

# GOVERNMENT AS ENTREPRENEUR AND PLANNER: ASPECTS OF RECENT INDUSTRIAL STRATEGY IN BRITAIN

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and

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Today, most European countries accept an active government role in industrial policy, whereas previously, direct involvement was confined mainly to services (e.g., railways and electricity). These countries regard market forces and monetary and fiscal policy as inadequate to influence industrial development.<sup>1</sup> In the past, government involvement in industrial development has been markedly *ad hoc*; recently, however, there is a move toward a more integrated approach. Most European economies are faced with certain endemic problems attaching to industrial development, such as the decline of geographic regions or of particular industries which have important social ramifications. The extent of government involvement varies: in West Germany, the government adopts a low profile but conducts sectoral analysis to provide a basis for coordinated industrial policy; in Sweden, the government plays a major role in manpower planning; in France, overall plans for the economy are well accepted.<sup>2</sup>

Since World War II, Britain has experienced chronic produc-

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1. Eric Varley, the British Secretary of State for Industry, addressing the American Chamber of Commerce, voiced an additional reason for greater government involvement: [t]he sheer scale of . . . modern industry means that the decisions taken by major companies can have economic, social, and environmental repercussions in wider and wider areas of society. But also because some of the richest and fastest growing markets in the world are now either directly in the hands of foreign governments or subject to their approval.

"Government Will Give Priority to Industrial Needs," Says Eric Varley, 22 TRADE AND INDUSTRY 130 (1976).

2. See generally O.E.C.D., THE INSTRUMENTS OF INDUSTRIAL STRATEGY (1975).

tivity, capital investment, and balance of payment problems.<sup>3</sup> The major thrust of industrial strategy in recent times has been to improve the structure and performance of industry — in particular, to make it competitive internationally. Present industrial strategy in Britain took shape at the famous Chequers meeting in the Autumn of 1975, where government, industry, and trade unions agreed that the manufacturing industry had priority in its claim on national resources.<sup>4</sup> That agreement led to the establishment of thirty-nine tripartite — government, industry, and trade unions — working parties under the auspices of the National Economic Development Council, covering some sixty percent of total manufacturing output and seventy percent of total exports. The primary focus of the working parties was to identify means of improving British industrial performance.<sup>5</sup> One aspect has been greater governmental involvement in the private sector to assist exports, restructure industry, and facilitate new product development.<sup>6</sup> Primarily, this has taken the form of government financial aid to industry through the National Enterprise Board, the Industrial Development Unit of the Department of Industry, and the Bank of England;<sup>7</sup> the government has also manipulated the Price Code, taken antidumping action, assisted industrial training, and made adjustments in public purchasing policy.<sup>8</sup>

This article focuses on two aspects of present industrial strategy in Britain. The first part examines the direct role government plays in industry through the National Enterprise Board and the British National Oil Corporation. Attention is then directed to planning agreements which, as originally formulated, were intended to function as a national planning mechanism, but which, in practice, have been over-shadowed by the activities of the sectoral working parties.<sup>9</sup> These measures are of direct importance to in-

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3. See generally F. KNOX, *GOVERNMENTS AND GROWTH* (1976).

4. TREASURY, DEPARTMENT OF INDUSTRY, *AN APPROACH TO INDUSTRIAL STRATEGY* 4, CMND. No. 6315 (1975).

5. The reports of the working parties identified matters such as the design of products, imports, delivery delays, labor problems, factory bottlenecks, and government policies. They stressed productive efficiency, strong financial assistance, more capacity, more up to date production, and more aggressive marketing.

6. Corina, *Government Assurance on Policy Changes to Support Manufacturing Needs*, *The Times* (London), Feb. 3, 1977, at 20, col. 1.

7. See generally Ball, *Investment Incentives*, *NAT. WESTMINSTER BANK Q. REV.* 22 (Aug. 1973).

8. See *Industrial Strategy—A Progress Report*, 25 *TRADE AND INDUSTRY* 410 (1976); *Industrial Strategy: Progress Report*, 26 *TRADE AND INDUSTRY* 356, 357 (1977).

9. For discussions of earlier planning attempts, see M. SHANKS, *PLANNING & POLIT-*

dustry, including multinational corporations. The National Enterprise Board, for example, is a major shareholder in such internationally known corporations as British Leyland and Rolls-Royce Ltd. Major oil corporations such as Amoco, British Petroleum, Esso, Mobil, and Shell have signed participation agreements with the British National Oil Corporation relating to the exploration and development of oil fields in the North Sea. The first planning agreement was signed with Chrysler (U.K.) Ltd. in 1977; this agreement was an outgrowth of government financial assistance to Chrysler in December, 1975.<sup>10</sup>

### I. GOVERNMENT AS ENTREPRENEUR

Government enterprises in Britain, of which the British Broadcasting Corporation and British Airways are examples, have competed directly with the private sector. In a number of cases, entire industries have been nationalized and competition excluded.<sup>11</sup> The statutory corporation has been the usual form for government enterprises and nationalized industries. However, as in other European countries, the recent trend in Britain has been for government to participate in economic activity in much the same manner as ordinary individuals.<sup>12</sup> Rather than adopting the form of a statutory corporation, many government enterprises currently utilize the legal form of an ordinary private corporation wherein the shareholder, or the most prominent shareholder, is the British government. This form offers several advantages for government enterprises. First, there is no need for special legislation to create such an entity. Second, it allows for participation by private interests through the sale of shares. Third, government enterprises in the form of private corporations are more flexible than statutory corporations in that there is no need for legislation to change their memoranda and articles. They may also be in a more competitive position, and are less likely to attract opposition by acquiring the

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ICS: THE BRITISH EXPERIENCE 1960-1975 (1977); G. DENTON, ECONOMIC PLANNING AND POLICIES IN BRITAIN (1968).

10. See text accompanying notes 145-163 *infra*.

11. This has been the case in the gas, electric, steel, coal, railway, and ship-building industries. See Daintith, *The United Kingdom*, in PUBLIC AND PRIVATE ENTERPRISE IN MIXED ECONOMIES 192-287 (W. Friedmann ed. 1974).

12. The only major nationalizations of the present Labour government have been of aircraft and shipbuilding. See Aircraft and Shipbuilding Industries Act, 1977, c. 3. The National Shipbuilders and Repairers, Ltd. is a corporation limited by guarantee and holds in trust for the Crown all the publicly owned stocks and shares acquired in various corporations of this nature between 1970 and 1975. See 926 PARL. DEB., H.C. (5th Ser.) 73 (1977).

appearance of being in a favored position with respect to such matters as procurement of government financial assistance.<sup>13</sup>

Before the establishment of the National Enterprise Board, direct government involvement in private industry was most haphazard. The most notable example before the 1970's was British Petroleum Co. Ltd. (B.P.), in which the government purchased shares in 1914, for strategic reasons, and in which it is now a majority shareholder.<sup>14</sup> There have been other instances where the government has purchased shares in private corporations to ensure survival of an economically vital industry.<sup>15</sup> The Industrial Reorganization Corporation (I.R.C.), a government body endowed with considerable funds, operated between 1966 and 1971 to aid the rationalization of British industry by making it more competitive internationally.<sup>16</sup> This was accomplished in the main by promoting voluntary mergers where finance was unavailable through ordinary commercial channels. Intervention by the I.R.C. sometimes involved the injection of government money through the holding of corporate shares, but only on a temporary basis.<sup>17</sup>

Then in 1971, following cash flow problems attendant on the production of the RB-211 engine for Lockheed, Rolls-Royce went into liquidation. The government took steps to take over the aero-engine and marine and industrial gas turbine divisions of Rolls-Royce because of their economic, defense, and social (employment) significance. Instead of outright nationalization, which was politically objectionable to the then Conservative government, or of acquiring the corporation's share capital, which would have involved the government in assuming the corporation's huge financial liabilities, the government purchased the assets described from the receiver and transferred these to a new corporation, Rolls-Royce (1971) Ltd.<sup>18</sup>

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13. See W. FRIEDMANN & G. KALMANOFF, JOINT INTERNATIONAL BUSINESS VENTURES 125 (1961); W. ROBSON, NATIONALISED INDUSTRY AND PUBLIC OWNERSHIP 28 (1960).

14. See Daintith, *The Mixed Enterprise in the United Kingdom*, in GOVERNMENT ENTERPRISE 53-78 (W. Friedmann & J. Garner eds. 1970).

15. For a list of government shareholdings in 1975, see 901 PARL. DEB., H.C. (5th ser.) 193 (1975); 903 PARL. DEB., H.C. (5th ser.) 444-46 (1976).

16. INDUSTRIAL REORGANISATION CORPORATION, CMND. NO. 2889 (1966). See also Industrial Expansion Act, 1968, c. 32; F. BROADWAY, STATE INTERVENTION IN BRITISH INDUSTRY 1964-68, at 62-65 (1969); R. CLARKE, THE MINISTRY OF TECHNOLOGY AND INDUSTRY 7-8 (1970).

17. For a list of shares held by I.R.C., see 903 PARL. DEB., H.C. (5th ser.) 313-14 (1976).

18. Rolls-Royce (Purchase) Act, 1971, c. 9; DEPARTMENT OF TRADE AND INDUSTRY, ROLLS-ROYCE LTD. AND THE RB-211 AERO-ENGINE, CMND. NO. 4860 (1972); DEPARTMENT

Different arrangements were used when British Leyland, the last remaining major British car manufacturer and an important exporter, faced severe economic difficulties in 1975. A government report<sup>19</sup> concluded that the corporation needed fundamental restructuring and investment, the latter estimated to cost some £2.8 billion with inflation over the following seven years.<sup>20</sup> Half the amount could be generated internally, but government finance was necessary for the remainder because commercial funds clearly were not forthcoming in the amount necessary. The report considered it undesirable to provide government financing *via* direct loans because undesirable gearing would result, because the corporation would be overburdened with interest payments, and because there was no guarantee that organizational changes would be implemented.<sup>21</sup> Outright nationalization was thought to be politically unwise; similarly, the option of allowing the corporation to proceed to receivership before purchasing its assets, as the government had done with Rolls-Royce in 1971, was discarded. Receivership, it was thought, would seriously damage the corporation's commercial reputation, particularly abroad, as well as have an unsettling effect on its industrial relations.<sup>22</sup>

The government accepted the report's recommendation and agreed to purchase some £200 million of new equity in the corporation, as well as to provide substantial loans.<sup>23</sup> To achieve this, a scheme of arrangement was necessary because the government was clearly reluctant to purchase newly issued shares in the corporation

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OF TRADE AND INDUSTRY, ROLLS-ROYCE LTD.—INVESTIGATION UNDER s. 165(a)(1) OF THE COMPANIES ACT 1948 (1973). See also S. YOUNG, INTERVENTION IN THE MIXED ECONOMY 148-55 (1974). The motor car division of Rolls-Royce remained in private ownership. The liquidation of the original corporation, however, solved two problems. First, the contract with Lockheed was avoided and with it the severe penalty clauses for delayed delivery. Second, it prevented the government from becoming liable for the debts of the corporation as a party to its continuation in business — as would have been the case if government loans had been made — when there was little prospect of new creditors being paid. See Companies Act, 1948, 11 & 12 Geo. 6, c. 38, § 332; *Re William C. Leitch Brothers Ltd.* No. 1, [1932] 2 Ch. 71, 77, *per* Maugham, J. Rolls-Royce then negotiated a new contract with Lockheed. By this contract, Lockheed agreed to pay a higher price for the engine, and not to proceed with claims against the receiver for penalties.

19. BRITISH LEYLAND: THE NEXT DECADE, H.C. No. 342 (1975).

20. *Id.* at 66-72.

21. *Id.*

22. *Id.* at 67-69.

23. British Leyland Act, 1975, c. 43. This special legislation was necessary because the government could not acquire more than 50% of the equity share capital of the corporation under the Industry Act, 1972, c. 63, § 8.

at par value when the latter was far in excess of the market value.<sup>24</sup> A new corporation was formed, British Leyland Ltd., which offered to buy the shares and debentures of the existing corporation in exchange for its own shares and debentures. The shares of the new corporation stood at a reasonable premium over par value, and the new corporation made a "rights issue." Not surprisingly, private shareholders failed to take advantage of this development, with the result that the government, as owner of some of the original shares and underwriter of the issue, was able to obtain some ninety-five percent of the shares.<sup>25</sup>

### A. *The National Enterprise Board (N.E.B.)*

1. *Creation and Operation of the N.E.B.* The creation of the N.E.B. marks the first occasion that a British government has committed itself to achieving a permanent shareholding in a considerable number of private corporations. The Labour Party first adopted the policy in 1961, and in 1973 a study group proposed a National Enterprise Board when the Party was next in government.<sup>26</sup> Their report derived much from the work of Stuart

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24. A new issuance of shares could have been offered at a discount, but this would have required the approval of existing shareholders. *See Companies Act, 1948, 11 & 12 Geo. 6, c. 38, § 57(1).*

25. This arrangement was approved by the High Court which rejected arguments of dissident shareholders requesting a higher offer for their shares or for the corporation to be liquidated. Templeman J. held that the scheme was reasonable, no better alternative being possible; that the directors had not been coerced by government pressure and had faithfully carried out their duties. Although the majority of shareholders voting in favor of this scheme were large institutional investors, they acted *bona fide*. Thus, the government could not be coerced into improving its offer. *Go-Ahead for Leyland Takeover*, *The Times* (London), Aug. 2, 1976, at 15, col. 5. The authors are grateful to Mr. G. McKenna for pointing out that the institutional shareholders voted for the scheme of arrangement because, although their loss was substantial — disregarding dividend payments received since purchase — compared with what they would have obtained if the corporation had been liquidated and the assets sold, the collapse of a major British corporation would have adversely affected the economy and their other investments.

A similar scheme of arrangement was used when the government acquired shares in Alfred Herbert, Ltd. 901 *PARL. DEB., H.C. (5th ser.) 400* (1975). The advantage of a scheme of arrangement is that it needs only the support of a majority of those present (in person or by proxy) at the shareholders' meetings, as long as they represent three-quarters in value.

26. The Conservative Party prefers simple financial assistance to corporations where there are sound economic reasons, rather than outright purchase. The Conservative party, however, has been forced to make such purchases (e.g. Rolls-Royce). The Conservatives (Tories) are pledged to wind down the N.E.B. and the British National Oil Corporation by selling most of their shareholdings, and to abandon planning agreements in favor of participation at the plant level. *THE RIGHT APPROACH: A STATEMENT OF CONSERVATIVE AIMS* (1976).

Holland, an academic economist, who argues that without direct government involvement multinational corporations can frustrate the social and economic objectives of a socialist government.<sup>27</sup> As actually established by the Industry Act of 1975, however, the N.E.B. owes much more to the lamentable record of industrial investment in Britain, and to the fact that financial institutions have exhibited little enthusiasm toward extending medium and long-term finance to further the country's industrial basis.<sup>28</sup>

The primary motivation underlying the creation of the N.E.B., then, was to provide a new source of investment capital to industry; a means of efficiently restructuring industry and a channel for grants to corporations experiencing financial difficulties.<sup>29</sup> These aims are to be achieved by acquiring permanent shareholdings in profitable sectors of the manufacturing industry, which is a departure from previous experience when permanent shareholdings have traditionally been eschewed.<sup>30</sup> The N.E.B. is entreated to exercise a commercial judgment in carrying out its function, to respond quickly to opportunities, and to obtain an adequate return on its investments within a reasonable period of time.<sup>31</sup> Because it operates with public funds, it is expected, while exercising its commer-

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27. See S. HOLLAND, *SOCIALIST CHALLENGE* (1975).

28. See J. HUGHES, *FUNDS FOR INVESTMENT 4-13* (Fabian Research Series No. 325, 1976).

29. Industry Act, 1975, c. 68, § 2(1)-(2); DEPARTMENT OF INDUSTRY, *THE REGENERATION OF BRITISH INDUSTRY 7-8*, CMND. No. 5710 (1974) [hereinafter cited as *WHITE PAPER*].

Upon its formation, the N.E.B. became the holding corporation for eight enterprises in which the government held shares. Presumably the government did not take over all government shareholdings (for example, in British Petroleum) because their overseas dealings would have been affected and because there was no need for injecting more effective management. See *WHITE PAPER, supra* at 8. The most important of the eight corporations are British Leyland and Rolls-Royce; their transfer to the N.E.B. was surrounded by controversy. The N.E.B. objected to the transfer valuation the government wanted to fix (the original cost plus subsequent expenses rather than the much lower current valuation), for it meant an excessive capital debt to the government and hence a burden on the N.E.B. earning a reasonable return. Industry Act, 1975, c. 68, § 1, sched. 2. See Corina, *Valuation Tussle on N.E.B. Takeover*, *The Times* (London), Jan. 19, 1976, at 15, col. 5.

30. The N.E.B. must obtain the approval of the Secretary of State for Industry before it or its subsidiaries dispose of any voting shares or stock unless, in the case of subsidiaries, the consideration involved does not exceed £500,000. NATIONAL ENTERPRISE BOARD, *ANNUAL REPORTS AND ACCOUNTS 57* (1977) [hereinafter cited as *ANNUAL REPORT 1977*]. At the end of 1977, there had been five approvals sought, four of which were granted. 939 *PARL. DEB., H.C.* (5th ser.) 39-40 (1977). A specific limitation on the N.E.B.'s permanent shareholding is that it must not acquire a shareholding in a corporation whose business is mass media. Industry Act, 1975, c. 68, § 9.

31. *ANNUAL REPORTS 1977, supra* note 30, at 58. In December 1977, the government announced a target for the N.E.B. of a 15-20% return on equity holdings by 1981 — excluding British Leyland and Rolls-Royce. 940 *PARL. DEB., H.C.* (5th ser.) 355-56 (1977).

cial judgment, to contribute to the long-term strengthening of the economy. A specific exception to the general commercial role that the N.E.B. is expected to play is that it may have to aid an ailing corporation in the interest of regional employment or industrial policy.<sup>32</sup> This function is separate from the N.E.B.'s ordinary operation, and the government must compensate the N.E.B. specifically to ensure its overall financial ability. In general, the N.E.B. is also supposed to encourage investment in order to reduce unemployment; this is to be achieved by restructuring and redeploying its "profitable" operations rather than by supporting projects with little or no future.<sup>33</sup> Clearly, these various goals could conflict in particular situations.<sup>34</sup>

The government will fund the N.E.B. with loans at the current rate of interest from National Loan Funds and from public dividend capital — amounts paid to the N.E.B. out of Parliamentary appropriations.<sup>35</sup> As noted above, the N.E.B. and the corporations in which it has shares are expected to generate profits, which will also be available for investment. Under the Industry Act of 1975, a commitment of up to £1 million has been made to the N.E.B.<sup>36</sup> Under current public expenditure projections, the bulk will be spent by the end of 1980. The government recognizes that this provision is arbitrary, and intends to keep it under review.<sup>37</sup> In addition to the appropriation under the Industry Act of 1975, N.E.B. corporations are eligible for funds under the Industry Act of 1972; considerable amounts paid to British Leyland have come from this source.<sup>38</sup>

The N.E.B. operates through purchasing share capital, forming corporations, making loans, providing guarantees, and engaging in joint ventures.<sup>39</sup> Loans, guarantees, joint ventures, or similar forms of financial commitment cannot exceed £25 million for any single project without the specific approval of the Secretary of State; when

32. See Industry Act, 1975, c. 68, § 3; ANNUAL REPORTS 1977, *supra* note 30, at 58.

33. See NATIONAL ENTERPRISE BOARD, ANNUAL REPORTS AND ACCOUNTS 3 (1976) [hereinafter cited as ANNUAL REPORT 1976]. As part of this strategy, the N.E.B. has opened regional offices in northeast and northwest England.

34. I. PAPPS, GOVERNMENT ENTERPRISE 40 (1975).

35. Industry Act, 1975, c. 68, § 1(9), sched. 2; WHITE PAPER, *supra* note 29, at 9.

36. Industry Act, 1975, c. 68, § 8(2).

37. THE GOVERNMENT'S EXPENDITURE PLANS, 1978-79 TO 1981-82, vol. II, at 23, CMND. NO. 7049-II (1978) [hereinafter cited as EXPENDITURE PLANS].

38. See Industry Act, 1975, c. 68, § 3. See also 915 PARL. DEB., H.C. (5th ser.) 502 (1976); 925 PARL. DEB., H.C. (5th ser.) 888 (1977).

39. See Industry Act, 1975, c. 68, § 2(4).



more than £10 million is involved, or new or significant policy issues are raised, the Secretary of State must be notified so that he can intervene if he thinks it desirable.<sup>40</sup> In lending to subsidiaries and other corporations, the N.E.B. must charge commercial rates of interest.<sup>41</sup> As expected when it was established, the N.E.B. has acted mainly by making loans and purchasing the equity capital of existing corporations.<sup>42</sup> Joint ventures in which the N.E.B. was engaged have collapsed,<sup>43</sup> and the only major enterprise which it has established, to assist British computer firms to market abroad, produced a disappointing response from industry.<sup>44</sup> It was envisaged that the N.E.B. would also have a role in providing assistance when a corporation experienced management difficulties, rather than just financial difficulties, but as yet it does not seem to have acted in such a case.<sup>45</sup>

2. *N.E.B. Autonomy.* One difficulty encountered in the operation of the N.E.B. relates to the degree of autonomy the N.E.B. exercises *vis-à-vis* the British government and judiciary. The crux of the problem is the necessity of avoiding excessive governmental interference while ensuring that the N.E.B. does not exercise such a degree of autonomy that the public interest is ignored.

In effect, the N.E.B. is free from day-to-day governmental interference.<sup>46</sup> To ensure N.E.B. operational freedom, the government exercises its oversight through long-term strategies, and in an annual corporate plan prepared by the N.E.B. The annual plan, which defines such matters as goals, strategies, investment plans,

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40. ANNUAL REPORTS 1977, *supra* note 30, at 57-58.

41. *Id.* at 58. Under English law, subsidiaries exist where the holding corporation controls the board or holds more than 50% of the equity. Companies Act, 1948, 11 & 12 Geo. 6, c. 38, § 154.

42. ANNUAL REPORTS 1976, *supra* note 33, at 9-10. In most of the 30 odd corporations in which the N.E.B. has acquired a shareholding, it has subscribed for newly issued shares; clearly there would be no advantage as far as injecting financial assistance to firms is concerned in simply buying shares already on the market. In one case, however, the N.E.B. increased its stake in a corporation by purchasing issued shares when another shareholder sold its interests. Depending on the circumstances, for example, to maintain adequate gearing, the purchase of shares has been accompanied by the purchase of loan stock and the making of loans. *Id.*

43. These ventures involved tendering for overseas construction projects. The N.E.B. claims the experience gave it valuable information on the problems facing British firms in such tendering. *Id.*

44. *Id.* at 18.

45. Industry Act 1975, c. 68, § 2(4)(h).

46. ANNUAL REPORTS 1977, *supra* note 30, at 60.

and annual budgets, is subject to governmental approval.<sup>47</sup> Yet other forms of governmental influence emanate from government appointments to the Board, and from frequent consultations on investment decisions which are not covered by the annual corporate plan.

Parliament first debated the N.E.B. in January 1977, about a year after it had been established, and Parliamentary committees have complained of their inability adequately to review the Board's operations.<sup>48</sup> To a large extent such complaints veil political opposition to the N.E.B. However, there seems no reason why the N.E.B. should be subject to closer Parliamentary scrutiny than ordinary corporations, particularly when to do so might adversely affect the Board's commercial viability.<sup>49</sup>

Considerable controversy has arisen because the N.E.B., while subject to government control, is free from judicial and Parliamentary oversight and can thus arrogate to itself power to decide and implement industrial policy.<sup>50</sup> Traditionally, British courts have been extremely reluctant to interfere with bodies such as the N.E.B. which enjoy wide discretion. It is unlikely, however, that the judiciary's attitude will change, even in circumstances where it would be desirable to interfere on social and economic grounds.<sup>51</sup> An additional area of potential controversy derives from Britain's membership in the European Economic Community. The latter imposes limits on government assistance which favors some undertakings or which distorts competition. At present, however, N.E.B. endeavors appear to fall within the exceptions recognized in the Treaty of Rome<sup>52</sup> in that they assist development in depressed areas, promote British economic growth, and facilitate development of certain economic activities.<sup>53</sup>

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47. *Id.* at 57.

48. 924 PARL. DEB., H.C. (5th ser.) 826-915 (1977); EIGHTH REPORT FROM THE COMMITTEE OF PUBLIC ACCOUNTS, H.C. No. 531, Session 1976-77, at xix-xxi (1977). *See also* THIRD REPORT FROM THE COMMITTEE OF PUBLIC ACCOUNTS, H.C. No. 334, Session 1975-76, at xxvii-xxix, 143-45 (1976).

49. *See generally* A. MILLER, *THE MODERN CORPORATE STATE* (1976).

50. *See* D. ROY, *STATE HOLDING COMPANIES* (Young Fabian Pamphlet No. 40, 1974) and E. DELL, *POLITICAL RESPONSIBILITY AND INDUSTRY* 172-97 (1973).

51. *See* *British Oxygen Co. v. Minister of Technology*, [1971] A.C. 610. *See also* GUIDELINES, *supra* note 30, § 32.

52. Treaty Establishing the European Economic Community, March 25, 1957, 298 U.N.T.S. 11 (*entered into force*, Jan. 1, 1958) (unofficial English translation).

53. *Id.* at art. 92. *See* H. SMIT & P. HERZOG, *THE LAW OF THE EUROPEAN ECONOMIC COMMUNITY* 338 (1976). *See also* *National Carbonising Co. Ltd. v. E.E.C. & National Coal Board*, 2 C.M.L.R. 457 (1975).

N.E.B. autonomy, and the controversy it has engendered, addresses the relationship between the N.E.B. and the British government and judiciary. A related area of prime importance relates to the relationship between the N.E.B. and the corporations in which it acquires a shareholding, specifically with respect to such matters as takeovers, mergers, access to government capital, and the degree of actual control the N.E.B. exercises over these corporations.

3. *Scope of N.E.B. Powers.* The N.E.B. has no power to acquire shares compulsorily, but must proceed on the same basis as any commercial company in its takeover activities.<sup>54</sup> Nationalization is thus necessary if the government wishes to bring a corporation into public ownership where: (1) the N.E.B. cannot acquire a controlling interest in the ordinary way; or, (2) a corporate structure is such that shares are only available in a holding corporation, and the government wants simply to acquire the assets of one of the subsidiaries.<sup>55</sup>

The Industry Act of 1975 requires the N.E.B. and its subsidiaries to obtain the consent of the government when the cost of acquiring shares in a corporation exceeds £10 million or where the acquisition would give the N.E.B. thirty percent or more of the voting rights.<sup>56</sup> This limitation is clearly to allay business fears that the N.E.B. possesses unbridled power to acquire shares. An additional factor is that under the City Code on Takeovers and Mergers a purchaser of thirty percent or more of the voting shares of a listed corporation<sup>57</sup> is normally obliged to make an offer for all the shares, which might commit the Board to a substantial expenditure.<sup>58</sup> In the case of listed corporations, the N.E.B. must notify the Secretary of State if an acquisition would entitle the N.E.B. to con-

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54. Industry Act, 1975, c. 68, § 2(4)(h).

55. The Labour Party has a long-term commitment to acquire an interest in pharmaceutical manufacturing, but the latter is nearly always only one aspect of a corporation's business. See, e.g., THE LABOUR PARTY, LABOUR'S PROGRAMME FOR BRITAIN 28 (1976). The Secretary of State has given a general statutory authority to N.E.B. subsidiaries to acquire 30% or more of the share capital of a corporation, provided that the acquisition is not opposed by the directors of the corporation, and that the cost of the total shareholding in the corporation does not exceed £500,000.

56. Industry Act 1975, c. 68, § 10(1). Approval has been given on a number of occasions and is mandatory, of course, when a new corporation is being established.

57. Listed corporations are defined in the Companies Act, 1967, c. 81, § 33.

58. The City Code on Take-overs and Mergers § 34 (1976). The City Code, despite its name, does not have the force of law. It is a self-regulatory covenant issued on the authority of the City Working Party which consists of several associations of businesses. City Code on Take-overs and Mergers, Introduction (1976); P. DAVIES, THE REGULATION OF TAKE-OVERS AND MERGERS 78-79 (1976).

trol more than ten percent of the voting shares and the directors have not agreed, or where it would raise new or significant policy issues.<sup>59</sup> This requirement does not mean that approval will be withheld, but it places an additional burden on the N.E.B.'s operation, in particular because under the general law a shareholder must acquire more than ten percent of the voting shares to avoid being bought out compulsorily.<sup>60</sup>

A further qualification on the N.E.B. is that it is normally expected to acquire shares in corporations by agreement of its directors.<sup>61</sup> N.E.B.'s first chairman emphasized that the Board's success was due to its circumspect measures "to respect confidences and never to thrust [its] presence" upon corporations, and that "[t]he only basis on which we do business is the recognition by industry that we have something real to offer them."<sup>62</sup> However, the government's position is that on occasion the N.E.B. will buy shares in a corporation without the agreement of its directors, for otherwise it would be at a major disadvantage when compared with other businesses, and directors would have the power to override the right of shareholders to sell their shares on a voluntary basis.<sup>63</sup> Because the N.E.B. is on the same footing as other businesses in takeover situations, its attempt to purchase shares in a corporation has been thwarted on several occasions by rival takeover bids by a large established corporation.<sup>64</sup>

When the N.E.B. was established, a major concern of the business community was that the N.E.B. and corporations in which it held shares would have an unfair advantage when compared with ordinary corporations, particularly in matters like procurement of, and access to, government capital. To alleviate such fears, the Industry Act of 1975 explicitly states that the N.E.B. is not a servant or agent of the Crown, and that it enjoys none of the associated

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59. ANNUAL REPORTS 1977, *supra* note 30, at 57.

60. *See* Companies Act, 1948, 11 & 12 Geo. 6, c. 38, § 209; Industry Act, 1975, c. 68, § 1, sched. 1.

61. ANNUAL REPORTS 1977, *supra* note 30, at 57. Compulsory acquisition is possible with Parliamentary approval where an important manufacturing concern would otherwise fall under the control of a foreign power inimical to British interests. Industry Act, 1975, c. 68, §§ 11-20.

62. Ryder, *Bridge Across the Cash Gap*, EUROPA 3, col. 4 (Mar. 1, 1977).

63. GUIDELINES, *supra* note 30, § 5.

64. ANNUAL REPORT 1976, *supra* note 33, at 18-19. However, in December 1977, N.E.B. successfully outbid a large British corporation. *What is NEB's Philosophy?*, The Times (London), Dec. 6, 1977, at 19, col. 1.

privileges or immunities.<sup>65</sup> Secondly, the N.E.B. has a legal duty to exercise its functions in accordance with the accepted practice regarding take-overs, mergers, and listings on the stock exchange.<sup>66</sup> Finally, the N.E.B. and its subsidiaries are bound by the fair trading legislation and price controls: they must avoid showing undue preference in their trading relations; they are specifically enjoined from acting as a pacesetter with respect to terms and conditions of employment for their employees; and, they are subject to ordinary taxation — except for stamp duty in certain limited circumstances.<sup>67</sup> A corollary to these provisions is that creditors dealing with an N.E.B. subsidiary are given no guarantees as to payment of N.E.B.'s debts unless the government undertakes a specific commitment in relation thereto.<sup>68</sup> Furthermore, the provisions of the Act do not avoid the fact that a corporation in which the N.E.B. has a shareholding is at a financial advantage over competitors because it receives financial assistance which would not otherwise be available.<sup>69</sup>

There is no difficulty with the N.E.B. in controlling a corporation in which it holds a majority or all the shares, subject to the rules relating to fraud on or oppression of a minority of shareholders.<sup>70</sup> It is possible under British corporation law for the N.E.B., while holding a minority of shares, to control a corporation by

65. Industry Act, 1975, c. 68, § 1(6).

66. ANNUAL REPORTS 1977, *supra* note 30, at 56. These practices are contained in the City Code on Take-overs and Mergers (1976) and in LONDON STOCK EXCHANGE, ADMISSION OF SECURITIES TO LISTING (1973 as amended). In addition, the N.E.B. is bound to consult with the Office of Fair Trading before transactions are concluded which may constitute a merger qualifying for investigation by the Monopolies and Mergers Commission. This is a burden which ordinary corporations do not share, although in practice private corporations will consult with the Office of Fair Trading.

67. ANNUAL REPORTS 1977, *supra* note 30, at 57-58; Industry Act, 1975, c. 68, § 1(7).

68. ANNUAL REPORTS 1977, *supra* note 30, at 58. There is some argument that the concept of limited liability should not apply to wholly-owned N.E.B. enterprises which are operating not so much for commercial as for social (for example, employment) reasons. See 827 PARL. DEB., H.C. (5th ser.) 699 (1971).

69. In April 1977, an application by a group of tanning companies for an interlocutory injunction to restrain the N.E.B. from investing £3 million in a rival tanning corporation was dismissed by a judge in chambers. The tanners argued that the N.E.B. had breached its statutory duty because it was not likely to make a satisfactory profit as required by the Guidelines. Talbot J. held that even if the tanners were to suffer serious damages from any breach of duty, there was no basis for an interlocutory injunction although there may have been a triable issue involved. Harris, *Tanners Fail to Obtain an Injunction Against N.E.B.*, *The Times* (London), Apr. 30, 1977, at 15, col. 5.

70. See Companies Act, 1948, 11 & 12 Geo. 6, c. 38, §§ 210 & 222(f); *Burland v. Earle*, [1902] A.C. 83, 93 (P.C.). See generally F. GORE-BROWNE, *GORE-BROWNE ON COMPANIES* 786-90 (42d ed. A. Boyle & R. Sykes, 1972).

utilizing preferred voting rights shares, by means of a shareholder's agreement, or by provisions in the corporation's articles allowing the shares held by the government to elect a majority of directors, or the N.E.B. to veto certain decisions.<sup>71</sup> *De facto* control can also result when the N.E.B. has a minority shareholding and other shareholders are fragmented.

The real issue is not *potential* control, but how the N.E.B. exercises *actual* control. Generally, the N.E.B. prefers a monitoring role to a supervisory role. The degree to which the N.E.B. monitors corporations in which it holds shares depends on the finance involved, the magnitude of the risk, the size of the corporation, the capability of existing management, as well as political and other considerations. Some firms simply need approval for major capital expenditures and actions which raise controversial issues; others must prepare annual corporate plans and hold regular progress meetings with government officials; and yet others must prepare regular cash flow and profit and loss statements, and perhaps even monthly commentaries on their order book, capital spending, and general financial position.<sup>72</sup> Constant monitoring is necessary if the government is to avoid a situation either of withdrawing further support, with the result that an industry closes down, or of making a further substantial and unanticipated financial commitment. However, prior to the establishment of the N.E.B., the government sometimes neglected its monitoring role and regarded a changed management without further pressure as sufficient.<sup>73</sup>

All the shares in Rolls-Royce Ltd. are owned by the N.E.B.

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71. While the government has the right to nominate two directors to British Petroleum who have the power to veto any resolution, this power has never been exercised and the government is pledged not to interfere in the corporation's affairs except in defense and security matters. BRITISH PETROLEUM LTD. AND CENTURY OILS GROUP LTD.: A REPORT ON THE PROPOSED MERGER 7, CMND. No. 6827 (1977).

This agreement differs greatly from that negotiated with International Computers Ltd. Under the latter agreement, as long as the government holds five percent of the shares it can veto I.C.L.'s association with any foreign corporation, any major change in its business, and any disposal of its assets. Computers Merger Scheme, STAT. INST. 1968 No. 990, §§ 10 & 12.

In certain social democracies, such as France and Italy, legislation specifically authorizes government representation on boards of directors in excess of its entitlement under the normal principles of shareholder representation. See Couzin, *The Canada Development Corporation: A Comparative Appraisal*, 17 MCGILL L.J. 405, 424-27 (1971). See Local Employment Act, 1972, c. 5, § 4(4).

72. See G. GANZ, GOVERNMENT AND INDUSTRY 61-62, 70 (1970).

73. Hogwood, *Monitoring Government Involvement in Industry: The Case of Shipbuilding*, 54 PUBLIC ADMINISTRATION 409, 413 (1976).

However, under a memorandum<sup>74</sup> with the corporation, the corporation continues to operate as far as possible on a normal commercial basis. Although the corporation must comply with the intention behind the Industry Act of 1975 — for example, to locate in development areas when possible and to further industrial democracy<sup>75</sup> — its day-to-day management is free from N.E.B. interference. Changes in the corporation's board are suggested by the corporation, whose chairman is entitled to direct access to the government, provided the chairman of the N.E.B. has the opportunity to attend any such meeting. However, the corporation's long-range plans, its major investment programs, projects involving capital expenditure of £5 million or more, and any outside borrowing are subject to N.E.B. agreement.<sup>76</sup> In addition, the N.E.B. is to be supplied with information enabling it to monitor performance and financial projects, and to be given advance warning of major issues which have Parliamentary implications.<sup>77</sup> The agreement with Rolls-Royce is similar to other agreements negotiated between the N.E.B. and its corporations, although the degree of monitoring varies.<sup>78</sup> British Leyland, for example, has been subject to greater scrutiny because of its importance to the British economy and the past difficulties it has encountered. Theoretically, N.E.B. approval for British Leyland's investment decisions are subject to improvements in productivity and industrial relations, and to other conditions such as discussion and acceptance of the corporation's plans by representatives of the workers.<sup>79</sup> The N.E.B. has used the threat that further financial assistance to British Leyland might be curtailed in an attempt to induce workers to improve their productivity and industrial relations.<sup>80</sup>

Legally, a corporation in which the N.E.B. has a shareholding appoints its own directors, but such appointments are subject to government approval which can be used to ensure greater control

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74. Memorandum of Understanding Between the National Enterprise Board and Rolls-Royce (1971), reprinted in *National Enterprise Board and Rolls-Royce* (1971), *The Times* (London), Feb. 27, 1976, at 20, col. 1 [hereinafter cited as Memorandum]. For the original agreement between the government and Rolls-Royce, see 874 PARL. DEB., H.C. (5th ser.) 389-91 (1974).

75. Memorandum, *supra* note 74.

76. *Id.*

77. *Id.*

78. See 903 PARL. DEB., H.C. (5th ser.) 310 (1976).

79. See *Government Backs BL Plans*, 31 TRADE AND INDUSTRY 2 (1978).

80. 927 PARL. DEB., H.C. (5th ser.) 387-88 (1977).

over a corporation's affairs.<sup>81</sup> The British Chamber of Commerce recommends that N.E.B. directors be appointed for all corporations in which the Board has a shareholding to supervise the expenditure of public money. In practice, however, the N.E.B. does not regard Board appointments as importantly as constant monitoring and has not always exercised its power in this regard.<sup>82</sup> British company law requires directors to act in the interest of their corporation, which means their shareholders, even if this conflicts with other interests; for example, workers' interests or a national interest such as alleviating unemployment.<sup>83</sup> Situations can be envisaged where this might lead to conflict. For example, N.E.B.'s policy of reinvestment for long-term growth or lowering unemployment in a depressed area could clash with the aim of higher short-term profits or higher dividends. In practice, such conflicts have been avoided in organizations like British Petroleum, but this is explained by that corporation's success and the fact that it has never needed financial assistance. The public interest and that of British Petroleum have almost always coincided.

British law allows corporations to invest wide power in management,<sup>84</sup> and it is accepted that in large British corporations control may be vested in management rather than in the board of directors.<sup>85</sup> Partly in recognition of this, the N.E.B. decided in 1977 that British Leyland should have a full-time chairman — himself a member of the Board of the N.E.B. — and it is reported that the N.E.B. has full-time officials at other corporations.<sup>86</sup>

### *B. British National Oil Corporation (B.N.O.C.)*

Britain expects to have self sufficiency in oil by 1980 as a result of the exploitation of offshore discoveries in the North Sea.<sup>87</sup>

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81. *Parliament*, 25 TRADE AND INDUSTRY 648, 650 (1976).

82. EXPENDITURE COMMITTEE (TRADE AND INDUSTRY SUB-COMMITTEE), PUBLIC EXPENDITURE ON CHRYSLER U.K. LTD., MINUTES, H.C. No. 104-ix, at 281 (1976).

83. *Parke v. Daily News*, [1961] 1 W.L.R. 493, 498-99; *Scottish Cooperative Society v. Meyer*, [1959] A.C. 324, 363, *per Lord Keith of Avonholm*.

84. *In Re Equitable Fire Insurance Co.*, [1925] Ch. 407, 426-28; Davies, *Employee Participation on Company Boards and Participation in Corporate Planning*, 38 MOD. L. REV. 254, 262 (1975).

85. R. Pahl & J. Winkler, *The Economic Elite: Theory and Practice*, in ELITES AND POWER IN BRITISH SOCIETY 102 (P. Stanworth & A. Giddens eds. 1974).

86. Townsend, *Leyland's New Chief Offered Job Before Dobson Recognition; NEB Takes More Direct Control*, *The Times* (London), Oct. 26, 1977, at 1, col. 1.

87. DEPARTMENT OF ENERGY, DEVELOPMENT OF THE OIL AND GAS RESOURCES OF THE UNITED KINGDOM 2 (1978).



North Sea oil, it is hoped, will assist the balance of payments, enhance Britain's international creditworthiness, and contribute to an increase in wealth through investments to improve industrial performance, as well as investments in energy and increased essential services.<sup>88</sup> Government policy is that these aims can only be achieved if the exploitation and distribution of North Sea oil is under full government control with majority government participation.<sup>89</sup> The policy is being implemented along three lines: first, oil corporations are obliged to pay petroleum revenue tax, in addition to royalties and corporation tax, to prevent windfall profits;<sup>90</sup> second, the actual exploitation of the oil is being closely regulated through licensing and other means; and third, the government has established the B.N.O.C. — a government enterprise with the capacity to become a fully integrated oil corporation — to compete with existing oil corporations.

Regulation and government involvement in the exploration and exploitation of North Sea oil are felt to be necessary in view of the continuing allegations that oil corporations have exploited North Sea oil resources in a way which fails to maximize employment and government revenue; for example, by leaving exploitable oil in the ground where to do so maximizes the return on investment.<sup>91</sup>

1. *Regulation of Petroleum Resources.* British law vests in the Crown the absolute ownership of oil and gas resources, but provides that licensees can explore and exploit those resources subject to the payment of license fees and royalties.<sup>92</sup> Licensing procedures can be effectively used to regulate the development of new fields and the production rates from fields onstream. These procedures are used at present to maintain exploitation at a reasonably stable level. Additionally, smaller amounts of territory are being licensed at more frequent intervals than previously.<sup>93</sup> Government policy

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88. THE CHALLENGE OF NORTH SEA OIL 3-4, CMND. NO. 7143 (1978).

89. UNITED KINGDOM OFFSHORE OIL AND GAS POLICY 3, CMND. NO. 5694 (1974).

90. Oil Taxation Act, 1975, c. 22.

91. See P. ODELL & K. ROSING, OPTIMAL DEVELOPMENT OF THE NORTH SEA'S OILFIELDS (1976).

92. Petroleum (Production) Act, 1934, 24 & 25 Geo. 5, c. 36, §§ 1 & 2; Continental Shelf Act, 1964, c. 29, § 1; Petroleum (Production) Regulations 1976, STAT. INST. NO. 1129.

93. Most licenses in the United Kingdom have been granted by ministerial discretion rather than by competitive bidding. DEPARTMENT OF ENERGY, OIL FROM THE U.K. CONTINENTAL SHELF 8 (1976); Petroleum (Production) Regulations 1976, STAT. INST. NO. 1129, § 6(6). See also D. MACKAY & G. MACKAY, THE POLITICAL ECONOMY OF NORTH SEA OIL 24-25 (1975).

dictates that licensees are expected to process approximately two-thirds of United Kingdom oil in Britain, and that, ideally, exports should be in the form of products other than crude.<sup>94</sup> In addition to licensing, legal regulation of oil and gas requires government approval for the construction of pipelines in offshore waters, the building of new refineries, or the expansion of existing capacity;<sup>95</sup> entrusting the British Gas Corporation (a nationalized industry) with a monopoly on supplying natural gas;<sup>96</sup> and measures to further safety and to control pollution.<sup>97</sup>

The establishment of B.N.O.C. represents a move beyond mere legal regulation to a situation where a government body both participates and competes with oil corporations in the exploration, exploitation, and distribution of oil resources. In this sense, the establishment of the B.N.O.C. emulates developments in other European countries which have established government oil corporations to carry out the whole range of activities from discovery to retailing.<sup>98</sup> B.N.O.C. participation ensures government access to information on costs, profitability and reserves, and at the same time influences private oil corporations on matters like investment and the rate of depletion.<sup>99</sup> Competition secures for the state, profits that would otherwise go to the oil corporations and may stimulate the latter to act to a greater degree in the interests of consumers.

2. *The Role of B.N.O.C.* B.N.O.C., a statutory corporation, is empowered to search for and exploit petroleum existing in its natu-

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94. 882 PARL. DEB., H.C. 646-48 (1974).

95. Petroleum and Submarine Pipe-Lines Act, 1975, c. 74, §§ 20 & 34.

96. Energy Act, 1976, c. 76, § 8(1)-(2). Natural gas for industrial purposes may be provided by private corporations if the Secretary of State approves. The Energy Act of 1976 gives the Secretary of State wide power to regulate or prohibit the production, supply, acquisition, or use of petroleum, natural gas, petroleum products, and any other fuel. Prohibition or regulation of use may only be implemented for the purpose of price control. Direct price controls may also be imposed. *Id.* § 1.

97. *See, e.g.*, Mineral Workings (Offshore Installations) Act, 1971, c. 61; Health and Safety at Work, etc. Act, 1974 (Application Outside Great Britain) Order 1977, STAT. INST. No. 1232; Submarine Pipelines (Diving Operations) Regulations 1976, STAT. INST. No. 923; Prevention of Oil Pollution Act, 1971, c. 70. *See also* Offshore Petroleum Development (Scotland) Act, 1975, c. 8. This act regulates the use of land for oil platform construction.

98. Government oil corporations in other European countries include: E.L.F. (France); E.N.I. (Italy); STATOIL (Norway); and HISPANOIL (Spain). *See* H. MADELIN, OIL AND POLITICS 103-09 (1975) on whether the establishment of B.N.O.C. breaches E.E.C. antitrust provisions. *See also* Woodliffe, *North Sea Oil and Gas — The European Community Connection*, 12 COMMON MKT. L. REV. 7, 14-15, 18-20 (1975).

99. DEPARTMENT OF ENERGY, NATIONALISED INDUSTRIES AND THE EXPLOITATION OF NORTH SEA OIL AND GAS 3-4, CMND. No. 6408 (1976).

ral state in any part of the world; to process it; to deal in it; and to give effect to agreements with a view to securing participation by the government — or B.N.O.C. on its behalf — in activities connected with petroleum in “controlled waters.”<sup>100</sup> Without prejudice to these powers, B.N.O.C. can provide and operate pipelines, tanker-ships, and refineries, and can carry out research in connection with petroleum.<sup>101</sup> B.N.O.C.’s general policy must be approved by the government, and the Secretary of State can give it directions, general or specific, as it deems appropriate.<sup>102</sup> Finance for B.N.O.C. comes from National Loan Funds, the National Oil Account — the latter including payments of license fees and royalties made by the oil corporations — and more recently from loans by commercial institutions. The corporation also benefits by an exemption from petroleum revenue tax.<sup>103</sup> Additionally, the government has the power to take royalties in the form of oil rather than money, which can be allocated to B.N.O.C.<sup>104</sup>

To fulfill its role in exploring for and exploiting oil, B.N.O.C. proceeds in a number of ways. First, B.N.O.C. has succeeded to the interests in established North Sea oil fields held by the National Coal Board (a nationalized industry) and most of those held by Burmah Oil Company Ltd.; N.E.B. has also been allocated some interests in its own right.<sup>105</sup> Second, B.N.O.C. benefits under the participation agreements which have recently been signed by the government and those oil corporations that were issued licenses in the first four rounds of bidding between 1964 and 1972.<sup>106</sup> Under most of these participation agreements, B.N.O.C. has an option, exercisable in the medium future — three to five years — to purchase

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100. Petroleum and Submarine Pipe-Lines Act, 1975, c. 74, § 2(1). “Controlled waters” means the territorial sea adjacent to the United Kingdom and the sea in any designated area within the meaning of The Continental Shelf Act of 1964, c. 29.

101. *Id.* § 2(2).

102. *Id.* §§ 3 & 4. B.N.O.C. must have the permission of the Secretary of State to search for or obtain petroleum outside Great Britain, to refine or deal in petroleum products, to participate in the formation of a corporation or to acquire or relinquish membership therein, to borrow or lend money, to change its assets, to give guarantees, or to provide advice or assistance outside the United Kingdom. *Id.* § 2(4).

103. *Id.* §§ 7 & 40.

104. *Id.* §§ 17 & 19, sched. 2, pt. I, § 8c.

105. *Id.* § 13; 915 PARL. DEB., H.C. (5th ser.) 167-68 (1976). The Burmah purchase involved a government directive to B.N.O.C. under § 4(1) of the Act because of a disagreement between B.N.O.C. and the government over the correct valuation of Burmah’s assets.

106. By mid-February, 1977, agreements had been signed in definitive form with 25 companies. DEPARTMENT OF ENERGY, *supra* note 87, Appendix 5.

at market price up to fifty-one percent of any oil produced.<sup>107</sup> B.N.O.C. is also made a joint licensee in each field, and hence has a seat and a vote — but not a veto — on the operating committees developing them.<sup>108</sup> Some of the larger oil corporations have the right under their participation agreements to repurchase enough of the oil — up to 100% in some cases — at the same price paid by B.N.O.C. to service their refining and marketing operations in Britain.<sup>109</sup> The proportion taken back will depend in most cases on an annual appraisal of a corporation's operations by the government, with B.N.O.C. acting as adviser. Further, in some cases B.N.O.C. is entitled to exchange part of the repurchased oil for oil a corporation obtains from other sources. In some participation agreements, B.N.O.C. executives have a right to attend the marketing and refining committees of the oil corporations in order to gain expertise, as long as B.N.O.C. does not engage in this aspect of business.<sup>110</sup>

For political reasons the government preferred the option system *via* participation agreements to the statutory expropriation of oil. Great stress was laid on the voluntary nature of participation agreements, and that their legal nature was of an ordinary commercial contract.<sup>111</sup> One early agreement was signed because a small exploration corporation needed a government loan, and in a subsequent but similar case B.N.O.C. was able to guarantee a loan for a five percent royalty and signature of a participation agreement.<sup>112</sup> The threat inducing other oil corporations to sign participation agreements was that otherwise they would be excluded from future

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107. Early in the negotiations, the government threatened to expropriate, for fair compensation, the 51% interest. 886 PARL. DEB. (5th ser.) 1341-42 (1975). The option system avoided the cost of expropriation. Smaller oil corporations are not greatly affected by the option system since they have no need for guaranteed supplies to utilize refining capacity; they will simply sell to B.N.O.C. rather than elsewhere.

108. Lord Kearnton, the first chairman of B.N.O.C., regarded the information and expertise acquired by participation on the operating committees as more important than the options. Bell & Richardson, *The Sheikh of Aberdeen*, *The Sunday Times* (London), Jan. 23, 1976, at 59, col. 1. See also 904 PARL. DEB., H.C. (5th ser.) 957-61 (1976).

109. See, e.g., Vielvoye, *BP and Government Sign Wide-Ranging Deal on North Sea Participation*, *The Times* (London), July 2, 1976, at 21, col. 1. Other terms included in some of the agreements are that the corporation undertakes to use any United Kingdom continental shelf oil from existing licenses in support of its United Kingdom feedstock requirements; to optimize the use of such oil in relation to the United Kingdom market; to trade at a fair price, thus attempting to safeguard government petroleum revenues; and to maximize the benefits to Britain's balance of payments.

110. *Id.*

111. The Participation Agreement Act, 1978, c. 1.

112. Petroleum and Submarine Pipe-Line Act, 1975, c. 74, § 42; Annual Report 1977, *supra* note 47.

licensing rounds.<sup>113</sup> Amoco, for example, objected to signing such an agreement, which led to its exclusion — as well as groups in which Amoco participated — from the fifth round of licensing in 1977.<sup>114</sup> Subsequently, Amoco conceded the principle of participation and a participation agreement was signed.<sup>115</sup>

The third manner in which B.N.O.C. engages in the exploration and exploitation of North Sea oil is that a majority state participation is ensured through the licensing conditions attaching to new licenses, including those issued in the fifth round of licensing in 1977.<sup>116</sup> B.N.O.C. — except in a few cases where the British Gas Corporation obtains a stake — has a mandatory fifty-one percent interest in new licenses and is thus entitled to a fifty-one percent share of all the benefits, including a corresponding share of any oil produced and income accruing, and to a commensurate voting power on any operating committee.<sup>117</sup> As a corollary, B.N.O.C. is responsible for its full share of the exploration and development costs as they are incurred for those fields in which it decides to participate.<sup>118</sup> Another condition of the fifth and subsequent rounds of licensing is that each group of co-licensees must agree to a *pro forma* operating agreement drawn up by the government defining the working relationship between B.N.O.C. and the licensees.<sup>119</sup>

Through the participation agreements for the earlier licenses and the licensing conditions attaching to new licenses in the fifth and subsequent rounds, B.N.O.C. is now involved in thirteen of the seventeen fields in production or under development in the North Sea. Although B.N.O.C. is entitled to conduct downstream refining and marketing activities, it has decided to abstain from these activities until the 1980's, in part because it is still bolstering its expertise and in part because Britain has excess refining capacity for the time

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113. DEPARTMENT OF ENERGY, UNITED KINGDOM PRODUCTION LICENSING: FIFTH ROUND—A CONSULTATIVE DOCUMENT (1976).

114. Vielvoye, *Oil License Snub for Amoco as Whitehall Makes Good its Warning*, The Times (London), Feb. 10, 1977, at 19, col. 1.

115. Amoco's objection was that participation agreements infringed accrued rights and gave B.N.O.C. access to confidential information on refining and marketing plans. The government's answer was that "options" were of a "no win no loss" nature and were a much better deal than oil corporations could expect in other jurisdictions where confiscation was common. 908 PARL. DEB., H.C. (5th ser.) 22 (1976).

116. DEPARTMENT OF ENERGY, *supra* note 113. See generally Petroleum (Production) Regulations 1976, *supra* note 92; Woodliffe, *State Participation in the Development of United Kingdom Offshore Petroleum Resources*, [1977] PUB. L. 249.

117. *Id.*

118. *Id.*

119. DEPARTMENT OF ENERGY, *supra* note 113, Appendix 1.

being. By then, however, B.N.O.C. anticipates an oil shortage and envisions the possibility of disposing of its crude to established oil corporations in exchange for refining and marketing concessions.<sup>120</sup>

## II. PLANNING AGREEMENTS

Planning Agreements represent the second of two institutions recently introduced by the British Government under the Industry Act of 1975; the other is the N.E.B.<sup>121</sup> The basic theme of planning agreements is to create a closer relationship between the government and industry for the achievement of national needs and objectives. The Industry Act of 1975 defines a "planning agreement" as a voluntary arrangement as to the strategic plans of a body corporate for the future development in the United Kingdom over a specified period of an undertaking of the body corporate . . . being an arrangement entered into by the body corporate and any Minister of the Crown which in the opinion of that Minister is likely . . . to contribute significantly to national needs and objectives.<sup>122</sup>

The White Paper, produced in August 1974, gave pride of place to the notion of planning agreements between major corporations and government. It stated that these were to be nonenforceable arrangements under which private and public investment and development plans would be coordinated in the interests of more stable economic management.<sup>123</sup> It was further pointed out, however, that planning would be given sufficient recognition by statute to enable a concerned corporation to rely on assistance promised under the agreement.<sup>124</sup> The agreements were to be regarded not so much as contracts in the ordinary sense, but as a means of achieving a new relationship between the government, a corporation, and its workers where consultation was of the essence.<sup>125</sup> The

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120. Rodgers, *Bonn Stiches Up German Oil Deal*, *The Sunday Times* (London), Jan. 9, 1977, at 58, col. 7.

121. Industry Act 1975, c. 68, § 21. The Secretary of State for energy has described participation agreements as a form of planning agreement in that corporations inform the government of such matters as production levels, refining through-put and output, pricing policies and investment plans. See *Shell/Esso Sign Outline Pact on North Sea Participation*, *The Times* (London), Jan. 6, 1977, at 15, col. 5.

122. Industry Act, 1975, c. 68, § 21(2).

123. WHITE PAPER, *supra* note 29, at 3-4.

124. *Id.* at 3. A government spokesman later observed that although a planning agreement would not be a civil contract, it would represent a statement of firm intent by both sides. See 907 PARL. DEB., H.C. (5th ser.) 179 (1976).

125. 886 PARL. DEB., H.C. (5th ser.) 1069-70 (1975). See Page, *The Industry Act 1975*, [1976] J. BUS. L. 130, 138.

planning agreement has been variously described as a cooperative, continuing, growing, developing, or voluntary arrangement. It is said to be based on an exchange of information and on the development of a relationship between the government and corporations, their employees, and trade unions, and not merely on an exchange of financial benefits or an exchange of legal or technical obligations.<sup>126</sup> The government does not intend to make a planning agreement with a corporation which has not achieved, or shown signs of achieving, the development of a satisfactory relationship over a broad range of issues with its employees.<sup>127</sup>

The concept of planning<sup>128</sup> agreements<sup>129</sup> is not a new one, but reflects the development of a practice in a number of European countries.<sup>130</sup> In implementing its various economic plans, the French administration, for example, often enters into contracts — called *contrats de programme* — with private industry in which the latter agrees to do something desired by the administration in exchange for some benefit conferred in return.<sup>131</sup> The French have used this special tool to administer the economy and industrial democracy in a technological society. The contractual mechanism has also been used by the French government to discuss with an individual corporation that corporation's problems and prospects. For example, corporations have been allowed under these agreements to raise prices outside government price controls in order to finance investment, subject to their compliance with the objectives

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126. OFFICIAL REPORTS, H.C., STANDING COMMITTEE E ON THE INDUSTRY BILL 1975, 1171, 1173, 1184-85, 1301 (1975) [hereinafter cited as STANDING COMMITTEE E]. See also *The Contents of a Planning Agreement*, 20 TRADE AND INDUSTRY 338 (1975).

127. STANDING COMMITTEE E, *supra* note 126, at 1446. In order to be effective, planning agreements require a genuine commitment from both sides. DEPARTMENT OF ENERGY, PUBLIC EXPENDITURE ON CHRYSLER U.K. LTD. 14, CMND. No. 6745 (1977).

128. The term "planning" is used to describe the rationale of economic regulation in modern industrial society. It implies the establishment of objectives, the creation of means of achieving them, and the implementation of an integrated program.

129. The term "agreement" is defined as

a concord of understanding and intention between two or more parties with respect to the effect upon their relative rights and duties, of certain past or future facts or performances; the consent of two or more persons concurring respecting the transmission of some property, right, or benefits, with the view of contracting an obligation, a mutual obligation.

BLACK'S LAW DICTIONARY 89 (4th ed. 1968). Although the term "agreement" is often used synonymously with "contract," M. RADIN, LAW DICTIONARY 13 (2d Rev. ed. 1970) and J. BALLENTINE, DICTIONARY 53-54 (3d ed. 1969), here it is used in a much broader sense.

130. See J. HAYWARD & M. WATSON, PLANNING, POLITICS AND PUBLIC POLICY—THE BRITISH, FRENCH AND ITALIAN EXPERIENCE (1975).

131. Bergsten, *The Administration of Economic and Social Programs in France by the Use of the Contractual Technique*, 48 SO. CAL. L. REV. 852, 879-80 (1975).

on output, investment, and exports of the national plan.<sup>132</sup> Since 1968, Italy has also used similar contracts — referred to as “Planned Bargaining” — with leading corporations as part of its national plan. These agreements are designed to establish a constructive dialogue between government and industry with an eye toward examining and harmonizing their respective programs of action. Like the British planning agreements, the Italian Planned Bargaining procedure consists of an exchange of information between the government and industry on their respective investment plans so that their projects can be harmonized effectively.<sup>133</sup> Belgium has also employed similar contracts since 1969; parties to these agreements include the government, trade unions, and the relevant trade associations.<sup>134</sup>

### A. *Objectives and Contents of Planning Agreements*

In their application to the private sector, the system of planning agreements is expected to provide a new and improved framework for cooperation between the government and leading industrial corporations. The primary purpose of a planning agreement is to bring the government’s projections and a corporation’s own intentions and plans into a state of harmony. They are intended to increase mutual understanding between industry and government so as to improve the effectiveness of existing government policies. Planning agreements are also expected to improve and influence the development of the government’s own central economic policy, and to further a new and improved opportunity for workers to be consulted about and involved in a corporation’s forward plans.

It is anticipated that discussions leading to the conclusion of a planning agreement will include such diverse topics as: economic prospects; the corporation’s broad strategy and long-term objectives; United Kingdom sales; exports, investment, employment, and training; productivity, finance, and prices policy; industrial relations and arrangements for negotiation and consultation; the interest of consumers and the community; and product and process development.<sup>135</sup>

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132. *Parliament*, 26 TRADE AND INDUSTRY 623, 624 (1977); 886 PARL. DEB., H.C. (5th ser.) 975 (1975).

133. See HAYWARD & WATSON, *supra* note 130, at 128-40.

134. *Parliament*, *supra* note 132, at 624.

135. See Discussion Paper, *infra* note 138. See also T. SHARPE, THE INDUSTRY ACT 1975, at 61-63 (1976).



The definition of planning agreements<sup>136</sup> envisions that they will include arrangements between industry and government likely to contribute significantly to national needs and objectives. The agreements will be concerned with economic objectives, while concomitantly serving perfectly proper commercial purposes. However, they are not to be viewed as purely commercial, since they will also be concerned with the wider social and political objectives of the government; for example, the regional location of employment and the protection of the interests of consumers and of the community on which other than wholly commercial criteria operate.

Planning agreements will be tailor-made to the circumstances of each case.<sup>137</sup> A series of consultations between the government and corporations, eventually leading to an agreement about strategic plans, will occur annually with provisions for revising the agreement during the course of the year as circumstances require. These annual consultations will be timed to coincide with a corporation's own planning cycle. In their discussions with corporations, the government will be concerned essentially with strategic issues. In a 1975 Discussion Paper,<sup>138</sup> the government stated that it was well aware that commercial plans and forecasts of corporations frequently have to change on short notice to keep up with changes in the market.<sup>139</sup> Clearly, it is essential that planning agreements avoid restricting a corporation's freedom to respond to market fluctuations, especially where corporations are in competition with overseas manufacturers. The need to respond to this contingency will have to be reflected in the final form of the planning agreement — for this reason alone the agreements must be flexible. As well as including firm statements on strategic issues, the planning agreement should also set forth those circumstances which might give rise to changes in particular plans and projects, and provide arrangements for consultation as necessary. It was further stated in the Discussion Paper that the government envisioned that planning agreements would record a company's objectives and policies, the ways in which these could be harmonized with the government's economic strategy, and the action that government, management, and, where appropriate, trade unions intended to take to ensure

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136. See note 122 *supra*.

137. STANDING COMMITTEE E, *supra* note 126, at 1164.

138. Reprinted in *The Contents of a Planning Agreement*, 20 TRADE AND INDUSTRY 338 (1975).

139. *Id.*

that corporation plans and projects which had been reviewed and endorsed during the course of the discussions were successfully carried out.<sup>140</sup>

The subjects covered in the discussions leading to a planning agreement, and the importance which is to be attached to each, is expected to vary from corporation to corporation. The content of the agreements will reflect the extent to which long-range planning is feasible for a particular technology or market situation. It will also reflect the differing conditions in which corporations find themselves. For example, in one case the central issue may be the financing of investment, while in another it may be the opportunity for major increases in export sales.

Although no statutory limitation is placed upon the nature of the enterprise which may enter into a planning agreement, the government has announced that the principal application of planning agreements will be to large corporations; that is, Category One companies.<sup>141</sup> Category One companies, broadly speaking, include manufacturers with total annual home sales of £50 million or more, and service companies with total home sales of £20 million or more.<sup>142</sup>

### *B. Benefits of a Planning Agreement*

There are several benefits for corporations in the planning agreement system. First, as noted above, these agreements will aid the development of a better government understanding of private industry and of an individual corporation's plans and problems, which in turn will influence the government's development of industrial, economic, and other relevant policies. In the past, large corporations have felt that the greatest weakness of their forward

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140. *Id.* at 339.

141. *Parliament*, 27 TRADE AND INDUSTRY 384, 387 (1977).

142. *Id.* The first planning agreement was concluded with Chrysler (U.K.) Ltd. Payments totalling £40 million have been made by the government under the agreement. Additionally, certain advances with respect to a guaranteed loan have also been made under the agreement, but for reasons of confidentiality the amount has not been disclosed. The agreement covers the period 1976 to 1980. See *Parliament*, 26 TRADE AND INDUSTRY 494 (1977). Seven other major corporations have agreed to enter planning agreement discussions. *Varley Announces Chrysler Planning Agreement*, 26 TRADE AND INDUSTRY 610 (1977). These achievements are far removed from the aim of the Trade Union Congress: planning agreements with the top 100 corporations by 1978. However, the government says that it remains fully committed to the concept. *Parliament*, 29 TRADE AND INDUSTRY 550-51 (1977); Tinnion, *The Industry Act of 1975 and Industrial Strategy*, 5 INDUS. L.J. 80, 87 (1976).

planning was the uncertainty of government action.<sup>143</sup> Planning agreements will lead to greater commitment by government to the economic objectives of corporations — to their investment, to their employment creation, and to their economic purposes in general. Second, planning agreements will provide an improved framework for consultation between the public and private sectors and for coordination of all pertinent governmental departments. Within this framework, the discussion should strive to identify specific constraints which inhibit profitable growth as well as identify areas for coordinated action between government departments and the corporation. Third, planning agreements will secure for the corporation specific commitments from government to address the particular problems it is experiencing; commitments which, because they are incorporated into the agreement, can be monitored by the corporation. Fourth, an important aspect of the planning agreement system is the development of improved labor-management relations;<sup>144</sup> planning agreements will provide a means of improving employee participation, of building, in a flexible way, on a corporation's existing employee participation arrangements to secure cooperation with the workforce in carrying out the corporation's plans. Finally, the system will provide considerable financial benefits to planning agreement companies, the first of which emanates from the provisions of the Industry Act of 1972. Government financial assistance is perhaps the main incentive inducing corporations to enter into a planning agreement; it was for this reason that Chrysler (U.K.) Ltd. signed such an agreement in 1977.<sup>145</sup> There are two types of government financial assistance available to companies that have entered into planning agreements: regional development grants and selective financial assistance.

Under the Industry Act of 1972,<sup>146</sup> the Secretary of State may make a regional development grant towards approved capital expenditure incurred on new buildings or works,<sup>147</sup> or on the adaptation of existing buildings or works where they form part of

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143. See W. BAUMOL, *BUSINESS BEHAVIOR, VALUE AND GROWTH* 31 (rev'd ed. 1967).

144. See notes 125-127 *supra*.

145. See notes 142-143 *supra*. There is no statutory requirement for a company to enter a planning agreement. In addition to financial assistance, the government uses government contracts, industrial development certificates, and export credit guarantees as inducements to companies to sign planning agreements. WHITE PAPER, *supra* note 29, at 3-4.

146. Industry Act, 1972, c. 63, § 1(1).

147. *Id.* § 6(2).

“qualifying premises”<sup>148</sup> in development areas or intermediate areas; on new machinery and plants for use in qualifying premises in development areas,<sup>149</sup> or in the construction of industry in development areas;<sup>150</sup> and on mining works provided for use in development areas.<sup>151</sup> The amount of grant is, in general, twenty percent of the expenditure on the asset.<sup>152</sup> Grants may be subject to conditions, including a condition for repayment in whole or in part,<sup>153</sup> and comprehensive provisions with regard to the enforcement of conditions are attached to them, including provisions as to offenses and penalties.<sup>154</sup>

The Secretary of State is empowered to guarantee planning agreement corporations the level of a regional development grant with respect to approved capital expenditure on projects identified in the agreement, at rates which are not lower than those applying when the agreement was concluded.<sup>155</sup> In addition, it is provided that “in the case of a project which was also identified in a previous planning agreement” the rate of grant will not be less than that which was prescribed at the date of the earlier planning agreement.<sup>156</sup> Planning agreement corporations are thus given a statutory guarantee that the level of regional development grants for identified projects will not be reduced during the lifetime of each agreement.<sup>157</sup> The grants will be paid to them on the basis of the law existing at the time of the conclusion of the planning agreement, notwithstanding any later changes that may be made by statutory order.

The second form of government financial assistance, selective financial assistance, is guaranteed under part II of the Industry Act of 1972.<sup>158</sup> For projects identified therein, the Act provides for selective financial assistance to industry in assisted areas<sup>159</sup> where the assistance is likely to provide, maintain, or safeguard employ-

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148. *Id.* § 2(2).

149. *Id.* § 1.

150. *Id.*

151. *Id.*

152. *Id.* table, § 1.

153. *Id.* § 4.

154. *Id.* §§ 4 & 11, sched. 1.

155. Industry Act, 1975, c. 68, § 21(1)(a).

156. *Id.* § 21(1)(a)(ii).

157. *See* *British Oxygen Co. Ltd. v. Minister of Technology*, [1971] A.C. 610; *Australian Woolen Mills Proprietary Ltd. v. Commonwealth*, 92 C.L.R. 424 (1954), *aff'd*, 93 C.L.R. 546 (1955).

158. Industry Act, 1972, c. 63, §§ 7-9.

159. “Assisted areas” are enumerated in the Industry Act, 1972, c. 63 § 7(7).

ment in those areas,<sup>160</sup> or where it is likely to benefit the economy or any part or area of the United Kingdom.<sup>161</sup> Selective financial assistance may be given on any terms or conditions, and by any description of investment, lending, or guarantee, or by making grants.<sup>162</sup> This statutory guarantee confers substantial financial benefits to a planning agreement corporation. The statutory guarantee is an important response to industry's demand that there be greater certainty in its dealings with government and provides a firmer base for corporate decision-making.<sup>163</sup>

### C. *Enforceability of Planning Agreements*

The government has repeatedly declared that planning agreements are nonenforceable arrangements, in that they are not agreements in the sense of civil contracts enforceable at law.<sup>164</sup> Nevertheless, the full meaning of "nonenforceability" has never been fully explained. If by "nonenforceability" it is meant that planning agreements are not binding on the parties; that a corporation, having received one form or another of financial assistance from the government for a specified project, accompanied by a guarantee of non-reduction during the lifetime of the agreement, may flout the agreement or squander the grant for extraneous purposes with impunity,<sup>165</sup> or that a corporation promised financial assistance for a project named in the planning agreement may never get it; or that the assistance may be discontinued or reduced, as the case may be, then planning agreements would be rendered absurd. Complete nonenforceability does not seem to be the inten-

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160. *Id.* § 7.

161. *Id.* § 8.

162. *Id.* § 7(3).

163. See Holland, *The National Enterprise Board and Planning Agreements*, GOVERNMENT AND INDUSTRY RELATIONSHIPS 29-33 (D. Lethbridge ed. 1976).

164. See, e.g., 907 PARL DEB., H.C. (5TH SER.) 179 (1976).

165. The Industry Act, 1972, c.63, §§ 4 & 11, sched. 1 contains comprehensive provisions with respect to the enforcement of conditions attached to grants, including provisions as to offenses and penalties. Paragraph 1 of the schedule makes it obligatory for a corporation which has received a grant to furnish such information, or to produce such books, etc. for the purpose of enabling the Secretary of State to determine whether any condition subject to which the grant was made is satisfied or is being complied with, or whether the grant had become repayable in whole or in part in accordance with any such condition. Paragraph 2 gives the right to enter and inspect the premises where any asset which relates to a grant is located. Paragraph 3 provides that a breach of the provisions of paragraphs 1 or 2 would make a person guilty of an offense and liable on summary conviction to a fine not exceeding £400 or £50 respectively. This paragraph also provides that any person who in purported compliance with a notice under paragraph 1 knowingly or recklessly makes any statement or produces any document which is false in a material particular shall be guilty of an offense.

tion of the government. The Minister of State for Industry, for example, has confirmed that a promise by the government to guarantee the level of appropriate financial assistance for a project identified in a planning agreement will be legally binding.<sup>166</sup> Conversely, it follows that a recipient corporation will be bound by law to spend the money in the manner prescribed, or be liable for the legal consequences. Undoubtedly, the granting and continuation of the non-reduction guarantee is conditioned on the company's compliance with the terms of the agreement. This is not to say that the corporation must guarantee that it will perform its obligations absolutely, for the government expressly acknowledges that market conditions can change.<sup>167</sup>

Although planning agreements imply reciprocal legal obligations, they are not completely enforceable as contracts. For instance, remedies such as the recovery of damages — including loss of anticipatory profits — specific performance, and injunctions, which are normally available to an aggrieved party in a breach of contract action, will not be available to planning agreement parties. For planning agreements, unlike contracts, strive to develop a closer and more continuous relationship between the parties in a flexible and informal setting. To render planning agreements wholly enforceable as contracts would likely subvert this goal.<sup>168</sup> In actuality, it appears that the planning agreement system confers more rights upon private industry than ordinary government contracts, for under the former either party may withdraw from the agreement in certain events, whereas under the latter only the government may do so — for example, under unilateral termination or break clauses.<sup>169</sup>

### III. CONCLUSION

At present it is only possible to offer an interim assessment of

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166. "Planning Agreements Misunderstood"—Kaufman, 26 TRADE AND INDUSTRY 476 (1977).

167. STANDING COMMITTEE E, *supra* note 126, at 1175.

168. Some of the government's research and development contracts, particularly long-term research contracts, involve a similar type of close relationship between the parties; in these cases, as well, enforceability has a completely different connotation. For an examination of theoretical difficulties in the application of private contract law to United States procurement practices, see Frenzen, *The Administrative Contract in the United States*, 37 GEO. WASH. L. REV. 270 (1968); Grossbaum, *Federal Support of Research Projects Through Contracts and Grants: A Rationale*, 19 AM. U.L. REV. 423 (1970).

169. C. TURPIN & J. WHELAN, THE LONDON TRANSCRIPT—A COMPARATIVE LOOK AT PUBLIC CONTRACTING IN THE UNITED STATES AND THE UNITED KINGDOM 3-44 (1973).

the institutions of industrial strategy discussed above. Certainly the N.E.B. has not realized the hopes of its progenitors of extending public ownership into the sectors of the profitable manufacturing industry.<sup>170</sup> So far, its role has been restricted to that of a holding corporation for enterprises like British Leyland and Rolls-Royce, to advise the government on certain industrial matters, and to provide financial assistance to a relatively disparate group of small to medium-sized firms experiencing financial difficulties, or which cannot obtain finance from other sources but whose future profitability is not unlikely.<sup>171</sup> The failure of the N.E.B. to fully realize the hopes of its progenitors is attributable to a number of factors. First, the N.E.B. lacks compulsory powers of acquisition so that only firms which cannot obtain finance elsewhere will allow the N.E.B. to acquire an equity holding. Second, the N.E.B. is undercapitalized. The other forms of government financial assistance to industry — specifically regional development grants and selective financial assistance — far exceed the amounts allocated to the N.E.B.<sup>172</sup> Certainly the relatively small sums of money the N.E.B. has, much of which goes to British Leyland and Rolls-Royce, cannot displace investment from existing financial institutions and from corporations' own resources. Third, the N.E.B. must earn an adequate return on capital, although a broader view might have released it from what is essentially the same consideration which guides private industry so that it could take account of other matters such as a wide range of economic costs and benefits external to investment. Finally, those controlling N.E.B.'s destiny have a view of its role quite removed from that of its founders in that they do not see the N.E.B. as replacing existing sources of finance for industry but rather as simply supplementing those sources.<sup>173</sup> Moreover, they see the N.E.B. as assisting small to medium firms in temporary

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170. WHITE PAPER, *supra* note 29, at 7.

171. "The N.E.B. has . . . been transformed from an instrument of nationalization to an investment bank, development agency and holding company." G. GANZ, *supra* note 72, at 53. The government is involved in the nationalized industries, such as steel.

172. EXPENDITURE PLANS, *supra* note 37. By one estimate, despite an anticipated outlay of £1 billion during the period 1977-1982, the N.E.B. will hold only two percent of the equity in the shares on the London Stock Exchange. *The Albatross Round Lord Ryder's Neck*, *The Observer* (London), Mar. 20, 1977, at 40, col. 1. See also N.E.B. EVIDENCE TO WILSON COMMITTEE ON CITY (1977).

173. Cf. R. CLARKE, *supra* note 16, at 8 (money provided in the 1960's by the Industrial Reorganization Corporation was a factor which enabled firms to undertake valuable projects which otherwise would not have been possible). See also text accompanying notes 15-17 *supra*.

difficulties rather than effecting a change in the control or ownership of the means of production, distribution, and exchange.<sup>174</sup> In sum, then, the N.E.B. will not greatly limit capitalism — ironically in view of the motives of those who advocated its establishment — but will assist and strengthen it.<sup>175</sup>

Another aspect of the N.E.B.'s operation which has yet to attain full potential is the issue of industrial democracy. Initially, the N.E.B. was to play a role in ensuring that enterprises under its control would provide for the full involvement of employees in decision-making at all levels.<sup>176</sup> Now the Secretary of State for Industry has directed that the N.E.B. need only make appropriate arrangements with the Board's subsidiaries "to ensure that the government's policies in this field are being advanced."<sup>177</sup> Some advances have been made in industrial democracy in N.E.B. subsidiaries,<sup>178</sup> but much is contingent on the government's response to the Bullock Report.<sup>179</sup>

If radical critics of the N.E.B. are unhappy, industry by no means wholeheartedly accepts it either. Industry's collective view, in so far as it is articulated, is that government lacks the experience and technical competence to participate directly in business through shareholdings in corporations.<sup>180</sup> Government financial assistance is welcomed, however, where private investment is not forthcoming. Not all corporations take a hard line as witnessed by the willingness of some corporations to accept N.E.B. participation. Considerable skepticism has also greeted the N.E.B. and the con-

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174. The trend of a government entity becoming increasingly influenced by commercial factors is perhaps stronger in the B.N.O.C. See Hennessey, *Unease Over Civil Servants on National Oil Board*, *The Times* (London), Feb. 9, 1976, at 4, col. 3.

175. See Ghai, *Control and Management of the Economy: Research Perspectives on Public Enterprise*, 9 *VERFASSUNG UND RECHT IN ÜBERSEE* 157, 160 (1976).

176. WHITE PAPER, *supra* note 29, at 7.

177. ANNUAL REPORTS 1977, *supra* note 30, at 59.

178. As part of the government's reorganization of Alfred Herbert, each site of the corporation elects a consultative committee which is given considerable information about the site's prospects, performance and profitability at a monthly meeting. *Guardian* (Manchester), July 12, 1977, at 16, col. 3-4.

179. This report concerns the advisability of representation of employees on boards of directors, and the role therein of trade unions. The Committee of Inquiry, chaired by Lord Bullock, on a split vote, reiterated the government's stated goal of the extension of industrial democracy, by labor, in particular trade union, representation on boards of directors. The Committee also made specific recommendations as to the best method of achieving this goal. DEPARTMENT OF TRADE, REPORT TO THE COMMITTEE OF INQUIRY ON INDUSTRIAL DEMOCRACY, CmND. No. 6706 (1977).

180. CONFEDERATION OF BRITISH INDUSTRY, GOVERNMENT AND INDUSTRY 32-33 (1974). See also CONFEDERATION OF BRITISH INDUSTRY, THE ROAD TO RECOVERY (1976).



cept of planning agreements from those who see them as one more step toward the corporate state.<sup>181</sup>

The concept of planning agreements represents a new initiative based upon a partnership between government and industry at the level of the firm, the purpose of which is to improve the quantity and quality of industry's contribution to the development and growth of the British economy. It is hoped to achieve this by providing a framework within which decision-making by government and management is improved by the sharing of information about plans and objectives, and in which the effectiveness of action to attain agreed objectives is enhanced by coordinated use of the resources of government and industry. Negotiation of a planning agreement is said to provide a mechanism whereby industry participates in the formulation of the rules which bind it.

An assessment of the success of planning agreements in the achievement of these goals must be suspended until they become a more established feature of the British economy. Certainly a significant, although rather specific, ramification of planning agreements might be in the development of government procurement law. Planning agreements might, for example, by creating closer links between government and industry, bring about a better understanding between these parties in their commercial dealings. These agreements might provide information to government contractors concerning the projected demands of government; in return, government might obtain information about how its suppliers are working, new designs in the planning, the proposed acquisition of new plants, as well as a multitude of other valuable information. This information might, *inter alia*, lead to financial and other assistance by government to indigenous industry which may in turn encourage industry to supply government requirements so as to reduce the proportion of government procurement from overseas.

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181. Winkler, *Law, State and Economy: The Industry Act 1975 in Context*, 2 BRIT. J.L. AND SOC'Y 103 (1975); *contra*, Hadden, *The Industry Act 1975*, 39 MOD. L. REV. 318, 319 (1976).