

THE CONVENTION ESTABLISHING THE MULTILATERAL INVESTMENT GUARANTEE AGENCY

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I. INTRODUCTION

WITHOUT going into the details of the origins of the Convention establishing the Multilateral Investment Guarantee Agency, it suffices to say that the present Convention, which reflects the aspirations of many investors in developed countries, is primarily the outcome of the initiative of Clausen and Shihata, the present president and vice-president respectively of the World Bank.

Although present bilateral treaty arrangements between investors and host countries, and customary international law concerning contractual obligations afford protection to private foreign investors, protection by multilateral arrangement would be much more reassuring for investors. In view of its wealth of experience and aims and objectives, only the International Bank for Reconstruction and Development (the World Bank) is appropriate to initiate such a convention.

The draft Convention, adopted by a resolution of the Governors of the World Bank on 11 October 1985, will come into force upon its ratification by five Category One countries and 15 Category Two countries, provided that these countries subscribe to at least one-third of the capital of the Multilateral Investment Guarantee Agency (MIGA).¹ The principal office of the Agency will be in Washington DC unless the Council of Governors of the Agency decides by special majority to establish it in another location.

II. A BRIEF ANATOMY OF THE CONVENTION

THE Convention contains 11 chapters and two annexes. The titles of the chapters and annexes are:

- I. Establishment, status, purposes (of MIGA) and definitions.
- II. Membership and capital.
- III. Operations.

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1. The text of the Convention has been published in (1985) 24 I.L.M. 1605. Under the Convention, countries have been classified for voting purposes as belonging to either Category One (broadly developed States) or Category Two (broadly developing States). Schedule A to the Convention provides the classification of countries. See generally A. Akinsanya, "International Protection of Direct Foreign Investment in the Third World" (1987) 36 I.C.L.Q. 58 (this issue).

- IV. Financial provisions.
- V. Organisation and management.
- VI. Voting, adjustments of subscriptions and representation.
- VII. Privileges and immunities.
- VIII. Withdrawal, suspension of membership and cessation of operations.
- IX. Settlement of disputes.
- X. Amendments.
- XI. Final provisions.

There are two annexes attached to the Convention:

- Annex I. Guarantees of sponsored investments under Article 24.
- Annex II. Settlement of disputes between a member and the Agency under Article 57.

It is not intended to discuss each of these chapters, but to highlight some of the most important features of the Convention, and examine how MIGA may improve the investment climate for private foreign investors and offer protection against traditionally unprotected risks.

III. AIMS OF THE AGENCY

ARTICLE 2 of the Convention identifies MIGA's objectives and purposes, which are to encourage the flow of investments for productive purposes among member countries and, in particular, to developing countries. In this way it supplements the activities of the World Bank, the International Finance Corporation and other international development finance institutions. To serve its objectives, MIGA shall:

- (a) issue guarantees, including co-insurance and reinsurance, against non-commercial risks in respect of investments in a member country which flow from other member countries;
- (b) carry out appropriate complementary activities to promote the flow of investments to and among developing countries; and
- (c) exercise such other incidental powers as shall be necessary or desirable in the furtherance of its objectives.

This operates as a "fundamental" article to guide MIGA in all its decisions and policy-making. In the absence of a definition of "investment" in the Convention, such meanings pertaining to it as may be reasonable may be assumed.² However, whether an investment would

2. In this connection one may refer to Art.25 of the International Convention for the Settlement of Investment Disputes between States and Nationals of Other States 1965 (the ICSID Convention), which has also not defined the term "investment", primarily with a view to accommodating the continuing connotations being devised for the term. See generally Tupman, "Case Studies in the Jurisdiction of the International Centre for Settlement of Investment Disputes" (1986) 35 I.C.L.Q. 813.

be for a "productive purpose" will perhaps be determined by MIGA in consultation with the host country concerned. Basically, the aims of the Convention are twofold: to encourage investors by alleviating concerns related to non-commercial risks; and, thereby, to enhance the flow of capital and technology to developing countries for purposes conducive to their development needs.

IV. THE STATUS OF THE AGENCY

ARTICLE 1(b) of the Convention states that:

The Agency shall possess full juridical personality and, in particular, the capacity to:

- (i) contract;
- (ii) acquire and dispose of movable and immovable property; and
- (iii) institute legal proceedings.

This provision should be read with those contained in chapter VII of the Convention entitled "Privileges and immunities", which guarantees those provided by the General Convention on Privileges and Immunities 1946. Like all other treaty or convention-based international institutions, MIGA's assets, wherever located and by whomsoever held, shall be immune from search, requisition, confiscation, expropriation and other form of seizure by executive or legislative action, and its archives inviolable. Its assets, income, property and authorised operations and transactions shall be immune from taxes and customs duties, and its officials, local or otherwise, shall also be immune from legal process with respect to acts performed in their official capacity. Its officials, other than the local nationals, shall be immune from payment of tax on their salaries etc. MIGA shall also be immune from liability for the collection or payment of any tax or duty.³ Action may only be brought against MIGA in a court of competent jurisdiction in which the Agency has an office or appointed agent authorised to accept service or notice of process.

The Convention has provided for entrenched inherent powers of the Agency, such as those in Articles 2(c) and 12. Article 2(c) states that MIGA shall "exercise such other incidental powers as shall be necessary or desirable in the furtherance of its objectives". Article 12 authorises MIGA to consider whether an investment may be offered a guarantee on bases such as "economic soundness of the investment and its contribution to the development of the host country", or "consistency of the investment with the declared development objectives and provisions of the host country". If any doubt as to the capacity of an international

3. Art.47, para.(a).

institution is raised, reference may be made to the Advisory Opinion of the International Court of Justice in the *Reparation for Injuries Suffered in the Service of the United Nations* case.⁴ Additionally, the inherent powers of institutions of this type may not be ignored. The limits of their powers may also be determined by referring to their purposes and obligations.⁵

V. MEMBERSHIP AND CAPITAL OF THE AGENCY

MEMBERSHIP of MIGA is not tied up with that of the UN but with that of the World Bank. The States listed in Schedule A will be the original members provided they become parties to the Convention on or before 30 October 1987. Schedule A classifies member States in two categories, Category One being broadly the developed nations, including most EEC members, Australia, Canada, Japan, South Africa and the USA. Category Two, described as "developing member countries for the purposes of [the] Convention", comprises 128 States and includes China, India, the Arab States and Central and South America.

The authorised capital stock of MIGA is to be one billion Special Drawing Rights (SDR), divided into 100,000 shares having a par value of SDR 10,000 each. These will be available for subscription by members.⁶ In addition to capital being increased with the admission of a new member, the Council may at any time increase the capital stock, by special majority.

The number of shares allocated to each original member appears in Schedule A. A subsequent member will be required to subscribe to such number of shares, on such terms and conditions, as may be determined by the Council but in no event at an issue price of less than par.⁷ No member shall subscribe to less than 50 shares. The Council has been authorised to prescribe rules by which members may subscribe to additional shares. Each member will be required to pay 10 per cent of the price of each share in cash, and an additional 10 per cent, usually in the form of non-negotiable, non-interest bearing promissory notes, within 90 days from the Convention coming into force.⁸ The remainder of the capital shall be subject to call by MIGA.

Subscriptions shall be paid in freely usable currencies except for developing member countries who may pay up to 25 per cent of the cash

4. [1949] I.C.J.Rep. 174.

5. See the Advisory Opinion of the Permanent Court of International Justice of 23 July 1926, Series B, No.13, p.18.

6. Payments with respect to capital stock shall be settled on the basis of the average value of the SDR in terms of US dollars for the period from 1 January 1981 to 30 June 1985 (Art.5).

7. Art.6.

8. Art.7(i).

portion in their own currencies. Calls on any portion of unpaid subscriptions shall be uniform on all shares.⁹ In the event of the amount received by the Agency being insufficient to meet its obligations, it may make further calls on unpaid subscriptions until the aggregate amount received by it becomes sufficient.

Members will have the right to withdraw from MIGA after the expiration of the third year of their membership. Failure to fulfil the obligations under the Convention may result in suspension of membership culminating in the loss of rights, except those relating to withdrawal and settlement of disputes; however, during suspension, a member shall remain subject to all its obligations. Article 53(a) provides that:

When a State ceases to be a member, it shall remain liable for all its obligations, including its contingent obligations, under the Convention which shall have been in effect before the cessation of its membership.

Incidentally, the board has been given the authority to suspend the issue of new guarantees for a specific period, or all MIGA's activities during an emergency, whenever it deems it justified, but during such time necessary arrangements shall be made to protect its interests and those of third parties.

It is noteworthy that developing member countries have been permitted to make up to 25 per cent of subscription payments in their own currencies. The tying of membership with the World Bank also indicates that progress in the economic development programmes of developing countries, which are often aided by the World Bank, would not be hindered due to lack of investment in those countries. The Agency's guarantee scheme should motivate investors to invest in developing member countries.

VI. ORGANISATION AND MANAGEMENT OF THE AGENCY

CHAPTER V of the Convention deals with organisation and management. MIGA will consist of a council of governors, a board of directors, a president and staff. The council is mainly entrusted with policy and organisation, and the board with general operational aspects. The council shall be composed of one governor and one alternate appointed by each member. The board shall consist of not less than 12 directors. The president, appointed by the board on the nomination of its chairman, is responsible for conducting ordinary business. The impartiality of the president and his staff in the discharge of their duties is regarded as of paramount importance. Article 33, paragraph (c) provides that:

In the discharge of their office, the president and the staff owe their duty entirely to the Agency and to no other authority. Each member of the

9. Art.8(b).

Agency shall respect the international character of this duty and shall refrain from all attempts to influence the president or the staff in the discharge of their duties.

The Agency, its president and staff shall not interfere in the political affairs of any member, and they "shall not be influenced in their decisions by the political character of the member or members concerned".¹⁰ Incidentally, the World Bank also follows this principle in considering loan applications from its members.

The voting arrangement under the Convention is designed to reflect "the equal interest in the Agency of the two categories of States listed in Schedule A of the Convention, as well as the importance of each member's financial participation".¹¹ Each member shall have 177 membership votes plus one subscription vote for each share of stock held by it. The Convention has also provided for supplementing votes during the first three years after its entry into force in order to meet the situation where the sum of membership and subscription votes of Schedule A members has fallen below 40 per cent of the total voting power.

During the third year following entry into force, the council shall review the allocation of shares, being guided by the following principles:

- (a) the votes of members shall reflect actual subscriptions to the Agency's capital and the membership votes;
- (b) "shares allocated to countries which shall not have signed the Convention shall be made available for reallocation to such members and in such manner as to make possible voting parity" between members of the two Categories; and
- (c) measures that will facilitate members' ability to subscribe to shares allocated to them.¹²

Unless otherwise specified in the Convention, decisions of the council and the board shall be taken by a majority of the votes cast. The voting system has been designed so as to preclude the domination of developing member countries by developed member countries. In fact, many of the Category Two countries have been allocated more shares than many of the Category One countries.

VII. ELIGIBLE INVESTMENTS AND INVESTORS

A. Eligible Investments

Article 12 of the Convention refers to various types of eligible investments:

10. Art.34.
11. Art.39(a).
12. Art.39(c).

- (i) equity interests, including medium or long-term loans made or guaranteed by holders of equity in the enterprise concerned and also such forms of direct investment as may be determined by the board of directors;
- (ii) the board of directors, by special majority, may declare any other medium or long-term forms of investment as eligible investments¹³; and
- (iii) guarantees relating to any transfer of foreign exchange for the purpose of modernising, expanding or developing an existing investment, and "the use of earnings from existing investments which could otherwise be transferred outside the host country".¹⁴

It is, however, interesting to note that, like the World Bank's practice in granting aid, in guaranteeing an investment MIGA shall satisfy itself as to the economic soundness of the investment, its contribution to the development of host country (both economic and social), the propriety of the 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".¹⁵ This last point clearly reiterates the importance of maintaining the principle of State responsibility including the international minimum standard to be shown by host countries towards aliens and their property abroad. Incidentally, investments shall be guaranteed only if they are made in a developing member country, and no contract of guarantee shall be issued by MIGA unless approved by the host government concerned.

B. *Eligible Investors*

The following shall be eligible to receive the Agency's guarantee:

- (i) any natural person who is a national of a member other than the host country; in the case of a person having more than one nationality, the nationality of the host or the nationality of a member, as the case may be, shall prevail over the nationality of a non-member or that of any other member respectively;
- (ii) any juridical person, whether or not privately owned, which operates on a commercial basis being incorporated in a country other than the host country, and whose principal place of business is in a member country or the majority of whose capital is owned by a member or members or nationals thereof. In other words, a transnational enter-

13. Loans other than those mentioned in (i) may be regarded as eligible investments only if they relate to a specific investment covered or to be covered by the Agency.

14. Art.12(c)(ii).

15. Art.12(d)(iv).

prise, whether publicly or privately owned or an enterprise of mixed ownership, would fulfil the requirements of Article 13(ii).

However, Article 13, paragraph (c) provides that:

Upon joint application of the investor 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 juridical 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.

As to "juridical persons" it is interesting that although, under the Convention, guarantee may be offered only to investments from a foreign country to a developing country, in view of the use of the word "or" in Article 13, paragraph (a), subparagraph (ii),¹⁶ it is not clear whether to become eligible for a guarantee a juridical person will be required to satisfy both of the following conditions:

- (i) it must be incorporated in the country in which it has its principal place of business; and
- (ii) the majority of its capital be owned by a member or members or nationals of an investor country.

VIII. THE TYPES OF RISKS TO BE COVERED BY A GUARANTEE UNDER THE CONVENTION

The Convention seeks to provide cover for the following types of risk:

- (a) Risks relating to currency transfer in a freely usable currency or another currency acceptable to the holder of the guarantee.
- (b) Expropriation and similar measures (including legislative or administrative action) which will have the effect of depriving the holder of a guarantee of his ownership or control or a substantial benefit from his investment, but not non-discriminatory measures of general application which governments normally take for the purpose of regulating economic activity in their territories.¹⁷
- (c) Breach of contract by the host government concerned and, when the investor will not have recourse to a judicial or arbitral body to determine the claim due to repudiation or breach, when a decision by such bodies will not be rendered within a reasonable period of time or when their decision may not be enforced.

16. Art.13(a)(ii): "Such juridical 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 that such member is not the host country in any of the above cases."

17. Art.11(a)(ii).

- (d) Loss of or damage to an investment due to war and civil disturbance occurred in the host country.

Upon the joint application of the investor and the host country, the board may, by special majority, extend the guarantee to cover specific non-commercial risks also, but in no case the risk of devaluation or depreciation of currency. Losses resulting from the following shall not be covered:

- (i) any host government action or omission to which the holder of the guarantee has agreed or for which he has been responsible; and
 (ii) any host government action or omission or any other event occurring before the conclusion of the contract or guarantee.¹⁸

The risks covered by the Convention appear quite extensive in nature. Nevertheless, it should be reiterated that the guarantee secured under the Convention does not extend to "non-discriminatory measures of general application which governments normally take for the purpose of regulating economic activity in their territories". Whether a governmental action has been taken for that purpose will always be justified by the government itself, and foreign courts cannot usually question the validity of decrees leading to such acts. An interesting provision is that the guarantee scheme will not provide any protection against those losses or damages which may be considered to have been contributed to by the holder of the guarantee itself. This is a matter which has long been advocated by developing countries, and in recent years the United Nations and the UN Agency on Transnational Corporations have consistently made efforts to make transnational corporations aware of their responsibilities as investors.¹⁹

It is also interesting to note that the Convention maintains the sanctity of the *pacta sunt servanda* principle in relation to individual agree-

18. Art.11(b)(i),(ii).

19. The Impact of Multinational Corporations on Development and on International Relations, E/5500/Rev.1-ST/ESA 6; Issues Involved in the Formulation of a Code of Conduct, E/C 10/17, 20 July 1976; Transnational Corporations: Material Relevant to the Formulation of a Code of Conduct, E/C 10/18 of 10 Dec. 1976; Transnational Corporations: Views and Proposals of Non-governmental Interests on a Code of Conduct, E/C 10/20 of 30 Dec. 1976; Transnational Corporations: Aspects of Possible Relationships Between the Work on a Code of Conduct and Related Work in UNCTAD and ILO, E/C 10/AC 2/5 of 18 July 1978; Transnational Corporations: Certain Modalities for Implementation of a Code of Conduct in Relation to its Possible Legal Nature, E/C 10/AC 2/9 of 22 Dec. 1978; UN Conference on an International Code of Conduct on the Transfer of Technology, Draft International Code of Conduct on the Transfer of Technology as of 11 Nov. 1978, TD/TOT/9 of 27 Nov. 1978; UN, First Draft of a Model Law or Laws on Restrictive Business Practices to Assist Developing Countries in Developing Appropriate Legislation, TD/B/C 2/AC6/16 of 1 June 1978 and Corr.1 of 10 July 1978; and International Labour Organisation, Tripartite Declaration on Principles Concerning Multinational Enterprises and Social Policy, ILO Doc. No. GN 204/4/2 of 18 Nov. 1977.

ments.²⁰ However, it is not absolutely certain whether under the Convention investors may receive protection against situations such as those caused by Libya and Kuwait in recent years in respect of British Petroleum, Texaco, Liamco and Aminoil respectively by legislative and administrative actions.²¹

IX. LIMITS OF GUARANTEE

USUALLY, the aggregate amount of MIGA's contingent liabilities must not exceed 150 per cent of its unimpaired subscribed capital, its reserves and such portion of its reinsurance cover as may be determined by the board. Only the council has the authority to determine, by special majority, other limits of guarantee. In the light of new circumstances the board may recommend to the council any changes in the maximum aggregate amount of contingent liabilities for the Agency. The contingent liabilities must not under any circumstances exceed five times the amount of its unimpaired subscribed capital, its reserves and such portion of its reinsurance cover as may be deemed appropriate. However, the board has wide powers to determine the limits of guarantee, including power to review the risk profile of the Agency's portfolio, and to prescribe aggregate amounts of contingent liability which may be assumed by giving due consideration to the share of the respective members in MIGA's capital, and to types of investment or risk.

X. GUARANTEES OF SPONSORED INVESTMENTS

ANNEX I deals with guarantees of sponsored investments under Article 24. Only members may sponsor an investment for guarantee. A sponsorship trust fund shall be set up to hold premiums and other revenues, including return on investment. Each sponsoring member shall share with the other sponsoring members in losses under guarantees of sponsored investments if losses cannot be covered out of that fund "in the proportion which the amount of maximum contingent liability under the guarantees of investments sponsored by it bears to the total amount of maximum contingent liability under the guarantees of investments sponsored by all members".²² In reaching any decision as to the issue of

20. Art.11(a)(iii).

21. *B.P. Exploration Company (Libya) Limited v. Government of the Libyan Arab Republic* (1979) 53 Int.L.R. 297; *Texaco Overseas Petroleum Company and California Asiatic Oil Company v. The Government of the Libyan Arab Republic* (1979) 53 Int.L.R. 389; *Libyan American Oil Company (LIAMCO) v. Government of the Libyan Arab Republic* (1981) 62 Int.L.R. 140; and *Government of the State of Kuwait v. The American Independent Oil Co. (AMINOIL)* (1982) 21 I.L.M. 976.

22. Art.1(b) of Annex I.

guarantees, MIGA shall pay due regard to the question whether the sponsoring member will be in a position to meet its obligations. Investments co-sponsored by the host country concerned shall receive priority. If the loss incurred under a sponsored guarantee cannot be met out of the sponsorship trust fund, the Agency shall call on each sponsoring member to pay into the fund the amount that may be determined in accordance with section (b) of Article 1 of Annex I, but not exceeding the total amount of guarantees covering investments sponsored by it. As to the continuing liability of a member, Article 3, paragraph (c) provides that:

Upon the expiry of any guarantee covering an investment sponsored by a member, the liability of that member shall be decreased by an amount equivalent to the amount of such guarantee; such liability shall also be decreased on a pro-rata basis upon payment by the Agency of any claim related to a sponsored investment and shall otherwise continue in effect until the expiry of all guarantees of sponsored investments outstanding at the time of such payment.

Subject to the conditions of sponsorship, MIGA may provide reinsurance to a member, an agency in a member country, or a regional agency as defined in the Convention or even a private insurer in a member country. Reinsurances shall be governed by the provisions of guarantees contained in Annex I and those of Articles 20 and 21 of the Convention. The cost of reinsurance shall be met out of the sponsorship trust fund. The board may decide whether and to what extent the loss-sharing obligation of sponsoring members may be reduced by virtue of the reinsurance cover being obtained. Article 7 of Annex I provides that in respect of decisions relating to sponsored investments each sponsoring member shall have one additional vote for each SDR 10,000 equivalent of the amount guaranteed or reinsured on the basis of its sponsorship, and the same formula shall apply to each member hosting a sponsored investment. The special voting system will be available only in making decisions, and must be disregarded in determining the voting power of members.

XI. RELATIONSHIP TO NATIONAL AND REGIONAL ENTITIES AND CO-OPERATION WITH PRIVATE INSURERS AND REINSURERS

ARTICLE 19 provides that, in order to maximise the efficiency of their respective services and their contributions to increased flow of foreign investment, MIGA shall co-operate with and seek to complement the operations of various national entities and regional entities to which most of its members belong and the majority of whose capital is owned by members. To this end, "the Agency may enter into arrangements with such entities on the details of such co-operation, including in par-

ticular the modalities of reinsurance and co-insurance".²³ The importance of this provision is twofold: first, that the resources of the Agency, both financial or otherwise, may not be sufficient to guarantee investment risks and therefore MIGA should complement the services of the existing entities, national and/or regional; second, that the system of offering guarantee against investment risks should be promoted at the national and regional levels where possible and thereby increase the prospect of foreign investments for the development of their economies.

The Agency may issue reinsurance in respect of specific investment against a loss resulting from non-commercial risks whether underwritten by a member or member-sponsored agency or by a regional investment guarantee agency the majority of whose capital is owned by members. The Convention has not defined "non-commercial risks"; however, it is for the board to prescribe from time to time maximum amounts of contingent liability which may be assumed in respect of reinsurance contracts. Article 20 provides, *inter alia*, that: "In respect of specific investments which have been completed more than 12 months prior to receipt of the application for reinsurance by the Agency, the maximum amount shall initially be set at 10 per cent of aggregate contingent liability of the Agency . . ." In order to minimise risks and determine a premium which would be commensurate with risks, the board shall have the authority to approve a contract of reinsurance conditional upon the fact that the reinsured entity is committed toward promoting new investment in developing member countries.

MIGA may enter into arrangements with private insurers in member countries primarily with a view to enhancing its own operations and encouraging such insurers to provide insurance for non-commercial risks. The aim of the Agency is not to compete with private insurers; Article 21 provides that it shall in particular "seek to guarantee investments for which comparable coverage on reasonable terms is not available from private insurers and reinsurers". In this context it should be reiterated that the aim of MIGA is not to replace various national and/or regional insurance agencies or programmes, but to supplement their resources and activities, where possible. Additionally, the Agency may provide insurance in those cases where national or regional agencies may be reluctant to participate, being apprehensive of the nature of risks involved. Indeed, one of its avowed policies will be to promote investment, by carrying out research, disseminating information on investment opportunities, seeking to remove impediments to the flow of investments and co-ordinating with other agencies concerned with the promotion of foreign investment.²⁴

23. Art.19.

24. Art.23.

XII. SETTLEMENT OF DISPUTES

It is interesting to note that the authority to deal with any question of interpretation or application of the provisions of the Convention arising between any member and the Agency, or among its members, has been given to the board, which is a non-judicial body. In this regard, the council has been given the status of an appellate body whose decision shall be final.

However, disputes between MIGA and its member countries, including those that have ceased to be members, shall be settled in accordance with the procedure set out in Annex II, which provides for negotiation, conciliation and arbitration. Any dispute arising from a contract of guarantee or reinsurance between the parties shall be submitted to arbitration.²⁵ The dispute-settlement procedure admits of a hierarchy: negotiation, conciliation and arbitration, except for disputes involving holders of a guarantee or reinsurance.

Parties to a dispute are required to settle their disputes by negotiation before seeking conciliation or arbitration. Should negotiation fail, the parties concerned shall be entitled, by mutual consent, to refer their dispute to the conciliation procedure unless one of the parties has submitted the dispute to arbitration. It is believed that the conciliation procedure under the Convention will follow closely that pursued by the International Centre for the Settlement of Investment Disputes (ICSID). Indeed, Article 3(c) provides that:

Unless otherwise provided in this Annex or agreed upon by the parties, the Conciliator shall determine the rules governing the conciliation procedure and shall be guided in this regard by the conciliation rules adopted pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States.

Additionally, in the absence of agreement on the conciliator, the parties may jointly request the Secretary-General of ICSID or the President of the International Court of Justice to appoint a conciliator. Once a dispute has been referred to conciliation, the parties cannot have recourse to arbitration unless one of the following conditions has been satisfied:

- (a) the conciliator has failed to submit his report within 180 days from the date of his appointment;
- (b) the parties have failed to accept all the proposals contained in the conciliator's report within 60 days after its receipt;
- (c) the parties, despite an exchange of views on the report, have failed to agree on a settlement of the most important issues within 60 days after receipt of the conciliator's report; and

25. Art.58.

- (d) a party has failed to express its views on the conciliator's report within 60 days from the date of the receipt of the report.

The arbitration procedure prescribed by the Convention²⁶ contains most of the usual conditions of arbitration held by international tribunals. Like the conciliation procedure, the arbitration procedure also provides that, unless otherwise provided in the Annex or agreed upon by the parties, the arbitral tribunal shall determine its procedure, being guided by the rules of procedure adopted by ICSID. Article 4, paragraph (f) provides, *inter alia*, that in certain cases, if a dispute should fall within the jurisdiction of the board or the council, it shall be decided by them. Legal problems may arise as to the demarcation of jurisdiction between the board or the council and the tribunal. However, the choice of law clause is modelled on Article 42 of the ICSID Convention. Article 4, paragraph (g) of Annex II to the Convention provides that:

The Tribunal shall, in any dispute within the scope of this Annex, apply the provisions of this Convention, any relevant agreement between the parties to the dispute, the Agency's by-laws and regulations, the applicable rules of international law, the domestic law of the member concerned as well as the applicable provisions of the investment contract, if any. Without prejudice to the provisions of this Convention, the Tribunal may decide a dispute *ex aequo et bono* if the Agency and the member concerned so agree. The Tribunal may not bring a finding of *non liquet* on the ground of silence or obscurity of the law.

The tribunal is the tribunal of first and final instances. Execution of its awards shall be governed by the laws concerning "the execution of judgments in force in the State in whose territories such execution is sought and shall not derogate from the law in force relating to immunity from execution".²⁷

XIII. CONCLUSIONS

ANY institutionalised programme of protection of private foreign investments on a multilateral basis must be based on consensus and a will to co-operate. It is very encouraging to see that, after several attempts made in the past,²⁸ a well thought out programme is about to come into operation. There are, however, a few points which should be mentioned by way of conclusion. First, the contractual obligations 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 inter-

26. Art.4 of Annex II.

27. Art.4(j) of Annex II.

28. For example, the Abs-Shawcross Draft Convention on Investment Abroad 1959, or the OECD Draft Conventions on the Protection of Foreign Property 1962 and 1967.

national minimum standard towards investors. Second, in conformity with international practice, the Convention clearly indicates that in the event of expropriation or taking of foreign property in any other form, there is a duty to pay compensation. Third, 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 governments normally take for the purpose of regulating economic activity in their territories".²⁹ This serves to affirm the fact that risks against certain acts of States can never be protected, not even by stabilisation clauses.³⁰ Fourth, the Convention has very appropriately emphasised that the nature and propriety of an investment must be primarily determined by the host country concerned. Fifth, the tying of membership with the World Bank should operate as a deterrent to many of the member countries to violating the obligations undertaken by them under the present Convention. Sixth, like the Convention setting up ICSID, this Convention also indicates that investment disputes should preferably be resolved by means of conciliation and/or arbitration procedure rather than court procedure. Seventh, in relation to decision-making, the Convention has provided for placing developed and developing countries on an equal basis.³¹ Eighth, this Convention, if it comes into force, will resolve the problem posed for investors by Article 2, paragraph (c) of the UN General Assembly Resolution entitled the Charter of Economic Rights and Duties of States, whereby payment of compensation in the event of taking of private foreign property by a host State is not obligatory.³² It will be interesting to see whether some of those countries that may have accepted both the Charter of Economic Rights and Duties of States and the present Convention will still follow the principles of the former in so far as this area of law is concerned. Finally, MIGA will be set up as a separate international institution; however, in respect of certain matters it is required to maintain a close relationship with the World Bank. Article 32, paragraph 2 provides, *inter alia*, that: "The President of the Bank shall be *ex officio* Chairman of the board, but shall have no vote except a deciding vote in case of an equal division." Article 35 provides that:

The Agency shall, within the terms of this Convention, co-operate with

29. Art. 11(a)(ii).

30. See *AMINOIL* arbitration, *supra* n.21.

31. See also I. F. I. Shihata, "Towards a Greater Depoliticisation of Investment Disputes: the Roles of ICSID and MIGA" 1986—1, 1 *ICSID Review For. Int. L.J.* 1, 17.

32. Art. 2(c) of the Charter of Economic Rights and Duties of States: "To nationalise, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent . . ."

the United Nations and with other inter-governmental organisations having specialised responsibilities in related fields, including in particular the Bank and the International Finance Corporation.

It would be inappropriate to predict at this stage whether MIGA will act reasonably independently of the World Bank or as its shadow.