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The Multilateral Investment Guarantee Agency

I. Background to the Initiative

On October 11, 1985, the Board of Governors of the International Bank for Reconstruction and Development (the Bank), at its Annual Meeting in Seoul, opened for signature a convention establishing a new international development institution, the Multilateral Investment Guarantee Agency (MIGA or Agency).¹ MIGA is designed to encourage the flow of investment to and among developing countries by issuing guarantees against non-commercial risk and carrying out a wide range of promotional activities.

Early initiatives to create an international investment guarantee facility emerged in the 1950s, and the concept was discussed in the early 1960s in various international fora, such as the Bank, the Organization for Economic Cooperation and Development, the Inter-American Development Bank, the United Nations Conference on Trade and Development and the European Community. While none of these earlier initiatives materialized, a regional agency, the Inter-Arab Investment Guarantee Corporation, was established in 1974 and has been operating successfully since then.²

*Vice President and General Counsel of the World Bank.

1. The Convention Establishing the Multilateral Investment Guarantee Agency [hereinafter referred to as the Convention or MIGA Convention], together with the official Commentary is reprinted in 24 INT'L LEGAL MATERIALS 1598 (1985), and is also reprinted in the first issue of ICSID REV. - FOR. INV. L. J. (1986).

2. See T. MERON, INVESTMENT INSURANCE IN INTERNATIONAL LAW 30-37 (1976), on the previous efforts of the World Bank towards the establishment of an International Investment Insurance Agency; Shihata, *Arab Investment Guarantee Corporation—A Regional Investment Insurance Project*, 6 J. WORLD TRADE L. 185 (1972) on the Inter-Arab Investment Guarantee Corporation; and Voss, *The Protection and Promotion of European Private Investment in*

The initiative to create a globally operating investment guarantee agency under the Bank's auspices was resumed by the President of the Bank, Mr. A. W. Clausen, in his first annual address before the Bank's Board of Governors in September 1981. After extensive studies and discussions within the Bank on the desirability of a multilateral investment guarantee scheme, a concrete proposal was devised and circulated to the Bank's member governments in May 1984.

On the basis of this proposal and in the light of the comments received, the Bank's staff prepared a first draft Convention and submitted it to the Bank's Executive Directors in October 1984. The staff subsequently held consultations with member governments of the Bank, both individually and in groups, as well as with business and professional associations and international organizations. As a result of these consultations, the interest in and support for the proposed MIGA broadened considerably. The draft Convention was revised in the light of the consultations and a second draft was circulated to member governments on March 8, 1985.

At its April 1985 meeting in Washington, D.C., the Joint Ministerial Committee of the Boards of Governors of the Bank and the International Monetary Fund on the Transfer of Real Resources to Developing Countries (the Development Committee) endorsed the Bank's efforts "to reach an understanding among governments for the creation of MIGA on a voluntary basis." From June to September 1985, the Bank's Executive Directors met as a "Committee of the Whole" under the chairmanship of the Bank's Vice-President and General Counsel in order to discuss the March 8, 1985 draft Convention. Assisted by experts from member governments and by a drafting team from the Bank's Legal Department, the Committee of the Whole succeeded in formulating a revised draft Convention on September 15, 1985 after twenty sessions of vivid and at times heated discussions.

After its formal approval by the Bank's Executive Directors, this draft Convention was submitted to the Bank's Board of Governors for consideration at its Annual Meeting in Seoul. There the Governors adopted a resolution approving the Convention for transmittal to member Governments of the Bank and the Government of Switzerland, and inviting these Governments to sign the Convention. As of June 25, 1986, thirty countries, including five Category One and twenty-five Category Two countries,³ had signed the Convention.

The Convention will enter into force upon its ratification by at least five Category One countries and fifteen Category Two countries, provided that these countries subscribe to at least one third of MIGA's capital (approx-

Developing Countries—An Approach towards a Concept for a European Policy on Foreign Investment, 18 COMMON MKT. L. REV. 363 (1981) on the discussions in the European Community.

3. Under the Convention, countries are classified for voting purposes as belonging to either

imately \$360 million). The subscriptions of the countries which have so far signed the Convention account for over forty percent of MIGA's capital. However, in view of the relatively lengthy ratification procedures of many countries, it may be some time before the Convention enters into force. To enable the Agency to commence operations immediately after the Convention's entry into force, the Governors have authorized the President of the Bank to convene a committee of the signatory States to prepare for consideration by MIGA's governing bodies the initial draft bylaws, rules and regulations needed to initiate the Agency's operations. This committee is scheduled to meet in September 1986.

The Bank's sponsorship of MIGA's establishment falls within the Bank's objectives of facilitating the investment of capital for productive purposes and promoting private foreign investment.⁴ Consistent with these objectives, the Bank sponsored the establishment of the International Finance Corporation⁵ and the International Centre for Settlement of Investment Disputes (ICSID)⁶ and recently further developed its co-financing techniques to stimulate increased commercial lending to developing countries.

Mechanisms for encouraging a greater level of direct investment to developing countries may be needed now more than ever before. In the 1970s, development was largely financed by commercial lending. Total outstanding debt of developing countries grew sharply, and is estimated to reach \$970 billion by the end of 1985. This has led to the recent world debt crisis and prompted banks to reduce lending to developing countries drastically. New efforts are being made to attract substantial amounts of new commercial loans to debt-stricken developing countries but the chances of substantial net transfers do not appear to be very promising in the near future. As official development assistance is also stagnating, foreign direct investment represents a source of external finance which holds a great promise for substantial increases, given a clear improvement in the investment climate. Unlike foreign loans, such investment does not generate demands on the host country's balance of payments except when it generates revenues.

Category One or Category Two. Countries listed under Category Two are also defined as "developing countries" for the purpose of the Convention.

4. See Articles of Agreement of the International Bank for Reconstruction and Development, *opened for signature* Dec. 27, 1945, 60 Stat. 1440, T.I.A.S. No. 1502, 2 U.N.T.S. 134, at Art. 1, paras. (i) and (ii).

5. See Articles of Agreement of the International Finance Corporation, *done* on May 25, 1955, 7 U.S.T. 2197, T.I.A.S. No. 3620, 264 U.N.T.S. 117.

6. The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, *done* Mar. 18, 1965, 17 U.S.T. 1270, T.I.A.S. 6090, 575 U.N.T.S. 159 and the Text of the World Bank Executive Directors' REPORT are reproduced in 4 INT'L LEGAL MATERIALS 524 (1965). Recent studies of ICSID include, Broches, *The Experience of the International Centre for Settlement of Investment Disputes* in INTERNATIONAL INVESTMENT DISPUTES: AVOIDANCE AND SETTLEMENT 75 (S. Rubin and R. Nelson eds. 1985), and Soley, *ICSID Implementation: An Effective Alternative to International Conflict*, 19 INT'L LAW. 521 (1985).

However, direct investment flows to developing countries have not been increasing in recent years. In fact, they decreased markedly from \$17.2 billion in 1981 to \$11.8 billion in 1982 and to \$7.8 billion in 1983. There are strong indications that viable investment opportunities exist in developing countries but that investors tend to avoid these opportunities because of concerns about risks which are basically of a non-commercial or political nature. MIGA is designed to overcome this obstacle to increased investment flows by providing insurance protection and contributing to the overall improvement and stabilization of investment conditions in host countries.

Although the idea of a multilateral investment guarantee facility is not new, MIGA differs from earlier proposals in five main areas:

- (1) While previous concepts focused exclusively on guarantee operations, MIGA will provide a broader forum for international policy cooperation among capital-importing countries, capital-exporting countries and foreign investors. Insurance is only one means of achieving MIGA's broader objective of encouraging investment flows for productive purposes.
- (2) Earlier proposals centered on investment flows from developed countries, but MIGA is directed also, and in fact specifically, to take part in the promotion of investment flows among developing countries.
- (3) Unlike previous schemes, which envisaged an agency closely linked with the Bank, MIGA is designed to be an autonomous institution which will operate on its own account and within its own responsibility while maintaining a symbolic, but significant, link with the Bank. In accordance with the MIGA Convention, the Bank's President will be *ex officio* Chairman of MIGA's Board of Directors and will nominate the Agency's chief executive officer.
- (4) Political oversight of and financial responsibility for MIGA will be shared by both home and host countries, while earlier proposals envisaged an agency controlled and financed solely by the investors' home countries.
- (5) Finally, more than previous conceptions, the Convention contains a number of safeguards which ensure the host governments' control over investment activities in their territories while requiring MIGA to work on the improvement of investment conditions and standards in agreement with these governments.

II. Operational Features

The objective of MIGA is to encourage the flow of investments for productive purposes among its member countries, and in particular to developing member countries. MIGA is intended to enhance mutual understanding and confidence between host governments and foreign investors,

heighten awareness of investment opportunities and increase information, knowledge and expertise related to the investment process. To fulfill its purposes, MIGA will guarantee eligible investments against losses resulting from non-commercial risk and carry out research and promotional activities.

The MIGA Convention specifically provides for coverage of four broad categories of non-commercial risk but authorizes the Agency to cover any other non-commercial risk upon the joint application of the investor and the host country and by a special majority decision of the Agency's Board of Directors. The four risks specified in the Convention are: (1) the transfer risk resulting from host government restrictions on currency conversion and transfer; (2) the risk of loss resulting from legislative actions or administrative actions or omissions of the host government which have the effect of depriving the foreign investor of his ownership or control of, or substantial benefits from, his investment; (3) the repudiation or breach of government contracts in the cases where the investor has no access to a competent judicial or arbitral forum, or faces unreasonable delays in such a forum or is unable to enforce a judicial or arbitral decision issued in his favor; and (4) the risk of armed conflict and civil disturbance. At present, the "transfer risk" is probably the most relevant from the viewpoint of investors as cases of outright expropriation have become infrequent. The value of the expropriation coverage will depend largely on MIGA's ability to cope with the problem of "creeping expropriation" and expropriation in the guise of apparently legal measures adopted by the host government.⁷ Article 11(a)(ii) of the Convention excludes from coverage "non-discriminatory measures of general application which governments normally take for the purpose of regulating economic activity in their territories." This exclusion is not meant to confine coverage under that provision to outright expropriation. The exclusion applies only to host governmental measures that meet all its requirements, i.e., to measures that (a) do not discriminate against the investor, (b) are *normally* taken by governments, and (c) are taken for the purpose of regulating economic activities in the host country's territory. The Commentary on the Convention, which was also approved by the Bank's Executive Directors, lists as examples of such measures "taxation, environmental and labor legislation as well as normal measures for the maintenance of public safety." MIGA's regulations and the contracts of guarantee to be entered into between MIGA and the investors should define the risks to be covered precisely in order to avoid any misunderstanding in this respect. As the Convention states the above-mentioned exclusion in the context of the

7. See Voss, *The Protection and Promotion of Foreign Direct Investment in Developing Countries: Interest, Interdependencies, Intricacies*, 31 INT'L & COMP. L.Q. 686, 702 (1982).

risks eligible for cover, such an exclusion should be made clear at the time of coverage and could not appropriately be cited as an excuse for nonpayment by the Agency in respect of a loss resulting from a covered risk which is clearly described in a contract of guarantee signed by the Agency.

To be eligible, investments will have to be new and of a medium- or long-term nature. They must be judged by the Agency as sound investments which contribute to the development of the host country, comply with its laws and are consistent with its declared development objectives and priorities. At the outset, MIGA will focus on equity interests and other forms of direct investment,⁸ but it may be authorized by its Board, acting by a special majority vote,⁹ to expand coverage to "any other medium- or long-term form of investment." This could include various forms of industrial cooperation such as management and service contracts, licensing and franchising agreements and turnkey contracts, as well as arrangements concerning the transfer of technology and know-how where the investor assumes a stake in the performance of the venture.¹⁰ This will enable MIGA to service several new types of non-equity investment that are commonly made in developing countries. All eligible investment must, however, represent a provision of assets for productive developmental purposes and thus may not include other forms of expenditures such as those related to military purposes.

Investors, to be eligible for the Agency's guarantee, must be nationals of a member country or, in the case of corporate investors, 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 nationals of the host country if they transfer the assets to be invested from abroad.¹¹ This feature of the Convention will allow MIGA to assist member countries in their efforts to reduce the problem of capital flight. It also emphasizes 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.

8. The IMF BALANCE OF PAYMENTS MANUAL para. 408, at 136 (4th ed. 1977) defines foreign direct investment as "investment that is made to acquire a lasting interest in an enterprise operating in an economy other than that of the investor, the investor's purpose being to have an effective voice in the management of the enterprise." See also OECD, DETAILED BENCHMARK DEFINITION OF FOREIGN DIRECT INVESTMENT (1983).

9. According to Article 3(d) of the Convention, a special majority requires a vote of not less than two-thirds of MIGA's total voting power representing at least fifty-five percent of its subscribed capital.

10. For a survey and discussion of the new forms of investment, see C. OMAN, NEW FORMS OF INTERNATIONAL INVESTMENT IN DEVELOPING COUNTRIES (1984).

11. MIGA Convention, *supra* note 1, Art. 13(c).

In recognition of host governments' sovereign control over both the admission of foreign investment into their territories and the treatment of such investment, MIGA "shall not conclude any contract of guarantee before the host government has approved the issuance of the guarantee by the Agency against the risks designated for cover."¹² The approval must hence extend to the issuance of the guarantee, i.e., MIGA's involvement, and the risks designated for cover, i.e., the scope of MIGA's involvement. Every host government would be free to withhold its approval. It could also limit its approval to certain types of risk, for example, the transfer risk. The Agency would then reflect these limitations in its contract of guarantee with the investor. 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. Article 38(b) of the Convention permits this procedure for approvals on a no-objection basis.

Article 12(d) of the Convention establishes a number of conditions which an investment must meet in order to qualify for a guarantee. Some of these conditions reflect MIGA's developmental objectives. Others seek to protect its financial viability.¹³ As already mentioned, the Agency must be satisfied that proposed investments comply with the host country's laws and regulations, are consistent with its declared development objectives and priorities, are economically sound, and contribute to its development. The investment conditions of the host country must also be assessed, including the availability of fair and equitable treatment and legal protection for the investment. Where, in MIGA's opinion, such conditions do not exist, it would seek to enter into an agreement with the potential host country on the treatment of investments guaranteed by it. Such agreements, according to Article 23(b)(ii) of the Convention, "will assure that the Agency . . . has treatment at least as favorable as that agreed by the member concerned for the most favored investment guarantee agency or State in an agreement related to investment."

In addition to its guarantee operations, MIGA will carry out a variety of promotional activities such as conducting research, providing information and policy advice to member governments, and such technical assistance as may be required in this field. In its promotional efforts, MIGA "shall give

12. *Id.* Art. 15. In the case of a host country national investing funds transferred from abroad, the host government must, under Article 13(c) of the Convention, apply for the guarantee jointly with the investor.

13. It should be noted, however, that the two aspects are interrelated, as investments that are welcomed by host countries and serve their interests are less vulnerable to adverse host governmental action.

particular attention . . . to the importance of increasing the flow of investments among developing member countries."¹⁴

III. Legal Regime and Settlement of Disputes

Different sources of law will govern the various legal relationships in which MIGA is expected to enter. The Convention establishes the institutional framework and powers of MIGA. Questions of interpretation or application of the Convention will be decided by MIGA's Board of Directors, and a member may appeal from the Board's decision to MIGA's Council of Governors for a final determination.¹⁵ Within the framework of the Convention, MIGA's Board of Directors or Council of Governors, as the case may be, will approve and establish the policies, rules and regulations for MIGA's operations and financial management.¹⁶ On the basis of these rules and regulations, MIGA will conclude contracts of guarantee with investors. These contracts will precisely specify the mutual rights and obligations of MIGA and the holders of a guarantee.¹⁷

Disputes arising under contracts of guarantee may be submitted to arbitration for final determination.¹⁸ The Convention does not provide specific procedures for these disputes. It is anticipated that the contracts of guarantee will contain provisions referring disputes to an internationally recognized body of rules for commercial arbitration, such as the ICSID arbitration rules, the arbitration rules developed by the United Nations Commission on International Trade Law (UNCITRAL) or the International Chamber of Commerce (ICC) arbitration rules. When MIGA pays or agrees to pay a claim, it will succeed or be subrogated to the rights that the indemnified investor acquired against the host country as a result of the event giving rise to his claim.¹⁹ Subrogation, a generally accepted principle of insurance law, would provide no more than the assignment of an existing claim from the investor to MIGA and would give MIGA no greater substantive rights than the investor had.

Disputes between MIGA and a host country arising from subrogation would normally be settled by negotiation. If negotiations fail, the parties may seek voluntary conciliation, or either party may refer the dispute directly to international arbitration according to the procedures detailed in an annex to the Convention. However, MIGA is also authorized under the

14. MIGA Convention, *supra* note 1, Art. 23(c).

15. *Id.* Art. 56.

16. *See, e.g., id.*, Arts. 16, 17, 22, 26.

17. *Cf. id.*, Art. 16.

18. *Id.* Art. 58.

19. *Id.* Art. 18.

Convention to enter into bilateral agreements with individual host countries on the resolution of such disputes using alternative mechanisms, provided that the agreement is approved in each case by special majority of the Board prior to the undertaking by the Agency of operations in the territory of the member concerned. These agreements would override the dispute settlement mechanism provided in the Convention. Although the latter directs the parties to use such mechanism as a basis for their agreement,²⁰ it is obvious that the agreement, if it is to be justified at all, would have to provide for different methods which would presumably be consistent with the constitutional requirements of the country concerned. Any other dispute between MIGA and a member, that is where MIGA does not act as a subrogee of a compensated investor, would be settled by international arbitration if not settled through negotiations.²¹

IV. Organization, Membership, and Voting

MIGA will have full juridical personality and will function autonomously. In particular, it will be both legally and financially separate from other financial institutions. It will have a Council of Governors composed of one representative of each member (and his alternate), a Board of Directors elected by the Council, and a chief executive officer, called the President, selected by the Board and responsible for the ordinary business of the Agency.

Membership in MIGA is open to all members of the World Bank and to Switzerland. A country's decision whether or not to join has no effect on its position in the Bank or any other organization. Countries not joining at the outset may accede later. This will give skeptical countries the opportunity to observe MIGA's operations for a time and then decide in the light of actual experience whether to join. It may be noted in this context that the ICSID Convention entered into force after ratification by only twenty countries and now has ninety-one signatories. It is hoped that MIGA will gradually gain broad recognition and attract a large membership. Its success as both an insurer and a forum for the development of policies regarding foreign investment will depend on widespread membership and support for its objectives.

MIGA's voting structure is based on the principle that both Category One and Category Two countries²² have a mutual interest in foreign investment and that both groups of countries should, when all eligible countries become

20. *Id.* Art. 57(b).

21. *Id.* Art. 57(a).

22. *See supra* note 3 on this classification of countries.

members, have voting parity. Article 39 of the Convention provides that each member country will receive 177 basic votes and one additional vote per share.²³ During the first three years of the MIGA's existence, each category of countries is assured a minimum of 40 percent of the total voting power, by the allocation of supplementary votes if necessary. All decisions during this initial period require a special majority vote of at least two-thirds of the total voting power representing at least 55 percent of the subscribed shares of MIGA's capital stock. This arrangement ensures that during the important initial period decisions will be taken with the support of both developing and developed countries. The supplementary votes and the special majority requirement will be cancelled at the end of the three-year period. MIGA's Council will then review the voting structure with a view to reallocating shares to assure voting parity between both groups of countries once they subscribe in the reallocated shares.

V. Financing: Self-Sufficiency and Joint Responsibility

MIGA's financial structure is designed to produce financial self-sufficiency. It is expected to meet its liabilities from premium income and other revenues such as return on its investments. The Convention therefore directs MIGA to carry out its activities in accordance with sound business and prudent financial management practices.²⁴ It might vary its premiums according to the actual risks assumed under its guarantees. However, such variations are expected to be based on the individual characteristics of a project and should not reflect a political judgment about the host country.

The principle of self-sufficiency will be supported by arrangements to ensure MIGA's financial viability even when losses exceed reserves at any given moment. These arrangements include a combination of capital subscriptions and "sponsorship."

MIGA will initially have a share capital of \$1 billion Special Drawing Rights.²⁵ It will become operational when at least one third of this amount is actually subscribed. The shares will be subscribed by member countries on the basis of their relative economic strength measured according to their allocation of shares in the capital of the World Bank. Only 10 percent of the subscriptions will be paid in cash. An additional 10 percent will be paid in the

23. The number of membership votes was computed so that if all members of the World Bank joined MIGA, developing countries as a group would have the same voting power as developed countries as a group.

24. MIGA Convention, *supra* note 1, Art. 25.

25. *Id.* Art. 5(a). The Article provides, however, that: "All payment obligations of members with respect to capital stock shall be settled on the basis of the average value of the SDR in terms of United States dollars for the period January 1, 1981 to June 30, 1985," i.e., U.S. \$1.082 per one SDR.

form of non-negotiable, non-interest-bearing promissory notes to be encashed only if needed by MIGA to meet its financial obligations. The remainder of the subscribed capital will be subject to call. While developed member countries will make payments in freely usable currencies, developing member countries will be able to make up to 25 percent of the paid-in cash portion of their subscriptions in their own currencies.

The amount of guarantees which MIGA may issue will initially not exceed one and a half times the amount of the subscribed capital plus reserves plus a portion of MIGA's reinsurance coverage. Once MIGA accumulates a balanced risk portfolio and gains experience, its Council of Governors can increase this conservative risk-asset ratio up to a maximum of five-to-one.

In addition to guarantee operations based on the Agency's capital and reserves, MIGA will be able to underwrite investments sponsored by member countries acting in fact as administrator of a separate sponsorship account. Revenues from sponsorship operations will be accumulated in a "Sponsorship Trust Fund" which will be kept apart from the Agency's own accounts. 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 only, each in the proportion which the guarantees sponsored by it bears to the total amount of guarantees sponsored by all sponsoring countries. This "sponsorship window" represents a particularly interesting feature of MIGA not only because it has no financial ceiling but also because it allows coverage of investments in all countries and not just in MIGA's developing member countries.

VI. MIGA as an Instrument of Public Policy to Improve Investment Conditions

MIGA is not envisaged as only an insurance mechanism. MIGA will also seek to stabilize and improve investment climates in its developing member countries and thus stimulate investment flows to these countries. This mandate is reflected in a number of the provisions of the Convention.²⁶ It is reinforced by MIGA's institutional structure and internal dynamics.

26. The Preamble recognizes that investment flows to developing countries "would be facilitated and further encouraged by alleviating concerns related to non-commercial risks" and expresses the desire of the Contracting States to enhance investment flows "on the basis of fair and stable standards for the treatment of foreign investment." Article 12(d)(iv) makes satisfactory investment conditions in the host country, "including the availability of fair and equitable treatment and legal protection for the investment" prerequisites for coverage; and Article 23 provides that MIGA will "seek to remove impediments . . . to the flow of investment to developing member countries," "encourage the amicable settlement of investment disputes between investors and host countries," endeavor to conclude with developing member countries agreements on the treatment of guaranteed investments, and "promote and facilitate. . . agreements . . . on the promotion and protection of investments."

In the past, the need for fair and stable investment conditions has been emphasized from the point of view of investors and their home countries. However, host countries clearly serve their national interests by providing sound investment conditions. Their ability to attract badly needed resources and to bargain for better terms and conditions is obviously strengthened by the availability of better investment climates in their territories. The establishment of an international development institution, financed and controlled jointly by developed and developing countries, manifests the common interest in creating a favorable investment climate in the latter countries.

Frequently, issues related to foreign investment have also become intermingled with the political interests of home and host countries. As a result, investment disputes often became highly politicized. MIGA seeks to remove these disputes from the political arena and ensure that they will be resolved only on the basis of legal and economic criteria.²⁷ It is explicitly prohibited from interfering in the political affairs of its members.²⁸ Moreover, MIGA's internal dynamics will result in its playing an important role as an intermediary between investors and host countries. To attract business and generate revenues, it must offer effective guarantee protection and pay claims which are justified. To minimize underwriting losses, it must avoid claims and, where they do occur, secure recovery from the host country whenever possible. Recovery procedures could jeopardize MIGA's good relations with developing member countries which could easily curtail MIGA's operations by denying their approval for further guarantees. Therefore, MIGA must ensure that the goodwill of member countries is not lost and that their common interest in the Agency's functioning prevails over the conflicting interests in a particular dispute.

The competing pressures will force MIGA to cover risks that are unlikely to invite adverse host governmental action which could give rise to claims. At the same time, MIGA will have to ensure that these investments are accorded stable and predictable treatment. Article 12(d) of the Convention reflects this balanced approach by directing MIGA to restrict its coverage to investments which are compatible with the host country's laws and development objectives and to require, on the other hand, that these investments be given adequate treatment and protection.

27. Cf. Meron, *The World Bank and Insurance*, 47 BRIT. Y.B. INT'L L. 301, 312 (1974-1975): "... the very raison d'être of the establishment of a multilateral insurance agency was to make subrogation into a non-political, technical, non-confrontation issue"; Martin, *Multilateral Investment Insurance: the OECD Proposal*, 8 HARV. INT'L L.J. 280, 318-319 (1967): "With an international agency it is more likely that the claim will be treated as the legal issue that it should be." Both comments referred to earlier proposals for the creation of an international agency for political risk insurance.

28. MIGA Convention, *supra* note 1, Art. 34.

Where disputes nevertheless arise between investors and host countries, MIGA will become involved in the process of conflict resolution in a way that will place it in a unique position to facilitate an amicable settlement. The Convention indeed directs MIGA to encourage such settlements.²⁹ In case of disputes, MIGA's assessment, based on the broad information available to it, together with its worldwide experience, is likely to moderate the conflicting claims of an investor and a host country and increase the likelihood of a settlement.

Another way in which MIGA may encourage host governments and investors to arrive at amicable settlements is to reduce the financial burden of any settlements by accepting the local currency of the host country on a temporary basis and paying the investor out of its own funds in freely usable currency. MIGA might then, under an agreement with the host country,³⁰ sell the local currency to the Bank, other international institutions, companies importing goods from the host country, or to the host government itself over a period of time and restore its financial position accordingly. MIGA might also facilitate the settlement by paying the investor in cash and accepting debt instruments from the government as reimbursement. As a variant of this approach, MIGA could persuade the investor to accept installments rather than insisting on a cash payment by backing the government's commitments with its guarantee. In view of its developmental mandate and policy interests, MIGA can be anticipated to facilitate settlements amicably at least as successfully as some of the national agencies have done.³¹ In this, as well as in all its other activities, MIGA will be serving its broad mandate of encouraging additional investment flows among its members and to developing countries in particular.

29. *Id.* Art. 23(b)(i).

30. Article 18(c) of the MIGA Convention *supra* note 1, directs MIGA to "seek to enter into agreements with host countries on . . . uses of . . . currencies to the extent that they are not freely usable."

31. The United States Overseas Private Investment Corporation (OPIC) has been especially successful in this respect. According to unpublished figures recently obtained from OPIC, that Corporation has settled claims in the total amount of \$96 million by paying compensation in cash to the investor while accepting installments from the host government; and claims totalling some \$292 million, by persuading investors to accept host government commitments backed by OPIC guarantees or by a combination of cash payment and guarantees.

