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Political and Other Risk Insurance: OPIC, MIGA, EXIMBANK and Other Providers

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POLITICAL AND OTHER RISK INSURANCE: OPIC, MIGA, EXIMBANK AND OTHER PROVIDERS

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I. INTRODUCTION

While every investment, domestic or foreign, entails commercial and political risks, the risks of international investment, particularly in developing countries, are generally greater and more complex than those for domestic investments. Of course, some commercial risks are greater in international investments. For example, it is often more difficult to obtain information on the creditworthiness of a foreign purchaser than a domestic purchaser. On the whole, however, the commercial risk of both domestic and foreign investments can often be calculated with some degree of precision. Experts can anticipate likely changes in transportation costs, for example, and foreign currencies can usually be hedged to minimize transfer exposure.

The political risks of international investment, on the other hand, particularly in developing countries, are generally without parallel in a domestic environment. For domestic investments, there is often a so-called "regulatory risk"[1] that the government will change the rules of the game in a way that will adversely affect the economics of the investment. However, the nature of this risk is only roughly similar to foreign political risk. In the United States and other industrialized countries, there are comprehensive and tested laws that permit an investor to make a reasoned judgment as to regulatory risks, and there are legal structures and impartial judiciaries to resolve disputes in accordance with those laws. This is usually not the case for real political risks, particularly in developing countries.

Therefore, investors and lenders often seek to obtain insurance against the political and commercial risks of foreign transactions. This article analyzes the types of insurance that may be available. First, it outlines the elements of political and commercial risks and U.S. Overseas Private Investment Corporation (OPIC) risk insurance. Then it deals with insurance available from the Multilateral Investment Guarantee Agency (MIGA) and the U.S. Export-Import Bank (Eximbank), and other government-sponsored and private political risk insurers. Finally, it provides tips for negotiating and drafting the three documents

1. *See e.g.*, Chemical Bank v. Washington Public Power Supply System, 666 P.2d 329 (1983).

crucial to insurance coverage: the underlying investment contract, the application for insurance, and the insurance contract itself.

II. Elements of Risk

A. *Political Risk*

Political risk itself has not changed much in several millennia. There are sovereigns that have a certain number of rights and usually a greater number of powers which can be exercised within their jurisdictions. However, the evaluation of political risk and the application of that evaluation to business decisions as well as operations have changed considerably in recent years.[2] Many large multinational companies even have in-house managers of political risk, often as a part of the treasurer's office, but sometimes as a separate insurance department.[3]

The evaluation of political risk has also developed theoretical underpinnings. Scholars and business people have evolved models by which to evaluate the nature, likelihood and seriousness of political risks. Basically, the best-known models require potential investors to identify and attach values to specific factors that can affect an investment. At a minimum, these models can be useful in focusing management's attention on special risks. However, at some point, the models become subjective.[4] For example, the numerical value that is attached to a particular risk in a political risk equation reflects its significance to the investor, although reasonable people may differ. Perhaps as a result of this subjectivity, experience indicates that evaluation of political risk is treated by most managers more as an art than a science. One writer has indicated that even managers who have models available for evaluating political risks often do not actu-

2. *See* Charles M. Newman II & James Czechowicz, International Risk Management Experiences and Practices (Financial Executives Research Foundation 1983); Fariborz Ghadar et al., Managing International Political Risk: Strategies and Techniques (Ghadar and Assoc. 1983).

3. Daniel A. Sharp, *Business Environment Assessment*, *in* Ghadar, *supra* note 2, at 7.

4. Stephen J. Kobrin, *Political Risk: A Review and Reconsideration*, 10 J. Int'l Bus. Stud. 67 (Spring/Summer 1979); Alan C. Shaprio, *Managing Political Risk: A Policy Approach*, 16 Colum. J. World Bus. 63 (Fall 1981); Yair Aharoni, The Foreign Investment Decision Process (Harvard Univ. 1966); Sharp, *supra* note 3, at 7.

ally use the models when making decisions.[5]

B. *Three Basic Categories of Political Risk*

A foreign investor faces three basic categories of political risks:

1. The risk that political violence, such as war, revolution, insurrection, terrorism or civil strife will occur. These are events over which the host government often has relatively little control. The host government has relatively limited responsibility under international law for resulting losses to foreign investors, unless those acts that are not actually committed by the state can nevertheless be attributed to the state;[6]

2. The risk that the host government will undertake deliberate acts, including expropriation and interference with contractual rights, that will result in the effective taking of the investor's property rights. These are events over which, almost by definition, the host government does have control and is generally responsible under international law for resulting losses to foreign investors;[7] and

3. The risk that the host government will restrict the conversion of local currency into foreign exchange. This is an event over which the host government usually has a great deal of control, but it has relatively little responsibility under international law for resulting losses to foreign investors.[8]

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5. FRANK, POLITICAL RISK INSURANCE SURVEY: ANALYSIS OF MARKET RESULTS (Univ. City Science Ctr., Phila., July 7, 1973); Sharp, *supra* note 3, at 16.

6. *See, e.g., Draft Articles on State Responsibility*, 35 U.N. GAOR Supp. (No. 10) at 59, U.N. Doc. A/35/10 (1980), *reprinted in* [1980] 2 Y.B. INT'L L. COMM'N 30, U.N. Doc, A/CN. 4/Ser. A/1980/Add. 1; *Acts of a "Puppet State" or of Local* de Facto *Government*, 8 Whiteman DIGEST § 12, at 835-36; Lena Goldfields (U.S. v. U.S.S.R.), 5 Ann. Dig. 3, 426 (1924-30) (Award of Sept. 2, 1930); (U.S. v. Mexico), 4 R.I.A.A. 82, 86 (1926) (government failed to punish its own nationals who engaged in acts against the personal safety of foreigners).

7. RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW [hereinafter RESTATEMENT (SECOND)] §188 cmt. b, (1965); *see* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW (2d ed., 1970); *Sixth Report by F.V. Garcia Amador, Special Rapporteur on Responsibility of the State For Injuries Caused in its Territory to the Person or Property of Aliens - Reparation of the Injury*, 2 Y.B. INT'L L. COMM'N 37-47, 51, U.N. Doc. A/CN.4/SER.A/1961/Add.1.; Letter from Secretary Hull to the Mexican Ambassador (Aug. 22, 1938), *reprinted in* Property Rights, 3 Hackworth DIGEST §288, at 655-65.

8. *See, e.g.*, Lighthouse Arbitration (France v. Greece), 23 Int'l L. Rep. 341 (Perm. Ct. Arb. 1956); Taxation, 4 Moore DIGEST §540, at 20; Burns H. Weston, *"Constructive*

The risks related to political violence and exchange restrictions are relatively straightforward, but the types of deliberate acts of the host government that may cause losses to foreign investors require some elaboration.

C. *Deliberate Acts of the Government*

The host government may engage in acts that present a range of political and commercial risks to the foreign investor. First, a host government can nationalize the investment. Outright nationalization is obviously a political act undertaken by a host government in the exercise of its sovereign power. The United States and other industrialized countries take the view that nationalization is lawful only if it: (1) is undertaken for a public purpose; (2) is not arbitrary or discriminatory; and (3) is promptly, adequately and effectively compensated. Many developing countries have more expansive views of what a government can lawfully do and more restrictive views of what an expropriating government has to pay as compensation.[9]

Second, a host government can regulate or tax a foreign investment. Regulation and taxation are political acts in the sense that they are undertaken for policy reasons by a host government in the exercise of its sovereign power. Regulation and taxation are presumptively lawful exercises of the police power inherent in a sovereign (a power of which many states, including the United States, regularly avail themselves) even if they deprive the investor of substantial rights in, or control of, the investment or of the return on the investment.

Takings" under International Law; A Modest Foray into the Problem of "Creeping Expropriation", 16 VA. J. INT'L L. 103 (1975).

9. The position of the developing countries is based primarily on nonbinding resolutions of the United Nations General Assembly, settlements at less than full compensation, and the views of a minority of scholars. United Nations resolutions are not sources of international law themselves and are not evidence of changes in custom and practice, particularly since the actual practice of States in various investment treaties adheres to the traditional standard. Settlements are, almost by definition, not sources of law, but decisions to resolve disputes outside the law. Only scholarly opinions are a possible source of international law, and, I submit, not nearly enough to overcome an accepted international standard. *See e.g.*, Chorzow Factory (Merits), p. 128 P.C.I.J., (ser. A), No. 17; Texas Overseas Petroleum Co./California Asiatic Oil Co. v. Libya (Merits), Jan. 19, 1977, 17 I.L.M. 1 (1976); Libya African Oil Co. v. Libya (Merits), April 12, 1977, 20 I.L.M. 1 (1981); I.C.J. Stat. art. 38.

Third, a host government can breach, or cause a government-controlled entity to breach an agreement with an investor. Such breaches can be either political or commercial acts depending upon a number of factors.

Finally, the host government can act, or cause a government-controlled entity to act in a commercial capacity as a shareholder, director, manager or creditor of an investment, and by such commercial acts deprive the investor of substantial rights in, or control of its investment or of its return on its investment. It is becoming increasingly common for governments or government-controlled entities to participate in commercial ventures.[10] So long as the government is legally entitled to act as a commercial participant, such acts should be deemed to be commercial, not political acts, even if they result in a loss to the investor.

D. *Definition of an Expropriatory Act*

The most obvious political risk is that of expropriation. Typically, an expropriatory act is defined as an unlawful act of a government, or on behalf of a government, that results in the effective taking of all or substantially all of the investor's property rights in its investment. This general definition may vary from contract to contract, and the definition of an expropriatory act is often heavily negotiated in insurance contracts between private investors and insurers.

However, it should also be noted that a taking need not be labeled as such to be an expropriation under international law. An expropriation need not be explicitly embodied in a nationalization decree. It can be a constructive expropriation as well.[11] Similarly, an expropriation need not be the result of a single event. A series of events that result in substantial loss of an investor's rights in an investment can amount to an expropriation. This is called a "creeping" expropriation.[12]

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10. Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1603 (1988).

11. RESTATEMENT (SECOND) § 192 Illus. 1, at 572 (1965); *see* ARGHYRIOS A. FATOUROS, GOVERNMENT GUARANTEES TO FOREIGN INVESTORS 34 n.12, (1962); *see* Louis B. Sohn and R.R. Baxter, *Responsibilities of States for Injuries to the Economic Interests of Aliens*, 55 AM. J. INT'L L. 545 (1961).

12. OECD Draft Convention on the Protection of Foreign Property, *reprinted in* G.W. Haight, *International Organizations OECD Resolution on the Protection of For-*

E. *Commercial/Political Distinction in Deliberate Acts of Government*

1. *Deliberate Acts*

In the real world, acts by a government do not easily and clearly fall within only one of the four categories. Particularly, distinctions between political and commercial acts can be difficult to determine. Any commercial act can have political elements. It is especially academic to try to distinguish commercial from political acts in non-market economies. The failure of a government-controlled or regulated entity to deliver supplies, for example, could be a commercial failure or a deliberate political act.

In principle, the distinction is made more difficult because the motivation of a government, even if discernible, is not relevant. A government is responsible under international law for its acts and its effects, not for its intentions.[13] However, in a dispute over whether an act is commercial or political, the government's expression of its intentions can be a decisive factor in the determination of whether an act is genuinely regulatory or expropriatory.[14]

The distinction between commercial and political acts, although difficult, is often crucial to the assessment of risk. A company should be able to judge in a reasonably effective manner the likelihood and effect of lawful regulatory or commercial acts. For example, it should know that tax rates can change and be expected to evaluate in advance the effect that such changes can have on the economics of an investment. More importantly, the distinction between commercial and political acts is often crucial to insurance coverage because certain types of insurance are only available to cover political risks, not commercial risks.

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eign Property, 2 INT'L LAW 326, 331 (1968).

13. RESTATEMENT (SECOND) § 192 (1965); "Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens," *reprinted in* Sohn & Baxter, *supra* note 11, at 548, 553.

14. *See* Revere Copper and Brass, Inc. v. Overseas Private Investment Corporation, Am. Arb. Assoc. Case No. 16 10 0137 76 (1978) (Bergan, Arb.).

F. *Elements Of Commercial Risk*

Commercial risks vary with the four commercial stages of an investment: (1) planning and development, (2) construction, (3) start-up of operations, and (4) operations.

1. *Planning And Development*

The investor has relatively small financial exposure in the planning and development stage itself. However, there are a number of risks that must be addressed so that they will not adversely affect the investment at a later stage. Therefore, it is at the planning stage that the question of insurance should be addressed, even though the risks to be insured against arise only in later stages. For example, insurance is useful, or even necessary, to obtain financing for the construction stage.

In order to identify risks, an international contract will often provide that the parties will undertake or fund feasibility studies acceptable to all parties.[15] Financial risk for feasibility studies can be reduced by applying for subsidized funding. Such funding is available from the World Bank for qualified investments that are beneficial to developing countries. For U.S. companies, funding may be available from OPIC and the Agency for International Development for investments in developing countries that would likely increase United States exports.[16] Additionally, developing countries themselves will sometimes provide funds or other assistance for feasibility studies.[17]

2. *Construction*

Real financial risk for the investor generally begins at the construction stage. Construction lending is usually with recourse

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15. Chinese law might even require that joint ventures produce feasibility studies. Law of the People's Republic of China on Chinese-Foreign Joint Ventures (1979), Art. 9, *reprinted in* COLLECTION OF LAWS AND REGULATIONS OF THE PEOPLE'S REPUBLIC OF CHINA CONCERNING FOREIGN ECONOMIC AFFAIRS (1980) [hereinafter China Joint Venture].

16. Foreign Assistance Act of 1967, 22 U.S.C. § 2421 (1988); *see* William A. Delphos, *Washington's Best Kept Secrets* (1983), *reprinted in* INSIDE WASHINGTON: THE INTERNATIONAL BUSINESS EXECUTIVE'S GUIDE TO GOVERNMENT RESOURCES (1988).

17. *See* ORGANIZATION FOR ECONOMIC DEVELOPMENT AND CORPORATION, INVESTING IN DEVELOPING COUNTRIES (1978); INVESTMENT POLICIES IN SEVENTY-THREE COUNTRIES (Price Waterhouse, 1982).

to the investor because lenders normally will not assume the risk of a failure to complete an investment. The primary risks are technical ones and the principal commercial exposure is unforeseen increases in projected costs. It is possible to reduce these risks by a well-drafted force majeure[18] clause and by contractual provisions that take account of any possible delays in construction.

3. *Start-Up of Operations*

At the start-up of the operations stage, the principal commercial risk is whether the investment can operate at the costs and to the specifications made when the investment was financed. If it cannot, it is likely that the investment will have to be restructured in order to produce enough earnings to service debt, pay expenses and earn a return.

4. *Operations*

At the final operations stage, the investment revenues should be sufficient to service debt, pay operating costs and provide a return to the investors. The principal commercial risks during the operations stage are:

1. Nondelivery of supplies and raw materials; unforeseen increases in the costs of supplies;
2. Raw materials or additional borrowing;
3. Failures of marketing;
4. Failure to produce goods of sufficient quality or with sufficiently reliable delivery;
5. Insufficient or unreliable demand;
6. Lack of trade financing for purchasers; and
7. Uncollectibility of receivables.[19]

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18. A *force majeure* clause protects the parties of a contract in the event that a part of the contract cannot be performed due to causes which are outside the control of the parties and could not be avoided by exercise of good care.

19. *See* Goodwillie, *Financing for Foreign Sites Projects: Methods of Risk Avoidance*, Am. Bar Assoc. Seminar on Counseling the U.S. Multinational (1985).

G. *Insuring Against Political and Commercial Risks*

In principle, one can say with some accuracy that any risk is insurable if one is prepared to pay the premiums. However, in practice, not all risks are insurable. Coverage against the basic political risks described above is available from one or more entities but coverage against many commercial risks is not usually available. Moreover, special commercial risk coverages are not of much utility in day-to-day business decisions and operations. Such coverages are sometimes not available at all, not usually timely and are almost always expensive.

Therefore, with respect to commercial risk insurance the question must be: against which commercial risk does the insurer offer coverage? It is possible to obtain insurance against: (1) certain risks of construction, basically property and casualty coverage for Acts of God but usually only for physical damage, rather than unforeseen increases in cost caused by Acts of God; (2) risks of project completion, that is a successful start-up of operations, involving someone other than the insured; and (3) certain risks of operation. Insurers are generally prepared to cover the reliability of a supplier, the creditworthiness of a purchaser, or the collectibility of receivables.[20]

Insurance for commercial risks of operation is not always available to cover purely market risks such as cost increases, insufficient demand or risks of technical failures. Insurance for commercial risks of operations may not be available to cover the effects of those commercial acts over which the insured has control. For example, it is unlikely that an investor could obtain insurance against losses caused by the failure of its own marketing or by its own increased borrowing or cost overruns.

III. OPIC

A. *Structure*

The Overseas Private Investment Corporation (OPIC) was chartered by Congress to provide support for private American business investment in developing countries. OPIC is a corpora-

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20. This subject is discussed further in sections on the United States Export-Import Bank and private insurance companies, and accompanying footnotes.

tion wholly owned by the United States government. Its obligations are backed by the full faith and credit of the United States. In 1971, OPIC commenced operations. OPIC insures against losses caused by expropriatory acts, inconvertibility, as well as war, revolution, insurrection and civil strife and business interruptions caused by such. Additionally, OPIC has special insurance programs to cover standby letters of credit and performance bonds.

In 1985 and 1988, Congress amended OPIC's authority in the following ways:

1. OPIC was authorized to provide a new category of insurance for losses due to "business interruption."[21]
2. The maximum contingent insurance liability that OPIC is permitted to have outstanding to any one investor, usually a bank, was increased from ten percent to fifteen percent "in order to provide increased flexibility for those entities which have used investment guarantee programs and which are likely to reach the ten percent ceiling before 1989."[22]
3. OPIC can operate in a country "only if the country in which the project is to be undertaken is taking steps to adopt and implement laws that extend internationally recognized worker rights, as defined in Section 2462(a)(4) of Title 19, to workers in that country (including any designated zone in that country) unless the President determines that such activities [by OPIC] would be in the national economic interests of the United States" and reports his determination to Congress.[23]
4. The ceiling on OPIC's total investment guarantees was raised from $750 million to $1.5 billion.[24]

However, in 1985, Congress rejected two administration requests for changes to OPIC's statutory provisions. Congress refused to exempt OPIC's risk pooling arrangements with OPIC-like organizations in other countries from certain policy requirements in OPIC's authorizing legislation, for example, any project

21. 22 U.S.C. § 2194(a)(1)(D) (1988), Overseas Private Investment Corporation Amendments Act of 1985, H.R. Conf. Rep. No. 428, 99th Cong., 1st Sess. 11-14 (1985).

22. 22 U.S.C. § 2194(d) (1988); Overseas Private Investment Corporation Amendments Act of 1985, S. Rep. No. 156, 99th Cong., 1st Sess. 2 (1985).

23. 22 U.S.C. § 2191a (a)(3) (1988).

24. OPIC Amendments Act of 1988, Pub. L. No. 100-461, Title V, 102 Stat. 2268-21, (1988).

assisted by OPIC must have positive developmental effects on the host country and have no adverse effects on the United States economy. The Senate Committee Report underscored its refusal by noting "that OPIC's primary mission, to foster the flow of investment to friendly developing countries without causing injury to the United States, is one which should apply to whatever activity OPIC undertakes."[25] Also, Congress refused OPIC's request that the definition of "eligible investor" be left to the discretion of OPIC's board of directors.[26]

OPIC is a corporation wholly owned by the United States government. Its obligations are backed by the full faith and credit of the United States.[27]

The business and affairs of OPIC are managed by a board of directors consisting of fifteen members and OPIC's president.[28] The chairman of the board is also the Administrator of the Agency for International Development. The vice chairman is the Deputy United States Trade Representative. Eight members of the board appointed by the President and confirmed by the Senate are from the private sector. The board also has representatives from the Departments of State, Treasury, Commerce and Labor.[29]

B. *Scope of OPIC Coverage*

It is important to emphasize at the outset that OPIC covers only political risks, not commercial risks. OPIC's purpose is to encourage investment by United States companies in developing countries by providing political risk insurance, loans and loan guaranties. One principal part of OPIC's operations is its political risk insurance, which covers risks of war, revolution, insurrection and civil strife, inconvertibility, expropriation and business interruptions caused by such. OPIC's expropriation coverage can also encompass arbitrary drawdowns on bonds, letters of credit and other guarantees of performance, payment,

25. S. REP. No. 156, *supra* note 22, at 3.
26. *Id.* at 3-4.
27. 22 U.S.C. § 2197(c) (1988).
28. 22 U.S.C. § 2193(b) (1988).
29. *Id.*

etc., if caused by political acts.[30]

OPIC's coverage is divided into two classifications:

1. The "current insured amount" is the amount of coverage actually in effect at a given time; and

2. The "standby insured amount" is assurance that OPIC will provide future coverage, up to the maximum amount specified in each contract.

OPIC will normally make insurance available for earnings valued at up to twice the amount of the initial insured investment. A premium is charged for the outstanding amount of the investment and related earnings, if any, and in some cases, there is an additional charge for the differences between coverage limits and the outstanding amount. OPIC can insure an investment for up to twenty years and coverage of at least fifteen years is common. During that time, the insurance cannot be cancelled by OPIC.

For an equity investment, coverage applies to the equity interest. For a loan, coverage applies to scheduled principal and interest payments. For other types of investments, the specific assets contributed by the investor, as set forth in the contract, represent the insurable investment.

C. *Eligibility*

OPIC is an agency of the United States government, and there are limitations on investors and investments eligible for OPIC's programs based upon policy considerations.[31] The most significant limitations are described in the following paragraphs. Eligible investors include United States citizens, entities incorporated in the United States if substantially beneficially owned by United States citizens, and entities incorporated outside the United States if more than ninety-five percent beneficially owned by United States citizens or such eligible corporations.[32]

30. 22 U.S.C. § 2194 (1988).

31. 22 U.S.C. § § 2191, 2197 (1988).

32. 22 U.S.C. § 2198(c) (1988).

1. *Investments*

OPIC can provide insurance coverage only for investments in less developed friendly countries.[33] OPIC must give preferential consideration to investment projects in "less developed countries" that have average per capita income of $984 or less in 1986 United States dollars, and must restrict its activities with respect to investment projects in "less developed countries" that have average per capita income of $4,269 or more in 1986 dollars.[34] By the end of 1991, OPIC was operating in 122 eligible countries.[35] Until the end of the cold war, Communist countries were specifically excluded, except where designated by statute.[36] Statutory exceptions have been made for Yugoslavia, Poland, Hungary, other East European countries, and China.[37] OPIC has subsequently been authorized to operate in the former Soviet Union and has signed agreements with all members of the former Soviet Union, except Azerbaijan and Uzbekistan, with which it expects to sign agreements shortly.

2. *Additionality*

OPIC should assist investments for which the insurance is "additional."[38] In principle, OPIC should provide insurance only if the investment would not proceed without that insurance. In practice, OPIC satisfies this policy by issuing its insurance only to investors who register their projects with OPIC prior to entering into an irrevocable commitment to invest. If investors have not registered their projects, they might still be eligible for coverage if they can clearly demonstrate that they would not have entered into the investment without the insurance. For example, the investment contract might provide that the investment is

33. 22 U.S.C. § 2191 (1988).

34. 22 U.S.C. § 2191(2) (1988).

35. OVERSEAS PRIVATE INVESTMENT CORPORATION, 1991 ANNUAL REPORT [hereinafter 1991 ANNUAL REPORT].

36. 22 U.S.C. § 2197(a) (1988).

37. 22 U.S.C. § 2199(f) (1988).

38. 22 U.S.C. § 2191 (1988); ARTHUR YOUNG AND CO., STUDY OF ADDITIONALITY OF OPIC ASSISTANCE TO U.S. PRIVATE DIRECT INVESTMENT IN DEVELOPING COUNTRIES (1982) [hereinafter ARTHUR YOUNG STUDY OF ADDITIONALITY]. "Additionality" is a bureaucratic word that, loosely translated, means "necessary."

contingent upon obtaining insurance from OPIC.[39]

3. *Eligible Countries*

OPIC is required to enter into "satisfactory arrangements" with a host government before it can offer insurance programs. Typically, these arrangements take the form of bilateral investment guarantee agreements. These agreements establish the basic relationship between OPIC and the host government.[40] Among other things, the agreements provide that the host government must specifically approve projects to be insured by OPIC, that OPIC will be subrogated to the rights of its insureds and that disputes between OPIC and the host government will be resolved by international arbitration in accordance with international law. OPIC has bilateral agreements with more than 135 developing countries. Almost three-fourths of these bilateral agreements were entered into by OPIC's predecessor, a division of the Agency for International Development.[41] For many years, OPIC was unable to do business in most of Latin America because many Latin American countries subscribe to the so-called Calvo Doctrine,[42] the effect of which is to make it impossible to enter into arrangements for subrogations and arbitration as provided for in the bilateral agreements.[43] OPIC can now do business in most Latin American countries.[44]

OPIC is prepared to insure an investment controlled by a host government only if there is a "high probability" that the

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39. This point is discussed further under "Negotiating and Drafting Points," below.

40. OPIC's bilateral agreements are different from the Bilateral Investment Treaties (BITs) being negotiated by the United States Department of State. BITs are agreements that are intended to protect all United States investors. *See* INTERNATIONAL CHAMBER OF COMMERCE, 1 BILATERAL TREATIES FOR INTERNATIONAL PRIVATE INVESTMENT (1978). By contrast, OPIC's bilateral agreements are intended to affect directly only the relationship between OPIC and the host government.

41. *See, e.g.*, Investment Warranties Agreement Between the United States of America and the Somali Republic, 1964, Effected by Exchange of notes, T.I.A.S. 5512 at 1.

42. A doctrine articulated by the Argentine jurist Carlos Calvo, it denies a complainant the right to seek diplomatic protection from its home government where doing so would give the complainant more rights and protections than are afforded to a national of the host country where the investment is made.

43. *See, e.g.*, Allison, *Capital Controls in Latin America*, *in* INT'L FIN. L. 31 (Rendell ed., 2d ed. 1983).

44. Countries not included are Mexico and Peru.

project will be commercially viable. This higher standard implies a presumption that governments are inclined to sponsor investments for other than commercial reasons.

4. *New Development*

The investment must be a "new" investment.[45] However, this can include the modernization or expansion of existing facilities. Also, it can include acquisitions to "privatize" government-owned entities and acquisitions from private parties if they are accompanied by substantial additional investment for improvements or modernization.

5. *Loan-to-Value Ratio*

OPIC can generally cover only up to ninety percent of an investment's value, to a maximum of $100 million per project. There are case-by-case exceptions to the dollar maximum and OPIC will insure up to one hundred percent of loans by lending institutions to unrelated parties.[46]

6. *Effects on U.S. Economy*

OPIC cannot assist in any investments in "run-away" plants or in any investments that would result in a significant net loss of United States jobs.[47] Also, OPIC may not assist in any investment that involves so-called "performance requirements" that "would reduce substantially the positive trade benefits likely to accrue to the United States from the investment."[48]

D. *Expropriatory Acts*

To constitute an expropriatory act, an act of the government must be outside the government's legitimate role as a commercial participant or beyond the scope of its legitimate regulatory authority.[49] For certain situations in which the potential

45. ARTHUR YOUNG STUDY OF ADDITIONALITY, *supra* note 38.
46. 22 U.S.C. § 2197(f) (1988).
47. 22 U.S.C. § 2191(k), 2191(l) (1988).
48. 22 U.S.C. § 2191(m) (1988).
49. Overseas Private Investment Corporation Insurance Contract 234, KGT 12-85 [hereinafter OPIC 12-85 Contract], Art. IV, Section 4.01 of the OPIC contract defines

difficulty of distinguishing between a commercial and a political act is inherent, OPIC has revised its expropriation insurance to cover noncompliance with the dispute resolution provisions of an agreement.[50] For example, in China, if the government's pervasive involvement would make distinctions between political and commercial acts particularly difficult, OPIC would compensate an insured investor if a Chinese entity:
1. Fails to participate in the dispute resolution procedure;
2. Participates, but refuses to pay an award or judgment rendered against it under the dispute resolution procedures; or
3. Obtains an award or judgment in its favor by means of fraud, corruption or coercion, or obtains an award that is not supported by substantial evidence on the record.[51]

1. *War, Revolution, Insurrection and Civil Strife*

For most investors, political violence coverage[52] extends to damage or destruction of physical assets only. For institutional

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total expropriation as

> an act or series of acts [that] satisfies all of the following requirements:
> (a)the acts are attributable to a foreign governing authority which is in *de facto* control of the part of the country in which the project is located;
> (b)the acts are violations of international law (without regard to the availability of local remedies) or material breaches of local law;
> (c)the acts directly deprive the Investor of fundamental rights in the insured investment (Rights are fundamental if without them the Investor is substantially deprived of the benefits of the investment); and
> (d)the violations of law are not remedied (§ 9.101.9) and the expropriatory effect continues for six months.

Expropriation of funds is compensable where (a), (b) and (d) above are met and the act or series of acts "directly" results in preventing the Investor from (1) repatriating the funds; and (2) effectively controlling the funds in the country in which the project is located. OPIC 12-85 Contract, Art. IV, Section 4.02.

50. OPIC covers "normal" expropriations (such as nationalizations or overt takeovers) in any event.

51. OPIC has not done business in China recently because of human rights violations.

52. OPIC 12-85 Contract, Art. VI, Section 6.01 of the OPIC Contract defines political violence as:

> a violent act undertaken with the primary intent of achieving a political objective, such as declared or undeclared war, hostile action by national or international armed forces, civil war, revolution, insurrection, civil strife, terrorism or sabotage. However, acts undertaken primarily to achieve labor or student objectives are not covered, compensation will be paid only for permanent losses that are the direct and immediate result of the political violence.

lenders and others the coverage also extends to liability for payments, such as payments for principal and interest on loans or under technical assistance agreements, when events of war, revolution, insurrection or civil strife cause a default. However, OPIC cannot cover defaults on payment obligations of a host government. OPIC has taken the position that insuring payments having the full faith and credit of the host government would, in effect, be underwriting the commercial obligations of that foreign government.

Insurance against civil strife was added relatively recently to cover events that do not fit within the traditional definitions of war, revolution or insurrection. Losses due primarily to labor and student disputes are specifically excluded from civil strife coverage.[53]

2. *Inconvertibility*

Coverage against inconvertibility[54] of local currency insures that local currency can be converted into dollars on the terms in effect at the time the insurance is issued. This is not coverage against devaluation, which involves the risk that local currency, although convertible, will be worth less in foreign exchange at the time of conversion than at the time of investment. Devaluation is deemed a commercial risk, not a political risk.

For OPIC's inconvertibility coverage, an investor must establish that at the time OPIC's policy was issued it had a legal right to convert the local currency into dollars. OPIC then insures the continuance of that right. If the right to convert is abridged after the policy is issued, for example, by the institution of exchange controls, or is substantially altered to the detriment of the insured, OPIC will transfer dollars to the investor in exchange for local currency at the prevailing official exchange

53. *Id.*

54. OPIC 12-85 Contract, Art II, Section 2.01 of the OPIC contract provides that compensation shall be payable

> if neither the Investor nor the foreign enterprise is able legally:
>
> (a) to convert earnings from or returns on the insured investment into United States dollars through any channel during the [specified] days immediately prior to a claim to OPIC, except at an exchange rate that is less favorable than the then-prevailing rate described under § 3.01.2, or
>
> (b) to transfer such converted earnings into the United States during such period.

rate or at the exchange rate available in another legal channel if there is no official rate.[55]

Typically, OPIC requires that the inability to convert continue for a period of time which is specified in the contract, after applying to the host government's central bank.[56] For countries in which the ability to convert local currency to foreign exchange is subject to considerable delay by the central government, OPIC's insurance, if available at all, will be subject to longer holding periods. Because of the way the contract is structured, the insured usually bears the risk of devaluations during the waiting period.

3. *Business Interruptions*

Insurance covering business interruptions caused by war, revolution, insurrection and civil strife, inconvertibility and expropriation was added to the list of OPIC services under the 1985 OPIC amendments.[57]

4. *Special Insurance Programs*

OPIC has special insurance programs to cover standby letters of credit and performance bonds. Typically, these letters of credit and bonds are "on demand" and can be drawn down for any reason by the beneficiary which in most cases is the host government. If the drawing is the result of political acts of the host country, OPIC's insurance coverage indemnifies the U.S. company for losses resulting from arbitrary or illegal drawing on the letter of credit or bond issued as a performance or advance payment guarantee. OPIC's insurance covers ninety percent of the guarantee and the term of the policy is generally co-extensive with the guarantee. Coverage is available:
1. If the underlying contract provides for a dispute resolution procedure, or
2. If local law and practice indicate that the procedure and the underlying contract would be followed in the event of a dispute involving a drawing under a guarantee and experience indicates

55. OPIC 12-85 Contract, Art. 3.01(2).
56. OPIC 12-85 Contract, Art. 2.01.
57. 22 U.S.C. § 2194(a)(1)(D) (1988).

that the procedure is likely to be fair and impartial.

For bid guarantees, a drawing is deemed to be arbitrary if it is not justified by the terms of the tender or agreements entered into with the contractor. For advance payment and performance guarantees, a drawing is deemed to be arbitrary if: (1) the dispute resolution mechanism in the contract makes an award to the contractor and the host government does not pay, or (2) through no fault of the contractor, the tribunal fails to render any award within a specified time, or (3) the tribunal renders an award in favor of the host government and the investor can establish that the award was obtained through fraud, corruption or is not supported by substantial evidence on the record.

E. *Finance Programs*

Although political risk insurance traditionally constituted the bulk of OPIC's operations,[58] OPIC also has a growing loan and loan guarantee authority for investment projects in developing countries.[59] Direct financing is usually at market or close-to-market interest rates. Loan amounts generally range from $1 million to $6 million. To be eligible for OPIC's direct loan program, a U.S. small business must be a project sponsor.

Loan guarantees, covering both commercial and political risk, are available to projects involving small and large U.S. companies. They are available to larger U.S. companies for projects located in higher income developing countries only if the projects have special benefits, such as promotion of a significant number of U.S. jobs. Loan guarantees usually range from $6 million to $25 million but can reach $50 million for large projects.[60]

F. *Claims*

Many investors believe that the mere existence of OPIC's insurance can deter political interference by a host government because of the host government's unwillingness to interfere with

58. 1991 ANNUAL REPORT, *supra* note 35.

59. 22 U.S.C. § 2194(b), 2194(c) (1988). There is more to say about OPIC's finance programs, but they are outside the scope of this article.

60. This is a brief description of OPIC's finance programs, which are currently growing in size and importance and should be addressed in more detail, but not in this article.

a project "sponsored by the United States government."[61] In 1991, OPIC settled three civil strife claims and one expropriation claim with cash payments of $2 million and a guaranty settlement of $30 million.[62] OPIC has also successfully negotiated the resolution, without payment by OPIC, of several potential expropriation claims. In many instances, these negotiations resulted in higher payments to the investor than the amount claimed.[63]

In its twenty year history from 1971 to 1991, OPIC denied twenty-two claims, "but only seven have been submitted to arbitration by the investors." OPIC has "paid, guaranteed, or provided indemnities for more than $510 million to investors in settlement of 242 insurance claims. As of September 30, 1991, claims pending totaled $5.5 million."[64]

IV. MIGA

The Multilateral Investment Guarantee Agency (MIGA), like OPIC, is intended to encourage the flow of foreign private investment to developing countries by providing political risk insurance.[65] MIGA was created to fill the gaps in "national" insurance programs such as OPIC and those of certain other industrialized countries which favor their own nationals and tend to concentrate on investments in their own regions of the world.[66] The convention to establish MIGA was opened for signature in 1985 by the Board of Governors of the International Bank for Reconstruction and Development (the World Bank); the MIGA Convention constituting MIGA as an independent member of the World Bank group was consummated in 1988.[67]

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61. *See* West, *The Utility of Political Risk Insurance as a Transfer Risk Mechanism*, *in* GHADAR, *supra* note 2, at 118, 123.

62. 1991 ANNUAL REPORT, *supra* note 35, at 4.

63. As a matter of policy, OPIC does not disclose the amount of insurance coverage.

64. OPIC Press Release, *Insurance Claims Experience to Date: OPIC and its Predecessor Agency*, Sept. 30, 1991; *See also* 1991 ANNUAL REPORT, *supra* note 35 at 4.

65. Convention Establishing the Multilateral Investment Guarantee Agency, [hereinafter MIGA Convention] *reprinted in* XXIV I.L.M. 1598 (1985); *see also* Shihata, *The Multinational Investment Guarantee Agency*, *in* PROCEEDINGS AND COMMITTEE REPORTS OF THE AMERICAN BRANCH OF THE INTERNATIONAL LAW ASSOCIATION, 50 (1985-86).

66. L. WALLACE, FIN. & DEV. 48 (1992).

67. MIGA Operational Regulations, I.L.M. Background/Content Summary, 27 I.L.M. 1227 (1988). MIGA Convention, Art. 61.

A. *Structure and Capitalization*

The MIGA Convention entered into force on April 12, 1988 upon ratification by the required minimum of five industrialized countries (referred to in the MIGA Convention as Category 1 countries) and fifteen developing countries (Category 2 countries) which were required to subscribe to the required minimum of one third of MIGA's capital (approximately U.S. $360 million). Membership in MIGA is open to all members of the World Bank.[68] To become a member in MIGA each country must ratify MIGA's Convention, subscribe to a specified amount of capital and contribute a portion of the capital.[69] A total of 116 countries have signed the MIGA Convention and 86 have become full members as of August 7, 1992.

During the first three years after MIGA entered into force, all decisions of the Board of Directors required a special majority vote consisting of not less than two-thirds of MIGA's total voting shares representing at least fifty-five percent of its subscribed capital.[70]

In effect MIGA required a consensus of developing and industrialized countries. After the first three years, MIGA was to review its voting structure with a view to reallocating shares, presumably resulting in a voting split of about 60/40 in favor of the Category 1 countries.[71] As of July 1992, MIGA had delayed such review for two more years.[72]

The business and affairs of MIGA are directed by a Council of Governors (one representative of each member), a Board of Directors (elected by the Council), and a Chief Executive Officer selected by the Board and responsible for the day-to-day business operations. MIGA is an autonomous and self-sufficient in-

68. MIGA Convention, Art. 61. (Switzerland was separately named as eligible for MIGA membership and subsequently became a member of the World Bank on May 29, 1992).

69. L.P. Hollywood, *MIGA and Long-Term Political Risk Insurance for Investment in Developing Countries, in* THE GENEVA PAPERS ON RISK AND INSURANCE: ISSUES AND PRACTICE, No. 63 (17th year), April 1992.

70. MIGA Convention, arts. 3(d), *supra* note 65, at 39.

71. MIGA Convention, art. 39(c), *supra* note 65, at 1619; *Introductory Note on the MIGA Convention, in* 24 I.L.M. 1598, 1603 [hereinafter *Introductory Note*].

72. Interview with Christophe Bellinger, MIGA, Washington D.C.

stitution.[73] Its relationship to the World Bank has been described as "symbolic,"[74] although the President of the World Bank is Ex Officio Chairman of MIGA's Board of Directors and nominates MIGA's Chief Executive Officer.[75]

1. *Capitalization*

MIGA was initially to have a share capital of one billion Special Drawing Rights (SDR).[76] Subscriptions have to be based on relative economic strength as measured by the subscribers' allocation of shares to the capital of the World Bank. MIGA became operational when one third of its total capital was actually subscribed. Ten percent of the subscription was to be paid in cash. Another ten percent was to be paid in nonnegotiable, noninterest bearing promissory notes. The remainder of the subscription was subject to call. Industrialized countries had to pay in foreign exchange, whereas developing countries could pay up to twenty-five percent of the cash portion of their subscriptions in their own currency.[77]

B. *Programs*

MIGA insures against only political, not commercial risks. At the outset, insurance liabilities could not exceed 150 percent of the amount of MIGA's subscribed capital plus reserves and a portion of its reinsurance coverage, or approximately U.S. $1.5 billion. This ratio can now be increased up to a maximum of five to one.[78]

1. *Eligibility*

Coverage under MIGA is subject to requirements of eligibility for investors and investments similar to those of OPIC. Eligible investors include nationals of a member country, entities incorporated and having their principal place of business in a member country and entities having a majority of their shares

73. MIGA Convention, art. 25, *supra* note 65, at 1617.
74. Shihata, *supra* note 65, at 53.
75. MIGA Convention, arts. 32(b), 33(b), *supra* note 65, at 1618, 1619.
76. MIGA Convention, art. 5(a), *supra* note 65, at 1609.
77. The United States' subscription was $222 million.
78. MIGA Convention, arts. 7, 8, 22, *supra* note 65, at 1610, 1615.

owned by nationals of member countries.[79] In an unusual provision, eligible investors also include nationals of the host country if the assets to be invested are obtained from abroad. This provision is intended to assist developing countries in reversing capital flight.[80]

Investments must be developmental, comply with the laws of the host country and be consistent with the host government's development objectives and priorities.[81] Initially, MIGA insured only equity interests and other forms of direct investment such as shareholder loans and guarantees. By special majority vote of MIGA's Board of Directors, coverage can be extended to other forms of investment including "indirect equity-type investments," (i.e., management, service contracts and licensing agreements).[82] In addition, loans by a financial institution to an unrelated borrower are insurable if MIGA is also covering a shareholder investment in the project. Certain types of investments, such as those related to military purposes, cannot be assisted by MIGA.[83]

MIGA can only insure new investments, but eligibility is not limited to new projects. Like OPIC, it will consider applications for coverage to be applied to expansion, acquisition and modernization of existing companies.[84]

The host government must approve the investment before coverage is extended.[85] MIGA can "deem" that an approval has been obtained if the host government has not objected within a reasonable period.[86] By contrast, OPIC requires specific approval. A matter that will have to be clarified is whether a failure to object can successfully be imposed upon a sovereign state as conclusive of specific approval.[87]

MIGA has the option of seeking an agreement with a host country concerning treatment of investments that MIGA guar-

79. MIGA Operational Regulations, para. 1.15, *reprinted in* 27 I.L.M. 1227 (1988).
80. *Introductory Note*, *supra* note 71, 24 I.L.M. at 1600.
81. MIGA Convention, art. 12(d), *supra* note 65, at 1612.
82. *Id.* art. 12(b); Hollywood, *supra* note 69, at 261.
83. Shihata, *supra* note 65, at 56.
84. Hollywood, *supra* note 69, at 262.
85. MIGA Convention, art. 15, *supra* note 65, at 1613.
86. MIGA Convention, art. 38(b), *supra* note 65, at 1620.
87. *See* SMIT, GALSTON AND LEVITSKY, INTERNATIONAL CONTRACTS (1981).

antees. Unlike OPIC, MIGA is required to enter into such an agreement only if it is not satisfied that the host country can provide fair and equitable treatment and legal protection for the investment.[88] If entered into, such agreements "will assure that the Agency . . . has treatment at least as favorable as that agreed by the member concerned for the most favorable investment guarantee agency or state in an agreement related to an investment."[89]

MIGA can only insure new investments but eligibility is not limited to new projects. Like OPIC, it will consider applications for coverage to be applied to expansion, acquisition and modernization of existing companies. Additionally, MIGA-assisted investments must be commercially sound.[90] By contrast, OPIC usually does not require an assessment of the commercial soundness of an investment.[91] MIGA, like OPIC, is expected to be self-sustaining. Rates can vary on the basis of the characteristics of the project, but not the characteristics of the host country.[92]

The agency has experienced record results on its investment programs for the fiscal year ending June 30, 1992. By June 30 MIGA had issued 21 investment insurance contracts with a combined maximum coverage of U.S. $313 million and with a total of U.S. $504 million written as of that date. In fiscal year 1991, MIGA had written a total of 11 contracts with maximum coverage of U.S. $59 million.[93]

2. *Coverage*

The MIGA Convention provides coverage against four broad categories of risk:
1. Transfer risk resulting from restrictions on currency conversion and transfer;
2. Risk of loss resulting from legislative or administrative ac-

88. MIGA Convention, art. 23(b), *supra* note 65, at 1616.

89. OPIC is likely to have the most favored treatment by virtue of its own bilateral agreements.

90. MIGA Convention, art. 12(d)(i), *supra* note 65, at 1612.

91. This is not always the case, however, because the political risk attached to a venture can increase if a venture is not commercially sound.

92. Shihata, *supra* note 65, at 60.

93. MIGA Press Release, *MIGA Guarantees Reach U.S. $500 Million Mark*, July 9, 1992.

tions or omissions that have the effect of depriving the investor of ownership or control or substantial benefits from the investment (expropriation);
3. Repudiation or breach of government contracts where the investor has no access to a competent judicial or arbitral forum, or faces unreasonable delays or is unable to enforce a judicial or arbitral decision issued in its favor; and
4. The risk of war and civil disturbance.

A special majority of MIGA's Board of Directors can vote to cover additional political risks on an ad hoc basis if the investor and the host country so request.[94]

In the beginning, MIGA envisioned some control and financial participation by developing countries as well as by industrialized countries.[95] This has made MIGA more acceptable to developing countries. However, it could also have created some potential concern about MIGA's coverage particularly in connection with events of expropriation or contract repudiation where the investor and the host government might disagree as to whether a taking or repudiation could occur or as to its cause.

The MIGA Convention addressed this concern by excluding from coverage "non-discriminatory measures of general application which governments normally take for the purpose of regulating economic activity in their territories."[96] This provision has been explained as follows:

> This exclusion is not meant to confine coverage under that provision to outright expropriation. The exclusion applies only to host governmental measures that meet all its requirements, i.e., to measures that (a) do not discriminate against the investor, (b) are normally taken by governments, and (c) are taken for the purpose of regulating economic activities in the host country's territory. The Commentary on the Convention, which was also approved by the Bank's Executive Directors, lists as examples of such measures "taxation, environmental and labor legislation as well as normal measures for the maintenance of public safety."[97]

94. MIGA Convention, art. 11(b), *supra* note 65, at 1612.
95. Shihata, *supra* note 65, at 53. This is unlike an earlier attempt by the World Bank to promote a political risk insurance agency.
96. MIGA Convention, art. 11(a)(ii), *supra* note 65, at 1611.
97. Shihata, *supra* note 65, at 55 (emphasis in text).

The same commentator also acknowledged that "[t]he value of the expropriation coverage will depend largely on MIGA's ability to cope with the problem of 'creeping expropriation' and expropriation in the guise of apparently legal measures adopted by the host government."[98]

Interpretation and application of the MIGA Convention are decided by MIGA's Board of Directors subject to appeal to MIGA's Council of Governors.[99] Some rules and regulations for MIGA's operations were originally set at a "Preparatory Conference" in October 1986; neither the allocation of voting rights nor the definitions of expropriation and compensation were addressed at the conference. Operational regulations were adopted on June 22, 1988[100] and eligible risks were defined in the General Conditions of Guarantee made part of the Standard Contract of Guarantee adopted January 25, 1989.[101]

3. *Claims*

Disputes arising under insurance contracts between MIGA and its insureds can, but are not required to, be submitted for arbitration.[102] When MIGA pays or agrees to pay a claim, it is to be subrogated to the rights of the investor. Disputes between MIGA and the host country arising out of subrogation are normally settled by negotiation, conciliation and arbitration.[103] MIGA is permitted to sell or use local currency obtained in an inconvertibility settlement if its agreement with the host country so provides. This is similar to the arrangement that OPIC has with the United States Department of State.[104]

4. *Comparisons With National Programs*

Compared to national programs such as OPIC, MIGA has raised some concerns that will have to be addressed before it becomes completely acceptable to foreign investors.

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98. *Id.* at 54.
99. MIGA Convention, arts. 56, 30, 31, *supra* note 65, at 1625, 1617.
100. 27 I.L.M. 1227 (1988).
101. 28 I.L.M. 1233 (1989).
102. MIGA Convention, art. 57, *supra* note 65, at 1626.
103. MIGA Convention, art. 57, Annex II, *supra* note 65, at.1626, 1631.
104. MIGA Convention, art. 18(c), *supra* note 65, at 1614.

First, MIGA's portfolio of business in its first few years is likely to be relatively small and, by the process of adverse selection, risky. Even if MIGA reinsures, it is likely to have a relatively small number of investments over which to spread its risk. This means that the potential risk of a substantial loss will be high, at least in the early years. This can be expected to result in high premiums if MIGA is to be self-sustaining. Under these circumstances, an investor might also have some concern about MIGA's ability to pay substantial claims during the start-up period except by a call upon its members.[105]

Second, it is not clear how MIGA will resolve internally the potentially troublesome and divisive issues of what constitutes an expropriatory act and what is fair compensation.[106]

On the other hand, MIGA could supplement OPIC and other national insurance plans, by the following means. First, MIGA is empowered to cover the risks of war damage to land-based assets. Such coverage is not generally available in the private market. OPIC offers such coverage, but MIGA's entry into the field might provide some additional volume of coverage and might also encourage changes in the private market. Second, MIGA, by virtue of its "symbolic" relationship with the World Bank, might discourage a host government from interfering with covered investments. Moreover, MIGA, like OPIC, can assist investors in obtaining recoveries, conceivably even in excess of coverage. Finally, MIGA might be more politically acceptable to a host government as a subrogee of the insured's rights. This might facilitate work-out arrangements.[107]

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105. MIGA is not underwritten by the World Bank. Shihata, *supra* note 65, at 52.

106. Payments of claims are decided by the President of MIGA "under the direction of the Board [of Directors] . . . [and] in accordance with the contract of guarantee and such policies as the Board may adopt." MIGA Convention, art. 17, *supra* note 65. The terms and conditions of MIGA's insurance contracts are also subject to the 'rules and regulation' of the Board of Directors. *Id.* at art. 16. Except for the first three years, the Board decided by majority vote. *Id.* at arts. 39, 42(a). Decisions about contract language and claims can, therefore, ultimately be made or changed by the Board of Directors, which will have on it substantial representation from developing countries.

107. Developing countries sometimes resent subrogation to a government. *See* Allison, *supra* note 43. *Cf.* Theodor Meron, *The World Bank and Insurance*, 47 BRIT. Y.B. INT'L L.J. 301, 312 (1974-75); Edward M. Martin, *Multilateral Investment Insurance: the OECD Proposal*, 8 HARV. INT'L L.J. 280, 318-319 (1967).

V. EXIMBANK

It is the policy of most industrialized countries to encourage their domestic companies to export and, to some extent, to invest in foreign countries.[108] This policy is intended to serve a number of national interests, such as increasing or protecting domestic employment, assuring supplies of raw materials or other important products, gaining access to restricted markets, and advancing foreign policy objectives.

Most industrialized countries support exports and foreign investment through various programs.[109] These programs can also reduce the costs of goods and services for exporters and investors. The United States supports exports principally by the Export-Import Bank of the United States (Eximbank).[110]

A. *Structure And General Coverage*

Eximbank is a government corporation. It is managed by a five member Board of Directors who are appointed by the President and confirmed by the Senate, of which not more than three can be from one political party.[111]

Eximbank's borrowings and financings are general obligations of the United States and are therefore backed by its full faith and credit.[112] In addition, although Eximbank receives no appropriated funds, Congress does establish ceilings on what it can loan, guarantee, or insure each fiscal year.

108. H.L. WEISBERG AND CHARLES RAUCH, A COMPARATIVE STUDY OF EXPORT INDUSTRIES IN THE UNITED STATES, FRANCE, THE UNITED KINGDOM, GERMANY AND JAPAN (1979) [hereinafter WEISBERG].

109. *Id.* at 26-30. ROBINSON, FOREIGN INVESTMENT IN THE THIRD WORLD: A COMPREHENSIVE STUDY OF SELECTED DEVELOPING COUNTRY INVESTMENT PROMOTION PROGRAMS (1980) [hereinafter ROBINSON]. *See also*, EXPORT-IMPORT BANK OF THE UNITED STATES, REPORT TO THE UNITED STATES CONGRESS ON EXPORT CREDIT COMPETITION FOR THE PERIOD JANUARY 1, 1984, THROUGH DECEMBER 31, 1984 (September 1985) [hereinafter EXIMBANK REPORT]; CONGRESSIONAL BUDGET OFFICE, BUDGETS AND COSTS OF THE EXPORT-IMPORT BANK LOAN SUBSIDIARY PROGRAM (March 1981) [hereinafter CBO REPORT].

110. 12 U.S.C. § 635a(a) (1988).

111. 12 U.S.C. § 635a(b), (c)(2) (1988).

112. 42 Op. Att'y Gen. 27 (1966).

B. *ECIP*

The Eximbank Export Credit Insurance Program (ECIP), unlike OPIC and MIGA, provides commercial as well as political risk coverage to exporters and foreign investors. Political risks covered through ECIP include war, revolution, insurrection, expropriation and inconvertibility of local currency. Commercial risks covered include the buyer's insolvency or protracted default.

ECIP has been restructured twice during the last two years. Prior to 1991, the Foreign Credit Insurance Association ("FCIA"), an association of approximately 50 leading private insurance companies, sold and serviced Eximbank export credit insurance policies. In October 1992, responsibility for administration of this program was transferred to FCIA Management Company, a private contractor. Effective September 1992, the program has become an in-house controlled operation, but will continue to offer the same services provided by the private contractor.[113]

Credit insurance is Eximbank's major program for short-term transactions, which are fewer than 180 days in duration.[114] This program insures against low foreign sales receivables. ECIP can insure U.S. exporters against ninety percent of commercial risk and 100 percent of the political risk associated with the financed portion of export sales.[115] Any entity engaged in exporting or the export financing of U.S. goods is eligible for coverage.[116] A bank can purchase a policy directly or the proceeds of a policy can be assigned to a bank in order to make it possible to obtain private export credits at lower interest rates.

ECIP's predecessor FCIA insured about three percent of U.S. exports. Over half of this coverage was provided to

113. *See Eximbank Press Guidance; Export Credit Insurance Program*, August 13, 1992. Eximbank officials have stated that this return to in-house adminstration is in the best interest of the program, citing a built-in conflict of interest involving the program's government guarantee as one reason behind the decision.

114. Eximbank Report, *supra* note 109, at 35.

115. ECIP Combined Short-Term/Medium-Term/Comprehensive Policy [hereinafter ECIP Policy].

116. ECIP will continue to provide the same insurance services as provided by FCIA Management Company.

banks.[117] Eximbank's in-house program will continue to provide uninterrupted coverage to participating investors and provide the vehicle for a more efficient and effective marketing effort.

1. *Requirements*

ECIP covers short and medium-term transactions. Short-term coverage is available if fifty percent of the value of a transaction is of United States origin; medium-term coverage usually requires 100 percent United States origin.

Certain conditions must be met on all exports covered by medium-term insurance. Initially, the foreign buyer must make a cash payment of at least fifteen percent of the contract price on or before delivery. The U.S. exporter must then retain at least ten percent of the risk of the financed portion of each transaction (that is, the contract price less any cash payments). Furthermore, repayment terms cannot exceed those customary in international trade for the goods covered, although the term will vary with the contract value. Higher contract values are eligible for longer terms of up to five years.

Premiums will vary with the repayment terms and with associated commercial and political risks. ECIP claims must generally be filed within 120 days after the date of default. Amounts received after payment of a claim, and after payment of ECIP's collection expenses, are shared between the insured and ECIP in the ratio in which they apportioned the loss.

2. *Multi-Buyer Programs*[118]

ECIP's multi-buyer programs assist U.S. exporters doing business with many buyers on a continuous basis. The programs allow a degree of flexibility to the exporter. ECIP offers short-term (up to 180 days) and medium-term (up to five years) multi-buyer policies. These policies cover both commercial and political risks. ECIP also offers policies that cover only political risks.

The multi-buyer policies usually include discretionary credit limits (commonly up to $200,000), which allow the exporter to

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117. CBO REPORT, *supra* note 109, at 11.

118. The First National Bank of Chicago, *National Export Credit Program* (1985) (internal material).

obtain coverage automatically on certain individual transactions without referring the transactions for separate approval by Eximbank.

ECIP relies to a great extent on the insured to check the creditworthiness of foreign buyers covered by multi-buyer policies. In order to encourage the insured to exercise sound credit judgment within the discretionary limits, ECIP's coverage for commercial risk requires that ten percent of the risk be retained by the insured.[119] Sales above the discretionary credit limit require ECIP's approval. Such policies normally have an annual commercial first loss deductible, similar to that in automobile insurance, which does not, however, apply to losses resulting from political, as contrasted to commercial, events. Multi-buyer policies can cover up to ninety percent of the commercial risk and up to 100 percent of the political risk.

These policies are generally written for a one-year period and cover sales to end-users, dealers or distributors.[120] The actual percentage of coverage for a specific transaction can be lower, depending upon Eximbank's assessment of commercial and political risks.

3. *Single-Buyer Programs*

ECIP offers three programs to insure exports to a single buyer (generally on medium-term repayment periods) of capital goods or goods having relatively high unit values. These three programs are called the medium-term single sale policy, the medium-term repetitive policy, and the combined short-term/medium-term policy. The buyer must make a minimum down payment of fifteen percent on all three policies.

Under the medium-term single sale policy, coverage applies to a single specified sale. The insured can make separate shipments during a specific period. This period is usually six months, although the period can be extended. Typically, each separate shipment must be covered by a separate promissory note issued by the buyer, but ECIP will also cover multiple ship-

119. *Id.* Financing banks are often expected to share with the exporter up to one half of the uninsured risk for supplier credits.

120. *Id.* In the political risk-only policies, ECIP is prepared to cover up to 200 percent of political risk.

ments on a single promissory note.

The medium-term repetitive policy offers the same coverage as the medium-term single sale policy but applies to goods shipped to a single buyer (usually a dealer or distributor) over a specific renewable period (usually one year).

The combined short-term/medium-term policy covers capital goods on terms similar to those of other policies, as well as parts and accessories for up to 180 days. It can also finance inventories related to exports of capital goods for up to 270 days. At the end of the period, the policyholder can convert the short-term obligation into medium-term insurance coverage upon making a fifteen percent down payment on the cost of the policy.

C. *Letters of Credit*

Eximbank has also established insurance coverage for letters of credit issued by banks. Under the policy, which is not applicable to back-to-back, red clause, conditional or standby letters of credit: 1. The financing bank can pass more risk exposure along to the exporter; 2. Coverage is the same for both political and commercial risk;[121] 3. The waiting period for filing claims following default is shortened from 180 days to sixty days; and 4. ECIP is prepared to commit to coverage for ninety days.

The insured can apply for a credit limit for an issuing bank so that, within that limit, insurance can be issued for a specific class of transactions. These transactions include, for example, those from a particular exporter to a particular importer, or of a particular product to a particular importer. Transactions can be in U.S. dollars, pounds sterling, French francs, Deutsche marks, Swiss francs, or yen.

At least fifty percent of the value of the goods before markup must be of United States origin. The policy normally covers payment terms of up to 180 days after presentation. It can also cover letters of credit used to finance the sale of services performed by U.S. personnel. For coverage to be effective, the

121. *Id.* Ninety-five percent for most transactions, ninety-eight percent for sales of bulk agricultural commodities, and one hundred percent for sovereign obligations.

issuing bank must accept the documents as those provided for in the letters of credit.

1. *Special Programs*

ECIP offers certain specialized programs, including insurance against specific risks during preshipment,[122] insurance against political risk for consignment sales,[123] and insurance for sales of bulk agricultural commodities sold on the basis of irrevocable letters of credit.

D. *Private Export Funding Corporation*

The Private Export Funding Corporation (PEFCO) is a private company owned by several U.S. commercial banks and corporations.[124] It extends medium-term and long-term loans to foreign buyers of U.S. capital goods. All PEFCO loans must be covered by an unconditional guarantee by Eximbank of both principal and interest. PEFCO raises its loan funds in the private capital market, using Eximbank's guarantee. Similarly, Eximbank's approval is required for individual loan commitments by PEFCO.

PEFCO was organized as a supplementary lending source. It generally does not make loans of less than $1 million. It makes loans only when necessary funds are not available from the usual private sector sources on normal credit terms at competitive interest rates. PEFCO's principal value to the export community has been its ability to make loans when loans from more traditional lenders are less readily available, and to make them at fixed interest rates for longer than normal commitment periods.

VII. Other Government Sponsored and Private Insurance

Virtually every industrialized country, and a number of developing countries, including India, have investment insurance programs similar to those of OPIC.[125] It is difficult to describe

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122. *Id.* This is the period of fabrication of goods for which sales contracts have been executed, generally for products that cannot easily be sold to another buyer.

123. *Id.* This is where the exporter retains title until the goods are sold.

124. *See*, Warren W. Glick and Robert J. McKinsey, *The Export-Import Bank of the United States*, *in* 2 Int'l Fin. L. (Rendell, ed., 2d ed., Euromoney Publications 1983).

125. Weisberg, *supra* note 108; Robinson, *supra* note 109.

what is available in the private political risk insurance market, because the information is frequently confidential and the market is often in flux.

A. *Other Government Sponsored Insurance*

Some of these government-sponsored insurance programs are operated by the same agencies that handle export insurance and credits, a function which Eximbank performs for U.S. exporters. Some of the agencies are administered by private companies, but all of the programs issue political risk insurance with governmental authority and financial backing.[126] These agencies are members of the International Union of Credit and Investment Insurers (the Berne Union).

Most official investment insurance programs base eligibility on the company's domicile and its operations in the host country, rather than, as in OPIC programs, on the nationality of the company's ownership. In principle, therefore, an investment by a subsidiary of a U.S. company could be covered under several programs, so long as the investment has real commercial value to the insuring country.[127] Financing and insurance for exports, unlike for investments, are generally available from nonofficial programs without reference to the nationality of the exporter, so long as the source requirements are met. The crucial test is whether the exporting country receives benefit.[128]

Political risk insurance programs offered by other industrialized countries are frequently available in more countries and areas than are OPIC's programs. However, in practice, many such programs concentrate on developing countries, particularly former colonies.[129] Government-to-government agreements, which are similar to OPIC's bilateral agreements, are rarely required by other programs.

Most other industrialized countries limit their programs to new investments. Other programs are not necessarily restricted

126. Cecil Hunt, *Government and Private Political Risk Insurance in* DOING BUSINESS IN HIGH RISK COUNTRIES 6, 8 (1979).

127. *Id.* at 9-10.

128. *See* 12 U.S.C. § 635a (1988).

129. *See* Weisberg, *supra* note 108, at 8-9; Hunt, *supra* note 126, at 11.

to private sector projects.[130]

Most political risk insurance programs for investment offered by other industrialized countries require that insured investments fulfill some policy objectives. These objectives range from developmental benefits to the host country to exports from the insuring country.

B. *Private Political Risk Insurance*

In general, relatively few private insurers directly cover political risk.[131] In covering property and casualty risks, some private insurers will, in effect, also cover losses resulting indirectly from political acts. Coverage for fire damage, for example, will usually extend to damage caused by acts that are "politically" motivated. Private political risk insurance is generally not available for more than three years, although it may be renewed for additional periods.

1. *Companies Active In This Field*

The largest U.S. private political risk insurer is probably the American International Group (AIG). The Political Risk Division of AIG was merged in 1984 with five other "agency companies" to create AIG Specialty Agencies, Inc., a wholly-owned subsidiary of AIG.[132]

Lloyds of London, Panfinancial, the Chubb Group of Insurance Companies, and the Continental Corporation, through its affiliates, Swett & Crawford and Pacific Insurance Company, are also major political risk insurers. Lloyds works through special underwriters who accept risks on behalf of individual members

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130. Hunt, *supra* note 126, at 11.

131. *See generally* CHARLES M. NEWMAN II AND JAMES CZECHOWICZ, INTERNATIONAL RISK MANAGEMENT EXPERIENCESS AND PRACTICES (Financial Executives Research Foundation 1983), at 139-75; Rober Svensk, *The Role of Private Sector Insurance in* FARIBORZ GHADAR ET AL, MANAGING INTERNATIONAL POLITICAL RISK: STRATEGIES AND TECHNIQUES (Ghadar and Assoc. 1983), at 114.

132. AMERICAN INTERNATIONAL GROUP, 1985 ANNUAL REPORT, 28-9 (1985). Other agencies merged with the Political Risk Division include divisions insuring oil and gas drillings rigs, the transportation industry nonstandard personal automobile risk, kidnapransom and extortion, and special coverage for the entertainment industry. 2 MOODY'S BANK AND FINANCIAL MANUAL 2924 (1984); 2 MOODY'S BANK AND FINANCIAL MANUAL 2926 (1985).

grouped in one or more of the 350 syndicates now in operation. Access to Lloyd's underwriters is controlled exclusively by Lloyd's brokers.

Most political risk insurance on investments, especially large investments, is negotiated by a few specialized brokers, not directly with the insured.[133] The brokers are legally the agents of the insured and are valuable for their expertise in keeping abreast of a changing market.

2. *Coverage Available*

Private insurance covering a substantial number of foreign political and commercial risks is generally available. Under expropriation (often referred to as "confiscation, expropriation and nationalization"), private insurers can cover both new and existing investments.[134] Private insurance coverage is also sometimes available against risks of inconvertibility and generally against the risks of arbitrary drawdowns of on-demand bank guarantees or bonds. Private political risk coverage is generally not available against risks of war damage to land-based assets, for reasons discussed below.[135]

Private insurance is also available against the commercial risks of contract repudiation by public buyers (not usually by private buyers), export embargoes, import embargoes and defaults of buyers for commercial reasons.[136] Coverage against losses caused by defaults for political reasons is available from private insurers under their standard political risk contracts.

Premiums will vary considerably depending upon the investment, but tend to be higher than premiums charged by OPIC and ECIP. Private insurers will often quote premiums as a single amount for the duration of the coverage, although they might be payable in periodic installments.[137]

133. *See Survey on Insurance and Insurance Brokering*, FINANCIAL TIMES, April 16, 1986; Frank, *supra* note 5; Hunt, *supra* note 126.

134. OPIC cannot insure existing investments.

135. OPIC does cover such risks.

136. ECIP offers all such coverage.

137. By contrast, the premiums of OPIC and ECIP are quoted on an annual basis.

3. *Reinsurance*

The political risk insurance market is relatively small, but demand is increasing. In order for political risk insurance to be commercially viable over time, the portfolio of investments insured must be large and diverse. Otherwise, the insurer runs the risk of wiping out one or two years' premiums with one major loss. Most private political risk insurers, therefore, seek to coinsure or reinsure some of their risk portfolios.

Reinsurance is a key to the development of the private political risk industry.[138] With some important exceptions, the primary reinsurance market for political risk insurance lies in a few syndicates associated with Lloyds. The reinsurance market at Lloyds is complex. Often there may be more than 100 underwriters on a single large reinsurance project.

The reinsurance market is now a limitation on the development of the private political risk insurance industry. Much of political risk reinsurance evolved out of property and casualty coverage, as reinsurers moved gradually from covering acts of God to covering acts of governments. The movement, however, has been gradual. For example, to date, there is only one private reinsurance treaty (Panfinance) that appears to cover land-based assets against war risks.[139] The overlap between the political risk reinsurance market and the property and casualty reinsurance market is such that when the property and casualty market is required to pay a large number of claims, the availability of political risk reinsurance is often further constrained.

Reinsurance can be by treaty or by project—"facultative" reinsurance.[140] Facultative reinsurance is done by a single reinsurer, whereas treaty insurance is done by a group of reinsurers. Facultative reinsurance includes, almost by definition, a limited portfolio of investments, whereas treaty reinsurance covers all investments that fit the requirements of the treaty. As such, facultative reinsurance is generally more expensive and less reliable

138. *See Survey on Reinsurance*, FIN. TIMES, Sept. 8, 1986; Hunt, *supra* note 126.

139. By contrast, vessels can be covered for war risks. The theory is that the insurers could, by contract, require an insured vessel to leave a war zone within a reasonable period. They obviously cannot do so with fixed landbased assets.

140. *See e.g.*, the OPIC Amendments Act of 1985, Sec. 10, and the discussion in S. Rep. 99-156, *supra* note 22, at 5-6.

than treaty reinsurance, which provides the greatest potential for growth in the political reinsurance industry.

VIII. Negotiating and Drafting Points

At least three documents are crucial to insurance coverage: the underlying investment contract, to which the insurer is not a signatory; the application for insurance; and the insurance contract itself. In negotiating and drafting these documents, investors or lenders seeking insurance against the political and commercial risks of foreign transactions should consider a number of points, including provisions that have been important in disputes between insurers and insureds.

A. *The Underlying Contract*

The parties to the underlying investment contract should consider the need for commercial and/or political risk insurance.

B. *When Should Commercial Risk Insurance Coverage be Considered?*

Insurance coverage for the elements of commercial risk should be addressed in the planning stage of an investment. This is not a requirement of law, but of practicality. In principle, insurers are prepared to issue coverage at any time. The most fundamental axiom of the insurance business, however, is to insure before a loss is sustained.

In some contracts, particularly with or within developing countries, foreign investors specify that insurance of a certain description will be procured. This is partly because local investors or governments might later object to the cost of insurance or want to reduce the coverage below a level at which the foreign investor or its lenders are comfortable.

In addition, some countries require that insurance be purchased from local insurers. In China, for example, the joint venture law provides that "[t]he insurance appropriate to a joint venture shall be furnished by Chinese insurance companies."[141] Technically, only foreign investments structured as equity joint

141. China Joint Venture, *supra* note 15, at Art. 8.

ventures are subject to this requirement. The government can waive the requirement, and it appears that, in practice, the requirement has been waived if the joint venture agreement permits the purchase of foreign insurance.[142] Many contracts with or within developing countries include provisions that require procurement of local goods and services.[143] This requirement could extend to the procurement of insurance.

Any explicit or likely requirement to buy local insurance should surface in negotiations at the planning stage. Requirements for local procurement can often be waived in the contract by the local participant and can usually be specifically waived by the government. The investor's maximum leverage to obtain such a waiver is in the planning stage, when the investment is being negotiated.

1. *Should the Contract Provide for Political Risk Insurance?*

Whether the underlying contract should provide for the procurement of political risk insurance is a more difficult issue. As noted earlier, OPIC can insure investments only if its coverage is "additional"[144] to the investment. In most cases additionality can be established if the investor registers its intention to procure insurance. Additionality can also be demonstrated by a provision in the underlying contract stating that the investment cannot proceed without the procurement of political risk insurance from OPIC, or, as an alternative, political risk insurance acceptable to the investor.

Although private insurers impose no such registration requirements,[145] it is often prudent, as noted, to bind private insurance in the planning stage, and in the underlying contract. Many investors are concerned, however, that an explicit provision for political risk insurance might be offensive to a host government and might make negotiations more difficult. This concern is sometimes valid, although the experience of many

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142. *See* S. Linn Williams, *Protecting Investments in China*, in LEGAL ASPECTS OF DOING BUSINESS WITH CHINA, 431 (PLI 1985).

143. Sometimes this requirement is lifted to local goods and services that are competitive in quality and price.

144. 22 U.S.C. § 2191 (1988).

145. Insurance can be purchased whether or not it is additional to the investment.

negotiators has been that most developing countries are relatively sophisticated about the investor's need for such insurance. It is often sufficient to explain that commercial lenders typically require such insurance, at least on any funds they lend, and often on the investor's equity as well.

In addition, a requirement under the older forms of OPIC's bilateral agreements, was a specific approval[146] of an investment before it would issue insurance. The government of the developing country, therefore, might have specific notice of OPIC's coverage, but it would not know the amount of such coverage. In contrast, many private insurers do not want developing countries to know of the existence of the insurance, for the same reasons that defense lawyers do not want a jury apprised of the existence of insurance in liability cases. Indeed, many private insurers would consider it a violation of the insurance contract if the insured advised the host government of the existence of coverage. The most prudent approach is to check with the private insurer during the planning stage and obtain the insurer's instructions on whether or not to provide for political risk insurance in the underlying agreement.

C. *Important Provisions*

As noted earlier in the discussion of OPIC, the provisions of the underlying contract can become crucial to the scope of the insurance coverage. Political risk insurance does not cover losses resulting from acts that the investor agreed to in its contract. There are a number of provisions in underlying investment contracts that have been important in disputes over the scope of insurance coverage and therefore merit special consideration. The following are some examples.

1. *Force Majeure*

The force majeure clause, at a minimum, should be drafted in such a way that it does not excuse a claim that an expropriatory act has occurred.[147]

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146. This is called a Foreign Government Approval.
147. *See supra* note 18 for definition.

2. *Dispute Resolution*

OPIC's insurance relating to the dispute resolution provision in certain instances underscores the importance of negotiating this provision. For example, if the investor agrees that disputes are to be resolved by local courts, the investor will be bound by the results of that process. An investor cannot agree to such a dispute resolution procedure and then argue later that the procedure itself is inherently unfair or partial.

3. *Choice of Law*

The choice of law provision can affect the substantive law applied to an issue of coverage such as whether an expropriatory act occurred. Applicable law in most insurance contracts is the law of New York, England or a similar jurisdiction. Most of these jurisdictions will not have direct authority on the law of expropriations and would therefore apply international law in the absence of a specific choice of law provision in the contract relating to the determination of expropriation. If the underlying contract applies local law to issues arising out of that contract, a tribunal would probably respect that choice of law and evaluate the issue of whether an expropriatory act had occurred by reference, first, to local law.[148] Local law must also meet standards imposed by international law.[149] However, if the taking has been accomplished in a manner in accordance with local law, and if the local law meets the threshold requirements of international law, no expropriatory act might have occurred under the usual definition of "expropriatory act" in an insurance contract.[150]

4. *Minimizing Loss, Maximizing Recoveries*

Insurance contracts typically require that the insured take all necessary steps to minimize loss and maximize recoveries.

148. *See, e.g.*, Texaco Overseas Petroleum Co. v. Libyan Arab Republic, *reprinted in* 17 I.L.M. 1 (1978) [hereinafter TOPCO]; CHITTARANGAN FELIX AMERASINGHE, STATE RESPONSIBILITY FOR INJURIES TO ALIENS (1967).

149. TOPCO, *supra* note 148; Revere Copper and Brass, Inc. v. Overseas Private Investment Corporation, Am. Arb. Assoc. Case No. 16 10 0137 76 (1978) (Bergan, Arb.); Sapphire International Petroleum Ltd. v. National Iranian Oil Company, 35 INT'L L. RPTS. 136 (1967).

150. *See* Sohn and Baxter, *supra* note 11.

This clause can be construed to require invocation of judicial and other remedies, which can be constrained by the dispute resolution and choice of law clauses.

5. *Start-up*

In the drafting of many contracts, serious consideration should be given to the definition of "start-up." From the standpoint of the investor or lender, the start-up should be accomplished as quickly and automatically as possible. The start-up stage can, however, last from months to years. The start-up generally implies operation at economically viable levels over a reasonable period of time. For example, the start-up of a chemical investment could be defined as the output of a certain volume and quality of gas, as verified by an impartial third party. This is particularly significant for so-called turnkey contracts, in which the investor agrees to provide a fully operational facility. The risk of operating the facility shifts to the new owners only at the startup of operations. A government's questionable acts toward the investment, therefore, might be deemed to be "commercial," rather than "political," and therefore not covered by most insurance contracts, if the start-up has not yet occurred.

D. *Applications*

The document that an insured executes at the planning stage is usually an application for insurance, not an insurance contract. Often, these applications are entered into under great time pressures, and the insured or its broker must mobilize a number of coinsurers in order to obtain the necessary level and type of coverage.

1. *Obligations of the Prospective Insured*

Misstatements or omissions in applications have been the subject of a number of disputes between insureds and insurers. In view of the substantial losses that insurers could incur as a result of risk analysis based upon incorrect facts, the law of most jurisdictions imposes an obligation upon prospective insureds to disclose accurately and completely information that is material

to the issuance of an insurance contract.[151] If they do not do so, the contract can be declared void ab initio.

Under New York law, for example, which is commonly applied in insurance contracts, there are two grounds for cancellation of insurance contracts by insurers: misrepresentation of material facts and concealment of material facts. Under most circumstances, New York law imposes upon a prospective insured a duty to disclose to the insurer all facts that are material to the issuance of an insurance policy.[152] New York law generally does not impose upon insurers a duty to investigate the accuracy of an insured's representations.[153] Only if an insurer has deliberately disregarded notice of an insured's misrepresentations will it be deemed to have waived its right to cancel an insurance contract because of misrepresentation or concealment of material facts.[154]

Materiality is often defined by statute[155] but, under most common law definitions, a material fact is one that induces action that the insurer might otherwise not have taken if it had known the true facts.[156] Modern analysis focuses upon the freedom of choice of the insurer. In order to weigh properly the risks and benefits associated with the transaction and thereby to make a correct choice, full and accurate disclosure of all information related to the risks is required. A potential insured who misrepresents or conceals facts skews the insurer's analysis and deprives the insurer of its freedom of choice on whether to insure the transaction and on what premium to charge.[157]

In order to prove that it might not have entered into a transaction had it been aware of all the facts, an insurer can show that its practice is not to enter into such contracts when such risks are involved. Affidavits and testimony of insurance of-

151. *See, e.g.*, note 152, *infra*.

152. *See* N.Y. INS. LAW § 3105 (McKinney's 1985).

153. *See* Geer v. Union Mutual Life Ins. Co., 7 N.E.2d 125 (1937); American General Life Ins. Co. v. Dos Santos, 457 N.Y.S.2d 789 (1st Dep't 1983); Kantor v. Nationwide Ins. Co., 227 N.Y.S.2d 703 (2d Dep't 1962).

154. *See* Orent v. Equitable Life Ins. Society, 51 N.Y.S.2d 115 (2d Dep't 1944).

155. *See supra* note 152.

156. *See* L. Smirlock Realty Corp. v. Title Guarantee Co., 421 N.Y.S.2d 232 (2d Dep't 1979).

157. *See also* Leamy v. Berkshire Life Ins. Co., 39 N.Y.2d 271, 383 N.Y.S.2d 564, 347 N.E.2d 889 (1976).

ficers have been sufficient to prove such a practice,[158] which can also be demonstrated by reference to underlying rules and manuals.[159] Because each insurer is free to accept or reject whatever risks it chooses, the reasonableness of an insurer's underwriting policies ordinarily cannot be challenged.[160]

Misrepresented facts can be material even though they are not the only facts involved in the insurer's decision to enter into a contract,[161] and even though they are not the cause of a loss.[162] It is not necessary for the insurer to prove fraudulent intent by the insured in order to maintain an action for misrepresentation. Even "innocent" misrepresentation, if material, is a sufficient ground for cancellation.[163]

An action for concealment in contract requires proof of fraudulent intent. It is fraudulent for an insured to fail to disclose facts that it knows would be material to the insurer in acting upon the application.[164] The standard of materiality is generally the same as in misrepresentation.[165]

The application can influence whether an omission of a material fact constitutes a "concealment" or a "misrepresentation." Under New York law, for example, this would depend upon whether an insurer made an inquiry relating to the undisclosed fact. The application form constitutes such an inquiry. If no inquiry is made, omission of a material fact constitutes concealment only if the insured knows that such a fact is material. For example, once an inquiry is made, in the application, omission or misrepresentation of a material fact constitutes a misrepresentation, regardless of the insured's knowledge that such fact is material.[166]

158. *See* Meyers v. Equitable Life Assurance Society, 401 N.Y.S.2d 325 (3d Dep't 1978); *But see* Witter v. IDS Insurance Co., 466 N.Y.S.2d 480 (2d Dep't 1983) (unsupported assertions are not sufficient).

159. *See* Friedman v. Prudential Life Ins. Co. of America, 589 F.Supp. 1017 (S.D.N.Y. 1984).

160. *See* Fernandez v. Windsor Life Ins. Co. of America, 83 Misc.2d 301, 372, N.Y.S.2d 357 (Sup. Ct. Queens Co. 1975).

161. *See* Geer v. Union Mutual Ins. Co., 273 N.Y. 261, 7 N.E.2d 125 (1973).

162. *See* Sebring v. Fidelity-Phenix Fire Ins. Co., 255 N.Y. 382 (1931).

163. *See* Anderson v. Aetna Life Ins. Co., 193 N.E. 181 (1934).

164. *See* Sebring v. Fidelity-Phenix Fire Ins. Co., 255 N.Y. 382 (1931).

165. *See, e.g.*, L. Smirlock v. Title Guarantee Co., 421 N.Y.S.2d 232 (2d Dep't 1979).

166. *See* VanderVeer v. Continental Casualty Co., 34 N.Y.2d 50, 356 N.Y.S.2d 13 (1974).

2. *Provisions In Applications*

An investor should give very careful attention to an application for insurance and perhaps even seek outside advice from a broker or experienced lawyer. The application usually requests basic information about the investment. It also requests information about the management of the investment, the relationship of the investment and the investor to the host government, and the dependence of the investment on the investor.[167] The following are some of the typical provisions in applications that have been the subject of disputes between insureds and insurers.

a. *Accounting method*

Most applications require a statement of the accounting method used by the insured with respect to the investment. It is crucial to the insurer that it be able to obtain adequate salvage of any investment on which it pays a claim and to which it is thereby subrogated. This requires that the same accounting method be used to determine the payment of claims and the valuation of the investment in the host country. However, sometimes the methods investors employ to account for the investment in the host country differ from those used to account for the investment in the home country. In fact, generally accepted accounting principles might even require such differing treatment.

It is prudent for the applicant to disclose any such differences in the application. In the event of a dispute, particularly one involving possible expropriation, the insurer's salvage will be substantially affected by the valuation applied to the investment in the host country. If the insured expects the insurer to pay a claim based upon the value of that investment in the United States, the insurer has a right to expect that the value of the investment in the United States will not differ substantially from the value of the investment in the host country. Otherwise, the insurer's salvage rights will be adversely affected without its knowledge or approval.

167. For example, this could occur because of licensed technology.

b. *Items insured*

Most applications require a comprehensive description and listing of the items to be insured. In general, property and casualty insurers cover only tangible, physical assets, and they can reasonably expect an insured to state the nature of its assets accurately in its application. Political risk insurers sometimes insure nontangible assets such as receivables. They rarely extend coverage, however, substantially beyond the stated value of fixed, tangible assets.

c. *"Catch-all" question*

Most applications contain a "catch-all" question that requests information on any matters that might affect coverage or give rise to a claim. An insured is not required to speculate in answering such an inquiry. On the other hand, if the insured has actual knowledge of a dispute or potential dispute that might affect its coverage, it withholds that information from the insurer at risk of cancellation. Political risk insurers are supposed to take risks and to have knowledge of local political conditions. However, insurers may not be aware of disputes or threats that specifically affect an investor or investment, and therefore the investor must bring these to the attention of the insurer in the application.[168]

d. *OPIC's application*

OPIC's application plays an additional role. It is important for OPIC to obtain from the investor certain information about statutory eligibility requirements, such as so-called "United States effects."[169] Obtaining this data also depends substantially upon the cooperation of the host government and can be provided for in the underlying contract.

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168. *See, e.g.*, Application for Expropriation Insurance (Permanent Investments) of the National Union Fire Insurance Company of Pittsburgh, Pa.

169. For example, the investment can not result in a significant net loss of U.S. jobs.

E. *Insurance Contracts*

Insurance contracts can, of course, vary considerably. For example, although the definitions of "expropriatory act" in a sample of insurance contracts issued by OPIC, AIG and Lloyds are basically the same, there are differences that might be crucial, given the variety of situations in which disputes over the existence of an "expropriatory act" can arise.

1. *Negotiating Insurance Contracts*

Private insurers are the most flexible in negotiating contracts, even though they work from forms. They have no policy goals to uphold. Contracts tend, therefore, to be relatively less complicated.

The investor has, at least in principle, some flexibility to negotiate its contract with MIGA. Generally, MIGA works from form contracts.[170] At the outset, however, the MIGA Convention implied that MIGA should be prepared to negotiate important terms of coverage.

OPIC prepared and promulgated simplified forms of contracts that are used for nonspecialized coverage.[171] The contracts were intended to simplify, not change, the previous contracts. OPIC's policies for interpreting the contracts and managing the claims, therefore, have not changed.[172] It is common for OPIC contracts to be modified to address special circumstances of the investment, or special concerns of the investor or OPIC.

2. *Most Important Provisions*

Among the most important provisions of the typical insurance contracts are the following:

a. *Definition of "expropriatory act"*

The definitions in various contracts are more alike than different, although there can be some important variations. The wording of one provision might be construed to imply that any

170. *See* MIGA Standard Contract *reprinted in* 28 I.L.M. 1233 (1989).
171. OPIC 12-85 Contract, *supra* note 49.
172. *Id.*

taking, not just an unlawful expropriatory taking, would be covered. Some provisions require total, not partial, takings. Under OPIC's contract, for example, an investor cannot have a claim paid and retain ownership of the underlying investment. Payment of the claim entitles OPIC to be subrogated to all of the investor's rights. By contrast, private insurers can be more flexible with respect to partial takings.

b. *Waiting period*

The "waiting period" is the time that must elapse between the date of the expropriatory act or loss and the time when it may be considered for compensation under the insurance contract. This is usually six to twelve months from the date of loss, although it can vary. The provision concerning the waiting period is important for two reasons. First, an insurer can avoid payment of a claim if the investor is restored its rights before the end of the waiting period. Second, the insured is usually subject to special obligations to the insurer to protect the investment during the waiting period. It is prudent for the insured to seek to provide a basis for "restoration" and to clarify its rights and obligations during this period. It is prudent in any event for the insured to regularly discuss its handling of the investment during this period with the insurer and, if possible, to obtain the insurer's approval of any actions or omissions.

c. *Notices*

An insurer is entitled to receive notice of the expropriatory act in accordance with the insurance contract. It is to the insured's advantage to give such notice sooner rather than later, not only because it is contractually required to do so, but also because the insurer might play a useful role in resolving any dispute.

d. *Warranties*

The insured is required in most insurance contracts to give certain covenants and warranties. The most common and important of these are that:

1. No material information has been withheld;
2. The insured will use all reasonable measures to prevent or

minimize loss;
3. The insured will cooperate with the insurers;
4. The insured will take all reasonable steps, before and after payment by the insurers of any loss, to effect recoveries of the investment;
5. The insured has or will have obtained all necessary authorizations and licenses and will renew them in accordance with the law;
6. The insured will preserve all remedies in the event of any disputes;
7. The insured has complied with and will continue to comply with laws of the host country; and
8. The uninsured percentage of loss will remain uninsured.

In addition, under OPIC's contracts, the insured agrees that the insured and the investment will remain eligible for OPIC's assistance throughout the period of insurance.[173]

e. *"Sue and Labor" doctrine*

As noted, a common provision in insurance contracts is that the insured will take all reasonable steps to minimize loss or to preserve the investment, or provisions to a similar effect. This is often a cause of dispute between insureds and their insurers. Such a provision reflects the general requirements of what is called the "sue and labor" doctrine,[174] which might be imposed upon the insured to some degree even in the absence of such a provision. Such provisions, however, can vary considerably from contract to contract, and the specific wording of the provision has often been crucial to the existence of coverage in the event of a dispute.[175]

f. *Definition and computation of loss*

This is one of the most negotiated provisions in private insurance contracts, and one that has been the focal point of a number of disputes between insurers and the insured. Even if an

173. OPIC 12-85, *supra* note 49 at Arts. 9.01(0), 9.01(2), 9.01(3).

174. *See, e.g.*, Slay Warehousing Company, Inc. v. Reliance Insurance Company, 471 F.2d 1364 (8th Cir. 1973); Southern California Edison Co. v. Harbor Insurance Co., 148 Cal. Rptr. 106 (1978); 18 CROUNCH ON INSURANCE 2d § 74:642, at 573-74 (1968).

175. OPIC 12-85 Contract, *supra* note 49 at Art. 9.01(a).

insurer is liable, the question of the extent of its liability is obviously of great importance. The definition and computation of loss can be described specifically, as it is in OPIC's contract,[176] or it can be described briefly by reference to a particular set of financial statements, as is sometimes the case in private contracts. A number of brokers advocate such a reference to financial statements, perhaps as calculated under generally accepted accounting principles consistently applied in the United States as the measure of loss. Most insurers resist this definition because, in their view, such financial statements do not always represent an accurate valuation of the investment.

g. *Exclusions*

Insurance contracts provide that coverage is excluded under certain conditions, the most common and important of which include the following:

1. Wrongful or dishonest acts or omissions of the insured;
2. Failure of the insured to take reasonable measures to prevent an expropriatory act;
3. Material breach or inaccuracy of any representation or warranty;
4. Failure to perform or fulfill any covenant;
5. Failure to obtain authorizations and permits; and
6. Destruction or physical damage to the property, except by act of the host government.

In addition, private political risk contracts typically exclude losses caused by or resulting from war.[177] OPIC's contracts also require that the insured caused the investment to be made and operated in accordance with the statements made to OPIC, and that the insured and its investment will remain eligible under OPIC's authorizing statute.

176. OPIC 12-85 Contract, *supra* note 49 at Art. 5.

177. *See, e.g.*, Hunt, *supra* note 126, at 22. AIG's and Lloyds' war exclusion provisions exclude only changes resulting from wars involving the United States, the United Kingdom, the old Soviet Union, France or China, wars between the country of the insured and the host country, and wars involving nuclear or thermonuclear devices.

h. *Recoveries*

Insurance contracts typically provide for distribution of recoveries for loss. Typically, recoveries before the payment of a claim can be retained by the insured and constitute a reduction of loss. Recoveries after the end of the payment of a claim are often shared by the insurer and the insured. Under one typical private insurance contract, recoveries occurring after payment of loss are shared between the insurer and the insured in the proportion to which they shared the loss. However, the recoveries provision should also indicate how recoveries should be shared if they are received after the end of the waiting period but before the payment of a claim; for example, recoveries during an arbitration between the insurer and the insured over the issue of coverage, occurring after the end of the waiting period.

IX. Conclusion

In addition to a general analysis of the nature of political risks, this article has described programs currently available for managing them.

Although programs like OPIC and MIGA are always under some domestic political strain, there is no reason to believe that there will be a radical change in this decade in the prevailing view that governments, individually and collectively, have policy interests in stable foreign investment in developing countries. It is also likely that the private reinsurance market will recover in this decade, following a period of stable claims, and the private insurers will continue to generate creative ways to manage political risks.

It is not yet clear what the end of this century and the beginning of the next portend for foreign investment in developing countries. On the one hand, the end of the Cold War may bring greater political stability and opportunity for economic development, for there are no remaining international ideologies that automatically create political risks for foreign investment. The portion of gross domestic product that went into arms in formerly communist countries can go into commercial development, but ironically, as the former communist and developing countries increasingly embrace capitalism, the world's demand for capital has substantially outstripped its ability to create cap-

ital, and developing countries are competing with one another for foreign capital. Thus, there will be a demand for foreign investment for some time to come.

On the other hand, there will surely be constraints. As former Speaker of the United States House of Representatives Tip O'Neill said (borrowing, I think, from some Victorian politician), "all politics is local;" and local political risks will outlast communism just as assuredly as they predated it. Also, and again ironically, as developing countries increasingly embrace open market economics, the strains on open markets in industrialized countries are as great as they have been in the last sixty years.

Given the right policies and a bit of luck, other elements may emerge in this decade that can further improve the climate for foreign investment. Many companies are becoming more sensitive in their foreign investments, thereby defusing local resentments natural to any foreign presence. More open markets in developing countries can create classes of entrepreneurs and capitalists that will make it difficult for local governments to revert to state intervention. EC-92, NAFTA and the Uruguay Round of GATT negotiations all imply that the future might include greater multilateral protection of foreign investment.

Ultimately, Polonius probably envisaged the only way to avoid political risk: "Neither a borrower nor a lender be."[178] So long as there are borrowers and lenders (remember that Polonius did not live to the end of the play), there will be political risk to analyze, allocate and manage.

178. William Shakespeare, Hamlet, Act 1, Scene 3.