also encourage compensation negotiations around benefit sharing to include legally binding commitments on the part of PT Weda Bay Nickel regarding their contribution to physical and social infrastructure such as roads and schools, and lobby for a partnership approach to any contribution of this kind that builds the capacity of Regency government offices beyond that already agreed under the Contract of Work. Given that service provision of this kind is ultimately the responsibility of government, this will allow better planning and increased capacity for Regency offices to take over provision of these services at an appropriate date, having benefited from PT Weda Bay Nickel's early input.
- The Government at the Regency, Provincial and Central levels must ensure prompt and independent investigation takes place, via the Komisi Pemberantasan Korupsi (the Anti-Corruption Commission), in relation to any allegations of corruption related to the project; and ensure that any guilty parties are held accountable for their actions under Indonesian law.
- The Government of North Maluku Province should take steps to ensure that any profit sharing negotiated in future is earmarked first and foremost for the development of the communities most seriously affected by the PT Weda Bay Nickel project.
- The Government of North Maluku Province and Central Halmahera Region should implement the Constitutional Court decision number 35/PUU-X/2012 entailing the creation of regional regulations regarding the rights of local Indigenous communities and processes for resolving conflict in rights over land where customary rights exist.
- The Government of the Republic of Indonesia must implement more robust process of free, prior and informed consultation and consent with local communities when granting concessions for extractives or other industries, so that the experience of the communities affected by the PT Weda Bay Nickel Mine is not replicated elsewhere in the archipelago. This would be supported by the swift implementation

of Constitutional Court decision number 35/PUU-X/2012 and stronger recognition of customary rights over forests.¹¹³

¹¹³ Commissioner Sandra Moniaga, Press Statement, 28 May 2013, Komnas Ham Available on Komnas HAM's website at <http://www.komnasham.go.id/informasi/images-portfolio-6/rekam-media/365-kabulkan-gugatan-uu-kehutanan-komnas-ham-apresiasi-mk>, accessed 30 September 2013.

Appendix One: Breaches of Free, Prior and Informed Consent and Consultation Obligations Under the IFC Standards

PROVISION OF THE IFC PERFORMANCE STANDARDS	PT WEDA BAY NICKEL'S ACTIONS
<p>Free, prior and informed consent applies to project design, implementation, and expected outcomes related to impacts affecting the communities of Indigenous Peoples.</p>	<p>The initial design and the feasibility stage have been undertaken without adequate free, prior and informed consent.</p>
<p>The client will develop an environmental and social risks and impacts assessment process which identifies all communities of Indigenous Peoples within the project area of influence who may be affected by the project, as well as the nature and degree of the expected direct and indirect economic, social, cultural (including cultural heritage), and environmental impacts on them.</p>	<p>PT Weda Bay Nickel has not properly established whether or not the Sawai constitute an indigenous group. Though PT Weda Bay Nickel claim they have conducted or are conducting the required assessments, only the AMDAL has been made public, and, on the company's own admission, it does not meet the assessment requirements in these standard.</p> <p>In particular, PT Weda Bay Nickel has failed to identify the direct and indirect economic, social, cultural and environmental impact of the project on the Tobelo Dalam.</p>
<p>The client's engagement process must include stakeholder analysis and engagement planning, disclosure of information, consultation, and participation, in a culturally appropriate manner.</p> <p>Disclosure of relevant information and participation of Affected Communities will continue during the planning, implementation, monitoring, and evaluation of compensation payments and livelihood restoration activities.</p>	<p>Disclosure of all relevant information has not been satisfactory. The AMDAL was not presented in an intelligent or culturally appropriate manner, and the ESIA and ESHIA continue to be withheld.</p> <p>The AMDAL, ESIA and ESHIA should be made available in meaningful formats in Indonesian and English.</p> <p>The consultation process has fallen short of international norms and standards in that it has been more a one-way communication process than a genuine, accessible, and culturally appropriate dialogue taking into account the concerns of affected communities.</p>

PROVISION OF THE IFC PERFORMANCE STANDARDS	PT WEDA BAY NICKEL'S ACTIONS
<p>The engagement process will involve Indigenous Peoples' representative bodies and organizations (e.g., councils of elders or village councils), as well as members of the Affected Communities of Indigenous Peoples.</p>	<p>So far this process has only operated through the government mandated village governance system, privileging consultation with Village Heads (Kepala desa), rather than taking a more participatory approach to account for those who do not share the opinion of the Kepala Desa.</p>
<p>The client will document: (i) the mutually accepted process between the client and Affected Communities of Indigenous Peoples, and (ii) evidence of agreement between the parties as the outcome of the negotiations.</p>	<p>No such documentation of either a mutually acceptable process, or an agreement regarding land compensation has been made public.</p>
<p>The client will prepare a plan that, together with the documents prepared by the responsible government agency, will address the relevant requirements of this Performance Standard. The client may need to include (i) the plan, implementation, and documentation of the process of ICP (informed consultation and participation) and engagement and free, prior and informed consent where relevant; (ii) a description of the government-provided entitlements of affected Indigenous Peoples; (iii) the measures proposed to bridge any gaps between such entitlements, and the requirements of this Performance Standard; and (iv) the financial and implementation responsibilities of the government agency and/or the client.</p>	<p>PT Weda Bay Nickel have not made public any plan to disclose how they will address the requirements of the IFC Performance Standards. The company claims this information will be in the ESHIA, however this document is yet to be publicly released, despite promises it would be available in 2012.</p>
<p>The consultation process should ensure that women's perspectives are obtained and their interests factored into all aspects of resettlement planning and implementation, particularly in relation to the different impacts of land acquisition women's and men's livelihoods, and in relation to the differences in women's and men's preferences in terms of compensation</p>	<p>To our knowledge there has been no effort to separately consult with or engage women, and to ensure that their different perspectives and needs are taken into account in impact assessments and planning.</p>

PROVISION OF THE IFC PERFORMANCE STANDARDS	PT WEDA BAY NICKEL'S ACTIONS
<p>mechanisms, such as compensation in kind rather than in cash.</p>	
<p>Where the exact nature or magnitude of land acquisition or restrictions on land use is unknown due to the stage of project development, the client will develop a Resettlement and/or Livelihood Restoration Framework outlining general principles compatible with this Performance Standard. Once the individual project components are defined and the necessary information becomes available, such a framework will be expanded into a specific Resettlement Action Plan or Livelihood Restoration Plan and procedures.</p>	<p>PT Weda Bay Nickel claims it does not yet know the impact of the project on the Tobelo Dalam. Yet, to our knowledge there is no publicly available Resettlement or Livelihood Restoration Framework for addressing the impact of the project on this community.</p> <p>Furthermore, though the impact on the Sawai villages is known, PT Weda Bay Nickel has not developed a Livelihood Restoration Plan.</p>

Appendix Two: Adherence by PT Weda Bay to IFC Performance Standards Requirements Pertaining to Economic Displacement and Compensation

PROVISION OF IFC PERFORMANCE STANDARDS	PT WEDA BAY NICKEL'S ACTIONS
<p>When displacement cannot be avoided, the client will offer displaced communities and persons compensation for loss of assets at full replacement cost and other assistance to help them improve or restore their standards of living or livelihoods</p>	<p>The cash compensation offered for land and plants is not adequate for the full restoration of livelihoods, and definitely not adequate for improvements to livelihoods.</p>
<p>Compensation standards will be transparent and applied consistently to all communities and persons affected by the displacement.</p>	<p>The rate of IDR 8000 per square metre for land was decided by the company, a consultant and some heads of village, without any public disclosure of the reasoning.</p>
<p>Where livelihoods of displaced persons are land-based, or where land is collectively owned, the client will, where feasible, offer the displaced land-based compensation.</p> <p>If circumstances prevent the client from offering suitable replacement land, the client must provide verification that such is the case. Under such circumstances, the client will provide non land-based income-earning opportunities over and above cash compensation to the Affected Communities of Indigenous Peoples.</p> <p>For persons whose livelihoods are land-based, replacement land that has a combination of productive potential, locational advantages, and other factors at least equivalent to that being lost should be offered as a matter of priority.</p>	<p>There have been no verifiable, meaningful offers of land-based compensation, or compensation-in-kind in lieu of cash compensation. PT Weda Bay Nickel have not demonstrated why suitable replacement land is not a feasible option for inclusion in the compensation package.</p>
<p>The client will also provide opportunities to displaced communities and persons to derive</p>	<p>The corporate social responsibility program and local employment program run by PT Weda Bay</p>

PROVISION OF IFC PERFORMANCE STANDARDS	PT WEDA BAY NICKEL'S ACTIONS
<p>appropriate development benefits from the project.</p>	<p>Nickel is impressive, but not a sufficient substitute for adequate compensation and retention of land rights by affected communities.</p>
<p>Women's and men's preferences in terms of compensation mechanisms, such as compensation in kind rather than in cash, should be explored.</p>	<p>To our knowledge, there has been no effort to take into account women's preferences regarding the form of compensation.</p>
<p>Decision-making processes related to resettlement and livelihood restoration should include options and alternatives, where applicable</p>	<p>Communities have only been offered a one-off cash payment for land and plants. No alternatives or other options have been offered.</p>
<p>Documentation of ownership or occupancy and compensation arrangements should be issued in the names of both spouses or heads of households, and other resettlement assistance, such as skills training, access to credit, and job opportunities, should be equally available to women and adapted to their needs.</p>	<p>As we were unable to obtain a copy of compensation agreements, it is not clear whether or not these agreements are made with heads of household, or with both spouses or all family members. No compensation or development benefits have been specifically targeted at women.</p>
<p>In the case of projects involving economic displacement only, the client will develop a Livelihood Restoration Plan to compensate affected persons and/or communities and offer other assistance that meet the objectives of this Performance Standard.</p>	<p>To our knowledge there is no Livelihood Restoration Plan for any of the communities affected by this project.</p>
<p>The client will establish procedures to monitor and evaluate the implementation of a Resettlement Action Plan or Livelihood Restoration Plan and take corrective action as necessary. The extent of monitoring activities will be commensurate with the project's risks and impacts. For projects with significant involuntary resettlement risks, the client will retain competent resettlement professionals to provide advice on compliance with this</p>	<p>There is no Livelihood Restoration Plan for the seaside communities or the Tobelo Dalam, and therefore also no plan for monitoring or evaluation of such a plan.</p>

PROVISION OF IFC PERFORMANCE STANDARDS	PT WEDA BAY NICKEL'S ACTIONS
<p>Performance Standard and to verify the client's monitoring information. Affected persons will be consulted during the monitoring process.</p>	
<p>Implementation of a Resettlement Action Plan or Livelihood Restoration Plan will be considered completed when the adverse impacts of resettlement have been addressed in a manner that is consistent with the relevant plan as well as the objectives of this Performance Standard. It may be necessary for the client to commission an external completion audit of the Resettlement Action Plan or Livelihood Restoration Plan to assess whether the provisions have been met, depending on the scale and/or complexity of physical and economic displacement associated with a project. The completion audit should be undertaken once all mitigation measures have been substantially completed and once displaced persons are deemed to have been provided adequate opportunity and assistance to sustainably restore their livelihoods. The completion audit will be undertaken by competent resettlement professionals once the agreed monitoring period is concluded. The completion audit will include, at a minimum, a review of the totality of mitigation measures implemented by the Client, a comparison of implementation outcomes against agreed objectives, and a conclusion as to whether the monitoring process can be ended.</p>	<p>There is no Livelihood Restoration Plan for the Sawai communities or the Tobelo Dalam.</p>
<p>If land acquisition or restrictions on land use result in economic displacement defined as loss of assets and/or means of livelihood, regardless of whether or not the affected</p>	

PROVISION OF IFC PERFORMANCE STANDARDS	PT WEDA BAY NICKEL'S ACTIONS
<p>people are physically displaced, the client will meet the requirements in paragraphs 27–29 below, as applicable:</p>	
<p>27. Economically displaced persons who face loss of assets or access to assets will be compensated for such loss at full replacement cost.</p>	<p>Though PT Weda Bay Nickel has compensated for plants, the basis of the calculation of plant prices has not been made publicly available. Furthermore, without any land for land compensation, it is not possible for families to replace their assets, and no equivalent livelihood plan has been developed.</p>
<p>28. In addition to compensation for lost assets, if any, as required under paragraph 27, economically displaced persons whose livelihoods or income levels are adversely affected will also be provided opportunities to improve, or at least restore, their means of income-earning capacity, production levels, and standards of living:</p>	<p>The one-off cash compensation does not provide affected families with the opportunity to restore their income-earning capacity, production levels or long-term standard of living. Though some families have used their compensation to build a house, this is not a replacement for a sustainable livelihood. Employment opportunities offered by the mine are not available to all community members who have lost farming land, and thus do not provide for the restoration of income earning capacity even in the short term.</p>
<p>For persons whose livelihoods are natural resource-based and where project-related restrictions on access envisaged in paragraph 5 apply, implementation of measures will be made to either allow continued access to affected resources or provide access to alternative resources with equivalent livelihood-earning potential and accessibility. Where appropriate, benefits and compensation associated with natural resource usage may be collective in nature rather than directly oriented towards individuals or households.</p>	<p>The one-off cash payment does not constitute an equivalent livelihood earning potential. No alternative resources or land has been provided.</p>
<p>If circumstances prevent the client from providing land or similar resources as</p>	<p>In this case, cash compensation is not sufficient to restore livelihoods. Though PT Weda Bay Nickel</p>

PROVISION OF IFC PERFORMANCE STANDARDS	PT WEDA BAY NICKEL'S ACTIONS
<p>described above, alternative income earning opportunities may be provided, such as credit facilities, training, cash, or employment opportunities. Cash compensation alone, however, is frequently insufficient to restore livelihoods.</p>	<p>have offered some ad hoc training, such as in how to bake cakes (provided by the chef of the PT Weda Bay Nickel mess), or how to manage cash (provided by the bank accepting the compensation deposits), this is not sufficient. A systematic, consultative and realistic livelihood restoration plan would require a more robust approach to alternative income earning opportunities, such as diverse and long-term training opportunities tailored to the realities of local markets.</p>
<p>29. Transitional support should be provided as necessary to all economically displaced persons, based on a reasonable estimate of the time required to restore their income-earning capacity, production levels, and standards of living.</p>	<p>To our knowledge, no transitional support has been provided to allow families to restore their livelihoods through alternative means.</p>
<p>The client's proposed actions will be developed with the ICP of the Affected Communities of Indigenous Peoples and contained in a time-bound plan, such as an Indigenous Peoples Plan, or a broader community development plan with separate components for Indigenous Peoples</p>	<p>The compensation arrangement was decided behind closed doors with only the input of a small number of village heads. No plan, time-bound or otherwise, has been made publicly available.</p>
<p>The client and the Affected Communities of Indigenous Peoples will identify mitigation measures in alignment with the mitigation hierarchy described in Performance Standard 1 as well as opportunities for culturally appropriate and sustainable development benefits. The client will ensure the timely and equitable delivery of agreed measures to the Affected Communities of Indigenous Peoples.</p>	<p>Our research found that affected communities have not been adequately involved in developing a plan for mitigation of the negative impacts of the project. Only a small number of village heads were involved in the negotiation of a one-off cash compensation package.</p>
<p>20. Various factors including, but not limited to, the nature of the project, the project context and the vulnerability of the Affected</p>	<p>The goals and preferences of the affected communities have not been taken into account in PT Weda Bay's strategy for benefit sharing.</p>

PROVISION OF IFC PERFORMANCE STANDARDS	PT WEDA BAY NICKEL'S ACTIONS
<p>Communities of Indigenous Peoples will determine how these communities should benefit from the project. Identified opportunities should aim to address the goals and preferences of the Indigenous Peoples including improving their standard of living and livelihoods in a culturally appropriate manner, and to foster the long-term sustainability of the natural resources on which they depend.</p>	<p>Furthermore, that strategy – their corporate social responsibility program – though impressive, is not sufficiently binding upon the company, and has not been sufficiently participatory in its planning.</p>

Appendix Three: Summary of Constitutional Court Ruling 35/PUU-X/2012¹¹⁴

WHAT CHANGED	ORIGINAL INDONESIAN WORDING IN LAW 41/1999	ENGLISH (UNOFFICIAL)	INDONESIAN REVISION BY CONSTITUTIONAL COURT'S (STATED OR IMPLIED IN 35/PUU-X/2012, 16THMAY)	ENGLISH REVISION (UNOFFICIAL)
Article 1.6	Hutan adat adalah hutan negara yang berada dalam wilayah masyarakat hukum adat.	"Adat" forests are state forests located in indigenous peoples' territories.	Hutan adat adalah hutan yang berada dalam wilayah masyarakat hukum adat.	"Adat" forests are forests located in indigenous peoples' territories.
Article 4.3	Penguasaan hutan oleh Negara tetap memperhatikan hak masyarakat hukum adat, sepanjang kenyataannya masih ada dan diakui keberadaannya, serta tidak bertentangan dengan kepentingan nasional.	Forest control by the state shall respect the rights of indigenous peoples, as long as they exist and their existence is recognized, and does not contradict national interests.	Penguasaan hutan oleh Negara tetap memperhatikan hak masyarakat hukum adat, sepanjang masih hidup dan sesuai dengan perkembangan masyarakat dan prinsip Negara Kesatuan Republik Indonesia yang diatur dalam undang-undang.	Forest control by the state shall respect the rights of indigenous peoples, as long as they remain in existence and are compatible with societal development, and with the principle of the Unitary State of the Republic of Indonesia as regulated by law.
Article 5.1	Hutan berdasarkan statusnya terdiri dari: a. hutan negara, dan b. hutan hak.	Forest status consists of two types: a. state forest, and b. forest subject to rights	Hutan negara sebagaimana dimaksud pada ayat (1) huruf a, tidak termasuk hutan adat	State forest as referred to in paragraph (1) point a, does not include adat forest.
Article 5.2	Hutan negara sebagaimana dimaksud pada ayat (1) huruf a, dapat berupa hutan adat.	State forest as referred to in paragraph (1) point a, can be in the form of "adat" forest.	[deleted]	[deleted]

¹¹⁴ Source: Down to Earth Indonesia website, <http://www.downtoearth-indonesia.org/story/turning-point-indonesia-s-indigenous-peoples>, accessed 1 October 2013.

WHAT CHANGED	ORIGINAL INDONESIAN WORDING IN LAW 41/1999	ENGLISH (UNOFFICIAL)	INDONESIAN REVISION BY CONSTITUTIONAL COURT'S (STATED OR IMPLIED IN 35/PUU-X/2012, 16THMAY)	ENGLISH REVISION (UNOFFICIAL)
Article 5.3	Pemerintah menetapkan status hutan sebagaimana dimaksud pada ayat (1) dan ayat (2); dan hutan adat ditetapkan sepanjang menurut kenyataannya masyarakat hukum adat yang bersangkutan masih ada dan diakui keberadaannya.	The Government shall determine the status of forest as referred to in paragraph (1) and paragraph (2); and adat forest shall be determined as long as the indigenous peoples concerned remain in existence and their existence is recognised.	Pemerintah menetapkan status hutan sebagaimana dimaksud pada ayat (1); dan hutan adat ditetapkan sepanjang menurut kenyataannya masyarakat hukum adat yang bersangkutan masih ada dan diakui keberadaannya.	The Government shall determine the status of forest as referred to in paragraph (1); and adat forest shall be determined as long as the indigenous peoples concerned remain in existence and their existence is recognised.

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