INTERNATIONAL INVESTMENT GUARANTEE AGREEMENTS AND RELATED ADMINISTRATIVE SCHEMES

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1. INTRODUCTION

Developing nations have tended to view foreign investment as a channel for releasing and augmenting domestic resources, while the developed countries have sought to increase their share of world trade through the promotion of manufacturing, agricultural and extractive industries by their nationals overseas. Moreover, the debt crises of the developing countries, as evidenced by the rapid expansion of commercial lending from 1967 to 1982, and the simultaneous decline of foreign direct investment within the same period, have raised eyebrows as to the wisdom of substituting commercial lending for direct investment as the main vehicle of international resource flow. As Jurgen Voss has noted, "Commercial lending results in liabilities of the borrower country not necessarily related to the contribution of these loans to its debt-servicing capacity, [whereas e]quity investment establishes a claim to repayment to the extent that it yields returns." It seems that prudence points to a return to self-induced development or self-reliance, supplemented by such foreign direct investment as is deemed necessary or desirable by the developing countries.

Both developing and developed countries have had to grapple with policies and mechanisms for the promotion and protection of foreign investment through the use of industrial and fiscal incentives and the creation of a fairly protective legal regime for investment. Some of these protective arrangements take a unilateral form in the sense that the steps taken involve the legislative or administrative machinery of

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only one state. Examples of this approach are the national investment codes found in host states,\(^4\) and provisions on tax credit and tax deferral in the tax codes of home states. Other arrangements are bilateral in character; and still others assume regional and interregional dimensions.\(^5\) There are many aspects of the bilateral approach, including investment protection treaties, insurance or guarantee agreements, and double taxation treaties.

In this article, the focus is on insurance or guarantee agreements, along with their supportive administrative schemes. The methodology is to analyze the main trends in these agreements by focusing on the main issues typically covered by them, utilizing a broad sample of agreements from different geographical, political, and ideological regions of the world. In this way, the article seeks to capture similarities as well as divergences in agreements reflecting north-north, south-south, north-south, and east-west economic relationships.

2. THE CONCEPT OF INVESTMENT GUARANTEE

Investment guarantee treaties should be analyzed against the backdrop of a related but distinct set of treaties, i.e., bilateral and multilateral investment protection treaties, which purport to provide the kinds of protection that foreign investors tend to expect from host and home states.

Protection treaties typically give reciprocal assurances to contracting states as to the treatment of investments within their borders. They provide many protections such as national treatment and most-favored-nation treatment; expropriation only in accordance with law, accompanied by prompt, adequate, and effective compensation, or some liberal variation of this formula; free transfer of dividends and proceeds from disinvestment; subrogation of the home country’s investment guarantee agency to the rights and claims of an investor against the expropriating state; and international arbitration for any disputes arising under the treaty, subject to the prior exhaustion of reasonable local remedies.\(^6\)

On the other hand, the arrangements embodied in these protection treaties have often been found inadequate on the ground that host states that are parties to such treaties have nonetheless taken adverse mea-


sures against foreign investors; hence, the emergence of the investment insurance or guarantee agreement as an additional protective instrument which seeks to indemnify investors so injured, irrespective of whether the home or host states concerned had concluded an investment protection treaty. An analogy from the field of municipal law would be the case of automobile owners or drivers who purchase automobile insurance even though there are traffic laws and the law of torts protecting them from other road users. It is felt that foreign investors need a greater measure of security and protection against non-commercial risks in the face of growing economic and political uncertainties. While it is possible for the foreign investor to buy private insurance against such risks on its own, either in its home state or in the host state or a third state, many of them prefer government sponsored insurance or guarantee schemes.

Some investors may seek government agency insurance in the hope that the aura and clout of their home governments may assist them in dealing with a host country government. In addition, their insurance is backed by the full faith and credit of their national government. The governments of capital-exporting countries insist on the conclusion of special agreements governing insurance of foreign investment between themselves and the investee states as a condition for insuring their national investors against these non-commercial risks. Such an arrangement is intended to strengthen the hands of the government of the capital exporting country in making a claim when the investment of its nationals suffers at the hands of the host government. Thus, even though investment guarantee agreements are not a logically necessary part of the insurance package, it has become for all practical purposes part of the investment insurance terrain.

7. Voss has noted in relation to the establishment of MIGA:

    [W]hile the [bilateral] treaties and the [UN] Code [on Transnational Corporations] establish a uniform legal or quasi-legal framework for foreign investment, MIGA is designed to act as financial intermediary between individual host countries and investors backing up the stability of their relationship by its guarantee.

Voss, supra note 2, at 22.

8. A private political risk insurance market has developed since 1972 within Lloyd's of London and in the U.S. After experiencing remarkable growth alongside national investment guarantee agencies, the private market is frequently shrinking as a result of underwriting losses sustained in other areas of insurance.

Id. at 17 n.43.

The basic concept in the arrangement is to purchase insurance against non-business or non-commercial risks, that is, political risks or risks associated with the economy as a whole, and the typical parties in this arrangement are the insured investor, the insurer and the broker or underwriter. The rationale for excluding traditional business risks is that investors as business people normally are presumed to be willing to run such risks, or at least to be able to procure insurance against them much more easily than the so-called non-commercial risks. Non-commercial risks may be defined restrictively or expansively, but four categories of such risks are noted in the relevant literature. These are:

a) The currency transfer risk, resulting from host government restrictions on currency conversion and transfer, as distinct from the devaluation risk.

b) The expropriation risk or the risk of loss resulting from legislative 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.


11. The insurer typically buys and sells currency at the prevailing rates. It bears the devaluation risk only from the time it acquires the currency until it disposes of it. Devaluation is generally considered a commercial risk, even though some see it as a political risk appropriate for public guaranty coverage.

12. The "deprivation of substantial benefit" language suggests coverage for the so-called creeping expropriation or de facto expropriation. Basically, this can be defined as any act, or series of acts, for which the state is responsible, which are illegal under domestic or international law, and which leave a substantial enough adverse effect on either the enterprise or the investor's rights under the enterprise. See Weston, 'Constructive Takings' Under International Law: A Modest Foray Into the Problem of 'Creeping Expropriation', 16 Va. J. Int'l L. 103, 111-13 (1975); Vagts, Coercion and Foreign Investment Rearrangements, 72 Am. J. Int'l L. 17, 25 (1978). The obvious question is how much is "substantial" for the purpose of this coverage. A broad range of governmental acts—from fairly direct forms of intervention to various subtle forms of interference—have confronted investors.

Shanks gives a dramatic example of a creeping expropriation scenario: There is a joint venture in a host country whose purpose is to catch, process and freeze seafood for export. A new government comes to power through a coup d'etat and is very hostile to the nationality of the foreign investors and to the local partners. Therefore it begins to take a series of acts, some of which could be characterized as regulatory, which has the effect of increasingly restricting the investment:

First, the expatriate manager and his family were threatened with physical harm; they packed up and left. Second, an expatriate refrigeration expert, whose services were vital, was denied the right to extend his visa; he was forced to leave. Third, government authorities interfered with the joint venture's fishing rights. Fourth, harbor authorities refused to allow ships dealing with the joint venture to use port facilities, and it became very difficult to export. Finally, when the investor had been reduced to flying out a single load of seafood per day on a small company plane, the
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.

d) The war and civil disturbance risk.

Schemes for the coverage of such risks may be national, bilateral, regional or multilateral in concept and scope. While the bilateral schemes have become well-established since the 1950s, and a regional insurance agency was established in the 1970s, only in 1988 did we witness an operational multilateral insurance agency. Early initiatives to create such an international investment guarantee entity emerged in the 1950s, and the idea was discussed in the early 1960s in various international forums including the World Bank, the Organization for Economic Cooperation and Development, the Inter-American Development Bank, the United Nations Conference on Trade and Development, and the European Economic Community. However, none of these earlier initiatives materialized. In the 1980s, the concept was reintroduced in the form of the Convention Establishing the Multilateral Investment Guarantee Agency ("MIGA"), which became effective in April 1988.

Since MIGA has just become operational, the main emphasis in this article will be with the bilateral schemes, even though in the ap-


13. This is the Inter-Arab Investment Guarantee Corporation based in Kuwait. Its operations are limited to investments made by Arab investors in Arab member countries of the Corporation. See Shihata, *Arab Investment Guarantee Corporation: A Regional Investment Insurance Project*, 6 *J. World Trade* L. 185 (1972).


propriate areas of the discussion, comparisons with and references to the MIGA scheme as represented in its Convention are made.

3. **GENERAL FORM AND CONTENT OF GUARANTEE AGREEMENTS**

The international agreements embodying these arrangements are usually not as formal as other protective schemes such as investment protection treaties. In fact, the bilateral guarantee agreements entered into with capital importing countries by the United States and Canada normally take the form of exchange of notes. The titles of some of the agreements can be rather misleading; they may bear the same name as a typical investment protection treaty, and yet deal with only investment insurance, or cover both protection and insurance. In every case, one would have to examine the particular agreement further in order to discover its objective and coverage. On the other hand, the multilateral arrangement, MIGA, has been established primarily as an investment insurance scheme through the medium of a convention, which is one of the most formal modes of international agreements. But while MIGA does not deal with investment protection in the traditional sense, it goes beyond investment insurance and it has been assigned consultative and advisory roles, all aimed at stimulating investment flows to and among its developing member countries.

Several common elements exist under treaties dealing with investment insurance. Included among the relevant treaty provisions are sections covering required approval of the participating governments and parties, limits on the types of insured investments, standards of compensation in the event of expropriation, recourse provisions defining the forum for dispute resolution, provisions regarding consultation upon request of either party, limits on the scope of protection, and explanations of subrogation procedures. These and other relevant issues are analyzed in the sections below. It will be observed that investor countries do not use the same substantive agreements for all investee states and that in some cases there are notable, though not fundamental, variations.

3.1. **Eligible Investors**

The first step in the analysis of investment insurance schemes is the determination of eligible investors for purposes of a particular investment insurance agreement. The treaties generally specify those individuals or groups that constitute eligible investors and consequently receive the protection afforded by the agreements. As a general rule,
investment guarantee insurance is available only to nationals of the contracting parties; nationals often include corporate bodies, individuals, and all other legal persons.\textsuperscript{16} For example, in the France-Haiti Agreement of 1973\textsuperscript{17} and the France-Indonesia Agreement of 1973,\textsuperscript{18} investment guarantees are limited and available only to French nationals. The agreements are bilateral in form but unilateral in scope. Not surprisingly, the France-Korea Agreement of 1975\textsuperscript{19} contains nearly identical language as the other two agreements regarding investor eligibility. Various United States agreements treat the issue of investor eligibility somewhat differently from the French agreements noted above. The United States-Nigeria Agreement of 1974, for example, does not expressly state who are eligible investors. Rather, it speaks in terms of investments in projects in Nigeria which are proposed by citizens of the United States of America.\textsuperscript{20} It is clear, however, that the scope of beneficiaries is again one-sided.

The United States-Yemen Arab Republic Agreement of 1972\textsuperscript{21} is another example of a bilateral agreement which only provides unilateral investment insurance. Here the investment is expected to occur primarily, if not exclusively, in Yemen. The insurance issuing government is defined as the United States, and the host government as the Yemen Arab Republic.\textsuperscript{22} The agreement also refers to an investor's proposal to invest in a project or activity within the Yemen Arab Republic.\textsuperscript{23} No mention is made of investments in the United States. Thus, only U.S. investors investing in Yemen could obtain coverage under the agreement. Three other American sponsored treaties are also written in the same unilateral vein: United States-Oman, 1976;\textsuperscript{24} United States-Fiji,
1976;\textsuperscript{25} The United States-China Agreement of 1980 initially anticipated only investments by U.S. citizens in China.\textsuperscript{27} It further provides for reciprocal treatment of investments between the two countries through a future exchange of notes, which would require authorizing legislation in the United States.\textsuperscript{28}

Other major capital exporting countries also offer guarantees exclusively to their nationals. The Canada-Israel\textsuperscript{29} and Canada-Jamaica\textsuperscript{30} Agreements refer to the promotion of investments in other countries by Canadian nationals through the Canadian governmental facility of the Export Development Corporation.

Another aspect of the category of eligible investors is found in the France-Yugoslavia Agreement of 1975. Only French nationals, both individuals and corporate bodies, are eligible for investment guarantees. These investors, however, must have obtained a bank guarantee ensuring the free and expeditious transfer of proceeds from the possible liquidation of their investments to be considered eligible.\textsuperscript{31} Thus, in defining eligible investors, this agreement also speaks to the issue of protecting the investments in the host country. The France-Egypt Agreement of 1976 appears more bilateral in design than the other treaties discussed in this subsection.\textsuperscript{32} Nationals or companies of either party are eligible for investment guarantees in the territory of the other

\textsuperscript{25} United States-St. Vincent, 1972.\textsuperscript{26} The United States-China Agreement of 1980 initially anticipated only investments by U.S. citizens in China.\textsuperscript{27} It further provides for reciprocal treatment of investments between the two countries through a future exchange of notes, which would require authorizing legislation in the United States.\textsuperscript{28}

\textsuperscript{26} Agreement on Investment Guaranties, May 15-June 14, 1972, United States-St. Vincent, 29 U.S.T. 3802, T.I.A.S. No. 7530 [hereinafter United States-St. Vincent Agreement].

INVESTMENT GUARANTEE AGREEMENTS

party\(^{33}\) insofar as the regulations of one Contracting Party provide for guaranteeing external investments.\(^{34}\) The result of the agreement is that bilateral investment in both directions is anticipated and that restrictions regarding eligible investors exist only to the extent of applicable investor country legislation.

The United States-Mauritius Agreement of 1970 also illustrates the limitation that only citizens of an investor country are eligible for investment guarantees.\(^{35}\) By contrast, the United States-Saudi Arabia Agreement of 1975 declares that all persons eligible under applicable United States legislation may be issued guarantees by the United States Government.\(^{36}\) Such language implies that non-United States nationals may be eligible for guarantees if United States legislation so allows. Still, the thrust of most bilateral agreements on this issue is clear; nationality or citizenship is the focal point of eligibility, and the nationality in question is that of the capital-exporting country.

Under the multilateral arrangement, an investor, in order to qualify for MIGA guarantee, must be a national of a member country of the organization or, in the case of a corporate investor, either be incorporated and have its principal place of business in a member country or have the majority of its capital owned by nationals of member countries.\(^{37}\) One distinguishing element of MIGA is that insurance eligibility could cover the nationals of capital exporting countries as well as nationals of the host state if they transferred the assets to be invested from outside the host country.\(^{38}\) This provision is intended to assist member countries in attracting flight capital back to their countries.

### 3.2. Eligible Investments

Among the relevant provisions of investment insurance treaties are sections requiring agreement on the nature of the project or investment being insured. The United States-Syria Agreement of 1975 limits application of the agreement procedures to those investments relating to projects or activities approved by the Government of Syria. Regarding construction or service contracts entered into with the Government of

33. Id., art. 1.
34. Id., art. 8.
37. MIGA Convention, supra note 10, art. 13(a).
38. Id., art. 13(c).
Syria itself, or any of its agencies or political subdivisions, the project or activity is ipso facto considered to have Syrian governmental approval for purposes of the agreement.39 In the case of the United States-Fiji Agreement of 1976, government approval is also presumed where the Fiji government, or any agency or political subdivision of it, participates in the project.40 Thus, a preliminary caveat for prospective investors under this and numerous similar agreements is to obtain the approval, actual or presumptive, of the government in question.41

Host government approval takes various forms. In the United States-China Agreement, project approval by the government’s Foreign Investment Commission constitutes complete government approval.42 Chinese government approval is also accomplished by obtaining approval of the Administrative Commissions for Special Economic Zones of the concerned provinces. Like the United States-Syria Agreement of 1975,43 the Canada-Malaysia Agreement of 1975 also requires government approval of the project in question.44 Adopting statute of frauds principles, the Canada-Singapore Agreement of 1975,45 the France-Korea Agreement of 1975,46 and the France-Indonesia Agreement of 197347 expressly require that host government approval be in writing.

The United States-Saudi Arabia Agreement of 1975 also requires host government approval; however, only investments in Saudi Arabia, the host country, are eligible for investment insurance.48 Four contemporaneously signed treaties to which the United States is a party —

40. United States-Fiji Agreement, supra note 25, art. 2.
41. Host government approval is not uncommon or limited to the illustrated instances. See United States-Yemen Agreement, supra note 21, para. 2, at 845; United States-Oman Agreement, supra note 24, para. 2, at 5670 (contains language which restricts application of the agreement procedures to coverage of investments in projects or activities approved by the host government); see also United States-St. Vincent Agreement, supra note 26, para. 2, at 3802 (which limits the application of agreement procedures to guaranteed investments in projects or activities approved by the government); Agreement on Investment Guaranties, Jan. 18, 1973, United States-Yugoslavia, 24 U.S.T. 1091, T.I.A.S. No. 7630 [hereinafter United States-Yugoslavia Agreement] (applies agreement procedures to projects or activities duly registered in accordance with applicable host government legislation).
42. United States-China Agreement, supra note 25, art. 2.
43. United States-Syria Agreement, supra note 39, art. 2.
46. France-Korea Agreement, supra note 19, art. 1.
47. France-Indonesia Agreement, supra note 18, arts. 2 & 3.
48. United States-Saudi Arabia Agreement, supra note 36, art. 1.
agreements with Bangladesh, Nigeria, Papua New Guinea, and Mauritius — contain common elements, one of which is the usual host government approval. Other elements include the requirement that upon the request of either of the contracting parties, the parties must hold consultations with respect to the nature of the project or activity. The United States-Mauritius Agreement stipulates that the consultation must be with regard to the nature of the proposed project or activity and its contribution to economic and social development in Mauritius.

Similarly, the United States-Yugoslavia Agreement provides for this type of consultation upon request of either party but is silent on the condition concerning the project’s contribution to the host country’s economic and social development. The United States-Romania Agreement makes a distinction in its approval provisions and consultation requirements between approval for investments in a joint venture, where coverage may be issued on the assumption that approval has been granted, and other forms of investments, where express approval is required.

Under the Belgium-Indonesia Agreement, the approved condition is handled in one of two ways. Where the investment is in Indonesia, protection is afforded only to investments with express Indonesian government approval. Where, on the other hand, the investment is in Belgium, protection is available provided the investment was made consistent with the relevant Belgian laws and regulations. Two points emerge from this provision. First, the agreement expressly anticipates a bilateral flow of investments between the contracting states. Second, the Belgian approval arrangement reflects the general situation in most Western capital exporting countries where there is no need for a foreign investor to obtain prior central government approval before doing

50. United States-Nigeria Agreement, supra note 20, para. 1.
52. United States-Mauritius Agreement, supra note 35, art. 1.
53. For similar treaties containing an economic and social consideration clause, see United States-Fiji Agreement, supra note 25, para. 1; United States-St. Vincent Agreement, supra note 26, para. 1.
54. United States-Yugoslavia Agreement, supra note 41, para. 1.
business. Registration of the requisite business organization with the appropriate government agencies (e.g., registrar of companies, tax authorities, etc.) are normally deemed adequate.

As with the bilateral arrangements, the investment eligibility requirements under MIGA will initially include equity investments and equity-type loans (i.e., loans and loan guarantees by equity holders in the investment project with maturities of three years or more). However, unlike most bilateral schemes, MIGA will also extend coverage to non-equity forms of direct investment (i.e., contractual arrangements falling between traditional investments and export credits, such as production-sharing, profit-sharing, management and turn-key contracts, as well as franchising, licensing, and operating leasing agreements). Moreover, MIGA's Board of Directors is authorized to extend coverage to additional forms of direct investment.\(^7\)

Thus, a third important issue in the investment insurance area is the scope of protection provided to investors. What risks are covered by the agreement and what risks are specifically excluded from coverage? Is payment for losses conditional on the fulfillment of certain prerequisites? Who ultimately pays for losses covered under the agreement?

### 3.3. Scope of Protection

Assuming that the investor and the investment are eligible for protection pursuant to specific treaty provisions, the next steps are to identify the insurance agency and evaluate the scope of protection, i.e., the range of risks for which coverage can be obtained.

Generally, in the case of the bilateral schemes, an agency of the government of the investor country provides the insurance coverage. In the case of Canada, the insuring agency is a government agency called the Export Development Corporation. This body is intended to promote investments in other countries by Canadian nationals by providing protection against specific risks. The Canada-Trinidad and Tobago Agreement of 1974 lists the specific risks entitled to protection: war, riot, insurrection, revolution or rebellion; expropriation, confiscation or deprivation of any property right by a government or any agency thereof and inconvertibility of foreign exchange.\(^8\) This particular agreement, like others, appears to limit insurance protection to the specific risks listed.\(^9\)

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57. MIGA Convention, supra note 10, art. 12.
58. Exchange of Notes Relating to Canadian Investments in Trinidad and Tobago, Feb. 8, 1974, Canada-Trinidad and Tobago, intro., para. 2, 977 U.N.T.S. 29.
59. The Canada-Israel Agreement, supra note 29, intro., para. 2, and the Canada-Jamaica Agreement, supra note 30, intro., para. 2, provide coverage for similar
In contrast, the Canada-Indonesia Agreement\(^\text{60}\) appears to contain a more expansive list of risks. The insuring agency offers protection against any action by the Government of Indonesia which prohibits or restricts transfer of money to a Canadian investor (if he is entitled to the money according to the laws and regulations of Indonesia), against nationalization and revocation of ownership rights of Canadian investors, against restrictions of the rights of control or management of investments by the Government of Indonesia; and against war, riot, insurrection, revolution or rebellion in Indonesia. Yet in another sense, the agreement is quite restrictive. First, it contemplates the right of Indonesia to limit its liability in certain circumstances. Second, in determining whether an investor is entitled to remuneration for currency losses, Indonesian laws and regulations prevail. Hence, questions exist as to when, under what circumstances, and to what extent Indonesia can limit its liability.\(^\text{61}\)

In terms of specific risks covered by particular agreements, the United States-China Agreement\(^\text{62}\) is somewhat exceptional. Losses from political risks are generally eligible for investment insurance. However, according to an interpretation letter from the U.S. Overseas Private Investment Corporation's ("OPIC") General Counsel issued prior to the conclusion of the incentive agreement with China, the scope of protection of this agreement does not cover losses resulting from war, revolution, and insurrection.\(^\text{63}\) One can only guess the reason for this exclusion: that China, from the standpoint of the U.S. Government, had been known to be too prone to cultural and other forms of revolution in addition to border wars since the 1960s. But if that is the case, this would be the very reason why a prospective investor in China would seek investment insurance against such types of political risks.

A final issue concerning the scope of protection under these agreements is addressed in the United States-Nigeria Agreement. Under that agreement, the United States must notify and consult the Nigerian risks: war, riot, insurrection, revolution, rebellion, expropriation, etc. They also declare that protection is offered by the insuring government against risks which are effected or triggered by government or government agency action. The loss need not occur through the fault of one of the contracting governments; only that a government or agency thereof be responsible for the loss-creating event. \textit{Id.}

\(^{60}\) Canada-Indonesia Agreement, \textit{supra} note 30, art. 1.

\(^{61}\) The Canada-Morocco Agreement, \textit{supra} note 30, and the Canada-Liberia Agreement, \textit{supra} note 30, employ language similar to the Canada-Indonesia Agreement, \textit{supra} note 30.

\(^{62}\) United States-China Agreement, \textit{supra} note 27, art. 1.

\(^{63}\) Letter from Paul R. Gilbert, OPIC Vice President and General Counsel, to Chen Shuzhi, Vice President of Chinese Int'l Trust & Investment Corp., Oct. 7, 1980, \textit{19 I.L.M.} 1490 (interpreting art. 1 of the United States-China Investment Incentive Agreement).
Government before the former pays any person under the guarantee agreement.\textsuperscript{64}

Under the MIGA Convention the covered risks are basically those referred to in Section 2 of this article discussing the concept of investment guarantee (i.e., the currency transfer risk, the expropriation risk, the contract repudiation risk, and the war and civil disturbance risk).\textsuperscript{65}

In addition to these types of risks, coverage may be extended to other non-commercial risks such as acts of terrorists directed at the investor, kidnapping or politically motivated strikes in the future.\textsuperscript{66}

3.4. Rights of Insuring Agency Against Investee State: Subrogation

Of all the provisions included in investment insurance treaties, those defining the rights of the insuring agency against the investee (host) state are the most essential. It should be noted that even though insurance or guarantee agreements ensure the subrogation of the investor's rights to the insurer government or agency, these agreements themselves do not spell out these rights of the investor which constitute the subject-matter of the subrogation. Rather, these rights are dealt with elsewhere under bilateral investment protection treaties, multilateral conventions, general principles of international law, the national investment codes, investment-related legislation, and constitutions of the host states, etc. It is to these documents that one should look for the rights of the individual and not to the guarantee agreements. Subrogation does nothing more than assign an existing claim from the investor to the insurer agency. On the other hand, these agreements do spell out the rights of the investor vis-a-vis the insurer agency.

As with the other issues of investor and investment eligibility and scope of protection covered by the bilateral treaties, the provisions on subrogation display common elements in the various agreements studied. These agreements establish the so-called subrogation rights of the insuring agency against the host state. Thus, the France-Haiti Agreement employs language to the effect that if the French State (the insurer) makes payment to any investor under its coverage, it shall automatically succeed to the rights of such investor with regard to the Haitian Government.\textsuperscript{67} The France-Yugoslavia Agreement has language identical to the France-Haiti Agreement on the matter of

\textsuperscript{64} United States-Nigeria Agreement, supra note 20, art. 3. The general scheme for processing and paying out claims to aggrieved investors is discussed in Section C of this report.

\textsuperscript{65} MIGA Convention, supra note 10, art. 11(a).

\textsuperscript{66} Voss, supra note 2, at 10.

\textsuperscript{67} France-Haiti Agreement, supra note 17, art. 4.
subrogation. The subrogation provisions of the United States-Syria Agreement and the United States-Fiji Agreement are also identical. Likewise, the France-Tunisia Agreement provides that the insuring state automatically succeeds to the rights of the nationals or beneficiaries. However, it adds that such payments under these conditions shall not affect the rights of the guaranteed beneficiary to have recourse to the ICSID or to continue actions brought before it until the outcome of the proceeding has been determined.

A second element found in some of the agreements is the delegation of subrogation rights to a national insuring agency by the insuring state or contracting party. Thus, the United States-Saudi Arabia Agreement provides that where OPIC, or a similar public agency of the U.S. Government, makes payment pursuant to an investment guarantee or received assignments, such agency shall be recognized as succeeding to the rights of the guaranteed person or firm. Similarly, three Canadian sponsored agreements state that when the Export Development Corporation makes payment pursuant to the agreements’ provisions, the host government shall allow the corporation to exercise the rights it acquires by law or those assigned to it.

There is a dual process involved in most provisions dealing with subrogation. The China-Sweden Agreement demonstrates this point. First, when a contracting state or delegated agency makes payment to an investor under an investment guarantee in the other contracting state, the host contracting state shall initially recognize the transfer by the investor to the insuring contracting state, of any currency, credits, assets or investments for which payment was made under the coverage (e.g., blocked dividends, compensation in soft local currency, physical assets damaged during civil war or strife). Second, the host contracting state must also recognize the subrogation of the other contracting state to any related right, title, claim, privilege, or cause of action that the investor may have against the host state. In other words, “transfer” describes the recognition of an investor-home state arrangement;

68. France-Yugoslavia Agreement, supra note 31, art. 4; see also identical language in the France-Indonesia Agreement, supra note 18, art. 5.
69. United States-Syria Agreement, supra note 39, art. 3, paras. A, B & C.
70. United States-Fiji Agreement, supra note 27, art. 3.
72. United States-Saudi Arabia Agreement, supra note 36, art. 2.
73. Canada-Morocco Agreement, supra note 30, art. 1; Canada-Indonesia Agreement, supra note 30, art. 1; Canada-Liberia Agreement, supra note 30, art. 1.
whereas "subrogation" properly relates to rights accruing from the investor-host state entanglement.

Under the China-Sweden Agreement, the subrogation of the insuring government to the rights of the insured beneficiary is expressly made subject to the deduction of the investor's debts to the host contracting state. The United States-China Agreement is similar in this respect. The United States-Romania Agreement is even more explicit: the issuing government as a successor in interest to the rights of the investor is liable for the payment of legal taxes and the fulfillment of all other contractual obligations of the erstwhile investor. Hence, rather than leaving for inference the fact that the successor in interest naturally assumes the investor's rights subject to all valid claims, these agreements specify taxes and contractual obligations as preconditions to the exercise of subrogation.

There are several additional elements which are worthy of note in the subrogation arrangements. First, there is the "third or other entity" proviso. Where the laws of the host state prohibit the insuring agency (e.g., the Canadian Export Development Corporation) from acquiring any property in that state, the host government may be requested to permit the agency to transfer the property to an entity permitted to own such property. However, while some agreements mention "prohibition" from acquisition of property, others refer to the "invalidation" of such acquisition.

Thus, the United States-Mauritius Agreement provides that the host government shall permit the issuing government to transfer the property to an entity permitted to own it if the laws of the host government invalidate the acquisition of any property by the issuing government. This seemingly slight difference between prohibition and invalidation might be interpreted to mean that the latter language authorizes or empowers the host government to invalidate post facto such property acquired by subrogation (e.g., on grounds that some legal rule or procedure was not followed in the course of the acquisition); whereas the language of prohibition covers the situation where there is a pre-existing general law preventing the foreign state's acquisition of such property under those circumstances (e.g., under the investment code, exchange control laws, or national security provisions). The United

75. United States-Romania Agreement, supra note 55, art. 3.
76. United States-Papua New Guinea Agreement, supra note 51, art. 4 ("invalidate or prohibit"); see also United States-Bangladesh Agreement, supra note 49, art. 4 ("invalidate or prohibit").
77. United States-Mauritius Agreement, supra note 35, art. 4; see also Canada-Morocco Agreement, supra note 30, art. 2; Canada-Indonesia Agreement, supra note 30, art. 2; Canada-Liberia Agreement, supra note 30, art. 2.
States-Nigeria Agreement includes a further requirement that the U.S. government, when it is subrogated to any assets, shall give the Nigerian federal government the first option to purchase the assets at a mutually negotiated price. 78

Second, some treaties provide that the government of the insuring agency reserves its rights to assert a claim under international law if there is a denial of justice or some question of state responsibility in international law. 79 Such claims are made by the issuing government in its sovereign capacity and may be called "sovereign capacity claims." 80

Third, the issue of currency treatment deserves mention. Some treaties require that the currency of the host government acquired by the insuring agency under investment insurance contracts should be treated in the same way by the host country as if the funds had remained with the investor. 81 Alternatively, under other agreements, treatment of acquired currency is to be no less favorable than the funds of private investors in similar investment activities. 82 The idea is to make such currency transferrable under the applicable exchange control laws.

Regarding currency treatment, some treaties state that funds shall be freely available to the government of the insuring agency to meet its expenses in the host state, 83 which could include diplomatic mission expenses as well as other financial commitments of the insurer state in the host country. After a claim is ripe and there has been no payment for the time prescribed in the insurance policy, the insurance agency hypothetically may buy the local currency for dollars at the prevailing rate and sell it to its embassy for the latter's local operating expenses. The embassy then credits the agency's account. However, this scheme is of little help when diplomatic relations have been severed between the host and home countries concerned or when the embassy is already deluged in local currency and is unable to spend it quickly enough. In such cases, the agency might arrange for swaps with other governments or commercial entities. 84

A final noteworthy aspect of subrogation rights concerns the limi-

78. United States-Nigeria Agreement, supra note 20, art. 3, point 3.
79. Canada-Morocco Agreement, supra note 30, art. 3; Canada-Indonesia Agreement, supra note 30, art. 3; Canada-Liberia Agreement, supra note 30, art. 3.
80. Canada-Morocco Agreement, supra note 30, art. 4; Canada-Indonesia Agreement, supra note 30, art. 4; Canada-Liberia Agreement, supra note 30, art. 4.
81. United States-Nigeria Agreement, supra note 20, art. 4; see also Agreement for Promotion and Protection of Investments, Dec. 3, 1980, Philippines-United Kingdom, art. 8, 20 I.L.M. 326.
82. Canada-Morocco Agreement, supra note 30, art. 4; Canada-Indonesia Agreement, supra note 30, art. 4; Canada-Liberia Agreement, supra note 30, art. 4.
83. See Shanks, supra note 12, at 426-27.
tation on the rights of the insuring agency (or the government, as the case may be). Some treaties declare that the insuring agency shall assert no greater rights than those of the transferring investor. Further, the United States-Oman Agreement expressly states that the successor government shall be subject to legal defenses assertable against the transferring investor to the same extent as a transferree that is a private entity. Thus, the issuing government may well have limited recourse against the host government.

The four elements of subrogation rights discussed herein — "other entity" clauses, sovereign capacity claims, currency treatment, and limitations on the rights of the successor in interest — are found in numerous other investment insurance agreements.

On the multilateral level, the MIGA Convention also affirms the subrogation principle. Upon payment of a claim to the investor, MIGA becomes subrogated to the investor's rights against the host country or third party obligors. Since insured investors will not be parties to the Convention, MIGA's subrogation will be based on covenants to this effect in the contracts of guarantee between MIGA and the investors. By virtue of article 18(b) of the Convention, the host country and all other member countries will recognize MIGA's subrogation without the need for any further agreement.

4. NATIONAL AGENCY SCHEMES FOR ADMINISTRATION OF GUARANTEE AGREEMENTS: OPIC AS A MODEL

The bilateral investment insurance or guarantee agreements analyzed so far provide little more than an umbrella for the operational aspects of international investment insurance. These agreements do not deal with the establishment of bilateral investment guarantee agencies. Hence, although the insurance protection provisions embodied in these documents are bilateral or intergovernmental in form and conception, their actual implementation falls into the domestic domain of one or both of the contracting states.

Thus, various capital exporting countries, including the United States, Canada, Japan, Great Britain, and West Germany, have established national guarantee or insurance agencies, which operate under their own statutes and regulations, with or without the appendage of bilateral investment insurance agreements. Even though the subject matter of this article is international, a fuller understanding of bilateral

84. United States-Oman Agreement, supra note 24, para. 3.
85. MIGA Convention, supra note 10, art. 18(a).
86. Voss, supra note 2, at 15.
insurance schemes demands some appreciation of the workings of national investment insurance agencies. For this analysis, the United States Overseas Private Investment Corporation is our bilateral paradigm.87

4.1. Historical Background

OPIC is a corporate body and an independent agency of the U.S. Government established by the Foreign Assistance Act of 1969. Its basic mission is "[t]o mobilize and facilitate the participation of United States private capital and skills in the economic and social development of less developed friendly countries and areas . . . ."88

The investment insurance program began in 1948 as part of the European Recovery Program or Marshall Plan. It was first limited to protection against currency inconvertibility. In the 1950s, there was a change of focus directed to the less-developed countries. At the same time, the program was also broadened to include insurance coverage for revolution and insurrection, as well as loan guarantees and feasibility study assistance. In 1961, the insurance program was transferred to the newly-formed Agency for International Development ("AID"). OPIC effectively took over the insurance program of AID in 1971.

4.2. Organization and Management

OPIC is governed by a joint public-private board of eleven directors. Six directors are from the private sector, and they are appointed by the President of the United States subject to Senate confirmation. The five government directors are the Administrator of AID, the President of OPIC, and the Undersecretaries or Assistant Secretaries from the Departments of State, Treasury, and Commerce. By law, the powers of OPIC are vested in and exercised by or under authority of its Board of Directors.89 OPIC has no overseas offices or staff, although it receives support from the U.S. embassies and the AID mission staff. Under section 2191 of Title 22 of the United States Code, OPIC "shall be under the policy guidance of the Secretary of State." The agency has an insurance program as well as a finance program.90

87. This section of the article is based on Hunt, The Overseas Private Investment Corporation, in INTERNATIONAL BUSINESS TRANSACTIONS 274 (2d ed. 1979); pamphlets and other literature from OPIC on its programs and services; and Shanks, supra note 12.


89. 22 U.S.C. § 2193(b) (1982).

90. "Under its finance program, OPIC can participate as a medium to long-term project lender. For smaller projects, involving small business, OPIC can participate as a
The Insurance Department of OPIC is administered by a Vice President and organized into two groups. There is a Natural Resources and Financial Services Division and an International Division, with each division headed by a Managing Director. The International Division is divided into two regional divisions. One division covers Europe, the Near and Middle East, Southeast Asia and Africa, while the other covers Latin America, the Caribbean, East Asia and South Asia. Insurance officers handle insurance matters in their assigned countries or areas of functional responsibility. The nature and financial structure of OPIC precludes any determination of net worth. Insurance and guarantee obligations are paid out of separate reserve accounts maintained in the Treasury of the United States, which are designated the Insurance Reserve and Guarantee Reserve. The agency's operations have been self-sustaining in recent years.

4.3. Basic Objectives and Policies

As already indicated, OPIC's function is to facilitate the contribution of U.S. private enterprise to the process of foreign economic development. OPIC is required to be selective in its support of United States investment in less-developed countries. In determining whether to support a project, OPIC is to be "especially . . . guided by the economic and social development impact and benefits . . . and the ways such a project complements, or is compatible with, other development assistance programs or projects of the United States or other donors."

The Foreign Assistance Act further requires OPIC to consider whether the foreign investments it is requested to underwrite might adversely affect the U.S. economy. OPIC is also directed by law to give "preferential consideration" to projects sponsored by small United States businesses. The 1985 amendments to the OPIC legislation urge the corporation to give preferential consideration to projects in countries with per capita incomes of $896 or less (in 1983 U.S. dollars). Other legislation also restricts OPIC's operations in higher income less-developed countries. There must be an agreement between the project country and the United States to institute a program for insurance guarantees, or reinsurance, such as the typical intergovernmental investment guarantee agreements analyzed in earlier sections of this article. Statutory constraints on furnishing assistance to a particular country, such as
the Hickenlooper Amendment\textsuperscript{94} to the Foreign Assistance Act, may limit OPIC operations.

4.4. Insurance Program

The political risks covered are specified in the Foreign Assistance Act. They include: unanticipated inability to convert into dollars other currency received by the investor as earnings or profits or return on investment; loss of investment, in whole or in part, due to expropriation or confiscation by action of a foreign government; loss due to war, revolution, or insurrection; and loss due to business interruption resulting from the foregoing risks.\textsuperscript{95}

4.4.1. Eligibility and Other Conditions

An eligible investor means:

(1) a United States citizen; (2) corporations, partnerships, or other associations . . . created under the laws of the United States or of any state or territory thereof . . . [which is] substantially beneficially owned by United States citizens [at least 50 percent United States ownership]; . . . and (3) foreign corporations, partnerships or other associations wholly owned by one or more such United States citizens, corporations, partnerships or other associations.\textsuperscript{96}

To be eligible for OPIC insurance, the investment must be in a new project, or a significant expansion, modernization, or development of an existing enterprise.\textsuperscript{97} The investor should obtain adequate insurance to cover possible project cost overruns, because a second application for further capital contributions may be deemed ineligible as not being a new project.\textsuperscript{98} In order for the investment to be insurable, it must plan to remain in the foreign enterprise for at least three years.

\textsuperscript{94} The Hickenlooper Amendment, adopted in 1962 against the views of the Kennedy Administration, seeks to deny the benefits of U.S. foreign aid to countries that expropriate property owned by U.S. citizens without full and speedy compensation "as required by international law." See § 301(3)(e) of the Foreign Assistance Act of 1961, as amended, 22 U.S.C. § 237(e)(1) (1982). The traditional formulation of this position is that nationalization should be accompanied by prompt, adequate and effective compensation. This concept is also known as the Hull Doctrine, first articulated in 1938 by U.S. Secretary of State Cordell Hull in an exchange with the Mexican Minister of Foreign Relations.


\textsuperscript{96} 22 U.S.C. § 2198(c) (1982) (these considerations apply notwithstanding foreign ownership of up to five percent of the shares).

\textsuperscript{97} See Hunt, supra note 87, at 292.

\textsuperscript{98} See id.
OPIC insurance coverage is available both for conventional equity investments and loans and for investment or exposure of funds, goods or services under various contractual arrangements. For licensing of patents, processes, and techniques in exchange for royalty payments, OPIC coverage is available for inconvertibility risk only. 99

"OPIC requires investors making application for insurance coverage to supply data on the project's effect on employment, development of local skills, balance of payments, taxes, and other host government revenues."100 From the domestic U.S. standpoint, no project will be assisted if it involves a significant reduction in U.S. employment. As already noted, there are additional statutory prohibitions against OPIC support for projects in certain countries and for certain types of projects.

4.4.2. Application Procedure

The applicant must obtain an OPIC "Registration Letter" before the investment has been irrevocably committed.101 The primary purpose of this document is to establish the timeliness of the application.102 A request for a Registration letter must contain the following information:

(a) the identity of the investor,
(b) citizenship eligibility of the investor,
(c) the country or territory in which the investment is to be made,
(d) a brief description of the project,
(e) a statement that the investment has not been made or irrevocably committed, and
(f) the type of investment contemplated, the kind of insurance coverages desired, and an estimate of the amounts under each coverage.103

A registration fee must accompany the application.104 The Registration Letter does not constitute a promise to insure a project.105

OPIC will do its own technical appraisal or evaluation of particular projects to ensure that it is attractive from the insurer's perspective.

99. Id. at 293.
100. Id. at 294.
101. Id. at 302.
102. Id.
103. Id. at 302-03.
104. Id. at 303.
105. Id. at 302.
An underwriter or broker generally is involved at this level to help the potential insured prepare the appropriate documents to satisfy the insurer's expectations. Special attention is given not only to the nature of the project but also its financial and ownership structure, since the latter arrangements could be an incentive or disincentive to expropriation depending on how they are structured.106

4.4.3. Project Approval and Collateral Agreements by Host Government

It is the responsibility of the applicant to obtain the foreign government project approval ("FGA").107 OPIC gives the applicant guidance on obtaining the FGA when it issues the Registration Letter.108 The original signed copy of FGA is delivered by local authorities to the U.S. Embassy for forwarding to OPIC.109 The OPIC application requires inclusion of statutes, decrees, or permits of special pertinence to the project. The insured is under a continuing duty during the period of the contract to disclose to OPIC all arrangements with the host government regarding investment remittances.110 Investors must agree not to enter into any agreement requiring compensation for expropriation without OPIC's prior written consent.111

4.4.4. Formal Application

The formal application for insurance coverage is filed when the final form of the investment is reasonably clear.112 An insurance officer may request clarification or additional data needed to complete a tentative form of insurance contract.113

106. Peter Gilbert cites the case of one medium-sized mine in Chile that escaped the 1971 Chilean nationalization exercise largely because it had involved foreign banks and international organizations in its debt and equity structure. He also notes that involvement of a local partner with special expertise may be a disincentive to nationalization, but not necessarily someone with a high degree of political exposure. Gilbert, Acquiring and Utilizing Political Risk Insurance: A Practitioner's Perspective, 9 HASTINGS INT'L & COMP. L. REV. 407, 409 (1986). MIGA is also expected to appraise projects before underwriting them. The appraisal is to be done in terms of the projects developmental merits (i.e., its economic viability), contribution to the host country's development consistent with the host government's declared development objectives and priorities and compliance with the host country's laws and regulations. See MIGA Convention, supra note 10, art. 12(d)(i)-(iii).
108. Id.
109. Id.
110. Id.
111. Id. at 303-04.
112. Id. at 304.
113. Id.
4.4.5. Limits of Guarantee and Cost of Coverage

Insurance coverage is limited to the dollar value at the time of investment in the project plus accrued earnings, interest, or profits. The insured must bear at least ten percent of the risk of loss on the total investment in the project. OPIC insurance contracts generally require the insurance premium to be paid annually ahead of time.

In 1977 a new comprehensive premium rating structure was adopted. Base rates for each coverage type were established for five different types of projects: manufacturing and services; natural resources; hydrocarbons; institutional lenders; and service contractors. Base rates can be adjusted up or down thirty-three percent depending on the risk profile of a specific project.

Insurance cost is based on the nature of the investor’s undertaking and the project’s risk profile, not on the country where the project is to be located. The 1984 base rates were as follows:

<table>
<thead>
<tr>
<th>Coverage</th>
<th>Annual Base Rate Per $100 of Coverage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Inconvertibility</td>
<td>$.30</td>
</tr>
<tr>
<td>Expropriation</td>
<td>.60</td>
</tr>
<tr>
<td>War, Revolution, Insurrection</td>
<td>.60</td>
</tr>
<tr>
<td>Civil Strife Rider</td>
<td>.15</td>
</tr>
</tbody>
</table>

Although these base rates are typical for most projects, cost is determined by a project’s risk profile.

4.4.6. Contract Terms

The “General Terms and Conditions” of the contract forms used by OPIC are standard and will be altered only to meet unusual circumstances. The OPIC “Special Terms and Conditions of the Final

114. Id. at 301.
115. Id.
116. The details of determining the specific premium rates are set forth in Hunt, supra note 87, at 344 (Exhibit 4). Compare this with the anticipated MIGA arrangement. Investors will be offered a choice between coverage against individual types of risk (currency transfer, expropriation, etc.) and coverage against a risk package comprising several or all of these types of package coverage, normally at a flat rate. Under MIGA, premiums will be differentiated in accordance with actual risk-taking within a range of 0.3 to 1.5% of the guaranteed amount per annum for each type of risk covered. “Within this range, risks will be rated on a case-by-case basis rather than on the economic and political stability of the host country. Investors purchasing coverage against several types of risk will qualify for a package discount of up to 50% of the sum of the rates for the types of coverage comprising the package.” Voss, supra note 2, at 18.
117. Id. at 300.
Contract of Insurance” contain a description of the investor, the investment, the project in which the investment is being made, and the securities evidencing the investment.\textsuperscript{118} These Special Terms and Conditions, together with the General Terms and Conditions, constitute the full and final contract of insurance or insurance policy.

4.4.7. Investor’s Claims Against Insuring Agency

The insurance obligations of OPIC can be met immediately through its insurance reserves.\textsuperscript{119} Obligations are also backed by the full faith and credit of the United States.\textsuperscript{120}

The insured is expected to take the following measures in order to expedite the processing of its claim: give OPIC prompt notice of any action or impending action by the investee state; work closely with OPIC to help avoid losses in the first place; be aware that most expropriation coverage requires the expropriatory action to continue for a year before an insurance claim can mature; attempt to avoid or mitigate losses; keep OPIC fully informed of the progress of any compensation negotiation with the investee states since, under the insurance contract, OPIC requires its prior consent to agreements with the foreign government on these matters; and carefully maintain and preserve accounting data and maintain records outside the project country.\textsuperscript{121}

Most of these measures or procedures are aimed at securing the subrogation rights of the insurer. As Gilbert notes, insurers cannot tolerate the destruction or loss of their potential rights under subrogation.\textsuperscript{122} At this point, the insurer and the insured are expected to function as a partnership, aimed at maximizing the insurer’s “salvage” potential after payment of the claim to the insured.\textsuperscript{123} As already noted, a political risk insurance policy has a “waiting period” during which the insured risk must continue in existence before a compensable loss is deemed to have occurred. The waiting period could be days, months or even years. The compensable loss does not arise immediately after the occurrence of the event constituting the risk, as in fire or theft insurance policies. During the waiting period, the insured is typically required to take reasonable steps to prevent loss and to preserve its remedies. Moreover the insurer may want to use the waiting period to attempt a negotiated settlement with the host country, either by itself or

\textsuperscript{118} Id.
\textsuperscript{119} Hunt, supra note 87, at 305.
\textsuperscript{120} Id.
\textsuperscript{121} See id. at 306.
\textsuperscript{122} See Gilbert, supra note 106, at 413.
\textsuperscript{123} Id.
Claims of the insured against the host government pass to OPIC under assignments required by the insurance contract. The intergovernmental guarantee agreements also set out the subrogation and succession rights of the United States Government. OPIC requires investors to pursue local remedies before insurance compensation is payable. Payment arrangements take more than one form. For example, OPIC may settle a claim by paying compensation in cash to the investor while accepting installments from the host government, by persuading the investor to accept host government commitments backed by OPIC guarantees, or by a combination of cash payments and guarantees. \(^{124}\)

4.5. Criticism of OPIC

The above account of OPIC and its operational structure is necessarily brief and insufficient as a basis for long-range conclusions. However, it should be observed that some commentators have questioned whether OPIC, in spite of the letter of the law, does in practice favor big business at the expense of small business, whether it really contributes to the economic development of investee states or if its primary goal is to help U.S. businessmen, whether governmental insurance of private investors increases the likelihood of conflict between the United States and host countries by politicizing investment disputes, and whether the concern of U.S. labor, namely, that OPIC operations constitute a subsidy to U.S. business and encourage the flow of jobs overseas, is well-founded. \(^{125}\)

Indeed, since 1985, critics of OPIC from opposing ends of the political spectrum have succeeded either in adding more restrictions on the agency's operational freedom or in questioning its place within the U.S. governmental framework. Thus in 1985, Congress adopted a provision prohibiting OPIC from assisting investments in countries which are not taking steps to adopt and implement "internationally recognized workers' rights." \(^{126}\) In the wake of Union Carbide's investment tragedy in Bhopal, India, Congress also added a provision requesting an environ-

\(^{124}\) Shihata, Int'l Law., supra note 14, at 497.


mental impact statement on investments to be supported by OPIC. At the same time, the Reagan Administration proposed in its 1987 Budget that OPIC be "privatized" by the end of 1988, a suggestion which it has rejected on previous occasions.

5. Evaluation of Bilateral Schemes and the Rationale for MIGA

This article has discussed international investment insurance agreements in terms of the main issues or topics with which they typically deal: eligible investors, eligible investments, the scope of protection or coverage afforded to investors, and the rights of the insuring agency against the investee state in the event of the occurrence of any of the risks covered by the investment agreement. The provisions of the bilateral agreements do not differ drastically from state to state or from one geopolitical region of the world to another. The provisions are fairly standard, even though there are interesting variations from time to time.

On the question of eligible investors, it is clear that all of the bilateral agreements analyzed restrict coverage to the nationals of the contracting parties. No mention is made of another group of potential investors, namely, permanent residents in capital exporting countries. The technical reason for this failure may be that since the latter are not nationals or citizens of the capital exporting countries in which they are residents, those countries cannot espouse the residents' claims under general principles of international law or international agreements. In any case, such agreements would presumably do nothing to prevent the state of nationality of such permanent residents from espousing their claim on their behalf. This could lead to a confusion of parties in interest.

The agreements are also silent on the criteria for determining the nationality of corporations (i.e., whether it is the country of incorporation or the country of effective management, or other criteria known in private international law). Since countries differ in terms of the criteria applicable in the determination of corporate nationality, it may be useful either to articulate in these agreements which criterion is applicable, or at least to decide which of the contracting parties has the right to determine that issue. The issue would otherwise fail to be decided under controversial principles of conflict of laws.

On the issue of eligible investments, the approval by the host state

128. Shanks, supra note 12, at 436.
is a standard condition of insurance eligibility. The variation among
countries and agreements consists of whether a particular country re-
quires a specific document of approval, or whether there can be “ap-
proval by implication.” In the case of the United States-Romania
Agreement of 1973, host government participation in a joint venture is
deemed to constitute approval. Another example of such approval by
necessary implication would be the situation in which a government
agency such as an investment board or commission has granted fiscal
incentives to a foreign investment project. These matters are perhaps of
purely evidentiary interest. Except in the situations where one could
speak clearly of approval by necessary implication, such as the two ex-
amples just given, it might be in the best interest of the foreign investor
to insist on an actual document of approval. Also of interest to the for-
eign investor is the provision in the Canada-Liberia Agreement which
restricts coverage to investments that further the development of eco-
nomic relations between the two contracting parties. This raises issues
of economic independence and undermines the autonomy of the host
state in deciding which economic projects are in its best interest. The
MIGA Convention provides a refreshing contrast by focusing exclu-
sively on the developmental aspects of the projects in the appraisal pro-
cess. There is no attempt to combine the developmental aspects with the
economic interests of the capital exporting country, such as export pro-
motion and procurement of raw material.

Not all investment insurance agreements define the scope of cover-
age or risks covered by the anticipated insurance. Indeed, agreements to
which the United States is a party hardly define such a scope of protec-
tion and leave this issue to the domestic legislation of OPIC. Where
domestic legislation takes care of this definitional issue, it is prudent for
the bilateral investment agreement to remain silent on the point so as to
avoid possible inconsistencies in coverage. However, where the matter
is covered by both domestic legislation and the intergovernmental in-
strument, there is a need to show consistency in the relevant provisions.
It appears that the scope of coverage is not of as much interest to the
host state as to the home state, since it is the latter or its delegated
agency that actually pays out the insurance when particular events
occur.

One interesting provision found in the United States-Nigeria
Agreement is the requirement that the host state should be consulted by
the investor state before the latter makes any payments to its national
investor in the event that the risks contemplated by the agreement actu-
ally are suffered. This provision, coupled with another clog on the sub-
rogation rights of the insuring agency against the investee state, puts
the host state in a significantly strong bargaining position. This is the
provision to the effect that in the event that the U.S. government be-
comes subrogated to any assets of its national investors, the government
of Nigeria should be given the first option to purchase those assets.

A more general issue concerns the necessity of bilateral investment
agreements as a condition for issuing national insurance coverage. As
indicated in the introduction to this paper, such agreements are not
logically necessary for the operation of an insurance scheme. Private
insurance companies offer insurance without these agreements, and
governments themselves have been known to have instituted insurance
schemes without these types of umbrella investment agreements. The
main reason these agreements are on the rise appears to be the fact that
the capital exporting countries in particular require them as a condition
for granting insurance to their nationals. These agreements presumably
give those countries greater confidence in espousing the claims of their
nationals under international law, particularly claims based on specific
international agreements rather than on customary principles. In any
case, most of these investment agreements are only bilateral in form
and serve essentially as vehicles for the governments of capital export-
ing countries to protect their investors doing business in foreign legal
jurisdictions. The main interests protected are the narrow concerns of
the foreign investor and its home government.

It is for these and other reasons that the international community
has established MIGA, not as a replacement, but as a complement to
bilateral investment arrangements. It has been noted that MIGA has a
great potential for complementing the national investment guarantee
agencies and supporting bilateral legal arrangements because the rates
of guarantee afforded by these agencies, as well as their levels of utili-
zation by investors, are quite low. Some of these agencies lack the fi-
nancial capacity and underwriting authority to cover larger invest-
ments. In the specific area of investment insurance, MIGA would
conceivably cover a wider field than the traditional form of equity in-
vestment. Insurance eligibility would cover not just the nationals of
capital exporting countries, but also nationals of the host state if they
transferred the assets to be invested from abroad. In other words, the
coverage relates to the origin of the investment as distinct from the na-

129. See Voss, supra note 2, at 17. Jurgen Voss has estimated that in the period
of 1977-1981, these agencies guaranteed less than 15% of net investment flows from
developed to developing countries. Moreover, the utilization levels ranged from a high
of more than 50% (Austria and Japan) to a low of less than 5% (most European
agencies).
tionality of the investor.\textsuperscript{130}

Beyond its technical job of investment insurance and consultative and advisory services, MIGA would, above all, serve an even more important function that cannot be addressed by bilateral investment agreements. It would create a broader forum for international policy cooperation on investments among capital exporting countries, capital importing countries, and foreign investors. Moreover, by treating the issues of international investment insurance and attendant dispute settlement on the multilateral plane, MIGA would hopefully act as a buffer against state diplomatic intervention and lessen bilateral confrontation in investment dispute settlement. It is too early to tell whether this would also lead to significant depoliticization of investment disputes or to a mere "multilateralization" of the politics of investment disputes.

6. Conclusion

MIGA, at the very least, stands for a bold and innovative attempt at restructuring the international atmosphere for investments and for an attempted solution to the drawbacks and limitations of the bilateral insurance approach.\textsuperscript{131} Bilateral and multilateral insurance schemes, if correctly utilized, can offer considerable protection against many of the political risks that have dampened the investment climate. To the extent that they reduce barriers to investment, these insurance schemes ought to stimulate the flow of resources to the countries that need them. The larger question concerns the extent to which such legal and institutional arrangements have actually led to increased resource flows. Indeed, the obvious validity of that question brings to mind the concern of the jurisprudent who, in his study of the impact of law on society, poses the question: "Does law make a difference?" The answer to a question of this genus can only be arrived at through empirical investigation.

\textsuperscript{130} MIGA Convention, \textit{supra} note 10, art. 13(c).