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Overseas investment promotes the development of foreign countries, stimulates employment, and broadens markets for U.S. exports. The developing nations of the world absorb nearly $100 billion in U.S. exports, and the market continues to expand. Political risk insurance encourages private investment in foreign countries through the reduction of risk, which permits more certainty in the investment decision-making process.

This article discusses political risk insurance issued by the Overseas Private Investment Corporation (OPIC) and OPIC's use of a "fiduciary agent" to facilitate the prosecution and resolution of subrogation claims in certain foreign countries. The overall effect of the fiduciary agent concept is to permit the prosecution of subrogation claims in countries that for domestic reasons did not traditionally provide a subrogation forum and therefore precluded OPIC from issuing political risk coverage there. The author views the "fiduciary agent" concept as a favorable development in establishing and maintaining good investment climates in these countries.

I. Historical Background

Congress established OPIC under the Foreign Assistance Act in 1969. OPIC is a self-sustaining governmental agency, which administers certain political risk insurance and loan guaranty programs.[1] The purpose of the organization is to facilitate private investment in less-developed countries

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1. *See* 22 U.S.C. §§ 2194(c), 2195(b), 2196 (1982).

and to promote the development assistance objectives of the United States Government.[2]

The U.S. government-sponsored insurance program began as part of the Marshall Plan in 1948. The program was originally designed to encourage U.S. investment for the reconstruction effort in war-torn Europe. More broadly, the program was intended to promote world peace, national interest, and the foreign policy objectives of the United States.[3] These objectives included economic concerns over the expected drop in consumer demand after World War II, and the fostering of democratic governments.[4]

The insurance program initially covered the risk of currency inconvertibility, which insures that income from a foreign investment can be converted back into U.S. dollars. Convertibility was a major concern to U.S. investors at that time. In 1953, the program was extended to encourage investments in less-developed countries. This expansion of the program was partially due to the recovery experienced in the Western European economies, the program also began offering coverage against the risks of expropriation and war.

In 1961, the program was transferred to the newly formed Agency for International Development (AID), which was originally established to facilitate government-to-government assistance. The coverage was further broadened to include the risks of revolution and insurrection. Facilities for loan guarantees and feasibility studies were also established. Since AID's purpose was the administration of intergovernmental assistance, it was not equipped to administer the volume of work inherent in the insurance program. In 1969, therefore, Congress determined that a separate, self-sustaining agency should be established to assist American investors entering the international market. The agency was OPIC.

In 1971, OPIC began to operate as an agency separate from AID. It was organized as a corporation and was structured to be responsive to private business enterprises. OPIC, however, soon met with a number of substantial claims in Chile, which were inherited from AID's "book of business." These claims resulted from the expropriation of U.S. investments nationalized by the Allende Government and amounted to $360 million. Two of the more substantial claims were submitted by the Anaconda Company and International Telephone and Telegraph (ITT). The Anaconda claim was for $154 million, and the ITT claim was for $55

2. *Id.* § 2191.

3. Economic Cooperation Act, 62 Stat. 144 (1948).

4. *See* SENATE COMM. ON FOREIGN RELATIONS, THE OVERSEAS PRIVATE INVESTMENT CORPORATIONS AMENDMENTS ACT, S. REP. NO. 676, 93d Cong., 2d Sess. 41 (1973), *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 517 [hereinafter S. REP. NO. 676].

million. Initially, a question existed as to whether OPIC had the necessary reserves to cover the exposure.

In 1973, Congress reevaluated the viability of OPIC. The congressional discussions focused on a number of threshold questions. The first was whether OPIC furthered the developmental assistance objectives of the United States. The second was whether OPIC increased the likelihood of disputes between the United States and the host countries. Finally, Congress turned its attention to OPIC's precarious financial condition.[5]

The Senate Committee on Foreign Relations concluded that OPIC's insurance guaranty program was only a marginal contributor to the development of third-world countries; that it increased the likelihood of United States Government involvement in the internal policies of the host countries; and lastly, that there was an inherent conflict with respect to the achievement of public policy objectives and sound insurance principles.

Congress decided to reauthorize OPIC, but only on the condition that it transfer insurance operations to the private sector by December 30, 1980. Congress directed OPIC to give preferential treatment to investment operations in countries with a per capita income of less than $450. It directed OPIC to give preference to small investors as opposed to large, multinational companies and not to write coverage for "runaway plants" or investments that would adversely affect the U.S. balance of payments or employment.

In 1976, it became apparent that OPIC would be unable to effect privitization on the schedule established by Congress. This failure was due to the private sector's disinclination to assume political risks under the same terms as OPIC. The private sector apparently lacked the resources to provide commitments in line with U.S. governmental objectives.[6] Also, foreign private investment declined, which led to further debate in Congress.[7]

In 1978, Congress recognized a marked shift in the attitudes of less-developed countries toward foreign investment. Significantly, countries with stringent foreign investment laws began to ease their laws, and the attitudes of the less-developed countries toward expropriation without compensation became more flexible. Congress decided that complete privitization was beyond the "realm of possibility," and withdrew the mandate to require the complete privitization of OPIC by 1980.

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5. S. Rep. No. 676, *supra* note 4.

6. Also, private insurers are required to be profitable, which according to one commentator, is "an objective well beyond the reach of the national schemes today." Paul, *New Developments in Private Political Risk Insurance and Trade Finance*, 21 Int'l Law. 709, 712 (1987).

7. *See* House Comm. on International Relations, Overseas Private Investment Corporations Amendments Act, H.R. Rep. No. 670, 95th Cong., 1st Sess. 6 (1977), *reprinted in* 1978 U.S. Code Cong. & Admin. News 102.

Congress promulgated specific criteria for OPIC to consider with respect to U.S. developmental objectives. OPIC was prohibited from supporting a project that would result in a significant reduction of U.S. employment. Then, in 1981, Congress proposed that OPIC's coverage be extended to include loss due to "civil strife." In 1985, Congress extended OPIC's mandate until 1988. On October 1, 1988, the Overseas Private Investment Corporation Amendments Act of 1988 was executed by the President.[8] The legislation authorizes OPIC to continue until September 30, 1992.

In 1986, OPIC supported 124 enterprises in thirty-nine developing countries and produced an insurance volume of $1.4 billion. Financial commitments of $152.9 million were made in twenty-nine projects. OPIC experienced a net income of $101.2 million in 1986, and it was optimistic about the future.[9]

II. Scope of Coverage

To attain its goals, OPIC operates two programs: political risk insurance and financial services. OPIC political risk insurance affords coverage for three types of risks, which include expropriation, currency inconvertibility, and political violence. The risk of political violence includes war, revolution, insurrection, and civil strife. Under the finance program, OPIC operates as a lender or guarantor of funds invested in less-developed countries.

As noted, inconvertibility coverage protects an investor against the inability to convert local foreign profits into U.S. dollars.[10] This coverage extends to loss due to discriminatory exchange rates. The currency, however, must have been exchangeable for U.S. dollars at the time the insurance was issued. The coverage does not extend to mere devaluation of a currency.

Expropriation coverage protects against loss due to nationalization or confiscation by a foreign government, including contract repudiation.[11] This coverage encompasses creeping expropriation, which is defined as actions that cumulatively deprive an investor of fundamental rights in an investment.

OPIC also provides coverage against war, revolution, insurrection, or civil strife.[12] Civil strife is defined as politically motivated acts of violence,

8. The reauthorization legislation was enacted as part of the FY 1989 Foreign Operations, Export Financing, and Related Programs Appropriations Act, Pub. L. No. 100-461.
9. OPIC ANN. REP. (1986).
10. 22 U.S.C. § 2194(a)(1)(A) (1982).
11. *Id.* §§ 2194(a)(1)(A), 2198(b).
12. *Id.* § 2194(a)(1)(D) (Supp. IV 1986).

including terrorism. This type of coverage can be obtained only through endorsement after the purchase of war, revolution, and insurrection coverage. Loss caused by nonpolitical acts are not covered. The coverage now includes business interruption due to a covered loss.

The coverage provided by OPIC is currently available in approximately 120 countries. The insurance and guarantees are backed by the full faith and credit of the United States Government. Projects with which OPIC is involved, however, must be consistent with U.S. economic and development objectives.

OPIC may only issue political risk insurance to "eligible investors."[13] The investment that can be insured or guaranteed includes a loan to an approved project, purchase of shares in the project, participation in earnings of a project, and furnishing of commodities or services.[14] Pursuant to OPIC's 1988 reauthorization legislation, OPIC must now give preferential treatment to a country with a per capita annual income of less than $984 in 1986 U.S. dollars.[15]

OPIC is prohibited from "operating" in a state with which the United States does not have an investment agreement.[16] The investment agreements enumerate the conditions under which OPIC may operate in a country, and these agreements generally require the investor to assign its claim to OPIC when the claim is paid. The agreements provide for arbitration of disputes when OPIC and the host country cannot reach a settlement. Also, the host government must approve the project. This approval provides OPIC with some assurance that the host government is in favor of the project and will not react adversely to implementation, which would result in a claim. OPIC can negotiate directly with the host government after payment of the claim to the investor.

III. Investment Dispute Settlement and Subrogation

OPIC has developed expertise in dispute settlement. When an investor submits an expropriation claim, a one-year waiting period begins, during

13. *Id.* § 2198(c). This includes U.S. citizens and companies and certain foreign companies wholly owned by other U.S. companies, provided such foreign companies are 95 percent owned by U.S. companies.

14. 22 U.S.C. § 2198(a) and (b).

15. *See* Overseas Private Investment Corporation Amendments Act of 1988, signed October 1, 1988, as part of the FY 1989 Foreign Operations, Export Financing, and Related Programs Appropriations Act, Pub. L. No. 100-461. The new legislation creates an exemption from the income restriction for countries participating in the Caribbean Basin Initiative. This currently includes the following Caribbean nations: Aruba, Barbados, Bahamas, Netherlands Antilles, and Trinidad and Tobago. The Reauthorization Bill contains a number of noteworthy changes, the majority of which are beyond the scope of this article. It nonetheless should be noted that the changes do not affect the "fiduciary agent" concept.

16. *Id.* § 2197(a).

which OPIC investigates the claim and attempts to facilitate a settlement by counseling the investor. A host government may be more apt to reach a settlement if its payment is made over time and the investor may accept the payment if it is guaranteed by OPIC.

With respect to the inconvertibility of currency claims, OPIC can purchase the local currency for U.S. dollars and sell it to the U.S. Embassy in the host country for use in operating expenses. In turn, OPIC's account can be credited by the Embassy. This system permits OPIC to convert currency when the central banking system of a country will not do so.

OPIC is required to ensure that "suitable arrangements" exist for the protection of its interests in connection with an insurance agreement. This requirement amounts to a congressional mandate that OPIC protect its right to subrogation in the applicable bilateral investment agreement. Generally, subrogation is defined as the right of an insurer to be put into the insured's position for the purpose of pursuing recovery from third parties, which are legally responsible to the insured for the loss.[17] The right accrues upon payment by the insurer to the insured. Subrogation usually exists by statute, judicial declaration, or agreement between the insurer and insured. The rationale behind subrogation is to compel discharge of an obligation by the party that in equity bears responsibility for the loss.

Upon payment of a claim, the investor must assign all interest in an investment to OPIC.[18] OPIC has been very successful in negotiating recoveries on its paid claims. The bilateral investment agreements generally provide that, if after negotiations between the interested governments the dispute has not been resolved, the matter must be submitted to an arbitration forum. The OPIC insurance contract also provides under section 8.05 that any disputes relating to the policy must be settled by arbitration. The availability of international arbitration is perceived as a factor in encouraging negotiated settlements.

IV. The Fiduciary Agent Concept

OPIC is currently operating in approximately 120 countries. Its development in South America, however, has been hindered due to apparent objections by several South American governments to OPIC's mandate of intergovernmental arbitration. Under the circumstances, therefore, U.S. investors in this area have not been able to obtain OPIC coverage.

South American countries were historically exposed to abuses of diplomatic protection. The so-called "Calvo Doctrine" emerged as a re-

17. COUCH ON INSURANCE § 61.1 (2d rev. ed. 1983).
18. OPIC, Form 234 KTG 12-85, Contract of Insurance.

sponse to the institution of diplomatic protection in these countries. The Doctrine, which was named after a nineteenth-century law professor, denied that foreign nationals were entitled to diplomatic protection. It provided that investment disputes between foreign nationals and host countries had to be settled under domestic law in the local court system. Under the Calvo Doctrine, the intervention of foreign States in investment disputes was deemed a violation of the territorial jurisdiction of the host State.[19] The Doctrine rejected the viability of intergovernmental arbitration as a method for dispute resolution.

The Constitutions and laws of many South American countries contain principles of the Calvo Doctrine. In 1969, the Andean Pact[20] contained a clause that precluded the withdrawal of investment disputes from local courts. Elements of the Calvo Doctrine have also appeared in the 1974 Charter of Economics, Rights and Duties of States, which was drafted, in part, by Mexico.

OPIC has been required to demonstrate that its participation in South America is compatible with elements of the Calvo Doctrine, because the arbitral requirement in the OPIC legislation conflicts with the Calvo Doctrine's mandate that investment disputes be litigated in the local court system.

On November 28, 1984, the U.S. executed an Investment Guaranty Treaty with Ecuador that permitted OPIC to write political risk insurance in that country after an absence of thirteen years. This agreement was the first of its kind executed with a member of the Andean Pact. On April 3, 1985, a similar Investment Guaranty Agreement was executed with Colombia.[21] Terms used in negotiations with Uruguay in 1982 and Chile in 1983 proved helpful in the Ecuadorean negotiations.

Article 6(a) of the Treaty between the U.S. and Ecuador provides that the parties may refer any dispute arising out of the project to arbitration if, at the end of three months following a request for negotiations, the governments have not resolved their disputes. Under article 6(b), however, the treaty provides that the United States is obligated to exhaust local remedies in Ecuador before seeking arbitration under article 6(a).

19. "Constitutional or statutory provisions in Latin American countries sometimes bar ownership of real property by a foreign government. . . . Similarly, the Calvo Doctrine is considered by many such countries to inhibit them from recognizing U.S. subrogation to claims, or agreement to negotiate and arbitrate such claims." *International Development & Security, 1961: Hearings on S. 1983 Before the Senate Comm. on Foreign Relations*, 87th Cong., 1st Sess. 282 (1961).

20. The members of the Andean Pact include Ecuador, Bolivia, Colombia, Peru, and Venezuela.

21. *See* Introductory Note, *Investment Guaranty Agreements with Ecuador and Colombia*, 24 I.L.M. 566 (1984).

This provision apparently satisfied Ecuador's concern for initial retention of jurisdiction in local courts. The United States did not view article 6(b) as a problem because customary international law requires the exhaustion of local remedies. Generally, international law provides that private individuals must exhaust remedies available under the municipal law of a State before an "international action" is brought against the State. The United States Government is subject to this rule because its rights are the same as the "investor" to whom it is subrogated after payment of the claim.

Article 3(a) of the Treaty provides that OPIC will assign its subrogated rights to a "fiduciary agent," which will pursue any claim in Ecuador. Under article 4(a), Ecuador agrees to recognize the transfer of rights to the agent. This "assignment" avoids a direct, politicized controversy between the United States and Ecuador in an Ecuadorean court. This confrontation would otherwise be unavoidable due to the Ecuadorean court's retention of initial jurisdiction pursuant to the Calvo Doctrine.

OPIC facilities in South America have proven to benefit U.S. private investment. The Treaty with Equador facilitated establishment of a feed mill and hatchery at an Ecuadorean shrimp farm. In this transaction, OPIC made loans to a U.S. investor of $2.7 million. The operation generated a number of jobs, and earnings of nearly $15 million in foreign exchange are projected for Ecuador over the next five years. Consequently, certain national objectives of the OPIC program have been realized. The Treaty opened markets for U.S. exports and assisted development in a third world country. In addition, in 1986, OPIC executed Investment Guaranty Agreements with Bolivia and Argentina.

V. Conclusion

The continued issuance of political risk insurance by OPIC encourages further investment in Ecuador and the other South American countries. In fact, Ecuador recently eased some of its foreign investment laws.[22] The Ecuadorean Government modified regulations to permit foreign investors to own a 25 percent capital basis in private companies. Similarly, OPIC reported loan facilities that will assist in the development of oil and gas facilities, and gold and silver mining in Bolivia. OPIC-insured investments in Chile are also reported, although issuance of new investment insurance in that country has recently been suspended. While other domestic and economic factors may account for this more favorable foreign

22. Ecuador has continued to relax foreign investment laws. *See Regional Developments: Latin America*, 21 INT'L LAW. 243, 245 (1987).

investment attitude, political risk insurance certainly plays a role in facilitating the participation of U.S. companies.

OPIC coverage for South American investments was heretofore hampered because of the apparent inconsistencies between the Calvo Doctrine and OPIC's mandate of intergovernmental arbitration. The "fiduciary agent" concept now avoids a politicized subrogation claim between the United States and Ecuador in an Ecuadorean court. This development should ensure that disputes will be settled on the basis of legal criteria without direct governmental confrontations. The result should be a positive affect on our economy as well as on the stimulation of host country operations.

The need for overseas investment is no longer questioned, and it is important for U.S. companies to compete effectively in the international market. Without political risk insurance in general, and OPIC coverage in particular, U.S. private overseas business would not be as significant as it is today. The establishment and maintenance of favorable and stable investment climates is in the best interest of all concerned.