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Fair Market Value: The Elusive Standard

*by **Mariano Gomezperalta** and **Felton (Mac) Johnston***

Fair market value (FMV) seems, at least to investors, a reasonable basis for compensating investment losses caused by sovereigns, but the concept involves many issues and complexities. Here are some insights into international law and practice regarding FMV, and some thoughts about the possibility of FMV compensation under political risk insurance (PRI) policies.

International law and practice.

PRI policies typically contain subrogation, transfer and assignment provisions that allow the insurer, in the event of a claim payment, to step into the shoes of the insured investor and seek recovery from any person or entity as the insurer may consider appropriate. The insurer's prospects for a successful recovery from a host government may be considerably enhanced if the insurer meets the nationality and eligibility criteria under the relevant investment treaty and the insurer's claim derives from losses attributable to the host government's breach of its investment treaty obligations. Alternatively, because PRI policies provide that the insured investor shall cooperate with the insurer in pursuing recovery from the host government, the investor may be called upon to act on its insurer's behalf in the pursuit of remedies under an investment treaty or such other rights as the investor may have in the circumstances. If these conditions are present, what type of compensation would be due

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An Interview with Ana-Mita Betancourt

***Ana-Mita Betancourt**, Director and General Counsel, Legal Affairs and Claims Group at the Multilateral Investment Guarantee Agency (MIGA), sat down with Geraldine Mataka, managing member of robert wray PLLC, to discuss her career in international economic development and business, and why it's such an exciting time to be a part of the MIGA team.*

Geraldine Mataka: You've been at MIGA for a year now. Have there been any big surprises?

Ana-Mita Betancourt: I feel as if I'm still in the honeymoon phase! I think the big surprise is how dynamic MIGA has become. I arrived at MIGA shortly after the Council of Governors approved significant changes to the MIGA Convention and after the Board of Directors approved changes to the Operational Regulations. These changes allow us to offer new coverage; for instance, we can now cover standalone debt and certain existing investments. We also have recently developed new products, such as the non-honoring of sovereign financial obligations coverage. Besides the new General Counsel, MIGA also has seen other changes in its senior management in the past year—a new Chief Economist, new CFO and a new Chief Operating Officer, who has just arrived. In addition, we've opened a new regional hub office in Asia and a new office in Europe. With these products and offices, we're reaching out to our clients differently and extending our developmental impact. It's a very exciting time to be at MIGA.

GM: That's great. When I was looking at the Annual Report page on your website, one of the things that I noted was that it was a record breaking—

AB: Historic.

GM: —year for MIGA—

AB: Historic high. We're very proud of that.

GM: —$2.1 billion in investment guarantees. What factors do you think contributed to this record breaking year?

AB: The main driver for our record high volume is the new flexibility that we obtained through the Convention and Operational Regulations amendments, as they've allowed us to offer the new products I mentioned. During this last fiscal year we also saw a large

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How Important are Bilateral Investment Treaties *Really* for PRI?

Lauge Skovgaard Poulsen *is a Fellow in International Political Economy at the London School of Economics. This article is adapted from* Yearbook on International Investment Law & Policy 2009/2010 *(Karl P. Sauvant, ed., New York: Oxford University Press, 2010).*

For decades, a commonly held belief among international investment lawyers has been that while bilateral investment treaties (BITs) may not necessarily be crucially important for foreign investment decisions, they have an important indirect effect: BITs lower the price and increase the availability of political risk insurance (PRI), thereby reducing the transaction costs of conducting foreign investments in the developing world and assisting in the stimulation of global investment flows. This view has also been repeated time and again in publications by international organizations such as the United Nations Conference on Trade and Development (UNCTAD), when advising developing countries on the economic rationale behind the treaties.

"The overlap between [BITs and PRI] suggests it would only be natural if PRI providers took BITs into account when assessing the risk of investment projects. But...a recent survey of the PRI industry indicates that the link between BITs and PRI is rarely considerable in practice."

There is a logical basis for this view. Backed by a powerful enforcement mechanism, BITs provide foreign investors considerable legal protection against political risks, many of which are also covered by PRI. The overlap between the two instruments suggests it would only be natural if PRI providers took BITs into account when assessing the risk of investment projects. But this has never been subject to empirical testing, and a recent survey of the PRI industry indicates that the link between BITs and PRI is rarely considerable in practice.

Government-sponsored agencies

To uphold the assumption that BITs are crucial for PRI, the standard reference used by academics, practitioners, and international organizations alike has often been the German investment insurance program, where coverage availability is contingent on the existence of an applicable BIT. Although the German program is not alone in this respect, most other programs do not incorporate BITs as a precondition for coverage. In the United States, the Overseas Private Investment Corporation (OPIC) does not "pay much attention to BITs" a senior official noted, and another stated that the existence of BITs is "entirely inconsequential when underwriting risks." Of course, OPIC is somewhat special among the family of public investment guarantee agencies due to its inter-governmental agreements, which provide for international arbitration of disputes arising under those agreements and allow OPIC to be subrogated to covered investors' claims. But even programs without such agreements are not too concerned with the existence of BITs. Apart from the German and American programs, I interviewed officials from eight public (or mixed private/public) PRI programs in developed countries, including ECGD (UK), EDC (Canada), EKF (Denmark), NEXI (Japan), SACE (Italy), Austria, Finland (Finnvera), Sweden (EKN), and the Netherlands (Atradius Dutch State Business). All were clear: while some are obliged in their formal guidelines to look to BITs, the treaties rarely had an impact on either premiums or availability. "We do not take BITs into account," a senior NEXI official noted, "even if there is a BIT, it will not impact the premium compared to a similar country without a BIT." Similarly, a Dutch official noted that, "BITs can perhaps simplify our analysis in some cases if taken as an indicator that the legal regime is favorable towards the protection of investment. But in practice they are hardly ever decisive." So although differences among providers do exist, and most find that the treaties can play a role in exceptionally risky jurisdictions, overall BITs are rarely part of the underwriting process in any decisive way.

MIGA

The Multilateral Investment Guarantee Agency (MIGA) deems a foreign investment to have adequate legal protection if it is covered by a BIT, and the treaties are relevant for other parts of MIGA's operational regulations as well. Yet, whereas a BIT is a desirable condition for coverage, it is not at all necessary. And, with respect to the pricing of expropriation risk, the existence of an "investment protection agreement" is only one of the 57 rating factors MIGA underwriters have to consider when determining premium rates. Senior MIGA officials noted in interviews that while BITs are undoubtedly a part of the underwriting process, they are far from essential when determining eligibility for MIGA insurance or its pricing. "While we have to look to BITs, they are not important determinants to our perception of the risk of an investment project," one official noted, and "it is very rare that BITs become crucially important for us in practice." If countries engage in conduct that signals a scale-

"So although differences among providers do exist, and most find that the treaties can play a role in exceptionally risky jurisdictions, overall BITs are rarely part of the underwriting process in any decisive way."

back of investor protections—such as withdrawing their consent to submit investment disputes to international arbitration—that would naturally be factored into MIGA's underwriting decisions. But for developing countries that remain committed to foreign investment and the rule of law, past and current high-ranking MIGA officials confirm that the absence of a BIT rarely impacts pricing or cover-

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How Important are Bilateral Investment Treaties *Really* for PRI? (cont'd.)

age, and is never in itself a sufficient reason for MIGA to withhold a guarantee. As one senior official put it, "cancelling all its BITs would not have a substantial impact on whether, and to what extent, MIGA would be willing to underwrite investments to that country."

Private insurers

The feedback from private insurers was largely similar. While a few incorporate BITs into their products, for instance by insuring against treaty-based arbitration award defaults, and some occasionally use them as a guiding tool when assessing investment risks, most find BITs largely irrelevant for the underwriting process. "I would be very surprised," one underwriter noted, "if out of a sample of 10 underwriters any of them would mention BITs as being directly relevant for their risk-evaluations…While the treaties are part of the backdrop to the investment regime, and will be relevant if claims arise, they don't play any direct role for the ranking or pricing of investment risks."

Again, cancelling or failing to honor existing BITs is naturally important if it can be taken as a signal that a host country is likely to weaken its investor protections, but for developing countries that treat foreign investors fairly and in a non-discriminatory way, BITs very rarely have a positive effect on private insurers' underwriting decisions. The typical view appears to be illustrated by this representative: "While they should perhaps have a role to play, I would say they are likely to be considered completely irrelevant by underwriters today and thus irrelevant for the pricing of risk insurance…Rather than having a role in the investment decision, they are just an extra arrow in the lawyer's quiver on the occasions where disputes arise."

Looking ahead

So while BITs are basically aimed at reducing the risk of investing abroad, insurers that price that risk rarely take them into account. Why might that be? One reason, unfortunately, appears to be ignorance. Just as many investors are still partly or entirely unaware of the existence of BITs, a number of insurance representatives complain that although BITs *should* be relevant for ranking and pricing political risks, many underwriters have yet to realize their potency. So perhaps the treaties will have a transformative impact on the PRI industry once their risk-reducing potential is more fully realized.

There are, however, reasons to be skeptical whether the treaties will ever be particularly crucial for PRI. If governed by international law and allowing recourse to international arbitration, contracts between investors and governments often provide investors with greater and more tailored protections than BITs can. Also, even among insurers well informed about BITs, there is skepticism about their relevance to risk mitigation because of the protracted nature of BIT arbitration.

"If governed by international law and allowing recourse to international arbitration, contracts between investors and governments often provide investors with greater and more tailored protections than BITs can."

Of course, BITs are likely to impact the insurance industry through other channels than coverage availability and pricing. This is particularly so in case of claims. BIT-based arbitration awards provide the foundation for arbitral award default coverage, although that form of coverage demands that the investor endure the considerable time and expense of an arbitral proceeding. But for now, at least, it appears that while BITs may be decisive for some firms and underwriting decisions, they have not had a transformative impact on the global market for PRI. If they ever will remains to be seen. ■

Fair Market Value: The Elusive Standard (cont'd.)

to an insurer as subrogee, or to the project enterprise fronting the recovery efforts on behalf of the insurer?

Investment treaties accept FMV or some formulation of market value (as opposed to book value and other non-market value approaches) as the most common measure of compensation in expropriation. For example:

US Model BIT (2004). The US Model BIT specifically refers to compensation at FMV and provides that investors are entitled to such compensation plus interest at a commercially reasonable rate.

French Model Bilateral Investment Treaty (BIT) (2006). France's Model BIT provides that compensation for any "measures of dispossession" shall be equal to the "real value of the investments concerned." Although the term "real value" does not in and of itself resolve whether compensation shall be on the basis of FMV, the relevant provision in France's BIT adds that compensation shall be set "in accordance with the normal economic situation prevailing prior to any threat of dispossession." The provision, therefore, approaches and is consistent with the notion of compensation at market value.

German Model Bilateral Investment Treaty (2008). Germany has generally been able to establish in its BITs with Bolivia, China, Mexico, Peru, Bulgaria and others, that compensation for expropriation must be determined by reference to the "value of the expropriated investment" immediately before the date on which the actual or threatened expropriation became publicly known. This probably means, from a practical standpoint, that the value of the investment will be its market value. It should be noted that Germany and Ku-

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Fair Market Value: The Elusive Standard (cont'd.)

wait opted for a more elaborated language in their BIT that expressly refers to compensation at FMV and even provides additional guidelines as to how FMV should be calculated: "equivalent to the fair market value of the investment, as determined in accordance with recognized principles of valuation such as, *inter alia*, the capital invested, replacement value, appreciation, current returns, goodwill and other relevant factors."

> "The fact that the determination of FMV is invariably one of the most litigated points in investment disputes illustrates the difficulty in connecting treaty wording…with the actual calculation of compensation when events materialize."

North American Free Trade Agreement (NAFTA). NAFTA's standard of compensation follows the United States' approach with respect to FMV but adds specific examples of valuation criteria, including "going concern value," "asset value including declared tax value of tangible property" and "other criteria as appropriate to determine fair market value."

The Energy Charter Treaty (ECT). The ECT provisions also expressly provide that compensation for expropriation shall amount to the FMV of the investment.

World Bank Guidelines on the Treatment of Foreign Direct Investment. The World Bank's Development Committee issued relevant guidelines with respect to the appropriate compensation standards for expropriation. The guidelines not only establish that compensation to investors will be adequate if it is based on FMV standards, but also recognize certain acceptable approaches to determine FMV, including discounted cash flow calculations, liquidation value, replacement value or book value (so long as it has been recently assessed).

The state's facility to agree to FMV standards in the text of its investment treaties and international instruments contrasts with the complexity of determining what FMV means in actual investment disputes.

FMV compensation lends itself to varied approaches: replacement value (*American Independent* Oil *Company v. Government of Kuwait*); diminution value (*CMS Gas Transmission Company v. Argentine Republic*); historical losses (*Alpha Projektholding GmbH v. Ukraine*); value to a well-informed third party (*Azurix v. Argentine Republic)*; lost profits (*Phillips Petroleum Co. Iran v. Islamic Republic of Iran*) and others. The amount of the actual investments prior to the injury date has also been considered by some tribunals as an adequate basis for compensation at FMV (e.g. *Metalclad Corporation v. United Mexican States, Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentina*, *Southern Pacific Properties (Middle East) Ltd. v Arab Republic of Egypt* and others). It is also possible to find book value or liquidation value or share value as FMV approaches to compensate injured investors.

Tribunals often determine compensation using more than one valuation approach, such as combining replacement value with going concern value, or using different methodologies like sunk costs plus lost profits depending on the particular damages claimed. FMV is therefore always determined on a case by case basis taking into account the specific nature of the assets, the project, the injury date, the foreign enterprise's track record of profitability, the local jurisdiction, contributory fault elements, concurring circumstances and a variety of other factors. There is no single FMV concept that fits every case. The fact that the determination of FMV is invariably one of the most litigated points in investment disputes illustrates the difficulty in connecting treaty wording (or policy wording for that matter) with the actual calculation of compensation when events materialize.

Implications of FMV for political risk underwriting.

To the best of our knowledge, political risk insurers do not expressly offer a blanket FMV compensation (i.e., without providing that it cannot exceed book value) for expropriation, forced abandonment or war-caused cessation of operations, although there may be rare exceptions.

Might underwriters offer FMV-based compensation?

Given the variety of methods to calculate FMV and the difficulty of finding an expert party whose calculations would readily be acceptable to host governments, the prospects of recovery of claim payments from those governments on a basis other than book value (if that) are not promising, absent an FMV-based arbitral award. Still, FMV compensation and, in particular, compensation based on forward-looking calculations, such as discounted cash flow methods or capitalization of earnings, might be offered under extraordinary circumstances.

> "Given the difficulties associated with FMV compensation, is there some middle ground—something better than book value—that investors and insurers might find acceptable, at least on a case-by-case basis?"

For policy reasons, and assuming that underwriting aspects of the project suggest a low likelihood of a covered event occurring, some public agency underwriters might be willing to assume the added risks of higher compensation values and limited prospects of recovery from the host government, especially if the amounts at stake are

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Fair Market Value: The Elusive Standard (cont'd.)

not significant. In such cases the agency would probably discuss with the host government its intention to offer such coverage and seek a favorable reaction. Private sector underwriters are unlikely to take this step even where small amounts are involved because such business is not very profitable to begin with.

Even if an underwriter were willing to offer FMV-based coverage, it would be risky to do so until the foreign enterprise became successfully underway for a reasonable period of time; prior to that, market valuations might be too speculative a basis for coverage.

Were FMV-based coverage offered, for the avoidance of later disagreement underwriters would be wise to specify in the policy both the authority for determining FMV and the accepted methodologies, both of which specifications should be tailored to the specific investment and to what is most likely to be acceptable, in principle, to the host government (and thus has greater prospects of recovery).

FMV is likely to exceed book value, and insureds who would want FMV are likely to require substantially higher-than-book value limits to reflect that likelihood. How should the limits be established? In this negotiation, assuming that the cost of coverage will vary with that limit, the insured may have some difficulty deciding what it thinks it should request. The insurer likewise has to consider matters of exposure management, risk tolerance and what it thinks that FMV is likely to yield. Yet another complication is that FMV, however calculated, will vary over time.

Given the difficulties associated with FMV compensation, is there some middle ground—something better than book value—that investors and insurers might find acceptable, at least on a case-by-case basis? One approach could be to adjust compensation so that it reflects the value of the investment as it appears on the books of the insured rather than the value appearing on the books of the foreign enterprise.

"The availability of PRI coverage compensation on an FMV basis is likely to remain rare, but other alternatives to traditional book value compensation may be achievable."

Another approach, admittedly inviting much discussion during the damages stage of claims processing, would be for the underwriter to offer (in its sole discretion or otherwise): (i) to make adjustments to the foreign enterprise's book value when such book value is substantially less than the fair market value of the foreign enterprise and/or (ii) to reflect the value of contracts or intangibles that do not appear on the books of the foreign enterprise.

Conclusion

FMV is a well-accepted standard in international law and practice, in investment treaties, and in investment dispute arbitrations, but it is an elusive standard that allows for many different approaches and techniques, and even these can yield different results in the hands of different experts. The availability of PRI coverage compensation on an FMV basis is likely to remain rare, but other alternatives to traditional book value compensation may be achievable. ■

An Interview with Ana-Mita Betancourt (cont'd.)

number of new clients, and issued our first contracts in Iraq, Kosovo, Liberia and the Republic of Congo. Our hub in Asia is also building up a robust pipeline. And we are all working hard to respond to the changes in the Middle East and North Africa region!

GM: It was also noted on your website that in the past fiscal year, the covered projects were mostly in the financial sector industry. Do you see the allocation changing in the coming year or do you think that it would continue to be focused on the financial sector industry?

AB: We anticipate ongoing diversification of our pipeline and have already seen it as of the fiscal year that closed as of June 30, 2011. Following the financial crisis, MIGA focused intensely on the financial sector as part of the World Bank Group's efforts to support the sector. In fiscal year 2011, a large part of our financial sector volume relates to development of a new product that we are calling capital optimization coverage. This past fiscal year, MIGA's Board approved coverage for the ProCredit Group Central Bank Mandatory Reserves Coverage project. MIGA is covering 14 banks in 14 countries against the risk of expropriation of funds held as mandatory reserves with host country banks. This allows ProCredit to obtain capital relief and free up equity that can be injected into its subsidiaries to provide loans and financial services to micro, small and medium enterprises. This is an innovative coverage. Going forward, we can already see that the portfolio is diversifying more and we expect continued diversification. We measure diversification in terms of sector and by region.

GM: That's interesting. In connection with the larger scope of noncommercial risk coverage that you seem to be able to provide subject to board approval, would it make sense for MIGA to provide comprehensive noncommercial risk coverage for losses like natural disasters or epidemics?

AB: MIGA's mission is to encourage the flow of foreign direct investment into developing countries—our job is to attract investors into difficult operating environments through the issuance of guarantees against political risks. Although the MIGA Convention refers broadly to "non-commercial risk," our strength is in assessing and

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An Interview with Ana-Mita Betancourt (cont'd.)

mitigating political risks such as expropriation or civil disturbance, breach of contract and now non-honoring of sovereign financial obligations. Our board-approved strategy focuses our efforts on projects in the poorest countries, on projects in conflict affected environments, on complex projects in infrastructure and extractive industries and in investments between developing countries (which we call "South-South investments"). There are a number of other facilities and instruments within the World Bank Group that are positioned to provide disaster-type relief. It makes more sense for MIGA to leverage its strength in the market and support developmental projects that are consistent with the strategy approved by our board.

> "MIGA is covering 14 banks in 14 countries against the risk of expropriation of funds held as mandatory reserves with host country banks...This is an innovative coverage."

GM: Non-honoring coverage is dwarfing more traditional PRI coverages in many an underwriter's portfolio. Is that happening or do you expect it to happen at MIGA?

AB: No, we expect to maintain a diversified portfolio in terms of our product mix, including as to our non-honoring of sovereign financial obligation coverage. We diversify because MIGA has a mandate to be self-sustaining and measures its capital adequacy and risk bearing capacity carefully. The non-honoring cover is just one of the products we offer and is still a relatively new product for us. We are excited about the development impact of the product—we have closed a couple of non-honoring projects, including supporting the expansion of Istanbul's metro system and a transportation project in Tunisia. The market is excited about this coverage. That we know. And we're excited to be able to offer it as it can contribute significantly to a country's development agenda, especially in infrastructure financings. We see it as a dynamic product, inasmuch as we are getting feedback from the market as to how it has been designed and we want to be open to this input so that we can continue to refine and improve with this and all our products.

GM: Do you think MIGA's status as a member of the World Bank affects MIGA's exercise of recovery actions against other World Bank member countries?

AB: MIGA's core strength is its ability to support the investments it covers by addressing potential disputes with governments. This strength derives from MIGA's status as a member of the World Bank Group, which provides us with access to government officials at high levels, on-the-ground insights about the local conditions and a huge amount of data. Before a dispute even develops into a claim, MIGA works with investors and host countries to avoid escalation of the dispute and support the parties in problem-solving. We have participated in more than 90 pre-claim situations since MIGA was founded. If a claim does ensue, MIGA will pay the investor and then seek salvage against the host country. This is contemplated in the MIGA Convention. We have never had a dispute with a claimant. In fiscal year 2011, we paid one claim as administrator of the Afghanistan Investment Guarantee Facility.

GM: Where do you stand relative to, say, other national agencies and private insurers who have the same exposure and claims?

AB: MIGA's membership in the World Bank Group provides significant advantages in preventing a troubled situation from becoming a claim, in resolving claims once they do arise and in our salvage efforts. We've paid six claims since inception.

GM: But before a claims situation, there is an advantage?

AB: Absolutely. That's our value-added: collaborating with investors and member countries to keep development projects on track.

GM: What is MIGA's current approach to pledge of shares?

AB: The famous pledge of shares dilemma! If we are insuring a sponsor that has pledged its shares, MIGA's standard and preferred approach is to require that, upon payment of an expropriation claim, MIGA receive unencumbered shares. As you know, this is where the dilemma arises—the lenders are not easily persuaded to release their lien on the shares. Since 2007, we have taken the view that in certain cases we are willing to consider receiving encumbered shares. Some of the conditions include our being comfortable with the lender group and our analysis of the local law. I'm not surprised the discussions around this issue continue since it was first identified many years ago. There is no easy solution. We are currently studying the issue, trying to take a fresh look and considering whether to commission some thorough analysis that will advance the matter.

> "We see [non-honoring coverage] as a dynamic product, inasmuch as we are getting feedback from the market as to how it has been designed and we want to be open to this input so that we can continue to refine and improve with this and all our products."

GM: It's a very tough issue.

AB: It's truly a dilemma: sponsors and lenders have different interests. We'd like to contribute to finding a viable approach for all.

GM: Have you encountered any lenders that have been willing to bend a bit on this issue?

AB: We've seen a continuum of approaches from "let's deal with it

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An Interview with Ana-Mita Betancourt (cont'd.)

later" to lenders agreeing to release their shares. But relative to the number of projects we support, the issue does not come up as often as folks might think.

GM: We've been doing some work with fair market value (FMV) and wanted to ask you this: to what extent do you think MIGA would be willing to depart from book value compensation, other than what comes out of an award? Would you consider an FMV compensation basis? Or are there other alternative approaches to straight book value?

AB: Our Operational Regulations already provide for the possibility of FMV as one of the ways we would calculate compensation. Deciding whether to agree on a FMV or net book value basis is an underwriting decision. We are flexible when considering the needs of our clients and what makes sense for a project when issues of this sort are raised.

> "I am really excited and proud about being in the World Bank. It's not something that I could have ever dreamt about or imagined when I started my legal career, certainly not when I was growing up in Puerto Rico."

GM: What was your favorite job before you got here?

AB: Well, you know…this is a terrific job…

GM: [laughing] OK, well what was your worst job?

AB: [laughing] Typically people will respond by saying: "Oh, when I was in high school, I had to do x, y, and z." I guess the older you get, the more you go back to the values you were raised with. Coming from a family of immigrants, we valued education and service to others. In my 30-year career, to the extent that I've been learning, I've enjoyed my jobs. To the extent that I felt that I've been able to serve, to make a contribution, I really have gotten a lot out of my positions. I feel very fortunate that I've had a career trajectory that combined the public and private sectors and that I'm at the World Bank now. I am really excited and proud about being in the World Bank. It's not something that I could have ever dreamt about or imagined when I started my legal career, certainly not when I was growing up in Puerto Rico.

GM: That leads us to the next question: what's your next step?

AB: I just got here! [laughter]. I am learning a lot at MIGA; I am passionate about development, it's intellectually stimulating and I work with a terrific team. And it's fun. I don't think many lawyers can say that about their jobs!

GM: A lot of these questions have been operational and not very much related to the legal aspect of your role here at MIGA, but I think maybe it was our attempt to try to have a broad reach with our readership. But for me, as a lawyer, I was curious and I wanted to know what you think, in terms of your position at MIGA versus some of the positions you've held in your career, whether you see a difference in the fact that it's part of the World Bank, in approach or thinking or in solutions to issues that arise?

AB: That's a great question. One of the things that strikes me about the World Bank is the emphasis on knowledge: knowledge management, knowledge sharing and the role that the Bank can have in contributing to countries by sharing and disseminating that knowledge. The emphasis is on reaching out to our countries in a way that can add value and help them generate sustainable solutions. MIGA places great emphasis on its knowledge management and thought leadership through our flagship report, conferences, lessons learned, media presence and training opportunities.

GM: What are some of the biggest legal issues that you're dealing with right now or that you've been dealing with since you came here?

AB: The main issue is how to promote innovation, given the amendments to MIGA's Convention and the new flexibility in our Operational Regulations. My task is to advise MIGA on how best to incorporate these new parameters into our products and contracts. For instance, this past year, we developed additional amendments to our Operational Regulations to reflect the Convention changes and we created the template contract for the non-honoring of sovereign financial obligations coverage. One of the interesting projects we closed in June was a guarantee for $450 million covering a "Murabaha" financing facility for a telecommunications provider in Indonesia. In order to support the Islamic financing arrangements, we had to adapt and innovate in our guarantee contracts, go beyond a conventional approach.

> "The main issue is how to promote innovation, given the amendments to MIGA's Convention and the new flexibility in our Operational Regulations. My task is to advise MIGA on how best to incorporate these new parameters into our products and contracts."

GM: With respect to going over the Convention and everything since then, there's a lot of new territory in MIGA that you're covering. As far as decisions that you're making now and their precedential effect on future issues that arise, is there a way that MIGA processes these issues, where what you decide now could have an effect ten years from now, and they say, "Well that was decided then and this is how we're going to do it"?

AB: Another great question. Yes, we are facing novel issues almost daily and it's very interesting. My challenge is to build on the available precedents while spurring innovation and promoting flexi-

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bility in light of changed circumstances. Managing documents and creating a way of recording, retaining and retrieving decisions is an important component in this process. Another important issue is being aware of the potential ramifications of decisions, including as to reputational risk and the application of a decision to a different scenario. The legal department plays a very important role in this process. It's important that each generation within an institution have the benefit of past decisions and the ability to refine, improve and grow the analysis. An institution like MIGA that values lessons learned and is willing to innovate is in a good position when novel issues arise.

GM: What is the right relationship between the underwriters and the lawyers? What are the tasks that properly belong to the underwriters and what tasks properly belong to the lawyers?

AB: Lawyers in an in-house legal department have a strong working relationship with their in-house business clients because of their knowledge of the business and the ease of communication among teams. The legal team at MIGA works with underwriters from the business development stage, throughout the underwriting, approval, negotiation and drafting stages, supports the monitoring team and handles claims. The MIGA lawyers thus have a "soup to nuts" role in deals and advise not only on operational issues, but also on the policy, country risk and financial aspects of deals and institutional activities. We pride and measure ourselves by how we add value in transactions and advisory roles. We do so not only by offering legal advice, but also by identifying risks and drawing on our experiences to offer our judgment and insights. Underwriters appreciate the close working relationship with and the knowledge and judgment of the legal team. On some issues, like pricing, it's clear that the underwriters need to take the lead. Other issues, such as drafting, require more input from the lawyers. And there is always a grey area along the continuum that benefits most from good communication and trust between the lawyers and underwriters. Keep in mind that the project team at MIGA includes also economists and colleagues who handle the environmental, social, integrity, communications and financial angles of a deal. Given the many disciplines that are involved, working effectively as a team is critical.

GM: One more: what are the main differences between your policies and other PRI policies?

AB: The main difference is what we bring to our clients because we are part of the World Bank Group. If a problem arises in a project, we can act quickly and effectively to engage with the government and with the investor to try to address it. This is a strength that the private sector doesn't have.

GM: Can you tell us a little bit about the upcoming conference?

AB: MIGA's Legal Department is for the first time participating in World Bank Group's Law, Justice, and Development Week, which is November 14, 15, and 16. MIGA is sponsoring a headline event on November 14 at 3:45 p.m. in the Preston Auditorium, where we will be gathering representatives from the public and the private sectors to talk about global risk management in today's changing landscape. Our keynote speaker is a prominent economist who also was a member of the first government in the Czech Republic. We have invited a professor from Wharton who specializes in political risk management; a banker and managing director from Standard Chartered, who is coming from Dubai, because part of the focus is on the Middle East and the North Africa region and the changes in the region; an international project finance partner from a leading international law firm who is based in London; and a general counsel from a global investment firm. It will be a very diverse and dynamic panel, and our goal is to get a lot of audience engagement, so I hope to see you there with lots of questions. I'll be calling on you! [laughter]. The Law, Justice, and Development Week also includes other interesting sessions, including one on political risk insurance. We're excited about these opportunities to learn, share our knowledge and showcase MIGA's legal team.

GM: Thank you, Ana-Mita.

AB: Thank you very much. ■

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This Political Risk Insurance Newsletter is a publication of robert wray PLLC, a law firm that specializes in the areas of political risk insurance, international development and microfinance, aircraft finance and international arbitration. The Newsletter is a forum for topics of interest to political risk insurers, buyers, brokers, attorneys and others, and for discussion of related topics such as arbitration of investment disputes and political risk insurance claims. The Newsletter should not be construed as legal advice or relied upon as a substitute for legal advice.

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