

MULTILATERAL INVESTMENT GUARANTEE AGENCY: A CRITICAL APPRECIATION OF ITS GUARANTEE SERVICE

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Foreign Direct Investment (FDI) in developing countries alarmingly decreased during the first half of the 1980s. Gross FDI declined during this period from \$13 billion to \$9 billion in 1986.¹ However, there are strong indications that viable investment opportunities exist in those countries but investors tend to avoid these opportunities because of concern about risks which are primarily non-commercial and political in nature. In such a situation Multilateral Investment Guarantee Agency (MIGA), fifth affiliate to the World Bank Group, has been established as the first international guarantor of FDI. It is an autonomous international organisation with 'full judicial personality' under international law and the domestic laws of its members.² The main objective of the Agency is to encourage the flow of investment for productive purposes among its member countries and, in particular, to its developing member countries.³

The draft Convention of MIGA was adopted by a resolution of the Governors of the World Bank on 11 October 1985. It came into force on April 12 1988 after the necessary ratification.⁴ Currently its country membership has grown from 29 founding members to 149 countries

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¹ Rowat M D, "Multilateral Approaches to Improving the Investment Climate of Developing Countries: The Cases of ICSID and MIGA", 33 (1992) *Harvard International Law Journal*, 103, at p. 103.

² Convention Establishing the Multilateral Investment Guarantee Agency 1985 Art. 1.

³ *Ibid.*, Art. 2.

⁴ *MIGA Annual Report*, 1997, at p. 10.

until 24 May 1999.⁵ In total, MIGA has issued 363 guarantee contracts⁶ that have facilitated foreign investment of about US\$ 27 billion in 63 developing countries.⁷ There is no denying the fact that, in a decade, it has achieved a limited success in its mission by concluding a number of contracts which facilitated a good amount of FDI and created 40,820 jobs in host countries.⁸ Moreover, at the end of the fiscal year 1997, the Agency had more than 1,000 active preliminary applications for coverage of prospective investments. However, it has issued only 55 contracts of guarantee during the fiscal year 1998⁹ and 15 during the first half of 1999.¹⁰ In such a situation, operations of this Agency deserve a searching reappraisal. The present study is devoted to that pursuit. This effort will explore various aspects of its guarantee operations and compare them with the relevant provisions of Major Investment Insurance Systems (MIIS) of the world. In this essay, MIIS includes US Overseas Private Investment Corporation, 1948 (OPIC) which covers 26% investment; Germany's TREUARBEIT, 1960 that covers 12% and the Japanese Export Insurance Division/Ministry of International Trade and Industry, 1970 (EID/MITI) which covers 46% investment. Together, these organisations represent over 80% of all outstanding national insurance coverage.¹¹ All of the above three are entirely national investment insurance programmes whose limitations in guaranteeing FDI warranted the emergence of an international insurer like MIGA. To serve its objectives, MIGA is required to complement the activities of the national insurance entities.¹² MIGA promotes such complementarities through co-insurance and re-

⁵ MIGA Press Release, 24 May 1999.

⁶ MIGA News, Winter 1999.

⁷ *Supra* note 5.

⁸ 6 (1998) MIGA News.

⁹ MIGA Annual Report, 1998.

¹⁰ *Supra* note 6.

¹¹ See Appendix 3, *supra* note 1, at p. 139. For information regarding MIIS used in this effort, see Appendix 4 (pp. 140-144), *supra* note 1 if not indicated otherwise.

¹² *Supra* note 2, Art. 19.

insurance with these institutions, bilateral exchanges of information, and its membership in the Berne Union.¹³

A recent example of such complementarity could be found in the resolution of the plenary session of the 1998 IMF-World Bank Group Annual Meetings in Washington. The session announced a new multilateral initiative titled 'Asian Growth and Recovery Program' (AGRP) to revitalise private sector growth in Asia, in an effort to assist many of the countries hard-hit by the economic crisis in the region. The IFC will finance the AGRP while MIGA will provide investment guarantees to foreign investment projects in these countries. These efforts will be complemented by the OPIC and EID/MITI.¹⁴ Before concluding the article, we also furnish a brief note on the continued guarantee services of MIGA to Bangladesh, a founding member of this world organisation. This note indicates the fact that Bangladesh has received fewer guarantees despite its attachment to this Agency (MIGA) since its inception.

GUARANTEE SERVICES

MIGA was designed to mitigate political risks as well as to provide financial compensation to investors for losses caused by covered risks that actually eventuated during the long term of a FDI. In so doing, it follows a prescribed procedure as discussed below.

Application for Guarantee-Fees and Formalities

An investor must file a prescribed application with MIGA before the investment is made or irrevocably committed. The information in this application allows the Agency to make an initial determination of a project's eligibility. Upon qualification, a Notice of Registration (valid for one year) is issued and a Definitive Application is mailed to the investors.

¹³ The Berne Union denotes the International Union of Credit and Investment Insurers. The Union, which includes virtually all major programmes, is an association of public export-credit and investment insurers which facilitates the exchange of information among its members. The Countries in this Union include all members of the Development Assistance Committee of the OECD, as well as South Korea and India.

¹⁴ Supra note 6.

Registered investors should complete and return the Definitive Application accompanied by necessary papers to MIGA approximately three to four months before a guarantee is needed.

The Agency charges an application fee to process the Definitive Application.

On the registration of a this application, the Agency must charge the proposed investor a fee which must be between 0.5 per cent of the proposed amount of guarantee, provided that such fee is in no case be less than US \$250 or more than \$1,000. A processing fee is also charged by it if extra costs for external services are incurred during the underwriting process, such as, for analysis of environmental sensitive project, e.g., oil and gas or mining. The unused portion of processing fees is refundable to investors. Application fee or part thereof must be refunded if the Agency declines to issue a guarantee due to the limit of guarantee capacity of the Agency specified in Art. 22 of the Convention. The fee is non-refundable if MIGA offers a guarantee and the applicant does not accept it. However, on the registration of a preliminary application, no fee is charged. Provisions regarding application fees could be revised to meet financial problem of MIGA. The minimum and maximum fees could be refixed at US\$500 and US\$ 5,000, respectively. But in the case of decline by the Agency, the total fees deposited by the investors should be refunded whatever the reasons for decline may be. This amendment is suggested on the premise that economic viability will certainly enable the Agency to provide service to a greater extent. The fees of those applicants who are refused its service should not be retained, whatever the amount may be. It will, in turn, increase MIGA's credibility to its clients.

UNDERWRITING PROCESS AND APPROVAL OF THE HOST GOVERNMENT

Once MIGA receives the Definitive Application accompanied by all essentials, the underwriting process is initiated. The review includes an assessment of environmental and developmental impact on the host country; the financial, technical and economic viability of the project; and the risks for which the guarantee is requested. In addition, MIGA must obtain approval from the host government to offer a guarantee to the applicant. The entire procedure, from receipt of the Definitive Application to the date the contract is issued, usually takes three to six months, depending on the nature of the project.

The provision regarding prior approval of the host country virtually facilitates the way for the Agency of being repaid the compensation by the host country. Because, once a country approves any guarantee, it binds itself to pay for any damage generated from the occurrence of any designated risks. However, the host country would be free to withhold its approval. It could also limit its approval to certain types of risks.¹⁵ The Agency would then reflect these limitations in its contract of guarantee with the investors. To avoid administrative delays in the approval process, MIGA could advise host governments that unless an objection was presented within a reasonable period of time, the proposal would be deemed approved. Art. 38(b) of the Convention permits this procedure for approval on a non-objection basis. This provision is different from MIIS. A MIIS requires specific approval.¹⁶ In this context a matter that has to be clarified is whether a failure to object can successfully be imposed upon a sovereign state as conclusive of specific approval. This deeming approval appears to contradict Art. 15 of the Convention. This Article spells out that "the Agency shall not conclude any contract of guarantee before the host government has approved the issuance of the guarantee by the Agency against the risk designated for cover." This is an important provision as it upholds the principle of state sovereignty.

ELIGIBILITY TESTS: IMPERATIVES FOR COVERAGE

MIGA does not provide guarantee for all investments. Before guaranteeing any investment, MIGA has to be satisfied with three tests for every investment. Those tests are: (i) eligibility of investments; (ii) eligibility of investors; and (iii) eligibility of risks.

Eligibility of Investments

The Convention does not define the eligibility of investments narrowly. It uses the term in a generic sense to allow for continuous adjustment of its programmes to market forces. Art. 12 of the convention provides that eligible investment for coverage is, *inter alia*, such forms of direct investment as may be determined by its Board of Directors.

¹⁵ Shihata I F, "The Multilateral Investment Guarantee Agency", 20 (1986) International Lawyer, 485, at p. 487.

¹⁶ Willams S L, "Political and Other Risk Insurance: Eximbank, OPIC and MIGA", 11 (1988) Middle East Executive Reports, at p. 4 (Lexis) and *supra* note 1.

It is, however, interesting to note that similar to the World Bank's practice in granting aids, MIGA shall, in guaranteeing an investment, satisfy itself as to the economic soundness of the investment, its contribution to the development of the host country (both economic and social), the propriety of investment in the light of the declared development objectives and priorities of the host country, the compliance of the investment with the host country's laws and regulations, and also as to "the investment conditions in the host country, including the availability of fair and equitable treatment and legal protection for the investment."¹⁷ This last point clearly reiterates the importance of maintaining the principle of state responsibility including observance of the international minimum standard by the host country towards aliens and their property abroad.¹⁸

Another requirement for the coverage is that the investment must be new.¹⁹ If an investment satisfies any of the following, such investment must be regarded as new:

- a) the implementation of the investment begins subsequent to the Agency's registration of the preliminary application for a guarantee;
- b) the implementation of the investment begins subsequent to the registration of the definitive application for a guarantee if the investor decides not to file a preliminary application;
- c) the purpose of the investment is to modernise, expand, and enhance the financial viability or otherwise develop an existing investment project;²⁰
- d) the purpose of the acquisition of an existing projects enterprise²¹ in whole or in part is either to expand, modernise,

¹⁷ Supra note 2, Art. 12(d).

¹⁸ Chatterjee S K, "The Convention Establishing the Multilateral Investment Guarantee Agency", 36 (1987) International and Comparative Law Quarterly, 76, at p. 82.

¹⁹ Supra note 2, Art. 12(c).

²⁰ In accordance with the Operational Regulations, investment project means the project or set of projects in which the investment covered or under consideration for coverage is made or to be made in the host country.

²¹ "Project enterprise" means a corporation, association, partnership or any other entity which holds title to, or the power to dispose of, the assets contributed to the investment project.

enhance such an enterprise or serve its financial restructuring, such as the improvement of its debt/equity ratio;

e) the purpose of such acquisition is to assist the host country in restructuring its public sector;

f) the use of earning from an existing foreign investment in the host country if such earnings could otherwise be transferred outside the host country at the time of the decision on the issuance of the guarantee for such earnings.²² Although Art. 12(c) of the Convention does not specify the date of implementation of the investment, paragraph 1.11 of the Operational Regulations provides that the implementation of an investment shall be deemed to have begun either when resources have been transferred to the project enterprise, or when the contribution of such resources to the investment project has been irrevocably committed.

Criteria set out for determining the eligibility of investment are well formulated. Development of the host country has been emphasised which is the main goal of the Agency. At the same time, attention has been paid to presume the potential risks that might be faced by the investors in future by taking into account the host country's law and regulations and investment conditions therein.

Further, investments in all member countries are not guaranteed by MIGA. Art. 13 states that investment shall be guaranteed only if they are to be made in the territory of a developing member country. This, however, may lead to the uneasy question, if this is the case, as to why would the developed nations join this Agency. The answer would lie in the proposition that guaranteeing investment in developing countries would, in parallel, benefit the developed ones as well. FDI provides a number of potential benefits for the nations from which the investment originates. It contribute significantly to the development and strengthening of the of the home country's economy by improving its competitiveness in the world market.²³

The MIIS has established certain criteria for the determination of eligibility of investment which are somewhat similar to those of the MIGA. To be eligible for guarantee under the Overseas Private

²² Supra note 2, Art. 12(e) paras. 1.11 to 1.13 of the Operational Regulations.

²³ Overseas Private Investment Corporation, *OPIC Programme Handbook*, 1994.

Investment Corporation (OPIC), the investment should be new including expansion, modernisation, and re-financing of the existing enterprises. It has excluded those projects from insurance that negatively affect US balance of payments and employment as well as casinos, military sales and environmentally harmful activities. Export Insurance Division/Ministry of International Trade and Industry (EDI/MITI) provides guarantee for the new projects like OPIC. However, it excluded projects, which affects public morals or violation of laws in most countries. TREUARBEIT is more liberal than the other two. It provides insurance for new investment including expansion, modernisation of existing enterprises with no exclusion. MIGA goes one step further in defining new investments. Its new investments include, in addition to OPIC, reinvestment of earnings. This inclusion encourages reinvestment which ultimately increases investment. Further, MIGA imposes a different condition that the investment should be economically sound. This condition virtually reduces the risk of insurance. Its exclusions also follow the detrimental environmental impact, similar to OPIC, but public morals are not taken into account like EID/MITI. It needs to be pointed that the issue of public moral could be important, particularly in view of the cultural pluralism of different developing countries as well as the host country and the desirability of a project and, hence, it's potential may be influenced by these diverse notions of what is desirable, culturally and morally.

In terms of host country, there are some different views between MIGA and MIIS. OPIC extends its insurance services if the host countries satisfy a set of conditions. Those conditions are as follows: i) friendly LDCs (including East Europe and Northern Ireland); ii) per capita income of less than US\$ 3,881; iii) observance of human rights and internationally recognised workers' rights; iv) oil and gas projects excluded in some OPEC member countries; v) existence of a bilateral agreement; and vi) host government's approval of insurance for each project.

EID/MITI does not impose any restriction in choosing a host country, but prior approval of the host country is imperative. TREUARBEIT has some limitations with regard to the host country. To be insured by it, an investment should be made in LDCs. In practice, it also considers the availability of adequate legal protection (e.g., Bilateral Investment Treaty — BIT) and host country's approval as a prerequisite for applicability of BIT. MIGA simply wants that investment be made in developing countries. But like others, approval

of the host country is a prerequisite for coverage. Hence, in respect of home countries, MIGA and EID/MITI have similar approach but the decision whether a particular investment is eligible for coverage or not may still be different. Because, there is a basic difference between the two organisations regarding the criteria specified for recognising investors. The difference is that EID/MITI accepts only citizens of Japan whereas MIGA welcomes any nationals of member countries. OPIC is more conservative than the others in selecting host countries.

Thus, MIGA has ultimately opened the door for potential investments, alleviating narrow barriers. But MIGA could take the human right issue into account in a proposal, unlike the OPIC, as a prerequisite. MIGA could propose to the host countries, where relevant and appropriate, that during the tenure of the designated investments host countries would improve their respective human rights conditions. Such a practice could contribute to the improvement of human rights in developing countries without further costs.

Eligibility of Investors

Eligible investors have been identified in Art. 13 of the Convention. It enumerates that investors, to be eligible for guarantee, must be nationals of a member country. In the case of corporate investors, these must either be incorporated and have their principal place of business in a member country, or the majority of their capital must be owned by nationals of a member or members. The Convention incorporates the innovative feature that eligibility may be extended to the nationals of the host country if they transfer the assets to be invested from abroad. In this respect the Convention states that:

Upon the joint application of the investors and the host country, the Board, by special majority, may extend eligibility to a natural person who is a national of the host country or a judicial person which is incorporated in the host country or the majority of whose capital is owned by its nationals, provided that the assets invested are transferred from outside the host country.²⁴

This feature of the Convention allows MIGA to assist member countries in their efforts to reduce the problem of capital flight. It also emphasises that MIGA's guarantee protection relates primarily to the transfer of funds into the host country from abroad for development purposes rather than merely to the foreign nationality of the investors.

²⁴ *Supra* note 2, Art. 13(c).

But as to “judicial persons”, an ambiguity needs to be clarified. Although, under the Convention, guarantee may be offered only to investment from a foreign country to a developing country, yet in view of the use of the word “or” in Art. 13(a)(ii), it is not clear whether to become eligible for a guarantee a judicial person will be required to satisfy both of the following condition:

it must be incorporated in the country in which it has its principal place of business; and

the majority of its capital be owned by a member or members or nationals of an investor country.²⁵

However, if a judicial or natural person has more than one nationality, the nationality of a member must prevail over the nationality of non-member, and the nationality of the host country must prevail over the nationality of any other member.²⁶

Further, if the government of the investor’s home country notifies the Agency that the investment would be financed with funds transferred from the home country in violation of its laws, such investment shall be considered as ineligible and in no case insurable.²⁷ This provision has ensured legal control of home country over the investors. To make the investment comply with relevant laws, the observance of the laws of both home and host countries should be honoured. Otherwise, home country may feel ignored, possibly leading to the weakening of the Agency.

As regards the mode of operations of the investors, Art. 13(a)(ii) of the Convention provides that in all cases the investor must operate on a commercial basis. Paragraph 1.19 of the Operational Regulations clarifies how this requirement operates in cases of privately and publicly owned investment. Where the majority of the equity in the investment is privately or publicly owned, the Underwriting Authority must determine whether the investor operates on a commercial basis.

²⁵ Supra note 2, Art. 13(a)(ii): “Such judicial person is incorporated and has its principal place of business in a member or the majority of its capital is owned by a member or members or nationals thereof, provided such member is not the host country in any of the above cases.”

²⁶ Ossman G, “Legal and Institutional Aspects of the Multinational Investment Guarantee Agency as the Fifth Affiliate of the World Bank Group”, 11 (1996) *Journal of International Banking Law*, 359, at p. 369.

²⁷ MIGA Operational Regulations, para. 3.10.

Such investor is eligible for coverage only in respect of investments that operate on a commercial basis.²⁸

In comparison with MIIS, MIGA has a wider understanding of investors. OPIC recognises those investors who are US citizens, corporations, partnerships and/or foreign corporations/partnerships owned at least 95% by US citizens. Ownership of domestic US corporations must be more than 50% by US citizens. EID/MITI provides guarantee for citizens of Japan or a corporation or other institutions established under Japanese laws. Domestic investors could be majority owned by foreign individuals. TREUARBEIT offers guarantee to German citizens and corporations established under German laws. Thus, the above three organisations favour their own citizens. But MIGA provides guarantee to nationals or juridical persons operating on a commercial basis which are nationals of member countries other than host country except where nationals of host country transfer assets from outside the country, or juridical persons established in a non-member country whose majority-capital is owned by national of member countries, provided such a member is not the host country.

Virtually the same principles have been followed by all in selecting investors. But MIGA, for the first time, has crossed the territorial boundary to encourage the investors to make FDI in developing countries, providing insurance against non-commercial risks.

Eligibility of Risks

From the outset, MIGA issues guarantees against four categories of non-commercial risks.²⁹ These are: a) currency transfer; b) risk of expropriation and similar measures; c) breach of contract by the host government and d) risk of war and civil disturbance.

Currency transfer: Under Art. 11(a)(i) of the Convention, the Agency may provide coverage for losses from such risk arising from any measure attributable to the government of the host country, for restrictions on the transfer outside the host country of either local currency or the foreign currency into which the local currency was converted, and/or restrictions on the currency acceptable to the guarantee holder. Such restriction must be introduced after the date of

²⁸ Supra note 26.

²⁹ Supra note 2, Art. 11(a).

issuance of the contract of guarantee and must apply to currency which represents returns on, or repatriated capital of, the guaranteed investment.³⁰

These restrictions may take both active and passive forms or either. An active restriction is a decision of the host government denying conversion and/or transfer of local currency, or authorising such conversion and transfer at an exchange rate less favourable than the lowest exchange rate determined under the contract of guarantee. Such contract must specify the currency into which conversion is guaranteed which may be either a freely useable currency within the meaning of Art. 3(e) of the Convention³¹ or any other currency of a member agreed on between the Underwriting Authority and the guarantee holder. Moreover, the contract must also specify the basis, and the date for determining the exchange rate or rates to be applied in calculating a claim. The exchange rate is the rate prevailing in the host country on the date on which the host government denies or is deemed to have denied conversion and/or transfer for the category of exchange rate that applied to the investment when the guarantee was issued.³² However, in the absence of such a category of exchange rate on the date of denial, the contracts of guarantee may provide an alternative basis for calculating a claim.³³

A passive restriction is a failure of the host country's exchange authority to act on conversion and /or transfer within 90 days from the date on which the guarantee holder applies or such other period as the contract of guarantee provides. In order for the guarantee holder to be entitled to claim coverage, the following contractual obligations must be performed. The guarantee holder must apply for conversion and/or transfer. The guarantee holder or the project enterprise must carry out

³⁰ Supra note 27, para. 1.23

³¹ Supra note 2, Art. 3(e): "A "freely useable currency" means (i) any currency designated as such by the International Monetary Fund from time to time and (ii) any other freely available and effectively useable currency which the Board of Directors referred to in Art. 30... may designate for the purpose of this Convention after consultation with the International Monetary Fund and with the approval of the country of such currency".

³² Supra note 26, at p. 370.

³³ Supra note 27, paras 1.24, 1.27 and 1.28.

instruction of the Agency, including restrictions to transfer to the Agency rights to the local currency covered by the guarantee as a condition for or on receipt of payment from it, or to deposit such currency in an account of the Agency or any person designated by the Agency.³⁴

In respect to currency transfer, MIGA follows the same path as MHS with, however, a minor difference. By the term "inconvertibility" OPIC refers to blockage of exchange of local currency for dollars through exchange controls or delays to act over specified period (60 days normally). It is not clear, though, transfer of which money could not be restricted. EID/MITI more clearly enumerates the situations that are regarded as blockages to transfer of currency. It regards that such a blockage exists when investors are unable to repatriate equity, dividend, interest and principal for more than 60 days. TREUARBEIT holds the same views like EID/MITI in this respect. But MIGA categorically mentions that transfer of currency which represents returns on, or repatriated capital of, the guaranteed investment can not be restricted. In cases of passive restrictions, the host government authority has been given 90 days from the date on which guarantee holder applies. The other three organisations have fixed 60 days after which the guarantee holder is entitled to claim losses arising out from inconvertibility of currency. MIGA, it is suggested, could revise its time limit in this regard. Because, 90-day is a long period for investors who deserves to be compensated. Such a long duration might discourage the investors to purchase its guarantee. Hence, the period could be refixed as 60 days, similar to the others to ensure speedier redress to investors.

Risk of expropriation and similar measure: Art. II(a)(ii) of the Convention empowers the Agency to offer coverage for losses from such risks as arising from measures which include, but are not limited to, expropriation, nationalisation, confiscation, sequestration, seizure, attachment or freezing of assets.³⁵ This Article lays down certain criteria for determining action under the law of the host country.³⁶

³⁴ Ibid., paras 1.24, 1.26.

³⁵ There are a considerable number of terms used in investment treaties to express the concept of expropriation. They include cancellation of rights, compulsory acquisition, condemnation, deprivation, dispossession, forfeiture, intervention, limitation of rights, bringing under public control, requisitioning, restrictive measures, taking, transfer to public ownership, wealth deprivation. See Amerasinghe C, "Issues of Compensation for

Measures attributable to the host government must have any of the following effects: first, depriving the guarantee holder of his ownership or control of, or a substantial benefit from his investment; second, preventing the guarantee holder from exercising his rights of ownership or control over his investment, or from using funds or enforcing claims against debtors in the host country.³⁷

Art. 11(a)(ii) of the Convention provides for a clear exemption to the above mentioned covered measures in order to enable the host country to exercise its regulatory powers. Measures taken by the host government which are non-discriminatory, of general application, in the public interest and for the purpose of regulating economic activity in its territory shall not be eligible for coverage. They may include the *bona fide* imposition of general tax, tariffs and price controls and other economic regulations as well as environmental and labour legislation for the maintenance of public safety.³⁸

MIIS's position on these, however, are different. OPIC enlists more acts to encompass expropriations. In explaining expropriations, it states acts that are: i) attributable to a foreign government authority; ii) in violation of international law; iii) deprive investor of fundamental rights; iv) have expropriatory effect continuing for one year. It also includes default to institutional lenders as a result of expropriatory actions. EID/MITI defines expropriations a little bit narrowly. It includes acts that deprive an investor of equity, loan principal, dividend, interest, assets by foreign government as well as proprietary interference. TREUARBEIT denotes expropriations as acts that deprive the foreign investor of his equity or assets. MIGA position is almost identical to EID/MITI and TREUARBEIT on this issue. MIGA enumerates the acts that deprive an investor of ownership or control of his investments except for non-discriminatory measures of general

Taking of Alien Property in the Light of recent Cases and Practices", 41 (1992) International and Comparative Law Quarterly, 22; Norton P, "A Law of the Future or a Law of the Past?- Modern Tribunals and the International Law of Expropriation", 85 (1991) American Journal of International Law, 474; Dolzer R, "New Foundation of the Law of Expropriation of Alien Property", 75 (1981) American Journal of International Law, 553.

³⁶ Supra note 32.

³⁷ Supra note 27, para 1.30.

³⁸ Supra note 26, at p. 371.

application as part of economic regulation. In this respect, MIGA could include violation of international law like OPIC to ensure and encourage a greater observance of this law. Because, proper observance of international law will result in politico-socio-economic development of international community which is the real goal of MIGA.

Breach of contract by the host government: Under Art. 11(a)(iii), the Agency may provide coverage for any repudiation or breach by the host government of a contract with the holder of a guarantee, when the holder of a guarantee does not have recourse to a judicial or arbitral forum to determine the claim of representation or breach; or a decision by such forum is not rendered within such reasonable period of time as shall be prescribed in the contract of guarantee pursuant to the Agency's regulation, or such a decision can not be enforced.

For the purpose of this Article, a judicial or arbitral forum shall be any competent court or arbitral tribunal which is independent from the executive branch of the host government, acts judicially and is authorised to make a final and binding decision. The guarantee holder is deemed to have lack of recourse to such a forum where access to it is denied because, for example, the host government has established unreasonable impediments.³⁹

A final decision shall be deemed unenforceable where the measures to be taken by the guarantee holder as specified in the contract of guarantee have not resulted in enforcement after 90 days from the date of the initiation of such measures or such other period as may be provided in the contract. If such measures appear to be futile in the judgement of the Agency, the Agency need not insist that they must be taken by the guarantee holder.⁴⁰

In providing guarantee for breach of contract by host country, MIGA is more liberal than OPIC. Under the OPIC operations, coverage for breach of contract may be offered in connection with broader expropriations. For more projects, this is possible only on a case-by-case basis, but it is commonly included in coverage for petroleum exploration/production project and under a special exporters and contractors program. MIGA, on the other hand, provides guarantee for any breach by the host government of a contract with the holder of a guarantee when the holder does not have recourse to other forum, or a

³⁹ Ibid.

⁴⁰ Supra note 27, paras 1.42- 1.44.

decision of such forum is not available within a reasonable period of time or such a decision can not be enforced. A 90-day time limit has been fixed for deeming a decision unenforceable. It is suggested that a specific time limit should also be imposed for rendering a decision by the host government authority on any such breach. The term "reasonable time" may make an investor suffer for longer periods in some instances. This time limit may be a period of 90 days as well.

War and civil disturbance: MIGA may further provide insurance coverage under Art. 11(a)(iv) to investments against internal or international armed conflicts. Civil disturbance, however, must be caused by actions from political and ideological groupings. Actions by the employees or terrorists and kidnapping are not covered by MIGA.⁴¹ Civil disturbance must be organised violence directed against the host government which has the objective of the overthrow of such government or its ousting from specific region, and must have been caused or carried out by groups which are primarily pursuing broad political or ideological objectives.⁴² As to the place of covered events although Art. 11(a)(ii) of the Convention stipulates that it is "in any territory of the host country", Operational Regulations do not confine the term to the covered events occurring inside such territory, but also outside it. Paragraph 1.50 of the Operational Regulations reads as follows:

A military action or civil disturbance occurring primarily outside the host country shall be deemed to take place in the host country, and qualify for coverage, if it destroys, injures or damages tangible assets of the Investment Projects which are located in the host country or interfere in its operation....

In addition to these broadly defined types of risks, coverage may be extended to other non-commercial risks such as acts of terrorists directed at the investors, kidnapping or politically motivated strikes.⁴³ But it is subject to special provision, as provided by the Convention in the following words:

⁴¹ Houtte, H., *The Law of International Trade*, London, 1995, at p. 253 and supra note 27, paras 1.47-1.49.

⁴² Supra note 26, at p. 372.

⁴³ Voss, J., "The Multilateral Investment Guarantee Agency: Status, Mandate, Concept, Features and Implications", 21 (1987) *Journal of World Trade Law*, 5, at p. 10.

Upon the joint application of the investors and the host country, the Board, by special majority, may approve the extension of coverage... to specific non-commercial risks other than those referred to ...but in no case to the risk of devaluation or depreciation of currency.⁴⁴

However, Art. 11(c) provides certain types of losses that are excluded from coverage. Losses arising from any action or omission of the host country to which the guarantee holder agreed or for which he had been responsible. The guarantee holder shall be deemed to have been responsible for any such action or omission reasonably attributable to conduct which must be prohibited under the law of the host country and carried out by the guarantee holder, persons on his behalf, or the project enterprise to the extent that the guarantee holder could have exercised his rights to prevent such conduct by the project enterprise. Finally, losses arising from any host government action or omission or other event occurring before the conclusion of the contract of guarantee.

With respect to war and civil disturbance, MIGA provides a different explanation. To denote war and civil disturbance, OPIC includes terrorism and sabotage. TREUARBEIT considers it in term of loss. Under its operations, identified loss occurs when all or substantial parts of assets are destroyed by acts of war. However, MIGA stipulates war and civil disturbance for its coverage as any international military actions and civil disturbance if the disturbance aims at overthrowing the government. But, unlike the OPIC, it does not generally include terrorist activities. MIGA, however, insures risks generated from the acts of terrorist directed at the investors upon the joint application of investors and the host government. This provision,⁴⁵ it is submitted, needs to be revisited. Because, in most developing countries, terrorism is a restraining factor for the investors or would be investors. Such a problem can not be eliminated overnight, as these are often inter-linked with historical factors, socio-economic conditions and political culture of the respective host country. More importantly, governments are often unwilling to recognise occurrence of collective terrorist activities within their countries. The Agency could extend coverage for any terrorist activity that resulted in damages to investors on the basis of sole application by the investors. It will automatically put pressure on

⁴⁴ Supra note 2, Art. 11(iv)(b).

⁴⁵ Supra note 2, Art. 11(iv)(b).

the host government. Such a provision might apparently discourage the developing countries to join the MIGA, but it ultimately should encourage them to improve law and order situation which is most crucial not only for foreign investors but their citizens as well.

FINANCING OF MIGA AND ITS GUARANTEE LIMITATIONS

MIGA was designed to be financially self-sustaining. The Agency's expenses were to be funded out of its income from its investments and premiums. But slow growth in the country membership hindered capital growth and hence investment income.⁴⁶ In order to establish MIGA as a credible insurer, its guarantee will be backed by share capital or, under special agreement, by the sponsorship of investors.⁴⁷

The Convention provides for an authorised capital of one billion Special Drawing Rights (SDR), divided into 100,000 shares of par value of SDR 10,000 each. Members' payment obligations with respect to capital stock will, however, be settled on the basis of the average value of the SDR in terms of US dollars for the period of January 1, 1981 to June 30, 1985, i.e., \$1.082, the former date being the date of the introduction of the current basket of currencies of SDR.⁴⁸ However, the Council, by special majority, may at any time increase the capital stock of the Agency.⁴⁹

Payment procedure describes that only ten per cent of the subscription will be paid in cash. Additional ten per cent will be paid in the form of non-negotiable, non-interest bearing promissory note to be encashed only if needed by MIGA to meet its financial obligations. The remainder of the subscribed capital will be subject to call.⁵⁰

The amount of guarantee, which MIGA may issue on the basis of its share capital, is initially subject to two limits. The total amount of contingent liability which MIGA may assume under all outstanding guarantees may not exceed 1.5 times of the subscribed capital. This

⁴⁶ MIGA- The First Five Years and Future Challenges, New York, 1994, at p 9.

⁴⁷ *Supra* note 43, at p. 18.

⁴⁸ *Supra* note 2, Art. 5(a).

⁴⁹ *Ibid.*, Art. 5(c).

⁵⁰ *Supra* note 2, Art. 7.

conservative risk-to-asset ration may later be increased upto a maximum of 5 to 1; this ceiling being embodied in the Convention.⁵¹ In addition, according to the policies agreed upon by the preparatory committee, MIGA's exposure in any individual project will be limited to 5 per cent of its total underwriting capacity. Depending on the amount of initial subscriptions, MIGA might therefore, at the out set, have to limit its guarantees for individual project to some 50 to 75 million dollars.⁵² It's country limit is \$200 million dollars. All these limitations have been caused by the shortage of currently available capital of MIGA. In fact, these are regarded as impediment towards MIGA's functioning as in some countries such as Brazil, Peru, Argentina and Russia, MIGA is already close to its modest \$200 million country limit.⁵³

As regards premiums, investors will be offered a choice between coverage against individual types of risk (currency transfer, expropriation etc).⁵⁴ Premiums will be differentiated in accordance with actual risk taking within a range of 0.3 to 1.5 per cent of the guaranteed amount per annum for each type of risk covered. Within this range, risk will be rated on a case-by-case basis with a focus on the specifics of the individual investment projects rather than on the economic and the political stability of the host country. Investors purchasing coverage against several types of risks will qualify for a package discount of upto 50 per cent of the sum rates for the types of coverage comprising the package.⁵⁵

In comparison to MIIS, MIGA offers a lower premium rate as costs of insurance. OPIC provides a base rates (which adjusted for project risk on a case-by-case basis) established for five major industry category. The rate is 1.5 per annum of the insured amount. And there is no country rate. In contrast, EID/MITI prescribes a combined premium rate which is charged for all risks (0.55%-1.75%). But it depends upon host country. TREUARBEIT charges 0.5% for all risks irrespective of host country. MIGA premium rates for each coverage can range from

⁵¹ Ibid., Art. 22(a).

⁵² Supra note 43, at p.19.

⁵³ 6 (7) *Infrastructure Finance*, 1997, at p. 6 (Internet).

⁵⁴ Most national investment guarantee agencies, including all European ones, offer just package coverage, normally at a flat rate. Supra note 43, at p. 18.

⁵⁵ Ibid.

0.3 to 1.5 per cent per annum. Unlike the EID/MITT, MIGA does not discriminate amongst the member countries, rather its premiums are rated on case-by-case basis. Since MIGA has been facing a funding shortage which hinders its greater service limiting its capacity in respect of project, country as well as total strength, it could reshuffle its premium rates. With a view of making the Agency financially viable, it could refix these rates at 0.5-1.6 per cent. These enhanced rates would still be less than MIIS. However, determination of premium on a case-by-case basis is a better method.

In terms of limitations, MIGA is weaker than the others, though the MIIS are serving as national organisations. OPIC has no limit on covered investment but maximum exposure per project is US\$ 100 million and, generally, it's per country exposure is upto 10% of its global portfolio. EID/MITI has no limit of cover too on original investment or for projects, but there are a few country limits. TREUARBEIT has gone one step further. It has no country limit. But MIGA, being the sole international agency, has project limit to some 50 to 75 million dollars and country limit of 200 million dollars. Financial constraints have led MIGA to impose such limitations.

To overcome its limited capacity, as an alternative, MIGA is authorised to underwrite on behalf of member countries additional investment that they wish to "sponsor". In these cases, MIGA will act as administrator for a separate sponsorship account⁵⁶. Revenues from sponsorship operations will be accumulated in a "Sponsorship Trust Fund" which will be kept separate from MIGA's own assets. Claims and other expenses resulting from sponsorship operations will be paid out of this fund. Upon its depletion, remaining liabilities will be shared by sponsoring countries, each in the proportion which the guarantees sponsored by it bears to the total amount of outstanding sponsored guarantees. Under this "Sponsorship Window", MIGA's underwriting capacity is substantial, as countries' sponsorship commitments increase automatically with the increase of every new guarantee. In addition, MIGA is authorised to cover investments in developed countries under the sponsorship window while only investment in developing member countries will qualify for MIGA's coverage on its own account.⁵⁷

⁵⁶ Supra note 2, Art. 24.

⁵⁷ This distinction is justified on the ground that guarantee operation in developed countries under the sponsorship window would not absorb

This initiative is certainly commendable. But such sponsorships are not widely available. Because, the country for which Trust Fund is to be constituted, has to make a contribution to the respective fund. Until 1997 the Agency has created two Trust Funds namely, "Investment Guarantee Trust Fund for Bosnia and Herzegovina" and "Investment Guarantee Trust Fund for West Bank".⁵⁸ Hence, it can, at least as yet, be considered as an effective alternative for outweighing its financial limitations.

MIGA's guarantee limitations are directly connected with its subscribed capital. This capital, however, increases with the joining of new members as MIGA's share capital has been allocated to 181 prospective countries. Until recently, a total of 165 countries have signed its Convention and 149 countries have secured full membership. The rest of the countries could be persuaded to join the Agency. It is true that the Agency works for the benefit of international community having due regards to equality and sovereignty of States. In this pursuit, there are a few aspects⁵⁹ which need elaboration. First, the contractual obligation which may be undertaken by contracting parties will be based on the principle of *pacta sunt servanda*, and host countries will be required to observe the international minimum standard towards investors. Second, although the Convention provides for giving protection against various risks, it has, for obvious reasons, left out the risks occasioned by "non-discriminatory measures of general application which the government normally take for the purpose of regulating economic activity in their territories."⁶⁰ Third, the Convention has very appropriately emphasised that the nature and propriety of an investment must be primarily determined by the host country concerned. Fourth, the Convention indicates that investment disputes should preferably be resolved by means of negotiation, conciliation and/or arbitration procedure rather than court procedure. *Fifth*, in

scarce underwriting capacity at the expense of developing member countries. On the contrary, such operation would improve the financial viability of sponsorship operations. *Supra* note 43, at p. 19.

⁵⁸ *Supra* note 4, at p. 17.

⁵⁹ *Supra* note 18, at pp. 89-98.

⁶⁰ *Supra* note 2, Art. 11(a)(ii).

relation to decision making, the Convention has provided for placing developed and developing countries on an equal basis.⁶¹

A financial institution like MIGA can not run well through a financial insufficiency. A renewed move is necessary to boost up its current financial position to make it capable for rendering expected service more effectively.

BANGLADESH AND MIGA'S GUARANTEE SERVICES

Bangladesh is one of the 29 founding members of this world agency. It signed and ratified MIGA's convention on 13 March 1987 and became a full member on 12 April 1988 on the very day on which the agency came into being.⁶² In line with the other 62 developing countries, Bangladesh has been effectively enjoying the guarantee services of MIGA. It has so far insured three projects operating in Bangladesh. The latest of these three projects aims at rescuing the power sector which is seemingly on the verge of disaster. It is one of the 15 guarantee contracts issued by MIGA during the first half of Fiscal Year 1999.⁶³ Optimistically, to alleviate the severe power shortages constraining the productivity of the private sector in the region, MIGA insured Coastal Power Khulna Ltd of the Cayman Islands, for its \$32.6 million investment in the first independent power producer in Bangladesh. The barge-mounted 110-megawatt thermal power plant will increase the critically-needed energy capacity in the city of Khulna. The project is being financed by IFC equity and loans. MIGA coverage of \$29.3 million will insure Coastal's investment against the risks of expropriation, transfer restriction, and war and civil disturbance.⁶⁴

The other projects insured by this agency are KAFCO project and Societe Generale, S A (Bangladesh).

Karnaphuli Fertiliser Company Limited (KAFCO) Project

In the fiscal year 1991 and 1992, MIGA issued four guarantee contracts covering portions of investments by Marubeni and Chiyoda

⁶¹ See also, Shihata I F, "Towards a Greater Depoliticisation of Investment Disputes: the Role of ICSID and MIGA", 1 (1986) ICSID Review for International Law Journal, 117.

⁶² MIGA Capital Subscription Data Category: 2 Members.

⁶³ *Supra* note 6.

⁶⁴ *Ibid.*

Corporation in KAFCO. The \$516 million project involved the construction and operation of a major ammonia and granular urea processing plant near Chittagong city. MIGA, together with some other insurers, helped facilitate the creation of the largest single private investment ever made in Bangladesh.⁶⁵ The positive development effects of the project include:⁶⁶

- i. An aggressive training program that demonstrates a strong commitment to human capital development and has more than 1,000 participants.
- ii. Creation of more than 600 permanent jobs for local nationals and another 300 jobs through contractors (the project employs only five expatriates).
- iii. Utilisation of modern fertiliser technology that allowed Bangladeshi ammonia to be introduced as an export product.
- iv. Provision of a complete social infrastructure for project employees, including housing, transportation, medical services, a school, a mosque, and recreation facilities.
- v. Stimulation of many local businesses.
- vi. Generation of significant export earnings.

Societe Generale, S A (Bangladesh)

In another initiative, MIGA issued a \$9 million guarantee to Societe Generale, SA of France for its investment in the establishment and operation of a branch bank in Dhaka. MIGA's guarantee covers the investment against the risks of expropriation, transfer restriction and war and civil disturbance.⁶⁷

Societe Generale (Bangladesh) will concentrate on commercial, merchant, and investment banking activities, and its clients will include private individuals, export companies, and multinational corporations. Additionally, technology for a new financial management system, designed by Societe Generale for its overseas operations, will improve banking operations.

Argentina, becoming a member on 11 February 1992, has been placed at the top of the list of the recipients of the guarantee services. It

⁶⁵ MIGA Annual Report 1997, at p. 19.

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*, at p. 28.

received the highest amount of such insurance coverage that facilitates \$2,805 million FDI⁶⁸ whereas MIGA, not alone but together with other insurers, has facilitated only \$557.6 million FDI in Bangladesh though the country has obtained membership in early 1988. Pakistan, it may be mentioned, has secured a place among the top five countries in this respect.⁶⁹

Bangladesh is a country with great economic investment potential. The rich natural endowments, vast human resources and its geographical location make Bangladesh a good choice for investment. In recognition of the private sector's ability to contribute towards achievement of higher growth path through rapid employment creation, the goals of socio-economic improvement to its people and self-reliance for the nation, the Government has implemented a number of policy reforms to increase FDI. Viewed from this perspective, Bangladesh could have been benefited from guarantee service in a greater extent.

CONCLUSION

MIGA celebrated its 10th anniversary in April 1998. Its president commented on that occasion that, "10 years is not a long time, but the dedication and drive of its staff had brought MIGA a long way at high speed."⁷⁰ There is no gainsaying the fact that MIGA has succeeded in its mission, if not spectacularly then at least reasonably. But this should not be regarded as sufficient accolade for a world body. Because it has been established with the goal of increasing FDI in developing countries in a world-situation where the national agencies are devoted to protect their own citizens and entities alone. To achieve this goal, MIGA has been providing guarantee for non-commercial risks for investors who invest their capital in its member developing countries. Various drawbacks regarding its guarantee operations have been identified in this essay as well as corresponding suggestions for their elimination. To recapitulate:

First of all, the Agency should be made economically viable to enable it to fully realise its goals and objectives. Available financial resources has largely limited the Agency's success so far. To enrich its

⁶⁸ Supra note 6.

⁶⁹ Ibid.

⁷⁰ 7 (1998) MIGA News.

financial strength, an increase in application fee and premium rates has been suggested. On the other hand, 32 prospective countries did not join the Agency yet which is an important factor for its financial constraints. Those countries need to be persuaded to join it as early as possible.

Improvement of human rights in developing countries is a national as well as international concern. If it were regarded as a prerequisite for guarantee of investment, many countries would be unable to avail MIGA's service. Hence, suggestion has been made that the Agency could put forward an appeal to such countries that they improve their human rights conditions during the tenure of the guarantees of the designated investments. Moreover, FDI itself contributes to the economic development and this development helps improve the existing human rights situation. Further, a firm commitment by the host country to this effect will certainly add a momentum to that progress.

Under the provision of the Convention, losses arising out of the terrorist activities can only be placed under the MIGA coverage if the investors and host country apply jointly. However, such an application by the host country would imply a failure against terrorism by the country concerned. Hence, a proposal has been advanced to consider this loss for compensation upon the sole application of the investor.

The Convention has rightly provided for host country's approval before coverage is extended. But a matter that will have to be clarified is whether a failure to object by the host country can successfully be imposed upon a sovereign state as conclusive of specific approval. It needs to be mentioned that MIIS does not rely upon such deeming provisions.

With regard to the payment of claims, investors are required to promptly seek remedy available under the laws of host country, failure of which may deprive a guarantee holder of payment under guarantee contract. Suggestion has been furnished to replace the vague term "promptly" by a specific time frame.

In the case of inconvertibility of currency, host government has been given a period of 90 days after which MIGA will provide compensation. This has been considered a long period for investors, as MIIS waits for only 60 days before processing compensation. The MIGA time-limit could be reduced to 60 days which should be an encouraging revision for the investors.

MIGA has been established to meet real needs. To make this world body more effective, its instruments and operations need to be revised. Though it has concluded a number of contracts, but three fold of that number are still pending. Had MIGA signed more contracts, more countries could have been benefited. With this end in view, its drawbacks, as mentioned in the foregoing discussion, deserve immediate attention.