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THE SETTLEMENT OF DISPUTES REGARDING FOREIGN INVESTMENT: THE ROLE OF THE WORLD BANK, WITH PARTICULAR REFERENCE TO ICSID AND MIGA

Ibrahim F. I. Shihata*

Introduction

The World Bank (the Bank), is often simply regarded as an international institution that provides loans for productive purposes in its member countries. The Bank's mandate, however, is not limited to making loans. Indeed, the Bank's founders thought that direct lending would be a secondary function of the institution.¹ Early plans for the Bank show that it was expected that the principle function of the institution would be "to encourage international investment by private investors."² The Bank's Articles of Agreement reflect this expectation.³ Article One of the Articles of Agreement emphasizes the Bank's role in "facilitating the investment of capital for productive purposes"⁴ and describes the promotion of private foreign investment as one of the Bank's chief objectives.⁵

In the forty years since its inception, the Bank has pursued this objective in a variety of ways. In acting as a financial intermediary between its borrowers and foreign capital markets, and as a provider of funds which mainly finance imports from foreign suppliers, the Bank can be seen as carrying out its mandate to encourage international investment. Through cofinancing and the exercise of its guarantee power, the Bank also stimulates increased international investment by com-

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1. E. MASON & R. ASHER, *THE WORLD BANK SINCE BRETTON WOODS* 18 (1973) (hereinafter cited as E. MASON & R. ASHER).

2. U.S. TREASURY, *QUESTIONS AND ANSWERS ON THE BANK FOR RECONSTRUCTION AND DEVELOPMENT* 4 (1944), *quoted in* E. MASON & R. ASHER, *supra* at 18.

3. Articles of Agreement of the International Bank for Reconstruction and Development, *opened for signature* Dec. 27, 1945, 60 Stat. 1440, T.I.A.S. No. 1502, 2 U.N.T.S. 134.

4. *Id.* at art. I(i); *see id.* at art. I (iii) (stating "[The purposes of the Bank are to] promote the long-range balanced growth of international trade and the maintenance of equilibrium in balances of payments by encouraging international investment for the development of the productive resources of members.")

5. *Id.* at art. I(ii).

mercial banks in particular.⁶ The provision of advice and other technical assistance, either in conjunction with its financing operations or separately, is a further means by which the Bank has been able to help its members to attract foreign investment.⁷ One of the Bank's most visible and interesting actions has been its sponsorship of the establishment of three other international organizations designed to promote investment. The first such organization was the International Finance Corporation (IFC), whose Articles of Agreement were approved in 1955.⁸ Unlike the Bank, IFC exclusively encourages private sector investment, both domestic and foreign, and makes equity investments as well as loans.⁹ The two other organizations, which will be examined later, are the International Centre for Settlement of Investment Disputes (ICSID or the Centre)¹⁰ and the Multilateral Investment Guarantee Agency (MIGA or the Agency)¹¹ whose constituent instruments were approved in 1965 and 1985 respectively.

It is in the context of this broad objective of the Bank that this Article describes the Bank's role in the settlement of investment disputes. Although its Articles of Agreement do not specifically mention the Bank's power to undertake this type of activity, the settlement of investment disputes is clearly a way to improve investment conditions and thus to stimulate increased flows of international investment.

I. The Bank's Direct Involvement in the Settlement of Investment Disputes

As a financial intermediary between its capital-importing and capital-exporting members, the Bank has an institutional interest in promoting the settlement of investment disputes. An unresolved investment dispute involving one of its borrowing countries can jeopardize the economic interests of the borrower which the Bank is intended to serve, and eventually might affect the Bank's own access to capital markets.

6. See WORLD BANK, COFINANCING 5-9 (1983) (describing the Bank's cofinancing activities).

7. See WORLD BANK, 1986 ANNUAL REPORT 67 (1986) (providing an overview of the Bank's recent technical assistance activities).

8. Articles of Agreement of the International Finance Corporation, *opened for signature* May 25, 1955, 7 U.S.T. 2197, T.I.A.S. No. 3620, 264 U.N.T.S. 117.

9. *Id.* at arts. I, II(2).

10. Convention on the Settlement of Investment Disputes between States and Nationals of Other States, *opened for signature* Mar. 18, 1965, 17 U.S.T. 1270, T.I.A.S. No. 6090, 575 U.N.T.S. 159 (hereinafter cited as the ICSID Convention).

11. Convention Establishing the Multilateral Investment Guarantee Agency, *opened for signature* Oct. 11, 1985, 24 I.L.M. 1598, ICSID REV.-FOR. INV. L.J. 147 (1986) (hereinafter cited as the MIGA Convention).

The settlement of investment disputes in a smooth and orderly manner can assist the Bank in its borrowing and, therefore, in its lending operations.

On a number of occasions, the Bank has taken an active role in the settlement of disputes between member governments of the Bank (or subdivisions or agencies of members) and foreign investors.¹² During 1951-1952, for example, the Bank attempted to provide a basis for the settlement of the dispute over the nationalization by Iran of the Anglo-Iranian Oil Company's assets.¹³ Following Egypt's nationalization of the Suez Canal Company in 1956, the Bank successfully mediated the settlement of claims by the Company's shareholders against the Egyptian Government.¹⁴ More recently, in 1985, the Bank agreed to provide technical advice to help the Argentine state gas company and a Dutch company settle their differences.

The President of the Bank, in his personal capacity, has also been willing to assist in the settlement of investment disputes. In 1958, the City of Tokyo and certain holders of bonds issued by that city entered into a Conciliation Agreement which requested the President of the Bank to propose a plan to settle the parties' long-standing dispute. Pursuant to this request, the President delivered a plan to the parties in 1960 which led to a resolution of the controversy.¹⁵ In 1959, the President of the Bank assisted in the settlement of claims arising from the nationalization and sequestration of British assets after the military intervention in Egypt in 1956.¹⁶ In 1965, the President of the Bank also agreed to act as a conciliator between the parties with regard to certain private claims resulting from Tunisia's nationalization of electric power properties in the late 1950s. Finally, in 1968 the President lent his good offices to the amicable settlement of disputes arising from the nationali-

12. The Bank has also lent its good offices to the settlement of economic disputes between the Bank's member governments. A notable example is the Bank's mediation of the dispute between India and Pakistan regarding the utilization of the water of the Indus River system. The Bank's efforts led to the conclusion of the Indus Water Treaty, Sept. 19, 1960. India-Pakistan, 419 U.N.T.S. 126. See Fischer, *La Banque Internationale pour la Reconstruction et le Developpement et l'utilisation des eaux du Bassin de l'Indus*, 6 ANNUAIRE FRANCAIS DE DROIT INTERNATIONAL 667 (1960). In another type of intervention, the Bank in 1977 assisted the Partner States of the East African Community in appointing a mediator to settle their differences. WORLD BANK, 1978 ANNUAL REPORT 38 (1978).

13. E. MASON & R. ASHER, *supra* note 1, at 595-610.

14. *Id.* at 641.

15. WORLD BANK, 1959-1960 FIFTEENTH ANNUAL REPORT 26 (1960).

16. WORLD BANK, 1957-1958 THIRTEENTH ANNUAL REPORT 6 (1958); E. MASON & R. ASHER, *supra* note 1, at 641. The settlement included payment by Egypt of a lump sum compensation for nationalized property and receipt by it of a fee for administering sequestered properties.

zation of certain foreign mining interests by Zaire.¹⁷

When the President of the Bank intervened, it was either as a mediator or as a conciliator who submits a report including specific proposals for a settlement. He was not prepared to act as an arbitrator who renders a binding decision on the merits of the dispute. In the relatively few cases where the Bank intervened as an institution, it acted neither as an arbitrator nor as a conciliator. Instead, the Bank provided good offices or advice to assist the parties reach agreement on a practical and effective solution to the problems involved. Resort to the Bank or its President to assist the parties settle investment disputes proved to be a cost-effective and highly efficient means of settling investment disputes. In comparison to the typically high costs of international arbitration, the expenses involved for the parties were minimal. Through this procedure, parties benefited from the vast experience available at the Bank and the diversity of its staff to reach a satisfactory settlement in a relatively short time.

II. The Role of ICSID in the Settlement of Investment Disputes

A. BACKGROUND

In spite of the obvious attractions of a wider involvement by the Bank or its President in the settlement of investment disputes, practical constraints as well as the limits of the Bank's mandate as a development finance institution argued against such involvement. In addition, there was the difficulty that a country might hesitate to seek the Bank's involvement if it were not certain of the validity of the country's position, and feared the effect that non-compliance with the Bank's advice would have on its overall relationship with the Bank. Thus, the President of the Bank, while noting the past successes in facilitating the settlement of investment disputes, observed in 1961 that the Bank was not really equipped to perform this type of function in the course of its regular routine.¹⁸ At the same time, a special forum for the conciliation or arbitration of these disputes could make a contribution to encourage greater flows of capital to developing countries. The fact, however, that governments and private investors had turned to the Bank to provide this assistance indicated that there was a lack of any other specific ma-

17. The World Bank and International Monetary Fund, 1969 Joint Annual Meetings of the World Bank (including IDA and IFC) and International Monetary Fund (Sept. 29-Oct. 3, 1969), *SUMMARY PROCEEDINGS* 67 (1969).

18. Address of the World Bank President Eugene R. Black, 1961 Joint Annual Meetings of the World Bank and International Monetary Fund (Sept. 17-22, 1961), *SUMMARY PROCEEDINGS* 7 (1969).

chinery for conciliation and arbitration which was regarded as adequate by investors and governments alike. The President of the Bank, therefore, announced that he would examine the possibility of establishing machinery of this kind.¹⁹

Extensive preparatory work and consultations on this possibility followed. By 1964, the prospects for negotiating a convention establishing the dispute settlement facility appeared favorable. Accordingly, the Bank's Board of Governors directed the Bank's Executive Directors to formulate such a convention and submit it to governments together with such recommendations as the Executive Directors might deem appropriate.²⁰ Pursuant to this directive, the Executive Directors, assisted by a committee of experts comprising representatives from sixty-one governments, formulated the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention) and submitted it to member governments of the Bank in March of 1965 "for consideration with a view to signature and ratification, acceptance or approval."²¹ The ICSID Convention's entry into force on October 14, 1966, following ratification by twenty countries,²² established ICSID as an autonomous international organization whose purpose is to provide facilities for conciliation and arbitration of investment disputes in accordance with the provisions of the ICSID Convention.²³ Under the Convention, the President of the Bank is *ex officio* the Chairman of ICSID's governing body, the Administrative Council, which, unless a Contracting State makes a contrary designation, consists of members of the Bank's Board of Governors serving *ex officio* as members of the Administrative Council.²⁴ In practice, ICSID's ties with the Bank are much closer than a reading of the ICSID Convention might suggest. The Vice President and General Counsel of the Bank has consistently been elected Secretary-General of ICSID and the Bank meets the total cost of the ICSID Secretariat.²⁵

19. *Id.*

20. *Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 4 I.L.M. 524 (1965) [hereinafter cited as *Report*].

21. *Id.*

22. ICSID Convention, *supra* note 10, at art. 68(2).

23. *Id.* at art. 5.

24. *Id.*

25. Res. No. AC(17)/RES/55 of ICSID's Administrative Council (on the election of the Secretary-General) and Report and Financial Statements of the Centre for the years ended June 30, 1984 and 1983, *reprinted in* ICSID, 1984 ANNUAL REPORT 20-23.

B. BALANCE OF INTERESTS OF THE ICSID SYSTEM

In formulating the ICSID Convention, the Executive Directors of the Bank devised a system that carefully balances the interests of investors and host countries. The arrangements made for ICSID's Administrative Council reflect this balance of interests. There is one representative of each Contracting State on the Council, and, as each representative casts one vote,²⁶ the ICSID Convention assures equal representation for all Contracting States.

The ICSID Convention gives private investors direct access to an international forum. Moreover, provisions of the ICSID rules, which will be examined in greater detail below, assure investors that refusal or abstention by the State party to the dispute to participate in the proceedings after it has consented to ICSID arbitration cannot frustrate the ICSID arbitral process.

Against the advantages for investors, the ICSID Convention provides that a Contracting State may, as a condition of its consent to ICSID arbitration, require prior exhaustion of local remedies.²⁷ This condition may be stipulated in the investment agreement, in a bilateral treaty between the host country and the investor's country, or in a declaration made by a Contracting State at the time of signature or ratification of the ICSID Convention, although only one Contracting State, Israel, has made such a declaration.²⁸ In addition, Article 42(1) of the ICSID Convention expressly provides that, unless the parties have specifically agreed otherwise, the arbitral tribunal must decide a dispute in accordance with the law of the host State, along with such rules of international law as may be applicable. Finally, it was recognized at the time that the ICSID Convention was finalized that:

When a host State consents to the submission of a dispute with an investor to the Centre, thereby giving the investor direct access to an international jurisdiction, the investor should not be in a position to ask his State to espouse his case and that State should not be permitted to do so.²⁹

This consideration finds its expression in Article 27 of the ICSID Convention. That provision expressly precludes the investor's State from exercising diplomatic protection or instituting an international claim unless the host State fails to comply with the award rendered in the

26. ICSID Convention, *supra* note 10, at art. 7(2).

27. *Id.* at art. 26.

28. *Measures Taken by Contracting States for the Purpose of the Convention: Notification Concerning Classes of Disputes Considered Unsuitable for Submission to the Centre*, ICSID/8-C 1 (June 1984).

29. *Report*, *supra* note 20, at para. 33.

dispute. The ICSID Convention's suspension of the right of diplomatic protection is one way in which the ICSID system contributes to the depoliticization of investment disputes. The depoliticization of such disputes, which is meant to promote an atmosphere of mutual confidence between States and foreign investors favorable to increasing the flow of resources to developing countries is a fundamental objective of the ICSID system.³⁰ The main features of this system include its voluntary character, its flexibility, and its effectiveness.

C. ICSID'S VOLUNTARY CHARACTER

ICSID's facilities are available on a voluntary basis. States eligible to join ICSID (members of the Bank and States invited to sign the ICSID Convention under its Article 67) are obviously free to decline to do so. Their decision has no bearing on their relations with the Bank itself. Even the act of ratification of the ICSID Convention is only an expression of a Contracting State's willingness, in principle, to make use of the ICSID machinery. Ratification does not constitute an obligation to use that machinery. That obligation can arise only after the Contracting State concerned has specifically agreed to submit to ICSID arbitration.

Under Article 25(4) any Contracting State may in addition notify ICSID, either at the time of ratification or at any time thereafter, of the class or classes of disputes that it would or would not consider arbitrable under ICSID's auspices.³¹

Within this framework, there is more freedom to determine whether a transaction is suitable for ICSID arbitration than might be assumed from the limitation of the Centre's jurisdiction to investment disputes of a legal character. The ICSID Convention does not define the term "investment,"³² and this deliberate lack of definition has enabled ICSID tribunals to accommodate both traditional types of investment in the form of capital contributions and new types of investment including service contracts and transfers of technology. Disputes submitted to the Centre have ranged from disputes relating to the exploitation of natural resources to disputes arising out of management contracts and technical and licensing agreements.³³ Interestingly, no disputes relating to fi-

30. *Id.* at para. 9.

31. Thus far, Israel, Jamaica, Guyana, Papua New Guinea, and Saudi Arabia have made such notifications. The texts of their notifications may be found in *Measures Taken by Contracting States for the Purpose of the Convention*, ICSID/8-C (1985).

32. ICSID Convention, *supra* note 10, at art. 25(1).

33. See *ICSID Cases, 1972-1984*, ICSID/16 (1985) (providing summary information on disputes submitted to the ICSID).

nancial transactions have been submitted to the Centre. Parties are, of course, also free to decide not to submit their investment disputes to ICSID, and, although provision for ICSID arbitration is sometimes made in transnational loans to foreign governments, it is no secret that lenders often continue to require the judicial adjudication of loan disputes before the domestic courts of New York or London.³⁴

D. FLEXIBILITY OF THE ICSID SYSTEM

The rules applicable to ICSID proceedings are flexible in the sense that the parties may derogate from them in order to meet their particular needs. For example, most of the provisions regarding the number of arbitrators and the method for their appointment are permissive, and apply only in the absence of agreement between the parties.³⁵ While they have the necessary flexibility, the ICSID rules are specific enough to ensure that a party cannot frustrate the proceedings. Thus, if one of the parties refuses to cooperate in the appointment of arbitrators, the tribunal still may be constituted through the appointment of arbitrators by the President of the Bank in his capacity as Chairman of ICSID's Administrative Council.³⁶ Even if a party which has consented to ICSID arbitration fails to participate in the proceedings, the ICSID Convention ensures that the proceedings can continue and lead to an award.³⁷ In practice, there has been little occasion for these provisions to be used, in view of the high degree of State participation in the proceedings and the frequent termination of these proceedings by means of amicable settlement.

E. EFFECTIVENESS OF THE ICSID SYSTEM

Several factors account for the unique effectiveness of the ICSID system. While parties are free to decide whether to make use of the ICSID machinery, the ICSID Convention assures both parties that once they have consented to submit disputes to ICSID conciliation or

34. Delaume, *ICSID and the Banker*, INT'L FIN. L. REV. 9 (Oct. 1983) [hereinafter cited as Delaume].

35. The only mandatory provisions are those according to which: (i) an arbitral tribunal composed of more than a sole arbitrator must include an uneven number of arbitrators, (ii) arbitrators must possess certain basic qualities, such as integrity and recognized competence in relevant fields, and (iii) the majority of the arbitrators must be nationals of a State other than the Contracting State party to the dispute or whose national is a party to the dispute. The last provision will not apply, however, if the sole arbitrator or each individual member of the tribunal has been appointed by agreement of the parties. ICSID Convention, *supra* note 10, at arts. 14(1), 37(2), 39, 40(2).

36. *Id.* at art. 38.

37. *Id.* at art. 45(2).

arbitration, neither party can unilaterally revoke its consent.³⁸ The exclusivity of the ICSID system also contributes to its effectiveness. Under the ICSID Convention, consent of the parties to ICSID arbitration is deemed to be exclusive of any other remedy, unless the parties agree otherwise.³⁹ This rule has several consequences, one of which is that ICSID proceedings are insulated in all Contracting States from any form of judicial intervention or control.

The ICSID Convention furthermore assures the effectiveness of an ICSID arbitral award once it has been rendered. Article 53(1) of the Convention provides that such an award is binding on the parties while Article 54(2) provides that a party may obtain recognition and enforcement of the award by simply furnishing a certified copy to the competent court or other authority designated for the purpose by each Contracting State.⁴⁰ It is true that the ICSID Convention does not derogate from the rules of immunity from execution that may prevail in a Contracting State,⁴¹ and that it is thus possible that an ICSID award could be executed against the assets of the State (or one of its subdivisions or agencies) party to the dispute in certain Contracting States and not in other Contracting States. This issue has not, however, arisen in practice and is unlikely to arise. Reliance by the State in question on its immunity from execution would be contrary to its obligation under the ICSID Convention to comply with the award and would expose that State to various sanctions set forth in the ICSID Convention.⁴² Moreover, refusal by the State involved to comply with an ICSID award would deprive it of credibility in the international business community. This is not a risk that a State would be likely to assume lightly. ICSID arbitration thus offers a degree of finality which, combined with the relatively low cost of ICSID arbitration, makes it an attractive alternative to other forms of international arbitration.

Out of twenty-one disputes submitted to ICSID, nine have been either discontinued or amicably settled.⁴³ This high proportion of settlements is encouraging, but ICSID's effectiveness cannot be assessed only on the basis of the number of disputes that have been submitted or settled by that institution. When an ICSID clause provides for arbitra-

38. *Id.* at art. 25(1).

39. *Id.* at art. 26.

40. *Id.* at art. 54(2).

41. *Id.* at art. 55.

42. *See id.* at arts. 27, 64 (regarding the resumption of diplomatic protection suspended under the ICSID Convention and the right of the Contracting State whose national is a party to the dispute to bring an international claim against the non-complying state).

43. *ICSID Cases, 1972-1984*, ICSID/16 (1985).

tion, it may be assumed that the prospect of involvement in such proceedings will work as a deterrent to the actions which give rise to the institution of proceedings. ICSID thus contributes to conflict avoidance as well as to settlement of conflicts if they arise.

These features of the ICSID system have not only contributed to the willingness of parties to have recourse to conciliation or arbitration under the ICSID Convention but have also helped to foster confidence in parties seeking the Centre's specialized services in cases falling outside the framework of the ICSID Convention. In particular, officials of the Centre, and especially its Secretary-General, have in an increasing number of cases been requested by parties to act as the appointing authority of arbitrators or conciliators in disputes which, for one reason or another, are not suitable for arbitration or conciliation within the context of the ICSID Convention.⁴⁴ To a large degree, this latter type of ICSID intervention has replaced *ad hoc* recourse to the Bank or its President, and in several instances was adopted by parties who had initially sought the Bank's intervention.⁴⁵

III. The Role of MIGA in the Settlement of Investment Disputes

A. BACKGROUND

At about the same time that ICSID's establishment was proposed in the early 1960's, various other schemes were being examined in international fora to encourage greater investment flows to developing countries by reducing the effects that non-commercial risks have on investment decisions. One possibility considered in the Bank since the late 1940's was the establishment of an international agency which would

44. A notable example of this may be found in several recent guarantee agreements executed by Brazil, which is not a member of ICSID, in favor of foreign lenders to Brazilian public entities. Delaume, *supra* note 35, at 9.

45. As in the case of the Brazilian guarantee agreements mentioned, *supra* note 44, cases where the State involved was not a party to the ICSID Convention. It should also be noted that since 1978, ICSID has offered an "Additional Facility" under which the Centre can administer conciliation and arbitration proceedings in cases where the disputes fall outside the scope of the ICSID Convention, either because one of the parties is not a Contracting State or a national of a Contracting State or because the dispute does not directly arise out of an investment. Fact-finding proceedings may also be conducted under the Additional Facility. Conscious of the fact that reference to the Additional Facility now appears in a number of bilateral investment treaties and national investment laws, ICSID's Administrative Council, which introduced the facility on a trial basis, decided in 1984 that the Additional Facility should be continued indefinitely. *Additional Facility for the Administration of Conciliation, Arbitration and Fact-Finding Proceedings*, ICSID/11 (1979); 2 NEWS FROM ISCID, No. 1, at 6 (1985); Broches, *The Additional Facility of the International Centre for Settlement of Investment Disputes* (ICSID), 4 Y.B. COMMERCIAL ARBITRATION 373 (1979).

provide insurance to investors against non-commercial risks. For a variety of reasons, however, the early proposals to create such an insurance facility did not materialize.⁴⁶

Concerned about the prospects for financial flows to developing countries, in view of the slow growth of official development assistance and the declining trends in commercial lending,⁴⁷ the Bank's management in 1981 revived the proposal to create a globally operating investment guarantee agency under the Bank's auspices.⁴⁸ As in the case of the ICSID Convention, extensive studies and consultations then took place, and support for the proposed new agency gradually broadened. Starting in June 1985, the Bank's Executive Directors held twenty sessions of meetings as a "Committee of the Whole" under the chairmanship of the Bank's Vice President and General Counsel in order to discuss a draft of the Convention Establishing the Multilateral Investment Guarantee Agency (the MIGA Convention). Assisted by experts from member governments and by a drafting team from the Bank's Legal Department, the Committee of the Whole agreed on a text of the MIGA Convention in September 1985.⁴⁹ After its formal approval by the Bank's Executive Directors, the MIGA Convention was submitted to the Bank's Board of Governors. On October 11, 1985, the Governors adopted a resolution opening the MIGA Convention for signature by member governments of the Bank and Switzerland.⁵⁰

The MIGA Convention will enter into force upon its ratification by five capital-exporting and fifteen capital-importing countries, provided that the total subscriptions of these countries amount to at least one-third of MIGA's authorized capital, or approximately \$360 million.⁵¹ The resolution of the Board of Governors referred to above also directed the President of the Bank to convene a preparatory committee of the signatory states once the MIGA Convention had been signed by the minimum number of countries where ratifications were required for the

46. T. MERON, *INVESTMENT INSURANCE IN INTERNATIONAL LAW* 31 (1976).

47. WORLD BANK, 1985 WORLD DEVELOPMENT REPORT ch. 9 (1985); OECD, DEVELOPMENT CORPORATION 1984 REVIEW, Table IV-2, 65 (1984) [hereinafter cited as OECD 1984 Review].

48. Address of Bank President A.W. Clausen, 1981 Joint Annual Meetings of the World Bank and International Monetary Fund, SUMMARY PROCEEDINGS 15, 23 (1982).

49. *Commentary on the Convention Establishing the Multilateral Investment Guarantee Agency*, Introduction [hereinafter cited as *Commentary on the MIGA Convention*] 1 ICSID REV.-FOR. INV. L.J. 195 (1986).

50. Resolution No. 406 of the Board of Governors, adopted Oct. 11, 1985, reprinted in IBRD, IFC & IDA, 1985 ANNUAL MEETINGS OF THE BOARD OF GOVERNORS: SUMMARY PROCEEDINGS 244 (1986).

51. MIGA Convention, *supra* note 11, at art. 61(a).

entry into force.⁵² This committee would prepare the draft by-laws, rules and regulations required for the initiation of MIGA's operations, and once the MIGA Convention entered into force, the committee's drafts would be submitted to MIGA's governing bodies for adoption.⁵³

By June 18, 1986, the MIGA Convention had been signed by the number of countries required to convene the preparatory committee; at a meeting held September 15-19, 1986, in Washington, D.C. the committee adopted a set of detailed draft by-laws, rules of procedure, financial regulations, and operational regulations for the Agency.⁵⁴ As of October 7, 1986, fifty countries⁵⁵ had signed the MIGA Convention, including seven Category One countries and thirty-nine Category Two countries. The prospect of having an operational MIGA by 1987 is thus no longer a remote possibility. An examination of MIGA's operational features, organization and financing will help in understanding its role in the settlement of investment disputes.

B. OPERATIONAL FEATURES

MIGA's objective will be to encourage the flow of investments for productive purposes among its member countries, and in particular to developing member countries.⁵⁶ To fulfill its objective, MIGA will guarantee and reinsure eligible investments against losses resulting from non-commercial risk.⁵⁷ Such insurance activities, however, only represent one means of achieving MIGA's objective, and the Agency will carry out a broad range of promotional activities as well.⁵⁸

Article 11 of the MIGA Convention specifically provides for coverage of four broad categories of non-commercial risk, but authorizes the Agency to cover any other non-commercial risk upon the joint application of the investor and the host country, provided the Agency's Board approves such coverage by special majority decision. The four risks

52. Resolution No. 406, *supra* note 50, at para. 6.

53. *Id.*

54. FIFTEENTH ANNUAL REPORT, *supra* note 15, at 26.

55. These countries are Bahrain, Barbados, Benin, Bolivia, Canada, Chile, Colombia, Côte d'Ivoire, Cyprus, Denmark, Ecuador, Egypt, Equatorial Guinea, Fiji, France, Germany, Ghana, Greece, Grenada, Indonesia, Ireland, Italy, Jamaica, Jordan, Korea, Malta, Morocco, Netherlands, Nigeria, Pakistan, Philippines, St. Christopher, Nevis, St. Lucia, Saudi Arabia, Senegal, Sierra Leone, Switzerland, Togo, Tunisia, Turkey, United Kingdom, United States, Uruguay, Vanuatu, Western Samoa, Yemen Arab Republic, Zaire and Zambia.

56. MIGA Convention, *supra* note 11, at art. 2.

57. *Id.* at art. 2(a). Articles 11-18 of the MIGA Convention detail MIGA's insurance activities and article 20 elaborates on the reinsurance of both public and private national and regional entities which cover foreign investment against political risk.

58. *Id.* at art. 2(b).

specified in the MIGA Convention are: (a) the transfer risk resulting from host government restrictions on currency conversion and transfer; (b) the risk of loss resulting from legislative actions or administrative actions or omissions of the host government which have the effect of depriving the foreign investor of his ownership or control of, or substantial benefits from, his investment; (c) the repudiation or breach of government contracts in cases where the investor has no access to a competent judicial or arbitral forum, or faces unreasonable delays in such a forum, or is unable to enforce a judicial or arbitral decision issued in his favor; and (d) the risk of armed conflict and civil disturbance.⁵⁹

To be eligible for the Agency's guarantee, investments will have to be new, medium or long-term, and must be judged by the Agency to be sound investments which contribute to the development of the host country.⁶⁰ While at the outset MIGA will focus on equity interest and on other forms of direct investment where the investor's profit depends on the fortunes of the enterprise concerned, it may later be authorized to expand coverage to "any other medium or long-term form of investment."⁶¹ Such other forms of investment may include various types of industrial cooperation such as management and service contracts, licensing and franchising agreements, turn-key contracts as well as arrangements concerning the transfer of technology and know-how where the investor receives a fixed return. MIGA will be able to service several new types of investment, especially among developing member countries which take non-equity forms and in due course, may also cover commercial loans which are related to a specific investment to be otherwise covered by the Agency.⁶²

Investors, to be eligible for the Agency's guarantee, must be nationals of a member country or, in the case of juridical persons (corporate investors), must either be incorporated and have their principal place of business in a member country, or the majority of their capital must be owned by nationals of a member or members.⁶³ Eligible investors include both public and private sector corporations and even member governments and joint ventures among them. An innovative feature of the MIGA Convention should be noted in this context: eligibility may, under certain conditions, be extended to nationals of the host country if they transfer the assets to be invested from abroad.⁶⁴ MIGA will there-

59. *Id.* at art. 11(a).

60. *Id.* at art. 12.

61. *Id.* Commentary on the MIGA Convention, *supra* note 49, at para. 19.

62. MIGA Convention, *supra* note 11, at art. 12(b).

63. *Id.* at art. 13(a).

64. *Id.* at art. 13(c).

fore be able to assist member countries in their efforts to reverse capital flight.

In recognition of host governments' sovereign control over the admission of foreign investment into their territories and the treatment of such investment, Article 15 of the MIGA Convention provides that the Agency "shall not conclude any contract of guarantee before the host government has approved the issuance of the guarantee by the Agency against the risks designated for cover." The approval must hence extend both to MIGA's involvement, i.e., the issuance of a guarantee, and to the scope of MIGA's involvement, i.e., the risks designated for cover. A member government may, if it wishes, limit its use of MIGA's services to the coverage of investments by its nationals in foreign member countries without necessarily allowing it to cover foreign investments in its own territory. In short MIGA's facilities, like those of ICSID, will only be made available where there is consent by all concerned.

MIGA's promotional activities will include carrying out research on investment opportunities in developing countries, and providing technical advice and assistance requested by members to improve investment conditions in their territories.⁶⁵ Article 23(c) of the MIGA Convention provides that in its promotional efforts, MIGA "shall give particular attention . . . to the importance of increasing the flow of investments among developing member countries." MIGA's promotional activities will constitute a vital part of its mandate and should not be considered a secondary function of the Agency.

C. ORGANIZATION

MIGA will have full juridical personality and, like other financial institutions, will have a Council of Governors composed of one representative of each member (and his alternate), a Board of Directors elected by the Council, and a chief executive officer selected by the Board and responsible for the ordinary business of the Agency.⁶⁶ The President of the Bank will be *ex officio* chairman of the Agency's Board of Directors.⁶⁷

Membership in MIGA will be open to all members of the World Bank and to Switzerland on a voluntary basis.⁶⁸ As in the case of ICSID, every country will be free to join without any effect on its position in the Bank or any other organization. The distribution of voting rights

65. *Id.* at art. 23(a).

66. *Id.* at arts. 30, 31(b), 33, 41(a).

67. *Id.* at art. 32(b).

68. *Id.* at art. 4(a).

in MIGA presents a further innovation which highlights the balance of interests maintained by the MIGA Convention.

The management of the Bank had originally proposed that voting power would be shared on an equal basis between home countries and host countries as groups, with countries initially classifying themselves as members of one of the two groups, subject to approval of the Agency's Council.⁶⁹ During the discussions among the Bank's Executive Directors, this proposal was challenged on the grounds that it cannot be foretold how many countries of either group will join MIGA from the outset and that in view of the unpredictable relative size of each of the two groups it is inequitable to allocate equal voting power to them before knowing the actual membership structure. The basic tenet of the management's proposal, however, was generally accepted, namely that both groups should receive equal voting power when all members of the Bank become members of MIGA.⁷⁰ In the first three years of its operations, the minority group will be guaranteed forty per cent of the total votes, through supplementary votes if required, and all decisions will be taken in this period by the special majority of two-thirds of the total votes representing not less than fifty-five per cent of subscriptions in the Agency's capital.⁷¹ The supplementary votes and the special majority requirement will be cancelled at the end of the three-year period; MIGA's Council will then review the voting structure with a view to reallocating shares to assure voting parity between both groups of countries once they subscribe in the reallocated shares.⁷²

69. The principle of equal representation of groups of countries which have distinct interests in the activities of the institution is reflected in most international commodity agreements. For example, the International Coffee, Cocoa, and Jute Agreements 647 U.N.T.S. 3, 882 U.N.T.S. 67, TD/JUTE/11/ Rev.1 (1983) distinguishes between member countries which are primarily exporters of the commodity concerned and those which are primarily importers; each group is allotted 1,000 votes which are then divided among the members of the group in various ways.

Under the system of weighted voting which prevails in most international lending institutions, voting rights are tied to capital subscriptions (one vote per share) while each member also receives an equal amount of membership votes. The Articles of Agreement of the Bank, *supra* note 3, at art. V(3) (a), for instance, accord to each member country 250 basic votes as well as one additional vote per share held in the Bank's capital stock, each share being worth \$100,000. *But cf.*, Agreement Establishing the International Fund for Agricultural Development, June 13, 1976, 28 U.S.T. 8435, 15 I.L.M. 922 (1976) (members are divided into 3 groups, each having one third of the total votes).

70. *Id.* at art. 39.

71. *Id.* at arts. 3(d), 39(b), 39(d).

72. *Id.* at art. 39(b).

D. FINANCING

MIGA is expected to meet its liabilities from premium income and other revenues such as return on its investments. Accordingly, Article 25 of the MIGA Convention directs the Agency to carry out its activities in accordance with sound business and prudent financial management practices. Under Article 26 of the MIGA Convention, MIGA will be able to vary its premiums in accordance with the actual risks assumed under its guarantees, but such variations are expected to be based on the specifics of the investment and risks involved — and would not simply reflect a political judgment regarding the host country.

The principle of self-sustenance, though borne out by the experience of public and private national entities providing political risk insurance⁷³ will be supported by arrangements to ensure the Agency's viability even when losses exceed reserves at a given moment. These arrangements include a combination of capital subscriptions and "sponsorship."

The Agency will initially have an authorized share capital equivalent to \$1.082 billion.⁷⁴ The shares will be subscribed by member countries' in accordance with their relative economic strength as measured in the allocation of shares in the Bank's capital. Only ten percent of the subscriptions will be paid in cash. An additional ten percent will be paid in the form of non-negotiable, non-interest-bearing promissory notes to be encashed only if needed by MIGA to meet its financial obligations.⁷⁵ The rest of the subscribed capital will be subject to call.⁷⁶ While developed member countries will make all payments in freely usable currencies, developing member countries will be able to make up to twenty-five percent of the paid-in cash portion of their subscriptions in their own currencies.⁷⁷ The amount of guarantees which MIGA may issue on the strength of its capital resources will initially not exceed one and one-half times the amount of the subscribed capital plus reserves plus a portion of MIGA's reinsurance coverage (a 1.5:1 ratio).⁷⁸ Once MIGA accumulates a balanced risk portfolio and gains experience, it might

73. Bank staff have calculated that as of December 31, 1984 the ratio of net payments of claims to aggregate premiums of all national investment guarantee programs was approximately twelve percent.

74. *Id.* at art. 5(a).

75. *Id.* at art. 7(i).

76. *Id.* at 7(ii).

77. *Id.* at art. 8(a).

78. *Id.* at art. 22(a).

increase this ratio up to a maximum of 5:1.⁷⁹

In addition to the guarantee operations based on the Agency's capital and reserves, MIGA will be able to underwrite investments sponsored by member countries acting in fact as administrator of a separate sponsorship account.⁸⁰ Revenues from sponsorship operations will be accumulated in a "Sponsorship Trust Fund" which will be kept apart from the Agency's own accounts.⁸¹ Claims and other expenses resulting from sponsorship operations will be paid out of this fund.⁸² Upon its depletion, remaining liabilities will be shared by sponsoring countries only, each in the proportion which the guarantees sponsored by it bear to the total guarantees sponsored by all sponsoring countries.⁸³ This "sponsorship window" represents a particularly interesting feature of MIGA, not only because it has no financial ceiling, but also because it allows coverage of investments in all countries, not just in MIGA's developing member countries, and regardless of the nationality of the investor.⁸⁴

The combination of capital subscription and sponsorship is another factor which distinguishes MIGA from the international investment insurance schemes previously discussed in the Bank. These schemes relied chiefly on sponsorship by investors' home countries (with some suggesting an initial contribution from the Bank).⁸⁵ Adoption of this concept, however, would have made the Agency dependent to a great extent on one group of members. By contrast, MIGA will primarily rely on capital subscriptions from all member countries and will have the necessary independence to carry out its development mandate in the common interest of all its members.

E. MIGA AND THE SETTLEMENT OF INVESTMENT DISPUTES

Directed to operate on a financially viable basis, MIGA, after it pays a claim, would assume the rights that the indemnified investor acquired against the host country as a result of the event giving rise to his claim.⁸⁶ The MIGA Convention envisages that, unless the Agency agrees otherwise, MIGA would ultimately have recourse to interna-

79. *Id.*

80. *Id.* at art. 24; Annex I, arts. 1, 2(c).

81. *Id.* at Annex I, art. 2(a).

82. *Id.* at Annex I, art. 2(b).

83. *Id.* at Annex I, art. 1(b).

84. *Id.* at Annex I, art. 6.

85. 1972 Draft Articles of Agreement, International Investment Insurance Agency, reprinted in T. MERON, *INVESTMENT INSURANCE IN INTERNATIONAL LAW* 259 (1976).

86. *Id.* at art. 18(a).

tional arbitration to enforce such subrogated rights.⁸⁷

Where a conflict arises, however, MIGA's involvement, like that of ICSID, will facilitate an amicable settlement. If an investor files a claim, MIGA will have to assess this claim and possibly defend itself against it. In so doing, MIGA will find itself in a position similar to that of a host government when confronted with the investor's demands. In many cases, however, MIGA will be in a better position to assess the investor's claim. MIGA's assessment, based on the broad information available to it and its worldwide experience, is likely to moderate the conflicting claims of the investor and his host country and increase the likelihood of a settlement.

Another way in which MIGA may induce host governments and investors to arrive at amicable settlements is the alleviation of the financial burden of such settlements on the governments. For example, MIGA might accept the local currency of the host country on a temporary basis and pay the investor out of its own funds in freely usable currency. MIGA might then, under an agreement with the host country, sell the local currency to the Bank or other international institutions, to companies importing goods from the host country, or to the host government itself over a period of time and recover its position accordingly.⁸⁸ MIGA might also finance the settlement by paying the investor in cash and accepting debt instruments from the government as recoupment. As a variant of this approach, MIGA could persuade the investor to accept installments rather than insisting on a cash payment by backing the government's commitments with its guarantee. Finally, where the views of the investor and the host government with respect to an adequate compensation cannot be completely reconciled, MIGA might pay all or part of the difference and in this way facilitate a settlement. In view of its developmental mandate and institutional interests, MIGA can be expected to use its potential for the facilitation of amicable settlements at least as actively as some of the national agencies, especially the U.S. Overseas Private Investment Corporation (OPIC), have successfully done.⁸⁹ In fact, the MIGA Convention specifically directs MIGA to encourage the amicable settlement of disputes

87. *Id.* at art. 57(b).

88. *Id.* at art. 18(c).

89. According to unpublished figures obtained from OPIC, OPIC has settled claims in the amount totaling \$96 million by paying compensation in cash to the investor while accepting installments from the host governments, and claims totalling some \$292 million, by persuading investors to accept host government commitments backed by OPIC guarantees, or by a combination of cash payments and guarantees.

between investors and host countries,⁹⁰ as such disputes constitute the seeds of conflict between MIGA and its capital-importing members.

F. MIGA'S CONTRIBUTION TO CONFLICT AVOIDANCE

MIGA's viability and continuity will depend largely on the good terms it must establish with capital-importing member countries. It will have every incentive to avoid conflicts with these countries whenever possible. From the beginning, the MIGA initiative aimed at the creation of "a synergism of cooperation" between capital-exporting and capital-importing countries.⁹¹ MIGA'S operations, much as the discussions which led to agreement on the text of its Convention, would be generally based on the consensus of both groups of countries. As every conflict with a member country might weaken this consensus, it is to be readily expected that MIGA will try to avoid conflict. Moreover, the pressures of MIGA's very business will force it to underwrite risks with a view to the avoidance of claims.

The origins of an investment conflict can often be traced to the investment terms and conditions and to the absence of clear and stable rules applicable to the treatment of foreign investment. If the terms of the investment turn out to be unfair to either party or if they lack the flexibility to be smoothly adjusted to changing circumstances, a party, especially a host government, might later feel tempted to remedy the arrangement by unilateral action. Also, if a project runs into financial or technical difficulties, a host government might interfere in order to protect its interests or those of its nationals. In addition, the absence of applicable standards or the application of ambiguous rules often lead to the initiation or aggravation of disputes. MIGA will, therefore, carefully screen every investment project to make sure it is economically sound, and is consistent with the host country's laws and development objectives and will contribute to the development of the host country.⁹² It will deny coverage when it finds deficiencies in the investment arrangement. Furthermore, the MIGA mandated to enter into agreements with member countries on the standards applicable to the investments it guarantees. In fact, MIGA Convention prohibits MIGA from initiating guarantee operations in a country unless it is satisfied that fair and equitable treatment and legal protection for the investment are available.⁹³ A final safeguard against conflicts is the MIGA Conven-

90. MIGA Convention, *supra* note 11, at art. 23(b)(i).

91. Address of Bank President A.W. Clausen, *supra* note 49, at 23.

92. MIGA Convention, *supra* note 11, at art. 12(d).

93. *Id.*

tion's requirement of host government approval for both the issuance of MIGA's investment guarantee and the risks designated for cover.⁹⁴

V. Conclusion

On a number of occasions, particularly during its early history, the Bank or the President of the Bank have assisted parties in the settlement of investment disputes. Though limited in scope, these interventions frequently have yielded positive results. As it became clear that a special machinery would be needed for the conciliation and arbitration of such disputes, the Bank sponsored ICSID's establishment. The wide membership that ICSID has since attracted⁹⁵ reflects its value as an effective and truly neutral forum where disputes are to be settled according to objective non-political criteria. As the services ICSID can offer have become known for their neutrality, effectiveness, and their relatively low cost, parties have increasingly made use of its facilities, not only for the resolution of disputes by conciliation or arbitration under the ICSID Convention, but also as an alternative to seeking the Bank's assistance in *ad hoc* dispute resolution. Twenty years after the approval of the ICSID Convention, the Bank proposed the establishment of MIGA, an agency whose constituent instrument and institutional imperatives demand that it promote the amicable settlement of investment disputes. Significantly, both ICSID and MIGA are also meant to contribute to the avoidance of investment disputes. This is in keeping with the expectation that they will help create a climate of mutual confidence between States and foreign investors. In so doing, ICSID and MIGA serve the broad objective that they share with the Bank, the promotion of investment for development purposes.

94. *Id.* at art. 15.

95. As of the date of writing, the ICSID Convention had been signed by ninety-five countries and ratified by eighty-eight of these nations. *See List of Contracting States and Signatories of the Convention*, ICSID Doc. ICSID/3 (October 1986).