

## International Law-Making



### Charter of Economic Rights and Duties of States<sup>1</sup>

#### Background

The idea of establishing the *Charter of Economic Rights and Duties of States* came from the President of Mexico, Luis Echeverria Alvarez on 1972. Alvarez used the *United Nations Conference on Trade and Development* (UNCTAD) forum to design the Charter. His idea gained a lot of support from developing countries. In the period of 1960-1969, the condition of global economy, especially those of developing countries did not make any progress. The economy was decreasing instead. The horrible condition of global economy did not change although a lot of efforts have been done by the United Nations. Alvarez said that international economic activity should be managed by a firm legal footing. This thinking brought the forum to the establishment of the *Charter of Economic Rights and Duties of States*.

In his speech at the 29<sup>th</sup> plenary meeting of UNCTAD on April 19, 1972, President Alvarez brought up the principles that should be inserted into the Charter. Those principles are the freedom to dispose of natural resources; the right of every nation to adopt the economic structure it considered most suitable and to treat private property as the public interest required; renunciation of the use of economic pressure; subjection of foreign capital to domestic laws; prohibition of interference by supranational corporations in the internal affair of State; abolition of trade practices that discriminated against the exports of non-industrial nations;

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<sup>1</sup> GA Res. 3281(xxix), UN GAOR, 29th Sess., Supp. No. 31 (1974) 50.

economic advantages proportionate to level of development; treaties guaranteeing stable and fair prices for basic products; transfer of technology; and greater economic resources for long term untied aid.

Based on the initiative of G-77, in its Resolution No. 45 (III) on May 18, 1972, UNCTAD stated the need of general (law) norms which accepted by International community to regulate economic relations systematically. The resolution also realized that it is not feasible to establish a joint order and a stable order as long as a charter to protect the rights of all countries, and in particular the developing states, is not formulated.<sup>2</sup>

The oil crisis in 1973 alerted the world as to the degree of economic warfare in which the international community might be involved. It demonstrated the level of economic co-operation which members of the international community were required to develop in an increasingly interdependent world. The year 1974 may be regarded as the year of consolidation of norms of inter-national economic relations. The UN General Assembly adopted two very important resolutions in that year:<sup>3</sup>

1. the Declaration on the Establishment of a New International Economic Order; and
2. the Program of Action on the Establishment of a New International Economic Order.

The resolutions established a working group, which consist of 31 State's representatives, to design a Charter about rights and duties of States which will be ratified by UNCTAD as soon as possible. This working group, was increased into 40 member States by UNGA through its Res. No.3037 (XXVII) December 19, 1972.

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<sup>2</sup> Huala Adolf, *Hukum Ekonomi Internasional Suatu Pengantar*, Jakarta: PT RajaGrafindo Persada, 2005, hlm.189-193.

<sup>3</sup> S.K. Chatterjee, "The Charter of Economic Rights and Duties of States: An Evaluation after 15 years," 40 *ICQL* 669-670 (1991). <<http://www.jstor.org/stable/759807>>.

In one of the working group's meeting, the Mexican Ambassador, Castaneda stated that the charter should be binding to member States. Because of that, Castaneda further stated every country should accept or at least tolerated the provisions of the charter if we want this charter to be effective. In the process, States were not able to decide what kind of instrument should be made about this regulation of rights and duties of States regarding economic activities. The developing countries thought that charter should be binding, not only declaration of States because in history, such declaration was proven would not working well. On the other hand, the Developed countries did not agree with it. According to them, the appropriate instrument was a declaration made by United Nations (UN) General Assembly. This kind of instrument has already been done in the past *inter alia* the *Universal Declaration of Human Rights* or the *Declaration on Principles of International Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations*. In their opinion, declaration was the most appropriate instrument to accommodate ideas widely and for a long term. If the instrument made has a binding character, the range covered by the instrument would be narrow because it would be limited for country to ratify it. Otherwise, it was worried that only a small amount of Country would ratify.<sup>4</sup>

France stated that to establish such binding instrument would take a long time. In the end the instrument would be left behind by the time it was established, with the present economic situation. The Netherlands and Denmark stated that the choice of form of the instrument should be taken by member States and not by the working group. In countering such opinion, India, Pakistan, Philippine, Yugoslavia, Indonesia, Hungary, Belgium, Canada, Denmark, and Netherlands stated that the character and binding power of an international law instrument shall be determined by its content and the problem of type or name of the instrument should

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<sup>4</sup> Op.Cit. hlm 195.

be put aside first. After many meetings, the working group agreed to 26 articles from 34 proposed. Afterwards, the council of trade and development of UNCTAD studied this report of the working group. On November 1974, Mexico officially introduced a design of charter. The previous designs were never reach any agreement among the member states. This new one was mostly based on the texts from the least developed countries.<sup>5</sup>

In the end, it was agreed that the resolution shall be in Charter form, although there are some States who against it. The charter was adopted by a vote of 120 in favor to 6 against, with 10 abstentions. The States which voted against it and which abstained were:

1. *Abstaining:* Austria, Canada, France, Ireland, Israel, Italy, Japan, the Netherlands, Norway and Spain.
2. *Voting against:* Belgium, Denmark, German Federal Republic, Luxembourg, United Kingdom and United States.

Except for Australia, none of the developed States cast a vote in favor of the Charter. There is no need to consider in this context the difference, legal or otherwise, between “abstention” and “negative voting”. The net result was that the vast majority of the traditional investor countries did not support the Charter. The Charter of Economic Rights and Duties of States may be described as an integral part of the resolutions entitled the New International Economic Order (“NIEO”) and the Program of Action.<sup>6</sup>

### **Concept**

The characteristic of the Charter is unique because the provisions of the Charter specifically governed economic matters. The objective of the Charter was to create a new system of international economic relations based on equity, sovereign equality and interdependence of the interests of developed and developing countries. It was intended by the member States, who was agree

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<sup>5</sup> Ibid, hlm. 196.

<sup>6</sup> Loc.cit. <<http://www.jstor.org/stable/759807>>.

with the establishment of the Charter, to make the charter a document second most important after the UN Charter. This Charter consists of 34 articles which divided into 5 groups: 1.) Preamble; 2.) Fundamental of International Economic Relations (Chapter I); 3.) Economic Rights and Duties of States (Chapter II); 4.) Common Responsibilities Towards the International Community (Chapter III); 5.) Final Provisions (Chapter IV).

### **Fundamentals of the Charter**

Economic as well as political and other relations among States shall be governed, *inter alia*, by the following principles: a) Sovereignty, territorial integrity and political independence of States; b) Sovereignty equality of all States; c) Non-aggression; d) Non-intervention; e) Mutual and equitable benefit; f) Peaceful coexistence; g) Equal rights and self-determination of peoples; h) Peaceful settlement of disputes; i) Remedying of injustices which have been brought about by force and which deprive a nation of the natural means necessary for its normal development; j) Fulfillment in good faith of international obligations; k) Respect for human rights and international obligations; l) No attempt to seek hegemony and spheres of influence; m) Promotion of international social justice; n) International co-operation for development; o) Free access to and from the sea by land-locked countries within the framework of the above principles.

### **Main Features**

The main features of the Charter of Economic Rights and Duties of States (hereinafter “the Charter”) consists of the economic rights and duties, and common responsibilities towards the international community. Chapter II of the Charter which stipulated economic rights and duties of States consists of 28 articles about matters as follow:

- 1) Sovereignty and foreign investment (Article 1, 2, 7 and 16) also shared resources which jointly governed (Article 3);
- 2) International trade regulations (Article 4-6, 14, 18, 20, 21, 22, 26, 27 and 28);

- 3) Preferential treatment towards least developed countries (Article 18, 19, 21, 25 and 26);
- 4) International Organization (Article 10 and 11);
- 5) Regional Economic Organization (Article 12, 23, and 24);
- 6) Transfer of technology (Article 13);
- 7) General obligations to increase the development and economy cooperation (Article 7-9, 11 and 17);
- 8) Disarmament (Article 15); and
- 9) Decolonization (Article 16)<sup>7</sup>

*1) Sovereignty and foreign investment and shared resources which jointly governed*

The Charter in its first article point out the right of State to choose its economic system as well as its political, social and cultural systems in accordance with the will of its people, without interference from the outside, coercion or threat in any form whatsoever. First protest came over the 2<sup>nd</sup> article of the charter. Article 2 Paragraph 1 of the charter stipulated, “Every State has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activities.” It was the word “full” here which obtained protests. Some scholar<sup>8</sup> believed that a State sovereignty could be waived although only for a short period of time. It was because not all States in the world has resources to fill their needs. Other States who have important resources, have to think about the wealth of other countries too. That is why in some case, the sovereignty of a State over its natural resources could be waived.<sup>9</sup> Paragraph 2 of article 2 would rotten the willfulness of Developed countries to give its agreement to the Charter. There are some provisions which gave States the right to nationalize, expropriate or

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<sup>7</sup> Op.cit. hlm, 203.

<sup>8</sup> Ibid, hlm. 204.

<sup>9</sup> Ibid, hlm. 205.

transfer ownership of foreign property unilaterally for the sake of the State. Although it was for the sake of the receiving State, the Developed States worried that it shall become a legal standing for the receiving State to nationalize their property whenever they wanted. This article shall obstruct investment flow, instead of smoothen it.

The self determination right of State over its natural resources was strengthened in article 7 of the Charter which stipulated every State has primary responsibility to promote the economic, social and cultural development of its people. State has the right to choose its means and goals of development and to ensure the participation of its people in the process and benefit of the development. Furthermore, in article 16 the Charter despised colonialism, apartheid and racial discrimination by obliging States to eliminate them. State which practice such coercive policies are economically responsible to the countries, territories and people affected for the restitution and full compensation for the exploitation and depletion of and damages to the natural and all other resources to those countries, territories and peoples. It is the duty of all States to extend assistance to them. Paragraph 2 of the same article also stated that no State has the right to promote or encourage investments that may constitute an obstacle to the liberation of a territory occupied by force. Article 3 stipulated in the exploitation of natural resources shared by two or more countries, each State must co-operate on the basis of a system of information and prior consultations in order to achieve optimum use of such resources without causing damage to the legitimate interest of others.

## *2) International Trade Regulations*

Provisions about international trade regulations are quite dominating the Charter. There are 1/3 or 11 articles from the Charter which governed this important issue. The big number of

articles emphasizing international trade regulations in the Charter showed the domination of interests from Developing countries.<sup>10</sup>

Article 4 stated that every State has the right to engage in international trade and other forms of economic co-operation irrespective of any differences in political, economic and social systems and no States shall be subjected to discrimination of any kind solely on differences. Also, in article 5, all States have the right to associate in organizations in order to develop their national economies. Article 6 of the Charter also stated that it is the duty of States to contribute to the development of international trade of goods and taking into account the interest of producers and consumers. All States share the responsibility to promote the regular flow and access of all commercial goods traded at stable.

Furthermore, article 14 also stated the duty of State to cooperate in promoting a steady and increasing, expansion and liberalization of world trade and an improvement in the welfare and living standards of all peoples, in particular those of *developing countries*. Article 18 of the Charter showed the preferential treatment which should be done to *Developing countries* by Developed countries such as the adoption of differential measures in order to meet the trade and development needs of the *developing countries*. Article 20 also obliged the member States to give due attention to the possibility of expanding their trade with socialist countries, in order to increase overall trade, by granting these countries conditions for trade not inferior to those granted normally to the developed market economy countries.

The domination of developing countries' interests in the Charter continued in article 21 which stipulated the need to promote the expansion of their mutual trade and to this end may grant trade preferences to other *developing countries* without being obliged to extend such preferences to *developed countries*, provided these arrangement do not constitute an impediment to general trade liberalization and expansion. Article 22 of the Charter stipulated the

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<sup>10</sup> Ibid, hlm. 212.



obligation of member States to assist the flow of resources development, in which such assistance should include economic and technical assistance. Article 26 talked about the duty of States to coexist in tolerance and live together in peace. International trade should be conducted without prejudice to generalized non-discriminatory and non-reciprocal preferences in favour of developing countries, on the basis of mutual advantage, equitable benefits and the exchange of most-favoured-nation treatment.

Article 27 stated that every States has the right to enjoy fully the benefits of world invisible trade and to engage in the expansion of such trade. Also, article 28 of the Charter stipulated all States have the duty to co-operate in achieving adjustments in the prices of exports of *developing countries* in relation to prices of their imports so as to promote just and equitable terms of trade for them, in a manner which is remunerative for producers and equitable for producers and consumers.

### *3) Preferential treatment towards developing and least developed countries*

The preferential treatment towards the developing and least developed countries and how their interests dominated the Charter, could be seen in some articles. For example, article 18 stated the developed countries should extend improve and enlarge the system of generalized non-reciprocal and non-discriminatory tariff preferences to the *developing countries* consistent with the relevant agreed conclusions and relevant decision as adopted on this subject, in the framework of the competent international organizations. Article 19 stipulated Developed countries should grant generalized preferential, non-reciprocal and non discriminatory treatment to developing countries in those fields if the international economic co-operation where it may be feasible.

The Charter also encouraged the expansion of mutual trade. Article 21 stipulated Developing countries should endeavour to promote the expansion of their mutual trade and to this end may, in

accordance with the existing and evolving provisions and procedures of international agreements where applicable, grant trade preferences to other developing countries without being obliged to extend such preferences to developed countries, provided these arrangements do not constitute an impediment to general trade liberalization and expansion.

The special treatment towards *Developing countries* continued in article 25 and 26. Article 25 point out the obligation of international community, especially developed countries, to pay attention to the particular needs and problems of the least developed among the developing countries, of land-locked developing countries and also island developing countries, with a view to helping them to overcome their particular difficulties and thus contribute to their economic and social development. While article 26 stressed out the duty of all States to coexist in tolerance and live together in peace, irrespective of the differences in political, economic, social and cultural systems. International trade should be conducted without prejudice to generalized non-discriminatory and non-reciprocal preferences in favour of developing countries, on the basis of mutual advantage, equitable benefits and the exchange of most-favoured-nation treatment.

#### *4) International Organization*

Article 10 of the Charter stressed out the equality of all States who has the right to participate fully and effectively in the international decision-making process, inter alia through the appropriate international organizations in accordance with their existing and evolving rules, and to share in the benefits resulting there from. Article 11 stipulated the need to cooperate to strengthen and continuously improve the efficiency of international organizations in implementing measures to stimulate the general economic progress of all countries, particularly *developing countries*, and therefore should cooperate to adapt them, when

appropriate, to the changing needs of international economic cooperation.

*5) Regional Economy Organization*

Article 12 of the Charter stipulated the right of States to participate in any kind of regional cooperation in the pursuit of their economic and social development. All States engaged in such cooperation have the duty to ensure that the policies of those groupings to which they belong correspond to the provisions of the present Charter. As an organization, States, especially developed countries, should provide appropriate and effective support and cooperation in order to help the Developing countries to accelerate their economic and social development, as stated in article 23. Article 24 also added that all States have the duty to conduct their mutual economic relations in a manner which takes into account the interest of other countries. In particular, all States should avoid prejudicing the interests of developing countries.

*6) Transfer of Technology*

It is a right of every State to access the advances and development in science and technology for the acceleration of its economic and social development. It was as stated in article 13 of the Charter. Moreover, all States should facilitate the access of developing countries to the achievements of modern science and technology, the transfer of technology and the creation of indigenous technology for the benefit of the developing countries in forms and in accordance with procedures which are suited to their economies and their needs.

*7) General Obligations to Increase the Development and Economy Cooperation*

Article 7 of the Charter emphasized that every State has primary responsibility to promote the economic, social and cultural development of its people. Each State has the right and the

responsibility to choose its means and goals of development to implement progressive economic and social reforms and to ensure the full participation of its people in the process and benefits of development. All States have the duty, individually and collectively, to cooperate in eliminating obstacles that hinder such mobilization and use.

Article 8 stipulated the obligation of States to cooperate in facilitating more rational and equitable international economic relations and in encouraging structural changes in the context of a balance world economy in harmony with the needs and interests of all countries, especially developing countries and should take appropriate measures to this end.

In article 9, it was stated all States have the responsibility to cooperate in the economic, social, cultural, scientific, and technological fields for the promotion of economic and social progress throughout the world, especially that of the developing countries.

Article 11 spoke about improving the efficiency of international organization in implementing measures to stimulate the general economic progress of all countries, particularly of developing countries, and therefore should cooperate to adapt them.

Article 17 stipulated international cooperation for development in the shared goal and common duty of all States. That every States should cooperate with the strict respect for the sovereign equality of States and free of any conditions derogating from their sovereignty.

#### 8) *Disarmament*

Article 15 of the Charter stipulated the duty of all States to promote the achievement of general and complete disarmament under effective international control and to utilize the resources of

released by effective disarmament measures for the economic and social development of countries, allocating a substantial portion of such resources as additional means for the development needs of developing countries.

#### *9) Decolonization*

Article 16 of the Charter stated about the right and duty of all States to eliminate colonialism, apartheid, racial discrimination, neo-colonialism and all forms of foreign aggression, occupation and domination, and the economic and social consequences thereof. No State has the right to promote or encourage investments that may constitute an obstacle to the liberation of a territory occupied by force.

Chapter III elaborated the common responsibilities towards the international community. First of all was the principle of common heritage of mankind. As stipulated in article 29, the seabed and ocean floor and the subsoil thereof which went beyond the limits of national jurisdiction, are common heritage of mankind. On the basis of the principles adopted by the General Assembly in resolution 2749 (XXV) of 17 December 1970, all States shall ensure that the exploration and exploitation of its resources are carried out exclusively for peaceful purposes and that the benefits derived therefore are shared equitably by all States, taking into account the particular interest and needs of developing countries. Article 30 also stipulated the protection, preservation and enhancement of the environment for the present and future generations is the responsibility of all States. All States have the responsibility to ensure that the activities within their jurisdiction or control do not cause damage to the environment of other States or of the areas beyond the limits of national jurisdiction. All States should cooperate in evolving international norms and regulations in the field of the environment.

#### **Entry Into Force**

Like other UN General Assembly Resolutions, this Charter did not be ratified. The entry into force of the Charter was the day when this Charter was agreed by the General Assembly. The binding power of the Charter was the same as soft law since no States ratify it. Since the provisions of the Charter sided in developing countries too much, many developed countries, especially those who gave abstain or against this Charter on its establishment meeting, acted as if the Charter has no binding power at all and as if the Charter was not even exists anymore in the present time. Although in realty, General Assembly never dissolve the Charter and in many of its meetings, General Assembly often use this Charter as a reference.<sup>11</sup> **(Ni Putu Anggraeni)**.

## Convention Establishing the Multilateral Investment Guarantee Agency<sup>12</sup>

### **Background**

Convention Establishing the Multilateral Investment Guarantee Agency (herein after “MIGA Convention”) as a result of International Bank for Reconstruction and Development’s Annual Meeting (herein after IBRD) was signed on 1985 in Seoul, South Korea. Indonesia is also a party to this convention. The Government of Indonesia signed the convention through its delegation in Washington D.C. on June 27<sup>th</sup>, 1986. The convention was ratified with the President’s Decision Number 31 Year 1986 (Keppres

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<sup>11</sup> Ibid, hlm. 231.

<sup>12</sup> MIGA Convention was created on 1985 in Seoul, South Korea. The membership of the Convention was divided in two categories, Category One and Category Two. Member states of Category One are considered developed states, and owned the total sum of 59,473% shares of MIGA. While member states of Category Two are considered developing countries and owned the total sum of 40,527% shares of MIGA.

No.31 Tahun 1986) and published in State's Paper Number 45 Year 1986 (Lembaran Negara No.45 Tahun 1986).

As its title said, MIGA Convention acted as the Establishing Convention of Multilateral Investment Guarantee Agency. Multilateral Investment Guarantee Agency (herein after "MIGA") was aimed to encourage foreign direct investment by providing guarantees, known as *political risk insurance*, to foreign investors against loss caused by *non-commercial risks* in developing countries. MIGA, which is part of the World Bank Group, also provides technical assistance such as capacity building and advisory services to help countries attract foreign investment. In addition MIGA provides dispute mediation services to reduce future obstacles to investment. Since its creation MIGA has issued more than \$21 billion for more than 600 projects in 100 developing countries.<sup>13</sup> Forty two per cent of its activity is concentrated within areas considered to be high-risk and low-income, many of which are in Africa.

MIGA's political insurance role is provided in four areas to cover against losses to investors and lenders involved in any project originating in a MIGA member state. Currency transfer restrictions relate to the inability of an investor to convert local currency, e.g. from investment profits, into foreign exchange for transfer out of the country due to actions of the host country's government. Coverage against expropriation relates to losses of an insured investment due to a host Government's actions that reduce or eliminate ownership of, control over or rights to an insured investment, although does not cover actions taken by host government when exercising its role as a legitimate regulatory body. Insurance against war and civil disturbance protects an investor against destruction, disappearance or physical damage to tangible assets and the associated losses due to acts of war, terrorism or civil disturbance. These include revolution, coups or

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<sup>13</sup> <[http://www.miga.org/about/index\\_sv.cfm?stid=1736](http://www.miga.org/about/index_sv.cfm?stid=1736)>

insurrections. An investor may also seek damages due to losses associated with a state breaching its contract.

MIGA provides insurance for new investment projects; additional contributions to existing investment associated with the expansion, modernization or financial restructuring; and investments involving the privatization of state-owned enterprises; additionally other investments are considered on a case-by-case basis. Equity investments, shareholder loans and shareholder loan guarantees (with a minimum three year maturity) are eligible. Application for insurance must be made by the investor before a binding commitment is made to invest. MIGA claims that insurance is only provided if a project is judged to be: *economically* and *financially* viable; in line with a host country's development objectives and labor standards; and is "environmentally sound." For each project MIGA identifies applicable policies and guidelines; each project must also adhere to international and national laws. An environmental and social impact assessment is produced for projects expected to have significant environmental impacts.<sup>14</sup>

The MIGA Convention should be seen as an effort to increase international cooperation for the purpose of economic development and foreign investment especially in developing countries. Foreign investment to developing countries is expected to increase with the establishment of MIGA with its strategy of decreasing the *non commercial risks*.

### **Concept**

The concept of this Convention is to establish a body which main duty is giving insurance to foreign investment especially in developing member countries of MIGA. It is done in order to encourage foreign investors to invest their money in developing member countries so the economic development in the countries shall increase as well. With the increase of economic development

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<sup>14</sup> <<http://www.brettonwoodsproject.org/item.shtml?x=537852>>



of developing countries which dominate the world in number, it is expected to increase the wealth of people of the world globally.

### **General Principles**

There are some matters that can be considered as the general principles of MIGA Convention. Those principles are, *the status of the Agency*<sup>15</sup>, *Objective and Purposes of the Agency*, *Memberships*, and *Capital*.

MIGA shall possess full juridical personality and, in particular, the capacity to: (i) contract; (ii) acquire and dispose of movable and immovable property; and (iii) institute legal proceedings (Article 1 Par. b).

The objective of the Agency shall be to encourage the flow of investment for the productive purposes among member countries, and in particular to developing member countries, thus Reconstruction and Development (herein after The Bank), the International Finance Corporation and other international development finance institutions (Article 2).

Membership in the Agency shall be open to all members of the Bank and to Switzerland. Original members shall be the States which are listed in Schedule A hereto and become parties this Convention on before October 30, 1987 (Article 4).

The authorized capital stock of the Agency shall be one billion Special Drawing Rights (SDR 1,000,000,000). The capital stock shall be divided into 100.000 shares having a par value of SDR 10,000 each, which shall be available for subscription by members.

### **Main Features**

MIGA's main duty is to create a conducive situation, and increasing the investment flow in member countries, especially in developing countries. The thing that will be placed under MIGA's

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<sup>15</sup> Refers to MIGA.

responsibility is the risk of the investors called *non-commercial risks*. The Agency may guarantee eligible investments against a loss resulting from the *non-commercial risks*. The type of risks is elaborated in Article 11 Par. a:

- (i) *Currency Transfer*, any introduction attributable to the host government of restrictions on the transfer outside the host country of its currency into a freely usable currency or another currency acceptable to the holder of the guarantee. Including a failure of the host government to act within a reasonable period of time on an application by such holder for such transfer;
- (ii) *Expropriation and Similar Measures*, any legislative action or administrative action or omission attributable to the host government which has the effect of depriving the holder of a guarantee of his ownership or control of, or a substantial benefit from, his investment, with the exception of non-discriminatory measures of general application which governments normally take for the purpose of regulating economic activity in their territories;
- (iii) *Breach of Contract*, any repudiation of breach by the host government of a contract with the holder of a guarantee, when (a) the holder of a guarantee does not have recourse to a judicial or arbitral forum to determine the claim of repudiation or breach, or (b) a decision by such forum is not rendered within such reasonable period of time as shall be prescribed in the contracts of guarantee pursuant to the Agency's regulations, or (c) such a decision cannot be enforced; and
- (iv) *War and Civil Disturbance*, any military action or civil disturbance in any territory of the host country to which this Convention shall be applicable as provided in Article 66.

Upon the joint Application of the investor and the host country, the Board, by special majority<sup>16</sup>, may approve the extension of coverage under this Article to specific non-commercial risk other than those referred to in Section (a) above, but in no case to the risk of devaluation or depreciation of currency (Article 11 Par. b).

Moreover, losses resulting from any host government action or omission to which the holder of the guarantee has agreed or for which he has been responsible; and any host government action or omission or any other event occurring before the conclusion of the contract of guarantee; shall not be covered by the Agency (Article 11 Par. c).

The Agency shall not conclude any contract of guarantee before the host government has approved the issuance of the guarantee by the Agency against the risk designated for cover (Article 15).

To realize its operation, the Agency may enter into arrangements with private insurers in member countries to enhance its own operation and encourage such insurers to provide coverage of non-commercial risks in developing member countries on conditions similar to those applied by the Agency. Such arrangement may include the provision of reinsurance by the Agency under the conditions and procedures specified in Article 20 (Article 21 Par. a).<sup>17</sup>

Aside from ensuring the increasing process of foreign investment in developing member countries, the Agency shall also carry out research, undertake activities to promote investment flows

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<sup>16</sup> Means an affirmative vote of not less than two-thirds of the total voting power representing not less than fifty-five per cent of the subscribed shares of the capital stock of the Agency (Article 3 Par. d).

<sup>17</sup> See Article 20.

and disseminate information on investment opportunities in developing member countries, with a view to improving the environment for foreign investment flows to such countries. The Agency may, upon the request of a member, provide technical advice and assistance to improve the investment conditions in the territories of that member (Article 23 Par. a). The Agency shall also encourage the amicable settlement of disputes between investors and host countries (Article 23 Par. b).

One more important thing about MIGA is that MIGA also tries to establish agreements with developing member countries in order to ensure that MIGA, in the matter related to investment which guaranteed by MIGA, is given the same treatment as the one in which member state made an investment agreement with. MIGA is also having a Council of Governors, Board of Directors, a President and staff to perform its duties as MIGA may determine (Article 30).

The Agency, its President and staff shall not interfere in the political affairs of any member. Without prejudice to right of the Agency to take into account all the circumstances surrounding an investment, they shall not be influenced in their decisions by the political character of the member or members concerned. Considerations relevant to their decisions shall be weighed impartially in order to achieve the purpose in Article 2<sup>18</sup> (Article 34).

Each member shall take such action as in necessary in its own territories for the purpose of making effective in terms of its own law the principles set forth in this Chapter and shall inform the Agency of the detailed action which it has taken (Article 49).

In relation to the payment of claims, the President under the direction of the Board shall decide on the payment at claims to a holder of guarantee in accordance with the contract of guarantee and such policies as the Board may adopt. Contracts of guarantee

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<sup>18</sup> See Article 2.

shall require holders of guarantee to seek, before a payment is made by the Agency, such administrative remedies as may be appropriate under the circumstances provided that they are readily available to them under the laws of the host country. Such contracts may require the lapse of certain reasonable periods between the occurrence of claims giving rise to claims and payments of claims (Article 17).

To enable the Agency to fulfill its functions, the immunities and privileges set forth in this Chapter shall be accorded to the Agency in the territories of each member (Article 43).

### **Dispute Settlement**

The settlement of dispute are divided into three types, *the interpretation and application of the Convention, settlement of disputes between the Agency and Members, and the settlement of disputes involving holders of a Guarantee or Reinsurance.*

Any question of interpretation or application of the provisions of this Convention arising between any members of the Agency and the Agency or among members of the Agency shall be submitted to the Board for its decision. Any member which is particularly affected by the question and which is not otherwise represented by a national in the Board may send a representative to attend any meeting of the Board at which such question is considered (Article 56 Par. a).

Any dispute between the Agency and member or an agency thereof and any dispute between the Agency and a country (or agency thereof) which has ceased to be a member, shall be settled in accordance with the procedure set out in Annex II to this Convention (Article 57 Par. a).<sup>19</sup>

Disputes concerning claims of the Agency acting as subrogee of an investor shall be settled in accordance with either (i) the procedure set out in Annex H to this Convention, or (ii) an

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<sup>19</sup> See Annex II of the MIGA Convention.

agreement to be entered into between the Agency and the member concerned on an alternative method or methods for the settlement of such disputes. In the latter case, Annex II to this Convention shall serve as a basis for such an agreement which shall, in each case, be approved by the Board by special majority prior to the undertaking by the Agency of operations in the territories of the member concerned (Article 57 Par. b).

Any dispute arising under a contract of guarantee or reinsurance between parties thereto shall be submitted to arbitration for final determination in accordance with such rules as shall be provided for or referred to in the contract of guarantee or reinsurance (Article 58).

### **Entry into Force**

The entry into force of this convention shall be on the day when not less than five instrument of ratification, acceptance or approval shall have been deposited on behalf of signatory States in Category One<sup>20</sup>, and not less than fifteen such instrument shall have been deposited in behalf of signatory States in Category Two; provided that total subscription of these States amount to not less than one-third of the authorized capital of the Agency as prescribed in Article 5<sup>21</sup> (Article 61 Par. b).

For Countries which deposit its instrument of ratification, acceptance, or approval after this Convention shall have entered into force, this Convention shall enter into force on the date of such deposit (Article 61 Par. c).

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<sup>20</sup> Member States of Category One are Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Iceland, Ireland, Italy, Japan, Luxembourg, Netherlands, New Zealand, Norway, South Africa, Sweden, Switzerland, United Kingdom, and United States.

<sup>21</sup> Article 5 of the Convention stipulated that the authorized capital stock of the Agency (MIGA) shall be one billion Special Drawing Rights (SDR 1,000,000,000)

### **Related Regulations**

President's Decision Number 31 Year 1986 (Keppres No.31 Tahun 1986) which published in State's Paper Number 45 Year 1986 (Lembaran Negara No.45 Tahun 1986). (Ni Putu Anggraeni)

## **United Nations Convention on Contracts for the International Sale of Goods<sup>22</sup>**

### **Concept**

The considerable increase in international commerce in recent decade has spurred efforts to unify international commercial law. By the mid 1970's, annual world trade had expanded to nearly \$800 billion F.O.B. (free on board) and to more than that amount C.I.F. (cost, insurance, freight)<sup>23</sup>. The increase of interaction between buyer and seller throughout the states has raised a question for the certainty of the existing any kinds of law systems. International trade regularly crosses legal and ideological boundaries-common and civil law systems, capitalist and socialist government, and industrialized and developing countries. This convention is one of the answers for the needs in international trade. It covers not only the common understanding but also the same rights and obligations for buyer and seller.

This Convention establishes a comprehensive code of legal rules governing the formation of contracts for the international sale of goods, the obligations of the buyer and seller, remedies for breach of contract and other aspects of the contract.<sup>24</sup> Mostly, this

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<sup>22</sup> <[http://www.uncitral.org/uncitral/en/uncitral\\_texts/sale\\_goods/1980CI\\_SG.html](http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CI_SG.html)>

<sup>23</sup> Unification and Certainty : The United Nations Convention on Contract of International Sales and Goods.<<http://www.jstor.org/stable/1340938>>

Convention is more like a code. It is codifying the usage that practically use in state's practices. Usage tends to be acceptable rather than progressive law, especially when we are in the area of private international law. Since this Convention primary purpose is uniformity, then usage seems to be the best choice.

According to Article 4, this Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided in this Convention, is not concerned with the validity of the contract or of any of its provisions or of any usage and the effect which the contract may have on the property in the goods sold.

### **Background**

The traditional concept of trade did not meet the development of trade. Trade, more over international trade, had grown so fast since the development of technology. Rules regarding to international trade depend by the law systems of each states. Each state has its own contract law. Therefore, the need for unification rules in international trade needs to be made.

International community had tried to answer this question by adopted the Uniform Law of International Sale and Goods in 1964 (ULIS). This convention did not effectively applicable due to the lack of ratification. It is said that only 9 states, mostly the European that ratified it.

In 1974, General Assembly of the <sup>25</sup> United Nations establishment of a New International Economic Order that need to be implemented. One of its primary focuses was the unification of international trade rules. The adoption of uniform rules which govern contracts for the international sale of goods and take into

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<sup>24</sup> <<http://www.un-documents.net/s6r3201.htm>>

<sup>25</sup> Resolution No. 3201 (S-VI) adopted on 1 May 1974



account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade.

### **General Principle**

The main principle of this Convention is the freedom for the parties to conclude a contract. Although it requires the parties to establish the widely known usage, but this freedom still appear since they can choose which usage that they want to use. Private international law is hard to be unified. Therefore, what this Convention done is mostly to codify the well-known usage that had been practically accept among states. Any subject matter that does not regulated in this Convention, they are subject for the parties' freedom.

### **Main Features**

This Convention consists of 101 articles. The features are:

#### **Application of the Convention**

This Convention applies only for trade with international character (article 7). In article 2 of the Convention, it is stated that the application of this Convention covers: goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use; goods bought by auction; goods under execution or otherwise by authority of law; stocks, shares, investment securities, negotiable instruments or money; ships, vessels, hovercraft or aircraft; electricity.

This Convention does not apply to the liability of the seller for death or personal injury caused by the goods to any person (article 5). The Convention also adopts the usage that had been established before the Convention. It bounds the parties with the usage; either from their agreement or by state's practices (article 9). Regarding to place of business, the one that has the closest relationship with the contract and its performance is the place of

business. In case the parties cannot found the place of business, they can use the party's habitual residence (article 10).

### **Formation of the Contract**

The contract should constitute an offer if it is sufficiently definite and indicates the intention of the offer or to be bound in case of acceptance. A proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price (article 14). It requires that an offer considered to be accepted when it reaches offeree (article 15-22). Furthermore, a contract is consider to be concluded in the moment when an acceptance of an offer becomes effective (article 23).

### **Sale of Goods**

The Convention also covers about breach of contract. Breach of contract committed by one of the parties may result in such detriment to the other party as substantially to deprive him (article 25). A party of the contract can also made a declaration of avoidance. To do this declaration, they need to make the notice to another party (article 26). The Convention also covers the modification or termination of the contract by the parties. Those actions need to be governing in a mere agreement (article 29).

### **Obligations of the seller**

- a. Delivery of the goods and handing over of documents; (article 30-32)

This Convention stated that there are three parties which involve in delivering goods. Mostly, the seller took the obligation to deliver his goods. However, there is also the possibility to have another party as the delivery. Due to the distance, mostly seller would have the carrier to deliver his goods. This Convention also regulate about the possibility of others party aside from those two, that can deliver the seller's goods.

- b. Conformity of the goods and third party claims;

1. Article 33 requires that the seller must deliver goods which are of the quantity, quality and description suitable with the contract and which are contained or packaged in the manner required by the contract.
  2. Regarding to the conformity, article 38 provides that the seller is liable in accordance with the contract for any lack of conformity which exists at the time when the risk passes to the buyer, even though the lack of conformity becomes apparent only after that time. However, the seller is not entitled to rely on the provisions of articles 38 and 39 if the lack of conformity relates to facts of which he knew or could not have been unaware and which he did not disclose to the buyer (article 40).
  3. The seller also oblige to deliver goods which are free from any right or claim of a third party, except when the buyer agreed to take the goods subject to that right or claim (article 42).
- c. Remedies for breach of contract by the seller;  
If the seller fails to perform any of his obligations under the contract or this Convention, the buyer may:
- i. Exercise the rights. The buyer may require performance by the seller or asks for substitute goods or ask for repair if the buyer found that the goods have covert damages (article 46). Avoiding the contract can also be done by the buyer if the seller fails to perform his obligations (article 49). The buyer can also refuse to take delivery in case the seller delivers the goods before the date fixed (article 52).
  - ii. Claim damages  
The buyer is not deprived of any right he may have to claim damages by exercising his right to other remedies (article 53). There is also no period of grace may be granted to the seller by a court or arbitral tribunal when the buyer resorts to a remedy for breach of contract (article 52).

**Obligations of the buyer**

d. Payment of the price;

The buyer is obliged to pay the price for the goods that he and the seller concluded and takes delivery of them as required by the contract and this Convention (article 53). This obligation to pay the price also includes taking such steps and complying with such formalities as may be required under the contract or any laws and regulations to enable payment to be made.(article 54)

The buyer must pay the price on the date fixed by or determinable from the contract and this Convention without the need for any request or compliance with any formality on the part of the seller.(article 59). Remedies for breach of contract by the buyer; if the buyer fails to perform any of his obligation under the contract or this Convention, the seller may (article 61):

- i. exercise the rights,
- ii. claim damages

e. Passing of Risk

Loss of or damage to the goods after the risk has passed to the buyer does not discharge him from his obligation to pay the price, unless the loss or damage is due to an act or omission of the seller;(article 66). The risk in respect of goods sold in transit passes to the buyer from the time of the conclusion of the contract; (article 68)

**Common obligations of the seller and the buyer**

f. Anticipatory breach and installments contracts;

- a. A party may suspend the performance of his obligations if, after the conclusion of the contract, it becomes apparent that the other party will not perform a substantial part of his obligations as a result of (article 71):

- i. A serious deficiency in his ability to perform.
- ii. His conduct in order to perform

- b. If prior to the date for performance of the contract it is clear that one of the parties will commit a fundamental breach of contract, the other party may declare the contract avoided.(article 72). In the case of a contract for delivery of goods by installment, if the failure of one party any of his obligations in respect of any installment constitutes a fundamental breach of contract with respect to that installment, the other party may declare the contract avoided in respect to that installment.
- g. Damages;
  - a. Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. (article 74)
  - b. If the contract is avoided and if, in a reasonable manner and within a reasonable time after avoidance, the buyer has bought goods in replacement or the seller has resold the goods, the party claiming damages may recover the difference between the contract price and the price in the substitute transaction as well as any further damages (article 75). A party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach (article 77).
- h. Interest;

If a party fails to pay the price or any other sum that is in arrears, the other party is entitled to interest on it, without prejudice to any claim for damages (article 78).
- i. Exemptions; (article 78-80)

A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.

The party who fails to perform must give notice to the other party of the impediment and its effect on his ability to perform. If the party's failure is due to the failure by a third person whom he has engaged to perform the whole or a part of the contract, that party is exempt from liability only if :

- i. he is exempt under the preceding paragraph; and
- ii. the person whom he has so engaged would be so exempt if the provisions of that paragraph were applied to him.
- iii. The exemption provided by this article has effect for the period during which the impediment exists.

A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.

j. Effects of avoidance; (article 81-84)

A party who has performed the contract either wholly or in part may claim restitution from the other party of whatever the first party has supplied or paid under the contract. If both parties are bound to make restitution, they must do so concurrently. Avoidance of the contract releases both parties from their obligations under it, subject to any damages which may be due. Avoidance does not affect any provision of the contract for the settlement of disputes or any other provision of the contract governing the rights and obligations of the parties consequent upon the avoidance of the contract.

k. preservation of the goods

A party who is bound to preserve the goods may sell them by any appropriate means if there has been an unreasonable delay by the other party in taking possession of the goods or in taking them back or in paying the price or the cost of preservation, provided that reasonable notice of

the intention to sell has been given to the other party (article 85). A party who is bound to take steps to preserve the goods may deposit them in a warehouse of a third person at the expense of the other party provided that the expense incurred is not unreasonable. (article 87).

If the buyer is in delay in taking delivery of the goods or, where payment of the price and delivery of the goods are to be made concurrently, if he fails to pay the price, and the seller is either in possession of the goods or otherwise able to control their disposition, the seller must take such steps as are reasonable in the circumstances to preserve them. He is entitled to retain them until he has been reimbursed his reasonable expenses by the buyer (article 88).

1. Final Provisions (article 89-101)

This Convention does not open for reservation, except if the Convention allows it. Moreover, This Convention does not prevail over any international agreement that might have already been or may be entered into and which contains provisions concerning the matters governed by this Convention, provided that the parties have their places of business in States parties to such agreement.

### **Dispute Settlement**

No special tribunals were created for the CISG; it is applied and interpreted by the national courts and arbitration panels that have jurisdiction in disputes over transactions governed by the Convention<sup>26</sup>. To achieve its fundamental purpose of providing uniform rules for international sales, the Convention itself requires that it be interpreted with a view to maintaining its international character and uniformity. Thus, this Convention provided us with CISG Advisory Council regarding any disputes of the application of the Convention. However, CISG Advisory Council still cannot give a binding decision since it is not a tribunal.

### **Entry into Force**

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<sup>26</sup> *Loc. Cit.* Note 8.

Based on article 99, this Convention entry into force on the first day of the month following the expiration of twelve months after the date of deposit of the tenth instrument of ratification, acceptance, approval or accession, including an instrument which contains a declaration. This Convention entry into force on 1 January 1988 in its eleven initial Contracting States<sup>27</sup>. Statistically, there are 77 countries that signed this Convention. The last one is Albania on 13 May 2009.<sup>28</sup>

### **Related Regulation**

For the application for this Convention, a Protocol amending the Convention on the Limitation Period in the International Sale of Goods was adopted on 11 April 1980<sup>29</sup>. This Convention need to be amended for the conformity with Convention on International Sale of Goods, articles had been adopted. It is also adopted an advisory council named CISG Advisory Council in 1987<sup>30</sup>. It is a body which helps the party of this convention regarding to any disputes that may arise. Until 2008, there are about 70 cases that had been solved.<sup>31</sup> **(Jenny Maria Doan)**

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<sup>27</sup> <<http://untreaty.un.org/cod/avl/ha/ccisg/ccisg.html>>

<sup>28</sup> <[http://www.uncitral.org/uncitral/en/uncitral\\_texts/sale\\_goods/1980CISG\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html)>

<sup>29</sup> <<http://www.uncitral.org/pdf/english/yearbooks/yb-1980-e/vol11p149-150-e.pdf>>

<sup>30</sup> <[http://www.boalt.org/bjil/docs/BJIL27.2\\_Karton.pdf](http://www.boalt.org/bjil/docs/BJIL27.2_Karton.pdf)>

<sup>31</sup> <<http://www.cisg.law.pace.edu>>



## **Convention on the Organization for Economic Co-operation and Development<sup>32</sup>**

### **Concept**

The Organization for European Economic Co-operation; (OEEC) came into being on 16 April 1948<sup>33</sup>. It emerged from the Marshall Plan and the Conference of Sixteen (Conference for European Economic Co-operation), which sought to establish a permanent organization to continue work on a joint recovery program and in particular to supervise the distribution of aid. OECD encourages its member governments to compare policy experiences, seek answers to common problems, identify good practices, and co-ordinate domestic and international policies<sup>34</sup>. The mandate of the OECD is broad, covering economic, environmental, and social issues. It is a forum where peer pressure can act as a powerful incentive to improve policy and implement "soft law" — non-binding instruments that can occasionally lead to binding treaties.

Exchanges between OECD governments flow from information and analysis provided by a secretariat in Paris. The secretariat collects data, monitors trends, and analyses and forecasts economic developments. It also researches social changes or evolving patterns in trade, environment, education, agriculture, technology, taxation and other areas. The OECD is also known as a premium statistical agency, as it publishes highly-comparable statistics on a very wide number of subjects.

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<sup>32</sup> <[http://www.oecd.org/document/58/0,3343,en\\_2649\\_201185\\_188940\\_2\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/58/0,3343,en_2649_201185_188940_2_1_1_1_1,00.html)>

<sup>33</sup> <[http://www.oecd.org/document/48/0,2340,en\\_2649\\_201185\\_187691\\_2\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/48/0,2340,en_2649_201185_187691_2_1_1_1_1,00.html)>

<sup>34</sup> *Ibid.*

The aims of the Organization for Economic Co-operation and Development according to article 1, are: (1)to achieve the highest sustainable economic growth and employment and a rising standard of living in Member countries, while maintaining financial stability, and thus to contribute to the development of the world economy; (2)to contribute to sound economic expansion in Member as well as non-member countries in the process of economic development; and (3)to contribute to the expansion of world trade on a multilateral, non-discriminatory basis in accordance with international obligations.

In the pursuit of those aims, this Convention stated in article 2, that the Members agree that they will, both individually and jointly: (1)promote the efficient use of their economic resources; (2)in the scientific and technological field, promote the development of their resources, encourage research and promote vocational training; (3)pursue policies designed to achieve economic growth and internal and external financial stability and to avoid developments which might endanger their economies or those of other countries; (3)pursue their efforts to reduce or abolish obstacles to the exchange of goods and services and current payments and maintain and extend the liberalization of capital movements; and (4)contribute to the economic development of both Member and non-member countries in the process of economic development by appropriate means and, in particular, by the flow of capital to those countries, having regard to the importance to their economies of receiving technical assistance and of securing expanding export markets.

### **Background**

Back to 1945s, productivity issues had been a long concern for most develop countries. The mystique of growth started after World War II, and owed its existence in Europe mainly to the American aid Marshall Plan<sup>35</sup>. The OEEC – the predecessor of the OECD – and the European Productivity Agency (EPA) devoted

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<sup>35</sup> <[http://www.csiic.ca/PDF/Godin\\_21.pdf](http://www.csiic.ca/PDF/Godin_21.pdf)>

considerable efforts to convincing member countries to improve their productivity in the 1950s.

The economic strength and prosperity of every state are essential for the attainment of the purposes of the United Nations. Therefore, the preservation of individual liberty and the increase of general well-being must be made.

Since the World War II, the economic recovery in Europe had developed European Economic Co-operation that made a major contribution. It was also have opened new perspective for strengthening the tradition of cooperation in international economic.

The increase of international trade also effects the cooperation between states. Realizing the sovereignty of state, the needs for cooperation become higher. No state is able to fulfill its own needs without any interaction with others. It is a need to have an organization to covers any disputes relating to international economic that may arise between states. Since each state has its own law systems, this kind of organization should be use to maintain their needs.

Cooperation should also contribute the development of the economic itself. Economic development is undeniable. It grows along mostly with technology. This kind of development needs to be covered. Economic development will be useless if it *vis a vis* with sovereignty of a state. Not every state recognizes the same economic development like the international community does. Once again, the need for organization to maintain the cooperation and development of economic is a must.

### **General Principles**

a. Non-discriminatory

This principle means that OECD gives the same treatment for its members. For example, the Convention stated that each

member only have one vote (article 6). In the same article, also stipulated agreement from all members to make a decision binds.

b. Efficient use of economic resources

Efficiency is needed to maintain the productivity. In its preamble, this effectiveness is needed to promote the highest sustainable growth of their economies and improve the economic and social well-being of the members.

c. Liberalization on international trade

Article 2 of the Convention stated that OECD, along with its members, needs to reduce any kind of obstacles to the exchange of goods and services. Liberalization is need, especially in economy. For its purpose, OECD needs this liberalization for marketing the products.

d. Access to information

Since OECD also focuses its activity in research, access to information is requires for this. Article 3 of the Convention requires each member to keep each other inform. The development and research that made for the purpose of OECD should be share with all members.

**Main Features**

This Convention consists of 21 articles and 2 supplementary protocols<sup>36</sup>. The description are as follow:

- a. The contracting parties to this Convention shall be Members of the organization. The first members of this organization were the states of its establishments. There are 20 states which became the first member. (article 4)
- b. Article 2 stipulated the obligations of the member. They are: to promote the efficient use of their economic resources, promoting the development in the scientific and technology, pursue policies designed to achieve economic growth and

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<sup>36</sup> *Loc. cit.*

internal and external financial stability, avoid developments which might endanger their economies or those other countries, reduce or abolish obstacles to the exchange of goods and services and current payments and maintain and extend the liberalization of capital movements, contribute to the economic development of both member and non-member states in the process of economic development by appropriate means.

- c. Moreover, there are others obligations for the member, such as keeping each other informed and furnish the Organization with the necessary information, consulting together on a continuing basis, cooperate closely and where appropriate take coordinated action.
- d. The Convention had decided the headquarters of the Organization. In article 18, it is stated that the headquarters shall be in Paris, unless the Council agrees otherwise.
- e. In order to achieve its goals, the Organization has the authority to (article 5):
  - a. Take decisions, except as otherwise provided, shall be binding on all the members.
  - b. Make recommendations to members
  - c. Enter into agreements with members, non-members states and international organizations.
  - d. Decision making, each member shall have only one vote. No decision shall be binding on any member until it has complied with the requirements of its own constitutional procedures. The other members may agree that such a decision shall apply provisionally to them.
- f. This Organization consists of The Council, a Chairman, two Vice-Chairmen, a Secretary-General, and others subsidiary bodies which the Council may establish (article 8-12).
  - a. A Council composed of all the members. The Council may meet in sessions of Ministers or of Permanent Representatives. The Council may establish an Executive Committee and such

- subsidiary bodies as may required for the achievement of the aims of the Organization.
- b. A Chairman and two Vice-Chairmen that shall designate each year at the ministerial sessions.
  - c. A Secretary-General that responsible to the Council and appointed by the Council for the term five years.
  - g. Regarding to the cooperation with non-member states and organizations, article 12 of the Convention allows the Council to take several actions, such as: address communications to non-member states or organizations, establish and maintain relations with non member states and organizations, invite non-member governments or organizations to participate in activities of the Organizations.
  - h. The Council may decide to invite any government prepared to assume the obligations of membership to accede to this Convention. This accession shall take effect upon the deposit of an instrument of accession with the depository government. (article 16)
  - i. The reconstruction of European Economic Cooperation shall take effect when this Convention comes into force. Moreover, article 15 stated that the legal personality possessed by the Organization for European Economic Cooperation shall continue in the Organization, except for its decisions, recommendations, and resolutions that need to be approve first by the Council.
  - j. Each year, in accordance with Financial Regulations adopted (article 20) by the Council, the Secretary General shall present to the Council for approval an annual budget, accounts and such subsidiary budgets as the Council shall request.
  - k. Any contracting party may terminate the application of this Convention to itself by giving twelve months notice to that effect. (article 17)

1. The legal capacity of the Organization and the privileges, exemptions, and immunities of the Organization, its officials and representatives to it of the members shall be provided in Supplementary Protocol No. 2 to this Convention. (article 19)

### **Entry into Force**

According to article 14 of the Convention, this convention shall come into force before 30<sup>th</sup> September 1961, upon the deposit of instruments of ratification or acceptance by all the signatories. Twenty countries originally signed this Convention on 14 December 1960. Since then a further ten countries have become members of the Organization. The 30<sup>th</sup> member is Slovak Republic in 14<sup>th</sup> December 2000.<sup>37</sup>

### **Related Regulations**

Protocols related to this convention are Supplementary Protocol No. 1 to the Convention on the OECD and Supplementary Protocol No. 2 to the Convention on the OECD. Both of the protocols were adopted on 14 December 2009<sup>38</sup>.

**(Jenny Maria Doan)**

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<sup>37</sup><[http://www.oecd.org/document/58/0,3343,en\\_2649\\_201185\\_1889402\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/58/0,3343,en_2649_201185_1889402_1_1_1_1,00.html)>

<sup>38</sup><[http://www.oecd.org/document/26/0,3343,en\\_2649\\_201185\\_3998223\\_4\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/26/0,3343,en_2649_201185_3998223_4_1_1_1_1,00.html)>

## Convention on the Settlement of Investment Disputes between States and Nationals of Other States<sup>39</sup>

### Background

Back on early 1960s, when countries in Africa and parts of Asia became decolonized and followed by the wave of take-over of foreign investments throughout the Third World countries, it had become apparent that it would be very difficult to achieve consensus on the obligations of hosts' countries toward multinational corporations. The World Bank began to consider how it could avoid becoming embroiled in controversies so as to further its overall purpose of promoting economic development in the world's poor countries.<sup>40</sup>

The World Bank came up with a plan for settlement of disputes not between states, but between private parties on one side and host states on the other side, under the auspices of an institution to which almost every state outside the Soviet bloc belonged, and which could be seen as a neutral umpire.<sup>41</sup> Extensive preparatory work and consultations on this possibility followed. By 1964, the prospects for negotiating a convention establishing the dispute settlement facility appeared favorable.<sup>42</sup> The result of the negotiations is the Convention on the Settlement of Investment

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<sup>39</sup> <[http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR\\_English-final.pdf](http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf)>

<sup>40</sup> Andreas F. Lowenfeld, *International Economic Law*, OXFORD University Press (2002), p.456.

<sup>41</sup> Andreas F. Lowenfeld, *Ibid.*, p 457

<sup>42</sup> Ibrahim F. I. Shihata, *The Settlement of Disputes regarding Foreign Investments: The Role of the World Bank, with Particular Reference to ICSID and MIGA*, Arab Law Quarterly, Vol. 1, No. 3 (May, 1986), p. 268



Disputes between States and Nationals of Other States. The Convention established an autonomous international institution, the International Centre for Settlement of Investment Disputes (ICSID), within the World Bank. The Convention itself became known as the ICSID Convention.

### **Concept**

The primary purpose of ICSID Convention is to provide facilities for conciliation and arbitration of international investment disputes between Contracting States and nationals of other Contracting States. Both the home country of the investor and the host state must have been parties to the Convention.

The Convention is addressed to investment disputes. That term was deliberately not defined, but efforts to limit the scope of the Convention, for instance to claims of denial of justice or discrimination, or to claims of violation of investment promotion laws, were rejected.<sup>43</sup> a given investment dispute must be the subject of a consent to arbitrate under the auspices of ICSID, which may be given in an investment agreement at the time the project in question is undertaken, or in an ad hoc agreement after the dispute arises.

This Convention sought to remove major impediments to the free international flows of private investment posed by non-commercial risks and the absence of specialized international methods for investment dispute settlement. ICSID was created by the Convention as an impartial international forum providing facilities for the resolution of legal disputes between eligible parties, through conciliation or arbitration procedures. Recourse to the ICSID facilities is always subject to the parties' consent.<sup>44</sup>

### **General Principles**

#### *Exhaustion of Local Remedies*

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<sup>43</sup> Ibid, p. 458.

<sup>44</sup> <[http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&pageName=AboutICSID\\_Home](http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&pageName=AboutICSID_Home)>

It may be presumed that when a State and an investor agree to have recourse to arbitration, and do not reserve the right to have recourse to other remedies or require the prior exhaustion of other remedies, the intention of the parties is to have recourse to arbitration to the exclusion of any other remedy. This rule of interpretation is embodied in the first sentence of Article 26. In order to make clear that it was not intended thereby to modify the rules of international law regarding the exhaustion of local remedies, the second sentence explicitly recognizes the right of a State to require the prior exhaustion of local remedies

### **Main Features**

The ICSID Convention comprises 10 chapters and 75 articles. The main features regulated in this Convention are:

#### **1. International Centre for Settlement of Investment Disputes**

The International Centre for Settlement of Investment Disputes (the Centre) was established under this Convention. The purpose of this Centre is to provide facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States. The Centre will not itself engage in conciliation or arbitration activities. This will be the task of Conciliation Commissions and Arbitral Tribunals. As Sponsor of the establishment of the institution the World Bank will provide the Centre with Premises for its seat.

#### **2. Bodies of ICSID**

ICSID consists of two bodies, the Administrative Council and the Secretariat. The Administrative Council (Article 4-8) is the governing body of the Centre and its function consists of various administrative tasks, e.g. approving ICSID's annual report and its administrative budget. It is comprised of one representative from each Contracting state, each being able to express one vote. The Chairman of the Council is the President of the World Bank ex officio, who has no voting power.

The Secretariat (Article 9-11) comprised of the Secretary-General, Deputy-Secretaries-General and the staff. Every six years, the Administrative Council appoints the Secretary-General, who is ICSID's legal representative and the head of the Secretariat, upon the nomination by the Council's Chairman. Duties of the Secretary-General are appointment and dismissal of staff members, the registration of requests for arbitration and conciliation, the authentication and certification of final arbitral awards and various other tasks. The Secretariat supervises the constitution of the arbitral tribunals as set forth in the convention

3. **Jurisdiction of the Centre**

The term “jurisdiction of the Centre” is used in the Convention as a convenient expression to mean the limits within which the provisions of the Convention will apply and the facilities of the Centre will be available for conciliation and arbitration proceedings. The Article 25 (1) requires that the dispute must be a “legal dispute arising directly out of an investment. For a dispute to be within the jurisdiction of the Centre one of the parties must be a Contracting State and the other party must be a national of another Contracting State.

Consent of the parties is the cornerstone of the jurisdiction of the Centre. Consent to jurisdiction must be in writing including an express ICSID arbitration clause in the investment agreement and once give cannot be withdrawn unilaterally. Another possibility<sup>15</sup> consent may be given is when a state consents to ICSID arbitration in its investment law or bilateral investment treaties (BITs). This offer by the state, which may require certain actions or procedures from the investor, can be accepted in writing by the investor. Consent does not have to be recorded in every instrument as long as each contract may be identified a part of a whole scheme (e.g. where the individual contracts refer to an arbitration clause).

4. **Proceeding under the Convention**

Proceedings are instituted by means of a request addressed to the Secretary-General (Article 28 and 36). The Secretary-General has the power to refuse the registration. In general, the provisions Article 32-35 dealing with conciliation proceedings and of Article 41-49, dealing with the powers and functions of Arbitral Tribunal and awards rendered by such Tribunals, are self-explanatory. Article 53 declares that the parties are bound by the award and that it shall not be subject to appeal or to any other remedy except those provided for in the Convention. The remedies provided for are revision (Article 51) and annulment (Article 52). On the matter of recognition and enforcement of arbitral awards, Article 54 requires every Contracting State to recognize the award as binding and to enforce the pecuniary obligations imposed by the award as if it were a final decision of a domestic court.

**5. Place of Proceedings**

In dealing with proceedings away from the Centre, Article 63 provides that proceedings may be held, if the parties so agree, at the seat of the Permanent Court of Arbitration or if any other appropriate institution with which the Centre may enter into arrangements for that purpose.

**6. Disputes between Contracting States**

Article 64 confers on the International Court of Justice (ICJ) jurisdiction over disputes between Contracting States regarding the interpretation or application of the Convention which are not settled by negotiation and which the parties do not agree to settle by other methods.

**7. Final Provisions**

The Convention is open for signature on behalf of States members of the Bank. It will also be open for signature on behalf of any other State which is a party to the Statute of the International Court of Justice and which the Administrative Council, by a vote of two-thirds of its members, shall have invited to sign. No time limit has been prescribed for signature. Signature is required both of States

joining before the Convention enters into force and those joining thereafter (Article 67).

The Convention is subject to ratification, acceptance or approval by the signatory States in accordance with their constitutional procedures (Article 68). The Convention will enter into force upon the deposit of the twentieth instrument of ratification, acceptance or approval.

### **Dispute Settlement**

Pursuant to the Convention, ICSID provides facilities for the conciliation and arbitration of disputes between member countries and investors who qualify as nationals of other member countries. Recourse to ICSID conciliation and arbitration is entirely voluntary. However, once the parties have consented to arbitration under the ICSID Convention, neither can unilaterally withdraw its consent<sup>45</sup>. Moreover, all ICSID Contracting States, whether or not parties to the dispute, are required by the Convention to recognize and enforce ICSID arbitral awards.

According to ICSID Additional Facility Rules 1978, give the authorization to the ICSID Secretariat to administer certain types of proceedings between States and foreign nationals which fall outside the scope of the Convention. These include conciliation and arbitration proceedings where either the State party or the home State of the foreign national is not a member of ICSID. Additional Facility conciliation and arbitration are also available for cases where the dispute is not an investment dispute provided it relates to a transaction which has "features that distinguishes it from an ordinary commercial transaction." The Additional Facility Rules further allow ICSID to administer a type of proceedings not provided for in the Convention, namely fact-finding proceedings to which any State and foreign national may have recourse if they wish to institute an inquiry "to examine and report on facts."

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<sup>45</sup> <[http://ICSID.worldbank.org/frontServlet?regTypecaseRH&actions=sow&home&pagename=aboutICSID\\_home](http://ICSID.worldbank.org/frontServlet?regTypecaseRH&actions=sow&home&pagename=aboutICSID_home)>

ICSID, in the field of the settlement of disputes, has consisted its Secretary-General to act as the appointing authority of arbitrators for ad hoc proceedings<sup>46</sup>. This is most commonly done in the context of arrangements for arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL), which are specially designed for ad hoc proceedings.

ICSID proceedings do not necessarily take place in Washington, D.C. Other possible locations include the Permanent Court of Arbitration at The Hague, the Regional Arbitration Centers of the Asian-African Legal Consultative Committee at Cairo and Kuala Lumpur, the Australian Centre for International Commercial Arbitration at Melbourne, the Australian Commercial Disputes Centre at Sydney, the Singapore International Arbitration Centre, the GCC Commercial Arbitration Centre at Bahrain and the Frankfurt International Arbitration Center of German Institution of Arbitration (DIS) and the Frankfurt Chamber of Commerce and Industry.

### **Entry into Force**

On March 18, 1965, the Executive Directors of the International Bank for Reconstruction and Development (the World Bank) submitted the Convention, with an accompanying Report, to member governments of the World Bank for their consideration of the Convention with a view to its signature and ratification. The Convention entered into force on October 14, 1966, when it had been ratified by 20 countries. As at April 10, 2006, 143 countries have ratified the Convention to become Contracting States.

### **Related Regulations**

The provisions of the ICSID Convention are complemented by Regulations and Rules adopted by the Administrative Council of the Centre pursuant to Article 6(1) (a)–(c) of the Convention (the

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<sup>46</sup> *Loc.cit.* Note 7.

ICSID Regulations and Rules). The ICSID Regulations and Rules comprise:

1. Administrative and Financial Regulations;
2. Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (Institution Rules);
3. Rules of Procedure for Conciliation Proceedings (Conciliation Rules);
4. and Rules of Procedure for Arbitration Proceedings (Arbitration Rules).

The latest amendments of the ICSID Regulations and Rules adopted by the Administrative Council of the Centre came into effect on April 10, 2006. (**Jeska Daslita**)