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Reports of Overseas Private Investment Corporation Determinations

Edited by Mark Kantor, Michael D. Nolan, and Karl P. Sauvant (New York: Oxford University Press, 2011).

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that are alleged to be in violation of investment protections found in investment treaties and investment law. They are additionally of interest in the context of the presentation and determination of future OPIC claims and decision making by other political risk insurance providers.

REPORTS OF OVERSEAS PRIVATE INVESTMENT CORPORATION DETERMINATIONS

VOLUME ONE

Edited by

MARK KANTOR, MICHAEL D. NOLAN,
AND KARL P. SAUVANT

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INTRODUCTION: POLITICAL RISK

The Rise of Foreign Direct Investment

The increase in foreign direct investment (FDI) over the past three decades has been remarkable. Since 1980–1985, when global FDI inflows averaged roughly US$50 billion per year, these flows have grown by a factor of forty, to US$2 trillion in 2007, although they declined to $1.7 trillion in 2008 and (as will be discussed below) declined even further in 2009 (figure 1). Globally, the number of multinational enterprises (MNEs)—firms headquartered in one country and controlling assets in another country—rose to more than 82,000 (of which some 21,000 were headquartered in developing countries) in 2008, with more than 810,000 foreign affiliates spread all over the world. By the end of 2008, world FDI flows had accumulated to a stock of over US$15 trillion, generating sales by foreign affiliates estimated to be worth some US$30 trillion (table 1); this sales value was about one and a half times the value of world exports the same year (US$20 trillion).

As a result of these developments, FDI has become an even more important vehicle to bring goods and services to foreign markets. Moreover, approximately one third of world trade consists of 'intra-firm trade', ie trade among the various units (foreign affiliates, headquarters) that makes up the increasingly integrated international production systems of individual MNEs. In this manner, MNEs integrate on a regional or global scale not only markets but also national production systems. The bulk of the world's commercial research and development is

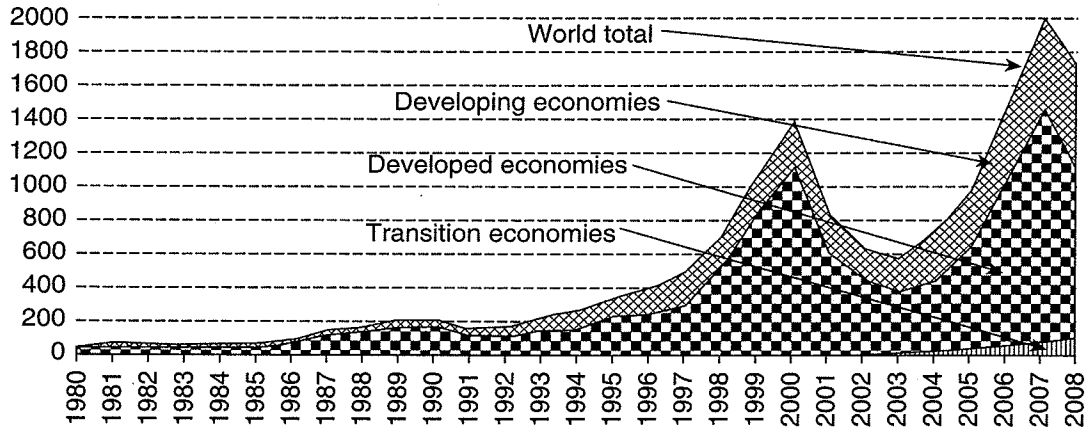

Figure 1 FDI inflows, global and by group of economies, 1980–2008 (Billions of US dollars)

Source: UNCTAD, *World Investment Report 2009: Transnational Corporations, Agricultural Production and Development* (Geneva: UNCTAD, 2009), p. 4.

Table 1 Selected indicators of FDI and international production, 1982–2008

Item	Value at current prices (Billions of Dollars)						Annual growth rate (Percent)					
	1982	1990	2007	2008	1986–1990	1991–1995	1996–2000	2004	2005	2006	2007	2008
FDI inflows	58	207	1979	1697	23.6	22.1	39.4	30.0	32.4	50.1	35.4	–14.2
FDI outflows	27	239	2147	1858	25.9	16.5	35.6	65.0	–5.4	58.9	53.7	–13.5
FDI inward stock	790	1942	15660	14909	15.1	8.6	16.0	17.7	4.6	23.4	26.2	–4.8
FDI outward stock	579	1786	16227	16206	18.1	10.6	16.9	16.8	5.1	22.2	25.3	–0.1
Income on inward FDI	44	74	1182	1171	10.2	35.3	13.3	33.4	32.8	23.3	21.9	–0.9
Income Outward FDI	46	120	1252	1273	18.7	20.2	10.3	42.3	28.4	18.4	18.5	1.7
Cross-border M&As*	..	112	1031	673	32.0[h]	15.7	62.9	28.4	91.1	38.1	62.1	–34.7
Sales of foreign affiliates	2530	6026	31764[c]	30311[c]	19.7	8.8	8.1	26.5	5.4[c]	18.9[c]	23.6[c]	–4.6[c]
Gross products of foreign affilliates	623	1477	6295[d]	6020[d]	17.4	6.8	6.9	13.4	12.9[d]	21.0[d]	20.1[d]	–4.4[d]
Total assets of foreign affiliates	2036	5938	73457[e]	69771[e]	18.1	13.7	18.9	4.8	20.5[e]	23.9[e]	20.8[e]	–5.0[e]
Exports of foreign affiliates	634	1496	5775[f]	6664[f]	22.2	8.6	3.6	21.3	13.8[f]	15.0[f]	16.3[f]	15.4[f]
Employment by foreign affiliates (thousands)	19864	24476	80396[g]	77386[g]	5.5	5.5	9.7	12.2	8.5[g]	11.4[g]	25.4[g]	–3.7[g]
GDP (in current prices)	11963	22121	55114	60780[h]	9.5	5.9	1.3	12.6	8.4	8.2	12.5	10.3
Gross fixed capital formation	2795	5099	12399	13824	10.0	5.4	1.1	15.4	11.8	10.9	13.8	11.5
Royalities and licence fee receipts	9	29	163	177	21.1	14.6	8.1	23.7	10.6	9.1	16.1	8.6
Exports of goods and non-factor services	2395	4414	17321	19990	11.6	7.9	3.7	21.3	13.8	15.0	16.3	15.4

Source: UNCTAD, *World Investment Report 2009: Transnational Corporations, Agricultural Production and Development* (Geneva: UNCTAD, 2009), p. 18.

being undertaken within these corporate systems. More generally, through positive spillovers and backward linkages, FDI is an important means by which host countries acquire bundles of tangible and intangible assets, including capital, employment, technological know-how, new management techniques, skills, and access to markets.[1] All of these assets associated with FDI are central to economic growth and development.

Although there has been a notable growth in recent years of outward FDI (OFDI) from emerging market MNEs, developed countries are still the overwhelming source for such investment. OFDI flows from developed economies reached a record high of US$1.8 trillion in 2007 (table 2), representing roughly 84 percent of total OFDI flows that year.[2] OFDI flows from developing countries were US$285 billion in 2007, largely accounted for by OFDI from South, East and South-East Asia (US$175bn in 2007) and Latin America and the Caribbean (US$52bn). Such investment from developing countries amounted to roughly 13 percent of world flows (10–11% between 1995 and 2000). Firms from economies in transition invested approximately as much abroad as those from Latin America and the Caribbean, namely US$52bn. The services sector accounts for the greatest share of both global OFDI stock (65% in 2007) and global OFDI flows (58% in 2007), followed by manufacturing, although there has been a recent increase in OFDI flows to the primary sector, especially to the extractive industry sector.[3]

In 2008, the increase in FDI flows came to a temporary halt with the financial crisis and the global economic downturn. Flows declined (though remained positive), principally due to a reduction of demand and the reduced ability of firms to finance their overseas expansion, be it through mergers and acquisitions (the principal mode of entering foreign markets) or greenfield investment.[4] Global FDI outflows declined by 13 percent, though the decline was largely due to reduced OFDI from developed countries (–17% from 2007), whereas OFDI from developing and transition economies as a group actually increased by 4 percent (table 2). Roughly two-thirds of global OFDI flows in 2008 were directed toward developed countries, about one quarter to developing countries (in particular to Asia) and roughly 5 percent to transition economies.

---

[1] See UNCTAD, *World Investment Report 1999: Foreign Direct Investment and the Challenge of Development* (Geneva: UNCTAD, 1999) and UNCTAD, *World Investment Report 2003: FDI Policies for Development: National and International Perspectives* (Geneva and New York: UNCTAD, 2003).

[2] UNCTAD, *World Investment Report 2009: Transnational Corporations, Agricultural Production and Development* (Geneva: UNCTAD, 2009), p. 247.

[3] UNCTAD, *World Investment Report 2009: Transnational Corporations, Agricultural Production and Development* (Geneva: UNCTAD, 2009), p. 219.

[4] Karl P. Sauvant, 'The FDI recession has begun', *Columbia FDI Perspectives, No 1*, 22 November 2008. *Also* UNCTAD, *Assessing the Impact of the Current Financial and Economic Crisis on Global FDI Flows* (Geneva: UNCTAD, 2009), p. 11. See also UNCTAD, *World Investment Report 2009: Transnational Corporations, Agricultural Production and Development* (Geneva: UNCTAD, 2009).

Table 2 FDI outflows, by region and major economy, 2007–2008 (billions of US dollars)

	FDI outflows		
Region/economy	2007	2008	Growth Rate (%)
World	2,146	1,857	–13%
Developed economies	1,810	1,507	–17%
Europe	1,271	944	–26%
United States	378	312	–18%
Japan	74	128	+74%
Developing economies	285	293	+3%
Africa	11	9	–12%
Latin America and the Caribbean	52	63	+22%
Asia and Oceania	223	220	–1%
West Asia	48	34	–30%
South, East and South-East Asia	175	186	+7%
Transition economies	52	58	+14%

Source: Data from UNCTAD, *World Investment Report 2009: Transnational Corporations, Agricultural Production and Development* (Geneva: UNCTAD, 2009).

The United States continued to be the most important source of OFDI, indicating the importance of the international investment regime to that country. OFDI from the United States accounted for 17 percent of total global OFDI flows in 2008, although OFDI from the US declined by 18 percent in 2008 as 'large repatriations of reinvested earnings and debt from foreign affiliates of the United States corporate sector took place and new investments abroad were halted'.[5] (The United States accounted for 22% of global OFDI flows in 1990–1994 and 20% in 1995–1999.) The Netherlands and the United Kingdom continue to be the largest host countries for FDI from the US; in 2008, the two countries accounted for over 27 percent of OFDI from the US (figure 2). Among industries, mergers and acquisitions or greenfield investments by US investors abroad were highest in finance and manufacturing (table 3).[6]

Global FDI inflows may well decline by as much as 50 percent in 2009; global outflows may decline by a similar percentage.[7] Even with this decline, however, the level of FDI flows remains significantly above that of the 1980s.

[5] UNCTAD, *Assessing the Impact of the Current Financial and Economic Crisis on Global FDI Flows* (Geneva: UNCTAD, 2009), p. 11.

[6] Marilyn Ibarra and Jennifer Koncz, 'Direct investment positions for 2008: country and industry detail', in *Survey of Current Business*, vol. 89 (7) (July 2009), p. 22.

[7] UNCTAD expects FDI flows to fall to between $900 billion and $1.2 trillion in 2009; see UNCTAD, *World Investment Report 2009: Transnational Corporations, Agricultural Production and Development* (Geneva: UNCTAD, 2009), p. 3.

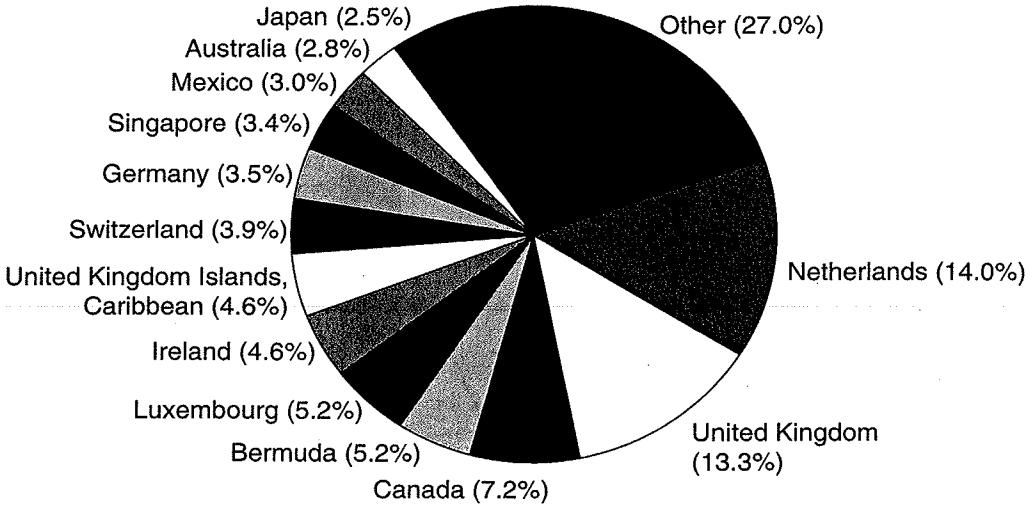

Figure 2 US Outward direct investment position, by country of foreign affiliate, year end 2008

Source: Marilyn Ibarra and Jennifer Koncz, 'Direct investment positions for 2008: country and industry detail', in *Survey of Current Business*, vol 89 (7) (July 2009), p. 21.

Table 3 US direct investment position abroad, by industry of US parent (millions of dollars), 2004–2008

Industry	2004	2005	2006	2007	2008
All industries	2,160,844	2,241,656	2,447,268	2,916,930	3,162,021
Mining	60,017	72,479	76,410	100,524	103,014
Manufacturing	1,197,349	1,218,774	1,331,968	1,542,868	1,667,338
Wholesale trade	63,625	71,562	88,950	102,458	117,760
Information	154,327	133,473	138,267	161,498	167,209
Depository institutions (banking)	92,659	104,061	96,681	158,940	193,248
Finance (except depository institutions) and insurance	310,727	341,422	411,157	493,124	500,998
Professional, scientific, and technical services	88,342	101,851	104,144	97,006	122,550
Holding companies (nonbank)	24,452	26,434	35,732	42,857	47,108
Other industries	169,347	171,601	193,961	217,655	242,795

Source: Bureau of Economic Analysis data.

The International Investment Regime

The rise of FDI has gone hand in hand with an increasingly open and protective regulatory environment that, especially since the mid-1980s, has become more welcoming for foreign direct investors. Countries have liberalized national entry conditions for MNEs, instituted various measures actively to attract such enterprises (eg through incentives and the establishment of investment promotion agencies) and facilitated the operations of foreign affiliates once established.

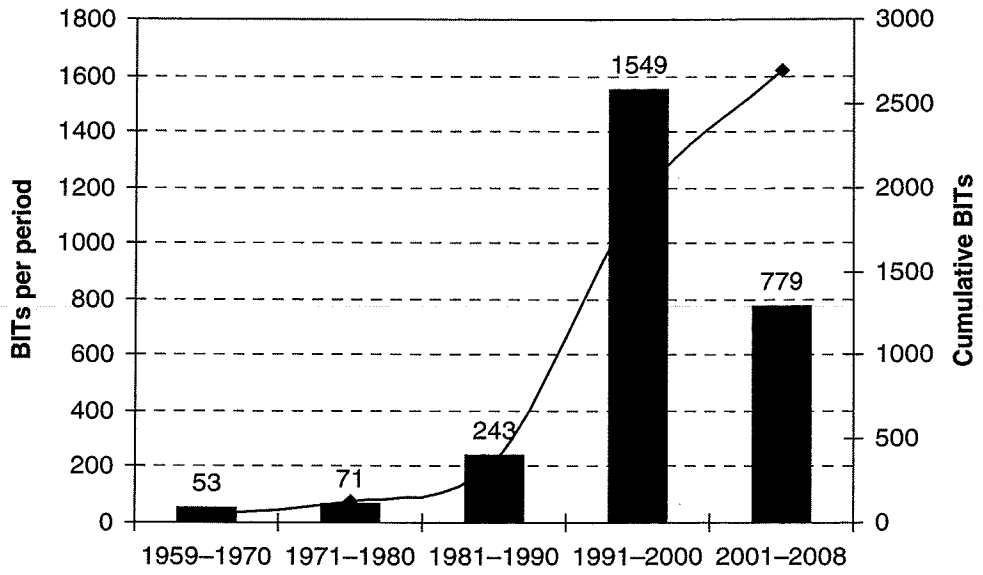

Figure 3 Growth of BITs from 1959–2008, by period and cumulative
Source: UNCTAD, <http://www.unctad.org/iia>.

These national regulatory changes have been complemented by international investment agreements (IIAs), particular bilateral investment treaties (BITs), whose main purpose is to protect foreign investors. By the end of 1970, only 53 BITs had been signed (although many of them were still relatively weak—compared to now—in terms of protections and dispute settlement). Their number began to grow slowly during the 1970s (when 71 BITs were signed), blossomed during the 1980s (when 243 BITs were signed) and really took off in the 1990s (between 1991 and the end of 2000, 1,549 treaties were signed), for a total of 2,695 BITs at the end of 2008, involving 179 countries (figure 3). As of August 2009, the United States had signed 48 BITs.[8]

Increasingly, moreover, commitments for the protection of international investment, and indeed the liberalization of entry and operational conditions, are also included in free trade agreements; in fact, the great majority of modern free trade agreements are also free investment agreements (figure 4). The US is party to a number of such agreements, including NAFTA and various bilateral free trade agreements with investment provisions.[9]

[8] US Department of States, United States Bilateral Investment Treaties (updated 3 March 2008), <http://www.state.gov/e/eeb/ifd/bit/117402.htm> (last accessed 13 August, 2009).

[9] Since the beginning of 2004, the US has concluded bilateral free trade agreements with investment provisions with Australia (2005), available at: <http://www.ustr.gov/Trade_Agreements/Bilateral/Australia_FTA/Final_Text/Section_Index.html>, Chile (2004), available at: <http://www.ustr.gov/Trade_Agreements/Bilateral/Chile_FTA/Final_Texts/Section_Index.html>, Morocco (2006), available at: <http://www.ustr.gov/Trade_Agreements/Bilateral/Morocco_FTA/FInal_Text/Section_Index.html, Oman> (2006), available at: <http://www.ustr.gov/Trade_Agreements/Bilateral/Oman_FTA/Final_Text/Section_Index.html, Peru> (2009), available at: <http://www.ustr.gov/Trade_Agreements/Bilateral/Peru_TPA/Final_Texts/Section_Index.html>, and is also part of the Dominican Republic-Central American

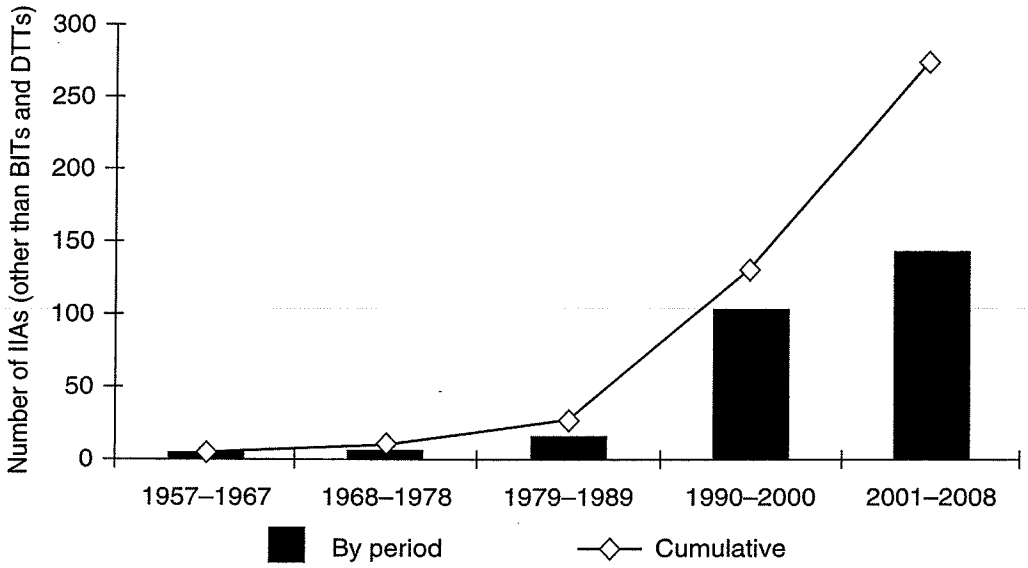

Figure 4 Number of IIAs other than BITs and double taxation treaties concluded, cumulative and per period, end of 2008

Source: UNCTAD, *World Investment Report 2009: Transnational Corporations, Agricultural Production and Development* (Geneva: UNCTAD, 2009), p. 34.

As a result, and even in the absence of a multilateral investment treaty,[10] a relatively strong international investment regime has emerged. It is enforced, moreover, through an investor-state dispute settlement mechanism that is increasingly used by firms to protect what they see to be their rights: there were at least 317 known treaty-based international investor-state disputes by the end of 2008,[11] with 30 percent of them brought by investors during 2006–2008 (figure 5). The US had been involved, as of 16 August 2009, in 16 disputes, all of them arising under NAFTA Chapter 11.[12]

FTA (2006), available at: <http://www.ustr.gov/Trade_Agreements/Regional/CAFTA/CAFTA-DR_Final_Texts/Section_Index.html>. The US-Columbia FTA, the US-Republic of Korea FTA, and the US-PanamaFTAhaveinvestmentchapters,butarestillawaitingapprovalbyCongress(<http://www.ustr.gov/Trade_Agreements/Bilateral/Colombia_FTA/Final_Text/Section_Index.html>, <http://www.ustr.gov/Trade_Agreements/Bilateral/Republic_of_Korea_FTA/Final_Text/Section_Index.html> and <http://www.ustr.gov/Trade_Agreements/Bilateral/Panama_FTA/Section_Index.html>).

[10] There are several multilateral treaties that cover aspects of international investment, most notably the GATS and TRIMs agreements of the WTO, as well as MIGA.

[11] Only ICSID reports the number of cases; hence the actual number of disputes is likely to be higher. UNCTAD, *World Investment Report 2009: Transnational Corporations, Agricultural Production and Development* (Geneva: UNCTAD, 2009). For a discussion of the reasons for this explosion of investment disputes, see Jeswald W. Salacuse, 'Explaining the increased recourse to treaty-based investment dispute settlement', in Karl P. Sauvant with Michael Chiswick-Patterson, eds., *Appeals Mechanism in International Investment Disputes* (New York: Oxford University Press, 2008), pp. 105–126.

[12] <http://www.state.gov/s/l/c3741.htm>.

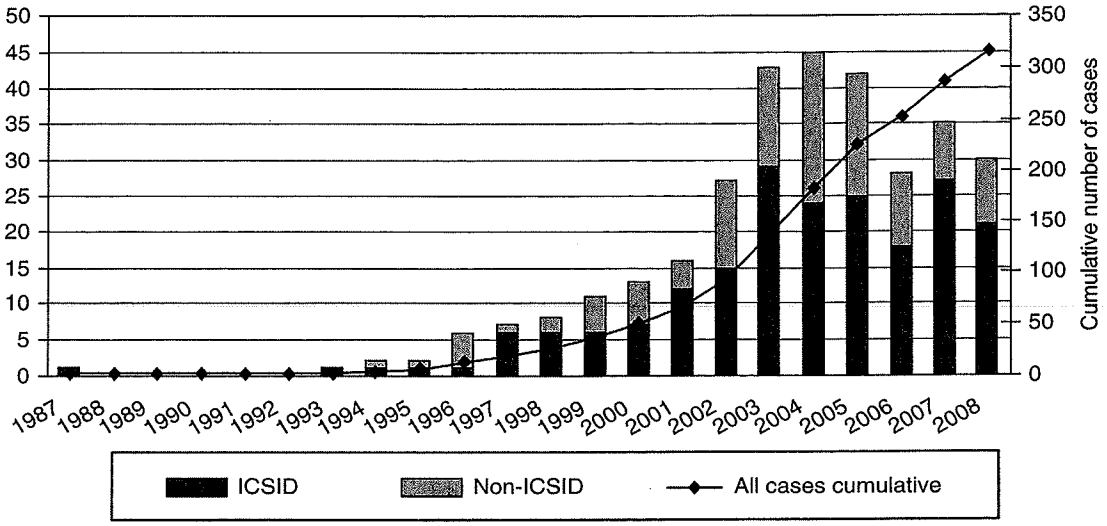

Figure 5 Known investment treaty arbitrations, cumulative and newly instituted cases, 1989–2009

Source: UNCTAD, 'Latest developments in investor-State dispute settlement', IIA Monitor No 1 (2009), UNCTAD/WEB/DIAE/IIA/2009/6, available at: <http://www.unctad.org/en/docs/webdiaeia20096_en.pdf>.

Political Risk

Notwithstanding a relatively strong international investment regime that gives some security to international investors, MNEs are becoming increasingly concerned about political risk in host countries. For example, a global survey by the Economics Intelligence Unit of 602 executives carried out in 2007 indicated a growing perception among major MNEs that political risk is on the rise, in fact, political risk was perceived to be more significant than economic risk, especially in developing countries.[13] Moreover, these risks were expected to increase.

'Political risk' refers to the possibility that investments will be impaired by certain types of government measures. More specifically, the United States' Overseas Private Investment Corporation (OPIC) defines political risk as 'the possibility that political decisions or political or social events in a country will affect the business climate in such a way that investors lose a portion of their investment or expected return'.[14] In light of the seemingly increasing political risk, political risk insurance has become increasingly important.

International investors can make use of different tools to mitigate political risk. Some governments, especially of developed countries, offer political risk insurance to protect the foreign investments of their domestic firms. Governments typically

[13] *World Investment Prospects to 2011: Foreign Direct Investment and the Challenge of Political Risk* (New York: Economist Intelligence Unit and Columbia Program on International Investment, 2007).

[14] Overseas Private Investment Corporation, 'Political Risk', available at: <http://www.opic.gov/insurance/political-risk> (last visited 7 January 2010).

provide such insurance through public export credit or investment insurance agencies, such as OPIC. In addition, some multilateral organizations (like MIGA) provide political risk insurance to investors investing in their member countries.

Although political risk is a key concern for international investors, investment insurance determinations have not received significant attention. Both the academic literature and practitioner manuals have concentrated on investment agreements concluded by international investors directly with a host state, or, alternatively, the protections afforded international investors by international investment agreements and the arbitration mechanisms they typically provide. This focus neglects another means available to many international investors to protect against political risk: investment insurance.

The United States first made available political insurance products in connection with the Marshall Plan and later through the United States Agency for International Development (USAID) as part of its foreign development aid. The United States later formed a stand-alone investment insurance program in 1971 under the umbrella of OPIC. OPIC remains an agency of the United States, organized pursuant to an act of the US Congress.[15]

From 1971 to 2008, OPIC has funded, guaranteed or insured more than US$180bn in US outbound investments.[16] Until recently, however, OPIC's claims determinations have remained largely out of the public eye. The determinations, available for the first time in their totality, display a mature approach to political risk. This approach deserves independent study, as well as investigation in the context of more widely disseminated political risk conceptions, such as those that have been articulated in investor-state arbitration awards.

OPIC Investment Insurance Coverage

OPIC investment insurance against political risk is available to protect against a number of distinct types of events: (i) inconvertibility of funds; (ii) expropriation; (iii) political violence; (iv) losses caused by material changes in project agreements unilaterally imposed by the host state; and (v) terrorism.[17] OPIC's inconvertibility coverage had significant historical value. Due to the increased globalization of trade after the collapse of the Soviet Union, however, inconvertibility has since lessened in importance with both expropriation and political violence coverage leading to a far greater number of claims in more recent years.[18] In the current

[15] See 22 USC Section 2191 et seq.

[16] See OPIC Annual Report, at p. 3 (2008).

[17] See OPIC Handbook, at pp. 16, 20, 23 (2008), available at <http://www.opic.gov/pdf/OPIC_Handbook.pdf>.

[18] After 1989, inconvertibility cases arose only in the context of the Argentine banking crisis. See *First Trust of New York, National Association—Argentina*, at [vol. 2, p. 881] (2002).

geopolitical conditions, this mix of claims is likely to shift even further towards a focus on expropriation and political violence and, potentially, terrorism.

Inconvertibility coverage protects against the risk that a US investor cannot convert or transfer foreign currency into US dollars. As OPIC explains, inconvertibility coverage does not protect against the devaluation of a country's currency relative to the US dollar.[19] Issues of inconvertibility historically have arisen because of central bank currency restrictions. These restrictions frequently were imposed when central banks experienced shortfalls in US dollar liquidity. Because of these shortfalls, requests for conversion of their respective currencies into US dollars frequently could not be met. In these cases, OPIC would routinely exchange the foreign currency for US dollars.[20]

OPIC's *expropriation* coverage remains highly relevant in current global economic conditions. This coverage protects against relatively straightforward direct expropriations, as well as 'unlawful government acts (or a series of acts) that deprive the investor of its fundamental rights in a project'.[21] OPIC expropriation determinations have addressed such diverse issues as the forced sale of a mine in Chile to the Chilean government[22] and court decisions concerning regulatory restrictions on lending in an Islamic host state.[23] OPIC's determinations provide insight into pragmatic assessments of expropriation focused on an investor's 'fundamental rights' in a project, which developed over time as institutional experience with such claims grew.

Political violence (including war) coverage also remains highly relevant under current geopolitical conditions. Since just 2000, ten such claims have been resolved with regard to investments in Gaza, Colombia, Afghanistan, and Haiti. War and political violence claims have involved destruction of property in war time,[24] responses to civil strife by governmental forces,[25] as well as the destruction of property by revolutionary or insurrectionist forces.[26] The political violence coverage further protects against 'politically motivated terrorism and sabotage'.[27] With the rise of politically motivated terrorism and sabotage risks in many developing

[19] See eg OPIC Handbook, at p. 18 (2008), *compare* OPIC Annual Report, at p. 32 (2008).

[20] The SOCOMET, Inc (Chile: 1973) determination further exemplifies the commercial realities acknowledged by OPIC—OPIC, as a US government agency, granted certain applications even in the face of facial defects when the US government needed to increase its foreign currency reserves in the underlying currency. In these rare instances, OPIC insurance contracts in essence constituted simple commercial currency exchanges.

[21] OPIC Handbook, at p. 18 (2008).

[22] Bethlehem Chile Iron Mines Company—Chile, at [vol. 1, p. 52] (1971).

[23] [Citibank NA—Sudan, at [vol. 2, pp 744–55] (2000, 2001)]

[24] See eg Hercules Inc.—Pakistan, at [vol. 1, p. 98] (1972).

[25] See eg Vinnell-Zachry-Perini—Bangladesh, at [vol. 1, p. 117] (1972).

[26] Ralston Purina Co.—Nicaragua, at [vol. 1, p. 1014] (1981)]

[27] OPIC Handbook, at p. 19 (2008).

economies in Latin America,[28] Africa,[29] the Middle East[30] and Asia,[31] this coverage is likely to grow further in importance and may prove important for attracting US foreign investment to recently war-torn economies.

In sum, although investment insurance coverage does not by any means address all facets of political risk involved in foreign investments, it covers the most significant ones. Given the host of issues identified in OPIC determinations, the information available in this exhaustive collection of OPIC claims determinations may assist users, practitioners and academics alike in identifying the types of items that trigger OPIC cover. This collection offers valuable insight for international investors wishing to secure OPIC insurance, as well as providing guidance for their advisers. It should also be of value for negotiators of investment agreements and for investment arbitration tribunals deciding investment treaty disputes.

Influence of Current Investment Insurance Decisions

OPIC claims determinations have begun to influence political risk determinations outside of the insurance field proper. Two investment arbitrations are good examples of how OPIC coverage and determinations have influenced investor-state disputes: *Generation Ukraine, Inc v Ukraine* and *Enron Corporation* and *Ponderosa Assets v Argentina*.[32] In *Enron*, the investor relied on a prior claims determination by OPIC establishing that an expropriation had taken place to bolster its expropriation argument in the arbitration.[33] The *Enron* tribunal did not, however, accept the OPIC determination as persuasive authority on the question of whether an expropriation had occurred, noting that the OPIC determination 'responds to a different kind of procedure and context that cannot influence or be taken into account in this arbitration'.[34] While declining to treat Argentina's conduct in that dispute as an expropriation, the *Enron* tribunal nevertheless held that Argentina had violated its obligations to provide Enron fair and equitable treatment.[35] The *Enron* investment treaty award does not make clear whether it considered the

[28] See eg Matthew Walter and Helen Murphy, 'Colombia Pipeline Bombed by FARC After Ecuador Attack', Bloomberg, 6 March 2008.

[29] See eg 'Nigerian militants claim bomb attack on "major" oil pipeline', CNN, 19 June 2009 (available at: <http://edition.cnn.com/2009/WORLD/africa/06/19/nigeria.militants.oil.pipeline/index.html>, last accessed 25 July 2010).

[30] See eg 'Terrorist Attack Highlights Risks Of Yemen's Oil Industry', Oil Voice, 7 Jan 2010.

[31] See eg Aftab Borka, 'Al Qaeda suspected of Pakistan's Marriott bombing', Reuters, 21 September 2008.

[32] *Generation Ukraine, Inc v Ukraine*, Award, ICSID Case No ARB/00/9 (2003), (Orrego, van den Berg, Tschanz); *Enron Corporation and Ponderosa Assets v Argentina*, Award, ICSID Case No ARB/01/3 (2007), (Paulsson, Salpius, Voss).

[33] *Enron Corporation and Ponderosa Assets v Argentina*, at 235.

[34] *Enron Corporation and Ponderosa Assets v Argentina*, at 247.

[35] *Enron Corporation and Ponderosa Assets v Argentina*, at 268.

OPIC expropriation standard laid out above to extend into areas of fair and equitable treatment as defined in US treaty practice, nor did it provide any analysis of the distinctions between the procedures and standards involved. This question of a potential distinction between US treaty and OPIC insurance standards for expropriation remains a fruitful one for further inquiry. It is one of the tasks with which this collection of OPIC claims determinations may meaningfully assist.

The *Generation Ukraine* tribunal made more sophisticated use of the fact of OPIC coverage. The tribunal in *Generation Ukraine* analysed the materials to be generated by an investor to qualify for continued OPIC coverage. On this basis, the tribunal established the existence of certain reports that had to be prepared by the investor as part of its obligations under the insurance contract.[36] The tribunal noted that these reports were not produced to the tribunal and drew inferences from the non-production of these documents in the arbitration.[37] The *Generation Ukraine* decision therefore signals a growing awareness of investment arbitration tribunals of the procedural and substantive requirements of OPIC and similar insurance coverage. This rising awareness may well lead to a closer analysis of the relationship between investment arbitration, investment agreements and investment insurance in the frame of investment arbitrations and in the negotiation of investment agreements themselves. This analysis hopefully will also be aided by this collection of OPIC determinations.

This collection aspires to provide a means for better understanding relationships among the different political risk mitigation tools. It provides scholars and practitioners with a further critical source against which to examine current conceptions of the scope of investment protections. This source is the more significant, given the development of OPIC claims determinations over time. In both practical and scholarly respects, this volume therefore hopes to add to a better and fuller understanding of political risks and the tools available for international investors to mitigate those risks.

[36] *Generation Ukraine v Ukraine*, at 19.22–19.24.
[37] *Generation Ukraine v Ukraine*, at 19.22–19.24.

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Vietnam Inconvertibility Claims

Cases covered

- Bank of America (Vietnam: 1970)
- The Chase Manhattan Bank (Vietnam: 1970)
- The Chase Manhattan Bank (Vietnam: 1972)
- Bank of America (Vietnam: 1973(I))
- Bank of America (Vietnam: 1973(II))
- Bank of America (Vietnam: 1974)

Overview

The Overseas Private Investment Corporation (OPIC) and its predecessor agency, the United States Agency for International Development (USAID), were faced with a significant number of inconvertibility claims by US investors in Vietnam for remittance of investment earnings between 1967 and 1973. 1967 marks failed peace efforts in the Vietnam war and an increasing shortage of foreign exchange in South Vietnam. The Vietnam war continued to intensify until the Fall of Saigon in 1975.

Claims were filed by The Chase Manhattan Bank ('Chase') for transfer of its 1967, 1968, 1969 and 1971 remittable profits. These claims have been resolved by USAID in several claims determinations. See The Chase Manhattan Bank (Vietnam: 1970) (transferring 1967, 1968 and 1969 profits), The Chase Manhattan

Bank (Vietnam: 1972) (transferring 1971 profits). Additionally, the Bank of America ('BoA') filed several claims for transfer of its 1969, 1970, 1971, 1972, and 20 percent of its 1973 remittable profits. These claims have been resolved by USAID and OPIC in several claims determinations.

The underlying determinations have several common factors. First, the National Bank of Vietnam consistently responded with great delay to transfer requests of US companies. As noted by USAID in the Information Memorandum for the Administrator appended to the 1 May 1970 Memorandum addressing Chase's claim for inconvertibility of its 1967–1969 branch profits, 'Saigon USAID has brought to the attention of the GVN [Government of Vietnam] the problems created by their failure to provide foreign exchange to US companies, but there has been no suitable reaction'. See The Chase Manhattan Bank (Vietnam: 1970), [p. 1].

Second, for the duration of the claims, the Vietnamese piastre (the local currency) was steadily devalued, meaning that USAID and later OPIC had an interest in settling convertibility claims early such as not be subject to the loss in value of the Vietnamese piastre against the US dollar for the time that the claims were pending. This concern is made in express in several of the claims determinations. See The Chase Manhattan Bank (Vietnam: 1970).

Third, the exchange regulations in force in Vietnam changed between 1966 when many of the underlying guarantees were executed and the time that claims were filed by Chase and BoA. These changes led to active blockage claims by BoA. These claims concerned the difference between the earlier more permissive rule that an investor could remit 90 percent of after-tax profits and the new rule that only 70 percent of such after-tax profits could be transferred. See, for example, Bank of America (1974: Vietnam (I)).

Suggested additional reading

- Phillip B. Davidson, *Vietnam at War* (Oxford: OUP, 1991)
- Marilyn B. Young, John J. Fitzgerald and A. Tom Grunfeld, *The Vietnam War: A History in Documents* (Oxford: OUP, 2003)

Vietnam Expropriation Claims

Cases covered

- Caltex (Asia) Ltd (Vietnam: 1976)
- International Dairy Engineering Co of Asia, Inc (Vietnam: 1976)
- The Chase Manhattan Bank (Vietnam: 1978)
- Singer Sewing Machine Company (Vietnam: 1978)
- Bank of America NT & SA (Vietnam: 1983)

Overview

OPIC was faced with a significant exposure to expropriation of US investments in Vietnam after the end of the Vietnam War. Claims were filed by Caltex (Asia) Ltd, International Dairy Engineering Co of Asia Inc, The Chase Manhattan Bank, Bank of America, and Singer Sewing Machine Company.

After the capture of Saigon by North Vietnamese forces on 1 May 1975, Vietnam pursued a policy of nationalization of foreign enterprises and nationalized banking. The new government also initially refused to honour debt obligations of the government of South Vietnam. As one commentator put it, however, 'The government nationalized all manufacturing and industrial activity even though the prospects of success were dim because of the lack of raw materials, fuel, and, above all, spare parts for machinery, which was usually of US origin' (D.R. SarDesai, *Vietnam Past and Present*, 3rd edn, Westview, CO, 1998, p. 97). Investment policy was later softened towards obligations owed to French and Japanese investors; in particular, to attract needed foreign investment.

The OPIC claims involving Vietnamese expropriations generally involve nationalization decrees and as such do not engage issues of the extent of permissible interference with fundamental property rights. The main issue of contention in many of the claims determinations is establishing the moment of expropriation given the evacuation of US citizens from the country. OPIC has employed two approaches. First, it has accepted the loss of communication with the investment as sufficient to deem an expropriation event to have occurred (see International Dairy Engineering Co of Asia, Inc (Vietnam: 1976)). Second, the promulgation of the nationalization decrees in Saigon after its fall were an alternative sufficient marker to the extent such a decree was communicated (see Caltex (Asia) Ltd (Vietnam: 1976)). These dates generally were within days of one another.

One investor posed an interesting special problem. The investor had partnered with a French investor in a textile company. The company was allowed to operate even after the fall of Saigon and the US investor remained in touch with the investment telephonically. After two years, the company was expropriated by the new government and the French investors—but only the French investors—were compensated for their stake in the company. As the expropriation occurred by decree, the date of the decree was deemed the date of nationalization (see Singer Sewing Machine Company (Vietnam: 1978)).

Suggested additional reading

- Phillip B. Davidson, *Vietnam at War* (Oxford: OUP, 1991)
- Marilyn B. Young, John J. Fitzgerald and A. Tom Grunfeld, *The Vietnam War: A History in Documents* (Oxford: OUP, 2003)

Chile Expropriation Claims

Cases covered

- Bethlehem Iron Mines Co (Chile: 1971)
- Parsons & Whittemore Inc (Chile: 1972)
- Ralston Purina de Panama SA (Chile: 1972)
- Kennecott Copper Corp (Chile: 1972)
- First National City Bank (Chile: 1973)
- Northern Indiana Brass Co (Chile: 1973)
- Cerro Corp (Chile: 1974)
- International Telephone and Telegraph Corp SA (Chile: 1975)
- The Anaconda Company (Chile: 1977)

Overview

OPIC was faced with a significant number of expropriation claims by US investors in Chile between 1970 and 1973, coinciding with the Allende administration in Chile. President Allende had been elected into office as Chile's first Socialist president in 1970. President Allende pursued an economic policy of greater government control and nationalization of key industries. These industries frequently were funded by significant US foreign investment. The Allende regime further was at odds with US foreign policy in the region on a frequent basis. The Allende administration was brought to an end by a military coup by General Pinochet in September 1973. The military coup followed on a growing constitutional crisis in Chile. The coup marked the end of nationalizations of OPIC insured investments in Chile and negotiations by the new Chilean government with regard to past expropriations.

Claims were filed by Bethlehem Iron Mines Co, Parsons & Whittemore Inc, Ralston Purina de Panama SA, Kennecott Copper Corp, First National City Bank, Northern Indiana Brass Co, Cerro Corp, International Telephone and Telegraph Corporation SA, and The Anaconda Company. The underlying determinations of these claims have several common factors. These common factors shed light on the prevailing economic factors in Chile at the time.

First, many of the expropriations were conducted by means of a forced sale. The forced sales occurred on the basis of a similar pattern: the Government of Chile generally approached the investor to conclude a sale of the investment while at the same time threatening expropriation of an investment if the negotiations failed. At the same time, it was typical that the investment was hampered by labour or administrative disputes immediately prior or during negotiations. See Bethlehem Iron Mines Co (Chile: 1971) (labour dispute prior to forced sale negotiations); Parsons & Whittemore Inc (Chile: 1972) (general reference to troubles interfering with the profitable operation of the plant); First National City Bank (Chile:

1973) (change in banking regulations while sale offers were outstanding); Northern Indiana Brass Co (Chile: 1973) (imposing requirement of continued full employment at a plant despite industry wide depression as well as intercession in management by government-backed unions). OPIC's attitude broadly was to consider the forced sales as being tantamount to negotiations for expropriation compensation.

Second, in some instances, a constitutional amendment was put in place formally nationalizing investments prior to final sale negotiations being concluded. See, for example, Cerro Corp (Chile: 1974); The Anaconda Company (Chile: 1977).

The Anaconda case is an interesting outlier to the forced sale determinations, as it, too, involved an initial settlement offer by the Government of Chile which was backed by threats of unilateral political action on the part of the Government of Chile, if no settlement could be reached (The Anaconda Company (Chile: 1977)). In that case, USAID did not consent to a structured settlement and, after the investor signed such a settlement without USAID's consent, informed the investor that it had effectively lost its expropriation coverage. This determination was ultimately successfully challenged in arbitration. One important factor may have been the timing of the negotiations led by the Anaconda Company which preceded the election of President Allende.

The political situation in Chile further led to several inconvertibility claims with regard to dividends and debt service. These cases unfold against the same underlying political risk environment as the expropriation claims. See John-Manville Corporation (Chile: 1973); Bank of America (Arauco) (Chile: 1973); Ensign Bickford Co (Chile: 1973); SOCOMET Inc (Chile: 1973(I)); SOCOMET (Chile: 1973(II)); International Chemical Fibers Inc (Chile: 1973(I)); International Chemical Fibers Inc (Chile: 1973(II)); Bank of America (Chile: 1974(I)); Bank of America (Chile: 1974(II)); Bank of America (Chile: 1974(III)).

Suggested additional reading

- Peter Winn, *Weavers of Revolution: The Yarur Workers and Chile's Road to Socialism* (Oxford: OUP, 1989)
- Robert Holden and Eric Zolov, *Latin America and the United States: A Documentary History*, 2nd edn (Oxford: OUP, 2010)

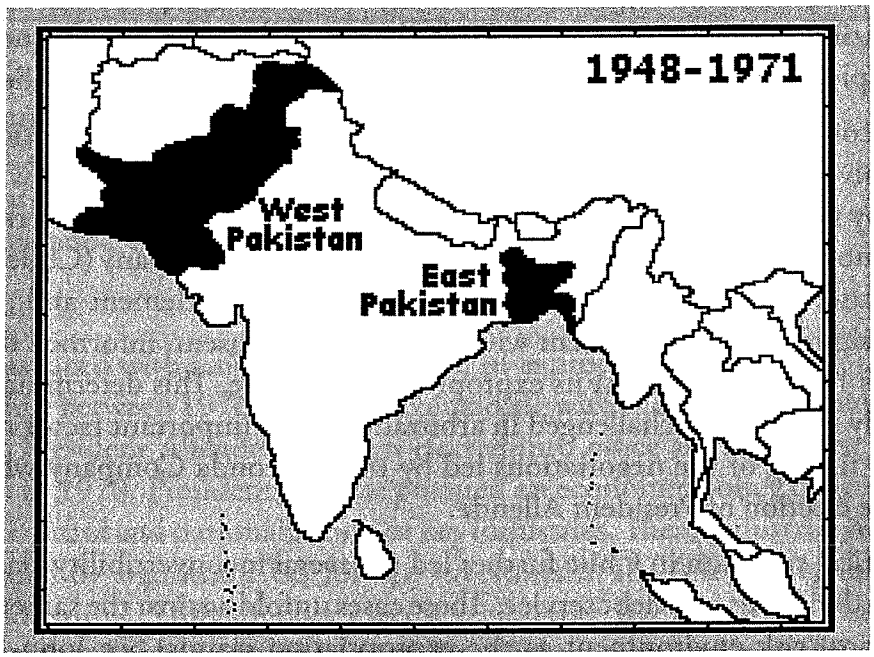
Indo-Pakistan War Claims

Cases covered

- Hercules Inc (Pakistan: 1972)
- Vinnell-Zachry-Perini, A Joint Venture (Bangladesh: 1973)
- Vinnell-Zachry-Perini, A Joint Venture (Bangladesh: 1974)

Overview

The most significant grouping of war claims in OPIC's early history concern the civil unrest prior to secession of East Pakistan (present-day Bangladesh) from Pakistan and the ensuing third Indo-Pakistan war. Several of these claims concerned projects in Bangladesh proper whereas others were affected by the war on the West-Pakistani front.



Historical Map of Pakistan

Source: WH KMLA Historical Atlas, available at <http://www.zum.de/whkmla/histatlas/india/haxpakistan.html>.

The Bangladesh conflict at the heart of the Indo-Pakistani war claims is rooted in the historical development of the independence movement on the Indian subcontinent from British rule. Although originally united, the independence movement splintered along religious lines, with Muslim political parties calling for a division of an independent Indian subcontinent into a Hindu and a Muslim state. This call led to unrest in the religiously heterogeneous Bengal region located at the eastern base of the Indian subcontinent. In the 1946 regional elections, Muslim parties in favour of splitting Muslim portions of the subcontinent into an independent state won a majority Bengali elections, setting off widespread violence.

When in 1947 an independent India and Pakistan were formed, borders were drawn on religious lines. In order to address the religious mix in Bengal, the region was split, with the predominantly Muslim East Bengal becoming East Pakistan and predominantly Hindu West Bengal becoming the Indian state of West Bengal. This solution, however, quickly ran into geopolitical problems: East Pakistan was separated from West Pakistan by more than 1,000 miles of Indian territory. Political and cultural differences between East and West Pakistan abounded.

A secessionist political agenda began to dominate one of the main East Pakistani parties, the Awami League, under the leadership of Sheikh Mujibur Rahman ('Mujib'). Mujib was arrested in 1966 for his political activities. Several attempts at civilian self-rule of East Pakistan within a larger Pakistan failed. Martial law was imposed twice between 1958 and 1962 and 1969 and 1971. After the Awami League won almost all of the East Pakistani seats in Pakistan's national assembly in 1970–1971, devolution talks were opened between East and West Pakistan.

The devolution talks failed. On 1 March 1971, an upcoming meeting of the Pakistani national assembly was delayed indefinitely by Pakistan's president, touching off large scale civil unrest in East Pakistan. Between 1 March and 26 March, Mujib again was arrested and his associates fled to India amidst Pakistani government crackdown. On 26 March 1971, these dissidents declared Bangladeshi independence and fighting between Bangladeshi and Pakistani government forces escalated. India sided with the Bangladeshi liberation effort, amassing troops on the East Pakistani border in November 1971. Armed hostilities between India and Pakistan began on 3 December 1971 with preemptive Pakistani air strikes on Indian airfields, setting off the third Indo-Pakistan war.

The war was fought mainly in East Pakistan with some holding maneuvers fought on the opposing West Pakistani flank of the war. The main incursions into West Pakistan included two naval operations crippling Karachi port and fuel storages on 4 December to 9 December 1971 and air force attacks. On the eastern front, a full invasion was launched by the Indian military, combined with Bangladeshi separatist forces. Dhaka, the capital city of still-East Pakistan, fell on 16 December 1971, effectively ending the war. The 1971 war led to the highest number of military casualties of the three Indo-Pakistani wars.

The common issues in the Indo-Pakistani war claims decided by OPIC concerned the question of whether the hostilities qualified for war coverage, whether the investor had taken sufficient steps to mitigate or prevent damage and how much damage had been inflicted by the act of war as to which the investor had sustained war damage.

In two cases, the war damage was obviously inflicted by military forces, as in the case of air bombardment. See Hercules Inc (Pakistan: 1972); Vinnell-Zachry-Perini, A Joint Venture (Bangladesh: 1973). However, in one case, the issue was more delicate, given that the damage had not been inflicted by conventional forces, but by dissidents. See Vinnell-Zachry-Perini, A Joint Venture (Bangladesh: 1974). In that context, OPIC looked to the intent of the rebels and found that the intention of the group in question was the overthrow of the government. In light of that intent, OPIC determined that the underlying actions fell within the meaning of insurrection rather than civil strife. See Vinnell-Zachry-Perini, A Joint Venture (Bangladesh: 1974).

The issue of mitigation has been addressed in several of the Indo-Pakistan war claims. Where personnel was present, actions taken to mitigate serious damage, but causing limited losses of their own, were recompensed on the theory that these actions were taken in proper mitigation of damages. See Hercules Inc (Pakistan: 1972).

Even in clear cases of war damage, the amount of damages frequently was reduced in order to account for theft of property outside of the war coverage. See Hercules Inc (Pakistan: 1972).

Suggested additional reading

- Richard Sisson, *War and Secession: Pakistan, India, and the Creation of Bangladesh* (Berkeley, CA: University of California Press, 1991)

Argentina Inconvertibility Claims (1971)

Cases covered

- General Signal Corporation (Argentina: 1973)
- Cabot Corporation (Argentina: 1973)

Overview

OPIC faced a limited number of inconvertibility claims with regard to Argentina's economic crisis in the 1970s. The 1971 crisis followed on a pattern of previous economic problems. In the early 1960s, Argentina engaged in significant deficit spending and an external debt financed investment inflow. Exchange controls were introduced in 1967 in order to avoid a balance of payment crisis. Nevertheless, both the budgetary and balance of payment picture deteriorated in 1970. Substantial capital flight and the feared balance of payment crisis ensued in 1971.

In March 1971, the Government of Argentina suspended transfer for payment of dividends, royalties and license fees on account of large public and private debt commitments in foreign currency. In September 1971, the Government of Argentina authorized a series of dollar-denominated external government bonds to be made available to eligible investors in lieu of foreign exchange. In 1976, a full scale economic meltdown ensued, with inflation reaching 400 percent per annum, leading to a military coup in March of that year. US foreign policy supported the military junta. The exchange controls were removed only in November 1976 after the coup.

US investors in Argentina at the time were affected by the new restrictions. Specifically, dividends, as well as royalties could not be repatriated. OPIC approved claims for inconvertibility in light of the new legislation. These claims

are interesting as predecessors to the later Argentine crisis, dealt with also in OPIC decisions. See, for example, First Trust of New York, NA (Argentina: 2002). Interestingly, these claims were treated by OPIC as inconvertibility claims rather than expropriation claims. This distinction is of interest in light of the financial crisis in the 2000s which led to many expropriation claims against Argentina.

Nicaragua Claims

Cases covered

- American Standard Inc (Nicaragua: 1979)
- General Mills, Inc (Nicaragua: 1979)
- General Mills, Inc (Nicaragua: 1980(I))
- General Mills, Inc (Nicaragua: 1980(II))
- General Mills, Inc (Nicaragua: 1981(I))
- General Mills, Inc (Nicaragua: 1981(II))
- Citizens Standard Life Insurance Company (Nicaragua: 1980(I))
- Citizens Standard Life Insurance Company (Nicaragua: 1980(II))
- Citizens Standard Life Insurance Company (Nicaragua: 1981(I))
- Citizens Standard Life Insurance Company (Nicaragua: 1981(II))
- American Standard Inc (Nicaragua: 1983)
- Citizens Standard Life Insurance Company (Nicaragua: 1983(I))
- Citizens Standard Life Insurance Company (Nicaragua: 1983(II))

Overview

OPIC was faced with a significant number of claims by US investors in Nicaragua between 1979 and 1981. These claims arose against the background of an ongoing political struggle in Nicaragua between the Frente Sandinista de Liberación Nacional ('FSLN') and the administration of Nicaraguan President Somosa-Debayle. After his father's assassination in 1956, President Somosa-Debayle succeeded his presidency. The FSLN was formally organized in 1961 and launched several successful military operations beginning in the early 1970s. The organization had significant links with Cuba.

In 1975, President Somosa-Debayle launched a violent counter-offensive, declaring a state of siege and threatening political opponents with detention and torture. In 1977, United States support for the Somosa-Debayle administration waned, making military assistance conditional on improvements in human rights. In the same time period, capital flight from Nicaragua continued, requiring the Somosa-Debayle administration to rely on foreign loans, mostly from United States banks, to finance the government. Violent confrontations intensified in 1978 and 1979, leading to a violent overthrow of the government in July 1979. These events left some 50,000 Nicaraguans dead and more than

150,000 exiled. The United States later was involved in a case before the International Court of Justice regarding its support of Nicaraguan guerillas, known as the Contras, in Nicaragua. The United States argued that its actions were in support of El Salvador's efforts to quell an insurgency. The International Court of Justice concluded that the United States' actions were internationally wrongful. See *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)*, Merits, Judgment of 27 June 1986, 1986 ICJ Rep. 14.

OPIC was confronted with two different types of claims: inconvertibility claims and political violence claims. Inconvertibility claims concerned the transfer of dividends (see American Standard Inc (Nicaragua: 1979); General Mills Inc (Nicaragua: 1979)) and certificates of deposit purchased to comply with Nicaraguan regulations governing the insurance industry. See, for example, Citizens Standard Life Insurance Company (Nicaragua: 1980(I)). These claims concerned situations in which the investor followed ordinary procedures for obtaining foreign exchange (see General Mills Inc (Nicaragua: 1979)), as well as situations in which investors sought to correspond directly with the Central Bank of Nicaragua. See American Standard Inc (Nicaragua: 1979). OPIC expressly commented that such an informal approach was appropriate in the context of a recently nationalized banking sector suffering from a lack of foreign exchange. See American Standard Inc (Nicaragua: 1979). OPIC noted that in all of these cases, no foreign exchange was made available to US investors and that in some instances, Nicaragua expressly confirmed its inability to make available foreign exchange for considerable periods of time. See General Mills Inc (Nicaragua: 1979). With regard to government obligations, OPIC attributed the lack of foreign exchange to a general policy of deferring all foreign currency obligations owed by government agencies. See, for example, Citizens Standard Life Insurance Company (Nicaragua: 1980(I)).

An additional feature in many of the OPIC determinations concerning the Nicaraguan inconvertibility claims is the insufficiency of the secondary exchange market. Thus, OPIC policies guaranteed convertibility of funds at a percentage of the official exchange rate. The secondary market available for foreign exchange only offered US dollars at a significantly worse exchange rate. In these circumstances, OPIC thus to a point assumed a devaluation risk on account of its support for the official rate recorded by the US government for the Nicaraguan currency. See, for example, General Mills Inc (Nicaragua: 1979).

The OPIC determinations dealing with political violence dealt with situations in which staff of the investment company had to be evacuated due to the violent clashes between the FSLN and the Somosa-Debayle government. See General Mills Inc (Nicaragua: 1980(II)). Upon return to the project site, employees of the investment company then discovered significant damage to investment property or outright theft. See General Mills Inc (Nicaragua: 1980(II)). Due to the absence

of personnel at the time the damage was inflicted, OPIC could not determine the cause of the damage with certainty.

Instead, OPIC looked to the circumstances surrounding the damage, including the need to evacuate personnel. See General Mills Inc (Nicaragua: 1980(II)). OPIC further noted that the FSLN fell within the definition of a revolutionary or insurrectionist group, given that its objective was the overthrow of the established government of Nicaragua, meaning that the damage was incurred during a revolution as defined in the contract. See American Standard Inc (Nicaragua: 1983). OPIC set the date of the damage presumptively on the day of evacuation (see General Mills Inc (Nicaragua: 1980(II))) or alternatively accepted the date submitted in the application by the investor as presumptively accurate. See American Standard Inc (Nicaragua: 1983).

Suggested additional reading

- Robert Holden and Eric Zolov, *Latin America and the United States: A Documentary History*, 2nd edn (Oxford: OUP, 2010)
- Misagh Parsa, *States, Ideologies, and Social Revolutions: A Comparative Analysis of Iran, Nicaragua, and the Philippines* (Cambridge: CUP, 2000)

Zaire Inconvertibility Claims

Cases covered

- Chase International Investment Corp (Zaire: 1978)
- Chase International Investment Corp (Zaire: 1979(I))
- Chase International Investment Corp (Zaire: 1979(II))
- Citibank NA (Zaire: 1979)
- Goodyear Tire and Rubber Company (Zaire: 1979(I))
- Goodyear Tire and Rubber Company (Zaire: 1979(II))
- Goodyear Tire and Rubber Company (Zaire: 1979(III))
- Goodyear Tire and Rubber Company (Zaire: 1979(IV))
- Goodyear Tire and Rubber Company (Zaire: 1979(V))
- Continental Milling Corp (Zaire: 1980(I))
- Continental Milling Corp (Zaire: 1980(II))
- Crocker International Investment Corp (Zaire: 1980)
- Goodyear Tire and Rubber Company (Zaire: 1980(I))
- Goodyear Tire and Rubber Company (Zaire: 1980(II))
- Goodyear Tire and Rubber Company (Zaire: 1980(III))
- Goodyear Tire and Rubber Company (Zaire: 1980(IV))
- Chase International Investment Corp (Zaire: 1980)
- Crocker International Investment Corp (Zaire: 1981(II))
- Goodyear Tire and Rubber Company (Zaire: 1981(I))

- Goodyear Tire and Rubber Company (Zaire: 1981(II))
- Goodyear Tire and Rubber Company (Zaire: 1981(III))
- Goodyear Tire and Rubber Company (Zaire: 1981(IV))
- Chase International Investment Corp (Zaire: 1982)
- Chase Manhattan Overseas Banking Corp (Zaire: 1983)
- Chase Manhattan Overseas Banking Corp (Zaire: 1984)

Overview

OPIC was faced with a significant number of inconvertibility claims involving Zaire, or current day Democratic Republic of Congo between 1978 and 1984. The first inconvertibility claim was filed by Chase International Investment Corp ('CIIC') with regard to a dividend declared in May 1977 by Société Textile de Kisangani ('SOTEXKI'), a company in which CIIC held an equity interest. See Chase International Investment Corp (Zaire: 1978). The last inconvertibility claim similarly was filed by CIIC with regard to its SOTEXKI investment. It concerned a dividend for the 1982 fiscal year. See Chase Manhattan Overseas Banking Corp (Zaire: 1984).

The Democratic Republic of Congo obtained independence from Belgium on 30 June 1960. The first years of independence were marked by political and secessionist violence, with the resource-rich province of Katanga province seeking to secede from the Democratic Republic of Congo. In 1965, then lieutenant-general and head of the army Mobotu Sese Seko seized control of the country, initially for a period of five years and thereafter was re-elected president. In 1971, he renamed the state Republic of Zaire. Mobotu created a one party state and enforced one party rule which remained in place until an agreement in principle in April 1990 to re-introduce a multiparty system.

The OPIC inconvertibility claims stand in the larger context of (failed) economic and monetary policies by the Mobotu regime. In 1973, Mobotu nationalized key foreign holdings in commercial buildings, light industry, and the agricultural sector in an attempted 'Zairianization' of the economy. The regime failed and was reversed after twelve months, leaving the economy in dire straights. Economic mismanagement brought Zaire to the brink of bankruptcy in 1976 and required debt restructuring from the Paris Club. Economic reforms mandated as part of debt restructuring by the Paris Club were circumvented, as a potential threat to the politico-economic power structure created by the Mobotu one-party state. GDP and per capita income in the relevant time period for the OPIC claims fell. Inflation, on the other hand, rose. The period was further marked by significant devaluation in the claims period, reducing the value of the Zaire from a reference of 0.847 zaires per US dollar in February 1978 to 30.6925 zaires per US dollar at the end of 29th October 1983.

The strongest challenge to the Mobotu-regime also coincided with the first inconvertibility events chronicled by the OPIC claims determinations. In 1977 and

1978, Katanga province again sought to secede from Zaire. In March 1977, an insurgency group invaded Katanga from Angola, initially seizing significant amounts of province. The rebellion was defeated by the Mobotu government with help from France, Belgium, the United States, Morocco and Egypt. In May 1978, the same insurgency group again invaded Katanga. It was defeated by French and Belgian troops with US logistical air support.

The inconvertibility claims filed with OPIC arose out of five different groups of investments. The first claim group concerns CIIC's minority equity investment in a local textile company, SOTEXKI. CIIC's inconvertibility claims all concerned dividends declared by SOTEXKI. The Banque du Zaire failed to respond to requests for transfer. See CIIC claims, volume 1, pages 448, 502, 583, 855, and 1047.

The second claim group concerns Goodyear Tire and Rubber Company's ('Goodyear') investment in a local plant. Goodyear held an equity investment in a manufacturing plant for tires, tubes and related products. Goodyear entered into an investment agreement with regard to its investment with Zaire in September 1970. Goodyear's inconvertibility claims concerned dividends, debt obligations, and technical assistance fees. The Banque du Zaire failed to respond to requests for transfer. See Goodyear claims, volume 1, pages 691–728.

The third claim group concerns Continental Milling Corp's majority equity investment in Minoterie Nationale Congolaise, SCARL ('MNC'). The inconvertibility claims concerned both dividends, and debt obligations. Both transfer requests were frustrated by central bank regulations, which made it impossible for MNC's commercial bank to process transfer requests. See Continental Milling Corp claims, volume 1, pages 606, 616.

The fourth claim group concerns banking investments. Citibank filed one inconvertibility claim with regard to its equity investment in Citibank (Zaire), established in June 1971. The inconvertibility claims concerned dividends. The Banque du Zaire in a negotiated settlement approved the transfer of zaires, but failed to provide foreign exchange to effectuate the transfer. The Citibank claim can be found at [volume 1, p. 508]. Crocker International Investment Corporation held an equity investment in a Zairian bank through BNP-Paribas. The inconvertibility claims equally concerned dividends. Crocker's transfer requests were rejected by Banque du Zaire by reference to a moratorium on dividend transfers. See Crocker International Investment Corporation claims, volume 1, pages 627, 872.

Suggested additional reading

- Sandra W. Meditz and Tim Merrill, *Zaire: A Country Study* (The Division, 1994)
- UNHCR, *Minorities at Risk Project, Assessment for Lunda, Yeke in the Dem. Rep. of the Congo*, 31 December 2003, available at < http://www.unhcr.org/refworld/docid/469f3a6f38.html> (accessed 19 August 2010)

- Jean-Louis Peta Ikambana, *Mobutu's Totalitarian Political System: An Afrocentric Analysis* (London: Routledge, 2006)

Ghana Inconvertibility Claims

Cases covered

- Union Carbide Corp (Ghana: 1978)
- Union Carbide Corp (Ghana: 1979)
- Firestone Tire and Rubber Company (Ghana: 1979)
- Firestone Tire and Rubber Company (Ghana: 1979(II))
- Firestone Tire and Rubber Company (Ghana: 1980(I))
- Firestone Tire and Rubber Company (Ghana: 1980(II))
- Firestone Tire and Rubber Company (Ghana: 1980(III))
- Firestone Tire and Rubber Company (Ghana: 1980(IV))
- Firestone Tire and Rubber Company (Ghana: 1981(I))
- Firestone Tire and Rubber Company (Ghana: 1981(II))
- Firestone Tire and Rubber Company (Ghana: 1981(III))
- Firestone Tire and Rubber Company (Ghana: 1980(III))
- Union Carbide Corp (Ghana: 1981)
- Union Carbide Corp (Ghana: 1982)
- Union Carbide Corp (Ghana: 1983)
- Firestone Tire and Rubber Company (Ghana: 1983(I))
- Firestone Tire and Rubber Company (Ghana: 1983(II))
- Firestone Tire and Rubber Company (Ghana: 1983(III))
- Firestone Tire and Rubber Company (Ghana: 1984(I))
- Firestone Tire and Rubber Company (Ghana: 1984(II))

Overview

OPIC was faced with a significant number of inconvertibility claims involving Zaire, or current day Democratic Republic of Congo between 1978 and 1984. The first inconvertibility claim was filed by Union Carbide Corporation ('UCC') with regard to a dividend declared in May 1977 by Union Carbide (Ghana) and Ucar Plastics (Ghana) Ltd, two companies in which UCC held an equity interest. See Union Carbide Corporation (Ghana: 1978). The last inconvertibility claim was filed by Firestone Tire and Rubber Company ('Firestone') with regard to its Ghanaian investment. It concerned a 25 May 1984 transfer request for recovery of excess capital gains taxes paid by Firestone for the sale of its equity investment under a tax settlement with Ghana. See Firestone Tire and Rubber Company (Ghana: 1984).

Ghana obtained independence from the United Kingdom on 6 March 1957. Post-independence Ghana had a tumultuous start, experiencing four coups and seven different regimes in 20 years. In the first nine years after its independence,

Ghana was governed by the Convention People's Party under the leadership of Kwame Nkrumah. Kwame Nkrumah was deposed in 1966 by a military and police coup. After the coup, a new republican government was set up. The new government was forced by economic conditions drastically to devalue the Ghanaian currency and make significant economic reforms. Reforms failing to show effect, the new government again was overthrown by a coup in 1972. The military government, however, was not capable of improving economic conditions and stood under constant suspicion of corruption and graft. Strikes and demonstrations in 1977 and 1978 ensued.

During the period in which the Ghanaian claims were made from 1978 to 1984, Ghana underwent significant political upheaval. On 21 June 1979, a group of junior and non-commissioned officers led by Flight Lieutenant Jerry John Rawlings overthrew the military government, executed senior officers and engaged in a purge of the Ghanaian political elite. After returning power to civilian hands on 24 September 1979, Flight-Lieutenant Rawlings led a second successful coup against the civilian government on 31 December 1981 after the economic situation in Ghana again failed to show significant signs of recovery. The Rawlings regime, a regime with strong socialist sympathies until the demise of the Soviet Union, ruled as a one party system until 1992. A formal multi-party state was reintroduced in December 1992, giving Flight-Lieutenant Rawlings a victory of presidential elections.

Economic problems were at the center of much of Ghana's political upheavals after its independence. A resource-rich and comparatively industrialized country shortly after its independence, poorly managed public works and agricultural projects fast drained Ghana's foreign currency reserves. By the mid-1960s, foreign currency reserves were used up, leading to an inability on the part of Ghana to meet debt obligations. Due to a combination of persistent droughts, falling cocoa prices, the expulsion of over one million Ghanaians from Nigeria and exacerbated by poor economic management and corruption, Ghana did not recover economically until the mid-1980s on the back of rising prices, infrastructure improvements and additional aid inflows.

The inconvertibility claims filed with OPIC arose out of two different investments. The first was UCC's investment in dry battery companies in Ghana. UCC's inconvertibility claims exclusively concerned dividends declared by the local companies. The Bank of Ghana did not act on transfer requests, noting that transfer approvals would be issued 'when the country's foreign exchange resources permit'. See Union Carbide Corporation (Ghana: 1978). See the UCC claims, volume 1, page 468.

The second investment was Firestone's majority equity investment in Firestone Ghana Ltd, as well as its investments in the form of technical assistance to the project. Firestone's inconvertibility claims concerned dividends, technical

assistance fees, the purchase price for its shares in a sale of the investment to the Government of Ghana, and tax settlement with regard to capital gains made on that sale. See the Firestone claims, volume 1, pages 523, 530, 632, 639, 645, 903, 915, 921.

The inconvertibility claims essentially were all caused by lack of foreign exchange reserves in Ghana. The Bank of Ghana approved the transfer requests, but was unable to provide foreign exchange due to a foreign exchange shortage or otherwise failed to act on transfer requests. In light of these foreign exchange conditions, OPIC granted the inconvertibility claims on account of passive blockage.

Suggested additional reading

- William H. Worger, Nancy L. Clark and Edward A. Alpers, *Africa and the West: A Documentary History, Volume 2: From Colonialism to Independence, 1875 to the Present* (Oxford: OUP, 2009)

Claims Arising out of the Iranian Revolution

Cases covered

- Transworld Agricultural Development Corporation (Iran: 1978)
- Foremost-McKesson Inc (Iran: 1980)
- The Gillette Company (Iran: 1980)
- Cabot International Capital Corp (Iran: 1980)
- Dresser, AG (Vaduz) (Iran: 1980)
- Carrier Corp (Iran: 1980)
- Phelps Dodge Corp (Iran: 1981)
- CPC Europe (Group) Ltd (Iran: 1981)
- Foremost McKesson, Inc (Iran: 1981)
- Intercontinental Hotels Corp (Iran: 1981)
- Gillette Company (Iran: 1982)
- Foremost-McKesson Inc (Iran: 1982)
- Otis Elevator Company (Iran: 1982)
- The Gillette Company (Iran: 1983)
- The Gillette Company (Iran: 1987)

Overview

OPIC was confronted with a significant number of claims arising out of the Iranian revolution of 1979. These claims related to inconvertibility, political violence and outright expropriation. The underlying events leading to the OPIC claims must be viewed against the background of the larger historical situation in Iran.

Due to its petroleum wealth, modern day Iran played an important role in global geopolitical considerations since the Second World War. During the Second

World War, Western Iran was occupied by United Kingdom and Soviet troops to prevent a Iranian alliance with National Socialist Germany in September 1941. At the end of the Second World War, Soviet troops briefly refused to leave the country, supporting friendly separatist Azerbaijani and Kurdish regimes. International pressure led to a withdrawal of Soviet troops in 1946, followed by the armed suppression of the Azerbaijani and Kurdish regimes by the Iranian national government.

Iran's energy policy again led to an international incident 1951. In 1951, the government of Iranian prime minister Mohammed Mossadeq nationalized the Anglo-Iranian Oil Company. The United Kingdom filed suit with the International Court of Justice with regard to this nationalization in May 1951. The suit was dismissed by the International Court of Justice for lack of jurisdiction in July 1952. The United States and the United Kindgom, suspecting links of the Mossadeq government to the Soviet Union, engineered a coup in 1953. The new government of Shah Mohammad Reza Pahlavi ruled Iran in an increasingly authoritarian manner. Thus, while the new government was able to bring about an economic boom fueled by its oil reserves, increasing governmental abuses led to domestic turmoil, culminating in near-revolutionary conditions by 1978. One touchstone of the revolution was police reaction to a student protest in Qumm protesting a recent state visit by US President Jimmy Carter to Iran and requesting that religious leader Ayatollah Khomenei, then in exile, be allowed to return to Iran on 9 January 1978. Police opened fire on student protesters, reportedly killing 70 students. Anti-government protests continued, combining students, religious groups, nationalists and socialists. These protests were met with deadly force by police. Moving from demonstrations, protests next turned to strikes to escalate political pressure. The continued combination of strikes and demonstrations eventually led to the collapse of the Shah's regime. The shah left Iran for medical treatment in mid-January 1979. Ayatollah Khomeini, returning to Iran from Paris, France, took the helm of the revolutionary movement in February 1979. On 12 February 1979, the prime minister of Iran fled the country, handing success to revolutionary forces.

With the Shah government removed from power, the question remained of how to govern. In the beginning days of the revolutionary government, turmoil, rather than order prevailed. One example of this turmoil is central to Iran-US relations to this day. A group of students on 4 November 1979 sacked the United States embassy in Tehran and held nearly 70 US embassy personnel hostage, of which 52 remained in captivity for more than 440 days. These actions were eventually ratified by Ayatollah Khomeini. On 7 April 1980, the United States broke diplomatic relations with Iran. To date, the United States does not have a diplomatic mission in Iran.

OPIC claims brought against Iran give some insight into the economic repercussions of the Iranian revolution. It provides only a partial picture, however. In order

to resolve the hostage crisis created by Iran's detention of United States embassy personnel and the subsequent freeze of Iranian assets in the United States, the United States and Iran formally signed a dispute resolution agreement on 19 January 1981 at Algiers to go alongside a general declaration resolving the hostage crisis. The Algiers declaration established the Iran-US Claims Tribunal. The claims tribunal hears claims by nationals of either the United States or Iran which arise out of debts, contracts, expropriations or other measures affecting property rights, certain official claims between the two governments relating to the purchase and sale of goods and services, and concerning the interpretation of the declarations, and claims between banking institutions of both countries. One thousand claims for amounts of US$250,000 or more, and 2,800 claims for amounts of less than $250,000 have been lodged with the Iran-US Claims Tribunal. The decisions of the Iran-US Claims Tribunal must be read side by side to the OPIC determinations to obtain a complete picture of the scope and impact of the Iranian revolution with regard to US foreign investment in that country.

One of the key issues common to many Iran-related determinations is the point in time at which revolutionary action could be attributed to the state. OPIC generally found that the acts of the revolutionary forces could be attributed to Iran at the time that the Shah fled Iran. Dresser, AG (Vaduz) (Iran: 1980). At that time, OPIC determined that Ayatollah Khomenei could exert actual control over Iran. OPIC further found that he condoned and encouraged the actions of revolutionary forces in Iran.

Expropriation claims in many instances involved actions not only by government forces directly, but also by revolutionary groups in the 1978 and 1979 period. Specifically, revolutionary groups had formed so-called worker's committees or councils. See Cabot International Capital Corp (Iran: 1980). These worker's councils assumed operational control over plants and facilities of US investors. See Cabot International Capital Corp (Iran: 1980). The worker's councils frequently shut out foreign management and did not allow the investor to assume any direction or control over the investment. In some cases, these actions forced foreign management to leave the country. See, for example, Otis Elevator Company (Iran: 1982).

In some instances, Iran denied the foreign investor its right to participate in shareholder meetings or elect members of the board. In those instances, OPIC held that the right to proper election of board members was a fundamental right and that its effective denial constituted an act of expropriation. See, for example, Foremost McKesson, Inc (Iran: 1981).

Other expropriation claims involved the abrogation of fundamental contractual rights to supply technology to companies in Iran. Dresser, AG (Vaduz) (Iran: 1980). Similarly, in some instances, government-controlled boards of Iranian companies refused to pay technical assistance fees for past rendered performance by the foreign investor. See Foremost-McKesson Inc (Iran: 1982).

Finally, in some instances Iran denied the right to transfer currency into US dollars. In some instances, Iran further would deny the investor the right to transfer local currency to the investor for transfer to OPIC. In those cases, OPIC generally treated the Iranian conduct as an expropriation rather than an inconvertibility claim. This change in perspective was required by the underlying insurance policies, which required transfer of inconvertible local currency to OPIC in order to present a valid claim. See, for example, Gillette Company (Iran: 1982), The Gillette Company (Iran: 1983). To the extent that the investor was able to obtain the local currency for transfer to OPIC, the claim was treated under the inconvertibility coverage. Gillette Company (Iran: 1980). The difference between treatment of a claim pursuant to inconvertibility or expropriation coverages could have had significant implications depending on the protections granted the investors pursuant to the underlying contract.

OPIC is not the only forum in which claims by US investors relating to the 1979 revolution were, and continue to be, addressed. The main forum for these claims is the US-Iran Claims Tribunal. The significance and history of that body is discussed for example in Zachary Douglas, The Hybrid Foundations of Investment Treaty Arbitration, (2003) 74 British YB Intl L 152. A longer treatment can be found in George H. Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal: An Analysis of the Decisions of the Tribunal* (Oxford: OUP, 1996).

Suggested additional reading

- Said Amir Arjomand, *The Turban for the Crown: The Islamic Revolution in Iran* (Oxford: OUP, 1989)
- George H. Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal: An Analysis of the Decisions of the Tribunal* (Oxford: OUP, 1996)
- Misagh Parsa, *States, Ideologies, and Social Revolutions: A Comparative Analysis of Iran, Nicaragua, and the Philippines* (Cambridge: CUP, 2000)

Sudan Inconvertibility Claims (1980s)

Cases covered

- Union Carbide Corp (Sudan: 1980(I))
- Union Carbide Corp (Sudan: 1980(II))
- Union Carbide Corp (Sudan: 1980 (III))
- Union Carbide Corp (Sudan: 1981)
- Equator Bank Limited (Sudan: 1982(I))
- Equator Bank Limited (Sudan: 1982(II))
- Equator Bank Limited (Sudan: 1983(I))
- Equator Bank Limited (Sudan: 1983(II))
- Union Carbide Corp (Sudan: 1983)

- Equator Bank (Sudan: 1984(I))
- Equator Bank (Sudan: 1984(II))
- Equator Bank (Sudan: 1985(I))
- Equator Bank (Sudan: 1985(II))
- Equator Bank Limited (Sudan: 1985(III))

Overview

OPIC was confronted with a significant number of claims regarding inconvertibility of Sudanese pounds in 1979 to 1985. These claims arose in the broader context of the impending second Sudanese Civil War, which started in 1983 and lasted until 2005.

The inconvertibility claims in Sudan played out against the broader political and economic developments in Sudan since its independence. Sudan historically is not a homogenous country, but is split into a Muslim, Arab north and a secular, predominantly ethnic African south. Sudan achieved independence in 1953 pursuant to an agreement between Egypt and the United Kingdom providing Sudan with self-government and the right to self-determination. A provisional constitution was drafted. This constitution did not address crucial federalism and secularism issues and political compromises on the issue of federalism and secularism were fast repudiated, leading to repeated civil wars in the country.

The first civil war in Sudan lasted from 1955 to 1972. It commenced as a mutiny of southern military officers. This mutiny fast spread into a larger civil war. During this civil war, General Ibrahim Abboud seized power in the north in 1958 and pursued a policy of Islamization for both north and south Sudan. The political equilibrium changed in 1969 when Colonel Gaafar Muhammad Nimeiri seized power on a communist platform. Shortly after coming to power, Nimeiri himself was almost toppled in a coup seemingly orchestrated by communist members of his government, leading to a purge by Nimeiri of communist sympathizers and a break with the Soviet Union. Several attempts of a rapprochement with southern Sudan were only partly successful, leading to the so-called Addis Ababa Agreement with southern rebels in 1972. Part of the agreement was greater financial independence for southern Sudan. This agreement lacked significant regional support and did not garner support amongst northern Sudanese leaders.

Nimeiri's government became increasingly pro-Western and concluded several bilateral agreements with Western nations. The Sudan during the mid to late 1970s became the second largest US aid recipient in the region.

The political landscape in Sudan was significantly altered in 1979 after an oil discovery by Chevron in southern Sudan. Northern leaders increasingly called for an abrogation of southern financial autonomy. In 1983, Nimeiri abolished this financial independence, introduced Arabic as the official language of the South and transferred control of military forces in the south to a central command.

This again led to a mutiny of Southern soldiers and a renewed civil war. At the time, financial conditions were grim, pressured both by a collapsing economy and war in the south. The civil war ultimately lasted until 2005.

OPIC claims stop around the period of a further coup in Sudan. In April 1985, Nimeiri's government was overthrown while Nimeiri himself was on a state visit in Washington, DC. The last OPIC claim determination related to 1 October 1985 obligations pursuant to a long-term loan.

OPIC claims relating to the Sudan were filed by two companies, Union Carbide Corporation and Equator Bank Limited. Union Carbide Sudan Limited was organized on 9 April 1974 to manufacture and sell dry cell batteries and to import and resell such batteries not produced locally. Equity investments were provided by Union Carbide Corporation ('UCC') and three private Sudanese investors. UCC executed an insurance contract with OPIC on 30 June 1975. Equator Bank Limited acted for a syndicate of lenders. The syndicate issued a loans in the aggregate amount of $9,500,000 to Sudan-Ren Chemicals and Fertilizer Limited ('Sudan-Ren') on 20 June 1978. The loans were insured by OPIC on 15 December1966. The loans were unconditionally guarantied by the Government of Sudan, meaning that upon failure of payment by Sudan-Ren the lenders could demand dollar payment of the unpaid amount.

The OPIC claims generally were premised on similar factual circumstances. The local company typically would make an application for transfer. The Bank of Sudan would normally approve the transfer request. However, the Bank of Sudan typically lacked requisite foreign currency to make foreign exchange available. On the basis of these facts, OPIC made determinations of passive blockage. These determinations effectively were based on the lack of foreign exchange in Sudan. See, for example, Union Carbide Corp (Sudan: 1980(I)), IIC 1085 (1980). In light of these economic conditions, OPIC in some instances waived waiting times for transfer to be made available as futile. See, for example, Equator Bank Limited (Sudan: 1982(I)), IIC 1137 (1982).

Suggested additional reading

- David Keen, 'Sudan: Conflict and Rationality' in F. Stewart and V. Fitzgerald (eds.), *War and Underdevelopment, Volume II: Country Experiences* (Oxford: OUP, 2001)

El Salvador Inconvertibility Claims

Cases covered

- Kimberly-Clark Corp (El Salvador: 1981)
- Kimberly-Clark Corp (El Salvador: 1982(I))

- Phelps Dodge Corp (El Salvador: 1982)
- Kimberly-Clark Corp (El Salvador: 1983(I))
- Kimberly-Clark Corp (El Salvador: 1983(II))
- Kimberly-Clark Corp (El Salvador: 1984)
- Kimberly-Clark Corp (El Salvador: 1985(I))
- Kimberly-Clark Corp (El Salvador: 1985(II))
- Kimberly-Clark Corp (El Salvador: 1985(III))
- Kimberly-Clark Corp (El Salvador: 1985(IV))
- Kimberly-Clark Corp (El Salvador: 1985(V))
- Kimberly-Clark Corp (El Salvador: 1985(VI))
- Kimberly-Clark Corp (El Salvador: 1985(VII))
- Phelps Dodge Corp (El Salvador: 1986)

Overview

OPIC faced several inconvertibility claims by investors in El Salvador in the period immediately past 1980. The OPIC claims evolved against a civil war that had erupted in early 1980 in El Salvador. The civil war lasted until 1992. The civil war pitted conservative and military forces on the one hand against reformist groups and guerilla militants, organized under the umbrella of the Farabundo Marti National Liberation Front (FMLN) on the other. The 1980 civil war was sparked by the assassination of Archbishop Romero on 24 March 1980.

The ensuing civil war is reported to have led to 75,000 casualties. The United States provided aid to the government of El Salvador during the conflict, with the outgoing Carter administration referring to the conflict as a textbook case of communist aggression. The political situation in El Salvador led to a significant shortage of foreign exchange. The United States later was involved in a case before the International Court of Justice regarding its support of Nicaraguan guerillas, known as the Contras, in Nicaragua. The United States argued that its actions were in support of El Salvador's efforts to quell an insurgency. The International Court of Justice concluded that the United States' actions were internationally wrongful. See *Case Concerning Military and Paramilitary Activities in and Against Nicaragua* (*Nicaragua v United States of America*), Merits, Judgment of 27 June 1986, 1986 ICJ Rep 14.

The main US investors in El Salvador making inconvertibility claims were Kimberly-Clark Corp and Phelps Dodge Corp. Kimberly-Clark Corp and its subsidiary Kimberly-Clark International SA owned securities in Kimberly-Clark de Centroamerica SA, a company incorporated in 1963. Phelps Dodge Corp was an equity investor in Conductores Electricos de Centro America SA. Claims raised by investors concerned dividends, and technical assistance fees. See Phelps Dodge Corp (El Salvador: 1982) (addressing dividends and technical assistance fees). OPIC determined that the main cause of the inconvertibility

issues common to all the claims lodged with it was a shortage of foreign exchange in El Salvador. Kimberly Clark Corp (El Salvador: 1981). The causes for this foreign exchange shortage are not further discussed in the OPIC determinations. It must, however, be understood in light of the broader historical context in which the El Salvador inconvertibility claims stand.

Suggested additional reading

- Robert Holden and Eric Zolov, *Latin America and the United States: A Documentary History*, 2nd edn (Oxford: OUP, 2010)

Philippines Inconvertibility and Political Violence Claims

Cases covered

- Armco-Marsteel Alloy Corp (Philippines: 1984(I))
- Armco-Marsteel Alloy Corp (Philippines: 1984(II))
- Armco Steel Corp (Philippines: 1984(I))
- Armco Steel Corp (Philippines: 1984(II))
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Overview

OPIC was confronted with a significant number of claims regarding inconvertibility of Philippine pesos in 1984 to 1986. These claims arose in the narrow context of a balance of payment crisis in the Philippines and the broader context of significant political upheaval in the Philippines at the time.

The claims arose in the context of broader political unrest in the Philippines. The 1982–1983 period presented a significant challenge to the Marcos regime in the Philippines. 1982 saw a significant economic downturn. This downturn was accompanied by major internal political protests which were met by significant government crackdowns. The political stakes increased again after the assassination of key opposition leader, Benigno Servillano 'Ninoy' Aquino Jr at the Manila airport on 21 August 1983 upon his return to the Philippines from exile.

Economically, the Philippines fell into a balance of payment crisis in October 1983. The crisis was the result of extensive borrowing by the Philippines in the 1970s to finance industrial development. The Philippines had obtained loans from the World Bank and the Asian Development Bank amongst others for these development projects. But the Philippine economy did not grow at a sufficient rate to shoulder the increasing payment obligations under the loans. In October 1983, the Philippines was no longer able to make repayment on its loans. In response to this balance of payment crisis, the Government of the Philippines enacted a moratorium on foreign debt transfers on 17 October 1983. The Moratorium was extended on 10 January 1984.

OPIC claims relating to the Philippines were filed by six companies, Armco-Marsteel Alloy Corp, General Foods Corp, Kimberly-Clark Corp, Philippine Geothermal, Inc, Universal Foods Export Corp, and JP Morgan Overseas Capital Corp. The two most important investments were made by Armco and KCC. Armco-Marsteel Alloy Corp, a Philippine subsidiary of Armco Inc, entered a Loan Agreement with Chase Manhattan Bank in which Armco-Marsteel was obligated to pay US$800,000.00 semi-annual installments. Armco guaranteed 37.5 percent of Armco-Marsteel's payments to Chase, Armco insured its investment with OPIC on 2 January 1980. Kimberly-Clark Corp held an 87 percent equity investment in Kimberly-Clark Philippines Inc, or KCP. KCP produced creped paper products in the Philippines. KCC and KCP on 3 November 1980, entered into a dollar denominated loan agreement in the amount of US$4,000,000.

OPIC claims premised on unrepatriated debt obligations were treated by OPIC as active blockages. See Kimberly-Clark Corp (Philippines: 1984(I)). OPIC claims premised on non-transferable royalty payments, dividends, and technical assistance fees were treated as passive blockage. See Armco Steel Corp (Philippines: 1984(I)); General Foods Corp (Philippines: 1984) (addressing dividend payments); Universal Foods Export Corp (Philippines: 1984) (addressing technical assistance fees). OPIC noted in both contexts that the repatriation limitations

had not been in place in the Philippines prior to the October 1983 moratorium. OPIC further confirmed its assessment that an active blockage had taken place on the basis of the Philippines statements that OPIC guarnteed loans constituted foreign government debt that was subject to Paris Club renegotiations. See Kimberly-Clark Corp (Philippines: 1985(III)).

The distinction between active and passive blockage claims is interesting in as much as the same foreign exchange shortage is relevant to in both situtations. But the moratorium was aimed on its face to preclude transfer of loan payments, not any payments. This may be a sufficient reason to distinguish between both situations in the particular cirumstances of the Philippine cases.

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- James K. Boyce, *The Philippines: The Political Economy of Growth and Impoverishment in the Marcos Era* (Honolulu: University of Hawaii Press, 1993)
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BOOK REVIEW

Reports of Overseas Private Investment Corporation Determinations

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Globalization, and its concomitant foreign direct investment (FDI), could not have succeeded to the extent that they did without the existence or framework for (a) analysing political risk in both the home and host countries engaged in FDI transactions, and (b) a system of insuring political risks at an affordable price, and mutually agreed and enforceable arbitration mechanisms for dispute resolution.

The cumulative positive effect of these phenomena is easily envisaged from the growth in FDI which increased from roughly US$50 billion per year during 1980-85 and currently stands at US$1.4 trillion per year. Another positive influence of their FDI flows has been increasing liberalization and harmonization in investment and lax regimes in various parts of the world and most notably among the developing countries and emerging economies of the world.

From the United States perspective, Overseas Private Insurance (OPIC) – a United States government agency – has played a critical role in expanding its outward FDI through insurance coverage for foreign expropriation-related risks. Their process has generated a large volume of cases and investment treaties.

These cases have been thoughtfully organized and analysed in *Reports of Overseas Private Investment Corporation Determinations*, edited by Mark Kantor, Michael D. Nolan and Karl P. Sauvant, which is the object of this review.

The two-volume report is an extremely important reference source, which contains a comprehensive cataloguing of 281 cases and 289 treaties. The strength of the compendium lies in the fact that for the first time, these cases provide access to the complete set of OPIC determinations. OPIC has the broadest set of political risk insurance (PRI) determinations by a public

institution in the world. It also has one of the oldest PRI programmes in the world.

These volumes provide important analysis through classification of contextual materials in the beginning of volume 1 where readers can understand how political risk issues are resolved from the insurance perspective and how the appreciation of political risk factors developed and was refined through different international crisis. In many instances, the insurance determinations addressed risks that were not otherwise captured by growing investment arbitration jurisprudence in anywhere near the same detail such as, for example, in the context of political violence and inconvertibility claims. Where similar risks are at issue, as is the case with expropriation claims, the decisions develop arguably different approaches in the PRI and investment treaty world (both with their own cohesive policy underpinnings) that are worthy of further examination. The data are easily accessed and expand on the basis of countries, corporations and types of disputes.

By making this primary material readily accessible for the first time, the editors have provided scholars and practitioners alike with tools to refine their own approaches to present day political risk issues such as the losses caused by the political violence in the Middle East and potential foreign exchange issues that could be created by the euro and the United States debt crisis.

From the perspective of this reviewer, I feel that the editors have missed a valuable opportunity to add three more steps to their analysis.

1. The current analysis is essentially classificatory in nature. Although, quite useful in its own right, it deprives the readers of the insights that the editors must have gained through their yeoman work in reviewing these materials.
2. The review focuses on the past, i.e., what has happened, but it does not look at what should have happened, but did not happen. For example, the editors could point out to some of the emerging areas of political (social) risks that could and should have been covered, or should not have been covered. For example, many syndicated loans from IFC and other multilateral organizations require that lenders comply with the Equator Principles and thereby certify whether

such loans – especially in infrastructure projects – would exclude environmentally unsustainable and potentially harmful projects.

3. The review could also use the editors' perspective as some of critical emerging issues of political risk where pre-emptive thought and action could save potential harm to the projects and to the funding and insuring organizations. For example, a significant number of projects in war-torn countries in Africa and other emerging economies that deal with extractive industries are facing extreme opposition from the indigenous people in the impacted region while the national governments have been highly supportive of these projects. These conflicts have resulted in frequent instances of violence, sabotage to the companies' facilities, and an overall increase of costs and thus lowering the potential for economic gain.

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Reports of Overseas Private Investment Corporation Determinations (Eds. M. Kantor, M.D. Nolan, K.P. Sauvant) - Book review

by P.M. Protopsaltis

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TDM is linked to **OGEMID**, the principal internet information & discussion forum in the area of oil, gas, energy, mining, infrastructure and investment disputes founded by Professor Thomas Wälde.

Kantor, M.; Nolan, M.D.; Sauvant, K.P. (eds), *Reports of Overseas Private Investment Corporation Determinations* (Oxford and New York : Oxford University Press, 2011), Vol. 1, lxi-1082p., Vol. 2, xxxii-1060p. (hardback).

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1. The late Prof Wälde once rightly claimed that "*une grande partie du droit international des investissements peut être vue comme principalement centrée sur la reduction de et l'aide à la gestion du risque politique*".[1] Foreign Direct Investment (FDI) protection and political risk insurance are in fact the two opposite sides of one coin. Nevertheless, so far scholars focused on treatment and protection and paid little attention to insurance.[2] Indeed, unlike the ever increasing bibliography on treatment and protection, only a limited number of studies on insurance have been conducted.[3] Yet, to those studying political risk insurance, this two-volume collection of determinations of the Overseas Private Investment Corporation (OPIC) the national investment guarantee scheme of the United States, offers valuable insight to political risk insurance operations. The collection contains 282 unpublished memoranda of determinations of the OPIC and of the United States Agency for International Development (USAID) its predecessor agency, dating from 1961 to 2007, and where applicable, the relevant awards of the American Arbitration Association (AAA). The collection is completed with an excellent introduction on political risk, an overview of the most important groups of claims submitted to USAID and OPIC and comprehensive tables of cases, legislation, treaties and other international instruments as well as an index on each volume.[4]

2. The USAID has been the first national political risk underwriter. It was established in 1961 to manage the U.S. guarantee program, originally created in 1948 to

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[1] Wälde, T.W., *Nouveaux horizons pour le droit international des investissements dans le contexte de la mondialisation de l'économie: Etudes de questions spécifiques*, Université Panthéon-Assas (Paris II), IHEI (Paris : Editions A. Pedone, 2004), pp. 36–37.

[2] Kantor, M.; Nolan, M.D.; Sauvant K.P. (ed.), *Reports of Overseas Private Investment Corporation Determinations* (Oxford and New York : Oxford University Press, 2011), Vol. 1, p. xxi.

[3] For a bibliography on political risk insurance and MIGA see Protopsaltis, P.M., «The Multilateral Investment Guarantee Agency», *in*: Wellens, K. (ed.) *Encyclopaedia of Intergovernmental Organizations*, (The Hague: Kluwer Law International, 2005), Suppl. 19, pp. 381-385.

[4] Perhaps the tables of cases, legislation, treaties and international instruments of Vol. 1 are of little use since they are included in the cumulative tables of Vols 1 and 2. Furthermore, the inclusion of page numbers on the List of Reported Cases for Volumes 1 and 2 would facilitate the task of the reader who currently has to look first for a case in the alphabetical list in order to find the relevant volume and then search on the list of contents of the relevant volume in order to find the exact page.

cover American investments in Europe in the context of the Marshal Plan and later modified to cover U.S. investments in developing countries. The OPIC succeeded the USAID in 1971. It is certain that USAID and OPIC served as models for most of the subsequently established public political risk insurance schemes. In fact, the American initiative was followed by Germany (1959), Norway (1964) and France (1967) while today more than 22 States have established national guarantee organisations that insure investments of their nationals in foreign countries against political risk.[5] In parallel, a number of regional schemes were introduced, beginning from the Inter-Arab Investment Guarantee Corporation established in 1974.[6] The Multilateral Investment Guarantee Agency (MIGA) whose creation was proposed in 1949 was finally established only in 1988.[7] In addition, the OPIC is today the major public political risk insurance underwriter. Although the international political risk insurance market is dominated by private insurers, namely the Lloyd's of London syndicates and a number of private insurance companies, OPIC holds the biggest share of the market in the hands of public national and international institutions.[8]

3. The OPIC, as previously the USAID, conducts its insurance operations in accordance with its establishing act under the terms defined in its guarantee contracts. The memoranda of determinations are internal documents established by USAID's and subsequently OPIC's officials that analyse the factual and the legal aspects of the insured investor's claims and recommend the recognition or rejection of the validity thereof as well as the amount of compensation payable according to the terms of the contract. The memoranda therefore provide valuable information on USAID and OPIC's operations and on political risk insurance operations in general, useful to

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[5] Schaufelberger, P., *La protection juridique des investissements internationaux dans les pays en développement: Etude de la garantie contre les risques de l'investissement et, en particulier, de l'Agence multilatérale de garantie des investissements (AMGI)*, (Zurich: Schultless Polygraphischer Verlag, 1993), pp. 157-164.

[6] Shihata, I.F.I., 'Arab Investment Guarantee Corporation: A Regional Investment Insurance Project', 6 *JWTL* (1972), pp. 185–202.

[7] Shihata, I.F.I., *MIGA and Foreign Investment: Origins, Operations, Policies and Basic Documents of the Multilateral Investment Guarantee Agency*, Dordrecht: Martinus Nijhoff Publishers, 1988, xvi–540p.; Schaufelberger, P., *op.cit.* (*supra*, note 4), pp. 281-513; Protopsaltis, P.M., "Multilateral Investment Guarantee Agency", *in*: Wouters, J. (ed.) *International Encyclopaedia of Laws: Intergovernmental Organizations*, (The Hague: Kluwer Law International), Part I, Suppl. 18 (March 2005); Part II Suppl. 19, (April 2005), 410p.

[8] Asian Development Bank, *Review of the Partial Risk Guarantee of the Asian Development Bank*, November 2000, p. 3; MIGA, *World Investment and Political Risk 2009*, *in*: <http://www.miga.org/documents/flagship09ebook.pdf>, p. 49; IEG World Bank, *The World Bank Group Guarantee Instruments 1990-2007: An Independent Evaluation*, *in*: <http://siteresources.worldbank.org/EXTGUARANTE/Resources/guarantees_eval_full.pdf>, p. 32.

both scholars and practitioners. They may, in particular, allow the analysis of the evolution of OPIC's concepts on political risk and provide guidance to other political risk underwriters and to subscribers to political risk insurance as well as to negotiators of investment agreements and arbitral tribunals.

4. We cannot possibly analyse OPIC's policy on political risk insurance in the context of a book review. Besides, a number of scholars have previously undertaken this task with success[9] and the new collection will certainly prompt further research. Furthermore, it would be rather premature to draw any conclusions on the influence of the memoranda outside OPIC's operations. We will therefore be restricted to some general observations.

5. The OPIC insures investments of U.S. nationals in some 150 foreign countries against the following main risks: "*(A) inability to convert into United States dollars other currencies, or credits in such currencies, received as earnings or profits from the approved project, as repayment or return of the investment therein, in whole or in part, or as compensation for the sale or disposition of all or any part thereof; (B) loss of investment, in whole or in part, in the approved project due to expropriation or confiscation by action of a foreign government or any political subdivision thereof; (C) loss due to war, revolution, insurrection, or civil strife; and (D) loss due to business interruption caused by any of the risks set forth in subparagraphs (A), (B), and (C)* ".[10] However, inconvertibility coverage does not protect against devaluation of a country's currency.[11] In addition, OPIC offers stand alone terrorism insurance and has developed special insurance products combining the aforementioned coverages to meet the needs of particular business sectors.[12]

6. From the statistical point of view, out of a total of 334 claims submitted to USAID and to OPIC from 1966 to 2009, 298 were settled while 36 were denied, 14 of which were submitted to arbitration. Of those settled, 176 claims were presented for inconvertibility, 68 for expropriation and 58 for political violence, 15 of which for war damages. Yet the different types of claims are unequally distributed over time. There

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[9] See for example, Koven, V.R., "Expropriation and the 'Jurisprudence' of OPIC", 22 *Harv.Int'l L.J.* (1981), pp. 269-327; Zylberglait, P.M., "OPIC's Investment Insurance: The Platypus of Governmental Programs and its Jurisprudence", 25 *Law & Pol. Int'l Bus.* (1993), pp. 359-389.

[10] 22 USC Sec. 2194, 01/07/2011; see also OPIC Handbook, *in*: <http://www.opic.gov /sites/default/files/docs/OPIC_Handbook.pdf>, 48p.; Comeaux, P. E.; Kinsella, S.N., *Protection Foreign Investment under International Law : Legal Aspects of Political Risk* (New York: Oceana Publications 1997), pp. 154-163.

[11] OPIC Handbook, *loc.cit.* (*supra*, note 10), p. 18; *Cf.* Kantor, M.; Nolan, M.D.; Sauvant K.P. (ed.), *op.cit.* (*supra*, note 2), Vol. 1, p. xxii.

[12] OPIC Handbook, *loc.cit.* (*supra*, note 10), pp. 20-27.

are practically no inconvertibility claims after 1993 while expropriation and political violence, including war claims, are of constant frequency.[13] From the legal point of view, it is however certain that more important are not the straightforward cases where the USAID and the OPIC's officials recognised the validity of the claims of the investors insured but rather those where such claims were denied as well as the corresponding AAA arbitral awards ruling on OPIC's liability.[14] A number of such claims relate to the scope of coverage against particular risks. Interestingly enough, no claim for inconvertibility was ever denied. Yet the same does not apply for expropriation and political violence claims.

7. Among expropriation claims denied by the OPIC, two are of particular interest for they refer to the effects of maintenance and loss, respectively, of effective control of the investor insured over the operation of the project. The Anaconda Company case (Chile: 1977) involved a copper mining investment in Chile expropriated by President Allende's government on July 1971. OPIC rejected Anaconda's expropriation claim on the grounds that its investment was already expropriated in 1969, when it was only under standby coverage.[15] In fact, on May 1969 President Frei in response to mounting political criticism and to the increase of the price of copper agreed with Anaconda officials the transfer of Anaconda's properties in two mixed mining companies jointly owned by Anaconda and Codelco, an autonomous government corporation, as well as the future gradual sale of Anaconda's participation to Codelco, leaving Anaconda in charge of mining, construction and sales operations, an arrangement latter described as a 'nationalisation by agreement'. The AAA tribunal focused on "*the extent of Anaconda's continuing control over the mining enterprises and the carrying out of the Projects*" to hold that the "*complex set of contracts including by-laws of the mixed mining company, sales contracts and advisory contracts ... were designed to give Codelco the appearance or 'façade' of predominance but Anaconda most of the substance of control*".[16] In particular, "[o]*n the evidence it is clear that from the end of 1969 to 1971 Anaconda retained de facto control in the sense that operations continued to be carried on in the same way as before, by the*

[13] OPIC, *Insurance Claims Experience to date: OPIC and its Predecessor Agency*, September 30, 2009, *in*: <http://www.opic.gov/sites/default/files/docs/2009_claims_history_report.PDF>.

[14] All insurance contracts issued by USAID and OPIC provide for the settlement of disputes between the investor insured and the OPIC by arbitration under AAA rules [see 4 *Political Risk Insurance Newsletter* (2008), Issue 2, pp. 6-7].

[15] Public Information File, The Anaconda Company (Chile), *in*: Kantor, M.; Nolan, M.D.; Sauvant K.P. (ed.), *op.cit.* (*supra*, note 2), Vol.1, pp. 354-356.

[16] Anaconda Company and Chile Copper Company v. OPIC (AAA, Case No. 16 10 0071 72), Opinion of July 17, 1975, par. 14.

same personnel ... as before, through substantially the same practical chain of command as before, and pursuant to the same plans as before... Taken together, Codelco's powers amounted to de jure control of a short on a policy level and, had it chose to exercise those powers, it might have at least stalemated the situation in the mines. However, it did not do so and ... did not even attempt to do so. ... Anaconda continued to have an interest in the mines' production and the resulting earnings, constituting a type of insurable interest therein. Thus we conclude that Anaconda retained such a connection with the subject matter of the guaranty as to entitle it to continued coverage".[17]

8. The Revere Copper and Brass case (Jamaica: 1978) involved an agreement between RJA, a subsidiary of Revere Copper, and the Jamaican government for an aluminium production project in Jamaica. In 1974, the Jamaican government, despite the stabilization clause in the agreement, imposed a levy on all existing mining contracts including the one with RJA. After the deterioration of the aluminium market and the refusal of the Jamaican government to purchase the project, RJA suspended operations and Revere filed a claim to OPIC for loss due to indirect expropriation. OPIC rejected Revere's claim on the grounds that Jamaica had neither taken nor deprived Revere of its control over the investment and that the project had failed for commercial reasons.[18] The AAA Tribunal, in a much criticised decision,[19] ruled, among others, that "[a]*lthough the agreement did not by itself grant rights to mine, it did contain important commitments of the Government to provide adequate reserves of 'commercial bauxite' ... Although specific revocation of the mining lease has not taken place, the Agreement that gave content and economic meaning to the right to operate under it has been repudiated ... the effects of the Jamaican Government's actions in repudiating its long term commitments to RJA have substantially the same impact on effective control over use and operation as if the properties were themselves conceded by a concession contract that was repudiated ... OPIC argues that RJA still has all the rights and property that it had before the events of 1974 ... This may be true in a formal sense but ... we do not regard RJA's 'control' of the use and*

[17] *Ibid.*, par. 28.

[18] OPIC, Office of the General Counsel, Revere arbitration, *in*: Kantor, M.; Nolan, M.D.; Sauvant K.P. (ed.), *op.cit.* (*supra*, note 2), Vol. 1, pp. 741-744.

[19] For example see Sornarajah, M. *The International Law on Foreign Investment* (Cambridge, Cambridge University Press, 2004), pp. 378-380, 423; OECD, *'Indirect Expropriation' and the 'Right to Regulate' in International Investment Law*, OECD Working Papers on International Investment, Working Paper 2004/4, September 2004, pp. 13-14.

operation of its properties as any longer 'effective' in view of the destruction by Government actions of its contract rights".[20]

9. The Beckman Instruments case (El Salvador: 1982) relates to the scope of coverage against political violence. The case involved a project of construction and operation of a facility to manufacture electronics in El Salvador. After the kidnapping of one of its engineers, a U.S. citizen, in 1979 by members allegedly representing a terrorist group and in view of the increasing political violence, Beckman decided that it was dangerous for U.S. personnel to be sent to El Salvador to train the local production workers. Beckman therefore resolved to discontinue operation of a certain production line and lay off a group of employees. The employees solicited the assistance of 'Fenestras', a labor union allegedly related to a guerrilla organisation. Following threats of the employees and a Fenestras member, the plant manager returned to the U.S. and Beckman decided to close the plant permanently. Beckman's attempts to retrieve equipment failed as armed Fenestras organizers and factory employees had previously placed the plant under surveillance. Subsequently, a group of employees which formed a workers' cooperative (EMI-17) agreed with Beckman to reopen the plant and resume limited production while Beckman would purchase the product. However, at the end of 1980 as a result of the deterioration of the electronics market, Beckman asked for the reduction of the originally set production rates. The cooperative laid off half of the employees, the quality of the product thereafter deteriorated and Beckman repudiated the agreement and filed a claim to OPIC for loss due to political violence. OPIC rejected the claim on the grounds that the group responsible for the injury to Beckman was not a revolutionary or insurgent force and that the acts which resulted to the injury were not undertaken for the purpose of overthrowing the existing political regime in the host country by violence.[21] The AAA Tribunal found that "*the kidnapping was committed by the PRTC, a radical group seeking to overthrow the government of El Salvador*", rejecting OPIC's contrary hypothesis as "*based on speculation, not evidence*". In addition, it ruled that the loss was caused by the kidnapping and that, therefore, met the conditions of coverage of the OPIC policy. Interestingly enough, the Tribunal held that "*the loss would not have occurred if the kidnapping had not transpired and that the kidnapping set in motion a*

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[20] Revere Copper and Brass, Incorporated v. OPIC (AAA, Case No. 16 10 0137 76), Award of August 24,1978, *in*: Kantor, M.; Nolan, M.D.; Sauvant K.P. (ed.), *op.cit.* (*supra*, note 2), Vol. 1, p. 766.

[21] Memorandum of Determinations, Claim of Beckman Instruments, Inc., War/Revolution/Insurrection – Contracts of Insurance Nos. 9652 and 9653, *in*: Kantor, M.; Nolan, M.D.; Sauvant K.P. (ed.), *op.cit.* (*supra*, note 2), Vol. 2, pp. 103-112.

sequence of events which led to the loss – i.e.; as a result of the kidnapping Beckman decided not to send any Americans to the plant; this meant that the resistor line could no longer be operated; rumours of layoffs and worse provoked ... ultimately the loss after the plant closed following the failure of the E-17 program. No intervening event broke this chain".[22]

10. Finally, a number of cases relating to conditions of coverage are of particular interest to political risk insurance subscribers. The International Telephone & Telegraph Corporation case (Chile: 1975) for example, relates, amongst others, to the duty of disclosure of material information. The case involved ITT investments in Chiletelco made for the purpose of modernising and expanding the telephone system operated by Chiltelco in Chile. In May 1971, ITT's officials met with President Allende to discuss his intention to nationalise the company and the potential compensation. Yet the Chilean government discontinued negotiations after ITT's political contributions and efforts to influence the U.S. policy in order to prevent Dr Allende's election were made public and subsequently cancelled the concession and nationalised Chiletelco's assets. OPIC rejected ITT's claim for expropriation for failure to comply with its obligations under the terms of the insurance policy, amongst others, to disclose material information.[23] The AAA Tribunal, however, found that "[t]*he ... contract of guarantee contain no express provision which forbids an Investor (a) to seek in the United States, U.S. Government action in or toward a host country in support of the Investor's interests, or (b) to engage in any political activity designed to protect the Investor's property within the host country. It would have been natural, if any such prohibition by the contracts had been intended, to include it in explicit terms*".[24] In addition, it held that the provisions of OPIC's guarantee contracts which bear on the duty of disclosure "*imposed on ITTSA no duty to disclose to OPIC the 1970 activities ... Absent such a duty, there is no breach of any one of the contracts by non-disclosure*".[25]

11. It is too early to draw any conclusions on the wider influence of OPIC's memoranda. The introduction to the collection observes that "*OPIC claims determinations*

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[22] Beckman Instruments, Inc. v. OPIC (AAA, Case No. 16 199 0029 87G), Award of February 26, 1988, *in*: Kantor, M.; Nolan, M.D.; Sauvant K.P. (ed.), *op.cit.* (*supra*, note 2), Vol. 2, p. 117.

[23] Expropriation, International Telephone & Telegraph Corporation, S.A. Chile – Narrative Summary, *in* : Kantor, M.; Nolan, M.D.; Sauvant K.P. (ed.), *op.cit.* (*supra*, note 2), Vol. 1, pp. 289-290.

[24] International Telephone & Telegraph Corporation, Sud America (ITTSA) v. OPIC (AAA, Case No. 16 10 0033 73), Award of November 4, 1974, par. 54.

[25] *Ibid.*, pars 73-76.

have begun to influence political risk determinations outside the insurance field proper".[26] However, in the Enron case, an ICSID Tribunal rejected the relevance of an OPIC's memorandum of determinations concluding that expropriation in violation of international law had taken place, invoked by the claimants in support of their expropriation argument. OPIC held that although the Argentinean Public Emergency and Exchange Reform Act which pecified dollar-nominated obligations had no impact over the assets of TGS, "*the revenue stream of TGS has been reduced so drastically as a result of the provisions of the Emergency Law that it resulted in the total write off of the investment under the equity method of accounting*". Thus, "*Ponderosa has been deprived of fundamental rights in the insured investment*". [27] The Tribunal held that the OPIC's memorandum "*responds to a different kind of procedure and context and cannot influence or be taken into account in this arbitration*".[28] Moreover, unlike OPIC, the Tribunal ruled that Argentina's conduct did not constitute an expropriation since the "*Claimants' interests ... have been freely sold*".[29] It held instead, amongst others, that Argentina breached the fair and equitable treatment standard since "*the 'stable legal framework' that induced the investment is no longer in place and that a definitive framework has not been made available for almost five years*"[30] as well as its obligations towards the investor.[31] In the Generation Ukraine case, the claimant invoked before an ICSID Tribunal the issuance of an insurance policy by the OPIC as "*incontrovertible evidence of a valid and authentic investment into Ukraine by a US citizen or US legal entity*".[32] Yet the argument had no influence on the Tribunal's decision. In relation to the claimant's expenditures though, the Tribunal sought to rely on records that the claimant was obliged to keep and on proofs of the financial contribution that he was obliged to make by virtue of his OPIC insurance policy. Howev-

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[26] Kantor, M.; Nolan, M.D.; Sauvant K.P. (ed.), *op.cit.* (*supra*, note 2), Vol. 1, p. xxiii.

[27] Memorandum of Determinations, Expropriation Claim of Ponderosa Assets, L.P. Argentina – Contract of Insurance No. D733, *in*: Kantor, M.; Nolan, M.D.; Sauvant K.P. (ed.), *op.cit.* (*supra*, note 2), Vol. 2, p. 942. For a commentary see Becky, B., "The Ponderosa Claim: OPIC Concludes that Argentina Violated International Law", 2 *TDM* (2005), 13p.

[28] Enron Corporation and Ponderosa Assets L.P. v. The Argentine Republic (ICSID Case No. ARB/01/3), Award of May 22,2007, *in*: <http://italaw.com/documents/Enron-Award.pdf>, par. 235, 247.

[29] *Ibid.*, par. 246.

[30] *Ibid.*, par. 268.

[31] *Ibid.*, par. 277.

[32] Generation Ukraine Inc. v. Ukraine (ICSID Case No. ARB/00/99), Award of September 16, 2003, *in*: <www.asil.org/ilm/ukraine.pdf>, par. 6.7. (a).

er, the claimant failed to produce the relevant evidence leading the Tribunal to draw inferences from the non-production.[33]

12. Yet we cannot exclude a wider influence of OPIC's memoranda on political risk insurance operations and on international investment law. It is obvious that the memoranda, coming from the major political risk insurance underwriter may influence the practice of other political risk insurers thus contributing to the creation of a *lex mercatoria* in the field of political risk insurance. It is equally obvious that the memoranda, coming from a public U.S. agency express the official U.S. position on international law standards of FDI protection. All the more so, since OPIC has repeatedly relied on the American Law Institute's Restatements of the Foreign Relations Law of the United States[34] whose content articulates the prevailing views of U.S. scholars on international law. Yet, the compatibility between OPIC insurance standards and other U.S. treaty, especially BIT standards, as the introduction to the collection rightly observes, is a matter for further inquiry.[35] But, irrespective of such compatibility, OPIC's memoranda may constitute evidence of State practice and could therefore contribute to the reinforcement of the existing or the shaping of the future customary international investment law.

Panayotis M. Protopsaltis

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[33] *Ibid.*, pars 19.22-19.24.

[34] For a list of references to the Restatements in the memoranda see Cumulative Table of Legislation for Volumes 1 and 2 *in*: Kantor, M.; Nolan, M.D.; Sauvant K.P. (ed.), *op.cit.* (*supra*, note 2), Vol. 2, p. xxviii.

[35] Kantor, M.; Nolan, M.D.; Sauvant K.P. (ed.), *op.cit.* (*supra*, note 2), Vol. 1, p. xxiv.

Book review: *Reports of Overseas Private Investment Corporation Determinations*, edited by Mark Kantor, Michael D. Nolan, Karl P. Sauvant, Oxford University Press, Oxford/ New York, 2011, two volumes, 2142 pages, plus additional 93 pages of introduction and tables/lists, £425/$850.

This summer the Oxford University Press has just published a dense book, *Reports of Overseas Private Investment Corporation Determinations*.

The collection of these documents – issued in the last four decades – has been arranged by Mark Kantor, Michael D. Nolan and Karl P. Sauvant, editors who do not need any introduction. Particularly for the readers of this *Journal*, since the editors are reputed experts in the matter of foreign investment, being, respectively, (i) an international arbitrator, (ii) a counsel in a Washington law firm, and (iii) the director, at the Columbia University of New York, of the Vale Center on Sustainable International Investment and one of the most authoritative and prolific authors in this field.

Still, the argument they have now put forward in this book is quite original for most people. So, before any other consideration, this editorial effort deserves appreciation for filling a gap.

1. A Book about Investment Insurance, an Issue not yet Largely Explored

Some of the readers of these notes may be aware that Overseas Private Investment Corporation (OPIC) of Washington is the government entity entrusted with the insurance of the U.S. investment – placed overseas – against political risk.

Those among the readers not familiar with the issue of political risk insurance (PRI) related to foreign direct investment (FDI), have an unique opportunity, through the pages of this book, to acquire an exhaustive knowledge of investment insurance, examining the operations that a political risk insurer typically manages.

Furthermore, the small community of PRI connoisseurs will be pleased to appreciate such an interesting collection of materials, on the basis of the cases faced by the leading investment insurer, as seen through the lenses of its *interna corporis*.

The volumes report a huge number of OPIC's decisions on the claims filed by investors against the damages they suffered, because of the adverse political events occurred in the host countries. The Determinations illustrate the reasoning followed by

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OPIC's management in order to decide on the subsistence – or not – of the conditions set forth in the policy to legitimate the investors' indemnification.

The few connoisseurs of PRI will be excited at being confronted with the facts, now that the veil has been lifted from investment insurance files. Yet, it has never happened before that such files – nor those of other investment insurers – were publicly exhibited.

Nor are explained the elements that induced the present disclosure, against a tradition of strict confidentiality. After all, if the community of PRI connoisseurs is so restricted, it partially depends on the fact that investment insurance, being so close to diplomatic protection, has been kept confidential among the insiders.

It must also be recognized that the limited popularity of PRI – even among the experts of economic diplomacy – admittedly descends from its modest incidence in the context of international affairs, not to mention the field of private insurance, where it ranks among the esoteric specializations.

In quantitative terms, according to the figures reported in the volumes – I, page xxi – over the period considered (i.e., almost four decades), OPIC has covered investments amounting to $180 billion in aggregate. Such an amount grossly corresponds to half the U.S. FDI in a single year, always in light of the figures indicated in the volumes – I, page xvi, table 2, *source reported UNCTAD, World Investment Report*, 2009–.

Put it differently, OPIC has guaranteed just 1.5% (one point five percent) of the overall U.S. investment abroad. A proportion not surprising, even for the leading investment insurer, if one confronts said figure with the share of the global FDI covered by the multilateral investment insurer, World Bank's MIGA.

In its first two decades of activity (1988-2008), MIGA has issued coverage in aggregate for $20 billion (roughly, 1bn per year), compared to a global annual flow of FDI sized in the range between $1-2 trillion.

So, it is not extravagant that even the doctrine has dedicated limited attention to this intriguing, but fairly marginal topic.

Since the first milestone in this field, edited by Theodore Meron, *Investment Insurance in International Law, Oceana Publications, New York, 1976*, thirty five years have now passed, during which, no other books have concentrated on the topic, at least to my knowledge.

With the only, notable exception of the few reports made by Theodore Moran (in some editions joined by Gerald West) of the biannual Georgetown Washington Symposia, meetings of PRI experts convened around MIGA.

Therefore, neglected by doctrine and left in bare minority by practice, investment

insurance has navigated the international arena of the last half century as the Flying Dutchman.

2. The Reason for the Limited Interest in Investment Insurance

Actually, one might wonder at the reason of this modest result achieved by investment insurance. Allow me to make a guess: in the current age of Legal Absolutism (i.e. the submission of any relation to law and of any conflict to legal procedures), investment insurance has been a response too similar to diplomatic protection, which means characterized by mediation and political compromise.

A somewhat "opaque" negotiation, conducted in a multi-party environment, between private interests and State priorities, oscillating from public budget constraints, to foreign economic policy ambitions, from diplomacy/comity considerations, to the unpredictable ability of bureaucrats.

All such elements clash with the business quest for predictability, measurement, reliability, attribution of responsibilities.

This is why – at least in my opinion – investment insurance has been overwhelmed by transnational arbitration, a practice more in tune with present times and responding to modern needs of Legal Absolutism: effective, time saving and allocating the cost of the difference to the losing party.

When transnational relations have reached a temper at which differences on international trade are no longer settled through the old GATT consensus, but instead in the frame of the WTO legal procedures, even China – joining the WTO – has left aside its traditional attitude of making justice through negotiation and compromise, accepting its allegiance to legal norms and procedures.

Why should we be surprised therefore if the international business community has favored transnational arbitration?

This different orientation has been largely to the detriment of PRI; as an old song went some years ago "*Video Killed the Radio Star*" or, in other words, a more effective solution surpassed other practices, making them marginal.

The beginning of the new millennium has witnessed a boost in investment arbitration, essentially of ICSID type, while the figures of PRI are in the magnitude order indicated above.

3. The Book Structure

As said above, the book is organized as a collection of Determinations, ordered

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chronologically from 1966 to 2009. Well over 250 cases are illustrated analytically, focusing on expropriation, political violence and inconvertibility.

Inconvertibility, in particular, has been the most recurrent claim, accompanied by its sister occurrence, payments blockage. This could take either the form passive, or active. The passive form materializes when the host State delays its payment due, or its economic obligation, by apparent neglect. The active form consists of express administrative action, aimed at a true blockage by the host State.

The bare sequence of Determinations is interposed by some arbitration awards, each one inherent to the preceding case. Arbitrations were filed by investors – whose claims were dismissed by OPIC – thus challenging OPIC Determinations, in accordance with the policy provisions.

It is peculiar to see that in no case did the arbitral award reverse the conclusion reached by OPIC in the Determination challenged. Nor should one infer a subaltern attitude within the panels, because usually they have been composed by reputed names; in one circumstance – for challenging the rejection of the 1982 claim of *Beckman Instruments Inc. v. El Salvador*, volume II, page 113 – even Robert McNamara, Walter Mondale and David Birembaum served on the panel.

Every single Determination is introduced by a sort of "executive summary", where are illustrated the basics of the document that the reader is going to examine.

No doctrine, comments, or other "additives" are joined by editors: they are all pure, original documents.

4. A BOOK DESTINED FOR WHOM: LAWYERS? DIPLOMATS? HISTORIANS? INVESTMENT INSURERS?

What should this book stand for? Beyond the mere euphoria for a long-wished discovery, typical of researchers, the editors' intention appears to be providing practitioners with a sort of "enemy's intelligence".

In other words, how the categories of doctrine and jurisprudence are applied to the secret, unintelligible – so far – decisions taken by an investment insurer.

(i). In fact, as in any other study of legal nature, the reading of the volumes should assist legal practitioners in handling prospective, similar cases.

The arguments elaborated and the evaluations formulated in those documents essentially concern the above cited categories: expropriation, political violence, inconvertibility.

Thus, beyond the restricted fence of investment insurance, considering that said categories apply also in the general regime governing FDI, and are provided by Bilateral

and Multilateral Investment Treaties, the content of the book will be most appreciated by arbitrators and counsels, active in the field of transnational arbitration on FDI.

In addition to that, as in most issues of international affairs, probably the use of this book could encompass all the four categories indicated in the title of this paragraph.

(ii). Diplomats should be interested in the Determinations, because the cases treated there deal with most of the crises occurred in the economic diplomacy of the last half century. For instance, in the Determination on Iran – volume II, page 48, *Intercontinental Hotels Corporation v. Iran, 1981* – the issues of expropriation and of state responsibility have been assessed by OPIC in the same manner as by the awards of the U.S. – Iran Arbitral Tribunal, created by the Algiers Accords of 1979.

(iii). Historians may see in these pages the liaison between the macro-events, they usually analyze, and the concrete response given to some specific, critical occurrences. One could read between the lines some consistency of OPIC's position vis-à-vis certain claims with the general attitude of the U.S. government toward some political occurrences abroad.

The rejection of claims relative to events as materialized in El Salvador – the case concerning *Beckman Instruments Inc., 1982*, mentioned above – or in Georgia – a case concerning *Belfinance Haussmann LLC, 2004*, volume II, page 955 – can be connected to a sort of political bad favour that the crises, which occurred in those countries, received in the Washington public opinion.

By contrast, political events that encountered a more respondent public opinion in the U.S., such as the Iran revolution, or the Argentina economic crisis, led to more benign treatment by OPIC, when processing the concerned claims.

Such linkages are not suggested by the editors who, as noted, made the choice of not embarking in a systematization of the materials produced, leaving to the reader or – as in this circumstance – to commentators, space to formulate connections and speculations.

(iv). Other users, who can likely welcome the publication of this book, are the more recent investment insurers, i.e. those belonging to the Export Credit Agencies (ECAs) of the advancing economies.

Such investment insurers could profit from OPIC's wisdom, as accrued and decanted through the several precedents reported in the book.

Among the several such PRI, one would primarily think of Sinosure – China's ECA – as the natural, prospective successor of OPIC, in the role of future key investment insurer. Also Brazil's SBCE should be regarded with interest, as Brazil is looking more and more at overseas investment as a means to consolidate its present economic growth.

Times are now mature in the global economy for seeing a Chinese ECA ranking

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among the world's top PRI, as it has been the case for other financial instrumentalities originating from that country, such as banks and insurances. In fact, at present, Chinese FDI is significant and the political risk – payments blockage, for instance – to which it is exposed might render PRI a sensitive tool for both its industrial and financial establishments abroad, even in countries traditionally considered reliable and low risky.

Huge external debt may create, in the host countries, the premises for adverse behaviours vis-à-vis foreign investment.

However, it is not yet foreseeable which role China is going to assign to the support of its FDI, through insurance coverage.

Or take the example of Brazil's SBCE, one of the ECAs affiliated to the Prague Club, an association linked to the Berne Union, which represents the primary market of ECAs, emanating from advanced economies.

Traditional observers of PRI practice may get some surprise from the forthcoming activity of such investment insurers.

Perhaps this book will bring a contribution in this respect, playing as the acid test to discover new attitudes in the ECA market. This might reveal one of the latent intentions that editors could have cultivated, when conceiving this work.

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(*) At the time when these lines were drafted, regretfully Ambassador Boris Biancheri, President of Ispi – Istituto di Studi Politici Internazionali, Milan – passed away. Let this note be dedicated to the memory of an exquisite gentleman, intellectual and writer, mentor of Italian diplomacy and an invaluable friend.

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Learning from Experience: An Interview with Three Experts

Reports of Overseas Private Investment Corporation Determinations, *is a forthcoming publication of Oxford University Press (www.oup.com/us/law), edited by three distinguished international legal experts: international arbitrator* ***Mark Kantor; Michael Nolan,*** *a partner at Milbank Tweed, Hadley & McCloy LLP and adjunct professor at Georgetown University Law Center; and* ***Karl P. Sauvant,*** *Executive Director of the Vale Columbia Center on Sustainable International Investment. Our interview with the editors, conducted by Mariano Gomezperalta and Felton (Mac) Johnston, explored the implications of this major work and other areas germane to international investment and political risk insurance.*

Mac Johnston: *OPIC's claims determinations are a rich store of information about political risk insurance (PRI) claims and losses and OPIC's policy interpretations, but your book obviously had a purpose beyond just putting these things together. Tell us a little bit about what makes the book particularly helpful and to whom and why.*

Mark Kantor: In the collection we have about 260 claims determinations and about 15 arbitration awards. OPIC does not put on their website the entirety of what they have done. In addition to providing the full set of claims determinations and the full set of publicly available arbitration awards, Michael's team has done a lot more than that. If you look at a determination in the collection, you will not only get the full text of the determination, but you'll get a headnote that will cross-reference by identity

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Arbitrator Comportment and Foreign Investment Claims

William W. Park *is a Professor of Law at Boston University, President of the London Court of International Arbitration and General Editor of* Arbitration International. *This article is adapted from Arbitrator Integrity, 46* San Diego Law Rev. *629 (2009).*

The Evolving Context: A Paradigm Shift to Treaty-Based Arbitration

Arbitration of investor-state disputes provides an external adjudicatory discipline to a country's treatment of foreign investment, thereby enhancing rule of law for cross-border economic cooperation. In its early days, such arbitration was largely a matter of contract, with concession agreements serving as the foundation for arbitral authority to hear complaints about *de jure* or *de facto* expropriation. During the past few decades, however, investors have come to rely on bilateral and multilateral treaties to exercise a direct right of action against the host state, exercisable as the occasion arises for claims related not only to asset confiscation, but also to discrimination and other forms of inequitable treatment.

The paradigm shift from private contract to public treaty has meant heightened attention to arbitrator impartiality and independence. Some authors have characterized investor-state arbitration as "The Businessman's Court," with the suggestion that systemic incentives for reappointment push arbitrators to favor claimants. Neither evidence nor logic, however, supports the existence of pro-investor bias.

Indeed, the very notion of such bias remains counterintuitive. Reputations tarnished by deviation from duty do not bring reappointment when both host state and investor have a role in the process, which has always been the case. Rumors of prejudice decrease rather than enhance the credibility of professional decision-makers. Although teenage boys may hope to attract adolescent girls by showing themselves dangerous and daring, no similar rule works for judges or arbitrators. Any arbitrator incentives that may in fact operate for large international cases work principally to promote the exercise of honest and independent judgment.

Nevertheless, all stakeholders in the arbitral process have an interest in monitoring and refining standards for acceptable arbitrator behavior. Integrity is to arbitration what location is to the price of real estate: without it, other things do not matter all that much.

As in other areas of law, the devil remains in the detail. Concrete standards rather than diffuse rhetoric must be applied to establish guidelines for arbitrator comportment. In this context one might turn to the basic treaty provisions creating the framework for challenging arbitrators deciding investor-state disputes.

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Arbitrator Comportment and Foreign Investment Claims (cont'd.)

The Basic Texts: ICSID and UNCITRAL

Challenges to arbitrators in investor-state disputes would normally be brought under either the ICSID or the UNCITRAL régimes, the two principal avenues for arbitration established through bilateral investment treaties and free trade agreements. Under the former, arbitration is administered by a World Bank affiliate, the International Centre for Settlement of Investment Disputes, and conducted pursuant to the Convention on Settlement of Investment Disputes between States and Nationals of Other States. The latter involves ad hoc proceedings under rules adopted by the United Nations Commission on International Trade Law.

> Neither evidence nor logic.....supports the existence of pro-investor bias.

Although these systems share some common elements, their treatment of challenges diverges with respect to two key elements: the person who decides whether the challenge is justified, and the possibility of judicial review. On both matters UNCITRAL arbitration falls toward the commercial arbitration model, whereas ICSID arbitration follows an ad hoc internal control mechanism.

For ICSID arbitration, the touchstone is Article 14 of the ICSID Convention, which speaks of the individual's ability to "exercise independent judgment." This requirement is supplemented by a certification of independence made by the arbitrator at the beginning of the proceedings. A party to the arbitration may propose disqualification of an arbitrator on account of any fact indicating a "manifest" inability to meet that standard.

When a dissatisfied litigant contests an arbitrator's fitness in an ICSID proceeding, the remaining arbitrators normally determine whether the individual lacks the capacity to exercise independent judgment. Any review of the resulting award would be made by an ICSID-appointed panel on limited treaty-based grounds, set forth in Article 52, rather than national judges who might conduct their own review of independence and impartiality. By contrast, outside ICSID, challenges to arbitrators in commercial arbitrations would initially be heard by the relevant supervisory institution and then again come before whatever national court is charged with considering motions to review awards.

Challenge under the UNCITRAL Rules differs in procedural mechanics, notwithstanding a basic similarity in the standards themselves. Article 10 provides for challenge if circumstances give rise to "justifiable doubts" about the arbitrator's impartiality or independence. Unless the other side agrees or the arbitrator withdraws voluntarily, the challenge decision will be made by the appropriate "appointing authority" that constituted (or would otherwise have constituted) the tribunal itself. In UNCITRAL arbitration, as in ordinary commercial cases, the ultimate validity of any appointing authority decision will be subject to review by national courts under the appropriate arbitration statute and/or within the framework of the New York Convention.

In some cases challenge of an arbitrator may take place under a hybrid process applying the ICSID Additional Facility Rules, available either when the host state is not a party to the ICSID Convention or when an investor is not a national of a party to that Convention. In such instances, the arbitration will be supervised by ICSID, under procedures similar to those of regular ICSID cases, but *outside* the framework of the ICSID Convention. The rule for challenge remains the ability to "exercise independent judgment", and the decision will normally be made by the challenged arbitrator's remaining colleagues. However, in vacating an award national courts might also have their say on the matter pursuant to their own standards of arbitrator fitness.

Filling the Gaps: Soft Law Standards

Evaluating arbitrator comportment would be a very difficult job indeed if investor-state cases were isolated from lessons learned in other varieties of arbitration. Notions such as independent judgment, or justifiable doubts as to impartiality, must be given meaning in the context of specific fact patterns shared with analogous cases resolved under commercial and financial arbitration regimes.

In any such comparisons, care must be taken in identifying distinctions as well as common ground. For example, the International Chamber of Commerce arbitration rules speak of arbitrator independence, but not impartiality. By contrast, impartiality as well as independence has been explicitly addressed in the Code of Ethics promulgated jointly by the American Arbitration Association and American Bar Association (AAA/ABA), as well as in the Guidelines on Conflicts of Interest drafted by the International Bar Association (IBA Guidelines) and the arbitration rules of the London Court of International Arbitration (LCIA). Some national legal systems speak directly about arbitrator bias and partiality as a ground for award annulment, while others subsume prejudice under the general rubric of "public policy" violation. Certain rules provide for challenge on the basis of actual bias, while other systems sanction the appearance of impropriety. Most standards require disclosure of circumstances that may cause doubts as to an arbitrator's ability to serve impartially and independently during a proceeding, whether by reference to "justifiable" doubts or circumstances which would cause doubt "in the eyes of the parties."

Many rules include a nationality requirement as a surrogate for impartiality. When litigants are of different nationalities, the LCIA Rules and the ICSID Convention generally provide that an arbitrator may not have the same nationality as either party. Conversely, the UNCITRAL Model Law provides that "no person shall be precluded by

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Arbitrator Comportment and Foreign Investment Claims (cont'd.)

reason of his nationality from acting as an arbitrator," unless the parties agree otherwise.

The vitality of nationality-based rules has recently been put into question by a June 2010 decision of the English Court of Appeal in the case of *Jivraj v. Hashwani*, on appeal as of the date of this writing. Finding that arbitrators were to be considered employees under the provisions of European anti-discrimination rules, the Court went on to invalidate an agreement between two businessmen, both members of the Ismaili branch of Islam, which called for an all-Ismaili arbitral tribunal. According to some observers, the logic of invalidating religious qualifications in arbitration, even when accepted by all parties, will ultimately extend to nationality-based standards.

Increasingly, conflicts of interest implicate non-governmental instruments such as the professional standards issued by the IBA or the AAA, supplemented by the writings of scholars and practitioners setting forth what might be termed the "lore" of international arbitral procedure. When properly applied, such standards fill lacunae left by national statutes and international treaties, thereby enhancing certainty. Professional guidelines provide an alternative to *ad hoc* rulemaking by scholars who with facile eloquence articulate general legal principles that constitute little more than a fig leaf to cover personal preferences. Crafted with intelligence, professional guidelines present a better guide to the parties' shared *ex ante* expectations than the unbridled discretion of clever arbitrators pursuing their own agendas.

> Any arbitrator incentives that may in fact operate for large international cases work principally to promote the exercise of honest and independent judgment.

Most often, professional guidelines get pressed into service to fill the gaps left by overly vague institutional rules or lack of foresight by the parties' advisers. Perhaps the most oft-cited of these standards are the ones propounded by the IBA. Rightly or wrongly, the IBA Guideline's lists of permissible and impermissible relationships have entered the canon of sacred documents cited when an arbitrator's independence is contested.

The general standards contain both objective and subjective elements. According to the IBA Guidelines, arbitrators should decline appointment if they doubt about their ability to be impartial or independent or if justifiable doubts exist from a reasonable third person's perspective. With respect to disclosure, the Guidelines require communication of facts or circumstances that may "in the eyes of the parties" give rise to doubts about impartiality or independence. Any potential conflict must be evaluated according to a "justifiable doubts" standard. In turn, doubts will be justifiable if a reasonable and informed third party would conclude that the arbitrator would likely be influenced by factors other than the merits of the case as presented by the parties.

One of the most useful (albeit controversial) features of the IBA Guidelines lies in its enumeration of illustrative elements that create varied levels of arbitrator disclosure. A "Red List" describes situations that give rise to justifiable doubts about an arbitrator's impartiality. Some are non-waivable (such as a financial interest in the outcome of the case), while others (such as a relationship with counsel) may be ignored by mutual consent. An "Orange List" covers scenarios (such as past service as counsel for a party) which the parties are deemed to have accepted if no objection is made after timely disclosure. Finally, a "Green List" enumerates cases (such as membership in the same professional organization) that require no disclosure.

Admittedly, the practice of looking to different sources of authority will not be satisfying to those who seek a hierarchy of clear authority such as that formed within a single legal jurisdiction. For better or for worse, however, no such unified judicial system governs the world of international economic relations. Accordingly, an approach taking into consideration relevant national and administrative practice will likely provide greater predictability and fairness than allowing each challenge decision to be fashioned from whole cloth.

The Heart of the Matter

In a world lacking global commercial courts of mandatory jurisdiction, arbitration provides one way to bolster confidence in cross-border economic cooperation. Without binding private dispute resolution, many business transactions would remain unconsummated from fear of the other side's hometown justice, or would be concluded at higher costs to reflect the greater risk due to the absence of adequate mechanisms to vindicate contract rights or investment expectations. Conflicts of interest thus take significance not only for the direct participants in cross-border trade and investment, but also for the wider global community whose welfare is directly affected by the arbitral process.

Thoughtful dialogue on ethical standards will seek to articulate principles which avoid either of two paths by which arbitration may come into disrepute. The first implicates lax canons of behavior, allowing arbitrator prejudgment and hidden links to parties. The second imposes unrealistic rules that facilitate abusive arbitrator challenge designed to disrupt the arbitral process.

Public and private interests each possess very real stakes in the systemic integrity of arbitration. All stakeholders in the process bear an obligation to work toward implementing standards calibrated to achieve an optimum balance between fairness and efficiency. Those who break faith with this duty make the world a poorer place. ■

Learning from Experience: An Interview with Three Experts (cont'd.)

of company, identity of host state, the claims that are presented, a summary of the factual background, the issues addressed, and a summary of the results. So if you are a law firm or a political risk insurer, or a prospective insured who wants to try to get its arms around this jurisprudence, you can use these tools to get the entirety of the history, not just a select few determinations and awards. That's a big difference.

Karl Suvant: And as to why anybody ought to be interested in looking at these determinations, we really see a renaissance of the issue of political risk in general. Increasingly, multinationals making locational decisions are concerned about changing legislation, repudiated contracts, restrictions on the repatriation of earnings and other adverse changes like these. In other words, political risk has re-emerged as a key issue. This is taking place in the context of a change in attitude towards foreign direct investment (FDI) in general, a change that involves a more skeptical attitude on the part of some countries, at least concerning some types of FDI, especially mergers and acquisitions. Hence, what organizations like OPIC have done in terms of determining what constitutes political risk and in which cases actually payment should be made becomes extremely important.

[W]hat organizations like OPIC have done in terms of determining what constitutes political risk and in which cases actually payment should be made becomes extremely important.—*Karl Suvant*

FMJ: *Were there any great discoveries or surprises that came out of producing the book?*

Michael Nolan: It turned out to be a real learning experience. One of the aspects that was interesting and important was the extent to which a truly cohesive manner of understanding the policy obligations and the broader issues behind the policy obligations has emerged over time. For example, if you look at some of the early determinations by OPIC, there's an awful lot of pragmatism in terms of, for example, local currency needs by U.S. embassies in a particular jurisdiction that will be expressly discussed in connection with the way in which a claim is determined. But you also see, going forward in time, how there really is a much more rigorous, consistent, thoughtful understanding of the policy wording and the broader considerations that are present in this area that increasingly inform the decisions. I think this has resulted now in a much more cohesive way of understanding how OPIC works and how OPIC thinks about the matters that its policies extend to. Also, it's interesting to see how much history really does repeat itself. For example if you look at the Chilean expropriations under the Allende regime, you see discussed the allegations of various participants in the process, and you see discussions of steps that were taken allegedly to coerce the sale of investments by investors—the types of conduct that are also now associated with a great many investor-state claims under bilateral investment treaties (BITs) and the like.

FMJ: *It strikes me that, in that respect, this makes good reading for a lot of different people involved in this arena. Underwriters and buyers and brokers could do very well to absorb a lot of this background. But how precedential or predictive of OPIC's future determinations is this history, given that the cases may involve very specific situations and that the policy language isn't always boilerplate, and that even boilerplate wordings evolve over time?*

MN: While it's true that you're going to have unique factual circumstances and particular issues that are obviously going to be important, you do see over time an increasingly cohesive approach to the sorts of issues that the policies address. It's useful to see how particular language is dealt with by OPIC because, as you say, although there can be an evolution of even consistent language over time and there can be unique aspects of policies, there are language and formulations that run through many different policies and, even more broadly, in instances where the language itself might not be exactly the same, the way in which issues are considered under these policies has become more comprehensive. Prior to looking at these decisions together, it really wasn't very easy to see how much effort, thinking, and meaningful wrestling with the policy language and broader issues has gone into these determinations. They could be quite important going forward with respect to new claims.

MK: Let me add that even though claims determinations are not binding precedent, they are persuasive documents. The people that write them seek to explain their reasons for honoring a claim or dishonoring a claim on an item by item basis, whether it's the substance of what is meant by an expropriation or what is meant by an exception or an exclusion in the policy. And, because they serve a persuasive function, that means that they are also persuasive within OPIC itself and persuasive with respect to covered insureds and other parties that provide similar products. The persuasiveness of these documents is far more significant than any notion that they may be binding precedent.

FMJ: *There's another potential audience for this work and that's the sovereigns who have signed bilateral agreements with OPIC and with similar entities. If they read this volume carefully, what consequences do you think might flow from that?*

KS: Well, I certainly think that sovereigns should be consulting these volumes. After all, sovereigns want to attract FDI, and having a regulatory framework that is stable, predictable and transparent is one of the key investment determinants. They really should be

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keeping themselves abreast as to what kind of actions companies that make the investment decisions are concerned about and therefore affect the investment climate and the attractiveness of a particular country for FDI.

MK: The question you asked assumes that sovereigns look at issues through the lens of international law. That is certainly true. But PRI policies at bottom are contracts, and sovereigns and many other participants in the PRI world often focus much more on the scope of cover which derives from international law, at least with respect to expropriations, but not necessarily on the contract-based exclusions and exceptions. One thing that comes through very clearly in looking at all of these determinations is the importance of the exclusions and the exceptions in these policies. That, [and what that means from a regulatory perspective] is, I suspect, a bit of an eye-opener for many government officials.

FMJ: *To shift the subject, it would be interesting to have your views about traditional PRI (inconvertibility, expropriation, political violence) that have kind of fallen out of favor with investors for a number of reasons. Do you have any opinions about how PRI policies might be improved in a way that's consistent with prudent underwriting and that would make them a better inducement to investment?*

MK: Mac, I think the people at robert wray probably know the answer to that question, but I have an opinion or two on that. I heard a lot of backchannel comments about the lack of predictability of confiscation cover, particularly by disappointed insureds in connection with the Argentine crisis. It was clear that there was a disconnect between the provider of the coverage and the party who was covered regarding what those policies meant. That, I suspect, has had

One thing that comes through...in looking at all of these determinations is the importance of the exclusions and the exceptions in these policies. That...is, I suspect, a bit of an eye-opener for many government officials. —*Mark Kantor*

a fairly significant negative consequence on the willingness of people to put money down in the way of premiums. I would therefore believe that a little more transparency about what the coverage is, and what the exclusions and exceptions mean, will help resolve that issue. It may end up producing altered coverages, exceptions, or exclusions if the current set of coverages, exceptions, and exclusions are not really attractive to the market. Or it may end up just eliminating some fears as to what those items mean—that in the end may be overstatements of fears. But I suspect the traditional approach of not providing specificity and keeping, for example, private insurance policy disputes entirely confidential is something that has contributed to the level of uncertainty in that market, with the consequence that people are less likely to put their money down and actually purchase the product. In addition, I think there was a viewpoint 5-10 years ago that most countries had moved away from direct expropriations. With 20/20 hindsight, a lot of us have come to realize that that is not true. Direct expropriations, as well as indirect bite-by-bite regulatory conduct that an insured believes has the effect of an expropriation: both of those topics continue to play a role in international economic relations. Therefore, I think the events particularly of the last five years may have stirred the pot a bit and made traditional CEN cover a bit more attractive than is was five years ago.

MGC: *In the investment arbitration arena, I wanted to start by asking whether you think there is a positive relationship between BITs and FDI. There are thousands of BITs in place. They seem to be an important element of almost every country's trade and investment policies. Are they really that important for investors? Do they really have an effect in attracting foreign investment?*

KS: Maybe I can start replying to this question, having edited with a colleague a volume which deals with the impact of BITs, and for that matter taxation treaties, on FDI flows. The starting point has to be that any locational decision by an investor is determined by economic determinants: the nature of the infrastructure, the rate of economic growth, the size of the market, the availability of skills, and other economic factors like that. If these factors are not present, meaning that a company cannot make any profit, then of course no investment is likely to take place, regardless of whether or not an enabling framework at the national level is in place or, for that matter, whether or not the country in question has any BITs or not. That's the starting point. There has to be a good opportunity for making a profit. Once there is the opportunity to make a profit, however, the nature of the regulatory framework—both at the national and the international levels—becomes important. At the national level this is the case, because without an enabling regulatory framework an investor may not even be able to enter a particular industry or undertake certain activities. But the nature of the international regulatory framework is also important because it provides a much more stable framework for the relationships between a foreign investor and the host country government. And, as you pointed out, there are about 2,700 BITs in place, in addition to some 300 free trade agreements that have investment chapters. The result is a sophisticated and strong international investment law and policy system, enforced by the investors themselves through the investor-state dispute settlement mechanism. It is very difficult to determine, within that overall set of factors and determinants, the role is of BITs in helping countries to attract foreign investment. But on the face of it, a BIT sends a signal that a country is prepared to subject itself to international investment disciplines—but how important that signal

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is ultimately in the decision-making process of firms is difficult to ascertain. Having said that, however, BITs certainly strengthen and complement the generally very favorable national frameworks for FDI.

MN: I can make one observation, really, from the perspective of a practitioner in the area who represents investors and states in arbitrations and acts as arbitrator. It does seem to me sometimes that the question as it's generally posed is too broad to be useful. If you simply ask whether there's a positive relationship between BITs and FDI, you get very broad data about FDI sometimes and the incidence of entry into BITs. But the question really might be appropriately more project-specific and more investment-specific than that. For example, if you have a situation where you have investment in exploration of an oil deposit or some other natural resource that might count on a currency basis for an enormous amount of FDI, you have a situation that's very different from an investment that's in, say, a manufacturing site or facility from some sort of clothing or good. A short way to put it is simply that there are some situations where investors have much more meaningful choices when they're trying to consider which countries to operate in and where to make investments. There are other situations where investors really don't, given the nature of their investment activities. I don't purport to have any truly broad or complete knowledge of the sort of data and work that's been done on this question, but when you look at a lot of these studies, they seem *not* to make those sorts of distinctions and they sometimes seem not to really zero in on those investment decisions with respect to which the legal environment and how it is affected by BITs could perhaps have the greatest bearing.

MK: Let me add just one extra point. If your library does not have the book that Karl and his colleague Lisa Sachs co-edited, you should buy it. And by purest chance, when I became aware of this question, I photocopied an article that Karl's co-editor, Lisa Sachs, wrote, just so I could make sure that I could give you the title of it so you could buy the book: *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties and Investment Flows*, by Oxford University Press.

KS: A question that is sometimes asked about BITs is whether they discriminate in favor of foreign investors. I wouldn't formulate it as BITs or international investment agreements in general discriminating in favor of foreign investors, but rather that international investment agreements—in particular, BITs—were concluded and still are being concluded with the specific purpose of protecting investors and, at least for some countries like the U.S. and Canada, to liberalize the conditions under which investors can enter and operate in a particular country. So from that perspective and by design, BITs are focused on one issue only, even though most treaties say that they are treaties for the protection *and promotion* of investment flows. I think a broader question that has arisen is whether the focus of treaties on investment protection and perhaps liberalization leaves enough policy space for host countries to pursue their own legitimate public policy objectives. To a certain extent, you see the answer to that question in the development of the model BIT of the United States between 1984 and 2004, in that the very strong emphasis on protecting investors in the 1984 model BIT has been tempered in the 2004 model in reference, for instance, to indirect expropriation, fair and equitable treatment (as not being more than the minimum standard) and the deletion of the umbrella clause. Beyond that, what is particularly worrisome is the inclusion of a self-judging essential security interests clause in the latest model BIT (and in actual treaties). All these are developments that other countries are likely to copy increasingly, as it limits the potential liability of host countries and makes international investment agreements more balanced in terms of the rights and responsibilities of both investors and host countries. At the same time, this development makes the international investment framework less predictable and transparent for foreign investors—or, to put it differently, this development increases political risk for international investors.

MGC: *Do you think there are particular regions or countries that are doing better in terms of shaping the international standards? At the WTO level, you see the EU and the U.S. participating in almost every case and they put a lot of emphasis on trying to influence what the standards ought to be and how to interpret certain rules. It's always these countries and other developed countries participating in the rule-making process. With investor state disputes, it seems to be the other way around. Respondents are usually developing countries. Do you think states have a chance of shaping the rules in a similar way as in WTO?*

MK: Why don't I talk to the role in shaping the rules through treaty making and then perhaps Michael can pick up and talk about shaping the rules through the process of adjudication by foreign investment treaty tribunals. Treaty making—the impact of the United States here is candidly astonishing, starting with the changes in the treaty template for the United States. A little bit of boring history: in 2002, Congress passed the Trade Promotion Authority Act, the Act that authorizes the U.S. to negotiate new trade agreements. That Act set out some negotiating objectives for the United States. Those negotiating objectives were immediately translated into the investment chapters of the two free trade agreements (FTAs) that were finalized promptly after the Trade Promotion Authority Act was passed in 2002: the Chile-U.S. FTA and the Singapore-U.S. FTA. Dramatic differences—both in an effort to tie the interpretation of the fair and equitable treatment and minimum standards of treatment test, and the expropriation test, to customary international law—dramatically increasing transparency in investor-state arbitration and a variety of other changes. They showed up first in 2003 in the Chile and Singapore FTAs. They were then translated into DR-CAFTA and into the Model BIT in November of 2004. The impact of

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that change in the U.S. template outside of the United States has been extraordinary. I'd like to draw your attention in particular to Asian investment agreements and Asian FTAs with investment chapters. The reality to anybody engaged in the international business today is the future involves India. It involves China. It involves Southeast Asia. That's where economic growth is occurring. That's where the hyper-powers of the 21st century are located. And when one looks at, for example, the China-ASEAN Investment Agreement or looks at the New Zealand-China FTA or looks at the Indian investment agreements that have recently been concluded, what you see is the developments in the U.S. template are showing up in the Asian treaties, along with some additional changes. The U.S. has had an impact far beyond just the treaties it has signed.

MN: Model treaties in general have a very significant bearing on how the treaty framework of particular countries develops. There are some instances where a particular state devotes terrific attention to its policy objectives and designs and to the extent that they can be achieved or reflected consistently across treaties. But it is quite surprising sometimes, when acting in these matters, the extent to which BITs vary even in states that have quite ambitious BIT programs. It raises the question as to the degree of attention that is sometimes directed to the specific treaty language. As treaty practice develops, I think it becomes important for drafters to address in the agreements themselves, which is where states obviously can be most effective, the sorts of issues that are resolved. Some of the questions that are remarked upon very, very amply in the community of people interested and such matters are whether most-favored nations clauses are intended to extend consents to arbitration, if investment treaties are intended to operate as essentially jurisdictional mechanisms, as well as mechanisms that operate with respect to the sorts of substantive protections to which a state consents. Another important question is whether state-owned claimants are deemed to be investors. Another is whether and how particular treatment standards operate with respect to taxation or include taxation. Those are just some of the sorts of questions that are very current in investment treaty dispute resolution practice and could be addressed at the drafting stage and the conclusion stage in treaty making but frequently are not. It's also interesting to look at some recent NAFTA decisions—and two cases that have received a fair bit of comment, and I think really appropriately so, are Glamis Gold and Merrill Ring—you see really radically different conceptions of what the international minimum standard means. So even when there is the mechanism that Mark posits, and even when that mechanism is used, the process of dispute resolution still does not necessarily result in a clarification or a consistency or a migration of the understanding of these standards in the way that the contracting states might intend and hope.

[It] is the view of many that increasingly larger number and now very significant number of decisions that we have under BITs are themselves something that you could argue to be a source of customary international law.—*Michael Nolan*

MGC: *Do you think customary international law is developing to establish a clearer framework for minimum standard of treatment? I think there is anxiety, at least with some governments, as to what exactly that standard means and how it applies: if it's still at the level that requires shocking and outrageous behavior like the Neer case or is it something else.*

MN: Well, customary international law certainly has to develop—there's no question—because state practice constantly evolves and develops and we move ahead. And it's remarked by many and is the view of many that a now very significant number of decisions that we have under BITs are themselves something that you could argue to be a source of customary international law, and therefore you have a sort of "artist painting a picture of an artist painting a picture of an artist painting a picture" phenomenon, whereby dealing with these questions itself can contribute to the process of state practice development and the process of development of customary international law. The difficulty, of course, is understanding exactly how state practice has developed and exactly how these standards sit at a particular time. As to whether the Neer standard of outrageousness really continues to exist as a feature of international law and what the U.S. perspective on that is, I don't want to comment on that directly, but I will say that people who are interested in that should read Glamis Gold, which is quite interesting in how it recites an understanding of the customary international law standard.

MK: A couple of additional comments there: first of all, as Michael well knows because he actually attended a presentation on this on Monday, there is a very strong critique of the notion that there is anything called customary international law in this area. Judge Stephen Schwebel, who was the president of the International Court of Justice, puts forward a very forceful argument that there's in fact no customary international law to be found in this area because of a lack of consensus amongst states as to what this means. Therefore, simply looking at these questions through the lens of customary international law maybe misplaced. Whether or not that is right, it's easier in a conversation like this to just talk about consistency of decisions rather than give it a label of customary international law, because then you implicate that entirely separate question. So just looking at this from the question of consistency of decisions and whether the arbitrators have a common understanding of what one means by the phrase "minimum standard of treatment" or the phrase "fair and equitable treatment" or the like, I just want to draw

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your attention to a little bit of parochial United States history. In the U.S. Supreme Court, a somewhat analogous debate played out for a very long period of time: what we in the U.S. call Substantive Due Process, the question of the extent to which that doctrine placed limits on the regulatory authority of states in the area of economic measures. Here in the United States, which is perhaps the most litigious country in the developed world (New Zealand competes with us, by the way), we had taken 40 years to come to some consensus about the proper standard for judicial review of economic regulatory measures from a due process perspective. It is therefore no surprise to me that we do not yet have consensus among arbitral tribunals on similar issues.

MGC: *There is this view that arbitration cases are very expensive and are only available for large enterprises with deep pockets. Do you think that investment arbitration will ever become accessible to smaller businesses?*

MN: I think that investment arbitration is becoming more accessible and is becoming more broadly utilized and I think that those trends are likely to continue. There's a sense in which obviously the biggest and most dramatic and highest dollar arbitrations are going to attract attention precisely because they're the biggest cases. That's true with respect to any sort of legal activity. But the mechanisms are obviously much more broadly available and the awareness of the investment treaty mechanism is something that's grown just spectacularly. At this point, it is really part of the thinking of all manner of businesses and enterprises that are involved in transnational activity. So you have an awareness of investment arbitration that is much greater and therefore obviously an interest in it in some cases that's much greater. Now, how can high costs of pursuing claims be addressed? I think that there has been real and meaningful development recently in that area and there is every indication that it is going to continue. One thing that we're seeing more and more of is third party financing becoming available and considered in the field of investment arbitration and this has the ability to make investment treaty arbitration much more broadly available. You also see already the development of mechanisms that allow smaller claims to be pursued in the arbitration process. One example of this that I think is very significant and portends probably a great deal for the way in which the field is going to develop are the Argentine bondholder cases.

MK: It is worth addressing the cost to the respondent state of investment treaty arbitration, because it's not just investors who are troubled by how expensive this can be, but also states. That has occasioned a good deal of discussion. I would point to two developments there that are worth thinking about: first is Latin American countries who are trying to organize themselves either for common defense or to provide resource facilities for the purpose of having resources that help them support their thinking about defenses. That's designed not just to provide consistency, but also to try to control costs. Whether it will be successful, yet no one knows. And second, just as there are developments in third party funding of claimants, there are also commercial market developments in third party funding of respondent costs and expenses. In the London market, for example, you can purchase something called "ATE" ("after the event" insurance), which is designed from a respondent's perspective to provide protection against unexpected increases in the cost of defending the case—not against a liability award, but the out-of-pocket costs for attorneys, experts, and similar costs and expenses. These are all responses to the recognition that international arbitration—whether we're talking investment treaty arbitration or international commercial arbitration—is an increasingly expensive proposition. And then I will make one last point on this topic, which is if you think it's expensive today, you should take a look at the developments in the Chevron-Ecuador investment treaty dispute and the role here in the United States of so-called Section 1782 discovery requests by Chevron (of which there are, I think, 19) and by Ecuador (of which there are at least three). You should ask yourself: if U.S.-style discovery tools become more commonly utilized in the international investment arbitration, do you think costs are going to decrease or increase?

FMJ: *Well, thank you everybody. We appreciate it very much .* ■

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