The Legal Effect and Consequences of Conferring Legislative Status on Contracts

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It is not uncommon to find contracts receiving legislative recognition or sanction. This recognition may come in various ways. Legislation may authorise a contract to be made or it may approve a contract that has already been made. Alternatively legislation may enact a contract in whole giving it legislative status. The latter practice is common in contracts that establish large scale investment projects. This article looks at the legal effect and consequences of contracts that receive legislative status.

The issues raised by legislative entrenchment include the status of these contracts, that is, whether they remain as contracts or are legislation attracting the attributes and consequences of legislation. Where there is a breach of any of the obligations, does this constitute a breach of contract or statutory duty? Where there are contractual stipulations prohibiting the unilateral variation of provisions (as they are the ordinary feature of contracts), is the legislature equally prohibited from changing those terms of the legislated contract, and what consequences follow where there is unilateral variation of such contract by legislation?

There are at least three reasons why contracts under which large investment projects are established are legislated, namely contractual effectiveness, efficiency and security. With legislative status, no issue of authority to contract can arise as the legislature in legislating it, has approved it. Where, as is common in many large-scale investment projects, administrative and legislative compliance requirements such as licensing and other approvals are required from various government departments and agencies in the operation of the project, legislative authorisation makes such requirements redundant, enabling the efficient development and operation of the project. Against the ever present threat of administrative interference from public authorities in the project operation and the performance of the contractual obligations, the legislative status secures the contractual provisions.

The extent to which these objectives are realised by the legislative entrenchment practice depends on its legal effect. These in turn raise important constitutional questions. In Australian jurisdictions, for example, the 'manner and form' issues under the *Colonial Laws Validity Act* 1865 (Imp.) arise in this connection. Where there are written constitutions like Papua New Guinea that accord to themselves the status of supreme law, issues of contractual provisions (with legislative force) fettering legislative powers also arise. It is important, therefore, to examine and understand the effect of the practice.

1. Legislative Entrenchment: The Practice

The conferral of legislative status on contracts must be distinguished from other forms of legislative sanction or recognition. These include agreements that merely receive legislative approval or confirmation, or where the statute authorises a contract to be made or those that declare a contract valid and binding.[1] They do not elevate the contracts so

1 E. Campbell, 'Legislative Approval of Government Contracts' (1972) 46 *A.L.J.* 217, 217-218.

treated to the status of legislation. In some cases, however, their statutory approval, confirmation or authorisation may secure the validity of these contracts that would otherwise be invalid, for instance, where they lack contractual intention;[2] where one of the parties lacks contractual capacity;[3] or where the terms of the contract are uncertain.[4] In *Sevenoaks, Maidstone & Tunbridge Ry.* v. *London, Chatham & Dover Ry*,[5] for example, Jessel M.R. went further in holding that Parliament had power by confirming an agreement, to create rights not known to ordinary law and incapable of creation by an ordinary contract.

Two contracts that have received legislative status may be cited to illustrate the legislative entrenchment practice and hence provide examples for the discussion. The two are agreements under which two major mining operations have been developed in Papua New Guinea. They relate to the development of the Bougainville copper mine and the Ok Tedi gold and copper mine. The two agreements make comprehensive provisions for the development of the projects, taxation, employment, development of infrastructure, provision of social services and environmental protection. Both agreements made between the project developers (mostly foreign investors) on the one hand and the Independent State of Papua New Guinea (hereafter 'the government') on the other, have been given legislative force.

The Bougainville Copper Agreement, entered into in 1967 and later re-negotiated in 1974, made express provision for its ratification by legislation:

> The Administration shall as soon as is reasonably practicable introduce and sponsor in the House of Assembly of the Territory a Bill for an Ordinance to approve this Agreement which Bill shall be in the form of the draft Bill hereto agreed upon between the Administration and the Company and signed on their behalf for the purpose of identification.[6]

The ratification was made a pre-condition to the Agreement coming into force:

> [T]his Agreement shall come into effect on the day on which an Ordinance in the form hereinbefore referred to ... comes into effect, and in the event that such an Ordinance does not come into effect ... this Agreement shall be of no effect and neither of the parties hereto shall have any claim against the other of them with respect to any matter or thing arising out of done or performed or omitted to be done or performed under this Agreement ...[7]

The *Mining (Bougainville Copper Agreement) Act* c. 196[8] (PNG), the draft of which had already been agreed to by the parties, after reciting that it was:

> [A]n Act for the approval and implementation of an agreement made on 6 June 1967 between

2 *Australian Woollen Mills Pty Ltd.* v. *The Commonwealth* (1954) 92 C.L.R. 424, 461; *Placer Development Ltd.* v. *The Commonwealth* (1969) 121 C.L.R. 353, 368; 43 A.L.J.R. 265, 271.

3 In re *Earl of Wilton's Settled Estates* [1907] 1 Ch. 50; *Caledonia Ry* v. *Greencock & Wemyss Bay Ry.* (1874) L.R. 2 H.L. (Sc.) 347; *R.* v. *Midland Ry.* (1887) 19 Q.B.D. 540, 550.

4 'A second suggestion was that, though the agreement as a whole is valid, there may be an invalid clause or two which the Legislature has overlooked, and that sufficient effect is given to the declaration of validity if the majority of the clauses are held valid. That is an argument which I am wholly unable to accept. When the Legislature declares an agreement valid, it is valid in toto, and I am not at liberty to hold it partly invalid ... What I have said also extends to the case of voidness for uncertainty. If the Legislature has declared the contract valid, how can I declare it void?': *Manchester Ship Canal Co.* v. *Manchester Racecourse Co.* [1900] 2 Ch. 352, 359, 360. 'First, it was urged before us that the agreement in clause 3 was void for remoteness or uncertainty. We think ... that every clause of the agreement has statutory validity, and that no objection can be taken on that score': *Manchester Ship Canal Co.* v. *Manchester Racecourse Co.* [1901] 2 Ch. 37, 50.

5 (1879) 11 Ch.D. 625.

6 Clause 2(a).

7 Clause 2(b).

8 On independence in 1975, Papua New Guinea's statutes were revised and are now contained in a Revised Law edition called the 'Revised Laws of Papua New Guinea'. The 'c' represents the chapter reference in the Revised edition.

> the Administration ... and Bougainville Copper Pty. Limited, concerning the development of certain mineral deposits in Bougainville ...

approved the Agreement.[9] The effect and status of the Agreement so entrenched was specifically declared:

> [T]he Agreement has the force of law as if contained in this Act, and applies notwithstanding anything to the contrary in any other law ...[10]

Similar provisions are made in the Ok Tedi Agreements and Acts which consist of a Principal Agreement and five supplementary ones. The structure of the Principal Agreement and the five Supplementary Agreements on the matters relevant here are similar. After making the law of Papua New Guinea the governing law of the Agreement,[11] under the heading, 'condition precedent', the Agreement provided that:

> The State shall as soon as is reasonably practicable introduce and sponsor in the National Parliament a Bill for an Act to approve this Agreement, which Bill shall be in a form agreed between the Parties.[12]

If the Act was not passed, the consequences were that the Agreement was not to come into force:

> This Agreement other than this Clause 4 shall not operate unless and until the Bill referred to ... is passed as an Act and comes into force and in the event that such an Act does not come into force on or before the 30th June 1976 (or such later date to which the Parties may agree) this Agreement shall be void and of no effect and neither of the Parties shall have any claim against the other of them with respect to any matter or thing arising out of, done or performed under the Agreement.[13]

The *Mining (Ok Tedi Agreement) Act* c. 363 (PNG) was enacted to give effect to the Principal Agreement.[14] Approval is given by the Act following a similar recital as that contained in the Bougainville Act.[15] The effect of the entrenchment is specifically declared:

> The Agreement has the force of law as if contained in this Act, and applies notwithstanding anything to the contrary in any other law in force in the country.[16]

The question that these provisions raise to be considered here is what is the effect of the legislation conferring on the Agreements 'the force of law as if contained in this Act'?

9 *Mining (Bougainville Copper Agreement) Act* c.196 (PNG), s.2.

10 *Mining (Bougainville Copper Agreement) Act* c.196 (PNG), s.4(1).

11 Principal Agreement, cl. 39.

12 Principal Agreement, cl 4.1; First Supplemental Agreement, cl. 3.1; Second Supplemental Agreement, cl. 3.1; Third Supplemental Agreement, cl. 3.1; Fourt Supplemental Agreement, cl. 3.1; Fifth Supplemental Agreement, cl. 3.1

13 Principal Agreement, cl 4.2; First Supplemental Agreement, cl. 3.2; Second Supplemental Agreement, cl. 3.2; Third Supplemental Agreement, cl.3.2; Fourth Supplemental Agreement, cl. 3.2; Fifth Supplemental Agreement, cl. 3.2.

14 The Supplemental Acts — First, Second, Third, Fourth, and Fifth — gave effect to their respective supplemental agreements.

15 *Mining (Ok Tedi Agreement) Act* c.363 (PNG), s. 2. Equivalent provisions under the supplemental agreements are s. 2 of each of the five Supplemental Agreement Acts.

16 *Mining (Ok Tedi Agreement) Act* c. 363 (PNG), 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.

2. Effect of Contracts having Legislative status

The 'as if enacted' formula is one commonly used in Acts that provide for the making of delegated legislation, that is, an Act of Parliament providing for subsidiary regulations or rules to be made by some authority other than Parliament, but confers on such regulations the status of the Act 'as if enacted' as part of the said Act. The object of this practice is to confer on the subsidiary legislation the same effect and status as the Act itself.

An effect of the 'as if enacted in this Act' formula in relation to subsidiary legislation is that, since the validity of an Act cannot be canvassed in the courts,[17] it is hoped that the subsidiary legislation given the same legislative status cannot be so canvassed. This is illustrated by *Institute of Patent Agents* v. *Lockwood*[18] where the point was addressed *obiter* by Lord Herschell as the case was decided on other grounds. The other Law Lords agreed on the point without discussion. Lord Herschell was of the opinion that the effect of the words was to make the 'subordinate legislation as completely exempt from judicial review as the statute itself'.[19] However, in later cases, courts have decided that, despite the use of this formula, they can exercise their power of judicial review to enquire into the validity of such regulations.[20] It has been held, for example, that where there is a question of *ultra vires* arising in respect of a subsidiary legislation, either because the subsidiary legislation is inconsistent with the provisions of the Act which authorise it or because the delegate went out of his province or where there has been a failure to comply with preliminary procedural requirements imposed by statute, the courts can invoke their powers of judicial review.[21] It is nevertheless fair to say that the latter cases refer to the courts' powers to inquire into the *vires* of the subsidiary legislation and so they do not affect their status — that the subsidiary legislation has the same status as the Act. The latter point is illustrated by *Foster* v. *Aloni*.[22]

Foster v. *Aloni* concerned criminal proceedings brought by the applicant against the respondent for breach of regulations made under the *State Electricity Act* 1928 (Vic.). Following the dismissal of the charge by a stipendiary magistrate in a Court of Petty Sessions, the applicant obtained an order *nisi* to review the decision. In the hearing of the application by the Supreme Court of Victoria, the respondent challenged the validity of the regulations which the 1928 Act declared 'shall have the like force and effect as if they were enacted in this Act'. The court held that where regulations made in these circumstances are within the authority's powers (in that case, the Governor in Council on the recommendation of the State Electricity Commission) and comply with any preliminary procedural requirements of the statute, the regulations have the force the statute confers on them subject to the provisions of the statute. Lowe A.-C.J., delivering the judgment of the Full Court, said:

> Not only, in our opinion, must the condition precedent as to the recommendation of the Commission be satisfied ... but in the next place, such regulations must be read as part of the Act, and if, when they are so read, some inconsistency is found with sections of the Act, other than those which actually define the heads of the power to make regulations ... then that inconsistency must be resolved, as must any question of conflict between sections of an Act of Parliament. Normally the inconsistent section would be treated as the leading provision and the regulation as *the* subordinate provisions.[23]

The implementation of international treaties by municipal legislation also provides an

17 S.G.G. 6. Edgor (ed.), *Craies on Statute*, (7th Edn., London: Sweet & Maxwell, 1976), 311.
18 [1894] A.C. 347.
19 *Id.* 359-360. See C.K. Allen, *Law and Orders* (London: Stevens & Sons Limited, 1945), 139.
20 See *Foster* v. *Aloni* [1951] V.L.R. 481.
21 *Minister of Health* v. *R. (on the Prosecution of Yaffe)* [1931] A.C. 494.
22 [1951] V.L.R. 481.
23 *Id.* 484. [Emphasis added.]

analogy as to the effect of instruments given legislative force. International treaties are sometimes given legislative force by domestic legislation. The effect of these in the municipal law, that is, whether they form part of the municipal law, depends on municipal law rules (especially the constitutional rules) of the particular country. In the United States, all treaties made even without legislative sanction have the status of 'supreme law of the Land'.[24] In England, by contrast, under the common law, treaties are not self-executing and so must receive the ratification by Parliament to bind the State (though the executive has power to enter into treaties) in international law. Even then, the treaty provisions may not be applied by the courts where they conflict with any municipal law.[25] Where a treaty is given legislative force, it has the force of an Act of Parliament in the municipal law, for instance, for the purposes of their construction.[26] Australian courts follow English decisions on the construction of treaties incorporated in statutes.[27] The effect of treaties given legislative force is that they have the force of Acts of Parliament.

There are two main differences that can be identified between the 'as if enacted' clauses concerning subsidiary legislation and the 'as if contained' clause found in contracts like the agreements in the Bougainville and Ok Tedi Acts. The words 'enacted' and 'contained' do not, it is suggested, make any difference in substance to the clauses (i.e. they have the same meaning in this context). The first substantial difference is that agreements like Bougainville and Ok Tedi are not subsidiary legislation authorised to be made by any authority other than Parliament. They are made by the government and approved by Parliament in legislative form. The second is that the agreements are contained as schedules to Acts and not separate from them. What is the effect of these differences?

The issue, so far as it can be determined, has not been addressed directly. The actions in *Placer Development Ltd.* v. *Commonwealth*[28] and *Ansett Transport Industries (Operations) Pty. Limited* v. *The Commonwealth*,[29] arose out of agreements given legislative approval, but the issue raised here did not arise. The issue could have been raised in the *Ansett* case, where the question was whether a contract given legislative force was inconsistent with regulations made under another Act. It could have been argued that, as the agreement had the force of an Act of Parliament, any subsidiary legislation made under it or under any other Act that was inconsistent, would be invalid.

The contract provisions in issue in *Commonwealth Aluminium Corporation Limited* v. *Attorney-General*[30] (hereafter referred to as *Comalco*) and *West Lakes Limited* v. *South Australia*[31] (hereafter referred to as *West Lakes*) are similar to the provisions in the Bougainville and Ok Tedi Agreements. In *Comalco*, the Premier of Queensland and the plaintiff company entered into an agreement for the exploitation of certain mineral deposits in the northern part of Queensland. The agreement was approved by the *Commonwealth Aluminium Corporation Pty. Limited Act* 1957 (Qld.), which provided that the provisions of the agreement (scheduled to it), were 'to have the force of law as though the Agree-

24 Article VI of the American *Constitution* states: 'This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the Contrary notwithstanding.'

25 *Attorney-General for Canada* v. *Attorney-General for Ontario and Others* [1937] A.C. 326, see especially Lord Atkin, 348.

26 *James Buchannan & Co. Ltd.* v. *Babco Forwarding & Shipping (U.K.) Ltd.* [1978] A.C. 141; *Commonwealth* v. *Tasmania* (1983) 57 A.L.J.R. 450; 46 A.L.R. 625; *Koowarto* v. *Bjelke-Peterson* (1982) 56 A.L.J.R. 625; 39 A.L.R. 417.

27 J. Crawford and W.R. Edeson, 'International Law and Australian Law' in K.W. Ryan (ed), *International Law in Australia*, (2nd ed. 1984), 111.

28 (1969) 121 C.L.R. 353.

29 (1977) 139 C.L.R. 54.

30 [1976] Qd.R. 231 .

31 (1980) 25 S.A.S.R. 389.

ment were an enactment of this Act'. The Act further provided that 'The Agreement may be varied pursuant to the agreement between the Minister for the time being administering the Act and the company ...'. A clause in the agreement itself also required the agreement of the company for any variation to its provisions. The State Parliament later enacted the *Mining Royalties Act 1974*, which provided for regulations to be made. Regulations made in pursuance of the powers under the 1974 Act were inconsistent with the 1957 Act concerning royalties. The company *inter alia* sought a declaration, that the regulations made under the 1974 Act were invalid either absolutely or in their application to them.

The case was argued and decided on the 'manner and form' issue under section 5 of the *Colonial Laws Validity Act* 1865 *(Imp)*.[32] The issue whether the contract could be treated as having the same force and status as the Act itself was not directly addressed by Wanstall S.P.J. in the leading judgment. Hoare J., dissenting, was of the view that the effect of conferring legislative force on the agreement was to make the agreement a part of the Act:

> In considering the 1957 Act it is essential to consider all the terms of the agreement because s.3 of the Act expressly provides 'Upon the making of the agreement the provisions thereof shall have the force of law as though the agreement were an enactment of this Act.' It seems to me that the plain words of this section are to confer on the agreement the status of an Act of the Queensland Parliament. Accordingly when s.4 of the Act contains provisions setting out precisely in what manner the agreement may be varied it seems to me to be inescapable that the section is speaking of a variation (i.e., an amendment) of an Act of Parliament. Ordinarily of course an Act of Parliament is amended by the passage of another Act of Parliament so that when the Act of Parliament lays down how it may be amended it purports to provide a 'manner and form' in which the amendment may be made.[33]

Dunn J., after stressing that the legislative force given to the agreement was for the purposes of giving legal effect to its provisions which would otherwise not be effective because of their likely conflict with existing statutes, stated:

> The Agreement remains something apart from the Act ... the legislative artifice adopted in order to give it effect does not make it, in point of law, 'an enactment of this Act'.[34]

Dunn J.'s view is questionable as it reduces to insignificance, if not ignores altogether, the provisions of the 1957 Act that expressly stated that the agreement there was to have the force of law.

West Lakes concerned an indenture made between the Premier of South Australia and the plaintiff company for the development of certain land. The indenture provided *inter alia* that its provisions were to be varied with the consent of the plaintiffs. The indenture was approved and ratified by legislation, which also provided that the indenture should be carried out and have effect as if its provisions were expressly enacted in the Act. When the State legislature sought to enact legislation inconsistent with the indenture, the plaintiffs sought declarations and injunctions to restrain the State from proceeding with the Bill. Again, argument turned on the 'manner and form' issue and the court's power to make the declarations sought in relation to the exercise of legislative power. The issue concerning the effect of conferring legislative status on the agreement was not addressed.

Thus, these cases, do not throw much light on the substantive effect of an agreement which has had conferred on it the status of an Act of Parliament. But *dicta*, including that of Hoare J., suggest that such agreements have the force of law in the same way as the legislation that gives them legislative force.

32 See discussion on this below.
33 *Comalco* [1976] Qd.R. 231, 247, 248.
34 *Id.* 260.

The effect of including agreements in the schedule to the Act points more to the conclusion that the scheduled agreements have the same effect as the sections of the Act.[35] For the purposes of determining the effect of a schedule or its relationship to the main provisions of the Act, a distinction has been drawn between a schedule that contains positive provisions and one that merely sets out forms. In the former case, it has been suggested that the schedule is a part of the Act, just as much as the section is a part of the Act:

> With respect to calling it a schedule, a schedule in an Act of Parliament is a mere question of drafting — a mere question of words. The schedule is as much a part of the statute, and is as much an enactment as any other part.[36]

In instances where a section of an Act conflicts with a provision in its schedule, the enactment in the Act prevails against the schedule: 'If the enacting part of the statute cannot be made to correspond with the schedule, the latter must yield to the former'.[37]

In the latter case, it was held that 'forms in schedules are inserted merely as examples, and are to be followed implicity only so far as the circumstances of each case may admit'[38] and where there is any conflict:

> [I]t would be quite contrary to the recognised principles upon which courts of law construe Acts of Parliament to ... restrain the operation of an enactment by any reference to the words of a mere form given for convenience' sake in a schedule.[39]

It is suggested that the fact that an agreement is expressly given legislative force as well as being scheduled to the entrenching Act, points more towards the conclusion that it is to be treated as part of the Act for all purposes unless there is any constitutional limitation preventing an agreement having any such effect. In the examples used of the Bougainville and Ok Tedi Agreements, there are no such constitutional limitations. The Papua New Guinea Parliament has power to make laws 'for the peace, order and good government' of the country.[40] As to the question whether the legislated Agreements are 'for the peace, order and good government', the approving Acts specifically provide that the Agreements are 'for a public purpose within the meaning of any law'.[41] Even without such declaration, as the Australian High Court held in *Union Steamship Co of Australia Pty Ltd* v. *King*[42] in respect of the New South Wales legislature, the power to make laws for the 'peace, order and good government' is plenary.[43] The words are not words of limitation. The courts, therefore, have no power to strike down legislation as not promoting or securing the peace, order and good government.

There is a further more compelling reason for treating these agreements as having the force of Acts of Parliament. It is that the intention of the legislature to give the agreements

35 *Manchester Ship Canal Company* v. *Manchester Racecourse Company* [1901] 2 Ch. 37, 50; [1900] 2 Ch.352, 359.

36 *Attorney-General* v. *Lamplough* (1878) 3 Ex. D. 214, 229.

37 *R.*v. *Baines* (1840) 12 Ad. & E. 210, 227, per Lord Cottenham; *Goodman* v. *Mayor, etc. of Melbourne* (1861) 1 W. & W. (L) 4, 6 per Stawell C.J.; *R.* v. *Taylor and Curtis* (1863) 2 W. & W. (L) 23; *South Australian Banking Co.* v. *Horner* (1868) 2 S.A.L.R. 263 per Gwynne J.

38 *Per Cur. in Bartlett* v. *Gibbs* (1843) 5 M. & G. 81, 96; 134 E.R. 490, 496.

39 *Dean* v. *Green* (1882) L.R. 8 P.D. 79, 89 per Lord Penzance: 'Such form, although embodied in the Act cannot be deemed conclusive ... we have also to consider the language of the section to which the schedule is appended, and if there be any contradiction between the two ... upon the ordinary principles, the form which is made to suit rather the generality of cases than all cases, must give way': *R.* v. *Baines* (1840) 12 Ad. & E. 210, 226 per Lord Denman. See however, *Foley; Channel* v. *Foley* (1952) 53 SR(NSW) 31, 36 per Roper C.J.

40 *Constitution*, s. 109(1).

41 *Ok Tedi Principal Agreement Act* s. 5; *Bougainville Agreement Act*, s. 10.

42 (1988) 82 A.L.R. 43.

43 '... the phrase [i.e., 'to make laws for the peace welfare and good government'] habitually employed to denote the plenitude of sovereign legislative power, even though that power be confined to certain subjects or within certain reservations': *Bribery Commissioner* v. *Ranasinghe* [1965] A.C. 172, 196-197.

the same force as the entrenching Acts, is clear. Many provisions in the Bougainville and Ok Tedi Agreements are inconsistent with numerous other Acts of Parliament. Examples include legislation on environmental protection, foreign investment compliance requirements under Papua New Guinean domestic legislation like the *National Investment and Development Authority Act* c. 120 (PNG) and the special taxation provisions. If the Agreements were not to have the force of law, these provisions of the agreements would be invalid and be ineffective. It must, therefore, be taken to be the legislature's intention to give the Agreements the legislative status to give effect to these contractual provisions.

3. Consequences of Contracts having Legislative status

The consequences of making an agreement an Act of Parliament by the conferral of legislative power are not clear. Campbell thinks that once agreements are given legislative status, they are no longer contracts but are Acts of Parliament and must be construed as such:

> When an agreement is given the effect of a statute, several consequences ensue. The rights and duties of the parties are taken outside the realm of contract and they become statutory rights and obligations, the validity of which is to be determined solely by reference to the constitutional limitations on the enacting Parliament's law-making competence. The agreement is to be construed as a statute rather than as a contract. Its terms cannot be varied by agreement between the parties unless such variation is authorised by statute. If the Act is silent on variation, the terms of the agreement cannot be varied except by statute. A further consequence is that if either party infringes the agreement, action claiming damages for breach will not be for breach of contract but for breach of statutory duty.[44]

It is logical (and there is authority supporting the proposition) that the validity of an agreement given legislative force cannot be questioned because it is not a valid contract at common law.[45] It is also a necessary consequence of the agreement assuming the status of an Act of Parliament that the rules applicable to its construction are those applying to statutes and not rules on the construction of contracts.[46] The suggestion that the rights and duties of the parties are 'taken out of the realm of contract and they become statutory rights and obligations' may not be necessary if it is meant that the agreement is then extinguished and replaced by the Act of Parliament and it ceases to exist for all purposes.

An agreement, it is suggested, is not extinguished altogether when given legislative force. It subsists as a contract while the statutory entrenched agreement operates and exists independently as an Act of Parliament. The agreement remains an agreement governed primarily by contract law while the statute is governed by constitutional law. The two can co-exist. There is no reason why they should not. Where the validity of the agreement as a contract is doubtful, for instance, because it lacks a necessary contractual element such as consideration or it is affected by any other common law rule, the agreement as a contract is vitiated accordingly leaving the statutory entrenched agreement in force. *Vice versa*, where the Act is repealed, unless the legislative intent (which would normally be the case) is to repeal the agreement as well, the latter subsists as a contract.

There are, however, two qualifications that are obvious but need to be specifically mentioned. The agreement cannot exist as a contract, first, where the Act giving it statu-

44 Campbell, *supra* note 1, 218. Campbell's further suggestion that an action for damages for breach of contract is replaced by an action for breach of statutory duty is discussed below.

45 *Manchester Ship Canal Co.* v. *Manchester Racecourse Co.* [1900] 2 Ch. 352; *Caledonia Ry.* v. *Greencock & Wemyss Bay Ry.* (1874) L.R. 2 H.L. (Sc.) 347; *Australian Woollen Mills Pty Ltd* v. *The Commonwealth* (1954) 92 C.L.R. 424, 461; *Placer Development Ltd* v. *The Commonwealth* (1969) 43 A.L.J.R. 265, 271.

46 'In such cases [i.e., contract having force of an Act] the ordinary canons of construction of contracts must be subordinate to those applying to the construction of statutes': *Craies on Statute Law, supra* note 17, 575. Craies also states (570-572) that private Acts are regarded as contracts and construed as such.

tory force contains a contrary intention (whether express or implied) and second, where the parties had a contrary intention that the agreement should remain in its statutory form as a statute only and not as a contract.[47] Hence, whether or not the agreement as a contract and in statute form co-exist will depend on the intention of the parties and the legislature. Do the mentioned qualifications apply in the Bougainville and Ok Tedi Acts and Agreements used as examples here?

Under the provisions cited earlier, both the Bougainville and Ok Tedi Agreements made their 'approval' by statute pre-conditions to their taking effect. The specific words used were, in the Bougainville Agreement, 'this agreement shall come into effect' on the day when the Ordinance came into effect while the Ok Tedi Agreement stated that it 'shall not operate unless and until the Bill ... is passed'. These words indicate no intention by the parties that the Agreements should cease to exist as contracts when they were given the force of law. Indeed, the contrary intention may be discerned. By providing that the 'Agreement shall not come into effect' or that it 'shall not operate unless and until the Bill ... is passed', the parties intended to make the operation of the Agreements (to operate as contracts) conditional on the Bills being enacted by Parliament. As to the operation of the Agreements as Acts of Parliament, these statements were irrelevant for it is not the intention of the parties but that of Parliament that gives them statutory force. This construction is also supported by the latter part of these provisions which declare that no liability arises in respect of any thing done before the Bills are enacted by Parliament, for it is assumed that once the Agreements come into force, liability will exist under them.

The Acts that give legislative force to the Bougainville and Ok Tedi Agreements do not express any contrary intention to the existence of the Agreements as contracts. Indeed, their provisions give support to the existence of the Agreements as contracts separate to their existence as Acts. The specific provisions approving the Agreements are separate from those that confer legislative status. Both the Bougainville and Ok Tedi Agreements provide that 'The Agreement is approved, and takes effect according to its tenor'.[48] In separate clauses, the Agreements are conferred 'the force of law as if contained in this Act'.[49] The separate approval of the Agreements would not have been necessary if they were to be Acts of Parliament only which could have been achieved merely by conferring legislative status or by enacting the Agreement provisions directly as Acts without using the schedule form. The following provision of the *Bougainville Act* which comes after the provision conferring the Bougainville Agreement legislative status[50] gives further support to the contention:

> The provisions of Subsection (1) [i.e., the provision giving legislative force] do not apply to or in relation to Clause 11(b), Clause 13(e) and Clause 14(a) of the Agreement.

Hence, these provisions which provide for the State and third parties to use, on payment of reasonable charges, company facilities including the company port (clause 11(b)), water and electricity (Clause 13(e)) and company roads (Clause 14(a)), do not have the force of law. They must exist purely as contractual obligations under the Agreement. Otherwise, they would be ineffective. That would be contrary to the intention of the parties. Another provision in the Bougainville Agreement that may also be referred to in support, is the provision which provides that, where there is any future legislation abrogating the provisions of the Agreement that has been given legislative status, the company 'shall

47 The parties cannot of course override with their contractual intent the effect of a contract given legislative status having the force of an Act of Parliament which is determined by the intent of Parliament.

48 *Bougainville Agreement Act*, s. 2; *Ok Tedi Principal Agreement Act*, s.2; s. 2 of each *Supplemental Agreement Acts*.

49 *Bougainville Agreement Act*, s. 4(1), *Ok Tedi Principal Agreement Act*, s. 3.1; s. 3 of each *Supplemental Agreement Acts*.

50 *Bougainville Agreement Act*, s. 4(2), quoted above.

have all the rights and remedies ... as if the same were a breach of this Agreement by the Administration'.[51]

One important consequence of drawing the distinction between the proposition that an agreement is extinguished when it is given legislative force and the argument advanced here, that the agreement exists as a contract separate from the enacted agreement, relates to remedies. A necessary consequence of the former proposition is that once the agreement is given statutory force extinguishing the agreement as a contract, the rights and duties of the parties are converted from contractual to statutory with the further consequence that, where there is a breach of the provisions, the remedies available to the parties are no longer in contract but in breach of statutory duty.[52] An insistence on this proposition would have the effect of unnecessarily denying a contract claim to an injured party in that the principles applicable to a breach of statutory duty action may be more stringent than contractual claims in damages. Relief for breach of statutory duty, for example, will only be given where there is no other remedy provided by the Act, whereas in contract, damages claims, in addition to any other remedy, exist as of right upon proof of breach. In breach of statutory duty claims, a distinction is made between statutes conferring powers and obligations as a statutory action will only lie where there is a breach of an obligation and not where a discretionary power is vested in the defendant. The plaintiff is also required to prove that the damage suffered by him or her is within the class of risks to which the statutory provision is directed and that he or she was one of the persons protected by the statute. Further, the plaintiff is required in certain instances to prove damage whereas in an action for breach of contract, this matter goes to determine the recoverable damages but is not necessary to establishing liability.

There are other instances where an instrument given legislative force exists in force both as the original instrument and as an Act of Parliament. One example is a treaty which is made part of the domestic law, although a treaty's separate existence is in two different legal regimes, the treaty existing as a treaty under international law and the statute giving it legislative force exists as an Act of Parliament under the municipal law. But the existence of the agreement as a contract at common law and the agreement with statutory force as part of the constitutional law, finds parallels in some common law principles. When a statute is enacted on a matter that has been covered by the common law, unless the contrary intention is present, the common law may exist in spite of the existence of the statute.[53]

There is therefore no reason why an agreement that has legislative status should not subsist as a contract separate from the Act existing as an Act. Where there is a breach of a contractual or statutory duty, the plaintiff has the choice of maintaining an action in contract or in tort for breach of statutory duty. Where the action is brought in contract, the rules on contract damages apply. Where it is in breach of statutory duty, the applicable rules are those of statutory construction and tortious remedies. The plaintiff must also have the option of proceeding in the alternative. This is common in tortious and contractual claims. An example is actions for personal injury arising in employment cases.[54]

4. Constitutional Implications

Problems of fettering legislative power by contract may arise in cases where contract

51 Cl. 2(c), quoted and discussed below.

52 Campbell, *supra* note 1, 218. (See above quote).

53 *Wolverhampton New Waterworks Co.* v. *Hawkesford* (1859) 6 C.B. (N.S.) 336; 141 E.R. 486.

54 An action in contract under the employment contract and one for breach of statutory duty may both be available where industrial legislation imposes obligations on employers to keep their premises safe for employees. Of course, the plaintiff cannot recover compensation and damages twice over for the same injury.

provisions attempt to limit or restrict the exercise of legislative power. Where this is done by an agreement not having legislative force, the restriction is invalid because such restriction of legislative power is against public policy.[55] The same applies to any contractual restrictions on an authority's exercise of legislative rule or law making powers.[56] Where the restriction is made by a contract that has legislative force, different considerations arise.[57] Whether or not such restriction is effective depends on the nature of the restriction and the particular legal regime where the issue arises.

In Australia, for example, contractual provisions having legislative force may lawfully limit the exercise of legislative power provided the limitations or restrictions contained therein provide 'a manner and form' for its amendment or repeal coming within section 5 of the *Colonial Laws Validity Act* 1865 (Imp). In a number of cases, recourse has been had to section 5 to support the validity of contractual provisions with legislative force. Section 5 provides in part:

> [E]very representative legislature shall, in respect to the colony under its jurisdiction, have, and be deemed at all times to have had, full power to make laws respecting the constitution, powers, and procedure of such legislature; provided that such laws shall have been passed in such manner and form as may from time to time be required by an Act of Parliament, letters patent, Order in Council, or colonial law for the time being in force in the said colony.

The *Comalco* and *West Lakes* decisions centred on the application of this section. In *Comalco* , the court was called on to decide whether the *Commonwealth Aluminium Corporation Pty. Limited Agreement Act* 1957 to which the subject agreement was scheduled and given legislature force, provided under section 4 the manner and form for its amendment. Section 4 provided:

> The Agreement may be varied pursuant to agreement between the Minister for the time being administering this Act and the Company with the approval of the Governor in Council by Order in Council and no provision of the Agreement shall be varied nor the powers and rights of the Company under the Agreement be derogated from except in such manner. Any purported alteration of the Agreement not made and approved in such manner shall be void and of no legal effect whatsoever.

In seeking to have the provisions on royalties made by the *Mining Royalties Act* 1974 declared invalid, the plaintiffs argued that the 1957 and 1974 Acts were laws respecting the constitution, powers and procedure of a legislature which is a representative legislature, as defined in *The Colonial Laws Validity Act* 1865. They argued that the provisions of the 1957 Act (i.e. section 4) were laws prescribing the manner and form for the passing of any law to vary the agreement. Hence the variation purportedly made by the 1974 Act, not having been passed in the manner and form prescribed was, it was argued, invalid.

The defendants in response, whilst accepting that the Queensland Parliament was a representative legislature, denied that the 1957 and 1974 Acts were laws respecting the constitution, powers and the procedure of the legislature. They argued alternatively, that there was no manner or form provided. They further argued that Parliament's right to exercise its legislative power to enact legislation given by section 5 of *The Colonial Laws Validity Act*, would be fettered if the 1957 Act were to have the effect of making the regulations under the 1974 Act ineffective and thus invalid. The majority (Wanstall S.P.J. and Dunn J.) decision was that the 1957 and 1974 Acts were not laws regarding the manner

55 *Commissioners of Crown Lands* v. *Page* [1960] 2 Q.B. 274; *William Cory & Son Ltd* v. *London Corp.* [1951] 2 K.B. 476; *Board of Trade* v. *Temperley Steam Shipping Co. Ltd* (1926) 26 Lloyd's List Law Reports, 76.

56 *Reilly* v. *The King* [1934] A.C. 176; *Ansett Transport Industries (Operations) Pty Ltd* v. *Commonwealth* (1977) 139 *C.L.R.* 54.

57 A statute cannot be declared invalid because it is against public policy.

and form of the exercise of the legislative power. Their reasons given for this conclusion differed.

Wanstall S.P.J. was of the opinion that the 1957 Act was enacted with two objectives; one, to confer a power on the executive government and two, to prohibit future legislation in any manner and form on the subject of variation of the Agreement applying only to the executive, and, therefore, was not a manner and form applying to the legislature. Dunn J., as indicated earlier, held that the Agreement remained an agreement and the provision in the 1957 Act requiring the prior approval of the plaintiff company were executive commands directed to the executive and so were not self-imposed restraints on the legislature. Hoare J., dissenting, held that the Agreement having been given legislative force, provided a manner and form for its variation and the 1974 Act, having been passed without following the manner and form so required, was invalid.

In *West Lakes*, the plaintiffs argued, *inter alia*, that the indenture given legislative force by the *West Lakes Development Act*, 1963-1970 (S.A.), could not be varied without its approval, as the requirement for their prior approval stipulated under that Act constituted a manner and form within the meaning of section 5 of the *Colonial Laws Validity Act,* 1856. King C.J. held that the 1968-1970 Act did not provide a manner and form for its variation, because the manner and form there required applied to the indenture and not to the Act, and further that the prior approval of the plaintiffs introduced an entity (i.e. the plaintiffs) not forming part of the legislature to come within section 5 of the 1865 Act. Zelling J., influenced by the particular facts of the case (i.e. that the challenge by the plaintiffs was made on a Bill not yet passed by Parliament), dismissed the applicant's argument on the ground that in the light of the general rule that Acts of one Parliament cannot bind its successors, noted that only clear words imposing restrictions would be required to provide a manner and form which was held to be lacking in this case.

The purpose of section 5 of the *Colonial Laws Validity Act* was to confer on representative legislators power to make laws, including laws respecting their own constitution, powers and procedure. As stated by Dixon J. in *Attorney-General of New South Wales* v. *Trethowan*:[58]

> The power to make laws respecting its own constitution enables the legislature to deal with its own nature and composition. The power to make laws respecting its own procedure enables it to prescribe rules which have the force of law for its own conduct. Laws which relate to its constitution and procedure must govern the legislature in the exercise of its powers, *including the exercise of its power to repeal those very laws*.[59]

It must be acepted that the exercise of the power to make laws for these purposes may also be invoked to repeal or modify that law so made. Where such a law provides for a 'manner and form' for its subsequent variation, no special manner or form would be required to repeal the provision which requires the manner or form for:

> If the legislature ... continues to retain unaffected and unimpaired by its own laws the power given by this provision to legislate respecting its own powers, it is evident that it may always repeal the limitations and restraints which those laws purport to impose. Moreover, this means, as *McCawley's Case* [[1920] A.C. 691; 28 C.L.R. 106] establishes, that no formal repeal is necessary to resume the power and the legislature remains competent to make laws inconsistent with the restraints or limitations which its former statutes have sought to create.[60]

58 (1931) 44 C.L.R. 394, 429-30.
59 Emphasis added.
60 *Id.* 430 per Dixon J.

Hence, the possible limitations that may be imposed by a manner and form requirement coming within section 5 of the *Colonial Laws Validity Act* are more apparent than real.[61] This is especially so when it is realised that State legislators have other sources of legislative power, for example, under s.2 of the *Constitution Act* 1867-1972 (Imp.).

An alternative argument used against the 'manner and form' arguments has been the contention that these provisions, if valid, would fetter the legislative power whether this power is derived from section 5 or from section 2 of the *Constitution Act* or from any other source. The argument becomes more persuasive when it is advanced against an Act entrenching an agreement that introduces considerations extraneous to the legislative process by requiring, for example, the approval of a particular sectional group. This point is made by King C.J. in *West Lakes*:

> A provision requiring the consent to legislation of a certain kind, of an entity not forming part of the legislative structure (including in that structure the people whom the members of the legislature represent), does not, to my mind, prescribe a manner or form of lawmaking, but rather amount to a renunciation *pro tanto* of the lawmaking power. Such a provision relates to the substance of the lawmaking power, not to the manner or form of its exercise.[62]

In *Comalco* and *West Lakes* for example, the purported effect of the provisions of the agreements and the approving Acts in requiring their variation upon the prior approval of the plaintiff companies was, as stated by Zelling J. in *West Lakes*, that 'no statute can be passed without the consent of the plaintiffs'.[63] Although the cases were decided on other points including the 'manner and form' clause, it was pointed out that such a restriction could fetter the legislative power of the legislature and therefore be invalid. Hoare J. stated in *Comalco*:

> A provision requiring first an agreement does present greater difficulties and I can see that such a provision might well be considered to impose a fetter on Parliament and infringe s.5 of *The Colonial Laws Validity Act*.[64]

Wanstall S.P.J. in the same case was of a similar view:

> But to the extent to which it [the Agreement] purports to restrain the Legislature from enacting legislation effecting a variation without agreement of the plaintiff it is plainly invalid, unless it could be construed as a manner and form provision.[65]

5. Consequences of Variation by subsequent Legislation

Provisions in agreements with legislative status may sometimes seek to restrict or limit the exercise of legislative power including any repeal or amendment of the legislated agreement. As stated earlier, an agreement that seeks to fetter the exercise of or restrict the rule or law making powers, is against public policy and is ineffective. Can a legislated agreement (that is now an Act) make the repeal or variation of itself (i.e. the Act) or the agreement (existing as a contract) a breach of contract?

The issue raised may, for clarity, be broken down further. The agreement that has legislative force is no longer an agreement and therefore its variation cannot be a breach of contract. The rights and duties under it are converted to statutory rights and duties for which any liability that may exist would be in tort, in breach of statutory duty.[66] But the repeal and amendment of legislation, which is the basic function of the legislator, cannot,

61 The purpose of s.5 may be restricted in application to constitutional provisions: *The South-Eastern Drainage Board (S.A.)* v. *Savings Bank of South Australia* (1939) 62 C.L.R. 603.
62 (1980) 25 S.A.S.R. 389.
63 *Id.* 392.
64 [1976] Qd.R. 231, 249.
65 *Id.* 236.
66 Campbell, *supra* note 1, see passage quoted above.

under normal circumstances, create liability. A unilateral variation of the agreement (that exists as a contract) will, under normal contract law principles be a breach of contract. But where the legislature amends or repeals the legislated agreement, as mentioned earlier, the normal intention would be that the agreement (that subsists as a contract) is also accordingly repealed or amended. The issue that is left for determination is whether the legislated agreement can validly make the repeal or variation of itself (and the agreement existing as contract) a breach of contract.

A provision in the Bougainville Agreement illustrates neatly the issue raised. It provides for the situation where any future legislation may adversely affect the provisions of the Agreement after it is brought into force. It states that:

> If such Ordinance [i.e., the Act giving the agreement legislative status] comes into effect as aforesaid but any time thereafter such Ordinance is expressly or impliedly amended or repealed or this Agreement is expressly or impliedly varied added to cancelled abrogated or deprived of any of the force or effect which it has upon the coming into effect of such Ordinance (except as provided by the Ordinance or this Agreement, or with the prior consent of the Company) then irrespective of whether such amendment repeal variation addition cancellation abrogation or deprivation would otherwise constitute a breach of this Agreement the Company the members of the Company and the beneficial owners of shares in the Company shall in respect of the same have all the rights and remedies which it or they would have as if the same were a breach of this Agreement by the Administration.[67]

In substance, this provision makes a repeal or amendment of the Act ratifying the Agreement and conferring legislative force (i.e. a variation affecting the legislative force so given) a breach of the Agreement on the part of the State. The intended effect of this provision is clear: if the State by inconsistent legislation were to deprive the Agreement of its legislative force, this would constitute a breach of the Agreement. In other words, it indirectly seeks to restrain the State from taking any legislative measures that would have such effect.

The State, comprising not only the executive arm of government but the whole juridicial entity (i.e. the body politic) including the different arms of government, is a party to the agreement. This is because the agreements that have legislative force are not made by the executive alone but are approved and entrenched in legislation by the legislature. As a contracting party an action taken by the State that contravenes the provisions of the agreement may, under ordinary contract law principles, constitute a breach of contract. The question here is whether any legislative action taken by the State in its right as legislator which contravenes the agreement could constitute a breach of contract giving rise to contractual liability.

An agreement to which a State is a party exists in its proper law (or governing law). Equally, the powers of the State whether they be for contracting or legislating, are derived from a legal regime. Where the proper law of the agreement is the same as the legal regime from which the State's contracting and legislative powers are derived, the answer to the question whether a breach of contract occurs where inconsistent legislation is enacted by the State (that is party to the subject agreement), must be found in that law. In the common law system, it has been stressed that a contract cannot fetter the exercise of the executive power of the State in right of the executive arm of government[68] or the legislative power in right of the legislature. The underlying reason for this principle is that it is against public policy (as determined by the same legal regime) for a contract to do so, and where it attempts to do this, the obligation is no obligation and therefore there is no question of its breach as it has ceased to exist.

Similar considerations must apply to the agreement that has legislative force. Al-

67 Bougainville Agreement, cl. 2(c).

68 That is under the doctrine of executive necessity; *Rederiakiebolaget Amphitrite* v. *The King* [1921] 3 K.B. 500.

though the executive arm of government may be prevented from conduct that would contravene the provisions of the agreements, because these would be illegal as a necessary consequence of the legislative force given to them and thus displace the common law executive necessity doctrine,[69] the legislative power cannot only not be fettered, but it can be used to amend or repeal any legislation including any agreement given legislative force. A provision in an agreement that makes the exercise of this power a breach of contract must, itself, equally be against public policy and be invalid. If therefore it is void, it does not exist to render the enacting of inconsistent or repealing legislation (whether expressly or impliedly) a breach of contract.

In the case of the legislation itself (i.e. the agreement that has statutory force), it can be repealed by the legislator in exercise of its constitutional powers[70] in the same way as all other statutes may be repealed. Where there is a repeal or amendment of the above provision in the Bougainville Agreement, because of its statutory force, could it give rise to liability separate from contract, for instance in breach of statutory duty? The answer must be in the negative. First, the provision preserves the company's 'rights and remedies which it or they would have as if the same was a breach of this Agreement'. It does not, therefore, preserve any statutory rights and remedies. Second, even if it were to preserve such rights and remedies against the State, the breach that would give rise to liability in breach of statutory duty, and an action based on it would be in an indirect fetter on the exercise of the legislative power in that the threat of an action based on statutory duty would restrict or limit the exercise of the legislative power.

6. Conclusions

A number of conclusions may be drawn from the foregoing discussion. First, the 'as if enacted' formula and the fact that an agreement like the Bougainville and Ok Tedi Agreements are scheduled to the approving and entrenching Acts give the agreement provisions the same force and effect as the entrenching Acts. Second, the elevation of the agreements to the status of legislation means that contractual rights and duties under it become statutory rights and duties. A necessary consequence is that any breach of the provisions given legislative status are breaches of statute. Therefore, relief for any injured party in cases of breach lies in breach of statutory duty. The elevation of an agreement to the status of legislation, however, does not (subject to contrary intention, expressed or implied in the entrenching legislation) extinguish the agreement and the contractual rights and duties under it. They remain contractual subject to the statute. Third, agreements like the Bougainville and Ok Tedi Agreements do not and cannot prevent their repeal or variation by subsequent legislation. They may be repealed by both express and implied reference. As there are no 'manner and form' issues that could arise in Papua New Guinea (because there is no paramount legislation requiring a particular manner and form like the *Colonial Laws Validity Act*), the provision in the Bougainville Agreement that makes such event a breach of contract may be ineffective to prevent the legislature from exercising its powers. Otherwise, it would be an indirect fetter on the legislative power of Parliament.

To answer the issue posed at the beginning (whether the legislative entrenchment of agreements, and especially agreements establishing development projects, achieve their objectives of contract effectiveness, administrative efficiency and security) they do, in part, achieve these objectives. Because of their status as legislation, any executive action inconsistent with their provisions would be ineffective. Equally, the legislative status will

69 *Ibid.*

70 P. MacNamara, 'The Enforceability of Mineral Development Agreements to which the Crown in the Right of a State is a Party' (1982) *U.N.S.W.L.J.* 263.

ensure efficiency in the development of projects as licensing and other regulatory requirements imposed by general legislation may be made redundant. In terms of security, while administrative interference in the development of the project may be inconsistent with the provisions of the legislated agreement and therefore unlawful, the legislature still retains its legislative powers to vary the agreement that has legislative force. Further, the legislative status given to the agreement has another consequence that the parties may not intend; that it has the effect of creating statutory rights and duties. Where there is a breach of a statutory duty for example, a claim in breach of statutory duty may be maintained not only by the parties to the legislated agreement but also by any third person who would otherwise not be able to sue under the agreement because of the privity rule in contract law.

There is now a move away from entrenching agreements in legislation. This is true in Papua New Guinea. The first major mining developments, the Bougainville and Ok Tedi mines, were developed under Agreements given legislative force. A number of mining and petroleum projects developed later in P.N.G. (the Porgera gold mining project, the Misima mine and the Kutubu petroleum projects) have not had their agreements legislated. This shift occurred because of practical reasons. Enacting legislation is a cumbersome process. It may prove disadvantageous to both the investor and the State. The parties will have to wait for the agreement to be legislated. If there are changes required, they may have to wait for amendments to be made. The Ok Tedi Agreements illustrate the problems. Apart from the Principal Agreement, five supplementary agreements were made later. They all had to be given legislative force. It was time consuming and cumbersome. Hence, the advantages and disadvantages of legislative entrenchment of contracts need to be carefully considered before adopting the practice.