

LEGAL CONTROL OF FOREIGN INVESTMENT IN PAPUA NEW GUINEA

BY BRUCE L. OTTLEY*

I. *Introduction.*

On 16 September 1975, Papua New Guinea, after over 90 years of rule by Germany, Britain and Australia, became one of the last colonies to achieve independence. Yet despite its proximity to Australia and its position on the cross-roads between Asia and the South Pacific, Papua New Guinea has remained largely unknown to the world in general and Australia in particular.

As Papua New Guinea becomes an independent member of the world community, it can no longer afford to remain anonymous. The drive for rapid economic development will require large amounts of capital, capital not available at home. The country will, therefore, be forced to turn to overseas sources for the necessary revenue: foreign aid, loans from international agencies and private investment. While the focus of foreign aid and loans will be on governmental projects - schools, roads, hospitals - private foreign investment will be sought for commercial projects, particularly in the area of resource development.

Until recently Papua New Guinea was the almost exclusive preserve of Australian commercial investment, which operated with only minimum regulation. Thus it is understandable that with independence the Government has sought to broaden the sources of investment, and, at the same time, exert greater control over the types and conditions of investment to ensure that it contributes to development plans.

In the past year the Government has enacted a number of new laws both to encourage and to regulate foreign investment. At the same time older laws have been amended to fulfil new objectives. Now that the Government has begun to exercise new policies over investment proposals and projects, it is useful to examine the legislative powers available to achieve its goals. While it is too early to assess the long-term success or failure of these laws, this examination should help to set a perspective, both for the Government, which must administer the laws, and for the investor, who must conform his operation to them.

II. *The Economic Background of Foreign Investment.*

As with most colonies, one of the primary reasons for initial European interest in Papua New Guinea was commercial gain. In 1884 the German New Guinea Company was formed to conduct trading in the Bismarck Archipelago

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and establish plantations on the New Guinea mainland.¹ By the late 1880s copra plantations were already in operation on the island of New Britain.

Initial British interest in Papua, prompted by Australia, was in response to the perceived threat of German expansion in the northern half of the island. Thus in November 1884 the British proclaimed a protectorate over the southern half of the island.² The land held little attraction for settlers in the early years and it was not until after World War I that a few coconut and rubber plantations were established.

Throughout the colonial period, the pattern of the economy was European owned and managed enterprises with Papuans and New Guineans supplying the unskilled or semi-skilled labour. The early emphasis on agriculture was diversified in the years between the wars to include cocoa, coffee, tea and rubber. Manufacturing, however, was limited to a few small sawmills and plants producing soft-drinks and bakery goods. In the 1950s this was expanded to include a brewery, tobacco, furniture, paints, concrete and cigarettes.³

In 1965 the International Bank for Reconstruction and Development sent a mission to Papua New Guinea to make recommendations for economic development in light of eventual independence.⁴ The Mission viewed the country's economic progress in terms of "expanding production for export"⁵ particularly in the areas of copra, coffee, cocoa and rubber.⁶ The Mission placed no emphasis on manufacturing on the grounds that "there are no known natural resources to provide the basis for large-scale export industries."⁷

As part of the overall development program, the Mission recommended the adoption of a five-year plan. The first such plan (1969-1973) emphasised development along the lines of the World Bank's report. Thus by 1973 the economy of Papua New Guinea could be characterised as a highly dependent economy. This dependency can be defined by three characteristics: a high ratio of exports to gross domestic product, the concentration of exports in a few key commodities, and a high degree of control of the economy by foreign investors.

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1. P.W. van der Veur, *Documents and Correspondence on New Guinea Boundaries* Canberra (1966) pp. 14,
 2. C. Lyne, *New Guinea: An Account of the Establishment of the British Protectorate over the Southern Shores of New Guinea* London (1885) pp. 22-23.
 3. I.B.R.D. *The Economic Development of the Territory of Papua New Guinea* Baltimore (1965) pp.13-18.
 4. *Ibid.*
 5. *Ibid.*, at p. 32.
 6. *Ibid.*, at p. 33.
 7. *Ibid.*

1. High Ratio of Exports to Gross Domestic Product (G.D.P.)

In most developing countries exports account for one-third to one-half of the gross domestic product. Although the ratio was much lower for Papua New Guinea in the early years of the five-year plan, by 1974 the percentage was higher than for most countries.⁸

TABLE ONE

EXPORTS AND GROSS DOMESTIC PRODUCT

	<u>Exports</u>	<u>G.D.P.</u>	<u>%</u>
1968	\$ 76.5m	\$ 413m	18
1969	\$ 86.8m	\$ 453m	19
1970	\$ 99.4m	\$ 531m	19
1971	\$113.6m	\$ 622m	18
1972	\$143.2m	\$ 645m	22
1973	\$291.7m	\$ 786m	38
1974	\$531.0m	\$1,003m	53

2. The Concentration of Exports in a Few Key Commodities

Before the Bougainville copper mine was opened in 1973, three commodities - coffee, cocoa and coconut products - accounted for over 75% of all exports. With the opening of the copper mine, copper, coffee and coconut products account for over 85% of the total export earnings. The value of these exports is indicated in Table Two:⁹

TABLE TWO

PRINCIPAL EXPORTS

<u>Commodity</u>	<u>Export Value (1973-74)</u>
Copper	\$311,909,000
Coffee	\$ 28,847,419
Copra	\$ 23,672,242
Cocoa	\$ 23,516,863
Timber	\$ 16,815,021
Fish	\$ 14,176,746
Tea	\$ 2,601,511

8. Papua New Guinea Bureau of Statistics, *National Account Statistics* (1974) Tables 1 and 22.

9. The figures were supplied to the author by the courtesy of the Bureau of Statistics

3. A High Degree of Control of the Economy by Foreign Investors

The principal source of funds for the economy during the years of the first five-year plan was foreign investment, as Table Three demonstrates:¹⁰

TABLE THREE

SOURCES OF PNG INVESTMENT FUNDS

	<u>1968-69</u>	<u>1969-70</u>	<u>1970-71</u>	<u>1971-72</u>
Private Domestic Savings	\$ 42.1m	\$ 59.0m	\$ 88.3m	\$ 60.5m
Public Savings	-\$ 47.6m	-\$ 56.1m	-\$ 42.4m	-\$ 27.6m
Depreciation	\$ 15.8m	\$ 22.8m	\$ 32.4m	\$ 33.0m
G.D.S.	\$ 10.3m	\$ 25.7m	\$ 78.3m	\$ 65.9m
Net Transfer from rest of World	\$105.2m	\$173.8m	\$215.5m	\$180.9m
TOTAL INVESTMENT	\$115.5m	\$199.5m	\$293.8m	\$246.8m
Foreign Investment as % of Total	91.%	87.1%	73.3%	73.9%

By the end of the first five-year plan, it was estimated that 68% of Papua New Guinea's monetary sector was controlled by foreign investors, principally Australians.¹¹ In agriculture, Australian ownership of the cocoa industry was estimated at 60%, coffee 25%, copra 80%, tea 90% and rubber virtually 100%.¹²

Commerce and manufacturing were also dominated by Australian firms. It was estimated that 85% of all retail trade was conducted by Australian companies, principally Burns Philp, Steamships, W.R. Carpenter.¹³ Of the 2,376 locally registered companies and 572 foreign companies about 2,500 were owned by Australian individuals or companies.¹⁴

Much of the encouragement of foreign enterprise to invest in Papua New Guinea was the result of the *Industrial Development (Pioneer Industries) Act*¹⁵ which gave a five-year tax holiday to new manufacturers. Additional incentive came from the "Development Capital Guarantee Declaration" passed by the House of Assembly in 1966 which promised that foreign investors:

10. Papua New Guinea Central Planning Office, *Papua New Guinea's Improvement Plan: 1973-74* Table 2.6.

11. See: J. Camileri, "Australian Involvement in Papua New Guinea" ACOFA Research and Information Service Bulletin (April 1974) and F. Brenchley "The Stranglehold Australia Has .. And Will Keep .. on Papua New Guinea" *The National Times* November 19-24 (1973) p.8.

12. Brenchley, *op. cit.*

13. *Ibid.*

14. *Ibid.*

15. No. 4 of 1965.

shall not be subject to expropriation, nor to discriminatory taxation or other like levies, nor to oppressive trading legislation, nor to unreasonable limitations on repatriation.

Although this declaration was not binding on future assemblies, it "directed" them not to withdraw these guarantees "unless the proposed legislation has the support of the majority of the electors in a referendum."

At the same time, the newly created Development Bank co-operated by making over 50% of its loans to foreign companies or joint ventures of which expatriates were the majority share-holders.¹⁶

The end of the first five-year plan in 1973 saw the beginning of a shift in the emphasis of economic development. First, the pattern of economic development which resulted from the first five-year plan came under academic criticism from the Overseas Development Group of the University of East Anglia in its *Report on Development Strategies for Papua New Guinea*.¹⁷ The Group argued for "increased local, indigenous control of the economy"¹⁸ in order to achieve "increasing national self-reliance."¹⁹ "Self-reliance" was defined to mean "adaption of the economy so that it may become, after Independence, progressively less dependent upon ... foreign investment capital."²⁰ The Group assumed that:

after Independence it will not be acceptable to have one-half of the marketed output of the agricultural sector and 80% of the output of the modern sector owned and controlled by expatriate enterprises; and that consequently, in order to avoid serious disruptions of production and employment, means should be found and introduced to encourage transfer of ownership and control of substantial parts of these sectors to local interests.²¹

The second major stimulus to economic change came with the political developments that followed the April 1972 general elections, which resulted in the formation of the National Coalition Government, internal self-government in December 1973, and finally Independence in September 1975. During this period the Government re-examined in great detail the direction

16. Papua New Guinea Central Planning Office, *Papua New Guinea's Improvement Plan: 1973-74* p. 109.

17. University of East Anglia, *A Report on Development Strategies for Papua New Guinea* (1973).

18. *Ibid.*, at p.4.

19. *Ibid.*

20. *Ibid.*

21. *Ibid.*, at p.5.

of the economy and particularly the dominance of foreign investment. The first expression of the general direction in which the new government hoped the country would develop was contained in the *Eight Point Improvement Plan* which provided for:

1. A rapid increase in the proportion of the economy under the control of Papua New Guinean individuals and groups and in the proportion of personal and property income that goes to Papua New Guineans.
2. More equal distribution of economic benefits, including movement towards equalisation of income among people and towards equalisation of services among different areas of the country.
3. Decentralisation of economic activity, planning, and government spending, with emphasis on agricultural development, village industry, better internal trade, and more spending channelled through local and area bodies.
4. An emphasis on small-scale artisan, service and business activity, relying where possible on typically Papua New Guinean forms of organisation.
5. A more self-reliant economy, less dependent for its needs on imported goods and services and better able to meet the needs of its people through local production.
6. An increasing capacity for meeting government spending needs from locally raised revenue.
7. A rapid increase in the equal and active participation of women in all forms of economic and social activity.
8. Government control and involvement in those sectors of the economy where control is necessary to achieve the desired kind of development.

In its implications for foreign investment, the *Eight Point Improvement Plan* places its emphasis on small-scale, rural-based ventures with maximum participation by Papua New Guineans. However, the varying needs of the country, the nature of the projects and the Government's own financial abilities require a mixed approach to commercial activities: outright ownership of certain activities (i.e. airlines, shipping and some mining); participating with foreign enterprises in joint ventures; and control mechanisms (guarantees for job training, utilisation of local materials) in those areas where foreign enterprises are encouraged or permitted.

In November 1973 the then Chief Minister (and now Prime Minister) Mr. Michael Somare made a statement in the House of Assembly outlining a series of guidelines indicating the role of foreign investment in an independent Papua New Guinea. Mr. Somare stated that in formulating the guidelines the

Government considered a number of factors. These were that:22

1. "it will be necessary to attract private foreign investment to Papua New Guinea to achieve the aims of the government and bring about increases in real income and employment for Papua New Guineans."
2. "such investment is welcome in so far as it helps to meet the needs of Papua New Guineans."
3. "to attract and retain that investment which will contribute to the government's aims, it is necessary to set conditions which must be adhered to by investors, and, on the other hand, give a 'fair deal' to the investor in his dealings with Papua New Guinea."

The Eight Point Improvement Plan's emphasis on local self-reliance and the Prime Minister's insistence on strict control of foreign investment found final expression as National Goals in the Constitution. In order to achieve these goals Article 3 calls for:

1. citizens and governmental bodies to have control of the bulk of economic enterprise and production;
2. strict control of foreign investment capital and wise assessment of foreign ideas and values so that these will be subordinate to the goal of national sovereignty and self-reliance, and in particular for the entry of foreign capital to be geared to internal social and economic policies and to the integrity of the nation and the people;
3. the state to take effective measures to control and actively participate in the national economy and in particular to control major enterprises engaged in the exploitation of natural resources;
4. economic development to take place primarily by the use of skills and resources available in the country either from citizens or the state and not in dependence on imported skills and resources;
5. the constant recognition of our sovereignty, which must not be under-mined by dependence on foreign assistance of any sort and in particular for no investment, military or foreign-aid agreement or understanding to be entered into that imperils our self-reliance and self-respect, or our commitment to these National Goals and Directive Principles, or that may lead to substantial dependence upon or influence by any country, investor, lender or donor.

22. The Hon. Michael T. Somare, "Statement on Foreign Investment Guidelines" House of Assembly Debates (Third House) Vol. III No. 24 (27 November 1973), pp. 3212-14.

In order to implement these National Goals, the Government has a number of specific legal tools. This legislation can properly be divided into three types. First, there is general legislation applicable to all foreign enterprises. This includes the new *National Investment and Development Act* and those parts of other legislation (i.e., the *Companies Act* and the *Income Tax Act*) which deal specifically with foreign investment. Secondly, there is legislation dealing with particular areas of foreign investment. For example, mining, petroleum exploration, and fishing, have been singled out for specific legislative forms of control. Finally, certain investment projects require legislation outside the normal types. At the present time the Bougainville Copper Agreement and the Ok Tedi Mining Agreement are the major examples of such "ad hoc" agreements, although they have also been used for a number of smaller fishing, forestry and oil palm agreements. It is expected that such agreements will be used in the future for most major investment projects.

III. *General Legislation.*

A. The National Investment and Development Act

The *National Investment and Development Act*²³ was enacted by the House of Assembly in November 1974. The preamble states that the Act is to provide for the regulation, control and promotion of investment (particularly foreign investment) in the interests of national development.

Section 1 sets out the four general purposes of the Act:

1. to facilitate the channelling of investment into those fields of business activities which will make the best use of resources consistent with national development and investment policies;
2. to facilitate Papua New Guinean participation in investment and in the ownership, management and control of foreign enterprises;
3. to enable the identification of activities which will achieve the above purposes;
4. to provide for the control of foreign investment.

In order to achieve these goals, the Act sets out procedures for establishing guidelines under which foreign investment will be permitted in the country and establishes the National Investment and Development Authority (NIDA) to assist and supervise foreign investment in these areas.

1. Guidelines for Investment

The enactment of the *National Investment and Development Act* was the result of the National Coalition Government's attempt to reconcile two views of foreign investment. On the one hand, the desire for rapid economic development, coupled with a lack of domestic capital, has meant that the Government's direct financial involvement in economic activity will be of a limited nature. Thus there is a need by the Government for private foreign investment. However, the desire for greater economic participation by Papua New Guineans and diversification, both in geographical terms and in making the country more self-reliant and less dependent upon imports, has

23. No. 77 of 1974.

lead the Government to be selective about those foreign enterprises it will permit to operate.

In order for the Government to maintain a balance between these two needs, the Act requires the periodic formulation of a National Investment Priorities Schedule,²⁴ specifying the business activities in which foreign investment will be allowed and the terms and conditions of the investment in each area. The First Schedule was drawn up in April 1975 but has now been replaced by a much more detailed Second Schedule. This Schedule is divided into four parts:

1. *Priority activities* in which foreign investment will be actively sought by the Government. In the Second Schedule these include exploration for minerals, integrated timber projects, offshore fishing, and processing of fish, agro-based industries, construction of houses and professional and technical services.
2. *Permitted activities* in which new foreign investment will be permitted but which will not be actively sought by the Government. This list contains aspects of activities which are not considered a priority but in which foreign investment will be required for some time.
3. *Restricted activities* in which new foreign investment will be restricted to companies with substantial Papua New Guinean equity or joint ventures between foreigners and Papua New Guineans. These include plantation operations, agriculture processing, retail and wholesaling businesses involving investment of less than K25,000 and construction work involving contracts of less than K50,000.
4. *Reserved activities* in which foreign investors will not be allowed to undertake new ventures.

Section 8 specifically states the need for investment guidelines in preparing the Priorities Schedule and in the general implementation of the Act. The guidelines are set out in Schedule One to the Act and state that:²⁵

1. There should be maximum practicable use and expansion of facilities and services available from existing enterprises owned and controlled by Papua New Guineans.
2. The creation of desirable new enterprises owned or controlled by Papua New Guineans should be encouraged as far as practicable.

24. *Ibid*, s.40.

25. *Ibid*, Schedule 1.

3. Small-scale enterprises owned and controlled by Papua New Guineans should be encouraged as far as practicable.
4. The maximum use should be made of Papua New Guinean labour and in particular provision should be made for the employment of women and every effort should be made to rapidly increase the general level of skill of the Papua New Guinean work-force.
5. As rapidly as possible, Papua New Guineans should replace others at all levels of employment, particularly in managerial, professional and technical positions at the highest levels, and, if at any time suitably qualified Papua New Guineans are not available to fill any position, provision should be made especially by foreign enterprises for training with a view to having the position filled by a Papua New Guinean within a reasonable time.
6. The maximum use should be made of Papua New Guinean raw materials, manufactures and supplies.
7. As far as practicable, all processing of Papua New Guinean materials should be carried out in Papua New Guinea.
8. Investment in rural and less-developed areas should be encouraged.
9. Investment should be encouraged in industries that reduce reliance on imports and on existing exports.
10. Every effort should be made to conserve the environment.
11. The essential relation between the spiritual integrity of the people and their physical surroundings should be scrupulously respected.
12. Foreign enterprises should not endanger Papua New Guinea's national integrity or undermine its foreign policy and, in particular, no foreign enterprise should interfere in the affairs of Papua New Guinea.
13. Foreign enterprises should not receive more favourable treatment from the government than Papua New Guinean enterprises.
14. Foreign enterprises should, on balance, make an important positive contribution to the well being of Papua New Guineans generally, and should not have serious adverse effects on Papua New Guineans in the area in which the foreign enterprise is located.

15. In respect of natural resource industries, national and community benefits should be at the highest level consistent with the continued operation of the foreign enterprise.
16. As practical and appropriate, provision should be made in the case of any new foreign investment for the acquisition of equity by or on behalf of the Government, or for joint ventures with enterprises owned or controlled by Papua New Guineans.
17. The equity of the Government and of Papua New Guineans in large scale operations by foreign enterprises for the exploitation of natural resources should normally be as great as practicable.
18. In general, Government purchase of equity in foreign enterprises should be paid for out of future earnings.
19. Provision should normally be made for control of foreign enterprises to be transferred to Papua New Guinean hands.
20. Any ancillary economic activity generated within Papua New Guinea should be conducted, as far as possible, by Papua New Guineans.
21. In general, foreign enterprises should provide any required infrastructure, and where infrastructure is provided by the Government specifically for a project, it should, in general be a condition of its provision that the Government obtain an equity in the enterprise to the value of the infrastructure provided or be otherwise compensated for it.
22. In general, new foreign investment should come from a geographically wide range of sources, to avoid excessive dependence of the economy or a major sector the economy on a single country or a limited region.
23. In general, agreements with foreign enterprises should provide for the disputes between those enterprises and the Government to be settled by Papua New Guinean tribunals as if all parties to the dispute were Papua New Guineans.

A more detailed set of guidelines, applicable to particular activities, are contained in the Priorities Schedule.

Although the Act does contain a set of guarantees to investors, it seems, at least on paper, to be a break with the traditional approach to foreign investment which stressed incentives. However, the guidelines are just that - guidelines expressed in general terms that give some idea of Government policy. Recently the Government has stressed the promotional

aspects of the Act, particularly to attract industrial development in urban areas.²⁶ This change of policy will be reflected in the importance that will be placed on particular guidelines.

2. National Investment and Development Authority.

The National Investment and Development Authority (NIDA) was established by the Act as the body responsible for making recommendations concerning the Priorities Schedule and for the overall coordination of the Government's relations with foreign investors.

NIDA is a statutory body under the Minister for National Development.²⁷ Its functions include both promoting Papua New Guinea to potential foreign investors and exercising supervision over enterprises which do invest in the country. In his statement on foreign investment guidelines, Mr. Somare outlined some of the specific functions of the Authority:²⁸

1. Register all existing and new foreign enterprises in Papua New Guinea. Such registration will indicate the Government's approval of the particular project.
2. Recommend the establishment of Government Corporations in industrial fields.
3. Plan for the establishment and management of industrial estates and free trade zones.
4. Collaborate with the Central Planning Office and government departments in all aspects of investment planning.
5. Devise an investment promotion strategy.
6. Advise the Government as to incentives and conditions which may be appropriate to a particular investment proposal.
7. Report to Cabinet on any breaches of conditions laid down in the original approval and recommend appropriate action to ensure compliance.
8. Ensure that all negotiations between the Government and investors are consistent with the Government's aims and investment guidelines.

NIDA exercises its regulatory functions over foreign enterprises in two ways: through registration of existing and new investors, and through a process of continuing supervision to ensure that the enterprise fulfils the conditions of its registration agreement.

26. Papua New Guinea *Post-Courier* 13 October 1975, p.4.

27. No. 77 of 1974, s.10. Presently, the Prime Minister also holds this portfolio.

28. The Hon. Michael T. Somare, "Statement on Foreign Investment Guidelines" *op. cit.* p. 3213.

(a) Registration

At the time of the commencement of the Act, 6 December 1974, all "foreign enterprises ... carrying on business" in Papua New Guinea were required to notify NIDA of their existing activities and constitutions.²⁹ Section 2 of the Act defines a "foreign enterprise" as:

1. in the case of an enterprise that is a corporation -
an enterprise that -
 - (a) does not have its central management or control in Papua New Guinea, or
 - (b) has its voting power controlled by persons who are not Papua New Guineans; or
 - (c) is incorporated or established by or under the law of a place outside Papua New Guinea; or
 - (d) is the subject of a declaration under Section 6

and, without limiting the generality of those provisions, includes

- (e) an enterprise in which 26% or more of the voting power is held or controlled by persons who are not Papua New Guineans; and
 - (f) an enterprise in which 26% in number or value of the shares are beneficially owned by persons who are not Papua New Guineans; and
2. in the case of an enterprise that is a cooperative society or savings and loan society - an enterprise one or more members of which is not a Papua New Guinean, and
 3. any other enterprise one or more of the partners or members of which is not a Papua New Guinean;

and includes -
 4. ... an enterprise in which the management or control is in the hands of persons who are not Papua New Guineans; and
 5. an enterprise that is a natural person other than a Papua New Guinean; and
 6. an enterprise that is a public authority or an instrumentality of the Government or a place outside Papua New Guinea.

29. No. 77 of 1974, s.52.

Such a "foreign enterprise" is considered to be "carrying on business" in Papua New Guinea by doing any of the following acts:

1. establishing or using a share transfer or share registration office; and
2. administering, managing, or otherwise dealing with property as an agent, legal personal representative or trustee, whether by servants or agents or otherwise; and
3. maintaining an agent for the purpose of soliciting or procuring orders whether or not the agent is continuously resident in Papua New Guinea; and
4. maintaining an office, agency or branch (however described) whether or not the office, agency, or branch is also used for one or those purposes by another enterprise; and
5. undertaking a building, construction or assembly project which will not be completed within 12 months.

but an enterprise shall not be regarded as carrying on business by reason only that it -

6. is or becomes a party to an action or suit or any administrative or arbitration proceeding or effects settlement of an action, suit or proceedings or a claim or dispute; or
7. holds a meeting of its directors or shareholders or carries on other activities concerning its internal affairs; or
8. maintains a bank account, or
9. effects a sale through an independent contractor; or
10. by advertisement, solicits or procures an order which becomes a binding contract only if the order is accepted outside Papua New Guinea; or
11. creates evidence of a debt or creates a charge on real or personal property; or
12. secures or collects any of its debts or enforces its rights in regard to any securities relating to any such debts; or
13. conducts an isolated transaction which is completed within a period of 31 days, and not being one of a number of similar transactions repeated from time to time, or
14. collects information or undertakes a feasibility study.

15. invests any of its funds or holds any property; or
16. collects information or undertakes a feasibility study.

Subsequent to notification of existing activities, all foreign enterprises were required to apply for registration with NIDA as an existing foreign enterprise undertaking certain activities.³⁰ The enterprise will only be registered for those activities in which it notified NIDA it was engaged at the date of the commencement of the Act.³¹ Other activities will be considered as "new" activities and will be dealt with in the same manner as applications for registration by new companies.³²

Over 4,700 notifications of existing activities were received by NIDA during 1975. Thus the process of evaluation in order to determine registration will be lengthy. However, the first registrations were made in September 1975. Before the registration of the company is accepted, it must be considered by both NIDA and related Government departments.³³ A recommendation for registration by the Board of NIDA to the Minister for National Development may also be accompanied by a proposal as to the terms and conditions which the Board considers appropriate to the registration.³⁴

A foreign enterprise not "carrying on business" in Papua New Guinea at the date of the commencement of the Act (and existing enterprises which want to undertake new business activities) must apply for registration with NIDA.³⁵ The company must submit a "project proposal" setting out an outline of its intentions.³⁶ Such an application will be approved only if it conforms to the Priorities Schedule.³⁷ Registration of such new companies may also contain the terms and conditions under which the firm will be accepted.³⁸

(b) Guarantees

Once a company has been registered with NIDA, it is protected by the guarantees set out in Schedule 5 to the Act, entitled "Investment Guarantees". These Guarantees provide:

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30. *Ibid*, s.52.
 31. *Ibid*, s.51.
 32. *Ibid*, s.56.
 33. *Ibid*, s.54.
 34. *Ibid*, s.54(9).
 35. *Ibid*, s.56.
 36. *Ibid*, s.56(1).
 37. *Ibid*, s.56(5).
 38. *Ibid*, s.56(5).

1. There will be no nationalisation or expropriation of the property of the enterprise or its investors except -
 - (a) in accordance with law; and
 - (b) for a public purpose defined by law; and
 - (c) in payment of compensation as defined by law.
2. Subject to any laws relating to taxation and exchange control, the enterprise and its investors shall be allowed the right -
 - (a) to remit overseas earnings and expatriate capital, and
 - (b) to remit amounts necessary to meet payments of principle, interest and service charges, and similar liabilities on foreign loans, and other costs of other foreign obligations, approved by the Government.

at the rate of exchange prevailing under any law of Papua New Guinea at the time of remission or repatriation.
3. Subject only to the exchange rate prevailing under any law of Papua New Guinea at the time, the enterprise and its investors shall be allowed the right to remit overseas all compensation received in accordance with the guarantee set out in paragraph 1(c).
4. Subject to any agreement between the Government and the enterprise, no rate, tax, rent, charge, duty, tariff or other levy and no related procedure or practice shall discriminate against the enterprise or its investment on the ground of its origin.

(c) Supervision

In addition to promoting foreign investment and registering foreign enterprises, NIDA also has the function of continuing supervision of foreign companies to ensure that they fulfil the terms and conditions set out in their registration agreements. However, NIDA also has the power to exempt companies from its control and supervision. Such an exemption has been made in the case of all foreign companies which have contracts with the Government.³⁹

As part of its supervisory role, NIDA may require reports from companies, make visits and inspections and monitor the activities of Government departments in these areas. NIDA is given the legal powers to enforce its supervisory functions, including heavy penalties against investors who do not comply with the terms and conditions of their registration.⁴⁰

39. Papua New Guinea *National Gazette* No. G26 (25 March 1976), p.9.

40. No. 77 of 1974, s.65.

An important area of NIDA's supervisory functions is the regulation of company takeovers. Section 67 of the Act requires that NIDA be given immediate notice in writing of any offer by a person to acquire a share from another person in a local or foreign company. NIDA must give its approval to the transfer of any shares which result in a local company becoming a foreign company or which results in the change of ownership from one foreign person to another foreign person. This would include, for example, the case of a foreign person who owns or controls 10% of a foreign company who then obtains shares in the company which result in him own owning or controlling 26% or more of the shares. The procedures for registration would apply in such a case.

It is still too early to judge the effect of the *National Investment and Development Act* and NIDA on foreign investment and economic development. NIDA has been in existence only a short time and has devoted the major portion of that time to organisation and receiving notifications from foreign enterprises. The real test for the Authority will be in its recommendations for registration and in the supervision it exercises over foreign companies. The comprehensiveness of the Act and the power it gives to NIDA in these areas, means that ultimate responsibility for the effect of private foreign investment on the national economy rests with that body.

For the potential investor, as well as the Government, the Act is the most comprehensive and most important piece of legislation to result from the new attitude towards foreign investment. But although the focus of investment attention is now on NIDA, there are a number of other pieces of legislation with provisions relevant to foreign investors. For the most part, however, these provisions were enacted before self-government and Independence and reflect earlier attitudes towards foreign investment. The role of these provisions within the Government's framework of investment control must be re-examined. However, until that is done they must be considered because of their current importance to the foreign investor and the Government.

B. Companies Act

With the enactment of the *National Investment and Development Act*, the primary responsibility for the registration and supervision of foreign companies passed to NIDA. However, there are a number of residual, and overlapping requirements placed on foreign companies under the companies legislation.

The law applicable to companies, both foreign and domestic, in Papua New Guinea is contained in the *Companies Act*,⁴¹ which is substantially the same as the *Uniform Companies Act* adopted in the various states of Australia. The *Companies Act* defines a "foreign company" in much less detail than the *National Investment and Development Act* defines a "foreign enterprise."⁴² It is defined simply as:

- (a) a company, corporation, society, association, or other body incorporated outside the country; or
- (b) an unincorporated society, association or other body which, under the law of its place of origin,

41 No. 1 of 1964.

42 *Ibid*, s.5.

may sue or be sued, or hold property in the name of the secretary or other officer of the body or association duly appointed for that purpose, and which does not have its head office or principal place of business in the country.

The *Companies Act* places minimum requirements on the operation of foreign companies in Papua New Guinea. There is no requirement that foreign owned or controlled corporations operating in the country be incorporated in Papua New Guinea as a separate entity. All that is required is that a "foreign company" which is "carrying on business" (which is defined in the same manner as under the *National Investment and Development Act*) in the country must register with the Registrar General.⁴³

Unlike the *National Investment and Development Act*, the *Companies Act* provides for only minimum supervision of companies after registration. Once a year, a foreign company must file a copy of its balance sheet with the Registrar General⁴⁴ and supply him with all documents it would be required to file in its country of incorporation.⁴⁵ However, the Registrar General cannot require the balance sheet or any documents to contain information not required of a Papua New Guinean company.⁴⁶ Certain classes of foreign companies are exempt from even this requirement.⁴⁷

Thus the provision of the *Companies Act* are primarily notification requirements enacted at a time when foreign companies operated with almost total freedom within the country. Although these provisions remain in force, with the enactment of the *National Investment and Development Act*, there is now more detailed companies regulation and the *Companies Act* is no longer the primary focus of attention for foreign enterprises.

C. Taxation

The attitude of the National Coalition Government towards the taxation of investment profits was set out by the Prime Minister, Mr. Michael Somare, in his address to the Australian Institute of Directors. Mr. Somare stated that the benefits of resource development projects must go "to the mass of the people."

For this reason there will be increasing emphasis on taxation of resource projects so that the benefits can be redistributed to the people through Government projects ... I recognise that foreign companies often take risks in resource development projects and it is not intended to remove the

43. *Ibid*, s.346(1).

44. *Ibid*, s.348.

45. *Ibid*, s.348(1).

46. *Ibid*, s.348(2).

47. *Ibid*, s.348(5).

possibility of profit. But I do believe that foreign companies should be satisfied with a reasonable return on their investment, and should not claim absolute right to gigantic profits that are really produced by the earth and water of Papua New Guinea.⁴⁸

Despite these statements and the large number of amendments to the *Income Tax Act*⁴⁹ in the past three years, the Act is substantially the same as the pre-1966 Australian Act.

Under the Act, the rate of taxation on foreign companies, $33\frac{1}{3}\%$ ⁵⁰ is the same as that imposed on Papua New Guinean companies but considerably lower than the 45% imposed on private companies and the 50% imposed on public companies in Australia. In addition, the *Income Tax (Dividend Withholding) Act*⁵¹ imposes a dividend withholding tax of 15% on dividends paid by companies incorporated in Papua New Guinea to shareholders resident outside the country. Since NIDA now requires local incorporation of all foreign companies wishing to invest in Papua New Guinea, this provision applies to almost all companies operating in the country. This raises the effective rate of taxation in Papua New Guinea to about 40%, still lower than in Australia.

An important aspect of the rate of taxation is that imposed on what the Prime Minister has termed "windfall profits". Due to conditions of demand in 1973, the world price of copper rose sharply, greatly increasing the profits of Bougainville Copper Pty. Ltd. This was one of the factors which brought about pressures for the renegotiation of its contract with the Government in 1974. As a result of the complex formula which was devised as part of the new agreement, *Mining (Bougainville Copper Agreement) (Amendment) Act 1974* (No. 79 of 1974), the company paid the normal company tax rate on its first \$87.2 million in profits in 1974. This gave the company \$58.1 million in profit after tax on that amount. This amount was chosen as giving 15% of the original capital investment which was set at \$382 million. In the years after 1974 the capital investment is calculated on the basis of \$382 million plus any capital expenditure made by the company and minus depreciation of replaceable items. A "reasonable profit" will be considered any amount that will give the company up to 15% of the adjusted capital investment after the normal company tax is paid.

Although few investment projects are likely to result in such "windfall profits", they are not unlikely in the major resource areas. With the other copper deposits at Ok Tedi, potential petroleum reserves, and the Purari hydroelectric project, the 1974 Bougainville agreement provides a precedent for taxation of excessive profits at a high rate.

48. The Hon. Michael T. Somare, "Address to the Australian Institute of Directors", 14 March 1974, p.6.

49. No. 26 of 1959, as amended.

50. No. 71 of 1974.

51. No. 50 of 1972.

As was mentioned above, an important incentive to foreign companies during the period of the first Five-Year Plan was the *Industrial Development (Pioneers Industries) Act*, which provided for a five year tax holiday to new companies. However, it was decided in late 1973 to grant no new certificates.⁵² Instead, an amendment was added to the *Income Tax Act* in 1975 to give wholly owned Papua New Guinea companies such an exemption but not foreign companies.⁵³ This was in keeping with the statement made by the Prime Minister in his investment guidelines speech that the Government would rely on reduced taxes rather than total exemption as the primary tax incentive for foreign investors.⁵⁴

D. Foreign Exchange

Although Australian foreign aid will play a major role in Papua New Guinea's development plans, the country's financial stability will be greatly influenced by its foreign exchange policies. Yet these policies have been complicated during the past two years by the dramatic fluctuations in the country's external economic relations.

As a result of the opening of the Bougainville Copper project and the record world price of copper in 1973, Papua New Guinea went from an overwhelming deficit to a sizeable balance of payments surplus.⁵⁵ However, since the country's exports consist almost entirely of raw materials, it has been especially vulnerable to the subsequent depression in world prices. Fiscal policies have been further complicated by the dependence of the country on imports of all of its manufactured goods and petroleum needs which have been constantly rising in price. Finally, since major sectors of the economy are owned by foreign investors, there are constant pressures to remit earnings in foreign exchange to the home country.

The problems faced by Papua New Guinea are common to almost all developing countries and many developed countries. One of the tactics adopted by many of these countries to deal with this situation has been various forms of controls on foreign exchange; either to limit the amount made available for non-essential imports, or to regulate the amount that may be sent out of the country. However, an examination of the various controls adopted so far by Papua New Guinea indicates that while there is considerable potential power within the legislation, the Government has not yet adopted a stringent policy in its implementation.

52. The Hon. Michael T. Somare, "Statement on Foreign Investment Guidelines", *op. cit.*, p. 3213.

53. No. 32 of 1975.

54. The Hon. Michael T. Somare "Statement on Foreign Investment Guidelines", *op. cit.*, 3213.

55. Papua New Guinea Central Planning Office, *Papua New Guinea's Improvement Plan: 1973-74* Table 2.8.

Initial control over all transaction of foreign enterprises involving foreign exchange is given to NIDA in the *National Investment and Development Act*.⁵⁶ Any foreign enterprise which wishes to enter into any agreement in which payments are to be made in foreign exchange must notify NIDA first.⁵⁷ After reviewing the proposal, NIDA then submits a report to the Minister for National Development who may approve the agreement.⁵⁸ However, if the Minister does not give his approval, the matter is referred to Cabinet which then decides whether to approve or disapprove it.⁵⁹

Although NIDA thus has a supervisory power over the approval of projects involving foreign exchange, the details of Papua New Guinea's foreign exchange legislation are contained in the *Foreign Exchange Regulations*⁶⁰ issued pursuant to the *Central Banking Act*.⁶¹ These regulations give the Bank of Papua New Guinea control over three types of foreign exchange transactions: monetary control, foreign securities control, and control of proceeds from exports.

1. Monetary Control

Under the *Regulations* the Bank of Papua New Guinea must give its authority for a number of monetary transactions. These include:

- (a) buying, selling or exchanging any foreign currency from a person other than the bank;⁶²
- (b) making payments to or on behalf of a person resident outside Papua New Guinea or placing any sum on credit for a person outside Papua New Guinea;⁶³
- (c) borrowing Papua New Guinea currency from, or lending Papua New Guinea currency to a resident outside Papua New Guinea;⁶⁴
- (d) determining the rate of exchange for the conversion of Papua New Guinea currency into foreign exchange and vice versa;⁶⁵

56. No. 77 of 1974, ss.69-73.

57. *Ibid*, ss.70-71.

58. *Ibid*, s.71(3).

59. *Ibid*, s.71(6).

60. No. 46 of 1973.

61. No. 72 of 1973.

62. *Ibid*, s.5(1).

63. *Ibid*, s.8(1).

64. *Ibid*, s.9.

65. *Ibid*, s.5(4).

- (e) taking or sending Papua New Guinea currency or foreign currency out of the country.⁶⁶

However, the Bank may give authority to an "authorised dealer" to perform these transactions on its behalf.⁶⁷ The trading banks in Papua New Guinea have been appointed "authorised dealers" for this purpose.

The Bank also has the authority under the Regulations to require that any sum of money which is due to a person resident outside the country be paid into a "blocked account."⁶⁸ These are accounts in Papua New Guinea currency which belong to a non-resident or company and which may not be used to purchase foreign exchange or repatriation. The money may come from export proceeds, commercial profits, payments, amortisation funds or royalties. The usual reason for the Bank invoking such authority would be in the case of a shortage of foreign exchange. However, the Bank has never exercised this authority, and in any event, the internal use of the funds would not be restricted.

2. Foreign Securities Control

In addition to monetary control, the Bank also has the authority to control the acquisition, disposal or dealing in foreign securities.⁶⁹ The Bank may also require the owners of foreign securities to furnish the Bank a return containing any information it requires.⁷⁰

3. Control of Proceeds from Exports

Although import licences are not required and foreign exchange is made available by "authorised dealers" to importers upon evidence of shipment or receipt of goods, the Bank exercises overall control of all exports by requiring Central Bank authority for the export of any goods from the country.⁷¹ Such authority may be either in the form of a General Authority permit, where payment from overseas is received within six months before or after the date of export and the proceeds are sold to an "authorised dealer" in Papua New Guinea, or a Special Authority where the conditions of a General Authority cannot be met.⁷²

66. *Ibid*, s.6(1).

67. *Ibid*, s.23.

68. *Ibid*, s.10.

69. *Ibid*, s.13.

70. *Ibid*, s.14.

71. *Ibid*, s.16.

72. *Ibid*, s.16(3).

In April 1975 Papua New Guinea introduced its own currency, the kina and toea, but maintained a period of dual currency with the Australian dollar until 1 January 1976. With the end of this period, the convertibility of the kina into foreign exchange and its repatriation became an important consideration to foreign investors. The "Investment Guarantees" contained in the Schedule to the *National Investment and Development Act* provide a broad guarantee of convertibility, but only within the framework of more detailed legislation. However, in November 1975, the Minister for Finance, Mr. Julies Chan, outlined the Government's exchange control policy after the end of the dual currency period. Because of the desire to attract foreign investment, the Government indicated that it would apply a liberal policy towards the remittance of foreign exchange by investors to their home country. Instead the Government would rely on its tax policy to obtain what it termed "its fair share of the profits of expatriate busines."⁷³ After companies paid their income tax, dividend withholding tax and any other taxes, they would be free to remit all dividends to overseas shareholders.⁷⁴

E. Employment

In his address to the Australian Institute of Directors, the Prime Minister, Mr. Michael Somare, stated that:

Any major investment project will not only be expected to employ the maximum number of Papua New Guineans, but will also be required to provide training to increase the number of skilled citizens. We cannot afford to allow major companies in Papua New Guinea to acquire a trained work force simply by increasing the wage rates and attracting workers from other industries.⁷⁵

To accomplish this, the National Parliament has enacted a number of laws dealing with the employment practices of foreign enterprises. The *Migration Act* ⁷⁶ requires an entry permit for every "immigrant"⁷⁷ wishing to enter the country.⁷⁸ This permit must be issued before the person enters the country and may contain certain restrictions on employment.⁷⁹ The *Employment (Training and Regulations) Act*⁸⁰ gives

73. Papua New Guinea *Post Courier* 10 November 1975, p.1.

74. *Ibid.*

75. The Hon. Michael T. Somare, "Address ..." *op. cit.*, pp. 4-5.

76. No. 60 of 1963, as amended.

77. *Ibid.*, s.5(1) defines an "immigrant" as:

a person who was not born in the country and a person intending to enter, or who has entered, the country for a temporary stay only, where he would be an immigrant if he intended to enter, or had entered, the country for the purpose of staying permanently.

78. *Ibid.*, s.6.

79. *Ibid.*, s.6.

80. No. 99 of 1971.

the Government the power to refuse certain jobs to immigrants where it is satisfied that there are a sufficient number of qualified Papua New Guineans to fill the position.⁸¹ In addition, the Act provides that the Government may require that foreign investors who do employ persons from the home country to provide special training for Papua New Guineans to fill the particular job.⁸²

The Government supervises these employment practices through the *Employment Statistics Act*⁸³ which requires all employers to furnish the Secretary for Labour with an annual employment return.⁸⁴ Although there is provision for criminal prosecution for the failure to submit these reports, the penalties provided are not sufficient. As a result a significant number of employers fail to make the required report.

IV. *Special Legislation*

Papua New Guinea is rich in natural resources. We have large deposits of valuable minerals, millions of super feet of commercial timber, potentially valuable oil and gas reserves, while rich fishing grounds surround our island. These valuable resources provide the basis of many of our development plans.⁸⁵

Papua New Guinea's natural resources are, and will remain for the foreseeable future, the primary source of export earnings, and a prime attraction for foreign investment. For this reason, many of these resources have been singled out for special legislation affecting their operation. These resources and their legislation can be divided into four groups: minerals, agriculture, forestry and fisheries.

A. Minerals

Much of the early economy of both Papua and New Guinea was based on one mineral: gold. In Papua, gold mining was the principal attraction for Australians in the early years. In the 1930s, when copra prices collapsed, the economy of New Guinea continued to expand due greatly to the Bulolo gold fields.⁸⁶

81. *Ibid*, s.6.

82. *Ibid*, s.8.

83. No. 23 of 1971.

84. *Ibid*, s.3.

85. The Hon. Michael T. Somare, "Address ..." *op. cit.*, pp. 5-6.

86. I.B.R.D., *op. cit.*, pp. 222-23.

The opening of the Bougainville copper mine shifted the emphasis to copper mining as the single most important industry and export in Papua New Guinea. Bougainville now produces all of the copper and almost all of the gold in the country, although a number of other potential sites for copper deposits are under study.

Although the emphasis is now on large scale mining of copper, petroleum and natural gas, requiring large amounts of foreign capital, the present mining laws date from 1928 in New Guinea and 1937 in Papua and reflect the then pre-eminence of gold.⁸⁷ These acts may, however, soon be superseded by new mining legislation which is being prepared by the Department of Law.

The present acts establish the procedure for Ministerial approval of a prospecting authority, subject to any conditions imposed by the Minister.⁸⁸ The prospecting authority is for a limited time and area and a report must be filed with the Minister every three months giving the nature and result of the prospecting.⁸⁹

The holder of a prospecting authority has an automatic right to a mining lease.⁹⁰ However, this lease is also subject to limitations of time and area.⁹¹ In the case of large deposits where mining would be impracticable under the standard lease because of size, cost or methods of production, the Minister may require that a development agreement be negotiated before he will grant a mining lease.⁹² Such a lease was obtained in the case of the Bougainville copper project. Such leases may be for a greater length of time (42 years in the case of Bougainville) and area but still may be subject to terms and conditions imposed by the Minister.⁹³

Petroleum exploration began in Papua as early as 1912 and intense explorations were undertaken by the Anglo-Iranian Oil Company in the late 1930s.⁹⁴ Oil prospecting and extraction is currently regulated by the

87. *Mining (Papua) Act 1928.*
Mining (New Guinea) Act 1928.

88. *Mining (Papua) Act*, s.25(A).

89. *Ibid*, s.25(J).

90. *Ibid*, s.25(O).

91. *Ibid*, s.35.

92. *Ibid*, s.49(B).

93. *Ibid*, s.49(D) and (E).

94. I.B.R.D., *op. cit.*, pp. 225-27.

*Petroleum (Prospecting and Mining) Act*⁹⁵ although new legislation dealing with on-shore and off-shore explorations is due later in 1976. An interim measure, the *Petroleum (Submerged Lands) Act* currently regulates operations in off-shore areas.⁹⁶

In March 1976 the Government issued its first statement on oil and gas exploration and production.⁹⁷ In outlining the goals and objectives of the policy statement, the Government stated:

Papua New Guinea has good possibilities for oil and gas discoveries, although no commercial deposits have yet been established. We cannot, however, develop our oil and gas industry without the involvement of the international oil companies. These companies have both the modern technological expertise and the financial resources that are necessary to carry out the very expensive and very complex tasks of petroleum exploration and production. The Government and the people of Papua New Guinea at this time have neither the knowledge nor the money required. For this reason the Government sees great advantages in a partnership between foreign companies and the State in this field. The Government wishes to encourage maximum exploration activity so that the full extent of our country's resources can become known as soon as possible, and so that we can plan for the wise and efficient use of these resources. Therefore it is essential to establish now a firm and consistent policy that both safeguards the interests of the country and at the same time provides the necessary long-term stability of conditions that the oil companies required if they are to invest the hundreds of millions of kina that will be needed to establish an oil and gas industry.

The foreign companies are entitled to security for their investment and to a reasonable return on that investment, taking into account the services technology and financing that they provide, and the risks that they take in exploration. At the same time, the Government's policy must ensure that the people of Papua New Guinea, through the State, maintain adequate control over the industry, to see that it conforms to national policies, and that the nation as a whole obtains a fair share of the large revenues likely to be produced by an oil or gas industry.⁹⁸

95. No. 6 of 1951, as amended.

96. No. 9 of 1975.

97. *Government Statement on Petroleum Policy and Legislation* (March 1976).

98. *Ibid.*, at p.6.

In the future all oil companies wishing to operate in Papua New Guinea will be required to obtain a prospecting licence for prospecting or a development licence for production. A prospecting licence will be issued only after the negotiation of a Petroleum Agreement between the company and the Government, setting out all of the details of how the project would proceed in the event of a commercial discovery. An important element of this Agreement will be the determination of the Government's share. The Government has stated that it will take an active minority participation interest in all petroleum developments, with the exact percentage to be determined in each project by negotiation between the parties. The Government's share of the exploration and development costs will be financed through a system of "carried-interest" under which the Government's costs will be lent to it by the company and repaid from the income on the Government's share of production. To administer the Government's participation interests, a specialised Government agency, the National Petroleum Authority, will be established.

Oil companies operating in Papua New Guinea will be subject to a tax rate of 50% of taxable income under a proposed Petroleum Income Tax which will replace, for companies producing oil and gas, the Income Tax Act and the dividend withholding tax. In addition, once a "reasonable rate of return" (defined as 25% money return on total funds invested in the project) has been achieved, the companies will pay an additional profits tax of 50% of the net cash receipts. This additional profits tax will not, however, apply to natural gas operations. Here the Government will receive a free "participation interest" - not repayable to the company - equivalent to an 8 - 16% royalty, depending on the size of the field and the rate of production.

In addition to the control and taxation policies, the Government has placed other requirements on prospective oil companies. They will be expected to conform to strict pollution controls, establish localisation and training programmes, use local supplies and equipment where possible, and assist Papua New Guinea citizens in setting up service businesses associated with the industry.

B. Agriculture

The days of Papua New Guinea as a plantation economy, owned and controlled by foreign interests, are ending. Although coffee, copra and cocoa still rank as Papua New Guinea's second, third and fourth largest exports, and cocoa and copra are still primarily owned by Australian interests, the old plantation system is rapidly breaking down as local land groups are formed to buy back alienated land. Thus agriculture will not be an area of foreign investment in the future.

In the past, controls on investment and export of agricultural products have been minimal. Under the *Land Act*⁹⁹ a Papua New Guinean was prohibited from selling his land to other than another Papua New Guinean.¹⁰⁰ However, the Administration was given the power to buy land from Papua New Guineans and then sell it to Europeans. Thus someone wishing to establish a plantation was required to purchase his land through the Administration.¹⁰¹

99. No. 6 of 1963, as amended.

100. *Ibid.*, s.81.

101. *Ibid.*, s.16.

Once a plantation was established, the only government control was through registration prior to export of the commodity. the *Cocoa Industry Act*¹⁰² requires registration with the Minister responsible in order to export cocoa; the *Coffee Marketing Board Act*¹⁰³ requires registration with the Coffee Marketing Board before exporting coffee; and the *Copra Marketing Board Act*¹⁰⁴ provides that only the Copra Marketing Board may export copra.

C. Forestry.

Forests cover over 75% of Papua New Guinea and represent one of the country's largest assets. Because of the costs involved and the scale of operation, their development will rely heavily on foreign investment.

There are two different systems relating to large scale exploitation of forests in Papua New Guinea. *The Forestry Act*¹⁰⁵ provides for the acquisition by the Government of timber rights and for subsequent dealing with them by the Government.¹⁰⁶ The Minister responsible may then grant permits giving an exclusive right to cut timber from the land.¹⁰⁷ The Government has stated that in negotiating timber concessions it will require, in the agreement, for the encouragement of locally owned business ventures associated with the timber project. The permittee will be obligated to assist Papua New Guineans in businesses connected with the main timber operation, such as log supply, felling, snigging, hauling and road preparation.¹⁰⁸ The company will also be required to undertake a programme of reforestation.¹⁰⁹

The *Forestry (Private Dealings) Act*¹¹⁰ allows for direct dealings (with the consent of the Government) between local forest rights owners and third parties.¹¹¹ Under the Act, local persons may apply for a Local Forest Area declaration which, if granted gives the local owners the power to sell the rights to remove timber from the land.¹¹²

102. No. 46 of 1958, as amended.

103. No. 64 of 1963, as amended.

104. No. 70 of 1952, as amended.

105. *Forestry (Papua) Act*, No. 7 of 1950, as amended.
Forestry (New Guinea) Act, No. 27 of 1951, as amended.

106. Forestry Acts, ss. 13-16.

107. *Ibid.*, s.15.

108. Papua New Guinea Central Planning Office, *Strategies for Nationhood* (1974) p.115.

109. Forestry Acts, s.15(B).

110. No. 107 of 1971.

111. *Ibid.*, s.8.

112. *Ibid.*, s.7.

D. Fisheries

The value of Papua New Guinea's fisheries exports has grown rapidly from A\$.4 million in 1968/69 to A\$10.1 million in 1973/74.¹¹³ To deal with this increased activity, two new acts, the *Fisheries Act*¹¹⁴ and the *Continental Shelf (Living Natural Resources) Act*¹¹⁵ were passed in 1974 to provide greater control over marine activities in Papua New Guinea waters.

The Fisheries Act requires that all persons engaged in fishing in the "declared fishing zone" must obtain a licence from the Governor-General, acting on the advice of Cabinet.¹¹⁶ The Act defines two types of boats: Papua New Guinea boats and foreign boats. A "Papua New Guinea boat" is defined as:¹¹⁷

a boat the operation of which is based on a place in Papua New Guinea and that is wholly owned by a natural person who is a resident of, or by a company incorporated in, Papua New Guinea, being a boat that -

- (a) was built in Papua New Guinea, or
- (b) has been lawfully imported into Papua New Guinea, otherwise than for a limited period, or
- (c) has been sold or otherwise disposed of in Papua New Guinea after having been forfeited or distrained under an Act or an Act of Australia.

A "Foreign boat" is defined as a boat other than a Papua New Guinea boat.¹¹⁸

Although NIDA will require all fishing licencees to have boats registered in Papua New Guinea, the distinction between a "Papua New Guinea" boat and a "foreign boat" will remain important for three reasons:

1. The Granting of fishing licences is discretionary. since only a limited number of such licences will be issued, it would appear that a Papua New Guinea boat will be given first preference.
2. In relation to "foreign boats" the Act currently regulates their activities only within a 12 mile limit. However, a "Papua New Guinea boat" is subject to regulation not only within the 12

113. Papua New Guinea Central Planning Office, *Papua New Guinea's Improvement Plan: 1973-74* Table 4.4.

114. No. 31 of 1974.

115. No. 29 of 1974.

116. No. 31 of 1974, s.7(1).

117. *Ibid.*, s.2.

118. *Ibid.*, s.2.

mile limit, but outside in any area declared to be a "declared fishing zone."¹¹⁹ The whole question of how much of the sea should be under the control of Papua New Guinea is currently under review in light of the Law of the Sea conferences but it is expected that the country will declare a 200 mile economic zone which would give control over all fishing activities to that limit.

3. The penalties imposed for violations of the regulations are much heavier for foreign boats than for Papua New Guinea boats.¹²⁰

Papua New Guinea's control over marine activities is further extended by the *Continental Shelf (Living Natural Resources) Act* which implements the 1958 Geneva Convention on the Continental Shelf.¹²¹ The Act gives Papua New Guinea sovereign rights over the continental shelf, which is defined in the Convention as the prolongation of the land mass to a depth of 200 meters or beyond that to the extent that the depth of the waters permit the exploitation of the seabed and subsoil. A licence must be obtained to take any minerals or organisms which cannot move off the bottom of the continental shelf.¹²² As with the *Fisheries Act*, the granting of licences to remove such minerals is discretionary with the Governor-General, acting on the advice of Cabinet, and, since licences will be limited, preference again would likely be given to Papua New Guinea boats.¹²³

V. *Ad Hoc Agreements.*

In addition to legislation dealing with specific areas of investment, which set out particular requirements (i.e., registration or licences) but otherwise bind the investor to the general laws of the country, are those special projects in which the agreement is given pre-eminence over the general legislation of the country. There are two basic reasons for such special agreements:

1. the inadequacy of existing legislation to deal with the scope of the particular project; and
2. the desire of the investor for special tax status.

119. *Ibid.*, s.3.

120. *Ibid.*, ss.13, 15, 16 and 17.

121. (1964) 499 U.N.T.S. 311.

122. No. 29 of 1974, s.8.

123. *Ibid.*, s.8(1).

In Papua New Guinea the principal examples of such special "ad hoc" agreements are the *Mining (Bougainville Copper Agreement) Act*¹²⁴ and the *Mining (Ok Tedi Agreement) Act*.¹²⁵

A. Bougainville Agreement

In the early 1960s large-scale deposits of copper were found near Panguna on the island of Bougainville. In June 1967 an agreement was signed between Bougainville Copper Pty. Ltd. (a subsidiary of Conzinc Riotinto of Australia and Rio Tinto Zinc of the United Kingdom) and the Australian Administration of Papua New Guinea, to mine and export the copper.¹²⁶

The Agreement conferred considerable quasi-governmental powers on the company in the running of the mine.¹²⁷ The Administration received only an entitlement to purchase up to 20% of the share capital of the company and was forced to raise the funds on the international loan market. In addition the Agreement created an obligation on the Administration to provide a considerable part of the infrastructure and services required for the project.¹²⁸ More importantly, an attempt was made in s.6 of the Act to exempt the Agreement from the control of other legislation in the country.

No law at any time in force in the country or a part of the country made after the date of this Act shall affect this Act or Agreement -

- (a) unless the contrary intention appears, either expressly or by implication, in the law;
- (b) except as provided by the Agreement; or
- (c) unless before the law comes into force the Company consents thereto.¹²⁹

The means for varying the Agreement were provided by s.5 of the Act. This required further agreement by the Minister responsible and the Company, and the approval of the House of Assembly. A unilateral variation of the Agreement by the Government was to be treated as a breach of the Agreement.

124. No. 70 of 1967.

125. The agreement between the Papua New Guinea Government and Dampier Mining Company was completed in March 1976 and embodied in the *Mining (Ok Tedi Agreement) Act*, No. 33 of 1976.

126. No. 70 of 1967.

127. See clause 8(c) and (d) and clause 14 (b) and (c) for examples.

128. *Papua New Guinea Budget Papers* 1973-74.

129. No. 70 of 1967, s.6(3).

The Company was granted additional exemption from the regulations and control of the Administration under clause 17 of the Agreement. Under clause 17(a), the Administration was prohibited from interfering with the rights of the Company, members of the Company and beneficial owners of shares in the Company to choose its directors, managers, employees and suppliers, pay dividends or be subject to discriminatory industrial, fiscal or social legislation. Under clause 17(b) the Administration was prohibited from cancelling any lease or expropriating any assets. Finally, clause 17 prohibited "any substantial interference with the rights of the owner fully to utilise and enjoy or to deal with or dispose of the asset, product or share" of the Company unless:

1. the action would not, except for the definition, constitute expropriation;
2. the price paid is "equitable ... in the circumstances of the case ... having regard to similar action taken in relation to other persons in the country;"
3. the taking is necessary "for the peace, order and good government of the Territory."

Finally, the Company was exempted from the general laws of the country in the area of taxation. Clause 7(a) provided:

The income of the Company shall be exempt from income tax for a period commencing on the date on which the Company first enters into commercial production of copper concentrates under this Agreement and ending on the last day of the period of three years next following that date ...

Subsequently the Company was to be taxed at 50% of taxable copper income but this rate was to be reached only by a four year progressive step from the general rate of company tax. In addition the Company was allowed to take accelerated depreciation in the years immediately following the exempt period. This would have the effect of postponing any tax liability for an additional 3 or 4 years depending on the amount of profits.

The 1972 general elections and the formation of the National Coalition Government produced a new concern for the direction of the economy and the effects of foreign investment. Mining policy was one of the first areas to come under review. In September 1972 the regional member for Bougainville in the House of Assembly, Father John Momis, introduced a motion to give the Government control over mining projects and the benefits from them.¹³⁰ This debate continued until late in the year but finally produced a new set of guidelines for mining ventures. These provided that:¹³¹

130. House of Assembly Debates (Third House) Vol. III Nos. 8 and 9 (27 September 1972 and 16 November 1972), pp. 886-89 and 1087-1112.

131. Papua New Guinea Central Planning Office, *Papua New Guinea's Improvement Plan: 1973-74*, pp. 82-83.

1. *Revenue:* the Government should receive in the area of 50% of the profits from mining ventures in the form of taxes.
2. *Equity:* the Government will seek options to purchase equity in major mines. In addition, contributions by the Government to infrastructure associated with mining projects will normally entitle the Government to a share of equity in proportion to its contribution.
3. *Royalty:* a minimal royalty rate of 1% of the value of gross metal content will be required. A proportion of this royalty will go to landowners in the area affected by mining.
4. *Infrastructure:* all facilities associated with a mine will normally be paid for by the mining company. At the end of the mine life, the infrastructure will revert to the Government or the landowners.
5. *Legal Structure:* prospecting and exploration may be undertaken by registered foreign companies but mining may only be undertaken by Papua New Guinea incorporated companies.
6. *Employment:* the Minister for Mines may require feasibility studies to determine the employment creation potential of different methods of mining. In addition, mining agreements must contain definite localisation objectives.
7. *Local Purchasing:* local goods and services must be used whenever they are available at competitive prices and quality.
8. *Processing:* the Government may require feasibility studies of smelting, refining, and fabrication operations in connection with mining development.
9. *Review of Agreements:* the Company and the Government must review major clauses of the agreement every ten years.
10. *Conservation:* the Government will have the power to require the use of the most modern and effective conservation measures.

The first public call for the specific renegotiation of the Bougainville Agreement came from Father Momis in a paper delivered at the Seventh

Waigani Seminar in May 1973.¹³² This pressure was intensified early in 1974 with the formation of a group which called upon the Government to renegotiate the Agreement or resign.¹³³ Despite the insistence by the Company that "a deal is a deal",¹³⁴ talks were held between the Company and the Government which resulted, in September 1974, in a new Agreement containing a number of variations from the 1967 Agreement.¹³⁵ Although the principal changes were in the area of taxation, there were also changes in the operation conditions and status of the agreement.

Although no change was made in the basic 1967 provision giving the Agreement the force of law, s.6 was amended to delete the requirement of Company consent to any further changes. Thus the Agreement was made subject to amendment by the House of Assembly in line with all other laws in the country.

Under clause 17 of the 1967 Agreement, the Government had been prohibited from interfering with certain internal activities of the Company and from enacting any industrial, fiscal or social legislation which discriminated against the Company. This clause was changed in the 1974 Agreement to provide that such prohibition must now

be read and construed subject to the laws of Papua New Guinea of general application whether enacted before or after the Agreement date which do not discriminate against or (having regard to reasonable standards) result in discrimination against the company, its members or the beneficial owners of its shares, and nothing contained in any such law shall give rise to any claim by the Company, its members or beneficial owners of its shares by reason only of the provisions of this paragraph.¹³⁶

Under the revised Agreement, the Government sought a larger share of the mine's profits not through greater equity participation, which remained at 20%, but through a change in the tax structure. Clause 7 of the 1967 Agreement was changed so that the tax holiday for the Company terminated on 31 December 1973. In addition, the Company would no longer be able to take accelerated depreciation on its capital under the new Agreement. Instead

132. Father John Momis, "Bougainville Copper: The Case for Renegotiation" in Zorn and Bayne (eds.) *Foreign Investment, International Law and National Development* Sydney (1975), pp. 123-28.

133. Papua New Guinea *Post Courier* 5 February 1974.

134. Papua New Guinea *Post Courier* 6 February 1974.

135. No. 79 of 1974.

136. *Ibid.*, c.14 of the Schedule.

the Company would now pay the normal company tax rate and a "windfall profits" tax on yearly profits above A\$87.2 million. These tax changes had the effect of raising the Government's share of the revenue from the Company's 1974 operations from A\$32 million to A\$93 million.

Finally, clause 23 of the 1967 Agreement was changed to ensure that the *Arbitration Act*¹³⁷ would be applied to the settlement of any dispute, question or difference between the Company and the Government. In the case of such a dispute, three arbitrators are to be appointed: one by the Company, one by the Government and a third to be agreed upon by the parties. If the parties are unable to agree on the third arbitrator, he will be selected from a panel of five proposed by the President of the Asian Development Bank.

B. Ok Tedi Agreement

In March 1976 the Papua New Guinea Government completed its second major "ad hoc" resource agreement, this time for the development of copper deposits in the Star Mountains of the Western Province.¹³⁸

Although earlier negotiations with the Kennecott Company, held at the same time as the Bougainville renegotiation talks, proved unsuccessful, the Government finally reached an agreement with the Dampier Mining Company, a wholly owned subsidiary of the Broken Hill Proprietary Company, under which efforts will be made by the Company to form an international consortium to explore and then develop, if practicable, the copper deposits.

The Ok Tedi Agreement is based heavily on the 1974 Bougainville Agreement in the areas of Government equity (20%), legal status of the agreement, control and arbitration. The major difference is in the area of taxation where, although the principles between the two agreements are the same, the means used are different.¹³⁹

In the 1974 Bougainville Agreement, a "reasonable return" on investment was allowed to the Company each year. This was because the Company already had had two good years and had received sizeable profits. In addition, the Government wanted the windfall profits from 1974, a record year for the world price of copper.

Under the Ok Tedi Agreement the Company is given an initial "Investment Recovery Period" when it will pay the normal company tax rate (but not to exceed 35%). This period will continue until the Company's taxable incomes in all tax years from the beginning of commercial production exceeds its total investment. Once the Company then recovers a "reasonable return" on this total investment (20%) it will pay a higher tax rate in every year, unless it loses money.

With the 1974 Bougainville Agreement the Government has developed a model agreement to be used in future mining negotiations. However, the Government has also indicated that "ad hoc" agreements will be negotiated

137. No. 46 of 1951.

138. *Mining (Ok Tedi Agreement) Act* 1976 (No. 33 of 1976).

139. *Ibid.*, clause 23.

for each oil project. At the present time no such agreement has yet been negotiated although the framework of future negotiations is indicated in the Government's policy statement.

VI. *Conclusion.*

The avowed emphasis in economic development in Papua New Guinea is on small-scale, rural based projects with maximum participation by Papua New Guineans. Yet much of the country's potential wealth lies in resources whose development will require capital and technology beyond the present capacity of the country. Therefore there is a recognition that some forms of foreign investment will be required to develop these resources. But whether this foreign investment will also accelerate the overall economic development of the country will depend on what goals that investment is to serve and what measures are taken to implement them.

The traditional approach to foreign investment by developing countries was through competition based on the granting of incentives, concessions and guarantees. The countries sought to exert little control over the projects and, in return, received little benefit from them. In this respect Papua New Guinea's investment history is not typical. Yet the country's late economic development has in some respects been fortunate. Only recently has serious thought been given by developing countries to regaining and exerting meaningful control over their resources. As late as 1967 the Administration gave the Bougainville Copper Company sizeable incentives and allowed it to operate with almost no accountability to the Government. However, by 1974 the Papua New Guinea Government sought a major renegotiation of the agreement to give it a larger share of the profits and make the Company subject to the general laws of the country.

This re-examination of investment policies by the developing countries was spurred by the record world commodity prices in the early 1970s (and the resulting desire for a greater share of the profits they produced) and by the corresponding rise in the cost of imported goods and petroleum. In Papua New Guinea these events had the added significance of occurring against the background of the rapid move to Independence which included a critical review of the entire way in which the country had been developed during the Australian Administration.

The rhetoric about future investment policy has been tough and the legislation which has been produced by it has established an elaborate system of controls. The stress - at least on paper - has been away from incentives. But in some areas Papua New Guinea can afford to be selective. Its natural resources - copper, petroleum, timber, fish and hydroelectric power - are eagerly sought by the world community despite the current depression in market prices.

While the few major investment projects are in the area of resource development, the overwhelming majority of the 4,700 foreign enterprises which registered with NIDA in 1975 are small operations. It was primarily to improve controls over this type of investment that NIDA was established. As the overall regulatory agency dealing with foreign investment, its functions include not only the promotion of investment from abroad, but the drawing-up of investment guidelines and the registration and supervision of foreign companies. To be totally effective in all of these areas is

probably too much for any Government body at this stage in the country's development. Yet through its investment guidelines it can channel investment into specified areas and provide a "watchdog" function. How well it succeeds will depend on the power given NIDA and the expertise it develops.

In the area of major resource projects, the Government's control will come through individual project agreements. Here the Government has indicated that its goals will be achieved not from a requirement for majority ownership but through taxation and specific provisions in the agreement establishing infrastructure, training and localisation programmes, local business development and environmental protections.

As was stated at the beginning of this paper, it is still too early to judge whether the legislation of the past year is sufficient to give Papua New Guinea effective control over foreign investment projects to ensure that they contribute to national goals. On paper the Government has given itself considerable power. It remains to be answered whether the will to exercise that power exists.