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DIE WELTBANKGRUPPE UND DIE MULTILATERALE INVESTITIONS - GARANTIE - AGENTUR (MIGA)

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DIE WELTBANKGRUPPE UND DIE MULTILATERALE INVESTITIONS-GARANTIE-AGENTUR (MIGA):

Eine neue Initiative zur Förderung von Direktinvestitionen in Entwicklungsländern

Bevor ich in die Diskussion der Konvention zur Schaffung der Multilateralen Investitions-Garantie-Agentur[1] - der jüngsten Tochter der Weltbankgruppe - eintrete, möchte ich Ihnen zuerst einen kurzen historisch-rechtlichen Überblick über die Weltbankgruppe insgesamt geben, damit Sie sehen, wo die Multilaterale Investitions-Garantie-Agentur sich hier einfügt.

Die Weltbank wurde bekanntlich 1944 zusammen mit dem Internationalen Währungsfonds geschaffen als einer der Eckpfeiler jener neuen Weltwirtschaftsordnung, die als Grundlage für die Nachkriegsentwicklung dienen sollte. Ich meine, daß diese neue Weltwirtschaftsordnung, die 1944 auf der Konferenz von Bretton Woods konzipiert wurde, in ihrem Potential noch längst nicht ausgeschöpft ist. Dazu erlauben Sie mir bitte den folgenden kurzen Überblick[2]:

Die Internationale Handelsorganisation (ITO), die damals geplant war und von der dann nur das GATT übriggeblieben ist, sollte bekanntlich die Freiheit der internationalen Handels-

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1 Abgedruckt in 24 International Legal Materials 1598 (1985) und in 1 ICSID Review - Foreign Investment Law Journal 151 (1986) vgl. grundlegend: I. Shihata, The Multilateral Investment Guarantee Agency (MIGA) in 20 The International Lawyer 485 (1986) und J. Voss, Die Multilaterale Investitions-Garantie-Agentur: Sachstand, Merkmale, Verbesserungen, Leistungsfähigkeit aus deutscher Sicht im Lichte des Baker-Plans in 33 Recht der Internationalen Wirtschaft 89 (1987)

2 Vgl. H.G. Petersmann, The operations of the World Bank and the evolution of its institutional functions since Bretton Woods, in: German Yearbook of International Law (1983), pp 1 seq

ströme gewährleisten: eine Aufgabe, die bis heute unvollendet geblieben ist - gerade auch im Hinblick auf den freien Marktzugang für Waren aus Entwicklungsländern. Der Internationale Währungsfonds (IWS) sollte dazu ergänzend den freien internationalen Zahlungsverkehr zu festen oder wenigstens berechenbaren Wechselkursen gewährleisten; und die Internationale Bank für Wiederaufbau und Entwicklung (IBRD)[3], wie die Weltbank offiziell heißt, sollte schließlich denjenigen Mitgliedstaaten vorübergehend unter die Arme greifen und zu einem Start verhelfen, die noch nicht von Anfang an in der Lage sein würden, aus eigener Kraft an einem solchen liberalen Welthandelssystem teilzunehmen. Dies betraf ursprünglich zwei verschiedene Staatengruppen: einmal die vom Krieg zerstörten europäischen Staaten - und interessanterweise wurden die ersten Weltbankdarlehen an Frankreich und Dänemark gezahlt - und dann die Entwicklungsländer. Das waren damals relativ wenige unabhängige Entwicklungsländer - vor allem in Lateinamerika. Seit 1947/48 wurde dann die Wiederaufbaufunktion der Weltbank zunehmend vom Marshallplan und von der OEEC, heute OECD, übernommen, und erst dadurch ist die Weltbank zu einer reinen Entwicklungshilfe-Organisation geworden.

Die Mitgliederstruktur der Weltbank, das ist sehr wichtig, ist genossenschaftlich strukturiert. Man kann das mit einer Bausparkasse vergleichen, in der Kreditgeber und Kreditnehmer zusammensitzen und gemeinsam Beschlüsse fassen. Die Beschlußorgane sind ein Gouverneursrat, in dem jedes Land z.B. durch seinen Finanz- oder Entwicklungs- oder Planungsminister vertreten ist, und dann ein Direktorium aus 21 Direktoren, worin die wirtschaftlich bedeutenderen Staaten - darunter die Bundesrepublik Deutschland - ihren eigenen Direktor haben. Ansonsten schließen sich mehrere Staaten zusammen und wählen ge-

3 Vgl. Articles of Agreement of the International Bank for Reconstruction and Development, in: 2 U.N.T.S. 134

meinsam einen Direktor. Die laufenden Geschäfte der Bank führt der Präsident - bisher übrigens immer ein Amerikaner. Dafür hat der Währungsfonds bisher immer einen Europäer als leitenden Beamten gehabt.

Die genossenschaftliche Mitgliederstruktur der Weltbank - das muß man wissen, um den Hintergrund zu verstehen - hat sich in den letzten 40 Jahren erheblich weiterentwickelt: 1946, als die Weltbank ihre Aktivitäten begann, gab es 44 Mitglieder - vor allem Europäer, die U.S.A. und einige lateinamerikanische Entwicklungsländer. Ende der vierziger Jahre kam Britisch-Indien, heute also Indien, Pakistan, Bangladesh und Sri-Lanka, dazu und damit ein ganzer Subkontinent mit den größten Armutsproblemen bis heute überhaupt. Das mußte auch die Aufgabenstellung der Weltbank starkt beeinflußen. Auch Indonesien, ebenfalls ein armes Land und mit ganz anderen Entwicklungsproblemen als etwa Lateinamerika, wurde Ende der vierziger bzw. Anfang der fünfziger Jahre Mitglied. Und in den fünfziger und sechziger Jahren führte dann der Dekolonisierungsprozeß in Sub-Sahara-Afrika wiederum zu einer großen Zahl neuer Mitgliedstaaten und nochmals auch zu einer qualitativ neuen Herausforderung für die Entwicklungsstrategie der Weltbank. Diese Veränderungen mußten sich, wie wir gleich sehen werden, auch institutionell auswirken. 1980 wurde dann interessanterweise die Volksrepublik China Mitglied. Das war keine neue Mitgliedschaft im juristischen Sinne, sondern wie in den Vereinten Nationen ein Anerkennungsproblem. Statt Nationalchina wurde die Volksrepublik China als Mitglied anerkannt. Und 1986 trat schließlich Polen der Weltbank erneut bei, das während des Kalten Krieges ausgetreten war. Von den übrigen Ostblockstaaten gehören zur Zeit die Sowjetunion, Bulgarien, die Tschechoslowakei, Albanien und die DDR nicht dem Internationalen Währungsfonds und der Weltbank an, wohl aber Rumänien, Ungarn und Jugoslawien. Die neutrale Schweiz ist übrigens auch nicht Migleid, arbeitet aber mit dem IWF und der Weltbank eng zusammen.

Wie haben sich nun all diese Veränderungen auf die Entwicklungsstrategie der Bank ausgewirkt? Das will ich nur ganz kurz streifen, denn wir haben hier ja eine juristische Veranstaltung. Aber letztlich beeinflußte die entwicklungspolitische Aufgabenstellung auch die institutionelle Struktur der Weltbank, die sich zur Weltbankgruppe entwickelt hat - und damit komme ich dann näher an unser eigentliches Thema heran.

Doch zuerst noch kurz zur Arbeitsweise und Entwicklungsstrategie der IBRD. Die Weltbank funktionierte in der Vergangenheit im wesentlichen durch die Vergabe von Entwicklungsdarlehen für konkrete Projekte. Daran knüpft sich ein ganzer Projektzyklus an - das geht von der Identifizierung über die Vorbereitung des Projekts bis zur Verhandlungsphase und zum Abschluß des eigentlichen Darlehensvertrages, bei dem es sich um einen völkerrechtlichen Vertrag handelt; daran schließt sich die Durchführung des Projekts an bzw. die Überwachung der Durchführung durch die Weltbank, und schließlich die Evaluierung: ein Prozeß, der alles in allem sieben bis zehn Jahre dauern kann. Es handelt sich hier also um lang angelegte bedeutende Entwicklungsvorhaben.

Die Entwicklungsprojekte der Weltbank haben ursprünglich in den 50er Jahren, als es sich vor allem um lateinamerikanische Entwicklungsländer handelte, in erster Linie im Bereich der Infrastruktur und der Industrialisierung gelegen. Als aber dann die ärmeren Länder dazukamen mit sehr viel schwierigen Sozial- und Armutsproblemen, da hat sich auch der sektorielle Schwerpunkt der Weltbankhilfe immer mehr verlagert: vor allem in den Bereich der Landwirtschaft, wo ungefähr 70 bis 80 % der ärmsten Schichten der Bevölkerung weltweit wohnen und ihren Unterhalt und ihr Einkommen verdienen müssen. Deswegen hat die Weltbank entsprechend den sich wandelnden Anforderungen ihrer in der Entwicklung befindlichen Mitgliedstaaten auch ihre Entwicklungsprojekte in diese Bereiche verlagert. Es gibt da weitere Verschiebungen - aber ich will nicht allzu

sehr in die Einzelheiten gehen, weil das eher ökonomische Probleme sind. In den siebziger Jahren mit Beginn der Energiekrise mußte die Weltbank z.B. ihr Augenmerk mehr auf die Energieexploration verlagern und seit etwa 1980 gibt es wieder völlig neue Probleme zu lösen auf Grund der erschwerten weltwirtschaftlichen Rahmenbedingungen. Hierauf reagiert die Weltbank z.B. mit ihrem neuen Instrument der Strukturanpassungsdarlehen. Darauf möchte ich nicht im einzelnen zu sprechen kommen, wohl aber auf die Vorkehrungen institutioneller und damit auch rechtlicher Art, die die Weltbank getroffen hat, um sich den jeweiligen Herausforderungen zu stellen.

Vielleicht am wichtigsten war die institutionelle Reaktion der Weltbank auf das Problem der Massenarmut in den ärmsten Entwicklungsländern. Dazu wurde 1960 eine der beiden Tochterorganisationen der IBRD gegründet, die Internationale Entwicklungsorganisation, bekannt als IDA, das ist die englische Abkürzung für "International Development Association"[4]. Die IDA soll sich speziell jenen ärmsten Entwicklungsländern widmen, die ein Bankdarlehen der "IBRD" zu Kapitalmarktsbedingungen wegen mangelnder Kreditwürdigkeit nicht in Anspruch nehmen können. Das sind also vor allem die Länder des indischen Subkontinents und die Länder Sub-Sahara-Afrikas. In Lateinamerika gibt es nur noch zwei Länder, Haiti und Bolivien, die noch zu dieser ärmsten Gruppe gehören. Das Kriterium ist ein Pro-Kopf-Einkommen unter 790 Dollar pro Jahr, praktisch in den meisten Fällen sogar unter 400 Dollar. Wenn Sie das vergleichen mit dem durchschnittlichen Pro-Kopf-Einkommen hier in Europa von ungefähr 12 000 - 13 000 Dollar pro Jahr, dann sehen Sie die Relation. Die IDA ist - das ist juristisch interessant - aus rechtlicher Sicht einmal als Fiktion

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4 Vgl. IDA in Retrospect, 1982

bezeichnet worden[4a], weil sie personell und organisatorisch mit der IBRD, mit der ursprünglichen Weltbank, identisch ist und auch nach denselben Prinzipien arbeitet. Doch ist diese Qualifizierung von zweifelhaftem Wert, denn finanziell und rechtlich ist die IDA eine eigenständige Organisation mit unabhängigen Finanzen, beruhend auf einem eigenen völkerrechtlichen Vertrag. Sie gibt ihre Entwicklungskredite an die ärmsten Entwicklungsländer nicht wie die IBRD für 15 bis 20 Jahre zu annähernden Marktzinsen, sondern praktisch zinsfrei mit Laufzeiten von 50 Jahren. Das bedeutet ein Zuschußelement von 80 % und mehr, wenn man die jeweilige Inflationsentwicklung in Betracht zieht. Sie verschafft sich ihr Geld deswegen auch nicht wie die IBRD durch Kapitalaufnahme auf den internationalen Kapitalmärkten, sondern aus periodischen Zuschüssen aus den Haushalten der Industrieländer, auch der Bundesrepublik, die zur Zeit mit 11,5 % an den Kosten beteiligt ist.

Eine andere institutionelle Entwicklung, die ebenfalls zur Neugründung einer internationalen selbständigen Tochterorganisation der Weltbank geführt hat, war der Wunsch nach einer stärkeren Unterstützung des privaten Sektors in den Entwicklungsländern und zwar ohne eine direkte Beteiligung der Regierung der Empfängerländer. Dazu wurde schon 1956 die Internationale Finanzcorporation (IFC)[5] gegründet, die neben der Kreditvergabe auch Beteiligungs-Investitionen in Entwicklungsländern tätigt und die - als "Katalysator" - oftmals private Investoren aus Empfängerländern mit ausländischen Investoren zusammenführt. Die IFC hat übrigens ein Gegenstück in Deutschland, in der Deutschen Entwicklungsgesellschaft (DEG) in Köln.

4a Vgl. Ronald T. Libby, International Development Association: A Legal Fiction Designed to Serve an LDC Constituency, in: International Organization, vol. 29 (1975), p. 1065 s.

5 Vgl. Articles of Agreement of the International Finance Corporation 246 U.N.T.S. 117

Wir haben jetzt also schon drei Teilorganisationen betrachtet, die die Weltbankgruppe ausmachen, nämlich die ursprüngliche IBRD, die IDA und die IFC. Eine weitere internationale Organisation mit einer engen Beziehung zur Weltbankgruppe wurde dann 1965 geschaffen, das International Centre for Settlement of Investments Disputes (ICSID)[6], das durch Bereitstellung eines Streitregelungsmechanismus - vor allem auf dem Wege der Schiedsgerichtsbarkeit - zur Rechtssicherheit beim Schutz privater Auslandsinvestitionen beitragen soll. Das ICSID soll auf diese Weise den Fluß von ausländischen Direktinvestitionen in Entwicklungsländer fördern.

Von den - unter Einbeziehung des ICSID - vier bereits exportierenden Teilorganisationen der Weltbankgruppe dienen also zwei, nämlich die IFC und das ICSID, der Förderung ausländischer Direktinvestitionen in Entwicklungsländern. Mit ihrer Gründung hat die Weltbank einem ausdrücklichen Auftrag in ihrer Satzung zur Förderung von Direktinvestitionen in Entwicklungsländern Rechnung getragen.

Hiermit komme ich zugleich zur jüngsten Gründung der Weltbank, der Multilateralen Investitionsgarantieagentur (MIGA), deren Einrichtung die Weltbank im Oktober 1985 ihren Mitgliedstaaten ebenfalls mit dem Ziel einer Förderung von Direktinvestitionen in Entwicklungsländern vorgeschlagen hat.

Das von der Weltbank nach ausgiebigen Konsultationen mit den interessierten Regierungen, Wirtschaftsverbänden und interna-

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6 Vgl. ICSID Convention, 575 U.N.T.S. 159; vgl. auch den zugehörigen Bericht der Weltbank-Direktoren in: 4 International Legal Materials 524 (1965); vgl. dazu ferner: A. Broches, "The Experience of the International Centre for Settlement of Investment Disputes, in: International Investment Disputes: Avoidance and Settlement 75 (S. Rubin and R. Nelson ed. 1985), und Soley, "ICSID Implementation: An Effective Alternative to International Conflict" 19 International Law, 521 (1985)
Für eine umfassende Bibliographie von Publikationen über ICSID, siehe 2 ICSID Review - Investment Law Journal (1986)

tionalen Organisationen vorgeschlagenen MIGA-Abkommen - es handelt sich um eine völkerrechtliche Konvention zur Gründung einer internationalen Organisation mit eigener Völkerrechtspersönlichkeit - ist inzwischen bereits von über 50 Staaten[7] unterzeichnet worden. Es ist allerdings einstweilen noch nicht in Kraft getreten, weil die notwendige Zahl von Ratifizierungen noch nicht vorliegt. In der Weltbank rechnet man damit, daß das Abkommen im Herbst 1987 in Kraft treten kann. So lange dauern die Ratifizierungsverfahren verschiedener maßgeblicher Industriestaaten voraussichtlich noch. Die Bundesrepublik hat das MIGA-Abkommen am 24. Juni 1986 unterzeichnet und beabsichtigt, es noch im Laufe des Jahres 1987 zu ratifizieren.

Lassen Sie mich ganz kurz etwas zur Vorgeschichte der Konvention sagen: erste Diskussionen einer internationalen Garantieagentur - oft wurde auch von einer internationalen Versicherungsagentur gesprochen - reichen bis in die vierziger Jahre zurück. Die IECD[8], die interamerikanische Entwicklungsbank[9], die Europäische Gemeinschaft[10] und auch die Weltbank[11] selbst hatten bereits entsprechende Initiativen unternommen. Diese Versuche waren in der Vergangenheit aber - mit der Ausnahme einer seit mehreren Jahren funktionierenden Ver-

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7 Bis Anfang April 1987 hatten bereits 57 Staaten die MIGA Konvention unterzeichnet und einer hatte die Konvention ratifiziert

8 Vgl. Martin, "Multilateral Investment Insurance: the OECD proposal" 8 Harv.Int. L.J. 280 (1967)

9 Vgl. Shihata und Voss a.a.O., Fn 1

10 Vgl. J. Voss "The Protection and Promotion of European Private Investment in Developing Countries. An Approach towards a concept for a European Policy on Foreign Investment", in 18 Common Market Law Review 363 (1981)

11 Das Weltbank-Projekt wurde früher unter dem Namen einer International Investment Insuranca Agency (IIIA) verhandelt; vgl. i. einzelnen: T. Meron, Investment Insurance in International Law 30-37 (1976); derselbe: "The World Bank and Insurance", 47 B.Y.I.L (1974-75), 301

sicherungsagentur arabischer Staaten[12] - immer wieder an verschiedenen Hindernissen gescheitert, darunter unter anderem auch am Mißtrauen vieler Entwicklungsländer gegenüber rechtlichen Festlegungen ihrer eigenen Wirtschaftssouveränität. Daß sich diese Haltung inzwischen geändert hat, liegt zum Teil an den Vorschriften der MIGA-Konvention, wie wir gleich im einzelnen noch sehen werden, zum Teil aber auch an dem veränderten internationalen Investitionsklima. Seit Anfang der achtziger Jahre erkannte man nämlich gerade auch in Lateinamerika, das, wie Sie wissen, von der internationalen Schuldenkrise besonders hart betroffen ist, daß ausländische Direktinvestitionen im Unterschied zu Bankkrediten bestimmte Vorteile haben können. Ausländische Direktinvestitionen bringen ihnen nicht nur einen Kapitaltransfer, sondern zugleich einen Transfer von Technologie und einen Transfer von Managementkapazität und der Kapitaltransfer hat den zusätzlichen Vorteil, daß er die Kapitalbilanz des Empfängerlandes nur dann belastet, wenn ein Gewinn tatsächlich erwirtschaftet wird. Einen Bankkredit müssen Sie zurückzahlen, ganz gleich, was Sie damit gemacht haben und ob er wirklich im Empfängerland einen Gewinn erwirtschaftet hat. Bei einer ausländischen Direktinvestition werden dagegen Profite nur retransferiert, wenn sie erst einmal erzielt worden sind.

Der Aufbau und die Struktur der MIGA spiegeln den typischen institutionellen Ansatz der Weltbankgruppe wieder, d.h. es handelt sich weitgehend, nicht in allem, aber doch weitgehend um eine Duplizierung des bereits von der Weltbank und vom IWF bekannten "Bretton-Woods-Systems". Dieses System ist - wie oben ausgeführt - gekennzeichnet durch einen Gouverneursrat, in dem alle Mitgliederländer durch einen Gouverneur,

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12 Vgl. I. Shihata, "Arab Investment Guarantee Corporation. A regional Investment Insurance Project", in 6 J. World Trade L 185 (1972)

z.B. durch ihren Finanz- oder Entwicklungs- oder Industrieminister vertreten sind und durch ein Direktorium mit etwa 12 oder 22 Direktoren. Ferner wird die MIGA einen Präsidenten haben, der übrigens vom Weltbank-Präsidenten nominiert wird. Auch hier handelt es sich um die Duplizierung eines schon in einer anderen Weltbank-Organisation, nämlich der IFC, vorhandenen Mechanismus. Die Verteilung der Kapitalanteile an der - wie die Weltbank juristisch als Aktiengesellschaft konstruierten - MIGA entsprechen ungefähr derjenigen an der Weltbank, die ihrerseits dem wirtschaftlichen Gewicht der einzelnen Mitgliedstaaten Rechnung trägt. Bei der Verteilung der Stimmrechte ist aber doch ein wichtiger Unterschied zur Struktur der Weltbankgruppe zu verzeichnen und dies ist eigentlich der Unterschied, der es vielen Entwicklungsländern erst ermöglicht hat, sich unter Aufgabe ihrer früheren Widerstände an der Organisation zu beteiligen: daß man nämlich, vergleichbar den internationalen Rohstoffabkommen, in den Beschlußorganen der MIGA eine Parität anstrebt bei der Stimmenverteilung zwischen Entwicklungsländern und Industrieländern - freilich aufgrund einer Formel, die wie bei den Bretton-Woods-Institutionen die Stimmrechte an die relativen Kapitalbeteiligungen bindet. Nach einer dreijährigen Übergangsfrist soll diese Parität erzielt werden. Das ist ein wesentlicher Unterschied zum bestehenden Bretton-Woods-System, in dem die kapitalexportierenden Staaten, also die Industrieländer, eine leichte Mehrheit haben. Viele von Ihnen wissen, daß das einer der Hauptkritikpunkte an den Bretton-Woods-Institutionen in den siebziger Jahren gewesen ist. Es wurde gesagt, man brauche als Element der geforderten neuen Weltwirtschaftsordnung eine fairere Verteilung der Stimmen. Ich möchte auf diese Diskussion hier nicht im einzelnen eingehen, aber es ist interessant, daß beim MIGA-Abkommen, das sich weitgehend an die bestehenden Weltbankstrukturen anlehnt, in diesem Punkt eine gewisse Änderung erfolgt ist.

Finanziell - und auch hier wiederholt sich das typische Schema der Bretton-Woods-Organisation - wird die MIGA eigenständig sein, d.h. sie wird nicht von Zuschüssen der Weltbank abhängen und muß ihre Finanzierungsmittel selbst erwirtschaften. Sie stützt sich dabei auf ihr Aktienkapital, das allerdings nur zu 10 % eingezahlt wird, während weitere 10 % in Form von Schuldscheinen begeben werden und der Rest - das ist alles wieder ganz ähnlich wie bei der Weltbank selbst - als Garantiekapital nur für den Notfall abrufbar zur Verfügung steht. Vor allem aber wird die MIGA Versicherungsprämien für ihre Versicherungsgeschäfte und Gebühren für ihre sonstige Förderungstätigkeit erheben. Diese Versicherungsprämien bzw. Gebühren werden die eigentliche Grundlage für die Kostendeckung der MIGA-Operationen bilden[13].

Die Geschäftstätigkeit der MIGA, wozu ich jetzt komme, umfaßt außer der allgemeinen Promotion von ausländischen Direktinvestitionen vor allem das Versicherungs- und Garantiegeschäft für Investitionen, die von Investoren eines MIGA-Mitgliedstaates in einem anderen in der Entwicklung befindlichen Mitgliedstaat getätigt werden. Dabei wird die MIGA Investitionen in Entwicklungsländern gegen vier verschiedene Arten nichtkommerzieller Risiken versichern:

Erstens das sogenannte Transfer-Risiko, resultierend aus einer aktiven oder auch aus einer passiven Behinderung des Umtausches bzw. des Transfers von Gewinnen durch das Gastland.

Zweitens das Enteignungsrisiko und zwar nicht nur das Risiko der ausdrücklichen, direkten Enteignung, sondern auch das Risiko aus der sogenannten indirekten und schleichenden Enteignung, resultierend aus gesetzlichen bzw. administrativen

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13 Zu den Finanzen der MIGA vgl. im einzelnen J. Voss, aaO. Fn 1

Eingriffen oder auch Unterlassungen des Gastlandes[14].

Drittens - das ist eine wichtige Erweiterung, wenn man das vergleicht mit bereits bestehenden Versicherungssystemen - Risiken aus der Nichteinhaltung öffentlicher Verträge in Fällen der Verweigerung des Rechtswegs oder der Urteilsvollstreckung - dem sogenannten "denial of justice".

Und viertens Risiken aus Krieg, Bürgerkrieg oder zivilen Unruhen.

Hier stellt sich nun eine wichtige Frage, die in der Diskussion unter den Fachleuten in der Bundesrepublik und anderswo eine große Rolle gespielt hat - nämlich die Frage nach der Abgrenzung des MIGA-Abkommens zu bereits bestehenden nationalen Schutzsystemen oder auch privaten Anbietern von Versicherungen[15]. Es gibt in der Bundesrepublik - wie in den meisten anderen OECD-Staaten - ein sehr erfolgreiches internationales Investitionsschutzsystem, beruhend einerseits auf einem System bilateraler Investitionsschutzverträge und andererseits auf der Existenz einer nationalen Versicherungsagentur. In Deutschland ist das die Treuarbeit AG, nicht zu verwechseln mit der Hermes-AG: die Hermes-AG versichert Exportkredite und die Treuarbeit AG versichert Direktinvestitionen im Ausland. Es stellt sich hier also die Frage: warum will man eine zusätzliche internationale Agentur schaffen oder warum sollen gerade die Deutschen oder die Schweizer oder auch die Amerikaner interessiert sein an einer zusätzlichen Agentur, wenn man doch schon eine gut funktionierende nationale Agentur hat, die übrigens auch fianziell recht gut

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14 Dazu im einzelnen Voss, "The Protection and Promotion of Foreign Direct Investment in Developing Countries: Interest, Interdependencies, Intricacies" 31 International and Comparative L.Q. 686, 702 (1982)

15 Die folgenden Ausführungen beruhen auf H.G. Petersmann, Die Multilaterale Investitions-Garantie-Agentur (MIGA): ein neues Instrument zur Fortbildung des Internationalen Wirtschaftsrechts in 46 Z.a.ö. R.V.R. (1986), pp. 758 ss.

dasteht? Die Antwort aus der Sicht der Weltbank auf diese Frage lautet, daß in der Tat eine zusätzliche multilaterale Agentur sich nur dann rechtfertigt, wenn sie - und hier kommt ein technokratisches Schlagwort, das ich aber trotzdem nenne, weil es sich durchgesetzt hat, - wenn diese multilaterale Agentur also "Additionalität " bieten kann, d.h., wenn sie voraussichtlich zusätzliche Investitionsflüsse in Entwicklungsländer mobilisiert, die ohne MIGAs Schutz unterblieben. Und diese Frage wird von der Weltbank in der Tat positiv beantwortet. Lassen Sie mich das anhand einiger Beispiele näher demonstrieren:

Besonders deutlich zeigt sich die Additionalität des Leistungsangebots der MIGA in den Fällen jener Exportländer, die über ein eigenes Investitionsschutzsystem nicht verfügen. Das sind vor allem kapitalexportierende Entwicklungsländer wie die OPEC-Staaten. Verschiedene OPEC-Staaten waren deswegen naturgemäß an der MIGA besonders stark interessiert. Eine interessante Neuerung bietet dabei die MIGA auch insofern, als sie sogar Investoren aus dem Gastland selbst den Versicherungsschutz der MIGA - also einen völkerrechtlichen Schutz - zur Verfügung stellen kann, sofern das für die fragliche Investition verwendete Kapital aus dem Ausland retransferiert wird. Man will damit dem Problem der Kapitalflucht aus Entwicklungsländern einen Riegel vorschieben oder diese sogar rückläufig machen.

Aber auch Investoren aus traditionellen Kapital-Exportländern wie den USA, Japan oder der Bundesrepublik Deutschland, wo es gut funktionierende Investitionsschutz- und Versicherungssysteme gibt, wird durch die MIGA eine Reihe zusätzlicher Vorteile geboten. Einmal durch das im Vergleich zu den meisten bestehenden Versicherungssystemen breiter gefaßte Spektrum der durch die MIGA zu versichernden Investitionen, worunter neben unmittelbaren Anlageinvestitionen, also z.B. einer

konkreten Fabrik oder Direktbeteiligungen, auch Portfolio-Investitionen und solche zum Teil ideelle Rechtspositionen wie Lizenz-, Franchise-, Management-, Leasing- oder Produktionsaufteilungsverträge fallen. Das Spektrum der zu versichernden Investitionsarten kann vom Direktorium der MIGA noch erweitert werden, wobei jedoch in jedem Falle der Bezug auf ein spezifisches Investitionsvorhaben erhalten bleiben muß[16].

Auch ist zu bedenken, daß selbst besonders erfolgreiche Kapital-Exportnationen wie z.B. die Bundesrepublik Deutschland - erfolgreich im Sinne des internationalen Investitionsschutzes durch bilaterale Abkommen - doch nicht mit allen Empfängerländern Abkommen abschließen konnten. Hier wären insbesondere wieder einige lateinamerikanische Staaten zu nennen, die die eingangs schon genannten Vorbehalte gegen jegliche völkerrechtliche Einbindung ihrer Wirtschaftssouveränität stets aufrechterhalten haben. Die Calvo-Klausel und Drago-Doktrin sind die beiden bekanntesten völkerrechtlichen Ausdrucksformen für diese Vorbehalte. Umso bemerkenswerter ist es, daß mehrere lateinamerikanische Staaten schon kurz nach der Zeichnungslegung des MIGA-Abkommens die Unterzeichnung tatsächlich vorgenommen haben. Das MIGA-Abkommen scheint also einen Umdenkungsprozeß auch auf Seiten der lateinamerikanischen Staaten begünstigt zu haben.

Selbst wo aber Überschneidungen des Versicherungs- und Leistungsangebots der MIGA mit nationalen Versicherungsschutzsystemen im Einzelfall vorkommen mögen, dürfte die kumulative Inanspruchnahme des nationalen und des multilateralen Versicherungsschutzes - im Wege der Rück- oder Co-Versicherung - oftmals für den Investor und das Gastland von Vorteil sein.

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16 Einen Überblick über moderne Investitionsformen gibt Oman, New Forms of International Investment in Developing Countries, ed. OECD Paris 1984, vgl. auch OECD, Detailed Benchmark Definition of Foreign Direct Investment Paris 1983

Der potentielle Vorteil liegt nicht allein in der zusätzlichen finanziellen Risikostreuung, sondern letztlich darin, daß der Investor ein zusätzliches internationales Forum für Verhandlungen mit dem Gastland gewinnt. Damit kann eventuell der in Frage stehende enteignungsgleiche Eingriff schon in einem früheren Stadium verhindert werden, bevor es zu dem eigentlichen Versicherungsfall überhaupt kommt. Damit komme ich zu einem wichtigen Zwischenergebnis: so könnten nämlich in einem paritätisch strukturierten Gremium Beratungen zwischen Gastländern und Heimatstaaten von Investoren stattfinden und rechtliche Kriterien entwickelt werden, die der Verbesserung des internationalen Eigentumschutzes langfristig zugutekommen.

Ein weiterer Punkt schließlich, den ich in diesem Zusammenhang für sehr wichtig halte, ist die "Additionalität" des MIGA-Systems unter dem Gesichtspunkt der Entwicklungspolitik. Diese ergibt sich daraus, daß der Abschluß eines Versicherungsvertrages mit einem ausländischen Investor an die Zustimmung des Gastlandes gebunden sein wird und daß das Investitionsvorhaben den entwicklungspolitischen Interessen und Prioritäten des Gastlandes einschließlich seiner Gesetzgebung entsprechen muß. Es können also nur entwicklungsförderliche Vorhaben versichert werden und deswegen ist anzunehmen, daß im Stadium der Vorbereitung des Garantievertrages das Investitionsprojekt selbst noch in seinem Zuschnitt, in seinem "project design", beeinflußt werden kann. Andererseits wird aber nicht nur von dem Investor ein Beitrag erwartet. Auch vom Gastland wird verlangt, daß es seinerseits seine Gesetzgebung und die sonstigen Rahmenbedingungen für ausländische Investitionen investitionsfreundlich gestaltet. Die Zusammenarbeit mit der MIGA wird also beiden Seiten zusätzliche Vorteile bieten. Hier zeigt sich erneut, daß die eigentliche Schutzfunktion der MIGA schon "im juristischen Vorfeld", vor dem Eintritt des Versicherungsfalles mit seinen rechtlichen Folgewirkungen einsetzen wird.

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Lassen Sie mich nun noch kurz zu den Rechtsfragen und Rechtsbeziehungen kommen, die durch die MIGA geschaffen werden und zu den Fragen der Streitregelung.

Die MIGA wird von der Gründungskonvention mit voller Rechtspersönlichkeit ausgestattet, d.h. es entsteht ein Völkerrechtssubjekt, das die Fähigkeit zum Abschluß von Verträgen, zum Erwerb und zur Veräußerung von Eigentum und auch zur Prozeßführung haben wird. Streitigkeiten zwischen den Mitgliedstaaten der MIGA über die Auslegung der Konvention werden durch das Direktorium und letztinstanzlich durch den Gouverneursrat geschlichtet werden. Das entspricht der rechtlichen Regelung in der Weltbankgruppe. Für die Regelung von Streitigkeiten zwischen der MIGA und einem Investor verweist das MIGA-Abkommen dagegen auf die Möglichkeit der Parteien, im Garantievertrag eine Schiedsgerichtsvereinbarung zu treffen. So könnten z.B. die Versicherungsregeln des sogenannten UNCITRAL oder die Regeln der Internationalen Handelskammer (ICC) vereinbart werden. Es liegt aber nahe - und diese Lösung wurde deswegen auch von der Vorkonferenz indossiert - die Anwendbarkeit der Schiedsgerichtsregeln des eingangs schon genannten ICSID zu vereinbaren, der zur Weltbankgruppe gehörenden Schiedsgerichtsorganisation. Für den Fall endlich, daß die MIGA im Wege der versicherungsrechtlichen Subrogation in die Rechte eines Investors gegen einen Gaststaat eintritt, ordnet die Konvention die Regelung von Streitigkeiten durch Verhandlungen oder Schlichtung oder als ultima ratio im Wege eines internationalen Schiedsgerichtsverfahrens an, dessen Einzelheiten in einem Anhang zur Konvention näher festgelegt sind.

Die wichtigste Bedeutung der MIGA dürfte allerdings wohl weniger in der versicherungsmäßigen Abdeckung finanzieller Risiken oder in der Bereitstellung einer schiedsgerichtlichen Streitregelung liegen, als in ihrem Potential zur allmählichen Fortbildung allgemeiner Rechtsgrundsätze des inter-

nationalen Investitionsschutzes. Es handelt sich hier um ein besonders umstrittenes und schwieriges Völkerrechtsgebiet, wobei dem traditionell westlich geprägten Rechtsanspruch auf ein vollständige, prompte und effektive Entschädigung für enteignungsähnliche Eingriffe im weitesten Sinne von seiten der Entwicklungsländer bereits seit langer Zeit die Behauptung eines neuen internationalen Wirtschaftsrechts entgegengehalten wurde. Zugleich wird hier auch die Abgrenzung der Rechte transnationaler bzw. multinationaler Unternehmen und ihrer Heimatstaaten einerseits von den souveränen Regelungsbefugnissen der Gastländer andererseits berührt. Die Kluft zwischen den hier herrschenden, oft noch entgegengesetzten Rechtsauffassungen der Kapitalexportländer und Kapitalimportländer konnte bisher auch durch ehrgeizige Kodifizierungsversuche internationaler Organisationen wie der OECD oder der UNCTAD nicht ausreichend überwunden werden, insbesondere da solche Kodifizierungsversuche in der Vergangenheit oftmals als Mittel der Interessenwahrung der einen oder anderen Gruppe zurückgewiesen wurden.

Von diesen früheren Ansätzen zur Kodifizierung des Rechts der Auslandsinvestitionen unterscheidet sich die MIGA-Konvention vor allem auch durch ihren weitgehenden Verzicht auf eine unmittelbare materiellrechtliche Kodifizierung des Investitionsschutzes in der Konvention selbst[17]. An deren Stelle ist die Delegierung weitreichender Rechtssetzungsbefugnisse an die längerfristig paritätisch aus Kapitalexport- und Kapitalimportländern besetzten Entscheidungsgremien der MIGA getreten. Außerdem war es in diesem Zusammenhang von Bedeutung, daß im September 1986 bereits in Washington D.C. am Sitz der Weltbank eine Vorkonferenz von 44 Signatarstaaten stattgefunden hat,

17 Siehe hierzu im einzelnen Voss, MIGA and the Code of Conduct, 22 The CTC Reporter 51, 54 (1986)

auf der Entwürfe für Satzungen, Verfahrensregeln und Geschäftsgrundsätze für die Versicherungstätigkeit bzw. Promotionstätigkeit der MIGA beschlossen wurden. Nach dem Inkrafttreten der MIGA-Konvention sollen die Satzungen dem Rat der MIGA und die Verfahrensordnungen sowie Geschäftsprinzipien dem Direktorium der MIGA zur Annahme vorgelegt werden. Durch die Annahme ihrer allgemeinen Geschäftsgrundsätze für die Garantieverträge und Entschädigungszahlungen oder durch ihre mit anderen Organisationen und Staaten abzuschließenden Verträge wird die MIGA vermutlich zunehmend zur Rechtskonsolidierung auf dem Gebiet des internationalen Investitionsschutzes beitragen können. Auch ihre zu erwartende überregionale Mitgliedschaft und die längerfristig angestrebte paritätische Stimmenverteilung in den MIGA-Organen zwischen Kapitalexport- und Importländern dürfte dazu beitragen, daß die von der Agentur entwickelten Grundsätze für Investitionen in Entwicklungsländern zugleich die Rechtsfortbildung allgemein begünstigen werden. Dabei dürfte die streitverhindernde Schlichtungstätigkeit der MIGA in der Praxis eine ebenso große Bedeutung erlangen wie die in der Konvention vorgesehene Möglichkeit nachträglicher schiedsgerichtlicher Streitregelung. Denn den Ablauf einer Streitigkeit über eine von der MIGA garantierte Investition wird man sich so vorstellen dürfen, daß sowohl der beteiligte ausländische Investor als auch der durch seine ursprüngliche Genehmigungserteilung ja rechtlich bereits beteiligte Gaststaat schon im frühen Stadium einer eventuellen Auseinandersetzung die MIGA einschalten werden, um eine gütliche Streitbeilegung zu erzielen. Zu solcher Hilfeleistung ist die MIGA durch die Konvention ausdrücklich aufgefordert. Angesichts der genossenschaftlichen Mitgliederstruktur der MIGA wird kein Gastland interessiert sein, gegenüber der MIGA und indirekt damit gegenüber deren Mitgliedern einschließlich den übrigen Entwicklungsländern regresspflichtig zu werden, so wie ja bisher praktisch auch kaum einmal ein der Weltbank angehörendes Entwicklungsland die Erfüllung seiner Verpflichtungen aus

einem Weltbankdarlehen aufgekündigt hat. Ein Gastland, das sich seinen Verpflichtungen aus einem von der MIGA versicherten Investitionsabkommen oder den Vermittlungsbemühungen der MIGA in einer Investitionsstreitigkeit leichtfertig entzöge, müßte damit rechnen, sich zumindest innerhalb der MIGA selbst zu isolieren.

Abschließend erlauben Sie mir nun bitte noch einen kurzen Hinweis auf die potentielle Bedeutung der - zusätzlich zum Garantiegeschäft - der MIGA übertragenen Promotionstätigkeit, das heißt ihrer Aufgabe zur Verbesserung des Investitionsklimas in Entwicklungsländern und zur Stimulierung der internationalen Investitions-Zuflüsse. Dabei kann es sich z.B. um Forschung oder Information oder um eine Beratung von Entwicklungsländern bei der Gestaltung ihres Steuer- und Wirtschaftsrechts und beim Aufbau einer effizienten Wirtschaftsverwaltung handeln. Welche Bedeutung diese Promotionstätigkeit der MIGA tatsächlich erlangen wird, muß die Praxis erweisen, wobei Fachleute den potentiellen Bedarf auf diesem Gebiet als erheblich einschätzen. Auch hier handelt es sich um eine Entwicklung mit starker rechtlicher Ausprägung, die unter dem Gesichtspunkt der Rechtsfortbildung auch für den internationalen Wirtschaftsjuristen von Interesse ist.

DISKUSSION

Professor Ress: Schönen Dank, Herr Dr. Petersmann. Sie haben uns ein faszinierendes Konzept, man könnte fast sagen: das Ei des Kolumbus vorgestellt, um aus den Schwierigkeiten des Investitionsschutzes herauszukommen. Bisher ist - und das haben Sie richtig dargestellt - die Hull-Rule, also "the prompt and effective and full compensation", im Völkerrecht umstritten. Es gibt eine Reihe von Gerichtsentscheidungen, die diese Regel nach wie vor bestätigen. Darüber hinaus gibt es eine erhebliche Tendenz, vor allem von seiten der Entwicklungsländer, die "rule" im Sinne einer adäquaten Entschädigung zu reduzieren. Für Investoren aus entwickelten Industriestaaten stellt der Schutz ihrer Investitionen eine ganz wichtige Aufgabe dar, mit der sich auch die Auswärtigen Ämter durch Abschluß bilateraler Investitionsschutzabkommen lange Zeit intensiv beschäftigt haben. Die Frage ist, ob man diesen Problemkreis multilateral regeln kann. Hierzu gibt es eine Reihe von Fragen: Was für ein Eigentumsbegriff würde in einem solchen System zugrundegelegt werden? Nehmen wir an, in einem Staat würden Gewinne, die aus ausländischen Investitionen gezogen werden, exorbitant besteuert. Er würde nicht ein Steuersatz von 50 % genommen, sondern es würde ein Höchststeuersatz von 90 % vorliegen. So sind beispielsweise ja aus Nordeuropa fast hundertprozentige Steuersätze bekannt. Welcher Eigentumsbegriff würde in einem paritätisch besetzten Entscheidungsgremium wie der MIGA zugrundegelegt werden? Woran würde sich ein solches Entscheidungsgremium zu orientieren haben? Am geltenden Völkerrecht?

Frage: Bei der MIGA handelt es sich um eine Versicherungsagentur. Nehmen wir also einmal an, daß der Versicherungsfall eintritt und die MIGA zahlen muß. Kann sie in diesem Fall intern gegenüber dem Mitgliedstaat, der unter den Genossen diesen Schadensfall verursacht hat und der sich auch nach Auffassung der MIGA nicht vertragskonform verhalten und die ganze Auslandsinvestition enteignet hat, Rückgriff nehmen?

Antwort: Zunächst zum Eigentumsbegriff: Dieser ist in dem Abkommen selbst und in dem Kommentar, der über die Gründungsgeschichte Aufschluß gibt, schon weitgehend formuliert. Darüber hinaus kann aber das Direktorium

eine Reihe moderner Investitionsformen, die im klassischen Völkerrecht noch nicht als solche anerkannt waren, die jedoch heute in die wirtschaftliche Realität Eingang gefunden haben, in den Versicherungsschutz einbeziehen: z.B. Franchise-Abkommen, Lizenzverträge, Verträge über Technologietransfer, Managementverträge[16] und selbst Bankkredite - sofern sie sich auf ein nach den MIGA-Vorschriften zu versicherndes Investitionsprojekt beziehen.

Ihre Frage ging aber noch viel weiter. An welchen Rechtsquellen soll sich die MIGA orientieren? Hier mag von Interesse sein, daß für den Fall eines Schiedsgerichtsverfahrens zwischen der MIGA und einem Investor die von der Vorbereitungskonferenz im September 1986 entworfenen Verfahrensregeln das Schiedsgericht auf drei verschiedene Rechtsquellen verweist: zuerst den Garantievertrag, dann die MIGA-Konvention und schließlich die allgemeinen Rechtsgrundsätze.[17] Ferner sagt die Konvention, daß sich die MIGA an bestehenden bilateralen oder auch multilateralen Investitionsschutzabkommen orientieren soll. Es war sehr wichtig - gerade für die Deutschen, die lange gezögert haben beizutreten -, daß die bestehenden bilateralen Investitionsschutzverträge nicht aufgeweicht werden dürfen, sondern daß im Gegenteil das schon bestehende Recht eher eine multilaterale Bestätigung und damit eine Ausweitung erfahren sollte. Doch können natürlich irgendwo die Präzedenzfälle aufhören, oder es gibt bilaterale Verträge, die sich widersprechen. In diesem Falle wird es zu einer echten Rechtsfortbildung kommen müssen, und dabei wird es in der Tat eine Rolle spielen, wie sich dieses multilaterale Gremium im einzelnen zusammensetzen wird[18]. Man wird hierbei auf eine breite Konsensfindung angewiesen sein. Deswegen halte ich es für so wichtig, daß skeptische Staaten - die hat es interessanterund erfreulicherweise auf beiden Seiten gegeben, unter den Entwicklungsstaaten z.B. manche Lateinamerikaner und unter den Kapitalexportländern etwa die Bundesrepublik Deutschland - sich letztlich doch zum Beitritt

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18 Vgl. auch I. Shihata, "Towards a greater depoliticization of investment disputes - the role of ICSID and MIGA", in I ICSID Rev. 1986, pp. pp. 1-25.

entschlossen haben, das wird sicherlich auch seinen Grund darin haben, daß sie bei der Rechtsfortbildung möglichst auch schon während der Vorkonferenz dabei sein wollten.

Ihre zweite Frage betraf das Funktionieren der MIGA: Was passiert, wenn die MIGA einen Investor entschädigt, weil dieser Investor enteignet worden ist? Hier greift das versicherungsrechtliche Prinzip der Subrogation ein. Die frühere Forderung des Investors an das Gastland geht also auf die MIGA über. Die MIGA gewinnt jetzt einen Entschädigungsanspruch gegen das einzelne Mitgliedsland. Schon die Existenz dieses Subrogationsmechanismus' wird allerdings vermutlich oft dazu führen, daß das Gastland ebenso wie der Investor es gar nicht erst so weit kommen lassen will. Denn wenn tatsächlich diese Subrogation eintritt und das Gastland auf seinem Standpunkt beharrt, daß eine Entschädigung nicht gezahlt werden soll, dann wäre diese Frage nach der MIGA-Konvention im Wege der Verhandlung oder Streitschlichtung und lediglich im Falle der Nicht-Einigung wegen der internationalen Schiedsgerichtsbarkeit zu klären, und das würde natürlich den Beziehungen dieses einzelnen Gastlandes zur MIGA und umgekehrt nicht unbedingt zugute kommen. Hier sieht man gut, wie die genossenschaftliche Struktur der Weltbankgruppe funktioniert. Mitglieder lassen es im allgemeinen - das zeigt die Geschichte der Weltbank deutlich - nicht zum Bruchpunkt kommen, sondern man arrangiert sich bereits zuvor.

Frage: Es könnte letztlich ja auch ein Ausschlußrecht gegenüber einem Staat, der sich nicht seinen Verpflichtungen gemäß verhält, geben oder eine Aberkennung des Stimmrechts, ein ruhendes Stimmrecht oder ähnliches.

Antwort: Ein Ausschluß ist möglich, und auch das entspricht wieder der Regelung bei der Weltbank und beim Währungsfonds. Praktisch ist das, wenn man das einmal am Beispiel der Weltbank zurückverfolgt, bisher eher umgekehrt verlaufen, d.h. ein Land, das seine Verpflichtungen nicht mehr erfüllen möchte, wird dann schon die Entscheidung zum Austritt selbst treffen, bevor es zu einem Ausschluß kommt.

Frage: Wird die Schaffung der MIGA nicht zu einem zusätzlichen Solidarisierungseffekt unter den Entwicklungsländern führen?

Antwort: Der Solidarisierungsprozeß ist ja gar nicht immer unerwünscht. Dafür ist ja durch die paritätische Stimmrechtsregelung der MIGA auch durchaus eine Kanalisierungsmöglichkeit gegeben. Nehmen wir einmal die Erörterung eines konkreten Enteignungsfalles in der MIGA an - z.B. den eingangs gebildeten Beispielsfall über den enteignungsähnlichen Charakter einer besonders hohen Besteuerung. Dann werden vielleicht das Gastland und weitere Entwicklungsländer sagen: Das ist keine Enteignung, das ist bei uns normales Steuerrecht, und dem hat sich jeder zu fügen. Der Investor - unterstützt von mehreren Industriestaaten - wird vielleicht sagen: 90 % Besteuerung, das ist eine schleichende, verdeckte Enteignungsmaßnahme. Das wird man dann in der MIGA diskutieren, und es kann sehr gut sein, daß man sich irgendwo in der Mitte zwischen den verschiedenen Vorstellungen trifft - z.B. bei 60 % als Grenze des Zulässigen. Man gewinnt dann zweierlei: Man legt den konkreten Streit bei und - was noch wichtiger ist - man gewinnt einen Präzedenzfall bzw. eine Orientierung für das nächste Mal. Ich glaube also, Solidarisierungen können durchaus stattfinden und sind nicht immer schädlich.

Frage: Sie haben vorhin gesagt, daß auch die Entwicklungsförderlichkeit der zu versichernden Investitionen überprüft werden soll. Wer bestimmt denn nun, was entwicklungsförderlich ist? Das Konzept der Weltbank? Dem kann man ja unter Umständen vorwerfen, daß es vor allem von den ökonomischen Theorien der kapitalexportierenden Länder bestimmt ist.

Antwort: Da geht die Theorie und wohl auch die praktische Einschätzung dahin, daß die Weltbank genau wie die MIGA nicht nur die Sicht einer einzelnen Staatengruppe wiedergibt. Auch die Weltbank ist ja genossenschaftlich und heterogen zusammengesetzt. In der Entscheidungspraxis der Weltbank, das habe ich eben nicht so im einzelnen dargelegt, herrscht das Konsensprinzip vor. Meinungsverschiedenheiten werden also im allgemeinen ausdiskutiert. Darüber hinaus führt die Weltbank - und dasselbe wird für die MIGA gelten - kein Projekt in einem Land durch ohne die Zustimmung von dessen Regierung. Hier gilt das Konsensprinzip erneut. Die Weltbank kann deswegen nicht etwa allein bestimmen, was für ein Land entwicklungsförderlich ist, sondern sie steht mit ihren Mitgliedstaaten in einem "Politikdialog". Das ist ein laufender Dialog, in dem ein Land selbst seine Entwicklungsziele festlegt und dann eben die externen Ex-

perten ihre Kommentare dazu abgeben. Durch diesen Politikdialog versucht man, zu objektiven vom Empfängerland getragenen Kriterien zu gelangen darüber, was entwicklungsförderlich und was entwicklungspolitisch unsinnig ist.

Frage: Mich würde die Stellung der Investoren interessieren. Das sind ja nicht Staaten, sondern das sind ja nun Private, das sind Unternehmen, teilweise auch große multinationale Unternehmen. Sie sprachen nun vom Beitrag der MIGA zur Entwicklung des Völkerrechts. Inwieweit glauben Sie, daß sich hier die Stellung von Privaten im Völkerrecht möglicherweise stärkt? Sie sagten, es kann ja auch ein Interessenkonflikt zwischen Entwicklungshilfekonzepten entstehen, d.h. Unternehmen investieren vielleicht in einem anderen Staat, und der Gaststaat ist damit vielleicht gar nicht so recht einverstanden. Wo können da Konflikte auftauchen, und wie stark ist möglicherweise die Stellung des jeweiligen Investors auch innerhalb der MIGA? Kann man nur über den diplomatischen Schutz helfen, oder kann man möglicherweise den einzelnen im Völkerrecht durch so eine Organisation stärken?

Antwort: Es gibt eine ganze Reihe von Entwicklungslinien, die zeigen, daß der einzelne, das Individuum oder auch juristische Personen im Völkerrecht eine Stärkung erfahren haben. Die Schaffung der MIGA ist sicherlich ein weiteres Beispiel dafür, wie das Individuum oder das private Unternehmen eine internationalrechtliche Stärkung erfährt. Wenn Sie es rein theoretisch durchspielen, dann könnte man natürlich sagen, an der eigentlichen völkerrechtlichen Konvention sind die Unternehmen nicht beteiligt, sondern die Heimatstaaten der Unternehmen. Und letztlich, soweit das Unternehmen scheinbar in eine völkerrechtliche Position gelangt, handelt es sich in Wirklichkeit doch nur um eine aus der Völkerrechtsstellung seines Heimatstaates abgeleitete Rechtsposition. Wenn man das praktisch betrachtet, erfährt das Unternehmen aber wohl doch auch eine unmittelbare Aufwertung seiner Rechtsposition als Teilnehmer an einer früher im wesentlichen auf Staaten begrenzten internationalen Rechtsordnung.

Frage: Natürlich interessiert mich mehr die praktische Seite. Denn in der Praxis ist es doch so: Die Investoren schließen meist mit den Entwicklungsstaaten selbst irgendwelche Entwicklungsverträge ab. Es kontrahiert also

ein Unternehmer oder ein Privater mit einem Staat. Er ist auch unter diesem MIGA-Abkommen versichert, d.h. wir bewegen uns auf einer völkerrechtlichen Ebene, in die der einzelne eingebunden ist.

Antwort: Das gilt ja im übrigen auch schon für den interessanten Bereich der Konzessionsverträge. Das fing an mit den Ölkonzessionen, und da gibt es ja mehrere berühmte Schiedsgerichtsfälle zu der Frage, ob solche Konzessionen nun Völkerrecht sind oder nationales Recht oder auch vielleicht nach den allgemeinen Rechtsprinzipien zu beurteilen sind. Die Antwort, die ich persönlich sehr elegant finde, besteht darin, daß man vom "transnationalen Recht" spricht. Dann stellt sich aber die Frage: Was ist transnationales Recht? Ist das ein Rechtsbereich zwischen Völkerrecht und nationalem Recht? Ich glaube, das Wichtige ist, daß man sieht, daß hier eine Entwicklung im Gang ist, daß transnationale Unternehmen in der Praxis eine rechtliche Stärkung erfahren, die zumindest wichtige völkerrechtliche Aspekte aufweist.

Frage: Sie haben gesagt, Streitigkeiten zwischen Mitgliedstaaten werden in der Organisation letztlich vom Gouverneursrat behandelt. Wenn es nun eine Streitigkeit dieser Art zwischen zwei Mitgliedstaaten gäbe, wenn sich also der eine Mitgliedstaat für die Position seines Investorunternehmens gegenüber einem anderen Mitgliedstaat, der dieses Investorunternehmen enteignet hat, behauptetermaßen enteignet hat, stark macht, dann handelt es sich also um einen Streit zwischen zwei Mitgliedstaaten, wenn der Industriestaat die Position seines Unternehmens als seine Position in der MIGA aufgreift. Das wäre eine Form des institutionalisierten diplomatischen Schutzes, wobei ja das Aufgreifen nach völkerrechtlichen Regeln im Ermessen des Mitgliedstaates steht und das Unternehmen gegenüber seinem Heimatstaat keinerlei völkerrechtlichen Anspruch hat. Nur in bestimmten Rechtsordnungen, wie z.B. in der Bundesrepublik Deutschland, hätte das Unternehmen einen aus nationalem Recht folgenden Anspruch auf diplomatischen Schutz, der auch im Rahmen des relativ weiten politischen Ermessens zu gewähren wäre. Würde aber der Mitgliedstaat im Rahmen einer Verhandlung auf die Position seines Unternehmens verzichten, so wäre auch wieder nach nationalem Recht dies unter Umständen eine Enteignung. Nach deutschem

Recht hätte die Bundesrepublik bei einem solchen Verzicht wegen Verletzung des Artikels 14 GG Entschädigung gegenüber dem eigenen Unternehmen zu leisten, wenn sich die Bundesrepublik im Rahmen der MIGA auf eine Lösung einlassen würde, die als partieller Verzicht auf Rechte des deutschen Unternehmens im Ausland anzusehen wäre. Das ist aber eine Position, die unterschiedlich von Staat zu Staat je nach nationalem Recht ist und die mit der völkerrechtlichen Frage gar nichts zu tun hat. Diese völkerrechtliche Lösung beseitigt also die Unterschiede, die aufgrund der unterschiedlichen nationalen Positionen bestehen, nicht.

Antwort: Dazu eine Klarstellung: Die Streitregelung zwischen den Mitgliedstaaten, von der ich sagte, daß sie durch das Direktorium und letztinstanzlich durch den Gouverneursrat stattfindet, bezieht sich auf die Auslegung des MIGA-Abkommens. Andererseits verweist das MIGA-Abkommen für die Klärung der Enteignungsfragen auf eine zwischen dem Investor und Gaststaat zu treffende Schiedsvereinbarung. Die erst im Entwurf vorliegenden Geschäftsgrundsätze der MIGA verweisen dazu in erster Linie auf die Schiedsgerichtsregelung der ICSID, einer anderen Weltbankorganisation. Wenn einmal ein Schiedsgerichtsverfahren in Gang kommt zwischen einem Unternehmen und einem Staat, dann ist zumindest beim ICSID ausdrücklich vorgesehen, daß das diplomatische Schutzrecht so lange ruht.

Frage: Sie haben ausgeführt, daß ein Versicherungsvertrag nur zustande kommt, wenn das Land, in dem investiert werden soll, zustimmt. Sie haben weiterhin ausgeführt, daß diese Zustimmung eine "rechtlich indirekte Beteiligung" des entsprechenden Landes sei. Ich möchte wissen, wie Sie denn diese Zustimmung rechtlich qualifizieren? Handelt es sich dabei tatsächlich um ein einseitiges Rechtsgeschäft? Wenn das so ist, kann dann (a) die Agentur und (b) der einzelne eventuell aus dieser Zustimmung besondere Rechte herleiten. Man könnte sich vorstellen, daß der einzelne dann gegen das Land, in welchem investiert worden ist, aus dieser Zustimmung Rechte herleiten könnte.

Antwort: Die Agentur wird einen Garantievertrag in der Tat nur nach Zustimmung der Regierung abschließen. Die Zustimmung kann ausdrücklich erfolgen - z.B. in Form eines Brief - oder, wie die Konvention ausdrück-

lich vorsieht, eventuell auch stillschweigend durch Verzicht auf einen Einspruch innerhalb einer bestimmten Frist. Ist das völkerrechtlich oder international-verwaltungsrechtlich zu qualifizieren? Das ist meiner Ansicht nach ein allgemeines juristisches Qualifikationsproblem. Ich bin der Auffassung, daß der Begriff des transnationalen Rechts eigentlich ein sehr wertvoller Begriff ist bei der Lösung von Qualifikationsproblemen in diesem Grenzbereich.

Frage: Ich glaube, es geht nicht so sehr um die Definition des transnationalen Rechts, sondern um die Frage, welche Rechtsfolgen aus der Zustimmung des Gastlandes für die MIGA und das beteiligte Unternehmen erwachsen.

Antwort: Das ist die nächste Frage. Erstens für die MIGA: Wenn die MIGA die Zustimmung des Gaststaates zu einer Investition einholt, verlangt sie eventuell zugleich auch etwas von dem Gastland. Z.B. bestimmte investitionsförderliche Rahmenbedingungen oder gesetzgeberische Maßnahmen oder Unterlassungen. Dann entsteht aus der Zustimmung des Gastlandes ein rechtlicher - ich möchte darüber hinaus meinen: ein völkerrechtlicher - Anspruch der MIGA. Zweitens: Was für Drittrechte entstehen für das Unternehmen daraus? Man könnte sich gut vorstellen, daß nach einer Weile der Gaststaat aufgrund irgendwelcher veränderter Vorstellungen - vielleicht auch nach einem Regierungswechsel - eben doch etwas machen wird, was nicht mehr mit der einmal gegebenen Zustimmung übereinstimmt. Und wer zuerst darunter leiden wird, wer das zuerst merken wird, das wird im allgemeinen nicht die MIGA sein, sondern das betroffene Unternehmen. Da stellt sich dann in der Tat die Frage: Kann nun das Unternehmen direkt aus der der MIGA erteilten völkerrechtlichen Zusicherung gegen den Gaststaat vorgehen oder kann sich das Unternehmen nur an die MIGA halten? Wie ich sehe, ist diese Frage zumindest in der Konvention selbst nicht geklärt, nicht vorausgenommen worden. Ich glaube, man konnte sie auch in der Konvention nicht vorausnehmen, sondern man wird das der weiteren rechtlichen Entwicklung überlassen.

Frage: Man kann sich zwei Konsequenzen vorstellen: Einmal, daß sich aus einer solchen Zustimmung, die ja zunächst einmal an die MIGA gerichtet ist, eine Drittberechtigung ergibt, und zwar einerseits eine völkerrecht-

liche Drittberechtigung für das Unternehmen, und zum zweiten eine Wirkung nach dem jeweiligen nationalen Recht des betreffenden Staates. Es hängt von dem nationalen Recht des Staates ab, ob es eine solche Zustimmung als eine Art Garantie oder was auch immer nach dem jeweiligen nationalen Recht qualifiziert. Eine generelle Antwort kann es nicht geben. Das hängt von der jeweiligen nationalen Rechtsordnung ab. Die andere Frage ist, ob es nicht sachgerecht wäre, eine solche Erklärung auch als eine Art völkerrechtliche Garantie oder Einräumung einer völkerrechtlichen Rechtsposition mit Drittwirkung zu verstehen. Wir interpretieren auch die Unterwerfungserklärung nach Art. 25 der Menschenrechtskonvention als eine unmittelbare Drittberechtigung. Das Individuum erwirbt also ein unmittelbares Anrufungsrecht internationaler Organe, das es vorher nicht hatte. Das ist also denkbar. Die Fortsetzung einer solchen Konstruktion müßte sich an sich in dem Streitregelungsmechanismus der MIGA niederschlagen, und da fehlt mir die Position des Unternehmens. Das Unternehmen müßte in dem Organ MIGA vor dem Gouverneursrat an sich auch ein Standing haben, um seine Position dann dort vertreten zu können. Und da scheint mir eine Lücke letztlich im MIGA-Abkommen zu sein, wenn es eine solche Position nicht vorsehen sollte.

Antwort: Dazu eine Klarstellung: Das Unternehmen verhandelt mit dem Präsidenten der MIGA. Der Präsident der MIGA ist zugleich der oberste Exekutivbeamte. Wenn es zu einem Schiedsgerichtsverfahren zwischen dem Investor und der MIGA kommt, soll das Schiedsgericht nach einem Entwurf der Vorbereitungskonferenz seine Entscheidung erstens auf den Garantievertrag, zweitens die Konvention und - hilfsweise - auf die allgemeinen Rechtsgrundsätze stützen. In einem Rechtsstreit mit der MIGA kann sich also der Investor, indem er sich auf den Garantievertrag beruft, auch auf die darin erteilte Zustimmung des Gastlandes berufen. Ob er sich allerdings auch in einem Rechtsstreit gegen den Gaststaat auf diese Zustimmung berufen kann - und hier stellt sich die eigentliche Frage der Drittwirkung -, das ist zumindest in der MIGA-Konvention nicht geregelt worden. Ich stimme Herrn Professor Ress in seiner Beurteilung zu, daß diese Frage im nationalen Recht des betreffenden Staats zu beantworten sein dürfte.

Frage: Ist nach Ihrer Erfahrung die Besteuerung ausländischer Investitionen in den Entwicklungsländern höher als die Besteuerung von inländischen oder umgekehrt? Ich könnte mir gut vorstellen, daß Länder, die an Devisenmangel ersticken, sich bei der Frage der Besteuerung von Auslandsinvestoren in einem Dilemma befinden.

Antwort: Da hat es einen Meinungsumschwung gegeben. In den siebziger Jahren, als viele nach einer neuen Weltwirtschaftsordnung riefen, gab es in manchen Ländern eine starke Tendenz, ausländische Unternehmen hoch zu besteuern. Inzwischen ist interessanterweise - das ist wohl vor allem auf die Veränderung des weltwirtschaftlichen Umfelds zurückzuführen - eine gegenteilige Entwicklung eingetreten. Es findet jetzt eher ein Konkurrenzwettlauf statt, um ausländische Investoren anzuziehen. Eine Gruppe ostasiatischer Staaten ist da besonders schnell gewesen, z.B. Korea, Singapur, Hong Kong usw. Diese Länder haben eine investitionsfreundliche Gesetzgebung eingeführt, weil sie frühzeitig erkannt haben, daß ausländische Direktinvestitionen für sie von Vorteil sind. Während dessen verharrten andere Länder noch länger bei Ideen, die inzwischen von der Wirklichkeit widerlegt worden sind. Die Tatsache, daß das MIGA-Konzept inzwischen auch bei manchen früher skeptischen lateinamerikanischen Staaten Anerkennung gefunden hat, unterstreicht genau das, was Sie sagen: Daß nämlich inzwischen die praktische Tendenz, ausländische Unternehmen zu benachteiligen, nicht mehr die Bedeutung hat, die sie mal hatte. Es ist eher umgekehrt, d.h. es findet ein Investitionswettlauf statt. Das gibt es ja auch bei uns in Deutschland. Sie erinnern sich: Als kürzlich Daimler Benz in Rastatt oder Bremen eine neue Fabrik auf die Wiese setzen wollte, da haben die Baden-Württemberger gesagt: Wir geben Euch 158 Mio DM dazu, wenn ihr bei uns in Baden-Württemberg investiert. Die EG-Kommission hat dann mit dem Argument interveniert, die anderen europäischen Staaten sähen das als unfairen Wettbewerb um Direktinvestitionen an. Der Nutzen zusätzlicher Direktinvestitionen hat sich aber inzwischen nicht nur in Europa, sondern auch in der Dritten Welt herumgesprochen.

Frage: Sie haben gesagt, daß auch Risiken aus Bürgerkriegen versichert werden können. Wie sieht das in einem solchen Falle mit dem Rückgriff aus? Wird man auf den Rückgriff verzichten? Die UN-Vollversammlung kann

ja vielleicht mitunter feststellen, wer der Aggressor ist, aber meistens wird es solche Anhaltspunkte nicht geben.

Antwort: Ich muß hier bemerken, daß ich an der Aushandlung des MIGA-Abkommens nicht persönlich beteiligt gewesen bin. Ich habe die Arbeiten aus persönlichem Interesse verfolgt. Trotzdem kann ich Ihnen nicht mit absoluter Sicherheit sagen, ob es nicht in einem Kommentar oder Verhandlungsprotokoll hierzu schon eine Bemerkung gibt oder ob von der Vorkonferenz, die im September letzten Jahres stattgefunden hat, vielleicht dazu schon etwas gesagt wurde. Mein Eindruck ist allerdings, daß man diese Frage bisher offen gelassen hat. Ich glaube, daß es in der Tat Situationen gibt, wie Krieg und Bürgerkrieg, wo der Regress besonders große Schwierigkeiten machen könnte und dann wird die Situation eintreten können, daß die MIGA aus ihren Prämienaufkommen oder notfalls sogar aus ihrem Kapital eine Versicherungsentschädigung erbringen muß, für die ein Rückgriff praktisch nicht möglich ist.

Frage: Ich habe da noch eine Frage zur Ausgestaltung des Versicherungsvertrages, der über die MIGA zustandekommt. Wenn ein deutscher Unternehmer z.B. in Brasilien investieren will, läßt er sich doch vermutlich gegen die dort auftretenden typischen Risiken versichern.

Antwort: Das ist richtig. Der Garantievertrag ist nicht einfach als ein kurzes vornommiertes Formular vorzustellen, auf dem man nur einige gewünschte Risiken ankreuzen muß, sondern er wird den besonderen Umständen jedes Einzelfalles ausführlich Rechnung tragen. Auch die Versicherungsprämien sind nicht einheitlich festgelegt und die Risiken werden dementsprechend unter Berücksichtigung der besonderen Umstände jedes einzelnen Falles eingeschätzt werden. Persönlich möchte ich damit rechnen, daß besonders in der Anfangsphase der MIGA diese Perspektive des Einzelfalles prädominieren wird. Allmählich - so könnte ich mir vorstellen - werden sich dann aber aus der Praxis doch zunehmend bestimmte Fallgruppen herausschälen, woraus schon unter dem Gesichtspunkt des Gleichheitssatzes gewisse Normierungstendenzen erwachsen könnten. Man wird aber hier erst einmal die praktische Entwicklung abzuwarten haben.

LIST OF SIGNATURES AND RATIFICATIONS OF THE CONVENTION ESTABLISHING THE MULTILATERAL INVESTMENT GUARANTEE AGENCY

(As of June 5, 1987)

The Convention has been signed by twelve Category One (capital-exporting) and forty-five Category Two (capital-importing) States. Fourteen of the signatory States have also ratified the Convention. Listed below are the fifty-seven states that have signed/ratified the Convention on the dates indicated. Asteriks denote Category One States.

State	Signature	Deposit of Instrument of Ratification
KOREA	October 11, 1985	
TURKEY	October 11, 1985	
ECUADOR	October 11, 1985	January 15, 1986
SENEGAL	October 30, 1985	March 10, 1987
SIERRA LEONE	December 4, 1985	
ST. LUCIA	January 13, 1986	
GRENADA	January 31, 1986	
NETHERLANDS*	February 3, 1986	
JORDAN	February 5, 1986	December 16, 1986
ITALY*	February 19, 1986	
VANUATU	March 7, 1986	
ZAIRE	March 26, 1986	
EQUATORIAL GUINEA	April 7, 1986	
SAUDI ARABIA	April 8, 1986	August 6, 1986
URUGUAY	April 8, 1986	
UNITED KINGDOM*	April 9, 1986	
CHILE	April 10, 1986	
CANADA*	April 10, 1986	

State	Signature	Deposit of Instrument of Ratification
MOROCCO	April 11, 1986	
BENIN	April 17, 1986	
ST. CHRISTOPHER AND NEVIS	April 18, 1986	
BOLIVIA	May 5, 1986	
BARBADOS	May 23, 1986	May 23, 1986
COLOMBIA	May 27, 1986	
COTE D'IVOIRE	May 29, 1986	
TOGO	May 30, 1986	
EGYPT	June 6, 1986	
U.S.A.*	June 18, 1986	
CYPRUS	June 25, 1986	March 11, 1987
GHANA	June 25, 1986	
INDONESIA	June 26, 1986	September 26, 1986
SWITZERLAND*	July 7, 1986	
PAKISTAN	July 7, 1986	December 1, 1986
GREECE	July 18, 1986	
FRANCE*	July 22, 1986	
FED. REP. OF GERMANY*	July 24, 1986	
BAHRAIN	August 6, 1986	November 12, 1986
DENMARK*	August 27, 1986	
JAMAICA	September 11, 1986	
WESTERN SAMOA	September 12, 1986	March 17, 1987
JAPAN*	September 12, 1986	June 5, 1987

State	Signature	Deposit of Instrument of Ratification
PHILIPPINES	September 15, 1986	
MALTA	September 16, 1986	
IRELAND*	September 18, 1986	
NIGERIA	September 23, 1986	
YEMEN, ARAB REPUBLIC OF	October 1, 1986	
TUNISIA	October 1, 1986	
FIJI	October 3, 1986	
SRI LANKA	October 3, 1986	
ZAMBIA	October 7, 1986	
LESOTHO	December 22, 1986	January 30, 1987
MALAWI	February 12, 1987	May 18, 1987
KUWAIT	March 6, 1987	
HUNGARY	March 10, 1987	
SUDAN	March 10, 1987	
BANGLADESH	March 13, 1987	March 13, 1987
SWEDEN*	April 2, 1987	

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The Multilateral Investment Guarantee Agency (MIGA)

Documents Submitted to the
Board of Governors of the
International Bank for
Reconstruction and Development
at its 1985 Annual Meeting

October 1985

Summary Table of Contents

INTRODUCTION

The present volume contains the basic documents on the Multilateral Investment Guarantee Agency (MIGA). MIGA is a projected international development institution designed to encourage the flow of investment to and among developing countries by issuing guarantees against non-commercial risk and carrying out a broad range of promotional activities.

The creation of an international investment guarantee facility has been discussed since the early 1960s in various international fora, such as the World Bank (the Bank), the Organisation for Economic Co-operation and Development (OECD), the Inter-American Development Bank (IDB), the United Nations Conference on Trade and Development (UNCTAD) and the European Community. While none of these earlier initiatives materialized, a regional agency, the Inter-Arab Investment Guarantee Corporation, was established in 1974 and has been in operation since then.

The initiative to create a globally operating MIGA under the auspices of the World Bank was resumed by the Bank's President, Mr. A. W. Clausen, in his first annual address before the Bank's Board of Governors in September 1981. After extensive studies and discussions inside the Bank on the usefulness and the merits of a multilateral investment guarantee scheme, a concrete proposal was developed by the Bank's Vice President and General Counsel, Mr. Ibrahim F. I. Shihata, and circulated to the Bank's member countries in May 1984.

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

At its April 1985 meeting in Washington, D.C., the Bank/IMF Joint Ministerial Committee on the Transfer of Real Resources to Developing Countries (the Development Committee) endorsed the Bank's efforts "to reach an understanding among governments for the creation of MIGA on a voluntary basis". From June to September 1985, the Bank's Executive Directors, assisted by experts from member governments and by a drafting team from the Bank's Legal Department, met in a

Committee of the Whole under the chairmanship of Mr. Shihata to formulate a draft Convention establishing MIGA.

On September 5, 1985, the Committee of the Whole agreed on the texts of the Convention and the Commentary thereon. On September 12, 1985, the Bank's Executive Directors formally approved the documents and decided to submit them to the Bank's Board of Governors with the recommendation that the Governors adopt a resolution approving the Convention and Commentary for transmittal to member Governments of the Bank and the Government of Switzerland and inviting these Governments to sign the Convention. The resolution would also authorize the President of the Bank to convene a preparatory committee of signatories of the Convention to prepare the draft documents necessary for the initiation of MIGA's operations.

Report of the Executive Directors on the Convention Establishing the Multilateral Investment Guarantee Agency

September 12, 1985

Report of the Executive Directors on the Convention Establishing the Multilateral Investment Guarantee Agency

I

1. The Executive Directors of the Bank have formulated a Convention Establishing the Multilateral Investment Guarantee Agency (MIGA) with a view to enhancing the flow of capital and technology for productive purposes to developing countries. They recommend that the Board of Governors adopt a Resolution which would open the Convention for signature by members of the Bank and Switzerland. This action by the Executive Directors does not, of course, imply that the governments represented by the individual Executive Directors are committed to take action on the Convention, nor would an affirmative vote by a Governor on the Resolution imply such a commitment.

2. The action of the Executive Directors has been preceded by extensive preparatory work, as detailed in paragraphs 3 to 5 below. The Executive Directors are satisfied that the Draft Convention provides a suitable legal framework for the operations of the MIGA and that the prospects for the Convention being widely accepted by members of the Bank are favorable.

II

3. The present Bank initiative for establishing a multilateral investment guarantee agency originated with Mr. Clausen's address to the Bank's Board of Governors at the Annual Meeting in September 1981. Mr. Clausen suggested that the possibility of creating a multilateral investment guarantee agency which would assist in mobilizing additional investment capital for the developing countries should be explored and that the Bank should facilitate this effort.

4. After consultations on issues related to the establishment of a MIGA with representatives of some member governments, national insurance agencies, the private insurance market and the international business community, Bank staff prepared a preliminary report which concluded that further discussions were warranted. In August 1982, the Executive Directors agreed, on the basis of this report, that staff should continue to examine the feasibility of establishing a MIGA within the framework or under the auspices of the World Bank Group with a view to submitting a

progress report or reports and, as soon as practicable thereafter, a final report on the matter. As directed, the major issues were examined by the staff; Staff Studies were submitted to the Executive Directors in June 1983 and discussed in December of that year. In the Spring of 1984 a paper, "Main Features of a Proposed Multilateral Investment Guarantee Agency," embodying a specific proposal for a multilateral investment guarantee scheme, was presented to and discussed with the Executive Directors. As a result of these discussions, a draft Outline of the Convention Establishing the Multilateral Investment Guarantee Agency was circulated to Executive Directors in October, 1984. This draft served as a basis for consultations which were conducted with member governments from October 1984 to March 1985. Meetings were held with individual member governments or with groups of them; views of other member governments were obtained through Executive Directors. Consultations were also held with international organizations and with business and professional associations. The draft Convention was revised in light of these consultations and a new draft was submitted to Executive Directors in March of this year. In April, there were two further developments. The Development Committee at its meeting in Washington, D.C., after expressing agreement that "private direct and portfolio investment could make useful contributions to development" and that "[s]uch flows can be promoted by improving the policy environment toward foreign investment in both developing and industrial countries," encouraged the Bank "to hold further discussions in order to reach an understanding among governments for the creation of MIGA on a voluntary basis." In addition, the Executive Directors decided that the text of the proposed Convention should be discussed in depth by them in a Committee of the Whole before it was considered by the Board of Executive Directors. The Board would then formally refer the Convention to the Board of Governors with its recommendations.

5. Twenty sessions of the Committee of the Whole were held in Washington between June and September 1985 (June 10-14; July 18-19; August 6-7; and September 5). In the Committee, Executive Directors were assisted by experts from member governments and by a drafting team from the Bank's Legal Department. On September 5, 1985, the Committee agreed on the text of a draft Convention for submission to the Executive Directors who met in a formal session on September 12, 1985, and agreed to submit a draft Resolution to the Board of Governors for its approval.

III

6. The Bank's initiative to establish the MIGA is all the more timely due to the dramatic decline in private capital flows to developing countries. From a level of about $17 billion in 1981, foreign direct investment in developing countries fell to some $12 billion in 1982 and to approximately $8 billion in 1983. Against this background there has been a renewed interest in the positive role that can be played by foreign investment in developing countries in assisting the resumption of economic

growth. In this context, the idea of removing obstacles to international investments and improving investment conditions has gained a new momentum. As discussed in greater detail below, the MIGA is designed to remove barriers to foreign investment and thus to stimulate the flow of resources to developing countries.

IV

7. The objective of the MIGA is to encourage the flow of resources to its developing members by issuing guarantees, as well as coinsurance and reinsurance, against non-commercial risks and by carrying out complementary activities such as the dissemination of information on investment opportunities and the provision of advice and technical assistance to its member governments. The MIGA is expected to provide an important forum for policy cooperation between capital-importing and capital-exporting countries.

8. In its operations, the MIGA would cooperate with and complement national investment insurance schemes as well as regional entities and the private insurance market. Arrangements for coinsurance and reinsurance are expected to be among the cooperative endeavors with these entities.

9. The Agency would basically cover four broad categories of non- commercial risks: (a) the transfer risk resulting from host government restrictions on conversion and transfer; (b) the risk of loss resulting from legislative action or administrative action or omission of the host government which has the effect of depriving the investor of his ownership, control, or substantial benefit from his investment; (c) the risk resulting from the repudiation of a contract by the host government when the investor has no access to a competent forum, faces unreasonable delays, or is unable to enforce a final judgment; and (d) the war and civil disturbance risk.

10. The funding requirements of the MIGA are to be met through a combination of capital subscriptions and sponsorship. The Convention provides for an initial capitalization of SDR one billion, with a paid-in portion of 20 percent (10 percent in cash and 10 percent in promissory notes) and a callable portion of 80 percent. All members would subscribe to the capital in accordance with their present allocations in the authorized capital of the World Bank. The maximum amount of guarantee that could be issued on the basis of this capital would initially be one hundred and fifty percent of the amount of the subscribed capital plus reserves and a portion of reinsurance cover. This risk-asset ratio could over time rise to a maximum of 5 to 1. In addition, the MIGA, as administrator, could issue guarantees on the basis of "sponsorship" by members. Under this supplementary operation, which would be totally separate from the operations of the MIGA on its own account, sponsoring members would share pro rata in any losses which cannot be met through the "Sponsorship Trust Fund" financed by premiums paid by sponsored investors. It should be

emphasized that, in both cases, the MIGA would be expected ultimately to operate at no cost to its members, financing itself from its own revenues.

11. Upon payment or agreement to pay compensation to an insured investor, the MIGA would be subrogated to such rights or claims as the investor might have had against the host country. Disputes between a host country and the Agency as a subrogee of an investor would be settled in accordance with either (i) the procedure set out in Annex II to the Convention (which provides for the settlement of disputes by negotiation and, failing negotiation, by international arbitration or, if the parties agree, by conciliation) or (ii) a bilateral agreement to be entered into between the MIGA and the members concerning methods of settlement of disputes related to guaranteed investments before the Agency begins its guarantee operations in the territory of that member.

12. The MIGA's basic structure would be patterned after other international financial institutions, notably the Bank and International Finance Corporation.

13. The MIGA would have full juridical personality and function autonomously. It would have, however, an organizational link with the Bank in that the President of the Bank would be *ex officio* Chairman of the MIGA Board of Directors and, in that capacity, would nominate MIGA's President.

14. Oversight of the MIGA would be shared by the two Categories of States mentioned in Schedule A of the Convention for purposes of subscriptions and voting. The voting structure of the Agency ensures equality of voting power between the two groups when all eligible countries become members of the MIGA. Because of the gradual accession of countries to MIGA membership, arrangements for a 3 year transition period would serve as protection for the rights of the minority.

15. Membership in MIGA would be open to all members of the World Bank and to Switzerland. MIGA would become operational upon ratification of the Convention by five Category One countries and fifteen Category Two countries, provided that the total subscriptions of these countries amounted to at least one-third of MIGA's authorized capital, i.e. SDR 333 million.

V

16. The Bank's role in establishing the MIGA is consistent with its mandate as defined in Article I of its Articles of Agreement. It complements current Bank Group efforts—such as cofinancing and the expanding activities of the International Finance Corporation—to channel international investment to developing countries. In view of the benefits expected to result from the operations of the MIGA, the Executive Directors recommend that the Board of Governors adopt the attached draft Resolution which:

(a) Provides for approval of the Convention establishing the MIGA and of the Commentary on the Convention for transmittal to the member Governments of the Bank and the Government of Switzerland;

(b) Invites governments to sign the Convention;

(c) Directs the President of the Bank to transmit a copy of the Convention and Commentary to members of the Bank and Switzerland and directs the President and the Vice President and General Counsel of the Bank to sign a copy of the Convention to indicate the Bank's agreement to fulfill the functions with which it is charged under the Convention;

(d) States that the Convention signed by the Bank will be deposited in the archives of the Bank and will be open for signature; and

(e) Directs the President of the Bank to convene a preparatory committee of signatories of the Convention prior to its entry into force to prepare for consideration by the MIGA Council or Board the draft documents necessary for the initiation of MIGA operations.

International Bank for Reconstruction and Development

(DRAFT)

RESOLUTION NO. _____

Multilateral Investment Guarantee Agency

WHEREAS the Executive Directors of the Bank have

(a) recommended the establishment of a Multilateral Investment Guarantee Agency to enhance the flow to developing countries of capital and technology for productive purposes by (i) issuing guarantees against non-commercial risks and (ii) carrying out promotional activities, and

(b) formulated a draft Convention Establishing the Multilateral Investment Guarantee Agency which, in their view, provides a suitable legal framework for the operations of such Agency and has the most favorable prospects of being widely accepted by the members of the Bank;

NOW THEREFORE the Board of Governors hereby resolves as follows:

1. The Convention establishing the Multilateral Investment Guarantee Agency, attached hereto as Attachment A, and the Commentary on this Convention, attached hereto as Attachment B, are hereby approved for transmittal to the member Governments of the Bank and the Government of Switzerland;

2. Governments are invited to consider signature of the said Convention in view of the benefits expected to ensue from the Multilateral Investment Guarantee Agency to their countries and to economic development in general;

3. The President of the Bank shall transmit a copy of the said Convention and Commentary to each member of the Bank and to Switzerland;

4. The President and the Vice President and General Counsel of the Bank shall sign a copy of the said Convention on behalf of the Bank to indicate the Bank's agreement to fulfill the functions with which it is charged under the said Convention;

5. The copy of the Convention so signed on behalf of the Bank shall remain deposited in the archives of the Bank and shall be open for signature on behalf of Governments in accordance with the terms of the said Convention; and

CONVENTION ESTABLISHING THE MULTILATERAL INVESTMENT GUARANTEE AGENCY

List of Chapters and Articles

Annex I: Guarantees of Sponsored Investments Under Article 24

Annex II: Settlement of Disputes Between A Member and the Agency Under Article 57

CONVENTION ESTABLISHING THE MULTILATERAL INVESTMENT GUARANTEE AGENCY

PREAMBLE

The Contracting States

Considering the need to strengthen international cooperation for economic development and to foster the contribution to such development of foreign investment in general and private foreign investment in particular;

Recognizing that the flow of foreign investment to developing countries would be facilitated and further encouraged by alleviating concerns related to non-commercial risks;

Desiring 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;

Convinced that the Multilateral Investment Guarantee Agency can play an important role in the encouragement of foreign investment complementing national and regional investment guarantee programs and private insurers of non-commercial risk; and

Realizing that such Agency should, to the extent possible, meet its obligations without resort to its callable capital and that such an objective would be served by continued improvement in investment conditions,

Have Agreed as follows:

CHAPTER I

Establishment, Status, Purposes and Definitions

Article 1. Establishment and Status of the Agency

(a) There is hereby established the Multilateral Investment Guarantee Agency (hereinafter called the Agency).

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

(i) contract;

(ii) acquire and dispose of movable and immovable property; and

(iii) institute legal proceedings.

Article 2. Objective and Purposes

The objective of the Agency shall be to encourage the flow of investments for productive purposes among member countries, and in particular to developing member countries, thus supplementing the activities of the International Bank for Reconstruction and Development (hereinafter referred to as the Bank), the International Finance Corporation and other international development finance institutions.

To serve its objective, the Agency shall:

(a) issue guarantees, including coinsurance and reinsurance, against non-commercial risks in respect of investments in a member country which flow from other member countries;

(b) carry out appropriate complementary activities to promote the flow of investments to and among developing member countries; and

(c) exercise such other incidental powers as shall be necessary or desirable in the furtherance of its objective.

The Agency shall be guided in all its decisions by the provisions of this Article.

Article 3. Definitions

For the purposes of this Convention:

(a) "Member" means a State with respect to which this Convention has entered into force in accordance with Article 61.

(b) "Host country" or "host government" means a member, its government, or any public authority of a member in whose territories, as defined in Article 66, an investment which has been guaranteed or reinsured, or is considered for guarantee or reinsurance, by the Agency is to be located.

(c) A "developing member country" means a member which is listed as such in Schedule A hereto as this Schedule may be amended from time to time by the Council of Governors referred to in Article 30 (hereinafter called the Council).

(d) A "special majority" means an affirmative vote of not less than two-thirds of the total voting power representing not less than fifty-five percent of the subscribed shares of the capital stock of the Agency.

(e) A "freely usable currency" means (i) any currency designated as such by the International Monetary Fund from time to time and (ii) any other freely available and effectively usable currency which the Board of Directors referred to in Article 30 (hereinafter called the Board) may designate for the purposes of this Convention after consultation with the International Monetary Fund and with the approval of the country of such currency.

CHAPTER II

Membership and Capital

Article 4. Membership

(a) Membership in the Agency shall be open to all members of the Bank and to Switzerland.

(b) Original members shall be the States which are listed in Schedule A hereto and become parties to this Convention on or before October 30, 1987.

Article 5. Capital

(a) The authorized capital stock of the Agency shall be one billion Special Drawing Rights (SDR1,000,000,000). The capital stock shall be divided into 100,000 shares having a par value of SDR10,000 each, which shall be available for subscription by members. All payment obligations of members with respect to capital stock shall be settled on the basis of the average value of the SDR in terms of United States dollars for the period January 1, 1981 to June 30, 1985, such value being 1.082 United States dollars per SDR.

(b) The capital stock shall increase on the admission of a new member to the extent that the then authorized shares are insufficient to provide the shares to be subscribed by such member pursuant to Article 6.

(c) The Council, by special majority, may at any time increase the capital stock of the Agency.

Article 6. Subscription of Shares

Each original member of the Agency shall subscribe at par to the number of shares of capital stock set forth opposite its name in Schedule A hereto. Each other member shall subscribe to such number of shares of capital stock on such terms and conditions as may be determined by the Council, but in no event at an issue price of less than par. No member shall subscribe to less than fifty shares. The Council may prescribe rules by which members may subscribe to additional shares of the authorized capital stock.

Article 7. Division and Calls of Subscribed Capital

The initial subscription of each member shall be paid as follows:

(i) Within ninety days from the date on which this Convention enters into force with respect to such member, ten percent of the price of each share shall be paid in cash as stipulated in Section (a) of Article 8 and an additional ten percent in the form of non-negotiable, non-interest-bearing promissory notes or similar obligations to be encashed pursuant to a decision of the Board in order to meet the Agency's obligations.

(ii) The remainder shall be subject to call by the Agency when required to meet its obligations.

Article 8. Payment of Subscription of Shares

(a) Payments of subscriptions shall be made in freely usable currencies except that payments by developing member countries may be made in their own currencies up to twenty-five percent of the paid-in cash portion of their subscriptions payable under Article 7(i).

(b) Calls on any portion of unpaid subscriptions shall be uniform on all shares.

(c) If the amount received by the Agency on a call shall be insufficient to meet the obligations which have necessitated the call, the Agency may make further successive calls on unpaid subscriptions until the aggregate amount received by it shall be sufficient to meet such obligations.

(d) Liability on shares shall be limited to the unpaid portion of the issue price.

Article 9. Valuation of Currencies

Whenever it shall be necessary for the purposes of this Convention to determine the value of one currency in terms of another, such value shall be as reasonably determined by the Agency, after consultation with the International Monetary Fund.

Article 10. Refunds

(a) The Agency shall, as soon as practicable, return to members amounts paid on calls on subscribed capital if and to the extent that:

(i) the call shall have been made to pay a claim resulting from a guarantee or reinsurance contract and thereafter the Agency shall have recovered its payment, in whole or in part, in a freely usable currency; or

(ii) the call shall have been made because of a default in payment by a member and thereafter such member shall have made good such default in whole or in part; or

(iii) the Council, by special majority, determines that the financial position of the Agency permits all or part of such amounts to be returned out of the Agency's revenues.

(b) Any refund effected under this Article to a member shall be made in freely usable currency in the proportion of the payments made by that member to the total amount paid pursuant to calls made prior to such refund.

(c) The equivalent of amounts refunded under this Article to a member shall become part of the callable capital obligations of the member under Article 7 (ii).

CHAPTER III

Operations

Article 11. Covered Risks

(a) Subject to the provisions of Sections (b) and (c) below, the Agency may guarantee eligible investments against a loss resulting from one or more of the following types of risk:.

(i) *Currency Transfer*
any introduction attributable to the host government of restrictions on the transfer outside the host country of its currency into a freely usable currency or another currency acceptable to the holder of the guarantee, including a failure of the host government to act within a reasonable period of time on an application by such holder for such transfer;

(ii) *Expropriation and Similar Measures*
any legislative action or administrative action or omission attributable to the host government which has the effect of depriving the holder of a guarantee of his ownership or control of, or a substantial benefit from, his investment, with the exception of non-discriminatory measures of general application which governments normally take for the purpose of regulating economic activity in their territories;

(iii) *Breach of Contract*
any repudiation or breach by the host government of a contract with the holder of a guarantee, when (a) the holder of a guarantee does not have recourse to a judicial or arbitral forum to determine the claim of repudiation or breach, or (b) a decision by such forum is not rendered within such reasonable period of time as shall be prescribed in the contracts of guarantee pursuant to the Agency's regulations, or (c) such a decision cannot be enforced; and

(iv) *War and Civil Disturbance*
any military action or civil disturbance in any territory of the host country to which this Convention shall be applicable as provided in Article 66.

(b) Upon the joint application of the investor and the host country, the Board, by special majority, may approve the extension of coverage under this Article to specific non-commercial risks other than those referred to in Section (a) above, but in no case to the risk of devaluation or depreciation of currency.

(c) Losses resulting from the following shall not be covered:

(i) any host government action or omission to which the holder of the guarantee has agreed or for which he has been responsible; and

(ii) any host government action or omission or any other event occurring before the conclusion of the contract of guarantee.

Article 12. Eligible Investments

(a) Eligible investments shall include equity interests, including medium- or long-term loans made or guaranteed by holders of equity in the enterprise concerned, and such forms of direct investment as may be determined by the Board.

(b) The Board, by special majority, may extend eligibility to any other medium- or long-term form of investment, except that loans other than those mentioned in Section (a) above may be eligible only if they are related to a specific investment covered or to be covered by the Agency.

(c) Guarantees shall be restricted to investments the implementation of which begins subsequent to the registration of the application for the guarantee by the Agency. Such investments may include:

(i) any transfer of foreign exchange made to modernize, expand, or develop an existing investment; and

(ii) the use of earnings from existing investments which could otherwise be transferred outside the host country.

(d) In guaranteeing an investment, the Agency shall satisfy itself as to:

(i) the economic soundness of the investment and its contribution to the development of the host country;

(ii) compliance of the investment with the host country's laws and regulations;

(iii) consistency of the investment with the declared development objectives and priorities of the host country; and

(iv) the investment conditions in the host country, including the availability of fair and equitable treatment and legal protection for the investment.

Article 13. Eligible Investors

(a) Any natural person and any juridical person may be eligible to receive the Agency's guarantee provided that:

(i) such natural person is a national of a member other than the host country;

(ii) such juridical person is incorporated and has its principal place of business in a member or the majority of its capital is owned by a member or members or nationals thereof, provided that such member is not the host country in any of the above cases; and

(iii) such juridical person, whether or not it is privately owned, operates on a commercial basis.

(b) In case the investor has more than one nationality, for the purposes of Section (a) above the nationality of a member shall prevail over the nationality of a non-member, and the nationality of the host country shall prevail over the nationality of any other member.

(c) Upon the joint application of the investor and the host country, the Board, by special majority, may extend eligibility to a natural person who is a national of the host country or a juridical person which is incorporated in the host country or the majority of whose capital is owned by its nationals, provided that the assets invested are transferred from outside the host country.

Article 14. Eligible Host Countries

Investments shall be guaranteed under this Chapter only if they are to be made in the territory of a developing member country.

Article 15. Host Country Approval

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.

Article 16. Terms and Conditions

The terms and conditions of each contract of guarantee shall be determined by the Agency subject to such rules and regulations as the Board shall issue, provided

that the Agency shall not cover the total loss of the guaranteed investment. Contracts of guarantee shall be approved by the President under the direction of the Board.

Article 17. Payment of Claims

The President under the direction of the Board shall decide on the payment of claims to a holder of a guarantee in accordance with the contract of guarantee and such policies as the Board may adopt. Contracts of guarantee shall require holders of guarantees to seek, before a payment is made by the Agency, such administrative remedies as may be appropriate under the circumstances, provided that they are readily available to them under the laws of the host country. Such contracts may require the lapse of certain reasonable periods between the occurrence of events giving rise to claims and payments of claims.

Article 18. Subrogation

(a) Upon paying or agreeing to pay compensation to a holder of a guarantee, the Agency shall be subrogated to such rights or claims related to the guaranteed investment as the holder of a guarantee may have had against the host country and other obligors. The contract of guarantee shall provide the terms and conditions of such subrogation.

(b) The rights of the Agency pursuant to Section (a) above shall be recognized by all members.

(c) Amounts in the currency of the host country acquired by the Agency as subrogee pursuant to Section (a) above shall be accorded, with respect to use and conversion, treatment by the host country as favorable as the treatment to which such funds would be entitled in the hands of the holder of the guarantee. In any case, such amounts may be used by the Agency for the payment of its administrative expenditures and other costs. The Agency shall also seek to enter into arrangements with host countries on other uses of such currencies to the extent that they are not freely usable.

Article 19. Relationship to National and Regional Entities

The Agency shall cooperate with, and seek to complement the operations of, national entities of members and regional entities the majority of whose capital is owned by members, which carry out activities similar to those of the Agency, with a view to maximizing both the efficiency of their respective services and their contribution to increased flows of foreign investment. To this end, the Agency may enter

into arrangements with such entities on the details of such cooperation, including in particular the modalities of reinsurance and coinsurance.

Article 20. Reinsurance of National and Regional Entities

(a) The Agency may issue reinsurance in respect of a specific investment against a loss resulting from one or more of the non-commercial risks underwritten by a member or agency thereof or by a regional investment guarantee agency the majority of whose capital is owned by members. The Board, by special majority, shall from time to time prescribe maximum amounts of contingent liability which may be assumed by the Agency with respect to reinsurance contracts. In respect of specific investments which have been completed more than twelve months prior to receipt of the application for reinsurance by the Agency, the maximum amount shall initially be set at ten percent of the aggregate contingent liability of the Agency under this Chapter. The conditions of eligibility specified in Articles 11 to 14 shall apply to reinsurance operations, except that the reinsured investments need not be implemented subsequent to the application for reinsurance.

(b) The mutual rights and obligations of the Agency and a reinsured member or agency shall be stated in contracts of reinsurance subject to such rules and regulations as the Board shall issue. The Board shall approve each contract for reinsurance covering an investment which has been made prior to receipt of the application for reinsurance by the Agency, with a view to minimizing risks, assuring that the Agency receives premiums commensurate with its risk, and assuring that the reinsured entity is appropriately committed toward promoting new investment in developing member countries.

(c) The Agency shall, to the extent possible, assure that it or the reinsured entity shall have the rights of subrogation and arbitration equivalent to those the Agency would have if it were the primary guarantor. The terms and conditions of reinsurance shall require that administrative remedies are sought in accordance with Article 17 before a payment is made by the Agency. Subrogation shall be effective with respect to the host country concerned only after its approval of the reinsurance by the Agency. The Agency shall include in the contracts of reinsurance provisions requiring the reinsured to pursue with due diligence the rights or claims related to the reinsured investment.

Article 21. Cooperation with Private Insurers and with Reinsurers

(a) The Agency may enter into arrangements with private insurers in member countries to enhance its own operations and encourage such insurers to provide coverage of non-commercial risks in developing member countries on conditions similar

to those applied by the Agency. Such arrangements may include the provision of reinsurance by the Agency under the conditions and procedures specified in Article 20.

(b) The Agency may reinsure with any appropriate reinsurance entity, in whole or in part, any guarantee or guarantees issued by it.

(c) The Agency will in particular seek to guarantee investments for which comparable coverage on reasonable terms is not available from private insurers and reinsurers.

Article 22. Limits of Guarantee

(a) Unless determined otherwise by the Council by special majority, the aggregate amount of contingent liabilities which may be assumed by the Agency under this Chapter shall not exceed one hundred and fifty percent of the amount of the Agency's unimpaired subscribed capital and its reserves plus such portion of its reinsurance cover as the Board may determine. The Board shall from time to time review the risk profile of the Agency's portfolio in the light of its experience with claims, degree of risk diversification, reinsurance cover and other relevant factors with a view to ascertaining whether changes in the maximum aggregate amount of contingent liabilities should be recommended to the Council. The maximum amount determined by the Council shall not under any circumstances exceed five times the amount of the Agency's unimpaired subscribed capital, its reserves and such portion of its reinsurance cover as may be deemed appropriate.

(b) Without prejudice to the general limit of guarantee referred to in Section (a) above, the Board may prescribe:

(i) maximum aggregate amounts of contingent liability which may be assumed by the Agency under this Chapter for all guarantees issued to investors of each individual member. In determining such maximum amounts, the Board shall give due consideration to the share of the respective member in the capital of the Agency and the need to apply more liberal limitations in respect of investments originating in developing member countries; and

(ii) maximum aggregate amounts of contingent liability which may be assumed by the Agency with respect to such risk diversification factors as individual projects, individual host countries and types of investment or risk.

Article 23. Investment Promotion

(a) The Agency shall carry out research, undertake activities to promote investment flows and disseminate information on investment opportunities in developing member countries, with a view to improving the environment for foreign investment flows to such countries. The Agency may, upon the request of a member, provide technical advice and assistance to improve the investment conditions in the territories of that member. In performing these activities, the Agency shall:

(i) be guided by relevant investment agreements among member countries;

(ii) seek to remove impediments, in both developed and developing member countries, to the flow of investment to developing member countries; and

(iii) coordinate with other agencies concerned with the promotion of foreign investment, and in particular the International Finance Corporation.

(b) The Agency also shall:

(i) encourage the amicable settlement of disputes between investors and host countries;

(ii) endeavor to conclude agreements with developing member countries, and in particular with prospective host countries, which will assure that the Agency, with respect to investment guaranteed by it, has treatment at least as favorable as that agreed by the member concerned for the most favored investment guarantee agency or State in an agreement relating to investment, such agreements to be approved by special majority of the Board; and

(iii) promote and facilitate the conclusion of agreements, among its members, on the promotion and protection of investments.

(c) The Agency shall give particular attention in its promotional efforts to the importance of increasing the flow of investments among developing member countries.

Article 24. Guarantees of Sponsored Investments

In addition to the guarantee operations undertaken by the Agency under this Chapter, the Agency may guarantee investments under the sponsorship arrangements provided for in Annex I to this Convention.

CHAPTER IV

Financial Provisions

Article 25. Financial Management

The Agency shall carry out its activities in accordance with sound business and prudent financial management practices with a view to maintaining under all circumstances its ability to meet its financial obligations.

Article 26. Premiums and Fees

The Agency shall establish and periodically review the rates of premiums, fees and other charges, if any, applicable to each type of risk.

Article 27. Allocation of Net Income

(a) Without prejudice to the provisions of Section (a)(iii) of Article 10, the Agency shall allocate net income to reserves until such reserves reach five times the subscribed capital of the Agency.

(b) After the reserves of the Agency have reached the level prescribed in Section (a) above, the Council shall decide whether, and to what extent, the Agency's net income shall be allocated to reserves, be distributed to the Agency's members or be used otherwise. Any distribution of net income to the Agency's members shall be made in proportion to the share of each member in the capital of the Agency in accordance with a decision of the Council acting by special majority.

Article 28. Budget

The President shall prepare an annual budget of revenues and expenditures of the Agency for approval by the Board.

Article 29. Accounts

The Agency shall publish an Annual Report which shall include statements of its accounts and of the accounts of the Sponsorship Trust Fund referred to in Annex

I to this Convention, as audited by independent auditors. The Agency shall circulate to members at appropriate intervals a summary statement of its financial position and a profit and loss statement showing the results of its operations.

CHAPTER V

Organization and Management

Article 30. Structure of the Agency

The Agency shall have a Council of Governors, a Board of Directors, a President and staff to perform such duties as the Agency may determine.

Article 31. The Council

(a) All the powers of the Agency shall be vested in the Council, except such powers as are, by the terms of this Convention, specifically conferred upon another organ of the Agency. The Council may delegate to the Board the exercise of any of its powers, except the power to:

(i) admit new members and determine the conditions of their admission;

(ii) suspend a member;

(iii) decide on any increase or decrease in the capital;

(iv) increase the limit of the aggregate amount of contingent liabilities pursuant to Section (a) of Article 22;

(v) designate a member as a developing member country pursuant to Section (c) of Article 3;

(vi) classify a new member as belonging to Category One or Category Two for voting purposes pursuant to Section (a) of Article 39 or reclassify an existing member for the same purposes;

(vii) determine the compensation of Directors and their Alternates;

(viii) cease operations and liquidate the Agency;

(ix) distribute assets to members upon liquidation; and

(x) amend this Convention, its Annexes and Schedules.

(b) The Council shall be composed of one Governor and one Alternate appointed by each member in such manner as it may determine. No Alternate may

vote except in the absence of his principal. The Council shall select one of the Governors as Chairman.

(c) The Council shall hold an annual meeting and such other meetings as may be determined by the Council or called by the Board. The Board shall call a meeting of the Council whenever requested by five members or by members having twenty-five percent of the total voting power.

Article 32. The Board

(a) The Board shall be responsible for the general operations of the Agency and shall take, in the fulfillment of this responsibility, any action required or permitted under this Convention.

(b) The Board shall consist of not less than twelve Directors. The number of Directors may be adjusted by the Council to take into account changes in membership. Each Director may appoint an Alternate with full power to act for him in case of the Director's absence or inability to act. The President of the Bank shall be *ex officio* Chairman of the Board, but shall have no vote except a deciding vote in case of an equal division.

(c) The Council shall determine the term of office of the Directors. The first Board shall be constituted by the Council at its inaugural meeting.

(d) The Board shall meet at the call of its Chairman acting on his own initiative or upon request of three Directors.

(e) Until such time as the Council may decide that the Agency shall have a resident Board which functions in continuous session, the Directors and Alternates shall receive compensation only for the cost of attendance at the meetings of the Board and the discharge of other official functions on behalf of the Agency. Upon the establishment of a Board in continuous session, the Directors and Alternates shall receive such remuneration as may be determined by the Council.

Article 33. President and Staff

(a) The President shall, under the general control of the Board, conduct the ordinary business of the Agency. He shall be responsible for the organization, appointment and dismissal of the staff.

(b) The President shall be appointed by the Board on the nomination of its Chairman. The Council shall determine the salary and terms of the contract of service of the President.

(c) In the discharge of their offices, the President and the staff owe their duty entirely to the Agency and to no other authority. Each member of the Agency shall respect the international character of this duty and shall refrain from all attempts to influence the President or the staff in the discharge of their duties.

(d) In appointing the staff, the President shall, subject to the paramount importance of securing the highest standards of efficiency and of technical competence, pay due regard to the importance of recruiting personnel on as wide a geographical basis as possible.

(e) The President and staff shall maintain at all times the confidentiality of information obtained in carrying out the Agency's operations.

Article 34. Political Activity Prohibited

The Agency, its President and staff shall not interfere in the political affairs of any member. Without prejudice to the right of the Agency to take into account all the circumstances surrounding an investment, they shall not be influenced in their decisions by the political character of the member or members concerned. Considerations relevant to their decisions shall be weighed impartially in order to achieve the purposes stated in Article 2.

Article 35. Relations with International Organizations

The Agency shall, within the terms of this Convention, cooperate with the United Nations and with other inter-governmental organizations having specialized responsibilities in related fields, including in particular the Bank and the International Finance Corporation.

Article 36. Location of Principal Office

(a) The principal office of the Agency shall be located in Washington, D.C., unless the Council, by special majority, decides to establish it in another location.

(b) The Agency may establish other offices as may be necessary for its work.

Article 37. Depositories for Assets

Each member shall designate its central bank as a depository in which the Agency may keep holdings of such member's currency or other assets of the Agency

or, if it has no central bank, it shall designate for such purpose such other institution as may be acceptable to the Agency.

Article 38. Channel of Communication

(a) Each member shall designate an appropriate authority with which the Agency may communicate in connection with any matter arising under this Convention. The Agency may rely on statements of such authority as being statements of the member. The Agency, upon the request of a member, shall consult with that member with respect to matters dealt with in Articles 19 to 21 and related to entities or insurers of that member.

(b) Whenever the approval of any member is required before any act may be done by the Agency, approval shall be deemed to have been given unless the member presents an objection within such reasonable period as the Agency may fix in notifying the member of the proposed act.

CHAPTER VI

Voting, Adjustments of Subscriptions and Representation

Article 39. Voting and Adjustments of Subscriptions

(a) In order to provide for voting arrangements that reflect the equal interest in the Agency of the two Categories of States listed in Schedule A of this Convention, as well as the importance of each member's financial participation, each member shall have 177 membership votes plus one subscription vote for each share of stock held by that member.

(b) If at any time within three years after the entry into force of this Convention the aggregate sum of membership and subscription votes of members which belong to either of the two Categories of States listed in Schedule A of this Convention is less than forty percent of the total voting power, members from such a Category shall have such number of supplementary votes as shall be necessary for the aggregate voting power of the Category to equal such a percentage of the total voting power. Such supplementary votes shall be distributed among the members of such Category in the proportion that the subscription votes of each bears to the aggregate of subscription votes of the Category. Such supplementary votes shall be subject to

automatic adjustment to ensure that such percentage is maintained and shall be cancelled at the end of the above-mentioned three-year period.

(c) During the third year following the entry into force of this Convention, the Council shall review the allocation of shares and shall be guided in its decision by the following principles:

(i) the votes of members shall reflect actual subscriptions to the Agency's capital and the membership votes as set out in Section (a) of this Article;

(ii) shares allocated to countries which shall not have signed the Convention shall be made available for reallocation to such members and in such manner as to make possible voting parity between the above-mentioned Categories; and

(iii) the Council will take measures that will facilitate members' ability to subscribe to shares allocated to them.

(d) Within the three-year period provided for in Section (b) of this Article, all decisions of the Council and Board shall be taken by special majority, except that decisions requiring a higher majority under this Convention shall be taken by such higher majority.

(e) In case the capital stock of the Agency is increased pursuant to Section (c) of Article 5, each member which so requests shall be authorized to subscribe a proportion of the increase equivalent to the proportion which its stock theretofore subscribed bears to the total capital stock of the Agency, but no member shall be obligated to subscribe any part of the increased capital.

(f) The Council shall issue regulations regarding the making of additional subscriptions under Section (e) of this Article. Such regulations shall prescribe reasonable time limits for the submission by members of requests to make such subscriptions.

Article 40. Voting in the Council

(a) Each Governor shall be entitled to cast the votes of the member he represents. Except as otherwise specified in this Convention, decisions of the Council shall be taken by a majority of the votes cast.

(b) A quorum for any meeting of the Council shall be constituted by a majority of the Governors exercising not less than two-thirds of the total voting power.

(c) The Council may by regulation establish a procedure whereby the Board, when it deems such action to be in the best interests of the Agency, may request a decision of the Council on a specific question without calling a meeting of the Council.

Article 41. Election of Directors

(a) Directors shall be elected in accordance with Schedule B.

(b) Directors shall continue in office until their successors are elected. If the office of a Director becomes vacant more than ninety days before the end of his term, another Director shall be elected for the remainder of the term by the Governors who elected the former Director. A majority of the votes cast shall be required for election. While the office remains vacant, the Alternate of the former Director shall exercise his powers, except that of appointing an Alternate.

Article 42. Voting in the Board

(a) Each Director shall be entitled to cast the number of votes of the members whose votes counted towards his election. All the votes which a Director is entitled to cast shall be cast as a unit. Except as otherwise specified in this Convention, decisions of the Board shall be taken by a majority of the votes cast.

(b) A quorum for a meeting of the Board shall be constituted by a majority of the Directors exercising not less than one-half of the total voting power.

(c) The Board may by regulation establish a procedure whereby its Chairman, when he deems such action to be in the best interests of the Agency, may request a decision of the Board on a specific question without calling a meeting of the Board.

CHAPTER VII

Privileges and Immunities

Article 43. Purposes of Chapter

To enable the Agency to fulfill its functions, the immunities and privileges set forth in this Chapter shall be accorded to the Agency in the territories of each member.

Article 44. Legal Process

Actions other than those within the scope of Articles 57 and 58 may be brought against the Agency only in a court of competent jurisdiction in the territories

of a member in which the Agency has an office or has appointed an agent for the purpose of accepting service or notice of process. No such action against the Agency shall be brought (i) by members or persons acting for or deriving claims from members or (ii) in respect of personnel matters. The property and assets of the Agency shall, wherever located and by whomsoever held, be immune from all forms of seizure, attachment or execution before the delivery of the final judgment or award against the Agency.

Article 45. Assets

(a) The property and assets of the Agency, wherever located and by whomsoever held, shall be immune from search, requisition, confiscation, expropriation or any other form of seizure by executive or legislative action.

(b) To the extent necessary to carry out its operations under this Convention, all property and assets of the Agency shall be free from restrictions, regulations, controls and moratoria of any nature; provided that property and assets acquired by the Agency as successor to or subrogee of a holder of a guarantee, a reinsured entity or an investor insured by a reinsured entity shall be free from applicable foreign exchange restrictions, regulations and controls in force in the territories of the member concerned to the extent that the holder, entity or investor to whom the Agency was subrogated was entitled to such treatment.

(c) For purposes of this Chapter, the term "assets" shall include the assets of the Sponsorship Trust Fund referred to in Annex I to this Convention and other assets administered by the Agency in furtherance of its objective.

Article 46. Archives and Communications

(a) The archives of the Agency shall be inviolable, wherever they may be.

(b) The official communications of the Agency shall be accorded by each member the same treatment that is accorded to the official communications of the Bank.

Article 47. Taxes

(a) The Agency, its assets, property and income, and its operations and transactions authorized by this Convention, shall be immune from all taxes and customs duties. The Agency shall also be immune from liability for the collection or payment of any tax or duty.

(b) Except in the case of local nationals, no tax shall be levied on or in respect of expense allowances paid by the Agency to Governors and their Alternates or on or in respect of salaries, expense allowances or other emoluments paid by the Agency to the Chairman of the Board, Directors, their Alternates, the President or staff of the Agency.

(c) No taxation of any kind shall be levied on any investment guaranteed or reinsured by the Agency (including any earnings therefrom) or any insurance policies reinsured by the Agency (including any premiums and other revenues therefrom) by whomsoever held: (i) which discriminates against such investment or insurance policy solely because it is guaranteed or reinsured by the Agency; or (ii) if the sole jurisdictional basis for such taxation is the location of any office or place of business maintained by the Agency.

Article 48. Officials of the Agency

All Governors, Directors, Alternates, the President and staff of the Agency:

(i) shall be immune from legal process with respect to acts performed by them in their official capacity;

(ii) not being local nationals, shall be accorded the same immunities from immigration restrictions, alien registration requirements and national service obligations, and the same facilities as regards exchange restrictions as are accorded by the members concerned to the representatives, officials and employees of comparable rank of other members; and

(iii) shall be granted the same treatment in respect of travelling facilities as is accorded by the members concerned to representatives, officials and employees of comparable rank of other members.

Article 49. Application of this Chapter

Each member shall take such action as is necessary in its own territories for the purpose of making effective in terms of its own law the principles set forth in this Chapter and shall inform the Agency of the detailed action which it has taken.

Article 50. Waiver

The immunities, exemptions and privileges provided in this Chapter are granted in the interests of the Agency and may be waived, to such extent and upon

such conditions as the Agency may determine, in cases where such a waiver would not prejudice its interests. The Agency shall waive the immunity of any of its staff in cases where, in its opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the Agency.

CHAPTER VIII

Withdrawal, Suspension of Membership and Cessation of Operations

Article 51. Withdrawal

Any member may, after the expiration of three years following the date upon which this Convention has entered into force with respect to such member, withdraw from the Agency at any time by giving notice in writing to the Agency at its principal office. The Agency shall notify the Bank, as depository of this Convention, of the receipt of such notice. Any withdrawal shall become effective ninety days following the date of the receipt of such notice by the Agency. A member may revoke such notice as long as it has not become effective.

Article 52. Suspension of Membership

(a) If a member fails to fulfill any of its obligations under this Convention, the Council may, by a majority of its members exercising a majority of the total voting power, suspend its membership.

(b) While under suspension a member shall have no rights under this Convention, except for the right of withdrawal and other rights provided in this Chapter and Chapter IX, but shall remain subject to all its obligations.

(c) For purposes of determining eligibility for a guarantee or reinsurance to be issued under Chapter III or Annex I to this Convention, a suspended member shall not be treated as a member of the Agency.

(d) The suspended member shall automatically cease to be a member one year from the date of its suspension unless the Council decides to extend the period of suspension or to restore the member to good standing.

Article 53. Rights and Duties of States Ceasing to be Members

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

(b) Without prejudice to Section (a) above, the Agency shall enter into an arrangement with such State for the settlement of their respective claims and obligations. Any such arrangement shall be approved by the Board.

Article 54. Suspension of Operations

(a) The Board may, whenever it deems it justified, suspend the issuance of new guarantees for a specified period.

(b) In an emergency, the Board may suspend all activities of the Agency for a period not exceeding the duration of such emergency, provided that necessary arrangements shall be made for the protection of the interests of the Agency and of third parties.

(c) The decision to suspend operations shall have no effect on the obligations of the members under this Convention or on the obligations of the Agency towards holders of a guarantee or reinsurance policy or towards third parties.

Article 55. Liquidation

(a) The Council, by special majority, may decide to cease operations and to liquidate the Agency. Thereupon the Agency shall forthwith cease all activities, except those incident to the orderly realization, conservation and preservation of assets and settlement of obligations. Until final settlement and distribution of assets, the Agency shall remain in existence and all rights and obligations of members under this Convention shall continue unimpaired.

(b) No distribution of assets shall be made to members until all liabilities to holders of guarantees and other creditors shall have been discharged or provided for and until the Council shall have decided to make such distribution.

(c) Subject to the foregoing, the Agency shall distribute its remaining assets to members in proportion to each member's share in the subscribed capital. The Agency shall also distribute any remaining assets of the Sponsorship Trust Fund referred to in Annex I to this Convention to sponsoring members in the proportion which the investments sponsored by each bears to the total of sponsored investments. No member shall be entitled to its share in the assets of the Agency or the Sponsorship Trust Fund unless that member has settled all outstanding claims by the Agency

against it. Every distribution of assets shall be made at such times as the Council shall determine and in such manner as it shall deem fair and equitable.

CHAPTER IX

Settlement of Disputes

Article 56. Interpretation and Application of the Convention

(a) Any question of interpretation or application of the provisions of this Convention arising between any member of the Agency and the Agency or among members of the Agency shall be submitted to the Board for its decision. Any member which is particularly affected by the question and which is not otherwise represented by a national in the Board may send a representative to attend any meeting of the Board at which such question is considered.

(b) In any case where the Board has given a decision under Section (a) above, any member may require that the question be referred to the Council, whose decision shall be final. Pending the result of the referral to the Council, the Agency may, so far as it deems necessary, act on the basis of the decision of the Board.

Article 57. Disputes between the Agency and Members

(a) Without prejudice to the provisions of Article 56 and of Section (b) of this Article, any dispute between the Agency and a member or an agency thereof and any dispute between the Agency and a country (or agency thereof) which has ceased to be a member, shall be settled in accordance with the procedure set out in Annex II to this Convention.

(b) Disputes concerning claims of the Agency acting as subrogee of an investor shall be settled in accordance with either (i) the procedure set out in Annex II to this Convention, or (ii) an agreement to be entered into between the Agency and the member concerned on an alternative method or methods for the settlement of such disputes. In the latter case, Annex II to this Convention shall serve as a basis for such an agreement which shall, in each case, be approved by the Board by special majority prior to the undertaking by the Agency of operations in the territories of the member concerned.

Article 58. Disputes Involving Holders of a Guarantee or Reinsurance

Any dispute arising under a contract of guarantee or reinsurance between the parties thereto shall be submitted to arbitration for final determination in accordance with such rules as shall be provided for or referred to in the contract of guarantee or reinsurance.

CHAPTER X

Amendments

Article 59. Amendment by Council

(a) This Convention and its Annexes may be amended by vote of three-fifths of the Governors exercising four-fifths of the total voting power, provided that:

(i) any amendment modifying the right to withdraw from the Agency provided in Article 51 or the limitation on liability provided in Section (d) of Article 8 shall require the affirmative vote of all Governors; and

(ii) any amendment modifying the loss-sharing arrangement provided in Articles 1 and 3 of Annex I to this Convention which will result in an increase in any member's liability thereunder shall require the affirmative vote of the Governor of each such member.

(b) Schedules A and B to this Convention may be amended by the Council by special majority.

(c) If an amendment affects any provision of Annex I to this Convention, total votes shall include the additional votes alloted under Article 7 of such Annex to sponsoring members and countries hosting sponsored investments.

Article 60. Procedure

Any proposal to amend this Convention, whether emanating from a member or a Governor or a Director, shall be communicated to the Chairman of the Board who shall bring the proposal before the Board. If the proposed amendment is recommended by the Board, it shall be submitted to the Council for approval in accordance with Article 59. When an amendment has been duly approved by the Council, the Agency shall so certify by formal communication addressed to all members. Amend-

ments shall enter into force for all members ninety days after the date of the formal communication unless the Council shall specify a different date.

CHAPTER XI

Final Provisions

Article 61. Entry into Force

(a) This Convention shall be open for signature on behalf of all members of the Bank and Switzerland and shall be subject to ratification, acceptance or approval by the signatory States in accordance with their constitutional procedures.

(b) This Convention shall enter into force on the day when not less than five instruments of ratification, acceptance or approval shall have been deposited on behalf of signatory States in Category One, and not less than fifteen such instruments shall have been deposited on behalf of signatory States in Category Two; provided that total subscriptions of these States amount to not less than one-third of the authorized capital of the Agency as prescribed in Article 5.

(c) For each State which deposits its instrument of ratification, acceptance or approval after this Convention shall have entered into force, this Convention shall enter into force on the date of such deposit.

(d) If this Convention shall not have entered into force within two years after its opening for signature, the President of the Bank shall convene a conference of interested countries to determine the future course of action.

Article 62. Inaugural Meeting

Upon entry into force of this Convention, the President of the Bank shall call the inaugural meeting of the Council. This meeting shall be held at the principal office of the Agency within sixty days from the date on which this Convention has entered into force or as soon as practicable thereafter.

Article 63. Depository

Instruments of ratification, acceptance or approval of this Convention and amendments thereto shall be deposited with the Bank which shall act as the depository

of this Convention. The depository shall transmit certified copies of this Convention to States members of the Bank and to Switzerland.

Article 64. Registration

The depository shall register this Convention with the Secretariat of the United Nations in accordance with Article 102 of the Charter of the United Nations and the Regulations thereunder adopted by the General Assembly.

Article 65. Notification

The depository shall notify all signatory States and, upon the entry into force of this Convention, the Agency of the following:

(a) signatures of this Convention;

(b) deposits of instruments of ratification, acceptance and approval in accordance with Article 63;

(c) the date on which this Convention enters into force in accordance with Article 61;

(d) exclusions from territorial application pursuant to Article 66; and

(e) withdrawal of a member from the Agency pursuant to Article 51.

Article 66. Territorial Application

This Convention shall apply to all territories under the jurisdiction of a member including the territories for whose international relations a member is responsible, except those which are excluded by such member by written notice to the depository of this Convention either at the time of ratification, acceptance or approval or subsequently.

Article 67. Periodic Reviews

(a) The Council shall periodically undertake comprehensive reviews of the activities of the Agency as well as the results achieved with a view to introducing any changes required to enhance the Agency's ability to serve its objectives.

(b) The first such review shall take place five years after the entry into force of this Convention. The dates of subsequent reviews shall be determined by the Council.

DONE at , in a single copy which shall remain deposited in the archives of the International Bank for Reconstruction and Development, which has indicated by its signature below its agreement to fulfill the functions with which it is charged under this Convention.

ANNEX I

Guarantees of Sponsored Investments Under Article 24

Article 1. Sponsorship

(a) Any member may sponsor for guarantee an investment to be made by an investor of any nationality or by investors of any or several nationalities.

(b) Subject to the provisions of Sections (b) and (c) of Article 3 of this Annex, each sponsoring member shall share with the other sponsoring members in losses under guarantees of sponsored investments, when and to the extent that such losses cannot be covered out of the Sponsorship Trust Fund referred to in Article 2 of this Annex, in the proportion which the amount of maximum contingent liability under the guarantees of investments sponsored by it bears to the total amount of maximum contingent liability under the guarantees of investments sponsored by all members.

(c) In its decisions on the issuance of guarantees under this Annex, the Agency shall pay due regard to the prospects that the sponsoring member will be in a position to meet its obligations under this Annex and shall give priority to investments which are co-sponsored by the host countries concerned.

(d) The Agency shall periodically consult with sponsoring members with respect to its operations under this Annex.

Article 2. Sponsorship Trust Fund

(a) Premiums and other revenues attributable to guarantees of sponsored investments, including returns on the investment of such premiums and revenues, shall be held in a separate account which shall be called the Sponsorship Trust Fund.

(b) All administrative expenses and payments on claims attributable to guarantees issued under this Annex shall be paid out of the Sponsorship Trust Fund.

(c) The assets of the Sponsorship Trust Fund shall be held and administered for the joint account of sponsoring members and shall be kept separate and apart from the assets of the Agency.

(b) The Agency may obtain reinsurance for investments guaranteed by it under this Annex and shall meet the cost of such reinsurance out of the Sponsorship Trust Fund. The Board may decide whether and to what extent the loss-sharing obligation of sponsoring members referred to in Section (b) of Article 1 of this Annex may be reduced on account of the reinsurance cover obtained.

Article 6. Operational Principles

Without prejudice to the provisions of this Annex, the provisions with respect to guarantee operations under Chapter III of this Convention and to financial management under Chapter IV of this Convention shall be applied *mutatis mutandis* to guarantees of sponsored investments except that (i) such investments shall qualify for sponsorship if made in the territories of any member, and in particular of any developing member, by an investor or investors eligible under Section (a) of Article 1 of this Annex, and (ii) the Agency shall not be liable with respect to its own assets for any guarantee or reinsurance issued under this Annex and each contract of guarantee or reinsurance concluded pursuant to this Annex shall expressly so provide.

Article 7. Voting

For decisions relating to sponsored investments, each sponsoring member shall have one additional vote for each 10,000 Special Drawing Rights equivalent of the amount guaranteed or reinsured on the basis of its sponsorship, and each member hosting a sponsored investment shall have one additional vote for each 10,000 Special Drawing Rights equivalent of the amount guaranteed or reinsured with respect to any sponsored investment hosted by it. Such additional votes shall be cast only for decisions related to sponsored investments and shall otherwise be disregarded in determining the voting power of members.

ANNEX II

Settlement of Disputes Between A Member and the Agency Under Article 57

Article 1. Application of the Annex

All disputes within the scope of Article 57 of this Convention shall be settled in accordance with the procedure set out in this Annex, except in the cases where the Agency has entered into an agreement with a member pursuant to Section (b)(ii) of Article 57.

Article 2. Negotiation

The parties to a dispute within the scope of this Annex shall attempt to settle such dispute by negotiation before seeking conciliation or arbitration. Negotiations shall be deemed to have been exhausted if the parties fail to reach a settlement within a period of one hundred and twenty days from the date of the request to enter into negotiation.

Article 3. Conciliation

(a) If the dispute is not resolved through negotiation, either party may submit the dispute to arbitration in accordance with the provisions of Article 4 of this Annex, unless the parties, by mutual consent, have decided to resort first to the conciliation procedure provided for in this Article.

(b) The agreement for recourse to conciliation shall specify the matter in dispute, the claims of the parties in respect thereof and, if available, the name of the conciliator agreed upon by the parties. In the absence of agreement on the conciliator, the parties may jointly request either the Secretary-General of the International Centre for Settlement of Investment Disputes (hereinafter called ICSID) or the President of the International Court of Justice to appoint a conciliator. The conciliation procedure shall terminate if the conciliator has not been appointed within ninety days after the agreement for recourse to conciliation.

(c) Unless otherwise provided in this Annex or agreed upon by the parties, the conciliator shall determine the rules governing the conciliation procedure and shall be guided in this regard by the conciliation rules adopted pursuant to the Convention

on the Settlement of Investment Disputes between States and Nationals of Other States.

(d) The parties shall cooperate in good faith with the conciliator and shall, in particular, provide him with all information and documentation which would assist him in the discharge of his functions; they shall give their most serious consideration to his recommendations.

(e) Unless otherwise agreed upon by the parties, the conciliator shall, within a period not exceeding one hundred and eighty days from the date of his appointment, submit to the parties a report recording the results of his efforts and setting out the issues controversial between the parties and his proposals for their settlement.

(f) Each party shall, within sixty days from the date of the receipt of the report, express in writing its views on the report to the other party.

(g) Neither party to a conciliation proceeding shall be entitled to have recourse to arbitration unless:

(i) the conciliator shall have failed to submit his report within the period established in Section (e) above; or

(ii) the parties shall have failed to accept all of the proposals contained in the report within sixty days after its receipt; or

(iii) the parties, after an exchange of views on the report, shall have failed to agree on a settlement of all controversial issues within sixty days after receipt of the conciliator's report; or

(iv) a party shall have failed to express its views on the report as prescribed in Section (f) above.

(h) Unless the parties agree otherwise, the fees of the conciliator shall be determined on the basis of the rates applicable to ICSID conciliation. These fees and the other costs of the conciliation proceedings shall be borne equally by the parties. Each party shall defray its own expenses.

Article 4. Arbitration

(a) Arbitration proceedings shall be instituted by means of a notice by the party seeking arbitration (the claimant) addressed to the other party or parties to the dispute (the respondent).The notice shall specify the nature of the dispute, the relief sought and the name of the arbitrator appointed by the claimant. The respondent shall, within thirty days after the date of receipt of the notice, notify the claimant of the name of the arbitrator appointed by it. The two parties shall, within a period of thirty days from the date of appointment of the second arbitrator, select a third arbitrator, who shall act as President of the Arbitral Tribunal (the Tribunal).

(b) If the Tribunal shall not have been constituted within sixty days from the date of the notice, the arbitrator not yet appointed or the President not yet selected shall be appointed, at the joint request of the parties, by the Secretary-General of ICSID. If there is no such joint request, or if the Secretary-General shall fail to make the appointment within thirty days of the request, either party may request the President of the International Court of Justice to make the appointment.

(c) No party shall have the right to change the arbitrator appointed by it once the hearing of the dispute has commenced. In case any arbitrator (including the President of the Tribunal) shall resign, die, or become incapacitated, a successor shall be appointed in the manner followed in the appointment of his predecessor and such successor shall have the same powers and duties of the arbitrator he succeeds.

(d) The Tribunal shall convene first at such time and place as shall be determined by the President. Thereafter, the Tribunal shall determine the place and dates of its meetings.

(e) Unless otherwise provided in this Annex or agreed upon by the parties, the Tribunal shall determine its procedure and shall be guided in this regard by the arbitration rules adopted pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States.

(f) The Tribunal shall be the judge of its own competence except that, if an objection is raised before the Tribunal to the effect that the dispute falls within the jurisdiction of the Board or the Council under Article 56 or within the jurisdiction of a judicial or arbitral body designated in an agreement under Article 1 of this Annex and the Tribunal is satisfied that the objection is genuine, the objection shall be referred by the Tribunal to the Board or the Council or the designated body, as the case may be, and the arbitration proceedings shall be stayed until a decision has been reached on the matter, which shall be binding upon the Tribunal.

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

(h) The Tribunal shall afford a fair hearing to all the parties. All decisions of the Tribunal shall be taken by a majority vote and shall state the reasons on which they are based. The award of the Tribunal shall be in writing, and shall be signed by at least two arbitrators and a copy thereof shall be transmitted to each party. The award shall be final and binding upon the parties and shall not be subject to appeal, annulment or revision.

(i) If any dispute shall arise between the parties as to the meaning or scope of an award, either party may, within sixty days after the award was rendered, request interpretation of the award by an application in writing to the President of the Tribunal which rendered the award. The President shall, if possible, submit the request to the Tribunal which rendered the award and shall convene such Tribunal within sixty days after receipt of the application. If this shall not be possible, a new Tribunal shall be constituted in accordance with the provisions of Sections (a) to (d) above. The Tribunal may stay enforcement of the award pending its decision on the requested interpretation.

(j) Each member shall recognize an award rendered pursuant to this Article as binding and enforceable within its territories as if it were a final judgment of a court in that member. Execution of the award shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought and shall not derogate from the law in force relating to immunity from execution.

(k) Unless the parties shall agree otherwise, the fees and remuneration payable to the arbitrators shall be determined on the basis of the rates applicable to ICSID arbitration. Each party shall defray its own costs associated with the arbitration proceedings. The costs of the Tribunal shall be borne by the parties in equal proportion unless the Tribunal decides otherwise. Any question concerning the division of the costs of the Tribunal or the procedure for payment of such costs shall be decided by the Tribunal.

Article 5. Service of Process

Service of any notice or process in connection with any proceeding under this Annex shall be made in writing. It shall be made by the Agency upon the authority designated by the member concerned pursuant to Article 38 of this Convention and by that member at the principal office of the Agency.

SCHEDULE A

Membership and Subscriptions

CATEGORY ONE

Country	*Number of Shares*		*Subscription* (millions of SDR)	
Australia	1,713		17.13	
Austria	775		7.75	
Belgium	2,030		20.30	
Canada	2,965		29.65	
Denmark	718		7.18	
Finland	600		6.00	
France	4,860		48.60	
Germany, Federal Republic of	5,071		50.71	
Iceland	90		0.90	
Ireland	369		3.69	
Italy	2,820		28.20	
Japan	5,095		50.95	
Luxembourg	116		1.16	
Netherlands	2,169		21.69	
New Zealand	513		5.13	
Norway	699		6.99	
South Africa	943		9.43	
Sweden	1,049		10.49	
Switzerland	1,500		15.00	
United Kingdom	4,860		48.60	
United States	20,519		205.19	
		59,473		594.73

CATEGORY TWO*

Country	*Number of Shares*	*Subscription* (millions of SDR)
Afghanistan	118	1.18
Algeria	649	6.49
Antigua and Barbuda	50	0.50
Argentina	1,254	12.54
Bahamas	100	1.00
Bahrain	77	0.77
Bangladesh	340	3.40
Barbados	68	0.68
Belize	50	0.50
Benin	61	0.61
Bhutan	50	0.50
Bolivia	125	1.25
Botswana	50	0.50
Brazil	1,479	14.79
Burkina Faso	61	0.61
Burma	178	1.78
Burundi	74	0.74
Cameroon	107	1.07
Cape Verde	50	0.50
Central African Republic	60	0.60
Chad	60	0.60
Chile	485	4.85
China	3,138	31.38
Colombia	437	4.37
Comoros	50	0.50
Congo, People's Rep. of the	65	0.65
Costa Rica	117	1.17
Cyprus	104	1.04
Djibouti	50	0.50
Dominica	50	0.50
Dominican Republic	147	1.47
Ecuador	182	1.82
Egypt, Arab Republic of	459	4.59
El Salvador	122	1.22
Equatorial Guinea	50	0.50

*Countries listed under Category Two are developing member countries for the purposes of this Convention.

CATEGORY TWO

Country	*Number of Shares*	*Subscription* (millions of SDR)
Ethiopia	70	0.70
Fiji	71	0.71
Gabon	96	0.96
Gambia, The	50	0.50
Ghana	245	2.45
Greece	280	2.80
Grenada	50	0.50
Guatemala	140	1.40
Guinea	91	0.91
Guinea-Bissau	50	0.50
Guyana	84	0.84
Haiti	75	0.75
Honduras	101	1.01
Hungary	564	5.64
India	3,048	30.48
Indonesia	1,049	10.49
Iran, Islamic Republic of	1,659	16.59
Iraq	350	3.50
Israel	474	4.74
Ivory Coast	176	1.76
Jamaica	181	1.81
Jordan	97	0.97
Kampuchea, Democratic	93	0.93
Kenya	172	1.72
Korea, Republic of	449	4.49
Kuwait	930	9.30
Lao People's Dem. Rep.	60	0.60
Lebanon	142	1.42
Lesotho	50	0.50
Liberia	84	0.84
Libyan Arab Jamahiriya	549	5.49
Madagascar	100	1.00
Malawi	77	0.77
Malaysia	579	5.79
Maldives	50	0.50
Mali	81	0.81
Malta	75	0.75
Mauritania	63	0.63

SCHEDULE B

Election of Directors

1. Candidates for the office of Director shall be nominated by the Governors, provided that a Governor may nominate only one person.

2. The election of Directors shall be by ballot of the Governors.

3. In balloting for the Directors, every Governor shall cast for one candidate all the votes which the member represented by him is entitled to cast under Section (a) of Article 40.

4. One-fourth of the number of Directors shall be elected separately, one by each of the Governors of members having the largest number of shares. If the total number of Directors is not divisible by four, the number of Directors so elected shall be one-fourth of the next lower number that is divisible by four.

5. The remaining Directors shall be elected by the other Governors in accordance with the provisions of paragraphs 6 to 11 of this Schedule.

6. If the number of candidates nominated equals the number of such remaining Directors to be elected, all the candidates shall be elected in the first ballot; except that a candidate or candidates having received less than the minimum percentage of total votes determined by the Council for such election shall not be elected if any candidate shall have received more than the maximum percentage of total votes determined by the Council.

7. If the number of candidates nominated exceeds the number of such remaining Directors to be elected, the candidates receiving the largest number of votes shall be elected with the exception of any candidate who has received less than the minimum percentage of the total votes determined by the Council.

8. If all of such remaining Directors are not elected in the first ballot, a second ballot shall be held. The candidate or candidates not elected in the first ballot shall again be eligible for election.

9. In the second ballot, voting shall be limited to (i) those Governors having voted in the first ballot for a candidate not elected and (ii) those Governors having voted in the first ballot for an elected candidate who had already received the maximum percentage of total votes determined by the Council before taking their votes into account.

10. In determining when an elected candidate has received more than the maximum percentage of the votes, the votes of the Governor casting the largest number of votes for such candidate shall be counted first, then the votes of the Governor casting the next largest number, and so on until such percentage is reached.

11. If not all the remaining Directors have been elected after the second ballot, further ballots shall be held on the same principles until all the remaining Directors are elected, provided that when only one Director remains to be elected, this Director may be elected by a simple majority of the remaining votes and shall be deemed to have been elected by all such votes.

Commentary on the Convention Establishing the Multilateral Investment Guarantee Agency

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Introduction

Considerable attention has been focused in recent years on the need to remove barriers impeding the growth of foreign investment in developing countries. Many countries have enacted new laws to promote foreign investment and entered into bilateral investment treaties with capital-exporting countries for this purpose.

The concept of providing foreign investors with financial guarantees against non-commercial risks in developing countries has emerged as a means of improving the investment climate in these countries and, hence, of stimulating investment flows to them. Almost all developed countries and two developing countries have established official schemes to provide guarantees against non-commercial risks to their nationals for investments into developing countries. In addition, the Inter-Arab Investment Guarantee Corporation provides guarantees on a regional basis. A private political risk insurance market has also been operating internationally for over a decade. The activities of these entities are subject to several limitations and the perception of political risk remains a significant barrier to investment in developing countries. There is need for a multilateral investment guarantee agency to complement these schemes and improve the investment climate by issuing guarantees and engaging in other investment promotion activities.

The idea of establishing a multilateral investment guarantee agency emerged in the 1950s. It was discussed in the International Bank for Reconstruction and Development (referred to in this Commentary as the Bank) on several occasions during the 1962-1972 period, but no decision was taken about creating such an agency. President Clausen revived the concept in his first address to the Bank's Annual Meeting in 1981. After detailed studies by the Bank staff and informal discussions with the Bank's Executive Directors, a paper entitled "Main Features of a Proposed Multilateral Investment Guarantee Agency" was distributed to the Executive Directors in May 1984. The paper presented a number of key features distinguishing the proposal from the schemes previously discussed in the Bank. This proposal, with modifications following discussions with the Executive Directors, was subsequently embodied in a "Draft Outline of the Convention Establishing the Multilateral Investment Guarantee Agency," which was circulated in October 1984. On the basis of that document, consultations were held with member governments of the Bank. These consultations resulted in a revised draft of the Convention which was circulated to the member governments in March 1985. Between June and September 1985, the Executive Directors, assisted by experts from

member governments, convened in a Committee of the Whole to discuss the draft Convention. In September 1985, the Executive Directors finalized the draft Convention and recommended to the Board of Governors that it adopt a resolution opening the Convention for signature.

The provisions of the Convention are for the most part self-explanatory. This Commentary describes some of its principal features to aid interpretation of its provisions.

I. Status, Establishment and Purposes

1. The Convention establishes the Multilateral Investment Guarantee Agency (referred to in this Commentary as the Agency) as an autonomous international organization with "full juridical personality" under international law and the domestic laws of its members (Article 1) with the main objective of encouraging the flow of investments for productive purposes among its member countries and in particular to its developing member countries (Article 2). The reference to "investments for productive purposes" emphasizes the Agency's concentration on concrete projects and programs in all sectors of the economy. It does not imply a restriction of its operations to the manufacturing sector. In addition to guaranteeing investments in these member countries against non-commercial risks, the Agency is to carry out complementary activities to promote investment flows (Article 2(b)). Article 23 of the Convention sets out the promotional activities the Agency will provide.

II. Membership and Capital

Membership

2. Membership in the Agency is open to all members of the Bank and to Switzerland (Article 4(a)). There is, however, no obligation for Bank members to join the Agency. The Convention recognizes the importance attached to participation by both capital-exporting and capital-importing members particularly in the provisions for its entry into force (Article 61(b)) and for voting (Article 39).

Capital

3. Earlier Bank proposals envisaged the Agency as having no share capital and conducting its operations on behalf of the member countries which would sponsor investments for guarantee by the Agency. Under the Convention the Agency will have a share capital (Article 5) and can issue guarantees in its own right which will be supplemented by guarantees issued for investments sponsored by members; with respect to the latter, the Agency will act only as administrator (Article 24 and Annex I to the Convention). The subscribed capital can be leveraged, allowing for guarantee coverage several times its size (see Article 22).

4. The Convention provides for an authorized capital of one billion Special Drawing Rights, divided into 100,000 shares having a par value of SDR10,000 each. Members' payment obligations with respect to capital stock will, however, be settled on the basis of the average value of the SDR in terms of U.S. dollars for the period January 1, 1981 to June 30, 1985, i.e. $1.082, the former date being the date of the introduction of the current basket of currencies of the SDR (Article 5(a)). Once the initially authorized amount is fully subscribed, the authorized capital will be increased automatically to the extent necessary to provide for subscriptions by acceding members (Article 5(b)). The authorized capital may also be increased at any time by the Council of Governors (referred to in this Commentary as the Council) by the special majority of at least two-thirds of the voting power representing at least fifty-five percent of capital subscriptions (Article 5(c) and Article 3(d)).

5. The amount of subscribed capital will determine the Agency's underwriting capacity (see Article 22). It is anticipated that the authorized capital will be subscribed within a reasonable time after the Agency commences operations and that it will be able to operate successfully on that basis.

6. Every member shall subscribe to the capital stock of the Agency. Article 6 provides for a minimum subscription of 50 shares (SDR500,000). This will give all members a stake in the Agency. Initial subscriptions of original members are set out in Schedule A to the Convention. The subscriptions of acceding members will be determined by the Agency's Council. While shares will be issued at par to original members, the Council is authorized to determine the terms and conditions of acceding members' subscriptions provided that the issue price shall not be less than par. Issue prices above par might be appropriate if the Agency has accumulated reserves at the time of the accession (Article 6).

7. The Convention provides that ten percent of the price of the subscribed shares is to be paid in cash and that an additional ten percent is to be paid in the form of non-negotiable, non-interest-bearing promissory notes or similar obligations to be encashed pursuant to a decision of the Board. The cash payment is designed to cover start-up costs, administrative expenditures and possible claims arising out of the Agen-

cy's guarantees. The arrangement for additional payment in the form of non-negotiable instruments allows the funds to remain within the members' central banking systems and provides a cushion in the event that a large claim occurs during the Agency's formative years. The purpose of this provision is to strengthen the Agency's standing as a financially sound insurer from the outset. The remaining eighty percent of the subscribed shares is subject to call by the Agency to meet its obligations (Article 7). It should be emphasized that actual recourse to the non-negotiable instruments and the callable capital is not anticipated because the Agency is expected to conduct its activities on a sound business basis and maintain under all circumstances its ability to meet its financial obligations (see Article 25). Article 8(c) provides that in case of default by a member on a call, the Agency is authorized to make successive calls on unpaid subscriptions.

8. Subject to the limited exception discussed below, payments on the paid-in and callable portions of subscriptions must be made in a freely usable currency as defined in the Convention (Articles 3(e) and 8). This is essential to ensure the Agency's financial viability and its recognition as a credible insurer. The Board of Directors (referred to in this Commentary as the Board) has the discretion, after consultation with the International Monetary Fund, to designate as "freely usable" currencies other than those so designated by the International Monetary Fund. The Board can make this decision if it is satisfied that the currency concerned can be readily used for the purposes of the Agency and if the country whose currency is involved agrees (Article 3(e)). In order to reduce the financial burden of developing member countries, the Convention allows developing countries to pay up to twenty-five percent of the paid-in cash portion of their subscription in their local currencies. In view of the small amounts likely to be involved, this is not expected to have adverse effects on the Agency's finances.

9. To reduce the financial burden on all members, the Convention provides that under certain circumstances the Agency will refund to members amounts paid on a call on subscribed capital. These refunds would be made in a freely usable currency in proportion to the payments made by members under calls made prior to such refund (Article 10(b)). In the case of recovery of payments from a host country in a currency which is not freely usable, it is envisaged that the Agency would make the refund once it succeeds in converting such payments into usable currencies. To the extent amounts are refunded, members' callable capital obligations would be re- established so that the situation existing before the respective call is restored (Article 10(c)).

III. Operations

10. The Convention establishes the general framework for the Agency's guarantee operations and enables the Board to define more precisely the scope of these operations by issuing policies, rules and regulations which can be amended from time to

time. This provides the Agency with the necessary flexibility to adapt, within this general framework, to changing circumstances and maintain its financial viability. For example, the Agency could limit the scope of its coverage on commencing operations and expand it as it gained experience and built up financial reserves. Moreover, the details of each guarantee operation and the specific arrangements reached between the Agency and the investor would be incorporated into the contract of guarantee entered into between the Agency and the investor. Article 16 provides that the Agency cannot cover under a contract of guarantee the total loss sustained by an investor. This provision is designed to discourage possible irresponsible conduct by investors relying on total loss cover (commonly referred to as "moral hazard"). In determining the appropriate percentage of possible indemnification, the Agency may find some guidance in the rules of national investment guarantee schemes which typically indemnify between seventy and ninety-five percent of a loss.

11. As stated above, the policies, rules and regulations applicable to guarantee operations will be determined by the Board. Contracts of guarantee, concluded on the basis of these principles, will be approved by the President of the Agency under the direction of the Board.

Scope of Covered Risks and Eligibility

12. The Convention provides for coverage of the three generally accepted categories of non-commercial risks: the currency transfer risk resulting from host government restrictions and delays in converting and transferring local currency earned by an investor, expropriation, and the risk of war and civil disturbance. The Convention adds to these traditionally covered risks the risk of breach or repudiation of a contractual commitment by the host government towards an investor under the limited conditions mentioned in paragraph 15 below (Article 11(a)).

13. The currency transfer risk is broadly defined in Article 11(a)(i). It is intended to encompass all forms of new direct restrictions, including additions to existing restrictions, as well as indirect or disguised restrictions, whether such restrictions are imposed by law or in fact. The restriction must be "attributable to the host government", restrictions imposed by public agencies and other public organs of the host country are intended to be covered by this language. The provision is also intended to include the failure of the host government to act within "a reasonable period of time" on a transfer application. The provision does not define the specific period but it is expected that this will be accomplished in the rules and regulations to be issued by the Board and specifically in the contracts of guarantee. In determining what constitutes a "reasonable period," the Agency will need to reconcile the investors' interest in a speedy transfer with the fact that certain delays in the processing of applications by governments may be justified.

14. Article 11(a)(ii) defines the expropriation risk. It would encompass measures attributable to the host government such as nationalization, confiscation, sequestration, seizure, attachment and freezing of assets. The phrase "any legislative or administrative action" in the provision includes measures by the executive, but not measures taken by judicial bodies in the exercise of their functions. Measures normally taken by governments to regulate their economic activities such as taxation, environmental and labor legislation as well as normal measures for the maintenance of public safety, are not intended to be covered by this provision unless they discriminate against the holder of the guarantee. In defining these measures, the Agency's practice would not be meant to prejudice the rights of a member country or of investors under bilateral investment treaties, other treaties and international law.

15. The breach of contract risk is contained in Article 11(a)(iii). Indemnification is available only when an investor has no forum to pursue the contractual claim against the government or when recourse to such a forum is hampered by an unreasonable delay as defined in the guarantee contract or when, after obtaining a final decision in his favor, the investor is unable to enforce it.

16. Article 11(a)(iv) encompasses the risk of war and civil disturbance. It is intended to include revolutions, insurrections, coups d'état and similar political events which are typically outside the control of the host government. Acts of terrorists and similar activities which are specifically directed against the holder of the guarantee are, however, not intended to be covered by this provision but may be covered under Article 11(b), which is discussed below.

17. The Convention provides additional flexibility by allowing the coverage of other specific non-commercial risks, but only at the joint request of the investor and the host country and with approval of the Board by special majority (Article 11(b)). Such approval may be issued on a case by case basis or in the form of regulations specifying the cases to be covered under this provision.

18. Events occurring before the conclusion of the contract of guarantee, governmental action to which the holder of the guarantee has agreed or for which he is responsible, and losses resulting from currency devaluation and depreciation are specifically excluded by Article 11(b) and (c).

19. Article 12 defines the type of investments eligible for cover by the Agency. This provision endeavors to strike a balance between the need to preserve the Agency's scarce capital to promote flows of direct investment and the need to assure future flexibility by allowing the Board to extend coverage to other types of investment. It is envisaged that the Agency will focus on guaranteeing investments eligible under Article 12(a), i.e. equity investment, different forms of direct investment, and medium- or long-term loans made or guaranteed by owners of equity in the enterprise concerned (so-called equity-type or sponsored loans). The term "direct investment" is a generic term whose precise scope will have to be determined by the Board. The Board

is expected to be guided by the International Monetary Fund's definition of foreign direct investment as an "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." The Board may consider as direct investment such new forms of investment as service and management contracts as well as franchising, licensing, leasing, and production-sharing agreements where the investor's return depends on the performance of the enterprise. In any case, it is immaterial whether the investment is made in monetary form or in kind such as the contribution of machinery, services, technical processes and technology.

20. Article 12(b) gives the Board flexibility, in the future, to extend the Agency's coverage to other forms of investment. It authorizes the Board, by special majority, to extend coverage to any medium- or long-term form of investment except loans which are not related to a specific investment covered or to be covered by the Agency. To conserve the Agency's scarce resources, the Agency would not guarantee or reinsure any export credit, regardless of its form, which is provided, guaranteed or reinsured by a government or an official export credit agency. Because the coverage of the Agency is restricted to investments, exports will be covered (within the limits of the preceding sentence) only to the extent that they represent a contribution to a specific investment. An agency or distributorship arrangement, which is designed primarily to promote exports, and in which an investor has an inconsequential equity interest, would not be covered by the Agency. The Agency would function as an investment guarantee agency, and would not function as an export credit agency which could compete with official export credit agencies.

21. To serve its objective without undermining its financial viability, the Agency will limit its guarantees to sound investments. It should satisfy itself that the investment concerned will contribute to the economic and social development of the host country, comply with the laws and regulations of that country, and be consistent with the country's declared development objectives. It should also be satisfied that appropriate investment conditions, including the availability of fair and equitable treatment and legal protection, will apply to the investment concerned (Article 12(d)). In case no such protection is assured under the laws of the host country or under bilateral investment treaties, the Agency will issue the guarantee only after it reaches agreement with the host country pursuant to Article 23(b)(ii) or otherwise on the treatment to be extended to the investments covered by the Agency. Investments guaranteed by the Agency should also be new, that is implemented subsequent to the registration of the application for the guarantee by the Agency (Article 12(c)). The exclusion of pre-existing investments would not bar the Agency from covering investments made to develop an existing investment or from covering the reinvestment earnings which could otherwise be transferred outside the host country. The term "earnings" in Article 12(c)(ii) is intended to include royalties and license fees.

22. To qualify for a guarantee, investors who are natural persons must be nationals of members other than the host country. If investors are juridical persons, they must be incorporated and have their principal place of business in a member country other than the host country or have the majority of their capital owned by a member country or its nationals, other than the host country or its nationals. Privately and publicly owned investments are eligible as long as they are operated on a commercial basis (Article 13(a)(iii)). It is expected, however, that the bulk of guaranteed investments will be privately owned.

23. Article 13(c) provides an exception to the requirement that investors may not be linked to the host country in the case of assets transferred from abroad by nationals of the host country or juridical persons incorporated in the host country or owned by host country nationals, provided that the investor and the host country jointly apply for a guarantee and the Board approves it by special majority. This exception is consistent with the Agency's central objective of channelling the flow of investments to developing countries, some of which now have nationals living abroad with considerable off-shore funds. It would also help in the repatriation of capital to developing countries.

24. Article 14 limits the Agency's own guarantee operations to investments made in the territory of a developing member country. A developing member country is defined in Article 3(c) as a member listed as such in Schedule A to the Convention. During discussions by the Executive Directors, it was understood that the Agency would develop policies on eligibility whereby priority in its operations would be given to lesser developed countries. It was also agreed that, for purposes of Article 14, dependent territories for whose international relations a non-developing country is responsible, should be treated as developing members, if the non-developing member country so requests. However, investments of that member in its dependent territories would be excluded from cover.

Host Country Approval and Subrogation

25. Article 15 provides that the Agency will 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." Any host government may withhold its approval. This enables the host country to evaluate a proposed investment before giving its consent. The Agency is expected to establish procedures for obtaining consents under this provision. These may include requesting approvals on a no objection basis (Article 38(b)). Although the approval of the home country of the investor is not required, it would not be appropriate for the Agency to cover an investment if informed by the investor's home country that it would be financed with funds transferred outside such country in violation of its laws.

26. Article 18 (a) provides that where the Agency compensates or agrees to compensate an investor under a contract of guarantee, it assumes the rights that the investor acquired against the host country as a result of the event giving rise to the claim against the Agency. Subrogation is an accepted principle of insurance law. It provides for the assignment of an existing claim from the guaranteed investor to the Agency and the Agency as subrogee acquires the same rights as the investor had. The contracts of guarantee will define the terms and conditions of subrogation. These terms and conditions are of special significance for the investor in view of the fact that the Agency will compensate investors only for part of their losses (Article 16). Article 18(b) provides for the recognition of the Agency's right of subrogation by all members.

27. Under Article 18(c), the Agency has the right to treatment as favorable as would be given the holder of the guarantee with respect to the use and transfer of local currencies of host countries received by the Agency as subrogee. In addition, the Agency is authorized to use these currencies for the payment of its administrative expenditures or other costs and is directed to seek to enter into agreements with host countries on other uses of these currencies if they are not freely usable. Such other uses could include the sale of the currencies to other institutions (such as international lending agencies), foreign investors in these countries or to importers of goods from these countries. The Agency's ability to use effectively, or otherwise dispose of, local currencies may be of significance in its operations in the unlikely case it should acquire substantial amounts of such currencies.

Payment of Claims

28. In order to ensure prompt payment of claims, decisions will be taken by the President in accordance with the contracts of guarantee and such policies as the Board may adopt (Article 17) and, in cases of dispute, final determination may depend on the outcome of arbitration between the Agency and the investor concerned (Article 58). It is envisaged that these policies will require the holder to seek such administrative remedies as may be appropriate under the circumstances, if they are readily available under the laws of the host country, and may provide for reasonable periods of time to elapse so as to maximize the prospects for amicable settlement of claims between investors and host countries (Article 17). It is expected that the specific time limits, to be included in the guarantee contracts, would be consistent with the practice of other political risk insurers. This provision reflects established practices of national investment guarantee schemes and should not impose an undue burden on investors since they are not required to exhaust all local remedies before obtaining compensation from the Agency. The time limits would depend on the type of risk involved and the complexity of the particular case. The above time limits must be distinguished from the maximum periods allowed between the filing of a claim and the Agency's decision on the claim.

These time limits are not specified in the Convention because of the difficulty in determining specific periods which would be appropriate in all situations. However, the Agency may establish such time limits in its rules and regulations and may incorporate them into the contracts of guarantee in order to increase the attractiveness of its services.

Relationship to National and Regional Entities as well as Private Political Risk Insurers

29. The Agency will complement national and regional programs rather than compete with them (Article 19). It is therefore expected to focus on guaranteeing investments from members without a national program (chiefly capital-exporting developing member countries), co-guaranteeing investments with national and regional agencies, providing reinsurance for national and regional agencies, guaranteeing investments which fail eligibility tests of the national and regional program concerned despite their soundness and developmental character, and guaranteeing investments financed by investors from different member countries. To contain its overhead and enhance its efficiency, the Agency may avail itself of the administrative support of national or regional entities and may enter into appropriate cooperative agreements with them (Article 19). For example, national administrative agencies might assist in processing applications of local investors for multilateral guarantees and any resulting claims. This would reduce the possible need for the Agency to establish offices away from its headquarters. It is clear, however, that the Agency would have to rely on its own risk assessments and reserve to itself decisions on issuance of guarantees and on payment of claims.

30. Article 19 defines the institutions the Agency may cooperate with in this respect as "national entities of members and regional entities the majority of whose capital is owned by members, which carry out activities similar to those of the Agency." This includes any agency that issues investment guarantees against non-commercial risks or that promotes private investment to developing countries. As a result, the Agency might cooperate with more than one institution in the same country. It should be noted that cooperation between a national entity and the Agency does not result in the entity automatically becoming the channel of communication between the member country and the Agency under Article 38. This provision requires each member to designate an appropriate authority for communication on all matters arising under the Convention.

31. The Agency may cooperate with private political risk insurers to enhance its own operations and to encourage those insurers to provide political risk insurance in developing members of the Agency on conditions similar to those of the Agency (Article 21(a)). For example, with respect to the former objective, private insurance companies might assist the Agency in marketing its program. With respect to the latter objective,

the Agency is expected to play a catalytic role in mobilizing private underwriting capacity, for example, by entering with private underwriters into coinsurance arrangements. The Agency will in particular seek to guarantee investments for which comparable coverage on reasonable terms is not available from private insurers.

32. The purpose of Articles 19 to 21 is to establish the Agency as a facility designed to cooperate with and increase the efficiency and effectiveness of both public and private political risk insurers. How cooperation will be achieved will depend on the administrative structure and the situation of the insurance market in the country concerned. In some countries governments play a role in coordinating public and private insurance activities, and Article 38(a) requires the Agency to consult with member governments, at their request, on the matters set out in Articles 19 to 21. These include the Agency's complementary role in the design of its own guarantee operations, coinsurance, reinsurance, sponsorship operations and administrative cooperation. Where appropriate, the Agency may enter into an "umbrella agreement" with a government providing the framework for the Agency's cooperation with the public and private insurers of that member.

Reinsurance

33. The Agency is authorized under Articles 20 and 21(a) to provide reinsurance to institutions of members issuing investment guarantees, to regional investment guarantee agencies (of which the sole example at present is the Inter-Arab Investment Guarantee Corporation), and to private insurers in member countries. As stated in paragraph 31 of this Commentary, the Agency's arrangements with private insurers, including arrangements for reinsurance, are intended to encourage them to offer investors guarantees on conditions similar to those offered by the Agency. Reinsurance is intended to diversify the Agency's own risk portfolio as well as that of the reinsured entity. It should also allow the reinsured entity to expand its operations.

34. It should be noted that reinsurance provided by the Agency must always relate to "a specific investment." The intention here is to exclude the reinsurance of portions of primary underwriters' risk portfolios (commonly referred to as treaty reinsurance). It should also be noted that reinsurance operations are intended to comprise only a predetermined part of the Agency's overall operations. Article 20(a) therefore provides that maximum amounts shall be set from time to time by the Board by special majority. In the case of investments completed more than one year prior to receipt of the application for reinsurance by the Agency, the Convention establishes an initial limit of ten percent of the total coverage which the Agency may provide on its own account, i.e. without resort to sponsorship. These limits apply to the reinsurance of both public entities and private insurers. They may be changed by the Board by special majority whenever deemed appropriate.

member's capital subscription; however, "due consideration" is also to be given to the need of applying these limits more liberally to developing member countries when they or their nationals invest in other developing members.

40. A third category of limits may be established by the Board in order to achieve a viable overall spread of risk and to avoid undue concentrations of risk. Thus limits may be placed on the Agency's exposure with respect to the size of individual projects, total investments in individual host countries, types of investment or risk or other factors (Article 22(b)(ii)). Since these limits serve solely to diversify risk, any limit on investments in individual host countries is not to be affected by such countries' relative capital subscriptions.

Investment Promotion

41. One of the features that distinguishes the Agency from earlier proposals is its obligation to carry out activities complementary to issuing guarantees to promote the flow of investments to and among member countries (Article 2(b)). The Agency has a responsibility under Article 23(a) to conduct research and disseminate information on investment opportunities in developing member countries, as well as to undertake other activities to promote foreign investment. In addition, the Agency, at the request of a member, may provide technical assistance and advice with the objective of improving investment conditions. This could include advice on such matters as the drafting of investment codes and reviewing investment incentive programs. Such complementary services may be provided against appropriate fees or may be extended at no cost to the beneficiary countries when warranted.

42. In carrying out its promotional activities, the Agency will be guided by the relevant investment agreements among its members and will seek to remove impediments among its members to investment flows. In addition, the Agency has a duty to coordinate with other agencies concerned with the promotion of foreign investment, particularly the International Finance Corporation (Article 23(a)). This would help to avoid duplication in the Agency's activities.

43. Article 23(b)(i) places a duty on the Agency to encourage the amicable settlement of disputes between investors and host countries. It may also provide information on available dispute settlement and conciliation mechanisms. The Agency is also directed to promote and facilitate the conclusion of investment protection treaties among its members. For example, it could undertake studies on existing agreements and assist member governments in the analysis of the implications of and benefits from such agreements.

44. Under Article 23(b)(ii), the Agency will endeavor to enter into bilateral and multilateral agreements with its members in order to assure that the investments

as a risk diversification device since it would allow them to substitute the pro rata share in all contingent liabilities of the Sponsorship Trust Fund for the entire contingent liability for the investments if insured by their national scheme.

48. In general, the provisions of the Convention relating to guarantee operations and financial management which are applicable to the Agency's own operations will also apply to sponsored guarantees (Article 6 of Annex I). In particular, the eligibility requirements under Articles 11 and 12 of the Convention also govern sponsored investments. However, guarantees relating to sponsored investments are not limited to nationals of member countries. Article 1(a) of Annex I provides that such investments may be made "by an investor of any nationality or by investors of any or several nationalities." The host country may co-sponsor an investment. Co-sponsorship indicates a strong developmental interest by the host country in the investment, and an intention to improve its risk profile. Article 1(c) of Annex I places a duty on the Agency to give priority treatment to the coverage of investments co-sponsored by the host country.

49. The limitation provided in Article 14 of the Convention restricting coverage to investments in developing countries applies to operations on the Agency's own account and does not extend to sponsorship operations. Members may sponsor investments in any member country, but a special emphasis is placed on operations in developing member countries. The rationale for allowing sponsorship operations in developed countries is that guarantees for sponsored investments in developed countries, which are of particular interest to some capital-exporting developing countries, do not absorb scarce underwriting capacity and would not therefore reduce the Agency's capacity to guarantee investments in developing countries. In some circumstances, an investment in a developed country corporation may facilitate joint ventures with that corporation or its subsidiary in developing countries. Investments in developed countries also have the advantage of improving the risk profile of the Sponsorship Trust Fund's portfolio and enabling it to achieve a greater measure of diversification.

50. Article 5(a) of Annex I authorizes the Agency to issue reinsurance to members and their agencies, regional agencies of members and private insurers in member countries on the basis of sponsorship. These reinsurance operations are subject to the same conditions as reinsurance operations on the Agency's own account. Reinsurance on the basis of sponsorship diversifies risk. The sponsorship of privately insured investment for reinsurance can be used by members as a substitute for the reinsurance of these investments on their own account. All sponsoring members would share pro rata in any loss under the reinsurance policies, irrespective of whether the loss arises from a sponsored guarantee or a sponsored reinsurance policy.

51. Article 6 of Annex I provides that sponsorship operations will be carried out in accordance with the same sound business and financial practices governing the Agency's guarantee operations based on its own capital and reserves. As in the case of underwriting for its own account, the Agency would not be expected to cover sponsored

investment involving unacceptably high risks or that would unbalance its risk portfolio. Sponsorship operations would also benefit from the credit of the sponsoring members which, it is assumed, would be among the most creditworthy members. Article 1(c) of Annex I specifically directs the Agency to "pay due regard to the prospects that the sponsoring member will be in a position to meet its sponsorship obligations." Moreover, sponsorship operations are expected to be financially as sound as the Agency's own guarantee operations.

52. Article 1(d) of Annex I requires the Agency to consult periodically with sponsoring member countries on matters related to sponsorship operations. Moreover, voting allocations will be modified for the purpose of decisions on sponsored investment in that each sponsoring member and each member hosting a sponsored investment will be allocated one additional vote for each SDR 10,000 of any investment sponsored or hosted by it (Article 7 of Annex I). Theoretically, therefore, there is a possibility that the terms and conditions adopted by the Board for sponsorship operations may not be identical to those concerning operations on the Agency's own account.

IV. Financial Provisions

53. Article 25 directs the Agency to "carry out its activities in accordance with sound business and prudent financial management practices with a view to maintaining under all circumstances its ability to meet its financial obligations." It is anticipated that the Agency would become financially self-sufficient. Management is expected to endeavor to avoid calls on members' subscribed capital. The experience of national investment guarantee agencies and the private insurance market indicates that this is a realistic objective.

54. The Agency will need to charge adequate premiums, fees and other charges under Article 26 in order to become financially viable and self-sufficient. The Convention does not prescribe how premiums and fees are to be determined and the rates applicable to each type of risk will need to be established and periodically reviewed by the Agency. It has considerable discretion to decide on the level and structure of its premiums and fees, including charges for its promotional activities.

55. The Agency's financial standing is enhanced by the requirement in Article 27(a) that all net income is to be retained as reserves until they amount to five times the subscribed capital of the Agency. An exception to this provision is that the Council, by special majority, may decide to use part of its revenues to return to members amounts paid on calls on subscribed capital if the financial position of the Agency would so permit (Article 10(a)(iii)). After these reserves have reached the above-mentioned limit, the Council can determine under Article 27(b) whether to allocate any excess net

income to reserves, make a distribution to the members or otherwise dispose of such income.

V. Organization and Management

56. The basic structure of the Agency follows that of other international financial institutions, especially the Bank and the International Finance Corporation. The Agency has a three-tiered structure, consisting of a Council of Governors, a Board of Directors and a President and staff (Article 30).

57. The Council is composed of one Governor from each member and his Alternate (Article 31). The Convention does not place any restriction on members in the appointment of their Governors and Alternates. The Council meets at least annually and can be convened at any other time by the Council or the Board. The Council is vested with all the powers of the Agency, except those specifically conferred by the Convention on another organ of the Agency. However, the Council may delegate to the Board the exercise of any of its powers except the specific powers listed in Article 31(a) reserved to the Council, such as admission and suspension of members, classification of members for voting purposes or as developing member countries, changes in capitalization, increases of the ratio provided in Article 22(a), determination of Directors' compensation, amendments to the Convention, cessation of operations and liquidation of the Agency, and distribution of assets to members upon liquidation.

58. The Board is elected in accordance with Article 41(a) and Schedule B and is responsible for the general operations of the Agency (Article 32(a)), a responsibility which covers all matters related to the Agency's policies and regulations but not its day-to-day management which is the responsibility of the President and staff. The Board may take any action required or permitted under the Convention. The Council determines the term of office of Directors under Article 32(c). The Board will consist of not less than twelve Directors. The Council will determine the number of Directors, which it may adjust to take into account changes in membership. Of the total number of Directors, one-fourth would be elected separately, one by each of the members having the largest number of shares. The remaining Directors would be elected by the other members (Schedule B). Each Director may appoint an Alternate (Article 32(b)). The Board will meet at the initiative of the Chairman or at the request of three Directors (Article 32(d)). It is anticipated that during the formative years of the Agency, the volume of business might not justify a Board sitting in continuous session. This would reduce administrative costs since, under those circumstances, the Directors and Alternates would receive compensation only for attendance at the meetings and the discharge of other specific official functions (Article 32(e)).

59. The President of the Agency is appointed by the Board. The Board would decide on this appointment on the Chairman's nomination (Article 33 (b)). The President is responsible for conducting the ordinary business of the Agency under the general control of the Board and for the appointment, organization and dismissal of staff (Article 33(a)). It is intended that the number of staff would be kept small to increase the Agency's effectiveness and viability. The salary and terms of the contract of the President are to be determined by the Council (Article 33(b)). This follows the practice of the Bank.

60. Article 34 is based on similar provisions in the Articles of Agreement of the Bank and the International Finance Corporation, and prohibits any interference by the Agency and its President and staff in the "political affairs" of any member. This does not prevent the Agency, however, from taking into consideration all circumstances relevant to its underwriting decisions and its promotional activities.

61. The principal office of the Agency will be located in Washington, D.C., unless the Council, by special majority, decides to establish it in another location (Article 36(a)). In addition, the Agency may, under Article 36(b), establish such other offices as may be necessary for its work.

62. While previous proposals envisaged a number of organizational links between the Bank and the Agency, the Convention establishes only a minimal organizational link between the two institutions. The President of the Bank would serve *ex officio* as Chairman of the Agency's Board (Article 32(b)). It is intended that this relationship would promote the role of the Agency as an international developmental institution and assist it to gain recognition without affecting the different roles of the two institutions. The Agency might find it advisable to enter into a cooperative agreement with the Bank or the International Finance Corporation or both to take advantage of their technical and administrative services and facilities as required (see Article 35).

VI. Voting, Adjustment of Subscriptions and Representation

63. The voting structure of the Agency reflects the view that Category One and Category Two countries have an equal stake in foreign investment, that cooperation between them is essential, and that both groups of countries should, when all eligible countries become members, have equal voting power (50/50). It is also recognized that a member's voting power should reflect its relative capital subscription. The Convention, therefore, provides that each member is to have 177 membership votes plus one subscription vote for each share of stock held by it (Article 39(a)). The number of membership votes is computed so as to ensure that if all Bank members joined the Agency, developing countries as a group would have the same voting power as developed countries as a group. In order to protect the minority group before such equality is reached, this group would receive, during the three years after entry into force of the Convention,

supplementary votes which would allow it to have as a group 40 percent of the total voting power. These supplementary votes would be distributed among the members of the group concerned in proportion to their relative subscription votes and would be automatically increased or decreased, as the case may be, so as to maintain the 40 percent voting power of the group (Article 39(b)). Even during the transition period, such supplementary votes would be cancelled whenever the group reached 40 percent of the total voting power through subscription and membership votes. In any case, supplementary votes would be cancelled at the end of the three-year period. During this three-year period, all decisions of the Council and the Board would be taken by a special majority of at least two-thirds of the total voting power representing at least fifty-five percent of total subscriptions, except if a specific decision was subject to a higher majority under the Convention, in which case, the higher majority would be controlling (Article 39(d)). An example of the latter would be certain amendments to the Convention (Article 59(a)).

64. During the third year after entry into force of the Convention, the Council is required under Article 39(c) to review the allocation of shares and to be guided in its decisions by three principles: (a) the voting power of members is to reflect actual subscriptions and membership votes; (b) the shares originally allocated to countries which have not signed the Convention at the time of the review are to be made available for reallocation so as to make possible voting parity between developing and developed members; and (c) the Council will take appropriate measures to facilitate the members' subscriptions to the shares allocated to them. The purpose of the reallocation is in time to achieve voting parity between both groups on the basis of relative subscription and membership votes.

65. To protect members' voting rights against erosion as a result of a general increase in capital, Article 39(e) entitles each member to new subscriptions of the increase in proportion to its relative subscription to the Agency's capital before the increase.

66. The voting procedures applicable to the Council and the Board under Articles 40 to 42 generally correspond to those of other international financial institutions, notably the Bank. One distinguishing feature is the provision that allows the Executive Directors to take decisions without a meeting (Article 42(c)). This is provided in view of the possibility that the Agency would initially have a non-resident Board.

VII. Privileges and Immunities

67. The provisions on the privileges and immunities of the Agency are patterned closely on those of the International Finance Corporation. The necessary differ-

ences from the privileges and immunities of the Corporation reflect special features of the Agency's operations.

68. The Convention provides that actions (other than actions arising in relation to disputes between parties to a contract of guarantee or reinsurance which are subject to arbitration under Article 58 and disputes between the Agency and a member concerning a guaranteed or reinsured investment, which are subject to arbitration or agreement on alternative procedures under Articles 57), may be brought against the Agency only in a court of competent jurisdiction in the territories of members where the Agency has certain specified ties (Article 44). It is specifically provided that no action may be brought by members or those deriving claims from members or in respect of personnel matters. The latter exclusion represents a codification of existing practice applicable to international organizations. Article 45(a) provides that the assets of the Agency, which for purposes of this Chapter are defined as including Sponsorship Trust Fund assets, are immune from search, requisition, confiscation, expropriation, or any other form of seizure by executive or legislative action; this immunity does not, however, extend to judicial action.

69. As a general rule, the Agency's property and assets are free from restrictions, regulations, controls, and moratoria. It should be noted, however, that assets acquired by the Agency exercising its rights as successor to or subrogee of an investor are free from applicable controls of the host country only to the extent that the investor whose rights the Agency acquired through subrogation was entitled to such treatment (Article 45(b)).

70. Article 46 provides that the Agency's archives are to be inviolable and that its official communications are to be accorded the same treatment as is accorded to those of the Bank. As in the Articles of Agreement of the Bank and IFC, no mention is made of the status of the Agency's premises. It is understood, however, that the Agency's premises will receive the same treatment that is accorded to the premises of other international organizations.

71. Article 47 exempts the Agency, its assets, property and income, as well as its operations and transactions from taxes and customs duties. This is not meant to provide for an exemption from taxes or duties which are in fact no more than charges for services rendered. With respect to assets acquired by the Agency from an investor through subrogation, it should be noted that these assets are acquired by the Agency net of taxes and duties owed by the investor. Once such assets become the property of the Agency, they shall be exempted from taxes and customs duties. The Agency is not expected to acquire non-cash assets through subrogation, as it would claim compensation from the host country only for amounts paid to the investor. In the exceptional case that the Agency does acquire such assets, the expectation is that the Agency would convert these into cash expeditiously.

72. It should be noted that privileges and immunities are bestowed on the Agency for the purpose of enabling it to carry out its functions (Article 43), and that the Agency may waive these immunities where such a waiver would not prejudice its interests. Moreover, the Agency is directed to waive the immunities of its staff where in its view the immunity would impede the course of justice and the waiver would not prejudice the interests of the Agency (Article 50).

VIII. Withdrawal, Suspension of Membership and Cessation of Operations

73. The provisions of the Convention on withdrawal from the Agency, suspension of membership and cessation of operations are generally patterned on those of the Bank. Any member may withdraw from the Agency at any time by notifying the Agency in accordance with Article 51. However, to ensure the Agency's continuity, especially in its formative years, a member may not withdraw within the first three years of its membership. The Council has power under Article 52(a) to suspend a member which has failed to fulfill any of its obligations under the Convention. A suspended member has no rights and privileges under the Convention other than procedural rights and the right of withdrawal and remains subject to all of its obligations (Article 52(b)). Every former member remains liable for its existing or contingent obligations towards the Agency incurred before the cessation of its membership, unless other arrangements have been made with the Agency (Article 53).

74. Article 54 enables the Board to suspend the Agency's guarantee operations and other activities. Under Article 55 the Council, by special majority, may decide to place the Agency into liquidation. No assets can be distributed to members after liquidation until all liabilities of the Agency have been discharged or otherwise settled (Article 55(b)).

75. Article 55(c) provides that any distribution of the Agency's remaining assets to members are to be made in proportion to each member's share in the subscribed capital. Similarly, any distribution of remaining assets of the Sponsorship Trust Fund must be made to sponsoring members in proportion to the relative amounts of investment sponsored by them. Members still having obligations towards the Agency would be entitled to their share in the assets only after settlement of these obligations. In practice, the Agency's claim against the member concerned could be offset against its claim to the share in the Agency's assets so that the Agency would be required to pay out only the balance. This Article also authorizes the Agency to distribute assets "in such manner as the Council shall deem fair and equitable." This provision is intended to provide for the most economical disposition of assets. It is intended that accepted corporate practice would be followed so that the value of assets given to an individual member in kind

would be assessed by independent appraisers and credited against that member's share in the distribution.

IX. Settlement of Disputes

76. The Convention establishes procedures for four different types of disputes:

(a) following the example of the Bank and other international financial institutions, questions of interpretation or application of the Convention arising between any member and the Agency or among any members will be decided by the Board subject to the possibility of appeal to the Council (Article 56);

(b) disputes arising under a contract of guarantee or reinsurance between the Agency and the other party will, if not solved amicably, be submitted to arbitration in accordance with the rules contained or referred to in the contracts of guarantee or reinsurance (Article 58);

(c) disputes between the Agency as subrogee of an investor and a member shall be settled either in accordance with Annex II to the Convention or in accordance with an agreement to be entered into between the Agency and that member on alternative dispute settlement mechanisms (Article 57(b)). Such an agreement (which must be approved by the Board by special majority before the Agency undertakes operations in the territory of the member concerned) would be negotiated between the parties taking Annex II as a basis. To the extent that such arrangements are satisfactory to the Agency, the agreement could, for example, provide that the Agency first seek remedies available to it under the domestic laws of the host country and seek recourse to arbitration only if it has not obtained relief under such remedies within a specified period of time. Such an agreement should assure that the Agency is treated at least as favorably, with respect to rights to proceed to arbitration, as in the arrangements which the member concerned has agreed for the most favored investment guarantee agency or any State party to an agreement related to investment. The agreement may also provide for alternative methods to arbitration such as seeking an advisory opinion from the International Court of Justice; and

(d) disputes other than those under (a), (b) or (c), which arise between the Agency and any member or agency thereof as well as all disputes between the Agency and a former member will be settled in accordance with Annex II, i.e., through negotiations and failing this, according to conciliation and arbitration (Article 57(a)).

77. The Convention does not provide specific procedures to govern arbitration between the Agency and holders of a guarantee or a reinsurance policy. It is anticipated that the contracts of guarantee and reinsurance would normally refer to an internationally recognized body of rules for commercial arbitration, such as the ICSID

rules, the rules developed by the United Nations Commission on International Trade Law (UNCITRAL) or the rules of the International Chamber of Commerce.

78. Annex II, which like Annex I is an integral part of the Convention, requires that the parties first attempt to negotiate a settlement before resorting to arbitration (Article 2 of Annex II). In fact, it is anticipated that all such disputes would be settled amicably through negotiations as is the case in the practice of other international financial institutions. Failing negotiation, the parties have the option of attempting a settlement through conciliation or proceeding to arbitration. Where the parties agree to use conciliation, they may proceed to arbitration only when conciliation fails (Article 3 of Annex II). Article 4(g) of Annex II provides that the arbitral tribunal (the Tribunal) shall "apply the provisions of this Convention, any relevant agreement between the parties to the dispute, the Agency's by-laws and regulations, the applicable rules of international law, the domestic law of the member concerned as well as the applicable provisions of the investment contract, if any." The reference to domestic law includes the member's conflict of laws rules. In case of a conflict between rules of international law and rules unilaterally issued by either of the parties to the dispute, international tribunals apply rules of international law. Arbitral awards are final and binding upon the parties (Article 4(h) of Annex II) and they are enforceable within the territories of every member as if they were final judgments of a court of the member concerned; however, they can be executed only according to the laws of the country where execution is sought (Article 4(j) of Annex II). This arrangement reflects the common interest of all members in the Agency's financial viability.

X. Amendments

79. The provisions of the Convention relating to amendments (Articles 59 and 60) strike the necessary balance between allowing modifications to the Convention that might be desirable or necessary for the operation of the Agency while protecting the members from increased obligations and dilution of their rights against their will. Thus amendments may generally be approved by three-fifths of the Governors having four-fifths of the total voting power, while certain amendments require unanimous approval and others require the approval of those members whose liability would be increased. Amendments to Schedules A and B require a special majority.

XI. Final Provisions

Entry into Force

80. The Convention provides for its entry into force when it is ratified, accepted or approved by five States classified in Category One and fifteen States classified

in Category Two if the total subscription of these countries amounts to not less than one-third of the authorized capital (Article 61(b)). This threshhold constitutes only the minimum requirement for the effectiveness of the Convention, based on a judgment that it will be possible to begin operations on a modest scale and that an early start of operations is desirable. It is expected that the Agency will exceed these minimum requirements in a reasonably short period of time.

Territorial Application

81. The Convention applies to all territories "under the jurisdiction of a member." This includes territories which, though not necessarily part of a member's territory in the strict legal sense, are subject to a country's jurisdiction for economic purposes under international law.