Economic Development Contracts and Investment Security in Papua New Guinea

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Contract as a Means for Channelling Investment Project 688
Choice of Law 690
Stability Clauses 691
Adaptation, Re-Negotiation, and Force Majeure Clauses 697
Adaptation clauses 697
Re-negotiation clauses 698
Force majeure clauses 702
Host Country Equity Participation 703
Dispute Resolution Machinery 704
Political and Economic Leverage 706
Home country political leverage 706
Economic leverage (risk management) 712
Conclusions 716

A number of agreements have been made between the government and foreign investors for the development of mining and petroleum projects in Papua New Guinea. These include the Bougainville Agreement,[1] the Ok Tedi Agreements,[2] the Misima Agreement,[3] the

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1. Mining (Bougainville Copper Agreement) of 6 June 1967 (hereafter, "the Bougainville Agreement"). This Agreement is scheduled to the *Mining (Bougainville Copper Agreement) Act*, c. 196 (hereafter, "the *Bougainville Agreement Act*").
2. There are five sets of Agreements setting up the Ok Tedi copper and gold mine in the Western Province of Papua New Guinea. The main Agreement—the Ok Tedi Mining Agreement (hereafter "the Ok Tedi Principal Agreement") is scheduled to the *Mining (Ok Tedi Agreement) Act*, c. 363 (P.N.G.) (hereafter, "the *Ok Tedi Principal Act*"). The five supplemental Agreements called First, Second, Third, Fourth and Fifth Agreements are scheduled to the following Acts, respectively: the *Mining (Ok Tedi First Supplemental Agreement) Act*, c. 363A; *Mining (Ok Tedi Second Supplemental Agreement) Act*, c. 363B; *Mining (Ok Tedi Third Supplemental Agreement) Act*, c. 363C; *Mining (Ok Tedi Fourth Supplemental Agreement) Act*, c. 363D; *Mining (Ok Tedi Fifth Supplemental Agreement) Act*, c. 363E.
3. Misima Development Agreement between the Independent State of Papua New Guinea and Misima Mines Pty Ltd of 1987 (hereafter, "the Misima Agreement").

Porgera Agreement[4] and the Kutubu Petroleum Agreement.[5] This paper examines briefly the reasons behind the use of the contract instrument to channel investment projects with a view to discussing one of the reasons, viz. its use to secure the investment. Before examining that issue, a brief observation may be made on the legislative basis for these agreements.

The abovementioned agreements were made by the state using its general contracting powers. Under the recently enacted *Mining Act* 1992, the state now has express legislative power to enter into such agreements in respect of "a mining development or the financing of a mining development".[6] Such an agreement may make provision for (a) the circumstances or manner in which the Minister or the Director of Mines will exercise the numerous discretions given in the implementation of the Act; (b) the resolution of disputes arising out of the agreement as well as the administration of the Act including provisions for international arbitration; (c) provisions on state participation in the investment venture the subject of the agreement; and (d) any other matter connected with the investment project the parties "may consider necessary".[7]

The provision allowing an agreement to make provisions on how the Minister and the Director should exercise their discretions under the Act is an interesting one. Numerous discretionary powers are conferred on the Minister and the Director by the Act. If an agreement provides for the exercise of these discretions to be exercised in a particular way, under the common law, such stipulations in a contract are not binding on a government or a public officer exercising statutory powers.[8] This common law principle does not apply to the Agreements made under the *Mining Act* 1992 because the Act provides that where the agreements make provisions for how a discretion should be exercised, the Minister or Director "shall exercise that discretion subject to and in accordance with any relevant stipulation contained in an agreement made" under the Act.[9] The Act further goes on to state that a project developed under a contract made pursuant to it "shall be undertaken in accordance with the provisions of the mining development contract" subject only to the qualification that in cases where there is a conflict between the provisions of the agreement and the Act, the Act provisions take precedence.[10]

4. Porgera Development Agreement between the Independent State of Papua New Guinea and Placer (P.N.G.) Pty Ltd, Highlands Gold Properties Pty Ltd, RGC (Papua New Guinea) Pty Ltd—A Joint Venture, of 1989 (hereafter "the Porgera Agreement").
5. The Agreement setting up the Kutubu Petroleum project in the Lake Kutubu area of the Southern Highlands Province of Papua New Guinea is confidential. It is however based on the "Standard Petroleum Agreement" and the references hereafter will be to the Standard Agreement.
6. *Mining Act* 1992, s. 17.
7. Ibid.
8. *Reiley v. The King* [1934] A.C. 176; *Commissioners of Crown Lands v. Page* [1960] 2 Q.B. 247; *Williams Cory & Son Ltd v. London Corp.* [1951] 2 K.B. 576; *Board of Trade v. Temperley Steam Shipping Co. Ltd* (1926) 26 Ll. L.R. 76.
9. *Mining Act* 1992, s. 17(2).
10. *Mining Act* 1992, s. 19(2).

CONTRACT AS A MEANS FOR CHANNELLING INVESTMENT PROJECT

The use of the contract instrument for the channelling of investments in large-scale investment projects is common in both developed and developing countries. This is done in spite of the existence of domestic legislation regulating investment. In Papua New Guinea, the existence of the now repealed *Investment and Development Authority Act*, c. 120,[11] for example, did not prevent the government from entering into the listed agreements with foreign investors for the development of the mining and petroleum projects.

The adoption of the contract instrument, particularly in large investment projects, is normally done at the insistence of investors. Its use is common especially in investments by foreign investors in developing countries. In developed countries, the investor may be less concerned about the legal machinery to be used for the investment as there are well established instruments under a reliable legal system.[12] In developing countries on the other hand, where possible benefits may be higher, investors are likely to be more careful about investing. Apart from extra capital expenditure required in the development of infrastructure, for example, investors may have concerns about the stability and reliability of the political and legal system. To secure their investment, investors in large projects have insisted on channelling their investments through a contract—a private treaty—made with the host country.

The contract instrument used in an investment has a number of advantages. It allows the parties—an investor and the host country—to allocate the benefits and risks through negotiation before the investment is actually made. The contract will make provision on such matters as—who is to own the investment project; how it is to be developed; who is to be employed; what law is to govern the contract; how disputes are to be resolved; how profits are to be shared (including the details on rate of tax or other levies payable to the government or other authority); what infrastructural developments are necessary; and who is to pay for them.

The different terminologies used to describe these agreements have been stated elsewhere.[13] The Papua New Guinea Agreements have been called "development contracts" in relation to mining agreements and "petroleum development contracts" in respect of agreements setting up petroleum projects. The term "economic development contract" is

11. The "c." reference means "chapter". It refers to the chapter number of the Act in the Revised Laws edition of the laws of Papua New Guinea—revised in 1975 and contained in the revised edition. This Act has been replaced by the *Investment Promotion Act* 1992. It is discussed below.
12. Brown suggests that this is also true of investments made during the colonial period by metropolitan investors in colonies. R. Brown, "Choice of Law Provisions in Concession and Related Contracts" (1976) 39 *Modern Law Review* 625 at 626.
13. See J. Nonggorr, "Problems of Choice of Law and Arbitration Provisions for Economic Development Contracts in P.N.G." (1991) *Melanesian Law Journal* 11 at 11-12.

adopted here to "expose the functional character of these contracts" from the perspective of the host country.[14]

Economic development contracts also make provisions on investment security and risks. Investment security and risks to the environment are the most important factors in risk management or risk sharing in investment projects. Investment security concerns the investment and the contract setting up the investment while environmental risks are created by the investment itself. The former is an important concern to the investor while the latter is a concern to the host country.

An important reason why a foreign investor may want to use a contract to channel a large investment in a developing country is to secure the investment. Investors perceive investing in developing countries as risky. Of great concern are the political risks involved which in turn may create doubts about the protection of private property. Foreign investors' concerns for investment security have been created by the expropriation or nationalisation of foreign investment projects in many developing countries in the 1960s.[15] Because of this, investors in developing countries have been cautious. They have attempted in various ways to protect their investments by contract.

By using the contract instrument, investors obtain undertakings from host countries directed at securing their investments. These include undertakings against interference in investment projects through executive or legislative means. Contracts have been entrenched in legislation giving them the status of parliamentary enactments. Investors have negotiated favorable terms. Tax exemptions or lower taxes may be negotiated. Terms of free import and export have also been common. Further, undertakings may be sought from the host government that terms initially offered will not be changed later or that there will be no discriminatory measure taken against them. The 1967 Bougainville Agreement gave such undertakings on fiscal matters.

Other matters relevant to investment security include the agreed machinery for the resolution of disputes arising between the investor and the host country. The investor may feel reluctant to rely on the municipal courts of the host country. Or both parties may prefer that, for commercial reasons, disputes are settled by dispute resolution machineries other than the courts. The contract may also provide for host country participation in the investment venture. Equity is taken by most countries for financial gain, to partake in sharing profits through dividends. This contributes to investment security as well because the host country, like the investor, will be concerned about the success and profitability of the venture. Factors external to the contract may also provide investment security. The relationship of the investor's home country and the host country generally and the existence of bilateral investment protection arrangements in particular may confer political leverage through the home country.

14. Nonggorr, op. cit.
15. Expropriation or nationalisations have not only occurred in developing countries. They occurred first in developed countries.

CHOICE OF LAW

The contracting parties in an economic development contract are free to agree on the law that is to govern their contract.[16] Since the contract will be construed in accordance with the governing law (that is, the proper law), the choice of the applicable law is important. Any changes to the terms of the contract and the establishment of contractual liability will be determined by the applicable law. The host country may attempt unilaterally to change the terms of the contract. It may, for example, impose taxation obligations additional to the terms earlier agreed under the contract. It may try to acquire certain parts of the investment. Or, it may attempt to nationalise the whole project. Whether it can do so and the legal liability and remedies available to the investor will depend on the applicable law.

There are many alternatives in the choice of the governing law.[17] The four most commonly used are the municipal law of the host country; the municipal law of the investor's home country; international law; or any combination of these. In the traditional concession agreements, the second and third options were popular.[18] In more recent contracts, the choice of the laws of the host country have been common. This has reflected the attitude of many developing countries that wish to assert their independence and their sovereign right in controlling and maximising benefits from their natural resources.[19]

All the Papua New Guinea contracts provide for the laws of Papua New Guinea to be the governing law. The reference in the Porgera and Misima Agreements that "acknowledge" that the law of Papua New Guinea "includes so far as they are relevant the rules of international law" may create problems.[20]

The choice of Papua New Guinea law as the governing law means that the contracts exist and the rights and duties arising under them are determinable in that law. The common law and equity rules on

16. At common law, the parties to a contract having some international connection are free to choose the law that is to govern the contract subject only to the qualification that the choice must be bona fide and is not against public policy. See Nonggorr, op. cit.
17. For various alternatives adopted in investment contracts, see W. Peter, *Arbitration and Renegotiation of International Investment Agreements* (Leiden: A. W. Sithoff, 1986), pp. 168-170.
18. These were contracts made during the colonial era and in the 1950s and 1960s when some developing countries were said to have had no proper laws or legal systems to regulate large investments. See *Petroleum Development Ltd v. Sheike of Abu Dhabi*, Award of August 1951, 18 *International Law Reports* 144; and *Ruler of Qatar v. International Marine Oil Co. Ltd*, Award of June 1953, 20 *International Law Reports* 534.
19. The sovereign right of independent countries to control and benefit from their natural resources is now internationally recognised. The United Nations accepted this principle in its General Assembly Resolution of December 1962 known as the Declaration on Permanent Sovereignty over Natural Resources—Resolution 1803 (XVII).
20. Porgera Agreement, cl. 23; Misima Agreement, cl. 25. The Standard Petroleum Agreement makes a similar provision by stating that the Agreement is to be governed by the law of Papua New Guinea "and such of international law as may be applicable". See Nonggorr, op. cit. at 19-20.

formation and construction of contracts therefore apply to these contracts. The common law doctrine of executive necessity may also apply. This doctrine propounded in *Rederiaktiebolaget Amphitrite v. The King*[21] operates to render ineffective any fetter on the exercise of executive powers of the government by contract.

STABILITY CLAUSES

As a security measure, economic development contracts sometimes are entrenched in legislation, that is, they are given legislative force by being enacted as Acts of Parliament.[22] The Bougainville and Ok Tedi Agreements did this. They required[23] and were given legislative force by Acts of Parliament.[24] This practice can confer some measure of security in two ways.

First, any executive action inconsistent with the contract provisions approved and given legislative force may constitute a breach of the contract. Such action may also be a breach of statute and relief may be sought to declare such action illegal or an action for breach of statutory duty may be maintained.[25] In this connection, the doctrine of executive necessity referred to earlier is ousted by the legislative entrenchment of the contract and so is not available to the executive government to avail itself of. Second, although the legislature of the host country is not prevented from enacting inconsistent legislation, it is hoped that the process of legislation may be cumbersome and so inhibit the state from resorting to changes readily whenever it desires.

The legislative force given to the contract has the effect also of enabling the parties to proceed with the development of the project without delays caused by any compliance requirements under other statutes. Efficiency in administration is therefore another objective. A provision in the Act that conferred legislative status on the Ok Tedi Agreement provides a good example:

> "Notwithstanding anything in any other law in force in the country at any time (whether before or after the commencement of this Act), the Minister has power, on behalf of the State to make all grants,

21. [1921] 3 K.B. 500.
22. For the effect of and consequences of this practice, see J. Nonggorr "The Legal Effect and Consequences of Conferring Legislative Status on Contracts" (forthcoming) (1993) *Queensland University Law Journal*.
23. Bougainville Agreement, cl. 2(a); Principal Agreement, cl. 4.1; First Supplemental Agreement, cl. 3.1; Second Supplemental Agreement, cl. 3.1; Third Supplemental Agreement, cl. 3.1; Fourth Supplemental Agreement, cl. 3.1; Fifth Supplemental Agreement, cl. 3.1.
24. *Mining (Bougainville Agreement) Act*, c. 196, s. 2; *Mining (Ok Tedi Agreement) Act*, c. 363 (P.N.G.), s. 3.1. Equivalent provisions under the supplemental agreements are s. 3 of each of the five Supplemental Agreement Acts—*Mining (Ok Tedi First Supplemental Agreement) Act*, c. 363A; *Mining (Ok Tedi Second Supplemental Agreement) Act*, c. 363B; *Mining (Ok Tedi Third Supplemental Agreement) Act*, c. 363C; *Mining (Ok Tedi Fourth Supplemental Agreement) Act*, c. 363D; *Mining (Ok Tedi Fifth Supplemental Agreement) Act*, c. 363E.
25. E. Campbell, "Legislative Approval of Government Contracts" (1972) 46 *Australian Law Journal* 217 at 218.

issues, renewals, and extensions required by or under the Agreement to be made by the State, and is not bound in that regard by any report, recommendation, appeal, procedure, procedural formality, or by any similar provision."[26]

The object behind this provision giving the responsible Minister broad powers is obvious and has proved useful in the Ok Tedi project:

"Such broad and sweeping powers were designed to facilitate project implementation and to insulate the project from time-consuming statutory obligations. . . . The threatened exercise of these ancillary powers proved to be important in overcoming bureaucratic problems in the acquisition of land for the project."[27]

In some cases, the contract may go further to "freeze" the applicable law at a particular date, in most cases, at the time of contracting.[28] Where this is done by a contract not having legislative force, it is doubtful that it will be effective as the applicable law may not be restricted by contract. Where the contract is approved and given legislative force, the matter becomes a little complicated. The proper analysis, however, is that in such cases, subject to any constitutional limitations on the exercise of legislative powers like a constitutional law requiring compliance with a certain procedure,[29] Parliament can amend the legislation including the entrenched contract by inconsistent legislation.[30] The Bougainville and Ok Tedi Agreements have provisions along these lines. The Ok Tedi provision, for example, states:

"This Agreement is to have the force of law and apply notwithstanding anything to the contrary in any other law in force in Papua New Guinea and no law at any time in force in Papua New Guinea made after the commencement of this Agreement shall effect this Agreement—(a) unless the contrary intention appears, either expressly or by implication in that law; or (b) except as provided by this Agreement."[31]

26. *Bougainville Agreement Act*, s. 5.
27. W. S. Pintz, *Ok Tedi: Evolution of a Third World Mining Project* (Mining Journal Books Ltd: London, 1984), pp. 64-65.
28. An example of a clause freezing the law is found in a Zambian copper agreement:
"Any arbitral tribunal . . . shall . . . in interpreting and applying any agreements, documents, legislation, orders, and other instruments with which the dispute is concerned, apply the law of the Republic of Zambia . . . as it existed on the 24th December, 1969, disregarding all legislation, instruments, orders, directions and court decisions having the force of law in Zambia adopted, made, issued or given subsequent to that date, it being the intention of the parties hereto that such decisions shall be made as if decided on that date under Zambian law."
Quoted in Peter, op. cit., pp. 137-138.
29. For example, by the "manner and form" provisions of s. 5 of the *Imperial Laws Validity Act* 1865 (Imp.) that applies in Australia.
30. P. McNamara, "The Enforceability of Mineral Development Agreements to which the Crown in Right of the State is a Party" (1982) *University of New South Wales Law Journal* 263.
31. Clause 3. Clause 39 in stating that the governing law of the contract as the law of Papua New Guinea further states, that "The Company shall in the construction, operation, maintenance and use of any work, installation, plant machinery, equipment, service or facility provided or controlled by the Company comply with and observe the provisions of this Agreement and, to the extent not inconsistent therewith, the laws for the time being in force in Papua New Guinea." This clause, though expressed in

The Bougainville Agreement is worded differently:

> "Where in this Agreement reference is made to a law in force as at a particular date, no account shall unless the context otherwise requires be taken of any modification or re-enactment therefore effected by a law made after that date but deemed to have come into operation or to have been made on or before that date."[32]

The two Acts entrenching the Agreements made similar provisions.[33] The provisions of the Agreements and the entrenching legislations for both projects did not really have the effect of "freezing" the law. They are qualified by the words (that is, words used in the Agreements and the Acts) "unless the contrary intention appears, either expressly or by implication" and "unless the context otherwise requires". These qualifications have done no more than to preserve the law, that legislation can be amended by later inconsistent legislation. Any attempt to go further to actually "freeze" the law would have been ineffective and unconstitutional. Section 100 of the Constitution of Papua New Guinea vests law-making powers in the National Parliament and provides that the Parliament cannot "transfer permanently, or divest itself of, legislative power". Any enactment that seeks to prevent Parliament from amending or repealing it that goes beyond requirements for special majorities, would be a fetter on the legislators' legislative powers and may be unconstitutional. The same would also apply to any requirement for prior approval of the other contracting party for legislative changes. The 1967 *Bougainville Act*, for example, provided that no enactment made after the commencement of the Agreement was to affect the Act or the Agreement "unless before that law comes into force the Company consents thereto".[34] The legal effect of this provision would have been to restrict the exercise of legislative power. It is doubtful that it would be valid.[35] If the provision had been retained, it might have been unconstitutional.

The stabilising of the applicable law of the whole contract is one way. Another use of stability clauses relates to their use in specific provisions concerning particular subjects. That is, stability clauses may be used to restrict or prohibit changes being made to particular terms. These may relate to the property of the investment, the fiscal regime, or other specific undertakings given by the host country including those relating to the terms and conditions for import and export of the products of the investment project. The Bougainville Agreement, for example, provides that the state:

> "shall not resume or expropriate or permit the resumption or expropriation of any asset (whether movable or not) of the

31. *Continued.* the negative, would not affect the validity and operation of a mandatory but inconsistent (i.e., inconsistent with the contract) provision on the subjects referred to in the clause, of a later enactment.
32. Clause 2(c).
33. *Bougainville Agreement Act*, s. 4(3) and *Mining (Ok Tedi Agreement) Act*, s. 3(2).
34. *Mining (Bougainville Copper Agreement) Act* 1967, s. 4.
35. *Reiley v. The King* [1934] A.C. 176; *Commissioners of Crown Lands v. Page* [1960] 2 Q.B. 247; *Williams Cory & Son Ltd v. London Corp.* [1951] 2 K.B. 576; *Board of Trade v. Temperley Steam Shipping Co. Ltd* (1926) 26 Ll. L.R. 76.

> Company used in connection with any of its operations under this Agreement, any of the products (whether processed or otherwise) resulting from such operations, the business of the Company, or any shares held or owned by any person in the Company,"[36]

a protection that has now been extended by the *Investment Promotion Act* 1992 to all other investments of foreign investors.[37]

The same provision also forbids the state from interfering with other rights, benefits and privileges granted to the company. It specifically provides that the state shall not interfere:

> "by executive or administrative action or in any other manner whatsoever (whether directly or indirectly) . . . [with] the Company's present freedom of choice of directors, managers, executives, advisers, consultants, associates, employees, contractors, suppliers and customers and its present freedom to declare credit and pay dividends and to grant other rights to its members . . . and no discriminatory action whether by way of industrial fiscal or social legislation or otherwise shall be taken against the Company or all or any of the members of the Company or the other persons . . . [and] so long as the Company complies with this Agreement and with any lease granted thereunder, the [State] shall not cancel or permit the cancellation of any such lease or require the surrender of the whole or any part of any area the subject of any lease."

These provisions, which have no counterparts in the other Agreements, effectively outlaw inconsistent administrative or executive action by the state.

The Bougainville Agreement also provides examples of stability clauses designed for other specific matters such as the fiscal regime including rates on the importation of goods and services for the investment and the export of its products. On the fiscal regime, the orginal 1967 Agreement conferred on the company favourable tax provisions. One clause provided that:

> "No alteration made to the law of the Territory . . . shall apply to or in respect of the Company or a member of the Company or a beneficial owner of a share in the Company if it would have the effect of increasing the amount of any tax charge due duty or other levy payable by the Company or by such a beneficial owner in respect of any dividends declared credited or paid by the Company."[38]

This provision, deleted in the 1974 re-negotiations, effectively exempted the company from tax increases brought about by subsequent general tax legislation. It has no counterpart in the other three Agreements.

The Bougainville Company was also exempted under the 1967 Agreement for the first five years of its operations from paying "any tax, charge, due, primage duty, tariff or other levy" on all imports (except

36. Clause 17(b)(ii).
37. See below, n. 96.
38. Clause 7(h).

articles for resale and foodstuffs). After the five years, imports intended for replacement of all machinery and equipment used were to be exempted from similar taxes for another ten years.[39] The export of its products was also exempt from "tax, charge, due, duty, excise, tariff or other levy".[40] This provision was amended in the 1974 re-negotiations allowing the government to:

> "impose duties on the Company under the *Customs Act* (but only if such import duties are of general application in Papua New Guinea and . . . do not discriminate against the Company)."[41]

The non-discrimination qualification is used in the other Agreements as well. Import duties or other levies can be imposed on imports of the investors but such rates or levies must not discriminate against the companies.[42] Exports of the produce of the mines are free from any export duty, tariff or levy apart from the payment of royalties.[43]

Finally, guarantees for the repatriation of profits of the investment is another matter of crucial importance to the investor. All four Agreements subject the investors to the general foreign exchange laws in the country applying from time to time.[44] The repayment of loans, the payment for goods and services bought from outside the country and the payment of dividends in foreign currency is however guaranteed,[45] guarantees that have been extended to other foreign investors by the *Investment Promotion Act* 1992.[46] The companies are required to remit all their foreign currency earnings to the country and convert them into Papua New Guinea currency. They are permitted however to retain them in foreign currency, in a bank outside the country, for a period of three months at any time, to meet loan obligations including interest and charges and for paying for goods or services and for paying dividends due to shareholders. Where a shortfall is expected, that is, where the foreign currency holding for any three-month period is not sufficient to meet the above obligations, they can apply for government approval to buy foreign currency for such shortfall. Alternatively, the state may purchase foreign currency on their behalf from money lent by the concerned company to it for such shortfall.

The legality of stability clauses in economic development contracts has been doubted. The doubts arise both in municipal law, where this is the governing law, and in international law. The problems in the municipal

39. Clause 9.
40. Ibid.
41. Clause 7 of the 1974 re-negotiated version.
42. Ok Tedi Agreement, cl. 25.4, Porgera Agreement, cl. 7.3, Misima Agreement, cl. 9.3. The *Investment Promotion Act* 1992 (s. 37(5)) now confers this assurance to all foreign investors.
43. Ok Tedi Agreement, cl. 25.3, Porgera Agreement, cl. 7.2, Misima Agreement, cl. 9.2.
44. In the Bougainville Agreement, at the time of contracting, as Papua New Guinea was an Australian territory, Australian currency was used and so there were no special provisions made on this. In the 1974 re-negotiations, the company was not given any special treatment.
45. Ok Tedi Agreement, cl. 26; Porgera Agreement, cl. 8; Misima Agreement, cl. 10. There are no equivalent provisions made in the case of the Bougainville Agreement for the reason given in the preceding note. It is therefore subject to the general foreign exchange laws.
46. *Investment Promotion Act* 1992, s. 37(3) and (4).

law relate to the constitutionality of contract provisions including those given legislative force. One issue is whether they can legally be binding on the state to prevent it from legislating on matters covered by stability clauses. The doubts in international law are based on the international law principle of permanent sovereignty over a state's natural resources. It has been suggested that this principle creates a constitutional limitation on the country's ability to deal with its natural resources,[47] a principle enunciated in the United Nations—Resolution 1803 (XVII) on Permanent Sovereignty over Natural Resources, U.N. General Assembly, 14 December 1962. The argument maintains that a state cannot constitutionally limit or restrict this sovereignty by stability clauses. Although this limitation by international law has been questioned[48] and in some instances their legality recognised[49] under the municipal law, they may nevertheless be ineffective.[50] Their only practical effect in the face of calls for variation or re-negotiation may be in giving the investor an extra bargaining item.[51] The stability clauses may have the opposite effect. Economic development contracts are normally for lengthy periods ranging from 20 to 30 years, and the "freezing" of the fiscal regime or other aspects of such agreements favorable to the investor may be seen as being excessive by subsequent governments. They may be prompted by them to force a variation or re-negotiation of the Agreement or parts of it.[52] As Peter observes:

> "The [stability] clauses cannot cure the inherent instability of these investment contracts, on the contrary there can be an accumulation of frustration leading to a sharp conflict."[53]

The effectiveness of stability clauses depend on the law governing the contract. In the Papua New Guinea Agreements, where this is primarily the law of Papua New Guinea, there are two problems. First, the common law doctrine of executive necessity may render any contract provisions fettering the exercise of executive power unenforceable. The doctrine will also apply to contracts that seek to fetter the exercise of

47. M. Sornarajah, "The Myth of International Contract Law" (1981) 15 *Journal of World Trade Law* 187 at 210.
48. "It seems unlikely that a state, by affirming a legal policy by its vote in the U.N. [on the resolution on the permanent sovereignty over natural resources, the Declaration on Permanent Sovereignty over Natural Resources], intends thereby to restrict its own freedom of contract, which is also a part of its fundamental sovereign rights." (Peter, op. cit., p. 141).
49. *Kuwait v. American Independent Oil Co.* (AMINOIL), Award of March 24 1982, (1981) 20 *International Law Materials* 976, Sec. 88-92; *AGIP v. Popular Republic of Congo*, ICSID Award of November 1979, (1982) 21 *International Law Materials* 726 at Sec. 86.
50. See R. Brown, "The Relationship Between the State and the Multinational Corporations in the Exploitation of Resources" (1984) 33 *International Comparative Law Quarterly* 218 at 222.
51. After reviewing the legal effect of these clauses, Peter concludes: "The results achieved reflect the parties' respective bargaining strength, and not the merits of their legal positions" (Peter, op. cit., p. 143).
52. R. Geiger, "The Unilateral Change of Economic Development Agreements" (1974) 23 *International Comparative Law Quarterly* 73.
53. Peter, op. cit., p. 146.

statutory discretionary powers. This doctrine may not now apply to the agreements made in pursuance of the *Mining Act* 1992 in relation to the exercise of discretions of the Minister and the Director of Mines for that Act allows the exercise of such discretions to be fettered under such contracts. In the contracts having legislative force, the doctrine of executive necessity may not apply but the stability clauses contained therein may be unconstitutional for fettering the legislative powers of Parliament. As pointed out earlier, the Constitution vests legislative power in the Parliament and prohibits it from divesting these powers temporarily or permanently. The measure of security conferred by stability clauses is hence limited. It is more apparent than real. An investor may not therefore give much weight to such provisions. Vice versa, a host country ought not feel that it is giving up much where an investor insists on stability clauses.

ADAPTATION, RE-NEGOTIATION, AND FORCE MAJEURE CLAUSES

Stability clauses reinforce the sanctity of contract principle. There are other clauses in economic development contracts that permit or provide for contract change, minor or major. These provisions may be called review, revision, adaptation, adjustment, restructuring, variation, re-scheduling or re-negotiation clauses. They fall into three categories.[54] The first are clauses that permit changes in minor respects. These may either be changes already agreed to by the parties that will apply automatically or changes that will apply according to some pre-determined procedure or mechanism; or they may be provisions that are conditional on an event happening, for example, in connection with a matter that is to be determined or decided by a third party. These may be called adaptation clauses. The second are force majeure clauses. These are normally labelled as such by the parties. The third are re-negotiation clauses. They may effect more substantive changes to the whole or some major terms of it.

Adaptation clauses

An example of the typical variation clause is found in the income tax provisions under the Papua New Guinea Agreements. Income tax is payable by the companies at the general rate applying in the country. Where the profits of the companies exceed a certain amount in a particular taxation year, they are required to pay an additional tax on that profit—the additional profits tax or resource rent tax. Liability for this tax and the amount payable depend on the amount of profit. These provisions provide an automatic adaptation machinery. Another example is "clauses providing for negotiation of certain details of a contract at a

54. Peter, op. cit., p. 148. For a detailed discussion of these provisions, see M. Bartels, *Contractual Adaptation and Conflict Resolution: Studies in Trans-National Law in Natural Resources* (Kluer Law and Taxation Publishers: Deventer, Netherlands).

later stage when technical or financial aspects are better known".[55] A provision that the parties themselves often describe in the contract as a variation clause is one that expressly provides for what is otherwise implied by law—a clause permitting changes by agreement. The changes contemplated by such provision may be minor or major encompassing re-negotiation.[56] The Ok Tedi Agreement makes such a provision:

> "The Parties may from time to time by agreement in writing add to, substitute for, cancel or vary all or any of the provisions of this Agreement . . . for the purpose of more efficiently or satisfactorily implementing or facilitating any of the objects of this Agreement."[57]

This provision that has counterparts in the Bougainville,[58] Misima[59] and Porgera[60] Agreements enable both minor and major changes to be made.[61] Such provisions do not however create any obligation on either party to vary any terms if one of them requests a variation.

Re-negotiation clauses

In Bougainville, the original 1967 Agreement had no provision for variation. The entrenching Act provided that it could "be varied by a further agreement or agreements between the Prime Minister on behalf of the State, and the Company".[62] It did not impose any obligation for variation or re-negotiation. When Papua New Guinean politicians called for its re-negotiation in 1974, the first obstacle faced was that no provision for re-negotiation was provided for under it other than the provision for variation by agreement. Without agreement from the company, there was no contractual duty for re-negotiation. Generally, in economic development contracts where re-negotiation is not provided for, whether a duty independent of the Agreement exists depends on the governing law.[63] In the Bougainville case, Papua New Guinea law was the proper law. The contract rules under the common law do not impose

55. Peter, op. cit., p. 150.
56. The "variation" provisions under the Ok Tedi, Porgera and Misima contracts provide for both major and minor changes. In the case of Bougainville, the entrenching Act—the *Mining (Bougainville Copper Agreement) Act*, c. 196—provides under s. 3 (discussed under "re-negotiation" below) for major changes.
57. Clause 42.1.
58. "The Administration and the Company may from time to time by mutual agreement in writing add to cancel or vary any of the provisions of any instrument evidencing any lease granted under the Agreement" (cl. 19).
59. Misima Agreement, cl. 28.1.
60. Porgera Agreement, cl. 26.1.
61. Clause 42.2 of the Ok Tedi Agreement stipulates that "Where an agreement [i.e., a variation] constitutes a material or substantial alteration of this Agreement the Agreement shall contain a declaration to that effect and the State shall as soon as is practicable introduce and sponsor in the National Parliament a Bill for an Act to approve that Agreement and give force of law to the alteration of the rights hereunder. That Agreement shall be subject to the coming into effect of the approving Act."
62. *Mining (Bougainville Copper Agreement) Act* 1967, s. 5(1). The Agreement(s) further required its publication in the *National Gazette* to be effective and even then could be disallowed by Parliament.
63. For a discussion of the different possibilities under the different legal systems including international law, see Peter, op. cit., pp. 85-93.

an obligation for re-negotiation independent of a contract. The company initially took this position and refused to submit to demands for re-negotiation.[64]

A number of factors contributed to the company agreeing later to the re-negotiation demands. First, in 1973 Australia conferred on Papua New Guinea self-governing status. Independence was planned for as early as 1975. Papua New Guinean politicians (who would become leaders of an independent Papua New Guinea) demanded the re-negotiation. Having already committed over A$400 million in the development of the copper mine and knowing that it was a profitable project, the company wished to avoid confrontation. Second, the House of Assembly exerted pressure on the company by passing a mining policy resolution in 1972 calling for general guidelines including no tax holidays, majority government ownership, higher taxes and stricter control of social and environmental effects.[65] Third, when the company refused re-negotiation, the government threatened to take unilateral legislative action[66] and during the negotiation, the government is reported to have "accidentally" left on the negotiating table during a break a draft nationalisation Bill.[67] Fourth, and most significantly, during the first two years of commercial production, as a result of high world copper prices, the company declared huge profits.[68] In its first nine months of operation in 1972, the company declared a profit of A$28 million from a net sales figure of A$96 million (from which A$11 million was paid as dividends). In the next 12 months of 1973, it declared a profit of A$158 million from a net sales figure of A$249 million (A$80 million was paid as dividends). This rate of return had not been expected.[69] A report sponsored by the United Nations Development Programme (UNDP) and the World Bank, because of these factors, recommended changes to be made to the fiscal provisions.[70] The company had insisted in the negotiation of the Agreement on fiscal concessions including tax holidays arguing that the project was a marginal one. To Papua New Guinean politicians in 1973, it was not a marginal project.[71] Fifth, international events had some bearing. Nationalism in Third World countries was at its peak in the

64. C. O'Faircheallaigh, *Mining and Development: Foreign-Financed Mines in Australia, Ireland, Papua New Guinea and Zambia* (Croom Helm: Sydney, 1984), p. 249; R. Garnaut, "The Framework of Economic Policy-Making" in Ballard (ed.), *Policy-Making in Papua New Guinea* 1972-77 (University of Queensland: St. Lucia, Queensland, 1981), pp. 157, 193-194.
65. Peter, op. cit., p. 56; O'Faircheallaigh, op. cit., p. 240; J. Momis, "Bougainville Copper: The Case for Renegotiation" in Zorn and Bayne (eds), *Foreign Investment, International Law and National Development* (Butterworths: Sydney, 1975), p. 125.
66. O'Faircheallaigh, op. cit., p. 249; Garnaut, above n. 64 at 195.
67. S. McGill, "Bougainville to Vanimo: A Negotiating Strategy to Achieve National Goals" in King et al (eds), *Papua New Guinea's Eight Point Plan and National Goals after a Decade: From Rhetoric to Reality* (University of Papua New Guinea Press: Port Moresby, 1985), p. 243.
68. Peter, op. cit., p. 54.
69. It may be noted that the shareholders equity contribution to the project was A$133 million: O'Faircheallaigh, op. cit., p. 237. In 1972 and 1973 alone (21 months), they received total dividends of A$99 million—representing a recovery of about 75 per cent of equity investment.
70. M. L. O. Faber, "Bougainville Re-negotiated—An Analysis of the Fiscal Terms" (Dec. 1974) *Mining Magazine* 446 at 449.
71. Faber, op. cit.

1960s with investment expropriations and nationalisations in developing countries. Although the initial Agreement was negotiated during this period, it was done by the Australian Administration. Papua New Guinean politicians, seeing an independent Papua New Guinea as near as 1975, were influenced by what was happening in other newly independent countries.[72] Although there was no legal obligation[73] on the company to re-negotiate, these factors influenced it to submit to the demands.

The re-negotiations focused mainly on the fiscal provisions from which the Papua New Guinea government improved its share of the mine income through new and increased tax mechanisms. An important provision for periodic review was also inserted. It states:

> "The parties shall co-operate with each other in carrying out the purposes of this Agreement and shall meet together during the seventh year after the year in which the Amendment Date occurs, and at intervals of seven years thereafter, with a view to considering in good faith whether this Agreement is continuing to operate fairly to each of them and with a view further to discussing in good faith any problems arising from the practical operation of this Agreement. If at any such meeting it is agreed that this Agreement is not so continuing to operate fairly to each of the parties, or the parties agree that there exist problems arising from the practical operation of this Agreement, then they shall confer together in good faith in an endeavor to ensure that this Agreement shall operate fairly to both of the parties or to resolve such problems (as the case may be) and, in particular, and without prejudice to the generality of the foregoing, they shall use their best endeavors to agree upon such changes to this Agreement as may be requisite in that regard."[74]

This clause obliges the parties, if required, to re-negotiate the Agreement after the periods stipulated. In fact, the Agreement was not reviewed in 1981 and 1987 when the periodic reviews were due.[75] A refusal to

72. Jackson appears to suggest that advisers to Papua New Guinean leaders who were also responsible for the negotiation of the failed Ok Tedi Agreement with Kennecott had worked and followed events in countries in Africa and had intimate knowledge of these events and they had considerable influence on the leaders: R. T. Jackson, *Ok Tedi: The Pot of Gold* (University of Papua New Guinea Press: Port Moresby, 1982), pp. 53-58. The government also sought advice from Latin American copper producing countries like Peru: Pintz, op. cit., p. 28.
73. Some of the arguments used in calling for re-negotiation did not have any legal basis. Some argued that the Agreement was too favorable to the company when it was negotiated. Others argued that while it may have been fair at that time (1967), it was no longer "fair" in 1973: G. O. Gutman, "Objectives, Strategy and Tactics in Negotiations for Mining Projects" in Zorn and Bayne (eds), op. cit., p. 102; Faber, at 449. Others took the position that Papua New Guinea as a newly self-governing nation was not bound by the Agreement signed by the Australian Administration: R. F. Mikesell, *Foreign Investment in Copper Mining: Case Studies in Peru and Papua New Guinea* (John Hopkins University Press: London, 1975), p. 127; or that it was unconscionable: S. Zorn, "Bougainville: Managing the Copper Industry" (1973) 7(4) *New Guinea* 23 at 38.
74. Clause 26A.
75. The 1981 review was not done because of disagreements between the national government and the North Solomons Provincial government. Due to a change of the national government in 1987, no review was done then: A. G. Corren, "Compensation for Damage to Land as a Result of Mining Operations", *Papua New Guinea Law Society International Conference*.

re-negotiate would constitute a breach of contract and would be referred to the arbitration machinery.[76] What is the effect of such a re-negotiation clause on the question of contract stability and investment security?

Some commentators argue that re-negotiation clauses reduce rather than increase contract stability.[77] "Why should we include a re-negotiation clause in our contract? Is it not more stable not to have one?"[78] Others argue that re-negotiation clauses add to contract stability. "Re-negotiation clauses," it is said, "clearly provide a measure of flexibility for adapting to changed circumstances and reduce the chances of confrontation and deadlock."[79]

The role and efficiency of stability clauses in general are also questioned because they cannot contain the pressure for contract change. The Bougainville re-negotiations would give support to this view. Although it must be acknowledged that the driving forces behind contract change or re-negotiation are of a political and economic nature, stability and re-negotiation clauses do play an important role in maintaining contract stability. It is only on major issues that stability clauses will be ignored. In other cases where the issues are not so crucial, and these must admittedly be numerous, they serve their purpose. While stability clauses stand for contract rigidity, re-negotiation clauses provide contract flexibility, in appropriate cases where

> "the prerequisite conditions for re-negotiation can be so well defined in the clause . . . they will at the same time assume the role of 'contract stabilisers'."[80]

Surprisingly, similar clauses to the clause allowing for periodic review of the re-negotiated Bougainville Agreement were not included in the other Agreements made later in relation to the Ok Tedi, Misima and Porgera projects. This is a serious omission. In Papua New Guinea, landowners are frequently demanding the re-negotiation of agreements made between the state and project developers because these agreements contain obligations that are inserted for their benefit. Project developers are required under the agreements, for example, to build schools, roads and provide health facilities. When such facilities are not provided or they take longer to appear, landowners become angry and demand

76. Where the parties fail to reach agreement, that would not be a breach of contract. In such case, the dispute resolution machinery agreed under the contract may be invoked: Peter, op. cit., pp. 157-166.
77. It is, for example, contended that "the absence of express provisions for revision puts the investor in an advantageous position when the government of a developing country requests a re-negotiation. The investor is able to proceed from a position of strength because he is under no obligation to re-negotiate": S. K. B. Asante, "Stability of Contractual Relations in Trans-National Investment Process" (1979) 28 *International Comparative Law Quarterly* 401.
78. Peter, op. cit., p. 153.
79. Z. Mikdashi, *The International Politics of Natural Resources*, Cornell University Press: Ithaca, 1976), p. 154; "Far from undermining the stability of agreement, re-negotiation provides a sort of insurance against that kind of explosive reaction generated by the bitter realisation that the investment agreement itself rules out any rational process of revision" (Asante, op. cit. at 411).
80. Peter, op. cit., p. 146.

re-negotiation of agreements. Where these demands are not met, they resort to violent means to air their grievances. The existence of re-negotiation provisions may contain the frustrations that give rise to problems as landowners or the contracting parties themselves can wait to air their grievances at the time of the review.

Force majeure clauses

Force majeure clauses are inserted to provide for situations where performance of the contract by one or both parties become impossible due to change in circumstances brought about by factors outside the parties' control. In economic development contracts, force majeure clauses normally provide for suspension of performance rather than termination of the contracts. These are normally coupled with obligations for appropriate action to lessen or overcome the impact with a view to re-negotiating the loss or damage suffered as a consequence of the force majeure event.[81] The force majeure clause in the Ok Tedi Agreement is a good example:

> "Any failure on the part of a Party hereto to comply with any of the terms conditions and provisions of this Agreement . . . shall not be grounds for termination or give another Party hereto any claim for damages insofar as such failure arises from force majeure, if the first-mentioned Party has taken all appropriate precautions, due care and reasonable alternative measures with the objective of avoiding such failure and of carrying out its obligations under this Agreement. That Party shall take all reasonable measures to remove such inability to fulfil terms and conditions of this Agreement with the minimum of delay.
>
> For the purposes of this Agreement, force majeure shall include war, insurrection, civil disturbances, blockades, riots, embargoes, strikes and other labour conflicts, land disputes, epidemics, earthquakes, storms, floods or other adverse weather conditions, explosions, fires, lightning, breakdown of machinery facilities or shortages of labour, transportation, fuel, power or essential plant, equipment or materials or any other event which the Party claiming force majeure could not reasonably be expected to prevent or control, and in the case of the Company . . . shall include any delay or failure by the State to give any consent or approval required hereunder or under any applicable law but caused by negligence in the provision of adequate supervision of the Project."[82]

Force majeure clauses have been associated with hardship clauses, that is, clauses "used in situations where contract performance has not

81. Peter, op. cit., p. 151; G. R. Delaume, "Excuse for Non-Performance and Force Majeure in Economic Development Agreements" (1971) 10 *Columbia Journal of Trans-National Law* 242.

82. Clause 36. Equivalent provisions in the other three Agreements are substantially in similar terms: Bougainville Agreement, cl. 24; Porgera Agreement, cl. 24; Misima Agreement, cl. 26.

become impossible but extremely burdensome''.[83] Hardship clauses in turn have been associated with frustration.[84]

Force majeure clauses provide for the obligations of the parties where a force majeure event occurs and since economic development contracts establish large investments involving large captital, their existence may help to reduce conflicts where such events arise. In that connection, they perform a security function, in assisting in avoiding conflicts.

Another type of provision that has a similar function of assisting conflict avoidance is consultation provisions. The Ok Tedi and Misima Agreements, for example, contain consultation provisions obliging the companies to furnish to the state reports on the implementation of some of their obligations. The latter relate to training and localisation programmes; local purchase of supplies; local business development; and environmental management programmes.[85] The Porgera Agreement provides for the formation of two committees. Membership of the committees include a representative each from the state, local landowners, the joint venture company and the provincial government. The committee's functions are to monitor the implementation of the joint venture company's contractual obligations including those on training and localisation, the supply and procurement of goods and services and for receiving quarterly reports on the receipt, consideration and acceptance of tenders by the company.[86] These consultation provisions are important in that they assist in preventing or reducing conflicts.

Adaptation, re-negotiation and force majeure clauses do not directly contribute to investment security as stability clauses do. They assist in avoiding conflicts. Adaptation clauses provide the parties with the flexibility to make or provide machinery for automatic adjustments where there are changes in circumstances. Re-negotiation clauses specify the situations where the parties can vary the terms by agreement while force majeure clauses define the obligations of the parties where a force majeure event (as defined by the parties) arises. The identification of these different situations and provisions for dealing with them contribute indirectly to investment security.

HOST COUNTRY EQUITY PARTICIPATION

Equity participation by host countries in major investment projects developed by foreign investment is sought principally for economic reasons. Political and defence reasons may also be important. Host

83. Peter, op. cit., p. 151.
84. Hardship clauses are invoked where hardship exists: "These circumstances normally incorporate three elements: first they must have arisen beyond the control of either party; self-induced hardship is irrelevant. Secondly they must be of fundamental character. Thirdly, they must be entirely uncontemplated and unforeseeable. These criteria make it clear that the hardship concept is very similar, if not identical, to that of frustration" (C. M. Schmitthoff, "Hardship and Intervener Clauses" (1980) *Journal of Business Law* 82 at 85).
85. Ok Tedi Agreement, cl. 43; Misima Agreement, cl. 29.
86. Porgera Agreement, cl. 27.

country equity participation can also have a bearing on investment security. In existing traditional concession agreements, demands for host country equity participation were resisted by investors who insisted on their contractual rights. These sometimes resulted in forced nationalisations and expropriations. In modern agreements, these demands have been accommodated. Investors have generally accepted host country participation and have tried to negotiate favourable fiscal terms and other undertakings to ensure the profitability and control of the investment. Most investors have come to accept that equity participation of the host country may contribute to the security of an investment. The host country, as a stock owner, will benefit from the profitability of the investment through dividends like any other investor. A host country in this position would be as eager as the investor to ensure the smooth and efficient running of the investment for the maximisation of profits.

While there may be valid reasons to justify investors' fears in allowing host country equity participation, as conflict of interest factors, for example, may be detrimental to the profitability of the investment, the conflict of interest may work to the benefit of the investment. To obtain maximum benefits from host country participation, the investor may focus its attention on making appropriate provision for dealing with cases of conflict of interest that would be detrimental to the investment and not attempt to resist equity participation which may contribute to investment security. In Papua New Guinea, it is now established government policy, which has, as has been pointed out earlier, been entrenched in the *Mining Act* 1992, to have the option to take equity or be a joint venture partner in all major contracts. The government is an equity holder or partner in all the existing projects.

DISPUTE RESOLUTION MACHINERY

The dispute resolution machinery chosen may have a deterrent effect on any action or omission that a party may or may not want to take in contravention of the contract provisions. It may in that respect, also contribute to investment security. Foreign investors investing in large projects in developing countries have often refused to submit to the national courts for the resolution of investment disputes with the state.[87] In the Ok Tedi project, for example, the arbitration machinery

87. There are some countries that refuse to submit to international arbitration. Latin American countries in paricular take this stand. Furthermore, they require investors to expressly renounce rights to seek diplomatic protection under the Calvo Clause. The Calvo Clause attempts to implement the Calvo doctrine put forward by Argentinean diplomat and lawyer, Carlos Calvo in 1868, which "aims to bar the exercise of diplomatic protection when the alien, by his own account, expressly or impliedly, is committed not to request such protection from the State of nationality" (F. V. Garcia-Amador, "The Proposed New International Economic Order: A New Approach to the Law Governing Nationalisation and Compensation" (1980) 12 *Lawyer of the Americas* 1 at 5).

was one of the three issues that led to the breakdown in negotiations with Kennecott Copper Corp.[88] Arbitration clauses, as the name indicates, provide an arbitration machinery.[89] An effective arbitration clause can contribute to investment security by assisting in avoiding or reducing conflicts. The parties may be deterred by the arbitration machinery either because they fear the cost and time-consuming aspect of arbitration or because of the possibility of an independent arbitral tribunal coming to a different decision from that of a host country's court that may be subject to influences of local factors including municipal legislation.[90]

The arbitration machinery differs under the four mining contracts in Papua New Guinea. The Bougainville[91] and Ok Tedi Agreements provide for arbitration under the *Arbitration Act* 1951 (now ch. 46). The Porgera Agreement provides for the submission of disputes to the United Nations Commission on International Trade Law (UNCITRAL)[92] while the Misima Agreement provides for arbitration by the International Centre for Settlement of Investment Disputes (ICSID) that is under the auspices of the World Bank.[93]

Although there are a number of problems that arise in respect of the legal effectiveness of arbitration clauses,[94] the adoption of international arbitration machinery can confer further security to an investment. The choice of international arbitration like ICSID and UNCITRAL have the advantage that the arbitration will work smoothly as their rules cover most eventualities. In addition, because of the reputation of the administering bodies, their determinations and awards carry more weight. The ICSID arbitration machinery, for example, has the acceptance of over 87 countries that ratified the multilateral treaty establishing it. The Bougainville and Ok Tedi arbitration machinery based on the *Arbitration Act* are vulnerable to changes that may be made to that Act.

88. Kennecott, having witnessed the forced Bougainville re-negotiations, insisted on an international arbitration while the state wanted arbitration to be subject to the domestic arbitration legislation as in the Bougainville case: Jackson, op. cit., p. 63.
89. The resolution of disputes by arbitration is additional to other dispute resolution mechanisms including negotiation, conciliation, expert determination and litigation: See R. M. B. Reynolds, "Problems with Long Term Contracts: Alternative Methods of Resolving Disputes" [1986] *AMPLA Yearbook* 451.
90. Peter, op. cit., p. 180.
91. Disputes involving taxation matters in the Bougainville project cannot be submitted to arbitration: cl. 7(r). This clause taken together with cl. 7(a) that preserves the application of the *Income Tax Act* means that tax disputes will be resolved under the provisions of that Act.
92. The Standard Petroleum Agreement (cl. 19) provides for arbitration by UNCITRAL as well.
93. See above, n. 13. Under the *Investment Promotion Act* 1992, arbitration of all investment disputes between foreign investors and the state are referable to the ICSID as well—section 39.
94. For a discussion of the validity of arbitration clauses and the relationship of the arbitration forum to the municipal courts, see Nonggorr, op. cit.

POLITICAL AND ECONOMIC LEVERAGE

In addition to measures taken by the parties under the Agreements, factors external to the contract may also confer security on the investment.[95] General guarantees under the municipal law protecting foreign investments are one source. The *Investment Promotion Act* 1992 of Papua New Guinea, for example, gives a number of guarantees including guarantees against nationalisation and expropriation measures.[96]

Another important source of investment protection is the investor's political leverage manifested by the support of its home government either through investment protection agreements with the host country or by offering insurance protection. Equally important may be the economic leverage or risk management measures taken by the investor itself as part of its investment strategy.

Home country political leverage

Home country political leverage (excluding diplomatic protection[97]) may be available in two ways: through investment protection agreements or under investment insurance schemes.[98] Attempts have been made to create international-based bilateral treaties for investment protection[99] but none have, to date, succeeded.[100] Investment protection agreements in existence are bilateral arrangements. Bilateral investment protection treaties are used by many western countries including the United Kingdom, France, West Germany and Switzerland.[101] The

95. Generally on international protection of foreign investment, see A. Akinsanya "International Protection of Direct Foreign Investment in the Third World" (1987) 36 *International Comparative Law Quarterly* 58.
96. Except where this is done in accordance with law for a public purpose and after payment of compensation: s. 37(1).
97. Diplomatic protection may be sought by a national through its state against another state for a wrong done by the latter to the national. In the case of foreign investors, where the host country does any act (or omits to act) that is injurious to the investor including a breach of an economic development contract, if the investor has no other remedy, it may seek diplomatic protection from its state.
98. Private insurance may be taken by the investor itself.
99. The attempts include the Havana Charter of 1948, the ICC proposal for an International Code of Fair Treatment for Foreign Investments (1949), the proposals of the International Association for the Promotion and Protection of Private Foreign Investment (API), proposals by Abs and Showcross for an "International Convention for the Mutual Protection of Private Property Rights in Foreign Countries" (1959) and an OECD Draft Convention on the Protection of Foreign Property (1967): see Peter, op. cit., p. 217; Z. A. Kronfol, *Protection of Foreign Investment*, (A. W. Sithoff: Leiden, 1972).
100. The ICSID Convention is a multilateral treaty but contracting states have the option of consenting to its jurisdiction on a case-by-case basis.
101. A. Broches, "Bilateral Investment Protection Treaties of Investment Disputes" in P. Sanders (ed.), *The Art of Arbitration: Essays on International Arbitration* (1982).

United States has entered into its "Friendship, Commerce and Navigation" treaties since 1950.[102]

Bilateral investment protection treaties vary but they have a number of common features. These are: (1) they prohibit expropriation, nationalisation or similar acts of state excepting such non-discriminatory acts taken to serve a public purpose done under due process of law with provision for prompt, adequate and effective compensation; (2) they limit statutory interference with contractual rights such as interventions, cancellations, forced re-negotiations, coerced sales or participation arrangements and the raising of taxes to confiscatory levels; and (3) the protection afforded continues even after termination to investment made prior to termination for a determined period or without any time limit.[103]

A big proportion of foreign investment in Papua New Guinea is made by Australian companies.[104] This is true of the four mining projects. The majority equity ownership in all of them are in Australian companies. Australia and Papua New Guinea had no formal investment protection arrangement when Papua New Guinea became independent. Investment by Australian nationals and companies in Papua New Guinea relied on the informal close political and economic relationship that existed between the two countries.

Economically, Papua New Guinea has been relying on Australian aid constituting 50 per cent of the government budget in 1975 falling gradually to 30 per cent in 1989.[105] Much project aid has been given annually since independence. Project or tied aid given for specific projects is additional to the budgetary aid. The political relationship has also been close even at personal levels between politicians. The decision by Broken Hill Proprietary Ltd (BHP) to step in immediately to develop the Ok Tedi mine following Kennecott's withdrawal after breakdown in

102. G. Aksen, "The Case for Bilateral Investment Treaties" in *Proceedings of the South Western Legal Foundation, Private Investors Abroad—Problems and Solutions in International Business*, New York, 1981, p. 357. The United States federal government sponsored overseas private investment insurance scheme is administered by the Overseas Private Investment Corp. (OPIC); see V. R. Koven, "Expropriation and the Jurisprudence of OPIC" (1981) *Harvard International Law Journal* 269.

103. Peter, op. cit., pp. 220-221.

104. Australian investment in Papua New Guinea from 1969 to 1970, for example, was A$420 million, making Australian investment by far the largest source of foreign investment in Papua New Guinea. To Australia, this represented 29 per cent of its investments overseas for that period: *Australian Papua New Guinea Investment Promotion Conference Report* (1979), p. 4.

105. On independence, Australia pledged A$500 million in aid for the period 1974-1975 to 1976-1977. In March 1976 under an aid agreement, Australia was to provide A$1,060 million budget support between 1976-1977 and 1980-1981. This has decreased since but budgetary aid from Australia still makes up a big part of Papua New Guinea government budget. Since 1980, Australian budgetary aid has hovered around the A$300 million mark each year: P. McCawley and S. Phillips, "Australia's Aid to Papua New Guinea: Issues and Prospects", paper presented at seminar organised by the N.S.W. Branch of the Council of National Interest (CNI) on 2 December 1989. In September 1992, the Australian government promised to give A$1031.4 million in budget support and A$516.8 million programme aid for the next five years to 1997.

negotiations, for example, has been attributed partly to influence brought on BHP by leading Australian politicians including Andrew Peacock.[106] In these circumstances, Papua New Guinea could not take any action that would injure investments of Australian companies and offend Australia. To formalise the relationship, however, and as a result of recent landowner instigated destruction to the Bougainville mine project in 1988, the two countries have adopted an investment protection treaty.

The Agreement signed in 1990 called the "Agreement for the Promotion and Protection of Investments" (APPI) is intended to complement the "Agreement on Trade and Commercial Relations Between The Government of Papua New Guinea and the [Commonwealth] Government of Australia" (PACTRA) signed soon after Papua New Guinea's independence. PACTRA, which came into effect on 1 February 1977 sought to put on a regular footing trade and commercial relations between the two countries. PACTRA's objectives, therefore, include the expansion and diversification of trade between the two countries through the creation of free trade areas, the development and use of the resources of the area, the promotion of direct investment and, in general, industrial, administrative and technical co-operation between the two countries.[107] A revision of this Agreement called PACTRA II was made in 1990 along with the APPI. PACTRA is essentially for the promotion of investment whereas APPI is mainly for the protection of investment.[108] In this respect, APPI makes a number of provisions.

First, the parties agree to accord to investments of each other's nationals (including companies) "fair and equitable treatment and shall enjoy full protection and security" in each other's territory.[109] In this connection but subject to their applicable laws, the parties agree not to

106. After posing the questions "Why was BHP involved at all? Who, if anyone, was doing the seducing?" to explain why BHP had stepped in in 1975 where the international mining giant Kennecott had been "rebuffed" by the Papua New Guinean government, Jackson speculates: "The change in Australian government brought about by the crisis of Remembrance Day also brought to the job of Foreign Minister, Andrew Peacock, who had strong personal as well as official ties of friendship with many top Papua New Guinean leaders, notably Michael Somare [then Prime Minister]. Indeed, it is strongly rumoured in Port Moresby, with how much veracity I know not, that Andrew Peacock's racing tips to his Papua New Guinea friends have frequently brought distress to Moresby's bookmakers' fraternity. Peacock knew as well, if not better, than Somare that a successful conclusion to the Ok Tedi saga would go far towards establishing greater financial self-reliance for Papua New Guinea. Any Australian Foreign Minister who could help to bring stability to its ex-colony whilst both retaining that country's friendship and reducing the costs to Australia of maintaining its budget would no doubt receive the unrestrained thanks of a grateful Australian tax-paying public. It was very much in Australia's best interests that Ok Tedi (or something like it) was a success and Peacock's excellent relations with leading Papua New Guinean politicians—developed during the early 1970s—would certainly help in the achievement of such a success." (Jackson, op. cit., p. 78).

107. PACTRA, Art. 2.

108. As Papua New Guinean companies and nationals have almost nil investment in Australia, APPI will mainly protect Australian investments in Papua New Guinea. However, the value of the Agreement to Papua New Guinea lies in encouraging Australian investment in Papua New Guinea in the Agreement providing investment security to Australian investors.

109. Art. 3(3).

impair or subject the other's nationals' "investment" activities to "arbitrary, unreasonable or discriminatory measures".[110] The expression "investment" includes "business concessions by law or under contract"[111] while the protection against arbitrary, unreasonable and discriminatory measures extends to

> "the management, maintenance, use, enjoyment, acquisition or disposal of investments, rights related to investments and activities associated with investments".[112]

Rights including those under the economic development contracts like protections afforded by the stability clauses are expressly protected:

> "A Contracting Party shall, subject to its laws, adhere to any written undertakings given to a national or company of the other Contracting Party concerning an investment, provided that the undertaking is given by a person lawfully entitled to give it."

Second, the parties agree not to

> "take any measures of expropriation, nationalisation or any other dispossession having effect equivalent to nationalisation or expropriation against the investments of nationals or companies of the other contracting party".[113]

The only exception made is where expropriation or nationalisation measures meet a number of conditions. The nationalisation or other measure must be (1) for a public purpose and effected under due process of law; (2) non-discriminatory; and (3) accompanied by provisions for the payment of prompt, adequate and effective compensation.[114] This protection as well as the other protective measures of the Agreement do not apply to locally incorporated companies even if the company is owned by nationals of the other contracting party.[115] Hence, Bougainville Copper Ltd and Ok Tedi Mining Ltd are not protected by the Agreement for any injurious action that may be taken by Papua New Guinea as they are incorporated in Papua New Guinea. Australian nationals and companies that have stock or other interests in Bougainville Copper Ltd or Ok Tedi Mining Ltd are protected by the Agreement. This is done in order to avoid conferring indirect protection to interests of nationals of third countries in companies like Bougainville and Ok Tedi.

Third, where there are other losses suffered by nationals of one contracting party in the territory of the other, the latter must accord treatment including restitution, indemnification, compensation or other settlement

> "no less favorable than that which that other Contracting Party accords to nationals or companies of any third country should it adopt any measures relating to such losses".[116]

110. Art. 3(7).
111. Art. 1(d).
112. Art. 3(4).
113. Art. 7(1).
114. Art. 7(2) makes provision on how such compensation is to be calculated.
115. Art. 2(2).
116. Art. 8.

The relevant losses are those suffered owing to "war, or other armed conflict, revolution, a state of national emergency, revolt, insurrection or riot".[117] The events leading to the disruption of the Bougainville project may, for example, be treated as "armed conflict", "revolt" or "insurrection or riot" but compensation or other settlement would not be required from Papua New Guinea to Australian nationals suffering investment losses as a consequence of it unless Papua New Guinea were to make such gestures to nationals of a third country suffering similar loss from the events. The "no less favorable treatment" (or sometimes called "most favoured nation treatment") is generally to be accorded by the contracting parties to the investment of each other's nationals:

> "Each Contracting Party shall treat investments and activities associated with investments in its own territory, including compensation . . . and transfers [of currency and property] . . . on a basis no less favorable than that accorded to investments and activities associated with investments by nationals or companies of any third country."[118]

Fourth, the transfer of funds in freely convertible currencies and assets of personnel employed from abroad must, upon request, "subject to the laws and policies applicable from time to time", be permitted without unreasonable delay.[119] This assurance is subject to two exceptions: one, property and funds may be stopped for the purposes of protecting creditors or for the satisfaction of court judgments[120] and two, in the case of currencies, the right to repatriate currencies is subject to the right of a contracting party to "exercise equitably and in good faith powers conferred by its laws" in "exceptional financial or economic circumstances".[121] Further, again subject to its laws and policies, a contracting party is to permit nationals of the other contracting party and personnel employed by companies of a contracting party to enter and remain in its territory for the purposes of any activity related to any investment.[122]

Fifth, where a contracting party or its agency or agencies make any payment to any of its nationals (including companies) under any guarantee or other form of indemnity in relation to an investment, that party is subrogated to the rights of its nationals who suffered the loss giving rise to the payment.[123]

Finally, the Agreement provides its own machinery for settling disputes arising under it. Consultation is emphasised as the first step.[124] Where this fails, a dispute between the contracting parties is to be

117. Ibid.
118. Art. 4(1). "Special incentives granted by one Contracting Party only to its nationals or companies in order to stimulate the creation of local industries are considered compatible with this Article" (Art. 4(2)).
119. Art. (1).
120. Art. 9(3).
121. Art. 9(4).
122. Art. 15.
123. Art. 10.
124. Art. 11.

submitted to arbitration.[125] The arbitration panel is to consist of three persons: one each appointed by the parties and a third (the chair) appointed by agreement.[126]

In the case of a dispute arising between a national of a contracting state and the other contracting state, consultations are required as a first step towards settling the dispute. If this fails, the parties can do one of two things. First, either of the parties may institute normal legal proceedings. This must be done in the courts of the contracting party. Secondly, either of the parties may submit the dispute to arbitration under Arts 28 or 36 of the 1965 Convention on the Settlement of Disputes between States and Nationals of Other States (ICSID) if Australia is then a party.[127] If Australia is not then a party to the Convention, an arbitration tribunal constituted of three persons—one each appointed by the parties who in turn appoint a third who is to be chair.[128] Unless the arbitration tribunal has decided that a dispute is not within its jurisdiction or that a contracting party fails to abide by any judgment, award, order or other determination of a body, a party to a dispute is not to have recourse to diplomatic channels.[129] In the case of any dispute arising under the mining Agreements, the dispute machinery under the investment protection Agreement would be additional to the arbitration procedure under those Agreements.[130]

The protection of investment by government-backed insurance schemes against such risks as expropriation, loss arising from war, revolution or insurrection and civil strifes not normally covered by private insurance is common in many countries.[131] The United States, for example, had such a national insurance scheme established under its 1961 *Foreign Assistance Act* which was later continued by the Overseas Private Investment Corporation (OPIC) created by the *Foreign Assistance Act* 1969.[132] Germany and Switzerland have similar insurance

125. Art. 12.
126. Where the parties do not agree, the chair is to be appointed by the President of the International Court of Justice or where he or she refuses or is unable to act, the Vice-President or if the Vice-President refuses or is unable to act, another senior member of ICJ.
127. Art. 13. Australia has since become a member and passed legislation to implement the Convention—the *ICSID Implementation Act* 1990.
128. Where the first two do not agree on the chair, the President of the International Bank for Reconstruction and Development is to select the chair: Art. 13.
129. Art. 13(5).
130. The APPI provides that in any dispute between nationals and a contracting party, a disputant "may" submit the dispute to domestic courts or the agreed tribunal.
131. Various attempts have been made to establish international insurance schemes for investments in developing countries: C. H. Wasler, "Resource projects and the political risk" in *Legal and Institutional Arrangements in Minerals Development* (1982), p. 133; D. M. Sassoon, "Mineral development insurance schemes" in *Legal and Institutional Arrangements in Minerals Development* (1982), p. 158.
132. Its purpose was "to mobilise and facilitate the participation of United States private capital and skills in the economic and social development of less-developed friendly countries and areas, thereby complementing the development assistance objectives of the United States" (V. R. Koven, "Expropriation and the 'Jurisprudence' of OPIC" (1981) 22 *Harvard International Law Journal* 261 at 269).

schemes that date back to 1959 and 1970, respectively.[133] Australia has such an insurance scheme as well.[134] The Overseas Investment Insurance Scheme covers risks not normally offered by private insurance. The three main categories of risks covered by the Australian scheme are (1) expropriation, (2) inability to transfer capital or earnings back to Australia by the insured and (3) damage or destruction caused by war-like acts including war, riots and insurrection.[135] CRA in the Bougainville project, for example, before making its investment, sought assurances from the Australian government against expropriation by a future independent Papua New Guinea.[136] The latter refused to give this undertaking or to offer insurance protection because it felt that this "would imply a lack of faith on its part in a future government of Papua New Guinea".[137] It has been said that CRA would have pressed its demands for such assurance or, if not forthcoming, it would have refused to make the investment if it had known then that Papua New Guinea would get self-governing status as early as 1973.[138]

Economic leverage (risk management)

An investor, as part or its overall investment strategy in an investment project, can develop finance, marketing, technology and management strategy to ensure the security of its investment. Peter[139] identifies two strategies of risk management: the spreading of an investment risk and the structuring of an investment to preserve the investor's dominant position. The latter is relevant particularly in investment projects where the host country has equity. In such cases, the management of the investment project and its operations including its marketing and loan agreements could be arranged in such a way so as to tie these in with the continued presence of the investor thus raising the costs to the state of any unilateral government action resulting in the expulsion or withdrawal of the investor from the investment project.

The spreading of investment risk can be achieved by the investor linking to the investment as many economic interests as possible. Any forced contract changes would introduce into the project other parties and thus increase the pressure against unilateral host-country intervention. This may in turn increase the costs to the host country of

133. For these and other national insurance schemes, see T. Meron, *International Insurance in International Law* (Oceania Publications, Inc., Dobb's Ferry: New York, 1976).
134. Other countries with insurance schemes include the United Kingdom and Canada. Their scheme and the United States scheme are discussed in Meron, op. cit.
135. G. P. Phillips, "Insurance of Overseas Investments—The Australian Scheme" in Starke (ed.), *The Protection and Encouragement of Private Foreign Investment* (Butterworths: Sydney, 1966), p. 123.
136. Mikesell, op. cit., pp. 81-82.
137. Mikesell, op. cit., p. 82.
138. Ibid. The Bougainville company had private insurance under which it has recently received A$102 million for losses arising out of the destruction and closure of the mine by militant landowners: Bougainville Copper Ltd Annual Report (1989).
139. Peter, op. cit., p. 240.

such intervention in economic and political terms.[140] This will normally be done for economic reasons but it can have the effect of providing further protection to the investment. The development of the Ok Tedi mine illustrates this risk management concept.

When Broken Hill Pty Ltd (Australia) (BHP) stepped in to develop the mine after Kennecott's withdrawal, it was estimated that the project's construction cost alone would be in excess of U.S.$1,400 million. This capital could not be raised by the project consortium alone.[141] It was decided, therefore, that the project would be developed by project financing. The concept of project financing means the involvement of many financial institutions and future customers like buyers of mining products. In the case of mining projects:

> "the expression [project financing] cover[s] those transactions which involve the provision of non-equity funds for the development of mining and energy projects on the basis that, relying on the financier's assessment of the mining, technical, commercial and financial viability of the economic unit which constitutes the project, the financier is willing to look initially to the cashflow and, if necessary, assets of the project for his timely repayment."[142]

One reason for using project financing is that it allows project sponsors to transfer some of the project risk, especially the political risks, onto lenders.[143]

The project financing of the Ok Tedi project involved many financial institutions and a number of government institutions. Numerous agreements on guarantees, assignments and recourse financing

140. After the Chilean government re-negotiations of mining Agreements with Kennecott Copper Corporation and Anaconde in 1960, Kennecott, anticipating further political risk adopted, according to Moran, "a strategy of protection" aimed specifically at spreading the risk: "First, a strategy of protection would mean subjecting as little of the corporation's own capital to the risk of nationalisation as possible. Secondly, it would mean lining up, from as many directions as possible, international supporters, who would automatically share the Kennecott's parent's outrage in case of nationalisation. Thirdly, it would mean raising the cost to Chile of nationalising the Kennecott mine as high as possible." (T. H. Moran, "Trans-National Strategies of Protection and Defense by Multi-National Corporations: Spreading the Risk and Raising the Cost for Nationalisation in Natural Resources" (1973) 27 *International Organisation* 273).
141. The three consortium members were BHP (Australia), Amoco (U.S.) and Kupferexplorationsgesellschaft (Germany).
142. R. A. Ladbury, et al., "Current Legal Problems in Project Financing" (1981) 3 *AMPLJ* 139 at 147-153. See also W. H. G. Burslem, "Financing Petroleum Development" (1984) 14 *Victoria University of Wellington Law Review* 103; D. Suratgar, "International project finance and security for lenders" in *Legal and Institutional Arrangements in Minerals Development* (1982), p. 144.
143. The other two reasons identified by Adamson are: one, a desire of project developers to match the cashflow generated by the project with loan drawdowns and repayments to make the project self-financing and two, to enable the developers to achieve off-balance sheet financing, i.e., it does not show as a direct liability on the project balance sheet; J. A. Adamson, *Proceedings of Energy Seminar, International Bar Association (Committee on Energy and Natural Resources) Topic N. N1.3*, 1979. There are problems in project financing, for instance, they may destabilise mineral markets or problems may arise in the timing of debt-servicing obligations: A. Stockmayer, "Changing contractual patterns of mining finance" in *Legal and Institutional Arrangements in Minerals Development* (1982), p. 94.

arrangements were also made between the project developers and these financial institutions.[144] For our purposes here, the main features of these arrangements may be outlined to illustrate the notion or risk distribution for investment security.

First, the main shareholders in the project were three major companies of three different countries important to Papua New Guinea—BHP of Australia, Amoco of the United States and Kupfer (short for Kupferexplorationsgesellschaft) which was a consortium of two German companies and a German government agency. These companies, including the state of Papua New Guinea as the "project developers", negotiated numerous loans from commercial lenders and export credit lenders after giving in return various guarantees (to some of which the state was also bound). The commercial lenders included Citicorp Bank (Australia), Overseas Private Investment Corporation (United States), and Kreditanstalt fur Wiederaufbau (Germany). The export credit lenders[145] led by Export Finance and Insurance Corp. of Australia were—the Export Credit Guarantee Department (United Kingdom), Export Development Corporation (Canada) and Oesterreichische Kontrollbank Aktiengesellschaft (Austria). Included in the loan supporting organizations were two Papua New Guinea companies—Mt Fubilon Development Company and Star Mountains Holding Company Pty Ltd—owned by the provincial government and local people of the project area.

Second, the state itself gave approvals and undertakings that are important as the project lenders refused to lend without these approvals and undertakings.[146] The state also brought the German government directly into the project by obtaining a loan to pay for part of its equity participation, that is, its contribution of A$50 million for the construction of the major road for the project. The German government additionally contributed to the loan advance from Kreditanstalt fur Wiederaufbau under an arrangement with Kupfer, the German consortium, in order to assist its own corporations in securing long-term supplies of raw materials.[147]

Third, the lending institutions tied into the loan agreements completion times for the various stages of the project development and additionally set project production levels. A default would carry penalties including reduction of the loan repayment periods or increase in interest rates. Although the state resisted and refused to be party to completion guarantees and carry political risks,[148] the whole cobweb nature of the financial arrangements bind it in some of these guarantees given on behalf of the project.

144. The Fourth Supplemental Agreement deals with these financial arrangements. For a detailed account, see S. McGill, "Project Financing Applied to the Ok Tedi Mine—A Government Perspective" (1983) 7(2) *Natural Resources Forum* 115; and Pintz, op. cit., Ch. 6.

145. Export credit lenders' loan advances normally take the form of supplying equipment, machinery and other goods produced in their country to the project.

146. McGill, op. cit. at 118. The undertakings included one given by the state that it would negotiate a treaty with Indonesia on the use of the Fly River which borders these two countries as the river was to be the transport route for shipping mine products: McGill, op. cit. at 122; Pintz, op. cit., pp. 144-145.

147. McGill, op. cit., p. 120.

148. Pintz, op. cit., p. 117.

A question may be posed to make the point: what consequences would ensue if Papua New Guinea were to do anything that would seriously interfere with the Ok Tedi project operations, for example, by acts of expropriation or nationalisation? In addition to any financial costs to it of such action, Papua New Guinea must be prepared to withstand pressure or even counter-action in different forms from numerous governments, government agencies, international financial institutions and also from within the country by the participating national companies which include local landowner interests and the provincial government on whose territory the project is situated. These would include Papua New Guinea's main trading partners—Australia, Germany, the United Kingdom and Canada. The consequences may not be dissimilar to what President Allende of Chile is reported to have faced in the nationalisation of Kennecott Corp.'s mining investments (the investments having involved similar financial arrangements):

> "When Allende proposed to pay no compensation for the remaining 49 per cent on the grounds that Kennecott's excess profits exceeded the value of its assets by $310 million, a chorus and an orchestration of pressure was generated, particularly in the United States and Europe. The United States government, with the full backing of Congress, adopted a strong position against Chile. The United States assets of the Chilean national airline and the Copper Corp., both state enterprises, were attached because of the guarantees of the Chilean State. The European and Asian creditors brought strong pressure on the 'Paris Club' of creditors to use re-negotiation of Chile's external debt as a lever to secure compensation for Kennecott. Faced with these pressures, the Allende government yielded inch by inch."[149]

Political leverage and risk-management strategy are matters external to the contract and in that sense they may not feature in the distribution of benefits and the sharing of risks under the economic development contracts. However, they are important factors that contribute to investment security. Security of the investment will be one of the important concerns of the investor. It will therefore attempt to adopt all measures including obtaining undertakings from the state to secure the investment. An undue insistence on numerous government undertakings, some of which the government may be reluctant to give, may be costly in terms of the investment not proceeding where there is disagreement. Or in exchange for the giving of such undertakings, the investor may forgo other benefits in the negotiation of the investment agreement. The existence of these external factors may be effective even on their own to confer that security. In the case of Australian investments in Papua New Guinea, like those in the projects cited here, it is unlikely, given the political and economic relationship, that Papua New Guinea would do anything to offend Australia. In addition, the existence of the investment protection Agreement gives further protection to Australian investors.

149. Moran, op. cit. at 289-29, quoting from an interview of R. Haldeman, former Executive Vice-President of Kennecott's Chilean operations, Santiago, 27 May 1970.

CONCLUSIONS

The provisions in the four Agreements in Papua New Guinea, in relation to investment security, reveal the extent to which the state there has accommodated the investor's concerns. The Bougainville and Ok Tedi Agreements have numerous stability clauses. Some were possible only because the Agreements were given legislative force. The Porgera and Misima Agreements do not have as many stability clauses because they do not have legislative force.

Recent legislative enactments like the *Mining Act* 1992 have gone further to confer statutory basis for the making of these contracts as well as empowering such contracts to regulate the exercise of discretions by the Minister and the Director of Mines. The *Investment Promotion Act* 1992 has extended some of the guarantees found in one or two of the Agreements to all other agreements as well as other investment projects involving foreign investment.

In Papua New Guinea, while the state has the discretion to decide whether or not to enter into development contracts for investment projects, in making legislative provision for it, it has sought to respond to concerns of foreign investors concerning investment security. The legislation of guarantees to foreign investors generally under the *Investment Promotion Act* 1992 are also an indication on the part of the government to acknowledge the security concerns of investors and are a response to such concerns.