

REGULATION IN THE SHADOWS OF PRIVATE LAW

PAMMELA S. QUINN*

ABSTRACT

With proponents of deregulation ascendant, both domestically and around the world, private regulation appears to be an attractive solution to a seemingly intractable problem—assuming it is or can be effective. This Article adds an important corrective to standard accounts of private legal regulation and its effectiveness.

Existing scholarship generally looks to the formal contract terms as the key to understanding private regulation and to evaluating its impact. This practice needs to be rethought. The relationship between contracting parties, as well as the regulatory authority that one party exerts over the other, can be quite different than the relationship described by the formal contract terms. This Article illustrates the problem with the scholarly assumption that formal contract language reliably describes the private regulatory relationships they establish. It does so through an in-depth analysis of a form of private contracting with great regulatory potential: the loan guarantees and associated political risk insurance policies underwritten by the World Bank.

Such policies are purchased by corporations to mitigate the risks associated with doing business in under-regulated jurisdictions. Because, on their face, the terms of these policies require socially responsible corporate behavior, they appear to be a promising form of private regulation, succeeding in imposing significant obligations on corporations that traditional public regulation has failed to mandate. But these formal terms reveal little about the true nature of the private regulatory relationships they create. Even though the policy terms themselves are unlikely ever to be

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* Associate Professor of Law, Drexel University Thomas R. Kline School of Law. J.D., Duke University School of Law; A.B. Dartmouth College. I am grateful to Tabatha Abu El-Haj, Julian Arato, Bret Asbury, Amy Boss, Doug Cassell, Sarah Dadush, Erika George, Anil Kalhan, Rachel Lopez, Tim Meyer, Kish Parella, Mike Vandenbergh, and Emily Zimmerman for their generous comments and thoughtful questions. Thanks also to the organizers of the Business & Human Rights Forum Workshop, hosted by the University of Washington School of Law, and the Works-in-Progress Roundtable for International Business at Washington and Lee School of Law for allowing me to share early versions of this project. Bojana Ilic provided excellent research assistance.

formally enforced, the policyholders often have significant incentives to go above and beyond the contract requirements if requested to do so by the underwriter. But whether they are in fact being asked to do so, and whether they are in fact complying if they are being asked, is unclear.

The World Bank provides considerable transparency surrounding the terms of its policies and the process for obtaining them. However, little information is available regarding its post-contracting interactions with policyholder corporations. Providing data about these interactions could be done relatively easily and without infringing upon the confidentiality interests that it, and its policyholders, may have. To the extent that entities like the World Bank are serious about their corporate social responsibility policies, it is imperative that information about the actual contracting relationship—and not just the formal contract terms—be made available.

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INTRODUCTION

It seems we all too frequently read stories of a building collapsing, a mass suicide, child labor abuse, or a report of inhumane working conditions at factories connected with multinational corporations such as Samsung,

Apple, Wal-Mart, and the Gap.¹ So too do we see recurring headlines documenting attacks targeting corporate interests abroad.²

There is reason to be concerned that we will continue to see tragic headlines. Regulating multinational business enterprises that operate in developing countries has proved challenging.³ It is no accident that these tragedies typically occur in jurisdictions without strong domestic legal protections that would encourage large multinationals to create humane working conditions, do business only with suppliers who do not abuse their employees, and take steps to minimize negative impacts of their operations on the environment and on local communities.⁴

The failure of traditional public lawmaking to regulate multinationals and compel socially responsible practices has led to a search for alternative forms of regulation.⁵ Recently there has been a surge in scholarly interest in

1. See Julfikar Ali Manik & Jim Yardley, *Building Collapse in Bangladesh Leaves Scores Dead*, N.Y. TIMES (Apr. 24, 2013), http://www.nytimes.com/2013/04/25/world/asia/bangladesh-building-collapse.html?_r=0; David Barboza, *After Suicides, Scrutiny of China's Grim Factories*, N.Y. TIMES (June 6, 2010), <http://www.nytimes.com/2010/06/07/business/global/07suicide.html>; Jeff Stone, *Samsung Child Labor: Ask Apple or Wal-Mart, Corporate Human Rights Violations Are Nothing New*, INT'L BUS. TIMES (July 11, 2014), <http://www.ibtimes.com/samsung-child-labor-ask-apple-wal-mart-corporate-human-rights-violations-are-nothing-new-1625870>; Richard Bilton, *Apple Failing to Protect Workers*, BBC PANORAMA (Dec. 18, 2014), <http://www.bbc.com/news/business-30532463>.

2. See Dan Molinski, *Colombian Rebels' Attacks Set Back Nation*, WALL STREET J. (Nov. 7, 2014), <http://www.wsj.com/articles/colombian-rebel-attacks-set-back-nation-1415399080> (reporting that Colombian rebels have ramped up attacks on the pipeline and disrupted large oil companies such as ExxonMobil and Occidental Petroleum); see also *infra* Part II, at 17–21 (documenting a coup d'état in Madagascar sparked by anti-FDI sentiment and culminating in a new government which cancelled major contracts including a plan by “the South Korean industrial conglomerate, Daewoo, to take out a 99-year lease for over 1.3 million hectares of arable land” to grow corn to export back to South Korea).

3. See Kenneth W. Abbott & Duncan Snidal, *Strengthening International Regulation Through Transnational New Governance: Overcoming the Orchestration Deficit*, 42 VAND. J. TRANSNAT'L L. 501, 504–05 (2009) (“In addition, the evolving structures of global production—multinational enterprises and global supply chains—pose major challenges for conventional ‘regulation.’”) (footnote omitted); Charles Sabel et al., *Ratcheting Labor Standards: Regulation for Continuous Improvement in the Global Workplace* 4 (Colum. L. Sch. Pub. L. & Legal Theory Research Paper Grp., Paper No. 21, 2000), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=262178 (“Transformations in the global economy have outpaced traditional labor laws and regulatory institutions. . . . Partly as a consequence, the present wave of globalization has given rise to widespread abuses . . .”).

4. See, e.g., Ilias Bantekas, *Corporate Social Responsibility in International Law*, 22 B.U. INT'L L. REV. 309, 345–46 (2008); see also John Ruggie, (U.N. Secretary-General's Special Representative for Business and Human Rights), *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises: Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect, and Remedy” Framework*, U.N. Human Rights Council, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011).

5. See, e.g., Bantekas, *supra* note 4, at 310–11; see also Caroline Rees, *Treaties and the U.N. Guiding Principles on Human Rights: A Way Forward*, CSRWIRE (July 7, 2014, 9:07 AM), <http://www.csrwire.com/blog/posts/1417-treaties-the-un-guiding-principles-on-business-human-rights-the-way-forward> (describing debate between a multilateral treaty vs. soft law approach to CSR).

the potential of private regulation to fill these significant regulatory gaps.⁶ For example, a new but rapidly growing literature explores the possibility that better corporate practices may be produced through global value chains that are governed by contracts between buyers and suppliers.⁷ Another major strand of recent scholarship examines the ways that private actors use contracts to supplement the public regulatory function, including with respect to setting, implementing, and enforcing standards.⁸

This increasingly dense literature presents private regulation via contracting as a promising alternative to traditional public regulation.⁹ In general, private regulation has been pitched as a particularly exciting option in contexts where the challenges associated with public regulation are at their apex—as they are with respect to transnational business ventures operating in developing countries that lack mature or well-functioning legal systems.¹⁰ Even in more mature and developed systems, current political movements to dismantle public regulation make the issue particularly timely and significant.¹¹

When analyzing private regulation by contract, scholars typically presume that the terms of the private regulatory relationship can be gleaned from the language of the contract documents. This focus on formal contract terms appears intuitive—at least at first blush. Given the importance of the

6. See, e.g., Larry Catá Backer, *Economic Globalization and the Rise of Efficient Systems of Global Private Law Making: Wal-Mart as Global Legislator*, 39 CONN. L. REV. 1739 (2007). This same interest in private regulatory potential has been the recent subject of environmental law scholars as well. See, e.g., Michael Vandenbergh, *Private Environmental Governance*, 99 CORNELL L. REV. 129 (2013).

7. See, e.g., Kishanthi Parella, *Outsourcing Corporate Accountability*, 89 WASH. L. REV. 747 (2014).

8. See, e.g., Michael Vandenbergh, *The Private Life of Public Law*, 105 COLUM. L. REV. 2029, 2033 (2007) (“First, the firm subject to first-order regulation [from the public regulator] often enters into second-order agreements with other private actors. These agreements then influence the incentives of the regulated firm and induce the other contracting parties to have an interest in the regulatory scheme.”). See generally Symposium, *The Duke Project on Custom and Law*, 62 DUKE L.J. 529 (2012); Symposium, *New Forms of Governance: Ceding Power to Private Actors*, 49 UCLA L. REV. 1687 (2002); Symposium, *Public Values in an Era of Privatization*, 116 HARV. L. REV. 1211 (2003); Symposium, *Thirty-Third Annual Administrative Law Issue: Agencies, Economic Justice, and Private Initiatives*, 53 DUKE L.J. 291 (2003).

9. See, e.g., Vandenbergh, *supra* note 8, at 2033.

10. See, e.g., Fabrizio Cafaggi, *New Foundations of Transnational Private Regulation*, 38 J. L. & SOC. 20, 23 (2011).

11. See, e.g., Thomas Franck, *While Big Bills Have Failed, Wall Street Sees Opportunity in Trump’s Massive Deregulation Movement*, CNBC (Aug. 5, 2017), <https://www.cnbc.com/2017/08/04/wall-street-sees-opportunity-in-trumps-massive-deregulation-movement.html> (describing Republicans’ 2017 agenda as “what may likely be the most massive deregulation effort the nation has ever seen”); see also TSUYOSHI OYAMA, DELOITTE, 2017 GLOBAL RISK OUTLOOK (describing how “new American and British governments [following the election of Donald Trump in the U.S. and the success of the “Brexit” vote in the U.K.] are drastically changing th[e previous] trend of greater regulatory controls”).

text in understanding and analyzing public rules, it makes sense that researchers analogizing to the public regulatory context might consider the formal contract language.¹² Furthermore, legal scholars generally prefer to examine written documents. Even if they are not always clear, written contracts are less time-consuming to interpret as compared with piecing together information from oral or outside sources—as some of contract law’s most basic principles reflect.¹³ While oral contracts are permitted in many situations, a written contract is sometimes required.¹⁴ Even when not required, it is generally preferable.¹⁵

Yet, although a contract brings a private regulatory relationship into existence, it does not necessarily dictate how it will develop. Once their relationship has commenced, contracting parties may or may not follow the terms they established at the outset. They may never even intend to do so.

So too may the regulatory behavior of the parties to the contract play out very differently than the formal terms suggest that it should. An example from the multinational context demonstrates how private regulation can work differently in practice than on paper. Given the intense scholarly interest in private regulatory solutions to the problems inherent in multinational business ventures, it is surprising that so little attention has been paid to the regulatory potential of contracts involved in guaranteeing foreign direct investment. If imposing obligations by contract is indeed a viable way of regulating transnational actors, we might expect to find these obligations written into contracts entered into by corporations when they

12. See, e.g., *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004) (“The starting point in discerning congressional intent is the existing statutory text . . . ‘[W]hen the statute’s language is plain, the sole function of the courts . . . is to enforce it according to its terms.’” (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000))).

13. See, e.g., Arthur L. Corbin, *The Parol Evidence Rule*, 53 *YALE L.J.* 603, 608 (1944) (noting that the parol evidence rule, not admitting evidence of oral contract modifications, derives from “[t]he belief that oral testimony varying or contradicting a written instrument is likely to be false or mistaken”).

14. See, e.g., *Emerson v. Slater*, 63 U.S. 28, 41 (1859) (“Verbal agreements between the parties to a written contract, made before or at the time of the execution of the contract, are in general inadmissible to vary its terms, or to affect its construction. All such verbal agreements are considered as merged in the written contract.”); *Grant v. Naylor*, 8 U.S. 224, 235 (1808) (“[A] promise to pay the debt of another shall be in writing, and which will not permit a written contract to be explained by parol testimony, originate in a general and a wise policy, which this court cannot relax so far as to except from its operation cases within the principles.”); see also U.C.C. § 22-201 (AM. LAW INST. & UNIF. LAW COMM’N 1977) (imposing a writing requirement on the sale of goods above \$500).

15. Yuval Feldman & Doron Teichman, *Are All Contractual Obligations Created Equal?*, 100 *GEO. L.J.* 5, 42 (2011) (discussing benefits of contracts that contain terms reducing uncertainty and the tendency of parties to draft very specific contract provisions to ensure certainty); cf. Timothy Meyer, *Power, Exit Costs and Renegotiation in International Law*, 51 *HARV. INT’L L.J.* 379, 392 (2010).

undertake cross-border investment projects and seek loan guarantees and insurance.¹⁶

As it turns out, some of these contracts do contain regulatory provisions. For example, contracts into which corporations enter to obtain loan guarantees and insure against political risks¹⁷ inherent to investment projects in developing countries typically require them to undertake local philanthropic projects and to engage in environmentally sustainable practices beyond what is required by public law in the relevant jurisdictions.¹⁸ Such contract provisions are direct evidence of private law's potential to regulate transnational corporate behavior where public law has failed to do so.¹⁹

Contract terms promoting socially responsible business practices are now standard. Intergovernmental and governmental agencies—including the Multilateral Investment Guarantee Agency (MIGA), an affiliate of the World Bank—and the credit and investment guarantee agencies that are MIGA's domestic counterparts²⁰—have developed detailed model agreements and provisions that mandate investors with whom they contract to undertake to comply with Environmental and Social Performance Standards (“ESP Standards”) tailored to the guaranteed or insured investment that is the subject of the guarantee.²¹ In short, these contracts purport to regulate

16. See, e.g., Bantekas, *supra* note 4, at 311; Korinna Horta, *Rhetoric and Reality: Human Rights and the World Bank*, 15 HARV. H.R. J. 227, 235–36 (2002).

17. In its “Glossary of Terms Used in the Political Risk Insurance Industry,” the World Bank Group’s Multilateral Investment Guarantee Fund (MIGA) defines “political risk” to be those “associated with government actions which deny or restrict the right of an investor/owner i) to use or benefit from his/her assets; or ii) which reduce the value of the firm.” MIGA, GLOSSARY OF TERMS USED IN THE POLITICAL RISK INSURANCE INDUSTRY 1. The definition also specifically identifies the following as political risks: “war, revolutions, government seizure of property and actions to restrict the movement of profits or other revenues from within a country.” *Id.*

The type of government in place is relevant to the level of political risk. See Nathan Jensen, *Political Risk, Democratic Institutions, and Foreign Direct Investment*, 70 J. POL. 1040 (2008) (The existence of “democratic institutions lead to lower levels of [political] risk” because of “the constraints placed on executives in democratic regimes.”).

18. Bantekas, *supra* note 4, at 330.

19. Cf. Vandenberg, *supra* note 8, at 2045–62. I am using the phrase “private law” to mean obligations that are incurred in voluntary transactions even if they are in contracts with public or quasi-public entities. That is, I meant it in contrast to the phrase “public law,” by which I mean laws or regulations enacted by governmental entities and imposed on their subjects.

20. As of 2005, there were seventy-six export credit agencies operating in sixty-two countries. ROGER MOODY, THE RISKS WE RUN: MINING, COMMUNITIES, AND POLITICAL RISK INSURANCE 15 (2005).

21. *Projects: Performance Standards*, MIGA, <https://www.miga.org/projects/environmental-and-social-sustainability/performance-standards> (last visited Sept. 18, 2017); see e.g., *Project Brief, Grand Hotel du Louvre, SA*, MIGA, <https://www.miga.org/pages/projects/project.aspx?pid=680> (last visited Sept. 18, 2017).

policyholders' conduct in ways that host countries have failed to do through public lawmaking. MIGA trumpets this development in its contracting practices as strong evidence of its support for socially responsible practices by multinational corporations.²²

Yet, critics dismiss the ESP Standards embedded in these contracts as political window dressing that bogs down the efficiency of the market.²³ The assertion that ESP Standards have no real impact is supported by the weak enforcement mechanisms connected to these Standards, which rely mainly on self-reporting by investors as proof of compliance.²⁴ And even if non-compliance were uncovered, it likely would not constitute a material breach that would result in the non-payment of a claim, thereby eliminating any direct financial consequences as a motivating threat to promote compliance.²⁵ Not to mention that formal claims are almost never made, thereby virtually ensuring the ESP Standards will never be the subject of any formal enforcement action.²⁶

But this contemptuous assessment of the regulatory influence of the ESP Standards is not necessarily accurate.²⁷ This critical account is based solely on the formal contract terms—and the fact that the formal rights they create are rarely invoked. Critics assume that we can discern the regulatory impact of the contract based upon whether it incentivizes policyholders to comply with their contractual obligations to undertake socially responsible conduct.

In fact, it is true that MIGA does not engage in traditional enforcement of its insurance policy terms, including the ESP Standards. It never cancels policies nor has it ever tried to deny any of the few claims that have been brought. Yet, the *reason* why these contract provisions are never formally enforced is precisely because MIGA is in a position to act as an extremely strong regulator of its policyholders. As discussed in great detail later, claims are never brought because MIGA is arguably not providing “insurance” in the sense that we typically understand that term—or in accordance with the

22. *Projects: Performance Standards*, *supra* note 21 (“These Performance Standards help MIGA and its clients manage and improve social and environmental performance through an outcomes-based approach.”).

23. Keith Rosenblum, *Terrifying Insurance*, 6 DEV. ASIA 32, 32–35 (2010).

24. Horta, *supra* note 16, at 228.

25. *See infra* note 140 & accompanying text (discussing the fact that MIGA has never denied a claim).

26. *See infra* note 140 & accompanying text (discussing the fact that MIGA has only had eight claims in its entire history).

27. In general, analyses of political risk insurance tend to reach polar opposite conclusions and it can be hard to determine which side is more accurate given the lack of data available. *See* VIRGINIA HAUFLE, DANGEROUS COMMERCE: INSURANCE AND THE MANAGEMENT OF INTERNATIONAL RISK 41 (1997).

formal terms of its own policies. Instead, by establishing contractual relationships that are tied to its policyholders' investments, it actually provides services as an enforcer of the investor's property rights within the host country and/or, alternatively, as a powerful mediator when disputes related to the insured investments arise.

Because these services are immensely valuable to the policyholders, MIGA has the power to wield enormous influence over them—as well as over the host governments of the countries in which they are invested (in large part because they are also generally recipients of loans and aid provided by other arms of the World Bank and thus eager to remain on good terms). Far less clear is whether MIGA actually exercises its regulatory authority by demanding strict compliance with the ESP Standards (or by imposing additional obligations in addition to the Standards). While MIGA is extremely transparent when it comes to information about its policies and the process for obtaining them, it provides very little information about the real product it is selling, namely, its post-contract services as an enforcer/mediator. Thus, whether and how it is choosing to regulate its policyholders' behavior is difficult to discern given the lack of available data.

This Article is the first to investigate the potential for private contract relationships to exert strong regulatory influence over transnational corporate policies and practices beyond the four corners of the contract documents. This project will attempt to develop a more nuanced account of private regulation that is created by contracting relationships, but is not necessarily elucidated by the formal terms of the contracts themselves. The goals of the project are (1) to provide a descriptive account of these regulatory relationships that is more complete, accurate, and nuanced than the current accounts; and (2) to develop a methodology to study these contractual relationships in a more meaningful way than can be done by looking solely at the formal contract documents.

The Article proceeds as follows: Part I summarizes the existing scholarly literature on private regulation. Part II describes a potential form of private regulation: contracts associated with loan guarantees and political risk insurance policies that contain lengthy and detailed provisions requiring compliance with corporate social responsibility criteria. Part III then describes how these contracts work in practice and demonstrates that the formal contract terms do not describe the true nature of the regulatory relationships they create.

While one can guess at the contours of those relationships from some of the information that MIGA makes publicly available, their true nature, and the extent to which regulatory authority is actually being wielded—and in what ways—is not clear. Part IV describes the current data collection and

disclosure undertaken by MIGA and concludes that more transparency is essential to fully understand the regulatory relationship between MIGA and its policyholders. The Article concludes that, while studying an extra-contractual approach to private regulation may prove difficult for researchers, it is necessary to examine these lived contract relationships closely in order to assess the actual and potential regulatory impact of private contracting. To that end, the Article creates a path upon which such projects could proceed.

I. PRIVATE REGULATION

One often thinks of legal regulation generally, and corporate legal regulation in particular, as solely or primarily within the ambit of public lawmakers. “In particular, political entities, states confined within a geographic territory, [have traditionally] had a virtual monopoly over economic regulation, each in their own territor[ies].”²⁸ Yet, when corporations cross borders and business becomes increasingly trans-national, even global, in scope, regulatory efforts become difficult for any one state to control.²⁹ As a result, “public law, as either substantive rules or as systems of governance, has proven increasingly unable to respond efficiently to the problems of the governance of economic relations.”³⁰ The result is that “[a] diverse group of actors today vie with national governments for the right to exert power and authority. . . . Of these, the modern multinational corporation (MNC) is perhaps the most powerful.”³¹

A deep scholarly literature describes the regulatory difficulties attendant to the cross-border nature of many corporate transactions.³² One possible solution that has emerged from this literature is regulation of MNCs by one another³³ or by other entities, such as insurance companies or public

28. Backer, *supra* note 6, at 1743.

29. *Id.* at 1745.

30. *Id.*

31. David Antony Detomasi, *The Multinational Corporation and Global Governance: Modelling Global Policy Networks*, 71 J. BUS. ETHICS 321, 321 (2007); see also Peter J. Spiro, *Constraining Global Corporate Power*, 46 VAND. J. TRANS. L. 1101, 1103 (2013) (“To the extent that states are less able to regulate them, then, globalization empowers multinational corporations.”).

32. See, e.g., PETER T. MUCHLINSKI, *MULTINATIONAL ENTERPRISES AND THE LAW* 123–72 (1999); Steven Lukes, *Five Fables About Human Rights*, in *ON HUMAN RIGHTS* 19 (Stephen Shute & Susan Harley eds., 1993); Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 446 (2001).

33. Spiro, *supra* note 31, at 1104–09 (describing private regulatory approaches to disciplining transnational corporate behavior); Mathias Koenig-Archibugi, *Transnational Corporations and Public Accountability*, 39 GOV'T & OPPOSITION 234, 245–57 (2004) (detailing the efforts to regulate corporations globally by states, international organizations, NGOs, and corporations themselves); Rhys Jenkins, U.N. RES. INST. FOR SOC. DEV., *CORPORATE CODES OF CONDUCT: SELF-REGULATION IN THE*

entities with whom they enter into private contracts.³⁴ Because these relationships are created and structured by contract, scholars typically and naturally presume that the terms of the private regulatory relationship can be found in the formal contract documents.

A. The Scholarly Literature on Private Regulation

A variety of scholars across many fields have challenged the traditional public law framework that permeates traditional scholarly analyses of regulation.³⁵ These scholars evaluate private law as a potential substitute for, or helpmate to, public law in situations “[w]here regulation does not exist (in form or fact), or where markets in law break down or are inefficient.”³⁶ Thus, scholars study how and when private actors³⁷—including corporations, civil society, the media, and individuals—separately and together can create a system of rule-making and rule-enforcement that may be more effective than public lawmaking (or at least public lawmaking on its own).³⁸

In many legal subfields, private regulation is a hot topic. Private law enforcement by small groups has been a subject of significant scholarly interest for at least twenty-five years, since Professor Bob Ellickson described the effectiveness of private social norms in influencing the behavior of Shasta County cattle ranchers.³⁹ Since then, legal scholars have

GLOBAL ECONOMY, (Apr. 2001) (describing the historic development of corporate codes); Sean D. Murphy, *Taking Multinational Codes of Conduct to the Next Level*, 43 COLUM. J. TRANSNAT'L L. 389, 389 (2005) (describing emergence of corporate codes of conduct).

34. See, e.g., Ken Abraham, *Four Conceptions of Insurance*, 161 U. PENN. L. REV. 653, 683 (2013); TOM BAKER & SEAN J. GRIFFITH, *ENSURING CORPORATE MISCONDUCT: HOW LIABILITY INSURANCE UNDERMINES SHAREHOLDER LITIGATION* (2010); Omri Ben-Shahar & Kyle D. Logue, *Outsourcing Regulation: How Insurance Reduces Moral Hazard*, 111 MICH. L. REV. 197, 228 (2012).

35. Backer, *supra* note 6, at n.15 (citing SARAH JOSEPH, *CORPORATIONS AND TRANSNATIONAL HUMAN RIGHTS LITIGATION* 128–43 (2004); Mitchell F. Crusto, *Green Business: Should We Revoke Corporate Charters for Environmental Violations?*, 63 LA. L. REV. 175, 241 (2003); A.J. Natale, *Expansion of Parent Corporate Shareholder Liability Through the Good Samaritan Doctrine: A Parent Corporation's Duty to Provide a Safe Workplace for Employees of its Subsidiary*, 57 U. CIN. L. REV. 717, 734–36 (1988)).

36. Backer, *supra* note 6, at 1748.

37. Larry Catá Backer suggests there are four principal actors who function separately and in tandem as private regulators: (1) corporations and other enterprises; (2) civil society, primarily economic and human rights NGOs; (3) the media; and (4) consumers (of both media and market goods). See *id.* at 1748–49.

38. *Id.*; Spiro, *supra* note 33, at 1103–06 (“[S]tates often lack regulatory capacity or regulatory will.”). But see Ralf Michaels, *The Mirage of Non-State Governance*, 2010 UTAH L. REV. 31, 33 (criticizing the notion of “non-state governance” as “conceptually,” “empirically,” and “normatively unattractive”).

39. ROBERT C. ELICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* 52–64 (1991).

analyzed myriad private groups—from cotton merchants⁴⁰ to diamond traders⁴¹ to lobstermen⁴² and more⁴³—who have been able to develop highly successful and efficient cooperative institutions that operate outside of traditional public regulatory mechanisms—that is, extra-legally.

This interest in private regulation has only expanded in recent years.⁴⁴ In the environmental law context, for instance, Professor Mike Vandenberg draws from a similar proliferation of interest in private regulation to demonstrate that such regulatory “activities, when viewed in the aggregate, represent a development in environmental law and governance”⁴⁵ He contends that “recent empirical research” demonstrates that private regulatory initiatives “are having important [beneficial] effects on environmental behavior and environmental quality.”⁴⁶

Previously, Vandenberg described one example of the private regulation of public law environmental standards: the inclusion of such standards in contracts, such as credit agreements and insurance policies.⁴⁷ He noted that credit agreements typically include provisions requiring compliance with environmental regulations (and sometimes compliance with even stricter standards than those that are already required by law). Consequently, “after the loan is entered into, a lender has incentives to ensure that its borrower does not violate the law or engage in liability-creating behavior if doing so will interfere with repayment of the loan or put the lender directly at risk for the liabilities of the borrower.”⁴⁸ While it is unclear, as an empirical matter, how frequently lenders actually insist on influencing borrowers to comply (or not) with environmental obligations, “it is clear that lenders have incentives to select low-risk borrowers and often have

40. Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724, 1745 (2001).

41. Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992); Barak D. Richman, *How Community Institutions Create Economic Advantage: Jewish Diamond Merchants in New York*, 31 LAW & SOC. INQUIRY 383, 409–13 (2006).

42. See generally, JAMES ACHESON, CAPTURING THE COMMONS: DEVISING INSTITUTIONS TO MANAGE THE MAINE LOBSTER INDUSTRY (2003); Pammela Quinn Saunders, *A Sea Change Off the Coast of Maine: Common Pool Resources as Cultural Property*, 60 EMORY L.J. 1323 (2011).

43. See, e.g., Peer Zumbansen, *Transnational Private Regulatory Governance: Ambiguities of Public Authority and Private Power*, 76 L. & CONTEMP. PROBS. 117 (2013) (*lex mercatoria*).

44. Perhaps inevitably, it has at the same time provoked a backlash. See, e.g., Michaels, *supra* note 38, at 31.

45. Vandenberg, *supra* note 6, at 139.

46. *Id.*

47. Vandenberg, *supra* note 8, at 2030–32.

48. *Id.* at 2052. “A sample of the credit agreements filed with the SEC suggests that firms filed more than 1,500 credit agreements in 2001, and almost 70% of these include environmental provisions.” *Id.* at 2051–52.

incentives to demand regulatory compliance or overcompliance during the term of the loan. As a result, in many instances lenders have incentives to engage in traditionally public regulatory functions, including monitoring and enforcement, implementation, standard setting, and dispute resolution.⁴⁹ “Lenders also include provisions in credit agreements that establish their right to monitor debtors during the term of the loan and to enforce regulatory compliance (e.g., by declaring noncompliance to be a breach of representation and an event of default).”⁵⁰

Likewise, Vandenberg reports that “[e]nvironmental insurance policies have many of the same effects on the regulatory scheme” as do credit and other agreements with environmental compliance provisions.⁵¹ For instance, “[i]nsurers often vary premiums for firms that can demonstrate compliance or overcompliance with environmental regulations.”⁵² Significantly, in at least some insurance contexts, Vandenberg reports, there is evidence that “insurers do monitor compliance on an ongoing basis.”⁵³ Marine insurance underwriters, for example, “employ marine inspectors to survey ships that they are considering insuring” in order to ensure that marine environmental risks do not manifest.⁵⁴

Other socio-legal scholars have also focused on the ways that insurance policy requirements influence actors and organizations that purchase insurance.⁵⁵ Professor Ken Abraham has described how insurance is sometimes viewed as “a relationship in which the insurer ‘governs’ its policyholders.”⁵⁶ Under this view of insurance as a form of regulation or governance, the insurer effectively functions like a government regulator “by influencing policyholders’ conduct.”⁵⁷ Or, as Abraham succinctly

49. *Id.* at 2053.

50. *Id.*

51. *Id.* at 2062–63.

52. *Id.* at 2063.

53. *Id.* at 2064.

54. *Id.* In the marine insurance context, private regulation by insurers has long been noted in connection with shipping risks inherent to the international sale of goods. For instance, in order to provide coverage of war-related risks in the late nineteenth century, insurers quickly determined that policies needed to require that shippers mitigate risk of damages by putting in at the nearest port when a war broke out. *See* HAUFLE, *supra* note 27, at 47. Multiple other “regulations” have also been written into shipping contracts since the nineteenth century. *See id.* at 41. These may have as much, or more, impact on private decision making than any formal set of public rules has had on the shipping industry.

55. *See, e.g.,* Shauhin Talesh, *Data Breach, Privacy, and Cyber Insurance: How Insurance Companies Act as “Compliance Managers” for Businesses*, Law & Soc. Inquiry doi:10.1111/lsi.12303 (2017), http://www.law.uci.edu/faculty/full-time/talesh/Talesh-2017-Law%20and%20Social_Inquiry%20Cyber%20Insurance.pdf; BAKER & GRIFFITH, *supra* note 34; Abraham, *supra* note 34; Ben-Shahar & Logue, *supra* note 34.

56. Abraham, *supra* note 34, at 683.

57. *Id.* at 684.

summarizes it, this conception of insurance views “insurance as a surrogate for government.”⁵⁸

Diverse scholarly projects have examined insurance through a similar lens. They have a common understanding of insurance “as a relationship in which the insurer ‘governs’ its policyholders.”⁵⁹

Within the insurance law scholarly literature, there are examples of the ways that insurance companies exercise control by entering into an insurance contract with a potential insured. Thus, insurance companies exercise de facto control over, *inter alia*, who may lawfully drive a car⁶⁰ or which physicians are granted hospital-admitting privileges.⁶¹

Insurance may serve a governance function in other ways as well. Professor Shauhin Talesh describes the impact that Employment Practices Liability Insurance (EPLI) has had on employers who face the threat of employment law litigation.⁶² Talesh concludes that EPLI has actually done far more than simply provide insurance coverage for those who are sued. Instead, EPLI has actually ended up “construct[ing] the meaning of compliance with antidiscrimination law.”⁶³ Moreover, it has done so in ways that may or may not be normatively desirable. Talesh concludes that his “data suggest EPLI and the series of risk-management services offered with the insurance policy can potentially improve employment practices and compliance,” but also “that EPLI risk-management services may at times shape compliance in a way that leans more toward making claims defensible rather than fostering a discrimination-free workplace.”⁶⁴

At the same time as researchers’ interest in regulation via insurance and other private contracts has been growing, there has also been a surge of scholarly interest within the transnational corporate law and business

58. *Id.*

59. *Id.* at 683.

60. Tom Baker & Jonathan Simon, *Embracing Risk*, in EMBRACING RISK: THE CHANGING CULTURE OF INSURANCE AND RESPONSIBILITY 13 (Tom Baker & Jonathan Simon, eds. 2002) [hereinafter EMBRACING RISK] (noting that because auto insurance plays this role that it “is a form of regulation”).

61. See Carol A. Heimer, *Insuring More, Ensuring Less: The Costs and Benefits of Private Regulation Through Insurance*, in EMBRACING RISK, *supra* note 60, at 127. That is, because hospitals require their physicians to have insurance coverage, medical malpractice insurers ultimately exercise complete control over which doctors may practice medicine in the setting where most medical treatment occurs. Abraham, *supra* note 34, at 685 (“[S]ince physicians and others in the medical profession are granted hospital-admitting privileges only if they have malpractice insurance, malpractice insurers determine which physicians get these privileges. The practical effect is that insurers decide who can practice medicine in public and private hospitals, where most medical treatment occurs.”).

62. Shauhin Talesh, *Legal Intermediaries: How Insurance Companies Construct the Meaning of Compliance with Anti-Discrimination Laws*, 37 L. & POL’Y 209, 209–11 (2015).

63. *Id.* at 211.

64. *Id.*

literatures on the potential of supply chain contracting to serve as an effective private regulatory mechanism. This literature focuses on the potential of contracts to positively impact the labor conditions that exist within suppliers' factories located in developing economies in which serious human rights violations occur with depressing frequency.⁶⁵ Recent events, such as the Rana Plaza tragedy, suggest that dangerous workplace conditions are a real threat to vulnerable workers worldwide.⁶⁶ Scholars have posited that through private or public-private regulation of the suppliers, the ultimate end users—who are typically located in highly-regulated, developed economies—can fill the regulatory gaps that currently account for the lack of public legal protection of workers and other located at the supplier end of the chain.⁶⁷ Whether and how supply chain contracting is or can be a feasible mechanism for addressing these public regulatory failures is debatable,⁶⁸ but it has been embraced as a serious alternative in situations where public regulation is especially unrealistic.⁶⁹

B. The Emphasis on Formal Contract Terms

While approaching private regulation from numerous angles and via various arrangements, what nearly all⁷⁰ examples of private regulation have in common is the existence of some sort of formal contract or written document setting forth the terms of the relationship between the regulated and regulating parties. Whether it is an insurance policy setting forth contract terms regulating the environmental risk exposure of a corporation⁷¹ or a

65. See, e.g., Backer, *supra* note 6 (describing Wal-Mart Supply Agreements).

66. See Larry Catá Backer, *Are Supply Chains Transnational Legal Orders?: What We Can Learn from the Rana Plaza Factory Building Collapse*, 1 U.C. IRVINE J. INT'L, TRANSNAT'L. & COMP. L. 1 (2016).

67. See, e.g., Parella, *supra* note 7, at 815–18 (criticizing current approaches for failing to take into account misaligned incentives of suppliers and their multinational buyers and suggesting alternatives that incorporate some elements of traditional public legal regulation).

68. See, e.g., RICHARD M. LOCKE, *THE PROMISE AND LIMITS OF PRIVATE POWER: PROMOTING LABOR STANDARDS IN A GLOBAL ECONOMY* (2013); cf. Backer, *supra* note 6; Parella, *supra* note 7 and accompanying text.

69. See, e.g., John G. Ruggie, *Commentary: Quo Vadis? Unsolicited Advice to Business and Human Rights Treaty Sponsors*, INSTITUTE FOR HUMAN RIGHTS AND BUSINESS (Sept. 9, 2014), <https://www.ihrb.org/other/treaty-on-business-human-rights/quo-vadis-unsolicited-advice-to-business-and-human-rights-treaty-sponsors> (discussing contentious debate over multilateral treaty on topic of business and human rights). See also Larry Catá Backer, *Regulating Multinational Corporations: Trends, Challenges, and Opportunities*, 22 BROWN J. WORLD AFF. 1, 3–4 (2015).

70. Obviously informal regulation by private close-knit groups or communities typically involves unwritten social norms rather than written contracts. See, e.g., ELLICKSON, *supra* note 39; Saunders, *supra* note 42. Although, even some examples of this type of private regulation involve formal contracts. See, e.g., Bernstein, *supra* note 40 (cotton merchants); Bernstein, *supra* note 41 (diamond industry).

71. See, e.g., Vandenberg, *supra* note 8, at 135–36.

contract between a supplier and a distributor or a distributor and a retailer,⁷² most of the space in which private regulation may happen occurs within the context of a formally negotiated and written agreement.⁷³ Indeed, the existence of the contract gives rise to the relationship itself and the power of one contracting party over the other within that relationship.

“The traditional and dominant conception of insurance is that it is a contract.”⁷⁴ Under this contract conception of insurance, the formal terms of the policy itself—“[t]he language of an insurance contract”—are typically assumed to be the relevant framework for understanding and interpreting the relationship established by the policy and the obligations thereby imposed on the insured.⁷⁵

Even when insurance or other private contracts are conceived as regulatory instruments, focusing on the formal contract terms has an intuitive appeal. Although the notion of private regulation inherently recasts public rules as private ones, it makes sense that researchers who draw analogies between public law and private regulation would consider the formal text of the rules as a starting point given the importance of the text in understanding and analyzing public rules.⁷⁶

Doing so is also easier than the alternative. Contracts are tangible sources. Legal scholars especially may feel most confident extracting data from written documents. The information they contain is far more likely to

72. See, e.g., Parella, *supra* note 7.

73. Of course, not all private contracts are subject to negotiation. Most insurance policies have terms drafted by the insurance company with insureds selecting their level of coverage by paying more or less depending on what standard terms and/or exclusions are included. Standardized contract terms proliferate in the transnational context, where the International Chamber of Commerce (ICC) oversees the drafting of standard terms. See, e.g., International Chamber of Commerce, *The Incoterms® Rules*, <https://iccwbo.org/resources-for-business/incoterms-rules/incoterms-rules-2010/> (last visited September 11, 2017) (“The Incoterms® rules have become an essential part of the daily language of trade. They have been incorporated in contracts for the sale of goods worldwide and provide rules and guidance to importers, exporters, lawyers, transporters, insurers and students of international trade.”). This is quasi-public—or completely public, as in the case of the Convention on the International Sale of Goods. U. N. Convention on Contracts for the International Sale of Goods, *opened for signature* Apr. 11, 1980, U.N. Doc. A/CONF.97/18 art. 5 (1981) [hereinafter CISG]. (<https://www.cisg.law.pace.edu/cisg/text/treaty.html>). And, some private “regulation” happens informally, as in the case of regulation among members of close knit groups. See ELLICKSON, *supra* note 39; see also ACHESON, *supra* note 42.

74. Abraham, *supra* note 34, at 658. Abraham notes that conceptualizing insurance relationships in contract terms “is the dominant way of understanding insurance for good reason,” as it “is the most accurate description of what insurance is.” In addition, and notably, insurance as contract “is also the way insurance law most often treats insurance.” *Id.*

75. *Id.* at 658–59 (noting that courts and scholars focus primarily on the language of the insurance contract).

76. See, e.g., *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004).

present a clear story than the information that might be pieced together from reconstructing oral agreements or looking to extra-contractual sources.⁷⁷

Relying on the contract itself, rather than outside accounts of what was intended, reflects a fundamental principle of contract law. Parties are sometimes legally required to document their agreements in writing.⁷⁸ Even when oral contracts are legally authorized, a written agreement is preferable because it can be consulted years later when memories fade.⁷⁹

Despite the inherent challenges, some scholars have recently started looking at other factors to better understand the formal relationship. For instance, Professor Talesh has contrasted Directors and Officers (“D&O”) liability insurance policies, in which scholars have concluded that certain inherent structural features of the contracting relationship between insurance companies and the directors and officers they are insuring, create disincentives against insurers putting in place loss prevention controls that would serve an important regulatory function,⁸⁰ with cyber liability insurance, in which insurers typically step in to provide direct management in a crisis and ensure appropriate legal responses by their insureds.⁸¹ But even when, as in this example, a scholar has widened his lens to encompass more of the contextual backdrop against which regulation within a contractual relationship might happen, the contracts and the formal terms they contain are still assumed to set the terms of the relationships.⁸²

II. POLITICAL RISK INSURANCE AS A POTENTIAL REGULATORY VEHICLE

As described in Part I, insurance law scholars have focused on a number of types of policies that might serve to regulate the behavior of insureds. This scholarly literature has so far failed to examine a particular type of insurance with great potential to exert regulatory influence. Political risk insurance

77. See Corbin, *supra* note 13, at 608.

78. *Emerson v. Slater*, 63 U.S. 28, 41 (1859) (“Verbal agreements between the parties to a written contract, made before or at the time of the execution of the contract, are, in general, inadmissible to vary its terms or to affect its construction. All such verbal agreements are considered as merged in the written contract.”); *Grant v. Naylor*, 8 U.S. 224, 235 (1808) (Marshall, C.J.) (“[T]he principles which require that a promise to pay the debt of another shall be in writing, and which will not permit a written contract to be explained by parol testimony, originate in a general and a wise policy, which this court cannot relax so far as to except from its operation cases within the principles.”); see also 2 U.C.C. § 201(1) (AM. LAW INST. & UNIF. LAW COMM’N 1977) (imposing writing requirement on sale of goods above \$500).

79. Feldman & Teichman, *supra* note 15, at 42 (discussing benefits of contracts that contain terms reducing uncertainty and tendency of parties to draft very specific contract provisions to ensure certainty); cf. Meyer, *supra* note 15, at 392.

80. BAKER & GRIFFITH, *supra* note 34, at 60–62.

81. Talesh, *supra* note 55, at 4.

82. *Id.* at 16–19.

(PRI) is striking in this regard, because it is sought by investors specifically when they know they will be operating in environments with low or no public regulation. PRI insures against precisely those risks that correlate with the instability and unpredictability of traditional public legal protections of foreign investments.

Concerns about a corporate social responsibility deficit are greatest in jurisdictions where corporations—particularly large, multinational enterprises (MNEs)—do business in unregulated or under-regulated environments. In places with little or no rule of law, what can constrain corporate abuses? It turns out, in fact, that the lack of legal protection gives rise to a market for insurance—which is itself a potential source of regulation, albeit private rather than public. The insurance policies and investment guarantees that MNEs use to lower the risks that arise in weak regulatory environments can and do contain terms that purport to regulate the policies and practices of entities engaging in foreign direct investment.⁸³

This is not surprising considering that entities offering political risk insurance policies have potentially great power to set strict terms when they underwrite such insurance. This is particularly so with respect to policies issued to those seeking to invest in the weakest regulatory environments, i.e., those in which foreign investment and activities become especially vulnerable to political risks.⁸⁴ The decision to invest in the absence of domestic regulation (and/or the ability to attract investors willing to back such a venture) is likely to require some security against the risk of financial loss in the face of the inherently significant risks that the investment will be negatively impacted or become a total loss. Therefore, internal corporate decision-makers will frequently deem investments too risky without PRI. Even in cases where they might be willing to proceed without it, they may be required to obtain it by outside investors. For instance, export credit agencies typically require PRI with respect to investments in which they are involved as a creditor and underwrite PRI policies that are tied to loans.⁸⁵

83. See *supra* notes 21-22 & accompanying text (describing MIGA's ESP Standards).

84. See *Glossary of Terms Used in the Political Risk Insurance Industry*, *supra* note 17 (describing the definition of "political risk" provided in MIGA's "Glossary of Terms Used in the Political Risk Insurance Industry").

85. While the focus of this Article is on PRI underwritten by public or quasi-public entities, corporations frequently opt to obtain PRI in the private insurance market. Besides the public institutions, there are several private insurance companies that are major players in insuring private international risks. See *id.* at 103 ("By the early 1990s there were only about six major private international risks insurers: Lloyd's, AIG, PanFinancial, Citicorp Trade Indemnity, and the relatively new PARIS."). Private insurance companies are even harder to study than public entities such as MIGA, as they have little or no incentive to provide any transparency regarding their industry and practices. See BAKER & GRIFFITH, *supra* note 34, at 17 (describing how "the key data for . . . quantitative analysis [of the insurance industry] . . . simply are not publicly available").

Thus, the ability to secure an investment guarantee and/or PRI is frequently an essential pre-requisite to the decision to engage in foreign direct investment in the under-regulated jurisdictions where corporate social responsibility is viewed as particularly deficient—that is, in the very locations where local populations (and local natural environments) are most at risk of being harmed because of a lack of legal protection.

This Part sketches the history of PRI, culminating in the fairly recent imposition of standards around corporate social responsibility in this type of insurance policy. In so doing, the Part describes the formal terms of this form of insurance and the way that, on paper, such policies establish frameworks of private regulation to fill gaps in public law. It ends by using the case study of political turmoil in Madagascar in 2009 to illustrate the way that PRI insurance policies would work if the formal terms truly set the terms of the relationship. This example, however, is a highly unusual scenario, as will be discussed further in Part III.⁸⁶

A. Historical Origins of Political Risk Insurance

Modern political risk insurance, which provides insurance against the risk of expropriation of an investment as a result of various political events (such as war, a coup, or other politically motivated action that targets foreign investment), is a direct descendant of war and civil disturbance risk insurance that has been offered as a transnational shipping insurance product since at least the nineteenth century.⁸⁷ War risks provisions in shipping insurance covered a risk inherent to transnational shipping, but at the same time these early insurance policies, underwritten in the emerging London global insurance market, “were constructed in such a way as to increase the incentives for [British] ship captains to avoid running high risks during a British conflict.”⁸⁸ Specifically, as they require even today, “under the terms of the [standard war risks] insurance contract, the outbreak of war meant that all ships had to put into the nearest protected harbor and stay there until the conflict ended.”⁸⁹ In short, they were careful to regulate moral hazards that might increase the potential liability of the insurer.

The political risk insurance product that exists today can be traced directly back to this shipping insurance which originated in the nineteenth

86. The claim brought in that case was the only one brought in connection with the political unrest that unseated the Madagascan President, and is one of just a handful of formal claims that has ever been presented to MIGA during its entire thirty-year history. *See infra* Part III.A.

87. *See* HAUFLER, *supra* note 27, at 29, 45-46.

88. *Id.* at 47.

89. *Id.*

century London insurance market.⁹⁰ At that time, the British Empire stood at the forefront of commerce and shipped goods to and from its colonies, the British Isles, and other markets around the world.⁹¹ The most significant risks to commerce were during the shipping leg. Everything from bad weather to piracy to seizure by enemy naval forces put shipments at risk of being lost or expropriated. While commercial interests had traditionally relied solely upon the British Navy to accompany ships and protect at-risk shipments, they eventually turned to the growing insurance industry and a market for marine risk insurance developed.⁹²

At first, war risks were excluded from marine insurance.⁹³ They were eventually covered when demand for coverage coincided with the increased ability of insurers to monitor risks and assess their likelihood of manifesting. Eventually, as British commercial interests shifted from a primary focus on shipping goods towards foreign direct investment in the early twentieth century, war risks insurance coverage evolved from policies covering marine risks inherent to shipping into policies covering similar risks inherent to operations involved in foreign direct investment.⁹⁴ At times, private insurers became skittish about continuing to offer war risks coverage (especially once insurance began to cover land-based risks which, unlike marine risks, could not be mitigated by sailing into port and taking shelter in the event of a war or civil disturbance).⁹⁵ British authorities, concerned about the potential impact of cessation of commerce during wartime, stepped in to create a public agency to offer this type of insurance: the first export credit guarantee agency.⁹⁶

Although it took some time for an official public agency to emerge, the public and private nature of the marine insurance market was blurred from the start. Lloyd's of London, in particular, developed a vast global network of agents to provide it with information necessary to conduct an actuarial assessment of global risks related to its international insurance products.⁹⁷ Thus, during the period between the two world wars, the insurance industry in London “maintained a unique relationship with the British Foreign Office” that blurred the lines between public and private.⁹⁸ Both entities

90. *Id.* at 29.

91. *Id.* at 34.

92. *Id.* at 28-29, 34.

93. *Id.* at 45-48.

94. *Id.* at 60-61.

95. *Id.* at 79-81.

96. *Id.* at 69.

97. *Id.* at 66-67.

98. *Id.*

“relied on a constant and accurate supply of information”⁹⁹ relating to interests located around the world and “regularly exchanged information relevant to each other’s interests.”¹⁰⁰

While coverage for political risks began in the shipping context,¹⁰¹ these policies evolved to cover a broader range of risks inherent to foreign direct investment when British commercial interests moved away from a primarily import/export economy and focused increasingly on foreign direct investment beginning in the early twentieth century. Descended directly from the war risks clauses in these shipping contracts, modern political risk insurance has been utilized to promote foreign direct investment since before the beginning of the twentieth century.¹⁰²

Political risk insurance continues to be underwritten by both public and private insurers.¹⁰³ Among the public insurers are national and export credit agencies (ECAs) and the Multilateral Investment Guarantee Agency (MIGA) of the World Bank (discussed in detail below). As of 2005, there were seventy-six export credit agencies operating in sixty-two countries.¹⁰⁴ Most are members of the Berne Union (International Union of Credit and Investment Insurers), which aims “to promote uniform principles for export credit and investment (including political risk insurance).”¹⁰⁵ More recent members—“mainly from the Middle East, Eastern Europe and ‘lesser developed’ countries”—are grouped together in the Prague Club, a ‘pre-membership training group’ for the Berne Union.”¹⁰⁶ Of the dozens of ECAs, some of the most significant (in terms of global reach and investment capabilities) are two U.S. government entities: OPIC and the Ex-Im Bank.¹⁰⁷ ECAs are used to underwrite 10% of global exports from Northern countries, primarily for private sector projects.¹⁰⁸

99. *Id.*

100. *Id.* at 67.

101. The war-related policies described above were the precursor to modern political risk insurance policies, which explicitly cover a variety of political risks.

102. HAUFLER, *supra* note 27, at 67.

103. Kausar Hamdani et al., *An Overview of Political Risk Insurance*, FEDERAL RESERVE BANK OF NEW YORK (2005), <http://www.bis.org/publ/cgfs22fedny3.pdf>.

104. MOODY, *supra* note 20, at 15.

105. *Id.* at 15–16.

106. *Id.* at 16.

107. *Id.* In addition to OPIC and Ex-Im Bank, Moody identifies the following as “the eight most important government ECAs”: EDC, Japan Bank for International Cooperation (JBIC), Export Credit Guarantee Department (ECGD) (UK), Compagnie Francaise d’Assurance pour le Commerce Exterieur (COFACE) (France), Hermes (Germany), Istituto per I Servizio Assicuratai per il Commercio Estero (Italy). *Id.*

108. Susan Hawley, *Underwriting Bribery: Export Credit Agencies and Corruption*, CORNER HOUSE BRIEFING 30 (Dec. 15, 2003), <http://www.thecornerhouse.org.uk/resource/underwriting-bribery>.

B. Contemporary Political Risk Insurance Underwritten by MIGA.

MIGA is the largest public underwriter operating in the field of political risk insurance. Similar to national ECAs—except that, as an inter-governmental agency, it serves equally investors from all nations—the terms of the products it offers have evolved since it was originally created in 1988.¹⁰⁹

Established as an affiliate of the International Bank for Reconstruction and Development (aka the “World Bank”), the stated objective for establishing MIGA was to “encourage the flow of investments for productive purposes among member countries, and in particular to developing member countries, thus supplementing the activities of the” World Bank and the International Finance Corporation (“IFC”) as well as “other international development finance institutions.”¹¹⁰ MIGA was created with the aim of fulfilling this overarching objective by, first and foremost, “issu[ing] guarantees, including coinsurance and reinsurance, against non-commercial risks in respect of [foreign direct investment].”¹¹¹ Specifically, the non-commercial risks MIGA is authorized to guarantee/insure are “political” risks, as is expressly spelled out in the treaty establishing the organization.¹¹² These include: currency transfer, expropriation, breach of contract by a host government, and war and civil disturbance.¹¹³

When MIGA was organized “to complement public and private sources of investment insurance against non-commercial risks in developing countries,” its “multilateral character and joint sponsorship by developed and developing countries were seen as significantly enhancing confidence among cross-border investors.”¹¹⁴ During its first decade, it had no policy terms similar to the environmental and social performance standards that have subsequently been developed. These terms find their historical origins in the “Environmental Assessment and Disclosure Policy” that was first adopted in 1999 to impose environmental standards on all MIGA-insured projects.¹¹⁵ The following year, MIGA established the Office of the Compliance Advisor/Ombudsman (“CAO”) whose mission is, in its own words, “to address complaints by people affected by IFC/MIGA projects and

109. *See generally* MIGA, THE CONVENTION ESTABLISHING THE MULTILATERAL INVESTMENT GUARANTEE AGENCY (2010).

110. *Id.* at 2.

111. *Id.*

112. *Id.* at 10.

113. *Id.* at 10–11.

114. *Who We Are*, MIGA, <http://www.miga.org/who-we-are/history/> (last visited Sept. 16, 2016).

115. *Id.*

to enhance the social and environmental accountability of both institutions.”¹¹⁶

About a decade ago, when the movement for corporate social responsibility (“CSR”) started becoming more mainstream, advocates began to lobby for the World Bank (and its affiliates, such as MIGA) to focus on human rights considerations as part of its decisionmaking processes.¹¹⁷ Such terms would not only be normatively desirable from the perspective of human rights advocates, but they would encourage practices correlated with reducing the harm the insurance regulates.

MIGA has standard insurance contracts that investors may choose to insure the five types of political risks coverage it offers.¹¹⁸ These model contracts are available on MIGA’s website and are tailored to coverage of equity investments, loan guarantees, and shareholder and non-shareholder loans.¹¹⁹ Most importantly, for purposes of this Article, all “proposed projects [for which a MIGA guarantee is sought] that are determined to have moderate to high levels of environmental and/or social risk, or the potential for adverse environmental and/or social impacts [must] be carried out in accordance with the requirements of” MIGA’s Environmental and Social Sustainability Performance Standards (“ESP Standards”).¹²⁰

116. COMPLIANCE ADVISOR OMBUDSMAN (CAO), <http://www.cao-ombudsman.org/about/> (last visited Sept. 16, 2016). Note that the compliance function of the CAO does not extend to the corporate sponsors of MIGA-backed projects. Instead, “CAO Compliance assesses how IFC and MIGA assure themselves of social and environmental performance at the project-level. Investigations focus on IFC or MIGA—not the project sponsor—and examine compliance with relevant policies, standards, guidelines, procedures, and conditions.” See *How We Work: Compliance*, CAO, <http://www.cao-ombudsman.org/howwework/compliance/> (last visited Sept. 16, 2016).

117. See, e.g., Horta, *supra* note 16, at 242-43.

118. These are the same risks enumerated expressly in the treaty establishing MIGA. See *Investment Guarantees, Terms and Conditions*, MIGA, <http://www.miga.org/investment-guarantees/overview/types-of-coverage> (last visited Sept. 16, 2016).

119. *Id.* As well, there are separate model contracts for its small investment program. See *id.*

120. *Projects, Policy on Environmental and Social Sustainability*, MIGA, <https://www.miga.org/projects/environmental-and-social-sustainability> (last visited Sept. 16, 2016). MIGA’s published guidelines state that it “categorize[s] projects based on an assessment of their likely environmental and social impacts” as follows:

Category A if it may have potentially significant adverse social or environmental impacts that are diverse, irreversible, or unprecedented

Category B if it may have potentially limited adverse social or environmental impacts that are few in number, generally site specific, largely reversible, and readily addressed through mitigation measures

Category C if the project has minimal or no adverse social or environmental impacts, including certain financial intermediary projects with minimal or no adverse risks

Category FI is assigned to business activities undertaken by Financial Intermediaries or through delivery mechanisms involving financial intermediation.

This category is further divided into:

FI 1: when existing or proposed portfolio expected to include substantial business activities that have potential significant adverse environmental or social risks or impacts that are diverse,

As MIGA proclaims in its elaboration of its ESP Standards: “[a]n important component of positive development outcomes is the environmental and social sustainability of projects, which [it] expect[s] to achieve by applying a comprehensive set of environmental and social performance standards.” These policies and standards, it says, have been “derived from our extensive experience insuring investments around the world” and are utilized during the underwriting stage to help it design specifically tailored “policies and guidelines that are applicable to a project. Projects are expected to comply with those policies and guidelines, as well as applicable local, national, and international laws.”¹²¹

C. The Theoretical Impact of MIGA Performance Standards on Corporate Social Responsibility

MIGA is perhaps the most likely of any political risk insurer to have an interest in promoting CSR.¹²² Unlike OPIC or credit guarantee agencies created with specific national political and policy interests as part of their

irreversible, or unprecedented.

FI 2: when existing or proposed portfolio expected to include business activities that have potential limited adverse environmental or social risks or impacts that are few in number, generally site specific, largely reversible, and readily addressed through mitigation measures; or includes a very limited number of business activities with potential significant adverse environmental or social risks or impacts that are diverse, irreversible, or unprecedented.

FI 3: when existing or proposed portfolio expected to include business activities that predominantly have minimal or no adverse environmental or social impacts.

Id. MIGA also notes that “[t]he decision with respect to classification of projects is the responsibility of MIGA.” *Id.*

121. *Id.* The PRI contract that culminated in the successful claim for reimbursement discussed in Part II.C., below, contained provisions purporting to regulate the corporate policyholders’s conduct in Madagascar to mitigate some of the risks that manifested. Issued in 2006, the policy included the then-applicable ESP Standards (somewhat different than those in effect today). In August 2007, the “Board of Directors approved new Policy and Performance Standards on Social and Environmental Sustainability and a new Policy of Disclosure of Information,” standards which were intended to “strengthen the environmental and social standards that the agency already applies to projects it supports.” *News*, MIGA, <http://www.miga.org/Lists/General/CustomDisp.aspx?ID=613&ContentTypeId=0x0100A8B57A37D4E66D42BD3171DEFD939B69> (last visited September 17, 2017). In particular, the new policies:

[D]efine[d] MIGA’s roles and responsibilities in supporting project performance in partnership with clients. MIGA expects to ensure positive development outcomes relating to social and environmental sustainability by supporting investments that meet a comprehensive set of performance standards. These address social and environmental assessment and management; labor and working conditions; pollution prevention and abatement; community, health, safety and security; land acquisition and involuntary resettlement; biodiversity conservation and sustainable natural resources management; indigenous peoples; and cultural heritage.

Id. The Performance Standards were updated once again in 2013.

122. In large part, this Article focuses primarily on MIGA because of this. MIGA initially seemed like a good candidate to use as a research subject because, as a public entity, its contracts and information about those contracts and the contracting process were more readily available than those underwritten by other insurers, particularly private PRI insurers – but also many public entities. This turned out to be somewhat ironic given the ultimate research conclusions that MIGA should make public a lot more data than it currently does, see *infra* Part IV.

mandate and decisionmaking processes, MIGA is an arm of an international organization that has no such domestic biases to intrude on its interest in promoting CSR in a principled and neutral way. To the extent that such national credit agencies are able to regulate their own domestic corporations to require or incentivize CSR, policymakers may do so through other domestic mechanisms instead of or in addition to terms included in the credit guarantee agency's contracts.¹²³ A private insurer, on the other hand, is likely to be only as interested in promoting CSR to the extent doing so is determined to be likely beneficial to the bottom line.

To the extent that the contracts generated by investment—including PRI contracts—could create an effective regulatory framework, the limits on public regulation that have frustrated proponents of CSR would lose their significance. If one looks at the contract provisions imposed by MIGA, there appears to be great potential for ESP Standards to play such a role. The ESP Standards impose private standards that could operate similarly to regulatory provisions included in the private contracts that are the subjects of the private regulatory literature discussed in Part I.

On their face, provisions like the ESP Standards provisions that are now part of MIGA's model policy reduce the potential liability that might be generated as a direct result of conduct undertaken in connection with the foreign direct investment projects being guaranteed and insured. Seemingly, it would be not only in the political interests of MIGA and its affiliate, the World Bank, to insist upon robust and effective ESP Standards. It would also appear to be in its financial interest to enforce them if it were in fact acting in a traditional insurance provider capacity. Per the terms of its guarantee contracts, MIGA stands to lose substantial sums should political risks manifest that trigger claims under these types of contracts.

D. Madagascar: A Political Risk Case Study

A situation that arose out of political unrest in Madagascar a decade ago, before the stricter ESP Standards that are now a standard part of the MIGA model policy, illustrates the way that political risks can materialize and lead to claims by investors. It also shows how the presence of investor corporations in politically unstable environments without strong public law

123. Of course, policymakers at domestic credit guarantee agencies may decide that there are particular reasons to require socially responsible corporate practices in connection with a loan guarantee that other domestic regulators might not decide should be more generally applicable to all domestic corporations. As discussed above, requiring those engaging in direct investment to engage in socially responsible business practices may be a financially savvy decision by the guarantor since such business practices may lessen the risk of a political risk manifesting, at least in some instances.

regulations can be linked to, and exacerbate, the political risks that can then manifest in damage to foreign investments in these environments.

In 2009, Madagascar experienced a dramatic political upheaval when incumbent President Marc Ravalomanana was overthrown in a coup d'état orchestrated by Andry Rajoelina, the former mayor of Antananarivo, the Madagascan capital. Rajoelina utilized skills he had learned working as a teenaged disc jockey to broadcast radio addresses criticizing the ruling regime. One of the major themes underlying his criticism concerned the ruling government's commitment to investment projects by foreign corporations, such as Daewoo, the South Korean conglomerate that was granted a 99-year lease of more "than 1.3 million hectares of arable land in order to plant corn to be exported back to South Korea."¹²⁴ Investments such as this one were widely perceived to benefit the elite members of Madagascan society at the expense of the majority.¹²⁵

Popular support for the ruling government had already been eroding by the time that large-scale protests began in early 2009 after Rajoelina ramped up his criticism.¹²⁶ The protests led to the deployment of security forces to suppress demonstrations near government buildings. The result was the deaths of hundreds of protestors. Eventually, in March 2009, after the head of the army was ousted and replaced by a Rajoelina supporter, Rajoelina was able to wrest control of the government. This extra-constitutional military coup was condemned by the African Union, as well as by the United States and the European Union.¹²⁷

124. AMNESTY INT'L, MADAGASCAR: URGENT NEED FOR JUSTICE 7 (2010), <https://www.amnesty.org/download/Documents/36000/afr350012010en.pdf> ("The announcement of this project created an atmosphere of distrust among the population, who suspected the government of selling off Malagasy land under conditions that lacked transparency.").

125. Tom Burgis & Javier Blas, *Madagascar Scraps Daewoo Farm Deal*, FINANCIAL TIMES (Mar. 18, 2009), <https://www.ft.com/content/7e133310-13ba-11de-9e32-0000779fd2ac>. The Daewoo deal was, at least "[i]n theory, . . . a win-win deal: Daewoo would pay Madagascar \$6 billion to grow corn and oil palm, helping South Korea meet both its food-security and bio-fuels needs, while providing Madagascar with revenues and desperately needed jobs." Scott Baldauf, *Hunger and Food Security: Is Africa Selling the Farm?*, CHRISTIAN SCI. MONITOR (Feb. 6, 2011), <https://www.csmonitor.com/World/Global-Issues/2011/0206/Hunger-and-food-security-Is-Africa-selling-the-farm>. But most of the local populace did not view it this way. The political protests that led to Ravalomanana's ouster, and Rajoelina's installation as head of state, "showed that the Madagascan people—70 percent of whom live in rural areas and nearly 50 percent of whom suffer chronic malnutrition—saw the deal as a 'land grab' and a threat to their country's survival." *Id.* The skeptical view of most Madagascans was shared by at least one European diplomat who opined when the deal was first announced that "[w]e suspect there will be very limited direct benefits [for Madagascar]. Extractive projects have very little spill-over to a broader industrializ[ation]." Song Jung-a & Christopher Oliver, *Daewoo to Cultivate Madagascar Land for Free*, FIN. TIMES (Nov. 19, 2008) <https://www.ft.com/content/6e894c6a-b65c-11dd-89dd-0000779fd18c>.

126. AMNESTY INT'L, *supra* note 124, at 7–9.

127. *Id.* at 8–10.

Following his installation as President, Rajoelina moved quickly to cancel contracts with foreign investors. One of his very first acts was the cancellation of the unpopular Daewoo contract.¹²⁸

Other impacted investors were apparently surprised by the coup's similar effects on their investments. In the same year that Rajoelina assumed power, Australian-British metals and mining conglomerate Rio Tinto (the largest foreign investor in Madagascar) issued a statement that "it foresaw no problems for its titanium mining operation and license" despite the regime change¹²⁹—only to see its mining contracts frozen just a short while later, with President Rajoelina announcing that his "administration was reviewing all contracts with foreign investors because the country was receiving too little revenue."¹³⁰

The coup—the result of local disapproval of foreign direct investment—is a classic example of the type of political risk that makes many foreign investments financially precarious. It is to guard against precisely the types of risks that manifested in Madagascar that foreign investments in tumultuous political environments are often guaranteed or insured by PRI.¹³¹ Not long before the 2009 coup, for instance, Louvre International, a Mauritius corporation, had obtained a PRI guarantee of \$2.2 million (USD) from MIGA "to cover its equity investment in Grand Hotel du Louvre of Madagascar" for a variety of risks including "war and civil disturbance."¹³² Following damages to its investment resulting from the civil disturbances leading up to the coup, MIGA paid out the claim lodged by Louvre under the guarantee.

The same political instability in Madagascar that necessitated PRI also created other risks and harms that public regulation often attempts to prevent. For example, in a report titled "Madagascar: Urgent Need for Justice," Amnesty International detailed how "[t]he political transition from the government of [the ousted Ravalomanana regime] to the [regime of President Rajoelina] was characterized by violence, often accompanied by human rights violations."¹³³ Violence continued after the regime change,

128. Burgis & Blas, *supra* note 125.

129. Eric Onstad, *Rio Expects No Problems from New Madagascar Government*, REUTERS (Mar. 18, 2009), <https://www.reuters.com/article/us-madagascar-crisis-riotinto-sb/rio-expects-no-problems-from-new-madagascar-government-idUKTRE52H2SZ20090318>.

130. *Madagascar Says Mining Contracts Will Be Reviewed*, REUTERS, Mar. 30, 2009, <https://www.reuters.com/article/idUSLU47467>.

131. HAUFLE, *supra* note 27, at 41.

132. *Project Brief, Grand Hotel du Louvre*, SA, *supra* note 21.

133. AMNESTY INT'L, *supra* note 119, at 9.

with supporters of the ousted government becoming the new victims of state-sanctioned violence.¹³⁴

The unstable political environment also had a devastating impact on Madagascar's precarious natural environment. "While illegal logging had been going on for years, the pace . . . suddenly escalated [after the collapse of Madagascar's government in 2009]: The forest was unpoliced and filled with organized gangs, a free-for-all of deforestation."¹³⁵ More generally, "[j]ust as the global environmental community rejoiced in 2002 when Marc Ravalomanana assumed the presidency on a green-friendly platform, so did they react with dismay in the spring of 2009 as the military routed Ravalomanana from office."¹³⁶ The escalating deforestation rate has also had a serious impact on plant and animal species that are endemic to Madagascar.¹³⁷ Perhaps the most famous endemic species—the lemur—has seen its numbers dwindle significantly since Rajoelina assumed power.¹³⁸ More than 90% of native lemur species are now endangered, with scientists pointing to the 2009 political turmoil as "a flashpoint" that dramatically worsened the situation for the species.¹³⁹

These risks to individuals and to the environment arose from the same shaky political environment as the risk to foreign investments in Madagascar at the time. Public regulations—either domestic or via public international law—are unlikely to be effective (or potentially feasible) mechanisms for managing risks under such circumstances. But even as the investments themselves potentially exacerbate the risks with which investors are concerned, the investment risk is potentially subject to private regulation.

134. *Id.*

135. Robert Draper, *Madagascar's Pierced Heart*, NAT'L GEO. (Sept. 2010), <http://ngm.nationalgeographic.com/2010/09/madagascar/draper-text>. Additional risks to the local population are also connected to the environmental disaster that is unfolding. One rosewood looter recounted to National Geographic the dangers of the illegal timber trade, noting as an example that "two men were decapitated with a machete over a timber dispute" shortly before the looter was interviewed. *Id.*

136. *Id.*

137. KAREN FREUDENBERGER, USAID, PARADISE LOST? LESSONS FROM 25 YEARS OF USAID ENVIRONMENTAL PROGRAMS IN MADAGASCAR v (2010), http://www.usaid.gov/sites/default/files/documents/1860/paradise_lost_25years_env_programs.pdf ("And where there is illegal logging, there are other illegal activities. Threatened animals, including several particularly endangered species of rare lemurs and tortoises, are being captured for export and for food at rates that ensure their extinction in the wild, unless this trend can be reversed.")

138. *Id.* at 88.

139. Cristoph Schwitzer et al., *Averting Lemur Extinctions Amid Madagascar's Political Crisis*, 343 SCI. 842, 842–43 (2014) (noting, e.g., that, as of 2014, "94% of lemur species are threatened, up from 74% in 2008" and describing various reasons why lemur populations declined rapidly after the 2009 political turmoil); see also Michelle Douglas, *The Future of Madagascar's Lemurs*, BBC (Feb. 27, 2015), <http://www.bbc.com/earth/story/20150226-what-hope-is-there-for-madagascars-threatened-lemurs>.

While political turmoil undercuts the ability of domestic legal regulation to serve as a check on the legal risks to the investment—or on the investors themselves—the involvement of MIGA and/or other public or private insurance companies in foreign direct investments in environments like Madagascar means there is space for regulation of at least the investor's own conduct in these politically volatile jurisdictions.

This is significant for several reasons. First, as was explicitly clear in the Madagascar situation, tensions over foreign direct investment often contribute to political instability and contribute to the risks being insured. To the extent that the conduct of insured investors can be regulated to reduce the same political risks they are seeking to insure against, everyone wins. Second, whatever the potential benefits, promoting investment by corporations in politically unstable environments generates other risks that are attendant to the low levels of public regulation of corporations in such environments. These risks—that corporations will not behave in a socially responsible manner vis-à-vis the local population and environment in such jurisdictions—contribute to political instability that may be triggered by popular dissatisfaction with corporate policies and practices, and have often seemed to be a seemingly insoluble regulatory puzzle.¹⁴⁰

The PRI contract under which Louvre made a successful claim for reimbursement did contain some provisions purporting to regulate Louvre's conduct in Madagascar to mitigate some of the risks that manifested—but the obligations imposed were minimal. For instance, MIGA touted that the project would benefit the local population by generating new jobs for local citizens.¹⁴¹ In fact, the estimated number of new jobs to be created was a mere thirty-five¹⁴²—hardly a boon likely to offset the perceived negative impact of a refurbished four-star hotel that would presumably benefit directly only elite Malagasy and foreign business interests.

Even if the terms of the policies could be crafted more appropriately—an achievement that reforms to the ESP Standard model provisions that post-date the Louvre policy purportedly now claim—a single policy like the one issued to Louvre could hardly be expected to do much work. But, significantly, MIGA (and the World Bank more generally) had underwritten guarantees and insurance with respect to a great deal more foreign

140. A large and significant literature has emerged on the subject of corporate social responsibility. As discussed *supra* notes 6–7 and accompanying text, a significant thread has explored the potential of private regulation. Despite this interest in private regulatory solutions in the context of supply chain contracts, there is a lack of attention in the scholarly literature to the regulatory potential of other types of contracts relating to foreign direct investment.

141. *Project Brief, Grand Hotel du Louvre, SA, supra* note 21.

142. *Id.*

investment in Madagascar that was impacted by the 2009 political turmoil.¹⁴³ If enforced, the terms of multiple policies across investment sectors—and particularly if there were ones involving large investors—might have had some impact.

But unlike the Louvre claim, details of which MIGA has made publicly available, what actions may have been taken by MIGA or investors who were covered by other policies, is not evident. The more significant story about MIGA's insurance of political risk in Madagascar may be the one that lies behind a wall of silence.

III. BEYOND FORMAL CONTRACT TERMS

While MIGA was established with the express purpose to underwrite guarantees and insure political risks that arise in connection with foreign direct investment, it often acts less like a traditional insurer than one would expect based on the formal terms of their contracts with investors. Claims like Louvre's described above are outliers. In general, such claims are almost never brought. Although formally operating as an "insurer," MIGA is arguably not providing political risk insurance so much as it is providing its services as a mediator/enforcer of the property rights of investors/insureds.

Yet, while the relationship forged between MIGA and its policyholders turns out to be quite different than the formal terms reflect, MIGA continues to possess potential as a strong regulator. The reason that investors pay MIGA significant sums for this form of "insurance" reflects the reality that it may possess the ability to exert even greater regulatory power—over both investors and host governments—than is evident on the face of its contracts.

This Part explains what services MIGA in fact provides to its policyholders under the label of "insurance," and the significant regulatory power it may wield over those with whom it has established contractual relationships. Whether it chooses to exercise its significant authority in favor of demanding greater corporate social responsibility is a harder question to answer given the lack of available data, an issue the next Part addresses in detail.

A. MIGA "Insurance" Contracts in Action

While acting as a guarantor for risky foreign investments, MIGA does not act much like an arms-length insurance company. Although it takes in

143. See, e.g., Onstad, *supra* note 124 (discussing World Bank's position that the mining contracts with Rio Tinto should not be renegotiated by the new government); Schwitzer, *supra* note 139, at 842 (discussing World Bank's foreign aid to Madagascar which continued to be offered to the new government even as the United States and the European Union suspended aid until a democratic government was re-installed).

substantial sums in premiums,¹⁴⁴ MIGA almost never has to pay out in connection with formal insurance claims. To date, it has paid only eight claims since it came into existence as an entity in 1988.¹⁴⁵ This is in contrast to other insurers of political risk. For instance, “[b]etween 1995 and 2001 the British ECGD regularly paid out more than twice (in some instances up to three times) as much in claims as it had ostensibly received in premium payments.”¹⁴⁶

Yet, MIGA’s numbers are misleading if they are taken to suggest that claims are unlikely to arise. The small number of claims paid by MIGA over the past three decades is a testament to the agency’s ability to work with investors and host countries to find amicable resolutions to disputes than it is to the rarity with which claims—or disputes that might lead to them—arise.

MIGA focuses on finding solutions to disputes before they reach the level of a full-fledged claim. Ultimately, MIGA’s goal is to keep the investment and its development benefits on track. On its website, MIGA promotes its ability to serve as a dispute resolution provider, proclaiming:

In order to prevent a potential claims situation from escalating, MIGA provides dispute resolution services to all of its clients. MIGA maintains close contact with investors and monitors projects and potential issues so that the Agency can respond at the first sign of trouble to facilitate resolution of potential investment disputes.¹⁴⁷

Even more to the point, MIGA advertises to its potential insureds that it has “immediate access to officials at the highest levels of government in the countries for which MIGA provides guarantees and its status as a member of the World Bank Group significantly strengthens MIGA’s ability to resolve potential disputes to the satisfaction of all parties and deters some

144. In 2016, MIGA’s net premium income was \$86.4 million. See MIGA, MANAGEMENT’S DISCUSSION AND ANALYSIS & FINANCIAL STATEMENTS 6 (2016) https://openknowledge.worldbank.org/bitstream/handle/10986/25109/MIGA_Financial_Statements_2016.pdf?sequence=2&isAllowed=y. This net total represents gross premiums of \$139.8 million minus amounts paid out to reinsure some of its risk (plus ceding costs minus other costs such as brokerage and other commissions). *Id.*; see also *id.* at 5.

145. MIGA, MIGA: HELPING KEEP SUSTAINABLE INVESTMENTS ON TRACK 1 (2015), https://www.miga.org/documents/Dispute_Resolution_and_Claims.pdf. Of course, it is also true that MIGA has never *denied* a claim (at least as of 2010). Louis Bedoucha, *Risk Assessment and Mitigation in Infrastructure Projects*, OECD, at 11, Feb. 18, 2010, <http://www.oecd.org/mena/investment/privatesectorinitiatives/44667907.pdf>. While this presumably remains the case, the author has not located any reliable source to support MIGA’s assertion that it has still never denied a claim.

146. MOODY, *supra* note 20, at 17. Note that the British EGCD was able to do so because of its reliance “on counter-guarantees from the countries which imported the underwritten goods and services.” *Id.* MIGA’s own practices may be similar—it may well be warding off claims by promoting settlements directly from host governments in cases where investments are threatened or negatively impacted.

147. *Id.*

government actions that otherwise could disrupt guaranteed investments.”¹⁴⁸ MIGA reports that as of October 2015, its “proactive facilitation efforts have been pivotal in the resolution of nearly 100 project-related disputes since the Agency’s founding in 1988.”¹⁴⁹ Its success in “facilitating” resolutions without claims means that MIGA takes in significant amounts of money in premiums, but very rarely has to pay out in return. “To date, MIGA has been able to resolve disputes that would have led to claims in all but two cases, and both of those claims were paid. MIGA also has paid six claims resulting from damage related to war and civil disturbance.”¹⁵⁰

Indeed, within the industry it is known that PRI insurers often have considerable influence with foreign governments that are targeted to host investment projects.¹⁵¹ Thus, the risk mitigation benefits offered by PRI go well beyond the ability of investors to obtain financial indemnification in the event of a loss. MIGA’s “ability to shield investors from loss” is well known and provides “a ‘halo effect’ associated with their policies.”¹⁵² As one industry analyst says,

Examples of [the “halo effect”] are the exemptions from currency controls that were granted to certain investors during the Russian and Argentine crises. In the latter crisis, this exemption was extended to clients of all members of the Berne Union (which includes public and private insurers). The halo effect can also be useful in facilitating the salvage of assets ceded to the insurer after a loss has been paid.¹⁵³

Precisely because of this “halo effect,” obtaining a guarantee or insurance policy from MIGA provides credibility that helps investors to obtain financing.¹⁵⁴

Thus, unlike insurance discussed in other literatures,¹⁵⁵ political risk insurance in general—and that underwritten by public entities like MIGA most particularly—is unlikely to exert much if any regulatory influence based on the threat of non-payment owing to an arguable breach of an ESP Standard. Rather, the way in which the insurance is actually used (to obtain

148. *Id.*

149. *Id.*

150. *Id.*

151. Hamdani, *supra* note 103.

152. *Id.*

153. *Id.*

154. MOODY, *supra* note 20, at 9. Because of its impact on obtaining financing, one commentator believes that “[a]ny influence the World Bank or OPIC might have exerted to forestall [negative] consequences [of an investment] could only have come from their refusing insurance at the outset.” *Id.* As discussed below, this is not necessarily the case, as investors who know they will work informally with MIGA to resolve disputes that might arise are likely to continue to have incentives to be cooperative.

155. See, e.g., Vanderbergh, *supra* note 8 (environmental); Talesh, *supra* note 62 (employment); BAKER & GRIFFITH, *supra* note 34 (directors and officers insurance).

financing and to obtain the good influence of the World Bank in relation to host governments), along with the very low probability of a claim arising, means that most investors are likely to assess the risk of non-payment based on a breach of an ESP Standard as a very low probability and make decisions based on other considerations. In this sense, such clauses are unlikely to carry much regulatory weight based on their status as formal contract obligations.

B. MIGA's Regulatory "Practice"

The fact that insureds are unlikely to be concerned about the financial consequences of breaching the contract terms and risking non-payment of a future claim does not mean that MIGA's contracts are without regulatory impact. To the contrary, its contract relationships may still provide considerable space for regulation of corporate policies and practices, albeit not via the more traditional contract theory considered above.

Instead, MIGA has the capacity to exert considerable influence over corporate practices at the contracting stage. Its ability to refuse insurance if applicants fail to meet the standards MIGA sets in connection with individual projects gives it considerable power and regulatory authority over practices related to project-specific ESP Standards.¹⁵⁶

In exercising this authority, MIGA could (and claims that it does) undertake to conduct comprehensive due diligence of corporate practices and policies. MIGA also claims to routinely conduct a detailed examination of a project's local impact and to survey the local constituencies to determine what ESP Standards would benefit local interests and forestall or minimize political risks from later manifesting. In practice, of course, due diligence may be more or less thorough. Whether it is effective will depend on many things—including but not limited to: the types of policies MIGA implements; the internal culture regarding compliance with the policies; openness to changes to policies intended to benefit local interests; the skills and devotion of the individuals conducting the investigations; and how those individuals are supervised.

Thus, even in making decisions about whether to enter contracts, MIGA has the capability to exercise significant regulatory authority in the field of corporate social responsibility (among others). But whether it, or other public entities that facilitate foreign direct investment, will make corporate social responsibility a priority in their contracting decisions is far from clear, notwithstanding the words MIGA uses in its own internal policies or in the

156. MOODY, *supra* note 20, at 9 ("Any influence the World Bank or OPIC might have exerted to forestall these consequences [of an investment] could only have come from their refusing insurance at the outset.").

policies it writes when it decides to accept an application and insure against the political risk involved.¹⁵⁷

But perhaps more significantly, after the contractual relationship commences, ongoing interactions between MIGA and the investors with whom it contracts may be regulatory in nature. To be sure, it is true that claims are not likely to be rejected based on an alleged breach of an ESP Standard because claims are not likely to be formally brought at all—or to be rejected even in the highly unlikely event that they are. But, there are significant numbers of cases in which *potential* claims arise and are dealt with informally.

As described above, more than one hundred different disputes between investors and host countries have been resolved through MIGA's offices.¹⁵⁸ Because insureds depend on MIGA to assist them in resolving claims, they have incentives to cooperate with MIGA and remain in formal good standing—and in its informal good graces.

Indeed, it is possible for enforcement to occur during a policy term based on environmental/social responsibility breaches or violations. In 1995, OPIC (the U.S. domestic counterpart to MIGA) canceled \$100 million in PRI cover for Freeport-Rio Tinto's Grasberg mine, and in 1997 an OPIC lawyer produced compelling environmental arguments against Rio Tinto's Lihir gold venture after citing a breach by Freeport-Rio of the U.S. Foreign Assistance Act.¹⁵⁹

But whether this is common practice for entities such as OPIC or MIGA is far from clear. On the one hand, it appears that such enforcement is not typical. One OPIC alumnus who has now built a private insurance practice asserts that private risk insurance is increasingly drawing clients in large part because private insurers can be “nimble” as a result of not having “to prepare 800 politically mandated labor, environmental, and workplace studies”—i.e., like the ESP Standard plans now mandated by MIGA (and OPIC) “before taking action.”¹⁶⁰

157. Even corporations with highly publicized accusations of human rights abuses have been able to secure PRI from public entities. In 2003, OPIC gave Unocal \$350 million in PRI for the company's West Seno (Indonesia) offshore oil and gas exploration project – despite the fact that dozens of NGOs, headed by the Environmental Defense Fund, had argued that the proposed project “appear[ed] to be in violation of Indonesia's environmental law[s]” and that there were “strong indications of serious . . . human rights abuses associated with the project.” MOODY, *supra* note 20, at 18 (citing Titi Soentoro & Stephanie Fried, *Case Study: Export Credit Agency Finance in Indonesia* (2002)).

158. MIGA, *supra* note 138; *see also* notes 137–40 & accompanying text.

159. MOODY, *supra* note 20, at 18 (citing MINING J. (London) (Nov. 10, 1995), FIN. TIMES (London) (Nov. 8 1995); OPIC, *Environmental Summary of Lihir Gold Project* (Washington, DC) (Aug. 8, 1997)).

160. Rosenblum, *supra* note 23, at 34 (quoting Robert E Svensk).

On the other hand, private insurance is more likely to be offered (and utilized) in lower risk investment situations. “[P]rivate insurers are said to ‘cherry-pick’ the more desirable risks and underwrite them at lower prices than the public benchmark.”¹⁶¹ Thus, it is *possible* that significant regulation can occur, and indeed may be occurring, as a result of the type of contracting relationship MIGA is creating with its insureds. Unfortunately, it is not clear. What is clear is only that the terms of the contracts themselves tell us precious little about the true nature and scope of the regulatory relationship.

IV. THE NEED FOR GREATER TRANSPARENCY IN PRIVATE REGULATION

The emphasis in scholarship (and practice) is often—perhaps too often—on formal written documents. As one sociologist notes in considering the way in which De Beers’ CSR policies have been implemented by its supply chain partners, CSR “Best Practices and Principles” are often constructed and conceived “not as a process or a practice, but as a material object: a set of written documents.”¹⁶² Unfortunately, this tendency to rely on written documents misses crucial aspects of the relationships they create or are intended to facilitate. For instance, De Beers’ top-down implementation of its CSR policy “by the book” caused it to miss out on integrating crucial internal cultural norms that would have made the policy more likely to be successful.¹⁶³

Likewise, understanding how MIGA engages with its regulatory subjects¹⁶⁴ is critical to understanding whether it is in fact successful in implementing its own CSR standards—and if not, why not. In short, mapping out a successful regulatory story requires incorporating information beyond that found on the written contract page.

161. Hamdani, *supra* note 103, at 5. Self-insurance may also become more attractive to investors who decide that CSR requirements imposed by insurers are too onerous. A lot of the initial interest in PRI is by investors who:

[T]est the PRI market as a part of a due diligence process. For example, the availability of insurance at a reasonable price might confirm the investor’s internal risk assessment of the project. However, the tendency of investors to go forward with emerging market investments without PRI also suggests that PRI coverage, while beneficial, is not essential to many investment decisions. Indeed, one market participant noted that PRI tends to be cut when a risk management budget is under pressure.

Id. at 7.

162. Jamie Cross, *Detachment as a Corporate Ethic: Materializing CSR in the Diamond Supply Chain*, 60 FOCAAL 34, 41 (2011).

163. *Id.*

164. By regulatory subjects, I mainly have in mind the corporate entities to which it issues guarantees and PRI, but the host governments are also MIGA’s potential regulatory subjects.

The difficulty with this from a scholarly perspective is that determining the impact of private contract regulation—much less developing a formal approach to improve it—is far more difficult when one moves beyond formal texts. In undertaking this project, for example, MIGA was a natural choice to study for a number of reasons. But perhaps none was as compelling as the fact that it is a public institution that appears to be relatively transparent, with much accessible data. It has an extensive website detailing its policies, procedures, and model contracts.¹⁶⁵ The website contains detailed information regarding the studies it conducts relating to the projects with which it is associated.¹⁶⁶ On its face, it appears to be an easy subject about which to conduct empirical research.

However, what appeared to be significant transparency turned out, in this case, to fall well short of full disclosure. Obtaining information about much of the post-contract conduct and relationships in which MIGA is engaged was not possible. While an outside or internal audit could reveal more about the organization and its culture, it would require interviews and in-depth investigation beyond what appears on the pages of MIGA's contracts. While the words on the paper that describe what an organization is and what it does are important, the lived experience on the ground is too.

In on-going business relationships, the formal legal remedies available—those that structure the law of contracts and form the basic common law principles every first-year law student is taught—are frequently not very important. Recognizing that parties involved in on-going business relationships typically prefer to permit cure in cases of breach, rather than to terminate and/or bring lawsuits, the Convention on the International Sale of Goods is structured around default presumptions reflecting that reality.¹⁶⁷ In many cases, the rules established by a contract are expected to be invoked in rare cases, such as in the event of a truly dire event, but otherwise will be ignored in favor of what is working day to day.

In other areas, as well, “[e]fforts to examine the broader landscape of informal relational forms [beyond the four corners of the contract relationship] generally have progressed further on a conceptual than an empirical basis.”¹⁶⁸ Empirical research that requires information not easily gleaned from existing documents can be extremely difficult to conduct.

165. See generally MIGA, Multilateral Investment Guarantee Agency, World Bank Group, <https://www.miga.org/> (last visited Sept. 22, 2017).

166. See *id.*

167. See United Nations Convention on Contracts for the International Sale of Goods, U.N. Doc. A/CONF. 97/98, reprinted in S. Treaty Doc. No. 9, 98th Cong., 1st Sess. 52 Fed. Register 6262, 6264–80.

168. Beth Gazley, *Beyond the Contract: The Scope and Nature of Informal Government-Nonprofit Partnerships*, 68 PUB. ADMIN. REV. 141, 142 (2008).

Private insurance companies are notoriously difficult to study because of the confidential nature of the industry.¹⁶⁹

Although MIGA is a public entity and, to its credit, makes a great deal of information publicly available, there are some significant gaps. These make it difficult to assess its regulatory relationships with its insureds and the host country governments. There are at least three ways in which MIGA compiles information about post-contract relationships. Each is explored below, with discussion of how much of a deficiency currently exists, as well as how and to what extent the deficiency could be alleviated.

A. Transparency Regarding MIGA's Dispute Resolution "Service"

One area in which MIGA could substantially increase transparency regarding its role as regulator vis-à-vis its contracting relationships is in its handling of its dispute resolution "services." This is potentially the easiest area about which MIGA could collect, compile, and publish data beyond what it currently provides.

Recently, MIGA has begun to provide more information regarding its handling of pre-claim disputes—which it describes as "dispute resolution" services. As described above, MIGA now advertises the fact that it provides a forum to resolve disputes that arise in connection with the projects it guarantees. While it does not explicitly sell its authority and ability to persuade host governments to change behavior that threatens insureds' investments, it no longer obscures the reality that this may be the "product" that is actually desired by those who pay substantial insurance premiums.¹⁷⁰ Indeed, on its website, MIGA now touts as the first two "side" benefits of its insurance policies: (1) its "status as a member of the World Bank Group and its relationship with shareholder governments [that] provides [it with] additional leverage [over governments] in protecting investments" and (2)

169. See Tom Baker, *Transparency Through Insurance: Mandates Dominate Discretion*, in CONFIDENTIALITY, TRANSPARENCY, AND THE U.S. CIVIL JUSTICE SYSTEM 186 (Doherty et al. eds., 2012) (noting that "[t]he liability insurance industry has a long history of providing information to civil justice researchers" but "[a]t the same time, . . . the liability industry has a long history of refusing to provide information to civil justice researchers"); *id.* ("Granting researchers access to insurance company data is a public service that is unlikely to provide any private benefit to the company that provides the access"); see also BAKER & GRIFFITH, *supra* note 34 ("The lack of transparency in most accounts of corporate D&O insurance limits data and defeats empirical study.") (quote on back cover by Prof. Donald Langevoort, Georgetown University Law School); Paul Sullivan, *Scrutinizing the Elite, Whether They Like It or Not*, N.Y. TIMES (Oct. 15, 2010), <http://www.nytimes.com/2010/10/16/your-money/16wealth.html> ("When we study the poor, it's relatively easy. . . . The poor don't have the power to say no. Elites don't grant us interviews. They don't let us hang out at their country clubs." (quoting Columbia University sociologist Sudhir Venkatesh)).

170. See MIGA, *supra* note 144 (describing MIGA's gross and net premium income from 2016 which was \$139.8 million and \$86.4 million respectively).

its willingness and ability to act as “an honest broker, [which] intervenes at the first sign of trouble to resolve potential investment disputes before they reach claim status.”¹⁷¹

Despite advertising dispute resolution as a distinct feature and benefit, MIGA still does not provide a good deal of data regarding its “dispute resolution” services. On its website, it provides some information about three example disputes it helped to resolve, but notes that the “[c]ompany and country names are used with permission or drawn from public sources.”¹⁷² The implication is that making all information public about each claim that enters the dispute resolution stage might be problematic in light of the fact that parties to a dispute may desire some measure of confidentiality. In fact, this confidentiality might in some cases be critical to settlement occurring.¹⁷³

Still, MIGA could track and publish a good deal of data regarding claims it helps resolve without breaching confidentiality. MIGA notes that “nearly 100 project-related disputes” have been resolved “since the Agency’s founding in 1988.”¹⁷⁴ This is approximately one dispute for every seven projects it underwrites.¹⁷⁵

Related to these one hundred or so disputes are likely to be reams of data that could be de-linked from the project and host country. Just by way of example,¹⁷⁶ MIGA could report on how many disputes arise by industry, region, and/or scale of project. It could report how far along a project was before the dispute arose, how long after it first arose that dispute resolution with MIGA’s involvement began, whether MIGA or another party initiated the dispute resolution, and how long a claim took to resolve. It could also report in far more detail regarding its own process for handling disputes—including even what it classifies as a “dispute” and what it means by “dispute

171. *Investment Guarantees, Overview*, MIGA, <https://www.miga.org/investment-guarantees> (last visited Sept. 22, 2017).

172. MIGA, *MIGA: HELPING KEEP SUSTAINABLE INVESTMENTS ON TRACK* (2015),.

173. Laurie Kratyk Doré, *Secrecy by Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement*, 74 NOTRE DAME L. REV. 283, 304 n. 91 (1999) (stating that “[c]onfidentiality proponents virtually all assume that confidentiality is critical to the settlement of many lawsuits”); Richard L. Marcus, *The Discovery Confidentiality Controversy*, U. ILL. L. REV. 457, 469–70 (1991); Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 429 (1991) (arguing that confidentiality is “not only acceptable, but essential” to settlement of lawsuits).

174. MIGA: *HELPING KEEP SUSTAINABLE INVESTMENTS ON TRACK*, *supra* note 172.

175. *Id.* (noting that over 700 policies have been underwritten to date). Of course, the way that MIGA has worded it does not make clear whether a single project may encompass multiple disputes. Thus, disputes may arise even less frequently than the 1/7 figure noted above.

176. I do not purport to know precisely what data categories might make the most sense for MIGA to identify. To a large extent it depends upon the nature of the dispute resolution process, the parameters of which (as noted above) are not defined clearly by MIGA in its discussion of its dispute resolution “service.”

resolution,” neither of which it defines in any way. Most importantly, for purposes of determining MIGA’s regulatory impact on CSR, MIGA could report data relating to disputes in respect of a project’s ESP Standards. For instance: how often are the disputes it helps resolve directly related to those standards and their implantation? Does MIGA ever require insureds to undertake additional measures that are not required by the ESP Standards? Does MIGA ever relax the ESP Standards or even, perhaps, direct an insured not to follow them?¹⁷⁷

B. Additional Transparency of the Office of the Compliance Advisor/ Ombudsman (CAO)

Data regarding dispute resolution would not only be relatively easy to collect, but also the most likely to reveal significant regulatory behavior by MIGA. One would expect MIGA to exert more regulatory pressure over both policyholders and host governments during periods when it is actively attempting to encourage them to settle disputes and prevent claims for which MIGA could become liable. The data published by the Office of the Compliance Advisor and Ombudsman (“CAO”) in connection with complaints brought by people affected by MIGA-guaranteed projects shows that more data collection and reporting is clearly possible.

MIGA publicizes information relating to complaints that are made to its CAO. The “CAO’s mission is to address complaints by people affected by IFC/MIGA projects and to enhance the social and environmental accountability of both institutions.”¹⁷⁸

It fulfills this mission in several ways: First, through its role as Ombudsman, in which capacity it fields and resolves complaints by individuals or community members affected by a project “to help resolve grievances about the social and environmental impacts of IFC/MIGA projects.”¹⁷⁹ Here, the CAO provides significant data. This is the one area in

177. By “relaxing” the ESP Standards, I do not mean formally in the sense that a new standard would become a part of a written contract. Instead, I mean such things as MIGA’s ignoring violations it becomes aware of or informally communicating to an insured or a host government that it will do so. In terms of directing an insured not to follow the Standards, I am imagining situations where, for some reason, the host government may object to them based on how they are being implemented or how such implementation is being perceived by its citizens. But one could imagine other scenarios that could also prompt such a direction from MIGA.

178. See *About the CAO*, CAO, <http://www.cao-ombudsman.org/about/> (last visited Sept. 22, 2017).

179. See *How We Work*, CAO, <http://www.cao-ombudsman.org/howwework/> (last visited Sept. 22, 2017). The CAO notes that its “[d]ispute resolution processes typically involve approaches common to alternative dispute resolution (ADR), including mediation, joint fact-finding, information sharing and facilitated dialogue.” *Id.*

which MIGA makes public a fair amount of detailed post-contract information.

With respect to its Ombudsman role, the CAO investigates all claims brought by affected individuals or community members who raise a social and environmental issue about a MIGA project.¹⁸⁰ Significantly, the CAO publishes synopses of *all* cases that it investigates. The website links to reports of all CAO cases (organized by region).¹⁸¹ These report details of the claims, the investigation, and the recommendations made by the CAO.¹⁸²

The CAO also fulfills its mission through its role as Compliance Auditor. In this capacity, the CAO conducts audits to assess how “MIGA assure[s] [it]self of social and environmental performance at the project-level.” To be clear, such audits are not aimed at examining whether or not an insured has itself engaged in misconduct but instead “focus on” MIGA’s “compliance with relevant policies, standards, guidelines, procedures, and conditions.”¹⁸³ However, despite the fact that the focus of audits is MIGA itself, as an entity, and whether it adequately followed its underwriting and risk management due diligence, report recommendations typically include steps that MIGA can take to regulate particular projects more effectively going forward—as well as make changes in its policies and practices to ensure more robust regulation at earlier stages in future projects.¹⁸⁴ This

180. Three explicit requirements that must be met in order to be eligible for dispute resolution by the CAO Ombudsman: 1) complaints must “raise[] social and environmental issues”; 2) be “filed by an individual and/or community directly affected by the project”; and 3) relate to a MIGA project. *See How We Work: Ombudsman*, CAO, <http://www.cao-ombudsman.org/howwework/ombudsman> (last visited Sept. 22, 2017).

181. *See CAO Cases*, CAO, <http://www.cao-ombudsman.org/cases/> (last visited Sept. 22, 2017).

182. Just as one recent example, *see, e.g., Guatemala/CIFI-01/Santa Cruz*, CAO, http://www.cao-ombudsman.org/cases/case_detail.aspx?id=241 (last visited Sept. 22, 2017). In this case, a group of community representatives from Santa Cruz, Guatemala, filed a complaint alleging that underwriting of the “project was never properly consulted with [impacted] communities and that community members’ opposition to the project has been met with violence and repression on the part of the company and the government.” The investigation resulted in a referral to the CAO’s compliance arm, and ultimately to a full-blown audit. *Id.*

183. Thus, for example, the Dikulushi Copper-Silver Mining Project Audit was triggered by a request from then-World Bank President Paul Wolfowitz to analyze the adequacy of the due diligence in which MIGA engaged when it approved a project in the Democratic Republic of the Congo (DRC) during the same time period as the due diligence was conducted. The DRC received logistical support from the insured to reestablish control over a town that had been taken over by a small rebel group, during the course of which “the armed forces of the DRC allegedly killed civilians, including by summary execution, looted, and carried out other crimes including extortion and illegal detention.” *See CAO, THE DILIGENCE OF MIGA’S DUE DILIGENCE OF THE DIKULUSHI COPPER-SILVER MINING PROJECT IN THE DEMOCRATIC REPUBLIC OF THE CONGO, FINAL REPORT i* (2005), www.cao-ombudsman.org/cases/document-links/documents/DikulushiDRCfinalversion02-01-06.pdf (last visited Sept. 22, 2017).

184. *See id.* at ii.

provides some indirect evidence that MIGA does in fact take steps after the initial contracting stage to work with and regulate the conduct of those engaged in the projects it guarantees. But as discussed below, after the Report is issued following a complaint process within the CAO—that is, once the audit report is produced and the project is once again operating in a “dispute free” zone—we again find little or no data regarding MIGA’s practices generally or with respect to what specific actions it undertakes to persuade its policyholders to engage in socially responsible behaviors.

CAO data is the most extensive post-contracting data MIGA currently provides. It strongly indicates that MIGA regulates beyond the four corners of its contracts in the post-contracting phase. Yet, because CAO audits are backwards-looking only, and typically arise in connection with alleged misconduct, they do not demonstrate whether MIGA monitors or regulates its run-of-the-mill, routine insureds—or even what regulatory actions MIGA takes following recommendations from the CAO.¹⁸⁵

C. Lack of Transparency Regarding MIGA’s Post-Contracting Relationships When There Is No Ongoing Dispute or Complaint

The CAO reports, detailed as they are, appear to be the sole exception to a lack of transparency and information regarding what happens between MIGA and its insureds after a contract is in place. The “Access to Information” section of MIGA’s website mainly focuses on disclosure of information before or at the “time of contract signature.”¹⁸⁶

In full, the “Access to Information” section of the website identifies six categories of information that it provides to the public. These are (1) Project Information, (2) Summaries of Proposed Guarantees (SPGs), (3) Project Briefs, (4) Environmental and Social Review Summaries, (5) Institutional Information, and (6) Access to Information Requests.¹⁸⁷

Of these, there is no information at all provided about the first category (Project Information).¹⁸⁸ The next three categories specifically state that the information provided is either pre-contract (in the case of SPGs) or from the time of contract signing (Project Briefs and ESRs). Institutional information is information about MIGA itself, including its by-laws,

185. Only in instances where the CAO were to conduct a subsequent audit, following a new complaint about the same project, would follow-on actions end up being reported.

186. *Access to Information*, MIGA, <https://www.miga.org/Projects/Access-to-Information> (last visited Sept. 22, 2017).

187. *Id.*

188. Under the first heading—“Project Information”—there is only blank space, with nothing currently on the website in this section. It is not clear what type of information MIGA provides or what it intends to say about this category.

standard contracts, and financial statements. The information provided under this part of the website does not include any mention of its relationships with insureds other than the formal model contract documents.

The only information in this section that may relate to the post-contract stage is the last category: “Access to Information Requests.” Under this heading, the website states that “[i]ndividuals looking for specific information not available on MIGA’s website may submit a disclosure request.”¹⁸⁹ However, the website itself does not explain the standards it uses to evaluate such requests or what types of information it will disclose in response to information disclosure decisions.

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Although MIGA appears committed to transparency and provides a substantial amount of information about its processes, there is a significant lack of data and information about MIGA and its relationship with investors from the point in time that a contract is signed. However, the exception to this—CAO Reports that detail investigations and audits—is very encouraging insofar as it demonstrates not only the capacity for monitoring and data collection, but the actual publication of detailed information about projects that MIGA underwrites and guarantees. Unfortunately, the CAO Reports do not provide much information about the specific post-contract interactions between MIGA and its insureds. At best, the recommendations they make suggest that such interactions are occurring and that MIGA has the capacity to engage with its insureds in an ongoing regulatory capacity during the contract relationship.

Ideally, going forward, MIGA would continue its trajectory towards more transparency. It should begin to publish information regarding the dispute resolution process itself and what happens when it acts to mediate disputes between host countries and investors, as well as data regarding those disputes. In addition, publicizing what happens to CAO recommendations and what steps MIGA takes to implement them would go a long way to revealing how MIGA regulates in practice.

CONCLUSION

Despite lawyers’ preference to rely on text, a contract’s formal terms, negotiated prospectively, actually represent only the starting point of a relationship between the parties. The real-life terms to which that relationship will ultimately conform may differ. Particularly in situations where the parties are engaged in an ongoing relationship and unlikely to test the contract by invoking it to claim damages, informal arrangements or

189. *Access to Information*, *supra* note 185.

decisions to depart from the formal terms of the contract may be a frequent occurrence. The stronger party in the contractual relationship might decide to exert its regulatory authority in ways not anticipated at the time the contract was negotiated. It might even direct the other party *not to comply* with contractual obligations.¹⁹⁰

Unfortunately, this makes it difficult to measure the regulatory impact of private contracts. Without data about the contracting parties' relationship during the term of the contract, we cannot draw conclusions with any degree of certainty. What appears to be non-regulation when measured against formal contract terms only may in fact be the strong regulation of one party by another. To understand private regulation, we need to understand the true nature of the relationship forged between private contracting entities.

More information about contractual relationships is therefore necessary to analyze to what extent private contracting can become a fruitful mechanism for regulating corporations. Its potential is likely to extend beyond the written words contracting parties use to create their relationship. Those words frequently will not capture the relationship's true contours. The true potential of contracting to fill public regulatory gaps will remain a mystery as long as these regulatory relationships continue to live in the shadows of private regulation.

Political risk insurance is a case in point. This form of insurance is theoretically able to bolster the regulation of corporate social responsibility in under-regulated jurisdictions. There has been an encouraging rise in the imposition of formal requirements on corporations that are obtaining guarantees and insurance for projects that pose political risk. Yet, it is unclear whether political risk insurers are fulfilling their regulatory potential. While one can map the increase in formal contract terms designed to foster more socially and environmentally responsible practices by investor corporations, further study is needed to determine in what ways MIGA may be applying pressure to ensure that policyholders engage in socially responsible behavior in relation to their foreign investment projects.

MIGA has recently made significant progress in enhancing its commitment to promoting socially and environmentally responsible business practices. It could make substantially more by increasing transparency of its

190. It might elect to do so for a number of reasons. Depending on the reason, and what alternative action is ordered, the goal underlying the obligation might still be furthered. If the obligation is costly, both parties may effectively agree to ignore the obligation without necessarily amending the contract to reflect that it no longer remains a formal requirement. Similarly, specific circumstances may arise that make clear the goal of the contract will be more likely to be realized if resources that might be used to ensure compliance are allocated in other ways. These new allocations may well be dictated by the party that had imposed the obligation that was later left by the wayside.

practices after the initial contracting stage. It would be groundbreaking were MIGA to implement a policy of collecting detailed information after it issues guarantees or agrees to underwrite political risk insurance policies. This practice would increase transparency regarding guaranteed and insured projects. The potential benefits to contracting institutions and scholars would be significant.