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Environmental and Social Due Diligence Vis-à-Vis Political Risk Insurance: An Assessment of the Role of the Multilateral Investment Guarantee Agency (MIGA) by G.I. Malumfashi

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ENVIRONMENTAL AND SOCIAL DUE DILIGENCE VIS-À-VIS POLITICAL RISK INSURANCE: AN ASSESSMENT OF THE ROLE OF THE MULTILATERAL INVESTMENT GUARANTEE AGENCY (MIGA)

Abstract:

The primary objective of political risk insurance by the Multilateral Investment Guarantee Agency (MIGA), an agency of the World Bank Group (WBG), is the encouragement of foreign direct investment (FDI) and capital flow in developing countries thereby facilitating economic development. This is in keeping with the World Bank's poverty reduction policy. Since the Earth Summit at the 1992 Rio UN Conference on Environment and Development (UNCED), however, economic development must be environmentally sustainable. Hence, it became the responsibility of not only the host government and the project proponent but also that of the MIGA to ensure that an economically viable project is also environmentally sound and socially acceptable. This paper assesses the MIGA's environmental and social policies in its political risk insurance activities, vis-à-vis the other stakeholders in project finance matrix. It examines the extent to which environmentalism and social activism is seeking to redefine the scope of political risk insurance by MIGA in international project financing.

1.0 INTRODUCTION

International project finance is by nature characterized by "risks," which are generally of either commercial or non-commercial nature.¹ Commercial risks are, within the contemplation and control of, and normally borne by, the commercial parties in the structure of the project finance matrix. These are evaluated, analysed and accordingly, apportioned.² Non-commercial risks³ concern issues within the *political* or administrative purview of the host government (HG), hence they normally, are referred to as "Political" or "Country" risks.⁴ Perceptions of political risks can greatly discourage foreign direct investment.⁵ The project company can only secure

¹ See Vinter, G., Project Finance: A Legal Guide, 187 (2nd ed. 1998).

² Ibid, at 23

³ See MIGA Convention, Art. 2(b).

⁴ Yescombe, E. R., Principles of Project Finance, 137 (2002).

⁵ Shihata, I., Multilateral Investment Guarantee Agency and Foreign Investment, 14, (1998); See also Agarwal, Determinants of Foreign Direct Investment: A Survey, 116 Weltwirtschaftliches Archive. (Review of World Economies, 760-1 (1980).

lenders' confidence in the project as to provide the necessary finance if the political risks are cushioned. Such risks are thus insured by independent outside bodies, normally export credit or multilateral agencies, specially established for that purpose, on behalf of the project sponsors and lenders. The Multilateral Investment Guarantee Agency (MIGA) is one such institutions established under the auspices of the World Bank Group (WBG) to underwrite political risks for projects financed in, and for the developmental benefit of,⁶ the member (especially, developing) countries.⁷

Traditionally, political risks mostly cover such issues as currency convertibility and transfer, expropriation, breach of contract and war and civil disturbance.⁸ In assuming political risks, MIGA institutes environmental and social due diligence. This is not only because MIGA is affiliated to WBG which has strict policies on environment and social aspects of developmental projects, but also because of the global institutionalization of environmental agenda in developmental activities, especially as a result of the 1992 Rio Declaration at the United Nations Conference on Environment and Development (UNCED).⁹ Since, the main objective of MIGA is to encourage in-flow of foreign direct investment to developing countries in order¹⁰ to facilitate quicker development of the host countries.¹¹ This objective must not be eroded by any attendant environmental and social consequences of the projects resulting from dereliction of environmental duty by MIGA, the project sponsors, the lenders or the host government.

⁶ Under Paragraph 3.06 of MIGA's Draft Operational Regulations, for a project to qualify for MIGA's guarantee, it must be shown to have the "potential to generate resources for the host country ... maximizing the ..Country's productive potential, and in particular, to producing exports or imports substitutes ...". See Shihata, I., *Ibid pp.* 230-231.

⁷See MIGA Convention, *supra* , Art. 14.

⁸ *Ibid*, Art. 11(a)(i - iv)

⁹ Rio Declaration on Environment and Development, Rio de Janeiro, June13, 1992. See Note 27 *infra*.

¹⁰ See MIGA Convention, *supra*, Art. 2

¹¹ Shihata, I., Multilateral Investment Guarantee Agency and Foreign Investment, 4 (1998). The writer postulated further that project finance "does not simply provide funds, but [it is also] an integrated package of financial resources, managerial skills, technical knowledge and marketing connections" to the developing country concerned.

The main thrust of this discourse, therefore, is the assessment of the environmental and social due diligence policies and processes of the MIGA vis-à-vis its political insurance activities over the years. The discourse will also consider how MIGA performed in some natural resources development projects undertaken in some developing countries over the years. It would also address the issue of overlaps and conflicts of environmental and social responsibilities between the MIGA and other stakeholders mentioned above, and how these can be harmonized for the overall benefit of all parties.

2.0 POLITICAL RISKS AND THE RELEVANCE OF ENVIRONMENTAL AND SOCIAL DUE DILIGENCE: AN OVERVIEW

2.1 The Nature of Political Risks in IPF

“Project Finance” is technically defined by Graham Vinter as “financing the development or exploitation of a right, natural resource or other asset where the bulk of the financing is not to be provided by any form of share capital and is to be repaid principally out of revenues produced by the project in question”.¹² It involves “a detailed evaluation of a project’s construction, operating and revenue risks, and their allocation between investors, lenders and other parties through contractual and other arrangements.”¹³

“Risk evaluation,” according to a writer, “is at the heart of project finance.”¹⁴ Each party in the project financing matrix conduct critical due diligence¹⁵ of the risks and considers realistically what it can assume and what some other party should be responsible of in the light of the general viability of the project. Risks are either commercial or non-commercial. Commercial risks, also known as *project risks*¹⁶ are those inherent in the project itself. These take the form

¹² See Vinter, G., Supra Note 1, at xxxi.

¹³ See Yescombe, E. R., *supra* Note 4, at 1.

¹⁴ *Ibid.* at pg 137

¹⁵ For the definition and processes of “Due Diligence” see Yescombe, *Ibid.*

¹⁶ *Ibid*

of the general commercial viability of the project,¹⁷ completion risk,¹⁸ environmental risk,¹⁹ operating risk,²⁰ revenue risk, input supply risk, force majeure,²¹ and sponsor support risk. Political risks fall within *Non-commercial risks* category. They relate to the effect of actions of HG on the project.

So, just as a project has to be commercially viable, it must also be politically viable.²² Where the project is really beneficial to the host country, then the political risks are assumed by the country. Project companies especially in petroleum resources development are familiar with political risks and are not deterred with it, where the “investment climate” is generally suitable to their objective.²³ But to be on the safer side and to win more confidence of the lenders, the project company and equity investors insure these political risks with export credit and multilateral agencies. This is the essence of the functions of national and multilateral political risk guarantee agencies and organizations, of which MIGA is one. MIGA provides political risk insurance products similar to Overseas private Investment Corporation (OPIC)’s but without OPIC’s U.S. investor eligibility requirements.²⁴

2.2 Environmental Risks and the Scope of Environmental and Social Due Diligence

¹⁷ Whether the project make the overall sense. Other issues relevant are

¹⁸ Whether the project can be completed on time and on budget

¹⁹ Whether the project face any environmental constraints or operation. This risk represents one of the core issues of this discourse, and it would be seen how it could magnify the scope of political risk insurance cover.

²⁰ Whether the project is capable of operating at the projected performance level.

²¹ Force majeure risk also takes the form of political risk where it emanates from an action (whether legal or illegal) of the HG, which renders continuation of the project impossible or ineffective such as war or civil disturbance. See Yescombe *supra* Note 4 at 137.

²² See Yescombe, *supra* Note 4 at 203.

²³ See Zakariya H., *Political Risk Insurance in Petroleum Investment*, in Petroleum Investment Policies in Developing Countries, 208 Beredjick, N., and Walde, T. (eds.), (1988).

²⁴ OPIC is a U.S. government agency, under the policy guidance of the Secretary of State, created by the Foreign Assistance Act of 1969 to promote U.S. private investment in *friendly* developing countries, thereby completing the task of the U.S. Agency for International Development (USAID). See Zakariya, H., *supra*, Note 24 at 211.

Since the Rio Declaration on Environment and Development,²⁵ environmental concerns became part and parcel of developmental projects. Hence, both the project company and lenders entertain serious concern as to the environmental quality of the project being financed. The Declaration called on investors and multinational corporations "to adopt and report on the implementation of codes promoting the best environmental practice,"²⁶ Thus environmental risks of the project are analyzed in the light of the international requirements on the one hand and the local legislation of the host government on the other. In the end an environmental due diligence is carefully conducted. The World Bank and most other public sector lenders have developed their own environmental standards as mandated by their members (the state shareholders) and would require these to apply even if local law does not.²⁷ For instance, Organisation for Economic Cooperation Development (OECD)'s Guidelines on Multinational Enterprises require investors to "assess and take into account in decision-making, foreseeable environmental and environmentally related health consequences of their activities, including impact on indigenous natural resources and foreseeable environmental and environmentally related health risks of product as well as from the generation, transportation and disposal of waste"²⁸ within the laws of the countries they operate.²⁹

The scope of environmental and social due diligence is determinable by the nature of the project itself. Generally, however, the project company would seek to include questions and solutions as to the likely effects or impacts of the project on the environment and the social life of the people in the light of both the general international law and the host country's local

²⁵ Otherwise known as *Agenda 21* or *The Earth Summit*, See Note ... Supra.

²⁶ Such as the Business Charter on Sustainable Development of the International Chamber of Commerce (ICC)" See Report of the United Nations Conference on Environment and Development ("UNCED"), Rio de Janeiro, June 3-4, 1992, UN Doc. A/CONF.151/26, Annex II.

²⁷ Yescombe, *opt cit.* pg . 155.

²⁸ OECD Guidelines for Multinational Enterprises (Paris 1976), 15 ILM (1976) p. 967, further developed 1991.

²⁹ Bekhechi, M. A., *International Investment and Environmental Protection: Notes on the environmental Conditions of Investment in the Oil and Mining Sectors*, 78 in (International Bureau of the Permanent Court of Arbitration ed.), International Investment and Protection of Environment: The Role of Dispute Resolution Mechanisms, (Kluwer Law International, The Hague: The Netherlands, 2000).

legislation. Environmental risks are those relating to environmental effect of the construction or operation of the project.³⁰ Specific issues here would include contamination of site of site which may cause delays or prevent construction, or even where the project itself causes the site contamination, Archeological find which may also prevent continuance of construction, project performance causes environmental pollution³¹ which affect the quality of the health of the people, and which may result in public opposition or condemnation of the whole project.³² Consequently, environmental risk in project financing is assuming a semblance of political risk.

Environmental liability in traditional common is *strict*, and a project company stands the risk of being held liable for committing *environmental offence* even where there was no proof of intent.³³ Thus a "project which involves a substantial damage on the basis of strict liability is unlikely to be bankable ... without significant (and probably prohibitively expensive) insurance cover."³⁴

3.0 An Overview of Political Risk Assurance and Environmental and Social Due Diligence Policy of the Multilateral Investment Guarantee Agency (MIGA)

3.1 The MIGA's Political Risk Insurance

The Multilateral Investment Guarantee Agency (MIGA) (hereinafter, "the Agency") was created in 1998 as a member of the World Bank Group to promote foreign direct investment (FDI) into emerging economies to improve people's lives and reduce poverty.³⁵ MIGA fulfils this mandate by underwriting political risk insurance (guarantees) to investors and lenders, and by helping

³⁰ Yescombe, *supra* at 336.

³¹ Haley, G., Lecture at CEPMLP on ...

³²

³³ The basic principles of environmental liability under common fall under the heads of trespass, nuisance, negligence, and breach of statutory duty none of which requires no proof of intent. See also the rule in *Rylands v. Fletcher* (1868) L. R. 3 HL 330.

³⁴ Vinter, G., *Ibid*, 209.

³⁵ See MIGA Convention, Article 2(b), MIGA Website at: <file://A:\Commentary%20on%20MIGA%20Convention.htm>.

developing countries attract and retain private investment.³⁶ Thus the emphasis has always been aid on the project being in a developing member country³⁷ to the MIGA. It is also required that the country must have also approved the issuance of the guarantee by the Agency³⁸.

Under Article 11 (a) of the convention, the Agency may guarantee eligible investments against loss resulting from the risk of currency transfer,³⁹ expropriation and similar measures,⁴⁰ breach of contract⁴¹ and war or civil disturbance⁴² occurring within the territory of, and “attributable to” the host country. The MIGA Board of Directors may nevertheless, by special resolution, upon joint application of the investor and the host country, approve the extension of coverage under this Article to specific non-commercial risks other than the above-mentioned.⁴³ The Agency does not cover risk of devaluation or depreciation of currency.⁴⁴ Also, losses would not be covered if it results from any action or omission of the host government agreed by the holder of the guarantee or for which he is responsible, or if the action or omission occurred before the conclusion of the guarantee contract.⁴⁵

³⁶ Article 2 (a).

³⁷ Art. 14. Member country has been defined by Article 3(a) as “ a State with respect to which this Convention has entered into force in accordance with Article 61.” See also <<file:///A:/MIGA%20Convention.htm>>.

³⁸ Art. 15.

³⁹ Ibid. (i) And this means “ any introduction attributable to the host government of restrictions on the transfer outside the host country of its currency into a freely usable currency or another currency acceptable to the holder of the guarantee, including a failure of the host government to act within a reasonable period of time on an application by such holder for such transfer.”

⁴⁰ Ibid. (ii) That is to say: “any legislative action or administrative action omission attributable to the host government which has the effect of depriving the holder of a guarantee of his ownership or control of, or a substantial benefit from his investment, with the exception of non-discriminatory measures of general application which the government normally take for the purpose of regulating economic activity in their territories.”

⁴¹ Ibid. (iii) This includes “any repudiation or breach by the host government of a contract with the holder of a guarantee, when (a) the holder of a guarantee does not have recourse to a judicial or arbitral forum to determine the claim of repudiation or breach, or (b) a decision by such forum is not rendered within such reasonable period of time as shall be prescribed in the contracts of guarantee pursuant to the Agency’s regulations, or (c) such a decision cannot be enforced”

⁴² Ibid. (vi). This includes: “any military action or civil disturbance in any territory of host country to which this Convention shall be applicable as provided in Article 66.”

⁴³ Article 11(b)

⁴⁴ Ibid

⁴⁵ Art. 11©.

Investments to be ensured must also be eligible within the definition of the Convention. A particularly important criteria of eligibility is the economic soundness of the investment and its contribution to the development of the host country. *It must equally, comply with the host country's laws and regulations*, and be consistent with the host country's declared development objectives and priorities. Finally, the investment conditions in the host country, including the availability of fair and equitable treatment and legal protection for the investment must be ascertained.⁴⁶

To date, MIGA insurance has issued 539 guarantees worth \$9.2 billion, and facilitated an estimated \$41.2 billion in foreign direct investment (FDI) in 78 developing countries.⁴⁷ Part of MIGA's activities also is provision of technical assistance and information services. MIGA-insured projects encompass a broad range of sectors, including manufacturing, infrastructure, mining, agribusiness, and financial services.⁴⁸ MIGA has detailed guidelines for determination of premium rates⁴⁹ to be paid by the insured, settlement of claims,⁵⁰ and HG approvals and MIGA's subrogation rights.⁵¹

3.2 Overview of the MIGA's Environmental and Social Policy

At its inception, MIGA did not have its independent environmental and social policy.⁵² As an arm of the WB, MIGA had to be generally guided by the IBRD⁵³ policies on environmental protection, sustainable development, cleaner production processes, pollution prevention, and poverty

⁴⁶ Article 12

⁴⁷ During the World Bank Fiscal Year 2001 (WBFY01) (July 1- June 30) alone, MIGA issued 66 new guarantee contracts, totaling \$2.0 billion in gross coverage. 28 developing member countries benefited. See *Summary: The World Bank Group* at <www.worldbank.org>.

⁴⁸ See *MIGA Project Highlights: A Risk Mitigation Tool for Sub-Saharan Africa* at <www.miga.org>.

⁴⁹ These are attached as annex to the MIGA's Operational Regulations. See Shihata, I. *Ibid* pgs. 439 and 487-495.

⁵⁰ See Art. 17. MIGA Convention *supra*. See also Para 28 of the Commentary on the MIGA Convention, at <<file:///A:\Commentar%20on%20MIGA%20Convention.htm>>.

⁵¹ Art. 15. See also Para. 25 of the Commentary on the MIGA Convention, *ibid*.

⁵² The MIGA's basic documents did not indicate the existence of any such material.

⁵³ International Bank for Reconstruction and Development, the World Bank.

reduction.⁵⁴ Accordingly, MIGA adopted, in 1999,⁵⁵ in general terms the environmental and social policy of the WB as enshrined in the ***Pollution Prevention and Abatement Handbook***,⁵⁶ and those of the IFC's.⁵⁷ MIGA particularly reviewed and adopted the IFC's established environmental and social policy and based upon which in 1999, it adopted its *Environmental and Social and Social Policy*. As complementary to this, MIGA also developed what it referred to as *Disclosure Policy*. These two documents are attached to the Regulations as Annex B and Annex C respectively,⁵⁸ and form the basis of MIGA's environmental and social due diligence.⁵⁹ Another supplementary document is the *MIGA's Environmental and Social Review Procedure*⁶⁰ which contains detailed guidelines for the due diligence activities of the MIGA staff's in the light of the *Environmental Assessment* and *Disclosure Policies*. The application of these policies, guidelines and procedures were inspired by the provision of Paragraph 3.06 of the Regulations which says, inter alia:

"Before issuing a Contract of Guarantee, the [MIGA's] Underwriting Authority shall satisfy itself that the Investment Project is consistent with MIGA's environmental policies and takes into account MIGA's environmental guidelines ..."⁶¹

MIGA achieves the above by subjecting the whole project to its environmental assessment and disclosure policies discussed below.

⁵⁴ *MIGA's Environmental and Social Review Procedures*, Para. 11, <http://www.miga.org/screens/policies/disclose/soc_rev.htm>.

⁵⁵ See 2 of MIGA's reply to Friend of the Earth's (FOE) critique report entitled: *How the World Bank's Insurance Arm Fails the Poor and Harms the Environment*, July 26, 2001, at <<http://www.miga.org/screens/news/whatsnew/riskybusiness.htm>>.

⁵⁶ The WB *Pollution Prevention and Abatement Handbook*, Part III sets forth the detailed provisions to be taken into account by project sponsors in designing and operating projects. See Note 63 supra.

⁵⁷ IFC is the private sector investment arm of the WB, making direct equity investments and loans to promote private sector development, foreign investment, privatization, and efficient financial markets in developing countries. IFC lends directly to private companies without a sovereign guarantee. See *The World Bank Group* at <www.worldbank.org> *ibid*.

⁵⁸ *MIGA's Environmental Assessment Policy*, <<http://www.miga.org/screens/policies/disclosure/environ.htm>>.

⁵⁹ *Ibid*.

⁶⁰ Hereinafter "the Review Procedures," is a 48 paragraph procedural document for the implementation of the Policies. Its *Annex 1* containing specific questions and issues to be addressed by the MIGA in its environmental and social due diligence especially as relates public consultation and disclosure requirements. See <http://www.miga.org/screens/policies/disclose/soc_rev.htm> supra.

⁶¹ *Ibid* Para. 32.

3.2.1 The Environmental Assessment Policy

The Environment Assessment Policy of MIGA (hereinafter “the policy”) is a 13-paragraph document by which MIGA institutes the environmental and social assessment requirements and procedures required of investors/project sponsors referred to therein as “applicant” for guarantee. It states that subject to the nature, scale and potential environmental impact of the proposed project, the assessment “evaluates” the project’s “environmental risks and impacts,” and “identifies ways of improving project planning, design, and implementation by preventing, minimizing, mitigating or compensating for adverse impacts and enhancing positive impacts”.⁶² It adds that MIGA would “favour *preventive* measures over *mitigatory or compensatory* measures” whenever possible.⁶³ The Policy considers “the natural and social aspects in an integrated way,”⁶⁴ taking into account the variations in project and country conditions; the findings of country environmental studies; national environmental action plans and the country’s overall policy framework and national legislation; the project sponsor’s capabilities related to the environment and social aspects; and obligations under international environmental treaties and agreements as these are relevant to the project”.⁶⁵ The necessary environmental assessment *instruments* to be prepared by applicants include *environmental impact assessment, environmental audit, hazard or environmental risk assessment, and an environmental action plan*.⁶⁶

Depending on their type, location, sensitivity and scale, and the nature and magnitude of their potential environmental impacts, projects are classified by MIGA into three categories “A”, “B” and “C”. Project would be categorized as “A” if it is likely to have “significant environmental

⁶² See Para. 2 of the Policy.

⁶³ Ibid. (emphasis added).

⁶⁴ The usual natural environmental aspects of a project are the impact of development project on the “air, water and land” resources, while the social aspects concern its impacts on public health and safety, indigenous peoples right, population, involuntary resettlement, cultural property, etc.

⁶⁵ Ibid. Para. 3

⁶⁶ Para. 7.

impacts that are sensitive, diverse or unprecedented.”⁶⁷ The project sponsor, in this case would be required to prepare an EIA in accordance with paragraph 7 of the Policy.⁶⁸ Category B are those projects with potential adverse environmental impacts on human populations or environmentally important areas (including wetlands, forests, grasslands, and other natural habitats) are less adverse than those of category A projects. The impacts though irreversible can be mitigated. The scope of the EIA required would be narrower than those of Category A.⁶⁹ A proposed investment will be classified as Category C if the project is likely to have minimal or no adverse environmental impacts, as such, beyond screening, would not require any further environmental assessment action.⁷⁰

The Policy also provides for the requirement of early public consultation and disclosure by Category A project proponent, with the project-affected groups and local non-governmental organizations (NGOs) about the project’s environmental impacts, and to take their views into account.⁷¹

I think this categorization is proper as it defines projects by their size and potential to adversely or minimally impact on the environment. This has the effect of guiding proponents as to “what” and “when” to perform to satisfy conditions of eligibility for insurance cover.

3.2.2 Disclosure Policy

⁶⁷ Para. 8 (a)

⁶⁸ According to para. 46 of MIGA’s Environmental and Social Review Procedures, for Category A projects, Environmental Action Plan is a necessary component of the EIA to be prepared by the applicant. See http://www.miga.org/screens/policies/disclose/soc_rev.htm.

⁶⁹ Para. 8 (b) of the Policy.

⁷⁰ Ibid, para. ©.

⁷¹ Ibid. para. 9 See also Note 86, supra.

The Disclosure Policy is a statement by which MIGA institutionalizes transparency and accountability by disclosing information about its activities to the stakeholders and the general public.⁷² This policy however, will only apply where the disclosure will “not harm the business and competitive interest of MIGA’s applicants,” or “violate confidential obligations”.⁷³ Of course, the Convention has strict provisions in respect of sanctity of confidential information. It states:

“The President and Staff shall maintain at all times the confidentiality of information obtained in carrying out the Agency’s operations.”⁷⁴

This provision has been reinforced by the Operational Regulations.⁷⁵

The policy then categorized the information to be made available to the public as: *General*,⁷⁶ *Operational*, *Financial*⁷⁷ and *Administration*⁷⁸ information. Environment related information and documents fall under Operational category. MIGA here will make available to the public, the EIA report for Category A projects, for 60 days prior to Board consideration. This information would be disseminated through the WB Infoshop.⁷⁹ MIGA would not underwrite the project unless the sponsors agree to the release of the EIA to the public in accordance with these guidelines.

3.3 Critical Assessment of MIGA’s Role in Some Selected Projects

MIGA’s primary objective is to facilitate and encourage socio-economic development through insuring political risks in FDI in natural resources development projects FDI of developing

⁷² See Paras. 1. and 2., MIGA Disclosure Policy: Annex C to the MIGA Operational Regulations, <<http://www.miga.org/screens/policies/disclosure/envIRON.htm>>.

⁷³ Ibid. para. 3.

⁷⁴ Art. 33(e).

⁷⁵ See Para. 3.30 of the Operational Regulations. These provisions however have been subject of criticism by NGOs like Friend of the Earth International (FOEI) as making room for the MIGA to conceal from the public essential information about the project and how it affects the life of the people. See *Risky Business*: infra.

⁷⁶ Ibid. The general information about MIGA and its activities, policies, projects, member-countries, etc, is made available on the website and produced in the Annual Reports of MIGA.

⁷⁷ Ibid. This includes MIGA’s financial statements, audit reports and other standard financial documents.

⁷⁸ This includes information about the organs and decision-making bodies and processes and procedures, including the Annual Report of the “Appeals Committee” (on request).

⁷⁹ WB’s Infoshop is at 701 18th Street, NW Washington DC, 20433. Infoshop also has offices in London, Paris and Paris to which requests for information can be forwarded.

countries.⁸⁰ Encouraged by the Earth Summit, environmentalism and social activism, on the other hand, insists that development must be weighted against environmental and natural resources sustainability.⁸¹ MIGA thus came under serious and sustained accusations of environmental and social insensitivity in some projects it insured across several regions of the developing world.⁸² For instance, in South and Central America, the projects which earned MIGA serious criticism include the Bolivia-Brazil Natural Oil Pipeline,⁸³ Antamina Mine, Peru,⁸⁴ Omai Gold Mine,⁸⁵ and the Xan Oil Field Upgrade by Basic Resources International, Guatemala.⁸⁶ In Africa, such critical MIGA-insured projects include the Bulyanhulu Gold Mine, Tanzania,⁸⁷ the Chad-Cameroon Gas Pipeline.⁸⁸ In the East and Central Europe, there was the Kumtor Gold Mine.⁸⁹ In the Asia, such projects include the Julietta Mine, Russia,⁹⁰ the Lihir Mine, Papua New Guinea,⁹¹ and the Grasberg Mine, Indonesia.⁹² Details on these cases have documented by many renowned environmental non-governmental organizations (NGOs) including Friends of the

⁸⁰ Art. 2 MIGA Convention Ibid Pg, ,..., See also Shihata, I. Supra, ...

⁸¹ UNCED, ibid

⁸² About 11 of these projects have been documented in some details i

⁸³ See MIGA Annual Report, 1999, MIGA website supra Hermerschlag, K., The Bolivia-Brazil Pipeline: A Model Development Project? March, 1999 at http://www.tebtebba.org/tebtebba_files/susdev/mining/eir/wbfinancedprojects.pdf

⁸⁴ See MIGA Annual Reports, 1999 and 2000; FOEI and National Wildlife Federation, Bull & Bear Newsletter, Vol. 1, No. 3, June 1999; Oxfam American Centre for International Environmental Law, “Trip Report: IFC/MIGA Mining Projects in Peru (draft), January 2000.

⁸⁵ See Ikawa, Motomichi, Letter to Pacific Environment and Resources Centre, August 18, 2000 at http://www.tebtebba.org/tebtebba_files/susdev/mining/eir/wbfinancedprojects.pdf

⁸⁶ *Ibid.* This project was facilitated by IFC loans in 1994 and 1996. The FCI was accused of being insensitive to the environmental and social quality of the project in that it did not investigate to ascertain whether and the project proponent conducted proper public consultation. It could be recalled that prior to 1999, MIGA adopted and was guided by the IFC’s environmental and social due diligence policies.

⁸⁷ *Ibid.* See also, Bosshard, P. and Berne Declaration: Tainted Gold from the Pacific, February, 1996, at www.evb.ch (up-dated, 2000); Mineral Law Institute press release: Oz Government Shares Responsibility for Cyanide Kill/Australian Government Finance Lihir Mine Cyanide Dumping, June 30, 2000.

⁸⁸ Note 94 supra.

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*

⁹¹ *Ibid.*

⁹² Chatterjee, P. World Bank Arm Insures Destructive Mining From Peru to Indonesia, in IterPress Service, August 15, 1995; Freeport Cancels World Bank Insurance Lawyer and Activist Harassed as New Orleans Lawsuit Proceeds, Drillbits and Tailings, September, 15 1996, Project Underground.

Earth International (FOEI),⁹³ Lawyers Environmental Action Network (LEAN) and the *Tebtebba* Foundation.⁹⁴

The central issue of discontent against the MIGA, which is common to all the above cases can be summarized as follows: that MIGA's environmental and social policy and disclosure policy are not adequate or effective enough.⁹⁵ This is because it allowed poorly prepared EIAs to proceed with the attendant consequences on the environment and the local community. An example here is the Bolivian-Brazil Pipeline project. Sometimes, the problem is not with the policies, but the inability of MIGA to monitor their implementation especially as the project progresses, or attend to local community's complaints and misgivings about the way handling of the project by the project companies. An example here also is the Antamina Mine Project, Peru, and the Omai Gold Mine, Guyana.

In its response to some of these accusations, MIGA has always emphasize the fact that its primary objective was to "help reduce poverty by facilitating FDI which plays an important role in promoting economic growth, employment generation, and technical and material knowledge transfer," and that its environmental and social due diligence was generally geared toward this objective.⁹⁶ MIGA indicated that it has in fact "turned down and cancelled projects that have not complied with our environmental and social requirements."⁹⁷ In some occasions MIGA

⁹³ See *Risky Business: How the World Bank's Insurance Arm Fails the Poor and Harms the Environment*, July 26, 2001, by Friends of the Earth, <<http://www.foei.org>> and <<http://www.brettonwoogsproject.org/topic/social/a26bulyahulu.htm>>.

⁹⁴ See Note *Supra.*, 95

⁹⁵ See *Risky Business: How the World Bank's Insurance Arm Fails the Poor and Harms the Environment*, July 26, 2001.

⁹⁶ See *MIGA's Letter in Response to the Friend of the Earth Report*, 2 Note 65 *supra*.

⁹⁷ Note 106 *supra*.

responded to local community/NGO complains to the effect that MIGA merely an “insurer” is not the “investor” or project sponsor, or host government thereby shifting the responsibility.⁹⁸

3.4 Balancing of Responsibilities for Environmental and Social Due Diligence Between MIGA and other Stakeholders

A critical issue of consideration is the relationship now between the MIGA environmental and social policy on the one hand, and environmental laws and regulations of the host country on the other. This is important as it goes along way to determine the scope of the necessary due diligence required of project proponents, the lenders, the MIGA and the host country, and which of these is decisive when it comes to legality of actions and responsibility. This also further raises the interesting question as to which among the various stakeholders, strictly, has the responsibility for environmental and social due diligence: project sponsor/investor, lender, host government or the insurer?! It is the candid opinion of the author that though the main responsibility for environmental and social due diligence in project finance lies with more with the project proponent and the host government. MIGA and the lenders, also have a very important stake to hold. By being environmentally conscious and responsible, the project proponent would be establishing a high level credit rating in the sight of the lenders,⁹⁹ on the one hand, and would achieve acceptance accommodation of the host government, on the other hand. The imperative of environmental due diligence on the part of the lender is to ensure that no environmental *strict* liability remains with the project when it takes its control in event of default by project company and investors to repay the loan.¹⁰⁰ That is to say that if the project is not environmentally sound, and for this or any other reason, it defaulted, naturally, the lenders will assume the project and all its liabilities. Consequently, MIGA’s interest is similar to

⁹⁸ See MIGA’s response to local NGO’s complaints in respect of Antamina Mine Project, Peru, Note 94.

⁹⁹ The Project Company or sponsor is, or should be conscious of the fact that “the possibility of liability for environmental damage can cause problems with regard to a project’s bankability”. See more on this Vinter *supra* at 219.

¹⁰⁰ Ibid

the lender's. As it underwrites the political risks in the project, it is also weary of the fact that the host government can in the future do some act including passing or amending its environmental legislation as to make it difficult or impossible for the project company to continue. This is a case of *creeping* or *indirect expropriation*.¹⁰¹ That will then prop up the project company to invoke its political risk cover. Thus, to guard against this, MIGA would need to ensure at the beginning, the environmental soundness, and social sensitiveness of the project. This may not in itself bar the host government from taking the action complained, but it would give MIGA and the project company a sound argument in determining the measure of compensation to be paid to the project sponsors where the host government insists on the *creeping* expropriation.¹⁰²

It is equally crucial for the host government to institute environmental and social due diligence in the project in order carry out its responsibilities under relevant MEAs, and to perform its social responsibilities. But then, who determines which standard/requirements a project proponent would need to satisfy in its EIA preparation: the MIGA's or the host country's? MIGA's Convention and Operational Regulations, and indeed the Review Procedures have it clear that MIGA would get involved in a project if, *interalia*:

- the project complies with the local legislation (including of course, environmental) of the HG country; and
- the host HG has agreed as to MIGA's involvement.¹⁰³

Thus, for an EIA by the project proponent to qualify, it has to first and foremost be in compliance with, and acceptable to, the HG's laws. Now, the question is what will happen

¹⁰¹ See generally, Kolo, A. A., *State Regulation of Foreign property Rights: Between Legitimate Regulation and Nationalisation –An Analysis of Current International Economic Law in the Light of the Jurisprudence of the Iran-United States claims Tribunal*, pp.143-155, (Unpublished PhD Thesis submitted to the CEPMLP, University of Dundee, 1994).

¹⁰² Ibid.

¹⁰³ See, Note .. Supra.

where the standard required of the host county's local legislation is comparatively lower or higher than the MIGA's? Well if it is higher, then the crucial question is whether the project company is ready to fully comply with it, in which case I submit, MIGA has to, accordingly *upgrade* its standard, and require the proponent to meet up with its commitment in relation to that project in that country. But where, the standards required by MIGA is higher than the HG's then the matter should be resolved by an understanding between the MIGA and HG as to the governing standards for the transaction.¹⁰⁴

4.0 CONCLUSION

MIGA's statutory function is the insurance of political risks in investments that bring development and improve the economic lot of the host country.¹⁰⁵ Most of these projects concern the development of resources in petroleum, mining and related fields, which have attendant devastating impacts on the environment and the social fabric. The popularisation of environmental agenda especially as a fall out of the UNCED has redefined and amplified the scope of the responsibilities of MIGA and other stakeholders in international project finance as relates environmental and social due diligence. And because the environmental protection and management of natural resources is a matter of policy and legislation, these fall within the ambit of HG's responsibility. Thus, it becomes logical to argue that environmental concern is an extension of political risk of project financing¹⁰⁶ which MIGA's indirectly also covers. Consequently, the evolution of an environmental and social due diligence of MIGA as represented in the Environmental Assessment and Disclosure Policies above have redefined the scope it its political risk insurance. It only remains to institute a harmonization measure to

¹⁰⁴ MIGA should not *force* HG to adopt its (MIGA's) standards, but should consider various other factors, including the extent to which the HG's legislation has satisfied relevant international obligations, the project company's views and its performance history, the ardent need of the project by the local community (that is to say whether insisting on higher standards may bring delay on the commencement of an otherwise highly and socially needed project by the local community and the country at large).

¹⁰⁵ MIGA Constitution, *supra*, note 62.

¹⁰⁶ Yescombe seems to hold similar view. See Yescombe, *supra*, at pg 155.

facilitate coordination of standards between MIGA and HG for the purpose of certification, and for monitoring. It is submitted also that the MIGA and the project company could demand the HG to, declare in the stabilization agreement:

- that the bench mark to be used to determine the acceptable and applicable EIA should be the MIGA's or the HG's or both or whichever is stricter;
- that it would not to pass any law or regulation in the future that may require a higher environmental performance above that agreed and accepted in the EIA prepared by it before the commencement of the project.

Only then that lenders would feel encouraged financing projects with less apprehension of inheriting, in an event of *recourse*, a *strict*¹⁰⁷ environmental liability without a fault of their own.

¹⁰⁷ Strict liability offence under criminal justice do not require proof of *mens rea* (intention, or guilty mind) to found liability.