THE PHILIPPINE FOREIGN INVESTMENT CLIMATE AND THE MULTILATERAL INVESTMENT GUARANTEE AGENCY: THE CONTINUING STRUGGLE TOWARDS ECONOMIC DEVELOPMENT

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I. INTRODUCTION

Foreign investment may be the last hope for the underdeveloped countries' march towards economic development. It is conceded that the major sources of foreign investments are investors from developed countries, which have adequate capital to export and are always looking for possible sources of profit.

The question then is "why are these investors from developed countries not investing?" The answer is the most basic response of any ordinary businessman confronted with the same situation. The bottom line is that what these investors want is "good business." Everything else is merely usually secondary. The possibility of getting these underdeveloped countries out of their economic doldrums is not the primary consideration; it is merely incidental to good business.

The attempt to induce foreign investors to commit their money into these ailing countries has been a phenomenon of the 20th century. It has brought about an upsurge of strategies and devices all aimed at only one purpose: to show that good business can be found even in these underdeveloped countries.

It cannot be denied that the investment climate of underdeveloped countries is not the most conducive climate. There are just too many considerations to be taken. In the past decades, any attempt at investing in such countries would have been immediately regarded as suicide. An investor would undoubtedly be taking a big risk, and there would be no consolation whatsoever because getting through the risks or not encountering them would not even guarantee a big return of investments. Simply put, there was not much reason for foreign

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investors to try their trade in such countries. The risks far outweighed the projected profits, and no smart businessman would be willing take such risks.

The problem gave rise to the race for economic policies and strategies that would remedy the problem. It was a race for the establishment of a formula that would package the underdeveloped countries into an investment haven. The end in view was to attract foreign investors to commit their money into these countries to show that there really was no risk and that that there was money in these places after all.

This paper presents one of these so-called strategies developed to remedy the problem, "the investment guarantee." This paper studies the concept of foreign investment guarantees and emphasis is given to the Multilateral Investment Guarantee Agency or MIGA (regarded as the culmination of almost half a century of efforts to arrive at an effective system of foreign investment insurance). The MIGA is the latest international organization to evolve from the World Bank Group, with the express declaration in its preambular paragraph of its desire "to enhance the flow to developing countries of capital and technology for productive purposes", and its belief that "it (MIGA) can play an important role in the encouragement of foreign investment." This paper studies the MIGA from a multiple perspective: in the context of international law and from a domestic angle. The paper also focuses on the Philippine economic scenario: particularly looking at its investment policies, its economic status, the government's reactions to the MIGA and investment guarantee in general.

The primary objective of this paper is to make a contribution to the ongoing efforts to arrive at an answer to a perennial Philippine question: What can be done to improve the country's economy?

The Philippines has always been expected to be "Asia's next economic miracle", but unfortunately the day has not yet arrived. The effort is there and it is believed that the ingredients and strategies are available. It boils down to the issue of determining which ingredients to mix and which strategies to apply. The combination is complex, but that is to be conceded if one expects a miracle.

II. THIRD WORLD ECONOMY: THE INVESTMENT CLIMATE

The importance attributed to economic development is certainly one of the major phenomena of our times. The term itself refers to a process of economic change, as manifested in the increase of a country's national income,[1] a high degree of productivity, and a general increase in the welfare of its inhabitants. Within the framework of international relations, economic development, as a relative term, denotes the existence of two categories of states. One consists of the so-called "developed countries," which are industrially advanced and have a high level of technology and productivity and a high national income per capita; the other is composed of the "underdeveloped countries," which are primarily agricultural and in which productivity, per capita national income and level of technical achievement are low.[2] Underdeveloped countries rely upon private foreign investment a great deal in their desire to improve their economic conditions. However, obstacles to private foreign investment in the under-developed countries have oftentimes made private foreign investors shy away. It is an undisputed fact that the "investment climate"[3] of these underdeveloped countries has not been very attractive to foreign investors. There exist too many non-economic risks[4] in underdeveloped countries such that prospects for profit are often outweighed. Should these risks not be eliminated or at least reduced, there would be little incentive to induce private foreign investors to try their trade in such underdeveloped countries.

The need has thus arisen for various means to minimize these risks which delay or prevent the entry of foreign investments into underdeveloped nations. The immediate problem that therefore presents itself in international investment law is not so much one of preventing the occurrence of such non-commercial contingencies as war, expropriation or the imposition of exchange restrictions; rather, it is essentially the problem of adequately protecting foreign investments from the adverse effects of these events.

III. THE NEED FOR INVESTMENT GUARANTEES

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[1]Without conceding the existence of other factors, a country's national income still remains to be the most relied upon factor of economic development. An author said: "The problem of economic development is generally considered to be one of raising per capita income." YUKAWA, *Constraints on the Development of Resource-Rich Countries: A Comparative Analysis*, in ECONOMIC DEVELOPMENT POLICIES IN RESOURCE-RICH COUNTRIES 9 (Urrutia and Yukawa eds. 1988).

[2]FATOUROS, GOVERNMENT GUARANTEES TO FOREIGN INVESTMENTS 35 (1962).

[3]Investment climate should be understood as referring to the general attitude in a given country towards foreign investment, chiefly as expressed in the relevant legal regulations.

[4]More prominent among these non-economic risks which are generally not insured against are: riot, civil war and other political risks; expropriation or confiscation; legislation prejudicial to foreign investors; embargo on servicing of foreign loans; inability to remit profits; import discrimination and refusal by host country to arbitrate an investment dispute, or to comply with an arbitral award.

One concept that has evolved in answer to this problem is the system of investment guarantees. This system is founded on the basic principles of insurance, as applied to risks which are not normally categorized as "ordinary business risks",[5] but which have nevertheless become real and actual risks in underdeveloped countries due to peculiar conditions prevalent in such places.

If there is to be any permanent increase in the amount of private foreign capital invested in underdeveloped countries, some or all of the obstacles to its investment must be removed. Government action can limit most of these obstacles; it can be particularly effective with respect to the obstacles relating to the investment climate.[6] In the case of most underdeveloped countries, it is impossible to predict that conditions of stability and security will exist or remain during the period of dynamic change ahead. This situation calls for legal guarantees, to be given by the state or states concerned to foreign investors. Because of the special nature of such guarantees, it is inevitable that the government take the brunt of the burden. The guaranteeing states have to commit themselves to the future, to promise that certain measures are not going to be taken, that others will continue to be taken, or that the investor will be compensated for any loss due to changes in such measures. Foreign investors have to be assured that they will receive, both today and in the future, a definite legal treatment, specified in the relevant legal instruments, and that consequently they need not fear any major changes in local legal o~ political conditions that would be unfavorable to their interests.[7]

The Guaranty Program[8] started out on a bilateral basis, requiring a bilateral treaty or agreement between the guarantor[9] and the host country. Little difficulty was experienced in obtaining these bilateral agreements from the European countries, but in the underdeveloped countries the process of agreement was slow and tortuous, due to objections to some of the provisions contained in these agreements.[10]

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[5]"Ordinary business risks" are already insured by private insurers. The "non-economic risks" are those risks which privaté insurers do not include in their normal scope of protection.

[6]FATOUROS, *supra* note 2, at 62.

[7]*Id.*, at 63.

[8]*See* note 33 for a historical background of the Guarantee Program.

[9]At that time, the guarantor was almost always the United States Government. The country was then engaged in the implementation of the "Marshall Plan." Since World War II, the U. S. has espoused principles of multilateralism and non-discrimination in pursuit of its trade objectives. Hathaway, *The Right Emphasis for US Trade Policy for the 1990's: Positive Bilateralism*, 8 Boston Univ Int'l L. J. 207 (Fall 1990).

[10]At the end of fiscal year 1961, there were only 39 countries (not including those in

Prior to the establishment of an effective multilateral guarantee scheme, countries had no choice but to adopt a bilateral or a national scheme. Since MIGA is basically the first multilateral investment guarantee scheme, national schemes dominated the investment guarantee field, prior to its establishment.

Twelve industrialized states have now general schemes for insurance of political risks of investments in developing countries.[11]

a) Australia

An investment guarantee scheme was established in 1966. This insurance scheme provides for separate policies for expropriation, war and transfer risks, or for a comprehensive policy covering all these risks. The policies are not restricted to developing countries but the scheme will probably be used mainly for investment in developing nations to which Australia has been anxious to increase her exports.[12]

b) Canada

Insurance for overseas investment was established in 1969. The guarantee covers non-commercial risks like expropriation and war as well as exchange control risks.[13]

c) Denmark

An investment guarantee scheme was established in 1966 under the Danish International Development Agency (DANIDA) which comes under the Danish Ministry of Foreign Affairs. The scheme provides for non-commercial risks and for political risks, such as war, expropriation and lack of transferability.

d) France

(i) The Decrees of 1956 and 1958

Europe) which had agreed to the issuance of convertibility guaranties, 35 which permitted expropriation guarantees to be issued, and only 15 which permitted the issuance of war risk guaranties. Goekjian, *A Critical Appraisal of United States Investment Guaranty Programs*, in INTERNATIONAL FINANCING AND INVESTMENT 132 (McDaniels ed. 1964).

[11] I. DELUPIS, FINANCE AND PROTECTION OF INVESTMENTS IN DEVELOPING COUNTRIES 135 (1987).

[12] *Id.*, at 136. The scheme is operated by the Export Payments Insurance Corporation (EPIC). The scheme covers investment in a number of developing countries, except Papua and New Guinea.

[13] The scheme is operated by the Export Development Corporation (EDC). EDC is the successor of the Export Credits Insurance Corporation (ECIC).

Under decrees of 13 November 1956 and 31 January 1958 and under an ordinance of 18 December 1958, dividends on shares are guaranteed by the state provided they derive from certain semi-public companies[14] which contribute to financing of overseas investments.

(ii) The Decree of 1967

An investor can further be covered for non-commercial risks under a decree of 12 April 1967 under which a limited investment scheme was established. To qualify for insurance, the investor must, however, invest in equity in overseas companies to which he proposes to sell capital goods for substantial sums. The decree was amended to cover also certain other investments, not linked to specific export contracts. If an investor can show that he will generate French exports "in the future", he may be eligible for insurance under the scheme, but the expected export must be "considerable" and should, in principle, reach a level 3 to 4 times the total amount of the investment.[15]

(iii) The 1971 Decree

In March 1971 France introduced a general scheme with more comprehensive application: she also proposed in December 1969, a multilateral guarantee scheme for investment by EEC members in developing countries. The risks covered are not merely limited to traditional types like nationalization, civil war and revolution, and restrictions of rights to transfer capital; they also include "violation by the foreign authorities of specific undertakings related to the investment" and general moratoriums proclaimed by such authorities.[16]

e) Germany

Germany established an investment guarantee scheme for non-commercial risks in 1960 and laws of 1963 and 1964 extended the application of the scheme. Direct investment projects may be eligible under the scheme provided they are likely to benefit the economy of the host country as well as that of Germany. An investor may avail himself of the scheme only in countries with which Germany has concluded

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[14]The companies concerned are the *Compagnie financiere pour outre-mer* (COFIMER), the *Societe pour le developpement de l'Afrique equatoriale* (SODAFE), the *Compagnie financiere pour le developpement de l'Algerie* (COFIDAL), the *Societe algerienne de developpement et d'expansion* (SOCALDEX), the *Compagnie francaise du Sahara* (CFS) and finally, the *Societe de developpement des regions sahariennes* (SDRS).

[15]The scheme is administered by the *Compagnie francaise pour la commerce exterieure* (COFACE).

[16]This scheme is administered by the *Caisse centrale de cooperation economique* and provides guarantees for investments in 13 African francophone countries plus the Malagasy Republic.

investment protection agreements.

f) Japan

The scheme concerns non-commercial risks but not merely such risks as expropriation and war. Losses through exchange restriction such as risks of non-convertibility and other remittance risks are also covered.[17]

g) The Netherlands

Under an Act of 1969 the Netherlands established an investment guarantee scheme for non-commercial risks. The scheme covers such risks as nationalization, war and revolution and also remittance risks such as non-convertibility and prohibition of transfer of capital.

h) Norway

Since 1968 investors have been able to avail themselves of a Norwegian investment guarantee scheme. Non-commercial risks like war and revolution, expropriation and transfer risks are covered.[18]

i) Sweden

An investment guarantee scheme was established in 1969 in Sweden.[19] The scheme is related but not limited to those countries which receive Swedish development assistance on a priority basis.[20] The Swedish scheme contains a rather original condition in so far as account is taken of the trade union activities of the company in charge of the project: guarantee is only available if the attitude of the company is such that it is likely to afford its employees satisfactory employment, working conditions and freedom of association. Like most other schemes three risks are covered: expropriation, war and insurrection as well as transfer risks.

j) Switzerland

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[17]This investment guarantee scheme introduced in May 1970 extended the application of the previous Overseas Investment Principal Insurance of 1956 and the Overseas Investment Profit Insurance of 1957.

[18]The scheme is administered by the Guarantee Institute, a public body responsible for long-term export credit guarantees. For investments in developing countries, however, the Norwegian Agency for Development Assistance (NORAD) must give its approval to the project; its approval depends on whether the project is likely to benefit the development of the host country.

[19]The scheme is administered by the Export Credits Guarantee Board (Exportkreditnamnden, EKN).

[20]These countries are Botswana, Ethiopia, Kenya, Lesotho, Pakistan, Sudan, Swaziland, Tanzania, Tunisia and Zambia.

An investment guarantee scheme came into being in 1970. The scheme is original in so far as the investor is covered not only for the traditional nationalization, war and transfer risk for equity investment but, in case of loan capital and interest, for transfer risk and "insolvency or refusal to pay by local public entities." If a loan has equity features the investor may also be covered for expropriation and war.

k) United Kingdom

The scheme covers the traditional non-commercial types, like war and revolution, expropriation and transfer restrictions. The scheme was established by the Overseas Investment and Export Guarantees Act of 1972. It is intended that the scheme should cover mainly investment with a certain permanence and it is therefore required that, for example, equity investment made by a UK investor for the purpose of expanding or safeguarding business interests or loans must have a mean repayment period of at least three years. All companies carrying on business in the United Kingdom are eligible, whether or not incorporated under UK laws and whether or not they are UK or foreign owned. Investment by overseas subsidiaries of companies incorporated in the UK may also be considered if the investment is "identifiable as British."[21]

l) United States

(i) Investment Insurance

Investment insurance offers conventional cover for non-commercial risks like expropriation, war, revolution and insurrection, as well as prevention of transfer of transfer of capital and profits. An investor can only insure a project under the scheme if the United States has concluded an investment guarantee agreement with the country where he intends to locate his project.

(ii) Investment Guaranty Programme

In order to encourage loans from United States institutional investors to other countries - in particular, to developing countries - the investment guaranty programme was instigated to furnish valuable insurance for such loans.[22]

Even if an investor has obtained insurance under such bilateral schemes and thus insured against non-commercial risks, he may still lose cover if, in the opinion of the insurance authority, he has not

[21]The scheme is administered by the Export Credits Guarantee Department (ECGD).
[22]DELUPIS, *supra* note 11, at 150.

fulfilled his part of a concession contract. If consequently there is non-performance of the contract on the part of the investor there is no actual nationalization or expropriation: the government is merely withdrawing a concession because of non-performance of contractual obligations undertaken by the investor.[23] This manifests that there were indeed problems and limitations in bilateral or national guarantee schemes.

Proposals for a multilateral investment insurance scheme[24] took root in the 1960's.[25] The concept for a multilateral investment insurance emerged when it became clear that it would be very costly for a single country to undertake to guarantee against such risks. It was conceded that not too many countries were willing, much less could afford to undertake such activity. While the principal proposals for multilateral investment insurance differ from one another in detail, essentially they would all call for an international organization with membership from both capital-importing and capital-exporting countries, which would insure private foreign investments in the less developed countries against certain risks. As a minimum, protection would be available against loss resulting from expropriation or nationalization without adequate compensation; inability to transfer profits or to repatriate capital; and international war. Some proposals would extend to loss resulting from government action, short of outright seizure, which substantially deprives an investor of the control or the benefit of his investment (sometimes described as "creeping expropriation"), and some would protect against loss from revolution or insurrection. Protection would not be available against normal business risks or any risk for which insurance coverage could be purchased from private sources.[26]

IV. THE MULTILATERAL INVESTMENT GUARANTEE AGENCY

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[23]A case before an arbitration tribunal of the United States may illustrate this point. See *Valentine Petroleum and Chemical Corporation v. US Agency for International Development*, Arbitration of Dispute involving US Investment Guarantee Program USAID Arbitration, 15 September 1967. Cited in DELUPIS, *Id.*, at 150.

[24]"Insurance" and "guarantees" are used interchangeably and are taken to mean the same thing.

[25]Among the more prominent proposals were: Council of Europe Proposal, Hood Proposal, Jalan Proposal, Maffry Proposal, Osborne Proposal, Pontzen Proposal, Reyre Proposal, Straus Proposal, Tilney-Bagnall Proposal, Van Eeghen Proposal and Zolotas Proposal.

[26]A staff report of the International Bank for Reconstruction and Development. A summary of this report was delivered by Mr. Lester Nurick, Former Assistant General Counsel of the International Bank for Reconstruction and Development at the Conference on Legal Problems of International Financing in 1962. A copy of the report was taken from INTERNATIONAL FINANCING AND INVESTMENT, *supra* note 10, at 170.

The culmination of all efforts to eventually establish an ideal body to undertake the arduous task of protecting investors from non-commercial risks was the organization of the Multilateral Investment Guarantee Agency, more commonly known as the MIGA. The establishment of the MIGA is a manifestation of the ability of the governments to react quickly and develop remedies required by the circumstances of the times. Thus, to regulate international trade, governments created the GATT;[27] to regulate international monetary relations, they established the IMF;[28] and to regulate direct foreign investment and multinational enterprise, the ICSID[29] was set up under the auspices of the IBRD.[30] At present, the MIGA has been established.[31]

On September 15-19, 1986, a preparatory committee of representatives of the signatory states to the "Convention Establishing the Multilateral Investment Guarantee Agency (MIGA)" met in Washington D.C. and formulated the regulations and policies that would govern the Agency's operations. The Philippines acceded to take part in the initial gathering but only to participate in the deliberation of the Agency's by-laws pending further study on the issue of eventual accession to the Convention itself.[32]

The initial moves to establish an international investment guarantee facility started in the 1950s and the concept was a frequent topic in international fora in the 1960's.[33] It was only in 1981, however,

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[27]General Agreement on Tariffs and Trade, October 30, 1947, T.I.A.S. 1700, 15 U.N.T.S. 187.

[28]International Monetary Fund, December 27, 1945, 2 U.N.T.S. 134. Also cited in 60 Stat. 140 (1945).

[29]International Centre for the Settlement of Investment Disputes, March 18, 1965, 575 U.N.T.S. 159, 17 U.S.T. 1270, T.I.A.S. 6090.

[30]International Bank for Reconstruction and Development, December 27, 1945, 2 U.N.T.S. 134.

[31]FRANKLIN ROOT, INTERNATIONAL TRADE AND INVESTMENT, 682 (1990).

[32]Report of the Ad-Hoc Inter-Agency Committee to Review the Philippine Position on the Issue of Accession to the Convention Establishing the MIGA, 1986.

[33]An author narrated the early origin of the concept of investment guarantees:

> The years since the end of World War II have witnessed not only the reconstruction of Europe from the ruins left by the war, but also the political and economic awakening of many countries whose governmental structures and economies had remained in primitive state due either to their own geographic and political isolation or to their domination, prior to the war, by certain of the great powers of Western Europe.
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> The mantle of leadership with which the United States was invested in post-war years, the lack of any physical damage to its economic and industrial machine, and the danger of an emergent Soviet Union subverting these prostate or underdeveloped countries imposed upon the United States the obligation of

that the concept received sufficient impetus for its global establishment, when then World Bank President Tom Clausen proposed the creation of an international investment guarantee agency under the aegis of the World Bank.[34] The world's general economic slowdown of the early 1980's and the collapse of commodity prices was perhaps the stimulus the formation of the MIGA was waiting for. This slowdown and collapse accounted for much of the decline in direct foreign investment in underdeveloped countries. Political uncertainties in these countries made many foreign investors reluctant to commit their money, even though the returns tended to be higher than in the developed world.[35] The first draft Convention was prepared and submitted to Bank Executive Directors in October 1984. After consultations with member governments, international organizations, and business associations, the draft was revised and the revised draft was circulated in March 1985. The third draft Convention was formulated in September 1985 and was submitted to the Board of Governors for its Annual Meeting in Seoul. The Governors then adopted a resolution approving the Convention for transmittal to member governments and Switzerland, inviting these governments to sign the Convention. Signature of the Convention signifies an intention to join the Agency.[36] A binding commitment though is only made by ratification, which generally involves a legislative process.[37] The Philippines became a signatory to the Convention on

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providing the necessary assistance to bring about the economic recovery of Europe and the economic development of the rest of the non-Communist world. This task was of such magnitude that it could be accomplished only through the joint efforts of the United States Government and the private sector of the United States economy.

To induce the private sector to participate in this enormous task, it soon became evident that some method had to be devised to minimize the risks of loss inherent in the flow of funds abroad. The unstable political and economic circumstances that existed in Europe in the immediate post-war years, and in the underdeveloped countries in even greater intensity to this day, created non-commercial risks which exist in any domestic investment. These included a chronically adverse balance of payments, or, in other words, a continuing shortage of foreign exchange, the possibility, if not the probability, of violent political upheavals, experimentations with utopian solutions to age-old economic problems, such as nationalization of production facilities, and a chauvinism and xenophobia which revealed itself in measures such as expropriation, confiscation or imposition of prohibitive taxes on foreign enterprises.

The method selected to alleviate some of these problems and to induce the private sector to play the role asked of it was to establish a guarantee program under the United States Government would protect the private investor against some of the more serious risks which had become prevalent. (Goekjian, *supra* note 10, at 127).

[34]Laqui, *Multilateral Investment Guarantee Agency*, 38 CB REVIEW 20 (June 1986).

[35]Burgess, *World Agency Insuring Noncommercial Risks Seems Certain*, International Herald Tribune, October 14, 1985, p. 7.

[36]*Id.*

[37]Article VII, Sec. 21 of the Constitution provides that:

September 15, 1986. Ratification of the Convention by the Senate is being sought by the Department of Trade and Industry through the Office of the President.[38]

A. Basic Features

Economic and political changes occurring in several regions of the world have created a variety of investment opportunities. Associated with these opportunities is a heightened concern by some investors about political risks, which may affect investments from external sources. MIGA 's Guarantee Program is designed to mitigate these risks and to facilitate projects in developing countries by providing investors with long-term, non-cancellable political risk investment insurance.[39]

1. Status, Establishment and Purposes

The Convention establishes the Multilateral Investment Guarantee Agency as an autonomous international organization with full juridical personality under international law and under the domestic laws of its members[40] with the main objective being that, encouraging flow of investments for productive purposes among its member countries, in particular the developing member countries.[41] The MIGA emphasizes on concrete projects and programs in all sectors of the economy.[42] In addition to guaranteeing investments in these member countries against non-commercial risks, the MIGA is to carry out complementary activities to promote investment flows.[43]

2. Membership

No treaty or international agreement shall be valid and effective unless concurred in by at least two thirds of all the Members of the Senate.

[38]Memorandum of Secretary Jesus Estanislao to Executive Secretary Catalino Macaraig, October 5, 1990.

[39]MIGA, 1990 ANNUAL REPORT 11 (1991). The following, which are enumerated in Article 11 of the MIGA Convention, are the four categories of non-commercial risks being guaranteed against:

a. transfer risk resulting from host government restrictions on currency conversion and transfer;

b. risk of loss resulting from legislative or administrative actions of host government which have the effect of depriving the foreign investor of his ownership or control;

c. repudiation of government contracts in the cases where the investor has no access to a competent forum; and

d. armed conflict and civil unrest risk.

[40]Article 1 of the MIGA Convention.

[41]Article 2 of the MIGA Convention.

[42]Article 2 of the Convention uses the phrase "investments for productive purposes."

[43]Article 2(b) of the MIGA Convention. Article 23 of the Convention sets out the promotional activities the Agency will provide.

Membership in the Agency shall be open to all Members of the Bank and to Switzerland.[44]

3. Voting

For voting purposes, member countries are classified into two categories: Category One or developed countries and Category Two or developing countries. The voting structure is based on the principle that both categories of countries have a mutual interest in foreign investment and that both groups of countries should have voting parity. During the first three years of the Agency's existence, each category of countries would be assured of a minimum of 40 percent of the total voting power, by the allocation of supplementary votes, if necessary.[45]

4. Juridical Personality

The MIGA is designed to be legally and financially separated from other financial institutions and will operate on its own account while maintaining a symbolic but significant link with the World Bank. It possesses full juridical personality. In particular it possesses the capacity to contract; acquire and dispose of movable and immovable property, and institute appropriate legal proceedings.[46]

5. Officers[47]

MIGA's governing body has a three-tiered structure: a Council of Governors composed of Representatives of Member States, a Board of Directors elected by the Council, and a Chief Executive Officer (President) selected by the Board.[48]

6. Capital Stock

The Agency has an authorized capital stock of One Billion Special Drawing Rights (SDR 1 Billion). The Capital Stock shall be divided into 100,000 shares with a par value of SDR 10,000 each, which will be available for subscription by member countries according to their allocation of shares in the capital of the Bank.[49]

7. Subscription

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[44]Article 4 of the MIGA Convention.

[45]Article 39 of the MIGA Convention.

[46]Article 1 of the MIGA Convention.

[47]The basic structure of MIGA follows that of the other international financial institutions, especially the World Bank and the International Finance Corporation.

[48]Article 30 of the MIGA Convention.

[49]Article 5 of the MIGA Convention.

Of the total subscription, only 10 percent will be paid in the form of non-negotiable, non-interest bearing promissory notes to be encashed only if needed by MIGA to meet its obligations, and the remainder of the subscribed capital will be subject to call.[50]

8. Extent of Guarantee

Initially, MIGA may issue guarantees not exceeding 1.5 times the amount of the subscribed capital plus reserves (1.5 to 1 risk asset ratio). This may increase to a maximum of 5 to 1 ratio when the Agency accumulates a balanced risk portfolio and gains necessary experience and expertise.[51]

9. Scope of Covered Risks

The MIGA 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 furthermore adds to these, the risk of breach or repudiation of a contractual commitment by the host government towards an investor.[52]

Currency transfer risk 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. It also includes failure of the host government to act within a reasonable period of time on a transfer application.[53]

Expropriation risk encompasses measures attributable to the host government such as nationalization, confiscation, sequestration, seizure, attachment and freezing of assets. 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 unless they discriminate against the holder of the guarantee.[54]

For breach of contract risk, indemnification is available only when an investor has no forum to pursue the contractual claim against

[50]Article 7 of the MIGA Convention.
[51]Article 22 of the MIGA Convention.
[52]Article 11(a) of the MIGA Convention.
[53]INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT, COMMENTARY ON THE CONVENTION 5 (1985).
[54]*Id.*, at 6.

the government or when recourse to such 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.[55]

Risk of war and civil disturbance are intended to include revolutions, insurrections, coup d'etat and similar political events which are typically outside the control of the host government.[56] Acts of terrorists and similar activities which are specifically directed against the holder of the guarantee are however not intended to be covered.[57]

10. Eligible Investments

The provision defining the type of investments eligible for coverage 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.[58] 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. The Board is given flexibility, in the future, to extend the Agency's coverage to other forms of investment.[59] 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.[60]

11. Host Country Approval

The Agency cannot 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.[61] Any host government

[55] *Id.*
[56] *Id.*
[57] These risks (terrorist acts) may however be covered under Article 11(b) of the Convention which provides that:

> 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.

[58] Article 12 of the MIGA Convention.
[59] Article 12(b) of the MIGA Convention.
[60] INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT, *supra* note 53, at 7.
[61] Article 15 of the MIGA Convention.

may withhold its approval to enable it to evaluate a proposed investment before giving its consent.

12. Subrogation

The MIGA Convention 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.[62] 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.[63]

13. Reinsurance

The Agency is authorized to provide reinsurance to institutions of members issuing investment guarantees, to regional investment guarantee agencies,[64] and to private insurers in member countries.[65] 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.

14. Payment of Claims

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,[66] and, in case of dispute, final determination may depend on the outcome of arbitration between the Agency and the investor concerned.[67]

15. Settlement of Disputes

The MIGA specifies four categories of disputes that are subject to its settlement mechanisms:

a) Any question of interpretation or application of the Convention

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[62]Article 18 of the MIGA Convention.

[63]These terms and conditions are important for the investor in view of the fact that the Agency will compensate investors only for part of their losses under Article 16 of the Convention.

[64]The sole example at present is the Inter-Arab Investment Guarantee Corporation.

[65]Articles 20 and 21(a) of the MIGA Convention.

[66]Article 17 of the MIGA Convention.

[67]Article 58 of the MIGA Convention.

between any member and the Agency or among any members will be decided by the Board subject to appeal to the Council;[68]

b) Disputes arising under a contract of guarantee or reinsurance between the Agency and the other party, if not solved amicably;[69]

c) Disputes between the Agency as subrogee of an investor and a member;[70] and

d) All other disputes other than those mentioned above, as well as disputes between the Agency and a former member thereof.[71]

The MIGA 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 UNCITRAL,[72] or the rules of the International Chamber of Commerce.[73]

B. General Advantages Of Accession To The Miga

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 flow to them. Almost all developed countries and several developing countries have established official schemes to provide guarantees against non-commercial risks to their nationals for investments in developing countries. There are also those which provide guarantees on a regional basis. A private political risk insurance market

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[68]Article 56 of the MIGA Convention.

[69]Article 58 of the MIGA Convention.

[70]These disputes could either be resolved in accordance with Annex II of the Convention or in accordance with an agreement to be entered into between the Agency and that member on alternative dispute settlement mechanisms under Article 57(b). Such an agreement may also provide for alternative methods to arbitration such as seeking an advisory opinion from the International Court of Justice. See Chapter IX, *infra*.

[71]These disputes will be settled in accordance with Annex II of the Convention, i.e. through negotiations and failing this, according to conciliation and arbitration as provided for in Article 57(a). See Chapter IX, *infra*.

[72]United Nations Commission on International Trade Law, G. A. Res. 2205 (XXI), December 17, 1966.

[73]INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT, *supra* note 53, at 22.

has been operating internationally for over a decade. The activities of these entities are subject to several limitations even if 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 appropriate guarantees and engaging in other investment promotion activities.[74]

The advantages of the formation of the Agency, are as follows:[75]

> 1) Establishment of the MIGA would encourage foreign investors to put up their businesses in developing countries and increase net flows of capital to these countries. Furthermore, the MIGA would equalize opportunities for investors from other countries not covered by OPIC-like guarantees; and
>
> 2) A multilateral investment insurance scheme could supplement the existing investment insurance facilities and mobilize additional investment insurance capacity along the following areas:
>
> a) insurance of investment from capital-exporting countries without national investment insurance systems. In particular, capital-surplus OPEC countries which intend to invest in developing countries can be covered by MIGA inasmuch as the Inter-Arab Guarantee Corporation covers only Arab investments in member countries and membership is limited to countries within the Arab League;
>
> b) insurance of investment in host countries in which national investment insurance is over-exposed. This is expected to expand insurance capacity inasmuch as MIGA can cover investments in host countries in which national investment insurance agencies are over-exposed;
>
> c) co-insurance of large investments with national schemes (e.g., mining and energy) which, because of their size, cannot be insured under national schemes. This possibility would avoid an unsound concentration of risk on the part of national schemes;
>
> d) re-insurance and co-insurance with private market for better spread of risk than national schemes. This would offset the geographic concentration of investments from individual home countries, and improve bargaining position vis-a-vis private market compared to national schemes; and
>
> e) insurance of multinationally-sourced investments. The MIGA would avoid difficulties related to the insurance of investments emanating from various home countries by providing a uniform

[74] *Id.*, at 1.

[75] Aide Memoire on the Proposed Multilateral Investment Guarantee Agency (MIGA), NATIONAL ECONOMIC AND DEVELOPMENT AUTHORITY, August 4, 1982.

protection and procedural umbrella for all investments in the project.

C. Current Status

The MIGA, the newest member of the World Bank Group[76] was formally launched in April 1988. MIGA's membership, open to all member countries of the World Bank and Switzerland, is increasing. Eighty-five countries (85) countries have now signed the Convention, of which 59 have become members by virtue of their ratification.[77]

During the year 1990, MIGA issued its first four guarantees[78] covering a maximum contingent liability of $132.3 million.[79] The projects covered by these guarantees are:

1. Freeport McMoran Copper Co., Indonesia.

MIGA's $50 million guarantee provides security for this U.S. Company's $500 million expansion of a copper, gold and silver mining project in Irian Jaya, Indonesia. The guarantee covers loss arising from breach of contract and war risks for a period of 14 years.

2. Placer Dome Inc., Chile.

With the support of MIGA's $49.8 million reinsurance agreement with the Export Development Corporation of Canada, Canadian-based Placer Dome Inc., one of the world's leading gold producers, will develop a $335 million gold and silver mining joint venture in Chile. The construction of the new mine aims to increase Chile's gold production and

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[76]The World Bank Group includes the International Bank for Reconstruction and Development (IBRD), the International Development Association (IDA), the International Finance Corporation (IFC) and the International Centre for Settlement of Investment Disputes (ICSID).

[77]MIGA, *supra* note 39, at 38. As of June 30, 1990, the countries that have already become members of the MIGA are: Angola, Bahrain, Bangladesh, Barbados, Botswana, Burkina Faso, Cameroon, Canada, Chile, China, Cote d'Ivoire, Cyprus, Denmark, Ecuador, Egypt, Finland, France, Germany, Ghana, Grenada, Guyana, Hungary, Indonesia, Ireland, Italy, Jamaica, Japan, Jordan, Kenya, Republic of Korea, Kuwait, Lesotho, Madagascar, Malawi, Netherlands, Nigeria, Norway, Oman, Pakistan, Poland, Portugal, St. Lucia, Saudi Arabia, Senegal, Spain, Sri Lanka, Swaziland, Sweden, Switzerland, Togo, Tunisia, Turkey, United Kingdom, United States, Vanuatu, Western Samoa, Zaire and Zambia.

Greece, Malta, Rwanda, St. Vincent and the Yemen Arab Republic have already ratified the Convention but have not yet completed all the membership requirements.

Signatories to the Convention that have not yet ratified it include: Belgium, Benin, Bolivia, Cape Verde, Congo, Costa Rica, Dominica, Equatorial Guinea, Guinea, Haiti, Mauritius, Morocco, Papua New Guinea, Philippines, St. Kitts and Nevis, Sierra Leone, Sudan, Uruguay, Yugoslavia and Zimbabwe.

[78]As of the year 1990, the number of applications registered by MIGA from business firms contemplating foreign investments in MIGA member countries was 116.

[79]MIGA, *supra* note 39, at 12.

create an additional 350 jobs. Protection is provided for a $250 million loan guaranty against the risks of currency transfer, expropriation and war and civil disturbance over its seven-year term.

3. General Electric Company, Hungary

MIGA executed a 20-year, $30 million reinsurance agreement with the Overseas Private Investment Corporation of the United States to support the General Electric Company's $150 million acquisition of an interest in the Tungsram Company Ltd., of Hungary, which produces lighting products. The U.S. company's investment - one of the largest foreign investments in Eastern Europe since the recent implementation of radical political and economic reforms in the region - aims to help in modernizing and expanding Tungsram's manufacturing and distributing operations. The risks covered by MIGA under its reinsurance contract are currency transfer and expropriation.

4. International Mariculture Partners, Chile

MIGA's $2.5 million guarantee will help International Mariculture Partners, a U.S. partnership, establish a new scallop breeding facility on the coastal waters of northern Chile. The investment was facilitated by Chile's debt-equity swap program. Equity and future retained earnings are protected under the guarantee against loss resulting from currency transfer, expropriation, and war and civil disturbance risks. The term of the guarantee is 15 years.

MIGA is prepared to provide political risk insurance to investors and projects, both large and small alike. There is no minimum amount of investment required to be eligible for MIGA insurance. Fiscal Year 1990 showed that MIGA's insurance can support both large investment projects, such as the two mining projects in Chile and Indonesia, as well as smaller entrepreneurial investments, such as that being made by International Mariculture Partners in Chile. MIGA recognizes that the benefits to host countries can vary in degree and effect and do not necessarily accrue in direct proportion to the amount of the investment. For example, a relatively small, labor-intensive project can generate significant levels of employment, while the contribution of a large capital intensive project may fall more heavily in the area of local procurement. In sum, both small and large investors may share similar concerns about investing in developing countries, and individual projects, regardless of their size, can contribute substantially to economic development.[80]

V. IMPLICATIONS OF PHILIPPINE MEMBERSHIP

[80] *Id.*, at 15.

There are currently only two investment insurance systems operating in the Philippines, the Inter-Arab Investment Guarantee Corporation[81] and the Overseas Private Investment Corporation (OPIC).[82] Both systems are limited in application. The MIGA intends to supplement these systems and induce those who are not covered by such guarantees to invest in the Philippines.

MIGA could also supplement the guarantee operation facilities offered by Philguarantee[83] or other similar institutions should the Philippines desire to guarantee resident investments abroad.[84]

Membership in the MIGA would entail subscription to the capital of the Agency. As a member, the country has to subscribe to 484 shares amounting to SDR 4.84 million[85] or $5.24 million.[86] Of this, $.524 million or 10 percent will be paid in cash, another 10 percent in the form of non-negotiable, non-interest bearing promissory notes and the remaining 80 percent would be subject to call by the Agency. Of the paid-in cash portion, 25 percent or $.131 million will be paid in local currency[87] amounting to P3.421 million.[88]

The main objective of eventual accession to the MIGA would be the encouragement of net inflow of investments into the Philippine economy. The inflow of investments, along with its ancillary benefits of manpower training, management and technology is a more preferred source of finance rather than resorting to foreign debt. Of course, eventual accession to the MIGA does not guarantee an immediate influx

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[81]The Inter-Arab Investment Guarantee Corporation established in 1974 covers only Arab investments in member countries.

[82]The Overseas Private Investment Corporation (OPIC) was organized on January 19, 1971 to mobilize and facilitate the participation of US private capital in the development of friendly countries through financing projects sponsored by US investors and providing insurance for US private investments against political risks or expropriation, inconvertibility of local currency and war and civil disturbance.

[83]The Philippine Export Loan and Guarantee Fund Corporation (Philguarantee) provides export guarantee cover. It issues guarantee cover for loans to exporters, particularly service exporters. Philguarantee has been in some financial trouble since a number of its guaranteed loans, mostly to service exporters to the Middle East, went sour during the past few years. Inspite of its recapitalization by the national government, its credit worthiness still continues to be in question. (*New guarantee agency mulled*, Bulletin Today, January 23, 1985, p. 15.)

[84]Laqui, *supra* note 34, at 22.

[85]Annex II, Schedule A of the MIGA Convention. The authorized number of shares of capital stock of countries was based on the countries' allocation of shares in the capital of the World Bank.

[86]Based on Article 5 of the MIGA Convention.

[87]Laqui, *supra* note 34, at 22.

[88]P26.12 per U. S. dollar as of February 21, 1992. When the Philippines was first asked to join in 1986, the paid-in local currency only amounted to P2.675 million at P20.422 per U. S. dollar.

of foreign investments. There are many other factors which have to be taken into consideration; such as, the domestic political and economic situation of the country; its investment policies and programs of the country, the Constitutional policies with respect to foreign investments; and the possible implication of the signing of the MIGA by other ASEAN[89] member countries, among others.

A. Objections To Philippine Accession To The Miga

In spite of the various benefits the MIGA claims to bring about if acceded to, certain groups have still voiced opposition to Philippine accession to the Convention. Oppositionists claim that accession to the MIGA does not tend to support the best interests of the Philippines. Among these objections are:[90]

> a) The fact that major U.S. investments in the Philippines are already insured for political risks by the Overseas Private Investment Corporation (OPIC) under a bilateral agreement between the United States of America and the Philippines. In the event OPIC effects payment under the agreement to insured investors, OPIC acquires nothing more than the right to negotiate as subrogee, with the Philippines for reimbursements. This, however, does not make the Philippines necessarily liable for the reimbursement of the entire sum paid by OPIC for covered risks. The Philippines may negotiate for a lesser sum in case OPIC made excessive payments. Under OPIC procedures, the Philippines is not obligated to reimburse all sums expended by OPIC in satisfaction of an insurer's claim. The structure of legal rights accorded to member countries under the MIGA Convention, however, overrides this privilege. Under the Convention,[91] the Philippines, as a host country may not negotiate beyond the terms of the guarantee for the reimbursement of a lesser sum in the event MIGA made excessive payments for covered risks;
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> b) The provisions of the Convention prohibiting all kinds of restrictions on currency transfer prejudicial to covered investments forecloses the adoption of certain necessary and non-discriminatory foreign exchange policy options without the possibility of incurring a corresponding international liability;[92]
>
> c) The MIGA policy direction which augurs a situation where the capital exporting bloc runs away with MIGA operations and control inspite of patronizing accommodations favoring the less affluent bloc;[93]
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> d) The Constitution of MIGA as an authority in the determination

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[89]Indonesia is the only ASEAN member country that has joined the MIGA so far.

[90]Memorandum to the Director of National Economic Development Authority (NEDA) from the Legal Staff, November 20, 1985.

[91]Article 18(a) and (b) of the MIGA Convention.

[92]Article 11(a) (1) of the MIGA Convention.

[93]Article 39(c) (1) of the MIGA Convention.

of transnational investment conditions, the perspective of which, tends to favor more the capital exporting members; and

e) The possibility that Philippine accession to the MIGA would give rise to a situation where the Philippines would extend more legal rights to foreign capital, to the prejudice of local investors.

Other objections are:[94]

a) The MIGA has a "Loaded Board" and the dispute settlement mechanisms can be characterized as an institutionalized system of intervention. These mechanisms override the country's control and judicial processes;

b) MIGA is a mere surplusage in Philippine-US trade relations in view of the already existing coverage of OPIC. Including MIGA in the policy package will not in any way enhance the persuasive standing of the President in attracting U.S. investors to the Philippines;

c) The proponents for accession have not presented a single argument to prove the advantages and benefits of accession. No argument has been introduced to support the intrinsic and substantive merits of MIGA itself. The MIGA's effectiveness to attract foreign investors is simply assumed by the agencies proposing accession; and

d) Flimsy excuses have been given as justifications for accession to the MIGA, nothing substantive whatsoever.[95] From the perspective of any advocate of economic independence, World Bank pressures are by itself a strong reason against MIGA accession.

There is also the argument that aside from the fact that Philippine accession to the MIGA would impose a financial burden by way of subscription of shares to the capital stock of the Agency,[96] it

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[94]Memorandum to the Director of National Economic Development Authority (NEDA) from the Legal Staff, August 20, 1986.

[95]Proponents of MIGA accession have set forth the following arguments in favor of accession:

a) To include MIGA accession as part of the Presidential policy package in the U.S. visit will enhance her persuasive standing in attracting U.S. investors to the Philippines. This became moot and academic because the MIGA was not acceded to prior to the President's state visit in 1986;

b) We will not lose anything by joining the MIGA. Not to participate means the possibility of losing the opportunity to introduce or protect measures beneficial to the Philippines;

c) It will not embarass the Philippines to accede and back out later for a cogent reason such as the insistence of national treatment by MIGA; and

d) In view of the U.S. and Indonesian accessions, the Philippines might eventually stand as an "odd-man-out" among World Bank transacting states and will in the future have to join MIGA due to World Bank pressures.

[96]Some $1,047,376 will be required from the Philippine Government of which $523,688 has to be paid in cash and the rest in promissory notes. Of the amount paid in cash, around 25% or $130,922 can be paid in local currency and the rest in "freely usable currencies" amounting to $392,766.

would also mean an increase in the government's exposure in the political risk coverage of foreign investments in the country in addition to those already assumed under OPIC guarantees pursuant to a bilateral agreement with the U.S. government. Sourcing of the required subscription may also pose a problem. The Special Drawing Rights (SDR) of the country are depleted and are often used for transactions with the International Monetary Fund (IMF). The national government is constricted by (IMF) Requirements and may not be able to provide the required amount.[97]

Opposition to accession to the MIGA has remained adamant and has yet to yield to external pressures, as shown by the fact that up to the present time, the Philippines has not yet joined the MIGA. These oppositionists, however, do not propose an absolute rejection of the Convention. They propose further study and consultation with other ASEAN countries prior to adopting an official stand, emphasizing that any policy resolution at this stage will be premature and precipitate.[98]

VI. FOREIGN INVESTMENT AND THE MIGA

We have already had occasion to refer to the contemporary investment climate prevailing in developing countries. The need for an increased inflow of foreign investments remains as these countries seek means to bridge the gap between their development financing needs and the funds available to them.[99] Foreign investors, however, are generally deterred from establishing enterprises in developing nations due to the volatility of the socio-political and economic forces interacting therein. Thus, aside from the projected profits that can be derived by an investor from the capital he may put into his business venture, foremost among his considerations in investing would necessarily be the safety thereof against what are commonly known as "non-commercial risks."[100] As the name denotes, this class of investment risk does not pertain to the basic contingencies that affect the profitability of a business enterprise and that arise either as a result of the normal interaction of market forces in the economy of any given place, such as the failure to make profits, or devaluation of currency; or in consequence of non-political casualty risks, such as fire, flood and lightning. Rather, non-commercial or political risks are those risks that cloud the very existence and continued operations of the business enterprise itself; and that occur as a result of

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[97]Aide Memoire of August 4, 1986, *supra* note 75.

[98]This conclusion and recommendation was made by the Legal Staff of the National Economic and Development Authority (NEDA) in August 1986. The grounds relied upon continue to be valid as there is no indication that an extensive study has been made and serious consultations have not yet been made.

[99]DE LUPIS, *supra* note 11, at 50.

[100]*Id.*, at 2.

action by the host government. These risks may be classified, in general terms, into three:

(a) nationalization, confiscation and other similar measures;

(b) war, civil disturbance and insurrection; and

(c) incontrovertibility or restrictions on remittances.

The difficulty in balancing the relative interests of the host government and the foreign investor in relation to matters falling exclusively within a State's competence is the reason for the heightened clamor for political risk insurance such as is provided by the MIGA. The problem ultimately stems from the lack of a clear and generally accepted international law standard for determining what constitutes prompt and adequate compensation for the taking of alien property.[101]

It would not, however, be accurate to conclude that under the present state of international law the MIGA, in the determination and settlement of disputes concerning just compensation for investment losses, would itself be operating in a vacuum. For, it is possible to derive concrete guidelines for the resolution of the fundamental issues that pervade international investment insurance.

A. *Conflicts of Interest Between Territorial Sovereignty and Safety of Investment*

The first step in all disputes of whatever nature and magnitude is the recognition of the relative rights of the parties thereto. With respect to the so-called non-commercial or political contingencies for which an insurance claim may be enforced under the MIGA, the primary consideration with respect to the host state would necessarily be the territorial sovereignty[102] which it exercises over the property found within its jurisdiction, including alien property. On the other hand, there is the undisputed right of the foreign investor to profit from the capital which he has injected into his business venture therein. It is these two rights that must be reckoned with in the ultimate settlement of any investment insurance claim that may arise.

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[101]T. MERON, INVESTMENT INSURANCE IN INTERNATIONAL LAW, 65 (1976).

[102]In spatial terms, international law knows four types of regime: territorial sovereignty, territory not subject to the sovereignty of any state or states and which possess a status of its own, the res nullius, and the res communes. Territorial sovereignty extends principally over land territory, the territorial sea appurtenant to the land, and the seabed and subsoil of the territorial sea. The state territory and its appurtenances, together with the government and population within its frontiers, comprise the physical and social manifestations of the primary type of international legal person, the State (I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW, 107 [1990]).

While the existence of the right of an investor to a reasonable return on investment is universally recognized and is readily apparent in the conclusion of any investment contract, the concept of the territorial sovereignty of an individual state is not so clearly defined. With respect to the breadth of a State's sovereignty in relation to foreign investment, the General Assembly of the United Nations has set forth several basic rules in the Charter of Economic Rights and Duties of States adopted on 12 December 1974, in Resolution 3281 (XXIX).[103] Article 2 of this Charter reads as follows:

> 1. Every State has and shall freely exercise full permanent sovereignty, including possession use and disposal, over all its wealth, natural resources and economic activities.
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> 2. Each State has the right:
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> (a) To regulate and exercise authority over foreign investment within its national jurisdiction in accordance with its laws and regulations and in conformity with its national objectives and priorities. No State shall be compelled to grant preferential treatment to foreign investment;
>
> (b) To regulate and supervise the activities of transnational corporations within its national jurisdiction and take measures to ensure that such activities comply with its laws, rules and regulations and conform with its economic and social policies. Transnational corporations shall not intervene in the internal affairs of a host State. Every State should, with full regard for its sovereign rights, co-operate with other States in the exercise of the right set forth in this subparagraph;
>
> (c) To nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent. In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals, unless it is freely and mutually agreed by all States concerned that other peaceful means be sought for the basis of the sovereign equality of States and in accordance with the principle of free choice of means.

Clearly, recognition of a State's "full sovereignty" over all its wealth, natural resources and economic activities has been established in international law. Along with such sovereignty likewise accorded recognition as a natural incident thereto, is the right of any given State

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[103] A resolution of the General Assembly may not, in itself be binding, but it may be considered a reflection of overwhelming world opinion. In some cases, such a resolution may be binding, not in its own right, but because it incorporates a rule which is binding under general international law. DE LUPIS, *supra* note 11, at 57.

to subject the activities of foreign investors within its territorial jurisdiction to the laws and regulations, as well as to the general economic and social policies that it may deem fit to promulgate. Thus, for example, a State can reserve the right to take over or direct the operation of any corporation within its jurisdiction when the public interest so dictates.[104] Such reservation, under international law, is considered as a valid exercise of that State's sovereignty and wholly within its competence to make.

B. Insurable Risks Under the MIGA

Having determined the conflicting interests between the foreign investor and the host State under an investment arrangement, attention must thus be turned to the problem of properly balancing the said conflicting interests. This necessarily entails the determination in each given case of the extent to which each party can exercise and enforce its rights under the existing investment arrangement. To what extent can a State deprive a foreign investor of his property without the requirement of just compensation? And, where such compensation is due, what are the standards for the determination of the amount thereof?

It would seem that, under the present state of international law, these questions can only be answered in the context of the given facts and circumstances of each distinct case. Under the above-quoted Resolution, there is no reference whatsoever to an international law standard.[105] If a question of compensation gives rise to a controversy, it must be settled by the courts of the host country and according to its laws, unless otherwise freely agreed upon by all the States concerned.

This absence of a clear-cut rule regarding matters of compensation in the event of losses in investments due to State action is largely addressed by the establishment of political risk insurance. Under the MIGA, an attempt has been made to clearly define each risk that may be made the subject of such insurance.[106] The determination of the relative rights of the parties in the fixing of just compensation upon the occurrence of each insured contingency must, however, be made in the context of the prevailing rules of written and customary law.

1. Expropriation and Similar Measures

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[104]The Philippines makes such a reservation in Art. XII, Sec. 17 of the 1987 Constitution, which provides that:

> In times of national emergency, when the public interest so requires, the State may, during the emergency and under reasonable terms prescribed by it, temporarily take over or direct the operation of any privately owned public utility or business affected with public interest.

[105]MERON, *supra* note 101, at 65.

[106]Article 11 of the MIGA Convention.

The fear of nationalization or expropriation[107] of foreign-owned enterprises in underdeveloped countries, without prompt, adequate and effective compensation is the outstanding deterrent to the increased inflow of private foreign capital to these countries.[108] Numerous developing countries provide in their constitutions for strict limitations for the exercise by their respective governments of this basic right of sovereignty, such as the requirement that the same be carried out only if it is necessary for "public purposes" and only provided full compensation is paid.[109] Such constitutional guarantees are, however, of little comfort to the foreign investor who may be wary of past nationalizations wherein the compensation given was not "full;" and who may have little interest in assurances that his loss was incurred "for the common good."

Under the Convention establishing the MIGA, such an investor is guaranteed in his investment against the occurrence of this risk. Article 11 of the Convention establishing the MIGA defines expropriation as the following:

> Any legal 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.

As a guaranteed risk, expropriatory action is essentially defined as any action taken, authorized, ratified or condoned by the

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[107]In international law, there exists a distinction between a case of expropriation and one of nationalization. In both cases ownership of property is compulsorily transferred from the individual to the state, and the purpose must relate to the public interest. However, in cases of expropriation, only a specific item of property may be involved; and the purpose to which it is devoted may not be the same as it was under private ownership. On the other hand, in cases of nationalization, an entire category of property is expropriated and the purpose remains the same, with the beneficiary changing from the former private owner to the general public. See W. LEVI, CONTEMPORARY INTERNATIONAL LAW: A CONCISE INTRODUCTION, 187 (1979).

This distinction is not applied in the definition of expropriation as a guaranteed risk under the MIGA. What is material under such definition is the nature of the taking of private property.

[108]E. I. NWOGUGU, THE LEGAL PROBLEMS OF FOREIGN INVESTMENT IN DEVELOPING COUNTRIES, 21 (1965).

[109]Constitutional guarantees regarding the exercise of the power of expropriation are given, for example, in countries like Kenya, Tanzania, and the the Central African Republic. Other countries have similar provisions in their investment laws. Cited in DE LUPIS, *supra* note 11, at 67.

In the Philippines, the guarantee is contained in Art. III, sec. 9 of the Constitution, which states that:

Private property shall not be taken for public use without just compensation.

host government, with or without compensation, which prevents the person guaranteed from controlling his property, or investors from controlling or disposing of their investments.[110] The power to expropriate is derived from the power of eminent domain. This power is not limited to the field of natural resources, although it is in this sector that this power is of particular importance.[111]

Under the Resolution on Permanent Sovereignty over Natural Resources 1803 (XVII) adopted by the General Assembly of the United Nations in 1961, a State cannot rid itself of its rights to its natural resources in perpetuity: its natural resources are "inalienable".[112] It

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[110]MERON, *supra* note 101, at 69; R. B. LILLICH, THE PROTECTION OF FOREIGN INVESTMENT: SIX PROCEDURAL STUDIES, 155 (1965); E. I. NWOGUGU, *supra* note 108, at 73.

[111]DE LUPIS, *supra* note 11, at 57.

[112]The Resolution reads:

The GENERAL ASSEMBLY...

BEARING IN MIND its Resolution 1314 (XVIII) of 12 December 1958, by which it established the Commission on Permanent Sovereignty over Natural Resources and instructed it to conduct a full survey of the status of permanent sovereignty over natural wealth and resources as a basic constituent of the right of self-determination...

BEARING IN MIND its Resolution 1515 (XV) of 15 December 1960 by which it recommended that the sovereign right of every state to dispose of its wealth and its natural resources should be respected,

CONSIDERING that any measure in this respect must be based on the recognition of inalienable right of all states freely to dispose of their natural wealth and resources in accordance with their natural interests, and on respect of the economic independence of states,

CONSIDERING that nothing in paragraph 4 below in any way prejudices the position of any member state on any aspect of the question of the rights and obligation of successor states and governments in respect of property acquired before the accession to complete sovereignty of countries formerly under colonial rule x x x,

CONSIDERING that the provision of economic and technical assistance, loans and increased foreign investment must not be subject to conditions which conflict with the interests of the recipient state xxx,

NOTING that the creation and strengthening of the inalienable sovereignty of states over their natural wealth and resources reinforces their economic independence xxx,

DECLARES THAT:

1. The right of the peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the state concerned;

2. The exploration, development and disposition of such resources, as well as the import of the foreign capital required for these purposes, should be in conformity with the rules and conditions which the peoples and nations freely consider to be necessary or desirable with regard to authorization, restriction or prohibition of such activities;

3. In cases where the authorization is granted, the capital shall be governed by the terms thereof, by the national legislation in force and by international law. The profits derived must be shared in the proportions freely agreed upon, in each case, between the investors and the recipient state, due care being taken to ensure that there is no impairment, for any reason, of that state's sovereignty over its natural wealth and resources;

4. Nationalization, expropriation or requisitioning shall be based on grounds or

cannot, therefore, validly transfer sovereignty thereon to another State.[113] Following this argument, it can further be said that the ownership of such resources cannot likewise be transferred so completely to a foreign investor that the territorial State cannot reclaim ownership.

It is by virtue of this right to reclaim ownership, as an incident of the power of eminent domain, that a State is deemed to have the power and right under international law to nationalize or expropriate private property, whether belonging to one of its subjects or to a foreign investor engaging in business within its territorial sovereignty. This does not mean that a foreign investor, or a national, cannot enjoy full ownership of its property; rather, that it is always subject to the power of eminent domain of the State.[114]

The exercise by a State of this power is, however, not simply discretionary and unrestricted. There now seems to be universal consent in international law that a State may nationalize foreign property provided that three requisites concur:

(a) There is no discrimination;

(b) There is a public purpose; and

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reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign. In such cases, the owner shall be paid appropriate compensation, in accordance with the rules in force in the state taking such measures in the exercise of its sovereignty and in accordance with international law. In any case where the question of compensation gives rise to a controversy, the national jurisdiction of the state taking such measures shall be exhausted. However, upon agreement by the sovereign states and other parties concerned, settlement of the dispute should be made through arbitration or international adjudication;

5. The free and beneficial exercise of the sovereignty of peoples and nations over their natural resources must be furthered by the mutual respect of states based on their sovereign equality;

6. Foreign investment agreements freely entered into by or between sovereign states shall be observed in good faith; states and international organizations shall strictly and conscientiously respect the sovereignty of peoples and nations over their natural wealth and resources in accordance with the Charter and the principles set forth in the present resolution.

113 A State may grant a right of exclusive use over a part of its territory to another State, retaining sovereignty, but conceding the enjoyment of the liberties of the territorial sovereign. The grantee under such an arrangement may receive very considerable powers of administration amounting to a delegation of the exercise of many of the powers of the territorial sovereign to the possessor for a particular period. Such a grant may be described as a "lease" and may occur on the basis of a treaty. It constitutes a privilege and in principle depends on the consent of the territorial sovereign. (BROWNLIE, *supra* note 102, at 374.)

114 DE LUPIS, *supra* note 11, at 62.

(c) There is fair compensation.[115]

a. The Rule of Non-Discrimination

The rule against discrimination implies that no distinction must be made between nationals and aliens. The expropriation law must be "general" in its scope and not be directed only against foreigners. This rule has been invoked in several cases to substantiate the claim that a nationalization was wrongful or illegal. Thus, with respect to the Iranian Oil Nationalization Act of 1 May 1951, the United Kingdom argued that the nationalization of the oil industry throughout Persia was unlawful, inasmuch as the legislation was exclusively directed against aliens, particularly, against persons of German origin.

Some authorities put forward the proposition that, at least in the field of expropriation, non-discrimination is an "absolute condition" of lawful expropriation.[116] On the other hand, there is the contrary view that the application of such rule does not invariably result in the illegality of an act of expropriation. Those who espouse such a view believe that such requirement may be outweighed by the more paramount consideration of public purpose. Thus, there may arise cases in which the act of nationalization cannot be considered as contrary to international law simply because it may be exclusively directed against foreign nationals, if it is dictated by overwhelming considerations of public utility and general welfare. In such cases, the fact that nationalization may affect foreigners only is in a sense, accidental.[117]

b. The Rule of Public Purpose

Under international law, a state is obligated to respect the vested private rights of an alien. The Permanent Court of International Justice in the Certain German Interests in Polish Upper Silesia Case[118] declared that respect for the vested interests of aliens formed a part of generally accepted international law. This principle comprises all private rights: those inherent in the human person and those acquired

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[115]*Id.*, at 68.

[116]G. SCHWARZENBERGER, FOREIGN INVESTMENTS AND INTERNATIONAL LAW, 120 (1969).

[117]Under this theory, it is believed that the rule on non-discrimination was simply borrowed from national law, where it is usually of great importance to assess whether or not the legislator had a particular property in mind when making a law for its expropriation. In the international community, since, more often than not, natural resources are exploited by foreign enterprises in developing countries, any nationalizing measures of such enterprises are then likely to be "discriminatory" in so far as only foreigners hold concessions to exploit natural resources. (DE LUPIS, *supra* note 11, at 70-71).

[118]1926 P.C.I.J. (ser. A 7).

by a person, mainly property, investments, contracts and concessions.[119]

A state's respect for the private rights of an alien is not, however, considered to be an absolute obligation. It is always subject to the higher interests of the state. Thus a state may, by invoking these interests, interfere with the personal and proprietary rights of an alien. The only limitation in such a case would be that the said state not undertake such interference in an arbitrary fashion, in which case it would be illegally abusing its right.

In consideration of this principle, international law has recognized and permitted the exercise by a state of the power to expropriate an alien's property, provided there be a genuine public interest involved. This requisite implies that a valid nationalization must be for the benefit of the community and not merely for the furtherance of any one person's individual interest.

The problem in determining whether an act of a state can be considered as founded on a "public purpose" is that such determination is purely subjective. Because a state is an abstract body and not a single individual whose intentions and motivations can be perceived, its actions cannot be assessed on the basis of any one specific intention. One can only assess the legality of state action under international law by analyzing the effect thereof.

c. The Rule on Compensation

While the right of a state to nationalize or expropriate foreign-owned property within its territory in the public interest is invariably recognized in international law, there have been disputes as to whether the exercise of this right must be accompanied with the payment of adequate compensation. According to one school of thought, in the absence of treaty obligation freely undertaken by a state, international law does not prescribe the payment of compensation for the taking of foreign property.[120] The traditional and more acceptable view, however, is that the payment of just compensation is an essential element of a valid act of expropriation and that, therefore, the taking of an alien's property must generally be accompanied by the adequate, prompt and effective compensation. Without the payment of such compensation, the taking cannot be considered as a form of expropriation, but rather, as an act of confiscation.[121] The rationale of

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[119] LEVI, *supra* note 107, at 183.

[120] FRIEDMAN, EXPROPRIATION IN INTERNATIONAL LAW 206-211 (1953), cited in NWOGUGU, *supra* note 108, at 22.

[121] *Id.*, at 22; BROWNLIE, *supra* note 102, at 532; SCHWARZENBERGER, *supra* note 116, at 17.

compensation for expropriation is:

> The fact that certain individuals in a community, or certain categories of individuals, without their being in any way at fault, are being asked to make a sacrifice of their private property for the general welfare of the community, when other members of the community are not making corresponding sacrifices. The compensation paid to the owners of the property taken represents precisely the corresponding contributions made by the rest of the community in order to equalize the financial incidence of this taking of individual property.[122]

There are limited instances where international law permits the taking of an alien's property without any corresponding obligation to pay compensation. These include loss resulting from the punishment of crime, as well as the diminution of the value of property by regulating it for health, housing and other public purposes.[123] Under the MIGA, these limited instances are likewise recognized with the express exclusion from coverage in Article 11 (a)(*iii*) of "non-discriminatory measures of general application which governments normally take for the purpose of regulating the same." According to the Commentary on the MIGA,[124] these measures refer to taxation, environmental and labor legislation; as well as those taken by judicial bodies in the exercise of their functions.

Moving now from the question of coverage, another area of particular importance in the topic of compensation is the assessment and actual payment of the amount that constitutes "just compensation."

The MIGA, under the insured risk of expropriation, guarantees acts of host governments that constitute "nationalization, confiscation, sequestration, seizure, attachment and freezing of assets."[125] It is apparent that the same makes no distinction as to the "legality" or "illegality" of the taking of an alien's property; *i.e.*, whether or not the three requisites of a valid expropriation have been complied with. It is necessary, therefore, to consider the effects under international law of a determination of such legality or illegality.

De Lupis, in the consideration of this issue, submits:

> There are rules in international law, by which compensation must be assessed differently when there is a lawful taking and when the expropriation is illegal because of discrimination and lack of public purpose. If the expropriation is lawful then adequate compensation is

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[122] B. CHENG, THE RATIONALE OF COMPENSATION FOR EXPROPRIATION 297 (1958) cited in NWOGUGU, *supra* note 108, at 22.

[123] *Id.*, at 22.

[124] *Id.*, at 6.

[125] INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT, *supra* note 53, at 6.

> due; but if it is illegal there must not only be such compensation but also some punitive damages.[126]

This view is reinforced by the general rules under international law on the breach of international obligations and on the imputation of international responsibility upon states.[127] In the ultimate determination by the MIGA of the amount recoverable from investment insurance claims in each particular situation, such rules necessarily apply.

2. War and Civil Disturbance

Another risk guaranteed against by the MIGA is the risk of loss resulting from war and civil disturbance. In most existing national investment insurance schemes such as that provided by the Overseas Private Investment Corporation, the guarantee afforded is against "war, revolution and insurrection."[128] The Contract of Insurance under such a scheme defined the scope of the guarantee as covering injury to the physical condition, destruction, disappearance or seizure and retention of covered property directly caused by war,[129] revolution and insurrection; and included any injury to the physical condition, destruction, disappearance or seizure and retention of covered property as a direct result of actions taken in hindering, combating or defending against a pending or expected hostile act, during the said war, revolution or insurrection. Such coverage did not include injury to, destruction, , disappearance or seizure and retention of covered property directly caused by civil strife of a lesser degree than revolution or insurrection. Thus losses incurred during riots or looting were excluded from coverage, as were those incurred from terrorist attacks, unless the group which carried out the act can be considered as an organized revolutionary or insurgent force.

Under the MIGA, insurance coverage makes no exclusion of the risk of loss arising from civil disturbances. Art. 11 of the MIGA Convention defines the covered risk as follows:

> Any military action or civil disturbance in any territory of the host country to which this Convention shall be applicable.

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[126] DE LUPIS, *supra* note 11, at 78.

[127] Essentially, these rules can be formulated into two simple propositions:

(1) The breach of any international obligation constitutes an illegal act or international tort.

(2) The commission of an international tort involves the duty to make reparation. (SCHWARZENBERGER, *supra* note 116, at 562).

[128] 22 U.S.C.S. 2194 (1982).

[129] The term "war" as used here encompasses any hostile act by any national or international organized force.

According to the Commentary on the MIGA, such risk was intended to include revolutions, insurrections, *coup d'etat* and similar political events which are typically outside the control of the the host government. With regards to losses arising from the acts of terrorists, similar activities which are specifically directed against the holder of the guarantee, these may be considered covered under Art. 11(b), which allows the extension of coverage to specific non-commercial risks other than those referred to in the Convention, pursuant to a joint application made by the investor and the country, and duly approved by the Board.

3. Breach of Contract

The MIGA provides for a guarantee against the risk of loss arising from a breach of contract, whereby indemnification is available in the following circumstances:

(a) when the holder of a guarantee does not have recourse to a judicial or arbitral forum to determine the claim of repudiation or breach;

(b) when a decision by such forum is not rendered within a reasonable period of time as prescribed in the contracts of guarantee; or

(c) when such a decision cannot be enforced.

As in the case of expropriation, the question of legality arises when a state commits an act resulting in or amounting to a breach of its contract with a foreign investor. In this respect, the problem is to inquire if there are circumstances in which, in the absence of express provision, an investment contract may be legally abrogated or modified.[130]

Although investment contracts are legally binding and protected by international law, there are situations in which the right of a contracting state to disturb the contractual relationship is generally recognized.[131] Thus, it is accepted that states have the right to pass legislation for the protection of public interest which may have an effect on the rights of an investor under a particular contract. The exercise of the power of eminent domain is one example of this situation. As earlier discussed, when the particular legislation conforms to international law standards requiring the same to be non-discriminatory, for a public purpose and with the payment of just compensation, then it cannot be regarded as a wrongful deprivation of property, but merely as valid regulation of the same.

State interference with investment contracts likewise condoned under international law may be, as above discussed, in the form of

[130] NWOGUGU, *supra* note 108, at 186.
[131] *Id.*, at 187.

confiscation of property undertaken to punish criminal offenses; or in the form of curtailment of acts considered by the host state to be criminal in nature.[132] When a foreign investor engages in acts declared criminal by the host state or uses the investment property for that purpose, the punishment may involve the confiscation of his property. If the investment was undertaken under a contract, the contract may be altered or cancelled in punishment of the offence.

Finally, another possible instance where the abrogation of an investment contract may be legally justified is in the application of the principle of *clausula rebus sic stantibus.*. This principle exists in international law and is generally applicable in the area of treaties entered into between states and other international entities. It lays down the principle that a vital change of circumstances after the conclusion of a treaty may bring about its dissolution.[133] The idea involved in the application of this principle of law is that a treaty becomes legally void in case there occurs a change in the state of facts which existed at the time the parties entered in the treaty. This principle is a counterpart of the municipal law concept of frustration, and is considered by some authorities to be applicable under customary international law to contracts and the obligations incurred thereunder by states.

After a consideration of the circumstances under international law by virtue of which an investment contract may be legally abrogated, we turn to a discussion of the problem of the characterization of a breach of contract. The question here relates to whether or not there has been a breach of contract and the consequences of such breach with respect to the parties thereto.

The preliminary question of determining the existence of a breach is necessarily answered by the application of the proper law of

[132]In spite of the notable differences in the criminal laws of various states, certain offenses are universally recognized. Some acts are generally punishable in public international law or by the general custom of states. For instance, smuggling and breach of currency laws, e.g. counterfeiting, belong to this category (NWOGUGU, *supra* note 108, at 188).

[133]I L. OPPENHEIM, INTERNATIONAL LAW 938 (1958). As a rule embodied in the Vienna Convention on the Law of Treaties, the principle is found in Art. 62 thereof, which states:

1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as ground for termination or withdrawing from the treaty unless:

(a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty;

(b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

the contract, which, under general international law, may be a municipal legal system, public international law or the general principles of law recognized by civilized nations.[134] It would seem that under the MIGA, the municipal law of the host state is the primary basis for this determination, considering that a foreign investor must raise his claim before the appropriate judicial forum of the state before he can recover from the MIGA the amount of the guarantee. This is further shown by Article 17 of the Convention, which states:

> 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.

On the question of the reparation for the breach of contract, again, the concept of international responsibility comes into play. The general principle is the same as that applied in the case of expropriation; *i.e.*, that any wrongful act committed against the property of aliens must be accompanied by adequate reparation. With respect to a breach of contract, the test followed by international tribunals is to put the injured party in the position as he would have been if the wrongful act had not been committed--restitution of the *status quo ante.* This may be done either by making restitution in kind, or if this is impossible or inadequate, to pay pecuniary damages in a fair, adequate and effective manner to the injured party.

4. Currency Transfer

One of the major difficulties in the economic growth of developing countries is that they constantly suffer from balance of payment and foreign exchange problems. Such states therefore, place great value on the limited foreign exchange available for all of their overseas transactions. As a result, many of such countries pass exchange control laws which are intended to safeguard the interests of the host state, but which may necessarily affect, at times adversely, the operations and interests of foreign-owned enterprises operating therein.

The primary consequence of the operation of these exchange laws is what is known as inconvertibility.[135] This pertains to a situation where the investor is unable to convert into dollars the local currency received as earnings on the original investment or the capital eligible for repatriation. Under the MIGA Convention, the risk of loss resulting from inconvertibility is covered under the insured risk of "currency transfer," which is defined thereunder as:

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[134]NWOGUGU, *supra* note 108, at 189.
[135]MERON, *supra* note 101, at 66.

> 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.[136]

Customary international law recognizes the right of control by a state over its currency as an attribute of sovereignty. This right, however, must be balanced with the recognized vested rights of an investor to his property. In the balancing of these rights, the general rule in international law is to treat restrictions on the transfer of currency as expropriatory in nature. Therefore, in so far as exchange laws have the effect of depriving a foreign investor of possession or control of the funds and profits he has earned from the operation of his business venture within the territorial jurisdiction of a particular state, such deprivation must comply with the established rules on the expropriation of private property.

VII. THE PRINCIPLE OF SUBROGATION

A right of subrogation is found in Article 18, which provides that:

> (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.

However, as we have seen earlier; before the Agency can make payment to a holder of a guarantee in the event that a risk insured against occurs, guarantee holders are required in their contracts of guarantee to seek such administrative remedies as may be appropriate under the circumstances, provided that these remedies are readily available to them under the laws of the host country.[137]

It must be noted that the Agency though composed of different States as members, is not itself a State and possesses a distinct juridical personality apart from its members; it is merely an international organization created by virtue of a treaty. And a guarantee holder, whether a natural or juridical person possesses a particular nationality.[138] Thus, assuming the occurrence of any of the risks insured

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[136] Article 11(a)(i) of the MIGA Convention.

[137] Article 17 of the MIGA Convention.

[138] Article 13 of the Convention provides:

against in a particular host country, with consequent damages to a guarantee holder, once such guarantee holder is paid by the Agency under the contract of guarantee, the Agency, an international organization which does not possess the nationality of the injured guarantee holder, rather, not possessed of any particular nationality at all, is subrogated to the rights or claims of such guarantee holder.

A. The Rule of Nationality of Claims

A normal and important function of nationality is to establish the legal interest of a state when nationals, and legal persons with a sufficient connection with the state, receive injury or loss at the hands of another state.[139] The rule may be stated thus:

> From the time of the occurrence of the injury until the making of the award the claim must continuously and without interruption have belonged to a person or to a series of persons:
>
> (a) having the nationality of the State by whom it is put forward, and
>
> (b) not having the nationality of the State against whom it is put forward.[140]

Since holders of guarantee, whether individuals or corporations possess nationality[141] then in the event of damages being incurred by such persons in the territory of another State, they are entitled to have their claims against such State to be espoused by the state of their nationality.

(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 of the majority of its capital is owned by a member or members or nationals thereof, provided that such member is or 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.

139BROWNLIE, *supra* note 102, at 480.

140*Id.*, at 481.

141There is no definite criteria in determining the nationality of a corporation though the International Court of Justice had occasion to delve on this in the *Barcelona Traction Light and Power Co. Ltd. Case* (1970 I.C.J. Reports 32). However, this point is considered of little relevance for the discussion at hand.

In case of subrogation under the Convention, however, it is the Agency which espouses the claim of the injured guarantee holder against the host country. This would seem inconsistent with the rule of nationality of claims as under this rule, it is the state of the injured guarantee holder who must put forward the claim because by asserting the claim of a subject, the home State demands respect for international law which has been violated by the injury inflicted on its national.[142]

But it has been said that like any other rule of international customary law, the rule on the nationality of claims may be modified or abrogated by means of treaties.[143] By way of treaty, existing subjects of international law may create a new subject of international law and, in relation to themselves, define as they desire the scope of its rights and duties.[144]

It is provided in the Convention creating the Agency that "the Agency shall possess full juridical personality and, in particular, the capacity to: ... (iii) institute legal proceedings"[145] and that "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 guarantee investment as the holder of a guarantee may have had against the host country and other obligors."[146] By signing the Convention and consequently becoming members of the Agency, States are thus bound by the Convention and its provisions including the two above mentioned. By becoming members of the Agency, States then *consented* to the possession of the Agency of juridical personality and its right of subrogation. Indeed, the exceptions to the rule of nationality of claims such as the diplomatic protection of nationals of dependent states, mandates and trust territories, the right of intervention on behalf of minorities by States not directly affected, and even in favor of nationals of a State which has undertaken commitments of this kind; and the protection of foreign nationals in times of peace and war in a third state in which another state is not diplomatically represented, are all founded on *consent*, recognition or acquiescence.[147] There is thus no inconsistency with the nationality of claims rule and no objection could be had against the Agency's right of subrogation. In the event of a dispute between the Agency as subrogee of a guarantee holder and a host

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[142]SCHWARZENBERGER, *supra* note 116, at 143.

[143]*Id.*, at 594; See also North Sea Continental Shelf Case (1969 I.C.J. Reports 3), where the ICJ implied that Art. 36(1) of the Statute of the ICJ provided a hierarchy among the sources of law.

[144]*Id.*, at 595.

[145]Article 1 of the MIGA Convention.

[146]Article 18 of the MIGA Convention.

[147]SCHWARZENBERGER, *supra* note 116, at 595.

country, such dispute will be settled in the manner set forth in the Convention which will be discussed below.

VIII. DISPUTE SETTLEMENT UNDER THE MIGA CONVENTION

Disputes provided for under the Convention include the following:

> (1) Disputes involving any question of interpretation or application of the provision of the Convention between the Agency and a member or among members;[148]
>
> (2) Disputes between the Agency and a member or an agency thereof - this includes disputes between the Agency and a country (or an agency thereof) which has ceased to be a member;[149]
>
> (3) Disputes concerning claims of the Agency acting as subrogee of an investor;[150]
>
> (4) Disputes arising under a contract of guarantee or reinsurance between the parties.[151]

A. Interpretation and Application of the Convention

In the event of a dispute of this type, the question is submitted to the Board for its decision which is taken by a majority of the votes cast.[152] This decision is not final and any member has the option to require that the question be submitted to the Council, whose decision in turn is final. But even pending resolution by the Council, the Agency may act on the basis of the Board's decision so far as it deems necessary and that the Member is given the option to "appeal" and at the time resolution of the "appeal" is pending, it is only the Agency which has in its favor the effect of the Board's decision becoming immediately executory.

B. Disputes Between the Agency and a Member or an Agency thereof

Disputes between the Agency and a member (or an agency thereof) other than those involving the interpretation and application of the provisions of the Convention, or between the Agency and a former member, may be settled in three ways:

> (1) In the manner provided for in Article 56 which is the same in case the dispute involves the interpretation and application of the

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[148] Article 56 of the MIGA Convention.
[149] Article 57 (a) of the MIGA Convention.
[150] Article 57 (b) of the MIGA Convention.
[151] Article 58 of the MIGA Convention.
[152] Article 42 (a) of the MIGA Convention.

Convention's provisions as discussed above;

(2) In accordance with an agreement entered into between the Agency and the member on an alternative method or methods to which Annex II of the Convention would serve as basis for such an agreement. In this case, the agreement shall be approved by the Board by a special majority prior to the undertaking by the Agency of operations in the territories of the Member concerned;

(3) In accordance with the procedure in Annex II;

C. *Disputes Concerning Claims of the Agency as Subrogee of an Investor*

Such disputes may arise when the Agency is subrogated to the rights or claims which the holder of a guarantee may have had against the host country related to the investment guaranteed, upon paying or agreeing to pay compensation to a guarantee holder.

These disputes are settled in accordance with either:

(1) the procedure set out in Annex II;

(2) 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 which agreement shall have as its basis, Annex II of the Convention, and subject to approval by the Board by special majority prior to the undertaking by the Agency of operations in the territories of the member concerned.

D. *Disputes Arising Under a Contract of Guarantee or Reinsurance Between the Parties*

In this case, such disputes are immediately submitted to arbitration for final determination.

E. The Dispute Settlement Procedure in Annex II

Annex II establishes a hierarchy of three stages, each mutually exclusive of the other. The first stage is negotiation, by which the parties must first attempt to settle the dispute before proceeding to the second stage, conciliation, or to the third stage, arbitration.

1. Negotiation

The parties must first attempt to settle the dispute by negotiation. Negotiations are 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, and thus the parties may submit the dispute to conciliation or arbitration.

2. Conciliation

On failure of negotiations, parties may settle the dispute by arbitration but they may, by mutual consent, decide to first resort to conciliation. In such a case, there shall be an agreement for recourse to conciliation which shall specify the matter in dispute, the claims of the parties, and if available, the name of the conciliator agreed upon by the parties. In the absence of agreement on the conciliator, the Secretary General of the International Centre for the Settlement of Investment Disputes(ICSID) or the President of the International Court of Justice (ICJ) may appoint a a conciliator, at the joint request of the parties.

The rules governing the conciliation procedure may be determined by agreement of the parties, by the provisions of the Annex, and failing either, by the conciliator who shall be guided in this regard by the conciliation rules adopted pursuant to the Convention on Settlement of Investment Disputes Between States and Nationals of Other States.

Parties are entitled to have recourse to arbitration in the following instances:

> (a) termination of the conciliation procedure, as when a conciliator is not appointed within ninety days after the agreement for recourse to conciliation;
>
> (b) the conciliator fails to submit a report recording the results of his efforts, the issues and his proposals within one hundred and eighty days from date of his appointment;
>
> (c) the parties fail to accept all of the proposals contained in the report within sixty days after receipt of such report;
>
> (d) the parties, after an exchange of views on the report, fail to agree on a settlement of all controversial issues within sixty days after receipt of the conciliator's report;
>
> (e) a party fails to express in writing, its views on the conciliator's report within sixty days from the date of receipt of the report.

3. Arbitration

Arbitration proceedings are instituted by means of a notice by the party seeking arbitration, called the claimant, addressed to the other party or parties to the dispute, called the respondent/s. The notice specifies the nature of the dispute, the relief sought and the name of the arbitrator appointed by the claimant. Within thirty days after the date of receipt of the notice, the respondent/s shall notify the claimant of the name of the arbitrator appointed by it. The third arbitrator, who is to act as the President of the Arbitral Tribunal is selected by both parties within a period of thirty days from the date of appointment of the second arbitrator.

At the joint request of the parties, the Secretary General of the ICSID appoints the arbitrator not yet appointed or the President not yet selected if the Tribunal shall not have been constituted within sixty days from the date of the notice. If there is no joint request, or if the Secretary General fails to make the appointment within thirty days of the request, either party may request the President of the ICJ to make the appointment.

The procedure is that agreed upon by the parties or as provided in the Annex, and failing either, determined by the Tribunal which will be guided by the arbitration rules adopted pursuant to the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States.

The Tribunal is to apply in the dispute: (1) the provisions of the Convention, (2) any relevant agreement between the Parties to the dispute, (3) the Agency's by-laws and regulations, (4) applicable rules of international law, (5) the domestic law of the member concerned, and (6) applicable provisions of the investment contract, if any. If the Agency and the Member concerned so agree, the Tribunal may decide a dispute *ex aequo et bono.*

The award is final and binding upon the parties and is not subject to appeal, annulment or revision and each member shall recognize the award as binding and enforceable within its territories as if it were a final judgment of a court in that member. Execution of the award is 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.

F. Disputes Between the Host State and a Guarantee Holder

Although the MIGA Convention provides for the settlement of all types of disputes between the Agency and a Member, it does not so provide for a dispute settlement procedure to be followed in case of disputes between holders of guarantees and the host state. In this case, recourse may be had to the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States provided of course that the host state is a party to the Convention and that such host state and the guarantee holder consent in writing to submit the dispute to the International Centre for the Settlement of Investment

Disputes[153] which dispute may be settled through either conciliation or arbitration.

IX. THE MIGA AND BILATERAL INVESTMENT TREATIES

Before the Agency was created, the Philippines was already party to several bilateral investment treaties which provided for guarantees against risks similar to that insured by the Agency. These bilateral treaties are with the United States, France and the Federal Republic of Germany and their significant provisions will be discussed hereunder.

A. With the United States of America

The Philippines' agreement with the United States is contained in the Exchange of Notes Constituting An Agreement Between The Republic of the Philippines And The United States of America Relating To Guaranties Under Section 111 (b) (3) Of The Economic Cooperation Act of 1948, as Amended,[154] which entered into force on February 19, 1952. Section 111 (b) (3) of the Economic Cooperation Act of 1948[155] provides for the making of guarantees to United States persons of investments in the participating country concerned. This investment guarantee program is administered by the Overseas Private Investment Corporation, a U. S. agency which is under the policy guidance of the Secretary of State.

> It guarantees eligible investors against the following risks:
> (1) Inability to convert into U. S. dollars other currencies, or credits in such currencies, received as earnings or profits from the approved project, as repayment or return of the investment therein, in whole or in part, or as compensation for the sale or disposition of all or any part thereof;
>
> (2) Loss of investment, in whole or in part, in the approved project due to expropriation or confiscation by action of a foreign government; and
>
> (3) Loss due to war, revolution, or insurrection.[156]

The Exchange of Notes, in the third paragraph, further provides that with respect to guarantees extending to projects approved by the Philippine Government in accordance with the aforesaid provision of the Economic Cooperation Act of 1948:

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[153]Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, article 25, March 18, 1965, 575 U.N.T.S. 159, 17 U.S.T. 1270, T.I.A.S. 6090.
[154]2 P.T.S. 772 (1953).
[155]62 Stat. 137 (1948).
[156]22 U.S.C.S. 2194 (1982).

> a. That if the Government of the United States of America makes payment in United States dollars to any person under such guaranty, the Government of the Philippines will recognize the transfer to the United States of America of any right, title or interest of such person in assets, currency, credits, or other property on account of which such payment was made and the *subrogation of the United States of America to any claim or cause of action of such person arising in connection therewith* (emphasis ours). The Government of the Philippines shall also recognize any transfer to the Government of the United States of America pursuant to such guaranty of any compensation for loss covered by such guaranties received from any source other than the Government of the United States of America.
>
> c. That any claim against the Government of the Philippines to which the Government of the United States of America may be subrogated as the result of any payment under such a guaranty, shall be the subject of *direct negotiations between the two Governments. If, within a reasonable period, they are unable to settle the claim by agreement, it shall be referred for final and binding determination to a sole arbitrator selected by mutual agreement.* If the Governments are unable, within a period of three months, to agree upon such selection, the arbitrator shall be one who may be designated by the President of the International Court of Justice at the request of either Government.

B. With The Republic of France

The Philippines' investment treaty with France is contained in the Agreement Between the Government of the Republic of the Philippines and the Government of the Republic of France for the Promotion of French Investments in the Philippines which entered into force in July 14, 1976.[157] Said Agreement provides that:

> French Investments shall not be subject to expropriation or nationalization or any other deprivation of use except for public use or in the public interest, or in the interest of national welfare or national defense and upon payment of just compensation (emphasis ours). Such compensation shall represent the fair market value of the investments as determined by Philippine laws or, in its absence, the fair equivalent for the loss sustained as of the date of expropriation or nationalization or any other deprivation of use, and shall be paid without unjustifiable delay.[158]

The Government of the Republic of the Philippines guarantees to French nationals and companies having investments in the Philippines *the transfer of the invested capital, the interest, dividends, royalties and other revenues produced by the invested capital, and the compensation for expropriation or nationalization*

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[157] 7 P.T.S. 493.

[158] Article III of the Agreement Between the Philippines and France.

referred to in Article III of the present Agreement (emphasis ours).[159]

The Government of the Republic of the Philippines shall allow French nationals and companies *withdrawal in freely convertible currency of the amounts treated in Article IV subject to the Philippine laws, rules and regulations concerning foreign exchange consistent with its responsibilities as a member of the International Monetary Fund* (emphasis ours).[160]

The Government of the Republic of France after study on a case-to-case basis of each investment to be made in the Philippines by French nationals and companies, *may grant its guarantee under the form of an insurance contract* with the interested French investors after delivery of a special document of agreement by the appropriate Government authorities of the Republic of the Philippines attesting to the desirability of the investment and its value for purposes of the guarantee.[161]

In the event that the French Government, as a result of a guarantee given by it within the framework of this Agreement makes payment to its own nationals or companies, the Philippine Government acknowledges that the French Government is entitled by virtue of *subrogation* to exercise the rights and assert the claims of such nationals or companies concerned. *This does not necessarily imply, however, a recognition on the part of the Philippine Government of the compensability of any claim arising therefrom.*[162]

Any *dispute* between the Contracting parties as to the interpretation or application of the present Agreement, not satisfactorily resolved through diplomatic channels or other amicable means, shall be submitted at the request of either party to a *panel of arbitrators* for settlement in accordance with applicable principles of international law.[163]

C. With the Federal Republic of Germany

The investment agreement with West Germany is contained in the Treaty on Investments Between the Republic of the Philippines and the Federal Republic of Germany which entered into force on March 3, 1964.[164] It contains the following relevant provisions:

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[159] Article IV of the Agreement Between the Philippines and France.

[160] Article V of the Agreement Between the Philippines and France.

[161] Article VI of the Agreement Between the Philippines and France. (Emphasis provided).

[162] Article VIII of the Agreement Between the Philippines and France. (Emphasis provided).

[163] Article X of the Agreement Between the Philippines and France.

[164] 5 P. T. S. 843 (1969).

> The investments of nationals or companies of either Contracting Party in the territory of the other Contracting Party *shall not be expropriated except for the public benefit and against compensation.* Such compensation shall represent the equivalent of the investment affected at the time of expropriation; it shall be actually realizable, freely transferable, and shall be made without delay. Adequate provision shall have been made at or prior to the time of the deprivation for the determination and the giving of such compensation. The legality of any such deprivation and the amount of compensation shall be subject to review by due process of law.[165]

Nationals or companies of either Contracting Party who owing to *war or other armed conflict, revolution or revolt* (emphasis ours) in the territory of the other Contracting Party suffer the loss of investments situated there, shall be accorded treatment no less favourable by such other Contracting Party than that party accords to any other similar investment in its territory as regards restitution, indemnification, compensation or other valuable consideration.[166]

Either Contracting Party shall guarantee to the nationals or companies of the other Contracting Party the *transfer of the capital, of the returns from it and, in the event of liquidation, of the net proceeds from such liquidation.*[167]

If a claim arising out of a guarantee given for an investment is asserted against a Contracting Party, the latter shall, without prejudice to its rights under Article 10, be authorized on the conditions stipulated by its predecessor in title to *exercise the rights having been assigned to such party by law or having been ceded to it by the predecessor in title (devolved interest).*[168]

Disputes concerning the interpretation or application of the present Treaty should, if possible, be settled by the Government of the two Contracting Parties.[169]

If a dispute cannot thus be settled, it shall upon the request of either Contracting Party be submitted to an *arbitral tribunal.*[170]

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[165]Article 3(2) of the Treaty Between the Philippines and West Germany.

[166]Article 3(3) of the Treaty Between the Philippines and West Germany.

[167]Article 4 of the Treaty Between the Philippines and West Germany. (Emphasis provided).

[168]Article 4 of the Treaty Between the Philippines and West Germany. (Emphasis provided).

[169]Article 10 of the Treaty Between the Philippines and West Germany. (Emphasis provided).

[170]Article 10(2) of the Treaty Between the Philippines and West Germany. (Emphasis provided).

Each of these treaties provide for guarantees against essentially the same risks as those guaranteed by the Agency such as expropriation or nationalization, war or other armed conflict, and restrictions on currency transfer. They also provide for subrogation in the event that the guaranteeing agency makes payment to the investor who suffers loss as a reuslt of the occurrence of the risk insured against. In addition, each prescribes its own dispute resolution mechanism.

An issue that may well arise with a consequent Philippine accession to the MIGA is the effect of the Philippines being a party in the bilateral treaties and at the same time, a member of the MIGA. Specifically, the questions that may arise are: Are there conflicts between obligations in the bilateral agreements and those in the MIGA Convention? Do Philippine obligations become more onerous or less onerous with MIGA accession?

These questions have been the subject of objections to Philippine accession to the MIGA. Among the objections are: one, under the MIGA, the Philippine Government may not negotiate beyond the terms of the guarantee for the reimbursement of a lesser sum in the event MIGA made excessive payments for covered risks; and that, MIGA accession by the Philippines would mean an increase in exposure in the political risk coverage of foreign investments in our country in addition to those that the country has assumed under OPIC guarantees. In response to the first objection, it cannot be concluded that the Philippine Government may not negotiate for a lesser sum than that paid by the Agency because in such disputes with the Agency as subrogee, the Philippine government and the Agency may undergo negotiations, conciliation or arbitration which means that the subject of excessive payments made by the Agency to a guarantee holder may be an issue in such negotiations wherein the Philippine government may still bargain for the payment of a lesser sum.

It can be seen that the bilateral investment treaties to which the Philippines is party and the MIGA convention contain similar provisions and in such a case, the rights and obligations of states parties to both treaties are determined by the Vienna Convention on the Law of Treaties.[171] Article 59 of this Convention provides:

> 1. A Treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject matter and:
>
> (a) it appears from the later treaty or is otherwise established that the

[171] U. N. Doc. A/CONF. 39/27 (1969). Also found in VI P.T.S. 494 (1980), 8 I.L.M. 679 (1969).

> parties intended that the matter should be governed by that treaty;
>
> (b) the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time;
>
> 2. The earlier treaty shall be considered as only suspended in operation if it appears from the later treaty or is otherwise established that such was the intention of the parties.

Nowhere can it be found in the MIGA Convention that the Convention supersedes all earlier treaties concluded between and among its members nor does it appear therein that all such previous treaties are suspended in operation. As a matter of fact, it can be implied from the provisions of the MIGA that previous existing guarantee schemes are not to be superseded by it as shown by Articles 19 and 21 of the same. In this case then, Article 30 provides that:

> (3) When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under Article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.

In this regard, Article 19 of the MIGA Convention provides that:

> The Agency shall *cooperate with, and seek to complement the operations of, national entities of members and regional entities* (emphasis ours) 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* (emphasis ours), including in particular the modalities of reinsurance and coinsurance.

It can be seen that the Agency will complement the operations of existing national and regional investment insurers which implies that present agreements between countries members to the MIGA are not deemed abrogated nor suspended.

X. MIGA AND PHILIPPINE LAW

A. The Miga As A Treaty

A large number of international disputes are concerned with the validity and interpretation of international agreements. Such agreements form the foundation for the relations between individual states and define their rights and obligations in respect of particular undertakings between such states. Under Philippine law, these agreements may take the form of treaties, international or executive agreements. On the other hand, under international law, the distinction between an executive agreement and a treaty bears no legal significance. The Vienna Convention on the Law of Treaties defines a treaty as:

> [A]n international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.[172]

Virally, on the other hand, defines a treaty as follows:

> A treaty is any international agreement which is entered into by two or more states or other international person and is governed by international law.[173]

Therefore, as far as the signatories to the Vienna Convention on the Law of Treaties are concerned, the binding effect of a treaty and an executive agreement is practically the same, because the definition of a treaty makes mention only of the agreement itself, without regard to the process by which the consent of the contracting parties in accordance with their domestic laws was secured before entering into the treaty. What is material is that such consent was legally sufficient from the point of view of their respective domestic laws. But as to whether the contracting party treats such an agreement as a treaty or an executive agreement is no longer of moment since the said Convention does not distinguish between the two. Hence, the binding effect of the agreement is practically the same regardless of the nature of the agreement from the point of view of the domestic law of a contracting party.

However, from the standpoint of Philippine domestic law, the distinction between said treaty and executive agreement is essential in the determination of the legal requisites to be met for their validity, for this touches on the validity of the manner of securing the consent of a contracting party to the agreement. The 1987 Philippine Constitution provides that:

> No treaty or international agreement shall be valid and effective unless concurred in by at least two thirds (2/3) of all the members of the Senate.[174]

The Constitution thus requires Senate concurrence for the validity of treaties and of international agreements, but makes no mention of executive agreements. Therefore, it may be implied that the requirement of Senate concurrence is dispensed with for this type of international agreement. This conclusion is bolstered by the fact that

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[172] Article 2 of the Vienna Convention.

[173] M. Virally, *The Sources of International Law* in MANUAL OF PUBLIC INTERNATIONAL LAW, 124 (M. Sorensen, ed. 1968).

[174] CONST. art. VII, sec. 21.

the Constitution itself recognizes the distinction between an international and an executive agreement when it speaks of the two separately, particularly in Article VIII, section 5, Paragraph (2)(a) thereof.[175] Therefore, if the Constitution recognizes the fact that an international agreement and an executive agreement are two different concepts, and in setting up the requirement of Senate concurrence it only speaks of a treaty and an international agreement, then it may be inferred that such a requirement is not necessary for executive agreements. As a necessary consequence to the rule that Senate concurrence is a requisite for the validity of a treaty or an international agreement from the point of view of Philippine domestic law, the Executive Department, through the President, has the sole power, authority and discretion to enter into and conclude executive agreements, which power is essentially executive in nature.

Having thus pointed out the importance of the distinction between a treaty and international agreement on one hand, and an executive agreement on the other, the next step is to determine which form is proper for a particular agreement. Simply put, the question is, when is an agreement properly the subject of a treaty and when is it properly the subject of an executive agreement?

The Philippine Supreme Court, in a line of decisions, attempted to define the matters which may be the subject of a treaty and those to which even only an executive agreement would suffice. In the case of *Commissioner of Customs v. Eastern Sea Trading*,[176] the Supreme Court stated:

> International agreements involving political issues or changes of international policies and those involving international agreements of a permanent character usually take the form of treaties. But international agreements involving adjustments of detail carrying out well-established national policies and traditions and those involving arrangements of a more or less temporary nature usually take the form of executive agreements.

In this connection, the Court quoted Francis B. Sayre's "The Constitutionality of Trade Agreement Acts," where he stated that:

> Agreements concluded by the President which fall short of treaties are

[175]CONST. art. VIII, sec. 5. The Supreme Court shall have the following powers:
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(2) Review, revise, reverse, modify, or affirm on appeal or certiorari as the law or the Rules of Court may provide, final judgements and orders of lower courts in:
(a) All cases in which the constitutionality or validity of any treaty, international or executive agreement, law, presidential decree, proclamation, order, instruction, ordinance or regulation is in question.

[176]3 SCRA 351 (1961).

> commonly referred to as executive agreements. They sometimes take the form of exhanges of notes and at other times of more formal documents. Hundreds of executive agreements, other than those entered into under the Trade Agreements Act, have been negotiated with foreign governments. They cover such subjects as the inspection of vessels, navigation dues, income tax on shipping profits, the admission of civil aircraft, customs matters, and commercial relations generally, international claims, postal matters, the registration of trademarks and copyrights, and the like.

In another case,[177] in which the validity of the Romulo-Snyder Agreement was challenged due to the absence of the requisite concurrence by the Senate for the binding effect and validity of a treaty, the Court held that:

> A treaty is not the only form that an international agreement may assume. For the grant of treaty-making power to the Executive and the Senate does not exhaust the power of the Government over international relations. Executive agreements may be entered with other States and are effective even without concurrence of the Senate. The distinction between the so-called executive agreements and treaties is purely a constitutional one and has no international legal significance.

The Supreme Court continued:

> There are various forms of pacts entered into by and between sovereign States which do not necessarily come under the strict sense of a treaty and which do not require ratification or consent of the legislative body of the State, but nevertheless are considered valid international agreements.

The Supreme Court therefore suggests that a treaty assumes a more important character than an executive agreement, by the nature of the agreements which it considered appropriate for each type. This is probably also the reason why Senate concurrence is required for both a treaty and an international agreement whereas the Constitution makes no mention of such requirement in case of executive agreements.

Following the guidelines laid down by the Court in the above-mentioned cases, should the MIGA be considered as the proper subject of a treaty or international agreement, or is it sufficient that the Philippines enter into such an agreement only through an executive agreement, and thus do away with the requirement of Senate ratification as a condition for its validity?

It is noteworthy to quote Fr. Joaquin Bernas regarding his views on the matter:

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[177] USAFFE Veterans Association v. Treasurer of the Philippines, 105 Phil. 1030 (1959).

"Treaties of any kind, whether bilateral or multilateral, require Senate concurrence. Treaties, however, are not the only forms of international agreements into which the Chief Executive may enter. The authority of the executive to enter into executive agreements without concurrence of the legislature has traditionally been recognized in Philippine jurisprudence. The concurrence of the legislature is required by our fundamental law in the making of treaties, which are, however, distinct and different from executive agreements, which may be validly entered into without such concurrence. However, as Francis B. Sayre, former U.S. High Commissioner to the Philippines noted: 'The point where ordinary correspondence between this and other governments ends and agreements---whether denominated executive agreements or exchange of notes or otherwise---begin, may sometimes be difficult of ready ascertainment.' The practice in fact was that agreements which were deemed to require concurrence were embodied in treaties whereas those which were deemed as not requiring concurrence were embodied in executive agreements. The following is an attempt, under the old Constitution, to delineate what may be covered by executive agreements and what must be covered by treaties.

[T]he right of the executive to enter into binding agreements without the necessity of subsequent Congressional approval has been confirmed by long usage. From the earliest days of our history we have entered into executive agreements covering such subjects as commercial and consular relations, most-favored nation rights, patent rights, trademark and copyright protection, postal and navigation arrangements and the settlement of claims. The validity of these has never been seriously questioned by our courts.

Agreements with respect to the registration of trademarks have been concluded by the Executive with various countries under the Act of Congress of March 3, 1881. Postal conventions regulating the reciprocal treatment of mail matters, money orders, parcel post, etc., have been concluded by the Postmaster General with various countries under authorization by Congress beginning with the Act of February 20, 1792. Ten executive agreements were concluded by the President pursuant to the McKinley Tariff Act of 1890, and nine such agreements were entered into under the Dingley Tariff Act of 1897. A very much larger number of agreements, along the lines of the one with Romania previously referred to, providing for most-favored nation treatment in customs and related matters have been entered into since the passage of the Tariff Act of 1922, not by direction of the Act but in harmony with it.

International agreements involving political issues or changes of national policy and those involving international arrangements of a permanent character usually take the form of treaties. But international agreements embodying adjustments of detail carrying out well-established national policies and traditions and those involving arrangements of a more or less temporary nature take the form of executive agreements.

What comes out from the discussion in the 1986 Constitutional Commission is that not all executive agreements require Senate

> concurrence. Executive agreements and other international agreements which are in the nature of original agreements of a permanent nature or which establish national policy require concurrence because they in fact are treaties. But executive agreements which are merely implementation of treaties or of statutes or of well-established policy or are of a transitory efectivity do not require concurrence.[178]

As previously discussed in the introduction, the MIGA is basically an arrangement whereby a member investor is insured against certain risks[179] by the Agency, which in turn is subrogated to the rights of the said investor for whatever claims the latter may have against the host state.[180] In turn, the Agency has set-up the procedure to be followed if such a situation arises.[181] Submission to such manner of dispute settlement would thus obviously entail a submission to the jurisdiction of the MIGA as far as disputes which are subject to its coverage are concerned.

It is likewise obvious that by entering into this kind of an arrangement, the Philippines would be obligated to submit to the jurisdiction of the MIGA and thus assume an obligation under which it was not in any way before bound. The political implications are thus serious. As a member of the MIGA, a State is under obligation to submit itself to the latter's jurisdiction, which therefore necessarily involves an apparent derogation of sovereignty. Sovereignty is in a major aspect a relation to other states defined by law. The principal corollaries of the sovereignty and equality of states are:

> (1) jurisdiction, *primia facie* exclusive over a territory and the permanent population living there;
>
> (2) a duty of non-intervention in the area of exclusive jurisdiction of other states; and
>
> (3) the dependence of obligations arising from customary law and treaties on the consent of the obligor.[182]

It is true that the MIGA is but the embodiment of well established national policies as found in the Omnibus Investments Code of 1987,[183] subject only to the limitations contained therein and the

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[178] J. BERNAS, CONSTITUTION OF THE PHILIPPINES, 248 (1989). Citations omitted.

[179] Article 11 (a) of the MIGA Convention.

[180] Article 18 of the MIGA Convention.

[181] Article 58 of the MIGA Convention.

[182] BROWNLIE, *supra* note 102, at 287.

[183] Article 2. Declaration of Investment Policies.--

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(1) The State shall encourage private Filipino and foreign investments in industry, agriculture, forestry, mining, tourism and other sectors of the economy which shall:

Constitution.[184] However, it cannot be denied that the MIGA is a device to attract foreign investments. In protecting foreign investments via the guarantees to covered risks,[185] it reserves the right of being subrogated to whatever claims an investor may have against a host state.[186]

In submitting oneself to the jurisdiction of the MIGA, there would thus seem to be a derogation of a State's sovereignty, which, as earlier mentioned, would carry great political implications. Following the guidelines set forth in determining which agreements are proper subjects of a treaty and an international agreement, it is thus obvious that the MIGA is properly the subject of a treaty. It would thus require the concurrence of the Senate for its validity, as far as the Philippine Constitution is concerned.[187] It should be noted that the MIGA has already been submitted to the Senate for ratification.

B. *Miga And Conflicts With The Constitution And Philippine Laws*

A perusal of the text of the MIGA would lead one to the impression that it is in perfect accord with our local investment laws. After all, it is nothing but a device by which foreign investments are filtered, since investor members must secure the approval of the Agency for the purposes of having their investments guaranteed.[188] At the same time, the Agency cannot conclude any contract of guarantee before the host government has itself approved the issuance of the guarantee by the Agency against the risks designated for cover.[189]

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provide significant employment opportunities relative to the amount of the capital being invested; increase productivity of the land, minerals, forestry, aquatic and other resources of the country and improve utilization of the products thereof; improve technical skills of the people employed in the enterprise; provide a foundation for the future development of the economy; meet the tests of international competitiveness, accelerate development of less-developed regions of the country; and result in increased volume and value of exports for the economy.

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(6) The State recognizes that there are appropriate roles for local and foreign capital in the development of the Philippine economy and that it is the responsibility of Government to define these roles and provide the climate for their entry and growth.

[184]An example of such a limitation would be Article XII, Section 10, which allows Congress, upon recommendation of the economic and planning agency, when the national interest dictates, reserve to citizens of the Philippines or to corporations or associations at least 60% of whose capital is owned by such citizens, or such higher percentage as it may provide, as to certain areas of investments.

Other examples would be those embodied in Article XII, sections 2 and 3, regarding the acquisition and holding of lands and other natural resources.

[185]Article 11 of the MIGA Convention.

[186]Article 18 of the MIGA Convention.

[187]CONST. art. VII, sec. 21.

[188]Article 16 of the MIGA Convention.

[189]Article 15 of the MIGA Convention.

However, despite such apparently innocent terms of the agreement, a closer look would cast some doubts as to the constitutional validity of some major features of the Agency.

1. *The Settlement of Disputes Under the MIGA and the Jurisdiction of Philippine Courts*

Chapter IX of the Agreement provides for the Settlement of disputes which may involve the interpretation and application of the convention,[190] the Agency and a member,[191] the Agency as subrogee and a member,[192] or those invovlving holders of guarantee or reinsurance.[193]

Under the Constitution, specifically section 2, Article VIII thereof, the Congress shall have the power to define, prescribe, and apportion the jurisdiction of the various courts but may not deprive the Supreme Court of its jurisdiction over cases enumerated in Section 5[194] thereof.

Having such constitutional limitation in mind, the question that immediately arises is whether or not the mode of settling disputes set forth in the MIGA constitutes a derogation of the Constitution.

An illustration of one possible conflict would be in a case involving the question of the interpretation of the terms of the Convention, in which the inevitable question of validity would arise. What would be proper under the Convention would be simply to apply Article 56, providing for the settlement of disputes. Such action would, however, run counter to the provisions of the Constitution. The reason is that although what Article VIII, section 2 speaks of is the appellate jurisdiction of the Supreme Court, and what is involved here is apparently the original jurisdiction to settle such types of disputes, still, by depriving the lower courts of the jurisdiction to settle the same is to indirectly deprive the Supreme Court of its appellate jurisdiction which the Constitution seeks to prohibit.

It may be argued that submission to the jurisdiction of the Agency may be justified under Article II, section 2 of the Constitution which provides:

> The Philippines renounces war as an instrument of national policy, adopts the generally accepted principles of international law as part of the law of the land and adheres to the policy of peace, equality, justice,

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[190]Article 56 of the MIGA Convention.
[191]Article 57 (1) of the MIGA Convention.
[192]Article 57 (2) of the MIGA Convention.
[193]Article 58 of the MIGA Convention.
[194]CONST. art. VIII, sec. 5.

freedom, cooperation, and amity with all nations.

By virtue of such provision, it may be posited that we have accepted the binding effect of the MIGA as a nation, because we have accepted the generally accepted principles of international law, among which is the principle of *pacta sunt servanda*, likewise embodied in the Vienna Convention on the Law of Treaties,[195] which mandates us to comply with our international obligations. Moreover, it is likweise embodied in said Convention that a country may not invoke its domestic laws to avoid compliance with its international obligations.[196] Likewise, the binding effect of such agreement may be implied from Article VII, section 21 which provides that no treaty or international agreement shall be valid and effective unless concurred in by at least two-thirds of all the Members of the Senate.

Now, can it be said that there still is a conflict in view of these arguments? It is submitted that the true issue is as to which constitutional provision should govern the present case. Should general provisions such as Article II, section 2 and Article VII, section 21, relating to State policies and to the binding force of treaties such as those in the present Convention, prevail over Article VIII, section 2, a specific provision, essentially regarding the supposedly indelimitable power of the Judiciary as one of the major branches of Government?

2.. Covered Risks And The Omnibus Investments Code

Another possible source of conflict would be the area of covered risks for members of the MIGA vis-a-vis the basic rights and guarantees of foreign investors under the Omnibus Investments Code.[197]

Under Article 11 of the MIGA, the following are the risks that may be the proper subjects of guarantee: currency transfer, expropriation and similar measures, breach of contract, and war and civil

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[195] Article 26 of the Vienna Convention. Pacta Sunt Servanda.

Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

[196] Article 27 of the Vienna Convention. Internal Law and Observance of Treaties.

A party may not invoke the provisions of the internal law as justification for its failure to perform a treaty. This rule is without prejudice to Article 46.

On the other hand, Article 46 provides:

1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

2. A violation is manifest if it would be objectively evident to any state conducting itself in the matter in accordance with normal practice and in good faith.

[197] Exec. Order No. 226 (1987).

disturbance.[198] On the other hand, the Omnibus Investments Code of 1987 provides for the basic rights and guarantees of foreign investors in Article 38 thereof, which extends to the following: repatriation of investments, remittance of earnings, foreign loans and contracts, freedom from expropriation and requisition of investment.[199]

An examination of these protected areas under the MIGA and the Omnibus Investments Code reveals that some of the said areas overlap. An example is the guarantee against confiscation placed side by side with the freedom against expropriation.

The problem with the abovementioned provisions lie not in their substance, but in the possiblity that forum-shopping might be too irresistible a temptation for the parties to resist. Apparently, both the MIGA and the Omnibus Investments Code provide for the manner in which such issues may be resolved. The question is thus: Is membership in the MIGA a bar to the application of the provisions of the Omnibus

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[198] *Id.*

[199] Art. 38 of the MIGA Convention. Protection of Investments.

All investors and registered enterprises are entitled to the basic rights and guarantees provided in the Constitution. Among other rights recognized by the Government of the Philippines are the following:

(a) Repatriation of Investments.— In the case of foreign investments, the right to repatriate the entire proceeds of the liquidation of the investment in the currency in which the investment was originally made and at the exchange rate prevailing at the time of repatriation, subject to the provisions of Section 74 of Republic Act No. 265, as amended;

For investments made pursuant to Executive Order No. 32 and its implementing rules and regulations, remittability shall be provided therein.

(b) Remittance of Earnings.— In the case of foreign investments, the right to remit earnings from the investment in the currency in which the investment was originally made and at the exchange rate prevailing at the time of remittance, subject to the provisions of Section 74 of Republic Act No. 265 as amended;

(c) Foreign Loans and Contracts.— The right to remit at the exchange rate prevailing at the time of remittance such sums as may be necessary to meet the payments of interest and principal on foreign loans and foreign obligations arising from technological assistance contracts, subject to the provisions of Section 74 of RA 265;

(d) Freedom from Expropriation.— There shall be no expropriation by the government of the property represented by investments or of the property of the enterprise except for public use or in the interest of national welfare or defense and upon the payment of just compensation. In such cases, foreign investors or enterprises shall have the right to remit sums received as compensation for the expropriated property in the currency in which the investment was originally made and at the exchange rate at the time of remittance, subject to the provisions of Section 74 of RA 265 as amended;

(e) Requisition of Investment.— There shall be no requisition of the property represented by the investment or of the property of enterprises, except in the event of war or national emergency and only for the duration thereof. Just compensation shall be determined and paid either at the time of requisition or immediately after cessation of war or national emergency. Payments received as compensation for the requisitioned property may be remitted in the currency in which the currency in which the investment was originally made and at the exchane rate prevailing at the time of remittance, subject to the provisions of Section 74 of RA 265, as amended.

Investments Code, and vice-versa, such that the acquisition of jurisdiction of either body would effectively prevent the other body from taking cognizance of the dispute?

If the answer is in the negative, then the problem of forum shopping might arise. This is so because if both the Philippine Courts and the MIGA have jurisdiction over the matter, then the parties would be given a choice as to which forum they might file the case. This would definitely lead to forum shopping, wherein one would be able to file his case in the body before which he thinks he has a better chance of winning his case.

Another point can be raised as to the difference in the areas of protection covered by the MIGA Convention and the Omnibus Investment Code. Under the latter, the MIGA has a right to be subrogated in the rights of an investor for whatever claims the latter may have against the host state. Hence, by this right of subrogation, in effect, the basic rights and guarantees of foreign investors are increased once we become a member of the MIGA.

In addition, the MIGA imposes an additional burden even to those protected areas common to both the latter and under the Omnibus Investments Code. An example is expropriation. Expropriation, under Philippine law, is valid, as long as the taking of property is for public use and with just compensation.[200] Hence, two elements must be present: (1) public use; and (2) just compensation. However, the definition of expropriation under Article 11 of the Convention is different. Expropriation is defined therein as 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.

The definition of expropriation under the Convention may possibly include regulations made by the State in the exercise of its police power. It made a sweeping generalization as to cover all forms of deprivation of property, unlike the Omnibus Investments Code which only expressly covered instances of taking for public use with just compensation. The only qualification made by the Convention are the measures taken for regulating economic activity, which is not the only permissible field of police power regulation. It cannot be denied that in the exercise of the police powers of the State, there are instances when

[200]CONST. art. III sec. 9.

such regulations would practically amount to a taking, which, however, cannot be struck down as being unconstitutional even in the absence of just compensation, as long as it satisfies the requirements of reasonableness and is not unduly oppressive. Again, it would thus seem that the Convention places undue restrictions in the exercise of the State of its sovereignty.

XI. PHILIPPINE POLICY ON FOREIGN INVESTMENTS

The State shall develop a self-reliant and independent national economy effectively controlled by Filipinos.[201] This is one of the declared policies of the Philippine Government under the 1987 Constitution. It is a policy that bears directly upon any discussion on foreign investments in the country and necessarily provides the framework in the determination of the viability of Philippine membership in the MIGA. Presently, the Philippines is far from being economically independent and self-reliant. One of its most pressing needs is an inflow of capital to boost its economic growth and to fuel the machinery for economic development. As previously discussed, the capital required by developing countries like the Philippines may primarilly be acquired through direct foreign investments therein.

Foreign investment is defined by law as equity investment made by a non-Philippine national in the form of foreign exchange and/or other assets actually transferred to the Philippines and duly registered with the Central Bank which shall assess and appraise the value of such assets other than foreign exchange.[202]

The Philippine government, aware that the country has an underdeveloped economy has adopted the policy of attracting domestic and foreign investment.[203] In furtherance of the said policy, the

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[201]CONST. art. II, sec. 19.

[202]Foreign Investments Act of 1991, Rep. Act No. 7042 (1991).

[203]Section 2 of Rep. Act No. 7042.

> It is the policy of the State to attract, promote and welcome productive investments from individuals, partnerships, corporations, and governments, including their political subdivisions, in activities which significantly contribute to national industrialization and socioeconomic development to the extent that foreign investment is allowed in such activity by the Constitution and relevant laws. Foreign investments shall be encouraged in enterprises that significantly expand livelihood and employment opportunities to Filipinos; enhance economic value of farm products; promote the welfare of Filipino consumers; expand the scope, quality and volume of exports and their access to foreign markets; and/or transfer relevant technologies in agriculture, industry and support services. Foreign investments shall be welcome as a supplement to Filipino capital and technology in those enterprises serving mainly the domestic market.

legislature thus enacted Republic Act No. 5186 otherwise known as the "Investment Incentives Act."[204] Later, on 27 February 1987, it enacted the Omnibus Investment Code to adapt to the changing investment climate,[205] Article 2 of this statute discusses in further detail the state policy of the Philippine Government respecting investments, to wit:

> To accelerate the sound development of the national economy in consonance with the principles and objectives of economic nationalism and in pursuance of a planned economically feasible and practical dispersal of industries and the promotion of small and medium scale industries,under conditions which will encourage competition and discourage monopolies, the following are declared policies of the State:
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> 1. The State shall encourage private Philippine and foreign investments in industry, agriculture, forestry, mining, tourism and other sectors of the economy which shall provide significant employment opportunities relative to the amount of capital being invested; increase productivity of the land, minerals, forestry, aquatic and other resources of the country, and improve utilization of the products thereof; improve technical skills of the people employed in the enterprise; provide a foundation for the future development of the economy; meet the test of international competitiveness; accelerate development of less developed regions of the country; and result in increased volume and value of exports for the economy.
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> 2. The State shall ensure holistic development by safeguarding the well-being of the social,cultural and ecological life of the people. For this purpose, consultation with affected communities will be conducted whenever necessary.
>
> 3. The State shall extend to projects which will significnbtly contribute to the attainment of these objectives, fiscal incentives without which said projects may not be established in the locales, numbers and/or pace required for optimum national economic development. Fiscal incentive systems shall be devised to compensate for market imperfrections, to reward performance contributing to economic development, be cost-efficient and be simple to administer.
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> 4. The State considers the private sector as the prime mover for economic growth. In this regard, private initiative is to be encouraged, with deregulation and self-regulation of business activities to be generally adopted where dictated by urgent social concerns.
>
> 5. The State shall principally play a supportive role, rather than a competitive one, providing the framework, the climate and the incentives within which business activity is to take place.
>
> 6. The State recognizes that there are appropriate roles for local and foreign capital to play in the development of the Philippine economy and that it is the responsibility of Government to define these

[204]September 16, 1967.

[205]*Policies on Competition and Restrictive Business Practices in the Philippines, Report prepared by Dr. Gonzalo T. Santos*, at 17, U.N. Doc. UNCTAD/ITP/63 (1991)

roles and provide the climate for their entry and growth.

7. The State recognizes that industrial peace is an essential element of economic growth and that it is a principal responsibility of the State to ensure that such condition prevails.

8. Fiscal incentives shall be extended to stimulate the establishment and assist initial operations of the enterprise, and shall terminate after a period of not more than 10 years from registration or start-up of operation unless a specific period is otherwise stated.

From the foregoing statement of Philippine investment policies, five basic objectives can be derived:

(1) an acceleration of the development of the economy under conditions which will encourage competition and discourage monopolies;

(2) the encouragement of investments to be able to meet tests of international competitiveness;

(3) the adoption of fiscal incentive systems to compensate for market imperfections;

(4) the encouragement of private initiative through deregulation and self-regulation of business activities; and

(5) the participation by the State in a supportive rather than a competitive manner in the business.[206]

A. Early Philippine Experience on Foreign Investments

The Philippines has had long experience with foreign investments. This started with state monopolies established by the Spanish government in the seventeenth century and was followed by an influx of trading investments by Chinese and English traders in the earlier part of the nineteenth century when the Spanish opened the Philippines up to foreign trade. Then there was a major shift to American investment after the Philippines was conquered by the United States at the start of the twentieth century. American investments grew in the fields of public utilities and trade in agricultural products, as a result of the preferential trading relationship between the Philippines and the United States from 1909 to 1946. A trade and investment law was passed by the Congress of the United States just before the Philippines gained its independence in 1946. This law was later converted into a treaty retaining national treatment for American investments in the Philippines and preferential treatment in trade. The Philippines also had dealings with trading firms under the auspices of the Japanese military government during the war years. The foreign

[206] *Id.*, at 18.

investments in the Philippines are not, of course, confined to these countries. Almost all free world countries have investments in the Philippines -- the United Kingdom, Switzerland, the Netherlands, Australia, Belgium, Sweden, Italy, France, Austria, Canada and Germany.[207]

After Philippine independence in 1946, the influx of investments was influenced by other policy considerations. Initially, foreign investments flowed back to the Philippines for reconstruction, such as the rebuilding of sugar and coconut mills, and the rehabilitation of public utilities like electricity, communications and transportation. The Philippines, during this period adopted import and exchange controls to conserve its reserves, but the pre-war parity rate of the peso to the dollar was maintained up to 1962 thus attracting many import-substitution industries especially products that had found market acceptance and were being imported as finished goods from the United States. Such investments were facilitated by liberal tax incentives and protective tariffs. But as foreign exchange reserves were being depleted by an industrialization pattern which was heavily import-oriented, the Philippines had to devalue in 1962 to check balahce of payment problem. This encourages its extractive industries like logging and mining. After devaluation, the country switched from exchange controls to an open economy, as a result of which, some of the Filipino joint ventures with foreigners were taken over completely or majority control thereof was transferred to foreigners.[208] Today, one fundamental element in Philippine foreign investment policy is that Filipino control of the basic industries is essential. This is clearly seen in the list of restrictions and limitations on foreign investments found in the Constitution. Article XII Section 10 of the 1987 Constitution provides that the Congress shall reserve to citizens of the Philippines or to corporations or associations at least sixty per centum of whose capital is owned by such citizens, or such higher percentage as Congress may prescribe certain areas of investment. In another provision the Constitution provides that the exploration, development and utilization of natural resources may be undertaken directly by the State or it may enter into co-production, joint venture, or production sharing agreements with Filipino citizens or corporations or associations at least sixty per centum of whose capital is owned by Filipino citizens.[209] Likewise, public utilities shall be controlled by Filipinos to the same extent.[210] Finally, only Filipino citizens or corporations or associations at least seventy per centum of the

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[207] Virata, *Foreign Investment in Developing Countries: The Phillipines*, in DIRECT FOREIGN INVESTMENT IN ASIA AND THE PACIFIC 260 (P. Drysdale ed. 1970).

[208] *Id.*, at 258-259.

[209] CONST. art. XII, sec. 2.

[210] CONST. art. XII, sec. 11.

capital of which is owned by such citizens shall be allowed to engage in the advertising industry,[211] while ownership and management of mass media shall be limited to citizens or corporations wholly-owned and managed by such citizens.[212]

All such legal restrictions considered, there are still other factors prevailing in the country that can determine the attractiveness of the Philippines to foreign investors. It is said that government stability is the single most important prerequisite to investing abroad.[213] But "stability" may be defined in different ways, depending on the experience of the investor. Thus, an American may consider a country unstable given the recurrence of certain events which would not seem normal in the United States, such as a rapid shift of government officials or public demonstrations which receive publicity through media. Yet these same events may be "normal" for a country if they are part and parcel of its political and social life.[214]

Though the Philippines achieved economic growth of about 6 per cent on the average during 1988 and 1989, there are underlying weaknesses in the economy. These include the debt burden, slow implementation of policies and programs relating to infrastructure, agrarian reform and population growth. Moreover, only slow progress has been made in bringing about varios structural reforms, especially in monetary, industrial, trade and exchange rate policies. Compounding these difficulties were political problems underscored by the an attempted military coup in 1989. By shaking business confidence this event could seriously disrupt what was commonly seen as a steady economic recovery process.[215]

There is a high level of unemployment and underemployment in the country today.[216] The unemployment situation worsened in 1989 and the unemployment rate moved up slightly to 9.2 per cent. Also, underemployment at 32 per cent remained almost as high as in 1988. Reducing unemployment continues to be a difficult problem in the face of modest economic growth and the rapid expansion of the labor force. Unemployment remains a principal concern as it directly relates to the problem of poverty.[217] Low literacy levels and a lack of an industrial

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[211]CONST. art. XVI, sec. 11 (2).

[212]CONST. art. XVI, sec. 11 (1).

[213]A. KAPOOR AND J. COTTEN, FOREIGN INVESTMENT IN ASIA 39 (1960).

[214]*Id.*, at 39.

[215]ASIAN DEVELOPMENT BANK, ASIAN DEVELOPMENT OUTLOOK 103 (1990).

[216]ASIAN DEVELOPMENT BANK, ASIAN DEVELOPMENT OUTLOOK 90 (1989).

[217]ASIAN DEVELOPMENT BANK, *supra* note 219, at 105.

tradition make it difficult for some workers to master advanced types of machines and other forms of technology. The government is thus faced with the serious task of finding employment for its citizens. For these reasons, the government often seeks labor-intensive investments of foreign companies.[218]

On the other hand, there is the factor of existing resistance in some sectors of Philippine society to foreign investment. There are those who see national independence as threatened by foreign equity capital. For them, all specialisation and exchange, or economic integration, involve a surrender of independence in the sense that they may limit or complicate the exercise of some forms of domestic policy. There is an economic gain involved, however. The mobility of capital internationally does not so much alter the host country's ability to pursue independent stabilization policies as it does the mix of monetary-fiscal policies which most effectively achieve domestic stabilization goals.[219]

Although there is a fundamental harmony of economic interests between the host country and the foreign investor, there is also a fundamental conflict of political interests that poses a challenge to the national sovereignty of the host country. People in the host country regard the foreign investor as far more than a business situation that raises questions of only economic benefits and costs. From their perspective, the foreign investor contributes economic benefits but at the cost of imposing actual or potential constraints on the policy decisions of national authorities. They see foreign investment as a political institution that can exercise decision-making power over key segments of the economy from a headquarters located outside the national territory and beyond the jurisdictional reach of their government. They allege, therefore, that foreign investments limit or thwart the capacity of the host government to achieve economic, social, and other goals in pursuit of the national interest.[220]

B. Obstacles To Private Foreign Investment

A view of international investment conditions leads to the conclusion that underdeveloped countries receive less private foreign capital than they need.[221] Deterrents to foreign investments in a developing country may assume both legal and non-legal forms. Foreign exchange controls, or those requiring joint ventures with local partners or

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[218]KAPOOR and COTTEN, *supra* note 217, at 87.

[219]Safarian, *Problems of Host Countries*, in DIRECT FOREIGN INVESTMENT IN ASIA AND THE PACIFIC 66 (P. Drysdale ed. 1970).

[220]ROOT, *supra* note 32, at 670.

[221]FATOUROS, *supra* note 2, at 29.

excluding foreign entrepreneurs from certain sectors of the national economy are legal barriers. Also, there is the fear of expropriation of property which usually form a vital part of foreign investments. On the other hand, non-legal barriers, like the nature and extent of risks involved also influence investment decisions. All these play an important role in the foreign investment decision process in the Philippines.[222] A discussion of the Philippine "investment climate"[223] will be made to determine what the obstacles to the entry of foreign investments to the Philippines are.

1. The "Screening" of Foreign Investment

The first of these obstacles is the screening of foreign investment. One of the situations sometimes cited as constituting an obstacle to private foreign investment in underdeveloped countries is the imposition by these countries of restrictions or conditions on the entry of foreign capital. These restrictions take the form of screening wherein the prospective investor needs to get the prior approval of the competent government body to which he submits his plans and which reaches its decisions on the basis of considerations of general economic policy. The requirement of approval, in whatever form, is founded on a number of considerations of economic policy. Another objective of screening is related to the avoidance of excessive concentration of foreign investment in a few fields. More generally, control over the entry and direction of foreign capital is an indespensable condition for the operation of national economic planning. Finally, screening may be used to exclude foreign investors from certain fields of the economy.[224]

Philippine law affirms the right of a sovereign state to exclude foreign corporations from doing business within its boundaries or to impose conditions on the exercise of such privilege.[225] The old Corporation Law provided that "no foreign corporation or corporations formed, organized or existing under any laws, other than those of the Philippines shall be permitted to transact business in the Philippines until after it shall have obtained a license for that purpose fom the Securities and Exchange Commission."[226] This is still provided for in the

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[222]SOLEDAD DE CASTRO, FOREIGN BUSINESS ENTERPRISE IN THE PHILIPPINES 14 (1977).

[223]According to Fatouros:

"the term is commonly employed in a number of related meanings differing from each other in their inclusiveness. The meaning adopted in this work includes factors which affect foreign investments in legal form, neither purely economic nor purely psychological in character."

[224]FATOUROS, *supra* note 2, at 38.

[225]Marshall Wells Co. v. Henry Elser and Co., 46 Phil. 70 (1924).

[226]Act 1459 (1906), sec. 68.

current Corporation Code.[227] This provision manifests that as a general principle, no automatic recognition or authority to do business is afforded by Philippine law to foreign corporations.[228]

The practice of screening prospective investors has sometimes been blamed for contributing seriously to the shortage of private international investment. The extent, however, to which screening affects the volume of foreign capital invested in underdeveloped countries is open to grave doubt. Another complaint is that screening sometimes results in the establishment of a governmental bureaucracy which may be antagonistic to foreign investors. These charges may be justified, but they indicate the need for improving rather than totally eliminating the practice of screening.[229]

2. Restrictions on the Entry of Foreign Capital

The practice of screening is closely related to the next obstacle which is the imposition of restrictions on the entry of foreign capital either into certain specified fields of the economy or into the country as a whole. These restrictions are usually imposed by legislation. In most underdeveloped countries, there are restrictions which are specifically directed against foreign investment. Such restrictions express the deep distrust of foreign investors since control over a couuntry's key industries entails a significant measure of influence over the country's economy. These restictions, however, often seek to achieve not the total exclusion of aliens but the increased participation of local capital in foreign-financed enterprises.[230]

All countries discriminate against the foreign ownership of local companies in at least some industries. Both industrial and developing countries exclude foreigners from direct investment in certain "key" industries that are regarded as essential to national security or as having a pervasive influence on the national economy and society. In addition, host governments may also require local ownership or participation in some industries.[231]

The extent of ownership permitted by the host government is an important consideration in the decision of a company to invest abroad. This is particularly true in the case of multinational enterprises which seek control over their worldwide operations in order to secure the most effective level of performance on a worldwide basis. However, host

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[227]Batas Pambansa Blg. 68 (1980), sec. 123.
[228]DE CASTRO, *supra* note 226, at 74.
[229]FATOUROS, *supra* note 2, at 29.
[230]*Id.*, at 41.
[231]ROOT, *supra* note 31, at 674.

countries, both developed and developing impose numerous restrictions on the extent of foreign ownership they will allow. In developing countries such an attitude may be the result of a colonial past, a desire to have control in the hands of nationals, and an effort to develop talent versus a dependence on foreign skills.[232]

Philippine economic policy is explicit in protecting local business from foreign competition. Foreign activity is limited to those areas which are not adequately exploited by nationals. A certain portion of local equity participation in the capital structure and control of the enterprise is prescribed.[233] The operation of public utilities, for instance, is limited by the 1987 Constitution to corporations or associations with at least 60% of its capital owned by Filipino citizens.[234] Foreign investments and operations are channelled into particular areas of economic activity which are characteristically capital-intensive and involve a fair amount of risk which local enterprise cannot ordinarilly raise and undertake.[235]

Provisions of law resticting ownership of enterprises by aliens may affect unfavorably the interests of foreign investors when they require majority participation or effective control of the enterprise by local nationals. The main disadvantages seem to be the sharing of profits and the possibility of friction between and among the partners. But there are also advantages to the foreign investor. Collaborations with local businessmen assures a knowledge of local conditions--economic, political and cultural. It also assists in increasing goodwill and makes possible the use of local "connections" to promote the interest of the enterprise.[236]

3. Restrictions on the Employment of Aliens

Problems arise with regard to the requirements found in the labor legislation of several states concerning the obligatory employment of their nationals by all enterprises operating therein. Limitations on the employment of aliens are a direct consequence of the labor situation in underdeveloped countries. They are calculated to contribute to increase the general level of employment and to reduce the existing shortage of native skilled labor.[237]

All countries place some form of restrictions in the employment of foreign nationals in local operations and several countries have

[232] *Id.*, at 50.
[233] CONST. art. X, sec. 12.
[234] CONST. art. XII sec. 11.
[235] FATOUROS, *supra* note 2, at 41.
[236] *Id.*, at 43.
[237] *Id.*, at 44.

exerted strong pressures for the employment of nationals, particularly at the lower and intermediate levels of the organization.[238] The Philippine Constitution affirms labor as a primary social economic force[239] and states that the State shall promote the preferential use of Filipino labor.[240] Also, the sustained development of a reservoir of national talents consisting of Filipino scientists, entrepreneurs, professionals, managers, high-level technical manpower and skilled workers and craftsmen in all fields shall be promoted by the State, and the practice of all professions in the Philippines shall be limited to Filipino citizens, save in cases prescribed by law.[241] Thus, aliens who are seeking employment in the Philippines need to obtain an employment permit from the Department of Labor. This employment permit may be issued to a non-resident alien or to the applicant employer after a determination of the non-availability of a person in the Philippines who is competent, able and willing at the time of the application to perform the services for which the alien is desired.[242] This means that for as long as a Filipino is competent, able and willing to perform the same services, the employment permit may not be issued, thereby protecting Filipino labor.

With respect to unskilled labor, no serious problem seems to arise because in the great majority of cases there exist obvious economic reasons in favor of the employment of local labor. More serious problems are raised by the limitations on the employment of skilled personnel in technical or managerial capacities. Foreign investors tend to emphasize the complications and inefficiency likely to arise because of the presence of inexperienced and unqualified persons among the higher-level personnel.[243]

4. Exchange Control and Restrictions

Foreign exchange control and restrictions are the fourth obstacle. In typical form, exchange control involves a monopoly of all foreign exchange by a central agency which handles all imports and exports of foreign currencies and allocates available foreign exchange. Exchange restrictions may also involve the use of multiple exchange rates, that is, different currency rates for different categories of transactions.[244]

The basic purpose of exchange control is the protection of a

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[238]KAPOOR & COTTEN, *supra* note 217, at 91.
[239]CONST. art. II, sec. 18.
[240]CONST. art. XII, sec. 12.
[241]CONST. art. XII, sec. 14.
[242]LABOR CODE, Pres. Decree No. 442 (1974), art. 40.
[243]FATOUROS, *supra* note 2, at 45.
[244]*Id.*, at 47.

country's balance of payments position through the limitation of effective demand for foreign exchange and the full utilization of available foreign exchange. The efforts to industrialise places great strain in a developing country's balance of payments.[245] Hence, exchange controls constitutes one of the main tools of the underdeveloped country's economic development policies.[246]

The Central Bank of the Philippines implements foreign exchange policies through regulations issued by its governing body, the Monetary Board. These regulations have the force and effect of law.[247] The foreign exchange policy in the Philippines since 1946 has been influenced by a complicated maze of shifting economic forces. It advocates both liberal measures for incentive purposes but at the same time contains policies to increase and save foreign exchange.[248]

Foreign exchange and import controls are effective but indirect means of regulating interrelated transactions across national boundaries. These controls were necessary in the Philippines to remedy the depletion of dollar reserves existing as early as 1949. The absence of a significant number of dollar-earning industries and controlled importation of foreign goods accounted for a disproportionate inflow and outflow of dollars. Hence, qualitative and quantitative import controls have been imposed by the Central Bank.[249]

All these exchange controls and restrictions nothwithstanding, there are certain guarantees which the law gives the foreign investor. Under Article 38 of the Omnibus Investments Code of 1987, foreign investments are entitled to basic rights and guarantees which include the following:

> (1) Repatriation of Investment - The right to repatriate the entire proceeds of the liquidation of the investment in the currency in which the investment was originally made and at the exchange rate prevailing at the time of repatriation;[250]
>
> (2) Remittance of Earnings - The right to remit earnings from the investment in the currency in which the investment was originally

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[245]Balance of payments policy embraces all the actions of governments to maintain or restore equilibrium in their external accounts. In the face of an enduring, fundamental equilibrium, governments generally respond to deficit (surplus) by: (1) deflating (inflating) the domestic economy with monetary and fiscal instruments, (2) devaluing (revaluing) the exchange rate, or (3) imposing exchange controls over some or all international transactions. (ROOT, *supra* note 31, at 27).

[246]FATOUROS, *supra* note 2, at 48.

[247]Central Bank Act, Rep. Act No. 265 (1949).

[248]DE CASTRO, *supra* note 226, at 24.

[249]*Id.*, at 143.

[250]OMNIBUS INVESTMENTS CODE, art. 38(a).

made and at the exchange rate prevailing at the time of remittance;[251]

(3) Foreign Loans and Contracts - The right to remit at the exchange prevailing at the time of remittance such sums as may be necessary to meet the payments of interest and principal on foreign loans and foreign obligations arising from technological assistance.[252]

These guarantees help in giving the foreign investor the assurance that notwithstanding the presence of exchange controls and restrictions, there are still some rights which the Philippine government gives him on which he can rely.

5. The Fear of Expropriation

The fear of expropriation is another obstacle. The strongest possible measure against an investor's interests is the taking of his property without compensation or with inadequate compensation. Thus, the fear of expropriation constitutes a serious deterrent to private foreign investment in underdeveloped countries.[253]

The expropriation of foreign-owned companies is the most dramatic action a host government can take to minimize the political costs of direct foreign investment. Broadly defined, expropriation includes any seizure of foreign owned property by a host government. When foreigners are not compensated for the properties seized from them, expropriation becomes a confiscation. There is also nationalization, which occurs when the host government assumes permanent ownership of the expropriated property.[254]

The Omnibus Investments Act of 1987 provides guarantees against expropriation and requisition. Thus, there shall be no expropriation by the government of property represented by the investment except for public use or in the interest of national welfare or defense and upon payment of just compensation. Also, there shall be no requisition of the property represented by the investment except in the event of war or national emergency, and only for the duration thereof. In both cases the investor has the right to remit payments received as compensation for the expropriated or requisitioned property in the currency in which the investment was originally made and at the exchange rate prevailing at the time of remittance.[255]

The Philippine Constitution of 1987 contains some provisions regarding the exercise of the right of eminent domain.

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[251]OMNIBUS INVESTMENTS CODE, art. 38(b).
[252]OMNIBUS INVESTMENTS CODE, art. 38(c).
[253]FATOUROS, *supra* note 2, at 50.
[254]ROOT, *supra* note 31, at 675.
[255]OMNIBUS INVESTMENTS CODE, art. 38(d) and art. 38(e).

Article III, Section 9 provides:

> Private property shall not be taken for public use without just compensation.

Also included in the Constitution are the following provisions:

> Article XII, Section 17. - In times of national emergency, when the public interest so requires, the State may, during the emergency and under reasonable terms prescribed by it, temporarily take over or direct the operations of any privately owned public utility or business affected with public interest.
>
> Article XII, Section 18. - The State may, in the interest of national welfare or defense, establish and operate vital industries and, upon payment of just compensation, transfer to public ownership utilities and other private enterprises to be operated by the Government.

At a single stroke, then, expropriation deprives the foreign parent company of all ownership rights in its affiliate. The economic costs of the expropriatin to the host country may be extraordinarilly severe. Apart from the costs associated with the disruption of the affiliate's operations, expropriation commonly deters new foreign investments and invites retaliation by the investor's home government.[256]

It is easy enough to understand how the fear of expropriation operates as a deterrent to private foreign investment. The existence of an obligation to compensate on the part of the expropriating state may not always be sufficient assurance to investors, if they fear that such compensation may be inadequate or may be granted only after a protracted process.[257]

6. Problems of Taxation

Taxation is generally considered as a normal business risk. It is the only element of the investment climate which directly affects a basic economic factor -- the investment's rate of return. From the point of view of the investor, any increase or decrease in the taxes which he would normally pay corresponds to a change in the profit rate of his investment. Therefor, taxation constitutes not only a possible deterrent but also a possible incentive to promote foreign investment.[258]

Taxation is an obstacle to foreign investment in essentially two ways. First, it constitutes a burden that investors must bear in that it

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[256]ROOT, *supra* note 31, at 675.
[257]FATOUROS, *supra* note 2, at 54.
[258]*Id.*, at 56.

effectively decreases the profits actually realized from their business venture. Such burden may sometimes be doubled in the case of the foreign investor whose income may be taxed in both his state of residence and in the state of investment. In another sense, taxation poses an obstacle to foreign investment in the event that the host state may discriminate against the alien in the form of excessive taxation.

On the other hand, taxation can play an important role as an incentive to foreign investment. Generally, tax considerations favor investment in the underdeveloped countries, for the investor's tax burden there is, as a rule, are less heavy than in the developed countries.[259]

Many developing economies consider incentive taxation an important instrument of economic growth. Since 1946, incentive taxation has been a significant feature of the Philippine tax system.[260] The Omnibus Investments Code of 1987 provides for tax incentives for registered enterprises engaged in a preferred area of investment.[261] Incentive legislation manifests the protective policy of the government towards local enterprise. It is a vital instrument which may be used to attain self-sufficiency through industrialization.[262]

The willingness of underdeveloped states to grant tax incentives, to the detriment of their public revenue, may be attributed to a general economic and political interest in the development of underdeveloped sectors. Their economic interest in attracting foreign investors is immediate, and their offer of tax incentives represents the sacrifice of possible future revenue for the sake of the country's development and the increase of public revenue which is a necessary consequence of such development.[263]

XII. CONCLUSION

It is apparent from the foregoing that foreign investments to the Philippines would be of great help in easing the burden of its floundering economy and help improve the standard of living of the Filipinos. Considering that the country is seemingly adequately protected by investment laws enacted by the legislature, perhaps the time is right for the country to venture into the field of attracting more foreign investments.

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[259] *Id.*, at 57.
[260] DE CASTRO, *supra* note 226, at 55.
[261] OMNIBUS INVESTMENTS CODE, art. 39.
[262] DE CASTRO, *supra* note 226, at 56.
[263] FATOUROS, *supra* note 2, at 57-58.