



“DEMOCRACY, CONSTITUTIONS & DEALING WITH THE WORLD”

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Session 3: Constitutional frameworks for international investment

- PNG as a case study

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- 1. What kinds of major international investment projects are there in your country? How do they affect community life and governance, whether positively or negatively? Are any of them controversial, or the subject of public debate?*

Papua New Guinea has significant amount of natural resources comprised of, amongst others, marine, forestry, minerals, oil and gas. The marine resources such as tuna is sold to the European market. There has been significant controversy regarding the logging and export of round logs. The customary landowners also continue to raise issues related to environment destruction, non-payment of royalties and lack of transparency and accountability in the management and distribution of benefits.

Mining and petroleum industries are the main sectors that attract major international investments. In practice, the National Government enters into framework agreements with the developers. Thereafter benefit sharing agreements are negotiated and agreed between the relevant provincial governments and customary landowners. The benefit sharing aspect has been very controversial amongst the customary landowners themselves and with the Government. The proper identification of affected landowners is lacking. This leads to protracted court battles. In the process, royalties and other forms of benefits do not reach the genuine landowners in a timely manner.

The Government and developers have been blamed for these failures but the issues remain controversial and sensitive. For instance, the Bougainville civil war erupted on the back of the issues related to the pollution of the environment and lack of adequate benefits trickle down to the customary landowners of Panguna Mining in the former North Solomons Province (now the Autonomous Region of Bougainville).

The people along the Fly River of the Western Province also raised concerns over the pollution of the Fly River by the OK Tedi Mining operation upstream in the Star Mountains. The issue forced the National Government and the developer to reach an agreement, whereby the interests in mining operation were transferred to the PNG Government, the Western Provincial Government and mine affected communities. The customary landowners of the mine site are still in court as to who should be the legitimate landowners. The royalties therefore are being withheld until the issues of landownership are resolved.

The PNG liquidified natural gas (LNG) customary landowners in the Hela Province also have been very vocal about the failure by the government and the developer to pay their royalties and other benefits. However, the government has repeatedly attempted to resolve the issues of proper identification of landowners before any royalties can be paid but those attempts were futile due to the landowners

infighting. These issues at times affect the production sites. The developers on regular basis hire security forces to ensure the safety of the sites, staff and production of the oil and gas.

2. *Does the Constitution provide a framework for making decisions about international investment? If so, since when? What does it provide? Does the framework operate in practice?*

International investments in PNG come in many different forms. Generally, the Constitution does not specifically prescribe how foreign investments are brought into the country. Goal 4 of the National Goals and Directive Principles of the Constitution states that PNG's natural resources and environment must be conserved and used for the collective benefit for all including the future generations.¹ Insofar as properties are concerned, s.53 of the Constitution protects the citizens against unjust deprivation or compulsory acquisition of property, unless it is for public purpose. In situations where property is compulsorily acquired by the State for public purpose, just compensation must be paid.

In that respect, the customary landowners are the vital stakeholders in any investment in the country. All investments on or in connection with customary lands, including maritime areas, must ensure that customary landowners are consulted, and they must give free prior informed consent, particularly where the investment concerns their land.

3. *Are investment projects subject to the ordinary law?*

Most investment projects are subject to the ordinary law. Any foreign investments may be run through companies established under the Companies Act. All foreign companies or companies with over 50% of shares owned by foreign individuals are required to be registered as foreign enterprises.

In addition to the above, industry specific investments are governed by relevant laws, for instance, marine resources and regulated by the *Fisheries Management Act (1998)*,² forest resources are guided by the *Forestry Act*,³ etc. Mining and petroleum industries are the main sectors that attract major international investments. The *Mining Act*⁴ and *Oil and Gas Act*⁵ are the principal laws that deal with investments in the minerals and oil and gas resources.

4. *Which institutions have authority to approve such projects? How are these decisions made?*

The Investment Promotion Authority deals with the registration and promotion of investment in the country.⁶ The relevant laws that govern that function are *Investment Promotion Authority Act* and *Companies Act*. Insofar as the requirements under those Acts are met, the Registrar of Companies will register companies. The Registrar of Companies also has powers to deregister or refuse applications for registration that do not meet the requirements.

In respect of maritime projects, the *PNG Fisheries Authority* regulates them whilst the *PNG Forest Authority* manages and regulates forestry projects. The *Mining Department and Mineral Resources Authority* oversee all mining projects and activities. The oil and gas projects fall within the domain of the *Department of Petroleum*. These authorities exercise powers in accordance with their relevant laws.

¹ http://www.paclii.org/pg/legis/consol_act/cotisopng534/

² <https://www.fisheries.gov.pg/legislation>

³ <https://forestlegality.org/risk-tool/country/papua-new-guinea#tab-laws>

⁴ [https://actnowpng.org/sites/default/files/2.%20Proposed%20Mining%20Act%20\(July%202006%20draft\).pdf](https://actnowpng.org/sites/default/files/2.%20Proposed%20Mining%20Act%20(July%202006%20draft).pdf)

⁵ http://www.paclii.org/pg/legis/consol_act/oaga199894/ and <http://www.parliament.gov.pg/index.php/bills-and-legislation/view/oil-gas-amendment-act-2020>.

⁶ <https://www.ipa.gov.pg/>.

5. To what extent is there transparency and public accountability for such decisions?

There is no freedom of information law in PNG, though s.51 of the Constitution gives people the right to information. A Right to Information Policy is currently being developed.⁷ In practice the customary landowners are informed about the investments by way of print-media or via face-to-face awareness. Many times, the correct information does not reach the people for them to make informed decisions. This issue is compounded by the customary landowner's lack of knowledge or illiteracy.

PNG is a member of the Extractive Industries Transparency Initiative (EITI).⁸ Under the EITI and some other schemes, there are now various form of transparency regimes established by a range of policies, action plans and legislation, including the:

- National Policy for Transparency and Accountability in the Extractives Sector in Papua New Guinea;
- EITI-PNG Work Plan (2019);
- PNG Roadmap for Beneficial Ownership Disclosure;
- National Action Plan on Promotion of Open Governance (2018- 2020);
- Anti-Money Laundering and Counter Terrorist Financing Act 2015 (No. 20 of 2015); and
- Principles and Prudential Requirements (Bank of PNG).

The above policies and laws support transparent foreign investments, but a number of them are also intended to prevent corruption and other crimes involving foreigners, including terrorism.

One of the areas where the extractive industry has faced most challenges is the involvement of landowners and the beneficiaries pertaining to the resources on their lands. Monetary benefits are the most common type of benefits derived from the resources on the land. The royalties earmarked for the customary landowners in mining and petroleum projects are in the first instance paid to the Mineral Resources Development Company Ltd (MRDC), a trustee entity, established by the Government to hold the royalties in trust for the landowners. MRDC invests the funds for and on behalf of the landowners and pays dividends to the landowners concerned. The landowners of Lihir Mining have set up their separate trustee company that manages the royalties from the mining and pays dividends to the landowners. No similar trust funds or entities are set up to deal with landowner's royalties or other benefits from other investment projects.

6. Are there any changes to current procedures and to the constitutional framework that applies to them that might retain the beneficial aspects of international investment while enhancing transparency, deliberation and accountability?

There were few changes made to the mining and oil and gas industries by way of amendments to the *Mining Act* and *Oil and Gas Act* in 2020. The significant changes made by these laws is that the mining and petroleum developers are now required to provide "live data" to the respective State entities.

Further, the procurement of construction works and services regime of the State was significantly altered whereby any contract valued below 10 million kina will be reserved for local companies. Foreign owned companies are only allowed to bid for State contracts valued over 10 million kina.

⁷ <https://ict.gov.pg/freedom-of-information-policy/>

⁸ <https://www.pngeiti.org.pg/>

7. Are there any other aspects of the experience with international investment and assistance in your country that might throw light on the issues for this theme?

Generally, transparency issues are addressed when engaging with the international developers. The *Companies Act* and others provide the necessary framework and protection for international investments to flourish in the country, though there remain challenges regarding how international investors interact with local landowners and with the Government.

Biography: Christopher Karaiye is the Principal of Morgens Lawyers and he holds Bachelor of Laws (with Honours), Bachelor of Business and Management (Honours) with economics major, and Bachelor of Economics from the University of Papua New Guinea. He practices law as a private practitioner and advocates at the District Court, National Court and Supreme Court of Papua New Guinea. Mr. Karaiye is the author of *Administrative Law and Judicial Review in Papua New Guinea (2019)* and he contributed a chapter in the book, *Legal Systems of the Pacific: Introducing Sixteen Gems (2021)*, edited by Professor Jennifer Corrin (University of Queensland, Australia) and Professor Tony Angelo (Victoria University of Wellington, New Zealand).