he claims is also claimed by a neighbor. The probability of feuding in such a situation is implicit, but never explicitly stated. Counterbalancing this potential for feuding is a vety Thai preference for surface orderliness and deference to authority. Officials must be consulted. Arrogance and refusal to submit to authority apparently are independent factors which may weigh heavily in the decision on the merits (section 67, first paragraph). This is anathema to western systems of law, but anyone familiar with modern Thai society (and, one is tempted to add, human nature) has witnessed it. Perhaps Thai law, left to its own devices, would have developed along lines which placed more emphasis on outward peace and tranquility in the community and submission to authority than on the "correct" solution to a given legal problem.

The diminution of damages as time passes under section 67 seems to represent a policy similar to our statute of limitations, but it is probably more closely related to our notion of proximate cause. The reasoning behind section 70, which is aimed at avoiding over-inclusiveness, seems to be modern legal reasoning. Previous knowledge or *scienter* is obviously an important element in sections 66, 69 and 70, but its significance in section 67 is lost to the modern lawyer.

LAW OF THE THREE SEALS, CRIMES AGAINST GOVERNMENT BOOK

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[Thai numeral 47]. Someone clears land to farm. *Thammasat* says to go inform the local officials, have (them) go to look at the cleared land so (they will) know how much (land was cleared). Have the officials write a document and leave it with the person who cleared (the land) so they will know that person lives at that house and (the land) was newly cleared in that canton in that year. If any person surreptitiously clears (land) following only his own wishes (and) does not inform the officials, whether he is caught (in the act) or someone comes to complain, *thammasat* says punish (him) six ways. If the king forbids you to kill (him), hang the tax which (he) avoided (around his neck) for three days to disgrace (him), then fine him quadruple (the amount of the tax).

A person who clears land to farm must notify the appropriate authorities. Anyone who clears land to farm without such notification commits a crime subject to severe, perhaps capital, punishment.

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Multilateral Approaches to Improving the Investment Climate of Developing Countries: The Cases of ICSID and MIGA

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The 1980s witnessed a substantial decline in the flow of investment to less developed countries ("LDCs"). From a peak of $100 billion in 1981, aggregate net resource flow (long-term) decreased to a low of $46 billion in 1987. Similarly, aggregate net transfers (long-term) declined from $46 billion to negative $17 billion over the same period. (See Table 1.) Gross foreign direct investment ("FDI")[1] also declined during this period from $13 billion in 1981 to $9.5 billion in 1986, although it returned to the 1981 level in 1987.

These declines reflected the adverse effect of the debt crisis on the perceived creditworthiness of LDCs and a sharp drop in investor confidence due to macroeconomic instability and recession in many countries.[2] During this period, commercial bank lending suffered an even greater decline, falling from $44 billion in 1981 to negative $1 billion in 1987 as banks reacted to mounting arrears by moving to reduce their overall exposure to LDC debt. Substantial capital flight from LDCs, resulting from an erosion of domestic confidence, compounded the problem.[3]

More recently, however, the level of foreign investment in LDCs has rebounded dramatically. Aggregate net resource flows reached $65 billion in 1989 with only slightly negative net transfers of $1 billion, while FDI grew from $13 billion in 1987 to $22.5 billion

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1. The International Monetary Fund [hereinafter IMF] has defined "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." IMF Balance of Payments Manual, § 408, at 136 (4th ed. 1977).

2. The IMF and World Bank attempted to cushion the impact of the deterioration in financial flows in the early 1980s through "purchases" or quick-disbursing adjustment loans linked to macroeconomic policy reforms. Lacking a strong private sector response, however, these mechanisms provided only partial, short-term relief.

3. An unpublished IMF staff study prepared in 1987 estimated the capital flight from LDCs at approximately $165–200 billion in the period from 1974 to 1985.

in 1989.[4] The recent increase in FDI to LDCs suggests that the policy reforms and adjustments many LDCs undertook in the early 1980s have begun to have an impact, although as much as fifty percent of that increase might be a result of the surge in debt-equity swaps. Many LDCs apparently realized that to reverse the negative resource flow trends of the early 1980s they had to foster a business environment more hospitable to FDI from both developed and other developing countries.

Several factors contribute to the establishment of a favorable foreign investment climate. These factors include: (1) overall macroeconomic stability, including relative consistency in prices, exchange rates, and trade policies; (2) a well-developed legal and regulatory framework, including favorable tax and labor codes, investment laws, property laws, the protection of intellectual property rights, and competition policy, as well as relative industrial deregulation;[5] (3) a sufficient infrastructure, including relatively comprehensive transportation, power, and telecommunications systems, as well as available housing and qualified human capital; and (4) overall political stability. Through a combination of economic austerity measures, liberalized foreign investment laws, and moves toward greater democracy, a number of LDCs have enhanced investor confidence and succeeded in attracting higher levels of foreign investment.

In addition, many LDCs have signed bilateral investment treaties ("BITs") with capital exporting countries.[6] BITs traditionally deal with such elements as regulation of entry and establishment, national treatment, monetary transfers, and protection against dispossession. More recently, BITs have addressed the settlement of investment disputes, and about half specifically mention the World Bank's International Centre for Settlement of Investment Disputes ("ICSID").[7] Although it is difficult to measure the impact of BITs on actual investment

4. It is difficult to predict what impact the Persian Gulf War will have on these figures, as well as on the political risk insurance market, in upcoming years. It is possible, for example, that more investors will seek political risk coverage or that the uncertainty created by the war will lead to a net reduction in FDI, at least in certain parts of the world.

5. In addition, it is important that the host nation's laws and regulations are transparent and stable, and that contractual commitments are honored, through an independent judiciary if necessary.

6. The first BIT was signed between the Federal Republic of Germany and Pakistan in 1959. Athena J. Pappas, *References on Bilateral Investment Treaties*, 4 ICSID REV. FILJ 189 (1989). By the beginning of 1989, more than 300 BITs had been concluded between the world's capital exporting countries and roughly 80 LDCs.

7. Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 [hereinafter ICSID Convention]. The ICSID Convention is reproduced at 4 I.L.M. 524 (1965).

BITS → + (1) Arbitr. (ICSID) → (2) INSUR. →

flows, they tend to enhance investor confidence by acting as a deterrent to arbitrary host government measures.[8]

This Article will examine the effectiveness of two additional elements in overall efforts to increase foreign investment in LDCs: (1) dispute settlement; and (2) investment insurance. In particular, this Article considers the extent to which a multilateral approach, using an international organization such as the World Bank as an umbrella, effectively supplements the mechanisms already available. Although isolating the impact of discrete factors on an investment climate is difficult, this Article attempts to assess the incremental impact of two World Bank institutions, ICSID and the Multilateral Investment Guarantee Agency ("MIGA").[9] ICSID has been in place for twenty-five years and, therefore, has a track record on which to base comparative judgments. By contrast, MIGA did not enter into the political risk insurance market until 1988, and therefore an assessment of its impact must be more prospective. The Article concludes with a brief assessment of the synergistic potential of the two agencies, both separately and jointly, to foster a more attractive investment climate in LDCs.

I. THE EFFECTIVENESS OF ICSID ARBITRATION

A. Origins

In the early 1960s several initiatives to reduce the political risks constraining increased foreign direct investment in LDCs were under consideration. These proposals included efforts by the Organization for Economic Cooperation and Development ("OECD") to develop a multilateral convention for the protection of foreign property as well as to propose the development of a multilateral investment insurance scheme that would protect investors against expropriation and other

8. One scholar adds:

> the BIT movement as a whole may be seen as part of an ongoing process to create a new international law of foreign investment to respond to the demands of the new global economy that has so rapidly emerged within the last few years. Although BITs themselves only bind the two countries concerned and are probably not sufficiently widespread to constitute customary international law, the process of study, consultation, discussion, and negotiation that has been part of the BIT movement has certainly laid a foundation for the creation of an international investment framework that may eventually attract the consensus of the nations of the world.

Jeswald W. Salacuse, *BIT by BIT: The Growth of Bilateral Investment Treaties and their Impact on Foreign Investments in Developing Countries*, 24 INT'L LAW. 655 (1990).

9. MIGA was created by the Convention Establishing the Multilateral Investment Guarantee Agency, *opened for signature* October 11, 1985, 24 I.L.M. 1598 (entered into force April 12, 1988), [hereinafter MIGA Convention].

risks.[10] The OECD abandoned its efforts in 1967. With regard to an investment insurance scheme, issues such as risk sharing and subrogation of the insurance agency to the claim of a compensated investor emerged as intractable problems, although the MIGA Convention created a somewhat similar agency in 1988.

The remaining proposal, which called for the creation of a center for the settlement of investment disputes, was first discussed in 1962. It received the formal approval of the World Bank's Executive Directors in 1965, when they adopted the ICSID Convention. The International Settlement Centre was empowered to hear disputes on October 14, 1966, after 20 governments had ratified the proposal. It is worth noting that even before the creation of ICSID, the World Bank had used its good offices to help settle disputes between member governments and foreign investors, including disputes arising out of the nationalization of the Anglo-Iranian Oil Company's assets in Iran in 1951-1952 and the Egyptian Government's nationalization of the Suez Canal in 1956. Since an institutional framework for dispute settlement in international commercial matters[11] and for ad hoc arbitrations[12] already existed at the time of ICSID's establishment, this Article attempts to assess ICSID's incremental contribution to the facility of dispute settlement, both at the time of its creation and also in light of the subsequent substantial growth in arbitration facilities worldwide.[13] The assessment is based not only on the merits of ICSID's arbitration capacities, but also on the Centre's success as a deterrent to investment disputes, its settlement record (approximately 50% of the cases registered with ICSID have settled before going to arbitration), and on the degree to which the Centre's awards have been enforced following arbitration.

10. *See* Aron Broches, *The Experience of the International Center for Settlement of Investment Disputes*, in INTERNATIONAL INVESTMENT DISPUTES: AVOIDANCE AND SETTLEMENT at 75 (S. Rubin & R. Nelson, eds. 1985).

11. The existing facilities included the International Chamber of Commerce/International Court of Arbitration [hereinafter ICC] in Paris, and the American Arbitration Association [hereinafter "AAA"] in New York. For a detailed assessment of the major international commercial arbitration systems, excluding the ICSID, see Steven J. Stein & Daniel J. Wotman, *International Commercial Arbitration in the 1980s: A Comparison of the Major Arbitral Systems and Rules*, 38 BUS. LAW. 1685 (1983). As an indication of the size of these systems, in 1981, 277 cases were filed with the ICC, while 130 "international" cases were filed with AAA.

12. The most important ad hoc mechanism was established under the United Nations Commission on International Trade Law (UNCITRAL). G.A. Res. 98, U.N. GAOR, 31st Sess., supp. no. 39. at 182, U.N. Doc A/31/39 (1976). The UNCITRAL Rules were published in 1976. U.N. Doc. A/31/17 (1976).

13. For a comprehensive survey of recent trends in international commercial arbitration, see Christine Lecuyer-Thieffry & Patrick Thieffry, *Negotiating Settlement of Disputes Provisions in International Business Contracts: Recent Developments in Arbitration and Other Processes*, 45 BUS. LAW. 577 (1990).

B. *Objectives and Main Features*

The purpose of the Centre was "to provide facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States in accordance with the provisions of this Convention."[14] However, ICSID does not settle disputes directly; rather, it relies on Conciliation Commissions and Arbitral Tribunals empowered by the provisions of the Convention and by the Rules adopted pursuant to it.[15] In an effort to balance the interests of all parties involved in a dispute settlement procedure and thus to "depoliticize" the settlement of investment disputes, Article 27 suspends the right of Contracting States to exercise diplomatic protection of nationals who have consented to an ICSID arbitration hearing. In addition, ICSID's governing body is an Administrative Council comprised of one representative from each participating state, with each representative entitled to cast one vote on behalf of the state. Because of these equitable safeguards, ICSID has been viewed as a more neutral body than agencies such as the ICC,[16] which many LDCs believed gave undue weight to the preferences and interests of capital-exporting countries.

As of June 30, 1991, there were 106 signatories of the ICSID Convention, 95 of whom had deposited instruments of ratification. Conspicuously absent at its inception in the mid-1960s were Latin American countries who chose not to become signatories as a result of the Calvo Doctrine.[17] Nonetheless, the final draft of the Convention was specifically drafted to address, among other things, some of the particular concerns of the Latin American delegations and other potential members. For instance, joining ICSID is purely voluntary, and

14. ICSID Convention, *supra* note 7, art. 1.

15. *See* INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, ICSID BASIC DOCUMENTS (1985).

16. The ICC is represented by national committees in over fifty countries. Its arbitral body is the Court of Arbitration, whose members are nominated by the different ICC national committees and appointed by the ICC Council. Like the ICSID, the Court of Arbitration does not engage in arbitration itself; rather, arbitration takes place before separately constituted tribunals of arbitrators appointed by the parties or by the Court of Arbitration. The Court of Arbitration decides such issues as the confirmation of or challenges to appointed arbitrators, the approval of arbitral awards, and the fixing of fees and costs of the arbitration. David J. Branson & W. Michael Tupman, *Selecting an Arbitral Forum: A Guide to Cost-Effective International Arbitration*, 24 VA. J. INTL. L. 917 (1984).

17. The Calvo Doctrine, named after Argentine jurist Carlos Calvo (1824–1906), was adopted by Latin American states in the 19th century. The doctrine maintained that "aliens are only entitled to those legal rights and privileges enjoyed by nationals, and hence may seek redress for grievances only before local authorities and to the extent permitted by local law." Alden F. Abbott, *Latin America and International Arbitration Conventions: The Quandary of Non-Ratification*, 17 HARV. INTL. L.J. 131, 137 (1976). As a result, Latin American states held firmly to the position that "disputes involving a Latin state, including arbitrations to which a state is a party must be adjudicated in accordance with local law." *Id.*

states that ratify the Convention are not compelled to use ICSID arbitration. That obligation can arise only after the Contracting State concerned has specifically agreed to submit a particular dispute or class of disputes to ICSID arbitration. In other words, the decision of a State to consent to ICSID arbitration is a matter within the sole discretion of each Contracting State.[18]

In addition, the Convention provides that a Contracting State may notify ICSID of any class of disputes that it would not consider submitting to its jurisdiction[19] and a Contracting State may, as a condition of its consent to ICSID arbitration, insist that the parties exhaust local remedies first.[20]

Moreover, Article 42 provides for the application of those rules of law selected by the parties; in the absence of a choice-of-law clause, the law of the Contracting State, supplemented where appropriate by international law, will be applied. Finally, although Article 27 specifically forbids a Contracting State from providing diplomatic protection to one of its nationals in a dispute submitted for arbitration under the Convention, this prohibition would lapse if the opposing Contracting State failed to comply with the award rendered.

Despite the inclusion of these provisions in the initial draft of the Convention, the Latin American states remained more hesitant than other LDCs to ratify the Convention. This reluctance may have reflected a desire to wait and see how the Convention's rules would work in practice. Nonetheless, Costa Rica, El Salvador, and Paraguay became the first Latin American states to sign the Convention in 1981, followed in subsequent years by Argentina, Bolivia, Chile, Ecuador, and Honduras. This small contingent of Latin American signatories indicates the gradual acceptance of ICSID in the Latin American region.

18. Ibrahim F.I. Shihata, *Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA*, 1 ICSID REV. FILJ 1, 4 (1986).

19. ICSID Convention, *supra* note 7, art. 25(4). To date, only six countries have made use of such a provision, and of those, two have later withdrawn their ratifications under Art. 25(4). *See* Doc. ICSID 8 (July 1991).

20. ICSID Convention, *supra* note 7, art. 26. Only Israel has specifically included this clause in its ratification agreement (since withdrawn), although several other countries have included it in individual agreements. Shihata, *supra* note 18, at 11. In order to facilitate the use of this provision, the ICSID Secretariat has prepared the following Model Clause which could be used in the investment agreement:

> Before [name of investor] institutes an arbitration proceeding in accordance with the provisions of this Agreement, [name of investor] must exhaust [all local remedies] [the (following) (administrative/judicial remedies), unless (name of the host state) waives the requirement in writing].

ICSID Model Clauses, Ch. XVI, at 13, ICSID Doc. ICSID/5/Rev. 1 (July 1981).

C. *Jurisdiction*

The Centre's jurisdictional reach extends to any disputes between a Contracting State (or any constituent subdivision or agency of a Contracting State designated by that state to the Centre) and a national of another Contracting State arising directly out of an investment-related agreement, provided both parties have consented in writing to submit such a dispute to the Centre. The Convention does not define the term "investment," however. In practice this omission has enabled ICSID tribunals to accept jurisdiction over a wide range of activities, including construction contracts, licensing, and concession agreements, as well as purely manufacturing activities.[21]

Although utilization of ICSID began slowly—no cases were arbitrated in its first seven years of existence—the use of ICSID arbitration has accelerated in recent years.[22] In fact, fifty percent of all cases arbitrated by ICSID have been submitted in the last six years. Of the twenty-four arbitration cases brought to ICSID since its inception, twelve were settled or discontinued and ten resulted in awards on the merits. The remaining two cases resulted in awards based on subsequent annulments of the disputed agreements.

Consent to jurisdiction can take any form, as long as it is in writing. In addition to an ICSID clause expressly included in an investment agreement, the Centre may obtain jurisdiction over a dispute through provisions in certain investment treaties or national codes applicable to the disputed agreement. In particular, an ICSID Arbitral Tribunal may find it has jurisdiction over a particular dispute when the relevant investment treaty between the Contracting State and the investor's home state:

> (a) contains an unconditional undertaking to agree, at the investors' request, to submit the dispute to ICSID arbitration, regardless of the content of the relevant investment agreement;
>
> (b) provides for the possibility that investment agreements between the investor and the host country include an ICSID clause that still falls short of effective consent to ICSID arbitration; or
>
> (c) merely refers to the possibility that the parties might consent to ICSID arbitration or other form of settlement.[23]

21. Appendix 2 contains a complete list of arbitration/conciliation cases submitted to ICSID since its inception, indicating the wide range of its practical jurisdiction.

22. The initial delay in the use of ICSID's facilities probably was attributable in large part to the lag period between the consummation of an investment transaction and the development of a dispute arising from that agreement.

23. GEORGES R. DELAUME, TRANSNATIONAL CONTRACTS, APPLICABLE LAW AND SETTLEMENT OF DISPUTES, 14–15 (1990).

Other instruments, such as investment promotion legislation, may also be appropriate vehicles through which a Contracting State can consent to ICSID jurisdiction.

The interpretation of ICSID arbitration clauses in investment treaties or codes has been an important issue in several ICSID cases. For example, in *Southern Pacific Properties (SPP) (Middle East) Limited v. Arab Republic of Egypt*,[24] SPP entered into a Heads of Agreement with the Egyptian Minister of Tourism[25] for the creation of two tourist complexes, one of which was to be located at the Giza Pyramids. Pursuant to a joint venture agreement, the Egyptian Government agreed to secure title to the land, while SPP and EGOTH agreed to provide engineering, design, drawings, architecture, work, and financing. In December 1979, SPP and EGOTH entered into a "supplemental agreement" on project-specific matters that included a clause calling for arbitration before the ICC in Paris, as well as a provision providing that EGOTH's obligations were subject to the approval of the Egyptian Government. Following a dispute involving an alleged breach of contract, SPP instituted an arbitration proceeding before the ICC, and despite Egyptian objections to jurisdiction, was awarded $125 million. The Egyptian Government appealed to the Paris Cour d'appel, which overturned the award on the grounds that the Tribunal did not have personal jurisdiction over Egypt since the Government had merely "approved" the contract but was not a "party" to it.[26]

Subsequently, SPP sought enforcement in a Dutch court which sustained the tribunal's award under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[27] While Egypt appealed to the Amsterdam Court, SPP sought review with the Cour de Cassation in France. The Cour de Cassation confirmed the annulment of the ICC award and the Amsterdam Court deferred to the French decision.

Finally, SPP brought the case before ICSID on the grounds that Egyptian investment law provided for ICSID arbitration in the event of a dispute. The ICSID Tribunal upheld its own jurisdiction over the case and Egypt sought annulment of the interim jurisdictional decision. However, ICSID did not register Egypt's annulment application because annulment is only available for final awards. A challenge, therefore, would have to await the ICSID Tribunal's final decision,

24. ICSID Case No. ARB/84/3.

25. The Minister was acting on behalf of the Egyptian Government and the Egyptian General Organization for Tourism and Hotels [hereinafter EGOTH].

26. The Cour d'appel cited Sect. 1502 of the French Civil Code as the basis for its ruling.

27. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, June 10, 1958, New York, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter New York Convention].

which is now pending. Regardless of the final outcome, the SPP-Egypt case illustrates that ICSID may accept jurisdiction over a particular dispute despite the absence of a specific clause in the investment agreement conferring such jurisdiction.

D. Arbitration

Similar to most other international commercial arbitration systems, ICSID provides for an arbitral tribunal of any uneven number of arbitrators; the panels usually consist of three members. Each party, in the absence of a contrary agreement, appoints one member, with the third, the tribunal president, appointed by agreement of the parties.[28] ICSID maintains panels of arbitrators appointed by Contracting States (up to four each) and the ICSID Chairman (up to ten) who have been recognized for their competence in a particular field—law, commerce, industry or finance.[29] If they so choose, parties can also select an arbitrator from outside the panel.[30] The majority of arbitrators must be nationals of States other than the Contracting State party to the dispute, although an exception may be made when there is a sole arbitrator or where each member of the tribunal has been appointed by agreement of the parties.[31] Under ICSID rules a tribunal should normally be constituted within 120 days of the filing of a claim for arbitration. In practice, however, it took an average of eight to nine months from the date of registration to constitute the first eleven Tribunals. The delays were largely due to the parties' own procrastination.[32]

As indicated earlier, the ICSID Convention is flexible with respect to choice of law: disputes are to be settled according to the substantive law chosen by the parties or, in the absence of such a choice, under the law of the Contracting State party to the dispute supplemented by appropriate rules of international law. The tribunal, however, can decide *ex aequo et bono* if the parties agree.[33] By contrast, under the ICC and UNCITRAL rules, unless the parties agree otherwise, the tribunal determines the dispositive law to be applied to the merits of the case using the conflict of laws rules the tribunal deems appropriate.[34]

28. ICSID Convention, *supra* note 7, art. 37.

29. Unlike UNCITRAL and ICC, ICSID provides for substantive qualifications of arbitrators. *See* Branson & Tupman, *supra* note 16, at 926–27.

30. ICSID Convention, *supra* note 7, art. 40(1).

31. *Id.* at art. 39.

32. Branson & Tupman, *supra* note 16, at 925.

33. ICSID Convention, *supra* note 7, art. 42.

34. Branson & Tupman, *supra* note 16, at 930.

The ICSID Convention itself contains no rules of substantive law or rules of conduct, but ICSID's Convention and Arbitration Rules, which are probably as extensive as any other set of arbitration rules, constitute the *lex arbitri* for the tribunal and represent public international procedural law. "The contrast is thus between restraints imposed by international law on national procedures, on the one hand, and a procedural system governed entirely by public international law, on the other."[35] Thus, ICSID arbitration is "delocalized" and thereby avoids, at least in theory, potential interference from domestic courts. This practice has sometimes affected other arbitration mechanisms, but under Rule 39(5) the parties can request a juridical authority prior to or during the proceedings, to preserve their respective rights, as long as the right to request such an authority was included in the original agreement.

A further advantage of ICSID arbitration is its low cost compared to other "for profit" private arbitration institutions such as the ICC.[36] ICSID's fees are a function solely of time spent by the arbitrators working on the case, plus expenses.[37] In contrast, ICC fees are computed, in part, as a function of the amount in dispute. In this sense, ICSID arbitrators are often deemed to be providing a public service.

E. *Constraints on the ICSID System*

Although the finality provisions in Articles 53 and 54 of the Convention put ICSID in better position than other arbitral mechanisms to enforce its awards,[38] and the Convention provides only a limited role for domestic courts in its proceedings,[39] there have been a small number of cases in which domestic courts have misconstrued the Convention's provisions and thus hindered the arbitral process. One such case was *Maritime International Nominees Establishment (MINE) v. Republic of Guinea*,[40] where MINE successfully petitioned the U.S. District Court for the District of Columbia in 1978 to compel arbitration under Section 4 of the Federal Arbitration Act[41] and under the

35. Broches, *supra* note 10, at 89.

36. Interestingly, ICC fees accrue primarily to the arbitrators and not directly to the ICC.

37. ICSID fees for time spent by arbitrators is scaled at 600 SDRs per day.

38. Both the ICC and UNCITRAL rules rely on the enforcement mechanisms of Article V of the New York Convention. Article V provides seven different grounds upon which courts can refuse to enforce arbitral awards. Reliance on these mechanisms, therefore, can result in costly litigation.

39. For example, Article 54 provides for the recognition and enforcement of awards. In addition, if the parties so agree, they may have recourse to provisional measures such as pre-award attachment. ICSID Basic Documents, Rules of Procedure for Arbitration Proceedings, Rule 39(5).

40. ICSID Case No. ARB/8414.

41. 9 U.S.C. 4 (1976).

Foreign Sovereign Immunities Act (FSIA).[42] Despite the inclusion of an ICSID arbitration clause in the agreement, the court granted MINE's motion, ordering arbitration before the AAA. With Guinea remaining absent from the proceedings, the arbitral tribunal granted MINE an ex parte award of more than $25 million. When MINE sought to confirm the award, Guinea appeared for the first time and argued lack of subject matter jurisdiction. Despite Guinea's protests, the District Court, perhaps frustrated by Guinea's earlier absences, confirmed the award, in part, on the ground that by agreeing to ICSID arbitration, Guinea had implicitly consented to arbitration in the United States; Guinea, therefore, could be subject to AAA arbitration in New York.[43] This conclusion indicated a misunderstanding of Articles 26 and 62 of the ICSID Convention. Nevertheless, when it reversed the lower court ruling, the Court of Appeals for the D.C. Circuit, rested its decision on the narrow ground that Guinea enjoyed immunity from jurisdiction under the FSIA;[44] the appellate court did not correct the obvious misinterpretation of the Convention's provisions.[45]

Furthermore, in a recent breach of contract dispute between a Franco-Belgian company and the Republic of Senegal, the Paris Cour d'appel refused to enforce an ICSID award on the ground that such an adjudication was contrary to the principle of immunity under Article 55 and, therefore, against international public policy. This decision reflected a confusion of the requirements for the recognition of an award under Article 54(2) of the Convention and the provisions for execution of an award under Article 54(3). Immunity under Article 55 of the Convention arises only when the assets to be used to satisfy an award are not related to an economic or commercial activity of the State.[46] The plaintiff appealed the decision of the Cour d'appel on

42. 28 U.S.C. 1602–11 (1976).

43. *See* Maritime Int'l Nominees Establishment v. The Republic of Guinea, 505 F.Supp. 141 (D.D.C. 1981)

44. Martime Int'l Nominees Establishment v. The Republic of Guinea, 693 F.2d 1094 (D.C.Cir. 1982), *cert. denied*, 464 U.S. 815 (1983).

45. For a more detailed account of the MINE v. Guinea Case, see George R. Delaume, *ICSID Arbitration and the Courts*, 77 AM. J. INT'L L. 784 (1983).

46. As one scholar has noted:

> En statuant comme elle l'a fait, la Cour d'appel a méconnu le régime d'exception instauré par la Convention de Washington, quant a la reconnaissance et l'exécution des sentences arbitrales rendues dans le cadre de cette Convention, qui rend inapplicable le droit commun d'arbitrage des Etats contractants sur ces matières. En l'espéce, la Cour d'appel de Paris n'avait pas du appliquer l'article 1502 N.C.P.C. Au surplus, la Cour a méconnu la nature de l'exequatur en le qualifiant de mesure d'exécution. Dans les deux cas, la Cour n'a pa suivi sa jurisprudence antérieure.

Aron Broches, *Jurisprudence française: État du Sénégal clSentie, ès-qual. de liquidation de la société SOABI*, 1 REVUE DE L'ARBITRAGE: BULLETIN DU COMITÉ FRANÇAIS DE L'ARBITRAGE, 164, 169 (1990). For a briefer treatment of the case, see Emmanuel Gaillard, *The Enforcement of ICSID*

this ground and the Cour de Cassation reversed the lower court's ruling on June 11, 1991.[47]

A problem more troublesome than domestic court misunderstanding of the ICSID Convention, however, has been the annulment of Tribunal awards under Article 52 of the Convention. Section 1 provides five grounds upon which either party may request the annulment of an award:

> (a) that the tribunal was not properly constituted;
> (b) that the tribunal has manifestly exceeded its powers;
> (c) that there was corruption on the part of a member of the tribunal;
> (d) that there has been a serious departure from a fundamental rule of procedure; or
> (e) that the award has failed to state the reasons on which it is based.[48]

The strong language contained in these provisions, such as "manifestly exceeded" and "serious departure," suggests that the drafters intended Article 52 to be used only in unusual circumstances.[49] When faced with a valid request for annulment, the ICSID Chairman is required to appoint an ad hoc committee of three persons, none of whom can be a member or a co-national of a member of the original tribunal, to consider the request. This consideration does not constitute a review on the merits, and thus is not equivalent to an appeal. Annulments can be partial or total, but if the award is nullified by the ad hoc committee, then under the Convention either party may submit the dispute to a new Tribunal.

In its first sixteen years, ICSID handled nine arbitrations, three of which resulted in awards, and none involved a request for annulment. The first annulment request occurred in 1981 in *Klöckner v. United Republic of Cameroon*.[50] The case involved a joint venture established by Klöckner (fifty-one percent) and the Government of Cameroon (forty-nine percent) to construct and operate a fertilizer factory in Cameroon. Virtually all agreements between the two parties included an ICSID arbitration clause. The one exception was a management

Awards in France: The Decision of the Paris Court of Appeal in the SOABI Cases, ICSID REV.—FOREIGN INVESTMENT L.J. 69 (1990).

47. 1991 Bull. Civ. I, No. 913 P (not yet published).

48. ICSID Convention, *supra* note 7, art. 52(1).

49. Mark B. Feldman, *The Annulment Proceedings and the Finality of ICSID Arbitral Awards*, 2 ICSID REV. FILJ 85, 100–01 (1987).

50. Klockner Gmbh. v. United Republic of Cameroon, ICSID Case No. ARB/81/2; *see also* Jan Paulsson, *The ICSID Klockner v. Cameroon Award: The Duties of Partners in North-South Economic Development Agreements*, 1 J. INT'L. ARB. 145 (1984).

contract, signed several years after the other agreements that contained an ICC arbitration clause. Following a dispute over lack of performance, Klöckner sought ICSID arbitration to force the Government to pay in accordance with its guarantee. Cameroon counterclaimed for its own losses, citing the lack of management performance. Klöckner claimed the management issue was the proper subject of ICC arbitration.

The ICSID tribunal held that it had jurisdiction over all basic management obligations of the Contracting State because such obligations were included in the Basic Agreement setting out the scope of the project. Furthermore, the Tribunal held that, in the absence of a choice-of-law provision, the law of the Contracting State party applied. And, under Cameroon law, since the plant was located in the eastern part of Cameroon, French law controlled. Attempting to apply French law, the Tribunal held that Klöckner (a) had a duty to disclose to its joint venture partner and guarantor certain serious problems facing the factory; (b) had breached that duty; and (c) Klöckner's breach relieved Cameroon of the obligation of reciprocal performance (*exceptio non adimpleti contractus*).[51]

The Klöckner-appointed arbitrator wrote a strong, fifty-three-page dissent and, drawing on criticisms contained in that opinion, Klöckner applied to ICSID for nullification of the award under Article 52. The ad hoc committee formed subsequent to this application annulled the award, holding that the Tribunal:

> (a) had exceeded its powers by not actually applying French law and by deciding, instead, "*ex aequo et bono*" or by acting as "amiable compositeur";
> (b) had failed to state the reasons for its decision; and
> (c) had breached a fundamental rule of procedure.[52]

Since the entire award was nullified, the parties resubmitted the case for de novo arbitration by a second Tribunal. The second Tribunal rendered an award[53] which again was challenged by both parties. This challenge led to the appointment of a second ad hoc committee to review the award. On June 4, 1990, nine years after commencement of the first Tribunal proceedings, the committee confirmed the award of the second Tribunal.

51. *Klöckner v. Cameroon, Decision of the Ad Hoc Committee, reprinted in* 1 ICSID REV. FILJ 139 (1986).

52. *Id.* at 93–118.

53. This award was not publicly known since it could not be published by ICSID without the consent of both parties. (Other entities, however, could have published the award). ICSID Basic Documents, Jan. 1985, Art. 48(5).

Were this the only case of its kind, its significance would be minimal. However, the very next ICSID case, *AMCO v. Republic of Indonesia*, also involved an annulment proceeding and resulted in a partial annulment.[54]

The dispute arose over an agreement, which included an ICSID arbitration clause, between a U.S. foreign investor (AMCO) and a local Indonesian organization linked to the Indonesian Army. The agreement related to a joint venture to construct and manage a hotel in Jakarta, Indonesia. Indonesian dissatisfaction with AMCO's fulfillment of its obligations under the contract led the Indonesian Army to seize the hotel and expel AMCO from its management position. AMCO brought the dispute to ICSID. A Tribunal unanimously awarded AMCO damages of $3.2 million plus interest, holding that: (i) interference with property violated due process and international law; and (ii) the license revocation constituted a breach of contract under both Indonesian and international law.[55]

An ad hoc committee established at the request of Indonesia partially annulled the award on the grounds that: (i) the Tribunal had manifestly exceeded its powers under Article 52(1)(b) by misapplying Indonesian law, construing the AMCO loan as equity and not accepting a Bank of Indonesia certification of the amount invested as conclusive evidence; and (ii) that, under Article 52 (1)(e), the Tribunal had failed to state the reasons for the amount of damages awarded. Although the Committee did not nullify the entire award, the final result resembled that in Klöckner in that a new Tribunal constituted on AMCO's request for reconsideration eventually reinstated the full award.

Except for the partial annulment in *MINE v. Guinea*, however, there have been no additional annulment proceedings since *AMCO*. (See Appendix 2). Although the ready manner in which a new committee of arbitrators may set aside an award rendered by a prior ICSID Tribunal can make the resolution of disputes under the ICSID Convention less final, a Tribunal's mistake of law or fact is not sufficient to justify the annulment of an award. Similarly, a party cannot obtain an annulment solely on the grounds that the reasons stated in an award do not adequately support its conclusions. Inadequate reasoning may conceal, or even disclose, a flagrant error of law but it does not establish a manifest excess of power nor a failure to state reasons for an award.[56]

A recent article by Professor Michael Reisman contains a more critical analysis of ICSID annulments, as well as a more radical suggestion for reform.[57] Reisman suggests that ad hoc committee members should:

> (a) restrict the grounds for nullification to those explicitly set out in Article 52(1);
> (b) use a material violation rather than a technical discrepancy approach, although this change might require an amendment to Article 52 of the Convention, which would in turn require unanimous agreement by all Contracting States;
> (c) where possible, reconstruct a Tribunal's reasoning; and
> (d) when it appears that an award is a compromise, adopt a more flexible approach to the absence-of-reasons ground for annulment.[58]

Professor Reisman also recommends that "second generation" Tribunals adopt a broad and inclusive concept of res judicata with respect to the findings of an ad hoc committee in order to ensure that only the "tainted" portion of an award is actually reviewed.[59]

Although such recommendations are worthy of consideration, they may be difficult to implement because of the desired independence and diverse composition of ICSID Tribunals and ad hoc committees. Moreover, any assessment of ICSID's annulment experience must be viewed in a proper perspective. To date, only five ICSID arbitral awards have prompted requests for annulment.[60] Of the other four proceedings, the first resulted in a total annulment of the challenged award, the second and third led to partial annulments, and the fourth proceeding resulted in rejection of the annulment request and an upholding of the award in its entirety. It should be noted that two disputes account for four of the five annulment requests and the fifth has been amicably settled by the parties since the rendering of the partial annulment decision.[61] Thus, overall, the annulment procedure has been invoked in respect to only three disputes, two of which have been definitively disposed of through a final award or settlement.

54. AMCO Asia Corp. v. Republic of Indonesia, ICSID Case No. ARB/81/1. Excerpts from the award are reprinted in 24 I.L.M. 1022 (1985).

55. Feldman, *supra* note 49, at 94–95.

56. *Id.* at 97, 99, and 109.

57. W. Michael Reisman, *The Breakdown of the Control Mechanism in ICSID Arbitration*, 4 DUKE L.J. 739 (1989).

58. *Id.* at 788–97.

59. *Id.* at 798–803.

60. See Appendix 2. The most recent annulment proceeding is, at the time of writing, still pending.

61. The first and fourth proceedings related to the same dispute (*Klöckner v. Cameroon*), as do the second proceeding and the one still pending (*AMCO v. Indonesia*). In addition, in the dispute that gave rise to the third annulment proceeding, *MINE v. Guinea*, *supra* note 40, an ad hoc committee annulled a damage award of $12.3 million against Guinea while upholding the breach of contract finding which resulted in a resubmission proceedings by MINE. The parties finally settled their dispute amicably in 1990. Among the interesting features of that annulment decision was its adoption of a narrower view of the annulment procedure than that expressed in the first *Klöckner v. Cameroon* annulment proceeding.

Moreover, since the registration of the first of the above three disputes, arbitration proceedings in nine subsequent ICSID cases have resulted in awards or amicable settlements without annulment requests, bringing to eighteen the number of ICSID arbitrations so concluded.

This record has created confidence in the ICSID system, with seven new signatories joining the Convention in fiscal 1991. In terms of membership, ICSID has exceeded all other arbitration treaties. In addition, the frequency with which ICSID arbitration clauses are included in investment laws and treaties as well as in individual investment agreements further illustrates ICSID's growing stature among investors and host countries.

It would be unwise, however, to conclude that the confidence in ICSID exists *despite* the annulment procedure. Rather, the procedure is an important part of the ICSID system, which might otherwise be called into question if it offered no guarantee against procedural injustice.

F. *Assessment*

Taken as a whole, ICSID's record of dispute resolution is quite positive. The use of ICSID clauses has become widespread in BITs, national investment laws and codes, and individual agreements. It serves both as a "prevention" of disputes and as a vehicle for settlement.[62] In addition, when ICSID arbitration machinery has been used, both investors and host governments have been on the "winning" and "losing" sides of awards, occasionally at the same time. A number of the disputes have involved "North/North" and "South/South" combinations rather than the traditional "North/South" configuration, and complaints have been brought by host governments as well as investors. Thus, although it is difficult and even unrealistic to measure the impact of ICSID based on the level of use of its arbitration machinery, the significance of ICSID is increasing, probably because it provides both investors and Contracting States with an impartial, low-cost repository of dispute resolution expertise. This impact is illustrated by the increasing frequency with which investors and host governments cite ICSID as their preferred mechanism of dispute resolution.

62. In 1978 ICSID also established an Additional Facility to deal with (i) investment disputes in which one party is *not* a Contracting State or national; (ii) disputes that do not arise directly out of an investment, provided that at least one party is a Contracting State or national of such state; and (iii) fact-finding proceedings. This facility has not yet been used in actual proceedings but is included in some individual agreements, treaties, and investment laws.

II. POLITICAL RISK INSURANCE AND THE ROLE OF MIGA

A. *Background*

The establishment of a multilateral investment insurance scheme under the auspices of the World Bank was first proposed in 1948, the same year that the U.S. government launched a national investment insurance program as part of its effort to rebuild Western Europe.[63] It was another 40 years before the World Bank created the Multilateral Investment Guarantee Agency (MIGA), and in the meantime, the United States, as well as nearly all major capital-exporting countries, developed sophisticated national investment insurance programs. These programs were supplemented by the emergence of a private political risk insurance market concentrated in the United States and the United Kingdom.[64] By the 1980s national and private risk insurance programs had outpaced the World Bank's initial low-key attempts, and raised doubts about the utility of an "additional" organization like MIGA.

This section of the Article will examine the origins and experiences of the national investment insurance programs, with a focus on the U.S. Overseas Private Investment Corporation (OPIC), Germany's Treuarbeit, and the Japanese Export Insurance Division, Ministry of International Trade and Industry (EID/MITI). Together, these organizations represent over eighty percent of all outstanding national insurance coverage.[65] The Article will also review the growth of the private risk programs and their ability to complement national programs, and assess MIGA's potential advantages within this framework and its possible future share of the political risk insurance market. Finally, the Article will analyze MIGA's strengths and weaknesses, its impact on the investment climate in LDCs, its early operational results, and its potential synergistic relationship with ICSID.

63. For an exhaustive treatment of the origins and operations of MIGA, see SHIHATA, MIGA AND FOREIGN INVESTMENT—ORIGINS, OPERATIONS, POLICIES AND BASIC DOCUMENTS OF THE MULTILATERAL INVESTMENT GUARANTEE AGENCY (MIGA) (1988).

64. During the 1960s a group of Arab states drafted the only regional political risk insurance scheme, the Arab Investment Guarantee Corporation. *See* Ibrahim F.I. Shihata, *Arab Investment Guarantee Corporation—A Regional Investment Corporation*, 6 J. WORLD TRADE L. 185 (1972).

65. *See* Appendix 3 for a summary of the relative size of the national insurance programs that are members of The International Union of Credit and Investment Insurers (the Berne Union). The Berne Union, which includes virtually all major programs, is an association of public export-credit and investment insurers which facilitates the exchange of information among its members. The countries in the Berne Union include all members of the Development Assistance Committee of the OECD, as well as Korea and India.

B. National Insurance Programs

Appendix 3 summarizes the stock of investment in LDCs insured by Berne Union members from January 1987 to December 1989 and the annual increments in those stocks.[66] The Berne Union covers close to $17 billion in investments. The largest insurer is Japan which covers $7.8 billion in investment (46% of the total), followed by the United States, which covers $4.3 billion (26%), and Germany, which covers $2.0 billion (12%). Although it is difficult to measure levels of coverage, rough estimates suggest that only about 10% of foreign investment in LDCs enjoys investment insurance.[67] In fact, studies based on interviews with investors reveal that only a minority consider insurance essential to proceed with a project.[68]

C. Comparing National Programs

As indicated in Appendix 4, the three largest national political risk insurance programs share many common features but differ in significant ways. The inherent limitations of these programs, as well as restrictions imposed by their sponsoring governments, have fostered the growth of a private insurance sector and have left a role for MIGA to play.

1. Eligible Investors

All national programs require that the investor have some relationship with the sponsoring country. OPIC has imposed the most restrictive conditions. It requires that U.S. citizens or corporations be the beneficial owners of a substantial share of "domestic" corporations, and that ninety-five percent of "foreign" corporations, defined as those incorporated or having principal offices outside the United States, be

66. Due to statistical variations between countries, exchange rate fluctuations, and definitional differences concerning investment, one should analyze the data with caution.

67. The data for 1989 reflects the low level of coverage: as indicated in Appendix 3, national insurance programs accepted $2.2 billion in investments for coverage, while, as noted in Appendix 1, estimates indicate that FDI totaled $22 billion. Other surveys have indicated similar results. *See, e.g.*, Jürgen Voss, *The Multilateral Investment Guarantee Agency and its Relationship to the National Investment Insurance Schemes*, (June 1983) [available from MIGA].

68. Results of a U.S. study summarized in *Study of a Joint Africa, Caribbean, Pacific/EEC Investment Insurance and Guarantee System*, (January 1988), an internal report sponsored by the Berne Union and the European Community ("Berne Union Study"). According to the study, fewer than 25% of U.S. investors believed that political risk insurance coverage made a difference in their decision to invest. The investors' responses, however, varied widely by host country and type of project. They generally perceived natural resources and energy projects to be riskiest. Moreover, such studies do not take account of changes in potential investment arising from the emergence of market economies in Eastern Europe.

owned by U.S. nationals.[69] The German program (Treuarbeit) includes a German-domicile requirement. As a result, an investment by a U.S. subsidiary of a German company may not be eligible for coverage under either the U.S. or German programs. Similarly, Japanese companies incorporated in the United States are not eligible for Japanese coverage and U.S. companies that have been acquired by Japanese buyers are no longer eligible for OPIC coverage.

2. Eligible Investments

All three programs provide coverage for equity investments that can take the form of cash or machinery and equipment for "new" projects. "New" projects include the expansion, modernization or restructuring of existing enterprises. Moreover, all three programs provide coverage for debt-equity swaps, insuring the resulting equity of the converted debt. OPIC covers a wide variety of investments, including leases, licensing, and technical assistance agreements. Treuarbeit, however, restricts its coverage to equity and shareholder loans. EID/MITI is unusual in permitting coverage for loans to projects in LDCs to exploit raw materials that Japan would import under long-term supply arrangements, although OPIC offers similar coverage in a broader perspective.

Unlike the other two major coverage programs, OPIC specifies a large number of additional investment criteria that it will consider when deciding whether to extend coverage.[70] These factors include environmental impact, balance of payments and employment effects in the United States, and the size of the enterprise. OPIC's coverage also tends to emphasize small businesses as a priority target group. Because potential investors may never request OPIC coverage, it is difficult to estimate the restrictive effect of these statutory constraints. It is almost certain, however, that the limitations have restricted the scope of OPIC's coverage, especially in import-sensitive industries such as textiles, footwear, citrus, and autos.

3. Eligible Host Countries

EID/MITI and Treuarbeit require no specific eligibility tests other than requiring that the host country approve the project. For Treuar-

69. Overseas Private Investment Corporation Act of 1969, 22 U.S.C. §§ 2191–99 (1970). Administration of the guaranty program was officially transferred to OPIC from the Agency for International Development (AID) on January 19, 1971 by Exec. Order No. 11,579, 3 C.F.R. 536 (1971–1975), *reprinted in* 22 U.S.C. § 2191 (1988). For a complete discussion of the origins and background of the OPIC Program, see Steven Franklin and Gerald T. West, *The Overseas Private Investment Corporation Amendments Act of 1978: A Reaffirmation of the Developmental Role of Investment Insurance*, 14 TEX. INT'L L.J. 1 (1979).

70. 22 U.S.C. § 2191.

beit, the host country must also offer adequate legal protection, such as the availability of a BIT. OPIC, however, also requires that countries observe human rights and internationally-recognized workers' rights, and generally supports only "friendly" LDCs that have a per capita income below $3,881.[71] Compared to the administrative restrictions on eligible investments noted earlier, these host country restraints have had a negligible impact on the demand for coverage.

4. Scope of Risks Covered

Typically, national insurance programs provide coverage for three major political risks: expropriation, war and revolution, and currency inconvertibility.[72] Providing insurance against expropriation was originally OPIC's most important function. Iranian claims in the early 1980s, however, have been virtually the only recent expropriation claims. Moreover, instead of outright nationalization problems, the more recent expropriation claims concern "creeping expropriation," that is, expropriation through a series of acts that could be considered illegal, but which, when taken separately, look like benign administrative decisions or measures adopted for health, safety, or welfare reasons rather than for purposes of confiscation.[73]

Until recently a fourth category of risk insurance, covering breach of contract, was not available except as a special subset of expropriation coverage or in other limited circumstances. In the past year, however, EID/MITI has signalled its willingness to enter this field of coverage, perhaps encouraged by the creation of MIGA. The Japanese program now covers loss caused by a breach of a contractual obligation of a host government where one of the following events have occurred: (a) incapability of continuation of business; (b) bankruptcy or similar causes; (c) suspension of transactions by banks or other similar causes; or (d) suspension of business operations for over six months.[74] The

71. 22 U.S.C. § 2191A. Since 1987, OPIC has suspended its programs in the Central African Republic, Chile, China, Nicaragua, Paraguay, and Romania because of human or workers' rights violations. OVERSEAS PRIVATE INVESTMENT CORPORATION 1989 REPORT, at 13–14. A number of these suspensions, however, are currently under review because of recent political changes.

72. For details, see Appendix 4.

73. According to one scholar, this trend appears attributable to at least three factors. First, the majority of LDC governments compete with each other to attract foreign investment and are reluctant to undertake actions that would cause concern about the foreign investment climate in their countries. Second, LDC governments have learned that they can use measures less drastic than expropriation to accomplish their political or economic objectives. Outright nationalization can hurt a country's standing in the international financial system and make it less attractive as an investment target. Third, international investors tend to form more varied and complex kinds of cooperative relationships with host governments and nationals than were common in previous eras. Robert B. Shanks, *Insuring Investment and Loans Against Currency Inconvertibility, Expropriation, and Political Violence*, 9 HASTINGS INT'L & COMP. L. REV. 417, 424–25 (1986).

74. From an internal Berne Union study of breach of contract coverage.

success of this coverage with private insurers is uncertain, given the difficulty in distinguishing commercial from political risk and the need to exhaust local remedies first.

5. Amount and Duration of Insurance

Sponsoring governments have imposed a variety of restrictions on their national investment insurance programs. The three major programs, for example, almost invariably limit coverage to a maximum of ninety percent of the total investment, although Treuarbeit can cover up to ninety-five percent in certain circumstances.[75] OPIC and, to a lesser extent, EDI/MITI also face country and project limits, thereby enhancing the attractiveness of coinsurance and reinsurance.[76] However, a recent comprehensive study of all the European national insurance programs concluded that, despite the lack of exposure constraints and attractive premium rates, demand fell far short of "capacity" in some countries.[77] The low level of demand may reflect both the lack of publicity of the European programs, as well as a genuine lack of demand for their products. With respect to duration, all programs offer long-term coverage in the fifteen-to-twenty-year range. Except for OPIC, nearly all national programs tend to concentrate their investment coverage in key countries or regions where they have special relationships or interests. For example, in Fiscal Year 1989, Asia accounted for eighty-two percent of EID/MITI's program, while as of March 31, 1990 Indonesia accounted for thirty percent.[78]

6. Cost of Insurance

There is a wide disparity in the premium rates offered by the national programs. Not surprisingly, OPIC charges the highest rates—about 1.5% for all three major risks, including standby coverage—because it is required to be self-sustaining. Most other national programs receive government subsidies and, as a result, offer lower rates. Treuarbeit's program, for example, offers the package of three risks at 0.5%, while EID/MITI's package ranges from 0.55% to 1.75%, depending upon the host country. Nevertheless, despite its higher rates and other legal constraints, OPIC continues to do a substantial

75. Appendix 4 describes the various exposure limits placed on the three major national programs.

76. OPIC commonly offers, for example, insurance commitments equal to 270% of the original investment, of which 90% represents the investment itself and 180% is a "standby" commitment to cover earnings or interest as accrued. *See* OPIC INVESTMENT INSURANCE HANDBOOK.

77. *See* Berne Union Study, *supra* note 68, at 34.

78. Unpublished EID/MITI data.

amount of underwriting, and accepted $683 million in new investments for coverage in 1989. This reflects OPIC's "global" orientation and the flexibility with which it defines eligible investments.

7. Indemnification and Recoveries

All of the major national insurance programs spell out the basis upon which they will compensate investors and provide for the subrogation of the rights of the insurer with respect to the host country. OPIC, with by far the longest experience in the field, had settled 238 claims involving some $478 million by September 30, 1990, including approximately $107 million in Chilean claims inherited from AID during the Allende regime. Of that total, $322 million represented cash payments by OPIC, $142 million represented host government obligations to investors guaranteed by OPIC, and $14 million reflected OPIC's indemnification of two investors against loss. OPIC has denied only twenty-two claims, and of these, only seven have gone to arbitration.[79] OPIC's record is commendable given the large size of the organization's portfolio, $4.4 billion under cover at the end of 1989, and the fact that its largest claims concerned coverage on investments in Chile for which OPIC was not directly responsible.[80]

OPIC's enviable claims record can be traced to two primary factors: (a) the full-faith-and-credit backing of the U.S. government; and (b) OPIC's salvage abilities, whereby it can arrange "three-way settlements with investors and host governments, by guaranteeing host government obligations, by pursuing subrogated rights against the government, and, . . . by disposing of locally blocked currency."[81] Although OPIC has never had to resort to international arbitration under a subrogation arrangement, the availability of this option probably has encouraged the early resolution of disputes. Such subrogation arrangements are contained in special procedural agreements between OPIC and the host country. For example, despite Latin America's historical hostility to legal arrangements that deprive the host country's judicial system of jurisdiction, in the 1980s OPIC concluded a large number of such agreements with Latin American countries, including Chile, Ecuador, Uruguay, Bolivia, Argentina, and Venezuela. Over time, such agreements have included more narrowly drafted subrogation clauses to improve their acceptability to host governments. Recently, under a special agreement between OPIC and Venezuela, submission to a tribunal was made "subject to the principle of prior exhaustion of appeals and administrative and judicial remedies available in Venezuela."[82]

79. OPIC Press Release, *Insurance Claims Expertise to Date: OPIC and Its Predecessor Agency*, Sept. 30, 1990.

80. Those results prompted Congress to consider gradually privatizing OPIC to ensure that it would not become a liability to the taxpayer. Congress eventually shelved this proposal in the late 1970s because it became clear that the private insurance sector was unwilling to assume risks on the same terms and conditions that OPIC offered. Moreover, OPIC was generating a positive cash flow, thereby proving itself capable of managing an effective program of political risk insurance without direct government support.

81. SHANKS, *supra* note 73, at 430.

D. *Private Political Risk Insurance Market*

The U.S. private sector's entry into the modern political risk insurance market dates from the early 1970s when Congress ordered the privatization of OPIC's underwriting activity so that the organization would eventually confine itself to a reinsurance role. Congress deemed the experiment,[83] which lasted until 1978, a failure and concluded that the commercial rather than developmental orientation of the program undermined some of OPIC's basic objectives. Congress still hoped, however, that the private sector would provide reinsurance for OPIC's underwriting activity in order to spread risks.

Despite what the U.S. government perceived as the mixed initial record of the private insurance sector, the private market has continued to grow. According to some estimates it amounts to approximately $200–350 million in annual premiums,[84] concentrated largely in the United States and the United Kingdom.[85] In addition, because private insurers apply only business judgments, these organizations have much greater freedom than national programs to choose what they will cover, particularly with respect to eligible investors and countries. Nonetheless, the private market offers a broad range of insurance coverage. It concentrates on covering losses resulting from confiscation, expropriation, and nationalization. It also protects, to a limited extent, against currency inconvertibility and political violence, primarily underwriting physical damage to mobile assets. Political violence insurance, however, excludes war between the world's major powers or between the country of the investor and the host country.

82. Investment Incentive Agreement Between the Government of the United States of America and the Government of Venezuela, June 22, 1990, U.S.-Venez., Temp. State Dept. No. 90-184, art. 6(b).

83. The program included the formation of the Overseas Investment Insurance Group (OIIG) in 1975, which consisted of Lloyds of London, seven private U.S. insurance companies and OPIC.

84. The major participants in this market include Lloyds of London, American International Group (AIG), Citicorp International Trade Indemnity (CITI), Professional Indemnity Association (PIA, New York), Pan Financial (London and New York), Chubb Group (New Jersey), and Poole d'Assurance des Risques Internationaux et Speciaux (P.A.R.I.S.). In 1990, Manufacturers Hanover Trust established a Bermuda-based operation.

85. Accurate data are not available because of "moral hazard," whereby insured parties would lose their coverage the moment they disclosed its existence.

Private insurers, however, operate under certain practical constraints. First, the private market only offers terms between one to three years. Although private insurance policies can be rolled over, the rollover does not happen automatically. This results in a partial reduction, but not complete elimination of the private market's ability to reinsure national programs. Second, private market fees are substantially higher than those of national programs. In some cases these charges can be as much as seven percent for coverage of high-risk country and project investments. Despite the high rates, the fact that the private insurance market continues to flourish suggests that there are a number of investors who fall outside the eligibility criteria of their national programs. Moreover, private insurers have been creative in developing highly specialized "manuscript" coverage which protects against unusual risks such as changes in the government policy in the investor's home country. Finally, the private market has traditionally covered trade as well as investment insurance activities.

Underwriting limits for private firms range from Chubb's $5 million ceiling to Lloyds maximum of $200–250 million per risk. Private underwriting limits can thus compare favorably with those offered by either OPIC ($100 million) or MIGA ($50 million per project). However, there should be scope for reinsurance involving national or multinational programs.

There is no publicly-available information on the claims record of the private insurance market. Its commercial orientation and the fact that its rate levels and differentiation are better than most national programs, particularly some of those in Europe that have not been self-financing, however, indicate that it is profitable.

E. MIGA's Role and Main Features

1. Origin

Although the international community, including the World Bank, actively considered the notion of a multilateral investment insurance agency in the late 1960s, no such agency materialized until twenty years later. In the intervening period, other devices to improve the investment climate in LDCs were launched. The International Finance Corporation (IFC), a member of the World Bank Group specializing in the promotion and financing of the private sector, gradually expanded. In addition, the World Bank created ICSID. Corporations and governments also created national and private investment insurance programs. Thus, in the twenty years during which commentators and policymakers debated the merits of a MIGA-type agency, separate institutions evolved that filled, at least partially, many of the needs

that such an agency would have met. In fact, the delay had less to do with arguments over the need for an effective multilateral insurance agency than with reconciling the widely divergent views of developed and developing countries as to how such an agency would function.[86]

MIGA came into existence on April 12, 1988 with ratifications by the United States and the United Kingdom.[87] The Convention established a juridical personality for MIGA separate and independent from that of the World Bank. One of MIGA's basic objectives is

> to enhance the flow to developing countries of capital and technology for productive purposes under conditions consistent with their development needs, policies, and objectives, on the basis of fair and stable standards for the treatment of foreign investment . . . [by] complementing national and regional investment guarantee programs and private insurers of non-commercial risk.[88]

Thus, the Convention designed MIGA to facilitate investment flows by *complementing* existing institutional arrangements. Any assessment of its effectiveness, therefore, must examine MIGA's "gap-filling" potential and the extent to which it can prompt existing institutions to be more active.

2. Ownership and Voting Arrangements

One of the innovative features of the MIGA Convention was the unusual, at least for the World Bank Group, arrangements it provided for voting rights. Under the terms of the Convention, both home and host countries would receive equal voting power when all members of the World Bank became members of MIGA.[89] During the first three years of MIGA's existence, each category of countries was entitled to additional votes to maintain a minimum forty percent of the total voting power. All decisions of the Board of Directors were to be taken by special majority (two-thirds of the total votes representing not less

86. For a detailed treatment of the negotiations that led up to the establishment of MIGA, see Shihata, *supra* note 63, at 31–99.

87. The MIGA Convention required, before enactment, that at least five signatories from Category One (developed countries) and at least fifteen from Category Two (developing countries) ratify the Convention. In addition, these signatories together had to account for at least one-third of MIGA's authorized capital. MIGA Convention, *supra* note 9, art. 61(b).

88. *Id.*, Preamble.

89. As of April 1991, 100 states had signed the Convention (17 from Category One and 83 from Category Two) representing 83.5% of the authorized capital. Of the signatories, 78 states, representing 75.2% of the authorized capital, had ratified the Convention. Of special interest is the fact that MIGA has attracted interest in Latin America, where ten countries have already signed the Convention (Argentina, Bolivia, Brazil, Chile, Costa Rica, Ecuador, El Salvador, Nicaragua, Peru and Uruguay). Three of these countries, Argentina, Chile, and Ecuador, have already ratified it.

than fifty-five percent of capital subscriptions).[90] The Convention called for a reallocation of shares after the first three years to attain parity before additional countries could join. This voting arrangement provided a strong incentive for developing countries to participate. At the same time, it ensured that subsequent claims on the Agency were reasonable, or that when claims were instituted, the appropriate dispute resolution measures were implemented.

3. Eligibility of Investor

Unlike all the national programs, the Convention does not restrict eligible investors other than to require that the investor be a national of a member country who operates on a commercial basis.[91] MIGA stands to fill a certain market niche, given the number of juridical persons that may not be eligible for coverage by any national program, and because national investment insurance programs do not yet exist in many countries. Moreover, the Convention also provides that nationals of host countries could be eligible in cases of reverse capital flight where assets invested are transferred from outside the host country.[92]

4. Eligible Investments

Aside from specifying the inclusion of equity interests, as well as medium and long-term loans made or guaranteed by the equity holder, the Convention deliberately left open the definition of investment.[93] The Convention relegated the responsibility of defining "investment" to the Board of Directors, which by special majority decided on the other eligible forms of investment. One can probably assume a level of flexibility in defining the term, at least equal to that shown by OPIC, rather than the more narrow definition applied by the European programs.

5. Eligible Risks

In addition, though the Convention resembles national programs in terms of risks covered—currency transfer, expropriation, and war and civil disturbance—it differs in two important respects. First, the Convention restricts its expropriation coverage by excluding "non-

90. MIGA Convention, *supra* note 9, arts. 3(d), 39(b), and 39(d).
91. *Id.*, art. 13(a).
92. *Id.*, art. 13(c). The Convention also provides for a sponsorship program whereby a sponsor country would guarantee an investment made by an investor of any nationality for which premiums would be held in a separate Sponsorship Trust Fund. The sponsoring member would be liable on a pro rata basis in the event of a default. *Id.*, Appendix 1.
93. *Id.*, art. 12(a).

discriminatory measures of general application which governments normally take for the purpose of regulating economic activity in their territories."[94] This provision reflects a sensitivity to LDCs that may wish to regulate economic activity on a non-discriminatory basis without being accused of engaging in "creeping" expropriation. Second, [redacted]. This coverage was not available in national programs until recently.[95] The coverage is predicated on the exhaustion of local remedies in a timely fashion or the lack of enforceability of such a remedy.[96] Nevertheless, the extent to which MIGA will actively solicit this kind of business is unclear, since it approximates the category of commercial risk sufficiently to cause interpretation problems should disputes arise.

6. Guarantee Capacity and Coinsurance and Reinsurance

Like the national investment programs, MIGA is subject to certain exposure limits to safeguard its creditworthiness. These limits accentuate the need for both MIGA and the national programs to consider coinsurance and reinsurance possibilities. Such plans would increase the size of projects they would underwrite together or would reduce their individual exposure in a project or country.[97] At present, MIGA's guarantee authority is limited to 150% of its unimpaired subscribed capital and reserves, including a portion of reinsurance coverage to be determined by the Board.[98] In addition, MIGA's Operational Regulations[99] specify that reinsurance limits should not exceed twenty-five percent of its guarantee capacity. As an interim measure, underwriting authority for individual investment projects would be limited to five percent of MIGA's total capacity to issue guarantees (roughly $50 million). Within these constraints, collaboration with national investment insurance programs, at least in the early years, is forseeable, particularly for larger investment proposals.

MIGA also provides for cooperation with private risk insurers,[100] although given the disparity in maturities, fees, and commercial orientation, it remains to be seen how quickly this cooperation will

94. *Id.* at art. 11(ii).
95. As mentioned earlier, EID/MITI, perhaps in response to the MIGA initiative, has begun to offer such programs.
96. *Id.* at art. 11(a)(iii).
97. *Id.* at arts. 19, 20.
98. *Id.* at art. 22(a). This limit could be increased to 500% upon the decision of MIGA's Council of Governors, composed of one Governor (usually the Minister of Finance) from each member country.
99. *Operational Regulations*, MIGA Secs. 3.51-.60 (as amended Jan. 25, 1989).
100. MIGA Convention, *supra* note 9, at art. 21.

develop. At a minimum, private risk insurers would reinsure MIGA since MIGA cannot rely on private markets with a purely commercial orientation to meet its eligibility standards. An additional complication in dealing with the private sector is that MIGA requires three to four months to process an investment application.[101] The private sector can underwrite insurance in a matter of days. Finally, in a private transaction, both parties are sworn to secrecy, whereas MIGA must disclose at least some information on every project to its Board, which has representatives from many countries of the world. Concerned with this discrepancy, the board recently decided that Directors could receive confidential information provided they signed a secrecy agreement.

7. Cost and Duration of Insurance

Like OPIC, MIGA is expected to be self-sustaining in its operations. Its premium rates are similar to those of OPIC, but they exceed the rates charged by other national political risk insurance programs. For example, MIGA's rates for a package of coverage (the three basic risks excluding breach of contract) would be 0.5% for currency transfer, 0.6% for expropriation, and 0.45% for war and civil disturbance. These rates represent percentages of the total insured amount with standby coverage for an additional 0.25%, 0.30%, and 0.20% respectively.[102] The duration of the guarantee is to be not less than three years nor more than fifteen years, but it can be extended to twenty years in special circumstances. Moreover, the insured can terminate a contract three years after its inception and thereafter at each anniversary date.[103]

8. Settlement of Disputes

The MIGA Convention anticipated four different types of disputes that would require established settlement procedures:

(a) disputes over interpretation and application of the Convention between a member and the Agency;

101. The delay in MIGA's processing is due in part to the requirement that all projects be submitted to its Board and that the Board concur in all underwritings over $25 million.

102. *See* MIGA—Premium Rates. Thus, a $1 million manufacturing investment with a 90% guaranteed percentage and a maximum insured amount of three times the original investment (3 x $1 million x 90% or 270%) would cost $32,950 in year 1 for currency transfer, expropriation and war and civil disturbance. Standby coverage is the additional capacity available to the insured to cover, among other things, increases in book value due to retained earnings on capital investments phased in over several years.

103. *Operational Regulations*, MIGA at Secs. 2.04.–.05 (June 22, 1988 as amended Jan. 25, 1989).

(b) disputes arising under a contract of guarantee or reinsurance between the Agency and the other party;
(c) disputes between the Agency as subrogee of an investor and a member; and
(d) disputes other than those under (a), (b) or (c) between the Agency and a member or former member.[104]

The Convention provides mechanisms to resolve each type of dispute. As in other international financial institutions, the Board of Directors settles disputes over interpretation and application of the Convention, although the parties retain a right of appeal to the Council of Governors.[105] Disputes between MIGA and its insured arising under a contract are settled through arbitration in accordance with the rules agreed upon by the parties in the contract. Standard contract guarantees call for arbitration under ICSID rules.[106] The rules also stipulate that the tribunal must make every effort to ensure that any award is legally enforceable,[107] provided the insurance contract contains such provisions.[108] In addition, the rules contain provisions for reinterpretation, correction, and supplementary decisions within forty-five days of the award by the *same* tribunal.[109]

When the Agency acts as subrogee of the investor in a dispute with a member country, the Convention calls for negotiations and conciliation, failing which arbitration under ICSID rules would follow.[110] If there were a delay in the appointment of one or more arbitrators beyond 60 days, those not selected could be appointed by the Secretary-General of ICSID at the joint request of the parties, or failing a joint request, by the President of the ICJ at the request of one party.[111]

104. Commentary on the Convention Establishing the Multilateral Investment Guarantee Agency, *supra* note 9, at ch. IX.

105. MIGA Convention, *supra* note 9, at art. 56.

106. MIGA recently signed a memorandum of arrangement with the Permanent Court of Arbitration (PCA) under which its Secretary-General will administer and act as appointing authority of arbitrators for arbitration between MIGA and its guarantee holders. ICSID, however, could not be a party to such an arrangement because of a potential conflict of interest for the Chairman of the Administration Council of ICSID, who is also the President of MIGA, should she be a party to any such arbitration. *Memorandum of Arrangements between the Secretary-General of the Permanent Court of Arbitration and the Multilateral Investment Guarantee Agency Concerning Rules of Arbitration under Contracts of Guarantee of the Multilateral Investment Guarantee Agency*, at 1 (May 22, 1990).

107. *Id.* at art. 53(3).

108. *Id.* at art. 47(4).

109. *Id.* at arts. 55–57. This is similar to the UNCITRAL Rules where, under Article 35, interpretation of awards are provided within 45 days of the request.

110. If the parties so agree, the conciliator could be appointed by the Secretary-General of ICSID or the President of the International Court of Justice. The Convention allows the parties to choose other dispute settlement mechanisms, provided MIGA's Board approves the alternatives chosen. MIGA Convention, *supra* note 9, at Annex II, arts. 2,3(a),(b),4(e).

111. *Id.* at Annex II, art 4(b).

The Convention also provides that the award shall be final and binding upon the parties and shall not be subject to appeal, annulment or revision.[112] Nevertheless, the Convention provides for review of a dispute concerning the meaning or scope of an award through petition to the tribunal within sixty days of the award. In the event that the same tribunal cannot be reconvened within sixty days, a new tribunal can be appointed under the same provisions as the original one. The new tribunal can stay enforcement of the award pending its decision on interpretation.[113] While the risks of delay and even reversal of awards are considerably lower than under the ICSID Convention, allowing the establishment of a second tribunal for the same dispute may cause delay. Nevertheless, the experience of OPIC suggests that the arbitration of such disputes is a remote possibility. Similar clauses in agreements between OPIC and individual countries have never been invoked in the almost twenty-year history of OPIC.[114]

9. Operational Results to Date

In its second full year of operation which ended June 30, 1990, MIGA issued its first four guarantees—two direct guarantees and two involving reinsurance—which represent a contingent liability of $132.3 million. One of the direct guarantees involved a U.S. investment in Indonesia. MIGA provided $50 million of coverage, its maximum, for breach-of-contract and war risk as part of a $130 million equity investment which expanded a project costing over $500 million. This guarantee is instructive for several reasons. First, the project's size already exceeds MIGA's capacity, thereby necessitating the use of coinsurance or reinsurance from either OPIC, which guaranteed the original investment, or private insurers, both of which ultimately participated. Second, this guarantee represented the first breach-of-contract coverage, and was complicated by the fact that, though Indonesia is a party to both the New York and ICSID Conventions, a 1984 decision of its supreme court prevents Indonesia from

112. *Id.* at Annex II, art. 4(h).

113. *Id.* at Annex II, art. 4(i).

114. OPIC's track record in this respect is not surprising since it, like MIGA, has other means to resolve disputes without recourse to arbitration. Thus, even before becoming a subrogee, MIGA would try to induce host governments and investors to settle their dispute amicably. For example, MIGA might agree to accept the currency of the host country temporarily and pay the investor out of its own funds. Then, under an agreement with the host country, MIGA would sell the local currency through the World Bank or another international institution to companies importing goods from the host country or to the host government itself. MIGA could also finance the settlement by paying the investor in cash in return for debt instruments from the host government. Alternatively, MIGA might persuade the investor to accept installments from the host country rather than insisting on a lump-sum cash payment and then back the government's commitments with a guarantee. Finally, if the investor and the host government cannot agree as to what constitutes an adequate compensation, MIGA might pay all or part of the difference. Shihata, *supra* note 18, at 23–24.

enforcing arbitral awards rendered outside the country without implementing regulations. MIGA proceeded on the assumption that such arbitral awards would be enforced consistent with Article 18 of the MIGA Convention. This case raises the possibility that when a private investor opts for ICSID arbitration and wins an award that it cannot enforce in the host country, the investor could then rely on compensation from MIGA, although its claim would in turn be subrogated to claim enforcement of the ICSID award against the host government.[115] This scenario, probably unforeseen at MIGA's inception, is highly unlikely. Although MIGA itself is not eligible to be a party to an ICSID proceeding, it could nonetheless have recourse to an arbitration procedure based on ICSID rules when it is subrogated to a guarantee holder.

The other direct guarantee provided by MIGA in 1990 involved a $0.9 million investment in Chile. Two of MIGA's first four projects involved Chile because Chile's suspension from OPIC's program due to workers' rights violations has created a demand for MIGA coverage. In addition, the guarantee is of interest because the investment was made through a debt-equity swap under Chapter XIX of the Chilean Central Bank's Compendium of Foreign Exchange Regulations, under which dividend remittances are prohibited for the first four years and for which MIGA is *not* at risk for inconvertibility. Finally, in the absence of a BIT between Chile and the United States or any special protection agreement between MIGA and Chile similar to those used by OPIC, MIGA had to rely in part on its own assessment of Chile's investment protection laws and their consistency with accepted standards of international law.

The first reinsurance contract also involved Chile. A Canadian company sought coverage for the three basic risks for a $335 million gold and silver project, of which US$300 million represented debt financing from the Export Development Corporation (EDC) of Canada. EDC, however, could only provide $140 million of coverage. MIGA supplemented this amount with $50 million of coverage. This transaction is interesting, aside from the insurance capacity issues, because MIGA preferred to reinsure rather than coinsure the agreement; this enabled the investor to benefit from a single contract with MIGA while EDC managed the contract and any claims that may have arisen.

The final project involved a twenty-year reinsurance contract of $30 million between MIGA and OPIC for the acquisition by a U.S. national of a $150 million interest in a Hungarian lighting-products company. The contract covered currency transfer and expropriation. As in the reinsurance contract with EDC, MIGA was to rely on OPIC

115. The investor could also seek to enforce the arbitration award under the New York Convention in another country in which the host government has assets.

to manage the contract and handle claims that might arise. Unlike Chile, Hungary had signed a BIT with the U.S., and MIGA itself had concluded an agreement on legal protection with Hungary in early 1990. Also after an independent assessment of Hungary's legal system, MIGA concluded that its interests would be sufficiently protected.

Although four guarantee or reinsurance operations during two years of operation represent a modest start, they signify a reasonable beginning, and each case sheds light on incremental niches that MIGA can fill.[116] In fact, this level of business already has allowed MIGA to outgrow many of the established national programs (Appendix 3). Moreover, the pipeline of guarantee applications is quite substantial, with over 300 applications received from forty host countries and investors from seventeen member countries. In the fiscal year ending June 30, 1991, MIGA issued 11 guarantee contracts supporting ten projects, totaling $922 million in direct investment. Thirty applications involving projects in seventeen different countries are under active consideration.[117]

III. CONCLUSIONS

The World Bank created both ICSID and MIGA as multilateral efforts to improve the investment climate in LDCs. Although it recognized that other factors, such as macroeconomic stability and legal protection, may have a more substantial effect on investor confidence, the World Bank and participating countries believed that the successful operation of either or both of these institutions under a multilateral umbrella would provide some incremental value to LDCs. In each case, the founders went to considerable lengths to ensure that the interests of both developed and developing countries were adequately represented, and thereby to create an apparently fair and impartial decision-making body.

To assess the effectiveness of ICSID over its twenty-five-year history, one must look beyond a narrow examination of the small number of arbitrations it has successfully handled. It is important to note the broader impact it appears to have made on the structure of international investment agreements, as well as the role it may play in future disputes. Clauses calling for ICSID arbitration to resolve disputes have

116. MIGA is also mandated to provide policy and advisory services to member governments on the content and administration of investment laws as well as overall policy measures that could increase FDI flows. MIGA Convention, *supra* note 9, at art. 23. MIGA has undertaken such efforts through a joint venture with IFC called the Foreign Investment Advisory Service (FIAS). The World Bank created FIAS within IFC prior to MIGA's creation, and the extent to which MIGA's additional involvement has made a tangible difference in FIAS's overall impact is unclear.

117. MIGA, Annual Report 1991, at 4.

become commonplace in BITs, local investment codes, and individual investment agreements. The widespread use of these provisions indicates that ICSID has contributed materially to the increase in investor confidence and the attractiveness of LDCs as investment targets. At the same time, host governments have benefited, both with FDI levels that are probably higher than they would be without a dispute resolution mechanism that was perceived as neutral and cost-effective, and from ICSID's providing a forum to seek redress against foreign investors who have failed to meet their obligations.

The few ICSID arbitration cases that resulted in annulment or resubmission should not be viewed as evidence of fundamental flaws in ICSID's machinery. Although the results in these cases undermined the finality and promptness that ICSID arbitration was intended to offer, they represent a small number of exceptions. Moreover, nearly all of them were successfully resolved in the end. Despite these few cases, ICSID's membership continues to grow. ICSID can also claim credit for the first breakthrough in Latin American support for an "external" arbitration authority. Finally, ICSID appears to have had a synergistic impact on foreign investment in LDCs, supporting MIGA indirectly through MIGA's commitment to the use of ICSID rules to resolve certain kinds of disputes. ICSID has also helped MIGA directly in its risk assessments by collecting and analyzing investment laws and treaties.

An assessment of MIGA's effectiveness must be quite different, because of its shorter period of operation and the different purposes and functions it serves. By definition, MIGA's impact can be measured more directly by its volume of business. Although at this stage future projections are speculative, an analysis of existing national and private risk insurance programs indicates that gaps in coverage remain and that MIGA is well suited to fill many of them. Despite the restrictions under which it operates, MIGA still fills gaps related to eligible investors, eligible investments, and large projects that require reinsurance coverage. At the same time, MIGA, like OPIC, has succeeded in operating on a self-sustaining basis. Moreover, EID/MITI's recent decision to include breach-of-contract coverage suggests that MIGA is having a catalytic effect on national investment insurance programs, prompting them to become more active and expand their programs. MIGA's impact on foreign investment is also evident in its rapidly growing membership, particularly in attraction of LDC interest because of its perceived impartiality in handling risk insurance and its unique voting arrangements.

Nevertheless, MIGA will continue to face a number of challenges, not the least of which will be the need to accelerate its processing of applications while maintaining its development objectives. To enable

MIGA to compete effectively with the private insurance sector and the national insurance programs, MIGA's Board may have to delegate more authority to management and staff.

Looking ahead, MIGA's importance in the political risk insurance market should continue to grow. In fact, despite its short period of operation, MIGA already surpasses many national programs in volume. In the next few years, MIGA should reach the annual investment coverage levels of Treuarbeit, although it probably will not achieve OPIC or EID/MITI's levels until the end of the decade. These results should be achievable even though, in the short term, MIGA will continue to complement rather than compete with existing programs, and even assuming that investment insurance coverage as a percentage of total FDI will not grow beyond its present level.

Appendix 1. Aggregate Net Resource Flows (Long-Term) to Developing Countries, 1980–90* *(US$ billions)*

	1980	1981	1982	1983	1984	1985	1986	1987	1988	1989	1990[p]
Aggregate net resource flows (long-term)	82.8	99.9	88.4	68.2	61.9	56.6	51.2	46.1	60.9	63.3	71.0
Official development finance	32.6	33.7	33.8	31.6	34.0	31.8	33.6	32.2	36.3	36.6	46.9
Official grants	12.5	11.4	10.4	9.9	11.4	13.2	14.0	14.9	18.0	18.6	19.5
Official loans (net)	20.1	22.3	23.4	21.7	22.6	18.6	19.6	17.3	18.3	18.0	27.4
Bilateral	12.2	12.9	11.9	10.6	10.3	6.4	6.3	4.9	6.8	6.1	10.4
Multilateral	7.8	9.4	11.5	11.0	12.4	12.2	13.3	12.4	11.5	11.9	16.9
Private loans (net)	41.1	53.3	43.6	28.1	19.6	14.3	8.1	0.7	5.5	4.3	2.3
Commercial banks	30.8	44.0	30.9	19.8	14.6	4.7	2.4	−1.1	0.7	3.0	
Bonds	1.1	1.3	4.8	1.0	0.3	5.0	1.3	0.2	2.2	0.3	
Other	9.2	8.0	7.8	7.4	4.7	4.5	4.4	1.6	2.6	1.0	
Foreign direct investment (FDI)	9.1	12.9	11.1	8.5	8.3	10.5	9.5	13.2	19.1	22.4[e]	21.8
Aggregate net transfers (long-term)	37.0	45.7	27.4	10.5	−0.9	−7.4	−10.0	−16.8	−9.5	−1.0	9.3
Memorandum items:											
Private grants	2.3	2.0	2.3	2.3	2.6	2.9	3.3	4.0	4.3	4.2	4.3
Net Use of IMF Credit	3.9	6.9	6.6	11.1	4.4	−0.2	−2.5	−5.8	−5.5	−2.3	2.1
Real aggregate net resource flows (long-term) (OECD deflator)	109.3	137.0	124.4	96.2	89.2	80.6	58.9	46.1	56.8	56.9	61.4
Real aggregate net resource flows (long-term) (import unit value index)	72.0	85.2	79.2	62.9	59.2	56.7	53.7	46.1	59.6	60.3	63.8
OECD deflator	75.7	72.9	71.1	70.9	69.4	70.2	87.0	100.0	107.1	111.3[e]	115.7
Import unit value index	114.9	117.2	111.7	108.6	104.6	99.7	95.3	100.0	102.2	105.0	111.4

[p] Projection.
[e] Estimate.
Notes and Sources: Loans: DRS; excludes short-term flows. FDI: IMF, balance of payments figures, which include reinvested profits. Official and private grants: OECD. Aggregate net transfers equals aggregate net resource flows less interest payments (DRS basis) and reinvested and remitted profits (IMF). Figures for FDI are substantially higher than shown in last year's tables, which were based on OECD estimates of FDI from member countries only (and included reinvested profits). Profit remittances and reinvestment are included in net transfers for the first time. OECD deflator: OECD, *Development Cooperation in the 1990s*. Paris, 1989. Import unit value index from IMF, *International Financial Statistics Yearbook 1990* and *World Economic Outlook*, Washington, D.C., October 1990.
* Reprinted from "World Bank Debt Tables, 1990–91," Vol. 1, at 16.

Appendix 2. Status of Arbitration/Conciliation Cases[d] Submitted to ICSID (as of November 14, 1990)

No.	Case	Award on the Merits	Settled/ Dis-continued	Annulment Decision[c]	Pending	Date of Registration
1	Holiday Inns/Morocco	—	x	—	—	1972
2	Gardella/Ivory Coast	x	—	—	—	1974
3	Alcoa/Jamaica	—	x	—	—	1974
4	Kaiser/Jamaica	—	x	—	—	1974
5	Reynolds/Jamaica	—	x	—	—	1974
6	Gabon/Serete	—	x	—	—	1976
7	AGIP/Congo	x	—	—	—	1977
8	Benvenuti Bonfant/ Congo	x	—	—	—	1977
9	Guadalupe/Nigeria	—	x	—	—	1978
10	AMCO/Indonesia[a]					
	(a) Original	x	—	—	—	1981
	(b) Annulment	—	—	x	—	1985
	(c) Resubmission	x	—	—	—	1989
11	Kloeckner/Cameroon[b]					
	(a) Original	x	—	—	—	1981
	(b) Annulment	—	—	x	—	1984
	(c) Resubmission	x	—	—	—	1985
	(d) Annulment	—	—	x	—	1990
12	SOABI/Senegal	x	—	—	—	1982
13	ALUSUISSE/Iceland	—	x	—	—	1983
14	Letco/Liberia	x	—	—	—	1983
15	Atlantic Triton/Guinea	x	—	—	—	1984
16	Colt/Korea	—	x	—	—	1984
17	SPP (ME)/Egypt	—	—	—	x	1984
18	MINE/Guinea					
	(a) Original	x	—	—	—	1984
	(b) Annulment	—	—	x	—	
	(c) Resubmission	—	x	—	—	1990
19	Pharson/Tunisia	—	x	—	—	1986
20	SETIMEG/Gabon	—	—	—	x	1987
21	Mobil/New Zealand	—	x	—	—	1987
22	AAPL/Sri Lanka	x	—	—	—	1987
23	Occidental/Pakistan	—	x	—	—	1987
24	MHT/Egypt and GAIF2	—	—	—	x	1989
	Total	12	12	4	3	

a AMCO: resubmission proceeding completed and award rendered.
b Kloeckner: second award rendered; second annulment proceeding closed.
c Including decisions rejecting annulment applications.
d All cases have involved either mining, manufacturing, energy, tourism or housing.

Conciliation

No.	Case	Discontinued	Report	Date of Registration
1	SEDITEX/Madagascar	x	—	1982
2	Tesoro/Trinidad & Tobago	—	x	1983
	Total	1	1	

Appendix 3. Official Institutions Extending Investment Insurance (in millions of US$)

Country	Agency	Year of Beginning of Investment Insurance	1987 Investment Accepted for Cover During Year	1987 Total Amount of Investment Under Cover at 12/31	1988 Investment Accepted for Cover During Year	1988 Total Amount of Investment Under Cover at 12/31	1989 Investment Accepted for Cover During Year	1989 Total Amount of Investment Under Cover at/12/31
Australia	EFIC	1966	27.6	74.5	91.6	188.3	114.05	328.31
Austria	OeKB	1964	8.7	230.9	89.9	331.0	1049.63	1293.60
Belgium	OND	1971	20.9	64.7	6.5	68.9	10.57	56.84
Canada	EDC	1969	9.9	109.3	113.5	233.0	69.28	308.37
Finland	VTL	1981	2.3	10.9		10.7		
France	COFACE	1967	29.8	174.4	46.4	167.9	27.67	166.16
	BFCE	1973	12.1	159.3	29.5	147.4	155.03	267.41
Germany	TREUARBEIT	1960	168.9	2119.0	277.7	2108.2	529.55	2073.74
India	ECGC	1978		9.6		6.3		5.09
Israel	IFTRIC	1964		0.2				
Italy	SACE	1980		1.5		1.8	3.27	
Japan	EID/MITI	1970	303.8	9469.7	422.5	9737.9	313.30	7788.32
Korea	EIBK	1972	1.1	156.2	5.3	30.9	12.56	44.19
Netherlands	NCM	1969	5.0	43.1	3.0	34.1	1.72	16.09
New Zealand	EXGO	1970						
Norway	GIEK	1964/65	5.6	17.4		16.1		13.38
Portugal	COSEC				0.2	0.2		0.194
South Africa	CGIC	N/A		5.9		0.1		
Sweden	EKN	1968	2.0	2.0	2.8	4.7		4.73
Switzerland	GERG	1970		29.2		23.5		14.99
UK	ECGD	1972	7.3	188.8	26.2	210.0	29.26	214.40
US	OPIC	1948	683.2	4139.5	943.3	3931.5	683.42	4344.38
Total			1288.2	17006.1	2058.4	17252.5	2297.31	16940.49

Source: Berne Union. Data should be viewed with caution since some agencies do not completely net out export credit from the investment insurance totals and distortions arise due to exchange rate fluctuations; data for Spain (CESCE) was not available.

Appendix 4. Comparative Analysis of Major Investment Insurance Systems and MIGA

	United States (OPIC)	Japan (EID/MITI)	Germany (TREUARBEIT)	MIGA
Eligible Investors	U.S. citizens, corps, partnerships, and/or foreign corporations/partnerships owned at least 95% by U.S. citizens, corps, etc. Domestic U.S. corporations must be owned by more than 50% of U.S. citizens, etc.	Citizens of Japan or a corporation or other institution established under Japanese law. Domestic investor could be majority owned by foreign individuals.	German citizens and corporations established under German law that are domiciled in Germany. Can include corporations under foreign control.	Natural or juridical person operating on a commercial basis who is a national of a member other than host country except where nationals of host country transfer assets from outside the country (Art. 13); or juridical persons established in a non-member country whose majority of capital is owned by nationals of member countries, provided such member is not the host country.
Eligible Investments				
1. Nature	New (including expansion, modernization, and refinancing of existing enterprises). Excluded are projects that negatively affect U.S. balance of payments and employment as well as casinos, militry sales, environmentally harmful activities.	New (including expansion, modernization of existing enterprises). No projects which affect public morals or violate laws in most countries.	New (including expansion, modernization of existing enterprises).	New (including expansion, modernization and refinancing of existing enterprises and reinvestment of earnings) that are economically sound. Exclusions related to the envitonmental impact also apply.
2. Type	Equity, and loans and loan guarantees (min. 3 years) in addition to technical assistance agreements, leases, licensing agreements, etc.	Equity and loans (min. 3 years, normally max. 15 years) only to date. Covers investments exploiting natural resources and importing them to Japan.	Equity and shareholder loans (min. 5 years) but bank loans excluded.	Equity and loans made or guaranteed by holders of equity in the enterprise concerned and forms of direct investment to be determined by Board (see Sec. 1.05 of Regulation).
3. Form	Cash, machinery and equipment, technology, reinvested earnings, consigned stock, debt/equity swaps.	Cash, machinery and equipment, technology, reinvested earnings, debt/equity swaps provided they are new projects.	Cash, machinery and equipment and debt/equity swaps but not portfolio investments.	No restrictions on particular forms (including portfolio investment).

Appendix 4. Comparative Analysis of Major Investment Insurance Systems and MIGA (Continued)

	United States (OPIC)	Japan (EID/MITI)	Germany (TREUARBEIT)	MIGA
Eligible Countries	—"Friendly" LDCs (including East Europe and Northern Ireland). —Per capita income of less than US$3,881 (1983). —Observance of human rights and internationally recognized workers' rights. —Oil and gas projects excluded in some OPEC member countries. —Existence of a bilateral agreement. —Host government approval of issuance of insurance for each project. —Investment can be made through 95%-owned subsidiary abroad.	—No restrictions by country though host country must first approve the project. —Can include investment in holding company of intermediate country.	—LDCs in practice. —An availability of adequate legal protection (e.g., BIT). —Host country approval as prerequisite for applicability of BIT.	—Developing member countries as host countries and both developed and developing as countries of the investor. —Host country approval is prerequisite for cover.
Risks Covered				
1. Expropriations	Acts that are: (a) attributable to a foreign governing authority; (b) violations of international law; (c) deprive investor of fundamental rights; (d) have expropriatory effect continuing for one year. Also includes defaults to institutional lenders as a result of expropriatory actions.	Acts that deprive an investor of equity, loan principal, dividend, interest, assets by foreign government as well as property interference.	Acts that deprive a foreign investor of his equity or assets. Breach of contract by that government not coveted unless breach is politically motivated, discriminatory and aimed at expropriatory effect.	Art. 11: Acts that deprive investor of ownership or control of his investments except for non-discriminatory measures of general application as part of economic regulation.
2. War, revolution, insurrection, civil strife	Includes terrorism and sabotage. "Business income" coverage is available for equity shareholders in addition to asset loss and loan defaults protection.		Identified loss occurs when all or substantial part of assets are destroyed by acts of war.	Any military action or civil disturbance.

Appendix 4. Comparative Analysis of Major Investment Insurance Systems and MIGA (Continued)

	United States (OPIC)	Japan (EID/MITI)	Germany (TREUARBEIT)	MIGA
3. Transfer (Inconvertability)	Blockage of exchange of local currency for dollars through exchange controls or delays to act over specified period (60 days normally).	When investor is unable to repatriate equity, dividend, interest and principal for more than 60 days.	Active or passive blockage of transfer of funds for more than 60 days.	Acts to restrict currency transfer outside the country that prevent the investor from transferring profits or liquidation proceeds out of the country for the period specified in the contract.
[redacted]	—Breach of contract coverage may be offered in connection with broader expropriation coverages. For more projects this is possible only on a case-by-case basis but it is commonly included in coverage for petroleum exploration/production projects and under a special exporters and contractors program (losses due to arbitrary drawings of letters of credit or on demand bonds posted as bid, performance or advance payment guarantees by exporters and contractors).	Breach of contract (as of June 1989).		Any breach by host government of a contract with the holder of a guarantee when the holder does not have recourse to other forum, or a decision of such forum is not available within a reasonable period of time or such a decision cannot be enforced.
Amount of Insurance Limits	—No limit on covered investment but maximum exposure per project is US$100 million and OPIC generally limits per-country exposure to 10% of global portfolio.	—No limits of cover on original investment or for projects, but there are a few country limits.	—Coverage issued only as a package but no country or project limits.	Limited to 5% of MIGA's aggregate limit of underwriting, which is 150% of unpaid capital and revenues.
	—Earnings coverage may be a multiple of original investment. All insured must retain 10% of risk except arms-length lenders who may be covered for 100% of principal and interest.	—90% of earnings up to 10% of invested amount and up to a maximum limit of 100% of principal in total.	—95% coverage except for oil and gas, which is 70% —Earnings are eligible up to 10% p.a. or an overall limit of 50%, but if reserves are transferred into shares, the coverage can be	Reinsurance limited to 25% of MIGA's guarantee capacity. 90% of investment contribution and up to an additional 180% for earnings attributable to the investment or an additional 90% for

Appendix 4. Comparative Analysis of Major Investment Insurance Systems and MIGA (Continued)

	United States (OPIC)	Japan (EID/MITI)	Germany (TREUARBEIT)	MIGA
			increased to 300% of original investment.	interest accruing to increased principal (for loans and loan guarantees).
Duration of Insurance Limit	Maximum 20 years. The insured is not bound to continue beyond the initial term-usually one year.	Normally 15 years but can be increased if project has long construction period (min. 5 years); cover can be assigned to new investor when sold or transferred.	Normally 15 years but could be increased to 20 years (min. 5 years).	Maximum 15 years (but can go to 20 years on exceptional basis) with minimum 3 years.
Cost of Insurance	Base rates (which are adjusted for project risk on a case-by-case basis) established for 5 major industry categories (manufacturing and services, (1.5% for all risks excluding standby coverage), institutional lenders, contractors, natural resources, and hydrocarbons). Fee reopener provision added by OPIC for adjustment up to 50% in first 10 years of contract and 100% during second 10 years of contract never utilized. NB: There are no country rates.	Combined premium rate is charged for all risks (0.55%–1.75% depending upon host country).	0.5% p.a. for all risks; premium rate applied to total insured amount.	Premium rate for each coverage can range from 0.3 to 1.5%.
Indemnification	Expropriation: generally net book value of the insured investment. Polititical violence: investors' share of the amount of damage to property.	90% of loss (loan guarantee 70%)—normal waiting period of 2 months.		
	Business Income: similar to property/casualty form of business income coverage. Transfer: then current applicable rate of exchange.	Loss calculated on basis of book value. Disputes settled through public hearing.	—No waiting period except for transfer risk. —No arbitration clause specified.	Dispute between member and Agency (as subrogee) settled by negotiation, conciliation or arbitration (art. 57, Annex 2) with final amount binding upon the par-

Appendix 4. Comparative Analysis of Major Investment Insurance Systems and MIGA (Continued)

	United States (OPIC)	Japan (EID/MITI)	Germany (TREUARBEIT)	MIGA
	Claims disputes settled under the Commercial Arbitration Rules of the AAA.			ties and not subject upon paying compensation to holder of guarantee.
Recoveries	Expropriations: on payment by OPIC, the insured investor assigns to OPIC all securities evidencing the insured investment together with any right, title, claim, etc. which OPIC then pursues against host government.	After payment to the insured MITI may require the subrogation of rights to the investment.	Investor must subrogate his rights to recover immediately before payment of an indemnification.	Same as OPIC except that under transfer, local currency could be sold to World Bank or other international financial institutions.
	War: Investor subrogates to OPIC any claims, etc.			
	Transfer: ptiot to payment, investor must deliver local currency to OPIC.			

Sources: 1. National programs: Extracted from responses to questionnaire prepared by Berne Union in 1988 and updated as appropriate. 2. MIGA Convention, *supra* note 9.

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Khomeinism, The Islamic Republic of Iran, and International Law: The Relevance of Islamic Political Ideology

Sarvenaz Bahar*

Since the Iranian Revolution of 1979, Ayatollah Ruhollah Khomeini's political ideology has become firmly rooted in the Islamic Republic of Iran as a system of governance based on the guardianship of the theologian jurisconsult and on the application of Islamic law. While appearing in the old garbs of Islam, the language and values of Khomeinism are vested with a relevance, content and significance aimed at the world community of the twentieth century. A reconstructed past is never the same as the past as it was; nor is it an affirmation of the present as it is. Islamic culture, religion and political ideology have come to engage in an uneasy interplay with the prevailing world order. The intersection of these elements with international law, however, remains to be explored: What is the relevance of Khomeinism, as the most significant and enduring manifestation of Islamic political ideology associated with the resurgence of Islam in this century, to the making and application of international law?

This study traces the legal process of political decision-making in an Islamic model of government as developed by Khomeini and adopted by the Islamic Republic of Iran: who makes decisions, with what authority, with what procedures, and by what criteria. This decision-making process determines the domestic and foreign policy of Iran, and is responsible for fashioning Iran's interaction with the international community. Significant disparities exist between ideology and practice in the domestic arena, and these disparities are aggravated in the international context where the pressures of conformity are far more intense. Only in passing beyond the veil of Islamic rhetoric, and more particularly Khomeini's rhetoric, and appreciating the myriad historical, political, social, and religious factors surrounding the resurgence of Islam, can one understand the primary motivations, interests, and values underlying Iran's conduct.

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