



Papua New Guinea ❖

The eastern half of the island of New Guinea – the second largest island in the world – was divided between Germany (North) and the UK (South) in 1885. The latter area was transferred to Australia in 1902, which occupied the northern portion during World War I and continued to administer the combined areas until its independence in 1975.

Economy

Papua New Guinea (PNG) has been undergoing years of economic decline and budget deficits. In 2003/2004, the economy was bolstered by a general rise in commodity prices and steps taken by the Government to control spending. The commodity boom was temporary and the nation continues to have serious problems concerning corruption; lack of law and order; land tenure worries; stifling investment; political interference in businesses; and political reluctance to adapt necessary, sweeping reforms. Declines in mining output and oil production have been at the forefront of a general downfall in the output of the modern economy of PNG. However, some see long-term hope for renewed productivity, after recent regulatory reforms.

PNG is rich in natural resources, including minerals, oil, gas, timber, and fish, and produces a variety of commercial agricultural products. The economy generally can be separated into an informal sector centered on subsistence agriculture and a formal sector centered on resources. Approximately 85 percent of the country's population relies primarily on the subsistence economy. The minerals, timber, and fish sectors are dominated by foreign investors.¹

After years of decline and government deficit, PNG was bolstered in recent years by a general rise in commodity prices and by government steps toward spending control. Economic activity accelerated in 2011 resulting in an estimated economic growth of 8.9 percent compared to 7.1 percent in 2010. This was largely due to a booming mining sector and, the start of construction on the US\$15 bn liquefied natural gas, project led by ExxonMobil as

PROFILE	
Population:	6.1 million***
GDP (Current US\$):	9.48 billion**
Per Capita Income: (Current US\$)	1900 (Atlas method)*** 2,532 (at PHP.)**
Surface Area:	462.84 million sq. km
Life Expectancy:	62.8 years***
Literacy (%):	60 (of ages 15 and above)**
HDI Rank:	153***
<i>Sources:</i> - World Development Indicators Database, World Bank, 2010 - Human Development Report Statistics, UNDP, 2011 - International Monetary Fund, 2012 (**) For the year 2010 (***) For the year 2011	

well as a recovery in international commodity prices.² PNG is now being regarded as the 7th fastest-growing economy in the world as of 2011, because of this strong growth in the mining and resource sectors.³

Competition Evolution and Institutions

PNG territories, which had been under Australian administration since 1906 and 1915, were granted independence, as a single nation, on September 16, 1975. Until a short time before independence, the territories' economy was wholly dependent on primary production. The majority of the population survived on subsistence farming of food crops.

PNG, like many other countries around the world, had been grappling with the task of how best to administer the regulatory bodies and the application of appropriate policies. In 1979, the Government requested IMF for aid. The IMF was asked to help PNG review its policies concerning regulatory institutions and, in particular, to determine what pricing policies were appropriate.

❖ Original paper written (2006-07) & Updated (October 2012) internally by CUTS International.

Prior to independence, the Australian Government set up a number of regulatory institutions such as the Electricity Commission (Elcom), the Housing Commission, Harbours Board, and so forth. Post independence, the new autonomous Government continued to create regulatory authorities like the Water Board, Eda Ranu, Provincial Development Corporations, as well as some specialised bodies for very specific tasks.

One of the main conditions imposed by the World Bank and IMF on PNG for extension of its loans was public sector reform. With the sale of PNG Shipping Line to Steamships, the mid 1980s saw the topic of privatisation enter the policy debate. In 1988, the Government started selling its shares in some of its enterprises, in order to encourage private sector representation on the boards, and in so doing, improve the management and performance of these bodies.

Efforts were also made to formulate a consumer protection policy for PNG. These included the PNG Law Reform Commission's (LRC) Report on Fairness of Transactions (1977), and subsequently the LRC's working paper on Consumer Protection. Nevertheless, no plans had been made to formulate a national competition policy and law. It was only in the 1990s, when the PNG Government had begun to witness the international trend of corporatisation and privatisation, that issues pertaining to competition policy and law were entertained. An appropriate competition policy and regime was imperative to achieve the ultimate objective of the corporatisation policy; to achieve allocative and productive efficiency, generate economic growth by removing all barriers to entry into a market, and encourage competition. Varying degrees of protection and regulation were provided for by diverse and distinct legislation, some mainly focusing upon consumer protection, some on the regulation of certain unfair trading practices as well as the misuse of market power. The first of such laws was the *Goods Act*, which protected consumers against the purchase of defective goods, providing a legal base for redress.

The second piece of noteworthy legislation was the *Commercial Advertisement Act*, which regulated commercial advertising, with the purpose of prohibiting unfair and misleading statements. Thirdly, though a bit outdated, was the *Prices Regulations Act* passed in 1949, which prohibited market practices that unfairly impose prices, and cornering or restriction of the circulation of goods. The fourth item of legislation was the *Fairness of Transactions Act, 1993*. The final and the centerpiece was the *Consumer Affairs Council Act 1993*. This legislation oversees the conduct of traders and suppliers, in the provision of goods and services to consumers, in an attempt to protect consumers. A Council on Consumer Affairs was established to enforce this legislation.

It soon became obvious that the Consumer Affairs Council Act, 1993 only regulated the provision of goods and

services to consumers, and protecting the interests of consumers in this regard. It did not regulate unfair trading practices, such as abuses of market power, price fixing arrangements, resale price maintenance, and such other anticompetitive behaviour, which harmed consumers. Work on a draft competition legislation commenced in 1995.

At the outset, the intention was to amend the Consumer Affairs Council Act 1993, to grant the Council an additional authority relating to the regulation of competition or trade practices. This proposed legislation was to be known as the *Consumer Affairs and Fair Trading Act 1996*. Its underlying principles, as set out in the preamble of the then draft legislation, are:

- to provide for the regulation of the supply of goods and services, and the protection of consumer interests;
- to preserve competition in trade and commerce to the extent required by the public interest;
- to establish the Consumer Affairs Council and other authorities, and making provision for their composition, function, and powers; and
- other purposes related or incidental to the above stated purposes.

Competition Law

A change in Government was brought about as a result of the 1997 general election. Much of the impetus for the proposed legislative reform died down, and the introduction of competition law and policy, in the 1996 draft legislation, was now placed on the back burner.

Fortunately, before the momentum was completely dissipated, there was another change in Government, in mid-2000, and this opened the door to a much more aggressive privatisation programme under the new regime. Henceforth, the privatisation programme propelled a competition law and policy for PNG which was finally unveiled in the Independent Consumer and Competition Bill 2002. In summary, this Bill would:

- establish an Independent Competition and Consumer Commission (ICCC);
- implement a new regulatory regime in certain industries, bodies, and goods and services; including the regulation of price and related service standards under regulatory contracts;
- allow the ICCC to make codes or rules relating to regulated industries or entities;
- provide for an appeals mechanism, which refers certain decisions of the ICCC to an independent appeals panel;
- state competition law policies and principles by enforcing laws, administered by the ICCC, which prohibit certain anticompetitive market practices; and
- abolish the Consumer Affairs Council and confer on the ICCC jurisdiction on all matters, which relate to consumer protection, including price control functions as well as added powers for the compulsory recall of unsafe products.

On February 27, 2002, the Parliament successfully passed the ICCC Act 2002. In so doing, the Consumer Affairs Council Act was repealed, and amendments made to the Prices Regulation Act. On April 29, 2002, the Act establishing the ICCC was legitimised.

This Act substantiates the main objectives of the ICCC as being:

- to enhance social welfare through the promotion of competition, fair trade, and consumer protection;
- to promote economic efficiency in industry infrastructure, investment and conduct; and
- to protect the long term interests of consumers with regard to price, quality and reliability of significant goods and services.

Functions of ICCC

The functions of the Commission are -

- (a) to perform such functions relating to price regulation, licensing, industry regulation and other matters as are conferred on the Commission by or under this Act or any other Act, including, without limitation, in relation to issuing, administering and enforcing regulatory contracts under Part III;
- (b) to promote and protect the *bona fide* interests of consumers in relation to the acquisition and supply of goods and services;
- (c) to make available information in relation to matters affecting the interests of consumers, including information with respect to the rights and obligations of persons under PNG laws that are designed to protect the interest of consumers;
- (d) to investigate complaints concerning matters affecting or likely to affect the *bona fide* interests of consumers in relation to the acquisition of goods and services and to enforce compliance with laws relating to such matters;
- (e) to investigate complaints concerning market conduct and to enforce compliance with laws relating to market conduct in PNG;
- (f) to make, monitor the operation of, and review from time to time, codes and rules relating to the conduct or operation of regulated entities; and
- (g) such other functions as may be conferred on the Commission by any other Act.⁴

Anticompetitive Business Practices

The first, and perhaps the broadest, rule of the ICCC Act 2002 is the prohibition of contracts, arrangements or understandings, which have the purpose or effect, or likely effect, of substantially lessening competition in a market.

That prohibition applies both to making such contracts or arrangements, or reaching understandings, and also to those who would give effect to such a contract, arrangement or understanding, which has already been made or reached. A similar prohibition applies to covenants over land having

Box 1: A case of fixed prices

In 2012 Council of Competition BiH sanctioned Apatin brewery for signing prohibited agreements with the distributor of its products on the market of Bosnia and Herzegovina. Apatin brewery was fined with 265,000 KM.

Specifically, the company Dejan commerce from Dobož filed request to Council of Competition BiH for initiating the procedure against Apatin brewery considering that this Serbian company had violated the Competition law because the contract made with the distributor, Dejan commerce, limited the prices of their products. According to the decision of the Council of competition Apatin brewery limited the right of buyer (Dejan commerce) to determine its sales prices. This is considered a severe limitation of the competition, which typically does not have positive effects on the market. In this case, the contractor was unable to change the terms of the contract, therefore, he had to sign the form in which it was offered by Apatin brewery.

Council has found that the provisions of the contract for the period 2008 - 2010 are prohibited which is punishable by fines of up to 10 percent of the total annual income of the offender for the year preceding the year in which the violation occurred.

Source: <http://www.ekapija.ba/website/bih/page/634397>, approached online 27.11.2012.

the purpose or effect, or likely effect, of substantially lessening competition in a market.

The Market Conduct rules contained in Part VI of the ICCC Act, were largely derived and are similar to those applicable in the Australian Trade Practices Act and the New Zealand Commerce Act, they are central to the ICCC Act and to the functions of the ICCC. These rules apply to commercial dealings by all individuals and businesses including Government owned and operated businesses. The following Market Conduct Rules are designed to help identify anticompetitive market behaviour or conduct that is likely to lessen competition in the domestic market arena⁵:

- anticompetitive arrangements;
- anticompetitive covenants;
- exclusionary provisions;
- price fixing;
- taking advantage of market power;
- resale price maintenance; and
- business M&As.

The prohibitions of anticompetitive M&As are dealt with differently from the prohibition of other types of anticompetitive market behaviour and trade practices.

Section 69 prohibits business acquisitions or mergers that will or is likely or have a likely effect to lessen competition in the market. The Commission can either give clearance or authorisation to firms wishing to merge or acquire other competitors, and the Commission also gives authorisation to companies wishing to engage in other trade practices.

In order to grant authorisation for a business acquisition, the ICCC must be satisfied that the acquisition would result in such a benefit to the public that it would outweigh the detrimental effect it would have on competition. The clearance process does not involve any assessment of public benefits. The clearance process is an application by the person or firm proposing a business acquisition, seeking the ICCC's view whether, in its opinion, the acquisition would have detrimental effects on competition and, thus, breach the ICCC Act.

For the authorisation of exclusionary practices, resale price maintenance, anticompetitive arrangements and anticompetitive covenants, the conditions are slightly different. In these cases, the ICCC may authorise the

activity if it is satisfied that the conduct, to which the authorisation application relates, will, in any and all circumstances, result in sufficient benefits to the public (the ubiquitous public interest test).

Since the effect of authorisation is to enable someone to engage in a particular conduct that would otherwise be prohibited, on the grounds that there are benefits to the public, the assessment of the merits of an authorisation application is a public process that is conducted independently by the ICCC.

The ICCC Act also prohibits contracts, arrangements or understandings, which contain exclusionary provisions (or primary boycotts). Whilst such exclusionary provisions are prohibited, they can be defended if it can be established that a *refusal to deal* agreement *does not have* the purpose or effect, or likely effect, of substantially lessening competition in a market.

Sectoral Regulation

Part III of the ICCC Act introduces a new regime for the regulation of a number of Government-owned utilities. The new framework was introduced in conjunction with the corporatisation and possible privatisation of a number of those utilities.

The *ICCC Act* provides for the Minister concerned to declare certain entities and goods and services to be regulated and monitored. The ICCC monitors and regulates the following industries and entities:

- PNG Power (electricity services);
- PNG Ports Corporation (ports and harbours services);
- Post PNG (postal services);
- Motor Vehicle Insurance Limited 'MVIL' (compulsory third-party motor vehicle insurance);
- PNG Water Board & Eda Ranu (water);
- PNG land transport (PMV and Bus fares);
- Petroleum industry (InterOil Corporation);
- Stevedoring and Handling services and
- A range of consumer goods, such as rice, flour and sugar that are necessities.

In each of the regulated entities (PNG Power, PNG Ports Corporation, Post PNG Ltd and MVIL), the corporatised utility businesses are subject to a 'regulatory contract', which sets out, among other, a future five to ten-year price path for the monopoly services provided by that utility, together with requirements regarding quality of service, and the conduct or operations of participants in a regulated industry. The utilities' obligations under the regulatory contract are supervised by the ICCC, which is the other party to these contracts.

Under the regulatory contract and under the ICCC Act, there are a number of remedies available to the ICCC to enforce compliance with the price path, and service quality standards, as specified in the contract. If a regulated entity

Box 1: Case under Exclusive Rights

ICCC received a letter from Mobil, one of the three key players in the petroleum industry advising of the proposed Exclusive Supply Agreement being discussed with InterOil and seeking preliminary view of the ICCC. Mobil is proposing an Exclusive Supply Agreement between BP and InterOil where BP will acquire products from InterOil refinery.

There are three factors that will guide ICCC in this matter if the proposed exclusive agreement is to be executed.

First, as a matter of principle, ICCC as a State agency will enforce any State policy or agreement that binds the State and in this case ICCC would assist in the enforcement of the Refinery Agreement that exist between the State and InterOil which is already exempt from the application of the Market Conduct Rules.

Secondly, ICCC is aware that the State has not enacted any law to enforce the anti-competitive provisions of the Refinery Agreement against Mobil or any other domestic distributors of petroleum products. The proposed Exclusive Agreement may not be necessary as it goes to enforce the Project Agreement anyway.

Thirdly, even if there is not law enacted to enforce the provisions of the Project Agreement, it would be unfair to penalise the third parties while State and InterOil, also key players in the petroleum industry are exempt from the application of the Market Conduct Rules. This matter is still pending formal decision of the ICCC.

disagrees with decisions of the ICCC, the ICCC Act provides for an appeal process where an Appeals Panel, which should include at least one international arbitrator, can review those decisions.

In addition to regulatory contracts governing price and service standards, there is also industry-specific legislation in relation to each of the regulated industries. The ICCC has assumed or been given responsibility for issuing and enforcing licences with regards to the electricity and ports and harbours sectors.

In addition to the arrangements set out in each of the regulatory contracts and licences, the ICCC may also make codes or rules relating to the conduct or operations of participants in a regulated industry.

With the recent update on the 2008 ICT policy document, the effects are now witnessed in the recent amendments to the *Telecommunication Act* 1996 passed by the PNG National Parliament on April 16, 2008. The amendments to the *Telecommunication Act*, are intended to achieve the following:

- (a) clarify ambiguities in the legislation;
- (b) determine exclusive reserved rights for Telikom PNG which includes: International Gateway services and Fixed line services;
- (c) mobile carriers also have the right to use satellite, microwave or any other wireless links in providing a public mobile telecommunications service provided such links are not used between places in PNG and outside PNG other than through facilities owned by a general carrier; and
- (d) private network operators have the right to use physical lines and satellite, microwave or any other wireless links in operating approved private networks; and
- (e) create a new licensing regime for private networks etc;

The legislative changes had resulted in the new authority (National Information, Communications and Technology Authority, NICTA) taking charge of the economic regulatory function that was once performed by the ICCC under the ICCC Act.

Consumer Protection

Part VII of the ICCC Act endows the ICCC to take over the former Consumer Affairs Council's responsibilities in relation to consumer affairs. The ICCC is now tasked with these responsibilities to carry out price monitoring and surveillance on price-controlled items; educating and providing information to consumers on their rights and obligations; and conducting food and trade inspections, verifications and calibrations on instruments and measurements used for the purposes of trade. The Commission also investigates consumer complaints. The following are some abuses experienced by consumers:

- continued sale of expired goods past the 'use by' and 'best before' dates;
- non-display of prices by some shops;
- bread sold without proper labels, by some bakeries, in violation of the Bread Act;
- measurement system in imperial units (yards) in some shops;
- lack of warranty on electronic goods resulting to unnecessary arguments;
- misleading advertisements;
- misleading promotional activities, where rewards offered cannot be redeemed because of usually shortened promotional timeframe;
- use of unjust weights and measures for trade;
- unjustifiable pricing;
- poor quality, imported, fake products, at high prices, that lack durability; and
- unregulated service industries like legal; medical; repair workshops; and real estate, charging unreasonably exorbitant fees.

The ICCC Act also introduced new provisions on product safety standards and unsafe goods, including compulsory product recall. These provisions are to be administered by the ICCC. The law does not contain prohibitions on misleading or deceptive or unconscionable conduct.

Concluding Observations and Future Scenario

As can be observed from the above discussion, a hybrid regulatory approach has been adopted by the Government of PNG to promote competition in the country. The ICCC is the one agency that is promoting competitive market conduct, behaviour and trade practices. It has been established to promote competition and fair trading; the regulation of prices of certain goods and services; the protection of consumers' interests; to promote economic efficiency in industry structure, investment and conduct; and to promote the long-term interests of the people of PNG with regard to price, quality, and reliability of significant goods and services.

Competitive Market Conduct Rules provided by ICCC Act apply to commercial dealings by individuals, businesses and even to the Government and its agencies where they are involved in business. The rules are designed to protect competition in the market place, to the benefit of consumers, through lower prices and access to more and better services, than would otherwise be available. The ICCC attempts to ensure that there is competition in the market, and all market behaviour or conduct must conform to competitive market conduct rules under the Act.

The lax economic regulation of State owned Enterprises (SoEs), over the years; and anti-competitive business practices together with higher costs of doing business; has led to higher prices, as well as a lower quality of goods and services on offer. There has also been a visible lack of innovative solutions to difficulties, or problems, faced in

supplying services throughout PNG due to structural challenges of the economy. Alongside the new set of policies and provisions, there is an urgent and increasing need to effectively implement the policies that best suit the nation as a whole; including embracing of competition within the entire spectrum of laws and regulations.

In view of its internal difficulties, the ICCC has undergone major restructuring in 2010 and recruitment exercise to increase its manpower. It is now implementing a staff technical capacity programme, with the funding assistance of AUSAID. The programme involves the engagement of consultants to be attached with the ICCC on a daily basis for 12 months to assist build staff capacity. Through this arrangement, ICCC expects to increase its staff technical capacity across its core functions to be able to effectively undertake economic regulation of its SOE's and investigations of anti-competitive practices in the market for the benefit of the PNG economy.

With the enactment and now administration and enforcement of the ICCC Act 2002, PNG has met its commitment to the international community – the WTO

and APEC, to free up the market and improve impediments to competition and free trade. With the current changes in world trade opportunities for PNG, there may be scope for the ICCC to look at amending the ICCC Act 2002 to cater for these changes to keep it on par with other world Competition regimes. Even so, this process will require continuous, effective management and maintenance. Hopefully, PNG's efforts will further strengthen its trade and industrial ties with the world, and region, with augmentation of its success in the future.

In the next few months ICCC will closely monitor and seek compliance on the following areas:

- the operations of the SOEs which have monopoly on utility industries;
- the general anti-competitive conducts that so far appear to be widespread in various industries.
- Mergers and acquisitions that appear to be increasing, in an economy that is experiencing booming business activities;
- Increasing efforts in addressing consumer concerns in the market place.

Endnotes

1 <http://www.state.gov/r/pa/ei/bgn/2797.htm>

2 <http://globaledge.msu.edu>

3 "Raising the profile of PNG in Australia" (http://ministers.dfat.gov.au/marles/speeches/2012/rm_sp_120309.html)

4 http://www.wipo.int/clea/docs_new/pdf/en/pg/pg040en.pdf

3 <http://www.jftc.go.jp/eacpf/05/APECTrainingProgramAugust2004/png.wasina.pdf>