PAPUA NEW GUINEA'S EXPERIMENTS WITH SOVEREIGN WEALTH FUNDS

John H Farrar and Glen Mola Pumuye*******

Papua New Guinea (PNG) is a developing country facing many challenges. On Independence Day in 1975, it adopted a Westminster style constitution. While recognising customary law, the Constitution also adopted the common law. Common law has always recognised the Crown's ownership of minerals and petroleum. Under PNG legislation, ownership of minerals and petroleum have been vested in the state. This has led to conflict and resentment by customary landowners who own the land on which the mineral and petroleum projects are. The mining operations of Ok Tedi caused environmental damage and resulted in class action litigation in Australia and the ultimate withdrawal of Broken Hill Proprietary Ltd (BHP). Efforts to set up a development fund incorporated in Singapore by BHP and the PNG Government led to continuing conflict, and attempts to set up a statutory sovereign wealth fund to share in the royalties from liquid petroleum, gas and minerals have not yet got off the ground. The resultant situation is that capital is tied up, the poor suffer, and the politicians fail to deal with the challenges facing the country. This article attempts to suggest ways forward on both fronts.

I INTRODUCTION

Papua New Guinea (PNG) is an archipelagic nation in the Pacific.[1] On independence in 1975, PNG adopted a Westminster democratic system of government as a constitutional democracy. The major task before and after independence was to govern coherently a very diverse country with over 800 languages and cultures. PNG recognised the Crown concept of the English common law, but opted for the power of the people to be recognised in the Constitution, which provided for the separation of powers, human rights and the organs of state. Within the territorial borders of PNG, there are rich mineral and petroleum deposits which have been a major export earner for the country. Many mining and petroleum projects were developed and continue to provide revenue for PNG. In

* Emeritus Professor of Law, Bond University and Honorary Professor of Law, University of Auckland.

** Lecturer in Law, University of Papua New Guinea and PhD Candidate, Bond University.

1 Occupying half of the large island of New Guinea with Irian Jaya, part of Indonesia, being the other half. It also includes adjoining islands in the Bismarck and Solomon Seas.

pursuing economic gain, the country suffered environmental destruction and problems with mismanagement of revenues acquired from the extraction of its mineral and petroleum resources. The contradictions enshrined in the Constitution over mineral and petroleum rights, coupled with environmental damage, are an ongoing source of conflict. Consequently, the Government recently decided to pursue the idea of a sovereign wealth fund (SWF) to serve as a savings mechanism to protect against the resource curse or the "Dutch Disease" by ensuring surplus revenue from the resource boom is saved for the benefit of future generations. In this article, we examine the nature of SWFs and their application in PNG, beginning with the Ok Tedi SWF and the Mineral Resource Stabilisation Fund (MRSF), followed by the recent establishment of a SWF for PNG under the Organic Law on Sovereign Wealth Fund. This article examines the structure of PNG SWFs, measures it against international best practice and uses a comparative lens to suggest reforms for the PNG SWF.

II NATURE OF SOVEREIGN WEALTH FUNDS

Sovereign wealth funds are a mixture of funds and entities set up for various purposes by states. Hence, as Ariff and Farrar note:[2]

> … it is difficult to prescribe similar goals or to generalise about the operational processes of all funds. Operating within market capitalism, they represent examples of state ownership of savings set aside for future consumption, from current incomes of resource-rich nations such as Saudi Arabia and Norway from high incomes due to oil and gas prices since 1978, or by small nations such as Singapore and Hong Kong which have fewer expenses than large countries and can invest the surplus.

A Definition of Sovereign Wealth Funds

At the request of Congress, the United States' Government Accountability Office defined SWFs by four criteria:[3]

(1) They are government-chartered or government-sponsored investment vehicles.
(2) They invest some or all of their funds in assets other than sovereign debt outside the country that established them.
(3) They are funded through government transfers arising primarily from sovereign budget surpluses, trade surpluses, central bank currency reserves or revenues from the commodity wealth of a country.
(4) They are not actively functioning as a pension fund.

---

2 See Mohamed Ariff and John H Farrar "The Governance and Regulation of Sovereign Wealth Funds and Foreign Exchange Reserves in a Post GFC world" in John H Farrar and David G Mayes (eds) *Globalisation, the Global Financial Crisis and the State* (Edward Elgar, Cheltenham (UK), 2013) 272 at 273–274.

3 At 274.

The International Working Group of Sovereign Wealth Funds (IWGSWF) defines them in the following way in the Generally Accepted Principles and Practices: sovereign wealth funds are:[4]

> Special purpose investment funds or arrangements that are owned by the general government. Created by the general government for macroeconomic purposes, SWFs hold, manage or administer assets to achieve financial objectives and employ a set of investment strategies that include investing in foreign financial assets.

Certain types are excluded from the latter: foreign exchange reserves, state-owned enterprises and public servant pension funds.[5] According to the International Monetary Fund (IMF), SWFs can be grouped into five categories: stabilisation funds, savings funds, reserve investment funds, development funds and pension reserve funds.[6]

In the West, there has been an increasing concern about the rise of SWFs and their governance. The latest wave of SWFs is arguably a product of the financial instability caused by Western financialisation and Eastern neo-mercantilism.[7] At the same time, these are funds which are recycling global financial flows rather than acting as sources of new funds. Apart from the need to adopt some degree of disclosure on how such large sums of money are deployed, there is also a public debate on whether some nations with large SWFs use these for political purposes. The Organisation for Economic Co-operation and Development (OECD) raised the latter issue and concluded that it is a matter of grave concern.[8]

B Governance and Regulation of Sovereign Wealth Funds

The governance and regulation of SWFs can be discussed under two main headings: domestic and international regulation.[9] In essence, domestic corporate governance is a system of legal and self-regulation. The self-regulation takes a variety of forms, such as stock exchange listing rules and statements of accounting practice and institutional codes, for instance, corporate governance principles and practice, companies' own codes and business ethics.[10] These are supplemented by the

---

4 International Working Group of Sovereign Wealth Funds *Sovereign Wealth Funds: Generally Accepted Principles and Practices – 'Santiago Principles'* (October 2008) appendix 1 [Santiago Principles].

5 Andrew Rozanov "Definitional Challenges of Dealing with Sovereign Wealth Funds" (2011) 1 AsianJIL 249 at 256.

6 Mark Allen and Jaime Caruana *Sovereign Wealth Funds – A Work Agenda* (International Monetary Fund, 29 February 2008).

7 See Ariff and Farrar, above n 2, at 288–289.

8 At 275.

9 At 282.

10 See John H Farrar and Pamela Hanrahan *Corporate Governance* (LexisNexis, Chatswood (NSW), 2017) at ch 1.

OECD's Principles of Corporate Governance.[11] By contrast, there is limited international legislation in respect of SWFs, although the Santiago Principles[12] now act as a code of self-regulation.

There are many countries that impose regulations on foreign direct investment, which vary in their operation. As Ariff and Farrar write:[13]

> … China is seeking to actively invest its surplus overseas while it operates a strict regime at home. Australia by contrast has tended to operate a fairly liberal approach to foreign investment in the past but has taken a stricter approach to recent bids …
>
> …
>
> The international approach has been through treaties and systems of self-regulation. An attempt at a multilateral approach failed but there have been bilateral treaties between some countries. One approach would be to attempt comprehensive regulation applicable to all, treating SWFs like other investors. This does not seem practicable. Another approach would be a prohibition of certain investments or activities. A third approach would be to insist on reciprocity.

The two main systems of self-regulation are the Santiago Principles[14] adopted by the IWGSWF in October 2008 and the OECD's Declaration and Guidelines.[15] In the spring of 2008, the IMF facilitated the establishment of the IWGSWF, which subsequently in the autumn of 2008, introduced a set of 24 voluntary Generally Accepted Principles and Practice of Sovereign Funds, commonly referred to as the Santiago Principles.[16] The "aim of the process that resulted in the Santiago Principles was to identify a set of practices that would lead to greater clarity about the operation of SWFs and at the same time fortify SWFs' operations".[17] The purposes of the Santiago Principles are:

(1) To identify a framework of accepted principles and practices.
(2) Enable a better understanding of SWFs.

---

11 Organisation for Economic Co-operation and Development *G20/OECD Principles of Corporate Governance* (OECD Publishing, Paris, 2015). See also Farrar and Hanrahan, above n 10, at ch 35.

12 See Ariff and Farrar, above n 2, at 283–284.

13 At 282.

14 Santiago Principles, above n 4.

15 Organisation for Economic Co-operation and Development *Sovereign Wealth Funds and Recipient Countries: Working Together to Maintain and Expand Freedom of Investment* (11 October 2008). See also Ariff and Farrar, above n 2, at 282.

16 Gordon L Clark and Adam D Dixon "Sovereign Wealth Funds and the Global Political Economy of Trust and Legitimacy" in Douglas Cumming and others (eds) *The Oxford Handbook on Sovereign Wealth Funds* (Oxford University Press, Oxford, 2017) 145 at 146.

17 "Introduction" in Ubaidir S Das, Adnan Mazarei and Han van der Hoorn (eds) *Economics of Sovereign Wealth Funds: Issues for Policymakers* (International Monetary Fund, Washington DC, 2010) xv at xv.

(3) To bring mutual benefit from sovereign wealth funds for the owners of the funds and the countries in which they are invested.[18]

There are five guiding objectives. These are:

(1) To help maintain a safer global financial system and free flow of capital;
(2) To comply with regulation;
(3) To invest on an economic and financial risk basis;
(4) To have transparency in governance, risk management; and
(5) To establish a governance structure that provides accountability.[19]

III PAPUA NEW GUINEA'S EXPERIMENTS WITH SOVEREIGN WEALTH FUNDS

To impose Western conceptions of the state upon a largely tribal society is not an easy task and some of the complexity is reflected in the PNG Constitution. PNG uses state-owned enterprises, which are often the subject of specific legislation. In other cases, companies incorporated under the general company legislation are used.

More recently, there have been experiments with SWFs. The first PNG experiment arose out of Ok Tedi Mining Ltd (OTML), a joint venture between Broken Hill Proprietary Co Ltd (BHP), PNG and two other mining companies set up in 1976.[20] This was a very profitable gold and copper mine that caused serious environmental damage in PNG's Western Province and led to class action litigation in the Supreme Court of Victoria, Australia.[21] As a result, BHP suffered reputational damage. In late 2000, BHP wished to close down the mine, but PNG resisted this manoeuvre. Eventually, a compromise was reached whereby BHP divested its shares in the company, which were transferred to PNG Sustainable Development Program Ltd (PNGSDP), a company limited by guarantee incorporated in Singapore.[22]

This was a kind of offshore SWF, modelled loosely on the Ford Foundation, but not intended to be technically a charitable trust. This was challenged by the O'Neill Government in two cases at the

---

18 See Joseph J Norton "The 'Santiago Principles' for Sovereign Wealth Funds: A Case Study on International Financial Standard-Setting Processes" (2010) 13 J Intl Econ L 645.

19 Simon Wilson "IMF Survey: Wealth Funds Group Publishes 24-Point Voluntary Principles" (15 October 2008) International Monetary Fund <www.imf.org>.

20 See GJ Hearn "Landslide and erosion hazard mapping at Ok Tedi copper mine, Papua New Guinea" (1995) 28 Quarterly Journal of Engineering Geology and Hydrogeology 47.

21 See Lawrence Kalinoe and Mako J Kuwimb "Customary Land Owners' Rights to Sue for Compensation in Papua New Guinea and the Ok Tedi Dispute" (1997) 25 Melanesian LJ 65.

22 Sara Busilacchi and others "Asymmetrical Development across Transboundary Regions: The Case of the Torres Strait Treaty Region (Australia and Papua New Guinea)" (2018) 10(11) Sustainability 4200 at 5.

Singapore High Court.[23] This also involved attempts at nationalisation of PNGSDP, or at least of its shares in Ok Tedi. This experience will be discussed in detail below. Although PNGSDP has some of the characteristics of a SWF, its history and character distinguish it from a more conventional SWF and this has been one of the problems, as we shall demonstrate.

The second experience involved the setting up of a SWF by statute to receive the state's share of royalties from liquid petroleum gas and minerals. Although enacted, this has not been operative. Again, we will discuss this in detail below.

A Papua New Guinea Sustainable Development Program

PNGSDP is a company promoted by BHP and PNG. The incorporation of PNGSDP was the end-product of a long and complicated history between BHP and PNG. This relationship started with the Ok Tedi mine in Western Province of PNG. PNGSDP was established as a kind of SWF. In setting the context to this analysis, it is crucial to examine the history of the Ok Tedi mine and how BHP's shares in OTML were transferred to PNGSDP.

1 Brief history of Ok Tedi[24]

Ok Tedi is a gold and copper mine located in Western Province of PNG. The Ok Tedi mine was one of the first mining projects of the post-colonial government of PNG. Construction of the mine began in 1982. Throughout the operation of the mine, there was substantial environmental destruction caused to forests and river systems surrounding the mine. Kirsch concluded that the Ok Tedi river had been turned into a "75 kilometre long sewage canal" with an overflow of sediments,[25] and that "trees along the Ok Tedi River became affected by pollution and gardens along the river floodplain were destroyed by mine tailings".[26] Campbell stated that "[w]aste rock is dumped directly into the local creeks via failing dumps", causing substantial environmental destruction.[27] In a study in 2014, Kirsch summarised the environmental effects in the following words:[28]

---

23 *Independent State of Papua New Guinea v PNG Sustainable Development Programme Ltd* [2019] SGHC 68; aff'd [2020] SGCA 44.

24 William S Pintz *Ok Tedi: Evolution of a Third World Mining Project* (Mining Journal Books, London, 1984). See also "Our History" Ok Tedi Mining <www.oktedi.com>.

25 Stuart Kirsch "Ok Tedi River a Sewer" *The Times of Papua New Guinea* (Port Moresby, 1–7 June 1989) at 3.

26 Stuart Kirsch "Indigenous movements and the risks of counterglobalization: Tracking the campaign against Papua New Guinea's Ok Tedi mine" (2007) 34 American Ethnologist 303 at 305.

27 Ian C Campbell "Science, governance and environmental impacts of mines in developing countries: lessons from Ok Tedi in Papua New Guinea" in R Quentin Grafton and Karen Hussey (eds) *Water Resources Planning and Management* (Cambridge University Press, Cambridge, 2011) 583 at 583.

28 Stuart Kirsch *Mining Capitalism: The Relationship between Corporations and Their Critics* (University of California Press, Oakland, 2014) at 16–18.

> Rivers that once ran green and clear have been transformed into muddy torrents the colour of coffee with milk. Three decades of mining have transformed the verdant landscape along the river corridor into a moonscape of grey tailings. … [B]irds of paradise that used to live along the river and in the forest are gone. Fish populations have been drastically reduced in number and biodiversity.

In a class action, 30,000 landowners sued BHP in the Victorian Supreme Court in 2004.[29] A negotiated settlement worth approximately USD 500 million in compensation and commitments to tailings containment was reached in June 1996.[30] BHP intended to close the mine altogether, but it later agreed to dispose of its shares in OTML "after the government and affected landowners lobbied for its continued operation, citing its social and economic benefits."[31]

The incumbent Prime Minister Sir Mekere Morauta was not keen to shut the mine because of economic considerations. By October 2001, BHP's exit plan was sufficiently concrete for the parties to take legally binding steps. The thrust of the exit plan was for BHP to gift its entire shareholding in OTML to a special purpose vehicle (PNGSDP), in return for:[32]

> (a) the state releasing and indemnifying BHP in relation to liability arising from its operation of the mine; (b) the state guaranteeing that it would not prosecute BHP in connection with its operation of the mine; and (c) the state enacting legislation giving statutory effect to these key points.

To give effect to this arrangement, the PNG Parliament passed the Mining (Ok Tedi Mine Continuation [Ninth Supplemental] Agreement) Act 2001.

This led to the incorporation of the company PNGSDP in Singapore in 2001 as a company limited by guarantee, and PNGSDP opening an office in Port Moresby. OTML's ownership was restructured. Effectively, "BHP bowed out at a moment of political and legal vulnerability", leaving ownership of 30 per cent with the PNG Government and transferring its 52 per cent to PNGSDP.[33] The "remaining

---

29 See Amaechi Nwokoo "The Trade-Off Between a Country's Obligation to Protect the Environmental Rights of Its Citizens and Its Desire to Maximise the Economic Benefits that Flow from Mining Operations – the Ok Tedi Saga" in Elizabeth Bastida, Thomas Wälde and Janet Warden-Fernández (eds) *International and Comparative Mineral Law and Policy: Trends and Prospects* (Kluwer Law International, The Hague, 2005) 953. See also Michael Cannon *That Disreputable Firm: The Inside Story of Slater and Gordon* (Melbourne University Press, Melbourne, 1998).

30 Stuart Kirsch "An Incomplete Victory at Ok Tedi" (6 April 2000) Carnegie Council for Ethics in International Affairs <www.carnegiecouncil.org>.

31 George Yapao, Lee Godden and Steven Pettigrove "Papua New Guinea: conflicts, customary landholding and resource exploitation" in Marcia Langton and Judy Longbottom (eds) *Community Features, Legal Architecture: Foundations for Indigenous People in the Global Mining Boom* (Routledge, Abingdon (UK), 2012) 77 at 81.

32 *Independent State of Papua New Guinea v PNG Sustainable Development Program* [2019] SGHC 68 at [14].

33 Peter S Adler, Janesse Brewer and Caelan McGee *The Ok Tedi Negotiations: Rebalancing the Equation in a Chronic Sustainability Dilemma* (Keystone Center, 24 August 2007) at 4.

18 [per cent] was retained by Inmet, a private Canadian mining consortium spun off from one of the mine's original German investors."[34] This stake was later bought out.

2 *PNGSDP's core function and corporate governance*

PNGSDP is a PNG institution incorporated in Singapore as a not-for-profit limited liability company, registered and operating in PNG as an overseas company. PNGSDP "is governed by its Constitution, which is comprised of the Memorandum and Articles of Association and Program Rules."[35] Currently, an independent board, consisting of eight international and PNG directors, controls and manages the affairs of the company and reports to PNG stakeholders annually. According to Filer and Imbun:[36]

> The new company's basic mandate was to invest two thirds of its mining profits in a "long term fund", and to spend the balance of its income, including the interest on this long-term investment, on the implementation of "sustainable development projects" in both Western Province and the rest of Papua New Guinea, throughout and beyond the remaining life of the mine.

PNGSDP was thus set up as a kind of SWF. PNGSDP comprised of a long-term fund and a development fund. The long-term fund invests two-thirds of the net income received from OTML in low-risk investments for the future benefit of the people of PNG following mine closure. It currently has a balance of over USD 1.2 billion. The development fund invests one-third of net income received from OTML in sustainable development projects.

3 *Nationalisation of Ok Tedi by the O'Neill Government*

In 2011, Prime Minister Michael Somare was unwell and seeking treatment in Singapore. During this time, he was illegally voted out of office by Parliament.[37] Peter O'Neill was elected the seventh Prime Minister of PNG. Mr O'Neill was hostile to PNGSDP: even before he was elected Prime Minister, he expressed dissatisfaction with the setup of PNGSDP. First as Treasurer and then as Prime Minister, Mr O'Neill fixed PNGSDP in his sights. After the elections in 2012, he stepped up his criticism, accusing PNGSDP of poor transparency, failing to meet its goals and letting BHP off the

---

34 At 4.

35 PNG Sustainable Development Program Ltd *Annual Report 2009* (2009) at 8.

36 Colin Filer and Benedict Imbun "A Short History of Mineral Development Policies in Papua New Guinea, 1972–2002" in RJ May (ed) *Policy Making and Implementation: Studies from Papua New Guinea* (ANU Press, Canberra, 2009) 75 at 104.

37 The following Supreme Court cases held that the act of removing Prime Minister Somare was illegal and unconstitutional: *Re Reference Pursuant to Constitution Section 19 by East Sepik Provincial Executive* SC1154, 12 December 2011; and *Re Reference Pursuant to Constitution Section 19 by the Attorney-General* SC1187, 21 May 2012.

hook for its environmental damage.[38] For Mr O'Neill, the endgame was for PNG to exercise more control over PNGSDP. With the passing of the Mining (Ok Tedi Tenth Supplemental Agreement) Act 2013, PNGSDP's shares were expropriated. Section 4 states:

> 4. Shareholders of OTML
>
> (1) On the coming into operation of this Act –
>
> (a) all ordinary shares held by PNGSDP in the share capital of OTML shall be cancelled and cease to exist; and
>
> (b) 122,200,000 new, fully paid ordinary shares in the share capital of OTML free of any encumbrance, change or equitable interest shall be issued to the State.

Under s 4(2), the share register of OTML was to be amended to reflect this. Few PNG politicians expressly opposed the Act or did not participate in the voting. Sir Mekere Morauta, in relation to the Act, said "the government's move to forcefully take ownership of the mine amounts to theft", while former Prime Minister Sir Michael Somare was the only member in Parliament to urge caution by saying "interpretation of the outside world will say this is the country that is moving towards nationalisation of major companies in the country".[39] Further, with the passing of the Mining (Ok Tedi Mine Continuation (Ninth Supplemental) Agreement) (Amendment) Act 2018, Prime Minister O'Neill revoked the immunity accorded to BHP from prosecution for environmental degradation.

4 Dispute arbitration and Singapore court decisions on PNGSDP

From the outset, it was clear that there were complicated legal issues at stake that would serve as a barrier to the application of the appropriation act by Parliament. For a start, PNGSDP was a company incorporated in Singapore. PNGSDP took legal action to challenge the Government on two fronts with a case in the High Court in Singapore and a case for international arbitration.[40]

In 2013, PNGSDP applied to have the matter arbitrated by filing a Request for Arbitration with the International Centre for Settlement of Investment Disputes (ICSID). The Tribunal could not deal with the issue of the expropriation of the PNG shares as the state had not consented.[41]

PNGSDP commenced proceedings by way of Originating Summons 1036 of 2013 (OS 1036) in Singapore to challenge the state's decision to meddle in its corporate governance structure. In July

---

38 Shane McCleod "A Billion Reasons: The Future of PNG's Sustainable Development Fund" (24 April 2019) Lowy Interpreter <www.lowyinstitute.org/the-interpreter>.

39 Liam Fox "PNG government takes control of Ok Tedi mine, repeals laws protecting BHP from legal action over pollution" (20 September 2013) ABC News <www.abc.net.au>.

40 Rujun Shen and Sonali Paul "Papua New Guinea sued in Singapore over mining assets dispute" (6 November 2013) Reuters <www.reuters.com>.

41 *PNG Sustainable Development Program Ltd v Papua New Guinea (Award)* ICSID ARB/13/33, 5 May 2015.

2014, Prakash J, as she then was, converted OS 1036 into a writ action with the state as the plaintiff.[42] The main issues before the Court were:

(1) Was there a partly oral, partly written agreement between BHP, PNG, and PNGSDP in or around late 2001 in respect of BHP's exit from OTML? And if so, what were the terms of that agreement?
(2) Does PNGSDP hold its assets and the dividends as a charitable trust?
(3) If either the agreement or the trust is found to exist, has PNGSDP breached either the agreement or the trust?

The matter was heard by Vinodh Coomaraswamy J. Justice Coomaraswamy was clear that there was no agreement either orally or part oral and written in or around 2001. In regard to the second issue, the Judge noted that PNGSDP had argued the trust was created by the agreement; since the agreement did not exist, consequently the trust could not exist.[43] PNGSDP's constitutional documents did not support the allegation that the parties intended to create a trust. The express trust which PNG alleged to exist was never constituted. BHP did not transfer the OTML shares to PNGSDP as trust property, and PNGSDP was unable to declare a trust over those shares. Even if the trust existed, PNG had not adduced sufficient evidence to show that it was exclusively charitable – that is, that PNGSDP's commercial or quasi-commercial functions were merely ancillary to the charitable purposes in Clause 3 of PNGSDP's Memorandum. In terms of issue three, it was a nullity because the agreement and the trust never existed.[44]

The decision meant that the corporate governance structure of PNGSDP could be amended from within PNGSDP and PNG had no legal right to manipulate or interfere in the internal affairs of PNGSDP. PNGSDP's founding documents in terms of its constitution and articles of association ensured the elimination of all forms of external control. PNG was fighting an uphill battle from the start. With such an agreement that potentially was worth millions of dollars, one would have thought the agreement would have been fully documented and the consensus *ad idem* on the nature of PNGSDP would have been crystallised. The lack of substantial evidence was clear although Dr Weiss, a PNG adviser and former director of OTML, tried to make a case from his deathbed. The other person the state would have relied on was the then Prime Minister of PNG who pushed for PNGSDP, Sir Mekere Morauta. However, he was now the Chairperson of PNGSDP and was in a conflicting position.

---

42 *Independent State of Papua New Guinea v PNG Sustainable Development Program Ltd* [2019] SGHC 68 at [32].

43 At [305].

44 At [331]–[343].

The framers of the PNGSDP corporate structure were mindful of the detrimental effects of corruption in PNG. In an interview with *PNG Loop*, Sir Mekere Morauta, in welcoming the decision by the Singapore High Court, stated:[45]

> PNGSDP was set up by my Government to be independent of future governments, to protect it from sticky fingers. That is exactly how the company was designed and history has proven me right. The High Court of Singapore has found, in its decision, that those who wanted to break into the bank cannot succeed.

On appeal by the state, the Court of Appeal of Singapore dismissed the appeal. The Court upheld the Judge's finding as to the non-existence of the agreement and, further, that if the agreement did not exist, then the trust was also non-existent.[46]

5 *Are there still legal avenues for PNGSDP to recover its shares in Ok Tedi or receive adequate compensation?*

The expropriation act by the PNG Government is harsh and oppressive, especially when there was no compensation paid to PNGSDP. By way of incorporating PNGSDP in Singapore, the future fund was protected. However, the shares in OTML previously held by PNGSDP have been cancelled and control now vests in the state. In our analysis, we set out two possible ways in which PNGSDP can seek redress.

(a) Under domestic law through a constitutional challenge

Since the decisions by the Singaporean courts, PNGSDP has not been officially compensated for the appropriation of its shares in the Ok Tedi mine. This act amounted to oppression and unfair prejudice of PNGSDP. The scenario presents a problem where the Government of PNG cannot access the funds held by PNGSDP and PNGSDP, on the other hand, cannot recoup its shares in OTML or claim compensation from the PNG Government for the expropriation of its shares.

There is a possibility that the legislation appropriating the shares could be challenged by PNGSDP; however, this has not been the case. Also, there are technical legal arguments as to the standing of PNGSDP because of its incorporation in Singapore. Another solution to this problem rests with the leadership of Western Province, especially the Governor. The state failed the people of Western Province when it granted environmental permits for the Ok Tedi mine to discharge tailings into the environment. Further, the state acted against the interest of the people of Western Province when it pushed for BHP not to close the Ok Tedi mine. PNGSDP was incorporated mainly for the benefit of Western Province and that is the reason why it held majority shares in OTML. The result of the expropriation is that Western Province has been left with a minority shareholding in OTML.

---

45 "Sir Mekere welcomes PM's court defeat over PNGSDP" (10 April 2019) Loop PNG <www.looppng.com>.

46 *Independent State of Papua New Guinea v PNG Sustainable Development Program Ltd* [2020] SGCA 44 at [52].

The only possible solution for the benefit of Western Province is for the Governor or a Member of Parliament from Western Province to file a Supreme Court reference asking the Supreme Court to determine the constitutionality of the Act of Parliament appropriating PNGSDP's shares in OTML. The Governor of Western Province or an elected member of Western Province would be an ideal candidate because they would fit the *locus standi* requirement of the Supreme Court to invoke its constitutional interpretation powers.

The constitutional challenge can be mounted under ss 18 or 19 of the PNG Constitution to enforce ss 53 and 57 of the PNG Constitution which provide for the right against unjust deprivation of property. The current shareholding by the people of Western Province in OTML is only a minority shareholding in the mine. Three landowner companies hold 33 per cent shares in OTML: Mineral Resource Ok Tedi No 2 (12 per cent equity); Mineral Resources CMCA Holdings (12 per cent); and Mineral Resource Star Mountains (nine per cent).[47]

The Mining (Ok Tedi Tenth Supplemental Agreement) Act 2013 was made pursuant to s 38 of the PNG Constitution. Laws can be passed under s 38 of the Constitution but there are certain criteria that must be fulfilled. In *NTN Pty Ltd and NBN Ltd v The State*,[48] Deputy Chief Justice Kapi set out the purposes for which laws can be made under s 38 of the Constitution. His Honour held in the Supreme Court:[49]

> section 38(1) of the Constitution sets out the purposes for which a law may be made when regulating or restricting a right. A law may be made for any one of three different purposes:
>
> (1) To give effect to public interest in defence, public safety, public order, etc. Section 38(1)(a)(i).
> (2) To protect the exercise of the rights and freedoms of others. Section 38(1)(a)(ii).
> (3) To make reasonable provisions for cases where the exercise of one such right may conflict with the exercise of another. Section 38(1)(b).

An Act of Parliament that is made pursuant to s 38 of the Constitution can regulate and restrict many of the civil and political rights conferred in subdivision C of Division 3 of the Constitution. However, there are several provisions in subdivision C that do not contain words permitting the regulation or restriction of specific rights. These include the s 53 protection from unjust deprivation of property.[50] The argument is that the above Act is unconstitutional because it seeks to restrict the application of s 53 of the Constitution.

---

47 David James "Going strong but for how long? Ok Tedi Mining announces strong profits and dividends" (27 May 2020) Business Advantage PNG <businessadvantagepng.com>.

48 [1992] PNGLR 1 (SC).

49 At 4.

50 Brian Brunton and Duncan Colquhoun-Kerr *Annotated Constitution of Papua New Guinea* (University of Papua New Guinea Press, Port Moresby, 1984) at 141.

This constitutional challenge would enable the funds held by PNGSDP and the majority shares in OTML to be used to fund development projects and sustainable income-generating opportunities after the closure of the mine. In the grand scheme of things, the people of Western Province would benefit if both the shares in the Ok Tedi mine and the future fund held by PNGSDP are vested in one controlling body. If the constitutional challenge is successful, this can come about. Even without the litigation, a negotiated solution could be worked out.

(b) Protection from expropriation under customary international law

In the case styled *PNG Sustainable Development Program Ltd v Independent State of Papua New Guinea*,[51] ICSID dismissed the expropriation claim by PNGSDP because the state did not provide written consent to arbitrate. PNG did not counterclaim for environmental damage. There has been a growing body of cases in ICSID which recognise the admissibility of counterclaims in respect of environmental obligations.[52] PNG could raise these if the proceedings were reopened, but it could be argued that they are not sufficiently connected to the primary claims or, alternatively, that they were permitted under the PNG law as it stood at the time of commission.[53] The complications arose because BHP had been superseded by PNGSDP. This also made it difficult to raise issues under the Bilateral Investment Treaty with Australia.[54] As a matter of customary international law, there are principles protecting foreign investment. The objectives of international foreign investment law are to provide international standards of protection and assure foreign investors of access to an independent international tribunal in the event of a dispute arising between the host state and a foreign investor.[55]

PNGSDP, with its incorporation in Singapore, has a separate legal identity: while having ownership of shares in OTML, the company is regarded as an alien in PNG. A general rule of international law has always been that access to justice for aliens is inseparable from the minimum standard of treatment of aliens. The international obligation of every state is to ensure access to courts

---

51 *PNG Sustainable Development Programme Ltd v Papua New Guinea*, above n 41.

52 See for example *Urbaser SA v Argentina (Award)* ICSID ARB/07/26, 8 December 2016; and *David Aven v Costa Rica (Award)* ICSID UNCT/15/3, 18 September 2018. See Debadatta Bose "*David R Aven v Costa Rica*: The Confluence of Corporations, Public International Law and International Investment Law" (2020) 35 ICSID Rev 20.

53 See Hege Elisabeth Kjos "Counterclaims by Host States in Investment Treaty Arbitration" (2007) Transnational Dispute Management <www.transnational-dispute-management.com>.

54 Agreement between the Government of Australia and the Government of the Independent State of Papua New Guinea for the Promotion and Protection of Investments [1991] ATS 38 (signed 3 September 1990, entered into force 20 October 1991).

55 Surya Subedi *International Investment Law: Reconciling Policy and Principle* (2nd ed, Hart, Oxford, 2012) at 12 and following.

for aliens and to administer justice under a minimum standard of fairness and process.[56] As a rule of thumb, foreign-owned property may not be expropriated or subjected to a measure tantamount to expropriation unless four conditions are met. They are as follows:

(1) An expropriation must be for a public purpose;
(2) It should be non-discriminatory;
(3) It is taken in accordance with applicable law and due process; and
(4) Full compensation is paid.[57]

The expropriation of PNGSDP shares in OTML was a direct breach of these customary international law principles. There was no compensation paid to PNGSDP for the expropriation of its shares. PNGSDP was not accorded the right to seek justice under the jurisdiction of ICSID because PNG did not give written consent. The matter should, therefore, be further pursued before ICSID. The PNG Investment Promotion Authority claims that PNG favours nations that are part of Asia Pacific Economic Cooperation (APEC), which include Singapore,[58] and thus this action is inconsistent with PNG's obligations under APEC.

B Mineral Resources Stabilisation Fund and the PNG Sovereign Wealth Fund

Even before the incorporation of PNGSDP, PNG considered the idea of SWFs. In 1974, PNG established the Mineral Resource Stabilisation Fund (MRSF). During that time, the MRSF was the only pure stabilisation fund in the region. MRSF's goal "was to buffer both the economy and the budget from the impact of commodity price changes."[59] Tax revenues, dividends and royalties from Misima mine, Porgera gold mine, the Kutubu oil development, Tolukuma mine and Ok Tedi accumulated here. It was designed to be a countercyclical balance to mining revenues, with in-built withdrawal guidelines to prevent politically-driven raiding of the coffers. The limits did not work. While withdrawals were USD 14.8 million in 1978, in the 1980s, several withdrawals of 30 million kina were recorded and the guidelines were eventually scrapped. In the 1990s, the Government experienced persistent deficits despite rising revenues, and by the end of the decade, the fund was

---

56 See James Crawford *Brownlie's Principles of Public International Law* (9th ed, Oxford University Press, Oxford, 2019) at 598.

57 Subedi, above n 55, at 73. It has been held that there must be just compensation for foreigners who are not automatic citizens (as determined by s 65 of the Constitution of the Independent State of Papua New Guinea) for the expropriation of their property: *Minister for Lands v Frame* [1980] PNGLR 433 (SC).

58 Investment Promotion Authority *The Papua New Guinea Investment Guide Book* (Investment Promotion Authority and Japan International Cooperation Agency, June 2014) at 13.

59 Eric Le Borgne and Paulo Medas *Sovereign Wealth Funds in the Pacific Island Countries: Macro-Fiscal Linkages* (International Monetary Fund, Working Paper WP/07/297, December 2007) at 8.

empty.[60] This was due to relaxed operation rules and poor integration with budget and fiscal policy which led to large fiscal deficits and public debts. The MRSF subsequently closed in 2001.[61]

C The Reinvention of Sovereign Wealth Funds in PNG

The idea of the reinvention of a SWF in PNG was mooted in government circles during and after the negotiations and the construction phase of the Papua New Guinea Liquefied National Gas Project (PNG LNG). In 2008, a study by ACIL Tasman on the impact of the PNG LNG project concluded:[62]

> A project of this magnitude will affect the economy of Papua New Guinea and its balance of trade situation profoundly. The net benefits for the country and its people are potentially very large.
>
> …
>
> The project is forecast to deliver direct capital investment of US$10 billion (K36 billion) in real terms over a 30-year life of the project. … GDP would more than double … to an average K18.2 billion per year.

In 2012, the Government of PNG decided that the legislative framework for the SWF would be enacted in an Organic Law. Organic Laws in PNG together with the Constitution are termed as constitutional laws. Organic Laws are second in the hierarchy of laws in PNG and are an extension of the Constitution, and only subject to it.[63]

1 PNG Sovereign Wealth Fund

Section 212(A) was inserted into the PNG Constitution to create a SWF. The SWF consisted of a stabilisation fund and a development fund.[64] Section 4 of the Organic Law on the Sovereign Wealth Fund provided that the objectives of the SWF are:

(a) to support macroeconomic stabilisation; and
(b) to support the development objectives of the Government including long-term economic and social development; and
(c) to support asset management in relation to assets accrued from natural resource revenue.

---

60 "Papua New Guinea Year in Review 2013" (20 January 2014) Oxford Business Group <www.oxfordbusinessgroup.com>.

61 Erdembileg Orchirkhuu and Keiko Takahashi *Papua New Guinea: Selected Issues* (International Monetary Fund, Country Report No 10/163, June 2010) at 7.

62 ACIL Tasman *PNG LNG Economic Impact Study: An assessment of the direct and indirect impacts of the proposed PNG LNG Project on the economy of Papua New Guinea* (6 February 2008) at v and vi.

63 Constitution of the Independent State of Papua New Guinea, s 9.

64 Organic Law on the Sovereign Wealth Fund 2012, s 3.

A minister is appointed to provide an investment mandate for the SWF in agreement with the board of the SWF. The board is accountable to the Minister in terms of producing reports of its compliance with the Organic Law.[65] The SWF board is created to oversee the investment and management of the SWF under the Organic Law.[66] The stabilisation fund receives deposits from all mineral and petroleum revenues, earnings from the investment of the mineral and petroleum revenues and other government contributions. In terms of withdrawal from the fund, where monies are standing to the credit of the stabilisation fund, the drawdown must be through the national budget and shall not exceed the 15-year long-term moving average of mineral and petroleum revenues as a share of non-mining revenue.[67]

The purpose of the development fund was to provide definite and ongoing funding for economic and social development under the development plans of the Government.[68] Revenue from the PNG LNG project would be deposited into the development fund and withdrawals would be made under an Act of Parliament. Commenting on the structure of the SWF, Avalos and others noted:[69]

> This fund is expected to [stabilise] PNG's economy, since PNG's SWF law explicitly stipulates that all [natural resource] revenues from mineral and petroleum and earnings from investments of [natural resource] revenues shall be incorporated into the fund. It also stipulates that the withdrawals from the stabilisation fund shall not exceed the 15-year moving average of mineral and petroleum revenues as a share of non-mining revenue.

However, in enacting the legislation, the Parliament of PNG made a fundamental error. This error meant that the Government had to reintroduce the legislation on the SWF.[70] Unfortunately, the incumbent government was ousted, and the government of Peter O'Neill took office. After making several changes to the 2012 format, the government passed the Organic Law on the Sovereign Wealth Fund 2015.

2 PNG Sovereign Wealth Fund 2015

With the adoption of the Organic Law on the Papua New Guinea Sovereign Wealth Fund 2015, the 2012 Organic Law was repealed and replaced. There were slight amendments to the structure and composition of the SWF and provisions for the SWF to be aligned with the Government's decision to

---

65 Section 6.

66 Sections 16–17.

67 Section 11.

68 Section 12.

69 Nayda Avalos and others *Papua New Guinea and the Natural Resources Curse* (Asia-Pacific Research and Training Network on Trade, Working Paper No 128, August 2013) at 36 (citations omitted).

70 David Osborne "What Has Happened to Papua New Guinea's Sovereign Wealth Fund?" (28 October 2014) Devpolicy Blog <www.devpolicy.org>.

consolidate its interests in state-owned enterprises under Kumul Consolidation, Kumul Minerals and Kumul Petroleum.

The SWF will consist of a stabilisation fund and a savings fund.[71] The objective of the SWF is to support macroeconomic stabilisation, intergenerational equity and asset management concerning assets accrued from mineral and petroleum receipts.[72] The functions of the Minister are to determine the investment mandate, receive and consider reports from the board and ensure that the board is achieving the SWF's objectives.[73] The purpose of the stabilisation fund is to manage the impact of fluctuations in mineral and petroleum receipts on the economy of PNG to promote and support macroeconomic stability and to ensure that large currency movements do not affect the competitiveness of the economy.[74] The purpose of the savings fund is to provide a means of preserving the real value of extracted mineral and petroleum resources through long-term investment for the benefit of current and future generations of citizens of PNG.[75]

Deposits into the stabilisation fund shall consist of:

- All earnings of the investment of the stabilisation fund.
- Fifty per cent of all mining and petroleum taxes.
- Sixty per cent of the proceeds of sale of any entity holding an interest or the state interest in an entity either directly or indirectly in mineral or petroleum interests.
- Withdrawals from the savings fund.
- Seventy-five per cent of all distribution from any of the state's holding entities.
- Any amount allocated in the national budget.[76]

Withdrawals (W) shall not exceed the five-year moving average of mineral and petroleum receipts (X) as a share of non-mineral and non-petroleum receipts (Y). (The moving average means that each year the five-year period will move forward by one year.) By s 12(3) of the Organic Law, withdrawals must not exceed the product of:[77]

---

71 Organic Law on the Sovereign Wealth Fund 2015, s 4(1).

72 Section 5.

73 Section 7.

74 Section 10.

75 Section 13.

76 Section 11.

77 David Osborne *Review of the Legislation establishing the Sovereign Wealth Fund in Papua New Guinea* (National Research Institute, Issues Paper 16, December 2015) at 6.

- the simple average of the yearly ratio of actual mineral and petroleum receipts to actual non-mineral and non-petroleum receipts for the last five years ending two years prior to the drawdown fiscal year; and
- actual non-mineral and non-petroleum receipts in the National Budget two years prior to the drawdown fiscal year, determined by the following formula (note that the formula is used to show the relative importance of mineral receipts compared to non-mineral receipts):

$$W_t = Y_{t-2}\left\{\frac{1}{5}\left[\sum_{s=2}^{6}\left(\frac{X_{t-s}}{Y_{t-s}}\right)\right]\right\}$$

(W=withdrawals, Y=non-mineral and non-petroleum receipts, X=mineral and petroleum receipts, t=time (years), s=2 years.)

Deposits into the savings fund shall consist of:

- Earnings of investment of the savings fund.
- Any surplus of the stabilisation fund after each balance reaches USD 1 Billion.
- Forty per cent of sale of any entity holding an interest or the state interest in an entity either directly or indirectly in mineral or petroleum interests.
- Twenty-five per cent of all distributions from any of the state's holding companies holding interests directly or indirectly in mining and petroleum projects.
- Between 25 per cent and 65 per cent whatever percentage is determined by Parliament of all dividends due to the state from non-holding companies holding interests in mineral or petroleum projects.
- Proceeds from sale of any non-mining or non-petroleum assets.
- Any amount allocated by the national budget.[78]

In terms of withdrawals, the savings fund's capital must not be withdrawn. However, withdrawals can be made from the income of the savings fund and shall not occur before the 10th anniversary. Withdrawals for each year must be equal to the real income of the savings fund earned two fiscal years prior to the year in which the withdrawal is being made. All withdrawals from the savings fund shall be directly deposited into the stabilisation fund.[79]

---

78 Organic Law on the Sovereign Wealth Fund 2015, s 14.

79 Section 15(5).

3 *Corporate governance of the 2015 Sovereign Wealth Fund*

The Minister is tasked with setting the SWF mandate and a board accountable to the Minister in terms of providing reports and achieving the SWF mandates was established.[80] The SWF board's function is to:

- Determine the investment strategies.
- Appoint the CEO of the Secretariat.
- Appoint fund managers.
- Appoint persons to assist the board.
- Instruct the fund managers in relation to the SWF's investment.
- Determine the functions of the Secretariat.
- Report to the Minister.
- Confirm that all requests from the fund are consistent with the Organic Law.[81]

The board of the SWF consists of seven members. Six are appointed by a committee.[82] The seventh member is the Minister for Treasury. The six board members are appointed for a term of five years.

4 *Comparison of 2012 Organic Law and 2015 Organic Law*

The biggest difference is the abolition of the development fund. The main reason why the development fund was abolished was that it "potentially created a parallel budgeting system and implementing structure for a significant portion of development expenditure which could undermine existing public financial management systems."[83] The "rationale behind channelling a portion of remittance flows into a sovereign development fund is to ensure more efficient management and investment in critical infrastructure."[84] Citizens of a country with the discovery of a large resource "will be wealthier in the future, and … it therefore makes sense to spend the resource windfall up front, to move the country toward its higher growth path faster".[85]

---

80 Section 17.

81 Section 18.

82 The committee consists of the Prime Minister, Leader of the Opposition, Governor of the Bank of PNG, Auditor-General and the President of the PNG Chamber of Commerce and Industry.

83 Osborne, above n 77, at 9.

84 Juergen Braunstein and Asim Ali "New Frontiers in Sovereign Wealth Fund Capitalization" in Paul Dobrescu (ed) *Development in Turbulent Times: The Many Faces of Inequality Within Europe* (Springer, Cham (Switzerland), 2019) 119 at 124.

85 Khalid Alsweilem and Malan Rietveld *Sovereign Wealth Funds in Resource Economies: Institutional and Fiscal Foundations* (Columbia University Press, New York, 2018) at 78.

5 *Link between the Sovereign Wealth Fund and PNG National Oil and Gas Company*

The link between the PNG SWF and the state-owned enterprise involved in the mining (Kumul Minerals) and petroleum sector (Kumul Petroleum) is provided for by s 7 of both the Kumul Mineral Limited Authorization Act and the Kumul Petroleum Limited Authorization Act. Both Acts call for a dividend to be paid into the SWF by Kumul Mineral and Kumal Petroleum as state-owned enterprises managing PNG's equity participation and ownership in mining and petroleum projects. Unfortunately, although the legislation for the establishment of the SWF has been passed, there has been no progress in establishing the SWF. The implementation of the Organic Law has been very slow, and the Treasury Department is yet to put together the relevant staff for the SWF.

6 *Problematic aspects of the PNG Sovereign Wealth Fund*

The slow start towards the implementation of the SWF is not the only problem that affects its effectiveness. There also needs to be some structural adjustments and amendments to its corporate governance practices to ensure compliance with the Santiago Principles and international best practices.

(a) Removal of political control

The Santiago Principles provide for the separation of political influence from the management of a SWF. Under the Generally Accepted Principles and Practice (GAPP), principle 9 provides that the operational management of the SWF should independently implement the SWF's strategies and follow clearly defined responsibilities. The SWF must be protected from undue and direct political interference and influence. As the owner, the Government determines the broad policy objectives of the SWF, but it should not intervene in decisions relating to particular investments.[86] Excessive political control is detrimental to SWFs. The PNG SWF needs to be shielded from the clutches of the Government or there will be a repetition of how the Government depleted the MRSF by excessive withdrawals and using its funds as collateral for loans. Bortolotti and others suggest most governments deliberately separate SWFs, "either legally, operationally, or both … from other ministries and agencies to shield the funds' managers from direct political pressure."[87]

---

86 Santiago Principles, above n 4, at 17.

87 Bernardo Bortolotti, Veljko Fotak and William L Megginson "The Rise of Sovereign Wealth Funds: Definition, Organization, And Governance" in Stefano Caselli, Guido Corbetta and Veronica Vecchi (eds) *Public Private Partnerships for Infrastructure and Business Development: Principles, Practices, and Perspectives* (Palgrave Macmillan, New York, 2015) 295 at 306.

In the PNG SWF set-up, excessive power to determine the SWF's mandate and to make amendments to it is vested in the Minister of Finance without parliamentary scrutiny. Osborne portrays this as follows:[88]

> The Minister can make changes to the Investment Mandate without the need to seek approval from Parliament or the Executive (NEC). Changes only need to be tabled in Parliament after they take effect. This allows the Minister great scope to adjust the Investment Mandate without seeking NEC or Parliamentary approval, leaving open the possibility of acting at odds with the objectives of the SWF, and therefore, potentially, against the interests of Papua New Guineans. There is a need for Parliamentary oversight of this process.

Because the Minister can change the SWF objectives without scrutiny, Bortolotti and others conclude that he or she:[89]

> may impose non-commercial, political objectives, not fully consistent with the shareholder wealth maximisation typically pursued by private firms, target valuation might be negatively affected. These objectives can be in the best interests of politicians (tunnelling of resources for private benefits), of their constituencies (in an attempt to gain votes and support …).

A better approach would be for the SWF board to set the investment mandate and the Minister to table it before the National Executive Council for approval than for it to be presented to Parliament for approval. If this is not practical, the Treasury Minister should present the investment mandate to Parliament for approval and any changes should also be approved by Parliament. This is because the investment mandate drives the function of the SWF and should not be subjected to political influences.

(b) Appointment of independent directors

The SWF board consists of members that are appointed by the Prime Minister, who acts as Chairman, and the following:

- Leader of the Opposition;
- Governor of the Bank of Papua New Guinea;
- Auditor-General; and
- President of the Papua New Guinea Chamber of Commerce and Industry.[90]

---

88 Osborne, above n 77, at 8.

89 Bernardo Bortolotti, Veljko Fotak and Giacomo Loss *Taming Leviathan: Mitigating Political Interference in Sovereign Wealth Funds' Public Equity Investments* (Baffi Carefin Centre, Working Paper No 64, December 2017) at 8 (citations omitted).

90 Organic Law on the Sovereign Wealth Fund 2015, s 22(3).

Although the criteria for appointing directors are spelt out in the Organic Law,[91] there is a need to emphasise the appointment of independent directors to serve on the board. In his work on the function of independent directors, Calder suggests that:[92]

> … the main principle is that [a] board should include a balance of executive and non-executive directors (with a particular emphasis on independent non-executive directors) in order to ensure that the board's decision-making is not dominated by a single individual or a clique of dominant individuals.

A fundamental way "to foster good governance and to improve the effectiveness of the board lies in its 'independence', which … [is] secured by prescribing a minimum number of independent directors."[93]

The board of the SWF should be expanded to include two independent directors to be appointed either by the Ombudsman Commission of PNG or the Auditor-General's Office. This is because these two institutions play the role of scrutinising the Government and their appointees to the SWF board will be independent and impartial.

The moment the law to establish the SWF was certified by the Speaker of Parliament, it was effective and binding. In an interview with *The National* newspaper, the Secretary for Finance Mr Dairi Vele stated:[94]

> In line with the requirements of the certified law, Treasury has commenced the preliminary work on establishing the SWF Board of PNG by engaging an independent and reputable human resources firm. The firm has already undertaken the search for potential candidates for possible appointment as the chairman and members of the SWF board in the labour markets in PNG and abroad (mainly the Asia-Pacific region). The report from the consulting firm will be presented to the screening committee as required by the [Organic Law on the Sovereign Wealth Fund]. The committee will screen the applications and make recommendations to the appointments committee which will decide and advise the Head of State to make appointments through a notice in the National Gazette. We expect to have the Sovereign Wealth Fund board and the management in place after the national election or by the fourth quarter of 2017.

---

91 Sections 24 and 25.

92 Alan Calder *Corporate Governance: A Practical Guide to the Legal Frameworks and the International Codes of Practice* (Kogan Page, London, 2008) at 70. See further Farrar and Hanrahan, above n 10, at [23.2] and following.

93 Lutgart Van den Berghe and Liesbeth De Ridder *International Standardisation of Good Corporate Governance: Best Practices for the Board of Directors* (Springer, Dordrecht, 1999) at 6.

94 Shirley Mauludu "Vele Explains Sovereign Fund" *The National* (online ed, Port Moresby, 7 June 2017).

To date, the PNG Government has not made any substantial decisions on the SWF, its board, and the manner of deposits to be made. Such a significant fund which will be of immense benefit to PNG is not being prioritised by successive governments.

IV CONCLUSION

PNG is new to the world of SWFs and so far, its experiences have been problematic. The first case reflects the colonial past and the difficulty of PNG in controlling its own economic destiny. It is arguable that the return which PNG got from the Ok Tedi mine did not compensate for the environmental damage caused. The attempt to vest the mineral rights in the state without adequate compensation of customary interests was always problematic. Likewise, the neglect of environmental impact on local customary rights and practices.

The divestment of its interest by BHP was well-meaning, but unfortunately got involved in the politics of PNG where there is an ongoing tension between central and local interests. This has worked to the detriment of the people of Western Province, the intended beneficiaries and those most prejudiced by environmental damage.

The second experience also reflects the changing politics of PNG. The idea of using a SWF to receive the royalties from oil, gas and petroleum is a good one, assuming that ownership interests have been worked out and there is fairness in receipt and distribution of the income. Until these are worked out, the new SWF will not get off the ground. All of this represents unfinished business under the PNG Constitution. The relationship between the state and customary interests in resources needs to be revisited.[95] The use of modern structures like SWFs can only then realise their full potential in a developing country.

95 See Glen Mola Pumuye "Legal Transplants: A Conflict of Statutory Law and Customary Law in Papua New Guinea" (2017) (4)2 IALS Student L Rev 31.